CRIME-FACILITATING SPEECH

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This article includes the URLs of many crime-facilitating Web pages that I give as examples. All these URLs can be found using a quick google search, so I do not believe that my including the URLs will materially help any would-be criminal readers.

[Note to workshop readers:

(1) I realize this article is very long. I'll probably try to split out the "Speech Brigaded With Action" section (III.B), "Laws of General Applicability" section (III.C.2), and "Distinctions Based on the Harms the Speech Facilitates" section (IV.D) as separate short pieces; and I'll try to tighten some of the other sections. I'd love to have people's advice on what can be cut, shortened, or carved out into a separate article.

(2) If you want a 60-page subset, try Parts I, II, IV.A.2-IV.A.3.c, IV.B, V, and VI (pp. 3-24, 47-64, 71-86, 107-116).

(3) I'd especially like people's advice on the commentary vs. entertainment and curiosity distinction (see Part IV.A.3.c) and the serious harm exception (see Part V.B); I have specific questions noted there, in brackets).

Thanks for your time,

Eugene]

I. INTRODUCTION: THE SCOPE OF THE CRIME-FACILITATING SPEECH PROBLEM

When should speech lose its First Amendment protection because it provides information that makes it easier for people to commit crimes, torts, or other harms? Consider:

(a) A textbook,[1] magazine, Web site, or seminar describes how people can make bombs (conventional[2] or nuclear[3]), make drugs,[4] painlessly and reliably commit suicide,[5] commit contract murder,[6] engage in sabotage,[7] evade taxes,[8]

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[1] For examples of chemistry textbooks being used for bombmaking or drugmaking information, see, *e.g.*, Keay Davidson, *Bombs Easy, But Risky, to Make; Ingredients Are Common, Recipes Available*, S.F. EXAMINER, Apr. 20, 1995, at A-12; David Unze, *Suspected Meth Lab Found in Search Near Paynesville*, ST. CLOUD TIMES, Dec. 6, 2000.

[2] *See* 18 U.S.C. § 842(p)(1) (prohibiting distribution of "information pertaining to . . . the manufacture or use of an explosive," "destructive device," or "weapon of mass destruction" "with the intent that the . . . information be used . . . in furtherance of . . . a Federal crime of violence"); *id.* § 842(p)(2) (prohibiting distribution of such materials "to any person" "knowing that such person intends to use the . . . information . . . in furtherance of[] an activity that constitutes a Federal crime of violence"); Plea Agreement, United States v. Austin, case no. CR-02-884-SVW (C.D. Cal. Sept. 26, 2002) (describing Web site operator's guilty plea to a violation of 18 U.S.C. § 842(p)(2)(A)).

[3] *See* United States v. Progressive, Inc., 486 F. Supp. 5 (W.D. Wis. 1979) (enjoining the publication of article describing how a hydrogen bomb could be constructed), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979); Atomic Energy Act, 42 U.S.C. §§ 2014, 2274 (prohibiting revealing data concerning nuclear weapons, if the speaker has reason to believe that revealing the information will harm the United States or help any foreign nation).

[4] *See, e.g.*, S. 1428, 106th Cong., 1st Sess., sec. 9, which was drafted much like 18 U.S.C. § 842(p) (see *supra* note 2), but focused on "controlled substance[s]" and drug crimes rather than explosives and crimes of violence.

[5] *See* Rebecca Sinderbrand, *Point, Click and Die*, NEWSWEEK, June 30, 2003, at 28 (describing a

or more effectively resist arrest during civil disobedience.[9]

(b) A thriller or mystery novel does the same, for the sake of realism.[10]

(c) A Web site or a computer science article explains how one can effectively encrypt messages (which can help stymie law enforcement),[11] how one can illegally decrypt encrypted copyrighted material,[12] or what security flaws ex-

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woman's family suing the operator of the suicide information Web site that the woman seemingly used to learn how to hang herself); *id*. (quoting prosecutor saying that "When we can definitely prove that someone assisted a suicide, we'll prosecute, no matter what form that help takes"); David Wharton, *Librarians Rely on Book Sense, Reviews in Stocking Shelves*, L.A. TIMES, Dec. 25, 1986, § 4, at 34 (describing a library's deciding not to order a suicide manual because of a warning from the city attorney about the risk of liability); Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech*, 34 ARIZ. L. REV. 231, 286 n.357 (1992) (suggesting that suicide manual publishers might be liable under current tort law, though concluding this was unlikely).

[6] *See* Rice v. Paladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 1997) (holding that the publisher of a murder manual may be held liable for crimes the manual facilitated).

[7] *See* Scales v. United States, 367 U.S. 203 (1960) (affirming Scales' conviction for being a member of the Communist Party with the intent of overthrowing the government, based in small part on his organizing "party training schools" where, among other things, instructors taught people "how to kill a person with a pencil"); Dennis v. United States, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting) (endorsing constitutionally of suppressing "teaching of methods of terror and other seditious conduct," such as "the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like"); 18 U.S.C. § 231(a) (prohibiting "teach[ing] or demonstrat[ing] to any other person the use . . . or making of any firearm or explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed" in civil disorders that obstruct commerce or federal functions); United States v. Featherston, 461 F.2d 1119 (5th Cir. 1972) (upholding, citing *Dennis*, the conviction of black militants for teaching people how to make explosives for "the coming revolution"); *see also* Earth Liberation Front, *Setting Fires with Electrical Timers*, available at *http://www.earthliberationfront.com/main.shtml* (describing how one can commit arson, and labeling itself "The politics and practicalities of arson").

[8] *Compare, e.g.*, United States v. Kelley, 769 F.2d 215, 216-17 (4th Cir. 1985); United States v. Freeman, 761 F.2d 549 (9th Cir. 1985); United States v. Buttorff, 572 F.2d 619, 623 (8th Cir. 1978); United States v. Schiff, No. CV-S-03-0281-LDG, order item 5, at 34 (June 13, 2003) *with* United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983).

[9] *Cf.* Dana Hull, *Anti-War Activists Plan To Disrupt Daily Activities If War Breaks Out*, S.J. MERCURY-NEWS, Feb. 25, 2003 ("Civil disobedience advice is passed from activist to activist, can be found on the Internet, and is dispensed at training sessions. Among the tips: It is easy to get arrested if your muscles are tense, but harder for cops to drag you away if you go limp."). *See* State v. Bay, 721 N.E.2d 421 (Ohio App. 1998) (holding that going limp to make it harder for the police to take you away constitutes resisting arrest).

[10] [Cite.]

[11] Bernstein v. United States Dep't of State, 176 F.3d 1132 (9th Cir. 1999), *reh'g en banc granted*, 192 F.2d 1308 (9th Cir. 1999), *appeal later dismissed*; Karn v. United States Dep't of State, 925 F. Supp. 1 (D.D.C. 1996).

[12] *See* sources cited *infra* note 223 (describing threatened lawsuits based on such speech). *Cf.* National Federation of the Blind, Inc. v. Loompanics Enterps., Inc., 936 F. Supp. 1232 (D. Md. 1996) (holding publisher of a how-to book on fraudulent trademark infringement liable for contributory trademark infringement).

ist in a prominent computer operating system.[13]

(d) A newspaper publishes the name of a witness to a crime, thus making it easier for the criminal to intimidate or kill the witness.[14]

(e) A leaflet or a Web site identifies boycott violators, abortion providers, strikebreakers, police officers, or registered sex offenders and perhaps even their home addresses.[15]

(f) A Web site posts people's social security numbers or credit card numbers, or the passwords to computer systems.[16]

(g) A newspaper publishes the sailing dates of troopships,[17] secret military plans, or the names of undercover agents in enemy countries.[18]

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[13] *See* Government's Motion for Reversal of Conviction, United States v. McDanel, CA No. 03-50135, 6-7 & n.3 (Oct. 14, 2003) (taking the position that distributing such information might well violate federal computer crime law, 18 U.S.C. §§ 1030(a)(5)(A), 1030(e)(8), but only if the distributor intended to facilitate security violations, rather than just intending to urge people to fix the problem); Letter from Kent Gerson, representing Hewlett-Packard, to SnoSoft (July 29, 2002) (threatening Digital Millennium Copyright Act and the Computer Fraud and Abuse Act liability based on SnoSoft's publication of information about a security bug); Declan McCullagh, *HP Backs Down on Copyright Warning*, C-NET NEWS.COM (Aug. 1, 2002) (describing the SnoSoft incident and saying that HP had withdrawn its threat); Ethan Preston & John Lofton, *Computer Security Publications: Information Economics, Shifting Liability and the First Amendment*, 34 WHITTIER L. REV. 71 (2002) (discussing this, and giving many examples); *see infra* notes 71-73 and accompanying text.

[14] *See* Times Mirror Co. v. Superior Court, 198 Cal. App. 3d 1420 (1988) (holding that liability may be imposed in such a situation, under the disclosure of private facts tort, even when the newspaper isn't intending to try to facilitate crime); Capra v. Thoroughbred Racing Ass'n, 787 F.2d 463 (9th Cir. 1986) (same); Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982) (same).

[15] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (rejecting lawsuit based partly on distribution of boycott violators' names); Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc) (allowing lawsuit based partly based on distribution of abortion providers' names and addresses, though focusing mostly on other material in the defendants' works); City of Kirkland v. Sheehan, 2001 WL 1751590 (Wash. Super.) (refusing to enjoin distribution of police officers' names and addresses); N.J. Dep't of Criminal Justice, *Megan's Law Rules of Conduct, http://www.state.nj.us/lps/dcj/megan/citizen.htm* (providing that people who receive flyers containing information on released sex offenders may not communicate the information to others, on pain of possible "court action or prosecution").

[16] *See* CAL. CIV. CODE § 1798.85(a)(1) (generally prohibiting "intentionally communicat[ing] or otherwise mak[ing] available to the general public" "an individual's social security number"), *enacted by* Cal. S.B. No. 25, ch. 907 (Oct. 12, 2003); City of Kirkland v. Sheehan, 2001 WL 1751590 (Wash. Super.) (enjoining the publication of social security numbers); KAN. STAT. ANN. § 21-3755(c)(1) (prohibiting all unauthorized disclosure of computer passwords, again without a requirement of an intent to facilitate crime); MISS. CODE ANN. 97-45-5(1)(b) (same); GA. CODE ANN. § 16-9-93(e) (same, but only when damage results).

[17] *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) (suggesting that the government could enjoin the "publication of the sailing dates of transports or the number and location of troops").

[18] *See* 50 U.S.C. § 421(c) (prohibiting engaging in "a pattern of activities intended to identify and expose covert agents . . . and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States"); *see also* 18 U.S.C. § 798 (prohibiting the publication of various kinds of classified information).

(h) A Web site or a newspaper article names or describes a Web site that contains copyright-infringing material.[19]
(i) A Web site sells or gives away research papers, which helps students cheat.[20]
(j) A magazine describes how one can organize one's tax return to minimize the risk of a tax audit,[21] share music files while minimizing the risk of being sued as an infringer,[22] or better conceal one's sexual abuse of children.[23]
(k) A newspaper publishes information about a secret subpoena,[24] a secret wire-

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[19] *See, e.g.*, Arista Records, Inc. v. MP3Board, Inc., No. 00 CIV. 4660, 2002 WL 1997918, at *4 (S.D.N.Y. Aug. 29, 2002) (holding that publisher of a link to an infringing site may be held contributorily liable for the infringement that the link facilitates); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1293-96 (D. Utah 1999) (enjoining defendants from "post[ing] on defendants' website, addresses to websites that defendants know, or have reason to know, contain the material alleged to infringe plaintiffs' copyright"); 17 U.S.C. § 512(d) (providing a safe harbor from damages liability to people who link or refer to infringing material, but only if they didn't know it was infringing); *see also* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 455–58 (2d Cir. 2001) (enjoining publication of links to page that contained material which violated the Digital Millennium Copyright Act). These cases all involved direct links, but including the URL even as plain text—rather than a link on which one can just click—would trigger copyright liability just as much as the clickable links would.

[20] Academic cheating is likely a form of fraud, and is tortious or perhaps even criminal (though of course the student is rarely ever brought to court). *Cf., e.g.*, Trustees of Boston Univ. v. ASM Communications, Inc., 33 F. Supp. 2d 66 (D. Mass. 1988) (dismissing a RICO case against a term paper mill on statutory grounds); United States v. International Term Papers, Inc., 477 F.2d 1277 (1st Cir. 1973) (granting an injunction against such a mill on the grounds that the mill used the mails to "assist[] students to make false representations to universities"). The question is whether distributing research essays knowing or intending that they be used for plagiarism should be constitutionally unprotected; the plagiarism itself—students' submitting others' works as their own—is clearly unprotected, because it involves a knowingly false statement of fact.

[21] *See, e.g.*, WorldWideWeb Tax, *How to Avoid an IRS Audit?*, *http://www.wwwebtax.com/audits/audit_avoiding.htm* (describing "a host of strategies you can use to ensure you aren't selected for an IRS tax audit"). Of course, this information is useful to many law-abiding taxpayers who want to save themselves the hassle and expense of an audit. But it's also useful to the not so law-abiding.

[22] *See, e.g.*, Electronic Frontier Foundation, *How Not To Get Sued by the RIAA for File-Sharing*, *http://eff.org/IP/P2P/howto-notgetsued.php* ("The RIAA appears to be targeting subpoenas at users who allow their computers to be 'Supernodes' . . . . In order to further reduce the risk of . . . being sued . . ., we recommend that you make sure your computer is not being used as a Supernode.").

[23] *Cf.* Melzer v. Board of Ed., 336 F.3d 185, 190 (2nd Cir. 2003) (describing such an article published by North American Man-Boy Love Association activists, though not deciding whether it was unprotected).

[24] *See* 50 U.S.C. § 1861(d) (added by the USA Patriot Act) (prohibiting disclosure by any person—not just government agents—of the issuance of certain document production orders involved in "investigation[s] to obtain foreign intelligence information . . . or to protect against international terrorism or clandestine intelligence activities"); 18 U.S.C. § 3486 (same as to investigations of health care violations and child abuse, though only if a court so orders, and only for "up to 90 days"); WASH. STAT. § 19.86.110 (same as to investigations of unfair or anticompetitive business practices, though only if a court so orders but without a time limit); *see also* MINN. STAT. ANN. § 609.4971 (prohibiting the disclosure of certain subpoenas "with intent to obstruct, impede, or prevent the investigation").

tap,[25] or a secret grand jury investigation,[26] and the suspects thus learn they are being watched.

(l) A master criminal advises a less experienced friend on how best to commit a crime, or on how a criminal gang should maintain discipline and power.[27]

(m) A supporter of sanctuary for El Salvadoran refugees tells a refugee the location of a hole in the border fence, and the directions to a church that would harbor him.[28]

(n) A lookout—or a stranger, who has no relationship with the criminal but who dislikes the police—warns a criminal that the police are coming and it's time to run.[29]

(o) A driver flashes his lights to warn other drivers of a speed trap.[30]

(p) When any of the speech mentioned above is suppressed, a self-described anticensorship Web site provides a copy, not because its operators intend to facilitate crime, but because they want to protest and resist speech suppression.[31]

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[25] *See* TEX CODE CRIM. PROC. Art 18.21, secs. 4, 7, 8 (prohibiting disclosure of searches or subpoenas "in certain cases involving access to stored electronic communications," if the court determines that such a revelation may "endanger[] the life or physical safety of an individual," lead to "flight from prosecution," "destruction of or tampering with evidence," or "intimidation of a potential witness," or "otherwise seriously jeopardize[e] an investigation or unduly delay[] a trial"); 11 DEL. CODE § 2412(a) (prohibiting all disclosure by any person "of an authorized interception or pending application . . . in order to obstruct, impede or prevent such interception"); 18 U.S.C. § 2332(d) (likewise). *Cf.* United States v. Aguilar, 515 U.S. 593, 606 (1995) (upholding conviction for disclosure of a secret wiretap where the discloser was a federal judge who had "voluntarily assumed a duty of confidentiality").

[26] [Cite.]

[27] *Compare* McCoy v. Stewart, 282 F.3d 626 (9th Cir. 2002) (holding that such speech is protected) *with* Stewart v. McCoy, 123 S. Ct. 468 (2002) (Stevens, J., respecting the denial of certiorari) (suggesting that perhaps such speech shouldn't be protected).

[28] *See* United States v. Aguilar, 883 F.2d 662, 685 (9th Cir. 1989) (upholding conviction for aiding and abetting illegal immigration based on such speech), *superseded by statute as noted in* United States v. Gonzalez-Torres, 273 F.3d 1181 (9th Cir. 2001).

[29] People v. Llanos, 77 N.Y.2d 866 (1991) (holding defendant not liable in such a case, but only because the relevant statute didn't cover helping people escape from the police); *see also* People v. Llanos, 151 A.D.2d 128, 131 (1989) (noting that "the record here is devoid of any proof linking defendant to the apartment occupants").

[30] This is tantamount to the driver acting as a lookout, *see supra* note 29: It lets the other drivers drive illegally before and after the speed trap without getting caught, because they're warned to obey the law when the police are watching. *See* State v. Walker, No. I-9507-03625 (Tenn. Williamson Cty. Cir. Ct. Nov. 13, 2003) (accepting a First Amendment defense in such circumstances); C.G. Wallace, *Speed Trap Warning Sparks Free Speech Battle in Utah City*, CHATTANOOGA TIMES FREE PRESS, Mar. 19, 2000, at A8 (noting prosecution of brothers who were prosecuted for obstruction of justice for "ma[king] a sign . . . that read 'Radar Trap, 25 mph' and [holding] it up along the road"); *cf.* Commonwealth v. Beachey, 728 A.2d 912 (Pa. 1999) (considering a similar case, but not dealing with the First Amendment question).

[31] *See, e.g.*, Mike Godwin, *The Net Effect*, AM. LAW., Feb. 2000 (describing how people sometimes put up mirror sites for this purpose); sources cited *infra* notes 300-301.

These are not incitement cases: The speech isn't persuading or inspiring some readers to commit bad acts. Rather, the speech gives some readers information that helps them commit bad acts—acts that they likely already want to commit.[32]

Surprisingly, the Supreme Court has never squarely confronted this issue,[33] and lower courts and commentators have only recently begun to seriously face it.[34] And getting the answer right is quite important: Because these cases are structurally similar—a similarity that hasn't yet been generally recognized—a decision about one of them will affect the results in others. If one of these restrictions is upheld (or struck down), others may be unexpectedly validated (or invalidated) as well.

In this article, I'll try to analyze the problem of crime-facilitating speech,[35] a term I define to mean

(1) any speech that,
(2) intentionally or not,
(3) communicates information that
(4) makes it easier for some listeners or readers to (a) commit crimes or other harmful acts (such as torts, hostile acts of foreign nations, or possibly suicide),[36] or (b) to get away with committing crimes or harmful acts.[37]

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[32] As Parts II.A, IV.E, and V.A explain, incitement cases differ from crime-facilitating speech cases enough that it is useful to analyze them as separate First Amendment categories. Crime-inciting speech and crime-facilitating speech are potentially valuable in somewhat different ways, and cause harm in somewhat different ways.

Likewise, crime-facilitating speech cases are different from copycat-inspiring cases, where movies or news accounts lead to copycat crimes, but don't actually provided criminals with any useful and nonobvious information about how to commit those crimes. The issues raised by the copycat cases are, I think, adequately addressed by the incitement caselaw. [Cite cases.]

[33] *See infra* Part III.A.

[34] The most extensive treatments of this question are *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), and U.S. DEP'T OF JUSTICE, 1997 REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION. KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989), an influential treatment of some related issues, spends only several paragraphs on this. *Id.* at 244-45, 281-82.

[35] I borrow the term from the concept of "criminal facilitation," a crime recognized in some jurisdictions. *See, e.g.*, N.Y. PENAL CODE § 115.00 ("A person is guilty of criminal facilitation . . . when, believing it probable that he is rendering aid . . . to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony."); *see also* ARIZ. REV. STAT. ANN. § 13-1004; 9 GUAM CODE ANN. § 4.65; KY. REV. STAT. § 506.080; N.D. CENTURY CODE § 12.1-06-02; TENN. CODE ANN. § 39-11-403. My focus in this article, though, is on all crime-facilitating speech, whether it's punished by one of these crime facilitation statutes or by some other law.

[36] I include torts as well as crimes because both are generally seen as actions that are potentially wrong to help people commit. Conduct that is only tortious and not criminal tends to be less harmful than criminal conduct, so there may be less of a case for restricting speech that facilitates such noncriminal behavior. But I think it's better to consider this as a potential distinction based on how harmful the facilitated conduct is, *see infra* Part IV.D, rather than to rule out tort-facilitating speech at the start.

[37] Helping criminals get away with crimes is as harmful as helping them commit them; among

I hope to ultimately provide (in Part V) a potential solution. My main goal, though, is to make some observations about the category that may be useful even to those who disagree with my suggestion.

The first observation is the one with which this article began: *Many seemingly disparate cases are linked because they involve crime-facilitating speech*, so the decision in one such case may affect the decision in others. The crime-facilitating speech problem looks different if one is just focusing on the *Hit Man* contract murder manual than if one is looking at the broader range of cases. It may, for instance, be appealing to categorically deny First Amendment protection to murder manuals or to bomb-making information, on the grounds that the publishers know that the works may help others commit crimes.[38] But such a broad justification would equally strip protection from newspaper articles that mention copyright-infringing Web sites,[39] academic articles that discuss computer security bugs,[40] and mimeographs that report on who is refusing to comply with a boycott, when some noncompliers had been physically attacked in the past by unknown third parties.[41]

If one wants to protect the latter kinds of speech, but not the contract murder manual, one must craft a narrower rule that distinguishes different kinds of crime-facilitating speech from each other.[42] And to design such a rule—or to conclude that some seemingly different kinds of speech should be treated similarly—it's helpful to think about these problems together, and use them as a "test suite" for checking any proposed crime-facilitating speech doctrine.[43]

The second observation, which Part II will discuss, is that most crime-facilitating

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other things, a criminal who knows he'll have help escaping is more likely to commit the crime in the first place, and a criminal who escapes will be free to continue his criminal enterprise and to commit more crimes in the future. This is why criminal law has long criminalized the accessory after the fact, who helps hide a criminal, as well as the accessory before the fact, and why lookouts are treated like other aiders and abetters. [Cite.]

[38] *Cf.* Monica Lyn Schroth, Comment, *Reckless Aiding and Abetting: Sealing the Cracks That Publishers of Instructional Materials Fall Through*, 29 SW. U. L. REV. 567 (2000) (proposing that the First Amendment should not be "an obstacle to civil liability for publications that constitute aiding and abetting," so long as the speaker is reckless about the risk that the publications will aid crime, but focusing chiefly on the *Hit Man* murder manual case and thus not explaining how this proposal would apply to the wide range of other crime-facilitating speech); Theresa J. Pulley Radwan, *How Imminent Is Imminent?: The Imminent Danger Test Applied to Murder Manuals*, 8 SETON HALL CONST. L.J. 47, 73 (1997) (likewise, though setting the mens rea at knowledge rather than recklessness).

[39] *Cf.* cases and statute mentioned in note 19, which would support such liability. [Check whether the existence of other sites that link to the infringing site may prevent liability, on the grounds of absence of but-for cause.]

[40] *See, e.g.*, Preston & Lofton, *supra* note 13; *infra* notes 71-73 and 223 and accompanying text.

[41] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, ___ (1982).

[42] For instance, the rule could distinguish speech that's intended to facilitate crime from speech that knowingly facilitates crime, though it's not clear how helpful such a distinction would be, *see infra* Part IV.B.2.

[43] *See* Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595 (1999) (discussing test suites).

speech is an instance of what one might call "*dual-use material*." Like weapons, videocassette recorders, alcohol, drugs, and many other things, many types of crime-facilitating speech have harmful uses; but they also have some valuable uses, including some that may not at first be entirely obvious. Moreover, it's often impossible for the distributor to know which consumers will use the material in which way.[44] Banning the material will prohibit the valuable uses along with the harmful ones.[45] Allowing the material will allow the harmful uses alongside the valuable ones. This dual-use nature turns out to have implications for how crime-facilitating speech should be treated.

Part III then observes that restrictions on crime-facilitating speech can't be easily justified under the existing First Amendment doctrine. Parts III.B and III.C will respond to claims that there's no First Amendment problem with punishing crime-facilitating speech under generally applicable laws that deal with aiding and abetting. Parts III.D and III.E will discuss the possibility that the strict scrutiny test or a "balancing" approach can resolve this problem.

The next set of observations comes in Part IV, which discusses the various distinctions that the law might try to draw within the crime-facilitating speech category, in order to minimize the harmful uses and maximize the valuable ones.[46] These distinctions are the possible building blocks of a crime-facilitating speech exception; but it turns out that such distinctions are not easy to draw. In particular, one especially appealing distinction—between speech intended to facilitate crime, and speech that is merely said with knowledge that some readers will use it for criminal purposes—turns out to be much less helpful than it might at first seem. Many other possible distinctions end up being likewise unhelpful, though a few seem promising.

The analysis in Part IV may thus help suggest which of the building blocks are worth including in whatever constitutional test one may choose to devise, and which are best omitted. And it points I think, to three questions that call for what seem to me to be the toughest policy choices, and that Part V discusses: (A) Should crime-facilitating speech be generally unprotected whenever the speaker knows that (or is reckless about the possibility that) it may facilitate crime? (B) Should it be unprotected in such circumstances when it may facilitate extraordinarily serious harms, such as nuclear or biological attacks? (C) Should it be unprotected, even when it's published (and not just said to a small group of criminals), when it has virtually no lawful value, for instance because it reveals social security numbers or computer

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[44] I adapt this term from arms control, where "dual-use" products are defined as products that have both military (and thus often prohibited) uses and civilian (and thus permitted) uses. *See, e.g.*, 10 U.S.C. § 2500.

[45] I use "ban" to refer both to criminal prohibitions and civil liability. First Amendment law treats the two identically, and so do I, for reasons described *infra* Part IV.F.

[46] I focus on distinctions that might be helpful when the government is acting as sovereign, using its regulatory power to restrict speech even by private citizens. The rules will likely be different when the government is acting as employer or as contractor, imposing restrictions as a condition of the contract. [Cite Snepp; Seattle Times; Pickering.]

passwords?

Part V suggests that the right answer to A is no, and to B and C is yes. My proposal, then, is that crime-facilitating speech should be constitutionally protected unless it causes extraordinarily serious harms, or unless it has virtually no lawful value. But I hope the analysis both in Parts IV and V will be helpful even to those who would reach a different conclusion. And even if courts ultimately do adopt a relatively broad exception for crime-facilitating speech (for instance, answering "yes" to question A), which leaves legislatures and courts plenty of room to craft statutes and common-law rules, some of the analysis may also help decisionmakers design these statutes and rules.[47]

II. THE USES OF CRIME-FACILITATING SPEECH

A. Harmful Uses

Information can help people commit crimes. It makes some crimes possible, some crimes easier, and some harder to detect and thus harder to deter and punish.[48]

The danger of crime-facilitating speech is related to that posed by crime-*advocating* speech. To commit a typical crime, a criminal needs three things:

(1) the desire to commit the crime,
(2) the knowledge and ability to do so, and
(3) either (a) the belief that the risk of being caught is low enough to make the benefits (financial or emotional) exceed the costs, or (b) the rage needed to act without regard to the risk.

Speech that advocates, praises, or condones crime can help provide the desire, and, if the speech urges imminent crime, the rage. Crime-facilitating speech helps provide the knowledge and helps lower the risk of being caught.

But the danger of crime-facilitating speech may be greater than the danger of crime-advocating speech (at least setting aside the speech that advocates imminent crime, which may sometimes be punished under the incitement exception). Imagine two people: One knows how to commit a crime with little risk of getting caught, but doesn't want to commit it. The other doesn't know how to commit the crime and escape undetected, but is willing to do it if he can.

Advocacy of crime may persuade the first person to break the law, but it will generally do it over time, in combination with other advocacy. No particular statement is likely to have much influence by itself. What's more, over time the person may be reached by counter-advocacy, and in our society there generally is plenty of counter-advocacy, explicit or implicit, that urges people to follow the law. This

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[47] The analysis may also be helpful for courts that want to analyze the question under state constitutional free speech guarantees. [Cite Oregon free speech jurisprudence.]

[48] For a long list of bombings connected to particular publications that describe how explosives can be made, *see* DEP'T OF JUSTICE, *supra* note 34, at ___.

counter-advocacy isn't perfect, but it will help counteract the desire brought on by the advocacy (element 1).

But information that teaches people how to violate the law, and how to do so with less risk of punishment, can instantly and irreversibly satisfy elements 2 and 3a. Once a person learns how to make a bomb, or learns where a potential target lives, that information can't be rebutted through counter-advocacy and needs no continuing flow of information for reinforcement.

True, a person who has learned how to commit a crime with relative impunity may still be persuaded not to want to commit the crime, just as a person who wants to commit a crime may be persuaded that committing the crime is too risky. But crime-facilitating speech can provide elements 2 and 3a more quickly and irreversibly than crime-advocating speech can provide elements 1 and 3b. And of course speech that both advocates and facilitates crime is more dangerous still.

Any attempts to suppress crime-facilitating speech will be highly imperfect, especially in the Internet age. Copies of instructions for making explosives, producing illegal drugs, or decrypting proprietary information will likely always be available somewhere, either in other countries or on American sites that the law hasn't yet shut down or deterred. The *Hit Man* contract murder manual, for instance, is available for free on the Web, even though a civil lawsuit led its publisher to stop distributing it.[49] The *Anarchist's Cookbook* is likewise freely available, and likely will continue to be, even if the government tries to prosecute sites that distribute it.[50] Holding crime-facilitating speech to be constitutionally unprotected, and prosecuting the distributors of such speech, may thus not prevent that much crime.

Yet these restrictions are still likely to have some effect, even if not as much as their proponents might like. Crime-facilitating information is especially helpful to criminals if it seems reliable, and well-tailored to their criminal tasks. If you want to build a bomb, you don't just want a bomb-making manual; you want a manual that helps you build the bomb without blowing yourself up, and that you trust to do that. The same is true, in considerable measure, for instructions on how to avoid detection while committing crimes.

The legal availability of crime-facilitating information probably increases the average quality—and, as importantly, perceived reliability—of such information. An arson manual on the Earth Liberation Front's Web site,[51] or an article on growing or manufacturing drugs in *High Times* magazine,[52] will probably be seen as more trustworthy than some site put up by some unknown stranger. It will often be more accurate and helpful, because of the organization's greater resources and greater access to

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[49] *See, e.g.*, *http://ftp.die.net/mirror/hitman/*, which can be found in seconds using a google search for "Hit Man." [Cite story about publisher no longer distributing the book.]

[50] *See infra* text accompanying notes 434-444.

[51] *See* Earth Liberation Front, *supra* note 7.

[52] *See, e.g.*, Ed Rosenthal, *Ask Ed*, HIGH TIMES, June 1998, at 92; Mel Frank, *Victory Garden: Planting for Personal Use*, HIGH TIMES, May 1992, at 44.

expertise. The organization is more likely to make sure that its version is the correct one, and doesn't have the potentially dangerous edits that versions on private sites might have. Moreover, because the information is high-profile, and available at a well-known location, it's more likely to develop a reputation among (for instance) animal rights terrorists or drug-growers; more people will have expressed opinions on whether it's trustworthy or not.

On the other hand, if crime-facilitating information is outlawed, these mechanisms for increasing the accuracy and trustworthiness of the information will be weakened. The data might still be easily available through a google search, but some of it will contain errors, and it won't have the reputation of a prominent group or magazine behind it. In marginal cases, this might make a difference between a criminal deciding to commit the crime, and knowing how to do it effectively, and being scared off by the uncertainty.

Serious criminals, who are part of well-organized criminal or terrorist networks, will likely get reliable crime-facilitating instructions regardless of what the law may try to do. But small-time criminals and tortfeasors may well be stymied by the lack of seemingly reliable publicly available instructions.

Restrictions on crime-facilitating speech may thus help stop at least some extremist protesters who want to bomb multinational corporations, abortion clinics, or animal research laboratories; some would-be solo drug makers or novice computer hackers; and some smaller-time offenders, such as people who want to illegally download pirate software or movies, or students who want to cheat by handing in someone else's term paper. Suppressing the most prominent examples of crime-facilitating information, which are identified with known organizations, will help the law prevent at least some kinds of crimes.

Moreover, some kinds of crime-facilitating information relate not to general matters (such as how to build a bomb), but to particular facts: particular subpoenas issued by government agencies, passwords to particular computers, the layout of particular government buildings. This information is likely to be initially known to only a few people, and not widely spread on hundreds of computers. If those few people are deterred from posting the material, or if the material is quickly ordered taken down from the Internet locations on which it's posted, then it might indeed be much harder for people—both serious professional criminals and solo, novice offenders—to track it down.

B. Valuable Uses

Speech that helps some listeners commit crimes, however, may also help others do perfectly legal and useful things. Different people, of course, have different views on what makes speech "valuable,"[53] and the Supreme Court has been notori-

[53] *See, e.g.*, Adam M. Samaha, *Litigant Sensitivity in First Amendment Law* 12 n.49 (draft) (citing sources).

ously reluctant to settle on any theory—self-government, search for truth, self-expression, and so on—as being the sole foundation of First Amendment law.[54] But the Court has generally been pretty consistent in broadly treating as "valuable" a wide range of commentary, whether it covers facts or ideas, whether it's ideological or merely entertaining, and whether it's politics, religion, science, or art.[55] There will doubtless be much controversy about when crime-facilitating speech is so harmful that the harm justifies restricting it despite its value. But there'll probably be fairly broad agreement that, as the following subsections suggest, much crime-facilitating speech indeed has First Amendment value. (Note that these subsections aren't meant to be mutually exclusive; I identify them separately only to better show that crime-facilitating speech can be valuable in different ways.)

1. Helping People Engage in Lawful Behavior Generally

Much crime-facilitating speech can educate readers, or give them practical information that they can use lawfully. Books about explosives can teach students principles of chemistry, and can help engineers use explosives for laudable purposes.[56] Tips on how to minimize the risk of being audited may help even law-abiding taxpayers avoid the time and expense of being audited, as well as helping cheaters avoid the risk of being caught cheating. Instructions on decrypting videos may help people engage in fair uses as well as unlawful ones; some of these fair uses may help the users engage in speech (such as parody and commentary) of their own.[57]

Likewise, speech that teaches drug users how to use drugs such as Ecstasy more safely is crime-facilitating, because making a behavior safer is generally likely to draw at least some people to that behavior. (Instructions on how to avoid injuring yourself while constructing illegal bombs, for instance, would be seen as crime-facilitating; likewise for instructions on how to avoid injuring yourself while consuming illegal drugs.) At the same time, such speech is also valuable because it may avoid death and injury among many people who would have used drugs in any event. Such "harm reduction" speech might actually be prohibited by some proposed crime-facilitation statutes, because it involves "distribut[ion of] information pertaining to . . . use of a controlled substance, with the intent that . . . [the] information be used for, or in furtherance of" drug use.[58]

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[54] *See, e.g.*, Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, ___ (1987); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 26 NW. U. L. REV. 1212, ___ (1983).

[55] *See, e.g.*, Winters v. New York, 333 U.S. 507, 510 (1948) (entertainment constitutionally protected); cases cited *infra* note 215 (scientific speech constitutionally protected).

[56] *See, e.g.*, NAT'L ASS'N OF AUSTRALIAN STATE ROAD AUTHORITIES, EXPLOSIVES IN ROADWORKS–USERS' GUIDE (1982).

[57] [Cite Samuelson.]

[58] *See, e.g.*, S. 1428, 106th Cong., 1st Sess., sec. 9, which would have barred, among other things,

2. Helping People Judge and Participate in Public Debates

a. Generally

Some speech that helps criminals commit crimes may at the same time be relevant to law-abiding citizens' political decisions. Publishing information about secret wiretaps or subpoenas may help inform people about supposed government abuses of the power to engage in such practices; it may be the only really effective way to do this, at least in a concrete and timely way. At the same time, it may help criminals conceal their crimes, by informing them that they're under suspicion and that certain phones are no longer safe to use.

Likewise, publishing the names of witnesses to a crime can help the public evaluate whether the witnesses' stories are credible or not.[59] Publishing the names (or even addresses) of people who aren't complying with a boycott may facilitate legal and constitutionally protected shunning, shaming, and persuasion of the noncompliers, as well as violence against them.[60] Publishing the names and addresses of abortion providers may facilitate legal picketing of their homes.[61] Publishing a description of how H-bombs operate can help explain why the government engages in certain controversial nuclear testing practices, or why it wants to build expensive and

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"distribut[ing] by any means information pertaining to, in whole or in part, the manufacture or use of a controlled substance, with the intent that the . . . information be used for, or in furtherance of, an activity that constitutes a Federal crime," and also "distribut[ing]" such information to "any person . . . . knowing that such person intends to use the . . . information for, or in furtherance of, an activity that constitutes a Federal crime." *See* Jacob Sullum, *Knowledge Control*, REASON ONLINE, *available at http://www.reason.com/sullum/060700.html* (expressing concern that this bill might jeopardize "Web sites that . . . offer advice for reducing the risks of drug use (say, by sterilizing needles or using vaporizers)").

[59] *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989), for instance, reasons that the names of crime victims, who are also witnesses, may be especially important when "questions have arisen whether the victim fabricated an assault." But often these questions will only arise once the victim-witness's name is publicized, and people come forward to report that they know the witness to be unreliable or biased.

Sims, *supra* note 5, at 291, argues that holding the media liable for publishing the names of crime witnesses "would not significantly chill the media's vigorous reporting of crimes," but I think this doesn't quite address the right question: The issue isn't whether the media can vigorously report crimes in general, but whether the media can report one particular item—the name of the witness—that may generate more information about the witness's credibility.

[60] See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which involved both social ostracism and violence. Only the names of boycott violators were published, but in a small county, many people are likely to know each others' addresses. (The population of the county around the time of the boycott was about 10,000. *See http://www.census.gov/population/cencounts/ms190090.txt*.)

[61] Even if focused residential picketing is banned by a city ordinance, parading through their neighborhood is constitutionally protected. *See* Madsen v. Women's Health Center, 512 U.S. 753 (1994); Frisby v. Schultz, 487 U.S. 474 (1988).

potentially dangerous new plants.[62]

b. By informing people how crimes can be committed

Some crime-facilitating speech may also affect law-abiding readers' political judgments precisely by explaining how crimes are committed.

