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THE ARMS DEALER WHO CRIES, “FIRST AMENDMENT”

*Gustave Passanante**

I. INTRODUCTION

While technology is helpful,¹ even life-changing,² it could also be unsettling.³ Surprisingly, it is permissible in most states to create a fully functional lawful firearm from scratch, without a serial number,⁴ in the comfort of a person’s own home so long it is made for personal use and never transferred to another person.⁵ The thought of untraceable firearms is especially alarming, knowing that there are

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¹ See 3-D WAREHOUSE, <https://3dwarehouse.sketchup.com/?hl=en> (last visited May 6, 2020).

² See Adrian Willings, *Medical Marvels: How 3-D printing is improving our lives*, POCKET-LINT (Oct. 13, 2017) <https://www.pocket-lint.com/gadgets/news/142506-medical-marvels-how-3-d-printing-is-improving-our-lives>.

³ See Patrick Roberts, *Where to Find 3-D Printed Gun Files*, RECOIL, <https://www.recoilweb.com/where-to-find-3-d-printed-gun-files-140438.html> (Aug. 10, 2018).

⁴ *Firearms Tracing Guide*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, <https://www.atf.gov/file/58631/download> (The ATF does a good job of explaining the significance of a serial number on a firearm. “The combinations of markings on firearms are integral in uniquely identifying a single firearm from hundreds of millions of other firearms. A firearm cannot be traced without a serial number. However, the serial number has to be accompanied by the model name and the name of the manufacturer or importer. Serial numbers are not issued by ATF.”).

⁵ *Does An Individual Need A License To Make A Firearm For Personal Use?*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, <https://www.atf.gov/firearms/qa/does-individual-need-license-make-firearm-personal-use> (last updated Nov. 6, 2017). See also 18 U.S.C. § 922. Although this is permissible, the firearm is still subject to state law restrictions. For example, New York prohibits possession of a “machine gun.” N.Y. PEN. § 265.02 (2013). A machine gun is defined as a firearm that rapidly or automatically discharges ammunition from the magazine with one continuous pull of the trigger. N.Y. PEN. § 265.00 (2013). If one were to create a machine gun within the comfort of their own home and for his or her own personal use, this would violate New York state law and would therefore be prohibited.

“blueprints”⁶ for firearms available on the internet for anyone to download and manufacture using a 3-D printer or a computerized numerical control milling machine.⁷ Due to the widespread accessibility of power tools and modern machinery, creating firearms is becoming more popular for consumers. A person can easily access these blueprints in an instant by typing “3-D gun files” into an online search engine. In just seconds, any person with internet access can download dozens of “blueprints” for firearms and various parts.⁸ Creating a firearm without a serial number is not a new phenomenon.⁹ Nevertheless, it used to require a bit of work.¹⁰

Do you remember that scene in *Back to the Future Part II* when Marty McFly’s grandmother “hydrated” a pizza? She put a small frisbee sized pizza into an oven, and it came out fully cooked and ready to eat in a matter of seconds.¹¹ Could you imagine if we were able to create anything we wanted just like that? Input material, output finished product, and repeat. We could have a full-fledged production facility in our own homes. There is no need to imagine because comparable technology exists today. It is called 3-D printing.¹²

3-D printing is a process in which material is joined under the control of a computer to create a three-dimensional object.¹³ A 3-D printer creates objects by putting the materials, typically plastic, into a

⁶ I use the term “blueprint” because the files that are being posted are not actual blueprints; however, they are commonly referred to as “blueprints” by the media. See Eric Levenson, *Maker of 3-D-printed guns begins selling blueprints, despite court order*, CNN, <https://www.cnn.com/2018/08/28/us/3-d-printed-guns-cody-wilson-blueprint/index.html> (last updated Aug. 28, 2018). Dennis Romero, *Texas man is selling 3-D gun blueprints online despite court orders*, NBC, (Aug. 28, 2018), <https://www.nbcnews.com/news/us-news/austin-gun-enthusiast-offers-3-d-firearm-blueprints-sale-online-n904511>.

⁷ Patrick Roberts, *Where to Find 3-D Printed Gun Files*, RECOIL, (Aug. 10, 2018), <https://www.recoilweb.com/where-to-find-3-d-printed-gun-files-140438.html>; Tom Will, *2020 Best Sites for Free STL Files for CNC Routers*, ALL3DP, (Jan. 3, 2020), <https://all3dp.com/2/best-sites-for-3d-models-stl-files-for-cnc-routers/>.

⁸ See Roberts, *supra* note 7.

⁹ Kyle Mizokami, *You Can Build Your Very Own Glock, AR-15, or AK-47*, THE NATIONAL INTEREST, (Jan. 12, 2018), <https://nationalinterest.org/blog/the-buzz/you-can-build-your-very-own-glock-ar-15-or-ak-47-24051>.

¹⁰ *Id.*

¹¹ BACK TO THE FUTURE PART II (UNIVERSAL STUDIOS 1989).

¹² *What is 3-D Printing?*, 3DPRINTING, <https://3dprinting.com/what-is-3d-printing/> (last visited May 6, 2020).

¹³ *Id.*

3-D printer.¹⁴ The printer will then melt the plastic and lay it down in successive layers until the object is complete.¹⁵

Another computerized manufacturing process similar to 3-D printing is C.N.C. milling or computer numerical control milling.¹⁶ Using computerized controls and multi-point cutting tools, a machining process progressively removes material from the workpiece to produce a custom-designed product.¹⁷ This process essentially does what 3-D printing does not; it creates a product by removing materials rather than adding materials. The 3-D printing and C.N.C. milling processes will be discussed in greater detail later in this Note to give the reader a complete understanding of exactly what the Note is trying to accomplish.

C.F.R. Section 478.92(a)(1) requires licensed firearm distributors to have special markings that identify each firearm.¹⁸ The Gun Control Act of 1968 defines a firearm as a weapon that will expel a projectile by the action of explosive, the frame or receiver of such weapon, a firearm muffler or silencer, or any destructive device.¹⁹ The critical language in this statute is “frame or receiver.”²⁰ An unfinished receiver is not classified as a “firearm” by the Bureau of Alcohol, Tobacco, Firearms, and Explosives, which means that a person can transfer unfinished receivers as freely as a paperweight.²¹

After one purchases what can be called a paperweight, the buyer then only needs to complete the remaining 20% of the manufacturing process to have a receiver, which is a firearm as defined

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Romina Ronquillo, *Understanding CNC Milling*, THOMAS, <https://www.thomasnet.com/articles/custom-manufacturing-fabricating/understanding-cnc-milling/> (last visited May 9, 2020).

¹⁷ *Id.*

¹⁸ C.F.R. § 478.92(a)(1) (2008).

¹⁹ 18 U.S.C. § 921(a)(3) (2006).

²⁰ Mizokami, *supra* note 9, (“Every firearm has a receiver, a common part that brings together the grip, stock, trigger group, barrel and action.”). To clarify further, a receiver is a part that is absolutely necessary to operate a firearm. It is the part of the firearm that receives the ammunition and fires it. A receiver is typically made up of aluminum or steel but can be produced using plastics or polymers as well. While the polymer receivers tend to not be very durable, they can still be used in a fully functioning firearm.

²¹ U.S. DEP’T OF JUSTICE BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, ATF RULING 2010-10 (2015). A receiver that is less than 80% complete is not considered a firearm and therefore not subject to any special marking requirements when transferred. The ATF provides guidance as to a working definition of the term “receiver,” which is particularly useful because courts and legislators have been reluctant to define the term.

by the Gun Control Act of 1968.²² A person can do this by securing the receiver to a workbench and set in a jig.²³ Next, by using common household tools like a router, a power drill, and a file, the receiver can be completed and used to assemble a firearm.²⁴ After drilling a few holes and completing the receiver,²⁵ a person is ready to order a rifle kit to his doorstep for \$299.99.²⁶ A magazine to feed ammunition is the last thing a person will need to purchase to have a fully functioning untraceable AR-15.²⁷

Historically, private actors have lawfully created firearms;²⁸ however, the stakes have become greater as technology advances. For example, an Amazon Dash button allows users to order products with just a click of a button placed wherever a person would like.²⁹ With technology like this readily available, it is not surprising that there is technology able to produce a firearm in a comparably easy manner.³⁰

There are currently “blueprints” that represent 100% lower receivers (“lowers”) available for anyone to download on the internet.³¹ Along with the “blueprints,” there are also micro C.N.C. milling machines coupled with files to complete the remaining 20% of the manufacturing process available for about \$2000 that can also be

²² 18 U.S.C. § 921(a)(3)

²³ Mizokami, *supra* note 9, A jig is used to secure the placement of the receiver and drill used in the milling process to ensure that the dimensions and locations of the drilling is perfect.

