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Article

“STICK A TOOTHBRUSH DOWN YOUR THROAT:” AN ANALYSIS OF
THE POTENTIAL LIABILITY OF PRO-EATING DISORDER WEBSITES

Annika K Martin ^{a1}

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I. Introduction

A young girl--perhaps unsure of herself and teased mercilessly at school, perhaps a victim of abuse or family dysfunction, perhaps seemingly normal-- stumbles across a website promoting a “lifestyle” of seeming power and achievement. All it takes is an iron will, the site says, but if she is strong enough, she too can look like the idols pictured on the site; she too can gain the approval of her peers and society at large; she too can take pride in being one of the few. She takes the site's message to heart; soon she is eating 400 calories per day, hiding her food under her mashed potatoes so no one will notice she's not eating. Sooner or later, she hurts herself. Perhaps it takes years of slow malnutrition to wear her body's systems down; perhaps in a moment of desperation, she tries the toothbrush trick or tries the infamous ipecac, only to be found in the morning, a wisp- *152 like body collapsed on the bathroom floor in a pile of her own blood and vomit.

Can the website be held liable for her death?

Surprisingly, litigation against such websites has not yet reached a courtroom, and action against such sites has been limited to their removal from certain free web hosting servers for alleged terms of service violations. In this paper, I will introduce the concept of these websites and analyze various theories of liability which might be used to hold them accountable for harms caused to their visitors. Part II will define eating disorders; Part III will explain the phenomenon of the websites that glorify them. In Part IV, I will explore the various causes of action which could potentially be brought against these sites, especially in consideration of the fact that the courts have not yet developed any consistent approach in evaluating the few analogous cases in which media cause physical harm.

For the purposes of this paper, the focus will remain on cases in which the harm in question is self-inflicted by the victim. This is most likely to be the case when harm is caused by a pro-eating disorder website. Additionally, cases concerning self-harm

suffer the same problem of causation, and contributory negligence diminishes the force of any claim for recovery, making the First Amendment more likely to bar tort liability.

II. Defining the Disorders

Defining eating disorders is not a simple task. The three major eating disorders--anorexia, bulimia, and compulsive overeating--have overlapping behaviors and cognitive processes. Anorexia and bulimia, especially, tend towards co-morbidity, leading sufferers to start with one behavior and end up with the other, flip-flop back and forth between them, or suffer both simultaneously in what is often called “bulimarexia.”¹

For the purposes of this paper, I will focus on anorexia and bulimia as pure forms. Anorexia (from the Greek for without appetite) is characterized by severely limited food intake, distorted body image, refusal to maintain a normal body weight, and intense fear of weight gain, despite the fact that the sufferer is often very underweight.² Bulimia (from the Greek for *153 ox hunger) is characterized as a binge/purge cycle. Sufferers binge, eating large amounts of food in a short time, accompanied by feelings of loss of control.³ This, in turn, leads to feelings of shame, guilt, and an intense fear *154 of weight gain, possibly triggering purging behavior such as vomiting, overexercise, or misuse of laxatives, diuretics, or other medications.⁴ Like anorexics, bulimics obsess over body shape and have low self-esteem.⁵

In the United States, seven million women and one million men across all races, age groups, and socioeconomic levels currently suffer from eating disorders.⁶ Three-quarters of these people will endure their disease for one to fifteen years, and six percent will die from it.⁷ Eating disorders have the highest mortality rate of any psychiatric disease, and only fifty percent of sufferers are ever cured completely of the disease.⁸

Clearly, eating disorders carry a heavy load of medical risks and complications. Anorexics often suffer severe muscle wasting, hair loss, changes to skin tone and texture, and their heart muscles can weaken, causing irregular and rapid heartbeat.⁹ Bulimics' frequent vomiting causes tooth enamel erosion, swollen salivary glands, and esophageal tearing, in addition to serious dehydration with subsequent kidney stones and/or kidney failure and loss of consciousness due to low blood pressure.¹⁰ Both anorexics and bulimics can suffer liver damage, amenorrhea (cessation of menstruation), infertility, osteoporosis, slowed digestion and constipation, anemia and malnutrition, and loss of mental clarity.¹¹

Because of these risks and the extreme tenacity of the disease, treatment for eating disorders is often extremely expensive. Large numbers of victims require extensive medical monitoring and treatment, and cognitive therapy generally extends over two years or more.¹² The cost of inpatient treatment can be \$30,000 or more a month, and many patients require repeated hospitalizations.¹³ Outpatient treatment, including therapy and medical monitoring, can extend to \$100,000 or more.¹⁴

“Though these two diseases are more widely prevalent among [minors], the treatment and recovery goals are often elusive. So the diseases continue through early adulthood and sometimes throughout a person's *155 lifetime.”¹⁵ Eating disorders are costly, emotionally painful, and ultimately deadly to victims, their families, and society.

III. The Rise of Pro-ED Websites

The Internet is rife with a constantly evolving number of personal websites concerning eating disorders. These can take the form of information-providing sites or message boards and forums. Many of these are run by current or former sufferers and tend to divide themselves between recovery-oriented sites and what are referred to as “pro-ED” or “pro-ana” sites.¹⁶ There also

exist thousands of web-based diaries or blogs¹⁷ documenting the lives and struggles of current or recovering eating disorder sufferers.

Of primary interest to this paper are the pro-ED sites, of which up to 400 may currently exist online.¹⁸ Generally speaking, what defines a pro-ED site is the provision of the “three Ts”: tips, tricks, and Thinspiration.¹⁹ The tips and tricks sections usually consist of lists of “safe” foods that are low in calories or bulky and filling, such as celery, egg whites, or chicken broth, and foods that are easy to vomit, like ice cream, soup, and bananas.²⁰ There is also advice on how to avoid eating (clean the house, put on music and dance), how to hide one's eating disorder from family and friends (say you already ate, you're still full from lunch, or you have a headache), how to handle “dangerous” situations like eating at restaurants or being forced to eat (drink water after every bite, hide food under your mashed potatoes).²¹ Sizeable archives of Thinspiration photographs are offered as ***156** “triggers” to aid in motivation by showing viewers the body ideals they are trying to attain or serving as a reminder that they are still imperfect.

Quite obviously, pro-ED sites are the antithesis of recovery-oriented websites on eating disorders. In fact, the prevailing philosophy of the sites is that the eating disorder sufferers who frequent them are not victims, nor are they even ill. In the words of one website campaigning against the existence of pro-ED sites:

Pro-ana means . . . anything that glamorizes, pushes, or otherwise promotes, anorexia, bulimia, and any other eating disorder, as a lifestyle choice rather than a disease or illness. This includes images of dangerously thin women and men, classed as “Thinspiration[.]” this includes the sharing of “tips and tricks” to prolong the effects of an eating disorder. . . . It does not encompass the genuine support websites. It does not encompass simple journals that chronicle the day to day battle with an eating disorder.²²

It is assumed that eating disorder sufferers are victims who do not choose their diseases but fall prey to them because of mental susceptibility triggered by family and/or societal pressures. In the community of pro-ED websites, however, there seems to be a disturbing trend of those who seem to choose to adopt, as a dieting method, the behaviors of eating disordered people. Many of the pro-ED sites are run by and targeted at those who claim to “choose” anorexia or bulimia as a lifestyle choice that will lead them to self-improvement and happiness. According to one popular site's explanation, there is a marked distinction between anorexia as a disorder and anorexia as a lifestyle.

Volitional, proactive anorexia is not a disease or a disorder. It is not to be confused with ED-anorexia; it is not something invasive which one “suffers from.” There are no VICTIMS here. It is a lifestyle choice that begins and ends with a particular faculty human beings seem in drastically short supply of today: the will.²³

On the Web, the distinction is sometimes made between anorexics and “rexies.” One site explains the difference this way: “If u [sic] want sympathy for your ‘disease’, you are anorexic. If you want respect and admiration for your lifestyle of choice, you are a rexie. . . . Anorexics die. Rexies don't. . . . This site is for us rexies, who are proud of our accomplishments, and the accomplishments that lie ahead. [W]e will never die.”²⁴

***157** The difference seems to lie in the focus on self-control rather than self-destruction; rexie sites ring with tones of superiority and empowerment, often speaking of an “elite” following the anorexic lifestyle and scorning the “weakness” of contemporary values.²⁵ As one site states, “volitional anorexics possess the most iron-cored, indomitable wills of all. Our way is not that of the weak.”²⁶ The claim of the pro-ED sites is that the disordered eating behavior is done solely to become thinner and not as a form of self-harm.

