

# Web-Assisted Suicide and the First Amendment

by ELLEN LUU\*

## Introduction

Online social networking websites such as MySpace,<sup>1</sup> Facebook,<sup>2</sup> and other newsgroups and message boards provide users with a unique way to socialize. Users create profiles, post pictures, and contribute to web-based discussions to maintain relationships.<sup>3</sup> Newsgroup users form online communities based particularly around certain topics where they can find “a valuable source of information, support and friendship.”<sup>4</sup> They share not only political opinions and daily musings, but also very personal struggles and concerns. For example, individuals suffering from depression may find a community message board where they can share their feelings and find support. Unfortunately, these individuals may also find community groups that trade detailed information on how to commit suicide as well as provide psychological and emotional encouragement for suicide.

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1. To view MySpace, visit <http://www.myspace.com>. See generally Brian Stelter, *From MySpace to YourSpace*, N.Y. TIMES, Jan. 21, 2008, available at [http://www.nytimes.com/2008/01/21/technology/21myspace.html?\\_r=1&st=cse&sq=myspace&scp=1&oref=slogin](http://www.nytimes.com/2008/01/21/technology/21myspace.html?_r=1&st=cse&sq=myspace&scp=1&oref=slogin) (indicating MySpace is the “world’s largest social networking site,” drawing over 1.3 billion visits a day, more than any other website in the world).

2. To view Facebook, visit <http://www.thefacebook.com>.

3. See generally Wikipedia—MySpace, <http://en.wikipedia.org/wiki/MySpace> (last visited Nov. 15, 2008) (“MySpace is a popular social networking website offering an interactive, user-submitted network of friends, personal profiles, blogs, groups, photos, music and videos for teenagers and adults internationally.”); Facebook—Information Page, <http://www.facebook.com/about.php> (last visited Nov. 15, 2008) (“Millions of people use Facebook everyday to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet.”).

4. Wikipedia—Usenet Newsgroup, <http://en.wikipedia.org/wiki/Newsgroup>.

Consider the case of Suzanne Gonzales: She was a nineteen-year-old student at the University of Florida who suffered from depression.<sup>5</sup> She found the Alt.Suicide.Holiday (ASH) newsgroup,<sup>6</sup> the most popular suicide internet group<sup>7</sup> that works “like an online bulletin board.”<sup>8</sup> It offers a “practical user’s guide to suicide. There’s death by poison—everything from antifreeze to heroin—death by asphyxiation, decapitation, immolation and exsanguinations.”<sup>9</sup> Gonzales posted one hundred messages in a period of nine weeks, obtained information and instruction on how to pose as a jeweler to obtain potassium cyanide and mix a lethal cocktail, and obtained the assistance of other users to edit the suicide note to her parents.<sup>10</sup>

Also consider the case of a fifty-two-year-old woman who rented two helium tanks and ended her life by overdosing on helium gas.<sup>11</sup> The police “found a printout from the Church of Euthanasia’s website titled ‘How to Kill Yourself,’ detailing the most effective way to use helium to end your life.”<sup>12</sup> In another case, a twenty-one-year-old woman who suffered depression was found hanging from a dog leash in the bathroom of her home.<sup>13</sup> When her husband came home to find her, he also found the computer still on, with a website on the computer screen detailing how to commit suicide by hanging.<sup>14</sup> While statistical information on how many people in the United States have visited these websites and subsequently committed suicide is limited, an estimated fifty-nine people in Japan in January 2005 committed suicide after visiting similar websites.<sup>15</sup> In the

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5. Julia Scheeres, *A Virtual Path to Suicide*, S.F. CHRON., June 8, 2003, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/06/08/MN114902.DTL>.

6. SR-71A, *Where Has ASBS Gone?*, <http://www.ashbusstop.org>.

7. Amelia Hill, *The Suicide Club*, THE OBSERVER, Apr. 27, 2003.

8. Thelma Gutierrez & Kim McCabe, *Parents: Online Newsgroup Helped Daughter Commit Suicide*, CNN, Nov. 11, 2005, <http://www.cnn.com/2005/US/11/04/suicide.internet/index.html>.

9. Mary Braid, *Suicide.com: click here to end it all*, THE INDEP., Mar. 5, 2001, available at <http://www.independent.co.uk/news/business/analysis-and-features/suicidecom-click-here-to-end-it-all-694607.html>.

10. Scheeres, *supra* note 5.

11. Rebecca Sinderbrand, *Point, Click and Die*, NEWSWEEK, June 30, 2003, available at <http://www.newsweek.com/id/59762>.

12. *Id.*

13. *Id.*

14. *Id.*

15. Ian Cobain, *Suicide Websites: Clampdown on Chatrooms After Two Strangers Die in First Internet Death Pact*, THE GUARDIAN, Oct. 11, 2005, available at <http://www.guardian.co.uk/uk/2005/oct/11/socialcare.technology>.

United Kingdom, these websites have been implicated in the deaths of at least sixteen young people in the years leading to 2006.<sup>16</sup>

In response to Suzanne Gonzales's tragic suicide, Representative Walter Herger of California introduced H.R. 940: Suzanne Gonzales Suicide Prevention Act of 2007.<sup>17</sup> The bill proposes to amend title 18 of the United States Code to federally criminalize those who use interstate commerce for suicide promotion.<sup>18</sup> It punishes the knowing use of interstate commerce with intent "to teach a particular person how to commit suicide, knowing that the person so taught is likely to use that teaching to commit suicide" or with the intent "to provide a particular person with material support or resources to help such person commit suicide, knowing that the person is likely to use the support to commit suicide."<sup>19</sup> The amendment would cover "supplying information . . . to a particular person who the provider knows is contemplating suicide," or providing "any property, tangible or intangible, or service that is reasonably capable of substantially assisting a person to commit suicide, with the intent of making that person's suicide attempt easier to accomplish."<sup>20</sup>

This Note discusses whether statutes that prohibit usage of the internet to actively and directly encourage a particular person to commit suicide or to provide general suicide-promoting information violate the First Amendment. Justice Stevens has recognized that the Court has "not yet considered whether, and if so to what extent, the First Amendment protects" speech that instructs people on how to commit crimes.<sup>21</sup> While it may be easy to argue that suicide-promoting cyber-speech is really just conduct-assisted suicide, such a determination fails to take into account the legitimate speech-related purpose. The Supreme Court has upheld the prohibition of assisted suicide,<sup>22</sup> but has not addressed cyber-speech that promotes or encourages suicide. It may similarly be easy to argue that cyber-speech that promotes suicide clearly falls within one of the

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16. Jonathan Owen, *Teens Die After Logging Into "Suicide Chat Rooms,"* THE INDEP., Sept. 10, 2006, available at <http://www.independent.co.uk/news/uk/this-britain/teens-die-after-logging-into-suicide-chat-rooms-415386.html>.