First, it can help support arguments that some laws are futile. For instance, explaining how easy it is for people to grow marijuana at home may help persuade people that the war on marijuana isn't winnable, and perhaps should be abandoned.[63] Listing offshore copyright-infringing sites may support an argument that current copyright law is unenforceable, and should thus be changed or repealed.

Explaining how easy it is to make gunpowder, ammunition, or guns may support arguments that criminals can't be effectively disarmed.[64] Explaining how easy it is to change the "ballistic fingerprint" left by a gun may rebut arguments in favor of requiring that all guns and their fingerprints be registered.[65] Explaining how one can

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[62] *See* Howard Morland, *The H-Bomb Secret*, PROGRESSIVE, Nov. 1979, at 14-15, 22-23. *See also* JAMES A.F. COMPTON, MILITARY CHEMICAL AND BIOLOGICAL AGENTS: CHEMICAL AND TOXICOLOGICAL PROPERTIES i (1987) (arguing that understanding chemical and biological weapons is valuable both to "industrial hygienists, safety professionals, civil and military defense planners," and to those interested in international politics and warfare, in which the author suggests chemical and biological agents may play a role).

[63] *Cf.* Robert Scheer, *Dole Backs the Big Lie in Drug War*, L.A. TIMES, Oct. 22, 1996 (arguing against the War on Drugs in part because "the supply of drugs cannot be effectively controlled because they are too easy to grow and smuggle," and "Even if you stopped drugs from coming into the country, that wouldn't affect the supply of marijuana, which is primarily home-grown and accounts for three-quarters of drug use").

[64] *Cf.* J. DAVID TRUBY & JOHN MINNERY, IMPROVISED MODIFIED FIREARMS: DEADLY HOMEMADE WEAPONS back cover, 7, 10, 13 (1992) (arguing that "The message is clear: if you take away a free people's firearms, it will make others. As these pages demonstrate, the methods, means, and technology are simple, convenient, and in place." and "The object lesson? Gun prohibition doesn't work," but not in fact providing specific details about how guns can be made at home), and BILL HOLMES, HOME WORKSHOP GUNS FOR DEFENSE AND RESISTANCE: THE HANDGUN (1979) (providing those details). Even both books put together may be unpersuasive—for instance, one might believe that many fewer criminals would get guns if they had to rely on homemade or black market weapons. But put together the books do make an important political argument, one that can't be made as effectively without the volume describing just how supposedly easy home gun making is. *See also* Bruce Barak Koffler, *Zip Guns and Crude Co[n]versions—Identifying Characteristics and Problems* (Pt. II), 61 J. CRIM. L., CRIMINOLOGY & POL. SCI. 115, 125 (1970) (discussing in detail the design of various homemade guns, mostly to explain how forensic investigators should deal with them, but also concluding that "In a city that has probably the most restrictive pistol laws on the continent, we have an example of how such legislation fails to achieve its purpose" because of how easy it is for people to make their own guns, and "When we ask for stricter gun ownership legislation in future, this is something to bear in mind"); David Hardy & John Stompoly, *Of Arms and the Law*, 51 CHI.-KENT L. REV. 62, 99-100 (1974) (arguing that the ease of making guns at home will make gun controls futile, briefly mentioning a couple of general ways one can make homemade guns, and citing to articles, including Koffler, *supra*, that describe more detailed designs).

[65] *See, e.g.*, Bill Twist, *Erasing Ballistic Fingerprints*,

deceive fingerprint recognition systems can be a powerful argument against proposed security systems that rely on those systems.[66] If the government is arguing for more metal detecting equipment as a means for preventing airplane hijacking, pointing to specific ways that hijackers can evade any such equipment can support an argument that such extra detection will do little good (and thus unjustifiably intrudes on privacy), and that it's better to invest money and effort in arming pilots, encouraging passengers to fight back, and so on.[67]

Second, some descriptions of how crimes can be committed may help show people that they or others need to take certain steps to prevent the crime. Publishing detailed information about a computer program's security vulnerabilities may help security experts figure out how to fix the vulnerabilities, persuade apathetic users that there really is a serious problem, persuade the media and the public that some software manufacturer isn't doing its job, and support calls for legislation requiring

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http://216.117.156.23/features/barrel_twist/2000/june/erase.shtml, which describes how this can be done, and concluding with:

> So why am I telling you all of this? Well, I have heard [a proposed mandatory ballistic signature recording system] called "ballistic fingerprinting" and "gun DNA." It is neither. . . . It is not easy to change your fingerprints, and it is impossible to change your DNA (so far). Changing the marks a firearm makes on bullets and cases is a trivial exercise. . . . Like trigger locks and background checks for private sales, the calls for "ballistic fingerprinting" are a big lie, to appease those who have an ingrained fear of firearms. Unfortunately, the only way to make sure they get the message is to rub their noses in it. . . .

[66] *See, e.g.*, Ton van der Putte & Jeroen Keuning, *Don't Get Your Fingers Burned*, *in* IFIP TC8/WG8.8 FOURTH WORKING CONFERENCE ON SMART CARD RESEARCH AND ADVANCED APPLICATIONS 289, 291 (2000), *available at http://www.keuning.com/biometry/Biometrical_Fingerprint_Recognition.pdf* ("This article should be read as a warning to those thinking of using new methods of identification without first examining the technical opportunities for compromising the identification mechanism and the associated legal consequences."); *id*. at 294 ("The biggest problem when using biometrical identification on the basis of fingerprints is the fact that, to the knowledge of the authors, none of the fingerprint scanners that are currently available can distinguish between a finger and a well-created dummy. Note that this is contrary to what some of the producers of these scanners claim in their documentation. We will prove the statement by accurately describing two methods to create dummies that will be accepted by the scanners as true fingerprints."); *id*. at 294-99 (providing such detailed methods). In an earlier age, this article in the proceedings of a technical conference might have been dismissed as unlikely to reach the eyes of criminals—though even then, presumably the sophisticated criminals would read even technical literature. In the Internet age, I stumbled across the article by accident through a pointer at *http://geekpress.com*, a Weblog that posts pointers to interesting or amusing technical information. *See* Paul Hsieh, post on Nov. 17, 2003, 2:43 am, *available at http://geekpress.com/2003_11_16_weekly.html#106900367854004686*.

[67] *See, e.g.*, Bruce Schneier, *Crypto-Gram Newsletter*, Aug. 15, 2003, *available at http://www.schneier.com/crypto-gram-0308.html*, which describes in detail how one can supposedly smuggle plastic explosives onto a plane, or build a knife out of steel epoxy glue on the plane itself, and concludes: "The point here is to realize that security screening will never be 100% effective. There will always be ways to sneak guns, knives, and bombs through security checkpoints. Screening is an effective component of a security system, but it should never be the sole countermeasure in the system."

manufacturers to do better.[68] Publishing detailed information about airport security problems can show that the government isn't doing enough to protect us.[69] Likewise, publishing information about how easy it is to build a nuclear bomb may alert people to the need to rely on diplomacy and international cooperation, rather than secrecy, to prevent nuclear proliferation.[70]

Third, while speech about possible problems in a security system (whether computer security or physical security) can help alert people to the need to fix those problems, the absence of such speech can make people more confident that the system is indeed secure. If hundreds of top security experts have been able to discuss possible security problems in some operating system, and have found none, then we can be relatively confident that the system is sound.

But this confidence is justified only if we know that people are indeed free to discuss these matters, both with other researchers and with the public, both through the institutional media and directly. Restricting speech about security holes thus deprives the public of important information: If the security holes exist, then the public

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[68] See, for example, Laura Blumenfeld, *Dissertation Could Be Security Threat*, WASH. POST, July 8, 2003, at A1, which describes a geography Ph.D. dissertation that contains a map of communication networks. The map, if published, might be useful to terrorists but also to citizens concerned about whether the government and industry are doing enough to secure critical infrastructure:

> Some argue that the critical targets should be publicized, because it would force the government and industry to protect them. "It's a tricky balance," said Michael Vatis, founder and first director of the National Infrastructure Protection Center. Vatis noted the dangerous time gap between exposing the weaknesses and patching them: "But I don't think security through obscurity is a winning strategy."

See also Preston & Lofton, *supra* note 13, at 81 ("At the same time that public disclosure of vulnerabilities unavoidably facilitates the exploitation of computer security vulnerabilities, the correction and elimination of those same vulnerabilities requires their discovery and disclosure. . . . Computer owners and operators who are aware of a potential vulnerability can take steps to fix it, while they are powerless to fix an unknown vulnerbility."); BRUCE SCHNEIER, APPLIED CRYPTOGRAPHY 7 (1996) ("If the strength of your new cryptosystem relies on the fact that the attacker does not know the algorithm's inner workings, you're sunk. If you believe that keeping the algorithm's insides secret improves the swecurity of your cryptosystem more than letting the academic community analyze it, you're wrong.") (speaking specifically about the security of cryptographic algorithms).

[69] *See, e.g.*, Bob Newman, *Airport Security for Beginners*, DENVER POST, May 16, 2002, at A21 ("A security screener, who when asked why he wanted to see the backside of my belt buckle, said he wasn't really sure (I told him he was supposed to be checking for a 'push' dagger built into and disguised by the buckle). Not a single security screener . . . had ever heard of a carbon-fiber or titanium-blade (nonferrous) knife, which can pass through standard magnetometers used at most airports. . . . Yet the government insists that new security procedures have made airports much more secure, despite the above incidents . . . .").

[70] United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979). *See* Morland, *supra* note 62, at 14, 17 ("People assume that even if nothing else is secret, surely hydrogen bomb designs must be protected from unauthorized eyes. The puncturing of that notion is the purpose of this report. . . . [T]here is little reason to think that any other nation that wanted to build [hydrogen bombs] would have trouble finding out how to do it. . . . No government intent upon joing the nuclear terror club need long be at a loss to know how to proceed.").

can't learn about them; if they don't exist, then the public can't be confident that the silence about the holes flows from their absence, rather than from the speech restriction.[71]

And in all these situations, as elsewhere, concrete, specific details are more persuasive than generalities: People are more likely to listen if you say "Microsoft is doing a bad job—look just how easy it is for someone to send a virus through Outlook" than if you say "Microsoft is doing a bad job—I've identified an easy way for someone to send a virus through Outlook, but I can't tell you what it is."[72]

Even readers who can't themselves confirm that the details are accurate will find detailed accounts more trustworthy because they know that other, more expert readers, could confirm or rebut them. If a computer security expert publishes an article that gives a detailed explanation of a security problem, other security experts could check the explanation. A journalist reporting on the allegations could call an expert whom he trusts and get the expert to confirm the charges—or can perhaps monitor a prominent online expert discussion group to see whether the experts agree or disagree. And if there is broad agreement, a journalist can report on this, and readers can feel confident that the claim has been well-vetted. Not so if the original discoverer of the error merely wrote that "There's a serious bug in this program," and released no supporting details.[73]

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[71] [Cite security through obscurity article.]

[72] *See* Bruce Schneier, *Full Disclosure*, CRYPTOGRAM NEWSLETTER, Nov. 15, 2001, *available at http://www.schneier.com/crypto-gram-0111.html* ("[Revealing] detailed information is required. If a researcher just publishes vague statements about the vulnerability, then the vendor can claim that it's not real. If the researcher publishes scientific details without example code, then the vendor can claim that it's just theoretical."). *Cf.* Eugene Volokh, *Burn Before Reading*, INTERACT , __ 1984, at __, which shows how users of HP 3000 multi-user computers who have been given a certain access privilege (so-called "PM") can use it to get a much higher level of privilege, called "SM" (roughly corresponding to "super-user" access in UNIX). I did this to persuade readers that they should limit PM privilege only to the most trusted users, and carefully protect those accounts that were given the privilege, something that many HP 3000 system managers didn't properly do. I've never been sure whether I was right to give the specific details, or should have instead just said "Don't give people PM privilege, because they can then easily use it to get SM privilege." I suspected, though, that if I just made this general statement, many people wouldn't really believe me. Only if I explained exactly how this could be done, so they could see it for themselves (it took only a few commands), would they see that this was a real problem.

Disclosure of specific details of a computer security problem can also motivate computer companies to fix it, simply because they know that if they don't fix the problem immediately, hackers will exploit it. *See* Schneier, *supra* (arguing that full disclosure has thereby helped transform "the computer industry . . . from a group of companies that ignores security and belittles vulnerabilities into one that fixes vulnerabilities as quickly as possible"); *see generally* Preston & Lofton, *supra* note 13, at 88 (describing the debate among computer security professionals about whether security vulnerabilities should be fully disclosed).

[73] *See* Schneier, *supra* note 72 ("[Without full disclosure,] users can't make intelligent decisions on security. . . . A few weeks ago, a release of the Linux kernel came without the customary detailed information about the OS's security. The developers cited fear of the DMCA as a reason why those details were withheld. Imagine you're evaluating operating systems: Do you feel more or less confi-

3. Allowing people complain about perceived government misconduct

The ability to communicate details about government action, even when these details may facilitate crime, may also be a check on potential government misconduct. When the government does something that you think is illegal or improper—uses your property for purposes you think are wrong, forces you to turn over documents, orders you to reveal private information about others, arrests someone based on the complaint of a witness whom you know to be reliable, and so on—one traditional remedy is complaining to the media. The existence of this remedy makes it possible for the public to hear allegations that the government is misbehaving. And it deters government conduct that is either illegal or technically legal but likely to be viewed by the public as excessive.

Some laws aimed at preventing crime-facilitating speech eliminate or substantially weaken this protection against government overreaching. Consider a law barring people (for instance, librarians or bookstore owners) from revealing that some of their records have been subpoenaed,[74] or barring Internet service providers or other companies from revealing that their customers are being eavesdropped on. Those private entities that are ordered to turn over the records or help set up the eavesdropping will no longer be legally free to complain, except perhaps much later, when the story is no longer interesting to the public.

Likewise, penalties for publishing witness names, aimed at preventing witnesses from being intimidated by the criminals or their associates, also keep third parties

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dent about the security the Linux kernel version 2.2, now that you have no details?").

This shows the weakness of the court's view in *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), that, though the hydrogen bomb information was published to "alert the people . . . to the false illusion of security created by the government's futile efforts at secrecy," there was "no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on the issue." *Id.* at 994. When the government is claiming that its nonproliferation efforts are working, because the design of a hydrogen bomb is a closely and successfully guarded secret, a mere "No, it's not—I discovered without any security clearance how such bombs are built" won't be persuasive: It will just be the author's word against the government's. Only providing the details, so that knowledgeable scientists can confirm them and say "Yes, the author is right, he has discovered the secret," can really support the author's claim. Perhaps the details of how to build a hydrogen bomb should nonetheless have been suppressed, because it could help cause extremely grave harm, see *infra* Part V.B. But one ought not deny that the details were indeed needed to make the political argument work.

Ferguson, *infra* note 228, at 545 n.124, argues the contrary, saying that "the same point could have been made with equal force by an affidavit from the Secretary of Energy which confirmed that the information in the magazine's possession was indeed an accurate design of a thermonuclear weapon." I doubt, though, that the government would often be willing to provide such an affidavit, in part because doing so might itself be seen as revealing certain secrets. [Check whether the govemment's position in the *Progressive* litigation was that the bomb description was correct, or that it may or may not have been correct but still revealed some valuable information.]

[74] *See supra* notes 24 and 25.

who know a complaining witness from explaining to the public why they think the witness is unreliable, and why the government is wrong to arrest people based on the witness's word. And laws restricting the publication of detailed information about security problems—whether computer security problems or physical security problems—may keep people from explaining exactly why they think the government or industry isn't taking sufficient steps to deal with some such problem.

4. Entertaining and satisfying curiosity

Speech that describes how crimes are performed may also entertain readers. A detective story might be centered around a murder that's committed in a particularly ingenious, effective, and hard to detect way. The precise details of the crime may be included either because they are themselves interesting, or for verisimilitude—many fiction writers try to make all the details accurate even if only a tiny fraction of readers will see the errors. Nearly all the readers will just enjoy the book's ingeniousness, but a few may realize that it offers the solution to their marital troubles.

This may be true even for some of the crime-facilitating speech that people find the most menacing, such as the contract murder manual involved in *Rice v. Paladin Press*. There were apparently 13,000 copies of the book sold,[75] and I suspect that only a fraction of them were really used by would-be contract killers.[76] Who were the remaining readers? Many were likely armchair warriors who derived pleasure from imagining themselves as daring contract murderers who are beyond the standards of normal morality.[77]

Others were probably just curious. Lots of nonfiction books are overwhelmingly read by people who have no practical need to know about a subject, whether it's how stars are formed, who Jack the Ripper really was, or how Babe Ruth (or, for that matter, serial killer Ted Bundy) lived his life. Some people are probably likewise curious about how hit men try to get away with murder, or how bombs are made. Satisfying one's curiosity this way may yield benefits later on—the information you learn

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[75] Rice v. Paladin Enterprises, Inc., 128 F.3d 233, ___ (4th Cir. 1997).

[76] Each year there are only about 15,000 homicides in the U.S., it seems likely that very few of them are contract killings, and presumably very few of those are contract killings by people trained using a particular book. *See* Jacob Sullum, *Murderous Prose*, REASON, May 27, 1998 ("[I]t's doubtful that people like James Perry were the main audience for Hit Man. If they were, somehow the thousands of murders they committed have gone unnoticed."); Rice v. Paladin Enterprises, Inc., 940 F. Supp. 836, 847 (D. Md. 1996) (asserting that "out of the 13,000 copies of Hit Man that have been sold nationally, one person actually used the information over the ten years that the book has been in circulation," though presumably the court meant that only one person had been discovered to have used the book to commit a crime), *rev'd*, 128 F.3d 233 (4th Cir. 1997). *See also* [cite article mentioning the other, more recent, crime in which the book was implicated].

[77] Respondent's Brief in *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, at ___ (4th Cir. 1997) (listing "persons who enjoy reading accounts of crimes and the means of committing them for purposes of entertainment" and "persons who fantasize about committing crimes but do not thereafter commit them" as the target markets for the *Hit Man* book).

might prove unexpectedly useful, in ways that are hard to predict.

This of course leaves the question of how highly we should value entertainment and satisfaction of curiosity, especially when we compare them against the danger that the book will facilitate murder. I will save this question for Part IV.A.3.c. For now, my point is simply that some crime-facilitating works do have some value as entertainment, whether because they're framed as detective stories or thrillers, or because they satisfy readers' curiosity or desire for vicarious thrills.[78]

5. Self-expression

Finally, crime-facilitating speech may be valuable to speakers as a means of expressing their views. A scientist or engineer may feel that speaking the truth about some matter is valuable in itself. People who strongly oppose a law may feel that explaining how the law can be circumvented can help them fully express the depth of their opposition, and can help their "engage in self-definition" by "defin[ing themselves] publicly in opposition" to the law.[79] Even people who give their criminal friends information about how better to commit a crime, or tell them when the police are coming, might be expressing their loyalty or affection.

As with entertainment, it's not clear how much we should value such self-expression. Perhaps the harm caused by crime-facilitating speech is enough to jus-

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[78] *Rice* was thus mistaken when it said that "the audience both targeted and actually reached is, in actuality, very narrowly confined," *id*. at 248, presumably to criminal users, that "a jury could readily find that the provided instructions . . . have no, or virtually no, noninstructional communicative value," *id*. at 249, that "*Hit Man* . . . is so narrowly focused in its subject matter and presentation as to be effectively targeted exclusively to criminals," *id*. at 254, that "*Hit Man*'s only genuine use is the unlawful one of facilitating . . . murders," *id*. at 255, that "the book [is devoid] of any political, social, entertainment, or other legitimate discourse," *id*., that "a reasonable jury could simply refuse to accept Paladin's contention that this purely factual, instructional manual on murder has entertainment value to law-abiding citizens," *id*., and that the book "lack[ed] any even arguably legitimate purpose beyond the promotion and teaching of murder," *id*. at 267.

[79] *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 994 (1978) (elaborating on self-expression as the primary First Amendment value). *Cf.* United States v. Aguilar, 883 F.2d 662, 685 (9th Cir. 1989) (upholding conviction for aiding and abetting illegal immigration in part based on a defendant's telling El Salvadoran refugees the location of a hole in the border fence was, and the directions to a church that would give them sanctuary), *superseded by statute as noted in* United States v. Gonzalez-Torres, 273 F.3d 1181 (9th Cir. 2001).

Thomas Scanlon has argued in favor of an autonomy vision of the First Amendment, under which the government may not restrict speech on the grounds that the speech persuades people to believe certain things. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213 (1972). This theory, though, is by its own terms limited to "expression which moves others to act by pointing out what they take to be good reasons for action," and doesn't cover purely factual communications that "provid[e people] with the means to do what they wanted to do anyway." *Id*. at 212. It thus offers little argument for protecting crime-facilitating speech, but also little argument for restricting it, because it doesn't purport to be an exhaustive theory of free speech; Scanlon acknowledges that other communications might still be protected under other theories, such as those related to self-government. *Id*. at 223-24.

tify restriction the speech despite its self-expressive value; or perhaps self-expressive value shouldn't count for First Amendment purposes. For now, I simply identify this as a possible source of First Amendment value.[80]

C. Dual-Use Materials

We see, then, that crime-facilitating speech is a form of dual-use material, akin to guns, knives, videocassette recorders, drugs, alcohol, and the like. These materials can be used both in harmful ways—instructions and chemicals can equally be precursors to illegal bombs—and in legitimate ways; and it's usually impossible for the distributor to know whether a particular consumer will use the product harmfully or legally.

We'd like, if possible, to block the harmful uses without interfering with the legitimate, valuable ones. Unfortunately, the obvious solution—outlaw the harmful use—won't stop many of the harmful uses, which tend to take place out of sight and are thus hard to identify, punish, and deter.

We may therefore want to limit the distribution of the products, as well as their harmful use, since the distribution is usually easier to see and block; but totally prohibiting such distribution would prevent the valuable uses as well as harmful ones. Most legal rules related to dual-use products thus try to come up with some intermediate positions that minimize the harmful uses while maximizing the valuable ones, for instance by restricting certain forms of the product or certain ways it's distributed.

Any analogies we draw between dual-use speech and other dual-use materials will be at best imperfect, because speech, unlike most other dual-use items, is protected by the First Amendment. But recognizing that crime-facilitating speech is a dual-use product can help us avoid false analogies. For instance, we generally assume that doing something knowing that it will help someone commit a crime is morally culpable. This assumption is sound enough as to single-use activity, for instance when someone personally helps a criminal make a bomb. But this principle doesn't apply to dual-use materials, for instance when someone sells chemicals or chemistry books to the public, knowing that the materials will help some buyers commit crimes but also help others do lawful things.

Likewise, as I'll argue in Part III.D, strict scrutiny analysis may apply differently to restrictions on dual-use speech than to restrictions that focus only on speech that has a criminal purpose. And, as I'll argue in Part IV.A.2, the case for restricting crime-facilitating speech is strongest when it ends up being in practice single-use—because there are nearly no legitimate uses for the particular content, or because the speech is said to people who the speaker knows will use it for criminal purposes—rather than dual-use.

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[80] *See infra* Part IV.A.2.a for a discussion of when in particular the speaker's interest in self-expression may have to yield.

III. IS CRIME-FACILITATING SPEECH ALREADY HANDLED BY EXISTING FIRST AMENDMENT LAW?

Naturally, if existing First Amendment law already sensibly explains how crime-facilitating speech should be analyzed, there'd be little need for this article. It turns out, though, that current law doesn't adequately deal with this problem: The Court has never announced a specific doctrine covering crime-facilitating speech, and none of the more general doctrines, such as strict scrutiny, are up to the task.

A. The Existing Crime-Facilitating Speech Cases

No Supreme Court case squarely deals with crime-facilitating speech. As Justice Stevens recently noted, referring to speech that instructed people about how to commit a crime, "Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech."[81]

Justice Stevens has suggested that a crime-facilitating speech exception ought to be recognized, but this was in a solo opinion respecting the denial of certiorari; and the brief opinion gave no details about what the exception might look like.[82] Likewise, Justice Scalia's solo concurrence in the judgment in *Florida Star v. B.J.F.* acknowledged that a ban on publishing the name of rape victims might be justified as a means of preventing further attacks aimed at intimidating or silencing the victim; but even the concurrence said only that the law wasn't narrowly tailored to this interest, and didn't discuss what should happen if the ban was indeed precisely focused on prohibiting crime-facilitating publications of witness's names.[83]

United States v. Aguilar upheld a conviction for disclosure of a secret wiretap, but the brief First Amendment analysis rested partly on the defendant's being "a federal district court judge who learned of a confidential wiretap application" through his government position rather than "simply a member of the general public who happened to lawfully acquire possession of information about the wiretap."[84] Finally, *Scales v. United States* upheld Scales' conviction for conspiring to advocate the propriety of Communist overthrow of the government; a small part of the evi-

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[81] *See* Stewart v. McCoy, 123 S. Ct. 468 (2002) (Stevens, J., respecting the denial of certiorari); DEP'T OF JUSTICE, *supra* note 34, at ___ [[near n.44]] (asserting the same).

[82] *Id.* (Stevens, J., respecting the denial of certiorari) (suggesting, in a case where the lower court reversed a former gang leader's conviction for giving advice to others about how to better enforce discipline and maintain loyalty within the gang, that *Brandenburg v. Ohio*, 395 U.S. 444 (1969), shouldn't apply "to some speech that performs a teaching function").

[83] 491 U.S. 524 (1989) (Scalia, J., concurring in part and concurring in the judgment).

[84] United States v. Aguilar, 515 U.S. 593, 606 (1995); *see also id.* ("As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public.").

dence against Scales was that he helped organize "party training schools" where, among other things, instructors taught people "how to kill a person with a pencil," but the Court viewed that simply as a concrete example of Scales' engaging in advocacy of concrete action rather than of abstract doctrine. The Justices didn't treat the case as being primarily about crime-facilitating speech, and enunciated no rules that would broadly cover crime-facilitating speech.[85]

Some lower court cases have considered the issue, but they haven't reached any consistent result. Several federal circuit cases have held that speech that *intentionally* facilitates tax evasion, illegal immigration, drugmaking, and contract killing is constitutionally unprotected.[86] Three federal circuit cases have held that speech that *knowingly* facilitates bombmaking, bookmaking, illegal circumvention of copy protection is constitutionally unprotected.[87] Two federal district court cases have similarly held that speech that knowingly facilitates (or perhaps even negligently) copyright infringement is civilly actionable, though they haven't confronted the First Amendment issue.[88]

Three appellate cases have held that speech that a newspaper doesn't have a First Amendment right to publish a witness's name when such a publication might facilitate crimes against the witness, even when there was no evidence that the newspaper intended to facilitate such crime;[89] *NAACP v. Claiborne Hardware*, however, suggests that knowingly publishing the names of boycott violators when such a publication might facilitate crimes against them *is* constitutionally protected.[90] And two federal appellate cases has applied the much more demanding *Brandenburg v. Ohio* test to speech that facilitated tax evasion and gang activity, so that even intentionally

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[85] 367 U.S. 203, 264-65 (1960).

[86] *See* United States v. Raymond, 228 F.3d 804, 815 (7th Cir. 2000); Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 243 (4th Cir. 1997); United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989), *superseded by statute as noted in* United States v. Gonzalez-Torres, 273 F.3d 1181 (9th Cir. 2001); United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985); United States v. Holecek, 739 F.2d 331, 335 (8th Cir. 1984); United States v. Barnett, 667 F.2d 835, 842-43 (9th Cir. 1982); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978).

[87] Universal City Studios, Inc. v. Corley, 273 F.3d 429, 457 (2d Cir. 2001); United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990); United States v. Featherston, 461 F.2d 1119, 1122 (9th Cir. 1972). *Mendelsohn* involved the distribution of computer object code, which might not be protected by the First Amendment in any event; but it held that even if code was potentially covered by the First Amendment, distribution of such material with the knowledge that it would likely be used for bookmaking could be punished.

[88] *See, e.g.*, Arista Records, Inc. v. MP3Board, Inc., No. 00 CIV. 4660, 2002 WL 1997918, at *4 (S.D.N.Y. Aug. 29, 2002); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1293-96 (D. Utah 1999) (enjoining defendants from "post[ing] on defendants' website, addresses to websites that defendants know, or have reason to know, contain the material alleged to infringe plaintiffs' copyright")

[89] *See* Times Mirror Co. v. Superior Court, 198 Cal. App. 3d 1420, 1429 (1988); Capra v. Thoroughbred Racing Ass'n, 787 F.2d 463, 464-65 (1986); Hyde v. City of Columbia, 637 S.W.2d 251, 269 (Mo. App. 1982).

[90] NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

crime-facilitating speech would be protected if it wasn't intended to and likely to incite crime.[91]

Legislatures at times assume that crime-facilitating speech may be punished, at least in some instances, even when the speaker doesn't intend to facilitate crime;[92] other statutes, though, do require such an intention.[93] In recent years, the U.S. Justice Department seems to have taken the view that published crime-facilitating speech may generally be restricted if it's intended to facilitate crime, but not if such an intention is absent.[94] But some federal statutes do not fit this understanding.[95]

The task at hand, then, is to define crime-facilitating speech doctrine, not to evaluate or modify some existing accepted doctrine.

B. Speech "Brigaded With Action" / "Speech Acts" / Illegal "Course of Conduct"

Some have argued that there's no problem with restricting crime-facilitating speech, and no need for a new First Amendment exception, simply because the First Amendment doesn't protect speech that is an integral part of a crime.[96] The Depart-

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[91] McCoy v. Stewart, 282 F.3d 626 (9th Cir. 2002); United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983).

[92] *See* 50 U.S.C. § 1861(d) (added by the USA Patriot Act) (prohibiting disclosure by any person—not just government agents—of the issuance of certain document production orders involved in "investigation[s] to obtain foreign intelligence information . . . or to protect against international terrorism or clandestine intelligence activities"); 18 U.S.C. § 3486 (same as to investigations of health care violations and child abuse, though only if a court so orders, and only for "up to 90 days"); WASH. STAT. § 19.86.110 (same as to investigations of unfair or anticompetitive business practices, though only if a court so orders but without a time limit); TEX CODE CRIM. PROC. Art 18.21, secs. 4, 7, 8 (prohibiting disclosure of searches or subpoenas "in certain cases involving access to stored electronic communications," if the court determines that such a revelation may "endanger[] the life or physical safety of an individual," lead to "flight from prosecution," "destruction of or tampering with evidence," or "intimidation of a potential witness," or "otherwise seriously jeopardize[e] an investigation or unduly delay[] a trial").

[93] *See, e.g.*, MINN. STAT. ANN. § 609.4971 (prohibiting the disclosure of certain subpoenas "with intent to obstruct, impede, or prevent the investigation"); 11 DEL. CODE § 2412(a) (prohibiting all disclosure by any person "of an authorized interception or pending application . . . in order to obstruct, impede or prevent such interception"); 18 U.S.C. § 2332(d) (likewise).

[94] *See* U.S. DEP'T OF JUSTICE, *supra* note 34, at ___; Government's Motion for Reversal of Conviction, United States v. McDanel, CA No. 03-50135, 6-7 & n.3 (Oct. 14, 2003) (taking the position that distributing information that facilitates computer crime might well violate federal computer crime law, 18 U.S.C. §§ 1030(a)(5)(A), 1030(e)(8), but only if the distributor intended to facilitate security violations, rather than just intending to urge people to fix the problem).

[95] *See* 50 U.S.C. § 1861(d) and 18 U.S.C. § 3486, *quoted supra* in note 92.

[96] *See* NOW v. Operation Rescue, 37 F.3d 646, 655 (D.C. Cir. 1994) ("That 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality."); United States v. Freeman, 761 F.2d 549, 551 (9th Cir. 1985) (concluding that when "the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself); United States v. Barnett, 667 F.2d 835, 842-43 (9th Cir. 1982) ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words

ment of Justice Report, for instance, reasons:

> On the other hand, the constitutional analysis is radically different where the publication or expression of information is "brigaded with action," in the form of what are commonly called "speech acts." If the speech in question is an integral part of a transaction involving conduct the government otherwise is empowered to prohibit, such "speech acts" typically may be proscribed without much, if any, concern about the First Amendment, since it is merely incidental that such "conduct" takes the form of speech. "'[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).[97]

It's hard to figure out, though, what exactly to make of the *Giboney* principle; and on closer analysis, it proves to be, I will argue, unsound.

Giboney itself was a fairly narrow decision, and on its own terms inapplicable to crime-facilitating speech. In *Giboney*, union members were picketing Empire Storage & Ice Co. to pressure the business "to agree to stop selling ice to nonunion peddlers"[98]—an agreement that, the Court said, would have violated Missouri trade restraint law. In the Court's view, "all of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law."[99]

The "powerful transportation combination" apparently referred to the union's economic power; later in the opinion, the Court said that "it is clear that appellants were doing more than exercising a right of free speech or press," because "[t]hey were exercising their economic power together with that of their allies."[100] The Court also stressed that the case involved not just normal speech, but picketing, which it said was "more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."[101]

It's not clear that the *Giboney* holding would apply at all outside picketing. Under *Brandenburg v. Ohio*, similar speech in a newspaper or in leaflets would likely

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to carry out his illegal purpose. Crimes, including that of aiding and abetting, frequently involve the use of speech as part of the criminal transaction."); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978) (likewise).

[97] U.S. DEP'T OF JUSTICE, *supra* note 34, at ___; Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 243 (4th Cir. 1997) (likewise relying on *Giboney* in holding crime-facilitating speech to be unprotected).

[98] 336 U.S. at 492.

[99] 336 U.S. at 498.

[100] *Id.* at 503.

[101] *Id.* at 503 n.6.

be constitutionally protected today, unless it was intended to and likely to produce *imminent* illegal conduct.[102] But in any event, on its own terms *Giboney* calls for *some* nonspeech conduct, whether picketing, the threat of ejection from a union, or something along those lines. It would be of little relevance to most crime-facilitating speech, which tends to be purely speech that's being punished precisely because it communicates harmful information.

Of course, *Giboney* might be read more broadly, to justify other kinds of restriction on speech that is somehow connected to some form of proscribable conduct. The Justices have at times tried to do so. These attempts to generalize *Giboney*, however, have not yielded any clear doctrine, and only suggest that the *Giboney* "[speech] brigaded with action" principle is a poor foundation for a First Amendment exception.

In *Cox v. Louisiana*, for instance, the Court tried to use *Giboney* to explain restrictions on crime-advocating speech and on fighting words:

> The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited. The most classic of these was pointed out long ago by Mr. Justice Holmes: 'The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.' *Schenck v. United States*. A man may be punished for encouraging the commission of a crime, *Fox v. Washington*, or for uttering 'fighting words,' *Chaplinsky v. New Hampshire*. This principle has been applied to picketing and parading in labor disputes. See *Hughes v. Superior Court*; *Giboney v. Empire Storage & Ice Co.*; *Building Service Employees, etc. v. Gazzam*. But cf. *Thornhill v. Alabama*. These authorities make it clear, as the Court said in *Giboney*, that 'it has never been deemed an abridgment of

[102] In the closely related context of secondary boycotts—union boycotts of a third party aimed at pressuring it to stop doing business with a struck employer—the Supreme Court has strongly suggested that leafletting and other speech would be constitutionally protected, even though picketing is not. *Compare* International Brotherhood of Electrical Workers v. NLRB, 341 U.S. 694, 705 n.10 (1951) (holding picketing in aid of secondary boycotts to be unprotected, citing *Giboney* and cases that cited *Giboney*) *with* Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575-76, 588 (1988) (holding that the National Labor Relations Act should not be read as banning leafletting aimed at persuading consumers to engage in a secondary boycott, because such a reading would pose "serious constitutional questions"); *see also id.* at 580 (resting its decision on the view that "picketing is qualitatively 'different from other modes of communication'").

Likewise, consider Hughes v. Superior Court, 339 U.S. 460, 466 (1950), which held that there was no First Amendment right to peacefully picket a store in order to pressure it into hiring black workers in proportion to the fraction of blacks in the store's clientele. There was no powerful union, acting with the benefit of special legal protections; there was no violence or trespass by the picketers; the picketers had no power to eject people from a union. There was simply patrolling accompanied by speech aimed at getting a store to act in a perfectly lawful way—under California law in 1950, discriminatory hiring was not illegal. *Hughes* relied on *Giboney*, among other cases, for the proposition that picketing may be restricted, *see id.* at 468; and three Justices relid solely on *Giboney*, *id.* at 468 (Black, J., joined by Minton, J., concurring in the judgment); *id.* (Reed, J., concurring) (likewise relying solely on *Giboney*). But surely newspaper articles urging a consumer boycott of businesses unless they adopt some legally permissible race-based hiring practice would be constitutionally protected.

> freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'[103]

"Encouraging the commission of a crime," though, was held to be constitutionally protected (except under narrow circumstances) just four years later, in *Brandenburg v. Ohio*.[104] The prosecution in *Fox*, for publishing a newspaper article praising the practice of nudism, would clearly be unconstitutional today.[105]

Likewise, uttering "fighting words," in the sense of words that may cause a fight, would also be constitutionally protected today unless the words are specifically targeted to the offended party. In the case that so held, *Cohen v. California*, the dissent—which was joined by Justice Black, the author of *Giboney*—actually relied on *Giboney* to argue that Cohen's "Fuck the Draft" jacket was unprotected:

> Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. See *Street v. New York*; *Cox v. Louisiana*; *Giboney v. Empire Storage & Ice Co.* The California Court of Appeal appears so to have described it, and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of *Chaplinsky v. New Hampshire*, where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seem misplaced and unnecessary.[106]

Yet this argument is both inconsistent with current law, and is inadequate on its own terms. Wearing a jacket is mostly communication; to the extent that it's conduct, so is moving one's lips while talking. California was trying to punish Cohen precisely because wearing the jacket was communication. Cohen's communication ought not be stripped of protection merely by the government's recharacterizing it as unlawful "conduct." That's true whether the behavior is wearing a jacket containing profanity, publishing a newspaper article urging people to violate public nudity laws, picketing to urge consumers not to shop at a store unless it hires more black employees, or publishing a Web site containing information about making bombs. The *Cohen* dissent's attempt to recharacterize disfavored speech as conduct is thus an error. Unfortunately, *Giboney*'s recharacterization of speech as merely part of a "course of conduct" foreseeably leads to this sort of error.

