

OUTSIDE COUNSEL

A Constitutional Solution to Online Mass-Violence Manuals

In allegedly orchestrating and executing his deadly truck attack in lower Manhattan on October 31, Sayfullo Saipov followed step-by-step instructions found in *Rumiyah*, the Islamic State's online magazine. *Rumiyah* and similar publications routinely offer articles with "how-to" guidance on terrorism for their readers, who are able to locate and review such materials with a simple online search. This state of affairs has unfortunately been linked to some of the deadliest terror attacks in U.S. history, yet these articles and their instructions remain easier than ever to access.

This article explores this ongoing problem and proposes a solution: legislation aimed at barring the publication of online materials that offer instructions on how to commit mass violence.



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Threat of Online Mass-Violence Manuals

On October 31, Sayfullo Saipov allegedly rented a Home Depot pickup truck and proceeded to drive it down a bike path in lower Manhattan, killing eight people and injuring another 12. John Miller, the NYPD's Deputy Commissioner of Intelligence and Counterterrorism, commented after the attack that Saipov "appear[ed] to have followed, almost exactly to a tee, the instructions that ISIS has put out in their social-media channels before with instructions to their followers on how to carry out such an attack." Michelle Mark, "The New York Attacker Had Been Planning for Weeks and Did It 'In the Name of ISIS,' NYPD Says," *Business Insider*, Nov. 1, 2017. Specifically,

multiple news outlets reported that Saipov closely adhered to instructions from an article titled "Just Terror Tactics" in *Rumiyah*, which offered guidance on how to use a load-bearing rental truck to inflict massive casualties. Indeed, virtually every detail of the attack followed *Rumiyah's* online instructions—the only difference was that while *Rumiyah* advised its readers to leave behind a post-attack note announcing "the Islamic State will remain," Saipov's post-attack message reportedly stated "the Islamic State will endure." Rich Schapiro, "Terrorist Sayfullo Saipov Appears to Have Followed ISIS Magazine Instructions Before Deadly Manhattan Truck Attack," *N.Y. Daily News*, Nov. 1, 2017.

Instructions on how to perpetrate mass violence are, of course, nothing new. Perhaps most famously, *The Anarchist Cookbook*—a book offering detailed guidance on, inter alia, how to manufacture explosives and other weapons—has appeared in 29 different editions since it was first printed in 1971. What is new, however, is the relative ubiquity of

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such instructions online, a product of both the Internet's promotion of mass, anonymous communication and, more recently, ISIS's focus on online recruitment and propaganda campaigns.

The costs of having articles like "Just Terror Tactics" a mere click away from would-be terrorists have proven enormous. Since the publication of that particular article in November 2016, there have been deadly truck attacks in at least six different countries by ISIS sympathizers. These six attacks have taken place all over the world, from Spain to Sweden to the United States, killing more than 50 people and injuring hundreds more.

Yet ISIS-related truck attacks are but one of the many threats posed by online mass-violence manuals. As just one example, in connection with the Boston Marathon bombing in 2014, FBI investigators recovered a copy of Al Qaeda's *Inspire* magazine on Dzhokhar Tsarnaev's laptop with a cover story titled "Make a Bomb in the Kitchen of Your Mom" (Scott Malone, "DIY Bomb Instructions, Device Remains Shown at Boston Trial," Reuters, March 15, 2015); the bomb described in the article was nearly identical to the ones that killed three people and injured another 260 in Boston. Such tragedies underscore the urgent need to stem the tide of the online proliferation of mass-violence manuals.

Need for New Legislation

No current laws squarely or effectively respond to the issue

of online mass-violence manuals. The closest applicable law is Title 18, United States Code, §842(p) ("Section 842(p)). Passed in 1999 in the wake of the Columbine shooting and, less immediately, the Oklahoma City Bombing, that law makes it unlawful for any person 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." 18 U.S.C. §842(p)(2)(A). The statute also makes it a crime to teach, demonstrate, or distribute such information "knowing that [the person receiving the information] intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence." 18 U.S.C. §842(p)(2)(B).

