

## CRIME-FACILITATING SPEECH

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This article gives as examples the URLs of some crime-facilitating Web pages. All these URLs can be found with quick and obvious google searches; I therefore think that my including them won't materially help any would-be criminal readers.

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

Some speech provides information that makes it easier for people to commit crimes, torts, or other harms. Consider:

- (a) A textbook,<sup>1</sup> magazine, Web site, or seminar describes how people can make bombs (conventional<sup>2</sup> or nuclear<sup>3</sup>), make guns,<sup>4</sup> make drugs,<sup>5</sup> commit

<sup>1</sup> See *infra* note 72 for examples of this.

<sup>2</sup> See 18 U.S.C. § 842(p)(1) (prohibiting distribution of “information pertaining to . . . the

contract murder,<sup>6</sup> engage in sabotage,<sup>7</sup> painlessly and reliably commit suicide,<sup>8</sup> fool ballistic identification systems or fingerprint recognition systems,<sup>9</sup> pick locks,<sup>10</sup> evade taxes,<sup>11</sup> or more effectively resist arrest during civil disobedience.<sup>12</sup>

(b) A thriller or mystery novel does the same, for the sake of realism.<sup>13</sup>

manufacture or use of an explosive” “with the intent that” the information be used criminally); *id.* § 842(p)(2) (prohibiting distribution of such information “to any person” “knowing that such person intends” to use it criminally); 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 § 842(p)(2)(A)).

<sup>3</sup> 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).

<sup>4</sup> See *infra* note 87 for examples of such speech, and the political message it may communicate.

<sup>5</sup> See, e.g., S. 1428, 106th Cong., 1st Sess., sec. 9 (applying the approach of 18 U.S.C. § 842(p), see *supra* note 2, to “controlled substance[s]” and drug crimes rather than to explosives).

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

<sup>7</sup> See 18 U.S.C. § 231(a) (prohibiting “teach[ing] or demonstrat[ing] . . . the use . . . or making of any firearm or explosive . . . 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 § 231(a) conviction of black militants for teaching how to make explosives for “the coming revolution”); see also Scales v. United States, 367 U.S. 203 (1960) (affirming conviction for being a member of the Communist Party with the intent of overthrowing the government, based partly on the defendant’s organizing “training schools” where, among other things, instructors taught people “how to kill a person with a pencil”); Earth Liberation Front, *Setting Fires with Electrical Timers*, <http://www.earthliberationfront.com/main.shtml> (describing arson techniques, and labeling itself “The politics and practicalities of arson”).

<sup>8</sup> See *infra* note 381 for calls to restrict such materials.

<sup>9</sup> See *infra* notes 88 and 89 for examples of such speech and of its possible noncriminal value.

<sup>10</sup> See Chicago Lock Co. v. Fanberg, 676 F.2d 400 (9th Cir. 1982) (refusing to enjoin the publication of manuals that help people make keys for certain locks given the serial number written on the outside of the lock).

<sup>11</sup> Compare, e.g., United States v. Kelley, 769 F.2d 215, 216-17 (4th Cir. 1985) (upholding criminal punishment for such speech); United States v. Freeman, 761 F.2d 549 (9th Cir. 1985) (same); United States v. Buttorff, 572 F.2d 619, 623 (8th Cir. 1978) (same); United States v. Schiff, No. CV-S-03-0281-LDG, order item 5, at 34 (June 13, 2003) (same), *aff’d on other grounds*, \_\_\_ F.3d \_\_\_ (9th Cir. 2004) with United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983) (holding such speech to be constitutionally protected).

<sup>12</sup> 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.”); State v. Bay, 721 N.E.2d 421 (Ohio App. 1998) (holding that going limp to make it harder for the police to take one away constitutes resisting arrest).

<sup>13</sup> See, e.g., EDWARD ABBEY, THE MONKEY WRENCH GANG 81, 169-79 (1975) (describing in some detail the sabotaging of heavy machinery, and the setting of explosive charges to derail a train);

- (c) A Web site or a computer science article explains how one can effectively encrypt messages (which can help stymie law enforcement),<sup>14</sup> how one can illegally decrypt encrypted copyrighted material,<sup>15</sup> what security flaws exist in a prominent computer operating system,<sup>16</sup> or how one can write a virus.<sup>17</sup>

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FREDERICK FORSYTH, *THE DAY OF THE JACKAL* 61-63 (1971) (describing a way to get a false passport). *See also Do You Remember: June 1975—MP Vanishes*, BIRMINGHAM EVENING MAIL, Apr. 19, 2001, at 10 (“Inspired by Frederick Forsyth’s best-seller *The Day Of The Jackal*, [politician John Stonehouse] obtained the birth certificate of a dead man named Joseph Markham, received a passport in that name and opened bank accounts. Then he faked his own drowning in Miami and fled to Australia.”). This technique is apparently known in England as the “Day of the Jackal fraud.” Philip Webster, *Tax-Dodgers Run Up Bill Totalling Millions*, THE TIMES (LONDON), Mar. 9, 2000. *See also* Marlise Simon, *Blaming TV for Son’s Death, Frenchwoman Sues*, N.Y. TIMES, Aug. 30, 1993, at A5 (“Marine Laine said her son, Romain, and his friend, Cedric Nouyrigat, also 17, mixed crystallized sugar and weed-killer, stuffed it into the handlebar of a bicycle and ignited it to test a technique used by MacGyver, a television hero who is part adventurer, part scientific wizard.”).

<sup>14</sup> *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) (holding that such speech is protected), *apeal later dismissed*; *Karn v. United States Dep’t of State*, 925 F. Supp. 1 (D.D.C. 1996) (likewise). I set aside for purposes of this article the debate whether restrictions on computer source code should be treated as content-based speech restrictions. *See, e.g.,* Lee Tien, *Publishing Software as a Speech Act*, 15 BERK. TECH. L.J. 629 (2000); Steven E. Halpern, *Harmonizing the Convergence of Medium, Expression, and Functionality: A Study of the Speech Interest in Computer Software*, 14 HARV. J.L. & TECH. 139 (2000); Robert Post, *Encryption Source Code and the First Amendment*, 14 BERK. TECH. L.J. 713 (2000); David McGowan, *From Social Friction to Social Meaning: What Expressive Uses of Code Tell Us About Free Speech*, 64 OHIO ST. L.J. 1515 (2003). If source code restrictions should be treated as content-based, then the analysis in this article applies to them. If they shouldn’t—for instance, because they’re seen as restrictions on the functional aspect of the code (since the code can be directly compiled into object code and executed, without a human being reading it) rather than the expressive aspect—then this article’s analysis would still apply to the human-language descriptions of the algorithm that the source code embodies, which are dangerous precisely because they communicate to humans.

<sup>15</sup> *See* sources cited *infra* note 204 (describing threatened lawsuits based on such speech). *Cf. Nat’l Fed’n of the Blind, Inc. v. Loompanics Enter., Inc.*, 936 F. Supp. 1232 (D. Md. 1996) (holding publisher of a how-to book on trademark infringement liable for contributory infringement).

<sup>16</sup> *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 communicating such information may violate the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030(a)(5)(A), 1030(e)(8), but only if the speaker intended to facilitate security violations, rather than intending to urge the software producer to fix the problem); Letter from Kent Ferson, representing Hewlett-Packard, to SnoSoft (July 29, 2002) (threatening Digital Millennium Copyright Act and Computer Fraud and Abuse Act liability based on SnoSoft’s publishing information about a security bug), <http://www.politechbot.com/docs/hp.dmca.threat.073002.html>; 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 general issue, and giving many examples); *infra* notes 96-98 and accompanying text.

<sup>17</sup> *See* Clive Thompson, *The Virus Underground*, N.Y. TIMES, Feb. 8, 2004, § 6, at 28 (describing people who post virus source code on Web sites, where it can be used both by people who are interested in understanding and blocking viruses, and by people who want to spread the viruses;

- (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.<sup>18</sup>
- (e) A leaflet or a Web site gives the names and possibly the addresses of boycott violators, abortion providers, strikebreakers, police officers, registered sex offenders, or political convention delegates.<sup>19</sup>
- (f) A Web site posts people's social security numbers or credit card numbers, or the passwords to computer systems.<sup>20</sup>
- (g) A newspaper publishes the sailing dates of troopships,<sup>21</sup> secret military plans,<sup>22</sup> or the names of undercover agents in enemy countries.<sup>23</sup>
- (h) A Web site or a newspaper article names a Web site that contains copyright-infringing material, or describes it in enough detail that readers could quickly

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similar issues would be raised if virus-writers posted not the code but a detailed description of the algorithm).

<sup>18</sup> See *Capra v. Thoroughbred Racing Ass'n*, 787 F.2d 463 (9th Cir. 1986) (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); *Times Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556 (Ct. App. 1988) (same); *Hyde v. City of Columbia*, 637 S.W.2d 251 (Mo. Ct. App. 1982) (same).

<sup>19</sup> 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); *infra* note 75 (describing New Jersey's restrictions on citizens communicating information on released sex offenders); CAL. PENAL CODE § 146e (prohibiting, among other things, "publish[ing] . . . the residence address or telephone number" of various law enforcement employees "with the intent to obstruct justice"); FLA. STAT. ANN. § 843.17 (likewise); *Probe into Republican Delegate Data Posting*, FOXNEWS.COM, Aug. 30, 2004 ("The Secret Service is investigating the posting on the Internet of names and personal information about thousands of delegates to the Republican National Convention . . . . [L]aw enforcement officials . . . said there were concerns that posting of the delegate lists could subject the delegates to harassment, acts of violence or identity theft. . . . Included [on the lists] are names, home addresses, e-mail addresses and the New York-area hotels where many are staying.").

<sup>20</sup> See CAL. CIV. CODE § 1798.85(a)(1) (generally prohibiting publishing social security numbers); *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); MISS. CODE ANN. 97-45-5(1)(b) (same); GA. CODE ANN. § 16-9-93(e) (same, but only when damage results).

<sup>21</sup> 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").

<sup>22</sup> See *New York Times Co. v. United States*, 403 U.S. 713, 733-34 (1971) (White, J., concurring) (suggesting that such publication could be punished).

<sup>23</sup> See 50 U.S.C. § 421(c) (prohibiting engaging in "a pattern of activities intended to identify and expose covert agents . . . with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States").

find it using a search engine.<sup>24</sup>

- (i) A Web site sells or gives away research papers, which helps students cheat.<sup>25</sup>
- (j) A magazine describes how one can organize one's tax return to minimize the risk of a tax audit,<sup>26</sup> share music files while minimizing the risk of being sued as an infringer,<sup>27</sup> or better conceal one's sexual abuse of children.<sup>28</sup>
- (k) A newspaper publishes information about a secret subpoena,<sup>29</sup> a secret

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<sup>24</sup> 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); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 265 (9th Cir. 1996) (defining contributory infringement as behavior that materially contributes to third parties’ copyright infringement, done with knowledge or reason to know that the behavior will contribute to that infringement, a definition that would cover providing addresses of infringing sites); see also *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 455-58 (2d Cir. 2001) (enjoining publication of links to a page that contained material which violated the Digital Millennium Copyright Act). The cases all involved clickable links, but including the URL even as plain text would trigger copyright liability just as much as the clickable links would.

The speaker couldn’t escape liability by arguing that some readers might have found the infringing site through other means even if the speaker hadn’t mentioned it, and that therefore its publishing the address isn’t the but-for cause of the infringement. First, many readers will only see a pointer to the site in the newspaper or Web site, and wouldn’t have thought of searching for the site had it not been for that reference. Second, even if several different sources report on the site’s location, under standard tort law principles, each would be liable for the harm. See *Anderson v. Minneapolis, St. P. & S. S. M. R. Co.*, 179 N.W. 45, 49 (Minn. 1920) (adopting this rule as to negligence cases); RESTATEMENT (SECOND) OF TORTS § 432 (1965) (likewise); *id.* § 622a cmt. b (likewise as to libel cases); *id.* § 632 cmt. c (likewise as to injurious falsehood cases).

<sup>25</sup> Academic cheating is likely a form of fraud, and is tortious or perhaps even criminal (though of course the student is rarely ever sued or prosecuted). The question relevant to this article is whether term paper mills are likewise constitutionally unprotected, because they help students commit such fraud. Cf., e.g., *United States v. International Term Papers, Inc.*, 477 F.2d 1277 (1st Cir. 1973) (enjoining a term paper mill on the grounds that the mill used the mails to “assist[] students to make false representations to universities”); *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).

<sup>26</sup> See, e.g., *WorldWideWeb Tax, How to Avoid an IRS Audit?*, [http://www.webtax.com/audits/audit\\_avoiding.htm](http://www.webtax.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 law-abiding taxpayers who want to save themselves the hassle of an audit, as well as to cheaters.

<sup>27</sup> 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>.

<sup>28</sup> Cf. *Melzer v. Bd. of Ed.*, 336 F.3d 185, 190 (2nd Cir. 2003) (describing such an article, though not deciding whether it was unprotected).

<sup>29</sup> 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

wiretap,<sup>30</sup> a secret grand jury investigation,<sup>31</sup> or a secret impending police operation,<sup>32</sup> and the suspects thus learn they are being targeted; or a library, Internet service provider, bank, or other entity whose records are subpoenaed alerts the media to complain about what it sees as an abusive subpoena.<sup>33</sup>

- (l) When any of the speech mentioned above is suppressed, a self-styled anticensorship Web site posts a copy, not because its operators intend to facilitate crime, but because they want to protest and resist speech suppression or to inform the public about the facts underlying the suppression controversy.<sup>34</sup>
- (m) 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.<sup>35</sup>
- (n) A supporter of sanctuary for El Salvadoran refugees tells a refugee the

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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, but without a time limit, as to investigations of unfair or anticompetitive business practices, though only if a court so orders); *see also* MINN. STAT. ANN. § 609.4971 (prohibiting the disclosure of certain subpoenas “with intent to obstruct, impede, or prevent the investigation”).

<sup>30</sup> *See* TEX CODE CRIM. PROC. art. 18.21, secs. 4, 7, 8 (prohibiting disclosure by any person of searches or subpoenas “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 jeopardiz[e] an investigation or unduly delay[] a trial”); 11 DEL. CODE § 2412(a) (prohibiting 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).

<sup>31</sup> *See, e.g.*, FLA. STAT. ANN. § 905.27(2) (banning the publication of “any testimony of a witness examined before the grand jury, . . . except when such testimony is or has been disclosed in a court proceeding.”).

<sup>32</sup> *Cf. Risenhoover v. England*, 936 F. Supp. 392 (W.D. Tex. 1996), which allowed a negligence lawsuit against media organizations that sent reporters to the scene of a forthcoming raid on the Waco Branch Davidians compound. The reporters’ presence tipped off the Davidians to the previously secret raid plans, and allegedly helped cause the death of plaintiffs’ relative, an ATF officer. *Risenhoover* involved newsgathering activities, rather than the publication of a news story; but it illustrates the possibility that speakers may also be sued for directly or indirectly exposing secret law enforcement plans, under the theory that “media defendants owe[] a duty . . . not to warn the [targets], either intentionally or negligently, of the impending raid.” *Id.* at 408.

<sup>33</sup> *See* 18 U.S.C. § 2709(c) (prohibiting communication service providers from disclosing FBI demands for subscriber or toll billing records information); 18 U.S.C. § 2705(b) (allowing court orders that bar communication service providers from disclosing administrative subpoenas for stored communications); 12 U.S.C. §§ 3406(c), 3409(b)3413(i), 3414(a)(3), 3420 (providing for similar restrictions on financial institutions that are ordered to turn over customer records).

<sup>34</sup> *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 311-312 (citing examples).

<sup>35</sup> *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).

location of a hole in the border fence, and the directions to a church that would harbor him.<sup>36</sup>

(o) A lookout,<sup>37</sup> a friend,<sup>38</sup> or a stranger who has no relationship with the criminal but who dislikes the police<sup>39</sup> warns a criminal that the police are coming.

(p) A driver flashes his lights to warn other drivers of a speed trap.<sup>40</sup>

These are not incitement cases: The speech isn't persuading or inspiring some readers to commit bad acts. Rather, the speech is giving people information that helps them commit bad acts—acts that they likely already want to commit.<sup>41</sup>

When should such speech be constitutionally unprotected? Surprisingly, the Supreme Court has never squarely confronted this issue,<sup>42</sup> and lower courts and commentators have only recently begun to seriously face it.<sup>43</sup> And getting the

<sup>36</sup> See *United States v. Aguilar*, 883 F.2d 662, 685 (9th Cir. 1989) (upholding conviction based on such speech for aiding and abetting illegal immigration based), *superseded on unrelated grounds by statute as noted in* *United States v. Gonzalez-Torres*, 273 F.3d 1181 (9th Cir. 2001).

<sup>37</sup> See, e.g., *United States v. Lane*, 514 F.2d 22 (9th Cir. 1975).

<sup>38</sup> See, e.g., *United States v. Bucher*, 375 F.3d 929 (9th Cir. 2004).

<sup>39</sup> See, e.g., *People v. Llanos*, 77 N.Y.2d 866 (1991) (holding defendant not liable in such a case, but only because the applicable statute didn't cover helping people escape from the police); see also *People v. Llanos*, 151 A.D.2d 128, 131 (1989), *aff'd*, 77 N.Y.2d 866 (1991) (noting that "the record here is devoid of any proof linking defendant to the apartment occupants").

<sup>40</sup> This is tantamount to the driver's acting as a lookout, see *supra* notes 37-39: It lets the other drivers drive illegally before and after the speed trap without getting caught, because they have been 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 obstruction of justice prosecution for "ma[king] a sign . . . that read 'Radar Trap, 25 mph' and [holding] it up along the road"); cf. *United States v. Bucher*, 375 F.3d 929, 930 (9th Cir. 2004) (noting the First Amendment question); *Commonwealth v. Beachey*, 728 A.2d 912 (Pa. 1999) (considering a similar case, but not confronting the First Amendment question).

<sup>41</sup> As Parts II.A and IV.E explain, crime-inciting speech and crime-facilitating speech differ considerably in how they cause harm and how they are valuable, so they are usefully analyzed as separate First Amendment categories.

Likewise, crime-facilitating speech cases are different from copycat-inspiring cases, where movies or news accounts inspire copycat crimes but don't give criminals any useful and nonobvious information about how to commit those crimes. See *Rice v. Paladin Enterprises, Inc.*, 128 F.2d 233, 265 (4th Cir. 1997) (making this distinction). The danger of speech that inspires copycat crimes is that it leads some viewers to want to commit crimes (even if that's not the speaker's purpose). This is the same sort of danger that crime-advocating speech poses, which is why copycat crime cases are generally analyzed using the incitement test. See, e.g., *Byers v. Edmondson*, 826 So.2d 551, 557 (La. Ct. App. 2002) (rejecting copycat claim by applying *Brandenburg v. Ohio*).

<sup>42</sup> See *infra* Part III.A.

<sup>43</sup> The most extensive treatments of this question are *Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997), and U.S. DEP'T OF JUSTICE, 1997 REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, available at <http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html>. (Because the Justice Department report is far more easily accessible to readers on the Department



answer right is important: Because these cases are structurally similar—a similarity that hasn't 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,<sup>44</sup> a term I define to mean

- (1) any communication that,
- (2) intentionally or not,
- (3) conveys information that
- (4) makes it easier or safer for some listeners or readers to (a) commit crimes, torts,<sup>45</sup> acts of war (or other acts by foreign nations that would be crimes if done by individuals), or suicide, or (b) to get away with committing such acts.<sup>46</sup>

In Part IV.G, I'll outline a proposed solution to this problem; but my main goal is to make observations about the category that may be useful even to those who disagree with my bottom line.

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 decisions 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

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Web site than it is in the limited print edition that was submitted to Congress, I will cite to the online version.) KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* (1989), treats many issues very well, but spends only a few pages on crime-facilitating speech, *id.* at 86-87, 244-45, 281-82.

<sup>44</sup> I borrow the term from the concept of "criminal facilitation," a crime recognized in some jurisdictions, *see infra* notes 276 and 277, but I apply the phrase to all crime-facilitating speech, whether it's punished by one of these criminal facilitation statutes or by some other law.

<sup>45</sup> I include torts as well as crimes because both are generally seen as actions that are potentially wrong to help people commit. *See infra* note 278. Tortious but non-criminal conduct is less harmful than criminal conduct, so restrictions on speech that facilitates purely tortious conduct may be less justified. 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.

I use the term "crime-facilitating" rather than a broader term such as "harm-facilitating" because it seems to me clearer and more concrete (since "harm" could include many harms, including offense, spiritual degradation, and more), and because most of the examples I give do indeed involve conduct that's illegal.