The pro-eating disorder community may be a result of ill adolescents seeking to find power and solidarity in their weakness, uniting in defense against society's negative view of eating disorders. “Pro-anorexia supports a form of communication that promotes the suppression of the body as a means of acquiring power and acceptability.”²⁷ By creating a stylized form of the disease, they fashion their suffering into a sort of club with elite membership standards.²⁸

Perhaps as a reflection of their audience, the messages on these sites are decidedly confusing. With one breath they are adamantly proud of their “strength” and superior willpower, with the next they are desperately praying for help to reach their ever-decreasing weight goals and, just as suddenly, they are preaching safety (such as exclamation-point-laden warnings against the use of ipecac syrup to induce vomiting). Effective weight loss wisdom (“Drink at least two quarts of water each day. This helps control your appetite. Sometimes a feeling of hunger is actually thirst.”²⁹) is mixed indiscriminately with pseudoscience, guesswork nutrition (“Celery actually burns calories. Every hour eat a stalk of it. Not only will it fill you up, but it will also get your metabolism kickin’.”³⁰) and flat-out lies (“The less sleep you get, the higher your metabolism.”³¹). “Talking to the girls and women who run these sites, it becomes apparent that many of them aren't clear where the information ends and disinformation begins.”³²

***158** In the forums, users will loyally support their “buddies” through encouraging posts, participation in mutual fasts, and cyber hand-holding in “accountability” threads. Simultaneously, they viciously attack users who they do not feel measure up to the site's standards. Rexies, who often claim to be “better” anorexics because they are “successfully” managing their eating and starving by design rather than disorder, are often blasted by “real” anorexics as being “fakers” and “wannabes.” Sixteen-year-old Tigerinpink, webmaster of Nothing Tastes as Good as Thin Feels, says, “[Y]ou can't just be anorexic in one day. Those are known as ‘wannabe anorexics.’ Ana takes years to develop.”³³ Competitive words can be found in all of the forums and guestbooks. One twenty-two-year-old woman left a note in a fifteen-year-old's guestbook stating, “No offense, but if you weigh 145, you're not ana! I'm about your height, and have never weighed above 109. I've maintained a weight of 98 for 16 months now. All I can say is good luck!”³⁴

Eating disorders are secretive diseases which drive their victims into isolation and dishonesty as they hide their starving, bingeing, and purging from family and friends and attempt to navigate a society in which many human interactions are based around food. For many sufferers, the sense of community offered by pro-ED sites is extremely attractive, despite the harsh competition that is also present.³⁵ Amongst their eating disorder buddies, they don't feel persecuted or looked down upon in the same way they do in “normal” society, and they have found a place where they can be honest and open about their disorder.³⁶ Also, because eating disorders can be described as maladapted coping mechanisms, from the perspective of the sufferer, embracing the disorder offers comfort and support in the face of an overwhelming and threatening world.

Perhaps the only difference between rexies and anorexics is that rexies take pride in their condition as a defense mechanism against a world that is constantly attacking what they have clung to as their identity. “Subterfuge and denial can be cornerstones of the condition,”³⁷ and perhaps rexies are the anorexics deepest in denial of their own illness. Their militant pride may come from a paradoxical combination of “feeling isolated from society and yet desperate to be allowed to take part in the world and be accepted.”³⁸ Belonging to the pro-ED community gives these lost youths a ***159** sense of identity and pride in belonging to an exclusive and secret group.³⁹ “In attempting to claim an identity or a voice for themselves, the image of slenderness is identified as a source of power.”⁴⁰

This sense of community and solidarity within an elite group structure is perhaps what is most unique about pro-ED websites. Certainly the pages of tips and Thinspiration are the most comprehensive collections ever available, but the ideas they compile are not novel. Long before pro-ED sites and even the development of the Internet, eating disorder sufferers have drawn their inspiration from popular culture. One woman spoke of being triggered by a TV special on Karen Carpenter, who died of heart failure in 1983 at age thirty-two, after a long battle with severe anorexia.⁴¹ Others have gleaned tips from descriptions of

behaviors in disorder recovery books.⁴² They abuse conventional websites, turning everyday diet planners, calorie counters, and body-mass index calculators into weapons of self-destruction.⁴³

Given a predisposition to eating disorders, it seems sufferers can feed their disease from any source and have done so regularly from the trough of popular culture. The world of celebrities and fashion models has long been a source of inspiration and body image standards for young girls, despite the fact that these icons use unhealthy methods to maintain their appearances and that photos are regularly doctored to match the ideal. Some researchers have wondered if it may be hypocritical to censor pro-ED sites in the face of fashion magazines constantly featuring celebrity diets and photos of underweight models--the same photos that appear in the Thinspiration sections of pro-ED websites.⁴⁴

Even so, when the phenomenon of pro-ED sites became widespread about three years ago, public outrage prompted many free web hosting companies to remove the sites from their servers. In July 2001, the National Association of Anorexia Nervosa and Associated Disorders (ANAD) began to lobby for the removal of the sites, citing the servers' ability to remove any sites they choose and calling on them to back up their self-proclaimed commitments to child and adolescent safety on the Web.⁴⁵ Yahoo! took action almost immediately and eventually several other free web-hosting services began banning pro-ED sites.⁴⁶ Yahoo! alone knocked one hundred pro-ED pages off its directory and two hundred more from its *160 Geocities servers.⁴⁷ The companies justified the removal of pro-ED sites by claiming they violated terms of service requirements that hosted websites pose no danger to minors.⁴⁸ “Content with the sole purpose of creating harm or inciting hate is brought to our attention, we evaluate it, and in extreme cases, remove it, as that is a violation of our terms of service,” a Yahoo! spokesperson said in 2001.⁴⁹

In response to the crackdown, the sites have gone underground, hosted on private servers or disguised and more difficult to track down.⁵⁰ “It's quite a mobile community--as soon as they're uncovered and they're shut down they move elsewhere,” usually deeper undercover, links to their addresses traded on password-protected message boards.⁵¹ This may lead to practical issues in regulating the sites or shutting them down in the event of an eventual lawsuit, but may also lessen the chance that a casual web surfer stumbles upon the sites.

IV. Potential Theories of Liability

Several potential theories of liability presented themselves during the researching of this paper, some based on prior media tort cases. This paper defines each theory of liability, presents case authority, and then discusses how the law might apply to pro-ED websites.

A. Incitement

A teenaged boy was found dead, hanging in his closet after apparently attempting an act of autoerotic asphyxiation that he had read about in the magazine that lay open at his feet.⁵² Action was brought against the publisher of Hustler Magazine to recover damages for emotional and psychological harm suffered as result of the adolescent's death allegedly caused by the article.⁵³ The Court ultimately held that the magazine article did not incite the adolescent to perform an act that led to death by hanging.⁵⁴

The court in *Herceg v. Hustler* used the incitement analysis put forward in the landmark *Brandenburg v. Ohio*,⁵⁵ and found that the article was *161 not advocacy for autoerotic asphyxiation (ignoring other questions required by the incitement standard, such as whether autoerotic asphyxiation or the resultant accidental suicide was “lawless activity”).⁵⁶ “Even if the article paints in glowing terms the pleasures supposedly achieved by the practice it describes, as the plaintiffs contend, no fair reading of it can make its content advocacy, let alone incitement to engage in the practice.”⁵⁷

The plaintiffs in *Herceg* argued that the article provided excessively detailed descriptions about how to perform autoerotic asphyxia, but the court concluded that the method was not a complicated one and “to understand what the term means is to know roughly how to accomplish it.”⁵⁸ Similarly, understanding anorexia or bulimia requires familiarity with only the most general concepts: refusing oneself food or overeating followed by purging behaviors such as vomiting or laxative abuse. The pro-ED websites go far beyond vague definitions of the disorders, giving very detailed instructions and advice that cannot inherently be gleaned from a description of the disorders. For example, the sites give tips for hiding fasting behavior from others, such as periodically dirtying dishes and throwing away food to make it seem that food has been consumed.⁵⁹ There are also lists of foods which are easily vomited and tips for easier purging, such as drinking salt water to aid in vomiting.⁶⁰

