"WHEN A NATION IS AT WAR": A CONTEXT-DEPENDENT THEORY OF FREE SPEECH FOR THE REGULATION OF WEAPON RECIPES

TABLE OF CONTENTS

INTRODUCTION

On the evening of September 11, 2001, as the sun set on one of the greatest massacres ever to occur on U.S. soil, the President, and a mourning country, declared a War On Terrorism. The events of that day fueled a new passion among Americans – to protect the country from future terrorist attacks. In an effort to regain a sense of safety and security, this passion quickly transformed into an obsession – one to eliminate weapons of mass destruction ("WMD"). A year and a half after the World Trade Center attacks, a second war was waged. This time the target was not the abstract enemy of terrorism. Instead, this war was motivated by a fear of weapons of mass destruction.

Weapons of mass destruction have taken on a new significance in the minds of U.S. government officials and civilians, alike. There is a fear throughout the country that if we do not eliminate weapons of mass destruction, they may be used against us. Against this backdrop, this Note proposes that the national climate is primed to take measures to prevent further dissemination of infor-

mation on how to build WMD. Eliminating their availability even within the confines of the United States and its Internet sources may be a small step, but one that is welcome in the midst of the country's ongoing War On Terrorism.

This Note is divided into four parts. Part I traces the basic problem of the availability of weapon recipes in print and discusses how the Internet has heightened the danger associated with WMD, particularly due to recent terrorism trends. Part II provides background on traditional speech theories and reviews the purposes and ideals that freedom of speech is meant to serve. Part III examines the development of the Supreme Court's First Amendment jurisprudence and analyzes current judicial and statutory attempts to regulate the dissemination of weapon recipes and dangerous instruction manuals. Part IV first surveys the current legal arguments on how to justify the regulation of weapon recipes. It then argues that a context-based approach to the First Amendment – one that would revert to the clear and present danger test during wartime – provides the most cogent explanation for why regulation of this type of speech would pass constitutional muster.

I. TRACING THE SOURCE OF THE PROBLEM

A. *The Availability of Weapon Recipes in Print and on the Internet*

The threat posed by the availability of weapon recipes[1] has existed since before 9/11, before the 1995 Oklahoma City bombing, before the 1993 World Trade Center bombing, and before the Columbine High School shootings. Instructional materials providing information on the ingredients needed and the precise steps for constructing bombs and other WMD have been available in print for decades.[2] Such materials, however, arguably contained natural

[1] This Note focuses primarily on "weapon recipes," which include instructional information on the ingredients and steps to build bombs and other weapons of mass destruction (including chemical and biological warfare). Reference is also made, however, to dangerous instructional manuals, such as manuals on how to commit murders and acts of terrorism, since these types of materials have been addressed more frequently by the courts than recipes for weapons of mass destruction.

[2] The Department of Justice's REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION provided information on the availability of instructional materials for the making of "explosives, destructive devices and other weapons of mass destruction" in print and electronic form. The report explicitly stated, "our study confirms that any member of the public who desires such information can readily obtain it." *See* REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION iii, (April 1997) *available at* http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html. [hereinafter DOJ BOMBMAKING REPORT]. The study reported:

> [A] cursory search of the holdings of the Library of Congress located at least 50

obstacles to their accessibility and thus, discouraged their purchase and use.[3]

The availability of weapon recipes combined with the explosive growth of the Internet as a form of communication[4] poses a new problem.[5] Several characteristics make the Internet a unique medium of communication, such as low cost of entry; faster speed of communication; lower organizational barriers; and lack of societal norms.[6] It is precisely these characteristics, however, that drastically weakens those obstacles (to the purchase and use of weapon recipes) that were previously in place for such recipes in print form. Specifically, the Internet's lack of personal contact makes access to dangerous information not only less socially costly, but also virtually anonymous.[7] Moreover, the Internet has the poten-

---

> publications . . . . Another collection of some 48 different 'underground publications' dealing with bombmaking . . . All of this literature was easily obtainable from commercial sources . . . . With respect to WMD, 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.; *see also* Bryan Yeazel, *Bomb-Making Manuals on the Internet: Maneuvering a Solution Through First Amendment Jurisprudence*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 279, 284 (2002).

[3] *See* Yeazel, *supra* note 2, at 282. Yeazel argues that in purchasing bomb-making instruction manuals, the purchaser must incur several "costs" that would deter most people. First, the purchaser must find a bookstore or publishing house willing to sell such information. Second, the purchaser will have to offer payment for the materials. Third, the purchaser must be willing to bear the social consequences of publicly purchasing such "taboo" materials. *Id.*

[4] The Internet provides various ways for communicating. The most common is through the use of Web sites, which allow people to post information or messages at relatively little cost. Electronic mail has also become extremely common. Instant message systems and chat rooms enable conversation, much like electronic mail, but allow people to send messages immediately. Online bulletin boards also enable people to post opinions and messages. *See* John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 442 (2002).

[5] The DOJ BOMBMAKING REPORT reported that bombmaking information "is literally at the fingertips of anyone with access to a home computer equipped with a modem." DOJ BOMBMAKING REPORT, *supra* note 2, at iv. "Much of the information available in print pertaining to nuclear weapons also can be found on the Internet. A number of websites, for example, have included compilations of nuclear weapons information gleaned from literature elsewhere in the public domain." *Id.* at n.5. "To demonstrate such availability, a member of the DOJ Committee accessed a single website on the World Wide Web and obtained the titles to over 110 different bombmaking texts . . . ." *Id.* at iv.

[6] *See generally* Yeazel, *supra* note 2.

[7] Anonymity has become a focal point of literature discussing Internet regulation since the ability of individuals to use pseudonyms (or no name at all) and the inability to trace the source of all Internet messages readily allows individuals to abuse the Internet without necessarily having to face any social or legal consequences. *See id.* at 291; *see also* Anne Wells Branscomb, *Emerging Media Technology and the First Amendment: Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639 (1995) (addressing the issue of whether true anonymity should and will be permitted on the Internet). Branscomb suggests that generally, anonymity (or, at a minimum, pseudonymity) on the Internet should be permitted so long as anonymity is not used for the purpose of removing accountability. *Id.*

tial to reach a more expansive audience. Therefore, notwithstanding the availability of destructive weapon recipes and instructional manuals in print and other sources, the unique manner of communication enabled by the Internet re-emphasizes the need for regulation of weapon recipes today.[8]

B. *Terrorism: Intensifying the Problem*

Statistics showing the increase in highly destructive terrorist acts add further complication to the problem of easy access to weapon recipes. Cases of terrorism involving WMD have shown a steady increase since 1995.[9] Moreover, "the availability of critical technologies, the willingness of some scientists and others to cooperate with terrorists, and the ease of intercontinental transportation enable terrorist organizations to more easily acquire, manufacture, deploy, and initiate a WMD attack either on U.S. soil or abroad."[10]

In recent years, there have been two increasingly alarming trends in terrorist acts. First, the Department of Justice reports

---

[8] *But see* Eric 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, 6 (1995) (suggesting a "futility principle" whereby speech should not be suppressed "when the speech is available to the same audience through some other medium or at some other place.").

[9] *See* TERRORISM IN THE UNITED STATES 1999: 30 YEARS OF TERRORISM: A SPECIAL RETROSPECTIVE EDITION, U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION 38, *available at* http://www.fbi.gov/publications/terror/terror99.pdf (last visited Sept. 28, 2004) [hereinafter 30 YEARS OF TERRORISM].

The Department of Justice's 30 YEARS OF TERRORISM notes that "[t]here is no single, universally accepted definition of terrorism." *Id.* at i. It goes on, however, to provide definitions of domestic and international terrorism, which will be adopted for the purposes of this Note. The Report defines domestic terrorism as:

> the unlawful use, or threatened use, of force or violence by a group or individual based and operating entirely within the United States or its territories without foreign direction committed against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.

Id. at ii. International terrorism is defined as "violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any state." *Id.* Furthermore, international terrorists' acts "appear to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by assassination or kidnapping." *Id.* These acts "occur outside the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which the perpetrators operate or seek asylum." *Id.*

[10] *See* NATIONAL STRATEGY FOR COMBATING TERRORISM 10, The White House, *available at* http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf (February 2003) [hereinafter NATIONAL STRATEGY]; *see also* Yeazel, *supra* note 2, at 284 ("From 1985 to 1995, 35 bombing incidents were known to have occurred as a result of bomb-making instructions obtained from computer 'bulletin boards' and in 1996, the number of incidents was a 600 percent increase in the average number of incidents annually.").

that while there has been an overall decrease in the number of terrorist incidents, the attacks have caused greater destruction and casualties.[11] Second, "recent acts have posed serious challenges to the sense of security the U.S. traditionally held concerning the potential for terrorism on U.S. soil."[12] The FBI in its 1999 Terrorism in the U.S. Report said:

> This trend toward high profile, high impact attacks comes at a time when interest is growing among domestic and international extremists in weapons of mass destruction . . . Between 1997 and 1999, the FBI opened 511 WMD related investigations . . . As information regarding these types of weapons becomes further disseminated through such means as the World Wide Web, the probability of some type of incident involving WMD devices or agent becomes greater.[13]

Between 1980 and 1999, the casualties from terrorism totaled 2242, with 2037 people injured and 205 killed.[14] This 19-year total was surpassed by the single terrorist act that occurred on September 11, 2001.[15] In the wake of the attacks on the World Trade Center, society is faced with the need to address the availability of WMD recipes head on. The events of 9/11 made real the possibility of terrorist attacks on U.S. soil. These attacks highlight the need for effective government intervention to regulate weapon recipes in print, and even more so on the Internet. Developing an approach to regulate weapon recipes, one that addresses their availability in all forms, will be the most effective solution.[16] Any

---

[11] From 1980-89, there were 267 known terrorist acts in which twenty-three people were killed and 105 injured. From 1990-99, there were only sixty known terrorist acts, but those acts killed 182 people and injured 1932. *See* 30 YEARS OF TERRORISM, *supra* note 9, at 16.

[12] *Id.* The Department of Justice report, 30 YEARS OF TERRORISM, cautions that terrorism is becoming a more formidable issue in recent years due to a change in its use. "The move away from terrorism as a 'means to an end' to terrorism as an end in itself represents a particularly troubling trend. Combined with an increased interest in WMD and casualties becomes an ominous security challenge as the world enters the 21st century." *Id.* at 27.

[13] *See id.* at 25. In a May 10, 2001 Congressional statement, FBI Director, Louis J. Freeh, spoke of the increased threat of weapons of mass destruction, "[b]etween 1997 and 2000, the FBI investigated 779 WMD-related reports . . . Given the potential for inflicting large scale injury or death, the efforts of international and domestic terrorists to acquire WMD remains a significant concern and priority of the FBI." FBI *Congressional Statement on the Threat of Terrorism to the United States, available at* http://www.fbi.gov/congress/congress01/freeh051001.htm (May 10, 2001).

[14] *See* 30 YEARS OF TERRORISM, *supra* note 9, at 53.

[15] As of October 2003, 2948 people were confirmed dead, with another 50 "reported dead or missing." *See* September 11, 2001 Victims, *at* http://www.september11victims.com/september11victims/STATISTIC.asp (last visited Oct. 29, 2003).