<sup>46</sup> Helping criminals get away with crimes can be as harmful as helping them commit crimes; among 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 lookouts are treated like other aiders and abettors, and why criminal law has long criminalized the accessory after the fact, who helps hide a criminal, as well as the accessory before the fact. *See, e.g.*, material cited *infra* note 135.

the publishers know that the works may help others commit crimes, and such knowing facilitation of crime should be constitutionally unprotected.<sup>47</sup> But such a broad justification would equally strip protection from newspaper articles that mention copyright-infringing Web sites,<sup>48</sup> academic articles that discuss computer security bugs,<sup>49</sup> and mimeographs that report on who is refusing to comply with a boycott.<sup>50</sup>

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.<sup>51</sup> 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.<sup>52</sup>

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

Moreover, it’s often impossible for the distributor to know which consumers will use the material in which way.<sup>53</sup> Banning the material will prohibit the valuable uses along with the harmful ones.<sup>54</sup> Allowing the material will allow the harmful uses alongside the valuable ones. This dual-use nature has 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 existing First Amendment doctrine. Part III.A describes the paucity of existing constitutional law on the subject, and Parts III.B and III.C discuss the

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<sup>47</sup> For articles that make such broad proposals, while focusing only on the well-publicized *Hit Man* case and perhaps one or two other cases, see S. Elizabeth Wilborn Malloy, *Taming Terrorists but Not “Natural Born Killers”*, 27 N. KY. L. REV. 81, 81, 105, 111 (2000); 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); 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).

<sup>48</sup> Cf. the cases and statute mentioned in note 24, which would support such liability.

<sup>49</sup> See, e.g., Preston & Lofton, *supra* note 16; *infra* notes 96-98 and 204 and accompanying text.

<sup>50</sup> See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 903-06 (1982) (involving such mimeographs, during a boycott where some noncompliers had been physically attacked by third parties).

<sup>51</sup> For instance, the rule could distinguish speech that’s intended to facilitate crime from speech that knowingly facilitates crime, though such a distinction has its own problems, see *infra* Part IV.B.2.

<sup>52</sup> See Eugene Volokh, *Test Suites: A Tool for Improving Student Articles*, 52 J. LEGAL EDUC. 440 (2003).

<sup>53</sup> I adapt this term from arms control, where “dual-use” refers to products that have both military (and thus often banned) uses and civilian (and thus allowed) uses. See, e.g., 10 U.S.C. § 2500.

<sup>54</sup> 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 in Part IV.F.

possibility that strict scrutiny or a “balancing” approach can resolve this problem.

Part IV discusses the various distinctions that the law might try to draw within the crime-facilitating speech category to minimize the harmful uses and maximize the valuable ones.<sup>55</sup> 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 seemingly 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 less helpful than might at first appear. Many other possible distinctions end up being likewise unhelpful, though a few are promising.

Part IV.G summarizes my tentative suggestion: that crime-facilitating speech ought to be constitutionally protected unless (1) it’s said to a person or a small group of people when the speaker knows the listeners are likely to use the information for criminal purposes, (2) it’s within one of the few classes of speech that has almost no noncriminal value, or (3) it can pose truly extraordinary harm (on the order of a nuclear attack or a plague) even when it’s also valuable for lawful purposes. But I hope the analysis in Part IV will be helpful even to those who would reach a different conclusion. And even if courts ultimately do hold that legislatures and courts should have broad authority to restrict a wide range of crime-facilitating speech, some of the analysis may help legislators and judges decide how they should exercise that authority.<sup>56</sup>

Finally, Part V will conclude with a few more observations, one of which is worth foreshadowing here: While crime-facilitating speech cases arise in all sorts of media, and should be treated the same regardless of the medium, the existence of the Internet does make a difference here. Most importantly, by making it easy for people to put up mirror sites of banned material as a protest against such bans, it makes restrictions on crime-facilitating speech less effective, both practically and (if they’re cast in terms of purpose rather than mere knowledge) legally.

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<sup>55</sup> 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. *See, e.g.*, *United States v. Snapp*, 444 U.S. 507 (1980) (dealing with restrictions on speech by government employees); *Pickering v. Board of Ed.*, 391 U.S. 563, 570 n.3 (1968) (likewise); *infra* note 119 and accompanying text (discussing *United States v. Aguilar*, which involved a similar issue); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (dealing with restrictions on litigants who receive confidential information through discovery, with the condition that they may not republish it).

I also do not deal with the special case of harm-facilitating speech that’s aimed largely at minors, for instance material that teaches them how to conceal their anorexia from their parents. *See, e.g.*, *Ana Angels*, <http://members.fortunecity.com/kikienpoite/id19.htm>; Deirdre Dolan, *Learning to Love Anorexia? ‘Pro-Ana’ Web Sites Flourish*, N.Y. OBSERVER, Feb. 3, 2003, at 1.

<sup>56</sup> The analysis may also be helpful for courts that want to analyze the question under state constitutional free speech guarantees. *See, e.g.*, *State v. Robertson*, 649 P.2d 569 (Ore. 1982) (setting forth a doctrine for Oregon Free Speech Clause cases that’s quite different from standard First Amendment doctrine).

## II. THE USES OF CRIME-FACILITATING SPEECH

### A. Harmful Uses

Information can help people commit crimes. It makes some crimes possible, some crimes easier to implement, and some harder to detect and thus harder to deter and punish.<sup>57</sup>

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<sup>58</sup>). 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 would be willing to do it if he knew.

Advocacy of crime may persuade the first person to break the law and to incur the risk of possibly harsh punishment, but it will generally do it over time, building on past advocacy and laying the foundation for future 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 counter-advocacy isn't perfect, but it will often 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. So crime-facilitating speech can provide elements 2 and 3a more quickly and irreversibly than crime-advocating

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<sup>57</sup> For a long list of bombings connected to particular publications that describe how explosives can be made, *see* U.S. DEP'T OF JUSTICE, *supra* note 43, pt. II.

<sup>58</sup> *See* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

speech can provide elements 1 and 3b.<sup>59</sup>

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,<sup>60</sup> even though a civil lawsuit led its publisher to stop distributing it.<sup>61</sup> (If the civil lawsuit that led the publisher to stop selling the book also made the publisher more reluctant to try to enforce the copyright, the suit might thus have actually made the book more easily, cheaply, and anonymously available.)

The *Anarchist's Cookbook* is likewise freely available online, and likely will continue to be, even if the government tries to prosecute sites that distribute it.<sup>62</sup> 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,<sup>63</sup> and that you trust to do that. The same is true, in considerable measure, for instructions on how to avoid detection while committing crimes.<sup>64</sup>

The legal availability of crime-facilitating information probably increases the average quality—and, as importantly, the perceived reliability—of such information. An arson manual on the Earth Liberation Front's Web site,<sup>65</sup> or an article on growing or manufacturing drugs in *High Times* magazine,<sup>66</sup> will probably be seen as more

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<sup>59</sup> Naturally, even if crime-facilitating speech provides elements 2 and 3a, speech that argues against committing a crime can help prevent element 1 from being satisfied. I am not claiming that crime-facilitating speech alone guarantees that a crime will be committed, only that it contributes to such crimes, and on average does so more than crime-advocating speech does.

<sup>60</sup> See, e.g., <http://ftp.die.net/mirror/hitman/>, which can be found in seconds using a google search for "Hit Man."

<sup>61</sup> See *Publisher Settles Case Over Killing Manual*, N.Y. TIMES, May 23, 1999, at A27 (reporting that *Hit Man* publisher Paladin settled the lawsuit by agreeing to stop publishing and selling the manual, as well as paying the victims' families millions of dollars); Mark Del Franco, *Paladin Kills Off Part of Its Product Line*, CATALOG AGE, Apr. 2000, at 14 (same).

<sup>62</sup> See *infra* text accompanying notes 438-448.

<sup>63</sup> Few bombers are suicide bombers, and even those who are want to commit suicide when the bomb is scheduled to detonate, not while it's being constructed.

<sup>64</sup> Cf. Park E. Dietz, *Dangerous Information: Product Tampering and Poisoning Advice in Revenge and Murder Manuals*, 33 J. FORENSIC SCI. 1206 (1988) (discussing this point, and speculating that such manuals are indeed quite helpful to criminals).

<sup>65</sup> See Earth Liberation Front, *supra* note 7.

<sup>66</sup> 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.

trustworthy than some site created by some unknown stranger. It will often be more accurate and helpful, because of the organization's greater resources and greater access to expertise. The organization is more likely to make sure that its version is the correct one, and doesn't include any potentially dangerous alterations 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.<sup>67</sup>

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 lead some criminals to use less accurate and helpful information, or be scared off to less dangerous crimes 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 or 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 novice computer hackers or solo drug makers; and some people who want to illegally download pirate software or movies, or to cheat by handing in someone else's term paper.

Moreover, some kinds of crime-facilitating information relate not to general matters (such as how to build a bomb), but to particular facts: for instance, particular subpoenas issued by government agencies who are investigating particular suspects, passwords to particular computers, or 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.

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<sup>67</sup> The *Anarchist's Cookbook*, for instance, seems to have developed a poor reputation. See, e.g., The Anarchist Cookbook FAQ, <http://www.righto.com/anarchy/> ("The Anarchist Cookbook is a book published in 1971, and you won't find the real thing online, although it is easily purchased from your local bookstore or from amazon.com. There are various files available on the Internet that rip off the name 'Anarchist Cookbook' and have somewhat similar content, but they are not the real Anarchist Cookbook. The Anarchist Cookbook has a poor reputation for reliability and safety, and most of the online files are considerably worse."). Were I to turn to a life of political crime, I would want to use material that had the imprimatur of an established organization, and that had developed a better reputation for reliability—something that would be harder if the material were outlawed.

### B. Valuable Uses

Speech that helps some listeners commit crimes, however, may also help others do legal and useful things. Different people, of course, have different views on what makes speech “valuable,”<sup>68</sup> and the Supreme Court has been notoriously reluctant to settle on any theory—self-government, search for truth, self-expression, or the like—as being the sole foundation of First Amendment law.<sup>69</sup> 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 argument, education, or entertainment, and whether it’s politics, religion, science, or art.<sup>70</sup>

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 at least some First Amendment value.<sup>71</sup>

#### 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. Much of this information is applied science. Books about explosives can teach students principles of chemistry, and can help engineers use explosives for laudable purposes.<sup>72</sup> Discussions of computer security problems, or of encryption or decryption algorithms, can educate computer programmers who are working in the field or who are studying the subjects (whether in a formal academic program or on their own). Such discussions can also help programmers create new algorithms and security systems. Scientific research is generally thought to advance more quickly when scientists and engineers are free to

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<sup>68</sup> See, e.g., Adam M. Samaha, *Litigant Sensitivity in First Amendment Law* 12 n.49 (draft) (citing sources).

<sup>69</sup> See, e.g., Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1617-19 (1987); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1217-23 (1983).

<sup>70</sup> See, e.g., *Winters v. New York*, 333 U.S. 507, 510 (1948) (entertainment constitutionally protected); cases cited *infra* note 195 (scientific speech constitutionally protected).

<sup>71</sup> These subsections aren’t meant to be mutually exclusive; I identify the different kinds of value only to better show that crime-facilitating speech can be valuable in different ways.

<sup>72</sup> Some books discuss how explosives (or drugs) are made. Keay Davidson, *Bombs Easy, But Risky, to Make; Ingredients Are Common, Recipes Available*, S.F. EXAMINER, Apr. 20, 1995, at A-12 (discussing bombmakers’ using chemistry textbooks); David Unze, *Suspected Meth Lab Found in Search Near Paynesville*, ST. CLOUD TIMES, Dec. 6, 2000 (same as to drugmakers). Others discuss how explosives can be used to effectively produce the desired destruction with minimal risk to the user. See, e.g., NAT’L ASS’N OF AUSTRALIAN STATE ROAD AUTHORITIES, *EXPLOSIVES IN ROADWORKS-USERS’ GUIDE* (1982); U.S. DEP’T OF THE INTERIOR, *EXPLOSIVES AND BLASTING PROCEDURES MANUAL* (1986).

broadly discuss their work.

Nonscientific information can be practically useful, too. 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 being caught cheating. Discussions of common scams can help put people on their guard.<sup>73</sup> 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.<sup>74</sup> Knowing who is a boycott violator, a strikebreaker, or an abortion provider can help people make choices about whom to associate with—choices that may be morally important to them. Knowing who is a sex offender can help people take extra precautions for themselves and for their children.<sup>75</sup>

Likewise, speech that teaches drug users how to use certain illegal drugs more safely<sup>76</sup> has clear medical value—it may avoid death and injury among many people who would have used drugs in any event—but it also facilitates crime. Just as speech that teaches people how to commit crimes with less risk of legal punishment is crime-facilitating, so is speech that teaches people how to commit crimes with less risk of injury.<sup>77</sup> Such “harm reduction” speech might embolden some people to engage in the illegal drug use; and some proposed crime-facilitation statutes would outlaw such speech, 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.<sup>78</sup>

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<sup>73</sup> See FRANK W. ABAGNALE, *THE ART OF THE STEAL*, especially 40-41, 108-13 (2001) (describing some frauds in considerable detail); *id.* at title page (giving the book’s subtitle as “How to Protect Yourself and Your Business from Fraud—America’s #1 Crime”).

<sup>74</sup> See, e.g., Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need To Be Revised*, 14 BERK. TECH. L.J. 519, 539-40 (1999).

<sup>75</sup> But see 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”). The Rules of Conduct purport to bind all people who get the information, as well as members of their households, not just those who promise to abide by the Rules as a condition of getting the information. See *Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration* 24, 30, 43 (Mar. 2000), available at <http://www.state.nj.us/lps/dcj/megan1.pdf>; *id.* at 23 (stating that the Rules should be enforced using court orders); *A.A. v. New Jersey*, 176 F. Supp. 2d 274, 281 (D.N.J. 2001) (“All those receiving notice are bound by the applicable rules of ‘Rules of Conduct.’”). If the rules were applied only to those who promised confidentiality, the First Amendment issue might be different, see *supra* note 55.

<sup>76</sup> Ecstasy is a prominent example of a drug that can be made less risky when certain precautions are taken. E-mail from Prof. Mark Kleiman, UCLA School of Public Policy, Aug. 11, 2004.

<sup>77</sup> See definition of “crime-facilitating” at text accompanying note 46 *supra*. Many people view drug use as a less serious crime than many other kinds of crime; but that doesn’t change the fact that speech that makes drug use safer does indeed facilitate the commission of that particular crime.

<sup>78</sup> See, e.g., S. 1428, 106th Cong., 1st Sess., sec. 9, which would have barred, among other things, “distribut[ing] by any means information pertaining to, in whole or in part, the manufacture or use of



## 2. Helping People Evaluate 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 wiretap or subpoena power. And such concrete and timely examples of alleged abuse may be necessary to persuade the public or opinion leaders to press for changes in government policies: A general complaint that there is some unspecified abuse happening somewhere will naturally leave most listeners skeptical.<sup>79</sup>

Likewise, publishing the names of witnesses to a crime can help the public evaluate whether the witnesses' stories are credible or not.<sup>80</sup> 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. Publishing the names and addresses of abortion providers may facilitate legal picketing of their homes.<sup>81</sup> Publishing a description of how H-bombs

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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, June 14, 2000, <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)").

<sup>79</sup> As to the need for timely details, see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976). As to the need for concrete details, the Court has implicitly recognized this in its libel cases, where the Justices have protected concrete factual allegations about government officials (if they are true, or even if they are the product of an honest mistake) and not just general statements of opinion. The recognition has not been explicit, I think, only because the need to give facts that concretely support the general claims is so obvious that few have doubted it. See also sources cited *infra* note 287 (noting the importance of specific details).

<sup>80</sup> *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 arise only once the victim-witness's name is publicized, and people come forward to report that they know the witness to be unreliable or biased.

Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech*, 34 ARIZ. L. REV. 231, 291 (1992), argues that holding the media liable for publishing witness names "would not significantly chill the media's vigorous reporting of crimes"; but it's not enough that the media can vigorously report crimes in general—there's also value in the media's reporting specific items, such as witness names, that may generate more information about the witness's credibility.

<sup>81</sup> Even if focused residential picketing is banned by a city ordinance, parading through the targets' neighborhood is constitutionally protected. See *Madsen v. Women's Health Center*, 512 U.S. 753, 775 (1994); *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988). I think it's therefore not correct to say that information including a person's address "is intrinsically lacking in expressive content," Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be*

operate can help explain why the government engages in certain controversial nuclear testing practices, or why it wants to build expensive and potentially dangerous new plants.<sup>82</sup>

None of this means the information is harmless: Publishing secret wiretap information may help criminals conceal their crimes, by informing them that they're under suspicion and that certain phones are no longer safe to use; publishing boycotters', abortion providers', or convention delegates' names and addresses can facilitate violence as well as lawful remonstrance and social ostracism.<sup>83</sup> But the speech would indeed be valuable to political discourse when communicated to some listeners, even if it's harmful in the hands of others.

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, such speech can help support arguments that some laws are futile. For instance, explaining how easy it is for people to grow marijuana inside their homes may help persuade people that the war on marijuana isn't winnable—or is winnable only through highly intrusive policing—and perhaps should be abandoned.<sup>84</sup> Likewise, some argue that the existence of offshore copyright-infringing sites shows that current copyright law is unenforceable, and should thus be changed or repealed.<sup>85</sup> But the validity of the argument turns on whether such sites indeed exist,

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*Criminalized?*, 13 ALB. L.J. OF SCI. & TECH. 273, 397, 404 (2003).

<sup>82</sup> 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 people interested in international politics and warfare, in which such weapons may play a role).

<sup>83</sup> See, for instance, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which involved both social ostracism and some violence. Only the names of boycott violators were published, but in a rural county with only 7,500 black residents, it likely wouldn't be hard for one black resident to find out where another lives. See U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK 1972, at 258 (noting that the Claiborne County black population in 1970 was 7,522, and that the total county population was nearly 75% rural). Cf. *Probe into Republican Delegate Data Posting*, *supra* note 19 ("There are several lists of Republican National Convention delegates posted on the Indymedia site . . . Included are names, home addresses, e-mail addresses and the New York-area hotels where many are staying. 'The delegates should know not only what people think of the platform they will ratify, but that they are not welcome in New York City,' said one posting [on the site] . . .").

<sup>84</sup> 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").

<sup>85</sup> See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1427 (2004) ("A common argument against

have an appealing mix of bootleg content, and are easy to use. A pointer to such a site, which law-abiding people can follow to examine the site for themselves, can thus provide the most powerful evidence for the argument.<sup>86</sup>

Explaining how easy it is to make gunpowder, ammunition, or guns may support arguments that criminals can't be effectively disarmed.<sup>87</sup> 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.<sup>88</sup> Explaining how one can

enforcement of intellectual property law online has been that infringers will simply move offshore."); Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 162 (1999) (making such an argument); Pamela Samuelson, *Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections*, 71 U. CHI. L. REV. 223, 237 (2003) (making a modest version of such an argument); Matthew V. Pietsch, *International Copyright Infringement and the Internet: An Analysis of the Existing Means of Enforcement*, 24 HASTINGS COMM. & ENT. L.J. 273 (2002) (likewise); Michelle Dello, *P2P Company Not Going Anywhere*, WIRED NEWS, July 17, 2004 (quoting someone who makes such an argument, and who mentions a particular offshore file sharing company as an example).

<sup>86</sup> There is nothing illegal about a curious user's simply looking at such a site, or even listening to some bootleg content just to figure out what's available; even if any copying happens in the process, the user's actions would be fair use, because they'd be noncommercial and wouldn't affect the market. See 17 U.S.C. § 107; *Sony Corp. of America v. Universal Studios*, 464 U.S. 417 (1983). The article would thus facilitate both legal use by curious users who are trying to decide whether copyright law is a lost cause, and illegal use by other users who want to get material without paying for it.

<sup>87</sup> See 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 for the benefit of forensic investigators, 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 easily people can make their own guns, and that "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 some ways one can make homemade guns, and citing articles, including Koffler, *supra*, that describe more detailed designs). 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). Many people might not be persuaded by the combination of these two books—for instance, one might believe that many fewer criminals would get guns if they had to rely on homemade or black market weapons. But the two books put together still make an important political argument, one that can't be made as effectively without the descriptions of how easy home gun making supposedly is.

<sup>88</sup> See, e.g., Bill Twist, *Erasing Ballistic Fingerprints*, [http://216.117.156.23/features/barrel\\_twist/2000/june/erase.shtml](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 [of 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. . . . [T]he calls

deceive fingerprint recognition systems can be a powerful argument against proposed security systems that rely on those systems.<sup>89</sup> Pointing to specific ways that hijackers can evade airport metal detecting equipment can support an argument that such equipment does little good, that the government is wasting money and unjustifiably intruding on privacy, and that it's better to invest money and effort in arming pilots, encouraging passengers to fight back, and so on.<sup>90</sup>

Second, some descriptions of how crimes can be committed may help show the public 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 manufacturers to do better.<sup>91</sup> Publishing detailed information about airport security

for "ballistic fingerprinting" are a big lie, to appease those who have an ingrained fear of firearms. . . .

<sup>89</sup> 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](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, which they claim can be followed in half an hour at the cost of \$20).