The other cases where the Court has cited *Giboney* to support speech restrictions likewise show the inadequacy of the *Giboney* analysis: The doctrine of the cases is actually justified on grounds quite unrelated to *Giboney*'s "speech brigaded with action" rationale, and a true application of *Giboney* would yield a very different sort of doctrine.

Ohralik v. Ohio State Bar Ass'n is one example: The Court was arguing there

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[103] 379 U.S. 559, 563 (1965) (citations abbreviated).

[104] 395 U.S. 444 (1969).

[105] Likewise, *American Communications Ass'n v. Douds*, 339 U.S. 382, 399 (1950), which upheld restrictions on Communists serving as union leaders, citing (among other cases) *Giboney*, *id.* at 399-400, is also probably not good law today. *See* United States v. Robel, 389 U.S. 258 (1967) (striking down restrictions on Communists working in defense plants).

[106] 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (citations abbreviated).

that the "course of conduct" consisted of "[i]n-person solicitation by a lawyer of remunerative employment," which it characterized as "a business transaction in which speech is an essential but subordinate component."[107] But in the companion case, *In re Primus*, the Court made clear that direct solicitation by a lawyer of pro bono employment in a politically charged case may *not* be restricted.[108]

Both the transactions were equally "course[s] of conduct," in which speech to the client plays an equal role. If the *Giboney* principle stripped one transaction of constitutional protection, it should do the same to the other. The Court's other justifications for its *Ohralik* decision—that the speech in *Ohralik* was commercial speech said face-to-face, and the speech in *Primus* was noncommercial speech communicated in a letter[109]—may be sound bases for distinguishing the two cases. *Giboney*, though, is not.

Similarly, *California Motor Transport Co. v. Trucking Unlimited* held that while legitimate litigation is immune from antitrust liability, because it constitutes the exercise of the First Amendment right to petition the courts, "sham" litigation aimed at "eliminat[ing] an applicant as a competitor by denying him free and meaningful access to the agencies and courts" is unprotected.[110] The Court relied primarily on *Giboney*, reasoning that "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute."[111]

But in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, the Court explicitly limited this "sham litigation" exception to litigation that is both objectively frivolous and subjectively ill-motivated.[112] Under the rationale of *Giboney*, objectively reasonable and unreasonable litigation would be equally "an integral part of conduct" aimed at monopolization; they should thus be treated equally. Yet *Professional Real Estate Investors* rightly recognizes that objectively reasonable litigation is a constitutionally protected exercise of the right to petition, and that's true whether it is "an integral part of conduct" that aims at securing a monopoly. The constitutionally significant distinction is between frivolous petitioning of the courts, which is unprotected by the Petition Clause against a wide range of liability, and objectively reasonable petitioning. It is not, as *Giboney* would suggest, between petitioning that's an integral part of a broader pattern of conduct and petitioning that can't be so described.

Likewise for *New York v. Ferber* and *Osborne v. Ohio*, which upheld bans on the distribution and possession of child pornography, and argued in passing that

> [T]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. "It rarely has been suggested that the constitutional freedom for

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[107] 436 U.S. 447, 456 (1978).
[108] 436 U.S. 412, 434-35 (1978).
[109] *Ohralik*, 436 U.S. at 455-56; *Primus*, 436 U.S. at 437-38.
[110] 404 U.S. 508, 514-15 (1972)
[111] *Id.*
[112] 508 U.S. 49, 60 (1993).

> speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney*.

Not all speech that provides a motive for illegal conduct can be made illegal simply because it is "an integral part of conduct in violation of a valid criminal statute." When the *New York Times* publishes illegally leaked documents,[113] or transcripts of an illegally excerpted conversation, it would have a strong First Amendment defense (assuming that it got the documents or tapes from an independent third party), even though such a publication doubtless provides a motive for the illegal leak or illegal interception.[114] Under some narrow circumstances, there might be some constitutional justification for restricting the *Times* publication—for instance, if there is some extraordinary pressing national security concern—just like there were other First Amendment reasons in *Ferber* and *Osborne* which justified the child pornography exception to the First Amendment. But the broad *Giboney* "speech . . . used as an integral part of conduct" argument can't itself justify the restriction, or else all publication of illegally leaked documents would be per se punishable.

Of course, the First Amendment generally allows laws that punish only the noncommunicative aspects of conduct, rather than the speech with which the conduct is associated.[115] When a law bans trespass, violence, or obstruction of pedestrian traffic, for instance, it may be applied even to picketing and sit-ins.[116] Likewise, *Giboney* was right to say that the law may punish conduct even when the evidence of the conduct is speech; in murder cases, for instance, motive may be shown by quoting the defendant's saying that he hated the victim and wanted to kill him.

But when the law punishes people precisely for what they say—for instance, because they urge illegal behavior (whether trade restraint or nudism), because they urge legal behavior, because their speech may cause a fight, because their speech may provide an incentive for others to engage in illegal conduct, or because their speech may impose undue pressure on would-be clients—the First Amendment issue can't be resolved simply by recharacterizing the speech as a "course of conduct."

Some such speech might be punishable, under properly crafted First Amendment doctrine. Advocacy of imminent illegal behavior may be punished.[117] Likewise for speech addressed to a particular person and likely to cause a fight.[118] Likewise for

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[113] The leak may be illegal because it violates a law that requires the government to keep certain information confidential, trade secret law, or a law that imposes a duty of loyalty on corporate employees. [Cite.]

[114] *See* Bartnicki v. Vopper, 532 U.S. 514 (2001).

[115] *See* United States v. O'Brien, 391 U.S. 367 (1969).

[116] *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 555 (1965) (citing *Giboney* for the proposition that the law may bar "cordon[ing] off a street[] or entrance to a public or private building," or might even nondiscriminatorily "forbid[] all access to streets and other public facilities for parades and meetings," in order to prevent, for instance, interference with traffic); Bell v. Maryland, 378 U.S. 226, 325 (1964) (Black, J., dissenting) (citing *Giboney* for the proposition that private property owners may use trespass law to evict speakers that they dislike).

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

[118] Cohen v. California, 403 U.S. 15, 21 (1971); Gooding v. Wilson, 405 U.S. 518, 525 (1972).

child pornography, which courts have found to be of low value and likely to create a great deal of harm.[119] Likewise for commercial advertising that jeopardizes important government interests in preventing undue pressure.[120] There may even be (rightly or wrongly) a special doctrine applicable to picketing and not just leafleting or other forms of speech.[121]

But such exceptions should be crafted acknowledging that they involve exceptions to First Amendment protection, and justifying why the speech is valueless enough or harmful enough that it should be restricted. They shouldn't be defended simply on the grounds that restrictions on "courses of conduct" or "speech brigaded with action" are not truly speech restrictions.

C. Laws of General Applicability

Some have argued that speech may be punished under generally applicable

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[119] New York v. Ferber, 458 U.S. 747 (1982); Osborne v. Ohio, 495 U.S. 103 (1990); *see* Bartnicki v. Vopper, 532 U.S. 514, 530 n.13 (2001) (distinguishing *Ferber* and *Osborne* on these grounds).

[120] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

[121] *See supra* note 102; NLRB v. Retail Store Employees Union, 447 U.S. 607, 618-19 (1980) (Stevens, J., concurring in part and concurring in the judgment) (reasoning that picketing can be restricted when it "calls for an automatic response to a signal, rather than a reasoned response to an idea"); Bakery Drivers v. Wohl, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring) (reasoning that picketing can be restricted because "the very presence of a picket line may induce action of one kind or another, quite irrespsective of the nature of the ideas which are being disseminated").

The same is true of the other examples cited by *Ohralik*, and then repeated by the Department of Justice Report. Misleading corporate proxy statements, *see* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970), may properly be seen as misleading offers of commercial transactions; they are punishable as misleading commercial speech, not as part of "a course of conduct." Employers' threats of retaliation for labor activities, see NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), are punishable under the threat exception to the First Amendment, *see* Allentown Mack Sales and Service, Inc. v. NLRB, 522 U.S. 359, 386 (1998). Insiders' leaks of information about securities, *see* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2nd Cir. 1968), are actually an example of crime-facilitating speech said to a small audience that the speaker knows is likely to use the speech for criminal purposes: The primary prohibition is on the conduct of trading based on inside information, and the tip facilitates that conduct.

The exchange of price and production information among competitors, *see* American Column & Lumber Co. v. United States, 257 U.S. 377 (1921), poses a complex First Amendment problem, as Justice Holmes's dissent in that case recognized. *Id.* at 413. In at least some situations, the public communication of price and production information should indeed be constitutionally protected; much advertising consists precisely of this. In other situations, such communication may simply be evidence that's admissible to prove the constitutionally unprotected conduct of price-fixing. *See* Wisconsin v. Mitchell, 508 U.S. 476, 488–89 (1993); Haupt v. United States, 330 U.S. 631, 642 (1947). But if a broader speech restriction, such as a criminalization of merely stating one's prices in certain fora, is called for, then it seems to me that courts should explicitly define and defend a First Amendment exception that defends this position, rather than simply condemning the speech as part of an illegal "course of conduct"—a phrase that could equally be used for any speech that violates a legislatively prescribed speech restriction.

criminal laws that prohibit all conduct (speech or nonspeech) that yields a particular harm.[122] (This might be one way of explaining *Giboney* itself, though this isn't how the Court treated *Giboney* in *Hughes*, *Cox v. Louisiana*, or other cases.) For crime-facilitating speech, those laws would be (1) aiding and abetting laws that punish conduct done with the intent to help commit a crime;[123] (2) crime facilitation laws or, in some jurisdictions, aiding and abetting laws, that punish conduct done with the knowledge that it will help commit a crime;[124] (3) obstruction of justice laws, which punish conduct done with the knowledge or intent that it will interfere with the pursuit of criminals.[125] Because the laws are facially speech-neutral laws of general applicability, the argument would go, the Free Speech Clause simply doesn't apply to them, or at least requires much lower scrutiny (for instance, the deferential scrutiny mandated by *United States v. O'Brien*).[126]

There are, however, two serious problems with this approach.

1. Aiding and abetting and crime facilitation laws and dual-use conduct

First, aiding and abetting laws and crime facilitation laws are almost never applied to dual-use conduct. In the typical aiding case, the aider knows that his services will be used by one particular person, solely to commit a crime. Even when the aider is generally in the business of providing a dual-use product—such as metal-

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[122] *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 243 (4th Cir. 1997) ("speech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes"); *id*. at 242 (pointing to "criminal aiding and abetting" as the generally applicable body of law).

[123] *See infra* note 275.

[124] *See infra* notes 275 and 276.

[125] *See, e.g.*, 18 U.S.C. § 1512(c) (outlawing "corruptly . . . imped[ing] any official proceeding"); People v. Shea, 326 N.Y.S.2d 70 (1971) (treating encircling officer and arrestee in order to let the arrestee escape as criminal obstruction); United States v. Hare, 49 F.3d 447 (8th Cir. 1995) (treating as obstruction of justice, for purposes of sentence enhancement, the defendant's alerting someone that the FBI); United States v. Cassiliano, 137 F.3d 742 (2nd Cir. 1998) (likewise); 4 WHARTON'S CRIMINAL LAW § 570 (15th ed. 2003) (stating that people who "knowing that a felony has been committed, render[] aid to the felon in order to protect him, hinder his apprehension, or facilitate his escape" have traditionally been punishable as accessories after the fact); *cf.* State v. Walker, No. I-9507-03625 (Tenn. Williamson Cty. Cir. Ct. Nov. 13, 2003) (accepting a First Amendment defense to a prosecution of a driver who flashed his headlights to warn oncoming motorists about a speed trap; the driver was prosecuted under a city ordinance, FRANKLIN (TENN.) MUNI. CODE § 11-504, which barred "knowingly . . . . interfer[ing] with . . . any officer or employee of the city while such officer or employee is performing . . . his municipal duties.").

[126] Such an argument might draw on theories that the Court's main focus in Free Speech Clauses cases is or should be on striking down statutes that likely rest on impermissible legislative motives. *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

cutting equipment—he is generally prosecuted only when he knows that a particular sale is going to a person who intends to use the product illegally (for instance, to break into a bank).[127]

I know of no aiding and abetting or criminal facilitation prosecutions where the seller sold a genuinely dual-use product (other than speech), and couldn't tell which users were going to use it for criminal purposes.[128] If anything, the cases suggest the opposite: Even when a seller of a dual-use good or service knows (but doesn't intend) that a *particular* customer will use the product criminally—for example, when an answering service operator knows that particular clients are prostitutes who use the service to arrange assignations—courts often refrain from imposing liability.[129]

It is too burdensome, the cases reason, to impose on providers of such staple products a "duty to take positive action to dissociate oneself from activities helpful to violations of the criminal law,"[130] even when the provider knows which customers are using the product for criminal purposes, at least when the crimes being facilitated aren't serious. It's no surprise, then, that suppliers of dual-use materials who can't distinguish which customers will use the materials criminally are similarly not held liable.

There have been a few tort cases where distributors of dual-use materials have been sued on some generally applicable theory that sounds in aiding and abetting, whether it's conspiracy or negligent marketing—but only a very few, and these have not generally been successful.[131] A few more such lawsuits have rested on specific contributory infringement theories applicable to particular legal fields, such as copyright and trademark.[132] Perhaps courts will one day develop a general tort law rule holding producers of dual-use goods liable for harms they knew would happen, or even intended to happen, but no such doctrine currently exists.

The generally applicable law, both in tort law and in criminal law, has thus been developed where the defendant knew that he was helping a *particular* person commit a crime, or even intended to do so, and could therefore avoid this crime-facilitating

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[127] *See, e.g.*, Regina v. Bainbridge, 3 All Eng. 200 (1959).

[128] DEP'T OF JUSTICE, *supra* note 34, at ___ & n.24, notes "some question whether aiding and abetting culpability ever can rest solely on the basis of general publication of instructions on how to commit a crime, or undifferentiated sale to the public of a product that *some* purchaser is likely to use for unlawful ends," and cites only a few cases, all involving speech, where aiding and abetting liability was imposed. The speech cases of course do not show that aiding and abetting law has been seen as generally applicable to sales of dual-use products—the "law of general applicability" theory presupposes applicability to speech just as a special case of applicability to all sorts of other things.

[129] *See, e.g.*, People v. Lauria, 251 Cal. App. 2d 471 (1967).

[130] [Cite.]

[131] *See, e.g.*, Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 157 (Cal. App. 1999) (negligent marketing lawsuit against gun manufacturer), *rev'd on statutory grounds*, 28 P.3d 116 (Cal. 2001); [cite other gun cases].

[132] *See* cases cited *supra* note 19 (contributory copyright infringement); National Federation of the Blind, Inc. v. Loompanics Enterps., Inc., 936 F. Supp. 1232 (D. Md. 1996) (how-to book on fraudulent trademark infringement).

action while still remaining free to distribute the product to law-abiding users.[133] Applying this law to distribution of dual-use speech would be a significant extension of the law, not just an application.

2. Generally applicable laws and the First Amendment

Second, and more importantly, even if applying aiding and abetting or crime facilitation law to dual-use speech were merely applying a generally applicable rule, that shouldn't change the First Amendment analysis. Even laws of general applicability are generally (and correctly) treated as content-based laws *if they apply to speech because of what its content does*. The law may ban all conduct that yields a certain harm, but if the harm flows from the content of the speech, the law is treated as content-based, and is presumptively unconstitutional.[134]

For instance, *Schenck v. United States* and other World War I-era cases didn't involve a restriction that was facially aimed at speech. The relevant provision of the Espionage Act barred all conduct, speech or not, that interfered with the draft.[135] It would have been quite constitutional to apply it to the burning of draft board offices (nonspeech conduct), or even to a demonstration that blocked the entrance to a draft board office (speech punished because of its noncommunicative impact). But under modern First Amendment law, Schenck's conviction would be overturned,[136] and the law treated as content-based,[137] because antiwar speech interferes with the draft precisely because of its content.

The same is true of *Cohen v. California*, where Cohen was prosecuted for a violation of a generally applicable breach of the peace statute.[138] The statute would have applied equally to conduct (fighting), speech that breaches the peace because of

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[133] *Cf.* Cheh, *infra* note 227, at ___.

[134] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 382 (1969) (stressing that a generally applicable law banning destruction of draft cards should be judged under a relatively forgiving First Amendment standard, rather than strict scrutiny, because it applied to the defendant "[f]or [the] noncommunicative impact of his conduct, and for nothing else").

[135] *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919); Schaefer v. United States, 251 U.S. 466 (1920). The relevant section of the Espionage Act generally prohibited "willfully obstruct[ing] the recruitment or enlistment service of the United States, to the injury of the service or the United States." Espionage Act of 1917, sec. 3, 65th Cong., sess. I, ch. 30, 40 Stat. 217-31.

[136] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), *disapproving of* Whitney v. California, 274 U.S. 357 (1927).

[137] *See, e.g.*, Carey v. Brown, 447 U.S. 455, 465 (1980) (citing *Schenck v. United States* as an example of a case that involved a content-based distinction); FCC v. Pacifica Found., 438 U.S. 726, 745 (1978) (plurality) (likewise).

[138] 403 U.S. 15 (1971) (involving a statute barring people, in relevant part, from "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by tumultuous or offensive conduct").

its noncommunicative impact (loud speech in the middle of the night), and speech that breaches the peace because of its content (wearing a "Fuck the Draft" jacket). But the Court held that the law could not constitutionally apply in the third situation, precisely because the law covered Cohen because of what he said. The same was true in *Hess v. Indiana*,[139] *Terminiello v. City of Chicago*,[140] *Cantwell v. Connecticut*,[141] and *Edwards v. South Carolina*,[142] all of which involved breach of the peace statutes; and in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*[143]

Likewise for *Hustler Magazine v. Falwell*, *NAACP v. Claiborne Hardware*, and *Eastern Railroad Conference v. Noerr Motors* and *United Mine Workers v. Pennington*.[144] The laws barring intentional infliction of emotional distress, interference with business relations, and anticompetitive behavior apply to a wide range of behavior that causes certain kinds of harm. Larry Flynt, for instance, would have been equally guilty of intentional infliction of emotional distress if he spit at Falwell (nonspeech conduct), disturbed Falwell by hiring people to stand with loudspeakers outside Falwell's house at 3 a.m. (speech that inflicts emotional distress because of its noncommunicative impact), or published his vicious attack on Falwell. But the Court held that applying this general law to Flynt because of the content of Flynt's speech was unconstitutional.[145] Similarly, *Bridges v. California*, *Pennekamp v. Florida*, and

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[139] 414 U.S. 105 (1973) (involving a statute barring people from "act[ing] in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting").

[140] 337 U.S. 1, 2 n.1 (1949) (involving a statute barring people from "making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace," with "breach of the peace" defined in a jury instruction as "misbehavior"—speech or not—"which violates the public peace and decorum" or "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm").

[141] 310 U.S. 296, 308-09 (1940) (stating that "[t]he offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility," including "violent acts" and "acts and words likely to produce violence in others," but striking down Cantwell's conviction because his conduct amounted to a breach of the peace only due to "the effect of his communication upon his hearers").

[142] 372 U.S. 229, 235 (1963) (involving a statute barring "a disturbance of the public tranquility[] by any act or conduct inciting to violence," but concluding that speech which "stir[s] people to anger, invited public dispute, or brought about a condition of unrest" is constitutionally protected even if it's covered by such a breach of the peace statute).

[143] 515 U.S. 557, 569 (1995).

[144] 485 U.S. 46 (1988); 458 U.S. 886 (1982); 365 U.S. 127 (1961); 381 U.S. 657 (1965). *Noerr* and *Pennington* reached a speech-protective result by interpreting the Sherman Act not to apply to anticompetitive lobbying or public advocacy; but it's clear that the Court's judgment was influenced by a desire to avoid a First Amendment violation. *See, e.g.*, *Noerr*, 365 U.S. at 138; FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990). All these cases involved civil lawsuits, but surely speech should be at least as protected against criminal punishments as it is against civil suits.

[145] The *Hustler* decision stressed that the speech was speech on matters of public concern about a

Wood v. Georgia struck down contempt-of-court convictions that were based on the content of speech, even though contempt-of-court law generally prohibits a wide range of action—much of it having little to do with speech—that is seen as interfering with the judicial process.[146]

All these laws were speech-neutral on their face. Most, and probably all, were enacted or created by courts without any censorious motive, partly because their creators were trying to punish and prevent harm, not speech as such. Yet these cases—or, as to the Espionage Act, the later cases that would have led to a different result in *Schenck*[147]—treat the application of these laws based on the content of speech just as skeptically as content-based restrictions are generally treated.[148]

And this skepticism is correct: When the government blocks people from communicating their views, and the very content of the communication triggers the prohibition, it shouldn't matter whether the content is punished pursuant to a broad law or a narrow law. First Amendment doctrine protects speech *even when* its persuasive or offensive effect indeed causes many kinds of harms. Some speech may indeed be so harmful or valueless that it might be excluded from protection, and the First Amendment exceptions reflect this. But if the speech is outside the exceptions, then its content ought not lead to its punishment, whether the punishment takes place under a narrow law or a broad one.

The Court has properly held that employment law, antitrust law, and other laws can be applied to speakers, but these laws generally apply to speakers because of the speakers' *noncommunicative* conduct, not because of the content of what speakers say.[149] In the rare situations where these laws do apply because of the communicative impact of speech, the First Amendment preempts them.[150] Likewise, the institu-

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public figure; the Court might yet recognize a free speech exception for intentional infliction of emotional distress where private figures or statements on matters of private concern are involved. But this would happen because that speech is seen as harmful and not valuable enough to be protected, not because the tort is a law of general applicability (since the tort's general applicability wasn't enough to save it in *Hustler*).

[146] 314 U.S. 252 (1941); 328 U.S. 331 (1946); 370 U.S. 375 (1962).

[147] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (protecting advocacy of crime unless the advocacy is intended to and likely to cause imminent harm).

[148] *See* David Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201, 222-23 (1997) (likewise distinguishing generally applicable laws that are applied to speech for reasons unrelated to its content from generally applicable laws that are applied to speech precisely because of its content).

[149] *See, e.g.*, Associated Press v. NLRB, 301 U.S. 103 (1937) (National Labor Relations Act); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192-193 (1946) (Fair Labor Standards Act); Associated Press v. United States, 326 U.S. 1 (1945) (antitrust laws); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581-83 (1983) (nondiscriminatory tax laws).

[150] *Compare* Associated Press v. United States, 326 U.S. 1 (1945) (antitrust law may be applied to newspapers that enter into anticompetitive contracts) *with* Eastern R.R. Conf. v. Noerr Motors, 365 U.S. 127 (1961) (antitrust law may not be applied to speakers based on their speech that urges the enactment of anticompetitive legislation).

tional press gets no special immunity under the Free Press Clause, beyond what's available to other speakers; as the Court held in *Cohen v. Cowles Media*, "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[151]

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[151] 501 U.S. 663, 669 (1991). Some commentators and courts have read *Cohen v. Cowles Media* for the broader proposition that I dispute in the text: the claim that generally applicable laws may constitutionally be applied to speakers even when the application turns on the content of speech. *See, e.g.*, Rice v. Paladin Press, 128 F.3d 233, 243 (4th Cir. 1997); Bogen, *supra* note 148, at 227; U.S. DEP'T OF JUSTICE, *supra* note 34, at ___ n.56. I think, though, that this misreads the term "generally applicable laws."

"General applicability" essentially means nondiscrimination based on some attribute, and that attribute varies depending on context—it might mean "applying equally to the press and to other entities" (call this "press-neutral"), "applying equally to speakers and nonspeakers" ("speech-neutral"), "applying equally to religious observers and to others" (call this "religion-neutral"), and so on. The *Cohen v. Cowles Media* Court was using "generally applicable laws" to refer to *press-neutral* laws, which "do not offend the First Amendment simply because their enforcement against the press" affects the press's function. It wasn't referring to *speech-neutral* laws.

I say this for two reasons. First, the Court gave five examples of "generally applicable laws," following the quote in the text. All five stressed what "the press," "the media," and "newspaper[s]" and "newspaper reporter[s]" may do. Moreover, one of the examples, "The press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws," is consistent only with the interpretation that the Court meant "generally applicable" as press-neutral. Copyright law is press-neutral but *not* speech-neutral: For most of its history, copyright law has applied exclusively to speech and other communication; even today it applies largely to such communication, though it has recently been extended to also cover computer software and architectural designs. [Cite.]

U.S. DEP'T OF JUSTICE, *supra* note 34, at ___ n.56, argues that *Cohen v. Cowles Media* and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), stand for the proposition "that generally applicable common-law causes of action typically will not offend the First Amendment in cases where they are applied to expressive conduct such as publication or broadcast," unless "an element of that cause of action inevitably (or almost always) depends on the communicative impact of speech or expression." This, though, ignores the fact that *Zacchini* itself involved the right of publicity, a tort that invariably involves "expressive conduct such as publication of broadcast"; and it doesn't mention *NAACP v. Claiborne Hardware*, in which a generally applicable common-law cause of action *was* seen as offending the First Amendment when applied to expressive conduct.

Second, as the text suggests, a long line of cases have indeed held that the First Amendment applies even to speech-neutral laws, when the speech falls within the law precisely of its content. The Court showed no indication of trying to overrule any of them.

The sound reading of *Cohen v. Cowles Media*, I think, is two-fold: (1) The Court concluded that the First Amendment doesn't specially exempt *the press* from press-neutral laws. It therefore overruled the Minnesota Supreme Court's conclusion that the First Amendment requires courts to "balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity." 457 N.W.2d 199, 205 (Minn. 1990). (2) The Court concluded that the First Amendment didn't specially exempt *speakers* from a particular speech-neutral law—promissory estoppel law—not because all speech-neutral laws are per se constitutional, but simply because the speaker in this case waived his free speech rights. The Court thus essentially recognized a waiver doctrine for the First Amendment, which validated speech-neutral contract law and promissory estoppel law. *See* 503 U.S. at 670-71 ("[In two earlier cases], . . . the State itself defined the content of publications that

Some have argued that just as laws that don't mention religious activity are constitutional under the Free Exercise Clause even when they are applied to religious activity, so laws that don't mention speech should be constitutional under the Free Speech Clause even when they are applied to speech.[152] But Free Exercise Clause and Free Speech Clause doctrine are quite different in many ways,[153] and the cases I mentioned above—*Hustler*, *Claiborne Hardware*, *Noerr*, *Pennington*, *Cohen*, the repudiation of *Schenck*, and so on—are evidence of one such difference. The Free Exercise Clause doesn't license people to inflict emotional distress, interfere with business relations, engage in anticompetitive conduct, breach the peace, or interfere with the draft, even if they feel religiously motivated or compelled to do so; it probably wouldn't have even licensed people to do so in the decades before *Employment Division v. Smith*,[154] when it ostensibly provided religious objectors with some exemptions from generally applicable laws.[155] The Free Speech Clause does allow one to do these things, if they're done through the content of what one's speech communicates.

And beyond this, even *Smith* and the results that it endorsed involved situations where the law was applied to religious activity *for reasons unrelated to its religious content*.[156] When conduct violates a generally applicable law *precisely because of its religiosity*, I think the law should indeed be inapplicable to the conduct, and lower courts have so held. Lower courts, for instance, have generally rejected claims that a religious denomination has inflicted emotional distress on a member by excommunicating him,[157] or that a minister who had sex with an adult congregant committed clergy malpractice or breached his fiduciary duty precisely because he was a minister.[158]

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would trigger liability. Here, by contrast, Minnesota law simply requires those making promises to keep them. The parties themselves, as in this case, determine the scope of their legal obligations, and any restrictions which may be placed on the publication of truthful information are self-imposed.").

[152] [Cite.]

[153] *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, ___ [part II.B] (1999).

[154] 494 U.S. 872 (1990).

[155] *See, e.g.*, Gillette v. United States, 401 U.S. 437, 460 (1971) (rejecting a claim that the Free Exercise Clause mandates a religious exemption from the draft).

[156] 494 U.S. 872, ___ (1990); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, ___ (1993).

[157] *Cf., e.g.*, Marks v. Estate of Hartgerink, 528 N.W.2d 539, 544-45 (Iowa 1995) (refusing to recognize a tort of wrongful excommunication); Korean Presbyterian Church v. Lee, 880 P.2d 565, 569-70 (Wash. Ct. App. 1994) (same).

[158] *See, e.g.*, Dausch v. Rykse, 52 F.3d 1425, 1429 (7th Cir. 1994) (clergy malpractice); *In re* Pleasant Glade Assembly of God, No. 2-98-222-CV, 1998 WL 745954, at *2-*4 (Tex. App. Oct. 22, 1998) (same); Doe v. Evans, 718 So. 2d 286, 291-94 (Fla. Dist. Ct. App. 1998) (breach of fiduciary duty); Amato v. Greenquist, 679 N.E.2d 446, 453-54 (Ill. App. Ct. 1997) (same); H.R.B. v. J.L.G., 913 S.W.2d 92, 98-99 (Mo. Ct. App. 1995) (same); Langford v. Roman Catholic Diocese, 677 N.Y.S.2d 436, 438 (N.Y. Sup. Ct. 1998) (same); L.C. v. R.P., 563 N.W.2d 799, 800-03 (N.D. 1997) (same). *But see* Moses v. Diocese of Colorado, 863 P.2d 310, 314, 321-23 (Colo. 1993) (accepting

None of this tells us whether crime-facilitating speech is constitutionally protected: Even if restrictions on such speech are treated as content-based—whether they are facially content-based, or facially speech-neutral but applied to speech because of its content—they may still be constitutional if the speech falls within an exception to protection.[159] And perhaps some such exception has to be created; but we can't avoid this question by just covering the speech under a law of general applicability.

D. Strict Scrutiny

In recent decades, the Court has often said that "The Government may . . . regulate the content of constitutionally protected speech"—speech that isn't within one of the existing free speech exceptions—if the regulation is "narrowly tailored" to a "compelling government interest."[160] In practice, the Court has found very few restrictions that pass this test,[161] but in principle, this seems like a possible defense for

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breach of fiduciary duty claim); F.G. v. MacDonel, 696 A.2d 697, 703-05 (N.J. 1997) (same); Martinelli v. Bridgeport Roman Catholic Diocesan Corp., 10 F. Supp. 2d 138, 149-57 (D. Conn. 1998) (same); Sanders v. Casa View Baptist Church, 898 F. Supp. 1169, 1176-77 (N.D. Tex. 1995) (same). These claims generally arise out of sexual relationships between a clergyman and a parishioner whom he is counseling. In secular counseling contexts, similar breach of fiduciary duty claims are fairly widely accepted because such relationships are seen as harmful and not fully consensual.

[159] Nor can aiding and abetting law or crime facilitation law, as applied to crime-facilitating speech, be defended on the grounds that it only addresses the "secondary effects" of speech and is thus a valid content-neutral time, place, or manner restriction. First, to pass that test, the law must serve a government interest *unrelated to the communicative impact* of the speech. [Cite.] Here, the interest in preventing crime, important as it is, is implicated precisely because of the content of the speech. Just as the emotive, persuasive, or psychologically harmful effect of speech (and the harms it causes) can't be considered a secondary effect justifying a law that punishes offensive speech, *see* Boos v. Barry, 485 U.S. 312, 321 (1988); Reno v. ACLU, 117 S. Ct. 2329, 2342 (1997); R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992); Texas v. Johnson, 491 U.S. 397, 411-12 (1989), so the informative effect of speech (and the harms it causes) can't be considered a secondary effect, either.

Second, to pass the test applicable to content-neutral time, place, or manner restrictions, the law must leave open ample alternative channels for expression. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 55-56 (1994); Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 75-76 (1981). A law prohibiting publication of material that might help cause crime—or even the communication of that material to a particular desired audience—leaves open no alternative channels for expressing that material. And though perhaps the law may still let people communicate general and unhelpful versions of the information, such a requirement would only provide an alternative channel for expressing material with *other* content—not an adequate alternative, and one that shows that the law is in fact content-based. *See* Volokh, *supra* note 219, at 712.

[160] Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989).

[161] The only case in which a majority of the Supreme Court has upheld an actual speech restriction under strict scrutiny is *Austin v. Michigan Chamber of Commerce*, 494 U.S. 115 (1989). A plurality also did the same in *Burson v. Freeman*, 504 U.S. 191 (1992); and a majority used what it described as strict scrutiny to uphold a restriction on campaign contributions in *Buckley v. Valeo*, 424 U.S. 1, ___ (1976).

bans on crime-facilitating speech, since preventing crime does seem like a compelling interest.

Unfortunately, it's hard to evaluate this argument doctrinally, because the strict scrutiny test is ambiguous in a way that particularly manifests itself as to dual-use speech. There are two possible meanings of "narrow tailoring," and two possible meanings of the requirement, embedded in the narrow tailoring prong, that a speech restriction not be overinclusive.

One meaning of "narrow tailoring" is that an attempt to prevent the improper uses of speech must be narrowly tailored to affect only those uses: The government interest may justify punishing instances of distribution that lead to those uses, but only if this doesn't substantially interfere with the lawful uses.

A classic example comes from laws that aim to shield children from sexually explicit material. The Supreme Court has acknowledged that there is a compelling government interest in such shielding, and it has upheld bans on distributing such material when the distributor knows that the buyer is a child.[162] But the Court has held unconstitutional laws that ban *all* distribution of sexually themed material that would be unsuitable for children, even when the laws were supported by the child-shielding interest.[163]

Sexually explicit but not obscene material is dual-use speech. It can be lawfully used by adults for its serious value, but it can also be unlawfully distributed to children. Yet even though any sexually themed work that's sold to an adult might end up in a child's hands, the Court held that restricting all such distribution to adults in order to prevent the distribution to children is "burning the house to roast the pig."[164] Likewise, though works that depict sex with (fictional) children might be used by some adults to try to seduce children, the Court rejected this justification for suppressing such virtual child porn:

> The government cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.[165]

Another example is the Court's treatment of laws banning leafleting. Cities argued that the laws were justified by the government interest in preventing litter, and the Court agreed that littering as such is an evil that the city can try to prevent: The First Amendment doesn't "deprive a municipality of power to enact regulations against throwing literature broadcast in the streets."[166] But the restriction could only

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[162] Ginsberg v. New York, 390 U.S. 629 (1968).

[163] *See* Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989) (reaffirming, under strict scrutiny, Butler v. Michigan, 352 U.S. 380 (1957)).

[164] *Butler*, 352 U.S. at ___.

[165] Free Speech Coalition v. Ashcroft, 535 U.S. 234, ___ (2002).

[166] Schneider v. State, 308 U.S. 147, ___ (1939). The case involved a content-neutral restriction,

go so far as prohibiting littering, whether by the leafleter or the recipient; the city couldn't bar all leafleting, even though each leaflet might end up getting littered.[167] Leaflets are dual-use products. Some recipients will read them and then lawfully dispose of them, while others will illegally litter them. But the government may not, the Court held, try to suppress the illegal use in a way that also blocks the lawful use.

Finally, a third example is *Free Speech Coalition v. Ashcroft*, where the government argued that a ban on virtual child pornography—computer-generated material that depicts children in sexual contexts, but that was generated without using real children—was needed in order to prevent the distribution of true child pornography. The Court, however, rejected this view:

> The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.
>
> The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ." The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.[168]

This then is the first sense of narrow tailoring: You may restrict that distribution of dual-use speech that leads to a harmful use (selling pornography to minors, dropping leaflets yourself on the street), but only if it doesn't interfere with the valuable use. Likewise, any restriction that lumps the valuable uses together with the harmful ones may be said to be "overinclusive."[169]

But an alternate definition of narrow tailoring is that the government interest may justify whatever is the least restrictive law necessary to prevent the harmful uses, even if this law also interferes with the valuable uses. A classic example of this is *Buckley v. Valeo*, which upheld a $1000 limit on campaign contributions because of the government interest in preventing contributions that are tantamount to bribes.[170] Many contributions that exceed $1000 are not bribes, especially in campaigns which are much more expensive than $1000—the contributors are often just trying to influence the outcome of the election, rather than to gain leverage over the official once

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which today would be judged under intermediate scrutiny, rather than strict scrutiny. But the Court's willingness to strike the law down even though it was content-neutral—and the Court's continued adherence to *Schneider*, *see, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994)—shows that the result would be the same under strict scrutiny.

[167] *Schneider*, 308 U.S. at ___.

[168] 535 U.S. 234, 255 (2002).

[169] *See also* Nixon v. Shrink Missouri PAC, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting) (holding that a contribution limit like the one upheld in *Buckley v. Valeo* wasn't narrowly tailored because "a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent").

[170] 424 U.S. 1, ___ (1976).

he's elected. Moderately large contributions are thus dual-use: They can be used as bribes or as honest attempts to support one's preferred candidates, and it's impossible to tell for sure which is which.

The Court, though, upheld the ban on contributions of more than $1000, partly because "it [is] difficult to isolate suspect contributions."[171] Blocking the honest contributions was necessary to effectively block the corrupt ones, and this necessity justified the broad prohibition. And the restriction wasn't treated as overinclusive, because it included only the activity that needed to be included for the law to serve the government interest.[172]

Another example is the plurality opinion in *Burson v. Freeman*, which used strict scrutiny to uphold a total ban on electioneering within 100 feet of polling places.[173] The restriction, the Court held, was justified by the government interests "in preventing voter intimidation and election fraud,"[174] but it also restricted speech that wasn't likely to cause intimidation or fraud. And yet, in the view of the plurality, this restriction on the legitimate speech was constitutional because it was a necessary side effect of the restriction on the harmful speech: It might be hard to distinguish the intimidating and fraudulent speech, especially because the people who would draw the distinction—police officers—were "generally . . . . barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process."[175]

So the meaning of strict scrutiny is unclear, and it's unclear in a way that is important to evaluating restrictions on dual-use crime-facilitating speech. If courts apply the first definition of narrow tailoring, the restrictions would be overinclusive because they would block speakers from communicating even with those listeners who would use the speech quite properly. If courts apply the second, the restrictions wouldn't be overinclusive, because this interference with valuable speech would be necessary to block the speech to those listeners who would use the speech to do harm.