²⁴ *Id.*

²⁵ *How to Complete an 80% Lower Receiver*, 80-LOWERS, (May 4, 2014), <https://www.80-lower.com/blogs/80-lower-blog/how-to-complete-an-80-ar-lower-receiver>.

²⁶ This kit includes everything you need to produce an AR-15 besides a lower receiver and a magazine. It contains a barrel, stock, chamber, etc. PALMETTO STATE ARMORY, <https://palmettostatearmory.com/psa-16-midlength-5-56-nato-1-7-socom-melonite-freedom-rifle-kit.html> (last visited May 10, 2020).

²⁷ This process would produce a “ghost gun” that flies under the radar because it is not registered nor does it have a serial number. Dennis Romero, *Officials across the country fear a new era of untraceable firearms*, NBC NEWS, (Aug. 1, 2018), <https://www.nbcnews.com/news/us-news/officials-across-country-fear-new-era-untraceable-firearms-n889536>.

²⁸ Bruce Holsinger, *The Medieval Roots of Our DIY Gun Culture*, SLATE, <https://slate.com/news-and-politics/2015/05/medieval-roots-of-our-diy-gun-culture-people-have-been-making-their-own-guns-since-the-late-middle-ages.html> (May 7, 2015).

²⁹ Amazon Dash Button, AMAZON, <https://www.amazon.com/Dash-Buttons/b?ie=UTF8&node=10667898011> (last visited May 10, 2020) (A button that orders laundry detergent would likely be placed in your laundry room. A button that orders toothpaste would likely be placed in your bathroom.).

³⁰ *How to 3-D Print, Beginner's Guide to 3D Printing*, 3D INSIDER, <https://3dinsider.com/3d-printing-guide> (last visited May 10, 2020).

³¹ GRAB CAD COMMUNITY, <https://grabcad.com/library/tag/ar15> (last visited May 10, 2020).

used to create a 100% complete lower receiver from an unfinished receiver.³² Technology now makes it possible to transfer a firearm digitally. While creating a firearm without a serial number for personal use is permissible, a transfer is not.³³

100% lowers are considered a “firearm” as defined by the Gun Control Act of 1986.³⁴ With 100% lowers available to print with just a few clicks, firearms are available to anyone willing and able to put together the remaining pieces of the firearm. With 100% lowers available to print or create, it makes an untraceable firearm that much more accessible. Personal gun-manufacturing used to require at least some degree of mechanical know-how. However, today, a person needs only to read assembly directions that resemble straightforward instructions for a couch from IKEA and download a file from the internet that was created by another person.³⁵

The Bill of Rights provides for substantial protections of human liberties or inalienable rights that are deemed inherent to being a citizen of the United States of America.³⁶ However, even those rules have exceptions.³⁷ The First Amendment presents the biggest obstacle that the government would have to navigate in an attempt to control digital files related to the production of untraceable firearms.³⁸

The First Amendment of the United States Constitution reads, “Congress shall make no law . . . abridging the freedom of speech.”³⁹ The Second Amendment of the United States Constitution reads, “[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁴⁰ The First Amendment is, arguably, the biggest obstacle, and not the

³² This CNC miller is called the Ghost Gunner 3 which is said to be made available for the public in the summer of 2020. GHOST GUNNER DISTRIBUTED, <https://www.ggd-store.com/product-page/ghost-gunner-2-cnc-machine> (last visited May 9, 2020).

³³ 18 U.S.C. § 922(k).

³⁴ See 18 U.S.C. § 921(a)(3) (2006).

³⁵ *How to Build an AR-15 Rifle*, MIDWAY USA, <https://www.midwayusa.com/how-to-guides/how-to-build-ar-15-rifle> (last visited May 10, 2020).

³⁶ U.S. CONST. amend. I.; U.S. CONST. amend. II.; U.S. CONST. amend. III.; U.S. CONST. amend. IV.; U.S. CONST. amend. V.; U.S. CONST. amend. VI.; U.S. CONST. amend. VII.; U.S. CONST. amend. VIII.; U.S. CONST. amend. IX.; U.S. CONST. amend. X.

³⁷ *E.g.*, *Miller v. California*, 413 U.S. 15 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

³⁸ U.S. CONST. amend. I.

³⁹ *Id.*

⁴⁰ U.S. CONST. amend. II.

Second Amendment,⁴¹ because digital firearm files, like computer code and engineering files, are speech, triggering First Amendment protections.⁴²

A firearm that lacks a serial number is known as a “ghost gun.”⁴³ Since “ghost guns” are untracked, it is difficult to determine just how prevalent they are.⁴⁴ While there are many reasons these firearms are alarming, the reason most disturbing is the element of anonymity. By using a computerized manufacturing process to create a firearm, it allows a person to bypass state background checks and untraceable firearms. Not every person who creates a “ghost gun” is creating it to circumvent a background check or to prevent the gun from being traced. However, the possibility alone ignites a potentially fatal concern amongst many in this country. Some states have acted on the “Ghost Gun” loophole by requiring those who wish to produce their own firearm to simply apply for a serial number and submit a background check.⁴⁵

This Note will present and analyze several policy recommendations that can be used to limit the accessibility of “ghost guns” that can be wholly or partially manufactured by a 3-D printer or C.N.C. milling machine. These policy recommendations will prohibit the possession of ghost guns. The hypothetical statutes to be considered include conduct restrictions, content-neutral speech restrictions, and content-based speech restrictions. Each has its constitutional challenges it must overcome, and when considered closely, some may survive constitutional scrutiny while others will fail. The goal of this Note is to examine the ideal statute, which would effectively prevent the mass production and distribution of ghost guns, while also withstanding strict constitutional scrutiny.

This Note will be divided into six sections. Section II will discuss the current state of computerized firearm manufacturing. Section III will discuss similar restrictions that have withstood

⁴¹ The Second Amendment would not apply because this Note will be analyzing restrictions of digital files, not a firearm. Further, regulations regarding the manufacturing of weapons have been in place for a significant time without being struck down. See 18 U.S.C. § 922.

⁴² See *Karn v. United States Department of State*, 925 F. Supp. 1 (D.D.C. 1996).

⁴³ Cathleen F. Crowley, *What Is A Ghost Gun And Are They Legal*, TIMESUNION, (Sep. 13, 2019), <https://www.timesunion.com/news/article/What-is-a-ghost-gun-and-are-they-legal-14437096.php>.

⁴⁴ *Id.*

⁴⁵ Alex Dobuzinkis, *California Governor Signs Bill To Require Registration Of ‘Ghost Guns’*, REUTERS (Jul. 22, 2016), <https://www.reuters.com/article/us-california-ghostguns-idUSKCN1022MB>.

constitutional scrutiny. Section IV discusses types of potential restrictions and their respective scrutiny's that they must be reviewed under. Section V will explain the computerized manufacturing process which will enable the reader to understand why digital firearm files should be considered speech that is not afforded First Amendment protections. Section VI will examine a constitutional restriction that could be used to effectively halt the mass production and distribution of untraceable firearms. Finally, Section VII will conclude the Note.