[16] *See* Clay Calvert & Robert D. Richards, *New Millennium, Same Old Speech: Technology Changes, But the First Amendment Issues Don't*, 79 B.U. L. REV. 959, 961 (1999) (arguing that despite the change in media, the best solution entails clarifying and resolving the fundamental principles of free speech – a solution that "cut[s] across media rather than rushing in to create new, medium-specific laws for each technological development or break-

regulation, however, will inevitably call into question speech rights. We must strike the "proper balance between free expression and protection from external threats."[17] In finding this balance, we will inevitably have to reevaluate our ideas of what kinds of speech should really be "free." One article aptly stated: "The U.S. government has a track record of clamping down on free speech during periods of crisis, and the audacity of the September 11 attacks brings to the foreground the concern that free speech values may once again be compromised."[18]

II. FREE SPEECH THEORY: AGREE TO DISAGREE

Proponents of the continued availability of weapon recipes find repose in the First Amendment's prohibition against government abridgement of speech. The First Amendment commands, "Congress shall make no law abridging the freedom of speech . . ."[19] Thus, it becomes crucial to first understand the various arguments that have shaped First Amendment theory, in order to more convincingly argue for the regulation of this particular form of speech.

There is one statement that all scholars of free speech theory can agree upon – that there is no single, universally accepted theory for what the right to free speech includes.[20] In other words, free speech theorists have agreed to disagree. The conflict over what to classify within the protections of free speech stems from the well-recognized proposition that First Amendment protections are not absolute.[21] Thus, a proper analysis of First Amendment doctrine asks the initial question, "What task or purpose is free

through"); *see also* Cass R. Sunstein, *Emerging Media Technology and the First Amendment: The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1765 (1995) (arguing that new technologies "do not raise new questions about basic principle but instead produce new areas for applying or perhaps testing old principles.").

17 Marin Scordato & Paula Monopoli, *Part III: Civil Liberties After September 11th: Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. & POL'Y REV. 185, 188 (2002).

18 Christopher Woo & Miranda So, *The Case for Magic Lantern: September 11 Highlights the Need for Increased Surveillance*, 15 HARV. J.L. & TECH. 521, 531 (2002).

19 U.S. CONST. amend. I.

20 *See, e.g.*, Robert Bork, *Neutral Principles and Some First Amendment Problems*, *reprinted in* JOHN H. GARVEY & FREDERICK SCHAUER, THE FIRST AMENDMENT: A READER 94 (1992) ("The law has settled upon no tenable, internally consistent theory of the scope of the constitutional guarantee of free speech.").

21 This much is generally believed to be true – scholars almost unanimously agree that Americans would not accept a First Amendment regime where all speech was left unregulated. *See* GARVEY & SCHAUER, *supra* note 20, at 36. John Garvey and Frederick Schauer correctly describe the goal of developing a First Amendment theory:

> Faced with the prospect that a First Amendment taken literally would constitutionalize far more of American law than most are comfortable with, First Amendment theory has developed in part as a way of reducing the literal scope

moting and protecting democracy and self-governance stems from the notion that freedom of expression is a natural right of the individual.[34] From this, it follows that the "right of all members of society to communicate their own beliefs is essential to a democratically organized society, and is especially true with regard to political decisions."[35] Democratic government is a function of the idea that the people are sovereign and that public officials are merely representatives of the people's will.[36] Thus, "democratic speech" comes in two forms: (1) speech relating to public affairs and (2) criticism of governmental officials and policies.[37] Protection of these types of speech is necessary for two main reasons. First, freedom of speech enables the people to act in their capacity as sovereign by providing them with the information they need to make wise judgments.[38] It is imperative that the citizenry be well informed so that they may intelligently grant their consent to be governed by public officials. In this manner, free speech is a means for promoting and legitimizing democratic government.[39] Second, the freedom to criticize public officials is a mechanism for protecting democratic government. By allowing criticism to flourish, government officials are made accountable to their constituents.[40]

One unique feature of the self-governance rationale is that it seems to have a narrow scope only applicable to truly "political

---

[34] *See* Emerson, *supra* note 23, at 51.

[35] *Id.* at 52. The special protection granted to political speech stems from the fear that the state has "a special incentive to repress opposition" and thus would more stringently suppress criticism of its policies and officials. *Id.* Political speech was deemed particularly vital to democracy as it was "usually a necessary condition for securing freedom elsewhere." *Id.* Thus, advocates of the self-governance theory contend that the most crucial battles over free speech fall within the political realm. *Id.*

[36] FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 35 (Cambridge Univ. Press, 1982).

[37] *See generally id.*

[38] *See id.* at 36. Alexander Meiklejohn is regarded as one of the premier proponents of the democratic self-governance theory. The focus, in his view, is not "the words of the speakers, but the minds of the hearers." *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (The Lawbook Exchange, Ltd., 2000); *see also* Alexander Meiklejohn, *Political Freedom, in* THE FIRST AMENDMENT: A READER, *supra* note 20, at 102-03. The ultimate aim is to reach a wise policy decision, therefore, the people, as voters and sovereign, must be as informed as possible. Informed decisions, however, would only be achieved by allowing "all facts and interests relevant to the problem" to be "fully and fairly presented." *Id.* Meiklejohn reiterates, however, that free speech, even in the context of self-governance, is not absolute. Rather, "what is essential, is not that everyone shall speak, but that everything worth saying shall be said, that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another." *Id.* at 104. It is suppression of speech in this context that is unacceptable.

[39] *See* Scordato & Monopoli, *supra* note 17, at 197.

[40] *See* Schauer, *supra* note 36, at 36.

speech."[41] Despite its primacy in the political context, however, this theory was extended to other forms of speech.[42]

III. Tracing the Jurisprudence and Regulation of Speech

This section examines the development of the Supreme Court's speech jurisprudence, its application to harmful speech generally, and to weapon recipes and dangerous instructional manuals, specifically.

A. *The History of First Amendment Regulation*

The guarantee that "Congress shall make no law . . . abridging speech"[43] has never been interpreted literally. Still, Americans are highly protective of their right to "free" speech, and most consider freedom of speech to be America's cornerstone freedom – the key to promoting liberty and democracy.[44] Ironically, despite its stronghold on the American public, the development of this special protection took a very long time.[45] A review of the historical development of free speech jurisprudence is crucial to understanding why and how we regulate various forms of speech today. The following analysis breaks the history of American speech jurispru-

---

41 Scordato & Monopoli, *supra* note 17, at 197. Robert Bork is renowned for advocating this point of view on a rather extreme level. He argues,

> There is no basis for judicial intervention to protect any other form of expression . . . . The category of protected speech should consist of speech concerned with governmental behavior, policy or personnel . . . . Explicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda. It does not cover scientific, educational, commercial or literary expressions as such.

Bork, *supra* note 20, at 95, 99. Ultimately, he concludes, "[f]reedom of non-political speech rests, as does freedom for other valuable forms of behavior, upon the enlightenment of society and its elected representatives." *Id.*

42 This right eventually extended to freedom of expression in religion, literature, art, science and all areas of human learning and knowledge.

43 U.S. Const. amend. I.

44 *See* Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom," 1909-1931*, 40 Wm. & Mary L. Rev. 557 (1999). Bobertz explains the primacy of free speech in the United States:

> Certainly from the modern perspective, freedom of speech comes quickly to mind as a defining feature of our national character. Americans agree on few values as strongly as the 'firstness' of this first freedom. America is a nation of opinions, and its citizens believe with almost religious fervor in the 'right' to voice them, as well as in the 'rights' of others to have their say, even if we disagree.

Id. at 559.

45 David A. Strauss, *Freedom of Speech and the Common-Law Constitution, in* Eternally Vigilant 33 (Lee C. Bollinger & Geoffrey R. Stone, eds. 2002). Strauss describes the development of free speech theory as the creation of "the common-law Constitution." *Id.* at 59. He asserts that the development of our current view of what free speech includes developed "mostly over the course of the twentieth century, in fits and starts, in a series of judicial decisions and extrajudicial developments." *Id.* at 33.

dence into three main eras: (1) the Founding, (2) Pre-Post WWI, and (3) the Modern Era.[46]

1. The Founding: From Ratification to the Civil War

While theorists and jurists in most areas of constitutional law turn to both the text of the Constitution and the intent of the Framers for interpretive guidance, such a practice is not commonly done with regard to the First Amendment.[47] History has shown that the First Amendment in early America was, as a personal liberty, actually very weak.[48] It is generally believed that the Founders did not care to eradicate all censorship. In fact, the Founders deemed it perfectly legitimate for states to regulate speech, despite their intent to prohibit federal regulation of speech.[49] With such a broad grant of power, however, state governments regulated speech very strictly and created a "legacy of suppression."[50]

The Civil War brought about improvements in individual liberties through the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments.[51] Despite the rhetoric of championing liberty, however, the aftermath of the Civil War produced no great strides in First Amendment doctrine.[52]

---

[46] These divisions are a slight adaptation of those presented by Yassky and Strauss in their own works. *See generally* Strauss, *supra* note 45; *see* David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1704 (1991). Yassky divides the "Eras of the First Amendment" into the Founding, Post-Civil War and the New Deal, while Strauss largely addresses the 20th Century as the turning point in First Amendment doctrine.

[47] David Strauss aptly makes this point:

> [T]he story of the development of the American system of freedom of expression is not a story about the text of the First Amendment. That text was part of the Constitution for a century and a half before the central principles of the American regime of free speech, as we now know it, became established in the law. Nor is it a story about the wisdom of those who drafted the First Amendment . . . [t]here is, in fact, good evidence that the people responsible for adding the First Amendment to the Constitution would have been comfortable with forms of suppression that are anathema today.

Strauss, *supra* note 45, at 33.

[48] *See* Yassky, *supra* note 46, at 1704.

[49] *See id.*

[50] *Id.* at 1706 (citing Leonard Levy and Norman Rosenberg, two historians who studied the history of censorship by state governments and revealed how states vigorously used criminal libel laws to suppress government critics) (citations omitted).

[51] *See id.* at 1717 (noting that the development of individual rights was accomplished essentially through the development of the Court's substantive due process jurisprudence); *see also* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 411 (14th ed. 2001) ("The post-Civil War Amendments signified a major escalation in the national concern with the protection of individual rights from state governmental action . . . [it was] the 14th Amendment's due process clause that became the major vehicle for that nationalization of individual rights.").

[52] *See* Yassky, *supra* note 46, at 1717. Notwithstanding the new limitations placed on state governments by the ratification of the Civil War Amendments, the states continued to censor speech, virtually unfettered, *id.*, along with the federal government. *Id.* at 1718.

2. Pre-Post WWI: A Transitional Decade 1919-1929

Fundamental improvements in the development of First Amendment jurisprudence would not begin to take shape until around the time of World War I. Still, this "era" was an awkward time, with key Supreme Court justices transitioning in their formulation of free speech protections.

Ironically, one of the most important opinions in shaping free speech doctrine, *Schenck v. United States*,[53] actually enforced the suppression of speech, and was written by a justice who would later be viewed as a champion of free speech. In *Schenck*, a man was convicted of violating the Espionage Act of 1917 for distributing leaflets that in "impassioned language," called the public to "assert [their] rights" and "influence[d] them to obstruct the carrying out [of the draft]."[54] Justice Holmes, in a unanimous opinion, articulated some of the contours of free speech rights in the famous phrase, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[55] The most significant aspect of the case, however, was the creation of the clear and present danger test, which stated, "[t]he 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."[56] A week later, Holmes authored a second opinion, *Debs v. United States*,[57] and again affirmed the conviction of a man for making a public speech condemning the draft.

Later that same year, another significant case in First Amendment doctrine was decided. This time, however, the minority opinions were vital. *Abrams v. United States*[58] affirmed yet another conviction under the Espionage Act, but this time Holmes and Brandeis dissented. In his dissent, Holmes reiterated his belief that *Schenck* and *Debs* were decided correctly, but distinguished the situation in *Abrams* by inserting another component – imminent threat – into his clear and present danger test when he stated, "I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe . . . unless they so *imminently*

---

53 249 U.S. 47 (1919).