Moreover, it is interesting to note that the tips for bulimic behaviors may be more specific and therefore could be considered more directly harmful than the tips for anorexic behaviors. Like the concept of autoerotic asphyxiation, the concept of anorexic behavior is not complicated: restricting caloric intake by fasting, eating an extremely low-calorie diet, and possibly forbidding major food groups, such as meat or sweets. Although the definition of bulimia includes different types of purging behaviors, it is not self-evident how these are best accomplished. The pro-ED sites offer large collections of novel ideas, including what types of food are easiest to vomit, different methods of vomiting, tips on brands of laxatives and how to use them, etc. While both anorexic and bulimic behaviors have an element of independent invention in them, the provision of bulimia tips to ease the difficulties in vomiting may well exacerbate the behavior in readers who had begun to find the pain and physical stress of forced vomiting to be *162 unworthy of the results. Hungry-Hippo, a twenty-two-year-old from New York who has been bulimic for the past four years, admitted:

Tips from pro-ED sites helped make purging easier, which in turn encouraged me to do it more frequently. For a while there, in the beginning, it was really tough to throw up sometimes--painful and desperate. I tore up the back of my throat and once burst a blood vessel in my eye. I started checking out the pro-ED sites, “researching” how to become more effective at purging. Some of the tips really worked well for me and purging got decidedly easier and less painful. After that, I would say I went from purging two or three times a week to at least once a day, if not more.⁶¹

In addition to intensifying bulimic behavior for many sufferers, the websites also offer bulimia-related tips that can be more immediately harmful than those for anorexia. For example, one site advises that “[i]f throwing up is hard for you use a tooth brush (not the side with the brush),” which urges users to try a behavior which could very easily cause esophageal rupture or choking.⁶² Because the potential harm resulting from the bulimia-related tips may be greater and more immediate than that from the advice encouraging anorexic behavior, a bulimic plaintiff might succeed more readily with a cause of action against the websites similar to that brought in *Herceg*.

Since the *Herceg* court found that *Hustler* was not liable because the advocacy prong of the *Brandenburg* test was not met, the court did not even discuss the question of whether the act allegedly incited was “lawless.” Clearly, autoerotic asphyxiation is not “lawless,” and neither is slow starvation or self-harm in the form of bingeing and purging. Even suicide is not “lawless.” For this reason, one commentator has suggested that the incitement standard should be altered for application to tortious speech by dropping the requirement that the act causing injury be a “lawless” one. “Showing that the act was foreseeably dangerous should be enough; if the incitement test, which was developed to deal with criminal speech, is to be applied to tortious speech, it should at least be adapted to the new setting.”⁶³ Foreseeability in the context of pro-ED websites will be discussed more fully *infra*.

The court in *Herceg* also explored the idea that incitement might be an inappropriate theory of liability because its original meaning was related to stirring up a crowd to violent action, usually with oral speech. Although it does not reach the question of “whether written material might ever be found to create culpable incitement unprotected by the first amendment,” the *Herceg* court does suggest that such a conclusion might be reached in *163 future cases.⁶⁴

The case of pro-ED websites could not be further from the original meaning of incitement. The sites are passive: visitors must seek them out using search engines. Rather than receiving oral messages as part of a raucous mob, they read them quietly and in isolation, spurred not to impulsive violence but to slow, repetitive, deliberate actions of self-harm. A defendant could make a strong case against an incitement charge by arguing that such written material cannot create culpable incitement as originally intended by *Brandenburg* and subsequently interpreted.

Moreover, the *Herceg* court found the incitement charge inappropriate against *Hustler* even though the jury considered evidence concerning whether the deceased read the article immediately prior to attempting the autoerotic asphyxiation procedure and eventually determined that he had.⁶⁵ In the case of pro-ED websites, the drawn-out time frame of the harm to the eating disorder sufferer makes the incitement charge seem even less appropriate than it was in *Herceg*. Forty-seven percent of those with eating disorders suffer from their diseases for six to fifteen years.⁶⁶ During this time, although they punish their bodies with a constant fasting, calorie restriction, or binge/purge cycles, often losing and gaining significant amounts of weight repeatedly, the harm is of a cumulative variety.

The complications that accompany eating disorders are mostly the result of the wearing down of body systems by long term self-abuse.⁶⁷ Such harm requires incredible dedication by eating disorder sufferers, who must deprive and mistreat themselves for years in order to cause the harm that eventually befalls them, but it also makes it seem less likely that a cause of action will lie against a pro-ED website for inciting viewers to harm themselves in such a way.

If an eating disorder sufferer starves herself for years and subsequently dies of malnutrition, how many times would she have to visit the website for a court to find that the site incited her to action? Would one visit suffice or, at the other extreme, would the plaintiff have to show that she had visited the site every day during the duration of her starvation? The long, slow duration of these diseases and the years it takes for harm to manifest itself is most likely a barrier to liability for incitement.

B. Emulation: The “Copycat” Cases

There is no question that the *Hustler* article, unlike a pure news story *164 of accidental death, describes the practice of autoerotic asphyxia and suggests that it is erotically satisfying despite its danger. Courts have sometimes had to consider whether the harm in question was the result of mere emulation of something reported or described in the media or if the inclusion of how-to instructions acted as a form of encouragement or suggestion that may be actionable.⁶⁸ It is clear, however, that pro-ED websites go even further by instructing visitors step-by-step on how to adopt disordered eating behaviors, and it cannot be said that mere emulation is taking place.

One court drew the distinction that in “copycat” situations, it will never be the case that the publisher intends its description to assist another in causing harm; “rather, the information for the dissemination of which liability is sought to be imposed will actually have been misused vis-à-vis the use intended, not as here, used precisely as intended.”⁶⁹ The language of the pro-ED websites makes it clear that the instructions and tips are intended for use in furthering the disordered eating behaviors of their readers; thus, these are not copycat situations.

C. Intentional Infliction of Emotional Distress

Another potential theory of liability against the media is the cause of action for intentional infliction of emotional distress. According to the Restatement (Second) of Torts, “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”⁷⁰ In considering whether conduct is outrageous, courts have found that it is not enough if the defendant acted with tortious intent, nor even the intent to inflict emotional distress, nor even malice.⁷¹ “Liability has

been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”⁷² Most courts have gone further to permit recovery when the conduct, although not intended to cause emotional distress, was engaged in with knowledge or reason to know that severe emotional distress was almost certain to follow.⁷³

***165** When applying this theory of liability to pro-ED websites, there is an initial question of whether exacerbation of an eating disorder can be considered “severe emotional distress” for the purposes of the law. If it is, it is likely that a jury would find that the pro-ED webmasters maintained the sites with knowledge that such emotional distress was certain to follow the viewing of the sites by susceptible web surfers, especially because most of the webmasters are current eating disorder sufferers themselves and are well aware of how they themselves react to such sites.

In applying this cause of action to the media tort of defamation, however, the Supreme Court held that tort law requirements of intent and outrageousness were not sufficient substitutes for the constitutional requirement of actual malice.⁷⁴ The Internet is an anonymous medium, and pro-ED websites are laced with secrets: no real names or identifying details are given, and lurkers abound on message boards. It is unlikely that a plaintiff could prove a pro-ED webmaster had actual malice in causing the severe emotional distress and subsequent physical harm the plaintiff may have experienced on viewing the sites.

D. Successfully Soliciting Another to Commit Suicide

Eating disorders have the highest mortality rates of any psychiatric disease: six percent of sufferers die as a direct result of the condition (usually heart failure due to starvation or electrolyte imbalances), and only half are ever completely cured of the disease.⁷⁵ It is conceivable that death by eating disorder be seen as slow suicide--sufferers deliberately, of their own volition, starve and weaken their bodies continuously for years to the point of organ failure and eventual death.