II. CURRENT RELEVANCE

The 3-D printing of firearms came to the general public's attention after Cody Wilson started a not-for-profit corporation, Defense Distributed, that began posting digital files for 3-D printers that represent firearms on the internet. The organization describes itself as "the first private defense contractor in service of the general public" on its website.⁴⁶ These names might sound familiar since they have been the subject of some media attention because Wilson and Defense Distributed are consistently subject to litigation.⁴⁷ Although the litigation has yet to lead to an in-depth constitutional analysis of a digital firearm file restriction, it has ignited discussion and tension among the public regarding the accessibility of homemade guns. While some constituents urge their representatives to outlaw the files, advocates argue that the files are protected speech under the First Amendment, which is the root of the analysis at issue here.⁴⁸ Even President Trump, a vocal guns-rights advocate, seemed wary about 3-D printed firearms.⁴⁹

Currently, New Jersey is one of the few states that have enacted legislation that prohibits "purchasing firearm parts to manufacture a firearm without a serial number."⁵⁰ Other municipalities have taken

⁴⁶ *About*, DEFENSE DISTRIBUTED, <https://defdist.org> (last visited May 9, 2020).

⁴⁷ See *Defense Distributed v. U.S. Dep't of State*, 121 F. Supp. 3d 680 (W.D. Tex. 2015); *Washington v. United States Department of State*, 420 F. Supp. 3d 1130 (W.D. Wash. 2018); *Defense Distributed v. Grewal*, No. 1:18-CV-637-RP, WL 2744181 (W.D. Tex. July 1, 2019).

⁴⁸ Justin McDaniel, *Why Cody Wilson, the man behind the 3D-printed gun, says he'll keep fighting-and win*, THE INQUIRER, (Aug. 4, 2018), <https://www.philly.com/philly/news/3d-printed-gun-cody-wilson-defense-distributed-first-amendment-20180804.html>.

⁴⁹ "I am looking into 3-D Plastic Guns being sold to the public. Already spoke to NRA, doesn't seem to make much sense!" Donald Trump (@realDonaldTrump), TWITTER (Jul. 31, 2018, 8:03 AM), <https://twitter.com/realDonaldTrump>.

⁵⁰ N.J. ST 2C:39-9(k).

pre-emptive measures for the guns.⁵¹ While these statutes might outlaw the computerized production of untraceable firearms, their effectiveness is suspect. The statutes are unlikely to be effective due to the accessibility and elusiveness of the computerized manufacturing processes. States, to protect its citizens, certainly have an interest in preventing people or organizations from posting these files in the public forum.⁵² Thus, it is only a matter of time before a state codifies a statute that further encroaches on the First Amendment in order to halt the digital transfer and computerized production of firearms effectively.

After any legislation limiting a person's freedom to post-digital gun files on the internet, a slew of litigation based on the First Amendment is likely to follow.⁵³ There are already groups of people advocating in favor of 3-D printed guns, whether they understand them or not.⁵⁴ Many people see no harm in guns in the hands of anyone with an internet connection and a 3-D printer or C.N.C. miller.⁵⁵ Among those advocates is Wilson, who has sued for his right to post files for the guns based on the First Amendment.⁵⁶ Before the Department of Justice tried the case, it offered him a settlement allowing Defense Distributed to continue posting the files.⁵⁷ After the disposition of that case, a number of states sued to enjoin the settlement in *Washington v.*

⁵¹ See Simon Van Zuylen-Wood, *Philly Becomes First City to Ban 3-D Gun Printing*, PHILADELPHIA MAGAZINE, (Nov. 21, 2013, 3:36 PM), <https://www.phillymag.com/news/2013/11/21/philly-becomes-first-city-ban-3-d-gun-printing/> (This is an article discussing the City of Philadelphia and its interest in taking "preemptive measures" in order to combat the disasters that could arise from 3-D printed firearms.).

⁵² *Washington v. United States Department of State*, No. C18-1115 RSL, 2018 WL 4057007 (W.D. Wash. Aug. 27, 2018).

⁵³ See *Defense Distributed v. Grewal*, 368 F. Supp. 3d 1087 (W.D. Tex. 2018).

⁵⁴ In the NRA's statement on 3-D printers and plastic firearms the organization's executive director, Chris W. Cox, grossly misleads his audience by dancing around the real issue. Yes, there is a federal law that prohibits undetectable firearms; however, just because a firearm is detectable doesn't mean it's legal. Mr. Cox fails to recognize the dangers of the mass production of firearms without a background check, without regulation, and without a serial number. Chris W. Cox, *NRA Statement on 3-D Printers and Plastic Firearms*, NATIONAL RIFLE ASSOCIATION, (Jul. 31, 2018), [https://www.nraila.org/articles/20180731/nra-statement-on-3-d-printers-and-plastic-firearms](https://www.nraila.org/articles/20180731/nra-statement-on-3-d-printers-and-plastic-firearms;); See 18 U.S.C. § 922(p).

⁵⁵ Cox, *supra* note 54.

⁵⁶ See *Defense Distributed v. U.S. Dept. of State*, 121 F. Supp. 3d 680 (W.D. Tex. 2015).

⁵⁷ Andy Greenberg, *A Landmark Legal Shift Opens Pandora's Box for DIY Guns*, WIRED (Jul. 10, 2018), <https://www.wired.com/story/a-landmark-legal-shift-opens-pandoras-box-for-diy-guns/>

United States Department of State.⁵⁸ That case did not analyze whether the government may regulate the publication of the digital firearm files on the internet, but rather the government's authority to enter into a settlement agreement under the Administrative Procedure Act,⁵⁹ an issue unrelated to First Amendment challenges.⁶⁰

Any case that addresses this topic will be one of first impression and, consequently, will have a tremendous impact on the future interpretation of the First Amendment. The first case will begin to lay the legal groundwork for the regulation of all 3-D printed items. With technology advancing at an exponential rate, these adjustments within the law are inevitable and necessary. If a restriction of digital files that represent illegal firearms is enacted, by either a state or the federal government, it will not be the first time digital files have been regulated in this country.⁶¹

III. KARN V. UNITED STATES DEPARTMENT OF STATE: GOVERNMENT RESTRICTION OF SOURCE CODE

The use of 3-D printing C.N.C. milling is a fairly new concept; however, the restriction of computer files is not.⁶² In *Karn v. United States Department of State*,⁶³ Phillip Karn wanted permission to export a book and a diskette containing source code in the C programming language⁶⁴ that embodied cryptographic algorithms.⁶⁵ The court did not find that the book was subject to International Traffic in Arms Regulations, but it ruled differently on the diskette.⁶⁶ The court in

⁵⁸ *Supra* note 47

⁵⁹ 5 U.S.C. § 500.

⁶⁰ *Washington v. United States Department of State*, No. C18-1115 RSL, 2018 WL 4057007, at *9 (W.D. Wash. Aug. 27, 2018).

⁶¹ *See Karn v. United States Department of State*, 925 F. Supp. 1 (D.D.C. 1996).

⁶² *See id.* at 3.

⁶³ *Id.* at 1.

⁶⁴ C programming language is general purpose computer language that can be used in various types of applications. G-code is the programming language used in the computerized manufacturing process. Simply put, this is just another form of computer language used for software and other files. C programming language and other digital files used in computerized manufacturing are merely different "languages" used to program computers. The author of this note is far from a programmer, but it is best understood by thinking of one as English and the other as Spanish. *What is C Programming?*, SOFTWARE ENGINEER INSIDER, <https://www.softwareengineerinsider.com/programming-languages/c.html> (last visited Oct. 13, 2019).

⁶⁵ *Karn*, 925 F. Supp. at 4.

⁶⁶ *Id.* at 10.

Karn ultimately upheld the designation of a computer diskette that included source code for an encryption algorithm as a “defense article,” making it subject to International Traffic in Arms Regulations (ITAR).⁶⁷ The court did not analyze whether the source code fell within the protections of the First Amendment.⁶⁸ Instead, the court *assumed* that the First Amendment protections applied to source code and ruled on the issue of whether the content-neutral restriction survived intermediate scrutiny if the government was able to prove a substantial state interest that is tailored to serve the interest.⁶⁹

The court found that the government justified its regulation as content-neutral and held that the designation, as well as the restriction, were constitutional.⁷⁰ The court determined that the law was content-neutral and served an important government interest because the government was:

[N]ot regulating the export of the diskette because of the expressive content of the comments and or source code, but instead . . . because of the belief that the combination of encryption source code on machine readable media will make it easier for foreign intelligence sources to encode their communications.⁷¹

The court concluded that the regulation survived intermediate scrutiny after applying the test put forth in *United States v. O’Brien*,⁷² stating,

These additional criteria—whether the regulation is (1) within the constitutional power of the government, (2) “furthers an important or substantial governmental interest,” and (3) is narrowly tailored to the governmental interest—have been referred to as the *O’Brien* test after the Supreme Court upheld the government’s prohibition against burning draft cards

⁶⁷ *Id.*

⁶⁸ *Karn v. United States Department of State*, 925 F. Supp. 1, 9 n.19 (D.D.C. 1996). The court avoided answering the question of whether source code is protected under the First Amendment. However, in 2000, the Sixth Circuit determined that source code is considered speech under the First Amendment. *See Junger v. Daley*, 209 F.3d 481, 485 (6th Cir. 2000).