54 *Id.* at 51.

55 *Id.* at 52.

56 *Id.* Holmes, in affirming Schenck's conviction, admitted that the fact that the country was at war was critical in needing to suppress the speech in question.

57 249 U.S. 211 (1919).

58 250 U.S. 616 (1919).

threaten immediate interference with the lawful and pressing purposes of law that an immediate check is required to save the country."[59] Finally, two more cases decided during the 1920s – *Gitlow v. New York*[60] and *Whitney v. California*[61] – provided "perhaps" the final push for First Amendment protections and paved the way for a more speech-protective era beginning in the 1930s.[62]

3. The Modern Era: 1930s-Present

The 1930s was the decade in which "[s]peech [s]tarts to [w]in."[63] The Supreme Court's first decision to uphold a free speech claim occurred in 1931 with *Stromberg v. California*.[64] In *Stromberg*, the Court rejected the state's prohibition of displaying a flag "as a sign, symbol or emblem of opposition to organized government" as so vague and indefinite as to permit the punishment of the fair use of [speech].[65]

Later that decade, two more decisions by the Court, *Schneider v. State*[66] and *Lovell v. City of Griffin*,[67] went on to place limits on "content-based"[68] regulations and refused to defer to legislative rationales for passing such speech restrictive regulations.[69] In these

---

[59] *Id.* at 630 (emphasis added). The radical shift in Holmes' positions between March and November of 1919 has puzzled many scholars. Most, however, attribute the change to Holmes' relationship with three people: Learned Hand, Zechariah Chafee, Jr., and Ernst Freund. Most believe that these three individuals challenged Holmes' position in *Schenck*, in a series of letters during the summer of 1919, causing him to eventually modify his clear and present danger test. *See* Bobertz, *supra* note 44, at 591-92.

[60] 268 U.S. 652 (1925) (convicting a man of criminal anarchy for advocating the overthrow of organized government by unlawful means) (Brandeis, J. and Holmes, J., dissenting).

[61] 274 U.S. 357 (1927) (affirming the conviction of a woman under the California Syndicalism Act) (Brandeis, J. and Holmes, J., concurring).

[62] *See* Yassky, *supra* note 46, at 1718 (citations omitted).

[63] Strauss, *supra* note 45, at 52 (citing HARRY A. KALVEN, A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 158 (1988)).

[64] 283 U.S. 359 (1931).

[65] *Id.* at 369. The Court articulated its first statement prohibiting prior restraints on speech one month later. *See* in *Near v. Minnesota*, 283 U.S. 1189 (1931) (invalidating a state statute that authorized injunctions against "any malicious, scandalous, and defamatory newspaper, magazine, or other periodical.").

[66] 308 U.S. 147 (1939) (declaring unconstitutional a municipal ordinance that forbade the distribution of leaflets on the streets).

[67] 303 U.S. 444 (1938) (invalidating a statute that prohibited the distribution of handbills without a permit).

[68] *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189-90 (1983) ("Content-neutral restrictions on speech limit communication without regard to the message conveyed . . . Content-based restrictions, on the other hand, limit communication because of the message conveyed.").

[69] The refusal to defer in *Schneider* stands in contrast with the Court's stance in an earlier case, in which the Court upheld a state law prohibiting the advocacy of overthrowing government by force *Gitlow v. New York*, 268 U.S. 652 (1925) (Holmes, J. and Brandeis, J., dissenting). The Court in *Gitlow* "emphasized the importance of deferring to legislative judgments about the dangerousness of speech." Strauss, *supra* note 45, at 52.

cases, the Court established its method for analyzing content-based restrictions and this process remains very similar today.[70]

By the 1940s, the Court had taken a solid stance as a guardian of free speech. The extent of the Court's shift to this highly protective position is demonstrated by four cases, involving very different situations, with opinions written by four different Justices, each reciting the need to demonstrate some "clear and present danger" before speech may be restricted.[71]

In perhaps the most noteworthy decision of the 1940s, the Supreme Court in *Chaplinsky v. New Hampshire*,[72] identified the distinction between what is now known as "low value" versus "high value" speech: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."[73]

In articulating this distinction, the Court made it clear that speech is presumptively considered "high value" until it is deemed to qualify in one of the "low value" categories.[74]

The 1950s brought the key decision of *Dennis v. United States*,[75]

---

[70] The Court applies different analyses when reviewing content-neutral versus content-based regulations.

In content-neutral analysis, the Court evaluates the extent of the restriction on speech and measures it against the government's interests in restricting such speech and decides whether there are less intrusive means to accomplish the same interests. The government bears the burden of proving the "substantiality" of its interests. *See* Stone, *supra* note 68, at 191.

In content-based analysis, the Court first decides what level of First Amendment value the speech has. If the speech is of only "low value" the Court applies a balancing test to decide when and how the speech may be restricted, with the key considerations being: "the relative value of the speech and the risk of inadvertently chilling high value expression." *Id.* at 195. This balancing test, however, does not always result in consistency, and the Court has formulated varying standards for the different categories of low value speech. *Id.* at 196. By contrast, the Court affords high value speech the greatest protection. As one scholar has found, "except when low value speech is at issue, the Court has invalidated almost every content based restriction that it has considered in the past quarter-century." *Id.*

[71] *See* Strauss, *supra* note 45, at 53 (discussing the Court's speech protective decisions in *Thornhill v. Alabama*, 310 U.S. 88 (1940), *Cantwell v. Connecticut*, 310 U.S. 296 (1941), *Bridges v. California*, 314 U.S. 292 (1941), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)).

[72] 315 U.S. 568, 572 (1942) (upholding conviction for using "fighting words" – "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

[73] *Id.* at 571-72. Today, the Court has classified several other categories of speech as "low value": incitement to imminent lawless action, false statements of fact, obscenity, commercial speech, and child pornography. *See* Stone, *supra* note 68, at 194-95.

[74] Strauss, *supra* note 45, at 54.

[75] 341 U.S. 494 (1951) (plurality of the Court upholding the conviction of leaders of the Communist Party of the United States for advocating the overthrow of the government by force or violence).

in which the Court added still another nuance to the clear and present danger test by stating, "whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[76] *Dennis* essentially set forth the principle that "a danger need not be so 'clear and present' if the ultimate harm was very grave."[77] This elaboration on the clear and present danger test prevailed in First Amendment jurisprudence for nearly twenty years, until the Court took a markedly different approach in evaluating freedom of speech in 1969.

Finally, the Court in *Brandenburg v. Ohio*[78] provided us with the newest speech test; it is this version that currently dominates First Amendment jurisprudence. In *Brandenburg*, a leader of the Ku Klux Klan was convicted under the Ohio Criminal Syndicalism statute for advocating violent means for accomplishing industrial or political reform. The Court reemphasized the idea that free speech does not allow the government to prohibit "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."[79] In *Brandenburg*, the court went on to say, "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."[80] Based on this reasoning, the court invalidated the statute as one that punished "mere advocacy."[81]

B. *Regulating Harmful Speech and Instruction Manuals*

Brandenburg provides the most recent step in the development of First Amendment jurisprudence. With this standard in mind, Congress and various lower courts have tried to indirectly regulate the dissemination of weapon recipes and dangerous instructional manuals. This section evaluates first how the courts have generally

---

76 *Id.* at 510 (opinion of Vinson, C.J.).

77 *See* Cass Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 369 (1996).

78 395 U.S. 444 (1969).

79 *Brandenburg*, 395 U.S. at 444. Strauss, however, describes *Brandenburg* as a product of two strands of First Amendment jurisprudence rather than a true departure from the clear and present danger test:

> Although it did not use the phrase 'clear and present danger,' the Court's emphasis on imminence and on a high probability of harm was derived directly from [that] test. *Brandenburg* appears to have added to that test a requirement that the speech be low value; if the government wants to restrict speech, it must show that the speech is not advocacy of ideas but is rather 'directed to inciting or producing imminent lawless action.'

Strauss, *supra* note 45, at 56-57.

80 *Id.* at 448 (citations omitted).

81 *Brandenburg*, 399 U.S. at 445.

treated harmful speech. It then outlines the current attempts – by the courts and Congress – to regulate the dissemination of weapon recipes and other dangerous instructional manuals.

1. Regulation of Harmful Speech, Generally

At the heart of needing to regulate certain speech is the fear that it will persuade individuals to think and act in certain ways.[82] Related to the idea that individuals may be persuaded is that speech may be harmful in itself or in its consequences. However, these arguments, as a general proposition, are usually not enough to justify the regulation of speech, particularly when the regulations entail content-based restrictions.[83] Thus, regulation usually turns on other factors, such as the content and viewpoint of the legislation, the imminence of harm, the gravity of the harm, and the intent of the speaker. Whether or not such harmful speech should be regulated, and if so, how to regulate it, continues to be the subject of great debate.[84]

---

[82] One author notes that this is precisely the reason why we value speech. *See* David Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 337 (1991). After making this initial point however, Strauss goes on to argue that the government may not restrict speech on the grounds that it persuades people to act and think in certain ways. *See id.* Strauss terms this argument the "persuasion principle." He qualifies this principle, however, in two ways. He stresses that, "[first] the persuasion principle does not hold when the consequences of following it are too severe. Second, the persuasion principle is insensitive to the danger that private parties, and not just the government, infringe autonomy." *Id.* at 371.

The problem with using the "persuasiveness" of speech as a proxy for regulation is that government is likely to exaggerate the problems associated with such speech. *See generally id.* Thus, the argument goes, the strongest mechanism for counter-acting "persuasive speech," is not regulation, but more speech. This was suggested by Justice Brandeis in his concurrence in *Whitney v. California*: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927).

[83] The main argument for regulating speech under the "harm" rationale is that "whatever value there may be in such harm-causing speech, that benefit is outweighed by the harm." *See* C. Edwin Baker, *Harm, Liberty and Free Speech*, 70 S. CAL. L. REV. 979 (1997).

Harm alone, however, is usually not enough. The Court's refusal to uphold speech regulation on the basis of harm alone is clearly revealed in its treatment of pornography and hate speech. *See generally* Elena Kagan, *Regulation of Hate Speech and Pornography After R.A.V.*, 60 U. CHI. L. REV. 873 (1993). Kagan states that many proponents of hate speech and pornography regulation contend that such restrictions are harm-based, and therefore, should pass constitutional muster. However, she points out that the Court continues to focus on such regulation as content-based and viewpoint-based and therefore unconstitutional. The court has yet to add hate speech or pornography to the categories of low-value speech, whereby they would be willing to overlook content-based restriction. *Id.*

[84] One scholar argues that speech should not be regulated solely because it may cause harm. *See generally* Baker, *supra* note 83. The key principle in Baker's argument is that a speaker should not be responsible for harm resulting from his speech. The idea is that speech, even if harmful, requires an "intermediate mental act" by the subsequent actor, which thus absolves the original speaker of guilt from any resulting harm. Baker makes this point by utilizing Schauer's distinction between two kinds of harmful speech. In the

2. Current Treatment of Weapon Recipes and Dangerous Instructional Manuals by Courts and Congress

This section outlines the various ways that the courts and Congress have addressed weapon recipes. The United States Supreme Court has yet to issue a decision involving the proper analysis of weapon recipes and other dangerous instructional materials, leaving the lower courts with room to devise their own standards. Additionally, there are several statutes in force, which could potentially impose liability on people who publish or distribute weapon recipes. However, both the lower courts' and Congress's attempts at regulation have inherent limitations.

a. Current Traditional Treatment

To date, the Supreme Court has yet to give its opinion on the proper First Amendment treatment of weapon recipes in either print or electronic/Internet form.[85] Without much guidance, the lower federal courts have been given much room to decide the amount of protection to afford such speech.[86] The paradigm case is *Rice v. Paladin*, decided by the Fourth Circuit Court of Appeals, since it comes the closest to addressing dangerous weapon recipes and whether they are deserving of protection.

i. Rice v. Paladin *& Murder Manuals*

Rice v. Paladin[87] is one of the few cases to find a dangerous

---

first category, the speaker (S) communicates with hearer (H) who harms the victim (V), (S _ H _ V); and in the second category, the speaker's speech itself harms hearer (S _ H). In the first category, the speech is "necessary but not sufficient to cause the harm." *Id.* at 990. In other words, "the harm is mediated through a 'mental act' of the second actor." *Id.* It is this person's "choice" that is "central to why the criminal law most frequently imposes liability only on the second actor." *Id.* Baker goes on to explain:

> The harm only results if the hearer accepts, adopts or otherwise responds to the speaker's mental contribution. In contrast, other cases in which a first actor contributes to an injury committed by a second party, the first typically provides a 'means,' not just a motive or rationale that the second actor 'employs.'