If death by anorexia or bulimia is seen as suicide, perhaps the pro-ED websites, which encourage and give instruction in the associated behaviors, can be held liable for the successful solicitation of another to commit suicide. To prove such a cause of action, the plaintiff must show that “(1) the defendant specifically intended the victim's suicide; (2) the defendant undertook some active and direct participation in bringing about the suicide, such as by furnishing the victim with the means of suicide; and, finally, (3) the victim actually committed a specific, overt act of suicide.”⁷⁶

It is not likely that this cause of action will lie for pro-ED websites. As to the first element, intent, many of the websites quite clearly state that they do not seek death but rather the maintenance of extremely low body weight.⁷⁷

***166** The second element will most likely not be met by most of the tips on the pro-ED sites, as encouraging someone to fast or severely restrict calories cannot be considered “furnishing the means of suicide.” Some sites, however, discuss the use of ipecac syrup to induce vomiting. Ipecac syrup is an emetic that can cause shock, cardiac arrest and seizures, especially if taken in too high a dose.⁷⁸ Most pro-ED sites strenuously discourage the use of ipecac syrup to induce vomiting, but a few nevertheless discuss dosing and instructions for use.⁷⁹ It is conceivable that sites suggesting ipecac use or advocating behaviors like gagging oneself with a toothbrush could satisfy the second element of this cause of action.

The third element also limits the application of this cause of action to those six percent of cases in which the eating disorder sufferer does, in fact, die from the disorder.⁸⁰

E. Restricting Access to Minors

Despite First Amendment protection, pro-ED websites could still be held liable because many of their visitors are minors. According to ANAD statistics, eighty-five percent of anorexics experience first onset of illness by age twenty.⁸¹ The average age has been decreasing, and over the past five years studies have shown a marked increase in cases of anorexia in eight to eleven-year-olds.⁸²

It is well established that the government can be more stringent in controlling media available to youths than that available to adults.⁸³ However, “only in relatively narrow and well-defined circumstances may [the government] bar public dissemination of protected materials to [minors].”⁸⁴ It has done so successfully in cases involving obscenity, child pornography, and tobacco products.⁸⁵

***167** The issue becomes more complicated because of the nature of internet interactions, which are not face-to-face. For example, a Wisconsin court found that a state statute that did not require the state to prove scienter as to the age of the people exposed to the materials was unconstitutional in the context of the Internet.

By requiring an internet user like [the defendant] to prove lack of knowledge regarding the age of the person exposed to material deemed harmful to a child, the statute effectively chills protected internet communication to adults. The “vast democratic forum” of the internet would be rendered a nullity if persons refrained from sharing a wide range of ideas and images in fear of criminal sanctions.⁸⁶

A similar problem of knowing and controlling the age of users exists for pro-ED sites. While they are not exclusively targeted toward minors (nor defined as limited to adults, for that matter), they are heavily trafficked by users under eighteen. In an informal poll on one popular site, over three hundred users replied to a post asking them to identify themselves if under eighteen.⁸⁷ In fact, the presence of minors is so prevalent that some forums have special sections--with names like “The Geriatric Room”--for older users, to which women in their twenties and older are relegated.⁸⁸ From a practical standpoint, it is also minors who have the vast amounts of time, interest, and tech-savvy to spend long hours surfing the pro-ED web scene; in fact, several of the pro-ED sites are maintained by minors.⁸⁹

Nevertheless, the pro-ED websites could make a salient argument that a significant number of their users are adults and shutting down the websites would violate their rights to communicate their ideas to other adults. Additionally, pro-ED webmasters could argue that the responsibility in this case falls to the parents of the minors to effectively control their children's usage of the Internet. “Much commercial software is available to enable parents to monitor and restrict their children's internet access,” which could conceivably be used to prevent access to websites containing pro-ED content.⁹⁰

Only one of the many pro-ED sites researched for this paper had any words discouraging minors from entering, even where “screens” providing ***168** disclaimers as to the severity of the material appeared before the actual content. Recent cases involving controlling access to pornographic websites have shown, however, that modern technology provides methods for websites to create adults-only zones that restrict access to minors.⁹¹ Today, “technological mechanisms exist to create adult zones by using credit cards, passwords, PIN identification, adult verification services, and website self-identification methods,” and they are in fact commonplace in the world of online pornography.⁹² Requiring pro-ED sites to put up such “screens” could certainly be considered a reasonable and not overly burdensome step in blocking minors from reaching harmful content without depriving access to adults.

F. Negligence

The Herceg court rejects a negligence standard for speech that has produced harm for fear of an overly chilling effect on free speech. “If the shield of the First Amendment can be eliminated by proving after publication that an article discussing a

dangerous idea negligently helped bring about a real injury simply because the idea can be identified as ‘bad,’ all free speech becomes threatened.”⁹³ Similarly, the Rice court stated that the exposure of media to liability under lesser standards would be “intolerable,” and that to avoid chilling of lawful speech, “the First Amendment may . . . stand as a bar to the imposition of liability on the basis of mere foreseeability or knowledge that the information one imparts could be misused for an impermissible purpose.”⁹⁴ Nonetheless, it is valuable to consider whether a negligence standard could be applied in assessing the liability of pro-ED websites.

By far the biggest hurdle to finding pro-ED websites liable for the harm to their visitors under a negligence theory is the issue of causation. In addition to the difficulties in pinpointing the causes of eating disorders themselves, there are also concerns regarding the drawn-out time span of the development of harms caused by eating disorder behavior, discussed supra, the susceptibility of victims due to pre-existing mental conditions, and a potential assumption of the risk issue raised by the fact that many of the sites contain disclaimers warning visitors of disturbing and “triggering” content.

*169 1. Causation

The causes of eating disorders remain to this day a subject of much debate. The only thing upon which all sources seem to agree is that eating disorders are not caused by any one factor, but rather some combination of biological, social, and environmental attributes. Quite obviously, it cannot be the media in general which causes an individual's eating disorder. While the American media is admittedly saturated with images of underweight celebrities and editorial content, and advertisements are overly focused on weight loss and fad diets, ninety-seven percent of the U.S. population does not suffer from eating disorders.⁹⁵

Many sources claim that eating disorders have very little--if anything--to do with food and weight, but instead are the results (symptoms) of a complex combination of “low self-esteem and an inability to cope with their own emotions and stress.”⁹⁶ Peggy Claude-Pierre, founder of the Montreux Clinic for treating eating disorders, considers the cause of eating disorders to be strongly linked to what she calls “Confirmed Negativity Condition” (CNC), in which sufferers are caught in an internal losing battle between themselves and a negative voice in their minds.⁹⁷ “What may have begun as doubting thoughts, indecisiveness, or mild self-criticism intensifies to form an autonomous voice. . . . It tells its victim: Everyone HATES you. You only cause trouble. There's nothing you can do right. You are demanding, selfish, greedy and mean. . . . You're fat and gross and ugly. . . . You don't deserve to live.”⁹⁸

Although the predisposition for CNC begins early in life and is most likely genetic, “a CNC ‘carrier’ does not necessarily have to develop an eating disorder.”⁹⁹ “In fact, many people can and do identify with the beginning stages of CNC . . . Yet they have somehow learned to live in the world without developing an eating disorder. . . .”¹⁰⁰ Children with a predisposition to CNC are, however, “fertile ground” for harmful social influences.¹⁰¹

Faced with added stress from family dysfunction, abuse, mistreatment *170 by peers, etc., predisposed people may be triggered to disordered eating. According to one recovery website, “for those already open to the possibility of negative coping mechanisms and/or mental illness, the media may play a small contributing role--but ultimately, if a young man or woman's life situation, environment, and/or genetics leave them open to an Eating Disorder . . . they will still end up in the same place regardless of television or magazines.”¹⁰² Claude-Pierre defines this susceptibility to eating disorders as CNC, which creates a distorting negative filter in the sufferer's mind. “This hypercritical subjectivity will cause the victim to interpret every comment made to her as a negative reflection on her,” and, it follows, external messages of good and bad will be deeply influential to her self-concept.¹⁰³

The media's many images, advertisements, and messages certainly glorify an unattainable, unhealthy body image, but the pro-ED websites go even further. Not only do they present underweight models and celebrities as examples of the ideal body shape to strive for, but they provide a method to reach that goal. Humans have an innate tendency to model their behavior after that

of other humans, especially when young.¹⁰⁴ When one sees another who has something desirable, one will tend to emulate that other's behavior in order to get what the other has already successfully attained. When a young person sees these images of a body shape regarded by society as ideal, and he or she is given a method of reaching that ideal, a powerful motivation to attempt that behavior is created.¹⁰⁵