17. Suzanne Gonzales Suicide Prevention Act of 2007, H.R. 940, 110th Cong. (2007), available at [www.govtrack.us/congress/bill.xpd?bill=h110-940](http://www.govtrack.us/congress/bill.xpd?bill=h110-940) (as of Sept. 26, 2008, this bill has not made it out of Committee.).

18. *Id.*

19. *Id.*

20. *Id.*

21. Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN L. REV. 1095, 1128-32 (2005) (citing Stevens, J., respecting the denial of certiorari in *Stewart v. McCoy*, 537 U.S. 993, 995 (2002)).

22. *Vacco v. Quill*, 521 U.S. 793 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

unprotected categories of speech. This argument, however, similarly fails because such speech does not in fact fall squarely within the existing categories of unprotected speech. Finally, as content-based regulations, a court analyzing the constitutionality of statutes prohibiting such speech must employ the strict scrutiny test.

Should cyber-speech promoting suicide be afforded First Amendment protection? Would criminalization arise when an individual simply posts instructions on the best way to commit suicide by hanging? Or, would it only arise when an individual provides such information to another whom that individual knows is seeking such information and is likely to use it to commit suicide? Section I of this Note presents and applies the traditional First Amendment jurisprudence to cyber-speech promoting suicide. Section II presents an overview of the Supreme Court's discussion of speech and the internet. Section III introduces the constitutionality of existing federal statutes that criminalize cyber-stalking. This analysis is useful because it shows how crime-facilitating cyber-speech squares with the First Amendment. Also, since the criminalization of cyber-stalking is a recent development, the analysis provides insight into how the use of cyber-speech to promote suicide may stand against a First Amendment challenge. Finally, Section IV uses cyber-stalking statutes as guidance for drafting statutes that prohibit the use of cyber-speech to promote suicide.

### **I. Traditional First Amendment Jurisprudence and Cyber-Speech That Promotes Suicide—an Imperfect Fit**

The First Amendment of the Constitution provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>23</sup> Implicit in the First Amendment is the right to information and ideas,<sup>24</sup> as well as the “right to receive it.”<sup>25</sup> It does not apply merely to political speech, but also to speech that is “entertaining as well as . . . instructive or informative.”<sup>26</sup> The founder of ASH, Andrew Beals,<sup>27</sup> argues that the “purpose of the site is rational, open discussion about suicide, with emphasis on individual liberty and autonomy.”<sup>28</sup> He asserts that the website serves as an open

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23. U.S. CONST. amend. I.

24. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (citing *Martin v. Struthers*, 319 U.S. 141, 143 (1943)).

25. *Id.* (citing *Struthers*, 319 U.S. at 143) (“[T]he right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.”).

26. 16A AM. JUR. 2D *Constitutional Law* § 497 (2008).

27. Scheeres, *supra* note 5.

28. Rebecca Sinderbrand, *Q&A: “Groups Like Ours Will Always Exist,”* NEWSWEEK, June 24, 2003, available at <http://www.newsweek.com/id/58538?tid=relatedcl>.

forum for people who share similar emotional pain and serves as one of the few places where they can find support, acceptance, and understanding.<sup>29</sup> Individuals who use the newsgroup find it easier to discuss depression or suicidal thoughts online than in person, and these newsgroups provide a place where they can speak without alarming friends and family or face hospitalization.<sup>30</sup> In light of claims that such cyber-speech has a legitimate purpose, are advertisements for suicide partners, feedback on self-murder plans, and guides on how to commit suicide in the “methods file”<sup>31</sup> protected speech in the face of challenges to legislation that criminalizes such speech?

First Amendment rights are not absolute. There are “well-defined and narrowly limited classes of speech, the prevention and punishment of which” does not violate the First Amendment.<sup>32</sup> These unprotected, content-based categories of speech include incitement, “true threats,” fighting words, and “obscenity.”<sup>33</sup> Legislation addressing these issues must meet the strict scrutiny standard to survive a constitutional challenge.<sup>34</sup>

#### A. Existing Categories of Unprotected Speech

The development of modern First-Amendment jurisprudence began in the early 1900s and historically arose in the context of political speech during wartime. In *Schenck v. United States*, Justice Oliver Wendell Holmes first employed the “clear and present danger” test for a violation of the Espionage Act of 1917.<sup>35</sup> The defendant participated in the print and mail distribution of leaflets calling for obstruction of the draft.<sup>36</sup> The test 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.”<sup>37</sup> Whether speech falls within this category is a question of “imminence and the magnitude of

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29. *Id.*

30. *Id.*

31. *Id.*

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

33. *See infra* Section I.A. Other types of unprotected speech not discussed here include libel, defamation, and false advertising.

34. *See infra* notes 150–167 and accompanying text.

35. *Schenck v. United States*, 249 U.S. 47 (1919) (holding the Espionage Act was a valid Congressional enactment and the conviction of the defendants did not violate the First Amendment).

36. *Id.* at 48–53.