Id. It is this "break" in the causal chain that absolves the one who "speaks or writes" harmful speech from being the actual "cause" of the ultimate harm. It is this quality that makes even harmful speech, arguably deserving of First Amendment protection. *Id.*

85 S. Elizabeth Malloy & Ronald J. Krotoszynski, *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1201 (2000) [hereinafter *Harm Advocacy*]. These authors define harm advocacy as a "narrow spectrum of expression that both advocates and facilitates illegal or tortious activities against others." *Id.* at 1165 n.24. This Note will somewhat adopt this terminology. Reference to the category of "harm advocacy" within this Note should be construed more narrowly, however, encompassing primarily weapon recipes and dangerous instructional manuals. *See* Part I.A., *supra* note 1.

86 Two decisions by United States Circuit Courts of Appeal have established different approaches to claims involving harm advocacy. *See* Rice v. Paladin, 128 F.3d 233 (4th Cir. 1997); Herceg v. Hustler Magazine, 814 F.2d 1017 (5th Cir. 1987). Discussion in this Note is limited to *Rice*, however, since *Herceg* did not involve a weapon recipe.

87 128 F.3d 233 (4th Cir. 1997).

instructional manual undeserving of First Amendment protection.[88] Paladin Enterprises published two murder manuals that were used to carry out the contract killing of three individuals.[89] In finding the publishers civilly liable for aiding and abetting[90] the Fourth Circuit did not apply the *Brandenburg* test. Instead, the court invoked the speech-act doctrine[91] to remove First Amendment obstructions to imposing liability on the publisher.[92]

The court repeatedly cited to the recent report by the Department of Justice that highlighted the availability of and easy access to bombmaking materials.[93] Relying on the report's stark revelations, the court found it relatively easy to then state that:

> [T]he First Amendment, and *Brandenburg's* imminence requirement in particular, generally poses little obstacle to the punishing of speech that constitutes criminal aiding and abetting, because culpability in such cases is premised, not on defendants' advocacy of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes.[94]

b. Current Legislative Treatment

There are currently five statutory mechanisms that could impose criminal liability for the dissemination of weapon recipes.[95]

---

88 *Harm Advocacy, supra* note 85, at 1201.

89 *Rice*, 128 F.3d at 241.

90 The court stated that, "'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality . . . Speech is not protected by the First Amendment when it is the very vehicle of the crime itself." *Id.* at 244. "The law need not treat differently the crime of one man who sells a bomb to terrorists and that of another who publishes an instructional manual for terrorists on how to build their own bombs out of old Volkswagen parts." *Id.* (citations omitted). *But see Herceg*, 814 F.2d 1017 (refusing to hold publisher liable for death of a fourteen year-old boy after following the instructions in an article entitled "Orgasm of Death"). The *Herceg* court applied the *Brandenburg* test.

91 The speech-act doctrine essentially states that speech that is tantamount to conduct is beyond the scope of the First Amendment. Thus the First Amendment does not proscribe "speech" which falls in this category.

92 The court went on to analogize the case to other cases involving the speech-act doctrine whereby courts refused to apply the *Brandenburg* test. *See* United States v. Barnett, 667 F.2d 835 (9th Cir. 1982) (holding that the First Amendment does not provide publishers a defense to criminal aiding and abetting by the publication and distribution of instructions on how to make illegal drugs because "crimes, including that of aiding and abetting frequently involve the use of speech as part of the criminal transaction."); *see also* United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990) (holding *Brandenburg* inapplicable to conviction for conspiring to transport and aiding and abetting the interstate transportation of wagering paraphernalia because the programs were "too instrumental in and intertwined with the performance of criminal activity to retain First Amendment protection."). The court also discussed the applicability of the speech-act doctrine to violation of federal tax laws. *See Rice*, 128 F.3d at 245.

93 *See generally* DOJ BOMBMAKING REPORT, *supra* note 2.

94 *Rice*, 128 F.3d at 146 (citations omitted).

95 *See* DOJ BOMBMAKING REPORT, *supra* note 2; *see also* 18 U.S.C. § 842(p) (2003).

The first three federal statutes indirectly penalize speech via prohibitions on certain criminal actions: (i) conspiracy,[96] (ii) solicitation,[97] and (iii) aiding and abetting.[98] The fourth statute penalizes the "teaching or demonstrating of techniques related to the use or manufacture of firearms and explosives."[99] The fifth, and most recent statute, prohibits the "teaching," "demonstrating" or "distributing by any means," of information relating to "the making or use of an explosive, a destructive device, or a weapon of mass destruction."[100] All these statutes, however, have intent requirements that are difficult to meet, and have other limitations to their usefulness with regard to the dissemination of WMD recipes.

i. *Conspiracy*

Weapon recipes may be regulated under a conspiracy theory of liability.[101] Under these statutes, however, the government must show that the dissemination of information is part of the substantive crime. While demonstrating liability under this statute does not require proving that the crime itself occurred, the government still must demonstrate that the speaker/writer/disseminator (i) had the requisite intent that the information be used unlawfully and (ii) made an agreement with co-conspirators.[102] The need to prove these two elements weakens the applicability of this statute.[103]

ii. *Solicitation*

Another federal statute imposes liability for the solicitation of certain crimes.[104] The DOJ Report expressly notes that

---

96 *See* 18 U.S.C. §§ 844, 371 (2003).

97 *See* 18 U.S.C. § 373 (2003).

98 *See* 18 U.S.C. § 2 (2003); *see also* the Anti-Terrorism and Effective Death Penalty Act, Section 323.

99 *See* 18 U.S.C. § 231(a)(1)(2003).

100 *See* 18 U.S.C. § 842(p). No official title was given to the Act that included § 842(p).

101 18 U.S.C. § 844(m) prohibits a conspiracy to commit any felony which may be prosecuted in a court of the United States. A conspiracy to commit any offense defined in Chapter 40 of Title 18 of the U.S. Code – entitled "Importation, Manufacture, Distribution, and Storage of Explosive Materials" – is prohibited by 18 U.S.C. § 844(n). There is also a general federal conspiracy statute, 18 U.S.C. § 371, which prohibits conspiring to commit any offense against the United States, making it criminal to commit federal crimes involving explosives.

102 *See* DOJ BOMBMAKING REPORT, *supra* note 2, at x.

103 The DOJ BOMBMAKING REPORT noted,

> [A] conspiracy requires agreement, and there is a difference between knowing that something will occur [by virtue of one's sale of a product] – even as an absolute certainty – and agreeing to bring that 'something' about. It follows that an 'isolated sale is not the same thing as enlisting in the venture.'

Id. (citations omitted).

104 Under the federal solicitation statute, 18 U.S.C. § 373 (2003),

> [w]hoever with *intent* that another person engage in conduct constituting a

"[s]olicitation prohibited in this statute often will take the form of speech, including written speech."[105] However, the act of solicitation would not include the dissemination of weapon recipe information per se. Still, the dissemination of weapon recipes and similar materials could be used as evidence to prove intent.[106] In such a situation, the dissemination of information would support an inference that the person intended to facilitate (and thereby solicit) the crime. Due to these strict requirements, however, this statute is not very useful since it would only apply to a very limited, specific set of cases.

iii. *Aiding and Abetting*

Two federal statutes could address the dissemination of bombmaking information under an aiding and abetting theory: (i) the general federal aiding and abetting statute, 18 U.S.C. § 2, and (ii) Section 323 of the Antiterrorism and Effective Death Penalty Act ("AEDPA") which prohibits providing support in crimes of terrorism.

The general aiding and abetting statute, 18 U.S.C. § 2, applies to all federal criminal offenses.[107] Here, aiding and abetting can take the form of speech, including providing instructions on "how to commit a crime to a particular person or a discrete audience."[108] Section 2, however, contains three major limitations. First, it is unclear whether one can be liable for aiding and abetting

> solely on the basis of general publication of instruction on how to commit a crime, or the undifferentiated sale to the public of a product that some purchaser is likely to use for unlawful ends,

---

> felony that has as an element of the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and *under circumstances strongly corroborate of that intent, solicits, commands, induces or otherwise endeavors to persuade* such other person to engage in such conduct . . . may be held criminally liable for soliciting a crime (emphasis added).

Id. (emphasis added).

105 DOJ BOMBMAKING REPORT, *supra* note 2, at x (citations omitted). "Indeed, Congress intended that the statutory phrase 'otherwise endeavors to persuade' be construed broadly to cover any situation 'where a person seriously seeks to persuade another person to engage in criminal conduct.'" *Id.*

106 *Id.*

107 18 U.S.C. § 2 states:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever *willfully* causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(emphasis added).

108 DOJ BOMBMAKING REPORT, *supra* note 2, at xii.

> or whether, at a minimum, the person supplying the aid must know that a particular recipient thereof will use it in the commission of a crime.[109]

Second, even if it could be established that a publisher knew someone would use the information to commit a crime, Section 2 requires "intentional wrongdoing, rather than mere recklessness."[110] Finally, Section 2 requires that the underlying offense must, in fact, be committed.[111]

A second aiding and abetting statute, Section 323 of ADEPA, makes it unlawful

> to provide material support or resources to another person, *knowing or intending* that they are to be used in preparation for, or in carrying out, various federal offenses relating to terrorism, or in preparation for, or in carrying out, the concealment from the commission of any such violation.[112]

The potential applicability of this statute is broader than the general aiding and abetting statute for two reasons. First, a publisher can be culpable even if the underlying offense is not carried out. Second, the scienter provision is a bit broader than the "intent" required in Section 2. Section 323 provides that one may be culpable so long as he "knows" that the resources provided are to be used "to prepare for or commit" a specified offense,[113] whereas Section 2 requires a higher, specific intent of willfulness or purposefulness.

At the same time, however, the provisions of Section 323 may be somewhat more limited in their application. Section 323 covers facilitation of only certain enumerated crimes.[114] Moreover, it is unclear whether courts would find that information on how to manufacture or use explosives fits within the meaning of "material

---

109 *Id.* (citations omitted).

110 *Id.* at xiii (citations omitted). Note that in *Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997), the publisher stipulated that in publishing such materials, it "intended to attract and assist criminals who desire information and instructions on how to commit crimes" and further, that "it intended and had knowledge" that the manuals "would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime murder for hire." *Id.* at 281 (citations omitted). Note also, that the convictions in *Rice* constituted only civil aiding and abetting, not criminal.