The modeling behavior triggered by the pro-ED websites is especially powerful because the sites often include personal stories of real people--either the webmaster herself or individuals posting in forums or chat rooms--who have achieved the goal incredibly “well” using these methods.¹⁰⁶ For a young person called “chubby” at school, ignored by a parent, or abused in some way, the methods on the sites offer a chance for “achievement,” for excelling at something, and for making a change that earns attention and, often in this thin-obsessed society, compliments and approval.¹⁰⁷ “In attempting to claim an identity or a voice for themselves, the image of slenderness is identified as a source of power.”¹⁰⁸

The real danger of these web sites, according to Dr. Susan Barstis, a psychotherapist who deals often with severely eating disordered patients, is that they cause habit formation with a powerful combination of encouraging *171 modeling behavior and providing a support system for maintaining those behaviors.¹⁰⁹ Upon viewing a pro-ED website, a visitor is attracted by the idea of looking like the celebrities pictured in the Thinspiration galleries, instructed by the tips and tricks, given faith by the personal stories of “success” by current eating disorder sufferers, and given personal encouragement and habit reinforcement via interaction with others in the chat room and on the message boards.¹¹⁰ The sense of solidarity that is then fostered makes this dangerous disease seem both normal and acceptable when seen from within the isolated and tightly-knit communities in the forums and on the message boards.¹¹¹ “The websites justify and validate the community, the peer support makes it feel O.K., especially if a girl with an eating disorder is surrounded by people who are horrified by her” in her daily life at home and at school, says Dr. Marcia Herrin, author of “The Parent's Guide to Childhood Eating Disorders.”¹¹²

The sites create a habit and maintain its perseverance, providing “an instant wealth of resources for people with [eating disorders] to augment their condition.”¹¹³ The sites “promote the perpetuation of these diseases and these diseases can be fatal,” says Amy P. Hendel, founder of Body Jam Corp.¹¹⁴ Others experts agree that these instructional sites are “positively dangerous. Given the fact that anorexia has the highest death rate of any mental disease, with one in five untreated cases ending in tragedy, this advice can have a terrible effect.”¹¹⁵

There is, however, an element of susceptibility that plays a part in whether a person is “sucked in” to the behaviors modeled and reinforced on the pro-ED websites. A normal person, not predisposed to CNC, might still be attracted to the sites by the idea of losing weight to conform to society's ideals but would soon find the negative aspect of anorexic and bulimic behaviors far outweigh any positive effects. In contrast, for those predisposed to CNC, the pro-ED websites clearly address the “negative voice” already ringing in their ears, telling them they are worthless and deserve pain and deprivation. Claude-Pierre quotes one of her patients' descriptions of the negative voice: “it doesn't matter how fast you run to escape it, you'll never run fast enough. . . . It has no features, no feelings; it is flat and lifeless yet it hates you and seeks your ruin more efficiently than anything else *172 could. . . . Its only reason for existence is to wreck you.”¹¹⁶ An eerily similar voice is attributed to “Ana” (short for anorexia) on one of the pro-ED websites; a “Letter from Ana” reads like the voice of the disease itself:
You are not perfect, you do not try hard enough. . . . Your friends do not understand you. They are not truthful. . . . Only I tell the truth. . . .

I expect a lot from you. . . . I will push you to the limit. You must take it because you cannot defy me! . . . I am with you always. I am there when you wake up in the morning and run to the scale. . . . I follow you throughout the day. . . . I fill your mind with thoughts of food, weight, calories, and things that are safe to think about. Because now, I am already inside of you. I am in your head, your heart, and your soul. The hunger pains you pretend not to feel is me, inside of you.

Pretty soon I am telling you not only what to do with food, but what to do ALL of the time. Smile and nod. Present yourself well. Suck in that fat stomach, dammit! God, you are such a fat cow!!!! When mealtimes come around I tell you what to do. . . . Push the food around. Make it look like you've eaten something. . . . I force you to stare at magazine models. Those perfect skinned, white teathed, waifish models of perfection staring out at you from those glossy pages. I make you realize that you could never be them. You will always be fat and never will you be as beautiful as they are. When you look in the mirror . . . I will show you obesity and hideousness.

Oh, is this harsh? Do you not want this to happen to you? Am I unfair? I do do things that will help you. I make it possible for you to stop thinking of emotions that cause you stress. Thoughts of anger, sadness, desperation, and loneliness can cease because I take them away and fill your head with the methodic calorie counting. I take away your struggle to fit in with kids your age, the struggle of trying to please everyone as well. Because now, I am your only friend, and I am the only one you need to please. ¹¹⁷

The behaviors described on the site and encouraged by Ana provide a way to “obey” the internal negative voice driving sufferers to self-punishment for their perceived “badness.” ¹¹⁸ A CNC-predisposed person may recognize on the pages of the pro-ED website the voice that already rings in his or her head and may find there a method to attempt to appease *173 that voice. According to Dr. Ira Sacker, Director of Adolescent Medicine at the Brookdale University Hospital in Brooklyn, New York, the websites provide an atmosphere that “fits neatly into the eating disorder mentality itself.” ¹¹⁹

In analyzing liability, it is worth noting that the webmasters of the pro-ED sites know that their audience is most likely to be susceptible to their message. The dissent in *Herceg*, for example, argued that Hustler knew its audience was in large part adolescent, a group “particularly vulnerable to thrillseeking, recklessness, and mimicry . . . as Hustler knew, the article is dangerously explicit, lethal, and likely to be distributed to those members of society who are most vulnerable to its message.” ¹²⁰ It seems unlikely that the pro-ED webmasters, most of whom craft their sites for an audience that shares views and values similar to their own, would not be aware of their visitors' susceptibility to influence by the content of their sites.

Others think the sites are capable of luring almost anyone into their behavioral tailspin, not just those with psychiatric predispositions as specific and qualifiable as CNC. The forums play host to fierce competitive battles over who can be the most extreme, the most “successful,” the best at her eating disorder. “[I]t's that atmosphere of trying to see who is best that lures in people who wouldn't otherwise be attracted to these behaviors,” says Vivian Hanson Meehan, President of ANAD. ¹²¹

2. The Eggshell Skull Doctrine

Under the longstanding “eggshell skull” doctrine, a negligent defendant is liable for harm resulting from his own negligent conduct even though the harm was aggravated by the particular plaintiff's condition at the time of that negligent conduct. ¹²² Additionally, in the context of this doctrine, severe “psychological vulnerability is on the same footing with physical.” ¹²³

The psychological state of the victim has been considered in other media tort cases. The jury in *Herceg*, for example, considered both psychiatric testimony about the likely effect that an article such as the autoerotic asphyxiation feature would have on normal adolescent readers and evidence concerning the victim's state of mind as he acted, coming to the conclusion that the boy's reaction to the article was “not the result of any clinical *174 psychological abnormality.” ¹²⁴

In holding pro-ED sites liable for the harm caused to site visitors, the eggshell skull doctrine clearly applies in this “psychological vulnerability” context, and a jury would almost certainly find the victim's reaction to the website content colored by a psychological abnormality. As the discussion of causation shows, *supra*, the websites cannot be said to be the sole cause of eating disorders and the related health complications in their visitors, but to the extent that they do exacerbate an existing condition, they could potentially be held liable for some of the harm befallen by the eating disorder sufferers.

In the case of eating disorders, it seems nearly impossible to determine what harm is caused by the websites and what by pre-existing conditions or other sources. Rarely is it so clearly defined as in the case of *Hungry-Hippo*, supra. Nevertheless, “if the fact finder cannot separate injuries caused or exacerbated by the [defendant] from those resulting from a pre-existing condition, the defendant is liable for all such injuries.”¹²⁵ It does not seem that the pre-existing eating disorders that already affect the victims will shield the sites from liability for the harms caused by their content.

G. Contributory Negligence or Assumption of the Risk

One of the arguments that can be made against finding pro-ED websites liable for harms to their visitors is that of contributory negligence. Contributory negligence is conduct on the part of a plaintiff that “falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff’s harm.”¹²⁶ Under such a theory, the defendant can show the contributory negligence of the plaintiff as a partial affirmative defense, and the “liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.”¹²⁷

Many of the pro-ED websites contain warnings or disclaimers about the severity of the content they contain. One popular site warns visitors: “You are the only one responsible for yourself, just as I am responsible only for me. . . . [K]now that this site contains extremities [sic] which may be triggering or harmful if they happen to exceed your boundaries. If you have or are recovering from an eating disorder or self-injury, know that this may not be a safe place for you to be and think carefully before proceeding.”^{*175}¹²⁸ It could be argued that visitors, by entering sites emblazoned with such warnings, are assuming the risk of creating mental distress or exacerbating a pre-existing eating disorder.