Though an admirable start, §842(p) is ultimately inadequate to address modern-day mass-violence manuals. Prosecutors have generally not relied on the statute. In 2003, Sen. Dianne Feinstein, who originally sponsored the bill, issued a statement in which she described the sole conviction obtained under the statute as "dismaying" and urged the Department of Justice to "ensur[e] that [prosecutors] take the law seriously."

Office of Senator Dianne Feinstein, Senator Feinstein Urges Department of Justice to Aggressively Enforce Bombmaking Statute, Sept. 3, 2003.

The problem is that the scope of the statute is far too narrow to serve as an effective tool against mass-violence manuals. As described above, these manuals have recently encouraged terrorism that did not feature explosives. Moreover, even if such attacks did fall within the bounds of the statute, prosecutors would bear the difficult burden of proving that the authors either *intended* the content to further a federal crime of violence or *knew* that the person receiving the information intended to commit such a crime. The challenge—and in many cases impossibility—of proving such intent or knowledge would surely discourage prosecutors from pursuing cases against authors even if that law were to apply.

Other proposed alternatives are equally flawed. Some commentators have suggested that prosecutions under aiding and abetting statutes might be sufficient to curb or eliminate mass-violence manuals. See, e.g., Bryan J. Yeazel, "Bomb-Making Manuals on the Internet: Maneuvering a Solution Through First Amendment Jurisprudence," 16 Notre Dame J. L., Ethics & Pub. Pol'y 279, 302-03 (2002). Yet such an approach is by nature reactionary: It addresses the materials only after they have engendered action, not before they reach the screens of would-be

terrorists' devices. Moreover, a person who is intent on committing a terrorist attack both knows that such conduct is illegal and is unlikely to be deterred by the fact that his conduct is in fact illegal. Thus, this suggestion does little to eliminate or greatly reduce the scourge of websites offering instructions on how to commit mass violence.

Meanwhile, other proposals—such as calls for the prohibition of online anonymity (see Jim Rutenberg, “Terrorism Is Faster Than Twitter,” *N.Y. Times*, Nov. 5, 2017 (describing such proposals)) or the outright criminalization of any association with a website supportive of ISIS (Eric Posner, “ISIS Gives Us No Choice But to Consider Limits on Speech,” *Slate*, Dec. 15, 2015)—are quite clearly overbroad, and would limit or stifle speech unconnected with terrorist acts. Thus, a new, targeted solution is both necessary and overdue.

Crafting a Constitutional Solution

To effectively combat online mass-violence manuals, Congress must pass new legislation that targets all online materials whose purpose is to teach readers how to execute a terror attack. Specifically, this law should impose criminal liability on any entity that posts instructions on how to execute an act of domestic terrorism. See 18 U.S.C. §2331(5) (“[T]he term ‘domestic terrorism’ means activities that (A) involve acts dangerous to human life that are a violation of the criminal laws of the United

States or of any State; (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.”). Liability under the statute, moreover, should attach regardless of whether the authors specifically intended the materials to be used to further a federal crime of violence or knew that the recipient intended to commit such a crime. By broadly criminalizing

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the act of posting online mass-violence manuals, the law would appropriately signal that such materials are, without exception, illegal and unacceptable.

Of course, many of those who post mass-violence manuals online are likely in foreign jurisdictions and not within easy reach of U.S. laws; in such instances the removal of the material in question will depend in large part on the cooperation of websites and Internet service providers (ISPs). Section 230 of the Communications Decency Act shields such entities from liability, instructing that “[n]

o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. §230(c)(i). Section 230 does not, however, provide immunity against criminal liability, and the Senate Commerce Committee notably voted unanimously last month to amend the statute to narrow the immunities it does provide, specifically in the context of user-generated content that facilitates sex trafficking. Alan Rozenshtein, “It’s the Beginning of the End of the Internet’s Legal Immunity,” *Foreign Policy*, Nov. 13, 2017.