37. *Id.* at 52.

the danger” stemming from the speech, which the Court must balance against the expressiveness of the speech.<sup>38</sup>

### 1. *Incitement and Fighting Words*

Fifty years after *Schenck*, the “clear and present danger” test was eventually replaced with the test for “incitement” from *Brandenburg v. Ohio*. The defendant in *Brandenburg* was charged with violating a criminal syndicalism statute for his speech at a Ku Klux Klan rally.<sup>39</sup> The speech included statements such as “Bury the niggers,” and “Send the Jews back to Israel.”<sup>40</sup> Justice Douglas wrote a compelling concurring opinion in which he questioned the use of the “clear and present danger” test in times of war and most certainly in times of peace.<sup>41</sup> In fact, Justice Douglas pointed out, in subsequent court opinions, that Justice Holmes intended a narrow use of the “clear and present danger” rule and rejected manipulating the rule to prohibit otherwise permissible speech.<sup>42</sup> Moreover, he criticized the overly flexible and inconsistent manner in which the test can be applied to prohibit speech.<sup>43</sup>

Under the new *Brandenburg* test, speech “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action” is not protected by the First Amendment.<sup>44</sup> The government may not, however, prohibit speech merely because “it increases the chance an unlawful act will be committed at some indefinite future time.”<sup>45</sup> A statute that punishes mere advocacy, even for lawless activity, is too broad to pass constitutional muster.<sup>46</sup>

Within the unprotected category of incitement is the small class of expressive conduct known as “fighting words.”<sup>47</sup> In *Chaplinsky v. New Hampshire*, the Supreme Court ruled that states are free to ban the use of “fighting words” which inherently would incite an ordinary citizen to

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38. 16A AM. JUR. 2D *Constitutional Law*, *supra* note 26, § 493 (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978)).

39. *Brandenburg v. Ohio*, 395 U.S. 444, 444–47 (1969).

40. *Id.* at 446.

41. *Id.* at 450–52 (Douglas, J., concurring).

42. *Id.* at 450–52, 457; see *Schaefer v. United States*, 251 U.S. 466, 482–84 (1920) (Holmes, J., dissenting); *Pierce v. United States*, 252 U.S. 239, 253–73 (1920) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

43. *Brandenburg*, 395 U.S. at 450–52 (Douglas, J., concurring).

44. *Id.* at 444–45, 447 (majority opinion) (holding that a statute that prohibits “advocating the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism” unconstitutionally prohibits mere advocacy).

45. *Id.*

46. *Id.* at 448.

47. 16A AM. JUR. 2D *Constitutional Law*, *supra* note 26, § 503.

whom the words are addressed to immediate physical retaliation.<sup>48</sup> The Court found a statute that prohibits the use of “offensive, derisive, or annoying word[s] to any other person who is lawfully in any street or other public place” to be a valid exercise of state power and neither vague nor overbroad.<sup>49</sup> It is narrowly drawn to prohibit specific speech that is likely to cause a breach of the peace.<sup>50</sup> The Court carefully distinguished these “fighting words” as verbal acts that have very low social value.<sup>51</sup> Such speech is not an “essential part of any exposition of ideas, and is of such slight social value as a step to truth that any benefit that may be derived from it is clearly outweighed by the social interest in order and morality.”<sup>52</sup> When analyzing the validity of statutes that prohibit suicide-promoting cyber-speech or the need to develop a new category of unprotected speech, weighing the social value of speech is a factor to consider.<sup>53</sup>

To determine whether speech falls within the “incitement” category, the courts must carefully examine the actual circumstances of the situation and determine whether it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>54</sup> In *Cohen v. California*, the defendant was charged with violating the penal code for wearing a jacket that bore the words “Fuck the Draft” in a courthouse.<sup>55</sup> The Court struck down the provision of the penal code which prohibits “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by offensive conduct.”<sup>56</sup> The use of “offensive” as a test for “incitement” was too broad to pass constitutional muster under *Brandenburg*.<sup>57</sup> While the speech addressed in *Cohen* also constituted “fighting words” in the sense that the words may have provoked a violent reaction from viewers, the speech was not directed at any individual in particular, a requirement of the *Chaplinsky* test.<sup>58</sup> The Court also addressed and rejected the “captive audience” argument that the government can prohibit speech merely because of the “presumed presence

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48. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

49. *Id.* at 569, 573–74.

50. *Id.* at 573.

51. *Id.* at 572–74.

52. *Id.* at 572.

53. See *infra* notes 60–62 and accompanying text; *infra* notes 160–162 and accompanying text (discussion about “dual-use distinction”).

54. 16A AM. JUR. 2D *Constitutional Law*, *supra* note 26, § 502 (citing *Knight Riders of Ku Klux Klan v. City of Cincinnati*, 72 F.3d 43 (6th Cir. 1995)).

55. *Cohen v. California*, 403 U.S. 15, 16 (1971).

56. *Id.*

57. *Id.* at 22–24.

58. *Id.* at 20.

of unwitting listeners or viewers.”<sup>59</sup> In fact, the government’s power to protect the public from such speech is “dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”<sup>60</sup> The Court found no such “captive audience” as people could easily avert their eyes.<sup>61</sup> The “captive audience” issue will be addressed in greater detail during this Note’s discussion of *Reno v. ACLU*.<sup>62</sup>

The narrow category of “fighting words” presents an analytical problem for cyber-speech that promotes suicide. As discussed in *Chaplinsky*, the “fighting words” must elicit an immediate physical reaction.<sup>63</sup> As elaborated in *Cohen*, the speech must be directed at a particular individual.<sup>64</sup> Many users of these online community groups do not have such an immediate reaction against the speaker due to the nature of the internet and how it is used. General documents describing methods for committing suicide that are posted on suicide-promoting websites present information and are not directed at anyone in particular. In situations where users directly post responses to questions about various suicide methods, the “fighting words” test also fails to render the speech unprotected because such words, while they may elicit a reaction—such as suicide—they do not elicit a physical retaliation against the speaker, as intended by the “fighting words” category of unprotected speech.

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

## 2. *Obscenity*

The Supreme Court has also determined that “obscenity” does not fall within First Amendment protection.<sup>65</sup> The test for “obscenity” is whether

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59. *Id.* at 21.

60. *Id.*

61. *Id.* at 21–22.

62. See *infra* notes 93–117 and accompanying text.

63. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

64. *Cohen v. California*, 403 U.S. 15, 18 (1971).