111 "Aiding and abetting, here, is only derivative from the principal offender's own liability. Therefore, if a crime has not been committed, the general federal aiding and abetting statute cannot be invoked." DOJ BOMBMAKING REPORT, *supra* note 2, at xiii (citations omitted). There is no federal statute generally proscribing an attempt to aid and abet a federal offense (though the Model Penal Code has recommended such a prohibition). *Id.*

112 *Id.* at xiii-xiv (emphasis added).

113 *Id.* at xiv.

114 *Id.*

support or resources."[115]

iv. *18 U.S.C. § 231(a)(1) Crimes: Civil Disorders*

Section 231(a)(1) of Title 18 seems more like a speech regulation in that it prohibits the "teaching" or "demonstrating"

> to any other person the use, application, or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons, *knowing or having reason to know or intending* that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder.[116]

The DOJ Report notes, however, that the statute has been utilized infrequently.[117] The potential operation of Section 231(a)(1) on cases involving weapon recipes is limited. Much like the previous statutes, this statute also contains difficulties in proving intent and causation.[118]

v. *18 U.S.C. § 842(p) Criminal Prohibition on the Distribution of Certain Information Relating to Explosives, Destructive Devices, and Weapons of Mass Destruction*

Two years after the publication of the DOJ report, a statute was passed that attempted to address its recommendations. This newest statute attempts to more specifically regulate weapons of mass destruction.[119] The language of this statute is useful in that it

---

115 *Id.*

116 *Id.* (emphasis added). This stands in contrast to the four previous statutes, which punished speech indirectly as part of the underlying criminal conduct.

117 "It appears that the statute has been used sparingly; there are only two reported decisions involving it." DOJ BOMBMAKING REPORT, *supra* note 2, at xv (citing National Mobilization v. Foran, 411 F.2d 934 (7th Cir. 1969) and United States v. Featherson, 461 F.2d 1119 (5th Cir.)). (In these cases "both courts of appeals construed the scienter element of § 231(a) narrowly").

118 Section 231(a)(1) can apply only where the person doing the teaching or demonstrating either (i) *intends* that the information will be used in furtherance of a civil disorder or (ii) *knows* that the information will be so used. Furthermore, it is debatable whether the operative verbs – 'teaches or demonstrates' – could be interpreted to include sales to unknown recipients. *Id.* at xv-xvi. Additionally, the intended or known use of the information conveyed must be in or in furtherance of a civil disorder. A civil disorder requires "a public disturbance involving violence by assemblages of three or more persons. Section 231(a)(1) would not, therefore, apply to uses of the information by merely one or two felons." *Id.* (emphasis added).

119 18 U.S.C. § 842(p)(2)(A)(2003) makes it a crime 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 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 of an explosive, destructive device, or

arguably encompasses speech by prohibiting certain "teaching" or "demonstrating." The addition of the word "distributing" is also broader than the other statutes and could potentially reach dissemination generally. However, it again requires that the person teaching or demonstrating *intends* to aid in the commission of a federal crime, or *knows* that the person he is teaching intends to break the law, making liability difficult to impose.

IV. Legal Argument: The First Amendment "In Context"

The previous section demonstrated how attempts to regulate weapon recipes have been relatively limited in their application and thus unable to truly alleviate the dangers associated with easy access to such information. This section will present the current legal arguments on how to justify regulation, and then suggest a different theory.

A. *Alternative Legal Arguments*

There are currently three major propositions on how to best handle weapon recipes regulation. The first contends that *Brandenburg* can be properly applied to regulate these materials. The second maintains that weapon recipes and instructional materials are more akin to conduct than to speech and are thus beyond the scope of the First Amendment. Finally, a third argument is that weapon recipes and instructional manuals should be considered a new and separate "low value" speech category.

B. Brandenburg *is the Proper Test*

The *Brandenburg* court held that in order to restrict speech, a showing must be made that the speech: (i) advocated use of force or of law violation and (ii) was directed to inciting or producing imminent lawless action.[120] Many scholars continue to believe that *Brandenburg* is the best First Amendment test to deal with harmful instructional manuals and, more importantly, that it works.[121]

---

weapon of mass destruction, *knowing that such person intends* to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence.

(emphasis added).

[120] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[121] *See* Daniel T. Kobil, *Advocacy Online: Brandenburg v. Ohio and Speech in the Internet Era*, 31 U. Tol. L. Rev. 227, 235 (2000). Kobil says that the Brandenburg test "works" for several reasons: (i) the test is "clear and relatively easy to apply"; (ii) it's "widely considered to be a substantial improvement (particularly in terms of protecting speech) over the content-sensitive approaches that the Court once used in the area of speech advocating unlawful conduct"; (iii) it "properly channels government efforts toward preventing unlawful behavior rather than into the more problematical task of attempting to police and punish poten-

Those who argue that *Brandenburg* is still a viable standard for dangerous materials contend that the language in *Brandenburg* is sufficiently broad to include these materials, or could be expanded to include these materials. Supporters also agree that the imminence requirement can be done away with, or in the alternative, can be sufficiently relaxed so that the requirement can be readily met.[122]

Many scholars, however, contend that *Brandenburg* is not an effective test for dealing with dangerous instructional materials. Some argue that *Brandenburg* should be limited to its facts,[123] while others reject *Brandenburg* because it does not take into account the "nature of the speech."[124] Still other scholars contend that *Bran-*

---

tially provocative speech"; (iv) despite its strong protection of speech, its approach "is flexible enough to allow the state to punish expression that amounts to little more than the first step in carrying out unlawful conduct such as soliciting murder for hire or publishing step-by-step instructions on how to murder people and get away with it." *Id.*

What is interesting, however, is that this author concedes that "Brandenburg's approach has not been challenged in a nationalistic 'social climate where there were strong pressures to suppress speech,' in contrast to the 'clear and present danger' test," thus leaving open the possibility that a different standard may be more appropriate in times of national crises and war. *Id.* at 241.

122 *See* Theresa J. Pulley Radwan, *How Imminent is Imminent?: The Imminent Danger Test Applied to Murder Manuals*, 8 SETON HALL CONST. L.J. 47 (1997). Radwan contends that the *Rice* court erred in its analysis of the imminence requirement by focusing on when the results of the speech occurred – the murder did not occur for well over a year. She stresses that the courts should focus on the speech itself, and "whether the language of the book demands action in the near future . . . though the actual act of the murder is not immediate, the planning may begin immediately." *Id.* at 67. She concludes that "advocacy of planning should be no less a source of liability than the advocacy of the killing." *Id. See also* Tiffany Komasara, *Planting the Seeds of Hatred: Why Imminence Should No Longer Be Required to Impose Liability on Internet Communications*, 29 CAP. U.L. REV. 835 (2002). Komasara argues that the *Rice* court effectively eliminated Brandenburg's imminence requirement in their analysis, and correctly so. She points to the court's statement as support for her argument.

> [T]o understand the [*Brandenburg*] Court as addressing itself to speech other than advocacy would be to ascribe to [the Court] an intent to revolutionize the criminal law . . . by subjecting it to the demands of *Brandenburg's* 'imminence' and 'likelihood' requirements whenever the predicate conduct takes, in whole or in part, the form of speech.

Id. at 851 (quoting *Rice*, 128 F.3d at 265.) Ultimately, she agrees with the *Rice* court's rationale – that eliminating the imminence requirement does no serious injury to the First Amendment – and concludes that "[a]pplying the new no-imminence standard takes into consideration the content of the message, the intent of the sender, the likelihood that the communication will result in harm . . . [t]his standard would still allow 'mere abstract teachings' as in *Brandenburg* and *Noto*." *Id.* at 854.

123 *See* Beth A. Fagan, *Rice v. Paladin Enterprises: Why the Hit Man is Beyond the Pale*, 76 CHI.-KENT. L. REV. 603, 633 (2000). Fagan argues that (i) *Brandenburg* involved ideological speech of a political nature; (ii) the incitement to imminent lawless action test does not apply to hit man books because the "crowd" context was crucial to the facts of *Brandenburg*, and (iii) the facts of *Brandenburg* suggest that it should only be used for similar fact patterns. *Id.* at 618-20. To support her contention of limiting the test to its facts, she cites *Walt Disney v. Shannon*, 276 S.E.2d 580 (Ga. 1981). In *Walt Disney*, the court refused to apply the *Brandenburg* test and instead applied the clear and present danger test, "presumably because *Brandenburg's* facts limited that test's usefulness to only similar situations." *Id.* at 619.

124 *See* S. Elizabeth Malloy, *Taming Terrorists But Not Natural Born Killers*, 27 N. KY. L. REV. 81 (2000). Malloy argues that *Brandenburg* is deficient because it "accommodates only con-

denburg only truly applies to political speech[125] — thus making its application in these cases overly protective of dangerous instructional materials.[126]

Additionally, *Brandenburg* has an imminence requirement that is difficult to meet in the type of harm advocacy involved in disseminating weapon recipes.[127] This is particularly important since the imminence requirement has become the focal point of the *Brandenburg* test.[128] Along these same lines, there is a problem with proving causation between the speech and subsequent harm.[129]

Finally, the dissemination of weapon recipes on the Internet poses a unique problem that *Brandenburg* may not be able to ad-

---

siderations that arise from the imminence of the harm, and not the nature of the speech itself . . ." *Id.* at 83-84. "Purely speculative harms are not sufficient grounds for censorship. But when the nature of the speech itself creates a palpable danger, the government's concerns sound less in censorship and more in the viewpoint neutral cadence of the public safety." *Id.* at 90.

Still, other scholars contend that while free speech should not necessarily include various forms of harm advocacy, *Brandenburg* is still the best mechanism for analyzing whether such advocacy deserves free speech protection. *See generally* Kent Greenwalt, *"Clear and Present Danger" and Criminal Speech, in* ETERNALLY VIGILANT, *supra* note 45, at 98.

125 *Brandenburg* is a test meant to protect political, democratic speech and the "abstract advocacy of violence or revolution." *Harm Advocacy, supra* note 85, at 1168. Moreover, "*Brandenburg* addresses speech activity designed to persuade someone to commit an unlawful act, not speech designed to facilitate the commission of an unlawful act by a person who has already decided to act." *Id.* at 1169.

126 Extending *Brandenburg* to reach Harm Advocacy provides more protection than such speech merits under the First Amendment. If a publisher knowingly seeks to facilitate conduct that the legislature may constitutionally proscribe, the speech at issue should itself be proscribable . . . . Moreover, the proscription is not the product of antipathy toward the speaker's ideological motivations, but rather a prudent preventative measure to protect the public from harm.

Id. at 1212-13.

127 "Because instructional books, songs, and movies generally require time for an individual to digest, such materials generally will not meet the imminence requirement – a requirement that demands that the speech cause an individual to act without rational thought." *Id.* at 1169. "The problem with imposing liability involves the absence of a direct temporal link between publication of the Harm Advocacy and the subsequent harmful act, as well as judicial doubts about the causal connection between works facilitating harmful acts and the acts themselves." *Id.* at 1191.

128 Subsequent Court decisions have highlighted what "imminence" requires. *See* Hess v. Indiana, 414 U.S. 105 (1973) (reversing the conviction of an anti-war demonstrator who yelled, "we'll take the fucking street later" since it amounted to "nothing more than advocacy of illegal action at some indefinite future time."); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (stating "[a]dvocates must be free to make spontaneous emotional appeals" without carefully weighing their words, and such appeals constitute protected speech when they do not immediately incite lawless action).