Like the pro-ED websites, the autoerotic asphyxiation article in *Herceg* was replete with warnings not to attempt the practice, including an editor’s note before the article, descriptions of victims who had died while engaged in the activity and at least ten different warnings that the practice is lethal.¹²⁹ The *Herceg* court did not consider that case under a theory of negligence, however, so no contributory negligence issue was raised. It is interesting to note, however, that the dissent in *Herceg* suggests no warning could have been expected to have been effective given the expected audience and the nature of the message.¹³⁰

Similarly, the court in *Rice v. Paladin Enterprises, Inc.* also stated that the disclaimers on the cover of a hit man manual were insufficient as warnings and most likely served to make the book even more attractive to its audience. Because the book was unabashedly an instruction manual for murder, the court found the warnings “plainly insufficient in themselves to alter the objective understanding of the hundreds of thousands of words that follow, which, in purely factual and technical terms, tutor the book’s readers in the methods and techniques of killing.”¹³¹ In that context, the court found the warnings “obviously were affixed in order to titillate, rather than ‘to dissuade readers from engaging in the activity [the book] describes. . . .’”¹³²

Like the hit man manual in *Rice*, the pro-ED websites are unapologetically instructive in promoting the behaviors of anorexia and bulimia. The site that carried the warning quoted supra also stated in its disclaimer, “This, mind you, is a pro-ED site and may at times trigger. Hell, much of it is designed specifically to trigger.”¹³³ To paraphrase the *Rice* court, there is nothing even arguably tentative or recondite in the site’s promotion of and instruction in disordered eating behavior,¹³⁴ which may take enough of the punch out of the warnings to render them meaningless or even transform them into incentives to visit the site.

Other sites carry warnings that seem more dissuasive, at least on their face. *Bluedragonfly*, a popular website and forum, greets visitors with a long disclaimer stating in part:

***176 THIS SITE IS NEVER MEANT TO TEACH PEOPLE HOW TO BE ANOREXIC. . . .** I do not want anyone here who thinks they are fine but could stand to “lose a couple for their boyfriends[.]” [] Tips are to give you fresh ideas on how to stay

on track so that you don't fall into a depression and kill yourself--not to teach you how to “not eat[.]” [] If you are anorexic, then you do not need tips on how to not eat. You do not need to be told how to stop eating. You do not need to be motivated. You look in the mirror. Problem solved. This site is for support. . . .¹³⁵

Eating disorder sufferers are often extremely perfectionistic and their low self-esteem makes them desperate for approval and identity.¹³⁶ To them, the warning supra could be read as a dare, a challenge to be the best anorexic or bulimic.¹³⁷

For adolescent females, a feeling of competency is a strong motivator.¹³⁸ It is true that some pro-ED websites greet visitors with disclaimers or contain lists of the health complications and dangers implicit in anorexic and bulimic behaviors, but rather than read these as warnings, young women may see them as the downfalls of incompetent anorexics and bulimics.¹³⁹ Noting that she has not blacked out from malnutrition or suffered dental damage from vomiting can be taken by an eating disorder sufferer as a sign of being “good at” her eating disorder.¹⁴⁰ Alternatively, some symptoms, like amenorrhea, can be seen as signs of success.¹⁴¹

Much as the would-be killers in Rice may have been attracted by the warnings on the cover of the book, and the adolescent male audience of *Hustler*, stirred by feelings of recklessness and rebellion, may have been encouraged by the danger warnings in the autoerotic asphyxiation article, so the mostly female audience of the pro-ED websites may actually be encouraged by the warnings on the websites. The pro-ED website visitors may see warnings as a sign that this material is “hard core”: the toughest, most serious, most advanced information, leading to a feeling of participation on an elite level, which directly feeds the adolescent hunger to differentiate, to feel special, and to prove oneself.¹⁴²

It seems more likely that a court would consider the warnings on pro-^{*177} ED sites to be more comparable to those on the “Hit Man” book in Rice rather than those in the autoerotic asphyxiation article in Herceg. The court in Herceg found that the article could not be considered advocacy because of the many warnings and “detail about all facets of the practice, including the physiology of how it produces a threat to life and the seriousness of the danger of harm.”¹⁴³ While it is true that the pro-ED websites also often contain warnings and descriptions of the dangers of anorexic and bulimic behaviors, they resemble more closely the “Hit Man” book in Rice, unquestioningly intending to instruct their visitors in how to carry out the very behaviors against which they warn.

V. Conclusion

With the increased awareness of pro-ED sites that has come in recent years, it seems certain that the questions discussed here will be brought before a court sooner rather than later. The outcome of such a case will depend heavily on the individual fact pattern of the case, but this paper has attempted to explore the main theories of liability which could potentially be considered.

Many of the claims brought against the pro-ED websites will be barred by the First Amendment. Causation problems seem to weaken claims of incitement and certainly weaken claims of negligence. Plaintiffs will have difficulty proving all the elements in causes of action for intentional infliction of emotional distress and solicitation of suicide. The only way it seems the sites can be held liable is for their harm to minors, since more stringent controls are permitted when preserving the safety of minors.

Freedom of speech is based on the idea that the benefit to society from a free exchange of ideas outweighs the cost of allowing expression of the dangerous ones. “However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”¹⁴⁴ However sickening, misguided, and dangerous the world of pro-ED websites may seem to outsiders, it adds to the marketplace of ideas, providing a perspective to balance that of recovery-based and informational eating disorder websites.

The First Amendment preserves for us the right to consider the pro-ED perspective as well as viewpoints which rail against it. In Eliza Burke's view, despite the tips on how to effect disordered eating behavior, the messages on the pro-ED sites are “not very far removed from many other normalizing techniques that exist in our culture to tell young women that they must control and regulate their bodies in order to be accepted.”¹⁴⁵

***178** While the harm that befalls eating disorder sufferers is indeed terrible, and the exacerbation of those harms via the provision of tips and encouragement can be seen as deplorable, perhaps the First Amendment serves us well in protecting pro-ED websites and allowing them to remain a part of the marketplace of ideas. By analyzing them in the context of our society, perhaps they can show us that the remedy to ameliorate these harms is not legal but social. Until we give young women other paths to acceptance, power, and self-worth beyond successful management of their bodies, some of them may well continue sticking toothbrushes down their throats.

Footnotes

^{a1} J.D., University of Southern California Law Center; B.S. in Journalism, Medill School of Journalism, Northwestern University. The author would like to thank Erwin Chemerinsky for his help and guidance with this article.

¹ Jason Roach, What is Bulimarexia??. at <http://www.geocities.com/WestHollywood/Heights/9351/bulimarexia.htm> (last visited Oct. 26, 2004).

² Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders, Text Revision § 307.1 (4th ed. 2000) [hereinafter DSM] (complete definition of anorexia nervosa includes:

A. Refusal to maintain body weight at or above a minimally normal weight for age and height (e.g., weight loss leading to maintenance of body weight less than 85% of that expected; or failure to make expected weight gain during period of growth, leading to body weight less than 85% of that expected).

B. Intense fear of gaining weight or becoming fat, even though underweight.

C. Disturbance in the way in which one's body weight or shape is experienced, undue influence of body weight or shape on self-evaluation, or denial of the seriousness of the current low body weight.

D. In postmenarcheal females, amenorrhea, i.e., the absence of at least three consecutive menstrual cycles. (A woman is considered to have amenorrhea if her periods occur only following hormone, e.g., estrogen, administration.)

Specify type:

Restricting Type: during the current episode of Anorexia Nervosa, the person has not regularly engaged in binge-eating or purging behavior (i.e., self-induced vomiting or the misuse of laxatives, diuretics, or enemas).

Binge-Eating/Purging Type: during the current episode of Anorexia Nervosa, the person has regularly engaged in binge-eating or purging behavior (i.e., self-induced vomiting or the misuse of laxatives, diuretics, or enemas).).