65. *Roth v. United States*, 354 U.S. 476, 485 (1957) (upholding a statute that punishes the mailing of “obscene, lewd, lascivious or filthy . . . materials”).



the speech at issue “deals with sex in a manner appealing to prurient interest”<sup>66</sup> as judged by “a reasonable person,”<sup>67</sup> whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and whether the work, “taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>68</sup> Cyber-speech that promotes suicide does not “deal with sex in a manner appealing to prurient interest” and similarly would not fall under this category of unprotected speech. In contrast, cyber-stalking speech often deals with sexual conduct.<sup>69</sup> Analysis of cyber-stalking speech as “obscenity” in Section III of this Note provides insight into how future courts may evaluate cyber-speech that promotes suicide, use existing First Amendment jurisprudence, and develop new frameworks for analysis.

### 3. *True Threats*

Finally, “true threats” to a person’s safety made by another person are not protected by the First Amendment.<sup>70</sup> In *Watts v. United States*, the defendant was charged with violating a statute which punishes “whoever knowingly and willfully . . . threat[ens] to take the life of or to inflict bodily harm upon the President of the United States.”<sup>71</sup> At a political rally, he said, “If [the army] ever make[s] me carry a rifle[,] the first man I want to get in my sights is [Lyndon B. Johnson].”<sup>72</sup> Following the statement, both he and the audience laughed in response.<sup>73</sup> Taking these factors into consideration, the Court held that he had not made a “true threat” and the statute unconstitutionally criminalized pure speech.<sup>74</sup> The government may only prohibit “true threats” and the statement made by the defendant constituted a “political hyperbole” meant to express political opposition to the draft.<sup>75</sup> “True threats” are “serious expression[s] of an intent to commit an act of unlawful violence to a particular individual or group of individuals, regardless of whether the speaker intends to carry out the

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66. *Id.* at 488–90.

67. *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987).

68. *Miller v. California*, 413 U.S. 15, 24 (1973).

69. *See infra* note 142.

70. *Watts v. United States*, 394 U.S. 705, 705–07 (1969); *see also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

71. *Watts*, 394 U.S. at 705–06.

72. *Id.*

73. *Id.* at 706–07.

74. *Id.* at 706–08.

75. *Id.*

threat.”<sup>76</sup> They are not constitutionally protected because such speech is used to intimidate or place the victim in fear of physical harm or death.<sup>77</sup>

Like the category of “obscenity,” the category of “true threats” would not apply to cyber-speech that promotes suicide. Users may offer information and instruction about committing suicide but the users do not threaten to cause harm themselves. The application of the “true threats” framework to cyber-stalking statutes, however, similarly provides guidelines for drafting statutes to prohibit cyber-speech that promotes suicide.<sup>78</sup>

### **B. A Call For a New Category of Unprotected Speech?**

Perhaps the Supreme Court must determine that cyber-speech which promotes suicide has virtually no constitutional value, creating a new First Amendment exception. One preeminent scholar, Eugene Volokh, has introduced a test to determine whether speech that substantially facilitates crimes should be a First Amendment exception.<sup>79</sup> This test requires that three conditions are satisfied: (1) “the speech is said to a few people who the speaker knows are likely to use it to commit a crime or to escape punishment,” (2) “the speech, even though broadly published, has virtually no noncriminal uses—for instance, when it reveals social security numbers or computer passwords,” and (3) “the speech facilitates extraordinarily serious harms, such as nuclear or biological attacks.”<sup>80</sup>

Under this framework, general discussion about suicide methods posted by an individual or speech about how to cope with depression may not fall under this proposed crime-facilitating exception. It is not directed at any particular person likely to use it to commit suicide, but is instead general information published broadly. It arguably has non-criminal purposes as the ASH founder and users of such websites allege.<sup>81</sup> Online communities based particularly around certain topics find the websites to be “a valuable source of information, support and friendship.”<sup>82</sup> Users of these suicide-promoting websites post information and have discussions that do not serve a criminal purpose. With regards to the third condition, it is arguable that suicide does not compare to nuclear or biological attacks, in

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76. *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (upholding a statute that prohibits burning a cross with the intent to intimidate a person or group of persons).

77. *Id.* at 359–60.

78. See *infra* Sections III and IV.

79. See Volokh, *supra* note 21, at 1107–27.

80. See *id.*

81. See *supra* notes 28–31 and accompanying text.

82. Wikipedia—Usenet Newsgroup, *supra* note 4.

scope nor level of criminality. Attempted and assisted suicide has traditionally only been criminalized or banned as a non-felonious offense, and there is no fundamental right to assisted suicide.<sup>83</sup>

This framework, however, could apply to situations where individuals post information about suicide methods in direct response to explicit or implicit requests for such information. The speech is directed at particular individuals who may be likely to use the information to commit suicide. The speech has no non-criminal purpose once it is directed at an individual who is seriously considering suicide with the intent that the individual commits suicide. However, as discussed above, the third condition poses a hurdle which may be difficult to overcome.

## II. Adapting First Amendment Jurisprudence to the Internet

It is important to consider the nature and characteristics of a medium of communication when conducting First Amendment analysis.<sup>84</sup> Consider, for example, the different approaches taken with print versus broadcast media. Radio broadcast is distinguishable from print media because of the scarcity of radio frequencies.<sup>85</sup> The Supreme Court struck down a statute requiring newspapers that print an attack on a political candidate's character to print the candidate's reply.<sup>86</sup> With regards to broadcast, the Supreme Court upheld the Federal Communications Commission (FCC) "fairness doctrine" that requires television and radio broadcasters to provide fair coverage to each side of a discussion on public issues.<sup>87</sup> Also take, for example, the differing analysis for the regulation of "indecent" speech. In *FCC v. Pacifica Foundation*, the Court held the FCC has the power to regulate a radio broadcast that is indecent, though not obscene.<sup>88</sup> Regulation is justified due to the fact that broadcasting is "uniquely pervasive" in a manner in which it intrudes into homes without

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83. See *infra* notes 150–153 and accompanying text; see generally *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding assisted suicide is not a fundamental right protected by the due process clause and that Washington's ban on assisted suicide was rationally related to a legitimate government interest).

84. *Red Lion Broad., Co. v. FCC*, 395 U.S. 367, 386–87 (1969); see also *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

85. *Red Lion*, 395 U.S. at 396–98.

86. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244, 258 (1974) ("The choice of . . . treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with [the] First Amendment.").

87. *Red Lion*, 395 U.S. at 375.