⁶⁹ *Karn*, 925 F. Supp. at 10 (emphasis added).

⁷⁰ *Id.* at 11.

⁷¹ *Id.*

⁷² *Id.* at 9.

based on these criteria in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).⁷³

The court reasoned that the national security of the country was at risk because it would “make it easier for foreign intelligence sources to encode their communications.”⁷⁴ Therefore, it chose to regulate the source code accordingly.⁷⁵

The application of this test to a digital firearm file restriction would present a similar analysis.⁷⁶ The *Karn* court reasoned that the mere speculation of a foreign intelligence source encoding its communications posed a threat to domestic security, which supports a restriction of digital firearm files placed in the public forum due to a similar risk.⁷⁷ The risk of digital files that represent illegal firearms available on the internet poses a greater threat because these files are mouse clicks away from producing an untraceable firearm. The justification for a digital firearm file restriction is analogous to the speculative basis used in *Karn*, which reasoned that if the source code ended up in the wrong hands, it could potentially harm the general public. The risk is even greater in regard to domestic security because it grants access to untraceable firearms to anyone with a 3-D printer or C.N.C. miller and stable internet connection.⁷⁸

IV. TYPES OF RESTRICTIONS

Before analyzing the constitutionality of a statute, it is necessary to determine what a statute is prohibiting. Speech regulations typically fall into one of three categories when limiting

⁷³ *Id.* (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).

⁷⁴ *Id.* at 11.

⁷⁵ *Id.*

⁷⁶ G-code is a type of source code that is used in the computerized manufacturing process, which is why these arguments are comparable. David Bolton, *Definition of Source Code*, THOUGHTCO., <https://www.thoughtco.com/source-code-definition-958200> (last updated July 3, 2019):

Source code is the list of human-readable instructions that a programmer writes—often in a word processing program—when he is developing a program. The source code is run through a compiler to turn it into machine code, also called object code, that a computer can understand and execute. Object code consists primarily of 1s and 0s, so it isn't human-readable.

Id.

⁷⁷ *Karn*, 925 F. Supp. at 11.

⁷⁸ *What is 3-D Printing?*, *supra* note 12.

speech in a public forum: conduct restrictions, content-neutral restrictions, and content-based restrictions.⁷⁹ While conduct restrictions are less complex, the prohibition on speech regulations are extremely complicated and require an in-depth review of the government's actions, specifically to why, how, and what is being prohibited, the level of judicial scrutiny the statute is subject to, and whether the burden of proof lies on the government or the challenger.⁸⁰

A. Conduct Restriction

One way a state can prevent these firearms from getting into the hands of someone willing to harm others is to create a statute that restricts a person from creating a possessing a firearm made through a computerized manufacturing process. A First Amendment question is not likely to arise if a state passes legislation that prohibits the possession or the creation of firearms produced using a computerized manufacturing process.⁸¹ However, the problem is probably not whether a state can enact such legislation, but how effective that legislation would be. The state's ability to control people's conduct inside of their own homes is essentially non-existent.

The City of Philadelphia was one of the first municipalities to enact a statute that prohibits the creation of a 3-D printed firearm.⁸² The effectiveness and enforceability of this statute are questionable because users of 3-D printers can operate the printer inside their own

⁷⁹ *Sorell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2222 (2015).

⁸⁰ Government action that does not violate fundamental rights is only subject to the "rational basis test." Conduct restrictions would fall into this category. This test puts the burden on the challenger to prove that the legislation is not supported by any conceivable basis. Therefore, the presumption of validity lies with the state. This is a high threshold to satisfy. 16B AM. JUR. CONST. L. *Rational Basis Test-Matters Considered* § 859 (2018). Speech restrictions on the other hand place the burden on the government to prove either a substantial or compelling government interest depending on the type of restriction. These regulations are presumptively invalid. Since speech is a fundamental right protected by the U.S. Constitution, these types of restrictions are subject to a higher level of scrutiny. 16A AM. JUR. CONST. L. *Tests to be applied to content-based and content-neutral regulations* § 480 (2018).

⁸¹ Another Constitutional question that could be raised is whether a restriction violates the Second Amendment and the right to bear arms. U.S. CONST. amend. II. That is an entirely distinct issue and will not be discussed in this Note.

⁸² Van Zuylen-Wood, *supra* note 54.

homes.⁸³ Although it is a conduct restriction, this statute could be subject to a First Amendment challenge under certain circumstances.⁸⁴

If a conduct restriction is challenged by someone who believes the statute harms them on First Amendment grounds, the burden is on the challenger to establish that the law is directed at communicative conduct and needs protection under the First Amendment.⁸⁵ A conduct restriction may be subject to First Amendment protections if it restricts conduct sufficiently imbued with elements of communication.⁸⁶ However, in *Sorell v. I.M.S. Health Inc.*,⁸⁷ the Supreme Court stated, “the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.”⁸⁸ A statute that unintentionally burdens speech is not reviewed under heightened scrutiny because the burden is incidental.⁸⁹

If the Philadelphia statute, or another statute that prohibits possessing firearms produced using a computerized manufacturing process or the creation itself, is challenged on First Amendment grounds, it would likely withstand the challenge. First, the challenger would have the burden to prove that manufacturing or possessing a functioning firearm is intended to be communicative and, in its context, be reasonably understood by its viewer to be communicative.⁹⁰ The scrutiny applied would change from a rational basis review to heightened scrutiny because, as applied, the statute is placing a burden on speech.

It is difficult to speculate how a 3-D printed firearm could communicate an idea that is understood by a viewer, or what the idea communicated could be. Perhaps an argument can be made that the

⁸³ Anatol Locker, *10 Reasons to buy a 3D Printer for Home Use*, ALL 3DP, <https://all3dp.com/1/why-buy-a-3d-printer-reasons/> (last visited Oct. 13, 2019).

⁸⁴ The circumstances are extremely limited. The challenger would have the burden of proving the prohibition of certain conduct is based on a particular viewpoint. For example, if the City of New York prohibited people from wearing the colors blue and orange simultaneously because they do not want anyone in the city to be a fan of the New York Mets, this would be an unconstitutional conduct restriction that violates the First Amendment.

⁸⁵ *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

⁸⁶ *Grzwna ex rel. Doe v. Schenectady School Dist.*, 489 F. Supp. 2d 139 (S.D.N.Y. 2006). In this case, a District Court determined that a student sufficiently showed wearing a red, white, and blue necklace conveys a particular message and it is likely to be understood by those who viewed it. Since the conduct fell within the definition of expressive conduct, the student was able to proceed with her claim against the school district.

⁸⁷ *Sorell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

production communicates the owner's love for hunting or shooting. The burden would then shift to the government⁹¹ to prove "the regulation is narrowly drawn to further a substantial government interest, and the interest is unrelated to the suppression of speech."⁹² Even then, the interest of keeping undetectable plastic firearms off the streets in the name of public safety would likely meet this burden because it furthers the interest asserted, which bears no relation to the creator's intended speech. Safety concerns are entirely unrelated to a hunter's love of sport or passion for shooting. Therefore, this argument would likely be enough support for a statute to pass constitutional muster under a strict or intermediate scrutiny analysis. The interest that the restriction is trying to further is entirely unrelated to the suppression of speech that occurs incidentally when 3-D printing a firearm.