³ DSM, supra note 2, at § 307.51 (complete definition of bulimia nervosa includes:

A. Recurrent episodes of binge eating. An episode of binge eating is characterized by both of the following:

(1) eating, in a discrete period of time (e.g., within any 2-hour period), an amount of food that is definitely larger than most people would eat during a similar period of time and under similar circumstances; and

(2) a sense of lack of control over eating during the episode (e.g., a feeling that one cannot stop eating or control what or how much one is eating).

B. Recurrent inappropriate compensatory behavior in order to prevent weight gain, such as self-induced vomiting; misuse of laxatives, diuretics, enemas, or other medications; fasting; or excessive exercise.

C. The binge eating and inappropriate compensatory behaviors both occur, on average, at least twice a week for 3 months.

D. Self-evaluation is unduly influenced by body shape and weight.

E. The disturbance does not occur exclusively during episodes of Anorexia Nervosa.

Specify type:

Purging Type: during the current episode of Bulimia Nervosa, the person has regularly engaged in self-induced vomiting or the misuse of laxatives, diuretics, or enemas.

Nonpurging Type: during the current episode of Bulimia Nervosa, the person has used other inappropriate compensatory behaviors, such as fasting or excessive exercise, but has not regularly engaged in self-induced vomiting or the misuse of laxatives, diuretics, or enemas.).

4 Id.

5 Id.

6 Nat'l Ass'n of Anorexia Nervosa and Associated Disorders, at [http:// www.anad.org/site/anadweb/content.php?type=1&id=6982](http://www.anad.org/site/anadweb/content.php?type=1&id=6982) (last visited Oct. 26, 2004) [hereinafter ANAD].

7 Id.

8 Id.

9 WebMD, Anorexia Nervosa: What Happens, at [http:// my.webmd.com/hw/health_guide_atoz/aa32469.asp](http://my.webmd.com/hw/health_guide_atoz/aa32469.asp) (last visited Oct. 26, 2004).

10 WebMD, Complications of Bulimia Nervosa, at [http:// my.webmd.com/hw/health_guide_atoz/ty6336.asp?navbar=hw49747](http://my.webmd.com/hw/health_guide_atoz/ty6336.asp?navbar=hw49747) (last visited Oct. 26, 2004).

11 Id.; Anorexia Nervosa: What Happens, *supra* note 9.

12 ANAD, *supra* note 6.

13 Id.

14 Id.

15 Amy P. Hendel, R-PAC, Websites That Help You ‘Perfect’ an Eating Disorder, at http://www.healthgal.com/articles_tmpl.php?art_name=eating+disorders (last visited March 8, 2005).

16 “ED” is an abbreviation of “eating disorder” and will be used hereinafter. “Ana” is a popular stylization of the word “anorexia” used often on pro-ED websites.

17 “Blog” is short for Web log, which is a popular and fairly personal content form on the Internet. Like an open diary, it chronicles what a person wants to share with the world on an almost daily basis. BuzzWhack’s Buzzword Compliant Dictionary, at <http://www.buzzwhack.com/buzzcomp/indac.htm> (last visited Oct. 27, 2004).

18 Jessica Reaves, Anorexia Goes High Tech, Time Online (July 31, 2001), at <http://www.time.com/time/health/article/0,8599,169660,00.html>.

19 “Thinspiration” is the name given to supposedly “inspiring” photographs of extremely thin celebrities and fashion models. Some sites show only mainstream celebrities and models; others have more extreme sections with titles like “Hardcore Bones” that show severely underweight, sickly women, usually not celebrities.

20 Fat Like Me: Binge/Purge Foods, at [http:// jaoui.lunarpages.com/bpfoods.html](http://jaoui.lunarpages.com/bpfoods.html) (last visited Oct. 27, 2004) (on file with author).

21 See, e.g., Ana’s Underground Grotto: Tips, Tricks & Techniques, at <http://www.plagueangel.net/grotto/id4.html> (last visited Oct. 27, 2004); Fat Like Me: Safe Foods, at <http://jaoui.lunarpages.com/foods.html> (last visited Oct. 27, 2004); Tips and Excuses, at <http://www.freewebs.com/littleanashouse/tipsandexcuses.htm> (last visited May 12, 2004) (on file with author).

22 What is Pro-Ana?, at <http://stop-pro-ana.com/whatis3.html> (last visited Oct. 27, 2004).

23 Ana’s Underground Grotto: Philosophy: There Are No Victims Here, at <http://www.plagueangel.net/grotto/id1.html> (last visited Oct. 27, 2004) [hereinafter There Are No Victims Here].

24 Rextia-World, at <http://dreamsofthin.websitegalaxy.com> (website offline as of April 2004).

- 25 Elanor Taylor, *Totally In Control*, Social Issues Research Centre, Oxford, UK (2002), at http://www.sirc.org/articles/totally_in__control.shtml (last visited Oct. 27, 2004).
- 26 *There Are No Victims Here*, supra note 23.
- 27 Eliza Burke, *Pro-Anorexia and the Internet: A Tangled Web of Representation and (Dis)Embodiment* 8, presented at the Internet, Media and Mental Health Conference (Apr. 21, 2004) (transcript on file with author) (copyright pending).
- 28 *Id.*
- 29 *Tips, Tricks, and Ideas* at <http://angelana.bravehost.com/tips.html> (last visited March 25, 2005).
- 30 *Id.*
- 31 Chris Bushnell, *The Skeleton Crew: Inside the Pro-anorexia Movement's Underground Web Campaign*, *The Wave Magazine*, Vol 3, Issue 2 (Jan. 16-29, 2003) available at <http://www.thewavemag.com/pagegen.php?pagename=article&articleid=22888> (last visited Oct. 27, 2004) [hereinafter *The Skeleton Crew*].
- 32 *The Skeleton Crew*, supra note 31.
- 33 *Id.*
- 34 *Guestbook: The Anorexic Files*, at <http://www.gloomday.net/theanorexicfiles> (website offline as of October 27, 2004).
- 35 Taylor, supra note 25.
- 36 *Id.*
- 37 Patrick Davies & Zara Lipsey, *Ana's Gone Surfing*, 16 *The Psychologist* 424, (2003), available at <http://www.bps.org.uk/publications/thepsychologist/0803davi.pdf> (last visited Oct. 27, 2004).
- 38 Burke, supra note 27.
- 39 See *id.*
- 40 *Id.*
- 41 *Dying to Be Thin*, (PBS television broadcast, Dec. 12, 2000).
- 42 E-mail from Hungry-Hippo, 22-year-old bulimic, to Annika K. Martin (May 3, 2004 06:15:08 EST) (on file with author).
- 43 Davies & Lipsey, supra note 37, at 425.
- 44 Taylor, supra note 25.
- 45 Reaves, supra note 18.
- 46 *Id.*
- 47 Bushnell, supra note 32.
- 48 *Id.*
- 49 Reaves, supra note 18.
- 50 Jamie Doward & Tom Reilly, *How Macabre World of the Web Offers Fresh Insight on Anorexics*, *The Observer*, Aug. 17, 2003, at <http://society.guardian.co.uk/internet/story/0,8150,1020959,00.html>.
- 51 *Id.*