88. *FCC v. Pacifica Found.*, 438 U.S. 726, 750–51 (1978).

warning as to content.<sup>89</sup> A statute that prohibits indecent telephone messages, however, was found unconstitutional.<sup>90</sup> The Court distinguishes between telephone and broadcast because telephone messages “requires the listener to take affirmative steps to receive the communication. There is no ‘captive audience’ problem.”<sup>91</sup> Radio broadcast lends itself to “unexpected outburst[s]” but an indecent telephone message is “not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.”<sup>92</sup>

Despite the fact that the nature and characteristics of the internet make it a medium of communication unlike more traditional mediums of communication such as print and broadcast, the Supreme Court seems to be analyzing free speech issues under the traditional frameworks set forth in the previous Section I of this Note. In *Reno v. ACLU*, the Court struck down the Communications Decency Act of 1996 (CDA) as unconstitutional.<sup>93</sup> The CDA prohibits the transmission of obscene or indecent communications by means of telecommunications devices to minors.<sup>94</sup> The Court specifically discussed three prior decisions in finding the CDA overbroad and an unconstitutional, content-based regulation: *Ginsberg v. New York*, *FCC v. Pacifica Foundation*, and *Renton v. Playtime Theatres, Inc.*<sup>95</sup> It compared the internet to broadcast media, distinguishing it on three factors: (1) “the history of extensive Government . . . regulation of the broadcast medium”; (2) “the scarcity of available frequencies at its inception”; and (3) the invasiveness of the broadcast medium.<sup>96</sup> The Court ultimately found that these factors are not present with the internet.<sup>97</sup>

Justice Stevens distinguished the CDA from the constitutionally upheld New York statute prohibiting the sale of obscene materials to minors for four reasons in *Ginsburg v. New York*.<sup>98</sup> First, the New York

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89. *Id.* at 748–49.

90. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989) (holding Section 223(b) of the Communications Act prohibiting obscene speech constitutional because the First Amendment does not protect this category of speech. However, Section 223(b)’s ban on indecent speech violates the First Amendment because this provision is not narrowly tailored to serve the compelling interest of limiting access to minors of sexually-oriented commercial telephone messages, also known as dial-a-porn).

91. *Id.* at 127–28.

92. *Id.*

93. *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

94. *Id.* at 859.

95. *Id.* at 865.

96. *Id.* at 868.

97. *Id.* at 868–69.

98. *Id.* at 865.

statute does not bar parents from purchasing the materials for their children.<sup>99</sup> Second, the New York statute applies to commercial transactions.<sup>100</sup> Third, the New York statute provides a standard for the vague term “indecent.”<sup>101</sup> And finally, the New York statute defines minors as those under the age of seventeen.<sup>102</sup> In contrast, the CDA is much broader: it allows criminal penalties against parents, applies to all transmissions by telecommunications devices, fails to define “indecent,” and includes seventeen year olds.<sup>103</sup>

The FCC regulation against indecent speech broadcast over the air in *Pacifica* is also distinguishable from the CDA.<sup>104</sup> In *Pacifica*, the Court upheld an FCC order for administrative sanctions against a radio station for broadcast of a satiric monologue called “Filthy Words” because it involved “obscene, indecent, or profane language by means of radio communications.”<sup>105</sup> First, the FCC, an experienced agency, was regulating content in terms of time.<sup>106</sup> Second, the FCC regulation did not involve criminal prosecution.<sup>107</sup> Third, the FCC regulation applied to a medium of communication in which historically, warnings have ineffectively protected listeners from unexpected content.<sup>108</sup> In contrast, the CDA broadly bans content absent evaluation by a regulatory body familiar with the nature of the internet; the CDA involves criminal prosecution; and, the CDA involves a communication medium—the internet—that does not have the same “captive audience” problem that exists with broadcast.<sup>109</sup>

The Court’s decision to uphold a zoning ordinance prohibiting adult movie theaters in residential neighborhoods in *Renton v. Playtime Theatres, Inc.* also does not support upholding the CDA.<sup>110</sup> The zoning ordinance was directed at regulating the secondary effects of crime and decreasing property value.<sup>111</sup> In contrast, the CDA regulates the primary effect of the

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 865–66.

103. *Id.* at 866.

104. *Id.* at 867.

105. *FCC v. Pacifica Found.*, 438 U.S. 726, 729–30 (1978).

106. *Reno*, 521 U.S. at 867.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 867–68.

111. *Id.* at 867.

speech.<sup>112</sup> The CDA is thus a content-based regulation, while the FCC order is a permissible regulation on time, place, and manner of speech.<sup>113</sup> Justice Stevens expressed particular concern about the vagueness, over breadth, and criminal sanctions of the CDA as a content-based regulation.<sup>114</sup>

When presented with the unique characteristics of the internet, the Supreme Court had to determine what level of First Amendment protection to give this new medium since it did not have case law precedent.<sup>115</sup> To summarize, in analyzing speech and the internet, the Court is concerned with content-based regulations that are overbroad, vague, and involve possible criminal sanctions.<sup>116</sup> When the content of both protected (indecent) and unprotected (obscene) speech is regulated as to time in the context of a medium that has no historical difficulty in preventing access to unexpected material, the Court prefers deference to and evaluation by an experienced agency.<sup>117</sup>

### III. The Changing Nature of the Internet and the Problem of Cyber-Stalking

Since *Reno*, internet use has increased dramatically and new concerns have arisen.<sup>118</sup> The legislature has responded to the advancements in technology that have created new crimes such as cyber-stalking and cyber-harassment.<sup>119</sup> The Department of Justice has defined cyber-stalking as the “use of the Internet, e-mail, or other electronic communications devices to stalk another person.”<sup>120</sup> Cyber-stalking can pose a greater danger than offline stalking due to “the ease of use and non-confrontational, impersonal, and sometimes anonymous nature of Internet communications [which] may remove disincentives to cyberstalking.”<sup>121</sup> This relatively new

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112. *Id.* at 868.

113. *Id.*

114. *Id.* at 871–72, 877–78.

115. *Id.* at 870.

116. *Id.* at 868–69, 871–72, 877–78.

117. *Id.* at 867.