129 This relates back to the idea that there is an intermediate "mental act" which precludes us from imposing liability on the speaker rather than the actor. Since causation is difficult to show in cases of harm advocacy, it is particularly difficult to impose liability on a speaker (publisher, author, musician, etc.) who may not have intended or foreseen any possible harm. This would cause an undesirable chilling effect on the arts. *See Harm Advocacy, supra* note 85, at 1192. Arguments have been made, however, that these problems can be overcome by requiring "a sufficiently demanding evidentiary standard of proof for establishing the author's or musician's subjective intent as well as by requiring significant proof of causation." *Id.*

dress.[130] Defining imminence has always been difficult, but it becomes especially problematic since it is unclear what "imminence" means in the context of Internet communications.[131] Also, identifying the "listener" or "audience" on the Internet is another issue that needs to be addressed in relation to *Brandenburg's* imminence requirement. As one scholar cautioned,

> *Brandenburg* made a great deal of sense for the somewhat vague speech in question, which was made in a setting where relatively few people were in earshot. But the case offers unclear guidance on the proper treatment of express advocacy of criminal violence via the airwaves or the Internet.[132]

Another author explicitly states that the *Brandenburg* standard "fails to instruct courts how to handle incitement on the Internet," specifically because "the Internet introduces a new type of speaker-audience relationship that makes the current standard unworkable."[133]

Still, the fact remains that *Brandenburg* is the normative test applied by courts and will remain so until the Court elucidates a different standard for addressing the dissemination of weapon

---

130 Cass Sunstein posed the question, while "advocacy of a crime is wholly outside of the First Amendment . . . [m]ight government ban advocacy of criminal violence in mass communications when it is reasonable to think that one person, or a few, will take action?" Cass Sunstein, *Is Violent Speech a Right?*, THE AMERICAN PROSPECT 34 (1995). *But see* Kobil, *supra* note 121.

131 *See* Norman Redlich & David Lurie, *First Amendment Issues Presented by the "Information Superhighway,"* 25 SETON HALL L. REV. 1446 (1995). These authors argue:

> Existing Supreme Court precedent – read restrictively – preclude the regulation of speech advocating illegal activity absent the demonstration of a risk of "imminent" wrongdoing accompanied by words of incitement. However, it may be difficult to establish such a risk of imminent harm arising from the electronic advocacy of criminal acts. It may be next to impossible to establish how the potentially vast, but anonymous, audience for a communication soliciting illegal conduct is likely to respond.

Id. at 1456.

132 Sunstein, *supra* note 130, at 34. Sunstein initially used this argument against those cases involving the "express advocacy of unlawful killing because it is the clearest case." He goes on to address weapon recipes specifically saying:

> [N]othing that I have said suggests that government lacks the power to limit speech containing instruction on how to build weapons of mass destruction. The *Brandenburg* test was designed to protect unpopular points of view from government controls; it does not protect the publication of bomb manuals. Instructions for building bombs are not a point of view, and if government wants to stop the mass dissemination of this material it should be allowed to do so.

Id.

133 Cronan, *supra* note 4, at 428. "The most important prong of the *Brandenburg* test, the imminence requirement, does not work with the vast majority of Internet communications, as words in cyberspace are usually 'heard' well after they are 'spoken.'" As a result, almost no Internet communication, regardless of the likelihood and seriousness of incitement, can be condemned under *Brandenburg*." *Id.*

recipes.[134]

1. Speech-Acts

Like the Fourth Circuit in *Rice*, many scholars and jurists believe that viewing instructional manuals and weapon recipes as "speech-acts" is the correct methodology by which to limit such speech.[135] They follow the rationale provided by the *Rice* court that, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[136] They also agree 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. Crimes, including that of aiding and abetting, frequently involve the use of speech as part of the criminal transaction."[137]

The difficulty with using the speech-act doctrine to remove weapon recipes and dangerous instructional manuals from the scope of First Amendment protection is that speech and conduct are not easily distinguishable.[138] In order to argue that the dissemination of such materials is unconstitutional as a speech-act, we must first answer the threshold question – is this speech or conduct? Most scholars argue that the act of publication (and dissemination) is part and parcel of exercising the right to free speech and free press; and is thus incapable of being conduct.[139] Moreover, it

---

134 Applying the *Brandenburg* test, Courts have refused to hold publishers liable because the incitement was not explicit, warnings were included, or no threat of imminent injury existed. *See Harm Advocacy, supra* note 85, at 1201.

135 *See, e.g.*, Loris L. Bakken, *Providing the Recipe for Destruction: Protected or Unprotected Speech?*, 32 McGeorge L. Rev. 289 (2000).

136 *Rice*, 128 F.3d at 243.

137 *Id.* at 245.

138 One author, however, suggests that there is a way to easily determine when speech becomes a criminal act. *See* Benjamin Means, *Criminal Speech and the First Amendment*, 86 Marq. L. Rev. 501 (2002). Means suggests that understanding the distinction between speech and crime can be done by looking at the established law. He argues, "the threshold distinction between speech and crime can be better understood as a version of the familiar distinction that courts rely upon when seeking to identify whether conduct (such as marching or nude dancing) is sufficiently expressive so as to merit First Amendment protection." *Id.* at 503.

139 *See* Fagan, *supra* note 123, at 633. Fagan argues that the Fourth Circuit erred in applying a speech-act rationale for imposing liability on the publishers. Instead, she suggests a categorical balancing approach of such materials, with the court taking into account three factors: (1) the speaker's specific intent to assist, instruct, and encourage activity; (2) balanced against the state's interest in preventing crimes and (3) that the speech assisting criminal activities must have taken an instructional, nonexpressive form, virtually devoid of "political, informational, educational, entertainment, or other wholly legitimate purpose." *Id.* at 633-35.

is questionable whether or not such "speech" is in fact "brigaded with action,"[140] a test that is normally utilized to try to determine whether something qualifies as a speech-act.

Another difficulty with equating this type of speech with conduct is that in order to apply civil or criminal liability to conduct, a certain level of intent or mens rea is required.[141] One way to remedy this problem would be to lower the necessary intent requirement to recklessness, negligence, or strict liability.[142] The *Rice* court, however, cautioned that the proper scienter would most likely require a higher standard, such as knowledge or purpose or intent.[143]

---

[140] *Brandenburg*, 395 U.S. at 456 (Douglas, J., concurring). Douglas elaborates on the distinction between speech and acts, but provides little in the way of a meaningful distinction:

> Picketing, as we have said on numerous occasions, is 'free speech plus.' (citations omitted). That means that it can be regulated when it comes to the 'plus' or 'action' side of the protest . . . The 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. The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre. This is, however, a classic case where speech is brigaded with action. They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution.

Id. at 455-7.

[141] This is the same problem that plagues the current statutes that attempt to impose criminal liability for the dissemination of these materials. *See supra* notes 95-119 and accompanying text.

[142] One author suggests that a standard of recklessness would be sufficient for imposing criminal aiding and abetting liability on publishers of dangerous manuals. *See* Monica Lyn Schroth, *Reckless Aiding and Abetting: Sealing the Cracks that Publishers of Instructional Materials Fall Through*, 29 SW. U. L. REV. 567 (2000). Such a standard would "allow the publisher to be held liable for consciously disregarding a substantial and unjustifiable risk that the publication of material will aid or abet a reader in the commission of a crime against another person." *Id.* at 569. She notes, however, that

> plaintiffs have been unsuccessful with causes of action such as negligence, strict products liability, negligent misrepresentation, and breach of warranty because of other considerations such as lack of privity, lack of strength of a causal connection between the publication and the harm, or the judiciary's reluctance to impose a duty of care on publishers.

Id. at 568.

[143] *See Rice*, 128 F.3d at 247 (stating "The First Amendment may, at least in certain circumstances, superimpose upon the speech-act doctrine a heightened intent requirement in order that preeminent values underlying that constitutional provision not be imperiled."); *see also* Radwan, *supra* note 122, at 70-71. Radwan points out:

> Under the original clear and present danger test outlined in *Schenck*, intent was not a factor. However, under the imminent danger test as it currently stands, specific intent for the end result to occur is required . . . . Given the incredible value society places on free speech, it would be difficult to accept a lenient standard, such as negligence or recklessness, in prohibiting speech . . . . Thus, it is wise to require a standard of at least knowing, and perhaps purposefulness, in suppressing speech. Whichever standard is appropriate has yet to be fully defined by the courts, but it appears that the *Rice* court has accepted the equivalent of the 'purposeful' standard of intent.

Id.

2. A New Category of Low-Value Speech

Other scholars maintain that speech advocating harm, such as dangerous instructional manuals and weapon recipes, should be classified in a new category called "low value" speech,[144] and that the resultant harm should be imposed on the speaker.[145] These scholars begin with the premise that "free speech is free precisely because a Court will classify it as such; whereas proscribable speech enjoys that status precisely because a reviewing Court would so classify the material at issue."[146] The Supreme Court, of course, has within its power the ability to create a new category of low value speech that would encompass harm advocacy, such as weapon recipes.[147] In support of their argument, these scholars contend that:

> Because harm advocacy speech usually consists of highly technical instructional details, it has little, if any, expressive value, and because it not only advocates, but also directly facilitates the commission of crimes and intentional torts, it has little if any politically or socially redeeming value. As a category of speech, therefore, it is particularly dangerous and not particularly valuable. More importantly, like other categories of unprotected speech, this category is likely to result in severe harms to innocent third parties. The state clearly has a very strong interest in safeguarding the lives of its citizens . . . Additionally, the risk that the government will suppress unpopular viewpoints or cultural minorities is, at best, remote.[148]

There is a problem, however, in expanding the categories of low value speech. Professor Weinstein argues, "the American experience has shown that any attempt to microsurgically remove even small categories of 'worth-less' speech from public discourse can seriously damage the vitality of the free expression crucial to de-

---

144 Courts currently use the incitement to imminent lawless action category of low value speech found in *Brandenburg*, to review harmful speech, generally. *See Harm Advocacy, supra* note 85, at 1187.

145 *See id.*

146 *Id.* at 1172. They essentially argue that First Amendment doctrine is unavoidably not content-neutral: "the content of speech prefigures its status as protected or proscribable." *Id.* "The unprotected categories of speech are unprotected precisely because the threatened social harms associated with the speech outweigh any potentially offsetting social value associated with the particular type of speech." *Id.* at 1186.

147 After balancing competing interests, the court has determined that some categories of speech are unworthy of First Amendment protection. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957) (holding that obscenity is a category of unprotected speech); *but see* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (rejecting hate speech as another category of unprotected speech). The Court has yet to qualify hate speech among the ranks of low-value speech.

148 *See Harm Advocacy, supra* note 85, at 1219-20.

mocracy."[149] Moreover, there are strong counter-arguments that the persuasiveness and harm of speech is not reason enough to justify regulation.[150]

C. *Why We Can and Should Regulate Today*

At this point, two questions still remain: (1) *CAN* we regulate weapon recipes and identify a valid rationale for their restriction?; and (2) *HOW* would such a regulation pass constitutional muster? This Note proposes that we can regulate these materials and that the War On Terrorism provides the highest justification for such regulation. Further, this Note proposes that a new context-dependent theory of free speech – one that applies *Schenck's* clear and present danger test during wartime – supplies a constitutional rationale for such regulation.

1. We Can Regulate: The War Against Terrorism is the Highest Justification

The FBI's National Strategy for Combating Terrorism states, "[t]he threat of terrorists acquiring and using WMD is a clear and present danger . . . . A central goal must be to prevent terrorists from acquiring or manufacturing the WMD that would enable them to act on their worst ambitions."[151] The need to keep weapon recipes out of the hands of terrorists is undeniable, and now, the War On Terrorism provides not merely a significant, but the highest governmental interest, as justification for the regulation of such information. If Congress were to ultimately decide to prohibit the dissemination of weapon recipes, the social climate is now ripe for it to do so.[152]

---

149 Jason Saccuzzo, *Bankrupting the First Amendment: Using Tort Litigation to Silence Hate Groups*, 37 CAL. W. L. REV. 395, 420 (2001) (citations omitted).