It's also not even clear that the Court would apply either form of strict scrutiny to these sorts of restrictions. Though the Justices have at times suggested that strict scrutiny should be the test for any content-based restriction on speech falling outside the existing First Amendment exceptions, at other times they have struck down speech restrictions without even applying strict scrutiny. Consider, for instance, *Virginia v. Black*, which holds that certain kinds of cross-burning are constitutionally protected, but doesn't even consider the possibility that restrictions on such cross-burning may be upheld under strict scrutiny.[176]

All this suggests that the strict scrutiny framework ultimately won't be much

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[171] *Id.* at ___.
[172] [Note that *Buckley* is now seen as applying a lower level of scrutiny, see McConnell v. FEC.]
[173] 504 U.S. 191 (1992) (plurality).
[174] *Id.* at 206.
[175] *Id.* at 207.
[176] 123 S. Ct. 1536 (2003).

help to the Supreme Court in deciding what to do about crime-facilitating speech. The Court may conclude that the valuable uses must be protected even if this means that some harmful uses would be tolerated, or that the harmful uses must be suppressible even if this means that some valuable uses would be restricted as well. But this decision will determine how strict scrutiny is applied, and not vice versa.

Likewise, the Court's precedents are inconsistent enough that lower courts aren't really bound by any particular vision of strict scrutiny, either. Defenders of restrictions on crime-facilitating speech may quote *Sable*'s statement that "[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[177] Opponents may quote *Ashcroft v. Free Speech Coalition*, saying that First Amendment law "prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."[178] Neither approach will itself resolve the question.

It's thus more helpful to ask the question that the remaining Parts confront—what should be the proper scope of a crime-facilitating speech exception—rather than trying to fit this inquiry within the strict scrutiny framework, which doesn't yield a determinate result here.

E. Balancing

Finally, one possible reaction to the crime-facilitating speech problem is to call for "balancing."[179] Balancing, though, can mean one of two things. First, balancing can purport to be an answer to the question "How should courts decide whether (and when) a speech restriction is justified?": "Balance the value of the speech against the harm that it causes."

Unfortunately, it's not clear what the command "balance" is really referring to. "Balance" is a metaphor, and its real world referent—the scale—works because it uses a physical force (gravity) to reduce two objects to a common measure (weight) that can then be compared. But there is no such force or mechanism in law. There is no means for directly comparing the value of speech and the harm that it causes.[180]

The closest analogy to the scale might be a judge's intuitions: "Judges should balance the value of the speech against the harm that it causes" might be seen as a

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[177] 492 U.S. at 116.

[178] 535 U.S. 234, 255 (2002).

[179] [Cite.]

[180] *See generally* Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, ___ [IV.A]. *Cf.* Stuntz, *infra* note 371, at 869 n.91 (defending the possibility of balancing against the charge that it is "like judging whether a particular line is longer than a particular rock is heavy" by responding that "courts make such judgments regularly, and at least in some cases they do not seem particularly hard to make. Some lines are very short, and some rocks are very heavy."); I think that may be correct, but when the rock is moderately heavy and the line is moderately long, "balancing" stops being a useful metaphor.

command that a judge in a particular free speech case simply think hard about both the value of the speech and the harm it causes, and decide which feels more important to him. But this sort of unexamined, unselfconscious intuitive inquiry can easily be influenced by factors that judges ought not consider, such as the ideology of the speaker or the perceived merits of the political movement to which he belongs.[181] And it leaves speakers uncertain about whether their speech will be constitutionally protected, or potentially subject to serious punishment.

Second, "balancing" can be a way of describing what courts end up doing when they decide whether a speech restriction is justified. When judges make such a decision, they can be said to have "balanced" all the factors—the constitutional text, the traditional understanding of the text, the harm and value of the speech, the possible indirect effects on future cases of deciding for or against protection in this one, and more—in the process of reaching the result.

All First Amendment cases, including ones that announce bright-light rules, might then be seen as involving a "balancing" of the factors in favor of protection and those in favor of suppression. In this sense, "balancing" is a useful reminder that free speech questions can't just be answered with a categorical assertion that all speech is protected, but must consider a variety of other factors.

But this definition of "balancing" still doesn't tell us just how should judges should make the decision that we'll then refer to as a "balancing" of the factors. It is this question that the next Parts confront. If one wants to call those Parts, and the analysis that they incorporate from Part II, "balancing," that's fine. The important issue is what the test should be, and the word "balancing" doesn't really add much to that analysis.

IV. POSSIBLE DISTINCTIONS WITHIN THE CRIME-FACILITATING SPEECH CATEGORY

So how then can courts craft a crime-facilitating speech exception? Let's begin by identifying and evaluating the distinctions that one can draw within the category, to decide which crime-facilitating speech is protected and which is unprotected. These distinctions will be the building blocks of any possible test.

A. Distinctions Based on Value of Speech

1. First Amendment constraints on measuring the value of speech

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[181] *See infra* Part IV.A.3.d.iii (criticizing proposals that the Court apply a more sliding-scale approach to valuing speech and inquire whether speech has not merely some value, but is of "unusual public concern") Melville B. Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, ___ (1968) (criticizing ad hoc balancing on these grounds).

When we decide how to deal with dual-use materials, we naturally care about how valuable the legitimate use would be. This is why, for instance, drugs are treated differently than guns: Both have harmful uses, but the valuable uses of drugs (generally the entertainment of those users who don't get addicted and who use the drug responsibly) are seen as less valuable than the valuable uses of guns (such as self-defense). The more valuable one thinks drugs are, for instance for medical purposes, the more willing one would be to allow them in some circumstances, even if this means there'll be inevitable leakage from the valuable uses to the harmful ones.[182]

This analysis is always complex, because the harm and the value of the product are hard to estimate, and hard to compare even once one has estimated them. But for crime-facilitating speech, the analysis is harder still, because First Amendment law constrains courts' and legislatures' ability to assess the value of speech. In daily life, we routinely measure the value of speech based partly on whether it expresses good ideas or evil ones, whether it's reasoned or not, or whether it's mere entertainment or genuine advocacy. The Court, though, has generally held that each of these distinctions may *not* be part of the First Amendment analysis.[183]

First Amendment law doesn't assume that these kinds of speech *are* equally valuable under some commonly held moral or political standard of value. It does, however, conclude that the government *must generally treat them as* equally valuable, because courts and legislators generally can't be trusted to properly decide which speech is right or useful and which is wrong or useless, and because people in a democracy are entitled to decide for themselves which ideas have value and which don't.[184]

Of course, First Amendment doctrine hasn't precluded the Court from making

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[182] Likewise, the less valuable one thinks that guns are—for instance, if one believes that guns really aren't very useful for self-defense, and have no other legitimate uses—the more willing one would be to ban them.

[183] *See, e.g.*, Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) (advocacy of adultery protected just like advocacy of other ideas); Winters v. New York, 333 U.S. 507, 510 (1948) ("Though we can see nothing of any possible value to society in these [sensational crime] magazines, they are as much entitled to the protection of free speech as the best of literature."); Cohen v. California, 403 U.S. 15 (1971) (jacket with just the words "Fuck the Draft" is fully protected); Texas v. Johnson, 491 U.S. 397 (1989) (burning a flag is fully protected, notwithstanding the absence of serious reasoning or argument in such symbolic speech). Obscenity is one narrow exception to this principle: To determine whether a work is obscene courts do look at whether the speech has "serious literary, artistic, political, or scientific expression," Miller v. California, 413 U.S., 15, ___ (1973). But obscenity law is intentionally limited to a narrow category of rather explicit sexually themed speech, and doesn't touch the overwhelming majority of speech, even speech that some might see as comparatively valueless, *see, e.g.*, *Cohen*, 403 U.S. at ___ (refusing to extend obscenity law to cover profanity that's not likely to be sexually arousing).

[184] *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

any judgments about the value of speech. Various First Amendment exceptions—such as the ones for false statements of fact and obscenity—are justified on the theory that certain speech has virtually no constitutional value.[185] Even within the zone of valuable speech, the Court has at times suggested that some speech is less valuable than "fully protected" speech.[186]

Still, the Court's jurisprudence constrains courts and legislatures in judging the value of speech; and the Court has taken this constraint seriously, often providing full protection to speech that a common-sense judgment would suggest is not tremendously valuable, such as vulgar parody, or speech that praises crime (unless it fits within the narrow incitement exception).[187] This limits the degree to which a crime-facilitating speech doctrine can distinguish the less valuable crime-facilitating speech from the more valuable. Conversely, if this limit is relaxed here, and courts are allowed to engage in free-ranging judgments about the value of various kinds of speech, then this new precedent may weaken these limitations elsewhere—a concern the Court has often expressed when rejecting proposed judgments that speech is of low constitutional value.[188]

2. No-value speech

a. Speech to particular people who are known to be criminals

Some speech is communicated entirely to particular people who the speaker knows will use it for criminal purposes. A burglar tells his friend how he can evade a particular security system. A lookout, or even a total stranger, tells criminals that

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[185] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("there is no constitutional value in false statements of fact"); Roth v. United States, 354 U.S. 476, 485 (1957) (concluding that obscenity is of "such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality"); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (same as to fighting words).

[186] FCC v. Pacifica Found., 438 U.S. 726 (1978) (plurality); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality). [Cite Schauer criticizing *Pacifica*.]

[187] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988); Brandenburg v. Ohio, 395 U.S. 444 (1969).

[188] Cohen v. California, 403 U.S. 15, 25 (1971) (reasoning that the proposed principle that profanity is unprotected but other offensive words remain protected "seems inherently boundless"); Texas v. Johnson, 491 U.S. 397, 417 (1989) (reasoning that "[t]o conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries"); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (reasoning that "[i]f it were possible by laying down a principled standard to separate [the attack on Jerry Falwell and his mother] from [traditional political cartoons], public discourse would probably suffer little or no harm," but concluded that "we doubt that there is any such standard, and we are quite sure that the pejorative description 'outrageous' does not supply one"); Eugene Volokh, *Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1096 (2003). *But see* FCC v. Pacifica Found., 438 U.S. 726 (1978) (plurality) (concluding that profanity should be distinguished from other speech, at least where radio broadcasting is involved).

the police are coming.[189] Someone tells a particular criminal (whom he knows to be a criminal) that his line is tapped.[190] A person tells another person how to make explosives or drugs, knowing that the listener is planning to use this information to commit a crime.

In all these examples, the speech has pretty much a solely crime-facilitating effect—it's really single-use speech rather than dual-use speech—and the speaker knows it or is at least reckless about this.[191] In this respect, the speech is like sales of guns or bomb ingredients to people who the seller knows are likely to use the material in order to commit crime.

Restricting such speech or conduct will, at least in some situations, make it somewhat harder for the listener or buyer to commit the crime, but it will interfere very little with valuable uses of the speech or other materials. The speech won't contribute to political or scientific debates, provide innocent entertainment, or even satisfy law-abiding users' intellectual curiosity; it will only be used by criminals to commit crimes.[192] It makes sense, I think, to treat the speech as having so little First Amendment value that it is constitutionally unprotected, much like how threats or false statements of fact are treated.

Moreover, such a judgment, if limited to this sort of single-use speech, would create a limited precedent that seems unlikely to support materially broader speech restrictions. The speech is not only harmful, but seems to have virtually no First Amendment value. It's been traditionally seen as punishable under the law of aiding and abetting or (more recently) criminal facilitation.[193] It's spoken to only a few people who the speaker knows are criminals. The rationale for punishing it rests on its nearly complete lack of noncriminal value. It seems unlikely that judges or citi-

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[189] *See supra* note 29.

[190] *See* United States v. Aguilar, 515 U.S. 593, ___ (1995).

[191] If the speaker doesn't realize that the listener is a criminal who will likely use the speech for criminal purposes, then the speech is considerably less culpable; and punishing such innocently intended speech is likely to unduly deter valuable speech to law-abiding listeners. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (using this rationale to prevent punishment of false statements of fact about public officials on matters of public concern); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (applying the same rule to false statements of fact about private figures on matters of public concern, though allowing compensatory damages when the speaker was shown to be negligent).

[192] One can imagine some possible social value that might flow from the communication. A burglar who learns more about what he'd need to do to safely commit a crime might be scared off by the difficulty of the process. If you tell someone who you think is a criminal that the police are coming, and it turns out that the person is really a law-abiding person whose behavior is simply suspicious-looking, then your statement might inadvertently prevent an unjust arrest. Even if the person you're warning is a criminal, it's possible that he may have some entirely innocent friends or family members standing nearby, so warning him might prevent the innocents from getting caught in a crossfire, or getting falsely arrested. Information is valuable, and one can always imagine some conceivable way in which it would facilitate wise and law-abiding decisions. Nonetheless, these valuable uses seem extremely unlikely when someone conveys crime-facilitating information to a criminal. It may be a mistake to assume that they are nil, but they seem too insubstantial to influence the analysis.

[193] [Cite.]

zens will see a narrow exception for this sort of speech as a justification for materially broader exceptions.[194]

Speech within this category should be treated the same whether it's said with the *intent* that it facilitate crime, or merely with the *knowledge* that it's likely to do so. Say a man goes to a retired burglar friend of his, and asks him for advice on how to quickly disable a particular alarm, or open a particular safe; and say that the burglar says "Look, I don't want you to commit this crime—it's too dangerous, you should just retire like I did—and I don't want a cut of the proceeds; but I'll tell you, because you're my friend and you're asking me to."

Strictly speaking, the retired burglar doesn't have the "conscious object . . . to cause" the crime.[195] He may sincerely wish that his friend just give up the project, among other things, because if the crime takes place, one of the criminals may be pressured into revealing the retired burglar's complicity. Nonetheless, his speech facilitates the crime just as much as if he wanted the crime to take place. It seems to be as constitutionally valueless, as much worth deterring, and as deserving of punishment, as speech that purposefully facilitates crime.

Knowingly or even intentionally providing information that helps others commit minor crimes might not be worth punishing. If I see the police pulling over speeders, and I call a friend who I know always speeds on the same route to warn him to slow

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[194] *See* Volokh, *supra* note 188, at ___, ___ (discussing equality slippery slopes and attitude-altering slippery slopes, two common mechanisms through which a narrow exception might grow into a broader one).

Such an exception might justify some other restrictions on valueless speech said to a criminal audience—but that's likely to be good. It has long been not entirely clear, for instance, why criminal soliciation (such as a man asking someone else to kill someone) is punishable even when the *Brandenburg v. Ohio* imminence requirement is satisfied. *See, e.g.*, Alexander, *supra* note 324, at 113-14 (asserting that solicitation should be punishable); Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1623 (1987) (suggesting that criminal solicitation shouldn't be subject to the "clear and present danger" test); GREENAWALT, *supra* note 34, at 261-63 [check]. *But see People v. Salazar*, 362 N.W.2d 913 (Mich. App. 1985), which overturned a solicitation conviction under these circumstances, citing *Brandenburg*. The chief value of speech that advocates violent conduct is not that it will persuade people to act violently, but that it will at the same time convey broader social criticisms, which people can act on even without committing crimes. When the speech is said to the public, some listeners—probably most—will focus on the social criticisms, rather than being egged on to commit crimes. *See* Dennis v. United States, 341 U.S. 494, ___ (1951) (Frankfurter, J., concurring in the judgment). But when it's said to a small audience, selected in part because of a belief that its members will be willing to commit a particular crime, it's much less likely that the listeners will draw some broader political message from the speech, and there's thus much less reason for the speech to be protected.

[195] MODEL PENAL CODE § 2.02(2)(a). *See also* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 346 (1985) ("Giving disinterested advice on the pros and cons of a criminal venture is closer to the line [between intentional help and knowing help], and there is sometimes doubt about whether it should suffice to establish liability. But in principle, if it was the purpose of the one giving the advice to influence the other to commit the crime, he is an accomplice [because he's intending to help the actor]; if that was not his purpose, he is not liable.").

down at the proper place, then I'm acting as a lookout: I'm helping him speed with impunity before and after the speed trap. Likewise, if I tell a friend how to set up a file-sharing program so that he can illegally download music, my advice would be crime-facilitating (or at least tort-facilitating). Still, it seems harsh to punish people who help their friends this way, when the friends' offenses are petty and when many mostly law-abiding people would help each other this way.

This, though, should be reflected in decisions by prosecutors (or civil plaintiffs), or in legislative judgments to limit some forms of aiding and abetting liability to more serious crimes, or at least to punish aiders of less serious crimes only when the aid is intentional.[196] I don't think the First Amendment should be interpreted as protecting such speech; the reasons not to prosecute it are not First Amendment reasons.[197]

Finally, I should acknowledge that even single-use speech may be valuable as self-expression: As I've suggested above, telling a criminal friend how to commit a crime, or telling him that the police are coming, may express one's loyalty and affection, and thus contribute to the speaker's self-fulfillment and self-definition.[198] The leading exponent of the self-expression theory of the First Amendment, Edwin Baker, argues that such speech (his example is informing one's bank robber "associates about the bank's security and layout") should be unprotected because the speech constitutes "participating in an activity that used illegal force," and is "merely one's method of involvement in a coercive or violent project."[199] But this argument doesn't quite explain why this sort of speech constitutes constitutionally unprotected "participat[ion]" in crime, but revolutionary advocacy—which, after all, is intended to bring about coercion and violence, but which Professor Baker would protect—doesn't constitute such "particip at[ion]."[200]

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[196] [Cite.]

[197] In his concurrence in *Whitney v. California*, 274 U.S. 357, 377-78 (1927), Justice Brandies argued that incitement of minor crimes should be constitutionally protected because "imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious"; but even if this view is correct, it rests on the assertion that such speech is constitutionally valuable, because it's "essential to effective democracy." Conveying crime-facilitation information to a person who you know is likely to use it for criminal purposes is not, I think, constitutionally valuable, and should thus be punishable even if it facilitates only a minor crime.

[198] *See* Baker, *supra* note 79, at 994.

[199] *Id.* at 1005.

[200] *See id.* (arguing that "publishing the layout and security system of a bank" should be protected "even though the publisher knows that a bank robber might use this information in a robbery attempt"); C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181, 1208 (1994) (arguing that revolutionary advocacy should be protected). Professor Baker does argue that speech that coerces a listener, causes harm through means other than "mental intermediation" or "the expression being understood by the listener," or intentionally deceives a listener, should be unprotected, because it isn't legitimate self-expression. *See* Baker, *supra* note 79, at 997-99; C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 909-10 (2002). Crime-facilitating speech, whether said to one known criminal or to the public, and whether said with the intent to facilitate crime or oth-

I think the proper focus here isn't whether the speech constitutes "participat[ion]" in crime, or whether its purpose is to bring about crime.[201] Rather, it seems to me that speech stops being legitimate self-expression when the speaker knows that its only likely use is helping bringing about crime.[202] Self-expression must be limited in some measure by a speaker's responsibility not to bring about illegal conduct. When the speech contributes to public debate about as well as constituting self-expression, the speech may deserve protection despite its harmful effects.[203] But when its value is solely self-expression, its contribution to the listener's crimes should strip it of its protection just as its coerciveness or deception would strip it of protection.[204]

b. Speech communicating facts that have very few lawful uses

The preceding subsection dealt with speech that has only harmful uses because of the known character of its *listeners*: The speaker is saying things to particular people who the speaker knows are planning to use it for criminal purposes. But there are also a few categories of speech that are likely to have virtually no noncriminal uses, because of their *subject matter*.

Social security numbers are one example of such information; computer passwords are another. Publicly distributing such information is unlikely to facilitate any political activity (unlike, say, publicly distributing abortion providers' or boycott violators' names and addresses). It's unlikely to contribute to scientific or business decisions (unlike, say, publicly distributing information about a computer security vulnerability). And unlike detective stories or even contract murder manuals, social security numbers and computer passwords are unlikely to have any entertainment value.

Even in these cases, there may be some conceivable legitimate uses. For instance, say that a newspaper or a Web log gets an e-mail that says "I have discovered a security hole in system X that allowed me to get a large set of social security num-

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erwise, doesn't fit within any of these exceptions.

[201] *See* Baker, *supra* note 79, at 1004 (suggesting that "purpose" is generally an important inquiry in determining whether something is proper self-expression); *id*. at 1005 (arguing that espionage should be distinguished from lawful speech "because the purpose of the espionage activity" is to "increase[] the coercive power of another country").

[202] *See supra* note 194 (arguing that public revolutionary advocacy should be protected precisely because many of its listeners will see it as a broader social criticism, which they can act on even without committing crimes).

See Dennis v. United States, 341 U.S. 494, ___ (1951) (Frankfurter, J., concurring in the judgment).

[203] *See infra* Part V.A.

[204] *See* Baker, *supra* note 79, at 997-99 (arguing that coercive speech isn't legitimate self-expression); *id*. at 1005 (arguing that speech which "increases the coercive power of another country" isn't legitimate self-expression, though limiting this to sitautions where such an increase in coercive power is "the purpose of the espionage activity"); Baker, supra note 200, at 909-10 (arguing that deceptive speech isn't legitimate self-expression).

bers; I'm alerting you to this so you can persuade the operators of X to fix the hole; I pass along a large set of the numbers and names to prove that the hole exists." By publishing some of the numbers and the names, the recipient can vividly prove the existence of the problem, and thus more quickly persuade people to fix the problem. If people see their own names and social security numbers on the list, they'll know there's a problem. If they simply hear that someone claims that such a Web site existed, they may be more skeptical.

Still, these valuable uses would be extremely rare; and people can easily accomplish the same goal in a less harm-facilitating way simply by releasing only the first few digits or characters of the social security numbers or passwords. (Such equally effective but less harmful alternative channels wouldn't be available for any of the other examples I describe; for instance, if you're trying to prove the existence of a security problem by describing the *problem* rather than by showing the *fruits of exploiting it*, then describing half the problem isn't going to be proof enough that the problem exists.[205]) Restricting the publication of full social security numbers or passwords thus will not materially interfere with valuable speech.

Moreover, because most such purely crime-facilitating information—such as the social security numbers and computer passwords—is specific information about particular people or places, restricting it might actually do some good, as Part IV.A.3.b below discusses in more detail. General knowledge, such as information about encryption or drug-making, is very hard to effectively suppress, especially in the Internet age: There will likely always be some other sites that will contain this information. But specific details about particular people or computers are more likely to be initially known to only a few people. If you deter them, then the information may well remain hidden.

Here, too, crime-facilitating speech is analogous to some crime-facilitating products. For example, some states that allow guns nonetheless forbid silencers, presumably because they have virtually no civilian purposes other than to make it easier to criminally shoot people without being caught.[206] They are seen as single-use devices; prohibiting them may help diminish crime, or make criminals easier to catch, without materially affecting any lawful behavior.[207]

Likewise, if a product has no substantial uses other than to infringe copyrights or

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[205] *See supra* note 72 and accompanying text.

[206] *See* 26 U.S.C. §§ 5841, 5845, 5861(d), 5871 (requiring registration of silencers); CAL. PENAL CODE §§ 12500, 12520 (prohibiting possession of silencers); GA. CODE ANN. § 16-11-123 (same).

[207] [Cite.] There might be factual objections to this claim: Though any potential civilian self-defense uses of silencers seem extremely unlikely (theoretically possible, but practically far-fetched), it seems more plausible that using silencers might enhance the pleasure of target-shooting. One of the annoying things about target-shooting is the noise, and shooting with silencers might thus be more pleasant; if this is so, then perhaps silencers should still be banned because the law-abiding use isn't that socially valuable, but at least one can no longer say that there are no law-abiding uses. Still, this is an item rarely heard in discussions about silencers: The premise (right or wrong) behind the bans on silencers seems to be that they are indeed single-use products, at least in civilian hands.

patents, then distributing it is legally actionable.[208] Distributing dual-use products is legal, because making it illegal would interfere with the substantial lawful uses as well as the infringing ones.[209] But when a product has virtually no lawful uses, then there is little reason to allow its sale, and ample reason—the prevention of infringement—to prohibit it.[210] The same sort of argument would apply to the crime-facilitating speech described here.

The major argument in favor of protecting even these publications is the concern about the precedent that a restriction would set. First, as I mentioned, even publishing others' passwords and social security numbers might have some theoretically possible law-abiding uses. I think these uses are pretty far-fetched; but once courts can find speech to be valueless on the grounds that it has very few (rather than just no) law-abiding uses, the term "very few" could be stretched over time to cover more and more.[211] If one thinks that this is likely to happen, or if one thinks that courts will often erroneously fail to see the valuable uses of truly dual-use speech,[212] one

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[208] Sony Corp. of America v. Universal Studios, 464 U.S. 417, 441 (1983); 35 U.S.C. § 271(c) (prohibiting selling products that are "especially made or especially adapted for use in an infringement of [a] patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use").

[209] The Digital Millennium Copyright Act, on the other hand, sets forth a somewhat more restrictive standard: 17 U.S.C. § 1201(a)(2) prohibits, among other things, distributing a product that "has only limited commercially significant purpose or use other than to circumvent a technological measure."

[210] *See, e.g.*, *In re* Aimster Copyright Litig., 334 F.3d 643, 653 (7th Cir. 2003) (holding that a music sharing service engaged in contributory copyright infringement because "Aimster has failed to produce any evidence that its service has ever been used for a non-infringing use"); Telerate Systems, Inc. v. Caro, 689 F. Supp. 221 (S.D.N.Y. 1988) (holding that a computer software distributor engaged in contributory copyright infringement by selling a program whose only use was to infringe a compilation owned by plaintiffs).

[211] *See* Volokh, *supra* note 188, at ___, ___, ___ (discussing how this process can operate).

[212] *See, e.g.*, text accompanying notes 217-222 (criticizing California Supreme Court's finding that a Web page containing the source code to a DVD decryption algorithm was irrelevant to public debates); note 73 and accompanying text (criticizing the court's finding in *Progressive* that the details of the hydrogen bomb plans were irrelevant to public debates). *See also* Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 254 (4th Cir. 1997), which argues that *Hit Man* "is so narrowly focused in its subject matter and presentation as to be effectively targeted exclusively to criminals," which means that though "Paladin may technically offer the book for sale to all comers," "a jury could . . . reasonably conclude that Paladin essentially distributed *Hit Man* only to murderers and would-be murderers." I think that the *Rice* court got the facts wrong here: Given that 13,000 copies of *Hit Man* were distributed, I find it very hard to imagine that it was distributed only to 13,000 murderers and would-be murderers—more likely, the overwhelming majority of all readers were using it for a form of macabre entertainment. *See supra* Part II.B.4. Perhaps this entertainment should itself not be seen as particularly valuable, *see infra* Part IV.A.3.c; but it was still an error for the *Rice* court to assert that a jury could reasonably find that *Hit Man* had virtually no law-abiding readers. *See also Rice*, 128 F.3d at 255 ("If there is a publication that could be found to have no other use than to facilitat unlawful conduct, then this would be it, so devoid is the book of any political, social, entertainment, or other legitimate discourse," because "a reasonable jury could simply refuse to accept Paladin's contention that this purely factual, instructional manual on murder has entertainment value to law-abiding citi-

might prefer to reject any distinction that asks whether speech has "virtually no" lawful uses.

Second, such a distinction would add to the set of reasons why a publication—not just speech to a few known criminals, but speech to the public—might be suppressed; and each such new exception makes it easier to create still more exceptions in the future. Arguments for exceptions are often made through analogies, which may be imperfect but still persuasive: I have argued, for instance, that the existence and propriety of the exceptions for threats and false statements of fact offers an analogy supporting an exception for crime-facilitating speech. As the exceptions increase, these arguments by analogy become easier to make.[213]

This concern may be too speculative to carry much weight when the need for the exception seems strong; but it might help argue against exceptions that don't seem terribly valuable on their own. If the category of facts that have almost no lawful uses is indeed limited to others' social security numbers and computer passwords, then perhaps creating a First Amendment exception to cover such speech might provide too little immediate benefit to justify the potential long-term slippery slope cost.

3. Low-value speech?

Once we set aside the speech that has only, or nearly only, illegal uses, the remainder is genuinely dual-use: Some listeners will be enlightened or entertained by the information, while others will misuse it. Is it possible to say that some categories of dual-use speech are less valuable than others? (I set aside, until Part IV.D, distinctions based on whether some such speech is more *harmful* than other speech; I focus here just on whether it can be distinguished on the grounds that it has less value.)

a. Speech relevant to policy issues vs. speech relevant to scientific or engineering questions

Some crime-facilitating speech is directly tied to policy debates. A newspaper article that reveals a secret federal subpoena of library records can help readers judge where the federal government is abusing subpoenas, but it can also alert the subject of the investigation (who may be a terrorist) that the police are after him.[214] Other

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zens.").

The *Rice* court also seems to have erred in deferring to what "a reasonable jury" could find about the value of the work. If lack of value to noncriminals is part of the First Amendment analysis, then reviewing courts should apply their own independent judgment to decide whether the work indeed lacks such value, just as they do in obscenity cases. *See* [cite]; McDonnell & Volokh, *infra* note 313, at ___.

[213] *See* Volokh, *supra* note 188, at ___; [cite example argument].

[214] *See* 50 U.S.C. § 1861(d) (added by the Patriot Act) ("No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the

speech discusses scientific or engineering questions: a chemistry textbook discusses how explosives are made, or a post to a computer security discussion groups discusses a security bug in a leading operating system. May the explicitly politically connected speech be treated as more valuable than the scientific speech?

The Supreme Court has never decided a case squarely involving the suppression of scientific speech, but it has repeatedly described scientific speech as constitutionally equal in value to political speech.[215] Though the Court has sometimes defended the protection of speech on "public issues" such as "economic, social, and political subjects" as being on "the highest rung" of constitutional protection,[216] the Justices seem to take the view that there's room on that rung for scientific subjects as well.

One reason for this is that scientific questions are often relevant to policy matters, at least indirectly. For instance, are software manufacturers negligently failing to correct security problems, so that they should be regulated by Congress, punished through tort liability, or pressured by consumers to change their ways? That's hard to tell unless people know just what security problems the companies are leaving unaddressed, how serious the problems are, and how hard it is to fix them.

Likewise, what's the proper way to regulate chemicals that are precursors to explosives? Again, it's hard to tell for sure unless one knows which chemicals can be used in explosives, what mechanisms there are for making it harder to use the chemi-

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Federal Bureau of Investigation has sought or obtained tangible things under this section," a section that deals with "order[s] requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities"). Section 1861 has aroused a good deal of controversy, because it allows the FBI to subpoena, among other things, library records. *See, e.g.*, CONG. REC. S10621-87, July 31, 2003 (statement of Senator Feingold on introducing S. 1507, "A bill to protect privacy by limiting the access of the government to library, bookseller, and other personal records for foreign intelligence and counterintelligence purposes").

[215] *See, e.g.*, Miller v. California, 413 U.S., 15, 22-23 (1973) ("[I]n the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression."). *See also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (determining the protection offered commercial speech by considering whether the speech "is so removed from any exposition of ideas, and from truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, that it lacks all protection"); Abood v. Detroit Bd. of Ed., 431 U.S. 209, 231 (1977) ("It is no doubt true that a central purpose of the First Amendment 'was to protect the free discussion of governmental affairs.' But our cases have never suggested that expression about philosophical social, artistic, economic, literary, or ethical matters to take a nonexhaustive list of labels is not entitled to full First Amendment protection.") (some quotation marks omitted).

Lower courts have repeatedly held that scientific speech is as valuable as political speech. *See, e.g.*, Junger v. Daley, 209 F.3d 481, 484 (9th Cir. 2000); Universal City Studios, Inc. v. Corley, 273 F.3d 429, 447 (2d Cir. 2001); [cite more]. *But see* DVD Copy Control Association v. Bunner, 75 P.3d 1 (2003), which said the same, *id*. at 10, but went on to treat the scientific speech as unprotected because "only computer encryption enthusiasts," *id*. at 16—i.e., people interested in the scientific issue rather than its political relevance—were likely to find the speech useful.

[216] Carey v. Brown, 447 U.S. 455, 466-67 (1980).

cals this way—which is information that may also help people figure out how to defeat the mechanisms—and just how hard it is to make the explosives regardless of what laws one might enact. These scientific details—and not just the generalities, as the next subsection will discuss—are as important to these debates as the legal or political arguments that can be built on these details.

The one lower court case that has treated scientific speech as being of low value, *DVD Copy Control Association v. Bunner*,[217] helps illustrate this. Bunner had published on his Web site a computer program that decrypts encrypted DVDs, and that can thus help people infringe the copyrights in those DVDs. The California Supreme Court assumed, given the case's procedural posture,[218] that the program was derived from algorithms that were plaintiffs' trade secrets, and that had been improperly leaked to Bunner.[219]

The court acknowledged that source code "is an expressive means for the exchange of information and ideas about computer programming"[220]—computer professionals can and do read such code to understand how an algorithm works—and concluded that publishing such code is protected by the First Amendment. But, the court concluded, Bunner's publication could be enjoined, because Bunner "did not post [the source code] to comment on any public issue or to participate in any public debate," and "only computer encryption enthusiasts are likely to have an interest in the *expressive* content—rather than the uses—of DVD CCA's trade secrets."[221] Therefore, in the court's view, "[d]isclosure of this highly technical information adds nothing to the public debate over the use of encryption software or the DVD industry's efforts to limit unauthorized copying of movies on DVD's. . . . The expressive content of these trade secrets therefore does not substantially relate to a legitimate matter of public concern."[222]

Contrary to the court's assertions, though, the code is relevant to debate about encryption policy and intellectual property policy. Many modern intellectual property policy proposals—the Digital Millennium Copyright Act is the best example—rest on the assumption that technological protection is a good way to secure intellectual property, and that the legal system should prevent people from circumventing such protections. These legal rules involve the use of the government's coercive force, as well as the spending of enforcement dollars; they also have opportunity costs, as Congress focuses on one set of enforcement techniques rather than another.

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[217] 75 P.3d 1 (2003).

[218] The trial court held that Bunner had violated trade secret law; the court of appeals didn't review this conclusion, because it reversed on First Amendment grounds; and the California Supreme Court was reviewing only the court of appeals' First Amendment decision. *Id.* at 9-10.

[219] Much of the analysis of *Bunner* in these paragraphs is drawn from Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred, 44 Liquormart, and Bartnicki*, 40 HOUS. L. REV. 697, ___ (2003).

[220] 75 P.3d at 10.

[221] *Id.* at 16.

[222] *Id.* at 16.

If the technological protections can be made fairly robust, and if industry uses those robust protections, then it may be worthwhile for Congress to support these protections despite the cost and the limits on liberty that they involve. On the other hand, if technological protections will inevitably be easy to circumvent, or if industry chooses not to use the most effective protections, then it may be better for us to explore other approaches to intellectual property law reform. How reliable these copy protection measures are, both actually and potentially, is thus an important question for sound policy analysis.

Descriptions of how copy protection measures can be evaded help interested observers—researchers, journalists, computer hobbyists, advocacy group staff, and others—answer this question. When a Princeton computer science graduate student discovers that a copy-protection feature of some CDs can be defeated by holding down the "shift" key while the CD is being loaded, that's an important piece of information about whether copy protection is effective.[223] The same is true when someone discovers that the CSS DVD scrambler can be defeated using a short computer program consisting only of about 120 lines of C source code.[224]

Of course, distributing the source code, or even the information that one can defeat a copy protection scheme by hitting a key at the right time, itself helps contribute to the copy protection mechanisms' failure. But if a mechanism can be so easily defeated by the distribution of simple instructions, reasonable observers can conclude that the legal system shouldn't invest its resources into protecting such an ineffective mechanism. These observers can't, however, have the necessary inputs to that decision unless the law allows speech that describes the circumvention mechanism—crime-facilitating as such a description may be.

So scientific speech, even crime-facilitating scientific speech, can be relevant to policy debates. Speech of that sort therefore deserves the same sort of protection that other policy-related speech gets.[225]

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[223] *See* John A. Halderman, *Analysis of the MediaMax CD3 Copy-Prevention System*, Princeton University Computer Science Technical Report TR-679-03, *available at http://www.cs.princeton.edu/~jhalderm/cd3/*; John Borland, *Student Faces Suit Over Key to CD Locks*, C-Net News, Oct. 9, 2003 (describing threatened lawsuit against a graduate student who posted an academic article on how people can avoid a certain kind of copy protection; the threat was later withdrawn); Letter from Matthew Oppenheim, representing the RIAA, to Prof. Edward Felten (April 9, 2001), *available at http://cryptome.org/sdmi-attack.htm* (cautioning a Princeton computer science professor that publishing an article that revealed security holes in a content protectioin mechanism might violate the Digital Millennium Copyright Act); *Statement by Matthew Oppenheim on Professor Felten* (July 13, 2001), *available at http://www.riaa.com/news/newsletter/press2001/042501.asp* (disclaiming any desire to sue Felten under the DMCA); Joseph P. Liu, *The DMCA and the Regulation of Scientific Research*, 18 BERK. TECH. L.J. 501, 513-14 (2003) (discussing *Felten* and other incidents); [European mathematician who declined an invitation to speak at a Carnegie Mellon crypto conference, out of fear of DMCA prosecution].

[224] *See http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/css_descramble.c* (found using a quick google search for "decss source code").

[225] *See* Zimmerman, *infra* note 227, at 263 (making a similar point).

The harder question is whether scientific speech should also be entitled to full protection for its scientific value alone, even if a court concludes (rightly or wrongly) that some scientific speech has only a very slight connection to policy issues. Say, for instance, that the government prohibits certain kinds of genetic modification of plants or animals. A scientist wants to publish an article discussing theories or techniques that will make genetic modification much easier, perhaps allowing it to be done with many fewer resources, and thus by many more researchers (maybe including amateurs). Even independently of any political value that the article may have,[226] it may advance scientists' thinking on forbidden genetic modification, on permitted genetic modification, or on biology more generally.

At the same time, it would indubitably make it easier for people to engage in prohibited research, research that might jeopardize the environment or public health. Should the article be treated differently than political speech because its value is purely scientific rather than political?[227] (Set aside for now whether this speech, like some nonscientific speech, might be restrictable because of its dangerousness, a matter that will be discussed in Part IV.D.1 below.)

I think the answer is no, because the search for truth about science should be as protected by the First Amendment as the search for truth about morality or politics. Deeper scientific understanding is just as necessary for our society's development as deeper political understanding. In the words of the Continental Congress's *Appeal to*

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[226] The speech may be, for instance, used to argue that banning genetic modification is futile, because scientists in other countries would surely uncover this technique independently even if it had been suppressed.