In the past, this article in the proceedings of a technical conference might have been dismissed as unlikely to reach the eyes of criminals—though even then, the sophisticated criminals might have read even technical literature. In the Internet age, I stumbled across the article by accident through a pointer at *GeekPress*, a Weblog that posts pointers to interesting or amusing technical information. See Paul Hsieh, GEEKPRESS, [http://geekpress.com/2003\\_11\\_16\\_weekly.html#106900367854004686](http://geekpress.com/2003_11_16_weekly.html#106900367854004686) (Nov. 17, 2003, 2:43 am post).

<sup>90</sup> See, e.g., Bruce Schneier, *More Airline Insecurities*, CRYPTOGRAM NEWSLETTER, Aug. 15, 2003, <http://www.schneier.com/crypto-gram-0308.html>, which describes 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."

<sup>91</sup> 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,

problems can show that the government isn't doing enough to protect us.<sup>92</sup> 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.<sup>93</sup>

Third, descriptions of how crimes are committed can help security experts design new security technologies. Knowledge in other fields often develops through specialists—whether academics, employees of businesses, or amateurs—publishing their findings, openly discussing them, and correcting and building on each other's work: That's the whole point of professional journals, working papers, and many online discussion groups. The same is true of security studies, whether that field is seen as a branch of computer science, cryptography, criminology, or something else.<sup>94</sup> And knowledge of the flaws with existing security schemes is needed to

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 16, 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 vulnerability."); 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 security of your cryptosystem more than letting the academic community analyze it, you're wrong.") (speaking specifically about the security of cryptographic algorithms). *But see* Scott Culp, *It's Time to End Information Anarchy* (Oct. 2001), [http://www1.microsoft.at/technet/news\\_showpage.asp?newsid=4121&secid=1502](http://www1.microsoft.at/technet/news_showpage.asp?newsid=4121&secid=1502) (arguing that publishing detailed information on vulnerabilities does more harm than good).

Computer security experts who find a vulnerability will often report it just to the software vendor, and this is often the more responsible solution. But if the vendor pooh-poohs the problem, then the security expert may need to describe the problem as part of his public argument that the vendor isn't doing a good enough job.

<sup>92</sup> *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 . . .").

<sup>93</sup> *See* United States v. Progressive, Inc., 467 F. Supp. 990, 994 (W.D. Wis. 1979) (citing defendants' arguments to this effect); Morland, *supra* note 82 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 joining the nuclear terror club need long be at a loss to know how to proceed.").

<sup>94</sup> *See, e.g.*, Declan McCullagh, *Crypto Researchers Abuzz over Flaws*, CNET NEWS.COM, Aug. 17, 2004 (discussing a conference presentation by cryptographers who claimed to have uncovered

design better ones.

In a very few fields, such as nuclear weapons research, this scientific exchange has traditionally been done through classified communications, available to only a few government-checked and often government-employed professionals. But this is definitely not the norm in American science, and it seems likely that broadening such zones of secrecy would interfere with scientific progress.<sup>95</sup> Perhaps in some fields secrecy is nonetheless necessary, because the risks of open discussion are too great. My point here, though, is that such open discussion does have scientific value, and, directly or indirectly, political value.

Fourth, 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 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 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.<sup>96</sup>

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—I'll show this by explaining how easy it is for someone to send a virus through Microsoft 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

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flaws in an encryption system); Ed Felten, *Report from Crypto 2004*, FREEDOM TO TINKER, Aug. 18, 2004, <http://www.freedom-to-tinker.com/archives/000664.html> (discussing this, with comments from readers that discuss it in more detail); Ed Felten, *SHA-1 Break Rumor Update*, FREEDOM TO TINKER, Aug. 17, 2004, <http://www.freedom-to-tinker.com/archives/000663.html> (likewise). Ed Felten is a Princeton computer science professor and cryptography expert; his Weblog, *Freedom to Tinker*, is devoted to information technology issues.

<sup>95</sup> See, e.g., Stephen Budiansky, *Retrofitting the Bomb Machine*, U.S. NEWS & WORLD REP., Feb. 5, 1990, at 66 (noting that even in nuclear research, "the tradition of secrecy . . . gets in the way of doing basic science").

<sup>96</sup> See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. . . ."). Cf. also BRUCE SCHNEIER, *SECRETS AND LIES* 344-45 (2000) (arguing that publishing source code, and letting it be vetted by many experts in the programming community, is the best way to make the code more secure, despite the possibility that publishing the source code can also help criminals find vulnerabilities).

tell you what it is.”<sup>97</sup>

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.

The journals could also 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. That is much less likely to happen if the original discoverer of the error was only allowed to write that “There’s a serious bug in this program,” and was legally barred from releasing supporting details.<sup>98</sup>

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<sup>97</sup> See Bruce Schneier, *Full Disclosure*, CRYPTOGRAM NEWSLETTER, Nov. 15, 2001, <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*, in THOUGHTS AND DISCOURSES ON THE HP 3000 82-83 (1984), which shows how users of HP 3000 computers who have been given a certain access privilege (so-called “PM”) can easily (with just a few commands) use it to get a higher level of privilege, called “SM” (roughly corresponding to “super-user” access in some other systems). 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; but I suspected that many system managers wouldn’t really believe that they needed to do anything unless they could see for themselves how easily the PM privilege could be exploited.

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, *Full Disclosure*, *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 16, at 88 (describing the debate among computer security professionals about whether security vulnerabilities should be fully disclosed).

<sup>98</sup> See Schneier, *supra* note 97 (“[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 confident 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 successfully guarded secret, a mere “No, it’s not—I discovered without a 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 say “Yes, the author is right, he has

### 3. Allowing people to 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 unreliable, and so on—one traditional remedy is complaining to the media. The existence of this remedy lets the public hear allegations that the government is misbehaving. And it deters government conduct that is either illegal or is technically legal but likely to be viewed by many people as excessive.

Some laws aimed at preventing crime-facilitating speech eliminate or substantially weaken this protection against government overreaching. Consider a law barring people (including librarians or bookstore owners) from revealing that some of their records have been subpoenaed, or barring Internet service providers or other companies from revealing that their customers are being eavesdropped on.<sup>99</sup> 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 timely and interesting to the public.<sup>100</sup>

Likewise, penalties for publishing the names of crime witnesses<sup>101</sup>—aimed at preventing witnesses from being intimidated by the criminals or their associates—may keep third parties who know a 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 may keep people from explaining exactly why they think the government or industry isn’t taking sufficient steps to deal with some such problem.

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discovered the secret,” can really support the author’s claim. Perhaps the details of how to build a bomb should nonetheless have been suppressed, because they could help cause very grave harm, see *infra* Part IV.D.1.b. But one ought not deny that the details are indeed needed to make the political argument work.

Ferguson, *infra* note 209, 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.

<sup>99</sup> See *supra* notes 29 and 30

<sup>100</sup> See *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 560-61 (1976) (stressing that even temporary restrictions can substantially interfere with valuable speech).

<sup>101</sup> See *supra* note 18 for examples.



#### 4. Entertaining and satisfying curiosity

Speech that describes how crimes are performed may also entertain readers.<sup>102</sup> A detective story might depict a murder that's committed in a particularly ingenious, effective, and hard to detect way. 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. (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 would notice any errors.)

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,<sup>103</sup> and I suspect that only a fraction of them were really used by would-be contract killers.<sup>104</sup> Who were the remaining readers? Many were likely armchair warriors who derived pleasure from imagining themselves as daring mercenaries who are beyond the standards of normal morality.<sup>105</sup>

Part of the fun of reading some novels is imagining yourself in the world that the book describes. People can get similar entertainment from factual works, including ones that are framed as “how-to” books, such as the travel guide *Lonely Planet: Antarctica*,<sup>106</sup> magazines about romantic hobbies,<sup>107</sup> the *Worst Case Scenario*

<sup>102</sup> See *supra* note 13 for examples.

<sup>103</sup> *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 241 n.2 (4th Cir. 1997).

<sup>104</sup> Each year there are only about 20,000 homicides in the U.S., see *infra* note 393; 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 *Publisher of Hit-Man Guidebook Settles Suit*, SEATTLE TIMES, Feb. 28, 2002, at B5 (mentioning another lawsuit flowing from an attempted murder supposedly facilitated by *Hit Man*).

<sup>105</sup> *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 241 n.2 (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 respondent’s asserted target markets for the *Hit Man* book). Cf. Albert Mobilo, *The Criminal Within*, HARPER’S MAG., Mar. 1999 (noting that “For an audience weaned on action movies, the obvious appeal” of books on building weapons, disposing of dead bodies, and committing contract murder “is obvious,” and including “vicarious thrills” as part of the appeal).

<sup>106</sup> Cf., e.g., Juliet Coombe, *Planet Goes to China*, HERALD SUN (MELBOURNE, AUSTRALIA), Jan. 30, 2004, at T11 (interview with Tony Wheeler, co-founder of the company that produces the *Lonely Planet* guidebooks) (“Q The *Lonely Planet* guide to Antarctica sells about 45,000 copies a year. Why is it so popular, despite relatively few people going there? [A] Science and wildlife expeditions are getting more exposure and lots of people are armchair travellers. . . . For most of us, a trip to Antarctica is a dream.”). Naturally, some of the readers are “armchair travellers” in the sense of

series,<sup>108</sup> and even some cookbooks<sup>109</sup>—many readers of such books may want to imagine themselves as Antarctic travelers, survivors, or cooks, all while sitting in their armchairs. And people can be likewise entertained by books about how to pick locks, change your identity, or even kill people, though naturally they may appeal to people with grislier imaginations.

Other readers of crime-facilitating how-to manuals are probably just curious. Many nonfiction books are overwhelmingly read by people who have no practical need to know about a subject, whether it's how planets were 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. And satisfying one's curiosity this way may sometimes yield benefits later on—the information you learn 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; Part IV.A.3.c discusses this. 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 because they satisfy readers' curiosity or desire for vicarious thrills. It is therefore not correct to say that such works are useful only to facilitate crime,<sup>110</sup> or that the author's or publisher's

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people who are curious and want to satisfy their curiosity by reading rather than by traveling; but I suspect that some of the armchair travelers really do read the books to fantasize about actually being there.

<sup>107</sup> See, e.g., MICHAEL RUHLMAN, *WOODEN BOATS* 23 (2002) (“[A]n obscure magazine idea, a magazine devoted to wooden boats, became a resounding success precisely because readers didn't have to own wood to love it, admire it, or even dream about it. . . . [I]ndustry experts guess that fewer than 10,000 wooden boats exist in America, not including dinghies, canoes, kayaks, homemade plywood skiffs, and the like . . . . Yet this minuscule industry . . . generates a subscription base for *Wooden-Boat* of more than 100,000 . . .”).

<sup>108</sup> Jayne Clark, ‘Worst-Case’ Writers’ *Newest Scenario: Runaway Train to Fame*, USA TODAY, Apr. 27, 2001, at 7D (“In this sequel to their best-selling *The Worst-Case Scenario Survival Handbook*, Joshua Piven and David Borgenicht have once again produced a very funny guide with a deadpan tone aimed at armchair Walter Mittys, as well as wannabe Indiana Joneses.”).

<sup>109</sup> See, e.g., Maurice Sullivan, *Last Best Books of 1997*, WINETRADER, vol. R, no. 6, <http://www.wines.com/winetrader/r6/r6bk.html> (“I have finally figured out that all these beautiful and expensive color cookbooks aren't for people who really want to cook, but rather are for folks on diets that want to fantasize about food!”). This is probably something of an overstatement, but I suspect that some of the cookbooks' readers do indeed use the books this way, even if others do actually use them to cook.

<sup>110</sup> See, e.g., *Rice*, 128 F.3d at 248 (“the audience both targeted and actually reached is, in actuality, very narrowly confined,” presumably to criminal users); *id.* at 249 (“a jury could readily find that the provided instructions . . . have no, or virtually no, noninstructional communicative value”); *id.* at 254 (“*Hit Man* . . . is so narrowly focused in its subject matter and presentation as to be effectively targeted exclusively to criminals”); *id.* at 255 (“*Hit Man*'s only genuine use is the unlawful one of facilitating . . . murders”); *id.* at 255 (“the book [is devoid] of any political, social, entertainment, or other legitimate discourse”); *id.* (“a reasonable jury could simply refuse to accept

purpose therefore must have been to facilitate crime.<sup>111</sup>

## 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 them “engage in self-definition” by “defin[ing themselves] publicly in opposition” to the law.<sup>112</sup> The same is true of people who strongly believe that all people should have the right to end their own lives, if the lives have become unbearable, and who act on this belief by publicizing information about how to commit suicide.<sup>113</sup> Even people who give their criminal friends information about how to more effectively and untraceably commit a crime, or tell them when the police are coming, might be expressing their loyalty, affection, or opposition to the law that the police are trying to enforce.

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 justify restriction the speech despite its self-expressive value; or perhaps self-expressive value shouldn’t count for First Amendment purposes.<sup>114</sup> For now, I simply identify this as a possible source of First Amendment value.

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Paladin’s contention that this purely factual, instructional manual on murder has entertainment value to law-abiding citizens’); *id.* at 267 (“[the book] lacks any even arguably legitimate purpose beyond the promotion and teaching of murder”).

<sup>111</sup> See, e.g., *id.* at 267.

<sup>112</sup> 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 limited to “expression which moves others to act by pointing out what they take to be good reasons for action,” and doesn’t cover factual communications that give listeners “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 Scanlon’s theory 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.

<sup>113</sup> See *infra* note 381 for examples of suicide-facilitating materials, and of calls to restrict them.

<sup>114</sup> 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.

### C. *Dual-Use Materials*

We see, then, that crime-facilitating speech is a form of dual-use material, akin to guns, knives, videocassette recorders, 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 have the law 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 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 of distributing it.

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, doing something knowing that it will help someone commit a crime is usually seen as morally culpable. This assumption is sound enough as to single-use activity, for instance when someone personally helps a criminal make a bomb.<sup>115</sup> 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.B, 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 the speech 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.

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

Naturally, if existing First Amendment law already sensibly explains how crime-

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<sup>115</sup> See *infra* notes 275-276 for examples of laws that punish such knowing assistance, even if the aider doesn't actually intend to help the criminal but simply knows that his conduct will have this effect.

facilitating speech should be analyzed, there would 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, is 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."<sup>116</sup>

Justice Stevens 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.<sup>117</sup> 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 the opinion said only that the law wasn't narrowly tailored to this interest, and didn't discuss what should happen if a ban is indeed precisely focused on prohibiting such crime-facilitating publications.<sup>118</sup>

*United States v. Aguilar* upheld a conviction for disclosing 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 as opposed to being "simply a member of the general public who happened to lawfully acquire possession of information about the wiretap."<sup>119</sup> Finally, *Scales v. United States* upheld a conviction for conspiring to advocate the propriety of Communist overthrow of the government; a small part of the evidence 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

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<sup>116</sup> *Stewart v. McCoy*, 123 S. Ct. 468, 470 (2002) (Stevens, J., respecting the denial of certiorari). See also U.S. DEP'T OF JUSTICE, *supra* note 43, text accompanying note 44 (asserting the same).

<sup>117</sup> *McCoy*, 123 S. Ct. at 470 (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 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").

<sup>118</sup> 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in the judgment).

<sup>119</sup> *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.").

broadly cover crime-facilitating speech.<sup>120</sup>

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.<sup>121</sup> Three federal circuit cases have held that speech that *knowingly* facilitates bombmaking, bookmaking, or illegal circumvention of copy protection is constitutionally unprotected.<sup>122</sup> Two federal district court cases have similarly held that speech that knowingly (or perhaps even negligently) facilitates copyright infringement is civilly actionable, though they haven't confronted the First Amendment issue.<sup>123</sup> And three appellate cases have held 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.<sup>124</sup>

The Supreme Court's *NAACP v. Claiborne Hardware* decision, on the other hand, suggests that knowingly publishing the names of boycott violators when such a publication might facilitate crimes against them *is* constitutionally protected.<sup>125</sup> 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 crime-facilitating speech would be protected if it wasn't intended to and likely to incite imminent crime.<sup>126</sup>

Legislatures at times assume that crime-facilitating speech may be punished, at

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<sup>120</sup> 367 U.S. 203, 264-65 (1960).

<sup>121</sup> See *United States v. Raymond*, 228 F.3d 804, 815 (7th Cir. 2000); *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 243, 266 (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).

<sup>122</sup> *United States v. Featherston*, 461 F.2d 1119, 1122 (9th Cir. 1972); *United States v. Mendelsohn*, 896 F.2d 1183, 1186 (9th Cir. 1990); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 457 (2d Cir. 2001). *Mendelsohn* involved the distribution of computer object code, which might not be protected by the First Amendment in any event; but the court 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.

<sup>123</sup> 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")

<sup>124</sup> 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).

<sup>125</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

<sup>126</sup> *McCoy v. Stewart*, 282 F.3d 626 (9th Cir. 2002); *United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983).

least in some instances, even when the speaker doesn't intend to facilitate crime;<sup>127</sup> other statutes, though, do require such an intention.<sup>128</sup> 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.<sup>129</sup> But some federal statutes do not fit this understanding.<sup>130</sup>

Some lower court cases have argued that there's no First Amendment problem with punishing crime-facilitating speech because it is "speech brigaded with action" and "an integral part" of a crime; the Justice Department has taken the same view.<sup>131</sup> Another case has contended that certain crime-facilitating publications violated generally applicable aiding and abetting law,<sup>132</sup> and that there is no First Amendment

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<sup>127</sup> See, e.g., 50 U.S.C. § 1861(d) (added by the USA Patriot Act) (prohibiting any person from disclosing the existence 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 (same as to 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[] an investigation or unduly delay[] a trial").

<sup>128</sup> See, e.g., MINN. STAT. ANN. § 609.4971 (prohibiting any person from disclosing certain subpoenas "with intent to obstruct, impede, or prevent the investigation"); 11 DEL. CODE § 2412(a) (same as to "of an authorized interception or pending application . . . in order to obstruct, impede or prevent such interception"); 18 U.S.C. § 2332(d) (likewise).

<sup>129</sup> See U.S. DEP'T OF JUSTICE, *supra* note 43, at pt. VI.B; 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 communicating such information may violate the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030(a)(5)(A), 1030(e)(8), but only if the speaker intended to facilitate security violations, rather than intending to urge the software producer to fix the problem)

<sup>130</sup> See 50 U.S.C. § 1861(d) and 18 U.S.C. § 3486, *quoted supra* note 127.

<sup>131</sup> 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 crime-facilitating speech may be suppressed because "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 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); U.S. DEP'T OF JUSTICE, *supra* note 43, at pt. VI.B.3 (arguing that certain crime-facilitating speech is punishable because it's speech "brigaded with action," a "speech act[]," and "an integral part of a transaction involving conduct the government otherwise is empowered to prohibit"); *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 243 (4th Cir. 1997) (likewise).

<sup>132</sup> Actually, as the Justice Department acknowledges, it's not clear that criminal aiding and abetting law is indeed generally applicable to the distribution of crime-facilitating dual-use products (whether speech or nonspeech) to unknown customers. See U.S. DEP'T OF JUSTICE, *supra* note 43, text accompanying note 24. Standard definitions of aiding and abetting are broad enough to cover

problem when they are applied to speech;<sup>133</sup> one could likewise make the same argument as to crime-facilitating speech that violates laws against criminal facilitation<sup>134</sup> or obstruction of justice.<sup>135</sup> But as I argue in detail elsewhere, such

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distribution of dual-use products, *see infra* note 275, either with the intention that the products be used for criminal purposes, or in many states even if the distributor simply knows that they'll be used for such purposes. But in fact, providers of dual-use products—such as metal-cutting equipment—have generally been held liable only when they know that a particular sale is going to a person who intends to use the product illegally (for instance, to break into a bank), *see, e.g.*, *Regina v. Bainbridge*, 3 All Eng. 200 (1959); and even then, some cases refuse to hold the providers liable based on mere knowledge, *see, e.g.*, *People v. Lauria*, 251 Cal. App. 2d 471, 481 (1967), reasoning that it's too burdensome 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” when the crimes being aided isn't serious. U.S. DEP'T OF JUSTICE, *supra* note 43, n.24, cites some cases that punish dual-use speech as criminal aiding and abetting; but these of course don't show that the law is generally applicable both to speech and nonspeech.

A few tort cases have allowed distributors of dual-use materials to be sued on some generally applicable theory that is related to aiding and abetting, whether it's conspiracy, negligent marketing (the theory being that the manufacturer almost certainly knew that some users would misuse the product, but didn't take steps to minimize this risk), or contributory infringement. *See, e.g.*, *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 157 (Cal. App. 1999) (rejecting motion to dismiss negligent marketing lawsuit against gun manufacturer), *rev'd on statutory grounds*, 28 P.3d 116 (Cal. 2001); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003) (allowing negligent marketing and negligent design lawsuit to go forward); cases cited *supra* note 24 (contributory copyright infringement); *National Federation of the Blind, Inc. v. Loompanics Enters., Inc.*, 936 F. Supp. 1232 (D. Md. 1996) (contributory trademark infringement). *But see, e.g.*, *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001) (rejecting a negligent marketing cause of action against a handgun manufacturer); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 536 (S.D. Ohio 1987) (rejecting an aiding and abetting cause of action against a handgun manufacturer); *In re Tobacco Cases II*, No. SDSC 719446, 2002 WL 3128649, \*11 (Cal. Superior Ct. Nov. 22) (rejecting an aiding and abetting cause of action against a cigarette manufacturer based on the theory that the manufacturers' marketing practices aided unlawful sales to minors). Perhaps courts will one day develop a general tort law rule holding producers of dual-use products liable for harms they knew would happen, or perhaps only for harms they intended to happen, but no such doctrine seems to be firmly established today. The generally applicable law, both in tort law and in criminal law, has 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 action while still remaining free to distribute the product to law-abiding users. *Cf. Cheh, infra* note 208, at 24. Applying this law to distribution of dual-use speech would be a significant extension of the law, not just an application.