B. Content-Neutral Restriction

If a speech regulation is without reference to any content, it is deemed neutral.⁹³ A content-neutral regulation that could be used to prohibit posting digital firearm files would, essentially, outlaw all digital object files used for computerized manufacturing. To restrict digital firearm files using content-neutral regulation, the regulation must avoid referencing a particular type of file, in this case, digital firearm files. However, a content-neutral regulation that bans the posting of any digital files used in a computerized manufacturing process is untenable. First, such a statute would be contrary to public opinion because there are many useful digital files available in the public forum that people would no longer be able to access.⁹⁴ Second, it would not withstand intermediate scrutiny if it were challenged.

Content-neutral restrictions are subject to intermediate scrutiny,⁹⁵ which provides the government with a lower standard to

⁹¹ The burden would shift to the government because laws that do not abridge fundamental rights are subject to rational basis review. Once the challenger proves that the conduct that is being restricted is communicative in nature the burden shifts to the government because that is when a fundamental right is being abridged.

⁹² *Clark*, 468 U.S. at 294.

⁹³ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁹⁴ 3-D WAREHOUSE, *supra* note 1.

⁹⁵ *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 622 (1994). (relying on *United States v. O'Brien*, 391 U.S. 367 (1968)). Intermediate scrutiny was not expressly created in *O'Brien* but it was hinted at. Justice Warren recognized a clear distinction between the descriptive words used to characterize the quality of a government interest necessary to justify

prove the quality of the state interest. A content-neutral regulation will survive intermediate scrutiny so long as it: (1) furthers an important governmental interest;⁹⁶ (2) the government interest served by the regulation is unrelated to the suppression of a particular message; (3) the restriction is no greater than what is essential to further that interest; and (4) the regulation must leave open ample alternative means for communicating messages.⁹⁷

It is unlikely that a statute outlawing all digital object files in a public forum would survive intermediate scrutiny. The statute serves an important government interest, preventing the public at large from having the opportunity to create and possess undetectable firearms.⁹⁸ Further, the second prong would certainly be satisfied. The government's reason for preventing the posting of digital object files in a public forum is not to suppress the message contained in the files because the reason is unrelated to any message a person may be attempting to convey. However, the third requirement would be more difficult to satisfy. A very broad prohibition of all digital object files is certainly greater than what is essential to further the government's interest in preventing unlawful weapons from getting into the wrong hands. An overbroad digital object file prohibition would burden "substantially more speech than is necessary."⁹⁹ Finally, the fourth prong may be easily satisfied because the transferring of digital object files is not the only means of communication available to express speech.¹⁰⁰ This prong will be easily satisfied, just as it was in *Ward v. Rock Against Racism*.¹⁰¹

Although such an interest may be enough to justify the government's prohibition of posting digital firearm files in a public forum, it may not pass constitutional muster because the restriction is overbroad and would limit more speech than what is necessary to

different regulations which eventually led to the different scrutiny that regulations are subject to today. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

⁹⁶ *Turner Broadcasting System, Inc.*, 512 U.S. at 624.

⁹⁷ *Ward*, 491 U.S. at 783.

⁹⁸ *See Ward*, 491 U.S. 781. (The Supreme Court deemed the City's desire to control noise levels and protect its citizens from "unwelcome and excessive noise" to be sufficient to serve a substantial government interest.)

⁹⁹ *Ward*, 491 U.S. at 807.

¹⁰⁰ *See Ward*, 491 U.S. at 785 (In this case, the Supreme Court said that this requirement was "easily met." The city did not prohibit people from using any particular manner or type of expression, it just regulated amplification, therefore, people were free to perform as long as they were within the volume allowed by the statute.)

¹⁰¹ *Ward*, 491 U.S. at 802.

achieve the interest.¹⁰² Because the interest is likely compelling enough to survive strict scrutiny for a content-based restriction and, arguably, fail to survive as a content-neutral restriction due to overbreadth, a content-based restriction would be the best option.

C. Content-Based Restriction

A restriction is content-based when it limits a particular idea or message that is expressed by a speaker.¹⁰³ Content-based restrictions are presumptively unconstitutional and, therefore, the burden shifts to the government to rebut the presumption.¹⁰⁴ A regulation is constitutional if it can survive strict scrutiny by proving that the government narrowly tailored the regulation to serve a compelling government interest.¹⁰⁵ In the context of this Note, a statute that outlaws someone from posting digital firearm files in a public forum is likely to survive constitutional review because the statute can: (1) be narrowly tailored by only restricting digital firearm files that represent firearms that are illegal to possess or be transferred and (2) serve a compelling government interest to protect the public from unregistered, untraceable, and illegal firearms being readily available.

The Supreme Court has noted that it is rare for a state to prove that it narrowly tailored its restriction to serve a government interest, but the cases do arise.¹⁰⁶ In *Williams-Yulee v. Florida Bar*,¹⁰⁷ the Florida Supreme Court adopted a rule that prohibited judicial candidates running for election from personally soliciting campaign funds.¹⁰⁸ After the petitioner was caught by the state bar association participating in the conduct that was expressly prohibited, the state bar association reprimanded the petitioner, but he claimed that the First Amendment protected a judicial candidate's right to solicit campaign funds personally.¹⁰⁹

The Florida Supreme Court upheld the law, finding that the state narrowly tailored the content-based restriction to serve a

¹⁰² *Id.* at 807.

¹⁰³ *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2222 (2015).

¹⁰⁴ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

¹⁰⁵ *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2222 (2015).

¹⁰⁶ *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442-44 (2015).

¹⁰⁷ *Williams-Yulee*, 575 U.S. at 433.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

compelling state interest.¹¹⁰ The Supreme Court affirmed Florida's ruling.¹¹¹ The Supreme Court reasoned that Florida had a compelling interest in "protecting the integrity of the judiciary" and "maintaining the public's confidence in an impartial judiciary."¹¹²

Additionally, the Court found the regulation narrowly tailored to serve the compelling interest because the statute merely prohibited the candidates from telling constituents to "give me money."¹¹³ Candidates are still free to speak to constituents about ideas and views and, regarding campaign financing,¹¹⁴ the candidates are free to hire a committee to solicit donations.¹¹⁵

A statute that prevents the sharing of digital firearm files in a public forum, available for anyone to take, unquestionably serves a compelling state interest because of the imminent threat to public safety. The government's interest in ensuring the safety of people has consistently been recognized as "compelling" in courts around the country to justify a regulation that abridges a fundamental right protected by the Constitution.¹¹⁶ Although it is rare for the Supreme Court to find a compelling interest to justify a restriction that is subject to strict scrutiny, preventing undetectable firearms from being readily available and transferrable is certainly among those interests,¹¹⁷ potentially even more compelling than maintaining the public's confidence in an impartial judiciary.¹¹⁸ A state may achieve this interest by narrowly tailoring a statute only to criminalize the posting of digital firearm files that represent firearms that are unlawful. The state would also have to simultaneously follow California's lead in requiring the prohibition of firearms without serial numbers to properly outlaw the digital files for all computerized manufacturing processes that inhibit a user to create an untraceable firearm. If a state

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 445.

¹¹³ *Id.* at 452.

¹¹⁴ *Id.* at 451.

¹¹⁵ *Id.* at 439.

¹¹⁶ *E.g.*, *Diaz v. Collins*, 872 F. Supp. 353 (E.D. Tex., 1994); *City of Solon v. Solon Baptist Temple*, 457 N.E.2d 858 (Ohio Ct. App. 1982); *Schulman v. New York City Health and Hospitals Corp.*, 355 N.Y.S.2d 781 (App. Div. 1st Dep't 1974).

¹¹⁷ In 1988 the Undetectable Firearms Act was passed making it unlawful for a firearm to be undetectable by a metal detector, therefore proving the government's interest against the possession of firearms that are undetectable. 18 U.S.C. § 922(p).

¹¹⁸ *Williams-Yulee*, 575 U.S. at 444.

were to enact the statute, under the foregoing constitutional analysis, it should satisfy strict scrutiny.