[227] *Compare* James R. Ferguson, *Scientific and Technological Expression: A Problem in First Amendment Theory*, 16 HARV. C.R-C.L. L. REV. 519, 543 (1981-82) (full protection); Martin H. Redish, *Limits on Scientific Expression and the Scope of First Amendment Values: A Comment on Professor Kamenshine's Analysis*, 26 WM. & MARY L. REV. 897 (1985) (likewise); Diane Lenheer Zimmerman, *Scientific Speech in the 1990s*, 2 N.Y.U. ENVTL. L.J. 254 (1993) (likewise); Mary M. Cheh, *Government Control of Private Ideas—Striking a Balance Between Scientific Freedom and National Security*, 23 JURIMETRICS 1, 22-28 (1982) (likewise); Ruth Greenstein, *National Security Controls on Scientific Information*, 23 JURIMETRICS J. 50, 77-83 (1982) (likewise) *with* Elizabeth R. Rindskopf & Marshall L. Brown, Jr., *Scientific and Technological Information and the Exigencies of Our Period*, 26 WM. & MARY L. REV. 909, 916-18 (1985) (reduced protection for much scientific expression); Robert D. Kamenshine, *Embargoes on Exports of Ideas and Information: First Amendment Issues*, 26 WM. & MARY L. REV. 863 (1985) (likewise); Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 908-12 (1986) (likewise, though limiting his argument to "technical data," such as "algorithms, equations, charts, or blueprints"). The Rindskopf & Brown and Kamenshine articles wrongly formulate much of their argument around the notion that speech that has "identifiable commercial applications" (Rindskopf & Brown) or that is distributed by a commercial company (Kamenshine) is "commercial speech" and should thus get less protection than other speech. But the Court has limited the commercial speech doctrine to advertising (explicit or implicit) for some product or service. It has clearly held that the speaker's economic motivation, the utility of the speech for economic purposes, or the sale of the speech for money do *not* make speech into "commercial speech." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, ___ (1976).

the Inhabitants of Quebec, the freedom of the press is important to the "advancement of truth [and] science," just as it is to the "advancement of . . . morality [and] arts" and "diffusion of liberal sentiments on the administration of Government."[228]

And just as we should be skeptical of politicians' ability to accurately evaluate the harms and benefits of political speech, which may run counter to the current majority's political preferences,[229] so we should be skeptical of their ability to accurately evaluate the harms and benefits of scientific speech, which may also run counter to the current majority's political preferences. Recent debates about stem cell research, cloning, genetic modification of agricultural products and of people, and copyright protection technology[230] show how deep the political disagreements about science can be, and how decisions are generally made not just based on a dispassionate, technocratic evaluation of likely danger, but also on ideological perspectives about change and stasis, and about the morality of particular practices.[231] It may be proper for these moral and ideological perspectives to be used as justifications for restricting what scientists do, to fetuses, life forms, or electronic devices. But the government shouldn't be trusted to use these perspectives as justifications for restricting what scientists say about science, any more than for restricting what people say about politics.

So the relevance of much scientific speech to political debates, coupled with its value to the search for scientific truth should, I think, lead it to be treated the same as political speech. The Court's, and lower courts', statements endorsing this position seem correct.[232]

Nonetheless, the matter is not as well-settled as one might at first assume. The Court has never squarely confronted the question; and when the question does come to the Court, it might be in a case where the government's argument for suppression will be hard for the Justices to resist: Scientific speech is most likely to be restricted precisely when it's harm-facilitating, and some scientific speech is now capable of facilitating some extremely serious harms. My sense is that if the scientific speech is to be restricted in such a situation, it should be restricted because (and only when) it's especially harmful, not because it's less valuable.[233] But it's hard to predict what the Court will end up doing in such a situation.

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[228] *See* Continental Congress, Appeal to the Inhabitants of Quebec, Oct. 26, 1774, *cited in* Roth v. United States, 354 U.S. 476, 484 (1957) ("The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs.").

[229] [Cite.]

[230] [Cite.]

[231] [Cite.]

[232] *See supra* note 215.

[233] *See infra* Part V.B.

b. General knowledge vs. particular incidents

Some crime-facilitating speech communicates general knowledge—information about broadly applicable processes or products, such as how explosives are produced, how one can be a contract killer, or how an encryption algorithm can be broken. Other crime-facilitating speech communicates details about particular incidents, such as a witness's name, or the fact that certain library records have been subpoenaed.

Some might think that the particular information is materially less valuable than the general, precisely because the particular touches only on one specific incident. But the Court has not taken this view. A wide range of cases—such as the libel cases, cases dealing with criticism of judges' performance in particular cases, cases dealing with the publication of the names of sex crimes victims, and more—have involved statements about particular incidents and often particular people, rather than general assertions about politics or morality.[234] All those cases have treated speech about particular incidents as being no less protected than speech about general ideas.

And the Court has been right about this. First, people's judgment about general problems is deeply influenced by specific examples. That's how people's minds work: Generalities alone rarely persuade people—to be persuasive and correct, an argument has to rest both on a general assertion and on specific examples. To decide whether library borrowing records should be subject to subpoena, for instance, people will often need to know just how these subpoenas are being used. Statistical summaries (especially ones that can't be verified by the media, because it's a crime to reveal the subpoena to the media) won't be enough.

Likewise, people are much less likely to be persuaded by accounts that omit names, places, and details of the investigation. People are rightly skeptical of such unsourced accounts—saying "trust me" is a good way to get people not to trust you, especially when, as now, people doubt the media as much as they do other institutions.[235] Any side that is barred from giving concrete, detailed examples will be seriously handicapped in public debate.

Second, speech about particular incidents is often needed to get justice in those incidents, and to deter abuses in future incidents. One important limit on government power is its targets' ability to publicly denounce its exercise.

If a librarian who is served with a subpoena can't publicize the subpoena, and

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[234] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Garrison v. Louisiana, 379 U.S. 64 (1964); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Florida Star v. B.J.F., 491 U.S. 524 (1989).

[235] Newspapers and other speakers sometimes do use anonymous reports in their stories, because of other constraints (such as promises to sources), but that's certainly not the optimal means of persuading a skeptical public. [Discuss argument that people will trust the newspapers, because they'll know that newspapers aren't publishing information because they're legally precluded from doing so.]

explain in detail how he thinks this subpoena may interfere with patrons' and librarians' freedom, then it will be more likely that such a subpoena may stand even if it's illegal or unduly intrusive. If a newspaper may not publish the names of witnesses to a crime, then it's less likely that others who may know that the witnesses are unreliable will come forward, and tell their story either to the court or to the journalists. Justice in general can only be done by working to get the right results in each case. And public speech about the concrete details of the particular cases is often needed to find the truth in those cases.

Finally, even temporary restrictions on publishing specific information raise serious First Amendment problems, because the value of speech can be lost even if the speech is just delayed, and not prohibited altogether—this is why the Court has generally rejected proposals to suppress speech during trials, even if the speech were to be freely allowed after the trial.[236] The same should apply to, for instance, rules that bar the revelation of witnesses' identities before they testify, or of the details of subpoenas before the investigation is over.[237]

Often, if the speech is delayed, any harm the speech seeks to avoid may become hard to remedy: Many people's personal reading habits might be wrongly revealed to the government by an overbroad subpoena, or a person may be wrongly convicted and the conviction may be hard to overturn even if new evidence is revealed after trial.[238] Moreover, the public is often less interested in discussing alleged wrongs in the past than it is in confronting supposed injustice in a crime or investigation that's now taking place. Just as any side of the debate that can't produce concrete details is greatly handicapped, so is any side that can't bring its evidence before the public when it's most timely.

But while specific information about particular incidents ought not be distinguished from general knowledge on grounds of value, it is different in another way: Trying to restrict the spread of such specific information may be less futile than trying to restrict general knowledge. General knowledge, such as drug-making or bomb-making information, is likely to already be known to many people, and published in many places, even if underground ones. People will therefore always be available to find it somewhere, especially on the Internet, with only modest effort. If the knowledge is available only on five sites rather than fifty, that will provide little help to law enforcement.

On the other hand, any particular piece of specific information—such as the existence of a particular subpoena or the password to a particular computer system—is less likely to be broadly available at the outset. If we can reduce the amount of such information that's posted, then fewer investigations or computer systems will be compromised. It's better that five thousand computer system passwords be publicly

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[236] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 560-61 (1976).

[237] *See supra* notes 14 and 24.

[238] *See* Herrera v. Collins, 506 U.S. 390, 400 (1993) (upholding Texas's rigid constraints on the ability to get a new trial based on newly discovered evidence).

revealed than fifty thousand. So to the extent that the futility of a speech restriction cuts against its constitutionality,[239] restrictions on general knowledge are less defensible than restrictions on specific information about particular people or places.

c. Commentary vs. entertainment and curiosity

As Part II.B.4 discussed, some people read crime-facilitating speech to entertain themselves or to satisfy their curiosity. The speech can be crime novels or thrillers, how-to books that are pitched as crime-facilitating but are mostly read by people who like to fantasize about themselves being soldiers of fortune, or books that people read just because they're curious about undetectable poisons or the practices of contract killers.

The Court has repeatedly refused to treat entertainment as less valuable than political advocacy.[240] The one narrow exception is obscenity law, which treats a subset

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[239] *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 567 (1976) (concluding that a ban on a newspaper's pretrial coverage was unconstitutional, partly because it was unlikely to serve its goal of preventing juror prejudice, since in the small 850-person town, "[i]t is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it."); *id.* at 559 n.22 (Brennan, J., concurring in the judgment) (emphasizing that in small towns such restrictions are likely to be ineffective because "the smaller the community, the more likely such information would become available through rumors and gossip, whether or not the press is enjoined from publication"); Buckley v. Valeo, 424 U.S. 1, 45-47, 53 (1976) (concluding that restrictions on independent expenditures were unconstitutional, partly because they were likely to be ineffective because they could so easily be skirted); ACLU v. Reno, 31 F. Supp. 2d 473, 496 (E.D. Penn. 1999) (concluding that Child Online Protection Act was unconstitutionally partly because it didn't substantially advance the government interest, given that children would still be able to access material from foreign sites), *aff'd*, 217 F.3d 162 (3rd Cir. 2002), *rev'd on other grounds sub nom.*, Ashcroft v. ACLU, 535 U.S. 564 (2002); [ALA v. Pataki (S.D.N.Y. 1999)]; [ACLU v. Johnson (10th Cir.)]; [American Booksellers Ass'n v. Dean (2nd Cir. 2003)].

[240] *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995) (stating that even nonsense poetry, instrumental music, and abstract are fully constitutionally protected); Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment"); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection."); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) ("We have no doubt that the subject of the *Life* article, the opening of a new play linked to an actual incident, is a matter of public interest. 'The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press].'"); Winters v. New York, 333 U.S. 507, 510 (1948) ("We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.").

of sexually titillating speech as less protected; but even sexually themed works are just as protected when they have artistic or literary value as when they have scientific or political value.[241]

The Court's justification for protecting entertainment hasn't generally focused on the value of entertainment as such. Rather, it has relied on the capacity of entertainment to also convey political messages:

> We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.[242]

And the same rationale applies to most crime-facilitating entertainment. The *Hit Man* contract murder manual does convey a message—a rejection of morality, and praise for the "man of action" who is able and willing "to step in and do what is required: a special man for whom life holds no real meaning and death holds no fear . . . A man who faces death as a challenge and feels the victory every time he walks away the winner." This message is one thing that leads many people to find the book disgusting.[243]

The real question is how seriously the Court should take this equivalence of entertainment and ideology. The Court's assertions that entertainment is fully pro-

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[241] Miller v. California, 413 U.S. 15 (1973).

[242] Winters v. New York, 333 U.S. 507, 510 (1948).

[243] *See, e.g.*, RODNEY A. SMOLLA, DELIBERATE INTENT 38-39 (1999): "The first time I read the book, I was totally disgusted. . . . I was depressed at the absolute incarnate *evil* of the thing, the brazen, cold-blooded, calculating, meticulous instruction, and repeated encouragement in the black arts of assassination." The encouragement, contemptible as it may be, is part of the book's "doctrine," a doctrine that being a hit man is a legitimate and even honorable profession, and, more importantly, that people who are capable of killing should do so unencumbered by moral compunctions.

Rice v. Paladin Enterprises, Inc. dismissed the possibility that *Hit Man* may convey an ideological message: "Ideas simply are neither the focus nor the burden of the book," the court concluded; "[t]o the extent that there are any passages within *Hit Man*'s pages that arguably are in the nature of ideas or abstract advocacy, those sentences are so very few in number and isolated as to be legally of no significance whatsoever." 128 F.2d 233, 262 (4th Cir. 1997). But this, I think, is mistaken: While the idea underlying *Rice*—that the "man of action" should be willing, even glad, to violate generally accepted moral commands—is evil, it is an idea, and the content and tone of the book pervasively supports that idea—that the "man of action" should be willing, even happy, to violate the laws of traditional morality. This is, I think, a form of "propaganda" through entertainment, and does "teach[]" a nihilistic "doctrine," even if the *Rice* court could "see nothing of any possible value to society" in the book. (*Winters* itself involved a ban on the distribution of "true crime" magazines, as applied to what the lower court said were "collection[s] of crime stories which portray in vivid fashion tales of vice, murder and intrigue," *People v. Winters*, 48 N.Y.S.2d 230, 231 (App. Div. 1944). As a class, these magazines seem likely to have not much more overtly political content than *Hit Man*.) Perhaps, as the text describes, *Hit Man* should nonetheless be seen as unprotected—but despite its political content, not because of the absence of such content.

tected came in cases where the harm caused by the speech was relatively indirect and, in the eyes of some, slight: *Winters* involved a law that tried to suppress accounts of crime on an obscenity-like moral degradation rationale;[244] other cases involved the false light invasion of privacy tort and the right of publicity.[245]

Moreover, *Winters* recognized that entertainment often conveys a political message, and restricting entertainment because of the messages it conveys can thus substantially interfere with debate about ideas. But entertainment is rarely intended to convey crime-facilitating facts—most entertainment is fiction, and the entertainers must expect that their audience won't focus too closely on a work's factual assertions—or to make political statements using such facts. The audience likewise probably rarely learns such facts or the ideas that they support from the entertainment. Restricting the spread of such facts through entertainment is thus less likely to interfere with debate, whether political, scientific, or historical, than restricting the spread of ideas through entertainment.

The question, then, is whether the *Winters* rationale still applies when (1) speech seems quite dangerous, (2) its chief noncriminal value is entertainment, and (3) the underlying political message could be expressed pretty much as well even without the especially dangerous speech. [Dear Readers: My instinct is that the answer is that *Winters* should apply; but I'm having an unexpectedly hard time defending this, and I'm not completely certain that I'm right. I'd love to hear people's reactions to this. Is the key problem that prong 3 will very rarely be satisfied? Or is it that any restriction on entertainment will necessarily be too vague, thus leaving authors without a sense of what they can or can't write? Or is it something else?]

d. "Speech on matters of public concern"

The Supreme Court has occasionally tried to create tests that distinguish speech on matters of "public concern" from speech on matters of merely "private concern." Both categories refer to speech that has at least some value, and thus deserves at least some protection;[246] but, the theory goes, speech on matters of merely private concern has comparatively little value, and so may be subject to more restrictions than speech on matters of public concern. The "newsworthiness" test in the disclosure of private

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[244] [Cite.]

[245] Time, Inc. v. Hill, 385 U.S. 374 (1967); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

[246] *See, e.g.*, Connick v. Myers, 461 U.S. 138, 147 (1983):

> We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. "The First Amendment does not protect speech and assembly only to the extent that it can be characterized as political. . . ." We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the state can prohibit and punish such expression by all persons in its jurisdiction. . . .

facts tort reflects a similar judgment.[247] So does the suggestion, expressed by many commentators, that free speech protection should be limited to speech that's part of "public discourse."[248]

[I'd like to trim this section, but I'm not yet exactly sure where.]

i. Some relevance to any political, social, or scientific controversy

To evaluate the public/private concern distinction, we must identify precisely what it means. One possible definition would rest on whether the speech is relevant to any political, social, or scientific controversy, whether general or specific. The Court seems to have taken this view in *Florida Star v. B.J.F.*, where it concluded that the name of a rape victim was a matter of "public significance" because of its connection to a report of a crime.[249] Under such an approach, only "domestic gossip,"[250] such as discussions of a private figure's (noncriminal) sex life,[251] would qualify as being of "private concern."[252]

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[247] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652D (describing what many cases refer to as the requirement of lack of "newsworthiness" as lack of "legitimate concern to the public"); Shulman v. Group W Productions, Inc., 955 P.2d 469 (Cal. 1998) (if statements "are of legitimate public concern, plaintiff cannot establish necessary element of tort action, the lack of newsworthiness"); Peckham v. Boston Herald, Inc., 719 N.E.2d 888 (Mass. App. 1999) (treating the "newsworthiness" and "legitimate public concern" categories as interchangeable); Romaine v. Kallinger, 537 A.2d 284 (N.J. 1988) ("publication of . . . facts would not constitute an actionable invasion of privacy if they are 'newsworthy' and thus a matter of legitimate public concern"); *see also* Joe Dickerson & Associates, LLC v. Dittmar, 34 P.3d 995 (Colo. 2001) (holding, as to the related tort of "invasion of privacy by appropriation of name and likeness," that the "newsworthiness" privilege applies when the speech "is made in the context of, and reasonably relates to, a publication concerning a matter that is newsworthy or of legitimate public concern").

The Supreme Court has never decided whether this tort is constitutional, though some courts have upheld it if it is limited to "non-newsworthy" facts.

[248] [Cite.]

[249] 491 U.S. 524, 536 (1989). The Court said that "That is, the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities"; but it ultimately held that the publication even of the specific identity was constitutionally protected under the principle that "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order," *id*. at 533.

[250] Bartnicki v. Vopper, 532 U.S. 514, 533 (2001).

[251] *See* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, ___ (1985).

[252] For criticisms of such lower protection, *see* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971) (Marshall, J., dissenting) ("[A]ssuming that . . . courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject [and thus on] what information is relevant to self-government. . . . The danger such a doctrine portends for freedom of the press seems apparent."); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 30 (1990); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People*

But little crime-facilitating speech would be included within this category. Publishing the names of witnesses to a crime, for instance, may jeopardize their lives, but these names may be of legitimate concern to observers who aren't sure that the witnesses are telling the truth, or that the police aren't paying enough attention to the witnesses.[253]

Perhaps the "private concern" speech that's defined this way would include the nearly no-value speech discussed in Part IV.A.2: the speech that only helps listeners commit crime, and has virtually no other value, such as the advice on how to commit burglary, the message that the police are coming, or the publication of social security numbers of computer passwords. So this distinction would support the Part IV.A.2 analysis; but it won't do any work beyond that.

ii. "Public concern" as defined in other Supreme Court cases

The Supreme Court has not, however, always drawn the "public concern" zone so broadly. One possible public/private concern line would try to track the narrower definition that the Supreme Court has applied in three cases, *Connick v. Myers*, *Dun & Bradstreet v. Greenmoss Builders*, and *Bartnicki v. Vopper*.[254] The difficulty is that it's not clear exactly where these cases drew the line, why they drew it there, or why the line is correct.

In *Connick*, the Court held that the First Amendment doesn't protect government employees from being fired for speech unless the speech is on matters of public concern. The speech was a questionnaire Myers distributed to her District Attorney's office coworkers about "the confidence and trust that [employees] possess in various supervisors, the level of office morale, and the need for a grievance committee." This, the Court held, was "not [speech] of public concern."[255] This, though, seems to be mistaken: Discussions of dissatisfaction in a District Attorney's office are generally seen as being of quite substantial public concern. We wouldn't be surprised or offended, for instance, if we saw a newspaper article discussing morale at the District Attorney's office.[256]

From Speaking About You, 52 STAN. L. REV. 1049, 1088-1106 (2000).

[253] Times Mirror Co. v. Superior Court, 198 Cal. App. 3d 1420 (1988), a disclosure tort case, held that a jury might properly find that the witness's name isn't "newsworthy"; but it did so by "balancing the value to the public of being informed" of the witness's name "against the effect publication of her name might have upon [the witness]'s safety and emotional well being," *id*. at 1429. The court was thus effectively ratcheting up the newsworthiness threshold in those cases where the witness's safety was at stake, so that the publication of the name might be restricted even if the name would be in some measure valuable to public discussion. *See* Capra v. Thoroughbred Racing Ass'n, 787 F.2d 463, 464-65 (1986) (same); Hyde v. City of Columbia, 637 S.W.2d 251, 269 (Mo. App. 1982) (same).

[254] 461 U.S. 138 (1983); 472 U.S. 749 (1985); 532 U.S. 514, 533 (2001).

[255] 461 U.S. 138, 148 (1983).

[256] Lower courts have likewise found that speech wasn't of public concern even when it alleged race discrimination by a public employer, criticized the way a public university department is run, and criticized the FBI's layoff decisions—not results that fit well with conventional understandings of

Likewise, *Dun & Bradstreet* held that presumed and punitive damages could be imposed without a showing of "actual malice" when the speech was on a matter of merely private concern—a category in which the Court included a credit report that noted a company's supposed bankruptcy. This, though, would surprise the company's employees, creditors, and customers, as well as local journalists who might well cover the bankruptcy of even a small company in their small town.[257]

Finally, in *Bartnicki*, the Court held that the media was generally free to publish "public concern" material even if it was drawn from telephone conversations that were illegally gathered by third parties, and then passed along to the media. In the process, the Court said, in dictum, that "We need not decide whether that interest [in preserving privacy] is strong enough to justify the application of §2511(c) to disclosures of trade secrets or domestic gossip or other information of purely private concern."[258] But this too doesn't seem quite right: Any confidential and valuable business information may be a trade secret, including decisions that are of great concern to a company's employees, customers, neighbors, or regulators—for instance, whether a company is planning to locate an allegedly polluting plant in a particular area, to manufacture a product that some may see as dangerous, or to close a plant and lay off hundreds of people.[259]

Perhaps the relevant distinction is whether the speech was said to the public, or only to a small group (*Connick* and *Dun & Bradstreet* justify their judgments by saying that a court should look at the "form and context" of speech as well as the "content"[260])—in *Dun & Bradstreet*, the bankruptcy report was sent only to five subscribers, and in *Connick*, the questionnaire was handed out to a few coworkers. But it's not clear why this distinction should matter much: Much important speech is said to small groups or even one-on-one, and not just in mass publications; in fact, the Court

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what's a matter of legitimate public concern. *See* Volokh, *supra* note 252, at 1097; Murray v. Gardner, 741 F.2d 434 (D.C. Cir. 1984); Lipsey v. Chicago Cook County Criminal Justice Comm'n, 638 F. Supp. 837 (N.D. Ill. 1986); Landrum v. Eastern Ky. Univ., 578 F. Supp. 241 (E.D. Ky. 1984).

[257] *See* 472 U.S. at 789 (Brennan, J., dissenting) ("an announcement of the bankruptcy of a local company is information of potentially great concern to residents of the community where the company is located"). Greenmoss Builders was located in Waitsfield, Vermont. *See* Superior Court Complaint, *in* Joint Appendix, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, No. 83-18 (U.S. 1983), a town that in 2000 had under 2000 residents. *See* http://www.badc.com/towns/census00/waitsfield00.pdf .

[258] *Id.* at 533.

[259] *See, e.g.*, RESTATEMENT (THIRD) OF UNLAWFUL COMPETITION § 39 (defining a trade secret as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others"); OHIO REV. CODE ANN. § 1333.61(D) (Anderson 2003) (defining trade secrets as including "any scientific or technical information, design, process, procedure, formula, . . . or improvement, or any business information or plans, [or] financial information" that "derives independent economic value, actual or potential, from not being generally known to . . . persons who can obtain economic value from its disclosure or use" and that "is the subject of efforts . . . to maintain its secrecy").

[260] 472 U.S. at ___; 461 U.S. at ___.

has held that government employee speech may be treated as being "of public concern" even when it's said to one person.[261] The distinction would in any event not explain *Bartnicki*, where the Court seemed to be talking about media publication of trade secrets. And even if this is the right distinction, then again most crime-facilitating speech will be of public concern.

Another possible explanation of *Connick* and *Dun & Bradstreet* (though not of the trade secret discussion in *Bartnicki*) is that the Court is focusing on the speaker's motive, and only secondarily on the content: In both, the speakers and likely the listeners seemed to be *motivated* by their own economic or professional concerns, rather than by a broader public-spirited desire to change society.[262] Lower court cases have tended to interpret *Connick*, and in some measure *Dun & Bradstreet*, this way.[263]

But again, it's not clear just how this line would be drawn—Myers, for instance, was apparently motivated in part by ethical concerns as well as by her own professional advancement[264]—and why such a line would be proper. As *Connick* itself acknowledged, questions about whether employees were being illegally pressured to work on political campaigns are of public concern, even if the speaker (Myers) and the listeners (her coworkers) were largely concerned about how this illegality affected them.[265] Why wouldn't the same be true for questions about whether the office is being managed inefficiently or dishonestly? And even if the speech is selfishly motivated, the Court has repeatedly stressed that such speaker motives don't make the speech unprotected. Finally, under this distinction most crime-facilitating speech would again be seen as of public concern, because it's usually motivated by matters other than the speaker's professional or economic grievances.

Connick and *Dun & Bradstreet* might have reached the right results, because the government needs to have extra authority when acting as employer, or because false statements of fact are less valuable than true ones. But it's not clear that the "public concern" test is the proper way to reach these results; and the particular holdings are clearly inapplicable to the government acting as sovereign, punishing true statements: Few people would argue, I take it, that true newspaper stories about mismanagement in the D.A.'s office or about a local company's bankruptcy should be denied full First Amendment protection.

So whatever one thinks of the *Connick* and *Dun & Bradstreet* results, the cases

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[261] *See* Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) (so holding).

[262] In footnote 8, *Connick* seemed to suggest that the motive, not the size of the audience or the subject matter of the speech, was the key factor. The Court said that "This is not a case like *Givhan*, where an employee speaks out as a citizen on a matter of general concern, not tied to a personal employment dispute, but arranges to do so privately [to one supervisor]," and went on to acknowledge that the content of Myers' statement might, "in different circumstances, have been the topic of a communication to the public that might be of general interest." 461 U.S. at 148 n.8.

[263] [Cite.]

[264] 461 U.S. at 140 n.1.

[265] *Id.* at 149.

offer little helpful precedent for a more broadly applicable "public concern" test. If anything, the flaws in the Court's analysis of what's a matter of "public concern" and what isn't should lead us to be hesitant about such a test more generally. What is or isn't a matter of legitimate public concern is a highly subjective judgment, with few really clear guideposts. It's no surprise that the Court has had a hard time drawing this line. Perhaps it simply can't be effectively drawn;[266] but even if there is a theoretically possible definition of the line, it at least suggests that the Court is quite unlikely to draw it well.

iii. "Unusual public concern"

In *Bartnicki v. Vopper*, Justices Breyer and O'Connor suggested another distinction, between speech on matters of "unusual public concern"—such as a threat of potential physical harm to others"[267]—and matters that are presumably merely of modest public concern. This approach may seem appealing to those who think that in some situation protecting speech should be the exception rather than the rule: That seems to have been Justices Breyer's and O'Connor's view as to publication of illegally intercepted conversations, and some might take the same view for crime-facilitating speech, too.[268] Information about possibly illegal subpoenas, the argument would go, might need to be constitutionally protected, even if such speech may help criminals evade detection. But crime-facilitating speech that's less important (for instance, speech that doesn't allege illegal or improper government behavior) should remain restrictable.

Such a distinction, though, seems hard to apply in a principled way. The *Bartnicki* concurrence appears to use "unusual public concern" to refer to speech that the public *should* be unusually concerned about, rather than just to a judgment about the actual level of public concern.[269] But deciding how much the public should be concerned about something, especially once one concedes that there's *some* legitimate public concern about the matter, is usually a matter of political and moral judgment.

Is there "unusual public concern" in the names of abortion providers, strikebreakers, or blacks who refuse to comply with civil rights boycotts? Those who want to publish these names would argue that there is, because performing abortions, crossing a picket line, or refusing to comply with a boycott is so morally reprehensible that people who do this deserve to be held morally accountable by their neighbors and peers: publicly condemned, personally berated, or ostracized. Others

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[266] *See* sources cited *supra* note 252 (reaching such a conclusion).

[267] *Bartnicki*, 532 U.S. at ___.

[268] *See also* David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957, 996 (2002) (discussing, without endorsing, such a possibility, when disclosure of crime-facilitating information "is justifiable because of the importance of the particular information," for instance when the media "disclos[es] weaknesses in the bomb-screening system for airline luggage or publish[es] detailed information about construction of a 'dirty' radiological bomb").

[269] [Cite.]

disagree; such behavior, they'd argue, should be nobody else's business, presumably because it's morally legitimate. After all, the more morally reprehensible someone's behavior is—especially when the behavior affects others' welfare, directly or indirectly—the more it legitimately becomes others' business.

Restricting this speech on the grounds that the names aren't matters of "legitimate public concern" is thus restricting speech based on a judgment about which side of this contested political debate is right—something judges generally ought not be doing.[270] The Court has sometimes made such decisions: The obscenity exception, for instance, rests on the notion that sexually themed speech is less likely to be relevant to public debate than to other speech, and thus rests on the rejection of the argument that pornography inherently conveys a powerful and valuable message about the social value of uninhibited sex.[271] But for this very reason, the obscenity exception has long been controversial; and even if that particular exception is sound, we should still be skeptical of a doctrine that would require courts to routinely make such ideological judgments about a wide range of speech that is potentially related to public affairs.

Moreover, there will always be some errors in applying any First Amendment test. If the test purports to distinguish public concern speech from purely private concern speech, there will be some public concern speech that is erroneously labeled private concern (and vice versa); but this would probably tend to be speech that's very close to the line, which is to say speech that has only slight public concern. Something would be lost to public debate when that speech is suppressed, but not that much.[272]

But if the test distinguishes speech of unusual public concern from speech of modest public concern, then the errors will suppress some speech that *is* of unusual public concern. When the test is applied properly, it will suppress valuable speech (speech of moderate but not unusual public concern), though by hypothesis that would be justified by the need to prevent crime. But when judges err, the test will suppress even extremely valuable speech.

In this respect, the "unusual public concern" test would also differ from the "se-

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[270] [Cite.] *Cf.* Roth v. United States, 354 U.S. 476, ___ (1957) ("All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests"); Abood v. Detroit Bd. of Ed., 431 U.S. 209, 231 (1978) ("expression about philosophical social, artistic, economic, literary, or ethical matters to take a nonexhaustive list of labels" is "entitled to full First Amendment protection" alongside "the free discussion of governmental affairs").

[271] [Cite.]

[272] *Cf.* FCC v. Pacifica Found., 438 U.S. 726 (1978) (plurality) (dismissing the risk that an order applying a vague standard "may lead some broadcasters to censor themselves"—presumably to censor themselves too much—because "At most, . . . the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern.").

rious value" prong of the obscenity test.[273] The serious value requirement may also be erroneously applied; judges and juries may wrongly conclude that some speech has only slight scientific, literary, artistic, and political value, even when it actually has serious value.

But this risk is diminished in obscenity law by the presence of the other two prongs of the test—the requirements that the speech appeal to the prurient interest and contain patently offensive depictions of sexual conduct. Because of these prongs, errors in the serious value prong affect only a narrow category of speech: those works that are sexually explicit *and* that a court erroneously concludes lack serious value.

Any facts and ideas that the speaker wants to convey are thus conveyable despite the obscenity exception, even if the courts erroneously misjudge their value. At worst, they couldn't be conveyed using sexually explicit and arousing depictions—a limitation on free speech, but still a relatively narrow one.[274] A crime-facilitating speech exception, though, would not be so limited: If it allows the suppression of speech that isn't of "unusual public concern," then errors in applying this test would altogether block the communication of certain facts, and thus entirely prevent the spread of information that can be quite closely tied to public debate.

Finally, the "unusual public concern" test would likely be especially unpredictable. A simple "public concern" test can at least be made clearer by defining the category quite broadly, to cover virtually anything that touches on public affairs or on crime. What's of "unusual public concern" and what's not is a much harder question. Perhaps after many years and many cases, courts might develop a clear enough rule that speakers would know what they may safely say. But even that is doubtful; and, in any event, until that happens, a good deal of speech that *is* of unusual public concern would be deterred by the test's vagueness.

B. Distinctions Based on the Speaker's Mens Rea

1. Focusing on recklessness or knowledge that speech will facilitate crime

Knowingly helping someone commit a crime is usually thought to be bad behavior. Some jurisdictions treat such knowing assistance—for instance, giving a gun to

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[273] Miller v. California, 413 U.S. 15 (1973).

[274] *But see* David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 33-37, 63, 67 (1994), which suggests that the lack of protection for speech that lacks "serious literary, artistic, political, or scientific value" should also be extended to non-sexually-themed speech, including some crime-facilitating speech, such as the publication of the names of crime witnesses. The analysis would call for an eight-factor balancing test, but the lack of serious value "should be one of the most significant criteria" in applying the test; and the test, according to the author, should be applicable even if the speaker doesn't intend to facilitate crime, but simply knows that some readers will act criminally based on the speech, or is reckless about that possibility. *Id.* at 63, 67.

a criminal knowing that he wants to use it to commit crime—as aiding and abetting (others require a mens rea of intent).[275] Other jurisdictions treat it as the special crime of criminal facilitation,[276] which may also cover reckless conduct.[277] Tort law generally holds knowing facilitators of torts civilly liable.[278]

Under this standard, though, most of the speakers I mention in the Introduction are likely to be culpable, because they generally know that some of their readers will misuse this information, or are at least reckless about this. For instance, a journalist who writes a newspaper article about a pirate Web site likely knows that some of his many thousands of readers will find the site and will then use it to infringe copyright.[279]

Even if the journalist doesn't subjectively know of this risk, that will quickly change once a copyright owner notifies the journalist and the publisher that his article is helping people infringe. Future articles will thus be published knowing the likely crime-facilitating effect; and if the article is on the newspaper's Web site, then the publisher will be continuing to distribute the article knowing its effects.

This is probably also true of the authors and publishers of prominent chemistry reference books or of books about how drugs are made. The authors and publishers probably know that some criminals will misuse their books; and even if they don't,

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[275] Knowledge: *See, e.g.*, IND. STAT. § 35-41-2-4 ("A person who knowingly or intentionally aids . . . another person to commit an offense commits that offense"); W. VA. STAT. § 17C-19-1 (likewise); WYO. STAT. § 6-1-201(a) (likewise); N.Y. PENAL LAW §§ 230.15, 230.20 (prohibiting knowing aiding of prostitution); Backun v. United States, 112 F.2d 635 (4th Cir. 1940); Regina v. Bainbridge, 3 All Eng. 200 (1959); People v. Spearman, 491 N.W.2d 606, 610 (Mich. App. 1992), *overruled as to other matters*, People v. Veling, 504 N.W.2d 456 (Mich. 1993); People v. Lauria, 251 Cal. App. 2d 471, 480-81 (1967) (dictum) (suggesting knowledge liability would be proper when the person is aiding a "[h]einous crime" as opposed to merely a "venial" one).

Intent: *See, e.g.*, ALA. CODE § 13a-2-23; COLO. REV. STAT. 18-1-1-603; PA. CONS. STAT. ANN. tit. 18, § 306; VERNON'S TEX. CODE. ANN., PENAL CODE § 7.02; United States v. Pino-Perez, 870 F.2d 1230, 125 (7th Cir. 1989); United States v. Peoni, 100 F.2d 401 (2nd Cir. 1938); People v. Lauria, 251 Cal. App. 2d 471 (1967). *See generally* Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 SO. CAL. L. REV. 2169 (1988).

[276] *See* ARIZ. REV. STAT. ANN. § 13-1004; 9 GUAM CODE ANN. § 4.65; KY. REV. STAT. § 506.080; N.Y. PENAL CODE § 115.00; N.D. CENTURY CODE § 12.1-06-02; TENN. CODE ANN. § 39-11-403.

[277] *See, e.g.*, N.Y. PENAL CODE § 115.00 ("A person is guilty of criminal facilitation in the fourth degree when, believing it probable that he is rendering aid . . . to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony.").

[278] *See* RESTATEMENT (SECOND) OF TORTS § 876 ("For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself"); Halberstam v. Welch, 705 F.2d 472, 482 (D.C. Cir. 1983).

[279] *See* MODEL PENAL CODE § 2.02(2)(b) (defining "knowingly" to mean that the actor "is aware that it is practically certain that his conduct will cause" a certain result). This would be true even if the site's URL isn't included in the article, since the article may well provide information to let people find the site using a search engine.

they will know it once the police inform them that their book was found in a bomb-maker's or drug-maker's apartment.[280] True, these cases will rarely involve knowledge that a particular person will misuse the information, but "knowledge" requirements in criminal law rarely require knowledge that's this specific: Someone who bombs a building knowing that there are people there is guilty of knowingly killing the people even if he didn't know their precise identities.

Such publishing, though, is much less clearly culpable than the classic examples of knowing aiding and abetting,[281] precisely because it involves dual-use behavior. A distributor who sells alcohol to a particular minor, knowing that he's a minor, is culpable; a manufacturer who sells alcohol to distributors in a college town, knowing for a fact that some substantial fraction of the alcohol will fall into the hands of minors, is a different story. Knowingly helping a particular person infringe copyright is culpable, and is contributory infringement. Knowingly selling VCRs is not, even if you know that thousands of people will use them to infringe.[282] The "substantial noninfringing uses" prong of the contributory copyright infringement test is intended to make sure that when people are sued for distributing a product, they can only be held liable if the product is nearly single-use (because nearly all of its uses are infringing) rather than dual use.[283]

The single-use/dual-use distinction also shows why the "actual malice" standard, which lets speakers be punished if they recklessly or knowingly make false statements of fact, can't be imported to crime facilitation:[284] False statements of fact are generally seen (despite a few occasional suggestions to the contrary) as entirely lacking in value[285]—their single use is to inflict harm, and knowingly inflicting such harm may thus be punished. But dual-use materials, such as a pointer to an infring-

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[280] *See supra* note 2 (citing newspaper stories about chemistry textbooks found during raids on illegal bombmakers' homes); *supra* note 4 (same as to illegal drugmaking labs).