<sup>133</sup> *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); U.S. DEP'T OF JUSTICE, *supra* note 43, at text accompanying notes 55-60; *cf. infra* note 275 (describing how aiding and abetting law may be read as applying to crime-facilitating speech).

<sup>134</sup> *See infra* notes 275 and 276 (describing the law of crime facilitation).

<sup>135</sup> *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 of justice); *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



attempts to escape First Amendment scrutiny for these speech restrictions are unsound, and inconsistent with modern First Amendment doctrine.<sup>136</sup>

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

### B. *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.”<sup>137</sup> In practice, the Court has almost never upheld restrictions under this test,<sup>138</sup> but in principle, this seems like a possible defense for 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.

The demanding 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.

Consider, for example, the decisions involving laws that aim to shield children from sexually explicit material. The Supreme Court has said that there is a

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someone that the FBI was pursuing him); *United States v. Bucher*, 375 F.3d 929 (9th Cir. 2004) (treating as interference with government employee the defendant’s alerting a friend that law enforcement officers were pursuing him); *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); FRANKLIN (TENN.) MUNI. CODE § 11-504 (barring “knowingly . . . . interfer[ing] with . . . any officer or employee of the city while such officer or employee is performing . . . his municipal duties.”), *held unconstitutional as applied in* *State v. Walker*, No. I-9507-03625 (Tenn. Williamson Cty. Cir. Ct. Nov. 13, 2003) (accepting a First Amendment defense to a § 11-504 prosecution of a driver who flashed his headlights to warn oncoming motorists about a speed trap).

<sup>136</sup> See Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones* (circulated for publication), available at <http://www1.law.ucla.edu/~volokh/conduct.pdf>.

<sup>137</sup> *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

<sup>138</sup> The only case in which a majority of the Supreme Court has upheld a speech restriction—as opposed to a restriction on expressive association, or on religious practice—under strict scrutiny is *Austin v. Michigan Chamber of Commerce*, 494 U.S. 115 (1989) (reaffirmed without extensive strict scrutiny analysis in *McConnell v. FEC*, 124 S. Ct. 619 (2003)). A plurality also upheld a speech restriction under strict scrutiny in *Burson v. Freeman*, 504 U.S. 191 (1992).

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.<sup>139</sup> But the Court has struck down laws banning *all* distribution of sexually themed material that would be unsuitable for children, even when the laws were supported by the child-shielding interest.<sup>140</sup>

Sexually explicit but not obscene material is dual-use speech. It can be lawfully used by adults for its serious value (or when it's not prurient or patently offensive as to adults), 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 "burn[ing] the house to roast the pig."<sup>141</sup> Likewise, though works that depict sex with (fictional) children might be used by some adults to try to seduce children, the Court held that such works cannot be restricted on that ground:

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.<sup>142</sup>

Dual-use speech couldn't be banned where such a ban would interfere with the valuable uses, even when the ban was needed to prevent the harmful uses.

Another example is the Court's treatment of laws banning leafleting. Some cities argued that the laws were justified by the government interest in preventing litter, and the Court agreed that littering is an evil that the city can generally try to prevent: The First Amendment doesn't "deprive a municipality of power to enact regulations against throwing literature broadcast in the streets."<sup>143</sup>

But the Court held that the restriction could only go so far as prohibiting littering, whether by the leafleter or the recipient; the city couldn't bar all leafleting, even though for each leaflet there is a risk that it will end up being littered.<sup>144</sup> Leaflets are dual-use products. Some recipients will read them and then lawfully dispose of them, while others will illegally throw them on the ground. Under the Court's holding, the government may not try to suppress the illegal use in a way that also blocks the lawful use.

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<sup>139</sup> *Ginsberg v. New York*, 390 U.S. 629 (1968).

<sup>140</sup> *See Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (reaffirming, using strict scrutiny, *Butler v. Michigan*, 352 U.S. 380 (1957)).

<sup>141</sup> *Butler*, 352 U.S. at 383.

<sup>142</sup> *Free Speech Coalition v. Ashcroft*, 535 U.S. 234, 252-53 (2002).

<sup>143</sup> *Schneider v. State*, 308 U.S. 147, 160-61 (1939). The case involved a content-neutral restriction, which today would be judged under a form of 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 a fortiori be the same under strict scrutiny.

<sup>144</sup> *Schneider*, 308 U.S. at 162-63.

Finally, a third example comes from *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.<sup>145</sup> 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. . . . “[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.<sup>146</sup>

This then is the first sense of narrow tailoring: The law may restrict distribution of dual-use speech that leads to a harmful use (selling pornography to minors, dropping leaflets yourself on the street), but only if the restriction 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.”<sup>147</sup>

But an alternate, more forgiving, 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 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.<sup>148</sup>

The restriction, the Court held, was justified by the government interests “in preventing voter intimidation and election fraud”;<sup>149</sup> but the law also restricted speech that wasn’t likely to cause intimidation or fraud. And yet, in the plurality’s view, this restriction on the legitimate speech was constitutional because it was a necessary side effect of the restriction on the harmful speech: It would be impossible to craft a law that would effectively distinguish the intimidating and fraudulent speech from other 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.”<sup>150</sup>

Likewise with *Buckley v. Valeo*, which upheld a \$1000 limit on campaign

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<sup>145</sup> In *Free Speech Coalition*, the government tried to defend the statute using both this justification and, separately, the justification quoted in the text accompanying note 142.

<sup>146</sup> 535 U.S. 234, 255 (2002).

<sup>147</sup> 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*, 424 U.S. 1 (1976), 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”).

<sup>148</sup> 504 U.S. 191 (1992) (plurality).

<sup>149</sup> *Id.* at 206.

<sup>150</sup> *Id.* at 207.

contributions because of the government interest in preventing contributions that are tantamount to bribes<sup>151</sup> (though under an analysis that is now seen as involving “‘closely drawn’ scrutiny” but not quite strict scrutiny).<sup>152</sup> Many contributions that exceed \$1000 are not bribes, especially in campaigns that cost millions—the contributors are often just trying to help elect an official whose views they like, rather than to gain leverage over the official once 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.”<sup>153</sup> 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.

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 demanding 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 forgiving definition, 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.<sup>154</sup>

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

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<sup>151</sup> 424 U.S. 1, 28-29 (1976).

<sup>152</sup> *McConnell v. FEC*, 124 S. Ct. 619, 655 59 & nn.42-43 (2003).

<sup>153</sup> 424 U.S. at 30.

<sup>154</sup> 123 S. Ct. 1536 (2003); *see also* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (holding the intentional infliction of emotional distress tort inapplicable as to certain speech, without applying strict scrutiny); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (striking down a content-based restriction without applying strict scrutiny); *cf.* *American Booksellers’ Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1986) (likewise).

suppressible even if this means that some valuable uses would be restrictable as well. But it is this decision that 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."<sup>155</sup> Challengers 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."<sup>156</sup> 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.

### C. Balancing

Finally, one possible reaction to the crime-facilitating speech problem is to call for "balancing." Balancing, though, can mean one of two things here. 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" would really refer 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.<sup>157</sup>

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<sup>155</sup> 492 U.S. at 116.

<sup>156</sup> 535 U.S. 234, 255 (2002).

<sup>157</sup> See generally *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) ("This process is ordinarily called 'balancing,' but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."); Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 167-68; Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 788-89 (2001). William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 869 n.91 (2001), defends 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 for the very short lines or very heavy rocks, but when the rock is moderately heavy and the line is moderately long, "balancing" stops being a useful metaphor.

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 an instruction 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.<sup>158</sup> 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 whatever 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.<sup>159</sup>

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 with 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 in defining the proper rule.<sup>160</sup>

This definition of "balancing," though, still doesn't tell us just how should judges should make the decision that would then be referred 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.

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<sup>158</sup> See 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, 939-41 (1968) (criticizing ad hoc balancing on these grounds); *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").

<sup>159</sup> "Balancing" is also sometimes used to refer to courts' applying strict scrutiny or intermediate scrutiny, since such tests require courts to consider whether the harm that the speech causes to government interests is enough to justify the speech restriction. For a discussion of why strict scrutiny is unhelpful here, see the preceding subsection. Intermediate scrutiny would be improper here because restrictions on crime-facilitating speech should be treated as content-based, *see* Volokh, *Speech, Conduct, and Laws of General Applicability*, *supra* note 136, at pt. II; intermediate scrutiny is applicable to content-neutral restrictions.

<sup>160</sup> This would be what Mel Nimmer called "categorical balancing" as opposed to "ad hoc balancing." MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* § 2.02 (1984).

#### 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 potential criteria that would distinguish protected crime-facilitating speech from the unprotected. These distinctions will be the potential building blocks of any possible test; the last subsection of this Part will then make some suggestions about which blocks should be included.

##### A. *Distinctions Based on Value of Speech*

###### 1. First Amendment constraints on measuring the value of speech

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.<sup>161</sup>

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.<sup>162</sup>

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<sup>161</sup> 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 if one thinks that other uses, such as target-shooting or hunting, aren't very valuable—the more willing one would be to ban them.

<sup>162</sup> *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, even though such symbolic speech doesn't contain serious reasoning or argument). 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, 23 (1973). But obscenity law is intentionally limited to a narrow category of rather explicit sexually themed speech, and doesn't touch other speech, even when some see it as comparatively valueless, *see, e.g., Cohen*, 403

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.<sup>163</sup>

Of course, First Amendment doctrine hasn't precluded the Court from making all judgments about the value of speech. Various First Amendment exceptions—such as the ones for false statements of fact, obscenity, and fighting words—are justified on the theory that certain speech has virtually no constitutional value.<sup>164</sup> Even within the zone of valuable speech, the Court has at times suggested that some speech is less valuable than “fully protected” speech.<sup>165</sup>

Still, the Court's jurisprudence in considerable measure constrains courts and legislatures in judging the value of speech; and the Court has taken this constraint seriously, often fully protecting 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).<sup>166</sup> 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.<sup>167</sup>

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U.S. at 20 (refusing to extend obscenity law to cover profanity).

<sup>163</sup> 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”).

<sup>164</sup> *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).

<sup>165</sup> *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (plurality); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality). See Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 *VAND. L. REV.* 265 (1981) (criticizing *Pacifica*).

<sup>166</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>167</sup> *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



2. Virtually 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.<sup>168</sup> A lookout, or even a total stranger, tells criminals that the police are coming.<sup>169</sup> Someone tells a particular criminal (whom he knows to be a criminal) that his line is tapped.<sup>170</sup> 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.<sup>171</sup> 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 committing a 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, and 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.<sup>172</sup> It makes sense, I think, to treat the speech as having so little First

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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) (discussing this sort of argument). *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).

<sup>168</sup> *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).

<sup>169</sup> *See supra* notes 37-39.

<sup>170</sup> *See* United States v. Aguilar, 515 U.S. 593 (1995).

<sup>171</sup> 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, unless the speaker knows the statements are false or are likely false); 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).

<sup>172</sup> One can imagine some possible social value that might flow from the communication. A

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 has been traditionally seen as punishable under the law of aiding and abetting or (more recently) criminal facilitation.<sup>173</sup> 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 citizens will see a narrow exception for this sort of speech as a justification for materially broader exceptions.<sup>174</sup>

Speech within this category should be treated the same for constitutional purposes 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,

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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's behavior is really legal but just suspicious-looking, then your statement might inadvertently prevent an unjust arrest. Even if the person you're warning is a criminal, he might have some innocent friends 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 knowingly conveys crime-facilitating information just to a person who wants to use it for criminal purposes, and thus too insubstantial to influence the analysis.

<sup>173</sup> See, e.g., *State v. Berger*, 96 N.W. 1094 (Iowa 1903); *State v. Hamilton*, 13 Nev. 386 (1878); cf. Brenner, *supra* note 81, at 373-74 (discussing the criminality of “[i]ntentionally giving advice with the purpose of facilitating the commission of a crime”).

<sup>174</sup> See Volokh, *supra* note 167, at 1056-61, 1077-87 (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 unclear, for instance, exactly why criminal solicitation (such as man's asking a friend to kill his wife) is punishable even when the *Brandenburg v. Ohio* imminence requirement is satisfied. See, e.g., Alexander, *supra* note 340, 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 43, at 261-63 (likewise). But see *People v. Salazar*, 362 N.W.2d 913 (Mich. App. 1985) (overturning a solicitation conviction under these circumstances, citing *Brandenburg*). It seems to me the answer is that the chief value of speech that advocates violent conduct is not that it will persuade people to act violently, but that it will also 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 moved to commit crimes. See *Dennis v. United States*, 341 U.S. 494, 549 (1951) (Frankfurter, J., concurring in the judgment). But when it's said to a few people who are selected because the speaker thinks they will be willing to commit a particular crime, it's much less likely that the listeners will draw a broader political message from the speech, and there's thus much less reason for the speech to be protected.

and asks him for advice on how to quickly disable a particular alarm, or open a particular safe; and say that the burglar replies “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.<sup>175</sup> He may sincerely wish that his friend just give up the project; he may even have a selfish reason for that wish, because if the crime takes place, one of the criminals may be pressured into revealing the retired burglar’s complicity. Nonetheless, the retired burglar’s 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.<sup>176</sup>

Finally, I acknowledge that even single-use speech may be valuable as self-

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<sup>175</sup> 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 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 . . . ; if that was not his purpose, he is not liable.”).

<sup>176</sup> 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 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. See *United States v. Bucher*, 375 F.3d 929, 930 (9th Cir. 2004) (upholding criminal liability for alerting a friend that park rangers were planning to arrest him for a minor offense, but expressing some misgivings about holding people liable for helping friends or relatives this way).

This, though, should be reflected in decisions by prosecutors, or in legislative judgments (or possibly common-law decisions by judges) 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. See, e.g., *People v. Lauria*, 251 Cal. App. 2d 471, 481 (1967) (concluding that aiding and abetting liability shouldn’t be applied to people who knowingly, but not intentionally, aid and abet minor crimes); VERNON’S TEX. CODE ANN., PENAL CODE § 7.02 (limiting aiding and abetting liability to intentional assistance). 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.

In his concurrence in *Whitney v. California*, 274 U.S. 357, 377-78 (1927), Justice Brandeis argued that inciting 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 this view 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 will likely use it for criminal purposes is not, I think, constitutionally valuable, and should thus be punishable even if it facilitates only a minor crime.

expression: Telling a criminal friend how to commit a crime, or telling him that the police are coming, may express loyalty and affection, and thus contribute to the speaker's self-fulfillment and self-definition.<sup>177</sup> But it seems to me that speech stops being legitimate self-expression when the speaker knows that its only likely use is helping bring about crime.<sup>178</sup> Self-expression must be limited in some measure by a speaker's responsibility not to help 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.<sup>179</sup> 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.<sup>180</sup>

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<sup>177</sup> See Baker, *Scope of the First Amendment Freedom of Speech*, *supra* note 112, at 994.

<sup>178</sup> See *Dennis v. United States*, 341 U.S. 494, 544-46 (1951) (Frankfurter, J., concurring in the judgment) (reasoning that public revolutionary advocacy is potentially valuable because many of its listeners will see it as a broader social criticism, which they can act on even without committing crimes).

<sup>179</sup> See *infra* Part IV.B.1.

<sup>180</sup> See Baker, *Scope of the First Amendment Freedom of Speech*, *supra* note 112, 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 situations where such an increase in coercive power is "the purpose of the espionage activity"); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 909-10 (2002) (arguing that deceptive speech isn't legitimate self-expression).

Professor Baker takes a different approach than I do to the speech described in this section: He reasons 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." Baker, *Scope of the First Amendment Freedom of Speech*, *supra* note 112, at 1005. But this argument doesn't quite explain why such speech constitutes constitutionally unprotected "participat[ion]" in crime, but revolutionary advocacy, which is intended to bring about coercion and violence but which Professor Baker would protect, see C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181, 1208 (1994), doesn't constitute such "participat[ion]." Nor is informing a known criminal about how to commit a crime fit within Professor Baker's categories of speech that doesn't constitute legitimate self-expression—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. See Baker, *Scope of the First Amendment Freedom of Speech*, *supra* note 112, at 997-99; C. Edwin Baker, *First Amendment Limits on Copyright*, *supra*, at 909-10. Finally, not all such speakers have a purpose to bring about crime, another factor that Professor Baker suggests is important. See Baker, *Scope of the First Amendment Freedom of Speech*, *supra* note 112, 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"). Rather, I think that the speech stops being legitimate self-expression for the reason given in the text: People's rights to self-expression should be limited by their responsibility not to help bring about illegal conduct, when that illegal conduct is the single likely effect of the speech.

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, and the speaker knows those people 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*.

Consider social security numbers and computer passwords. Publicly distributing such information is unlikely to facilitate any political activity (unlike, say, publicly distributing abortion providers' or boycott violators' names, which may facilitate lawful shunning and social pressure, or even their addresses, which may facilitate lawful residential picketing and parading<sup>181</sup>). It's unlikely to contribute to scientific or business decisions (unlike, say, publicly distributing information about a computer security vulnerability<sup>182</sup>). 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 numbers; 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 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 security hole 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 (still coupled with the owner's names) or of the computer passwords. Restricting the publication of full social security numbers or passwords thus will not materially interfere with valuable speech.<sup>183</sup>

Moreover, because such purely crime-facilitating information tends to be 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

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<sup>181</sup> See *supra* note 81 and accompanying text.

<sup>182</sup> See *supra* text accompanying note 91.

<sup>183</sup> 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. See *supra* note 97 and accompanying text.

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 those people from publishing the information, 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,<sup>184</sup> presumably because silencers are seen as having virtually no civilian purposes other than to make it easier to criminally shoot people without being caught. People view silencers as single-use devices; prohibiting them may help diminish crime, or make criminals easier to catch, without materially affecting any law-abiding behavior.<sup>185</sup>

Likewise, if a product has no substantial uses other than to infringe copyrights or patents, then distributing it is legally actionable.<sup>186</sup> Distributing dual-use products is legal, because making it illegal would interfere with the substantial lawful uses as well as the infringing ones.<sup>187</sup> But when a product has virtually no lawful uses, then there is little reason to allow its sale, and ample reason—the prevention of

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<sup>184</sup> See 26 U.S.C. §§ 5841, 5845, 5861(d), 5871 (requiring registration of silencers); CAL. PENAL CODE § 12520 (prohibiting possession of silencers by civilians); DEL. STAT. tit. 11, § 1444 (same); GA. CODE ANN. § 16-11-123 (same); HAW. REV. STAT. § 134-8 (same); ILL. CONSOL. STAT. 5/24-1 (same); IOWA CODE § 724.3 (same); KAN. STAT. ANN. § 21-4201 (same); MASS. GEN. LAWS ANN. tit. 269, § 10A (same); MINN. STAT. ANN. § 609.66 (same); MICH. CONSOL. LAWS ANN. 750.224 (same); VERNON'S ANN. MISSOURI STATS. 571.020 (same); N.J. STAT. ANN. 2C:39-3 (same); MCKINNEY'S PENAL LAW § 265.02 (same); N.D. CONSOL. CODE 62.1-05-01 (same); R.I. GEN. LAWS § 11-47-20 (same); 13 VT. STAT. ANN. § 4010 (same).

<sup>185</sup> See, e.g., Statement of Rep. Volkmer, 132 Cong. Rec. H1757-01 (1986) (distinguishing modifications aimed at muffling sound from “legitimate sporting purposes”; Rep. Volkmer was the cosponsor of the Firearms Owners’ Protection Act of 1986); *United States v. Hall*, 171 F.3d 1133, 1155 (8th Cir. 1999) (Panner, J., concurring in part and concurring in the judgment) (“It is difficult to conceive of any legitimate purpose for which a private citizen needs a silencer.”); *Desimone v. United States*, 423 F.2d 576, 583 (2nd Cir. 1970) (likewise). It’s not clear that the claim is factually accurate: Though civilian self-defense uses of silencers seem extremely unlikely (theoretically possible, but practically far-fetched), 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 is not very valuable, but at least one can no longer say that there are no law-abiding uses. Still, the target-shooting point is rarely seen in discussions about silencers: The most common argument (right or wrong) given for the bans on silencers seems to be that they are indeed single-use products, at least in civilian hands.

<sup>186</sup> *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”).