V. UNPROTECTED UTTERANCES

If a statute preventing the public posting of digital firearm files does not withstand constitutional analysis under the differing scrutiny levels, the government may argue that digital firearm files fall into a category of unprotected speech.¹¹⁹ Digital firearm files should be considered speech that incites imminent lawless action. If the speech fits into this category, a statute restricting the sharing of a digital firearm file is constitutionally valid, similar to statutes restricting child pornography.¹²⁰ Unprotected speech, or speech that is innate to criminal conduct, remains outside the protection of the First Amendment.¹²¹ An analysis of whether digital firearm files would fall into this category requires an understanding of the computerized manufacturing process.

A. The Computerized Manufacturing Process

To properly determine whether a restriction on sharing digital firearm files would survive constitutional scrutiny, it is crucial to understand how the processes work. Moreover, it is essential to understand the notion that the issue does not involve the unlawfulness of the firearms themselves, but rather the sharing of the files used to create the firearms.

i. 3-D Printing¹²²

First, one must design the object he or she desires to print by using computer-aided design (hereinafter “CAD”) software.¹²³ The

¹¹⁹ *E.g.*, *Miller v. California*, 413 U.S. 15 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹²⁰ *New York v. Ferber*, 458 U.S. 747, 764 (1982).

¹²¹ *U.S. v. White*, 610 F.3d 956, 960 (7th Cir. 2015).

¹²² Interview with David T. Jones, Head of Digital Services and Technology Training, Westhampton Free Library, in Westhampton, New York (Sep. 8, 2018). Mr. Jones laid the foundation of knowledge necessary to begin to understand and deeply analyze the complexity of the 3-D printing process and the First Amendment.

¹²³ *How to 3-D Print, Beginner’s Guide to 3-D Printing*, *supra* note 30. CAD stands for “computer aided design.” CAD software has typically been only used by engineers due to its

CAD software brings an idea to life, in which a person designs the desired 3-D product using three-dimensional shapes and editing tools.¹²⁴ Second, the user converts the CAD file into a Standard Triangle Language (hereinafter “S.T.L.”) file. The S.T.L. file is the file that is then imported into a “slicer.”¹²⁵ The S.T.L. file is generally the file that enthusiasts share because it represents the object to be created.¹²⁶ Finally, the model is “sliced” using specialized software.¹²⁷ This process slices the virtual model into layers for the printer to read and generates a G-code readable by the printer.¹²⁸ This step is completed with a few clicks.¹²⁹ The G-code file gives instructions to the printer on how to create the object layer-by-layer.¹³⁰ It instructs the printer on speed, the flow of material, and the appropriate temperature of the material.¹³¹

The creation and perfection of the final object as an S.T.L. file are critical in the constitutional analysis of the hypothetical content-based restriction because they finalize the structure the creator set out to fabricate and, therefore, its production is “imminent.”¹³² Consequently, due to how difficult it is to bring an object to life using a 3-D printer, from creation to production, many people are likely deterred from manufacturing an illegal firearm.¹³³ However, putting the digital firearm files in a public forum allows anyone with internet access to a finished, easily-printable gun. Once a person has a digital firearm file, he or she merely needs to hit print. Thus, if that digital file represents an illegal object, the file itself should be illegal as well.

The reason it is important to distinguish between the different stages of this process is that the further along a creator goes, the more imminent the production of the gun from the file becomes.¹³⁴ Understanding this distinction helps discern just how imminent the

complexity. With 3-D printing gaining popularity, so has its use. There is now a lot of free CAD software available for public use; however, there is still a steep learning curve.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² If possession of the object being created is also “lawless” the digital firearm file incites “imminent lawless action.”

¹³³ *How to 3-D Print, Beginner’s Guide to 3-D Printing, supra* note 30.

¹³⁴ *Id.*

production of an illegal object represented by a digital firearm file is. G-code and S.T.L. files are not like the CAD file that is used in the early stages of the process, where the production of the object is much less imminent because of its prematurity. The reason that it is so imminent is that a digital firearm file will become the object it represents because of the amount of time, effort, and expertise that goes into creating the file.¹³⁵ Someone who puts in all of the time and effort to create a digital firearm file and abandons it, without ever creating the final 3-D object, would be similar to a contractor pouring the foundation, constructing the framing for a house, and then walking away without ever building it. If someone were to drive past a foundation and some framing for a house, most would agree that this will soon, absent unforeseeable circumstances, become a completed house. The same can be said for a digital firearm file. If one were to stumble across a digital firearm file, the final stage before that actual creation of an object in a 3-D printer, one could assume that soon it will be produced and created in a 3-D printer.

ii. Computer Numerical Control Milling

The process of manufacturing products using computer numerical control (hereinafter “C.N.C.”) milling is extremely similar to the 3-D printing manufacturing process. The first step consists of the user designing the model he wishes to produce in C.A.D or C.A.M. software (computer-aided manufacturing).¹³⁶ After this, the image needs to be converted into a D.X.F. file (drawing exchange format).¹³⁷ Compare this to an S.T.L. file used in the 3-D printing process. From here, the D.X.F. needs to be imported to a C.N.C. software, where it is transformed into a G-code file.¹³⁸ Similar to 3-D printing, the G-code file consists of the computer code that controls and directs the milling machine.¹³⁹

In the context of firearms, this technology can be used to manufacture the remaining 20% of the lower 80% receivers that were

¹³⁵ *Id.*

¹³⁶ *Tips and Tricks: What to Know When Preparing Your CAD Model for CNC Milling*, 3E RAPID PROTOTYPING, (May 17, 2018), <https://www.3erp.com/blog/tips-tricks-know-preparing-cad-model-cnc-milling/>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

mentioned earlier in this Note.¹⁴⁰ There are also digital firearm files floating around the internet that are used to complete the remaining 20% of the manufacturing process, which can easily be used to mass produce firearms with little to no skill or effort.¹⁴¹

B. *Schenck v. United States*: Clear and Present Danger

Schenck v. United States created a clear and present danger test.¹⁴² The case involved a person who was protesting against World War I;¹⁴³ the Espionage Act was just passed in 1917 and made obstructing the enlistment service a crime.¹⁴⁴ Schenck was charged and convicted of obstructing the enlistment service after mailing thousands of pamphlets, alleging the government did not have a right to send U.S. citizens to other countries to kill people.¹⁴⁵ Schenck sent these pamphlets to men drafted into the armed forces.¹⁴⁶

Justice Oliver Wendell Holmes wrote the opinion for the Court, claiming that the circumstances and nature of the speech must be taken into consideration when determining if the speech presents a clear and present danger that would invoke the “substantive evils that Congress has a right to prevent.”¹⁴⁷ The logic supporting the constraint on speech carries astounding merit; “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.”¹⁴⁸ The Court upheld the Espionage Act as constitutional because of the circumstances surrounding World War I.¹⁴⁹ If one’s words could weaken the military in a time of war, it has the effect of hindering the security of the United States. The Court mentioned that Schenck’s acts

¹⁴⁰ Ronquillo, *supra* note 16.

¹⁴¹ STL FINDER, <https://www.stlfinder.com/3dmodels/80-lower-cnc-file/> (last visited May 10, 2020).

¹⁴² *See* *Schenck v. U.S.*, 249 U.S. 47 (1919).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 48-49.

¹⁴⁵ *Id.* at 49.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 52.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

would have been within his constitutional rights if done at an ordinary time rather than during a world war.¹⁵⁰

It is easy to draw an analogy from the time of war that was mentioned in *Schenck*¹⁵¹ to the world today. We live in a time of the internet and exponentially advancing technology. The evolution of technology means that every day, it becomes more and more accessible and affordable to produce objects using a computerized manufacturing process.¹⁵² As each day goes by, it becomes more and more imminent that a digital firearm file, which is available in a public forum, will turn into a tangible firearm. Technological literacy, paired with an abnormal rate of mass shootings in the United States,¹⁵³ is the present-day equivalent of the time of war the Court described in *Schenck*. Justice Holmes stated that the circumstances and the nature of speech should be taken into consideration when determining if speech has the same effect as force. Even though the clear and present danger test has evolved into a new test used by the Supreme Court, the reasons behind the test still have survived. The foregoing considerations establish that digital firearm files have the same effect as force, especially today.