118. Key Global Telecom Indicators for the World Telecommunication Service Sector—International Telecommunication Union, [http://www.itu.int/ITU-D/ict/statistics/at\\_glance/KeyTelecom99.html](http://www.itu.int/ITU-D/ict/statistics/at_glance/KeyTelecom99.html). The statistics indicate that from 1997 to 2006, the total number of internet users in the world increased from 117 million to 1.168 billion. *Id.*

119. See *infra* notes 129–135 and accompanying text.

120. 1999 REPORT ON CYBERSTALKING: A NEW CHALLENGE FOR LAW ENFORCEMENT AND INDUSTRY (Attorney General of the United States ed. 1999), available at <http://www.usdoj.gov/criminal/cybercrime/cyberstalking.htm>.

121. *Id.*

crime drastically bridges the distance barrier and now enables stalking to occur from across the country, allows for the ease of online stalking with the click of a button,<sup>122</sup> and allows the stalker to hide behind a “veil of anonymity.”<sup>123</sup> These factors made it difficult to address the problem of cyber-stalking. If a stalker was located in a different city or state than the victim, it was difficult to investigate and prosecute the stalker.<sup>124</sup> A stalker can also create an email address, which many service providers allow without proper authentication as to identity, from which to send harassing and stalking messages.<sup>125</sup> The ease and anonymity of sending emails makes it difficult for victims and law enforcement to identify cyber-stalkers and cyber-harassers who communicate over the internet.<sup>126</sup>

Cyber-stalking involves a wide range of conduct that cannot be easily or accurately drafted into anti-cyber-stalking legislation. While such legislation must be broad to effectively cover this wide range of conduct, over breadth presents First Amendment problems. Cyber-stalking involves expressive conduct and speech over the internet. It implicates the unprotected category of “obscenity,”<sup>127</sup> and, in particular, the category of “true threats” discussed in *Watts*.<sup>128</sup>

#### A. Overview of Existing Cyber-Stalking Legislation

The examination of federal legislation to address cyber-stalking and cyber-harassment provides insight into how to draft statutes to criminalize the similar problem of cyber-speech that promotes suicide. The Interstate Communications Act prohibits the transmission in interstate commerce of “any communication containing . . . any threat to injure the person of another.”<sup>129</sup> This includes threats transmitted across state lines via the telephone, email, beepers, or the Internet.<sup>130</sup>

Section 113 of the Violence Against Women and Department of Justice Reauthorization Act (Violence Against Women Act) amended the Communications Act of 1934, originally applicable to telephone

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122. *Id.*

123. *Id.*; see also Amy C. Radosevich, Note, *Thwarting the Stalker: Are Anti-Stalking Measures Keeping Pace with Today's Stalker?*, 2000 U. ILL. L. REV. 1371, 1387 (2000).

124. 1999 REPORT ON CYBERSTALKING: A NEW CHALLENGE FOR LAW ENFORCEMENT AND INDUSTRY, *supra* note 120.

125. *Id.*

126. *Id.*

127. See *supra* discussion in Section I.

128. See *supra* notes 70–77 and accompanying text; *Watts v. United States*, 394 U.S. 705, 705–06 (1969).

129. Interstate Communications Act, 18 U.S.C. § 875(c) (2006).

130. *Id.*

communication, to apply to the Internet.<sup>131</sup> It prohibits the knowing and anonymous use of a “telecommunications device” “to annoy, abuse, threaten, or harass” a person.<sup>132</sup> This includes “any device or software that can be used to originate telecommunications or other types of communications that are transmitted, in whole or in part, by the Internet.”<sup>133</sup>

Finally, the Violence Against Women Act also amended the Federal Interstate Stalking Punishment and Prevention Act to address cyberstalking.<sup>134</sup> The statute punishes those who, “with the intent to kill, injure, [or] harass,” uses “mail, any interactive computer service, or any facility of interstate or foreign commerce to engage in a course of conduct that causes substantial emotional distress . . . [or] reasonable fear of the death of, or serious bodily injury” to another person.<sup>135</sup>

## **B. How Existing Anti-Cyber-Stalking Legislation Stands Up Against the First Amendment**

Legislation that address cyberstalking have passed constitutional muster despite their seeming over breadth for a number of reasons. First of all, a “true threat” under the Interstate Communications Act must be such that a reasonable person “(1) would take the statement as a serious expression of an intention to inflict bodily harm (the mens rea), and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation (the actus rea).”<sup>136</sup> This is an objective standard, dependent on whether the recipient of the communication would reasonably perceive the communication to be a serious expression of an intent to cause bodily harm.<sup>137</sup> The statute punishes the knowing and willful threat of bodily injury through the use of

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131. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 113, 119 Stat. 2960, 2987 (2006).

132. Communications Act of 1934, 47 U.S.C. § 223(a)(1)(C) (2008).

133. *Id.* § 223(h)(1)(C).

134. Federal Interstate Stalking Punishment and Prevention Act, 18 U.S.C. § 2261A (2006), amended by Violence Against Women and Department of Justice Reauthorization Act of 2005, 119 Stat. 2960, 2987–88 (2006).

135. *Id.*

136. *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997) (finding a reasonable person would not perceive an email and fictional stories posted to a newsgroup depicting the “abduction, rape, torture, mutilation, and murder of women and young girls,” including one about “a young woman who shared the name of one of [his] classmates at the University of Michigan,” to constitute “serious expressions of an intention to inflict bodily harm . . . [or] to effect some change or achieve some goal through intimidation” to that woman. The Court employed an objective standard); see also *United States v. Stewart*, 411 F.3d 825 (7th Cir. 2005).

137. *Stewart*, 411 F.3d at 828.



interstate commerce.<sup>138</sup> Cyber-stalking involves categories of unprotected speech—most often “true threats” and occasionally “obscenity.” As discussed in Section I of this Note, cyber-speech does not fall as easily into the traditional exceptions to First Amendment protection.<sup>139</sup>

Second, when analyzing whether communication of the threat occurred, courts do not focus on whether the chosen mode of communication reached an “indefinite and unknown audience,” but whether the individual intended to communicate the threat to the recipient through the means.<sup>140</sup> In other words, the Interstate Communications Act punishes communicating threats regardless of the range of dissemination. Section (a)(1)(C) of the Interstate Communications Act prohibits the use of a telecommunications device to anonymously “annoy, abuse, threaten, or harass any person . . . who receives the communication.”<sup>141</sup> It similarly employs a requirement that the speech be addressed or intended for a specific recipient, regardless of the mode of telecommunication used.