150 *See* Strauss, *supra* note 82; *see also* Baker, *supra* note 83.

151 *See* NATIONAL STRATEGY, *supra* note 10, at 10.

152 *See* Floyd Abrams, *The First Amendment and the War Against Terrorism*, 5 U. PA. J. CONST. L. 1, 3 (2002) (citations omitted). In his article, Abrams discusses the extreme vulnerability that the U.S. is currently exposed to and how civil liberties can and should (to an extent) be curtailed during this time. He does, however, stop short of condoning the curtailing of speech. His article focuses primarily on speech in the context of political debate, dissent, and the freedom of the press. Thus, his article does not necessarily argue that dangerous speech, such as is the subject of this Note, cannot be limited. *See also* Marci Hamilton, *Where Not to Draw the Line, When It Comes to Constitutional Rights: The Left, Federalism, and the War Against Terror, at* http://writ.news.findlaw.com/hamilton/20020926.html (Sept. 30, 2004). As Professor Marci Hamilton aptly stated in discussing the need for emergency measures in a post-9/11 nation, "When danger to lives and security lurk, some rights can be curtailed for the time being." *Id.*

> To be sure, the burden rests on the Administration to make the case for the danger . . . . however, the Left's drumbeat against the Administration admits of no circumstances when rights may be curtailed to save lives. That is the sort of

Weapon recipes, as a form of speech, are exceedingly harmful and contribute nothing positive to the public good. The availability of these recipes does not promote any of the free speech theories on which courts commonly rely to measure speech's value. Speech in the form of weapon recipes and dangerous instructional manuals does little, if anything, to promote individuality and self-fulfillment or the search for truth in the marketplace of ideas, and it certainly does nothing to promote democracy or self-governance. If anything, its continued availability to the public, especially on the Internet, only serves to heighten the vulnerability of the United States.

2. Regulation of Weapon Recipes Will Pass Constitutional Muster of Two Theories

The regulation of weapon recipes will pass constitutional muster under either of two theories. First, any regulation would arguably survive strict scrutiny and meet the Court's current standard in the *Brandenburg* test.[153] Second, as this Note argues, regulation would certainly pass constitutional muster under a context-dependent theory of the First Amendment, a theory that reverts to *Schenck's* clear and present danger test during wartime.

a. Regulation Will Satisfy *Brandenburg* & Strict Scrutiny

Any statute prohibiting the dissemination of weapon recipes would inevitably be subject to strict scrutiny since such a regulation would include both content-based and viewpoint-based regulation. In the context of the War On Terrorism, any such law would almost certainly survive strict scrutiny. To survive strict scrutiny there must be both a compelling state interest and the means of regulating must be narrowly drawn to achieve the given end.[154] The Court rearticulated the confines of content and viewpoint based regulations in the case of *R.A.V. v. City of St. Paul, Minnesota.*[155]

> rigid Constitution that cannot survive the demands of history. Common sense and judgment must be permitted to flow through the Constitution's guarantees.

Id.

153 This argument acknowledges that *Brandenburg* is currently the constitutional standard that the Supreme Court applies in evaluating speech. Moreover, *Brandenburg* is the most speech-protective standard to date. Still, the nature of the War On Terrorism will defeat these strict requirements. This Note does not use the *Rice* standard because it is not clear whether the Supreme Court would necessarily adopt the Fourth Circuit's analysis.

154 *See, e.g.*, Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989) (applying "compelling interest," "least restrictive means," and "narrowly tailored" requirements to indecent telephone communications).

155 505 U.S. 377 (1992) (holding a statute that prohibited use of fighting words that

There, the Court reiterated that "content-based regulations are presumptively invalid."[156] Still, the court has carved out exceptions for certain types of speech. These exceptions survive the prohibitions against content and viewpoint-based regulations because the speech itself often lacks value, and any benefit that may be provided by such speech is clearly outweighed by the harm it causes.[157] Such is the case with weapon recipes and other dangerous instructional manuals. Moreover, the state's compelling interest in protecting the United States from future terrorist attacks would trump the prohibitions against content-based and/or viewpoint-based regulations.

While there are statutes currently in force, such as 18 U.S.C. § 842(p), which appear to address weapon recipe dissemination, these statutes have intent requirements that are very difficult to prove. Moreover, under the Court's current test, *Brandenburg's* imminence requirement would need to be satisfied. Given that the War On Terrorism provides the highest justification for regulation, the Court could choose to significantly loosen these intent and imminence requirements. Cass Sunstein supports this proposition saying,

> The calculus changes when the risk of harm increases because of the sheer number of people exposed. Hence the requirement of causation might be loosened . . . There is little democratic value in protecting simple counsels of murder, and the ordinary *Brandenburg* requirements might be loosened where the risks are great.[158]

Thus, even under the *Brandenburg* test, a Congressional prohibition on the dissemination of weapon recipes, even one with a low intent or imminence requirement, would be constitutionally valid.

---

insult or provoke violence "on the basis of race, color, creed, religion or gender" as unconstitutional for its content and viewpoint discrimination).

156 *Id.* at 382. "In our view, the First Amendment imposes . . . a 'content discrimination' limitation upon a state's prohibition of proscribable speech." *Id.* at 387.

157 *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250 (1957) (defamation); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words). "[T]hese areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content. . . ." *R.A.V.*, 505 U.S. at 383.

158 Cass Sunstein, *supra* note 77, at 371. He made this specific argument in reference to "counsels to murder," but makes an identical argument regarding bomb recipes.

b. A New Understanding: The First Amendment as a "Context-based" Protection

i. *The History of Court Ratification of Emergency Powers and Regulations*

The government has a long history of stripping away civil liberties during times of war (declared and undeclared, conventional and unconventional)[159] and national emergencies or crises.[160] Among the earliest examples of this phenomenon is the passage of the Alien and Sedition Acts.[161] During the Civil War, Abraham Lincoln suspended habeas corpus – an act cloaked in apparent legitimacy since Congress subsequently approved it with the passage of the Habeas Corpus Act of 1863.[162] The Court remained silent on this issue for the duration of the war.[163]

During World War I, Congress, at Woodrow Wilson's behest, passed the Espionage, Sedition, and Alien Acts of 1917 and 1918.[164] It was during this period that the Court first stated that there are limits to free speech in times of war.[165] Based on this reasoning, the Court proceeded to limit speech and uphold convictions under these Acts;[166] and in cases that followed, the Court persistently distinguished between war and peacetime restrictions on speech.[167]

---

159 *See generally* Steven J. Bucklin, *Dedication to the Small Town Attorney: To Preserve These Rights: The Constitution and National Emergencies*, 47 S.D. L. REV. 85 (2002) (surveying the major national events during which presidents have summoned their emergency powers). "John Adams and Abraham Lincoln did not request declarations of war, nor did any Cold War or Drug War era president, nor has George W. Bush requested a declaration of war from Congress in the War Against Terrorism." *Id.* at 8 n.7.

160 The Great Depression was a national economic crisis. In response to the Great Depression, President Franklin Roosevelt and Congress enacted a series of rather unprecedented legislation in an attempt to restore economic stability. The Court, despite its initial resistance, ratified many of these acts. *See, e.g.*, Home Building and Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), Steward Machine Co. v. Collector of Internal Revenue, 301 U.S. 548 (1937).

161 These Acts "allowed the president to detain enemy aliens during war time and authorized him to deport any alien (not just 'enemies') he deemed a threat to national security." Moreover, "the Act allowed the government to arrest anyone who 'defamed' the president or who engaged in a 'conspiracy' to prevent federal officials from enforcing the law.") Bucklin, *supra* note 159, at 86.

162 *Id.* at 87-88.

163 It was not until the end of the war that the Supreme Court became involved, handing down a decision in *Ex parte* Milligan, 71 U.S. 2 (1806). *See* Bucklin, *supra* note 159, at 88.

164 "These acts enabled him to censor the press, to prosecute anyone who interfered with the mission of the armed forces, and to control the mail in an effort to prevent distribution of disloyal materials." *Id.* at 89.

165 "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured." *Schenck*, 249 U.S. at 52.

166 *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919), Debs v. United States, 249 U.S. 211 (1919), Frohwerk v. United States, 249 U.S. 204 (1919), Abrams v. United States, 250 U.S. 616 (1919), Schaefer v. United States, 251 U.S. 466 (1920).

167 *See, e.g.*, Burleson v. Dempcy, 250 U.S. 191 (1919) (upholding revocation of newspa-

Finally, World War II provides one of the most significant (and frightening) examples of the Court's wartime jurisprudence. The Supreme Court upheld the internment of over 110,000 Japanese people, citizens and aliens alike, in *Korematsu v. United States.*[168]

Even during the Cold War, there were instances of federal actions (both executive and legislative), meant to investigate the loyalty of persons within the U.S. and evaluate internal threats.[169] Despite the Cold War's arguably non-conventional status, the Court upheld the revocation of some individual rights, stating: "History eloquently attests that grave problems of national security and foreign policy are by no means limited to times of declared war."[170]

Following the attacks of September 11, 2001, President George W. Bush has followed a long list of precedent in limiting certain civil rights in the name of national emergency.[171] In carrying out the War On Terrorism, it seems that the public, Congress, and even the Court are fully supportive of his efforts.[172]

These historical examples are not cited in order to argue that such expansions of governmental power are necessarily correct,

---

per's mailing status during wartime) (Brandeis, J., dissenting), Gilbert v. Minnesota, 254 U.S. 325 (1920) (affirming a conviction under a statute making it unlawful to interfere with or discourage enlistment) (Brandeis, J., dissenting).

168 323 U.S. 214 (1944); *but see Ex parte* Endo, 323 U.S. 283 (1944) (holding that very same day, that such a detention could only be temporary and that once a person's loyalty had been determined, that person must be released).

169 *See* Bucklin, *supra* note 159, 92-95. In *Haig v. Agee,* 453 U.S. 280 (1981), an executive order revoking certain passports executed without congressional approval passed Constitutional muster with the Court.

170 Haig, 453 U.S. at 660.

171 In his effort to fight the War On Terrorism, President Bush has received virtually limitless support from Congress with respect to the passages of the USA Patriot Act. Some measures to fight this war have included government ability to search homes and offices without prior notice, the use of wiretaps and monitoring of computers and e-mails (even of attorney-client communications), and the use of military tribunals to prosecute suspected terrorists. *See* Steven H. Aden & John W. Whitehead, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and Justice Department's Anti-Terrorism Initiatives,* 51 AM. U. L. REV. 1081, 1083 (2002).

172 Bucklin summarizes the history of court ratification of emergency powers, saying:

> It is clear, even in this abbreviated history, that ample precedents exist for the Federal Government to acquire powers in times of national emergency that it would not otherwise be allowed . . . . Equally clear is that the courts have upheld this process . . . . It seems likely that in the event the current administration's new policies are challenged, the Court will sustain them as well, even though Congress has not declared war.

Bucklin, *supra* note 159, at 97-98; *see also* Marci Hamilton, *The Constitutional Threats We Face from Without But Also From Within, A Year After 9/11, at* http://writ.news.findlaw.com/hamilton/20020909.html (Sept. 30, 2004). Virtually all of the Administration's actions may well be held to be entirely constitutional, depending on the exigency of the circumstances. The courts have always been willing to defer to the government when genuine risk is imminent. Constitutional flexibility is the key to our success through times of peace and times of war.