Yet despite these protections, the ISPs have demonstrated an increased ability and willingness to purge their sites of terrorist-related materials. Just days after the Halloween attack allegedly committed by Saipov, YouTube revealed that, using fingerprinting technology and human reviewers, it was able to block English-language jihadist recruitment videos of Anwar al-Awlaki before users were able to watch them. See Scott Shane, “In ‘Watershed Moment,’ YouTube Blocks Extremist Cleric’s Message,” *N.Y. Times*, Nov. 12, 2017. This development is highly significant.

There is thus reason to believe that ISPs and websites could use similar efforts to clear their systems of online mass-violence manuals, especially after posting such materials is made illegal. Indeed, such entities might even prove willing to enter into a voluntary enforcement agreement with the

government to remedy the problem, as they recently did in the European Union to address online hate speech. (Specifically, Facebook, Twitter, YouTube and Microsoft have agreed to cooperate with EU regulators to help “tackle illegal hate speech online.” European Commission Press Release, “European Commission and IT Companies Announce Code of Conduct on Illegal Online Hate Speech,” May 31, 2016). Such additional structures, however, are beyond the scope of this article.

While such a law seems rooted in common sense, is it actually constitutional? The main hurdle is, clearly, the First Amendment, as the Supreme Court has repeatedly emphasized that “[c]ontent-based laws ... are presumptively unconstitutional.” See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Nevertheless, there is reason to believe that legislation prohibiting the posting of online mass-violence manuals would survive constitutional scrutiny.

First, when the Supreme Court came closest to addressing the issue of how-to guidance on crime—in a statement respecting the denial of a petition for writ of certiorari, which admittedly is not that close—it contemplated the possibility that the First Amendment does not protect such speech. Thus, in Justice Stevens’s statement, he emphasized that “the First Amendment does not prevent restrictions on speech that have clear support in public danger,” and that the court’s

cases “have not yet considered whether ... the First Amendment protects such instructional speech.” *Stewart v. McCoy*, 537 U.S. 993, 995 (2002) (Stevens, J., respecting the denial of the petition for writ of certiorari) (internal citation and quotation marks omitted). If the court were to find that any subcategory of instructional speech on crime was undeserving of the First Amendment’s protection, it would likely be the mass-violence subcategory, which presents the most public danger.

Second, the court’s decision in *Holder v. Humanitarian Law Project (HLP)*, 561 U.S. 1 (2010), lends further support to the conclusion that legislation barring the posting of online mass-violence manuals would be constitutionally sound. The *HLP* court notably recognized that the law at issue—a statute barring the provision of material support to terrorists (see 18 U.S.C. §2339B)—was a content-based regulation of speech as applied to the plaintiffs, a collection of U.S. individuals who wished to provide legal training to two organizations designated as foreign terrorist organizations. See *HLP*, 561 U.S. at 10, 27. Nevertheless, the six-member majority found that the law’s application was constitutional, justified by the fact that “the Government’s interest in combatting terrorism is an urgent objective of the highest order.” *HLP*, 561 U.S. at 28. That same justification applies to legislation aimed at eliminating mass-violence manuals and the attacks they engender.

Ultimately, the case for the constitutionality of such legislation may be stronger than the winning arguments deployed by the government in *HLP*. For example, whereas *HLP* implicated speech for a political purpose—and thus speech that “occupies the highest, most protected position” in the free-speech hierarchy (*R.A.V. v. St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgement))—legislation aimed at mass-violence manuals is focused on crime-facilitating speech, which is arguably not entitled to *any* First Amendment protection. See generally Eugene Volokh, *Crime-Facilitating Speech*, 57 Stan. L. Rev. 1095, 1217-18 (2005) (acknowledging that crime-facilitating speech that encourages “extraordinarily serious harms” or is marketed in a certain way should not enjoy First Amendment protection).

Conclusion

Accordingly, there are many reasons to believe that federal legislation can effectively address the pressing national security threat raised by online mass-violence manuals in a manner that fully complies with the First Amendment.