The statute also overcomes First Amendment scrutiny by not impinging on constitutionally protected speech. The statute, in provisions other than section (a)(1)(C), prohibits the use of telecommunications devices to knowingly make “any comment, request, suggestion, proposal, image, or other communications which is obscene or child pornography, knowing that the recipient . . . is under 18 years of age.”<sup>142</sup> It also prohibits knowingly making “any obscene communication for commercial purposes” through the interstate use of telephones.<sup>143</sup> Obscene speech, as discussed in *Miller*, is not afforded First Amendment protection.<sup>144</sup>

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138. *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976), *cert. denied*, 429 U.S. 1022 (1976); *see also* *United States v. DeAndino*, 958 F.2d 146 (6th Cir. 1992), *cert. denied*, 505 U.S. 1206 (1992); *United States v. Darby*, 37 F.3d 1059 (4th Cir. 1994), *cert. denied*, 514 U.S. 1097 (1995).

139. *See supra* discussion in Section I.

140. *Kelner*, 534 F.2d at 1023 (At a Jewish Defense League press conference following a session of the United Nations General Assembly at which Yasser Arafat, leader of the Palestine Liberation Organization, was to speak, Kelner was interviewed by a reporter and indicated he would assassinate Arafat. The interview was broadcast on television and Kelner was charged with violating the Interstate Communications Act. The court held that speech that was “so unequivocal, unconditional, immediate, and specific as to person threatened that it conveyed gravity of purpose and imminent prospect of execution” was not afforded First Amendment protection.).

141. Interstate Communications Act, 18 U.S.C. § 875(c) (2006).

142. *Id.*; *see also* *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (1988), *cert. denied*, 488 U.S. 924 (1988).

143. Communications Act of 1934, 47 U.S.C. § 223(a)(1)(C) (2008).

144. *Miller v. California*, 413 U.S. 15 (1973); *see supra* notes 68–69 and accompanying text.

#### IV. What to Consider When Drafting Legislation That Prohibits Suicide-Promoting Cyber-Speech

While cyber-stalking statutes provide a starting place for analysis of suicide-promoting cyber-speech, they fall short of providing a solid foundation for such analysis. Cyber-stalking statutes criminalize unprotected speech—either “true threats” or “obscenity.” But, as discussed in Section I of this Note, cyber-speech that promotes suicide does not fall neatly within these unprotected categories of speech.<sup>145</sup> General information on different methods to commit suicide posted on the website may be protected speech. It is not obscene and does not constitute “fighting words” or incitement of immediate lawless action. In contrast, a web-post that directly responds to an individual’s request for information on a specific method leads to a different conclusion. This speech may in fact be “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>146</sup>

Consider the following scenario: Person A joins a newsgroup that provides information on suicide. Person A converses with Person B over the course of two months and Person A conveys serious signs of depression. The relationship progresses into discussions about suicide. Then, one day, Person A requests information about death by poison. Person B provides encouragement and detailed information about various methods, and, the following day, Person A commits suicide. The encouraging words and information would likely qualify as inciting suicide, a non-felonious offense. Person B was arguably aware that his speech would produce such action, and under a federal statute prohibiting the use of interstate commerce (e.g., the internet) to promote or directly encourage suicide, Person B may be found guilty.

This discussion inevitably leads to strict scrutiny analysis. Content-based regulations of speech are “presumptively invalid under the First Amendment.”<sup>147</sup> The government may “regulate the content of constitutionally protected speech” if the regulation is “narrowly tailored” to a “compelling government interest.”<sup>148</sup> Under these factors, then, we must first consider whether the government would have a “compelling interest” in the above hypothetical. “The government may not prohibit the expression of an idea simply because society finds the idea itself offensive

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145. See *supra* discussion in Section I.

146. 16A AM. JUR. 2D *Constitutional Law*, *supra* note 26, § 502 (citing *Knight Riders of Ku Klux Klan v. City of Cincinnati*, 72 F.3d 43 (6th Cir. 1995)).

147. *Id.* § 458 (2008) (citing *Davenport v. Washington Educ. Ass’n*, Nos. 05-1589 and 05-1657, 2007 U.S. LEXIS 7722 (Jun. 14, 2007)).

148. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

or disagreeable[,]” so bad ideas alone are not a compelling interest.<sup>149</sup> Therefore, while society may find cyber-speech that promotes suicide to be offensive or disagreeable, this would not be enough to satisfy the “compelling state interest” prong. However, while the bad idea alone may not be enough, a compelling interest may be based on the very issue at hand—suicide.

### A. The Preservation of Life as a Compelling Interest

There is a compelling interest in the preservation of life. Attempted and assisted suicide has traditionally been criminalized or banned as a non-felonious offense.<sup>150</sup> In *Washington v. Glucksberg*, after finding no fundamental right to “physician-assisted suicide,”<sup>151</sup> the Court found a statute that criminalizes a person who “knowingly causes or aids another person to attempt suicide” to be constitutional. The state has a legitimate interest in the preservation of human life, preventing suicide, maintaining the integrity and ethics of medical profession, and protecting vulnerable persons who might be pressured.<sup>152</sup> Because such statutes do not impinge on any fundamental rights, they are subject only to rational basis judicial scrutiny. The most notable assisted suicide cases, however, are related to physician-assisted suicide.<sup>153</sup> The question then becomes whether these government interests satisfy the compelling interest prong of strict scrutiny in the context of content-based restrictions of cyber-speech that promotes suicide.

Perhaps the ease with which web-assisted suicide can occur justifies the determination that there is a compelling interest. Cyber-speech promoting suicide (1) is instantaneous, (2) provides for wide dissemination, (3) bridges distance, and (4) provides for anonymity—factors that make cyber-stalking dangerous and which provide important considerations for the drafting of cyber-stalking statutes.<sup>154</sup> Individuals can send information and instructions on how to commit suicide through e-mail, chat rooms, and instant messaging nearly instantaneously. With the use of websites, chat rooms, and community boards, individuals can distribute information and instructions on how to commit suicide to a wide group of particularly

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149. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

150. *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding assisted suicide is not a fundamental right protected by the due process clause and that Washington’s ban on assisted suicide was rationally related to a legitimate government interest).