<sup>187</sup> The Digital Millennium Copyright Act, on the other hand, sets forth a standard that would allow somewhat more restrictions on dual-use products: 17 U.S.C. § 1201(a)(2) bars, among other things, distributing certain kinds of product when the product “has only limited commercially significant purpose or use other than to circumvent a technological [data protection] measure.”

infringement—to prohibit it.<sup>188</sup> The same sort of argument would apply to the crime-facilitating speech described here.

There are two major arguments in favor of protecting even these publications. The first is the risk that the category will be applied erroneously, or will stretch over time to cover material that it shouldn't cover. 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 are allowed to find speech valueless on the grounds that it has very few (rather than just no) law-abiding uses, the term "very few" could eventually broaden to cover more and more.<sup>189</sup> 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,<sup>190</sup> one 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 sometimes persuasive. (My own argument above, for instance, uses the existence and propriety of the exceptions for threats and false statements of fact as an analogy supporting an exception for certain kinds of crime-facilitating speech.<sup>191</sup>) As the exceptions increase, these arguments by analogy become easier to make.<sup>192</sup>

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<sup>188</sup> 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).

<sup>189</sup> See Volokh, *supra* note 167, at 1064-71 (discussing how this process can operate).

<sup>190</sup> See, e.g., text accompanying notes 197-202 *infra* (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 98 and accompanying text (criticizing the court's finding in *Progressive* that the details of the hydrogen bomb plans were irrelevant to public debates); notes 103-110 and accompanying text (criticizing the court's conclusion in *Rice v. Paladin Enterprises* that *Hit Man* was "effectively targeted exclusively to criminals").

<sup>191</sup> See *supra* text preceding note 172.

<sup>192</sup> See Volokh, *supra* note 167, at 1093-98 (discussing how a large set of exceptions can strengthen arguments for still more exceptions); see, e.g., *California v. Acevedo*, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring in the judgment) ("Even before today's decision, the 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable. . . . Unlike the dissent, therefore, I do not regard today's holding as some momentous departure, but rather as merely the continuation of an inconsistent jurisprudence that has been with us for years. . . . In my view, the path out of this confusion should be sought by returning to the first principle that the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded.").

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.

Nonetheless, it seems to me that the benefits of this exception exceed the potential costs. If crime-facilitating material really does seem to have virtually no legitimate uses, the case for allowing the law to suppress it seems quite strong.

### 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 nonetheless less valuable than others, so that they can be excluded from full First Amendment protection while the others remain protected? (I set aside, for 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 discusses a secret federal subpoena of library records can help readers judge whether the federal government is abusing subpoenas, though it can also alert the subject of the investigation (who may be a terrorist) that the police are after him.<sup>193</sup> Other speech discusses scientific or engineering questions: A chemistry textbook discusses how explosives are made, a post to a computer security discussion group discusses a security bug in a leading operating system, or a work on criminology or forensics may discuss how hard-to-solve murders are committed.<sup>194</sup>

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<sup>193</sup> See 50 U.S.C. § 1861(d) (added by the Patriot Act) (“No person shall disclose to any other person . . . that the Federal Bureau of Investigation has sought or obtained tangible things” under 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”). This section has aroused a good deal of controversy. 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”).

<sup>194</sup> I define forensics and criminology as sciences for the purposes of this discussion. Like



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.<sup>195</sup> 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,<sup>196</sup> the Justices seem to believe that there’s room on that same 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 chemicals 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 are 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,

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chemistry or computer science, they involve knowledge about the world that can inform people about how do socially valuable things, and that is advanced as people (academics, professional practitioners, and amateurs) build on each others’ published work.

<sup>195</sup> See, e.g., *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); *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”); *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.”).

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). 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 predominantly in the scientific issue—were likely to find the speech useful.

<sup>196</sup> *Carey v. Brown*, 447 U.S. 455, 466-67 (1980).

*DVD Copy Control Association v. Bunner*,<sup>197</sup> 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,<sup>198</sup> that the program was derived from algorithms that were plaintiffs' trade secrets, and that had been improperly leaked to Bunner.<sup>199</sup>

The court acknowledged that source code "is an expressive means for the exchange of information and ideas about computer programming,"<sup>200</sup>—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."<sup>201</sup> 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."<sup>202</sup>

Contrary to the court's assertions, though, the code is indeed relevant to debate about encryption policy and intellectual property policy. Many new and proposed intellectual property rules—such as the Digital Millennium Copyright Act<sup>203</sup>—rest on the assumption that technological protections are 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. And they also have opportunity costs, as Congress focuses on one set of enforcement techniques rather than another.

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

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<sup>197</sup> 75 P.3d 1 (Cal. 2003).

<sup>198</sup> 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.

<sup>199</sup> 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, 745-48 (2003).

<sup>200</sup> 75 P.3d at 10.

<sup>201</sup> *Id.* at 16. As note 14 mentioned, I don't take a position in this Article on whether restrictions on computer source code should be viewed as content-based or content-neutral. My criticism here is of the California Supreme Court's view that the code is of low value, not of its conclusion that the restriction on the code was content-neutral.

<sup>202</sup> *Id.* at 16.

<sup>203</sup> See 17 U.S.C. § 1201.

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 legislators, scholars, and voters 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.<sup>204</sup> 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 source code.<sup>205</sup> And providing the specific source code is often the most effective way of persuading expert readers that the copy protection measure can be evaded. General claims that one has found a flaw will often be unpersuasive; only providing the source code will prove that the flaw really exists.

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 legislators and voters may conclude that the legal system shouldn’t invest its resources into protecting such an ineffective mechanism. These legislators and voters 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

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<sup>204</sup> See John A. Halderman, *Analysis of the MediaMax CD3 Copy-Prevention System*, Princeton Univ. Computer Science Tech. Rpt. TR-679-03, <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 protection 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 the Felten matter and other incidents); Neils Ferguson, *Censorship in Action: Why I Don’t Publish My HDCP Results*, Aug. 15, 2001, <http://www.macfergus.com/niels/dmca/cia.html> (asserting that Ferguson, a leading Dutch cryptographer, refrained from publishing a paper discussing certain security vulnerabilities for fear of being sued or prosecuted under the DMCA).

<sup>205</sup> See [http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/css\\_descramble.c](http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/css_descramble.c) (found using a quick google search for “decss source code”).

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.<sup>206</sup>

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,<sup>207</sup> it may advance scientists' thinking about forbidden genetic modification, about permitted genetic modification, or about 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?<sup>208</sup> (Set aside for now whether this speech, like

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<sup>206</sup> See Zimmerman, *infra* note 208, at 263 (making a similar point).

<sup>207</sup> The speech may, for instance, be used to argue that banning genetic modification is futile or harmful to American economic competitiveness, because scientists in other countries would surely uncover this technique independently even if it had been suppressed.

<sup>208</sup> 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) (arguing for 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) (arguing for 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”).

It seems to me that the Rindskopf & Brown and Kamenshine articles make a major mistake: They 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. The Court 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, 761 (1976).

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 scientific questions should be as protected by the First Amendment as the search for truth about morality or politics. Deeper scientific understanding is as necessary for our society’s development as deeper political understanding. In the words of the Continental Congress’s *Appeal to 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.”<sup>209</sup>

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,<sup>210</sup> 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 mechanisms show how deep the political disagreements about science and technology can be. And the debates show 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,<sup>211</sup> and about the morality of particular practices. There is no First Amendment problem with legislators using these moral and ideological perspectives 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 matter is not as well-settled as one might at first assume—the Court has never squarely confronted the question, and when it does so, it might be facing 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. Nonetheless, for the reasons discussed above, the Court’s

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<sup>209</sup> 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.”).

<sup>210</sup> See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 106 (1980).

<sup>211</sup> See, e.g., VIRGINIA POSTREL, *THE FUTURE AND ITS ENEMIES* xi-xviii (1999).

dicta (and lower courts' holdings) that scientific speech should be as protected as political speech are likely correct.<sup>212</sup>

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 argue that the particular information is materially less valuable than the general, precisely because the particular discusses only 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.<sup>213</sup> 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; and any side that is barred from giving concrete, detailed examples will thus be seriously handicapped in public debate. Generalities alone rarely persuade people—to be persuasive and correct, an argument typically 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 such 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 accounts that lack corroborating detail—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.<sup>214</sup>

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<sup>212</sup> See *supra* note 195.

<sup>213</sup> 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).

<sup>214</sup> 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.

Some readers may trust the newspaper that says “trust us” more if it says “trust us; we'd give the supporting facts, but the law prohibits us from doing so.” But other readers might reasonably fear that the newspaper actually doesn't have all the facts—or they might fear that the newspaper thinks it has

Second, speech about particular incidents is often needed to get justice in those incidents, and to deter future abuses. 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 can't explain in detail how he thinks this subpoena unnecessarily interferes with patrons' and librarians' privacy and freedom, then it will be more likely that such a subpoena may stand even if it's illegal or unduly intrusive.

Likewise, if a newspaper may not publish the names of crime witnesses, 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 in particular. 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.<sup>215</sup> The same should apply to, for instance, rules that bar revealing witnesses' identities before they testify, or that bar revealing subpoenas before the investigation is over.<sup>216</sup>

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.<sup>217</sup> Moreover, the public is often less interested in discussing alleged past wrongs than it is in confronting supposed injustice in a prosecution or an 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 indeed 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 (including offshore places that are hard for U.S. law to

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the facts, but that those facts are less accurate or unambiguous than the newspaper thinks. There's no substitute for seeing the underlying facts, and knowing that other people, who may know more about the subject than you do, see the facts. Anything else will be inherently less credible.

<sup>215</sup> See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976).

<sup>216</sup> See *supra* notes 18 and 29

<sup>217</sup> 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).

reach). People will therefore probably be able 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 the law can reduce the amount of such information that’s posted, then fewer investigations will be compromised and fewer computer systems will be broken into; it’s better that there be fifty incidents of computer system passwords being revealed than five hundred. So to the extent that the futility of a speech restriction cuts against its constitutionality,<sup>218</sup> restrictions on general knowledge are less defensible than restrictions on specific information about particular people or places.

c. Commentary vs. entertainment and satisfaction of curiosity

i. The limits of existing First Amendment rules related to entertainment

As Part II.B.4 discussed, some crime-facilitating speech can entertain readers. A crime novel or a thriller, for instance, may describe how a character commits a crime. A how-to book (how to make guns, how to pick locks, how to be a contract killer) may give armchair adventurers a vicarious thrill, or may justify satisfy people’s curiosity.

In some of these situations, the only (or nearly only) non-criminal value of some crime-facilitating details would be entertainment. The work itself may have a substantial ideological component—for instance, a thriller may send the message that big business is evil, or that espionage agencies corrupt even the idealistic. But the detail, for instance, the nonobvious and hard-to-detect way that the hero kills his

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<sup>218</sup> 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).



enemy, may have little connection to the work's ideas. The thriller would convey the same message if the killing were described more vaguely, or if some key element of a bomb recipe were omitted or changed.<sup>219</sup>

May the law properly treat speech which has purely entertainment value as less constitutionally protected than speech which has political, scientific, technical, or educational value? The Supreme Court has generally treated works of entertainment as no less protected than works of advocacy:

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.<sup>220</sup>

And this is quite right: precisely because entertainment is more entertaining, it can reach and persuade more viewers than a political tract might. *Dirty Harry* is a powerful piece of advocacy,<sup>221</sup> and ought not be restricted even if a court concludes that it defends, praises, and thus advocates (among other things) illegal behavior in the service of fighting crime. Likewise, the communication of facts is constitutionally protected even if it's done in a docudrama or a novel rather than in a documentary or a work of serious biography.

Nonetheless, *Winters* doesn't fully resolve whether crime-facilitating elements

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<sup>219</sup> See, e.g., TOM CLANCY, *THE SUM OF ALL FEARS* 210-11, 261-62, 269-70, 280-81, 296-98, 311-12, 332-33, 356-60, 384-85, 414, 421-22, 430, 444-48, 456-60, 469-70, 480-81, 487-88, 495-97, 615-19, 797 (1991) (describing in some detail how nuclear bombs are built, but saying in the Afterword that "certain technical details have been altered, sacrificing plausibility in the interest of obscurity"); CHUCK PALAHNIUK, *FIGHT CLUB* 11-13, 69, 72-73, 110, 185, 204 (1996) (describing creating a silencer, making and using explosives, opening locks, and facilitating arson); cf. *IGN for Men Interview: Chuck Palahniuk*, *IGN FOR MEN*, Oct. 15, 1999, <http://formen.ign.com/news/11274.html?fromint=1> (quoting Palahniuk as saying that "at the last minute the publisher made me change one ingredient in each of the recipes").

<sup>220</sup> *Winters v. New York*, 333 U.S. 507, 510 (1948); see also *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].'"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (echoing *Winters*).

The one narrow exception comes in obscenity law, which treats a subset 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. *Miller v. California*, 413 U.S. 15 (1973).

<sup>221</sup> See, e.g., John Vinocur, *Clint Eastwood, Seriously*, *N.Y. TIMES*, Feb. 24, 1985, § 6, at 16.

that have purely entertainment value should get full First Amendment protection. First, *Winters* and the cases that followed it involved potential harms that were relatively indirect—long-term harm caused by reading supposedly degrading crime stories<sup>222</sup>—or relatively slight, such as the use of another’s name without permission.<sup>223</sup> They did not involve speech that could help others commit crimes, perhaps serious crimes.

Second, the *Winters* rationale concludes, quite correctly, that even works of entertainment are generally protected because of the ideological message that they contain. As I discuss below, fictional details of the work that are connected to the ideological message should thus also be protected.<sup>224</sup> But *Winters* doesn’t resolve whether this protection should extend even to those crime-facilitating elements of the work that aren’t necessary to express that ideological message, or whether authors may be required to exclude those elements even from an otherwise valuable work. Under libel and child pornography law, for instance, even works that have substantial value may not include knowing falsehoods or pictures of real children.<sup>225</sup> Such details are seen as being harmful and constitutionally valueless (or nearly valueless);<sup>226</sup> and their potential entertainment value does not save them.

Obscenity law takes a different approach: There, the constitutional value of the work taken as a whole does protect even isolated scenes that might otherwise be obscene.<sup>227</sup> But, as with the speech in *Winters*, the potential harm of obscenity (even if one accepts, as the Court has, that there is such potential harm) is relatively indirect. The question is whether crime-facilitating speech whose only noncriminal value is entertainment should be treated like potentially entertaining false statements of fact or child pornography—which authors must exclude even from their otherwise valuable works—or like other potentially entertaining sexually explicit material, which may be retained if the surrounding work has serious value.

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<sup>222</sup> *Winters*, 333 U.S. at 515.

<sup>223</sup> *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

<sup>224</sup> One could imagine a novel, for instance, that has as its main ideological point the futility of the drug war, and that therefore describe how its characters easily manufacture drugs and how this stymies any attempts at serious drug control. The author might then want readers to take the details of the characters’ actions seriously, and might even specifically tell readers that while the plot and the characters are fictional, the descriptions of how the characters make drugs are accurate. Even if the author doesn’t make any such assurances, readers might be intrigued by the details, suspect that they might be accurate, confirm them independently, and thus learn something that might be important to their view of drug prohibition.

<sup>225</sup> See *New York v. Ferber*, 458 U.S. 747, 761, 764 (1982) (noting that in child pornography cases, “the material at issue need not be considered as a whole,” and thus may be punished even if isolated scenes in an otherwise valuable work are child pornography); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (providing for recovery in libel cases for falsehoods even when the falsehood appears in a magazine article that also contains protected political opinion).

<sup>226</sup> 458 U.S. at 758, 762-63; 418 U.S. at 340-41.

<sup>227</sup> See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 89 (1973).

Finally, *Winters* holds that works of entertainment are categorically protected without the need for any case-by case judgment of whether they have an ideological message.<sup>228</sup> This makes sense: Even overtly ideological entertainment is commonplace (“Everyone is familiar with instances of propaganda through fiction”), and probably most entertainment makes at least some implicit statements about human nature, morality, or politics.<sup>229</sup>

But comparatively little entertainment includes crime-facilitating information, and probably a small portion of such entertainment uses that crime-facilitating information in ways that are needed to express the work’s message (though this is necessary speculative). If courts conclude that purely entertaining uses of crime-facilitating information don’t have much First Amendment value, then it may make sense to decide case by case which crime-facilitating information has such broader value beyond entertainment, rather than categorically presuming such value.

- ii. The tentative case against treating purely entertaining crime-facilitating speech as less valuable

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<sup>228</sup> The one notable exception is sexually explicit entertainment, which the Court has held may be unprotected when it lacks “serious literary, artistic, political, or scientific value.” *Id.* at 67. But this is a deliberately narrow exception.

<sup>229</sup> Even the *Hit Man* contract murder manual conveys a message—a rejection of morality, and a sort of bargain basement Nietzschean 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 repellent. *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.”). If *Hit Man* were being restricted precisely because of its potential to persuade—because of its nihilistic moral message—the rationale of *Winters* would squarely apply to it.

*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. 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 magazines that 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*.) If *Hit Man* is to be unprotected, it would be despite its overall political content—for instance, on the theory that some of the crime-facilitating details are unneeded to convey the political message—and not because such content is supposedly absent.

The question whether the law may treat purely entertaining elements of a work as less constitutionally valuable is thus open. Still, there are two related reasons to be skeptical of such distinctions.

1. Much purely entertaining crime-facilitating speech would have considerable value, beyond just entertainment, in other contexts. Details about a hard-to-detect poison may just be a plot device in a novel; but they have scientific and practical value in the medical textbook or forensics textbook, and political value in debates about how such chemicals should be regulated or about whether the police properly investigated a case in which the poison might have been used. The explanation of how one can get a fake identity is entertainment in *The Day of the Jackal*<sup>230</sup> but would be relevant to policy debates in an article criticizing lax government identity checks or even in a news story on how crimes are committed. Most of the details in the *Hit Man* manual for aspiring contract killers could equally appear in a textbook on how contract killers operate, and how they can be identified, stopped, deterred, or avoided.<sup>231</sup>

In fact, the details in nonentertainment works would probably be more credible, detailed, and useful (both to criminals and to the law-abiding) than the material in a novel, precisely because the work would purport to be factual, and the reader would have less reason to worry that the author has been taking dramatic license or skimping on his research. And they would probably be more credible even than an ostensibly factual work such as *Hit Man*, because they would likely be written by a known, credentialed expert in the field rather than “Rex Feral” (the pseudonym used by the author of *Hit Man*).

So the facts banned from novels or other works that are mostly consumed for entertainment would still be available in other places. The only way to prevent that would be to shift to a system where fairly basic medical, forensic, criminological, and security literature is classified and available on a need-to-know basis—something that’s unlikely in a free and large country, where tens of thousands of professionals and students work in each field.<sup>232</sup> A restriction on crime-facilitating entertainment would thus have little crime-fighting benefit, precisely because the restriction would be limited to entertainment. (Recall that the whole question in this

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<sup>230</sup> See *supra* note 13.

<sup>231</sup> See also Part IV.D.2, which argues that information that is relevant to political, scientific, and practical matters should be protected even when it’s presented without an explicit connection to those matters—for instance, in a “just the facts” newspaper article. It seems to me that this argument is weaker when the information is presented as entertainment, especially as fiction. Readers expect fiction to be false. They may expect it to contain real ideological advocacy, or real information about the era or milieu in which the fiction is set, for instance when an author of historical fiction has a reputation for accuracy. But even fiction authors who have reputations for verisimilitude are traditionally given a great deal of latitude in changing details. Few people, therefore, are likely to treat fiction—as opposed to a newspaper article—as an especially helpful source of specific data about how crimes can be committed.

<sup>232</sup> See also text accompanying note 95 *supra*.

subsection is whether entertainment should be treated as specially regulable, even when serious works containing the same facts are protected.)

The restriction probably would not have zero benefit: a widely read novel may give readers ideas that they wouldn't have otherwise had, and that they can confirm by doing more research. Many criminals aren't particularly methodical, patient, or intelligent, and might not spend much time reading dry technical tomes—if they didn't see the idea in some entertaining potboiler, they might not have come across it, and thus would have committed the crime using a less effective or more detectable technique. Still, this crime-fighting effect would likely be fairly modest.

More broadly, crimes committed based on a work of fiction, or even based on entertaining how-to manuals, seem fairly rare. There's no reliable data that I know of, but I've seen relatively few such instances.<sup>233</sup> If one sets aside those crimes that would have been committed in any event, even had the criminals had to rely on other, more constitutionally protected sources, the number seems likely to be smaller still.

2. Some crime-facilitating speech in works of entertainment will also have value beyond mere entertainment even in that work itself. A novel that carries a political message about the futility of drug or gun prohibition may describe how a character easily makes or smuggles drugs or guns. The description may create an entertainingly realistic atmosphere, but it may also support the novel's ideological claim, just as at it would in a political tract. (The novelist may even specifically note to readers that, though the work is fiction, these details are quite accurate.)

The connection may also be more indirect, though still important: The realistic depiction of a complex killing may illuminate the killer's character, and help support the point that the work is trying to make about human nature. In a well-made novel or film, most details aren't just purely entertaining diversions—they work together to support what the work is saying, whether the ultimate statement is about politics or human nature. Under *Winters*, the First Amendment fully protects such elements of entertaining works that are indeed related to the "doctrine" that the work teaches, even if it might not fully protect the purely entertaining details that are irrelevant to the work's ideology.