- 52 [Herceg v. Hustler](#), 814 F.2d 1017 (5th Cir. 1987).
- 53 *Id.*
- 54 *Id.*
- 55 395 U.S. 444 (1969). (Under *Brandenburg* the plaintiff would have to show that: 1. Autoerotic asphyxiation is a lawless act; 2. Hustler advocated this act; 3. Hustler's publication went even beyond “mere advocacy” and amounted to incitement; and 4. The incitement was directed to imminent action.)
- 56 [Herceg](#), 814 F.2d at 1022.
- 57 *Id.* at 1023.
- 58 *Id.*
- 59 [N]othing's gonna stop me from floating: Tips Tricks, at <http://www11.brinkster.com/starvation/tips.html> (last visited Jan. 16, 2005).
- 60 “Tips and Excuses,” Little Ana's House, at <http://www.gloomofday.net/theanorexicfiles> (website offline as of October 27, 2004).
- 61 E-mail from Hungry-Hippo, *supra* note 42.
- 62 Tips and Excuses, *supra* note 21.
- 63 David A. Anderson, *Tortious Speech*, 47 Wash. & Lee L. Rev. 71, 74 (1990).
- 64 [Herceg v. Hustler](#), 814 F.2d 1017, 1023 (5th Cir. 1987).
- 65 See *id.* at 1021.
- 66 ANAD, *supra* note 6.
- 67 See, e.g., *Anorexia Nervosa: What Happens*, *supra* note 9; *Complications of Bulimia Nervosa*, *supra* note 10.
- 68 See, e.g., [DeFilippo v. Nat'l Broad. Co., Inc.](#), 446 A.2d 1036 (R.I. 1982) (holding that the First Amendment barred recovery against broadcaster in action arising out of a 13-year-old boy's death by hanging after he had watched a professional stuntman stage a mock hanging of Johnny Carson on television).
- 69 [Rice v. Paladin Enters., Inc.](#), 128 F.3d 233, 265 (4th Cir. 1997).
- 70 Restatement (Second) of Torts § 46(1) (1965).
- 71 *Id.* at cmt. d. Extreme and outrageous conduct (1965).
- 72 *Id.*
- 73 See Russell L. Wald, *Am. Jur. Proof of Facts 2d Intentional Infliction of Emotional Distress* § 2 (2003).
- 74 [Hustler Magazine, Inc. v. Falwell](#), 485 U.S. 46 (1988).
- 75 ANAD, *supra* note 6.
- 76 [In re Ryan N.](#), 92 Cal.App.4th 1359, 1375 (2001).
- 77 *Fat Like Me*, at <http://jaoui.lunarpages.com/index2.html> (last visited Oct. 27, 2004) (on file with author).
- 78 *Laxatives, Diet Pills, Diuretics and Eating Disorders*, at http://www.healthyplace.com/Communities/Eating_Disorders/peacelovehope/laxatives.html (last visited Feb. 22, 2005).
- 79 “Tips,” *The Anorexic Files 5.0*, *supra* note 60.

- 80 *In re Ryan N.*, 92 Cal.App.4th at 1380. (“[The statute] criminalizes aiding, advising or encouraging a suicide only when the victim actually kills him or herself.”)
- 81 Reaves, *supra* note 18.
- 82 *Id.*
- 83 See, e.g., *Ginsberg v. N.Y.*, 390 U.S. 629 (1968).
- 84 *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975).
- 85 See, e.g., *Ginsberg*, 390 U.S. 629 (1968) (holding that statute banning the sale of obscenity to minors did not invade freedom of expression or other freedoms constitutionally guaranteed to minors and was not void for vagueness); *Osborne v. Ohio*, 110 S.Ct. 1691 (1990) (holding in part that prohibition against possession and viewing of child pornography complies with the First Amendment and is not unconstitutionally overbroad); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (holding in part that regulations requiring retailers to place tobacco products behind counters and requiring customers to have contact with salesperson before they are able to handle such products did not violate the First Amendment).
- 86 *State v. Weidner*, 611 N.W.2d 684 (Wis. 2000).
- 87 “Under 18? Please Read,” posting to The Thin Pages Message Board (Feb. 4, 2003) at <http://www.thinpages.com/index.php?act=ST&f=2&t=1506&s=40effe721ecb569e88ad93bca1a9d76b>.
- 88 See, e.g., The Thin Pages at <http://www.thinpages.com> (last visited Oct. 27, 2004) (on file with author).
- 89 Reaves, *supra* note 18.
- 90 Davies & Lipsey, *supra* note 37, at 425.
- 91 See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997).
- 92 *PSINet, Inc. v. Chapman*, 362 F.3d 227, 252 (4th Cir. 2004) (Niemeyer, J. dissenting).
- 93 *Herceg v. Hustler*, 814 F.2d 1017, 1024 (5th Cir. 1987).
- 94 *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 247 (4th Cir. 1997).
- 95 ANAD, *supra* note 6; Central Intelligence Agency, The United States, The World Factbook (2003), available at <http://www.cia.gov/cia/publications/factbook/geos/us.html> (last visited Oct. 27, 2004) (noting that eight million Americans suffer from eating disorders; the U.S. population was 290,342,554 as of June 2003).
- 96 “Prevention: Causes: Society: The Media,” at <http://www.something-fishy.org/prevention/society.php> (last visited Jan. 16, 2005).
- 97 Peggy Claude-Pierre, *The Secret Language of Eating Disorders* 37 (Vintage Books 1997).
- 98 *Id.* at 38.
- 99 *Id.* at 36.
- 100 *Id.* at 54.
- 101 *Id.* at 48.
- 102 Prevention: Causes: Society: The Media, *supra* note 96.
- 103 Claude-Pierre, *supra* note 97, at 41.
- 104 Interview with Susan Barstis, Ph.D., in Los Angeles, Cal. (Apr. 30, 2004).
- 105 *Id.*

- 106 Id.
- 107 Id.
- 108 Burke, *supra* note 27, at 7.
- 109 Interview with Susan Barstis, Ph. D., *supra* note 104.
- 110 Id.
- 111 Hendel, *supra* note 15.
- 112 Bonnie Rothman Morris, A Disturbing Growth Industry: Web Sites that Espouse Anorexia, N.Y. Times, June 23, 2002, at section 15, page 8.
- 113 Davies & Lipsey, *supra* note 37, at 424.
- 114 Hendel, *supra* note 15.
- 115 Doward & Reilly, *supra* note 50 (quoting Steve Bloomfield, spokesman for the Eating Disorder Association, UK).
- 116 Claude-Pierre, *supra* note 97, at 37.
- 117 Letter from Ana, at <http://www.anycities.com/user1/funhousemirrors/noangels/letterana.html> (n.d.) (on file with author)..
- 118 Interview with Susan Barstis, Ph.D., *supra* note 104.
- 119 Morris, *supra* note 112, at P 6 (quoting Dr. Ira Sacker).
- 120 *Herceg v. Hustler*, 814 F.2d 1017, 1026-27 (5th Cir. 1987).
- 121 Bushnell, *supra* note 32.
- 122 See, e.g., *Vosburg v. Putney*, 80 Wis. 523 (1891); Restatement (Second) of Torts § 46(1) (1965).
- 123 *Brackett v. Peters*, 11 F.3d 78, 81 (7th Cir. 1993); see, e.g., *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997); *Lutz v. United States*, 685 F.2d 1178(9th Cir. 1982).
- 124 See *Herceg*, 814 F.2d at 1021.
- 125 *Stevens v. Bangor & Aroostook R.R. Co.*, 97 F.3d 594, 603 (1st Cir. 1996).
- 126 Restatement (Second) of Torts, § 463.
- 127 *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1232 (Cal. 1975).
- 128 Disclaimer and Trigger Warning, Fat Like Me, at <http://jaonii.lunarpages.com/disclaim.html> (last visited Feb. 19, 2005) (on file with author).
- 129 *Herceg v. Hustler*, 814 F.2d 1017, 1019 (5th Cir. 1987).
- 130 See *id.* at 1026 (Jones, J. concurring and dissenting).
- 131 *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 263 n.10 (4th Cir. 1997).
- 132 Id.
- 133 Disclaimer and Trigger Warning, *supra* note 128.
- 134 *Rice*, 128 F.3d at 263.

- 135 Bluedragonfly: The Mission Statement, at [http:// www.bluedragonfly.org/](http://www.bluedragonfly.org/) (last visited May 13, 2004) (emphasis in original).
- 136 See, e.g., Claude-Pierre, *supra* note 97, at 37.
- 137 Reaves, *supra* note 18.
- 138 Interview with Susan Barstis, Ph.D., *supra* note 104.
- 139 *Id.*
- 140 *Id.*
- 141 See, e.g., Something Fishy Message Board, at [http:// www.somethingfishy.org/board.php](http://www.somethingfishy.org/board.php) (last visited Oct. 27, 2004).
- 142 Interview with Susan Barstis, Ph.D., *supra* note 104.
- 143 [Herceg v. Hustler](#), 814 F.2d 1017, 1023 (5th Cir. 1987).
- 144 [Gertz v. Robert Welch, Inc.](#), 418 U.S. 323, 340 (1974).
- 145 E-mail from Eliza Burke, School of Social and Political Inquiry, Monash University, Australia, to Annika K. Martin (May 11, 2004, 01:03) (on file with author).

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