151. *Id.* at 728.

152. *Id.* at 731–32.

153. *Id.* at 728; see also *Vacco v. Quill*, 521 U.S. 793, 796–97 (1997).

154. See *supra* notes 118–126.

vulnerable individuals. These individuals may suffer from depression or suicidal thoughts and may not want to speak to friends, family, or psychologists. Instead, they can interact with people from all over the world who are willing to discuss and instruct on how to commit suicide. The online social networks are particularly compelling due to the public's discomfort with suicide. Many do not discuss or openly encourage suicide so the topic is shrouded with secrecy and stigma. However, on the internet, individuals can overcome hesitation or unwillingness and provide information and instruction under the "veil of anonymity."<sup>155</sup> Anonymity also allows individuals to monitor the activities of vulnerable users. They can watch the emotional and psychological progress of an individual and provide encouragement and instruction for committing suicide when that individual is most vulnerable. In an even more frightening scenario, individuals can adopt methods used in cyber-stalking to encourage suicide. For example, an elicitor can recruit a third party to anonymously provide information and encouragement to a person the elicitor knows is contemplating suicide.

## B. Narrow Tailoring

To satisfy the second, narrow tailoring prong, the court looks to a number of factors. First, the statute must advance the government interest.<sup>156</sup> Second, it must not be over-inclusive to prohibit speech which does not implicate the government interest.<sup>157</sup> Third, it must be the least restrictive measure that serves the government interest.<sup>158</sup> Finally, under-inclusiveness is also a concern.<sup>159</sup> Under-inclusiveness is suspect because it suggests that the stated government interest may actually be a pretext for favoring one form of speech deemed acceptable over another form deemed offensive or disfavored.

Does this mean that statutes designed to prohibit cyber-speech without violating the First Amendment are merely drafting exercises where the goal is to mirror cyber-stalking statutes? Eugene Volokh, mentioned above, suggests that crime-facilitating speech is a form of "dual-use material" which can be used in both harmful and legitimate ways.<sup>160</sup> These websites

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155. 1999 REPORT ON CYBERSTALKING: A NEW CHALLENGE FOR LAW ENFORCEMENT AND INDUSTRY, *supra* note 120.

156. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986); *Buckley v. Valeo*, 424 U.S. 1, 45-47, 53 (1976).

157. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 500-01 (1985).

158. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

159. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (analyzing strict scrutiny in a race classification context).

160. Volokh, *supra* note 21, at 1107-27.

may be used in harmful ways by providing instructions on how to commit suicide to particularly vulnerable people. They may also be used in legitimate ways by helping people “evaluate and participate in public discourse”<sup>161</sup> and by providing others a “valuable . . . means of expressing their views.”<sup>162</sup>

The focus of cyber-stalking statutes is on the speech instilling fear of bodily harm or death. There is clearly a harmful use and virtually no legitimate purpose behind cyber-stalking. The Sixth Circuit has said that the Federal Interstate Stalking Punishment and Prevention Act which prohibits intentionally “using the internet in a course of conduct that places a person in reasonable fear of death or serious bodily injury” cannot be seen as overbroad to impinge on constitutionally protected conduct.<sup>163</sup> This law, along with the section 223 of the Communications Act of 1934, applies to conduct that does not warrant First Amendment protection.<sup>164</sup> Cyber-stalking is “intended to instill fear in the victim,” not to invoke constitutionally protected political speech.<sup>165</sup> But, websites such as ASH purport to provide a place for open discussion and a place where users can find support and understanding.<sup>166</sup> So, while the harmful use is to encourage vulnerable people to commit suicide, there may be a legitimate use.

Volokh proposes that “[u]nder this approach, the dual-use speech [could not] be banned when such a ban would interfere with the valuable uses, even when the ban was needed to prevent the harmful uses.”<sup>167</sup> The drafting concerns would thus be less problematic and more likely to satisfy the narrow tailoring prong of strict scrutiny if the statute focuses explicitly on (1) intentionally and knowingly providing information and methods for committing suicide, (2) through the use of interstate commerce, (3) to a specific recipient, (4) who has implicitly or explicitly indicated a desire for such information, (5) with the intent and knowledge that the recipient use that information to commit suicide. In other words, regulations that explicitly focus on prohibiting the harmful uses of such cyber-speech are valid. But those that interfere with valuable uses—such as discussing depression and suicide for therapeutic purposes and the need for a sense of community and understanding—are invalid.

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161. *Id.* at 1114–15.

162. *Id.* at 1107–27.

163. *United States v. Bowker*, 372 F.3d 365, 378–79 (6th Cir. 2004).

164. *Id.* at 379; *see also* Communications Act of 1934, 47 U.S.C. § 223(a)(1)(C) (2008).

165. *Bowker*, 372 F.3d at 379.

166. Sinderbrand, *supra* note 28.

167. Volokh, *supra* note 21, at 1133.

## Conclusion

Cyber-speech used to provide information about suicide and to promote suicide is a new concern that has arisen with the changing nature of internet use and the increasing prevalence of internet use in our daily lives. Just as lawmakers have reacted to the threats of cyber-stalking and cyber-harassment by modifying existing legislation or drafting new legislation, they should act similarly with the new threat of cyber-speech for suicide promotion. The factors that made cyber-stalking particularly problematic, including dangers accompanied with anonymity, wide dissemination, instantaneous dissemination, and the narrowing of proximity, are present in the use of the internet to promote suicide. Because cyber-speech that promotes suicide does not fall neatly into traditional categories of unprotected speech, legislators must pay careful attention to what the proposed legislation intends to prohibit. A statute that prohibits general information about suicide or suicide methods posted on internet community boards or social networking sites may in fact violate the First Amendment. However, a statute that prohibits intentionally and knowingly providing information and methods for committing suicide through interstate commerce to a specific recipient who has implicitly or explicitly indicated a desire for such information, with the intent and knowledge that the recipient uses that information to commit suicide, may survive First Amendment scrutiny.