Yet sorting out which speech is merely entertaining and which has a serious connection to a work's message can be very hard, especially since both the message and the connections between the work's elements may be intentionally subtle and indirect. To some readers, a plot detail may illuminate a character's temperament or attitude, and thus affect how they perceive the character, his actions, and the ideas he represents. To others, the connection may be invisible, and the plot detail may seem irrelevant. Even authors may sometimes not be able to syllogistically express the connection between a detail and the overall theme of the book—all they can often say is that they included an element because they felt it was integral to the story.

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<sup>233</sup> The chief example seems to be the *Day of the Jackal* fraud, see *supra* note 13.

So perhaps here, as in *Winters*, “[t]he line between the informing and the entertaining is too elusive” for constitutional purposes.<sup>234</sup> First, the vagueness of the line between the purely entertaining and the ideologically linked may make it hard for authors to know what they may safely write about. This may lead the authors to avoid more speech, including speech that has ideological value beyond just entertainment, than the legal rule would ultimately require.<sup>235</sup> (Likewise, courts would have to draw some line between substantially crime-facilitating pure entertainment and entertainment whose crime-facilitating effect is too modest to count, perhaps because the instructions that it gives are obvious.<sup>236</sup> The vagueness of this line would also end up deterring some speech that has some First Amendment value, even if only entertainment value.)

Second, the vagueness of the line between the purely entertaining and the ideologically linked may increase the risk that prosecutors, judges, and juries will erroneously punish speech that is indeed part of a work’s ideological argument. This is especially likely when the criminal harm caused by one reader of the work is concrete and obvious, whereas the benefit of the work—not just entertainment, but moral or political enlightenment—to many thousands of readers is diffuse and harder to see.

Third, the vagueness may increase the risk that prosecutors’, judges’, and juries’ decisions will be based on impermissible factors, such as the ideology that the work as a whole expresses.<sup>237</sup> And fourth, the vagueness may increase the risk that courts will over time move the line to restrict more and more speech, including speech that is indeed necessary to most effectively present the author’s ideological argument.<sup>238</sup> These are the same reasons mentioned in Part IV.A.2.b as reasons hesitate even about an exception for speech that seems to have no noncriminal value, including no

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<sup>234</sup> See text accompanying note 220 *supra*.

<sup>235</sup> One can argue that both the existence of any new exception for the purely entertaining crime-facilitating speech and its vagueness would also have a less direct effect on author’s work: By undermining the sense of freedom that authors in America now enjoy, and making them feel that their work is being regulated by the government, such a restriction might hurt our cultural life even when the writer doesn’t feel any specific fear that a particular work is going to be restricted. But while this is not impossible, it strikes me as not being especially likely. I’ve seen no substantial evidence of such an atmospheric fear (as opposed to specific concern about particular items) flowing from copyright law, which does regulate the writing of parodies, quotation of songs in books, and more. And more broadly, many great works both of literature and entertainment have been written in places which have legal systems that allow many more speech restrictions than the U.S. legal system does. Perhaps still more or better would have been produced if the legal systems had been more libertarian, but perhaps not.

<sup>236</sup> Many details—consider, for instance, a character’s patiently aiming a rifle rather than just shooting from the hip, or wearing gloves to avoid leaving fingerprints—convey some information that could conceivably help some criminals commit crimes more effectively, if those criminals were too dumb or too ignorant to have learned these details on their own. Yet surely such obvious crime tips wouldn’t be outlawed, or else crime fiction simply couldn’t be written.

<sup>237</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

<sup>238</sup> See *Volokh*, *supra* note 167, at 1056-61, 1077-87 (discussing such slippery slope phenomena).

entertainment value. But the reasons are even more applicable here, precisely because this exception is potentially broader, since it would deliberately cover even speech that has some First Amendment value.

For all these reasons, as Part IV.A.2.b also discussed, there is good reason to hesitate before creating any new exception. In a legal system built on precedent and analogy, each new free speech exception strengthens the case for still broader and more dangerous exceptions in the future.<sup>239</sup> In some cases, we may have to run that risk, because the need for a new exception is so pressing. But crime-facilitating entertainment seems like a relatively small problem. The benefits of carving out a special restriction for such entertainment thus seem fairly modest. And the potential harm of long-term erosion of protection for fiction—material that often has serious value, and that even Western democracies have in the past tried to restrict precisely because of its ideological component<sup>240</sup>—seems substantial enough that the risk doesn't seem worth running here.

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” (though it has unfortunately never set forth a clear definition of either phrase). Both categories refer to speech that has at least some value, and thus deserves at least some protection;<sup>241</sup> 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 facts tort reflects a similar judgment.<sup>242</sup> So does the suggestion, expressed by many

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<sup>239</sup> See *supra* notes 191-192 and accompanying text.

<sup>240</sup> See, e.g., *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959) (involving New York's attempt to restrict *Lady Chatterley's Lover* because of its endorsement of adultery); cf. *Ford's Land Rover Ad Banned by U.K. Regulator on Use of Gun*, BLOOMBERG NEWS, Aug. 31, 2004 (“Ford Motor Co. . . . has had a television commercial for its Land Rover brand banned by the U.K. communications regulator after it was judged to ‘normalize’ the use of guns. The advertisement, which featured a woman brandishing a gun later revealed to be a starting pistol, breached the Advertising Standards Code and must not be shown again . . .”).

<sup>241</sup> See, e.g., *Connick v. Myers*, 461 U.S. 138, 147 (1983) (citations omitted):

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. . . .

<sup>242</sup> 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) (treating “of legitimate public concern” and “newsworth[y]” as interchangeable); *Peckham v. Boston Herald, Inc.*, 719 N.E.2d 888 (Mass. App.

commentators, that free speech protection should be limited to speech that's part of "public discourse."<sup>243</sup>

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

One possible definition of "private concern" 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, and that therefore publishing the name was fully protected speech.<sup>244</sup> Under such an approach, only "domestic gossip,"<sup>245</sup> such as discussions of a private figure's (noncriminal) sex life,<sup>246</sup> would qualify as being of "private concern."<sup>247</sup>

Little crime-facilitating speech would be of merely private concern under this test, for the reasons described in Part II.B.<sup>248</sup> Perhaps the "private concern" speech

1999) (likewise); *Romaine v. Kallinger*, 537 A.2d 284 (N.J. 1988) (likewise); *see also* *Joe Dickerson & Associates, LLC v. Dittmar*, 34 P.3d 995 (Colo. 2001) (likewise, as to the related tort of "invasion of privacy by appropriation of name and likeness"). 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. *See, e.g.*, *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998).

<sup>243</sup> *See, e.g.*, Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990).

<sup>244</sup> 491 U.S. 524, 536 (1989). The Court said that "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 ultimately held that the publication even of the specific identity was constitutionally protected under the principle that "if 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.

<sup>245</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001).

<sup>246</sup> *See* *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 756 (1985).

<sup>247</sup> 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) (taking a similar view); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1088-1106 (2000) (likewise).

<sup>248</sup> *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 raising 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



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. So lower protection for "private concern" speech under this definition would further support the Part IV.A.2 analysis, but it wouldn't do any work beyond that.

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

An alternative public/private concern line would try to track the narrower definition of "public concern" that the Supreme Court has applied in three cases, *Connick v. Myers*, *Dun & Bradstreet v. Greenmoss Builders*, and *Bartnicki v. Vopper*.<sup>249</sup> Unfortunately, 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, which the Court found to be "not [speech] of public concern," 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."<sup>250</sup> Yet discussions of dissatisfaction in a District Attorney's office would likely be seen as being of quite substantial public concern under any familiar definition of that phrase. We wouldn't be at all surprised or offended, for instance, if we saw a newspaper article discussing morale at the District Attorney's office.<sup>251</sup>

Likewise, *Dun & Bradstreet* held that presumed and punitive damages in libel cases could be imposed without a showing of "actual malice" when a false statement of fact 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.<sup>252</sup>

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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).

<sup>249</sup> 461 U.S. 138 (1983); 472 U.S. 749 (1985); 532 U.S. 514, 533 (2001).

<sup>250</sup> 461 U.S. 138, 148 (1983).

<sup>251</sup> 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 what's a matter of legitimate public concern. See *Volokh*, *supra* note 247, 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).

<sup>252</sup> 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, a town that in 2000 had under 2000 residents. See Superior Court Complaint, in Joint Appendix, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, No. 83-18 (U.S. 1983); *Waitsfield Town: Census 2000 Data Report*,

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.”<sup>253</sup> 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.<sup>254</sup>

Perhaps the relevant distinction is whether the speech was said to the public, or only to a small group—in *Dun & Bradstreet*, the bankruptcy report was sent only to five subscribers, and in *Connick*, the questionnaire was handed out to a few coworkers.<sup>255</sup> 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 public relations; in fact, the Court has held that government employee speech may be treated as being “of public concern” even when it’s said to one person.<sup>256</sup> The distinction also wouldn’t 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 cases, the speakers and likely the listeners seemed to be motivated by their own economic or professional

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<http://www.badc.com/towns/census00/waitsfield00.pdf>.

<sup>253</sup> 532 U.S. at 533.

<sup>254</sup> 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”).

<sup>255</sup> *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.” 472 U.S. at 761; 461 U.S. at 147-48.

<sup>256</sup> See *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979) (so holding). Part IV.A.2.a does argue that speech lacks First Amendment value when it’s said to a small audience that the speaker knows consists of criminals who want to use the speech for criminal purposes. But the reason for this is the use that the speaker knows the criminals will make of the speech—knowledge that’s most likely when the audience is small—and not the size of the audience as such.

concerns, rather than by a broader public-spirited desire to change society.<sup>257</sup> Lower court cases have sometimes treated the public concern test as being focused largely, though not entirely, on the speaker's motive.<sup>258</sup>

But again, it's not clear just how this line would be drawn—Myers, for instance, was apparently motivated partly by ethical concerns as well as by her own professional advancement<sup>259</sup>—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.<sup>260</sup> 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, selfishly motivated speech (such as, for instance, unions' advocacy for higher wages) is generally fully protected, so long as it doesn't propose a commercial transaction between the speaker and the listeners. 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 offer little helpful precedent for a more broadly applicable "public concern" test. If anything, the flaws in the Court's analysis of what is and what isn't a matter of "public concern" should lead us to be hesitant about such a test more generally. What's a matter of legitimate public concern is a highly subjective judgment, with few clear guideposts. Perhaps the line simply can't be effectively drawn;<sup>261</sup> but even if there is a theoretically possible definition of the line, the Court's stumbling in this

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<sup>257</sup> In a footnote, *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.

<sup>258</sup> See, e.g., *Foley v. University of Houston System*, 355 F.3d 333, 341 (5th Cir. 2003); *Salehpoor v. Shahinpoor*, 358 F.3d 782, 788 (10th Cir. 2004).

<sup>259</sup> 461 U.S. at 140 n.1.

<sup>260</sup> *Id.* at 149.

<sup>261</sup> See sources cited *supra* note 247 (reaching such a conclusion).

area 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<sup>262</sup>—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.<sup>263</sup> For instance, some might argue that information about possibly illegal subpoenas might need to be constitutionally protected, but less important crime-facilitating speech (for instance, speech that doesn’t allege 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” in a normative sense, referring to speech that the public *should* be unusually concerned about, rather than in an empirical sense, referring to speech that the public is *actually* unusually concerned about.<sup>264</sup> 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 closely tied to the decisionmakers’ political and moral preconceptions.

Is there something of “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 the named people’s actions are so morally reprehensible that the people deserve to be held morally accountable by their neighbors and peers: publicly condemned, personally berated, or ostracized. Others disagree; such behavior, they would argue, should be nobody else’s business, presumably because it’s morally legitimate. After all, the more morally reprehensible someone’s behavior is, the more it legitimately becomes others’ business (so long as it has at least some effect, direct or indirect, on others’ welfare).

Restricting the 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

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<sup>262</sup> *Bartnicki*, 532 U.S. at 536.

<sup>263</sup> 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”).

<sup>264</sup> *Bartnicki*, 532 U.S. at 536.

this contested political debate is right—something judges generally ought not be doing.<sup>265</sup> 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 is other speech, and thus in turn rests on rejecting the argument that pornography inherently conveys a powerful and valuable message about the social value of uninhibited sex.<sup>266</sup> 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 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 perhaps not a vast amount.<sup>267</sup>

But if the test distinguishes speech of unusual public concern from speech of modest public concern, then the linedrawing errors will suppress some speech that is of unusual public concern. When the test is applied properly, it will suppress quite 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 “serious value” prong of the obscenity test.<sup>268</sup> The risk of erroneous judgments about serious value is mitigated in obscenity law by the presence of the other two prongs—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.

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<sup>265</sup> See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (“it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas”) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) (plurality opinion)).

<sup>266</sup> See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 56 n.1 (1986) (Brennan, J., dissenting); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 111-112 (1978).

<sup>267</sup> 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.”).

<sup>268</sup> *Miller v. California*, 413 U.S. 15 (1973).

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, the facts and ideas couldn't be conveyed using sexually explicit and arousing depictions—a limitation on free speech, but still a relatively narrow one.<sup>269</sup> A crime-facilitating speech exception, though, would not be so limited: If it lets the government suppress speech that lacks “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 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 knowledge or recklessness that speech will likely facilitate crime

Some First Amendment doctrines, most famously libel law, seek to avoid First Amendment problems partly by distinguishing reasonable or even negligent mistakes from situations where the speaker knows (or is reckless<sup>270</sup> about) that the speech will cause harm.<sup>271</sup> Would it make sense for First Amendment law to likewise treat crime-facilitating speech as unprotected if the speaker knows that the speech will help facilitate crime, or perhaps if he is reckless about that possibility?<sup>272</sup>

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<sup>269</sup> 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 denial 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.

<sup>270</sup> See MODEL PENAL CODE § 2.02(2)(a) (defining recklessness as knowledge of a substantial and unjustifiable risk that conduct will produce a certain effect).

<sup>271</sup> See *infra* note 279. The test in public figure/public concern libel cases, of course, is whether the speaker knows or is reckless about the falsehood of the speech, but since the key harm in libel law—as well as the element that makes the speech lack value—is unjustified injury to another's reputation, knowledge of falsehood is tantamount to knowledge of unjustified, improper harm.

<sup>272</sup> See cases cited *supra* notes 122-124 (allowing liability for, among other things, disseminating

Under this standard, most of the speakers mentioned in the Introduction would probably be punishable, because they generally know that some of their readers will likely misuse this information. For instance, a thoughtful journalist who writes a newspaper article about a pirate Web site would have to know that some of his many thousands of readers will probably find the site and will then use it to infringe copyright.<sup>273</sup> Even if the journalist doesn't subjectively know this, that will quickly change once a copyright owner notifies the journalist and the publisher that the article is indeed 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 likely effects.

Likewise for authors and publishers of prominent chemistry reference books that discuss explosives. The authors and publishers probably know that some criminals will likely misuse their books; and even if they don't, they will know it once the police inform them that the book was found in a bomb-maker's apartment.<sup>274</sup>

Yet such broad liability for knowingly producing harm using dual-use speech cannot be defended by analogy to single-use speech or products. Indeed, helping a particular criminal, knowing that he will use the help (whether it's the loan of a gun or information about where to find a victim) to commit a crime, may rightly be punished as aiding and abetting in many jurisdictions.<sup>275</sup> Other jurisdictions treat it

information about bombmaking knowing that the information "would be used in the furtherance of a civil disorder," disseminating information that the speaker knows, or perhaps even should know, could be used to infringe copyright, or publishing the names of witnesses when the speaker knows that criminals could use the information to kill or intimidate the witnesses); sources cited *supra* note 47 (urging civil liability for certain kinds of crime-facilitating speech based on knowledge or on recklessness).

<sup>273</sup> 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.

<sup>274</sup> See *supra* note 2 (citing newspaper stories about chemistry textbooks found during raids on illegal bombmakers' homes and on illegal drugmaking labs).

Of course, a publisher may not know that some readers *will* misuse the books; it's impossible to predict the future with such confidence. But when one is distributing a work to many thousands (or, for some newspaper articles, millions) of readers, and the work is capable of facilitating crime, surely a thoughtful author and publisher has to know that there's a high probability—which is all we can say as to most predictions—that at least a few readers will indeed use the work for criminal purposes. And though the publisher and author will rarely know which particular person will misuse the information, "knowledge" requirements in criminal law and First Amendment law generally don't require such specific knowledge: Someone who bombs a building knowing that there are people in it is guilty of knowingly killing the people even if he didn't know their precise identities; and someone who knowingly defames a person is liable for business that the victim loses as a result of the defamation even if the speaker didn't know precisely who will stop doing business with the victim.

<sup>275</sup> 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 or

as the special crime of criminal facilitation,<sup>276</sup> which may also cover reckless conduct.<sup>277</sup> Tort law generally holds knowing facilitators of torts civilly liable.<sup>278</sup> Similarly, knowing (and likely reckless) distribution of falsehood, obscenity, and child pornography is constitutionally unprotected.<sup>279</sup>

But these situations involve strong cases for liability precisely because the speaker or actor knows his conduct will produce harm but no (or nearly no) good. That's true if he gives a gun to a particular person who he knows will use it to commit crime (which is analogous to the no-value one-to-one speech discussed in Part IV.A.2.a), or if he broadly distributes false statements of fact, which are

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prostitution); *Backun v. United States*, 112 F.2d 635 (4th Cir. 1940) (treating knowing help as aiding and abetting); *Regina v. Bainbridge*, 3 All Eng. 200 (1959) (likewise); *People v. Spearman*, 491 N.W.2d 606, 610 (Mich. App. 1992) (likewise), *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).

In other jurisdictions, intent to help aid the criminal is required. *See, e.g.*, ALA. CODE § 13a-2-23 (defining only intentional aiding as aiding and abetting); COLO. REV. STAT. 18-1-603 (likewise); PA. CONS. STAT. ANN. tit. 18, § 306 (likewise); VERNON'S TEX. CODE. ANN., PENAL CODE § 7.02 (likewise); *United States v. Pino-Perez*, 870 F.2d 1230, 125 (7th Cir. 1989) (likewise); *United States v. Peoni*, 100 F.2d 401 (2nd Cir. 1938) (likewise); *People v. Lauria*, 251 Cal. App. 2d 471 (1967) (likewise). *See generally* Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability* 61 SO. CAL. L. REV. 2169 (1988).

<sup>276</sup> *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.

<sup>277</sup> *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.”).

<sup>278</sup> *See, e.g.*, 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).

<sup>279</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (knowing or reckless distribution of falsehood); *Smith v. California*, 361 U.S. 147 (1959), 153 (knowing distribution of obscenity); *Gotlieb v. State*, 406 A.2d 270, 276-77 (Del. 1979) (reckless distribution of obscenity); *Osborne v. Ohio*, 495 U.S. 103, 112 n.9 (1990) (reckless possession of child pornography). *Cf. Schroth, supra* note 47, at 582, 584 (arguing that a knowledge/recklessness standard should be imported from *New York Times v. Sullivan* into crime-facilitating speech law, on the theory 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”); *cf. 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 witness—should be punishable just as negligently false and defamatory statements of fact about private figures are punishable).



generally seen as lacking in constitutional value (analogous to the no-value public speech discussed in Part IV.A.2.b).<sup>280</sup>

If, however, a speaker is distributing material that has valuable uses as well as harmful ones, and he has no way of limiting his audience just to the good users—the classic dual-use product scenario—then the case for restricting his actions is much weaker. For instance, a distributor who sells alcohol to a particular minor, knowing that he’s a minor, is breaking the law.<sup>281</sup> A manufacturer who sells alcohol to distributors in a college town, while being quite certain that some substantial fraction of the alcohol will fall into the hands of minors, is acting quite lawfully.

Likewise, knowingly helping a particular person infringe copyright is culpable, and constitutes contributory infringement.<sup>282</sup> Knowingly selling VCRs is not, even if you know that millions of people will use them to infringe.<sup>283</sup> Under the “substantial noninfringing uses” prong of the contributory copyright infringement test, product distributors can only be held liable if the product is nearly single-use (because nearly all of its uses are infringing) rather than dual-use.<sup>284</sup> Where speech is concerned, the First Amendment should likewise protect dual-use speech from liability even when the speaker knows of the likely harmful uses as well as the likely valuable ones.

Of course, knowingly distributing some dual-use products is illegal, because the harmful use is seen as so harmful that it justifies restricting the valuable use. Drugs (the valuable use of which is mostly entertainment) are a classic example. Guns, in the view of some, should be another.

One may likewise argue that knowingly crime-facilitating speech should be unprotected, because it can cause such serious harm: bombings, killings of crime witnesses, computer security violations that may cause millions or billions of dollars in damage, and the like.<sup>285</sup> Moreover, the argument would go, restricting crime-facilitating speech will injure discussion about public affairs less than restricting crime-advocating speech would—people could still express whatever political ideas they might like, just without using the specific factual details.<sup>286</sup>

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<sup>280</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“there is no constitutional value in false statements of fact”). On rare occasions, the Court has suggested that false statements may have value, see, e.g., *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 most of the time it has treated false statements said with actual malice as valueless; and in *New York Times v. Sullivan* itself, it concluded that they could be punished, 376 U.S. at 279 80.