[281] [Cite.]

[282] Sony Corp. of America v. Universal Studios, 464 U.S. 417 (1983).

[283] *See supra* text accompanying note 208.

[284] *Cf.* Schroth, *supra* note 38, at 582, 584 (proposing such an importation, by arguing that a publisher of a crime-facilitating book is equivalent to "a security guard who gives his accomplice the combination to a safe in the bank where he works"); Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 248 (4th Cir. 1997) (reasoning that the conclusion that intentionally crime-facilitating speech is unprotected "would seem to follow a fortiori" from *New York Times v. Sullivan*'s endorsement of liability "for reputational injury caused by mere reckless disregard of the truth of . . . published statements"); Hyde v. City of Columbia, 637 S.W.2d 251, 264-67 (Mo. Ct. App. 1982) (reasoning that negligently crime-facilitating speech—there, the publication of a crime witness's name, where the criminal was still at large and could use the information to intimidate or attack the wtiness—should be punishable just as negligently false statements of fact about private figures are punishable).

[285] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("there is no constitutional value in false statements of fact"). *But see* New York Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) (stating that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error,'" but ultimately treating false statements as unprotected when said with actual malice).

ing Web site, or a discussion of the chemistry of explosives, can't be as easily condemned: The speaker knows that he's doing both good and harm, and the known harmful effects may be inevitable if the good effects are to be preserved.

Of course, some people argue that some dual-use devices, such as alcohol or guns, should be banned, because they cause a great deal of harm, and have (in the advocates' judgment) comparatively little value. If one believes that, then one might think that distributing such devices knowing the harmful results is culpable, and should be illegal.

But that judgment flows primarily from one's estimate of the harm and value of the products, and not from the distributors' mens rea. If the distributors knew the product would be used harmfully by some consumers (as is the case with cars, kitchen knives, and baseball bats), but it was valuable enough that this harm had to be tolerated, then the distributors' behavior—though equally knowing—would be quite legitimate.

The same is so where dual-use crime-facilitating speech is involved (as opposed to the speech discussed in Part IV.A.2, which is solely crime-facilitating, and has no substantial noncriminal uses). That the distributor knows the speech may facilitate crime is not a sufficient argument for prohibiting the speech. The real question would be whether the harmful uses of the speech justify suppressing the valuable, noncriminal uses.

2. Focusing on intent to facilitate crime

So the speakers and publishers of most crime-facilitating speech likely know that it may help some readers commit crime. But what about a distinction based on intent (or "purpose," generally a synonym for intent[286])—on whether the speaker has as one's "conscious object . . . to cause such a result," rather than just knowing that the result may take place?[287]

Intent and knowledge (or recklessness) are often not clearly distinguished, partly because most crimes and torts, including those thought of as "intentional," don't actually require a showing of intent; recklessness or knowledge generally suffice. Murder, for instance, is sometimes thought of as intentional killing,[288] but intent to kill isn't required; knowledge or even recklessness suffice.[289] Likewise, the tort of "intentional infliction of emotional distress" generally requires a mens rea of either recklessness, knowledge, or intent; which of the three mental states is present is generally irrelevant.[290] Concepts such as "constructive intent" or "general intent," which

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[286] *See, e.g.*, MODEL PENAL CODE § 2.02.

[287] *Id.* § 2.02(2)(A)(i).

[288] *See, e.g.*, CAMBRIDGE DICTIONARY OF AMERICAN ENGLISH ___ (defining murder as "the crime of intentionally killing a person").

[289] *See, e.g.*, N.Y. PENAL CODE § 125.25.

[290] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 46; *see generally* RESTATEMENT (SECOND) OF

often don't require a finding of intent in the sense of "conscious object . . . to cause [a particular] result" further muddy the distinction.[291]

A few crimes, though, do require intent and not just knowledge. If your son comes to the country in wartime as an agent of the enemy, and you help him simply because you love him, then you're not intentionally giving aid and comfort to the enemy even if you know your conduct will have that effect. But if you do want to help the enemy win the war, then you are acting intentionally and not just knowingly, and are guilty of treason. (This is the distinction the Court drew in *Haupt v. United States*, a World War II case.[292]) Likewise, if a doctor knowingly touches a 15-year-old girl's genitals in the course of an examination, and knows that either he or she will get aroused as a result, the doctor isn't guilty of a crime. But if he does so with the *intent* of sexually arousing himself or the girl, he may be guilty of child molestation.[293] To quote Justice Holmes in *Abrams v. United States*,[294]

> [T]he word "intent" as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. . . . But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it

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TORTS § 8A ("The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that *he believes that the consequences are substantially certain to result* from it.") (emphasis added). *See also* Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 251 (4th Cir. 1997) (taking the view that in civil aiding and abetting cases, intent "requires only that the criminal conduct be the 'natural consequence of [one's original act],'" as opposed to "a 'purposive attitude' toward the commission of the offense").

[291] *See* RESTATEMENT (THIRD) OF TORTS (PHYSICAL HARMS) § 1 (tent. draft no. 1, 2001) ("A person acts with the intent to produce a consequence if: (a) The person has the purpose of producing that consequence; or (b) The person knows to a substantial certainty that the consequence will ensue from the person's conduct."); *id*. § 5 (imposing liability for physical harm that's caused "intentionally" under the § 1 definition); BLACK'S LAW DICTIONARY ___ (7th ed. 1999) (defining "constructive intent") ("A legal principle that actual intent will be presumed when an act leading to the result could have been reasonably expected to cause that result. 'Constructive intent is a fiction which permits lip service to the notion that intention is essential to criminality, while recognizing that unintended consequences of an act may sometimes be sufficient for guilt of some offenses.' Rollin M. Perkins & Ronald N. Boyce, Criminal Law 835 (3d ed. 1982)."); *id*. at ___ (defining "general intent") ("The state of mind required for the commission of certain common-law crimes not requiring a specific intent or not imposing strict liability. * General intent usu. takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence).").

[292] *See* Haupt v. United States, 330 U.S. 631, 641-42 (1947).

[293] *See, e.g.*, UTAH CODE § 76-5-401.1(2). *But see* CAL. PENAL CODE § 11165.1(b)(4) (defining sexual assault as intentional touching of a child's genitals "for purposes of sexual arousal or gratification," but excluding "acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose," presumably in order to prevent prosecution based on a theory that seemingly normal caretaking, affection, or medical care was actually motivated by sexual desires).

[294] 250 U.S. 616, 626 (1919) (Holmes, J., dissenting).

> is the proximate motive of the specific act, although there may be some deeper motive behind. . . .
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> A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime [under a statute limited to statements made "with intent . . . to cripple or hinder the United States in the prosecution of the war"].

Might courts draw a useful distinction between dual-use speech distributed with the intent to promote the illegal use, and dual-use material distributed without such an intent?

a. Crime-facilitating speech and intent

Let's begin analyzing this question by considering what the possible intentions behind crime-facilitating speech might be.

1. Some speakers do have the "conscious object" or "the aim" of producing crime: For instance, some people who write about how people can more effectively resist arrest at sit-ins, engage in sabotage, or make bombs may do so precisely to get more people to engage in sit-ins, sabotage, or bomb-making.[295] The deeper motive in such cases is generally ideological, at least if we set aside speech said to a few people. Speakers would rarely want unknown strangers to commit a crime unless the crime furthers the speakers' political agenda.

2. Others who communicate dual-use information may intend to facilitate the lawful uses: They may want to concretely show how the government is overusing wiretaps, by revealing the existence of a particular wiretap. They may want to show the futility of drug laws, by explaining how easy it is to grow marijuana. Or they may want to entertain, by writing a novel in which the criminal commits murder in a particularly hard to detect way.

3. Other speakers may be motivated by a desire for profit, without any intention of facilitating crime—though, as in category 2, they may know that they're facilitating crime. The speaker may be aware that he's making money by helping criminals, but he might sincerely prefer that no-one act on his speech. The contract murder manual case is probably a good example: If you asked the publisher and the writer "What do you aim to do?," they'd probably sincerely tell you "Make money." If you asked them "Do you aim to help people commit murder?," they'd sincerely say

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[295] *See, e.g.*, Plea Agreement, United States v. Austin, case no. CR-02-884-SVW (C.D. Cal. Sept. 26, 2002) (defendant admits that he put up a Web site contain bombmaking information intending to help people make bombs); Earth Liberation Front, *Setting Fires with Electrical Timers*, available at *http://www.earthliberationfront.com/main.shtml* (described as "The politics and practicalities of arson"); Travis Bemann, *Targeting the Capitalist Propaganda/Media System*, eXperts Against Authority #0001 (July 1, 2001) ("A textfile zine on anarchy, technology, direct action, and generally deconstructing our wonderful society and culture."), *available at* http://free.freespeech.org/xaa/xaa0001.txt (focusing on physical sabotage of communications channels).

"Most of our readers are armchair warriors, who just read this for entertainment; if we had our choice, none of them would use this book to kill someone, because if they did, we might get into legal trouble."[296]

Perhaps this intention to make money, knowing that some of the money will come from criminals, is unworthy. But "when words are used exactly," the scenario described in the preceding paragraph does not involve speech said with the intent to facilitate crime. If crime-facilitating speech doctrine is consciously designed to distinguish dual-use speech said with the intent to facilitate crime from dual-use speech said merely with knowledge that it will facilitate crime (and the knowledge that it will have other, more valuable, effects), the profit-seeking scenario falls on the "mere knowledge" side of the line.

In the *Rice v. Paladin Press* litigation, the defendants stipulated for purposes of their motion to dismiss that they intended to facilitate crime, but that was done simply because they couldn't debate the facts at that stage of the litigation.[297] In reality, there was little practical or ideological reason for them to intend to help criminals (as opposed to merely knowing that they're helping criminals).

4. Still other speakers may be motivated solely by a desire to speak, or to fight speech suppression, rather than by an intention to help people commit crimes or torts.[298] A journalist who publishes information about a secret subpoena might do so only because he believes that the public should know what the government is doing, and that all attempts to restrict publication of facts should be resisted.

Some people who posted information on decrypting encrypted DVDs, for instance, did so because they wanted people to use this information.[299] But after the first attempts to take down these sites, others put up the code on their own systems, intending only to frustrate what they saw as improper speech suppression—many

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[296] *Cf.* Schroth, *supra* note 38, at 575 (acknowledging "the intent that derives from knowledge is probably not as easily inferred in the case of a publisher of a book that teaches how to commit a murder" than when an ideologically minded author self-publishes his crime-advocating and crime-facilitating work, but arguing that the publisher should be held liable under a recklessness standard rather than an intent standard).

[297] [Cite.]

[298] *See, e.g.*, Laura Blumenfeld, *Dissertation Could Be Security Threat*, WASH. POST, July 8, 2003, at A1:

> Toward the other end of the free speech spectrum are such people as John Young, a New York architect who created a Web site with a friend, featuring aerial pictures of nuclear weapons storage areas, military bases, ports, dams and secret government bunkers, along with driving directions from Mapquest.com. He has been contacted by the FBI, he said, but the site is still up.
>
> "It gives us a great thrill," Young said. "If it's banned, it should be published. We like defying authority as a matter of principle."

This is a pretty irresponsible intention, I think, at least in this situation—but it is not the same as an intention to facilitate harmful conduct (though it may show a knowledge that the site will facilitate harmful conduct). The site is at *http://www.cryptome.org/eyeball.htm*; I found it through a simple *google.com* query.

[299] [Cite.]

such "mirror sites" are put up precisely with this intention.[300] Still others put up the material precisely because it was the subject of a noted court case, reasoning that the public should be entitled to decide for itself what the subject matter of the case was.[301] Again, while the mirror site operators knew that their posting was likely to help infringers, that wasn't their intention.

5. Some speakers may be motivated by a desire to help the criminal, though not necessarily to facilitate the crime. That was Haupt's defense in *Haupt v. United States*—he wanted to help his son because he was his son, not because he wanted the son's sabotage plans to be successful. The Court acknowledged that such a motivation does *not* qualify as an intention to assist the crime.[302]

Likewise, consider the burglar who asks a friend for information on how to better break into a building (or a computer system).[303] "Don't do it," the friend first says, "it's too dangerous"; but then the friend relents and provides the information, either from friendship or from a desire to get a flat sum of money up front (as opposed to a

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[300] *See, e.g.*, Russ Kick, *About the Memory Hole*, *http://www.thememoryhole.org/about.htm* and *http://www.thememoryhole.org/feds/cdc-ricin.htm* (describing a broad-ranging mirror site for a wide variety of documents that people have been trying to delete or suppress, including, for instance, a CDC report that said that "Amateurs can make [the deadly gas] ricin from castor beans" because "Ricin is part of the waste 'mash' produced when castor oil is made"); *MPAA Continues Intimidation Campaign*, 2600NEWS, Mar. 12, 2000, *available at http://www.2600.com/news/view/article/331* ("We first took a stand in the DVD battle back in November, when the first cease and desist letters were being sent out. We joined in the mirroring campaign to lend our support to those who had been subjected to hollow threats and harassment from the DVD industry, but were forced into compliance due to circumstances beyond their control. . . . Our modest mirror list has grown substantially and continues to grow, despite mirrors being removed from time to time. The success of the DeCSS mirroring campaign demonstrates the futility of attempts to suppress free speech on the Internet."); *My Motivation to Mirror the Nuremberg Files*, *http://www.xs4all.nl/~oracle/nuremberg/index.html* ("While I strongly hold that every woman should have an abortion if she needs one, I do not think that other opinions about the subject should be outlawed or fined, no matter how harshly they are put. Yet this is precisely what happened in the case of the Nuremberg Files."). The Nuremberg Files site was shut down because it was found to have threatened abortion providers' lives, but it also listed their names and home addresses; the names and addresses are faithfully mirrored on the mirror site. [Cite.]

[301] *See* David S. Touretzky, *What the FBI Doesn't Want You to See at RaisetheFist.com*, *http://www-2.cs.cmu.edu/~dst/raisethefist/* ("I don't share [the politics of Sherman Austin, the creator of the Reclaim Guide bombmaking information site, involved in *United States v. Austin*, *supra* note 2]. I'm a registered Republican, a proud supporter of President Bush (despite the USA PATRIOT Act), and I have nothing but contempt for the mindless anarchism people like Austin mistake for political thought. My reason for republishing the Reclaim Guide is to facilitate public scrutiny of the law under which Austin was charged, and the government's application of the law in this particular case."); David S. Touretzky, *Gallery of CSS Descramblers*, *http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/* ("If code that can be directly compiled and executed may be suppressed under the DMCA, as Judge Kaplan asserts in his preliminary ruling, but a textual description of the same algorithm may not be suppressed, then where exactly should the line be drawn? This web site was created to explore this issue, and point out the absurdity of Judge Kaplan's position that source code can be legally differentiated from other forms of written expression.").

[302] *Haupt*, 330 U.S. at ___.

[303] *See supra* text accompanying note 194.

share of the proceeds). The advisor's goal is not to help the burglary take place: The advisor would actually prefer that the burglar abandon his plans, because that would be safer for the advisor himself. Thus, the advisor isn't intending to facilitate crime with his advice, though he knows he is facilitating the crime.

We see, then, several kinds of motivations, but only the first actually fits the definition of "intent," as opposed to "knowledge." Some of the other motivations may be unworthy—but if they are to be punished, they would be punished despite the absence of intent, not because of its presence.

This list also shows that the presumption that "each person intends the natural consequences of his actions"[304] is generally misplaced here. This presumption causes few problems when it's applied to most crimes and torts, for which a mens rea of recklessness or knowledge usually suffices: It makes sense to presume that each person knows the natural consequences of his actions (the loose usage of "intent" to which Justice Holmes pointed).[305]

But when the law really aims to distinguish intent from mere knowledge, and the prohibited conduct involves dual-use materials, the presumption is not apt. As the above examples show, people often do things that they know will bring about certain results even when those results are not their object or aim. People who distribute dual-use items may know that they're facilitating both harmful and valuable uses, but may intend only the valuable use—or, as categories three through five above show, may intend something else altogether. If one thinks the presumption ought to be used in crime-facilitating speech cases, then one must be arguing that those cases should require a mens rea of either knowledge or intent, and not just of intent.

b. Difficulties proving intent

We see, then, that virtually all speakers of crime-facilitating speech will know that the speech may facilitate crime; but relatively few will clearly intend it. For many speakers, their true mental state will be hard to determine, because their words may be equally consistent with intention to facilitate crime and with mere knowledge.

This means that any conclusion about the speaker's intention will usually just be a guess. There will often be several plausible explanations for just what the speaker wanted—to push an ideology, to sell more books, to titillate readers by being on the edge of what is permitted, and more. We generally avoid having to disentangle these possible motives, because most crimes and torts (such as homicide or intentional in-

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[304] *See, e.g.*, Sandstrom v. Montana, 442 U.S. 510, 513 (1979); Staten v. State, 813 So.2d 775, 777 (Miss. 2002).

[305] The more common statement of this principle, which is that "a man [is] responsible for the natural consequences of his actions," *see, e.g.*, Monroe v. Pape, 365 U.S. 167, 187 (1961), is thus also the more accurate one, because it focuses on responsibility—for which recklessness or often even negligence usually suffices—rather than intent.

fliction of emotional distress) require only knowledge or even just recklessness, rather than intent.[306] But when the mens rea is indeed intent, decisionmaking necessarily requires a good deal more conjecture.

This conjecture will often be influenced by our normal tendency to assume the best motives among those we agree with, and the worst among those we disagree with. This may have taken place in some of the World War I antiwar speech cases: Eugene Debs' speech condemning the draft, for instance, didn't clearly call on people to violate the draft law;[307] I suspect his conviction stemmed partly from some jurors' assumption that Socialists are generally a suspicious, antigovernment sort, whose ambiguous words generally hide an intent to promote all sorts of illegal conduct.[308]

Even if judges, jurors, and prosecutors try to set aside their prejudices and look instead to objective evidence, an intent test will tend to deter ideological advocacy, and not just intentionally crime-facilitating speech. The most reliable objective evidence of speakers' intentions is often their past political statements and affiliations. If the author of an article on infringing sites has in the past written that copyright is an immoral restraint on liberty, and that free copying is good for the advancement of knowledge, then that's evidence that he wrote the article with the intent to help people infringe. Likewise if the author of an article on how marijuana is grown is active in the medical marijuana movement. But if the authors are apolitical, or have publicly supported copyright law or drug law, then that's evidence that they intended simply to do their jobs as reporters, or perhaps even to caution the public about the way criminals act.[309]

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[306] *See, e.g.*, sources cited *supra* notes 289 & 290.

[307] Debs v. United States, 249 U.S. 211 (1919).

[308] [Cite.] *See also* U.S. DEP'T OF JUSTICE, *supra* note 34, at 48 (acknowledging that in a similar mens rea inquiry—the determination whether a speaker is reckless—a jury may be tempted to find liability because it "is hostile to the message conveyed in the information and does not believe that it serves any social utility to distribute such information").

[309] *Rice v. Paladin Press*, 128 F.2d 233, 265 (4th Cir. 1997), defended its holding by saying that there will be very few works that would be punishable under the court's test, which required intent to facilitate crime: "[T]here will almost never be evidence proffered from which a jury even could reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity. In only the rarest case . . . will there be evidence extraneous to the speech itself which would support a finding of the requisite intent." Likewise, the court said, "News reporting . . . could never serve as a basis for aiding and abetting liability consistent with the First Amendment," because "[i]t will be self-evident . . . that neither the intent of the reporter nor the purpose of the report is to facilitate [crime] . . . but, rather, merely to report on the particular event, and thereby to inform the public." But this is just mistaken: If the author or the publisher has in the past taken political stands supporting the violation of a particular law, the jury could quite reasonably (even if perhaps incorrectly) infer that the current stateme—including a news report—was intended to help some readers commit crime. If Haupt could be convicted of treason based on his past statements about the Nazis (see the next paragraph in the text), so the author of the article on infringing sites or on how marijuana is grown could be convicted of aiding and abetting based on his past statements about the evils of copyright law or marijuana law.

Considering people's past statements as evidence of their intentions is quite rational, and not itself unconstitutional:[310] The inferences in the preceding paragraph make sense, and are probably the most reliable way to determine the speaker's true intentions. In cases where intent is an element of the offense, such evidence is often needed. For instance, in *Haupt v. United States*, where Haupt's treason prosecution rested on the theory that he helped his son, a Nazi saboteur, with the intention of aiding the Nazis and not just from "parental solicitude," the Court stressed that the jury properly considered Haupt's past statements "that after the war he intended to return to Germany, that the United States was going to be defeated, that he would never permit his boy to join the American Army, that he would kill his son before he would send him to fight Germany, and others to the same effect."[311] Likewise, in hate crimes prosecutions, evidence of a person's past racist statements may be introduced to show that he intentionally attacked someone because of the victim's race, and not for other reasons.[312]

But the inferences are imperfect. The anti-copyright or pro-medical-marijuana reporter may genuinely oppose illegal conduct at the same time that he opposes the underlying law—he may be writing his article simply because he finds the subject matter interesting and thinks readers ought to know more about how the law is violated, perhaps because this will show them that the law needs to be changed. And if the factfinder's inference is indeed mistaken, then the error is particularly troublesome, because it involves a person being convicted because of his political beliefs, and not because of his actual intention to help people commit crimes.[313]

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[310] Wisconsin v. Mitchell, 508 U.S. 476, 488–89 (1993); Haupt v. United States, 330 U.S. 631, 642 (1947).

[311] 330 U.S. 631, 642 (1947).

[312] *See, e.g.*, United States v. Allen, 341 F.3d 870, 885-86 (9th Cir. 2003) (holding that it was proper for the prosecution to introduce "color photographs of [the defendants'] tattoos (e.g., swastikas and other symbols of white supremacy), Nazi-related literature, group photographs including some of the defendants (e.g., in 'Heil Hitler' poses and standing before a large swastika that they later set on fire), and skinhead paraphernalia (e.g., combat boots, arm-bands with swastikas, and a registration form for the Aryan Nations World Congress)"); [cite more cases].

[313] [Check Holmes sources for quotes re: Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting) and the "unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow" language.]

Independent judicial review, *see* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), will do little to prevent such errors. In First Amendment cases, appellate courts and trial courts are indeed required to independently review findings that speech is unprotected. *See generally* Eugene Volokh & Brett McDonnell, *Freedom of Speech and Appellate and Summary Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998). But while they're asked to review judgments that rest on application of legal standards to the facts that the jury has found, *id*. at ___, and to determine whether the jury had sufficient evidence to make the finding that it did, *Bose*, 466 U.S. at ___, courts do not reexamine juries' findings of credibility. *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688-89 (1989); *Bose*, 466 U.S. at 499-500. So if a journalist testifies that he had no intention of helping people infringe copyright or make drugs, and the jury concludes—based partly on his past anti-copyright or pro-drug political statements—that he's lying, appellate

For all these reasons, an intent test tends to deter speakers who fear that they might be assumed to have bad intentions. Say you are an outspoken supporter of legalizing some drug, because you think it can help people overcome their psychiatric problems.[314] Would you feel safe writing an article describing how easily illegal labs can make the drug, and using that as an argument for why it's pointless to keep it illegal, when you know that your past praise of the drug might persuade a jury that the article is really intended to teach people how to make the drug?

Likewise, say that you often write about the way drugs are made, perhaps because you're a biochemist or a drug policy expert. Would you feel safe publicly announcing that you also think that drugs should be legal and that people should use them, given that you know that such speech could be used as evidence should you be tried or sued for your writings on drugmaking? More likely, if you're the drug legalization supporter, you'd be reluctant to write the article about drug manufacturing; and if you're the biochemist, you'd be reluctant to write the article favoring legalization—there'd be just too much of a chance that the two pieces put together could get you sued or send you to prison.

Moreover, this deterrent effect would likely be greater than the similar effect of hate crimes laws or treason laws. As the *Wisconsin v. Mitchell* Court pointed out, it seems unlikely that "a citizen [would] suppress[] his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits . . . [an] offense against person or property [more serious than a minor misdemeanor]."[315] Few of us plan on committing such offenses; and we can largely avoid any deterrence of our speech simply by not committing the other crimes. But if crime-facilitating speech is defined in terms of intent, speakers might suppress one form of speech (endorsement of some illegal conduct) for fear that it will be introduced at trial for another kind of speech (description of how the law can be broken). This is a likelier scenario than in *Mitchell*, especially if engaging in one or the other form of speech is part of one's job or ideological mission.

These concerns about the difficulty of proving intent, and the risk of deterring speech that might be used as evidence of intent, haven't led the Supreme Court to entirely avoid intent inquiries. Most prominently, for instance, modern incitement law retains the inquiry into whether the speaker intended to incite crime.[316]

But the requirement that the speech be intended to and likely to incite *imminent* crime prevents any serious intent inquiry in most cases; it is this, I think, that has

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courts will not meaningfully review this conclusion.

[314] *See, e.g.*, *FDA Permits Test of Ecstasy as Aid in Stress Disorder*, WALL ST. J., Nov. 6, 2001, at B1; Rick Doblin, *A Clinical Plan for MDMA (Ecstasy) in the Treatment of Post-Traumatic Stress Disorder (PTSD): Partnering with the FDA*, *http://www.maps.org/research/mdmaplan.html* (describing the study); Multidisciplinary Ass'n for Psychedelic Studies, *http://www.maps.org* ("MAPS' goals are to sponsor scientific research designed to evaluate psychedelics and marijuana as potential prescription medicines, and to educate the public honestly about the risks and benefits of these drugs.").

[315] 508 U.S. 476, 489 (1993).

[316] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

kept the incitement exception narrow.[317] There will rarely be enough evidence to create a jury question on whether a speaker was intending to incite imminent crime.

Had the imminence requirement not been part of the test, though, there would often be enough evidence based on which a jury could decide that a speaker—especially a speaker known for hostility to the particular law—was intending to persuade people to violate the law some time in the future. Concerned about this, many speakers would avoid any statements to which a jury might eventually impute an improper intent. And to the extent that incitement might be civilly actionable (for instance, in a lawsuit by the victims of the allegedly incited crime), the jury wouldn't even have to find this improper intent beyond a reasonable doubt, but only guess at it by a preponderance of the evidence or at most by clear and convincing evidence.[318]

This danger in fact helped lead the Supreme Court to hold that libel liability may not be premised only on hateful motivations—a common view before 1964, when many states allowed recovery on a showing that speech was made without "good motives," but rather out of "ill will" or "hatred."[319] "Debate on public issues," the Court reasoned, "will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred," especially since "[i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives."[320] The same risk appears with crime-facilitating speech: Speakers who are genuinely not intending to facilitate crime might nonetheless be deterred by the risk that a jury will find the contrary. And the Court has taken the same view in holding that intent to cause emotional distress isn't enough to make speech punishable.[321]

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[317] Though I think the imminence requirement is valuable as part of the incitement test, Part IV.E *infra* explains why it couldn't effectively be transplanted to the crime-facilitating speech test.

[318] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (requiring that actual malice be proven by clear and convincing evidence in libel cases); People v. Mitchell Brothers' Santa Ana Theater, 545 P.2d 229, ___ (Cal. App. 1982) (same as to obscenity in civil injunction cases). *But see* Rattray v. City of National City, 51 F.3d 793, 801 (9th Cir. 1995) (concluding that falsity, as opposed to actual malice, in libel cases need only be proven by a preponderance of the evidence); Goldwater v. Ginzburg, 414 F.2d 324, 341 (2d Cir. 1969) (same).

[319] *See* Garrison v. Louisiana, 379 U.S. 64, 72 n.7 (1964).

[320] *Id.* at 73-74.

[321] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988) ("Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently 'outrageous.' But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. . . . [W]hile . . . a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.") (citing *Garrison*); *see also* Jefferson Cty. School Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 857-58 (10th Cir. 1999) (citing *Hustler* to reject a "reading of state [interference with contract] tort law . . . [under which] the protection afforded to an expression of opinion under the First Amendment might well depend on a trier of fact's determination of whether the individual who had published the article was motivated by a legitimate desire to express his or her view or

c. Is intentional crime facilitation meaningfully different from knowing crime facilitation?

I have argued so far that intentionally and knowingly/recklessly crime-facilitating speech are hard to distinguish in practice. But they are also seem quite similar both in their value and in the harm they inflict.

Consider two newspaper reporters. Both publish articles about secret subpoenas of library records; the articles criticize the practice of subpoenaing such records. Both know that the articles might help the target of the subpoena evade liability. The first reporter publishes his article with genuine regret about its crime-facilitating properties. The second, on the other hand, openly admits in his article that he wants the article to stymie the investigation of the target: The second reporter thinks no-one should be prosecuted even in part based on what he has read, and hopes that if enough such subpoenas are publicized and enough prosecutions are frustrated, the government will stop looking at library records.

Is there a reason to treat the two reporters differently? Both articles facilitate crime. Both articles convey valuable information to readers. As the Court said when holding that speech about public figures can't be punished just because it's motivated by hatred, and intended to harm the target, "even if [the speaker] did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."[322] Likewise, as the Court held in *Eastern Railroad Conference v. Noerr Motors*, lobbying or public advocacy is protected against antitrust liability even if the speaker's "sole purpose" was anticompetitive: "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so," partly because even anticompetitively motivated people may be "a valuable source of information."[323] The ability of crime-facilitating speech to contribute to the exchange of facts and ideas is likewise independent of whether it's motivated by a desire to help crime.

Similarly, say that both articles are posted on Web sites, and the government tries to get the site operators to take down the articles, either by asking for an injunction or by threatening the site operators with legal liability if they continue to keep the articles on their sites. The site operators—who might be the publishers for whom the reporter works, or the hosting companies from whom the reporter rents space—probably have the same knowledge as the reporter, at least once the government

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by a desire to interfere with a contract").

[322] Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (rejecting the argument that unintentionally false statements should be punishable if they're motivated by hatred); Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988) (rejecting the argument that outrageous opinion should be punishable because it's intended to inflict emotional distress).

[323] 365 U.S. 127, 138-40 (1961).

alerts them about the situation.

But they quite likely have no intention to facilitate crime. Their decision to keep the articles may have been simply motivated by a desire to let the reporter say what he wants to say. And yet the value and the harm of the speech are the same whether the government is pursuing a reporter who intends the speech to help facilitate crime, or a site operator who merely knows that the speech has this effect.[324] The one difference between the two articles might be the moral culpability of the speakers, which I'll discuss at the end of the subsection. For now, though, we see that the practical effects of the articles are quite similar.

Of course, there is precedent for using intent (and not just knowledge or recklessness) as part of First Amendment tests: Under the incitement test, speech that is intended to and likely to cause imminent harm is unprotected.[325] Speech that the speaker merely knows is likely to cause imminent harm is protected.

The incitement cases, though, have never fully explained why an intent-imminence-likelihood test is the proper approach (as opposed to, say, a knowledge-imminence-likelihood test). Moreover, as the preceding subsection mentioned, the main barrier to liability under the *Brandenburg* test has generally been the imminence prong, not the intent prong; and given the imminence prong, it's not really clear whether it makes much of a difference whether the incitement test requires intent or mere knowledge.

Considering the quintessential incitement example—the person giving a speech to a mob in front of someone's house[326]—reinforces this. One can imagine someone giving this speech simply knowing (but regretting) that the speech would likely lead the mob to attack, as opposed to intending it. But, first, this scenario would be extremely unlikely. Second, it's not clear how a jury would determine whether the speaker actually intended the attack or merely knew that it would happen. And, third, if the speaker did know the attack would happen as a result of his words, it's not clear why the protection given to his speech should turn on whether he intended this result.

In the era before the Court adopted the imminence prong, Justice Holmes did defend the distinction between an intent-plus-likelihood test and a mere knowledge-plus-likelihood test;[327] and indeed, if no imminence prong were present, a knowledge-plus-likelihood test would be inadequate: People would then be barred from expressing their political views whenever they knew that those views could lead some listeners to misbehave, and that's unacceptable.[328]

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[324] *Cf.* Larry Alexander, *Incitement and Freedom of Speech*, *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 101, 107-08 (David Kretzner & Francine Kershman Hazan eds. 2000) (making a similar point in criticizing the intent prong of *Brandenburg*).

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

[326] *See, e.g.*, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1023 (5th Cir. 1987).

[327] *See* Abrams v. United States, 250 U.S. 616, ___ (1919) (Holmes, J., dissenting).

[328] *See id.* at ___ ("A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even

But the intent-plus-likelihood test ultimately proved unsatisfying, too, partly because knowledge could so easily be confused with intent.[329] So while the intent-plus-likelihood and the intent-imminence-likelihood tests have long been part of the incitement jurisprudence, it's not clear that either of them offers much support for focusing on intent in other free speech exceptions: The focus on intent proved to be not speech-protective enough in the first test, and in the second test it ultimately ended up doing little of the work, which has mostly been done by the imminence prong instead.

So the one distinction between intentionally and knowingly crime-facilitating speech is the speaker's moral culpability. Trying to help people commit or get away with their crimes is generally reprehensible. Trying to inform the public about perceived government misconduct, persuade the public that some laws are futile, or even entertain people, while regretfully recognizing that this will as a side effect help people get away with their crimes, is much more defensible.[330]

It seems to me, though, that this advantage of the intent test is more than overcome by its disadvantages, described in preceding subsections. Judges and juries likely will often mistake knowledge for intention, especially when the speakers hold certain political views—either views that seem particularly consistent with an intent to facilitate a certain crime, or just views that make factfinders assume the worst of the speaker.

As a result, many speakers who do not intend to facilitate crime will be deterred from speaking. Some speech will be punished when equally harmful and valueless speech—perhaps including copies of the punished speech, posted onto mirror sites on the Web—will be allowed. And the one ostensible advantage of the intent test, which is distinguishing the morally culpable intentional speakers from the morally guiltless knowing speakers, won't be much served, precisely because of the substantial risk that factfinders won't be able to easily tell the two apart.

C. Distinctions Based on How Speech Is Advertised or Presented

1. Focusing on whether speech is advertised or presented as crime-facilitating

We have so far discussed two classic mens rea tests: Whether the speaker knew the speech would likely facilitate crime, and whether he intended to facilitate crime.

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if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime [under a statute limited to statements made 'with intent . . . to cripple or hinder the United States in the prosecution of the war']").

[329] [Cite.]

[330] *See* Cheh, *supra* note 227, at 24 & n.28 (arguing that intention may be an important factor distinguishes the publisher of a bombmaking manual for terrorists, and the publisher of a work on explosives that's not aimed at terrorists—"[i]ntention is irrelevant to the issue of whether harm is or will be caused, but it is crucial to establish culpability").

There is, however, another possible inquiry—is the distributor knowingly distributing material that's being advertised or distributed (by him) or designed or presented (by the author) in a way that's intended to especially appeal to criminals?[331]

This is a not uncommon inquiry for other dual-use products. For instance, products that circumvent technological copy protection, for instance, are prohibited, among other circumstances, if they are "primarily designed or produced for the purpose of" circumvention, or are "marketed . . . for use" in circumvention.[332] Drug paraphernalia laws focus on whether a product has been "designed or marketed for use" with drugs.[333] Likewise, one gun manufacturer has been held liable for injuries caused by a gun that it produced in part because it advertised the gun as "resistant to fingerprints."[334]

The distributors might have no intention to promote crime. It is not their "conscious object" to help criminals. They may sincerely prefer that by some miracle no buyer ever uses the product for criminal purposes (perhaps because there would then be less likelihood that they will be sued or prosecuted). But there's more to their mental state than mere knowledge that criminals might use the product: They also intend to present the product as especially useful or appealing to criminals, or they know the manufacturer intended to make or present it that way.[335]

Some of the crime-facilitating speech examples seem to fit within the same category. The *Hit Man* murder manual and the *Anarchist's Cookbook*, for instance, seem particularly blameworthy precisely because their content and their promotional advertising portrays them as tools for committing crime; they are different in this from a novel about contract killers and a chemistry book about explosives.[336] A Web site that presents itself as a source of research papers that students can use to cheat seems different from an online encyclopedia, though the encyclopedia can also be used for cheating. This is true even if we're satisfied that these books and Web sites are published by people who intend only to make money, not to facilitate crime.

Likewise, someone who puts up a Web page that mirrors the contents of a crime-

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[331] [Explain why I lump together design and advertising decisions.]

[332] 17 U.S.C. § 1201(2)(A), (C).

[333] *See generally* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982).

[334] Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 157 (Cal. App. 1999). The decision was reversed on statutory grounds that didn't bear directly on the advertising question. 28 P.3d 116 (Cal. 2001).

[335] I am *not* arguing here that the way the speech is framed or advertised is "highly probative of the publisher's intent" to facilitate crime. *See* Rice v. Paladin Press, Inc., 128 F.2d 233, 253 (4th Cir. 1997). As the text discusses, I think publishers and other distributors may often lack such an intent (as opposed to knowledge) even if they promote the speech to appeal to criminals. Rather, this discussion focuses on whether the separate mental state involved in framing or advertising speech—"the distributor['s] knowingly distributing material that's being advertised or distributed (by him) or designed or presented (by the author) in a way that's intended to especially appeal to criminals"—should itself make the speech more regulable.

[336] *See Rice*, 128 F.3d at 253-54 (stressing this as to *Hit Man*).

facilitating page may intend only to strike a blow against censorship, and not facilitate crime.[337] But he knows that the material he's distributing was intended (not by him, but by its author) to be especially useful to criminals.

This sort of inquiry actually already takes place in some measure (though controversially[338]) in the "pandering" doctrine, which is part of obscenity law. Obscenity law rests on the view that much sexually themed material is dual-use speech, which can sometimes have a degrading effect on readers, but can sometimes be enlightening. If a work, taken as a whole, has serious scientific, literary, artistic, or political value, then it's protected because of its valuable effects, and despite its potentially harmful ones.[339] Only if the work has negligible valuable uses, because taken as a whole it lacks serious value, will it be found to be punishable because of its supposedly harmful uses.