Id.

but rather to illustrate the bigger picture, and to try to elucidate some rhyme or reason to the development of First Amendment jurisprudence in war versus peacetime contexts. What history has repeatedly shown is that constitutional decision-making, by all three branches of government, undergoes drastic changes in times of serious national threat. Moreover, during national crises, the Court, often without hesitation, departs from its usual role as a check on the executive and the legislature and upholds government intrusions into civil liberties.

ii. *A Different Standard in War versus Peacetime:* Schenck vs. Brandenburg

A retreat to the bigger picture and an evaluation of the Court's track record on free speech reveals the Court's varying treatment of speech depending on the social and political climate of the day. The First Amendment's historical development seems to show that the Court readily utilizes different tests during wartime (usually, *Schenck*) and peacetime (today, *Brandenburg*). Rather than a fluid evolution of a single test, speech jurisprudence has gone back and forth. The Court consistently applies a more speech-restrictive test during wartime and then returns to a highly speech-protective test during peacetime. Their decisions seem more coherent and less haphazard when analyzed within this "context-based" framework.[173] This is the most cogent explanation for the Court's continued deference to both congressional and executive relegation of civil liberties during times of war and national emergency.

The proper test for regulation of weapon recipes in today's national context would thus be to return again to the "clear and present danger test" articulated in *Schenck*,[174] at least for the duration of the War On Terrorism. There are several reasons why the clear and present danger test is more flexible and adaptive than

---

[173] *Cf.* Marci Hamilton, *Commentary: On School Vouchers and the Establishment Clause: Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807 (1999) [hereinafter *Commentary*]. Professor Marci Hamilton has suggested a similar application of such "context dependent balancing" with regard to the Free Exercise and Establishment clauses of the First Amendment; *see also*, Marci Hamilton, *The Constitution's Pragmatic Balance of Power Between Church and State*, 2 NEXUS J. OP. 33, 39 (1997).

[174] Again, this test states:

> 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. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

Schenck v. United States, 249 U.S. 47, 52 (1919).

Brandenburg. *Schenck's* clear and present danger test is sufficiently broad to enable the Court to address specific concerns that arise exclusively during times of war, without imposing a rigid imminence requirement. By contrast, the application of an overly speech protective test during a wartime climate would have meant that throughout history, most (if not all) executive and legislative wartime measures should have failed as impermissibly speech-restrictive.

In addition, the clear and present danger test utilizes a balancing-of-interests approach that appropriately takes into account issues of national security – a concern often heightened during wartime.[175] *Brandenburg*, by contrast, attempts to carve out a categorical exception when speech incites imminent lawless action. As such, *Brandenburg's* test seeks to set forth a bright line between protected and unprotected speech without regard for the context in which the speech is occurring. Moreover, a context-based application of the clear and present danger test allows for decision-making based on common sense and judgment,[176] a necessary feature in constitutional adjudication. Reason, rather than strict rules, should dictate what types of speech and how much speech should be regulated. Related to this is the corollary that bright line rules do not always make for good law. The process of developing a single bright line test is marred with uncertainty.[177] While a categori-

---

[175] Far from allowing a mere assertion of a national security interest to validate any and all regulations limiting speech, the Supreme Court has clearly recognized national security as a legitimate interest during wartime. Justice Brennan articulated this best, saying:

> [T]he First amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result . . . . Our cases, it is true have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation 'is at war.'

New York Times Co. v. United States, 403 U.S. 713 (1971) (Brennan, J., concurring).

[176] *See* Marci Hamilton, *Commentary: On School Vouchers and the Establishment Clause: A Reply*, 31 CONN. L. REV. 1001 (1999) [hereinafter *Reply*]. Hamilton, in her *Reply* reiterated this saying, "my approach is not about doctrine but rather about the complex context against which doctrine must be deployed. It is about what he [Tushnet] calls 'common sense,' but what I would call 'judgment.'" *Id.* at 1008.

[177] *See* Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 943 (1919). He goes on to say:

> The gradual process of judicial inclusion and exclusion, which has served so well to define other clauses of the federal Constitution by blocking out concrete situations on each side of the line until the line itself becomes increasingly plain, has as yet been of very little use for the First Amendment. The cases are too few, too varied in character, and often too easily solved, to develop any definite boundary between lawful and unlawful speech. Even if some boundary between the precedents could be attained, we could have little confidence in it unless we knew better than now the fundamental principle on which the classification was based.

Id. at 944; *see also* Robert F. Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69

cal rule provides for some consistency, it unnecessarily restricts the Court when facts and circumstances change. A balancing test – one that considers the changes in societal interests that occur during wartime – generally provides a better approach for dealing with speech issues as the national climate changes over time.[178] Abandoning the need for a bright line rule allows for flexibility and adaptability, which enables the court to make more sound judgments.[179] Finally, a broader "context-based" jurisprudence avoids the current state of confusion that riddles much of First Amendment doctrine. The Court's repeated attempts at devising specific rules for categorizing speech cases arguably give such cases the appearance of inconsistency. In order to bring coherence to its speech cases, the Court should adopt this broader, context-based jurisprudence, and acknowledge that the balance between state interests and individual speech rights often tips in favor of the gov-

---

CORNELL L. REV. 302 (1984). In his assessment, judges are prone to try to create clear categories of speech in their decision-making. He says,

> A basic assumption in modern first amendment theory is that the kind of explicit categorization so often useful in legal thinking can effectively resolve free speech questions and can provide the bridge that links individual cases to the whole system . . . . Yet there are reasons to doubt that categorical clarity actually promotes free expression.

Id. at 330. "If anything is certain from the development of first amendment law since 1919, it is that categorical solutions can only crudely resolve free speech issues." *Id.*

178 *Cf. Commentary, supra* note 173, at 825-26. Professor Hamilton argues:

> The relevant facts in any establishment decision include the particular issue at stake, but also the social context against which the church-state relationship must be assessed . . . . The Establishment Clause does not lend itself to a 'Grand Unified Theory' (citation omitted). Rather, it charges the courts with delineating the boundaries between church and state over time . . . . In the establishment cases, the Court's attention has been trained, appropriately, not on devising a bright-line test, but rather on the political reality of the balance of power between church and state presented in each case. The Court's analysis is more akin to Goldilocks' approach (too hot, too cold, just right) than any rigid formula . . . . As it has done so, establishment doctrine has evolved into a context-dependent and era-dependent balancing approach, which affords the Court maximum flexibility to identify inappropriate relationships of power.

Id.

See also Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1186 (1982) (defending the clear and present danger test – in a speech protective form – is the best constitutional standard). Redish condemns attempts of categorical tests in free speech jurisprudence and contends that the clear and present danger test is the best test with regard to unlawful advocacy. He argues that the balancing test provided by *Schenck* is better than an ad hoc balancing approach in that it provides the court with some guidance as to its limits.

179 Redish, *supra* note 178, at 1186-87.

> [A] decrease in flexibility is necessarily accompanied by an increase in the cumbersomeness of application. Because by definition an inflexible test cannot allow a court to fit its rule to the unique circumstances of a case, it is likely to become a procrustean bed that will often prove to be either overprotective or underprotective in individual instances. Given such a choice, as a practical matter a court is considerably more likely to choose a rule that will be underprotective than one that will be overprotective.

ernment during times of war.[180]

Many scholars argue, however, that *Schenck* is a poor test. Martin Redish, defending the clear and present danger test, notes that the *Schenck* test has been attacked as being both under-protective and over-protective of speech.[181] One of the major criticisms of the *Schenck* test is that a categorical rule would be preferable. Dean Ely takes this position and criticizes the *Schenck* test as insufficiently protective of speech.[182] He states:

> Where messages are proscribed because they are dangerous, balancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing – or if not, at least with the relative confidence or paranoia of the age in which they are doing it.[183]

This reasoning is unsound, however, since virtually all tests – categorical and balancing alike – are vulnerable to judicial manipulation,[184] nor will Ely's concern that judges will become "immersed" in the "paranoia of the age"[185] be eliminated by a categorical test. Redish responds to this critique saying:

---

180 Zechariah Chafee summarizes these points best in his work, *Freedom of Speech in War Time*, *supra* note 177, when he recommended a context-based balancing approach process for discerning what speech is protected.

> Indeed, many of the decisions in which statutes have been held to violate free speech seem to ignore so seriously the economic and political facts of our time, that they are precedents of very dubious value for the inclusion and exclusion process.
>
> To find the boundary of any right, we must get behind the rules of law to human facts . . . there are individual interests and social interests, which must be balanced against each other . . . . The social interest is especially important in wartime . . . . The true boundary of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth . . . and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled . . . . We cannot define the right of free speech with the precision of the Rule against Perpetuities or the Rule in Shelley's Case, because it involves national policies which are much more flexible than private property, but we can establish a workable principle of classification in this method of balancing and this broad test of certain danger.

Id. at 944-45, 958-60.

181 *See generally* Redish, *supra* note 178. While Redish presents several major criticisms, this Note focuses on the two that are most relevant to this discussion.

182 *Id.* at 1184.

183 *Id.*

184 Redish argues:

> The problem with Ely's analysis is that it fails to recognize that it is simply impossible to string together a group of words – with the possible exception of an absolutist approach (one that Ely obviously does not adopt) – that will remove from judges the ability to manipulate general rules when those rules are applied to specific cases.

Id.

185 *Id.*

> A court caught up in the nation's paranoia could just as easily have shrugged off any categorical rule . . . Ultimately, if there is to be any protection against the courts becoming imbued with a 'mob' psychology in time of crisis, it is the nation's long tradition of judicial independence and widespread recognition of the role of the courts as protectors of minority rights against majoritarian oppression. If that fails, no grouping of words in the form of a constitutional test will help.[186]

A second major criticism of the clear and present danger test takes the polar opposite view, that the test fails to sufficiently balance competing societal interests.[187] Professor Freund is known for this particular critique. He claims:

> The truth is that the clear-and-present-danger test is an oversimplified judgment unless it takes into account also of a number of other factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those which the state has imposed; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase 'clear and present danger,' or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms, which the judge must disentangle.[188]

Freund, however, misstates the effect of *Schenck's* test. The clear and present danger test does not replace the weighing and balancing of values, but rather, as Redish explains, "is the final product of such a weighing process."[189] The test in fact does weigh values, but it charges the state with the task of proving "the existence of a real – not just imagined or speculative – threat of harm flowing from a speech to justify suppression of that speech."[190] Thus, the test does not create "a delusion of certitude," but merely provides the courts with guidance.[191] Once the legislature has made a determination of the danger posed by certain speech in a wartime climate, it remains for the Court to decide the case, based on the particular context and circumstances presented by the facts before it.

---

186 *Id.* at 1185-86.
187 Redish, *supra* note 178 at 1195.
188 *Id.* at 1199.
189 *Id.*
190 *Id.*
191 *Id.*

CONCLUSION

This Note demonstrates that there is an undeniable danger posed by the availability of weapon recipes, particularly those available on the Internet. Combined with the contemporary trends in terrorism, the need to regulate these materials has become a stark reality. Regulation of weapon recipes does little, if any, injury to the values protected by the First Amendment. As a form of speech, these materials are exceedingly dangerous and have no offsetting or redeeming value. This Note argues that Congress has, within its arsenal to wage the War On Terrorism, the ability to create a statute that would prohibit the dissemination of such materials. Moreover, a context-dependent analysis of the First Amendment – one that revives the clear and present danger test during times of war – provides the best method for understanding why any regulation by Congress would easily pass constitutional review. Those who would argue that *Schenck* is a poor test and that we should not go back to it, forget that the Constitution protects both life and liberty. By looking at history, we find a cogent explanation for even the most extreme government measures during wartime. Ultimately, when it comes time to choose between protecting all liberties or protecting American life, the government and the courts should choose to err on the side of protecting life. The current war should be no exception.

Liezl Irene Pangilinan