<sup>281</sup> See, e.g., TEX. ALC. BEV. CODE ANN. § 106.06.

<sup>282</sup> See, e.g., *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 265 (9th Cir. 1996).

<sup>283</sup> *Sony Corp. of America v. Universal Studios*, 464 U.S. 417 (1983).

<sup>284</sup> See *supra* text accompanying note 186.

<sup>285</sup> See *supra* Part II.A. The argument 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. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1836-38 (1995).

<sup>286</sup> Cf. Scanlon, *supra* note 112, at 211-12, 214 (seemingly endorsing broad restrictions on crime-

Such restrictions may interfere more seriously with scientific speech, whether about chemistry, computer security, drugs, criminology, or cryptography, since such speech particularly requires factual detail. 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. Chemistry textbooks on explosives, publications that name boycott violators or abortion providers, and detective novels that describe nonobvious but effective ways to commit crime would thus be stripped of First Amendment protection—the decision about whether to allow them would be left to legislatures.

I think, though, that creating such a broad new exception would be a mistake. As Part II.B described, dual-use crime-facilitating speech can be highly relevant to important public debates. And few public policy debates are resolved by abstractions. People need concrete examples that are rich with detail; and requiring speakers on certain topics to omit important details will systematically undermine the credibility of their arguments.<sup>287</sup>

“Mandatory ballistic fingerprinting of guns won't work” isn't enough to make a persuasive argument.<sup>288</sup> “Mandatory ballistic fingerprinting won't work because it's easy to change the gun's fingerprint; I'm not allowed to explain why it's easy, but trust me on it” isn't enough. Often only concrete details—a description of the supposedly easy techniques for changing the fingerprint—can really make the argument effective, and can rebut the government's assertions in defense of the proposed program. 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, or by experts that newspapers can call on to evaluate the claims.<sup>289</sup>

Also, as Part II.B.3 discusses, the ability to communicate details may be a check on potential government misconduct. Bans on publishing information about subpoenas, wiretaps, witnesses, or security flaws, for instance, can prevent people from blowing the whistle on what they see as government misbehavior. It is indeed

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facilitating speech, and distinguishing speech that provides “reasons for action” from speech that simply informs people how to do things). The Court has recognized that providing specific factual details is important, even when they may harm reputations or privacy, *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964); *Florida Star v. B.J.F.*, 491 U.S. 524, 531 (1989); but such speech would be distinguished on the grounds that it involved lesser harm than that caused by crime-facilitating speech.

<sup>287</sup> *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.”).

<sup>288</sup> See *supra* note 88 for more on this example.

<sup>289</sup> See *supra* text accompanying note 98.

unfortunately true that if 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. Here, as in other areas, the First Amendment may require us to tolerate some risks of harm—even serious harm—in order to preserve people's ability to effectively debate policy and science.

A broad exception for knowingly crime-facilitating speech 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 concededly has serious value (unlike, for instance, false statements of fact, fighting words, or even obscenity), and is often connected to major political debates.<sup>290</sup> It would empower the government to completely ban the publication of certain facts, and wouldn't leave the speaker with any legal means to communicate those facts.<sup>291</sup> And it would let the government do so in a wide variety of cases, not just the truly extraordinary harmful ones, such as the publication of instructions on how to make H-bombs.<sup>292</sup> That's quite a step beyond current First Amendment law, as I hope some of the examples in Part I illustrate.

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.<sup>293</sup> 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.<sup>294</sup> In a legal system built on analogy and precedent, broad new exceptions can have influence considerably beyond their existing boundaries.

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<sup>290</sup> The incitement exception does let the government restrict speech that's connected to major political debates, and that sometimes does have serious value (for instance, when the speech both incites imminent illegal conduct but also powerfully criticizes the current legal system). But the imminence requirement has narrowed the incitement exception dramatically; crime-advocating ideas may still be communicated, except in unusual situations such as the speech to an angry mob. An exception for knowingly crime-facilitating speech would be considerably broader than this narrow incitement exception.

<sup>291</sup> Cf. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (stressing that the prohibited fighting words were “no essential part of the exposition of ideas”); *FCC v. Pacifica Found.*, 438 U.S. 726, 773 (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, 585-86 (1985) (likewise as to copyright law); *New York v. Ferber*, 458 U.S. 747, 763 (1982) (likewise as to child pornography law).

<sup>292</sup> For more on the possibility of a narrow exception for knowing publication of material that facilitates extraordinary harms, see *infra* Part IV.D.1.

<sup>293</sup> See Volokh, *Mechanisms of the Slippery Slope*, *supra* note 167, at 1059-60.

<sup>294</sup> See *id.* at 1093-94.

## 2. Focusing on purpose to facilitate crime

So the speakers and publishers of most crime-facilitating speech likely know that it may help some readers commit crime. Punishing all such knowingly crime-facilitating speech would punish a wide range of speech that, I suspect, most courts and commentators would agree should remain protected. But what about a distinction based on intent (or “purpose,” generally a synonym for intent<sup>295</sup>)—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?<sup>296</sup>

Most legal rules don’t actually distinguish intent and knowledge (or recklessness), even when they claim to require “intent.” Murder, for instance, is sometimes thought of as intentional killing,<sup>297</sup> but it actually encompasses knowing killing and reckless killing as well.<sup>298</sup> Blowing up a building that one knows to be occupied is murder even when one’s sole purpose was to destroy the building, and one sincerely regrets the accompanying loss of life.

Similarly, 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.<sup>299</sup> The same is generally true of so-called intentional torts more broadly.<sup>300</sup> Concepts such as “constructive intent” or “general intent,” which often don’t require a finding of intent in the sense of a “conscious object . . . to cause [a particular] result,” further muddy the intent/knowledge distinction,<sup>301</sup> and risk leading people into confusion whenever the

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<sup>295</sup> See, e.g., MODEL PENAL CODE § 2.02.

<sup>296</sup> *Id.* § 2.02(2)(A)(i). This is the distinction that seems to have been endorsed by the Justice Department and some lower courts. See *supra* notes 121 and 129; see also Brenner, *supra* note 81, at 373-78, 411-12 (taking a similar view); GREENAWALT, *supra* note 43, at 273 (likewise).

<sup>297</sup> See, e.g., CAMBRIDGE DICTIONARY OF AMERICAN ENGLISH (2001) (defining murder as “the crime of intentionally killing a person”).

<sup>298</sup> See, e.g., N.Y. PENAL CODE § 125.25.

<sup>299</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 46.

<sup>300</sup> See, e.g., RESTATEMENT (SECOND) OF 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); *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”).

<sup>301</sup> 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 813 (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.’”)

distinction does become important.

Yet some legal rules do indeed distinguish intent to cause a certain effect from mere knowledge that one's actions will yield that effect. For instance, if a doctor knowingly touches a 15-year-old girl's genitals during a routine physical examination, the doctor isn't guilty of a crime simply because he knows that either he or the girl will get aroused as a result. But if he does so with the *intent* of sexually arousing himself or the girl, he may be guilty of child molestation in some states.<sup>302</sup>

Likewise, 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—and thus not committing treason—even if you know your conduct will indeed help the enemy. But if you help your son partly because you want to help the other side, 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*,<sup>303</sup> a World War II case, and it's a staple of modern treason law.<sup>304</sup>) To quote Justice Holmes in *Abrams v. United States*,<sup>305</sup>

[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 is the proximate motive of the specific act, although there may be some deeper motive behind. . . .

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 follow this exact usage of "intent"—meaning purpose, as opposed to mere knowledge—and draw a useful distinction between dual-use speech distributed

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(citation omitted); *id.* (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).").

<sup>302</sup> See, e.g., IDAHO STATS. § 18-1506; VERNON'S TEX. CODE ANN., PENAL CODE § 21.11; 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).

<sup>303</sup> 330 U.S. 631, 641-42 (1947).

<sup>304</sup> See, e.g., *Kawakita v. United States*, 343 U.S. 717, 736, 742-44 (1952); *Cramer v. United States*, 325 U.S. 1, 29 (1945).

<sup>305</sup> 250 U.S. 616, 626 (1919) (Holmes, J., dissenting).

with the purpose of promoting the illegal use, and dual-use material distributed without such a purpose?

a. Crime-facilitating speech and purpose

Let's begin analyzing this question by considering what the possible purposes 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 to 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.<sup>306</sup> The deeper motive in such cases is generally ideological, at least setting aside speech said to a few confederates in a criminal scheme. Speakers 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 of the sort that Part II.B described. For instance, 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 is your purpose in publishing this book?,” they'd probably sincerely tell you “Make money.” If you asked them “Is your purpose to help people commit murder?,” they'd sincerely say “Most of our readers are armchair warriors, who just read this for entertainment; if we had our choice, we'd prefer that none of them use this book to kill someone, because if they do, we might get into legal trouble.”<sup>307</sup>

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<sup>306</sup> See, e.g., Plea Agreement, *United States v. Austin*, case no. CR-02-884-SVW (C.D. Cal. Sept. 26, 2002) (stating that the defendant admits he put up a Web site contain bombmaking information intending to help people make bombs); Earth Liberation Front, *Setting Fires with Electrical Timers*, <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.”), <http://free.freepress.org/xaa/xaa0001.txt> (focusing on physical sabotage of communications channels); materials cited *supra* note 12 (giving advice about how to effectively resist arrest at sit-ins).

<sup>307</sup> Cf. Schroth, *supra* note 47, 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

Perhaps this intention to make money, knowing that some of the money will come from criminals, is unworthy. But “when words are used exactly,”<sup>308</sup> the scenario described in the preceding paragraph does not involve speech purposefully said to facilitate crime. If crime-facilitating speech doctrine is set up 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 (as well as 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, including their mental state, at that stage of the litigation.<sup>309</sup> 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.<sup>310</sup> 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, likely did so because they wanted people to use this information. 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 such “mirror sites” are put up precisely with this intention.<sup>311</sup> Still others put

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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).

<sup>308</sup> See *supra* text accompanying note 305.

<sup>309</sup> *Rice*, 128 F.3d at 241.

<sup>310</sup> 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 search.

<sup>311</sup> 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

up crime-facilitating material because it was the subject of a noted court case, reasoning that people should be entitled to see for themselves what the case was about.<sup>312</sup> 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 of parental love, 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.<sup>313</sup>

Likewise, consider the burglar who asks a friend for information on how to more effectively break into a building (or a computer system).<sup>314</sup> "Don't do it," the friend at 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

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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, <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."); Karin Spink, *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.

<sup>312</sup> 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."); Kristin R. Eschenfelder & Anuj C. Desai, *Software as Protest: The Unexpected Resiliency of U.S.-Based DeCSS Posting and Linking*, 20 INFO. SOC'Y 101, 109-13 (2004) (describing many sites' posting of the DeCSS code, or links to such posted code; my sense is that the purpose of many of these sites is simply expressing their creators' hostility to the attempts to suppress DeCSS).

<sup>313</sup> *Haupt*, 330 U.S. at 641.

<sup>314</sup> See *supra* text accompanying note 174.



front (as opposed to a 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" or "purpose," as opposed to "knowledge" (at least when "intent" is used precisely and narrowly, which it would have to be if the law is indeed to distinguish intent and knowledge). Some of the other motivations may well 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"<sup>315</sup> 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).<sup>316</sup>

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 purpose, and dangers of guessing at purpose

We see, then, that most speakers of crime-facilitating speech will know that the speech may facilitate crime; but relatively few will clearly intend this. 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 purpose will usually just be a guess. There will often be several plausible explanations for just what the speaker wanted—to push an ideology, to convey useful information, to sell more books, to

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<sup>315</sup> See, e.g., *Sandstrom v. Montana*, 442 U.S. 510, 513 (1979); *Staten v. State*, 813 So.2d 775, 777 (Miss. 2002).

<sup>316</sup> 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.

titillate readers by being on the edge of what is permitted, and more. The legal system generally avoids having to disentangle these possible motives, because most crimes and torts (such as homicide or intentional infliction of emotional distress) require only knowledge or even just recklessness, rather than purpose.<sup>317</sup> But when the law really requires a mens rea of purpose, decisionmaking necessarily requires a good deal more conjecture.

And 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;<sup>318</sup> I suspect his conviction stemmed partly from some jurors' assumption that Socialists are a suspicious, disloyal, un-American sort, whose ambiguous words generally hide an intent to promote all sorts of illegal conduct.<sup>319</sup>

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.<sup>320</sup> 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. The same is true if the author of an article on how marijuana is grown is active in the medical marijuana movement.<sup>321</sup> But if the

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<sup>317</sup> See, e.g., sources cited *supra* notes 298 & 299.

<sup>318</sup> Debs v. United States, 249 U.S. 211 (1919).

<sup>319</sup> *Id.* at 215. See also U.S. DEP'T OF JUSTICE, *supra* note 43, at text accompanying note 75 (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”); United States v. Pelley, 132 F.2d 170, 177 (7th Cir. 1942) (concluding that a pro-Nazi critic of the U.S. war effort must have acted with “the hope of weakening the patriotic resolve of his fellow citizens in their assistance of their country’s cause,” because “[n]o loyal citizen, in time of war, forecasts and assumes doom and defeat . . . when his fellow citizens are battling in a war for their country’s existence, except with an intent to retard their patriotic ardor in a cause approved by the Congress and the citizenry of this nation”).

<sup>320</sup> Cf. Brief for the United States, Debs v United States, at 32-44 (arguing that the Socialist Party platform, which expressed opposition to the war and to the draft, was properly admitted to show that Debs' facially ambiguous words were indeed intended to advocate draft resistance), in 19 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 637-49 (Philip B. Kurland & Gerhard Casper eds. 1975).

<sup>321</sup> *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

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 scholars, or perhaps even to caution the public about the way criminals act.

Considering people's past statements as evidence of their intentions is quite rational, and not itself unconstitutional.<sup>322</sup> 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."<sup>323</sup>

Likewise, in *United States v. Pelley*, a World War II prosecution for spreading false reports with the intent to interfere with the war effort, the government relied, among other things, on Pelley's pro-German statements in a 1936 third-party Presidential campaign, and on "his genuine admiration of the Hitler regime."<sup>324</sup> 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, rather than for other reasons.<sup>325</sup>

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

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 those statements are 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 statement—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.

<sup>322</sup> *Wisconsin v. Mitchell*, 508 U.S. 476, 488-89 (1993); *Haupt v. United States*, 330 U.S. 631, 642 (1947).

<sup>323</sup> 330 U.S. 631, 642 (1947).

<sup>324</sup> 132 F.2d 170, 176 (7th Cir. 1942).

<sup>325</sup> 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)"); *United States v. Dunnaway*, 88 F.3d 617, 619 (8th Cir. 1996) (likewise); *People v. Slavin*, 1 N.Y.3d 392 (2004) (likewise).

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's being convicted because of his political beliefs, and not because of his actual intention to help people commit crimes.<sup>326</sup>

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.<sup>327</sup> Would you feel safe writing an article describing how easily people can illegally make the drug, and using that as an argument for why it's pointless to keep the drug illegal, when you know that your past praise of the drug might persuade a jury that the article is really intended to facilitate crime?

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 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 would be just too much of a chance that the two pieces put together could get you sued or imprisoned.

Moreover, this deterrent effect would likely be greater than the similar effect of hate crimes laws or possibly even treason laws. As the *Wisconsin v. Mitchell* Court pointed out, it seems unlikely that "a citizen [would] suppress[] his bigoted beliefs

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<sup>326</sup> 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 2442, and to determine whether the jury had sufficient evidence to make the finding that it did, *Bose*, 466 U.S. at 511, courts generally 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 courts will not meaningfully review this conclusion.

<sup>327</sup> *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.").

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].”<sup>328</sup> Few of us plan on committing such offenses; and we can largely avoid any deterrence of our speech simply by obeying the other laws.<sup>329</sup>

If, however, the purpose-based law restricts not conduct, but speech, its deterrent effect on protected speech would be considerably greater. Citizens might well suppress their pro-drug-legalization beliefs for fear that evidence of such beliefs will be introduced against them at trial if they publish information about how drugs are made—especially if discussing drug-making is part of their job or academic 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.<sup>330</sup> But in most cases, any serious inquiry into intent is made unnecessary by the requirement that the speech be intended to and likely to incite *imminent* crime; it is this, I think, that has kept the incitement exception narrow.<sup>331</sup> 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—had the test been simply intent plus likelihood—a jury could often plausibly decide that a speaker, especially a speaker known for hostility to the particular law, was intending to persuade people to violate the law at some future time. Concerned about this, many speakers would avoid any statements to which a jury might eventually impute an improper intent.<sup>332</sup> 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

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<sup>328</sup> 508 U.S. 476, 489 (1993).

<sup>329</sup> Moreover, for other crimes that require intent, such as attempt or conspiracy, there’ll often be powerful corroborating evidence of intent other than the defendant’s past political statements—for instance, the defendant’s getting a share of the crime’s proceeds, or the defendant’s having taken physical steps that strongly point towards the defendant’s purpose being to commit a crime. Proof that someone is involved in a conspiracy to distribute marijuana will rarely rest on the person’s past pro-marijuana statements. But when the crime itself consists solely of speech, the defendant’s political opinions will often be the strongest evidence of his purpose.

<sup>330</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>331</sup> 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.

<sup>332</sup> Say, for instance, that a statute bars speech that’s intended to and likely to lead to draft evasion or to interfere with war production. Would people feel free to criticize the war even if they do this with the purest of intentions? Or will they be reluctant to speak, for fear that juries or judges would conclude, as did the judges in *United States v. Pelley*, 132 F.2d 170, 177 (7th Cir. 1942), that “[n]o loyal citizen, in time of war, forecasts and assumes doom and defeat . . . when his fellow citizens are battling in a war for their country’s existence, except with an intent to retard their patriotic ardor in a cause approved by the Congress and the citizenry of this nation”?

guess at it by a preponderance of the evidence or at most by clear and convincing evidence.<sup>333</sup> And this is in fact one reason the intent-plus-likelihood test was criticized,<sup>334</sup> and perhaps one reason that the Court rejected it in favor of the *Brandenburg v. Ohio* intent-plus-imminence-plus-likelihood test.

The risk of jury errors in determining purpose likewise led the Supreme Court to hold that libel liability and infliction of emotional distress liability<sup>335</sup> may not be premised only on hateful motivations. Before 1964, many states allowed recovery on a showing that speech was made without “good motives,” but rather out of “ill will” or “hatred.”<sup>336</sup> But the Court rejected this, reasoning that “[d]ebate on public issues 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.”<sup>337</sup> The same risk, and the same inhibition of public debate, 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.

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<sup>333</sup> 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*, 180 Cal. Rptr. 728, 730 (Ct. App. 1982) (same as to obscenity in civil injunction cases). *But see* *Ratray 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).

<sup>334</sup> See, e.g., Geoffrey R. Stone, *The Origins of the “Bad Tendency” Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 424-27; ZECHARIAH CHAFEE, *FREE SPEECH* 78 (1941); see also James Parker Hall, *Free Speech in War Time* 21 COLUM. L. REV. 526, 532-33 (1921) (acknowledging this risk, but concluding that the World War I intent-plus-likelihood cases were correctly decided despite this risk); Ernst Freund, *The Debs Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13 (“[T]o be permitted to agitate at your own peril, subject to a jury’s guessing at motive, tendency and possible effect, makes the right of free speech a precarious gift.”).

<sup>335</sup> *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 v. Louisiana*, 379 U.S. 64 (1964)); 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 by a desire to interfere with a contract”).

<sup>336</sup> See *Garrison v. Louisiana*, 379 U.S. 64, 72 n.7 (1964).

<sup>337</sup> *Id.* at 73-74.

- 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 similar in the harm they inflict, and in the value they may nonetheless have.

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 being potentially crime-facilitating. The second reporter secretly wants the article to stymie the investigation of the target: This 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 convey valuable information to readers. The second reporter's bad motivation doesn't diminish that value or increase the harm, which would suggest that this bad motivation ought not strip the speech of protection.

The Court has, for instance, rejected the theory that statements about public figures lose protection because the speaker was motivated by hatred and intention to harm the target: "[E]ven if [the speaker] did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."<sup>338</sup> Likewise, the Court has held that 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."<sup>339</sup> 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 bad purpose.

Similarly, say that the intentionally crime-facilitating article is posted on some Web sites, the government try to get the site operators to take down the articles, and the operators refuse. 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 alerts them about the situation.

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<sup>338</sup> *Id.* at 73 (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).

<sup>339</sup> *Eastern Railroad Conference v. Noerr Motors*, 365 U.S. 127, 138-40 (1961).