But under the pandering cases, of which the leading one is *Ginzburg v. United States*, a work that would otherwise not be obscene may be treated as obscene if it's "openly advertised to appeal to the erotic interest of . . . customers."[340] For instance, one of the works in *Ginzburg* was a text called *The Housewife's Handbook on Selective Promiscuity*. According to the Court, "[t]he Government [did] not seriously contest the claim that the book has worth" for doctors and psychiatrists. The book apparently sold 12,000 copies when it was marketed to members of medical and psychiatric associations based on its supposed "value as an adjunct to therapy," and "a number of witnesses testified that they found the work useful in their professional practice."[341] But because Ginzburg marketed the work as pornographic, his distribution was treated as violating the obscenity law, even though other sorts of promotion of the work would have been protected. The obscenity inquiry "may include consideration of the setting in which the publication [was] presented," even if "the prosecu-

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[337] *See, e.g., http://ftp.die.net/mirror/hitman/*, which provides a copy of the *Hit Man* contract murder manual, which denounces the lawsuit and court decision that ordered *Hit Man* to be taken off the market, and concluding:

> The book was initially published in 1983. 13,000 copies of the book are now in existence. There has only ever been one case where the book was associated with a crime, in that case the criminal had recently finished a lengthy prison sentence and had a history of prior violent crime. It is our opinion this book has never incited a murder, that the settlement of the Paladin Press case was wrong and forced by the insurance company, and that this book, and no book, should be banned. We invite the public to judge for themselves.
>
> That said, here is Hit Man . . .

[338] *See, e.g.*, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 249 (1990) (Stevens, J., concurring in part and dissenting in part); Splawn v. California, 431 U.S. 595, 602 (1977) (Stevens, J., dissenting).

[339] The harmful effects of even valuable works would arise when readers read the work only for its valueless passages, and out of prurient motives. This would presumably be as likely to have "a corrupting and debasing impact leading to antisocial behavior" as would a person's reading a work that's entirely valueless. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973).

[340] 383 U.S. 463, 467 (1966); *see also* Pinkus v. United States, 436 U.S. 293, 302 (1978); Splawn v. California, 431 U.S. 595, 598 (1977); Hamling v. United States, 418 U.S. 87, 130 (1974).

[341] *Ginzburg*, 383 U.S. at 472.

tion could not have succeeded otherwise."[342]

Why should the promotional advertising, or the purposes for which the product was designed—as opposed to the uses that the product actually has—affect the analysis? After all, the potential harm and value flow from the substance of the work, not its advertising or its authors' purposes. As Justice Douglas said when criticizing *Ginzburg*,

> The sexy advertisement neither adds nor detracts from the quality of the merchandise being offered for sale. And I do not see how it adds to or detracts one whit from the legality of the book being distributed. A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it.[343]

One might likewise say the same about the advertisement that touts a work's utility for criminal purposes.

There are three possible answers to this, though it's not clear how persuasive they are. First, and most important, when a dual-use work is promoted as crime-facilitating or is designed to be useful to criminals, more of its users are likely to be criminal. The advertisements or internal design elements will tend to attract the bad users and repel the law-abiding ones.[344] Restricting this speech will thus mostly obstruct the illegal uses, especially since the law-abiding readers will still be able to read material that isn't promoted to criminals.

A criminologist interested in contract killing, or a novelist who wants to write plausibly about contract killers,[345] would still be able to get information from books that aren't framed as contract murder manuals. A high school student who genuinely wants to research, not plagiarize, would still be able to get information from encyclopedias and other Web pages that aren't pitched as term paper mills.

The *Ginzburg* Court justified this decision partly this way: Even if a book could lawfully be distributed "if directed to those who would be likely to use [it] for the [scientific] purposes for which [it was] written," "[p]etitioners . . . did not sell the book to such a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provoca-

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[342] *Id.* at 465-66.

[343] *Ginzburg*, 383 U.S. at 482 (Douglas, J., dissenting); *see also Splawn*, 493 U.S. at 249 (Stevens, J., concurring in part and dissenting in part) ("If conduct or communication is protected by the First Amendment, it cannot lose its protected status by being advertised in a truthful and inoffensive manner"; the "inoffensive" was relevant because patent offensiveness is part of the obscenity test, so a sufficiently offensive sexually themed advertisement may itself be obscene).

[344] *See* Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 254 (4th Cir. 1997) (arguing—though I think incorrectly, given the broad distribution of the book—that *Hit Man* "is so narrowly focused in its subject matter and presentation as to be effectively targeted exclusively to criminals," which means that though "Paladin may technically offer the book for sale to all comers," "a jury could . . . reasonably conclude that Paladin essentially distributed *Hit Man* only to murderers and would-be murderers").

[345] *See* Brief of Horror Writers of America in Rice v. Paladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 1997) (claiming that *Hit Man* "is a research tool that offers verisimilitude and authenticity to writers of fiction as well as intelligence to law enforcement and security officials").

tive aspects of the work, in order to catch the salaciously disposed."[346] As Justice Scalia, the most prominent modern supporter of the *Ginzburg*, approach put it, the *Ginzburg* rule is justified because "it is clear from the context in which exchanges between such businesses and their customers occur that neither the merchant nor the buyer is interested in the work's literary, artistic, political, or scientific value."[347]

Second, some material that is designed to be especially useful to criminals may be optimized for criminal use. Though the same information or features might be available from other sources, the other books or devices may be harder to use for criminal purposes, and perhaps more likely to lead to errors. A book on the chemistry of drugs that's designed to help criminals make drugs would be likely to offer special tips (for instance, about how to conceal one's actions) that would be missing in books that are aimed at chemistry students or lawful drug producers.

Bans on books designed to help criminals may thus make it harder for criminals to gather and integrate the information they need to accomplish their crimes. This won't stymie all criminals, of course, but it might dissuade some, and cause others to make mistakes that might get them caught.

Third, there's something especially shameless about distributing or framing material in a way that stresses its illegal uses. Even if the public promotion of the illegal uses is insincere—if the speaker or publisher actually doesn't intent to facilitate the illegal uses, but simply wants to make money—the promotion seems to be particularly reprehensible. It's therefore tempting to hold the speaker to his word and treat his speech as solely focused on those things that the advertising or framing of the speech stressed, and to keep him from relying on the scientific value (as with the speech in *Ginzburg*) or entertainment value (as with *Hit Man*) of the speech.

So, the theory goes, restrictions on advertising that promotes the improper uses of a work impose only a modest burden on lawful uses, because the same material could be distributed if it weren't framed as promoting illegal uses.[348] And these restrictions have some benefit, because they somewhat decrease the illegal uses. The same can be said of restrictions on speech that describes itself as crime-facilitating (or as sexually titillating), even if the self-description appears in the text of the work, rather than in its promotional advertising.

But while this line between material that's advertised or framed as crime-facilitating, and material that's advertised or framed in other ways despite its crime-facilitating uses may be conceptually plausible, as a practical matter it requires some rather subtle and difficult judgments.

First, sometimes the suggested use of a statement is unstated or ambiguous. Different factfinders will therefore draw different inferences about it. Is a list of abor-

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[346] *Id.*

[347] United States v. Playboy Entertainment Group, Inc., 120 S. Ct. 1878, 1896 (2000) (Scalia, J., dissenting).

[348] *Cf. Ginzburg*, 383 U.S. at 470-71 (stressing that a prosecution under a pandering theory "does not necessarily imply suppression of the materials involved").

tion providers, boycott violators, strikebreakers, or police officers crafted to especially appeal to readers who want to commit crimes against these people, or to readers who want to lawfully remonstrate with them, socially ostracize them, or picket them? Is an article that simply explains the flaws in some copy protection system crafted to especially appeal to would-be infringers, or to readers who are curious about whether technological attempts to block infringement are futile?

Many publications may simply present facts, and leave readers to use them as they like. Unless we require that each publication describe its intended audience, it may often be hard to determine this audience.[349]

And this determination may therefore turn chiefly on the factfinder's political predilections. For instance, some city governments have sued handgun manufacturers on the theory that the handguns are "designed to appeal to criminals" not because the guns are fingerprint-resistant, but because they are small, concealable, or powerful.[350] As it happens, these features are appealing to law-abiding users as well as criminals—in 36 of the 50 states, virtually all law-abiding adults are entitled to get a permit to carry a concealed handgun in public,[351] and in half the remaining states, people may carry a concealed handgun in some places, such as on their own property.[352]

Maybe these features are indeed in reality designed to appeal to criminals, because they're disproportionately more useful to criminals; or maybe they're designed to appeal to the law-abiding, because the overwhelming majority of the handgun market is law-abiding. My guess is that supporters of broad gun control will tend to assume the former, and supporters of broad gun rights will tend to assume the latter—and I know of no way to conclusively prove who's right. Likewise, whether a factfinder thinks that a list of boycott violators' or abortion providers' names is designed to appeal to criminals or to the law-abiding will often (not always, but often) turn more on the factfinder's views on the underlying cause than on any more neutral factors.

So there's a substantial risk that factfinders will err in deciding whether something is "designed to appeal to criminals." But beyond this, if the law starts focusing on this question, speakers—both those who are really trying to appeal to criminals and those who aren't—will slightly change their speech so that it doesn't look like an overt appeal to illegal users. (Some term paper Web sites, for instance, already present themselves as offering mere "example essays," and say things like "the papers

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[349] [Give more examples, or bring up example from below.]

[350] *See, e.g.*, Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap For Reforming Gun Industry Misconduct*, *http://www.gunlawsuits.org/pdf/docket/review.pdf* (objecting, among other things, on "the industry . . . focus[ing] all of its design innovation efforts on making more concealable and/or more powerful"); [cite Chicago Complaint].

[351] [Cite 36/50 source.]

[352] [Cite.] *See, e.g.*, CAL. PENAL CODE § 12026 (allowing a person to carry a handgun concealed "anywhere within the [person's] place of residence, place of business, or on private property owned or lawfully possessed" by the person.

contained within our web site are for research purposes only!"[353]) Recall that one of the purported advantages of this "pandering" approach is precisely that it won't burden speech much, since the core information could still be communicated if it's not presented in the wrong way.

If this happens, then there are two possible outcomes. One is that people who genuinely do want to appeal to criminals will be able to get away with it. The pandering exception will be narrow enough that it doesn't much burden legitimate speakers, but at the same time so narrow that it doesn't much help prevent crime.

The other possibility is that lawmakers will understandably seek to prevent these "end runs" around the prohibition—and this prevention may end up covering not just those end runs, but also legitimate speech. A narrow exception to protection for speech that's promoted in a way that makes it appealing to criminals may start being seen as the rule, so that any legitimate promotion would be seen as exploiting a "loophole" in the rule. This would then lead to pressure for categorizing more and more speech under the "promoted as crime-facilitating" label. This is a powerful tendency because it reflects a generally sensible attitude: the desire to make sure that rules aren't made irrelevant by easy avoidance.[354]

This pressure for closing supposed loopholes has been visible with other speech restrictions. For instance, the characterization of obscenity as being "utterly without redeeming social importance" led pornographers to add some token political or scientific framing device: a purported psychologist introducing a porn movie with commentary on the need to explore sexual deviance, or a political aside on the evils of censorship. The Court reacted by rejecting the "utterly without redeeming social importance" standard and demanding "serious literary, artistic, political, or scientific value."[355] This change helped close the loophole to some extent[356]—but only at the

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[353] *See Welcome to Example Essays!*, *http://exampleessays.com/aup.php*:

> 1. The papers contained within our web site are for research purposes only!
>
> You may not turn in our papers as your own work! You must cite our website as your source! Turning in a paper from our web site as your own is plagerism [*sic*] and is illegal!

[354] Eugene Volokh, *Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, ___ (2003) (describing such "enforcement needs slippery slopes").

[355] *See* Miller v. California, 413 U.S. 15, ___ (1973)

[356] Similar devices still seem to be occasionally used, with some success. *See, e.g.*, Main Street Movies, Inc. v. Wellman, 598 N.W.2d 754, 761 (Neb. 1999):

> The district court determined that exhibit 9, "Takin' It to the Jury," has serious literary or artistic value . . . and, therefore, found as a matter of law that [this movie is] not obscene. "Takin' It to the Jury" depicts the deliberation of a six-person jury in an obscenity case. The jurors discuss the community standard requirements, and when they discuss specific scenes of the movie that they are reviewing for obscenity, various jurors fantasize about themselves in similar scenes.
>
> Based on our de novo review . . ., we conclude that the State did not prove beyond a reasonable doubt that "Takin' It to the Jury" lacked any serious literary, artistic, political, or scientific value. The movie appears to be an attempt by the producers to instruct viewers in the basics of obscenity law with political commentary regarding the lack of validity and useful-

cost of punishing speech that "clearly ha[s] *some* social value" because "measured by some unspecified standard, [the value] was not sufficiently 'serious' to warrant constitutional protection."[357] A seemingly very narrow restriction proved so easy to circumvent that the Court shifted to a broader one.

Likewise, in *Buckley v. Valeo*, the Court narrowly interpreted the Federal Election Campaign Act's restrictions on independent expenditures "relative to a clearly identified candidate," in order to minimize the burden on free speech rights. Such restrictions, the Court held, applied only to speech "that include[s] explicit words of advocacy of election or defeat of a candidate."[358] Political advertisers naturally began avoiding the restrictions by avoiding such explicit words, so that the advertisements would be treated as issue advocacy rather than candidate advocacy.

Supporters of campaign finance regulation then naturally responded by condemning such speech as "sham issue advocacy" and urging that it be restricted.[359] One court of appeals in fact adopted a test that allowed ads to be characterized as candidate advocacy because of what they implied rather than because of what they explicitly said, in order to avoid "eviscerat[ing]" the Act.[360] And the Bipartisan Campaign Reform Act aimed to deal with the problem by treating as a candidate advertisement any ad "that depicts a federal candidate within 60 days of a general election,"[361] a proviso that the Supreme Court then upheld, citing among other things the need to close the loophole.[362] For good or ill, the original narrow restriction set forth by the Court proved so easy to circumvent that this circumvention created considerable pressure for a broader restriction.

Similarly, narrow restrictions on speech containing explicit words that present the speech as crime-facilitating may lead people to use more and more implicit words, which may in turn lead to broader restrictions aimed at rooting out "shams." Yet such broader restrictions will tend to affect both the insincere relabeling of crime-facilitating speech and the distribution of valuable material that's genuinely designed for and marketed to law-abiding readers, but that unfortunately proves to be useful to criminally minded readers as well.

The main advantages of a focus on how the work is promoted and framed would thus disappear. A ban on promoting material in a way that makes it especially appealing to criminals offers the prospect that, first, the material will still remain distri-

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ness of obscenity laws. . . .

I have no reason to think that such devices are that common; but obscenity prosecutions are rare, too, and if they became more common, such devices might become more popular.

[357] Miller v. California, 413 U.S. 15, ___ (1973) (Brennan, J., dissenting). Justice Brennan had originated the "utterly without redeeming social importance" test sixteen years before, in *Roth v. United States*, 354 U.S. 476 (1957).

[358] 424 U.S. 1, ___ (1976).

[359] [Cite.]

[360] FEC v. Furgatch, 807 F.2d 857, 863 (9th Cir. 1987)

[361] 2 U.S.C. § 434(f)(3)(A)(i).

[362] McConnell v. FEC, 124 S. Ct. 619, 689 (2003).

butable when it's properly promoted, and, second, courts can apply the rule without having to investigate distributors' or authors' intentions. Judges will no longer have to ask about the hidden motivations of, for instance, an author of an article about infringing Web sites, because they can focus on the objective terms of the book and its advertising.

But the attempts to prevent end runs, code words, and exploitation of loopholes will tend to make it harder and harder to distribute the material even to law-abiding buyers, since people will always suspect that the supposed attempt to focus on law-abiding buyers is just a sham, and that the real market is criminals. And courts may then have to return to trying to determine distributors' or authors' presumed intentions, now by asking whether, for instance, a statement that "Here's how common copyright piracy sites are" is an insincere cover for what the author really wanted to say, which is "Here's how you can infringe copyright."

So on balance, a focus on whether the work panders to the criminal users will probably do more harm than good. It offers only a small degree of protection from crime—the premise of the proposed distinction, after all, is that the work will still remain available if it's promoted in a way that doesn't seem to be aimed at a criminal audience. And it seems likely to be hard to accurately and fairly apply, and carries the risk that the narrow restrictions will end up growing into broad ones.

2. Focusing on whether speech is advertised or presented as political argument

Some speech that contains crime-facilitating facts is presented as crime-facilitating. Some is framed as political commentary aimed at the law-abiding. And some is framed as just presenting the facts, either by themselves or as part of a broader account. A newspaper article might, for instance, describe a secret wiretap without either encouraging the criminals to flee, or arguing that secret wiretaps should be abolished. A Web page might explain how easy it is to change the supposed "ballistic fingerprint" of a gun, without either urging criminals to use this to hide their crimes, or arguing that the ease of this operation means that legislation requiring all guns to be "fingerprinted" is thus misguided.

The previous subsection asked whether speech that's presented as being crime-facilitating should be given less protection than speech that's framed as political argument. But if it should be given less protection, it's possible to argue further that even speech that's framed as purely factual should likewise be given less protection that speech that's framed as political. The reason the speech is protected, the argument would go, is because it can be relevant to public policy or scientific debates, and if it appears not to be tied to such debates, then it shouldn't be protected.[363]

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[363] *Cf.* Isaac Molnar, Comment, *Resurrecting the Bad Tendency Test to Combat Instructional Speech: Militias Beware*, 59 OHIO ST. L.J. 1333, 1370-72 (1998) (suggesting that the law distinguish "[n]onexpressive instructional speech"—apparently referring to crime-facilitating speech that lacks an overt political message—from "expressive instructional speech").

This would be a mistake. We often find information to be most useful to our political decisionmaking when it comes to us as just the facts, without the author's political spin. Most modern newspapers operate this way: They give readers the facts on the news pages, and save the policy conclusions for the editorial page. Some of the news articles include commentary from both sides as well as the news, but many don't—they present just the information, in the hope that readers will be able to use that information (for instance, that secret wiretaps were used on this or that occasion) to make up their own minds. This is a legitimate and useful way of informing the public.

Moreover, a rule distinguishing purely factual accounts from factual accounts that are coupled with political commentary seems easy to avoid, even more than the "pandering" rule discussed in the preceding section. Just as the Court saw "little point in requiring" advertisers who sought constitutional protection to add an explicit "public interest element" to their price advertising, "and little difference if [they did] not" add such an element,[364] so there seems to be little benefit to requiring people to add political advocacy boilerplate in order to make their factual assertions constitutionally protected.[365]

D. Distinctions Based on the Harms the Speech Facilitates

1. Speech that facilitates severe harms vs. speech that facilitates less severe ones

Some speech facilitates very grave harms—the possible construction of a nuclear bomb, the torpedoing of a troop ship, the murder of witnesses, abortion providers, or boycott violators. Some facilitates less serious harms: drug-making, suicide, burglary, copyright infringement.

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[364] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, ___ (1976). Of course, the claim here is that such factual assertions should generally be fully protected, unlike commercial speech, which gets a lower level of protection. But the lower level offered to commercial speech comes from its subject matter, not its being purely factual. (After all, even commercial advertising that is coupled with political statements still remains merely commercial advertising. [Cite.]) The *Virginia Pharmacy* quotes simply show that the purely factual component of speech doesn't itself justify lower protection than when the speech is set forth together with its political implications.

[365] *See, e.g.*, the books cited *supra* in note 64. The first, *Improvised Modified Firearms*, describes how people have throughout recent history made guns themselves, and argues that "The message is clear: if you take away a free people's firearms, it will make others. As these pages demonstrate, the methods, means, and technology are simple, convenient, and in place." *See supra* note 64. The second book, *Home Workshop Guns for Defense and Resistance*, actually describes "the methods, means, and technology," and thus helps show whether they are indeed "simple, convenient, and in place." There is little reason to conclude that the two books should be constitutionally protected if they are published in one volume, because the first provides the political argument that the second lacks, but that the second book should be unprotected if published separately. Both books, incidentally, are published by the same company.

When we're deciding how to deal with dual-use technologies, we would normally pay close attention to how severe the harmful uses can be. Machineguns and VCRs can both be used for entertainment. They can both be used for criminal purposes. Yet machineguns are much more heavily regulated, because their criminal uses are more dangerous.[366] It's therefore appealing to have the constitutional protection of crime-facilitating speech turn on the magnitude of the crime being facilitated.

But these severity distinctions are much harder for courts to draw in constitutional cases than they are for legislatures to draw when drafting statutes. They are not conceptually impossible to draw, nor (as I'll discuss below) are they prohibited by well-settled constitutional doctrine. Still, it seems likely that judges would in practice hesitate to draw these distinctions; and if such severity distinctions are drawn, judges would be likely to over time push the severity threshold lower and lower.

People often bitterly disagree about how severe various crimes are. Consider one of the classic cases where an argument was made for courts to draw severity distinctions. In *Brinegar v. United States*, Justice Jackson argued that the government should have less power to engage in searches and seizures when it's pursuing petty criminals, such as those who smuggle alcohol into "dry" states,[367] than when it's pursuing serious criminals, such as kidnappers. Justice Jackson's opinion has often

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[366] Technologies that facilitate copyright infringement have traditionally been protected so long as they have the potential for "substantial noninfringing uses." Even if most uses are likely to be illegal, so long as a substantial number of uses—current or future—are legal, courts have judged it better to tolerate both the legal uses and the illegal ones than to prevent both. *See supra* text accompanying note 283.

On the other hand, where risk of death is involved, the calculus has been different. Machineguns do have substantial noninfringing uses: People collect them, and use them for target-shooting (though naturally in exercises different from normal single-shot target-shooting). Nonetheless, they are generally banned (except for the some 100,000 grandfathered from before the machinegun ban, *see* GARY KLECK, TARGETING GUNS ___ (1997)), because their potential criminal use is seen as harmful enough to justify such a ban.

The actual criminal uses of machineguns seem fairly rare, and machineguns are actually not dramatically more dangerous in criminal hands than non-machinegun firearms. *See* KLECK, *supra*. But because machineguns are seen as having less value than other firearms (because they aren't particularly effective for self-defense, and their chief lawful use is thus entertainment), and as posing more risk of harm than other entertainment devices such as VCRs, they are more heavily regulated than either sort of device.

[367] Brinegar v. United States, 338 U.S. 160, 182 (1948) (Jackson, J., dissenting):

> [I]f we are to make judicial exceptions to the Fourth Amendment [because of the special nature of cars], it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, . . . I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.

been praised by commentators, because it seems to make good sense, and to echo the Fourth Amendment's focus on "reasonableness."[368]

At the time, though, Oklahoma—the state into which Brinegar was trying to smuggle alcohol—was a dry state, and it remained dry until 1959; Oklahoma law barred the manufacturing, sale, or importation of virtually all beverages with a more than 4% alcohol content.[369] Presumably the Oklahoma legislature thought alcohol to be a cause of many deaths and many more crimes, and may have viewed alcohol smuggling as far from a petty offense.[370] Perhaps Justice Jackson was right to disagree with the legislature, and to treat alcohol smuggling as a relatively minor problem that—unlike other problems—didn't justify relaxation of the standard Fourth Amendment rules. But it's not clear what principled way there was for the Court to make this sort of decision. And there are similar divides today about the seriousness of, for instance, drug crimes,[371] copyright infringement, and even burglary.

Legislatures can and do resolve such disagreements simply by applying their policy judgments, even if this means drawing seemingly arbitrary lines—setting the sentences for crimes, for instance, is necessarily a largely arbitrary process. Perhaps judges should feel free to do the same, even in the absence of a principled rule: If principle tells us that the Constitution requires that some line be drawn in a way that constrains legislatures, but doesn't tell us where the line is to be drawn, maybe judges still have to draw the line even if this line-drawing will be somewhat arbitrary.[372] But in practice many judges seem to be reluctant to engage in this sort of

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[368] [Cite.]

[369] *See* OKLA. STAT. tit. 37, § 1 (1941) (barring manufacturing or sale of beverages with more than 3.2% alcohol); *id*. § 32 (prohibiting possession of more than one gallon of spirits or wine, or one cask of malt liquor); *id*. at 41 (prohibiting importation of beverages with more than 4% alcohol). [Cite 1959 repeal.]

[370] The prohibition was naturally not enforced with great sternness. Selling and manufacturing stronger drinks were punished only as a misdemeanor for the first offense, with a maximum sentence of 6 months in jail, and possession of small amounts of alcohol at home wasn't criminalized, though importation was punished by up to five years in prison. [Cite.] But I suspect that this just reflected the difficulties of practically enforcing alcohol prohibition, given the magnitude of noncompliance by otherwise law-abiding people. A reasonable legislature may well have concluded both that alcohol was extremely dangerous, and that imprisoning moonshiners and illegal vendors for many years would be impractical.

[371] *Cf.* William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 852 (2001) (suggesting that under the Fourth Amendment probable cause and a warrant shouldn't be enough to justify searches of homes in cases of "less-than-serious drug cases—anything associated with marijuana would be a good example," though it should be enough to justify such searches where serious crimes, such as murder, are involved); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 801-02 (1994) [check].

[372] *See, e.g.*, Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989) (concluding that crimes that have a statutory penalty of six months' jail time or less qualify as "petty" for Sixth Amendment purposes, and thus don't require a criminal jury trial); County of Riverside v. McLaughlin, 500 U.S. 44 (1991) ("Our task in this case is to articulate more clearly the boundaries of what [delay before determination of probable cause following a warrantless arrest] is permissible under the

line-drawing, as they might have been in *Brinegar* itself, unless they have a principled rule that they could apply; and such rules are often unavailable.

Judges drawing constitutional lines have four different ways to deal with this difficulty of deciding how the severity of a crime should be judged for purposes of a First Amendment or Fourth Amendment rule.

a. Rejecting severity determinations

First, judges may refuse to make severity determinations a part of the constitutional rule, precisely because it's so hard to make these determinations in a principled way. In *Mincey v. Arizona*, for instance, the Court declined to create a "murder scene" exception to the Fourth Amendment warrant requirement, reasoning that courts had no manageable standards for drawing a line between murders and other crimes:

> [T]he public interest in the investigation of other serious crimes is comparable. If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a robbery, or a burglary? "No consideration relevant to the Fourth Amendment suggests any point of rational limitation" of such a doctrine.[373]

Likewise, in *Branzburg v. Hayes*, the Court declined to create a First Amendment journalists' privilege that was sensitive to the severity of the crime being investigated:

> [B]y considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a

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Fourth Amendment. Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds. Taking into account the competing interests articulated in [an earlier case], we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement . . . .").

[373] 437 U.S. 385, 393 (1978). *See also* Richards v. Wisconsin, 520 U.S. 385, 393-94 (1997) (refusing to categorically exclude drug crimes from the requirement that police knock and announce themselves when performing a search, unless exigent circumstances are present, because "the reasons for creating an exception in one category can, relatively easily, be applied to others"; "[i]f a per se exception were allowed for each category of criminal investigation that included a considerable—albeit hypothetical—risk of danger to officers or destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless."); Chimel v. California, 395 U.S. 752, 766 (1969) (insisting that decisions about the permissible scope of searches incident to arrest be based on "reasoned distinctions," rather than arbitrary line drawing based on the size of the area to be searched); Florida v. J.L., 529 U.S. 266, 272 (2000) (refusing to create a special rule based on anonymous tips that someone is possession a weapon, partly because "one [could not] securely confine such an exception to allegations involving firearms," though noting that there might be a special exemption where "the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability," for instance when there is "a report of a person carrying a bomb").

> value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.[374]

This approach yields rules that are simpler to apply, and that minimize hard-to-defend judgments about how important various laws are. The Court can, for instance, announce that there may be no warrantless searches of people's homes (subject to a few exceptions, such as exigent circumstances), with no need for controversial and sometimes unpredictable case-by-case determinations of which crimes are serious enough to justify a "crime scene exception."

The downside of this approach, though, is that very different crimes are treated the same way, regardless of how compelling an interest the crimes threaten. Restricting the government equally in prosecuting the most serious crimes and the least serious ones probably restricts the government too much in the former cases, and too little in the latter.[375]

b. Distinguishing severity based on the crime's objective characteristics

Second, judges may create rules distinguishing offenses from one another based on the inherent characteristics of the crime, such as whether the crime involves violence. The Court in *Tennessee v. Garner*, for instance, held that the Fourth Amendment generally bars the police from shooting at a fleeing felon unless "the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm."[376] Though "burglary is a serious crime," the Court concluded, "it is [not] so dangerous as automatically to justify the use of deadly force," because it was "a 'property' rather than a 'violent' crime."[377]

Similarly, *Coker v. Georgia* held that the death penalty was an excessive punishment for the rape of an adult female, because "in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which . . . involve[s] the unjustified taking of human life."[378] It's possible that the death penalty may still be available for child rape and for very serious national security crimes such as treason and espionage. But practically, the Court must have understood *Coker* as limiting the death penalty almost exclusively to murder prosecutions, which

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[374] 408 U.S. 665, 705 (1972).

[375] [Possibly merge the discussion of this point with the similar discussions in b and d.]

[376] 471 U.S. 1, 11 (1985).

[377] *Id.* at 21. *See also* State Farm Mutual Automobile Ins. v. Campbell, 123 S. Ct. 1513, 1521 (2003) (holding that the Due Process Clause limited the amount of punitive damages, and that one factor in this limitation was the gravity of the defendant's misconduct, determined based on factors such as whether "the harm caused was physical as opposed to economic").

[378] 433 U.S. 584, 598 (1977).

at least reflects a fairly clear and coherent (though not uncontroversial) rule that the decision to inflict death should be reserved largely for those who themselves inflict death.

Establishing and applying these lines can involve highly controversial judgments. Trying to set up a separate rule for "victimless crimes," for instance, may run up against the bitter disagreement about what constitutes a victimless crimes. To many, drug crimes have many victims, even setting aside the victims caused by the criminalization of drugs—minors who start using drugs even though they lack the maturity to weigh the risks, people who are killed by intoxicated drivers, and so on. In *Harmelin v. Michigan*, for instance, Justice Kennedy's concurrence specifically concluded that possessing 650 grams of cocaine was a serious enough crime to justify life imprisonment, and that "[p]etitioner's suggestion that his crime was nonviolent and victimless, echoed by the dissent, is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society."[379] Similarly, there are heated debates about whether courts should treat child rape, like murder, as deserving of the death penalty.[380]

Nonetheless, some such lines tend to provide fairly clear and generally defensible results in most situations, and they give the government more power to use harsh methods against serious crimes without extending the same harshness to all crimes. When a suspected murderer is fleeing, the need to prevent further crimes coupled with the suspect's refusal to obey the commands of the police may justify a shooting. It doesn't follow that it's constitutionally reasonable to shoot a fleeing shoplifting suspect—the need to prevent further crimes just isn't as strong there. The ability to draw such distinctions is valuable.

c. Distinguishing severity based on legislature's own categorization of the crime

Third, judges may create rules that divide offenses from one another based on the legislature's own categorizations, such as whether the offense is a crime or merely a tort, whether it can lead to jail time, or whether it's a felony or a misdemeanor. For instance, in *Welsh v. Wisconsin*, the Court held that a warrantless home arrest couldn't be justified by the Fourth Amendment's exigent circumstances exception when the person was being arrested for a nonjailable misdemeanor (even though the misdemeanor was drunk driving, which at least one member of the majority agreed

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[379] 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in the judgment).

[380] *See, e.g.*, State v. Wilson, 685 So. 2d 1063 (La. 1996) (holding that people who rape children may be sentenced to death, because child rape is a more severe crime than rape); Sherry Colb, FINDLAW.COM WRIT, *Is Capital Punishment Too Harsh for Rapists?*, Sept. 10, 2003, *available at http://writ.corporate.findlaw.com/colb/20030910.html* ("It is arbitrary . . . to treat child rape as qualitatively more heinous than the 'rape of an adult woman,' for death penalty purposes. To do so minimizes the devastation of rape for women, because it suggests that although the rape of one category of people is bad enough to call for execution, adult women do not qualify—as a matter of constitutional law—for inclusion in that category.").

was a very serious crime).[381]

This approach lets courts avoid entirely substituting their views for the legislature's, since courts can point to legislative judgments that themselves acknowledge that certain crimes aren't very serious. They leave the legislature with considerable flexibility, though, to produce a different result simply by upgrading the crime or lengthening its sentence; and since most of the clearest dividing lines are at a relatively low level, many crimes—for example, all felonies—will be treated as serious enough to justify an exception from a constitutional guarantee.

d. Distinguishing severity based on case-by-case evaluation

Fourth, judges may decide case by case which offenses are serious enough and which aren't. The child pornography exception, for instance, was based partly on the conclusion that sexual exploitation of children is such a serious crime.[382] It's not clear, though, that this exception should be extended to speech that's the product of other, less serious crimes. Banning the distribution of depictions of animal cruelty, or of works made based on illegally leaked information, for instance, would deter the mistreatment of the animals and the illegal leaks; but this alone probably shouldn't justify bans on distributing or even possessing copies of the illegally created material.[383]

There are two main difficulties, though, with this approach. First, it creates a good deal of uncertainty, both for legislators and for speakers. Neither will be able to know whether speech that facilitates drug making, copyright infringement, or tax evasion is constitutionally protected until a court decides each particular question.

Second, such an approach requires courts to make repeated decisions that are controversial, that set aside legislative judgments about severity, and that do so without any seeming application of a principle. Some judges may not be much troubled by this, but others—such as those who remain influenced by the *Mincey* and *Branzburg* arguments cited above—might be, and might therefore feel obliged to defer to the legislative judgments.

Such decisionmaking will thus tend to lead courts to ultimately define the gravity threshold at a pretty low level. For instance, in *Riggins v. Nevada*, the Court held that criminal defendants may not be forced to take antipsychotic drugs in order to

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[381] 466 U.S. 740, 752 (1984).

[382] New York v. Ferber, 458 U.S. 747, ___ (1982).

[383] *Cf.* 18 U.S.C. § 48 (banning distribution of videos that depict animal cruelty); Bartnicki v. Vopper, 532 U.S. 514, 533 (2001) (holding unconstitutional, as applied, a statute that banned distribution of material that was drawn from an illegally intercepted telephone call). Likewise, one distinction the Court gave when holding that private possession of child pornography was punishable, though private possession of simple obscenity was not, was that creation and further distribution of child pornography (the harms that legal possession tends to foster) were more harmful than the distribution of obscenity. Osborne v. Ohio, 495 U.S. 103, ___ (1990).

become competent to stand trial, unless there is "overriding justification."[384] A decade later, in *Sell v. United States*, the Court interpreted this as requiring that "important governmental interests [be] at stake," and concluded that this test was satisfied if the defendant is "accused of a serious crime."[385] But the Court then held that an "important" interest is present "whether the offense is a serious crime against the person or a serious crime against property," because "[i]n both instances the Government seeks to protect through application of the criminal law the basic human need for security."[386] This may well be the right result, but it does show judges' reluctance to dismiss some crimes, even nonviolent crimes, as not significant enough to pass the gravity threshold.[387]

We see a similar phenomenon in cases where defendants invoke the Cruel and Unusual Punishments Clause to challenge the length of a prison term. Lacking a sharp distinction, as it had in *Coker v. Georgia*, between crimes that cause death and other crimes, the Court has deferred to legislative judgments of gravity. In *Ewing v. California*, for instance, the Court upheld a 25-years-to-life sentence for a repeat offender who had been convicted of stealing merchandise worth $1,200, and had a prior record that included a robbery, three burglaries, and various lesser offenses. In upholding the sentence, the Court did point to Ewing's criminal history, but it also stressed the need to defer to legislative judgments of gravity: Ewing's instant crime, the court said, "should not be taken lightly. . . . Theft of $1,200 in property is a felony under federal law . . . and in the vast majority of States. . . ." And Ewing's sentence under the repeat offender statute "reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated."[388]

Likewise, if courts conclude that the First Amendment requires them to distinguish speech based on the seriousness of the crime that it facilitates, they may feel

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[384] 504 U.S. 127, 135 (1992).

[385] 123 S. Ct. 2174, 2184 (2003).

[386] *Id*. The "compelling government interest" prong of the First Amendment strict scrutiny test may seem like an authorization for the Court to distinguish the really strong government interests from the weaker ones. In practice, though, the Court has not been willing to use this prong this way: The Court has found compelling interests not just in preventing violence or injury to national security, but also in shielding children from purely psychological harm caused by exposure to sexual material, Sable Communications v. FCC, 492 U.S. 115, 126 (1989), in preventing political corruption, Buckley v. Valeo, 424 U.S. 1 (1976), and in ensuring that "criminals do not profit from their crimes" and that crime victims are compensated by the criminals, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118-19 (1991). The strict scrutiny test has proven "strict in theory, fatal in fact," *see* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, ___ (1972) (quotation marks omitted), because the Court has applied the test's narrow tailoring prong in a demanding way, not because of the compelling interest prong.

[387] [Incorporate reader comment: "Maybe the more the rule departs from normal intuitions, or the more controversial the area, the clearer a rule needs to be."]

[388] [Cite.]

similar pressure to "defer[]" to "rational legislative judgment" about the "gravity of the offense." Courts may be reluctant to distinguish, for instance, bans on bomb-making information from bans on drug-growing information,[389] given that many people find drug manufacturing to be as deadly as bomb manufacturing.[390] And this may be true even if the judges might themselves have taken the view that drug manufacturing is a less serious crime.

Once courts have upheld bans on drug-growing and bomb-making information, they could take a different view as to information that helps people break into banks or computer security systems, on the theory that these are just property crimes rather than violent crimes or drug crimes. But again, courts may be reluctant to overturn a contrary legislative judgment, given that such crimes are felonies (like the similar property crimes in *Ewing*), and that in the aggregate they can lead to very serious harm, such as the vast damage that violating computer network security can do. And once courts uphold bans on that sort of crime-facilitating information, they may find it hard to distinguish, say, information that describes how people evade taxes, that points to copyright-infringing sites, or that discusses holes in copy protection schemes, especially if Congress raises the penalties for such crimes and the speech that facilitates them.