C. *Brandenburg v. Ohio: Imminent Lawless Action*

In *Brandenburg*, the Court reversed the conviction of a member of the Ku Klux Klan and deemed an Ohio criminal statute unconstitutional.¹⁵⁴ The criminal statute outlawed, among other things, advocating doctrines of criminal syndicalism.¹⁵⁵ The Klan member invited a journalist to attend a Klan meeting and, further, gave the journalist permission to record and publish his findings.¹⁵⁶ The recorded video showed the Klan member giving a speech stating that the group is not a “revengent” or violent organization but may need to

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Matt Rosoff, *Why Is Tech Getting Cheaper?*, WORLD ECONOMIC FORUM, (Oct. 16, 2015), <https://www.weforum.org/agenda/2015/10/why-is-tech-getting-cheaper/>.

¹⁵³ Jason Silverstein, *There Have Been More Mass Shootings Than Days This Year*, CBS NEWS, (Sep. 1, 2019), <https://www.cbsnews.com/news/mass-shootings-2019-more-mass-shootings-than-days-so-far-this-year/>.

¹⁵⁴ *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

be if Caucasians continue to be suppressed by the President, Congress, and the Supreme Court.¹⁵⁷

The Court claimed that, in order for a statute like the one in Ohio to be constitutional, it must distinguish between teaching about a moral ideology and preparing a group for violent action that leads a group to commit the violent action.¹⁵⁸ The Court found that a statute is too broad if it prohibits advocating any modicum of violence because such a statute infringes on the First Amendment right to free speech.¹⁵⁹ The Court emphasized the necessity to make the distinction between ideas and overt acts,¹⁶⁰ which lead to the conception of the imminent lawless action test. The Court determined that the teachings alone did not incite imminent lawless action but, if the speaker coupled speech with summoning a group to commit violence, then this would fall within the scope of the imminent lawless action test.¹⁶¹

D. From Clear and Present Danger to Imminent Lawless Action

The clear and present danger test received much criticism by the Supreme Court years after its conception.¹⁶² Nonetheless, the clear and present danger test was never expressly abandoned by the Supreme Court.¹⁶³ Instead, the Supreme Court in *Brandenburg v. Ohio*,¹⁶⁴ provided more clarification by establishing a clearer standard when analyzing speech that incites unlawful conduct.¹⁶⁵ Although courts no longer follow the clear and present danger test, the reasons for its birth are identical to those of the imminent lawless action test: justify the restriction of speech if the speech carries the same effect of physical conduct.¹⁶⁶

This case established a slightly different exception to the First Amendment protections, claiming the speech must incite imminent

¹⁵⁷ *Id.* at 446.

¹⁵⁸ *Id.* at 448.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 456.

¹⁶¹ *Id.* at 448.

¹⁶² *See id.* at 444-50.

¹⁶³ *See id.* (The words “clear and present danger” do not even appear, as quoted, in its *per curiam* opinion. They are first mentioned in Justice Black’s concurrence.). *Id.* at 448-49 (1969) (Black, J., concurring).

¹⁶⁴ *Id.* at 444-50.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

lawless action, and the speech must be likely to incite the lawless action.¹⁶⁷ Justice Black even went as far as to say the clear and present danger test had no place in the interpretation of the First Amendment; however, this proposition is a bit harsh.¹⁶⁸ It is important to realize that the end goal remains the same: create an exception that allows for the restriction of speech that amounts to unlawful conduct.

When comparing the clear and present danger test to the imminent lawless action test, “clear and present” evolved into “imminent,” and “danger” changed to “lawless action.”¹⁶⁹ The Court in *Brandenburg* defined the first prong as mostly dependent on whether the advocacy incites action.¹⁷⁰ This prong is very similar to the circumstances that were focused on by the *Schenck*¹⁷¹ Court. In *Schenck*, the Court was concerned with what dangers could follow from the content of speech and less on the ‘imminence’ of the danger.¹⁷² The Court in *Brandenburg* decided that the proximity of the danger and speech was important to consider because it did not want to allow a First Amendment exception to be so broad that it would limit more speech than intended.¹⁷³ The Court in *Brandenburg* did not disagree with the opinion in *Schenck*; it merely placed more emphasis on the imminence of danger.¹⁷⁴

The *Brandenburg* decision provided more clarification to the broad expression of substantive evils—“danger”—recognized in *Schenck* by defining it as “lawless action.”¹⁷⁵ It is fair to say that the Court heightened the standard because not everything dangerous is necessarily lawless; however, for this Note, the distinction is insignificant. The possession of an outlawed, undetectable firearm falls into both categories, dangerous and lawless.

¹⁶⁷ *Id.* at 448-49.

¹⁶⁸ *Id.* at 448-49 (Black, J., concurring).

¹⁶⁹ *Id.* at 447.

¹⁷⁰ *Id.*

¹⁷¹ *Schenck v. U.S.*, 249 U.S. 47, 52 (1919).

¹⁷² *Id.*

¹⁷³ *Brandenburg*, 395 U.S. at 449.

¹⁷⁴ *Id.*

¹⁷⁵ *See Schenck*, 249 U.S. at 52.; *Brandenburg*, 395 U.S. at 449.

E. Hess v. Indiana: Defining “Imminent”

The word “imminent” remained undefined until *Hess v. Indiana*.¹⁷⁶ Gregory Hess (“Hess”) was a man convicted of disorderly conduct under an Indiana statute.¹⁷⁷ Hess challenged the statute, arguing that it abridged his constitutionally protected freedom of speech.¹⁷⁸

The events leading up to the arrest began with an anti-war protest at Indiana University.¹⁷⁹ A large group of about 100 to 150 protesters entered the street and blocked the roadway.¹⁸⁰ When the protesters were not clearing the street after the sheriffs’ demands, the sheriffs began to gather protesters and lead them to the sidewalk.¹⁸¹ Hess was already standing on the sidewalk as a sheriff passed him, and the two parties stipulated that Hess had said, “[w]e’ll take the fucking street later” or, “[w]e’ll take the fucking street again.”¹⁸²

The state was unable to justify the statute using any established First Amendment exceptions successfully but came the closest with the imminent lawless action test.¹⁸³ The statute failed the test because, “[a]t best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time.”¹⁸⁴ The Court claimed that the test must fail because it was impossible to determine when the lawless action was going to occur.¹⁸⁵ The Court also relied on uncontested evidence that showed Hess did not direct his statement to any particular person or group of people.¹⁸⁶ Since Hess did not direct his statement to any person or group of people, it was impossible to conclude that the lawless action was “imminent” or tended to encourage violence.¹⁸⁷

¹⁷⁶ *Hess v. Indiana*, 414 U.S. 105 (1973).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 106.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 107.

¹⁸³ *Id.* at 108.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

The superior argument in that case, however, is in the dissenting opinion by Justice Rehnquist, joined by Chief Justice Burger and Justice Blackmun.¹⁸⁸ The dissent carefully pointed out the lack of a sufficient basis for the Court's decision.¹⁸⁹ The majority unreasonably concluded that the word "later" did not show that the advocacy incited imminent lawless action.¹⁹⁰ There are, undoubtedly, interpretations that construe the word, "later," to represent an increased or decreased chance of imminent action.¹⁹¹ Yet, by choosing an understanding of the word, the Court unreasonably expanded its scope of authority by interpreting evidence dissimilar from the court below.¹⁹² Moreover, this ruling essentially does not affect other courts because it leaves those lower courts with making its own determination of what speech incites "imminent" lawless action or incites action at some indefinite future time.¹⁹³

VI. DIGITAL FIREARM FILE PROHIBITION

With technology quickly evolving, First Amendment protections require deeper and more complex interpretations as to avoid infringement of any rights vested in the Constitution. Further, governments must provide constitutional legislation that prevents substantive evils stemming from the use of this technology. In regard to sharing digital firearm files, courts and legislators must carefully examine the computerized manufacturing process. Such an examination is the only way the application of the First Amendment to a content-based restriction can be justly made by legislators.

A statute prohibiting the sharing of digital firearm files used to produce firearms that are illegal to possess or transfer, in a public forum, would likely survive constitutional scrutiny if a court were to apply the imminent lawless action test. The statute is likely to survive constitutional scrutiny for two reasons. First, digital firearm files are speech that incites imminent lawless action, so long as the file represents a firearm that is unlawful to possess or transfer. This means that the state must also outlaw the possession of a firearm without a

¹⁸⁸ *Id.* at 109 (Rehnquist, J., dissenting).