Such deference to legislatures seems particularly likely because many judges would find it both normatively and politically attractive. Deference avoids a conflict with legislators and citizens who may firmly and plausibly argue that certain crimes are extremely serious, and who may resent seeing those crimes treated as being less constitutionally significant than other crimes. Deference shifts from the judges the burden of drawing and defending distinctions that don't rest on any crisp rules. Deference fits the jurisprudential notion that arbitrary line-drawing decisions, such as arbitrary gradations of crime, arbitrary threshold ages for driving or drinking, and so on—decisions where one can logically deduce that there's a continuum of gravity or maturity, but where one can't logically deduce the proper dividing line—are for the legislature rather than for judges.[391]

These are all good arguments for deference, which is why the Court may have been correct in its Cruel and Unusual Punishment Clause cases or in its compelled antipsychotic medication cases, where it set a rather low severity threshold for legislative action. But the plausibility of such arguments suggests that if the courts allow crime-facilitating speech to be restricted based on a case-by-case judgment of the crime's severity, the severity threshold is likely to settle at a rather low level over

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[389] So far Congress has treated the two differently. *Compare* 18 U.S.C. § 842(p) (banning the distribution of certain kinds of speech that facilitate bomb-making) *with* S. 1428, 106th Cong., 1st Sess., sec. 9 (unsuccessfully proposing a similar ban as to speech related to drug-making). The question is what might happen if Congress does enact the ban on drug-making information.

[390] *See* Harmelin v. Michigan, 501 U.S. 957, 1002 (Kennedy, J., concurring in the judgment) (arguing that drug crimes are extremely serious).

[391] [Cite.]

time.

2. Speech that's very helpful to criminals vs. speech that's not very helpful

Some information is especially helpful to criminals: it makes it considerably easier to commit a crime than if the information were unavailable. All things being equal, detailed information (here's how you can make a silencer) is more helpful than general information (resist the temptation to brag about your crimes). Nonobvious information is more helpful than the obvious. Information that is only available in a particular place—for instance, a mimeographed list of the names of shoppers who aren't complying with a boycott, distributed only by the organization whose members stand outside the stores taking down names—is more marginally helpful than information that's also available in lots of other places, such as information about how marijuana is grown.

Laws restricting crime-facilitating speech may well distinguish speech that provides substantial assistance from speech that provides very little assistance; some general crime facilitation laws already do that.[392] I doubt, though, that courts could do this as a constitutional matter, at least in a way that's predictable enough that speakers can know what they may or may not say. Generality and obviousness are such subjective criteria that the points made about severity in the previous subsection would apply even more clearly here. Courts would be quite reluctant to draw arbitrary-seeming constitutional lines based on such criteria, even if in theory we might think that they're entitled to do so.

How easily the speech is available from other sources may be a different matter. If a work is widely available enough, then any particular copy will be of little marginal value to a criminal—for instance, if one Web site containing *The Anarchist's Cookbook* were unavailable, the criminal would use another.[393]

The government can argue that it's trying to reduce the availability of such works by going after each posting, just as it tries to prosecute each drug dealer and illegal gun seller. But sometimes it might seem unlikely that the government can effectively reduce the work's availability: The work might be available from overseas mirror sites, or the statute might not even prohibit domestic mirror sites (for instance, if the statute applies only to copies of the work that are posted with the intent to facilitate crime, and the mirror copies are posted without such an intent).[394] If that's so, then attempts to restrict such works may be condemned on the grounds that they

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[392] For instance, of the six jurisdictions that explicitly define the crime of "criminal facilitation," three limit it to knowingly providing "substantial" assistance, 9 GUAM CODE ANN. § 4.65; N.D. CENTURY CODE § 12.1-06-02; TENN. CODE ANN. § 39-11-403 (likewise), and three do not, ARIZ. REV. STAT. ANN. § 13-1004; KY. REV. STAT. § 506.080; N.Y. PENAL CODE § 115.00.

[393] *See, e.g.*, N.D. CENTURY CODE § 12.1-06-02 ("The ready lawful availability from others of the goods or services provided by a defendant is a factor to be considered in determining whether or not his assistance was substantial.").

[394] *See supra* text accompanying notes 298-301.

don't substantially advance the government interest in preventing crime, and thus impose a free speech cost with no corresponding benefit.[395]

On the other hand, as Part IV.A.3.b points out, speech about particular people, places, or events—for instance, speech that reveals the existence of a wiretap, the social security numbers of various people, or the passwords to various computer systems—is less likely to be available in many places, and therefore more likely to be restrictable. Each location that contains such speech will thus provide a substantial marginal benefit to criminal users; and preventing such speech from being posted will provide a substantial marginal benefit to people who might otherwise have been victimized.

E. Distinctions Based on Imminence of Harm

Some crime-facilitating speech, such as a warning that the police are coming, facilitates imminent harm or imminent escape from justice. In the incitement test, which is applicable to crime-advocating speech, imminence is an important requirement, quite possibly the most important one.[396]

But there seems to be little reason to apply such a requirement to crime-facilitating speech. The standard argument for punishing only advocacy of imminent crime is that such advocacy is especially harmful: It increases the chance that people will act right away, in the heat of passion, without any opportunity to cool down or to be dissuaded by counterarguments.[397]

Crime-facilitating speech, though, generally appeals to the planner, not to the impulsive criminal. When someone tells a criminal just how to build a particularly sophisticated bomb, that information is just as dangerous whether it's said months before the bombing or the day before the bombing. Occasionally, crime-facilitating information may be useful only for a limited time, for instance when it reveals a password that's changed every couple of days. By and large, though, crime-facilitating speech is equally harmful (and equally potentially valuable) whether the information is to be used immediately or some time later.[398] It's hard to see, then, why such speech should be treated as constitutionally different depending on

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[395] *See* cases cited *supra* note 239.

[396] *See supra* Part IV.B.2.c.

[397] *See, e.g.*, Whitney v. California 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting) ("To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.").

[398] [Respond to reader comment: "But perhaps it's most useful when it provides imminent aid, as an empirical matter, given that the criminal presumably has no opportunity to find the information from other sources in that situation."]

whether it facilitates imminent crime or the criminal's future plans.

F. Distinctions Between Criminal Punishments and Civil Liability

Finally, one might distinguish restrictions on crime-facilitating speech based on whether they criminalize such speech, or just impose civil liability. This, though, would be unsound. If crime-facilitating speech is valuable enough to be protected against criminal punishment, then it should be protected even against civil liability. If it isn't valuable enough, then there is little reason to immunize it against criminal punishment.[399]

To begin with, if civil liability leads the court to enjoin the speech, after a trial on the merits,[400] then the speech *will* become criminally punishable. If the defendant refuses to stop distributing the speech, he may be sent to jail for criminal contempt.

Furthermore, the threat of punitive damages or even compensatory damages can be a powerful deterrent to speech, as the Court recognized in *New York Times v. Sullivan*.[401] The threat of losing all one's assets—which for noncorporate speakers will likely include their homes and their life's savings—may, for many speakers, be a deterrent not much less than the threat of jail. The risk that damages will be awarded without proof beyond a reasonable doubt and the other procedural protections available in criminal trials further increases this deterrent effect.

In some fields of tort law, compensatory damages may sharply differ from open-ended punitive damages, because compensatory damages merely require actors to internalize the social costs of their conduct. This, the theory goes, fosters a socially optimal level of the conduct—it does deter the conduct in some measure, but doesn't overdeter it, because if it's really valuable, people will engaged in it despite the risk of having to pay compensatory damages.[402]

But even if this argument works for some kinds of conduct, there's no reason to think that compensatory damages for speech will provide this sort of socially optimal deterrent. Valuable speech is generally a public good, which has social benefits that aren't fully internalized (or aren't internalized at all) by its speakers.[403] Requiring

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[399] *See, e.g.*, Bridges v. California, 314 U.S. 252 (1941) (treating criminal contempt punishment for speech as tantamount to any other criminal punishment for speech).

[400] *See, e.g.*, the copyright-facilitating speech cases cited *supra* note 19; City of Kirkland v. Sheehan, 2001 WL 1751590 (Wash. Super.) (enjoining the publication of social security numbers); *see also* Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, ___ (1998) (discussing courts' increasing willingness to enjoin even libel, and the general constitutionality of such permanent injunctions).

[401] 376 U.S. 254, ___ (1964).

[402] [Cite.]

[403] Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 555 (1991) ("[B]ecause information is a public good, it is likely to be undervalued by both the market and the political system. . . . Consequently, neither market demand nor political incentives fully capture the social value of public goods such as information. Our polity responds to this undervaluation of information by providing special constitutional protection for infor-

people who communicate dual-use speech to pay for its harms when they aren't paid for its social benefits will thus overdeter many speakers.

At the same time, purely compensatory liability will also underdeter many other speakers, who are judgment-proof. If a college student is thinking about setting up a Web site that mirrors some crime-facilitating material, the risk of compensatory liability will do little to stop him. The compensatory damages award against the *Hit Man* murder manual publishers has actually led the book to become *more* available, because several people who aren't worried about liability have posted copies on the Web; the copies are now available for free to the whole world, and not just by mail order from Paladin Press. The speech has simply been shifted from easily deterrable speakers to the hard-to-deter ones. If people really want to suppress the speech (assuming that it can practically be suppressed), they need a more forceful tool than compensatory damages.

The Court has routinely declined to distinguish criminal liability from civil liability for First Amendment purposes, at least when the speaker is acting recklessly, knowingly, or intentionally.[404] At least as to crime-facilitating speech, this approach seems to be correct.

V. DEFINING A "CRIME-FACILITATING SPEECH" EXCEPTION

What, then, might be the proper boundaries of a "crime-facilitating speech" exception? I have argued in Part IV that some of the potential distinctions—for instance, distinctions based on the speaker's intent, on whether the speech is science, entertainment, or politics, or whether the speech is on a matter of "private concern," "public concern," or "unusual public concern"—are not terribly helpful.

I have also argued that one particular distinction, between speech that's said to a few people who the speaker knows are likely to use it criminally (classic one-to-one aiding and abetting) and speech that's broadly published, is definitely sound.[405] Such speech should indeed be unprotected: It's harmful, it lacks First Amendment value, and any such exception is unlikely to set a precedent for something materially broader.

That leaves, I think, three main value judgments to be made:

(1) Should published speech (including dual-use speech) be unprotected whenever the speaker *knows* that the speech will help some readers commit crime

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mation-related activities.").

[404] *See* [the Court's refusal to accept Stevens's proposal that obscenity be subject only to civil remedies]; Garrison v. Louisiana, 379 U.S. 64 (1964) (accepting the possibility of criminal penalties for libel, if the *New York Times v. Sullivan* standards are satisfied). *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, ___ (1974), held that punitive damages may not be awarded in private figure libel cases when the speaker is merely negligent, which suggests that criminal liability would likewise be improper in such cases; but this judgment rested on the special dangers of holding speakers liable based on honest mistakes. *Id.* at ___.

[405] *See supra* Part IV.A.2.a.

or is at least *reckless* about that prospect?

(2) If the answer to 1 is no, should published speech nonetheless be unprotected if it's likely to help some readers create *extraordinarily serious harms*, such as nuclear or biological attacks?

(3) If the answer to 1 is no, should published speech nonetheless be unprotected if it seems to have *virtually no noncriminal uses*, for instance if it reveals social security numbers or computer security passwords?

I tentatively think that the best solution is to answer question 1 no, and questions 2 and 3 yes, and I'll explain why below.

A. Should Dual-Use Speech Be Unprotected Based on Knowledge/Recklessness That It's Crime-Facilitating?

Say that a speaker knows that a certain form of speech is dual-use—that some listeners are likely to use it to commit crimes. Should that alone justify restricting it, as some courts and commentators have indeed urged for at least some kinds of crime-facilitating speech?[406]

The strongest argument for a "yes" answer would naturally focus on the harm that the speech can cause: bombings, killings of crime witnesses, computer security violations that may cause millions or billions of dollars in damage. And it would be reinforced by the growing ease of public communication: In the past, it may have been possible to rely on publishers' refraining from printing really dangerous material, but now that Internet publication is cheap, this constraint vanishes.

The argument would also have to distinguish crime-facilitating speech from other speech that may cause similar harms—chiefly crime-advocating speech—but that is nonetheless protected. The main distinction, I think, would have to be that restricting crime-facilitating speech wouldn't greatly injure discussion about public affairs. People could still express whatever political ideas they might like.[407]

They might be somewhat constrained in supporting these ideas with detailed facts: They couldn't, for instance, reveal the details of a wiretap to argue that the government is getting improper wiretaps. But they could still discuss the subject on a broad level, so the loss to public debate would be small (though not zero). And they would often have other factual details (for instance, information on past wiretaps that are no longer secret) on which they could draw as well.

And, the argument would go, this loss to public debate would be justified by the

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[406] *See* United States v. Featherston, 461 F.2d 1119 (5th Cir. 1972) (upholding a ban on distribution of information on bombmaking because the ban applied to speakers who spoke "with intent *or* knowledge that the information disseminated would be used in the furtherance of a civil disorder" (emphasis added)); sources cited *supra* note 38 (urging liability for certain kinds of crime-facilitating speech based on knowledge, or on recklessness).

[407] *Cf.* Thomas Scanlon, *supra* note 79, at 211-12, 214 (seemingly endorsing broad restrictions on crime-facilitating speech, and distinguishing speech that provides "reasons for action" and speech that simply informs people how to do things).

benefits in crimes prevented or criminals caught. Why should a witness be killed by a criminal's confederates, just so a newspaper could provide a bit more detail in its story by publishing the witness's name? Why should businesses lose millions of dollars because an irresponsible computer specialist decided to publicly reveal a security problem in the course of explaining its magnitude? Why should terrorists escape because someone who learned of a wiretap or a subpoena reported this to a newspaper, which published the story and thus alerted the suspects?

So communication of general ideology would be protected, even if it does help cause crime, because such communication is so important. Communication of factual details would also be protected when the only things at stake are reputation or privacy, or possibly even the fairness of trials.[408] But when the communication is both merely of factual details (and is thus somewhat less valuable than communication of ideas) and helps facilitate crime (and is thus especially harmful), it can be restricted.

Factual details are more important to scientific speech, whether about chemicals, computer security, drugs, criminology, or cryptography. But, the argument would go, the government is unlikely to regulate such speech more than necessary, because of legislators' common sense and because of the government's interest in not stifling technological innovation. Even if chemistry books about explosives aren't constitutionally protected, they wouldn't be entirely outlawed—they're just too useful.

Most crime-facilitating technical speech, then, won't be restricted. For some such speech, the government might insist that publishers eliminate some important details, or limit dissemination to make it harder for casual would-be criminals to get the speech. Only a very small range of speech about extremely dangerous things, such as H-bombs or biological weapons, would be outlawed for all unauthorized readers. So the burden on scientific investigation wouldn't be vast, and it would be justified by the need to prevent serious harm.

If one accepts this view, then one would likely conclude that it should apply to all speech that knowingly or recklessly facilitates crime, not just to speech that intentionally facilitates it. The focus of the argument, after all, is on the harm that speech can cause, not on the bad intentions of the speaker.

Merely negligent crime-facilitating speech would probably not be punishable under this approach, because of the danger that such punishment might deter people from engaging even in some non-crime-facilitating speech because they're afraid it might be found to be crime-facilitating.[409] But if the speaker subjectively realizes that the speech may help crime, there's no reason to demand any greater mens rea

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[408] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, ___ (1964); Florida Star v. B.J.F., 491 U.S. 524, ___ (1989); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, ___ (1976).

[409] *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, ___ (1964) (adopting this reasoning in public figure/public concern libel cases); Smith v. California, 361 U.S. 147, 152-53 (1959) (same in obscenity cases).

than recklessness, any more than there is in libel law.[410]

This approach, though, would substantially restrict people's ability to discuss important issues. Few public policy debates are resolved by abstractions. People need concrete examples that are rich with detail, and omitting important details will make the speaker's argument less credible.[411] "The government is wiretapping people without enough justification" isn't enough. "The government is wiretapping people without enough justification; we're sure there are specific examples, but it's illegal for people to tell us about them" isn't enough.

Only concrete details—who was wiretapped, why he was wiretapped, why we should think he shouldn't have been wiretapped, and so on—can really make the argument effective, and can rebut the government's assertions that the wiretapping regime is working. And this is true even if the details don't themselves mean much to the typical reader: Once the details are published, lay readers will be able to rely on further information brought forward by more knowledgeable readers, such as people who know the person who is being wiretapped or who are experts on the government's wiretapping policy.[412]

Also, as Part II.B.3 discusses, the ability to communicate these details may also be a check on potential government misconduct. Bans on publication of information about subpoenas, wiretaps, witnesses, or security flaws prevent people from blowing the whistle on what they see as government overreaching in those areas. The government may argue that if, for instance, librarians can publicize subpoenas for library records, the criminals who are being investigated may learn of the subpoenas and flee. But if librarians can't publicize such subpoenas, even if they think that the subpoenas are overbroad and unjustified, then the government will have more of an incentive to issue subpoenas that are too broad or even illegal.

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[410] Some advocates of this view may want to exclude from the new First Amendment exception speech that facilitates lesser harms, such as copyright infringement, plagiarism (the term paper mill example), or perhaps even the growing of some of the less harmful drugs, such as marijuana. *Cf.* Whitney v. California, 274 U.S. 357, 377-78 (1927) (Brandeis, J., concurring in the judgment) (arguing that incitement of minor crimes should be constitutionally protected). As Part IV.D suggests, such lines are often hard to draw in a way that would make them stable and administrable. For instance, even if you believe that copyright infringement is different from computer security violation, or that the production of marijuana is different from the production of crack or methamphetamines, it seems unlikely that courts would be willing to draw stable constitutional lines there. But perhaps there could be a viable distinction between facilitating crimes and facilitating noncriminal torts, facilitating felonies and facilitating misdemeanors, or facilitating crimes of violence or drug crimes and facilitating property crimes.

[411] *Cf.* Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 303 (Iowa 1979) ("[A]t a time when it was important to separate fact from rumor, the specificity of the report would strengthen the accuracy of the public perception of the merits of the controversy"); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L. Rev. 291, 356 (1983) ("A factual report that fails to name its sources or the persons it describes is properly subject to serious credibility problems.").

[412] *See supra* text accompanying note 73.

Such a broad crime-facilitating speech exception would also, I think, set a precedent for other broad exceptions in the future. The exception, after all, would empower the government to restrict speech that (unlike, for instance, false statements of fact, fighting words, or even obscenity) would concededly have serious value, and is often connected to major political debates. It would empower the government to ban the publication of facts, with no justification that it's simply taking away one narrow and unnecessary form of expression.[413] And it would let the government do so in a wide variety of cases, not just the truly extraordinary ones, such as the publication of instructions on how to make H-bombs. That's quite a step beyond current First Amendment law.

There are, of course, already many exceptions to free speech protection, and free speech flourishes despite the precedent they set. But the existing exceptions are already used, sometimes successfully, to argue for broader restraints.[414] Each new exception strengthens those arguments—and an exception for all knowingly or recklessly crime-facilitating speech, including speech that is potentially an important contribution to political debate among law-abiding voters, would strengthen them still further.[415] In a legal system built on analogy and precedent, broad new exceptions can have influence considerably beyond their existing boundaries.

B. Should Published Speech Be Unprotected When It May Facilitate Extraordinarily Serious Harms?

A small subset of crime-facilitating speech involves harms (whether crimes or acts of war) that are extraordinarily grave. Publishing detailed instructions that might enable terrorists or governments to build an H-bomb is a classic example, though it turns out that the speech in the *United States v. Progressive* case probably didn't qualify.[416] Reporting the sailing dates of troopships is another. Publishing instructions on making even conventional bombs might also qualify, given the potential destructive power of such bombs (consider the Oklahoma City bombing). Revealing data on security vulnerabilities of biological research laboratories or nuclear power plants, or instructions for making weaponized biological warfare agents,

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[413] *Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568, ___ (1942) (stressing that the prohibited fighting words were "no essential part of the expression of ideas"); FCC v. Pacifica Found., 438 U.S. 726, ___ (1978) (plurality) (stressing that the profanity restriction left the speaker free to convey his message in other ways); Harper & Row v. Nation Enterps., 471 U.S. 539, ___ (1985) (likewise as to copyright law); New York v. Ferber, 458 U.S. 747, ___ (1982) (likewise as to child pornography law).

[414] [Cite.]

[415] *See* Volokh, *Mechanisms of the Slippery Slope*, *supra* note 188.

[416] In 1979, or even today, building a hydrogen bomb required an industrial base that only advanced countries possess; and it seems quite likely that, over 25 years after the bomb was invented, those countries would have scientists with the knowledge needed to deduce how such a bomb could be constructed. [Cite.]

might qualify as well. The harm here isn't just the risk of death—that's present even in more conventional revelations, such as of the names of boycott violators or crime witnesses—but rather the risk of mass death.

This category of speech raises two questions: First, should this speech be constitutionally protected? Second, if courts are going to find it unprotected—whether or not they'll be right to do so—which approach will minimize the risk that such a conclusion will eventually be used to strip other speech of protection as well?

My sense is that the answer to the first question should be "no," at least as to the most potentially harmful sorts of speech, especially when the speech is unavailable from other sources.[417] Important as free speech may be, avoiding the killings of tens of thousands or more people is more important. The matter is less clear as to harms that are less serious, though still extremely grave, such as the harms that might be caused by bombmaking instructions or the publication of the sailing dates of troopships (or some modern equivalents). And, of course, there's a danger that because these lines tend to be hard to draw, the exception can easily grow, as Part IV.D discusses, from nuclear bombs to conventional bombs to the names of witnesses in bombing cases to information on wiretaps of people who are suspected of planning bombings.

Moreover, the benefit of trying to restrict the speech may be overstated: The most dangerous users of the speech are ones who are likely to be able to get the information (such as the H-bomb designs) in any event.[418] Nonetheless, it seems to me that the case for restricting the speech is pretty strong.

But whether I'm right or wrong, chances are that judges will indeed allow this sort of restriction, like the trial court did as to the H-bomb plans in the *Progressive* case.[419] And if that's so, then it seems to me that it would be best if judges frankly acknowledge that they're carving out a special exception for speech that facilitates extraordinarily grave harms, rather than trying to apply a test that doesn't consider harm, and that might thus apply to a considerably broader range of speech.

There are reasonable arguments against punishing even the most harmful speech. First, there is a serious risk that harm distinctions may prove unstable: Judges, finding it hard to describe facilitation of killing, or facilitation of witness intimidation, or even facilitation of massive computer vandalism as "too unimportant to count," will keep defining more and more crimes as serious enough to justify speech restrictions. And this is made especially likely by the lack of any crisp logical lines, or crisp distinctions drawn by other bodies of law, that can prevent the slippage. The likeliest candidates for bright-line distinctions—between, for instance, physical injury and property damage, or felony and misdemeanor—are, I think, too low for this purpose.

Second, as the discussion at the end of Part V.A suggested, any restriction of speech that is acknowledged to be valuable—not just false statements of fact, child

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[417] *See supra* Part IV.D.2.

[418] [Cite.]

[419] United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

pornography, or obscenity, which are punished on the grounds that they are generally valueless—would make it easier for future proposed speech restrictions to be enacted. And third, restricting even the speech that describes how one can create even extraordinary harms would do only limited good. Most of the people who seem likeliest to misuse the speech (for instance, the foreign governments or terrorist organizations that might want to build nuclear bombs or biological weapons) will likely be able to get access to the information whether or not the law bans it.[420]

Nonetheless, it seems to me that in this situation these risks are worth running, precisely because the speech may pose very substantial harms. Moreover, some of this information—for instance, information on biological weapons—can be harmful even in the hands of small terrorist groups or individuals, who might not have the resources to develop the information on their own. Restricting it may thus help avoid some attacks, and perhaps save thousands of lives.

And the alternatives to a harm-based distinction seem likely to be worse. Intent-based distinctions probably won't satisfy those judges who want to restrict the speech, since at least sometimes—as in the *Progressive* case, or when a Web site mirrors speech to protest censorship—the speech is not intended to facilitate crime.[421] Characterizing the speech as a mere adjunct to crime (or to an act of war), or characterizing the laws punishing the speech as generally applicable laws, risks legitimizing much broader prohibitions that would apply even to less harmful speech that ought to remain protected.[422] Distinguishing political advocacy from scientific speech would likely lead to much broader restrictions on scientific speech, including speech that has a direct bearing on public policy matters.[423]

The real problem, of course, is defining the harm threshold. My sense is that the exception should probably be limited to information on things like nuclear or biological weapons—devices that can kill many thousands of people at a time, and that impose risks beyond what even a nation that's devoted to protecting speech at considerable cost should have to bear. (This is in some respect similar to other debates about suspension of rights in cases of extraordinary danger, such as the debates about torture.[424]) [Workshop readers: I'm particularly unsure about what do with this section. On the one hand, I think some such exception is necessary, and inevitable. On the other hand, I can certainly see the slippery slope and chilling effect risks here. I'd love to hear people's advice.]

C. Should Published Speech Be Unprotected When It Has (Virtually) No Lawful Value?

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[420] *See, e.g.*, L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55, ___ (1990).
[421] [Cite.]
[422] [Cite.]
[423] [Cite.]
[424] [Cite.]

Some public speech conveys information that's usable only, or nearly only, for criminal purposes (see Part IV.A.2.b). There are only a few sorts of such information: The best examples are people's social security numbers and computer system passwords. This information is not materially relevant to any political or scientific debates, or to people's making decisions about their daily lives; it even lacks value as entertainment.

Some specific information about particular people or incidents may be valuable to listeners. The name of a witness to a crime may help the public evaluate his credibility. The address of an abortion provider may make it easier for people to demonstrate outside his house or in his neighborhood. The name and address of a convicted sex offender may help people decide whether to deal with him.

But information such as social security numbers and computer system passwords lacks such utility. The only practically likely use of this information is illegal. Even relatively benign uses, such as the use of someone's social security number to check his credit history, will be unlawful because they will generally involve falsely claiming to be that person. This sort of information is thus a good candidate for speech that, like false statements of fact or threats, lacks First Amendment value and may thus be suppressed.

The chief dangers with such an exception are that there is a risk that these restrictions will be incorrectly applied, and will set a precedent for broader restrictions, as Part IV.A.2.b discusses. Deciding whether speech lacks noncriminal value isn't easy, and there's a substantial risk of error. Even the canonical examples may have some value, for instance when the information is posted to demonstrate the very fact that people can get this data from insecure systems. Perhaps such information is of low marginal value, because the speaker can easily make the same point by just posting, say, the first few digits of a person's social security number and not the whole thing[425]—but this is the sort of subtle inquiry that courts may often get wrong.

More broadly, when courts are asked to make somewhat subjective judgments such as whether speech has virtually no noncriminal value, it's easy for their decisions to be influenced by their hostility to the speech or to the movement that it serves. And when an error does happen, the effect isn't just suppression of speech communicated among a few people, as with the narrow version of the exception; rather, it's suppression of broadly published speech.

Moreover, a new precedent that newspapers, magazines, books, and Web sites may be barred from publishing speech that's very harmful or that's valueless may help strengthen the case for other such restrictions in the future. If one thinks the benefit of these restrictions won't be great, precisely because they're likely to be so narrow—if indeed the category consists largely of computer passwords and social security numbers—then it's not clear that trying to prevent the spread of such speech, an attempt that is likely to be highly imperfect in any event, justifies creating

[425] *See supra* Part IV.A.2.b.

a new free speech exception. If one is persuaded that the proposed new exceptions will do relatively little good, the potential harm caused by the long-term precedential effect of the exception may be enough to lead one to reject the proposal.[426]

My view is that the exception would indeed be justifiable. It is, however, a close call, which depends on how one evaluates the likelihood of slippage, and the likely effectiveness of the restriction.

VI. CONCLUSION

The above analysis has suggested what the right test for crime-facilitating speech should be; but even if readers disagree with this proposal, I hope the analysis has shown several things.

First, many important First Amendment problems—such as the ones with which the Introduction begins—turn out to be problems related to crime-facilitating speech. They may at first seem to be problems of aiding and abetting law, national security law, copyright law, invasion of privacy law, or obstruction of justice law. But they are actually special cases of the same general problem; solving it may thus help solve many specific ones.

Second, precisely because the specific problems are connected, they should be resolved with an eye towards the broader issue. Otherwise, a solution that may seem appealing in one situation—for instance, concluding that the *Hit Man* murder manual should be punishable because all recklessly or knowingly crime-facilitating speech is unprotected[427]—may set an unexpected and unwelcome precedent for other situations.

Third, crime-facilitating speech often has surprisingly many lawful, valuable uses.[428] Among other things, knowing just how people commit crimes can help the law-abiding know which security holes need to be plugged, which new laws need to be enacted, and which existing laws are so easy to avoid that they should be either strengthened or repealed. Similarly, knowing what exactly the police are doing—which wiretaps they're planting or which records they're subpoenaing—can help the law-abiding monitor police misconduct, even as it helps criminals evade police surveillance. As with many other dual-use products, the very things that make dual-use speech useful in the right hands are often what make it harmful in the wrong hands.

Fourth, some of the most initially appealing answers—for instance, punishing intentionally crime-facilitating speech but not knowingly crime-facilitating speech, allowing crime-facilitating speech to be restricted when it's done under laws of general applicability, and applying strict scrutiny—ultimately prove not very helpful.[429] Whatever one might think is the right answer here, I hope I've demonstrated that

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[426] *See* Volokh, *supra* note 188, at ___.
[427] *See, e.g.*, *supra* note 38.
[428] *See supra* Part II.B.
[429] *See supra* Parts IV.B.2, III.C, and III.D.

these are wrong answers, or at least seriously incomplete ones.

Fifth, I hope this analysis has also suggested that some of these approaches may be unsound in other contexts, too. Distinguishing speech based on the speaker's mens rea, for instance, may prove to be a mistake in a broader range of cases.[430] Likewise for assuming that strict scrutiny can provide the answer,[431] or for assuming that speech may generally be restricted by laws of general applicability, even when the law applies to the speech precisely because of the communicative impact that the speech has.[432] Conversely, other approaches—such as, for instance, a focus on whether the speech is said only to listeners whom the speaker knows to be criminal—may be promising in other contexts, such as criminal solicitation.[433]

Finally, this analysis may show that the existence of the Internet may indeed make a significant difference for First Amendment analysis.[434] This is not because

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[430] Thus, for instance, it's not clear whether the Court's newfound focus on intent in threat cases is wise. *See* Virginia v. Black, 123 S. Ct. 1536, ___ (2003); *cf.* Jennifer Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, ___ [III.C] (2002) (describing the pre-*Black* lower court caselaw, which generally did not require intent). *See also* Taylor v. K.T.V.B., Inc., 525 P.2d 984 (Idaho 1974) (allowing an intentional infliction of emotional distress claim based on the speaker's knowledge that the speech will produce emotional distress, by analogy—in my view, misguided analogy—to *New York Times v. Sullivan*); [harassment articles].

[431] [Cite.]

[432] This criticism also applies to other laws that courts or commentators have defended on "general applicability" grounds, even when the speech has caused harm precisely because of its content. *See, e.g.*, Jews for Jesus, Inc. v. Jewish Community Relations Council, 968 F.2d 286 (2nd Cir. 1992) (upholding, despite *NAACP v. Claiborne Hardware*, tort liability based on speech that urged a boycott of Jews for Jesus, on the grounds that "the First Amendment provides no defense to persons who have used otherwise protected speech or expressive conduct to force or aid others to act in violation of a valid conduct-regulating statute"); *In re* Andrus, 189 Bankr. 413 (N.D. Ill. 1995) (upholding as content-neutral an injunction prohibiting a creditor from trying to collect debts, even though the injunction was applied to speech publicizing the debtor's failure to pay); State v. Springer-Ertl, 2000 WL 488449, *11 (S.D.) (Sabers, J., dissenting) (arguing that publicly displaying pro-criminal-defendant posters that are aimed at influence jurors is unprotected by the First Amendment because the person has violated a "content-neutral statute" prohibiting attempts to influence jurors). *Cf.* Schutz v. Schutz, 581 So.2d 1290 (Fla. 1991) (upholding an injunction ordering a mother to say Hatch v. Superior Court, 2000 WL 337527, *18 (Cal. App.) (upholding a statute barring transmitting harmful matter over the Internet to seduce a child on the grounds that it "is not directed at speech, but at the activity of attempting to seduce a minor"). *But see In re* Stonegate Security Servs., Ltd., 56 Bankr. 1014 (N.D. Ill. 1986) (holding that public statements accusing a debtor of not paying the supplier were constitutionally protected, even when the speaker was pursued under a generally applicable law prohibiting "act[s] to collect, assess, or recover a claim against the debtor"); *In re* National Service Corp., 742 F.2d 859, 862 (5th Cir. 1984) (likewise); *In re* Sechuan City, Inc., 96 Bankr. 37 (E.D. Penn. 1989) (holding such statements unprotected because they were "on matters of purely private concern," but acknowledging that the restriction should be judged as a speech restriction).

[433] *See supra* note 194.

[434] This has generally not been my view for most areas of First Amendment law in cyberspace. *See, e.g.*, Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 L. & CONTEMP. PROBS. 299, ___ (2000); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

crime-facilitating speech on the Internet should be treated differently from crime-facilitating speech elsewhere, but because the creation of the Internet makes it much more difficult to fight crime-facilitating speech anywhere.[435]

In 1990, banning *Hit Man* or *The Anarchist's Cookbook* would have likely made it substantially harder for people to get the information contained in those books. Today, the material is a google search away, and thus *easier* to access than when it was only in book form: The second entry returned by the search for the text "hit man," for instance, pointed me to a site that contained the book's text, and another google search (for "hit man," "independent manual for contractors," or "rex feral," the pseudonym of the author) found seven more copies. And because many of these sites appear to be mirror sites run by people who intend only to fight censorship, not to facilitate crime,[436] they are legally immune from laws that punish intentionally crime-facilitating speech.[437]

To try to adequately suppress these sites, then, the U.S. government would have to prohibit *knowingly* crime-facilitating speech and not just intentionally crime-facilitating speech—a very broad ban indeed, which may encompass many textbooks, newspapers, and other reputable publishers.[438] And even that would do little about foreign free speech activists who may respond to the crackdown by putting up new mirror sites, unless the U.S. gets nearly worldwide support. Moreover, unlike in other contexts, where making unprotected material just a little less visible may substantially decrease the harm that the material causes,[439] here the would-be users are likely to be willing to invest a bit of effort into finding the crime-facilitating text. And a bit of effort is all they're likely to need.

This substantially decreases the benefits of banning crime-facilitating speech—though, as Part I.A described, it doesn't entirely eliminate those benefits—and thus makes it harder to argue that these benefits justify the costs. Broadly restricting all intentionally crime-facilitating speech, for instance,[440] might seem appealing to some if it seems likely to make it much harder for people to commit crimes. It should seem less appealing if it's likely to make such crimes only a little harder to commit, because the material could be freely posted on mirror sites.

Of course, all this presupposes the current Internet regulatory framework, where the government generally leaves intermediaries, such as service providers and search

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[435] *See* Godwin, *supra* note 31 (making this point in the wake of the *Hit Man* case).

[436] *See, e.g.*, sites cited *infra* notes 300-301.

[437] *See, e.g.*, Rice v. Paladin Enterprises, Inc., 128 F.3d 233, ___ (4th Cir. 1997) (stressing that the *Hit Man* publisher might be held liable because of its unusual stipulation, entered for purposes of the motion to dismiss, that it intended to help criminals).

[438] *See supra* Part V.A.

[439] For instance, reducing the dissemination of libels, speech that reveals private facts about a person, tangible copies that infringe copyright, and obscene spam that's sent to unwilling viewers would reduce the harm done by that speech.

[440] *See, e.g.*, Part V.A.

engines, almost entirely unregulated.[441] Under this approach, civil lawsuits or criminal prosecutions will do little to suppress the online distribution of *Hit Man* or *The Anarchist's Cookbook*, even if the law purports to broadly ban knowingly crime-facilitating speech.

But say Congress enacts a law that requires service providers or search engines to block access by the provider's subscribers or search engine's users to any site, anywhere, that contains this material. Presumably, the law would have to require providers and search engines to electronically examine the content of the site for certain tell-tale phrases that identify a particular prohibited work, since a list of prohibited URLs would do nothing about new mirror sites.

There would also have to be a way for prosecutors to quickly get new phrases added to the prohibited sites list. Service providers would also have to block access to any offshore providers that might make it possible to evade these U.S. law restrictions. This might indeed make the material appreciably harder to find, though of course not impossible (after all, the bomb recipes in *The Anarchist's Cookbook* are also available, though perhaps in less usable form, in chemistry books).[442]

This regulation, though, would be much more intrusive—though perhaps much more effective—than any Internet regulation that we have today; and I suspect that such regulation would face much greater opposition than, say, 18 U.S.C. § 842(p) (the new bombmaking information ban) did.[443] This sort of control would return us, in considerable measure, to the sort of government power to restrict access to material that we saw in 1990: far from complete power, but still greater than we see today. Yet I doubt, at least given today's political balance, that such a proposal would succeed.[444] So the example of crime-facilitating speech shows how far the Internet has reduced the effectiveness of at least a certain form of government regulatory power—and how much would have to be done to undo that reduction.

Crime-facilitating speech thus remains one of the most practically and theoreti-

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[441] *But see* 17 U.S.C. § 512(d) (which seems to require search engines to remove links to copyright-infringing pages, when they are notified that the pages are infringing).

[442] *Cf.* 18 PENN. CONSOL. STAT. § 7626 (trying to institute a much narrower version of this aimed at ordering service providers to block access to child pornography).

[443] *See supra* note 1. Among other things, 18 U.S.C. § 842(p) prohibits only *intentionally* crime-facilitating speech (unless it's said to a particular person, rather than broadly published); the new proposal would go after *knowingly* crime-facilitating speech. It would also mean more work and more potential legal risk for service providers, including universities and businesses who provide their own Internet connections—powerful and reputable organizations that might object to the new obligations. And it would sound like the very sort of national firewall that many Americans have condemned as repressive when it has been instituted by countries such as China.

Such a service provider mandate might also be an unconstitutional prior restraint, because it would coerce providers into blocking access to material even without a final judgment that this particular material was constitutionally unprotected. *See* Center for Democracy & Technology, *The Pennsylvania ISP Law: An Unconstitutional Prior Restraint and a Threat to the Stability of the Internet*, *http://www.cdt.org/speech/030200pennreport.pdf.*

[444] [Cite the blocking of the Clipper chip.]

cally important problems, and one of the hardest problems, in modern First Amendment law. I hope this article will help promote a broader discussion about how this problem should be solved.