¹⁸⁹ *Id.* at 111 (Rehnquist, J., dissenting).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

serial number to be effective. Second, the likelihood of the unlawful action occurring is high because the digital firearm files are one of the final steps of the computerized manufacturing process. The Supreme Court has been consistent when deciding on whether to justify content-based restrictions when the content is close to indistinguishable from lawless conduct.¹⁹⁴ It was stated best by Justice Holmes, in *Frohwerk v. U.S.*,¹⁹⁵ that one justification for a restriction of speech is that it must be, “in quarters where little breath would be enough to kindle a flame.”¹⁹⁶

The first element of the imminent lawless action test is: does the advocacy incite imminent lawless action?¹⁹⁷ Since the G-code instructs the printer on how to create the firearm and the files used prior to the G-code are easily transitioned, the firearm’s production needs only a few clicks of a mouse at most. Allowing a digital firearm file that can produce a firearm that is illegal to possess or transfer to be shared in a public forum is like allowing a person to leave a firearm at the top of a hill for anyone to pick up and have for themselves. Anyone willing to put in the minimal amount of effort and money to climb to the top of that hill will be granted an untraceable firearm. Since it is lawful to create and produce a lawful gun for self-use in most places,¹⁹⁸ it is essential for states to outlaw firearms without serial numbers as well as the digital files that will lead to their production.¹⁹⁹ The internet is a rapidly moving and untamed environment if there is no prohibition on placing digital firearm files on the internet, not only would the production and distribution of those firearms be imminent, they would be inevitable.

The second element of the imminent lawless action test is: what is the likelihood of the imminent lawless action to occur?²⁰⁰ It is convincing to say that the action of producing a firearm after gathering a digital firearm file used to produce a firearm with a computerized manufacturing process is inevitable, let alone imminent. For what other reason would one obtain the materials necessary for the final

¹⁹⁴ See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Frohwerk v. U.S.*, 249 U.S. 204 (1919); *Schenck v. U.S.*, 249 U.S. 47 (1919).

¹⁹⁵ See *Frohwerk*, 249 U.S. at 204.

¹⁹⁶ *Id.* at 209.

¹⁹⁷ *Brandenburg*, 395 U.S. at 447.

¹⁹⁸ See *Does An Individual Need A License To Make A Firearm For Personal Use?*, *supra* note 5.

¹⁹⁹ *Id.*

²⁰⁰ *Brandenburg*, 395 U.S. at 447.

steps of production without proceeding to actual production? The thought is difficult to come across. The Court in *Brandenburg* puts an extreme emphasis upon distinguishing an idea from an overt act.²⁰¹ The distinction becomes an easy one in this case. Instruction on how to produce a firearm is merely an idea that does not incite imminent action. The act of posting a digital firearm file, which is entirely different, is certainly advocating more than just an idea but granting everyone on the planet access to the overt act of the firearm's actual production. If the possessor of a digital firearm file clicks the necessary option displayed on his computer screen, the computer will act. If the digital firearm file can be used to produce a firearm the possession or transfer of which is outlawed by a particular jurisdiction, and the digital firearm file is available on the internet, the production of the firearm is both imminent and lawless.

A. "Imminent" Lawless Action in a Public Forum

The argument made by the Court in *Hess*²⁰² is the most detrimental to the justification of the statute, however, not destructive. The set of facts that the Court based its decision on could be interpreted either way, depending on the subjective interpretation of "indefinite." The Court claimed that speech which incites lawless action that may occur at an indefinite future time would not fall within the scope of the imminent lawless action test.²⁰³ The Court, however, did not clarify what that means.²⁰⁴ Moreover, the Court acknowledged that Hess's speech could incite imminent lawless action, or it could not.²⁰⁵ Ultimately, it blindly chose to follow the latter.²⁰⁶

The Court in *Hess* also relied on the audience to whom Hess directed the speech.²⁰⁷ The audience was said to be a factor in identifying the lawless action to be indefinite because the Court must be able to determine whom the speech was meant for in order to determine if lawless action is imminent.²⁰⁸ This argument is unpersuasive if used to bar a restriction of G-code files in the public

²⁰¹ *Id.* at 456.

²⁰² *Hess v. Indiana*, 414 U.S. 105 (1973).

²⁰³ *Id.* at 108.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

domain because the mere possession of a firearm that is outlawed is, itself, the unlawful action. If the G-code that expresses an outlawed firearm is out in the public for anyone to possess, the audience is the public in general, and it is more than likely someone will be there in the “audience” to obtain the file. It may have been important to identify an audience in 1973²⁰⁹ when determining the presence of imminence. However, it is unimportant in the age of the internet. When one posts on the internet, he is not speaking into an empty room, there is almost always an audience.²¹⁰

Some jurisdictions would not hesitate to codify a law that forbids the placement of an illegal firearm in a public park—a place where anyone can take it for themselves. Likewise, legislators should not hesitate to outlaw the placement of a digital firearm file which will or is designed create an object that can expel a projectile by the action of an explosive on the internet. If digital firearm files are available in a public forum, the user is essentially ordering a firearm, but instead of its being shipped, it is being manufactured using the file, computer, and whichever machine the user chooses.²¹¹ It is imminent that there will be someone who is searching the internet who will find, download, and produce a firearm that is unlawful to possess or transfer in his jurisdiction because of the accessibility alone.

VII. CONCLUSION

The restriction of source code that represents outlawed firearms is content-based. Content-based restrictions are presumptively unconstitutional and subject to strict scrutiny. However, a restriction of digital firearm files will pass constitutional muster. A restriction of digital firearm files is narrowly tailored to serve the compelling state interest of enhancing domestic security, and

²⁰⁹ *Id.* at 105.

²¹⁰ INTERNET WORLD STATS, <https://www.internetworldstats.com/stats.htm> (last updated Mar. 3, 2020) (It is estimated that more than 4.5 billion people regularly use the internet. This translates to 58.7% of the world’s population.).

²¹¹ Typically, states are stricter when it comes to the transfer of firearms privately versus the transfer involving a licensed dealer. *See Private Sales in New York*, GIFFORDS LAW CENTER, <https://lawcenter.giffords.org/private-sales-in-new-york/> (last updated Nov. 8, 2017). Not every private conveyance involves people trying to evade the law; however, it is very easy for a private conveyance to be dangerous because it allows someone who may not have been able to purchase the firearm legally from a dealer to participate in the transaction “under the radar.” There are strict rules preventing conveyances like this but the regulations on private transactions are likely very difficult to enforce. *Id.*

will, therefore, be deemed constitutional. The imminent lawless action test will serve to support the state's interest in the restriction, something that has been well established by the Supreme Court for almost fifty years,²¹² and its logic, for almost 100.²¹³

People use G-code files to produce objects with a 3-D printer, not CAD files, not S.T.L. files, or any other premature files. As mentioned earlier, the digital firearm files is basically the final step in the drawn-out computerized manufacturing process.²¹⁴ It is reasonable to draw the inference that those in possession of a digital firearm file possesses it because they intend to create the object that it represents.

The proposition of giving any person with access to the internet and a 3-D printer, which will inevitably become inexpensive as technology advances, the ability to create untraceable firearms is undoubtedly a substantive evil that Congress has an interest in preventing.²¹⁵ Such power should, without opposition, be enough to justify a content-based speech restriction within the scope of the First Amendment. As technology evolves and grows with time, so must the law. It is hard to distinguish, with merit, the differences that separate 3-D printing from movie magic. The clicking of a mouse to create an object, that has half the power of God, is analogous to the snap of fingers or the waving of a wand to create an object. One who claims to gather a digital firearm file, but not to create, is no different from one who claims to gather food, but not to eat.

²¹² See *Brandenburg*, 395 U.S. 444.

²¹³ See *Schenck v. U.S.*, 249 U.S. 47 (1919).

²¹⁴ *How to 3-D Print, Beginner's Guide to 3-D Printing*, *supra* note 30.

²¹⁵ *Schenck*, 249 U.S. at 52.