But they quite likely have no intention to facilitate crime. Their decision not to take down 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 site operators who merely know that the speech has this effect.<sup>340</sup> The one difference between the two articles might be the moral culpability of the speakers, which I'll discuss in the next 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.<sup>341</sup> 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<sup>342</sup>—reinforces this. One can imagine some such person 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 quite rare. 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.<sup>343</sup> 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 this would be too broad a restriction.<sup>344</sup> But an

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<sup>340</sup> 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*).

<sup>341</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>342</sup> See, e.g., *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1023 (5th Cir. 1987).

<sup>343</sup> See *Abrams v. United States*, 250 U.S. 616, 626-27 (1919) (Holmes, J., dissenting).

<sup>344</sup> See *id.* at 627 (“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



intent-plus-likelihood test proved inadequate, too, partly because of the risk that jurors would err in finding intent.<sup>345</sup> 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 intent prong proved to be not speech-protective enough in the first test, and in the second test the intent prong provides little of the speech protection that the test offers (protection that stems mostly from the imminence prong).

#### d. Moral culpability

So the one remaining potential 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.<sup>346</sup>

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

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crime [under a statute limited to statements made 'with intent . . . to cripple or hinder the United States in the prosecution of the war']”).

<sup>345</sup> See *supra* note 334.

<sup>346</sup> See *Cheh, supra* note 208, at 24 & n.28 (arguing that intention may be an important factor distinguishing the publisher of a bombmaking manual for terrorists from 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”).

## a. The inquiry

Dual-use products are sometimes specially regulated when they have features that seem especially designed for the criminal use, or that are promoted in a way that seems to emphasize the criminal use. For instance, products that circumvent technological copy protection are prohibited if (among other circumstances) they are “primarily designed or produced for the purpose of” circumvention, or are “marketed . . . for use” in circumvention.<sup>347</sup> Drug paraphernalia laws focus on whether a product has been “designed or marketed for use” with drugs.<sup>348</sup> 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 being “resistant to fingerprints.”<sup>349</sup>

This is not quite an inquiry into the defendant’s purpose: Someone who is distributing programs “primarily designed or produced for the purpose of” circumvention can be held liable even if his only purpose is to make money, to strike a symbolic blow against the law that bans such distribution, or to promote the noncircumvention uses of the program. Many such distributors might sincerely prefer (though not expect) that by some miracle no buyer ever uses the product for criminal purposes, among other things because then there would be less likelihood that the distributor would be sued or prosecuted. They would know the criminal uses are likely, but not have the purpose of promoting such uses; and yet they would still be held liable.

Likewise, I suspect that the *Hit Man* court was wrong to argue that the framing or advertising of the book—there, its characterization as a manual for contract killers—is “highly probative of the publisher’s intent” to facilitate crime.<sup>350</sup> As I’ve mentioned above, 13,000 copies of the book were sold.<sup>351</sup> That seems to be much greater than the likely set of would-be contract killers who would learn their trade from a book (especially a book written by a person using the pseudonym “Rex Feral”).

The publisher and the author must have known this, and thus likely intended their market to be armchair soldiers of fortune who like to fantasize about being Nietzschean ubermensches. Perhaps, as I discuss below, distributing *Hit Man* should still be punished because of the way the book was framed or promoted. But this would have to be because of something other than the light that the framing and promotion sheds on the publisher’s intent.

On the other hand, neither is the inquiry simply into whether the defendant knew

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<sup>347</sup> 17 U.S.C. § 1201(2)(A), (C).

<sup>348</sup> See generally *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

<sup>349</sup> *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).

<sup>350</sup> *Rice v. Paladin Press, Inc.*, 128 F.2d 233, 253 (4th Cir. 1997).

<sup>351</sup> See *supra* note 103.

of the crime-facilitating uses—a seller of cigarette rolling paper wouldn't be held liable simply because he knows that many buyers use it for marijuana rather than tobacco.<sup>352</sup> Rather, the test for distributors would be whether the distributor is knowingly distributing material that's being advertised (by him) or designed or presented (by the author) in a way that's intended to especially appeal to criminals. And the test for authors would be whether they are purposefully producing material that especially appeals to criminals, though not necessarily whether their purpose is actually to help those criminals.<sup>353</sup>

Some of the examples of crime-facilitating speech seem to fit within this definition, and in many instances the definition would track many people's moral intuitions. 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.<sup>354</sup> A Web site that presents itself as a source of research papers that students can plagiarize seems different from an online encyclopedia, though the encyclopedia can also be used for plagiarism and the papers can also be used for legitimate research. And this is true even if the books and Web sites are published by people who intend only to make money, not to facilitate crime.

The definition would also include another category of material: Web pages that mirror the contents of suppressed crime-facilitating pages, such as some of the pages that mirror *Hit Man* itself. The mirror page operator may intend only to strike a blow against censorship, and not facilitate crime;<sup>355</sup> and I suspect that many people would be less eager to punish him than they would be to punish the publisher or the author of the original site. But the mirror page operator likely does know that the material

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<sup>352</sup> See, e.g., *Dubose v. State*, 560 So.2d 323, 325-26 (Fla. App. 1990).

<sup>353</sup> This inquiry treats an author's decisions about how to frame the work (writing it as a manual about how to commit contract murder rather than as a book about how contract murderers operate) the same as the publisher's decisions about how to promote the work (advertising it as a manual about how to commit contract murder rather than as a book about how contract murderers operate). One could, I suppose, treat the two kinds of decisions differently, but I think they are best treated the same way: Both are choices about how the information is presented to potential readers, and both may (as the material below discusses) affect what sorts of readers the book attracts.

<sup>354</sup> See *Rice*, 128 F.3d at 253-54 (stressing this as to *Hit Man*).

<sup>355</sup> 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 concludes:

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 [that] 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* . . .

he's distributing was designed or presented—not by him, but by its author—to especially appeal to criminals. His actions would thus be on the punishable side of the line discussed here.

b. *Ginzburg v. United States* and the “pandering” doctrine

This inquiry into how a work is promoted or framed already takes place in some measure—though quite controversially<sup>356</sup>—in the “pandering” doctrine, which is part of obscenity law.

Obscenity law is based on the view that sexually themed material can have “a corrupting and debasing impact [on its consumers,] leading to antisocial behavior.”<sup>357</sup> On the other hand, obscenity law also recognizes that much sexually themed material can also have serious value to its other consumers.

Under this framework, many sexually themed works would be dual-use. Consider a work that has some highly sexual portions that aren't valuable by themselves (or aren't valuable to those who are merely seeking sexual arousal), but that taken as a whole has serious scientific, literary, artistic, or political value. Some consumers will view the work for that value. But other consumers may look only at the valueless portions of the work, and do so out of prurient motives—as to them, the work will, under the logic of obscenity law, be harmful rather than valuable. Generally speaking, such dual-use works are constitutionally protected. Only those works that the law views as single-use, because they lack serious value and thus are likely to be used only for their prurient appeal, are punishable.

But under the pandering cases, of which the leading one is *Ginzburg v. United States*, a work that would otherwise not be obscene—perhaps because it indeed has serious value—may be treated as obscene if it's “openly advertised to appeal to the erotic interest of . . . customers.”<sup>358</sup> 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.”<sup>359</sup>

Because *Ginzburg* marketed the work as pornographic, however, his distribution

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<sup>356</sup> 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) (criticizing *Ginzburg*); *Splawn v. California*, 431 U.S. 595, 602 (1977) (Stevens, J., dissenting) (likewise); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 911 n.53 (likewise); G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 258 (1982) (discussing *Ginzburg* in unflattering terms).

<sup>357</sup> *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

<sup>358</sup> 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).

<sup>359</sup> *Ginzburg*, 383 U.S. at 472.

of the book was treated as constitutionally unprotected, though other sorts of promotion of the work would have been protected. The obscenity inquiry, the Court held, “may include consideration of the setting in which the publication [was] presented,” even if “the prosecution could not have succeeded otherwise.”<sup>360</sup>

Why should the promotional advertising, or the purposes for which the product was designed—as opposed to the potential 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.<sup>361</sup>

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

There are three plausible answers to this, though for reasons I’ll explain below I think they are ultimately inadequate. 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.<sup>362</sup>

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, a novelist who wants to write plausibly about contract killers,<sup>363</sup> or just a layperson who’s curious about the subject 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

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<sup>360</sup> *Id.* at 465-66.

<sup>361</sup> *Id.* 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).

<sup>362</sup> 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”).

<sup>363</sup> 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”).

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 provocative aspects of the work, in order to catch the salaciously disposed.”<sup>364</sup> As Justice Scalia—the most prominent modern supporter of the *Ginzburg* approach—put it, “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.”<sup>365</sup>

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 be more likely to lead to errors. A book on the chemistry of drugs that’s designed to help criminals make drugs will likely 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, something seems 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 may seem to some to be particularly reprehensible.<sup>366</sup> It’s therefore tempting to hold the speaker at his word, to treat his speech as solely focused on those things that the advertising or framing of the speech stressed, and not to let him defend himself by citing the psychiatric 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 burden lawful uses only slightly, because the same material could be distributed if it weren’t framed as promoting illegal uses.<sup>367</sup> And these restrictions

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<sup>364</sup> *Id.* Cf. WHITE, *supra* note 356, at 258 (linking *Ginzburg* with Chief Justice Warren’s view in *Jacobellis v. Ohio*, 378 U.S. 184, 201 (1964) (Warren, C.J., dissenting), that “‘the use to which various materials are put—not just the words and pictures themselves’—was to be considered in determining whether a work was obscene”).

<sup>365</sup> *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 832 (2000) (Scalia, J., dissenting).

<sup>366</sup> Cf. *Rice v. Paladin Press*, 128 F.3d 233, 254 (4th Cir. 1997) (noting the “almost taunting defiance” of the publisher’s stipulation at trial “that it intended to assist murderers and other criminals”).

<sup>367</sup> 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”).

have some benefit, because they somewhat decrease the illegal uses. The same can be said of restrictions on speech whose text (rather than its promotional advertising) describes the work as crime-facilitating or sexually titillating. The 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 is thus conceptually plausible.

At the same time, the line requires some rather subtle and difficult judgments, because the suggested use of a statement will sometimes be unstated or ambiguous, and different factfinders will draw different inferences about it. Is a list of abortion providers, boycott violators, strikebreakers, police officers, or political convention delegates 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 describes 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 simply present facts, and leave readers to use them as they like. Unless we require that each publication explicitly define its intended audience, it may often be hard to determine this audience.

And lacking much objective evidence about the intended audience, factfinders may end up turning to their own political predilections. As Part IV.B.2.b suggested, guesses about a person's purposes—here, to which audience the author is intending the work to appeal<sup>368</sup>—tend to be influenced by the factfinder's sympathy or antipathy towards the person. If we think anti-abortion activists are generally good people trying to save the unborn from murder, we are likely to give the writer and the readers of a list of abortion providers the benefit of the doubt, and to assume the list was aimed only at lawful picketers and protesters. If we think anti-abortion activists are generally religious fanatics who seek to suppress women's constitutional rights, we are likely to assume the worst about their intentions. There is thus a substantial risk that factfinders will err, and will err based on the speaker's and their own political viewpoints, in deciding whether something is “designed to appeal to criminals.”

Finally, if the law starts focusing on how the speech is framed or marketed, many speakers—both those who are really trying to appeal to criminals and those who aren't—will just 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 contained within our web site are for research purposes only!”<sup>369</sup>) Recall that one of

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<sup>368</sup> See *supra* text accompanying note 353 (pointing out that the inquiry here is into whether the work is intended or promoted in a way that's intended to especially appeal to criminals).

<sup>369</sup> 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

the purported advantages of this “pandering” approach is precisely that it won’t burden speech much, since the underlying 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 won’t much burden legitimate speakers, but at the same time so narrow that it won’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 First Amendment exception for speech that’s promoted in a way that makes it appealing to criminals may start being seen as the rule. Even legitimate promotion of dual-use speech would then be perceived as exploiting a “loophole” in the rule. This perception would then tend to yield pressure for categorizing more and more speech under the “promoted as crime-facilitating” label. And this tendency will be powerful because it would reflect a generally sensible attitude: the desire to make sure that rules aren’t made irrelevant by easy avoidance.<sup>370</sup>

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 some pornographers to add token political or scientific framing devices: 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.”<sup>371</sup> This change helped close the loophole to some extent<sup>372</sup>—but only at the

source! Turning in a paper from our web site as your own is plagerism [*sic*] and is illegal!

Likewise, the *Hit Man* contract murder manual included a disclaimer that “IT IS AGAINST THE LAW TO manufacture a silencer without an appropriate license from the federal government. There are state and local laws prohibiting the possession of weapons and their accessories in many areas. Severe penalties are prescribed for violations of these laws. Neither the author nor the publisher assumes responsibility for the use or misuse of information contained in this book. **For informational purposes only!**”). *Rice v. Paladin Press*, 128 F.3d 233 (4th Cir. 1997), though, wasn’t impressed: “[A] jury could readily find [the book’s disclaimer] to be transparent sarcasm designed to intrigue and entice . . .” *Id.* at 254.

<sup>370</sup> Eugene Volokh, *Mechanisms of the Slippery Slope*, *supra* note 167, at 1051 (describing such “enforcement need slippery slopes”); Hall, *supra* note 345, at 531-35 (describing such a phenomenon at work in the World War I-era anti-draft speech cases, though concluding that those prosecutions were nonetheless sound).

<sup>371</sup> See *Miller v. California*, 413 U.S. 15, 24 (1973)

<sup>372</sup> Though 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



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.”<sup>373</sup> 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—aiming to minimize the burden on free speech rights—narrowly interpreted the Federal Election Campaign Act’s restrictions on independent expenditures “relative to a clearly identified candidate” as covering only speech “that include[s] explicit words of advocacy of election or defeat of a candidate.”<sup>374</sup> Political advertisers then naturally avoided 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.<sup>375</sup> The Bipartisan Campaign Reform Act ultimately changed the express advocacy definition to cover any ad that “refers to a clearly identified [federal] candidate” within 60 days of the election.<sup>376</sup> And the Supreme Court upheld the new rule, citing among other things the need to close the loophole.<sup>377</sup> 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.

The same may easily happen to restrictions on speech that’s explicitly presented as crime-facilitating: Such narrow restrictions will likely lead many authors and distributors to characterize their works less explicitly, with what some see as a wink and a nudge. Legislators may then understandably try to enact broader restrictions aimed at rooting out such “shams.” Yet these broader restrictions may affect not just the insincere relabeling of crime-facilitating speech, but also the distribution of valuable material that’s genuinely designed for and marketed to law-abiding readers.

The main advantages of focusing on how the work is promoted and framed would thus disappear. Such a focus offers the prospect that (1) the material would still remain distributable when properly promoted, and (2) courts could apply the rule

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 usefulness of obscenity laws. . . .

<sup>373</sup> *Miller v. California*, 413 U.S. 15, 47 (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).

<sup>374</sup> 424 U.S. 1, 43 (1976).

<sup>375</sup> *McConnell v. FEC*, 124 S. Ct. 619, 653 (2003).

<sup>376</sup> 2 U.S.C. § 434(f)(3)(A)(i).

<sup>377</sup> *McConnell*, 124 S. Ct. at 689.

by focusing on the objective terms of the work and its advertising, while minimizing investigations of distributors' or authors' hidden intentions. But the attempts to prevent end runs, code words, and exploitation of loopholes will tend to make it 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 isn't aimed at a criminal audience. It seems likely to be hard to accurately and fairly apply. And it carries the risk that the narrow restrictions will end up growing into broad ones.

2. Focusing on whether speech is advertised or presented as an argument rather than just as pure facts

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.

It would be a mistake, though, to protect such purely factual speech less than expressly political speech.<sup>378</sup> Information is often especially useful to people's political decisionmaking when it comes to us as just the facts, without the author's political spin. Most modern newspapers generally 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

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<sup>378</sup> *But see* 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 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 evade, 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,<sup>379</sup> so there seems to be little benefit to requiring people to add political advocacy boilerplate in order to make their factual assertions constitutionally protected.<sup>380</sup>

#### *D. Distinctions Based on the Harms the Speech Facilitates*

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

###### a. Generally

Some speech facilitates very grave harms—the possible construction of a nuclear bomb or a biological weapon, the torpedoing of a troop ship, or the murder of witnesses, abortion providers, or boycott violators. Some facilitates less serious harms: drug-making, suicide,<sup>381</sup> burglary, copyright infringement.

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<sup>379</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (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 protection offered to commercial speech comes from its subject matter, not its being purely factual. (After all, even commercial advertising that is coupled with political advocacy still remains merely commercial advertising. See *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557, 463 n.5 (1980).) 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.

<sup>380</sup> See, e.g., the books cited *supra* in note 87. 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.” The second, *Home Workshop Guns for Defense and Resistance*, 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, come from the same publisher.

<sup>381</sup> See Australian House of Representatives, Criminal Code Amendment (Suicide Related Material Offences) Bill 2004, secs. 474.29A(2)(b)(ii), 474.29A(2)(c)(iii) (proposing a ban on electronically distributing material that “directly or indirectly” “provides instruction on a particular method of committing suicide” with the intent that “the material . . . be used by another person to commit suicide”); Criminal Code Act of 1995 (Australia) § 5.2(3) (defining “intention” as including cases where the actor is “aware that [a result] will occur in the ordinary course of events,” thus covering what the Model Penal Code would call “knowledge” as well as “intent”); Rebecca

When legislatures decide how to deal with dual-use technologies, they normally and properly consider how severe the harmful uses can be. Machineguns and VCRs can both be used for entertainment as well as for criminal purposes. Yet machineguns are much more heavily regulated, because their criminal uses are more dangerous.<sup>382</sup> It's likewise appealing to have the constitutional protection of crime-facilitating speech turn to some extent 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. Some Supreme Court cases have asserted that such line-drawing is actually impermissible.<sup>383</sup> Other cases have indeed drawn such lines, based on a crime's

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Sinderbrand, *Point, Click and Die*, NEWSWEEK, June 30, 2003, at 28 (stating that a woman's family is suing the operator of a suicide information Web site that a 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); *cf.* Jerry Hunt, *How to Kill Yourself Using the Inhalation of Carbon Monoxide Gas*, <http://www.jerryhunt.org/JerryHunt/kill.asp> (found using a google search for "how to kill yourself").

<sup>382</sup> 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 284. But 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, civilians are generally banned from owning machineguns (except for the some 100,000 machineguns grandfathered from before the ban, *see* GARY KLECK, TARGETING GUNS 108 (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*, at 108. 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 civilian 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.

<sup>383</sup> *See* *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972), where the Court declined to create a First Amendment journalists' privilege that was sensitive to the severity of the crime being investigated, reasoning:

[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 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

inherent severity<sup>384</sup> or based on the legislature's own severity distinctions, for instance based on whether the crime is punishable by jail time or only by a fine.<sup>385</sup> And sometimes, the Court has decided case by case that a particular offense is severe enough to justify a special constitutional rule: For instance, the First Amendment child pornography exception is based partly on the Court's conclusion that sexual exploitation of children is such a serious crime.<sup>386</sup>

I discuss these issues in much more detail elsewhere,<sup>387</sup> so here I will just briefly state my conclusion: Such severity distinctions are potentially justifiable, but they are hard for courts to draw, unless courts are willing to draw them at a rather low level of severity. And, for reasons discussed in Parts II.B and IV.B.1, the value of the speech to public discussion by law-abiding listeners should lead to its being protected even when the speech does help a few criminal recipients commit crimes.

The most obvious legislatively defined lines that the courts can adopt, such as the line between crimes and torts or between felonies and misdemeanors, would classify most of the examples in the Introduction as being on the "severe" side of the line: For example, a newspaper article that provides the URL of an infringing Web site may facilitate criminal copyright infringement, which is potentially a felony.<sup>388</sup> Even limiting a new exception to speech that facilitates violent crimes would let the exception cover (unless other limitations prevent this) chemistry textbooks that describe explosives, novels that describe nonobvious way of poisoning someone, newspaper articles that mention the name of a crime witness, and publication of the names of boycott violators or strikebreakers.

Courts could try to draw the line at a higher level, without pegging it to some established or intuitively obvious distinction. But such ad hoc linedrawing may prove unpredictable both for speakers and for prosecutors; and it may also over time lead the severity line to slip lower and lower, as courts feel that they ought to "defer[]" to "rational legislative judgment" about the "gravity of the offense."<sup>389</sup>

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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. See also *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (taking a similar view in the Fourth Amendment context); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985) (likewise); Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. \_\_\_, pt. II, available at <http://www1.law.ucla.edu/~volokh/severity.pdf> (forthcoming 2004) (discussing these cases).

<sup>384</sup> For instance, *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), held that shooting at a fleeing suspect is an unreasonable seizure unless there is probable cause to believe that the suspect is guilty of a violent crime, as opposed to just a property crime. See Volokh, *Crime Severity and Constitutional Line-Drawing*, *supra* note 383, at pt. III (discussing *Garner* and other such cases).

<sup>385</sup> See Volokh, *Crime Severity and Constitutional Line-Drawing*, *supra* note 383, at pt. IV.

<sup>386</sup> *New York v. Ferber*, 458 U.S. 747, 764 (1982).

<sup>387</sup> Volokh, *Crime Severity and Constitutional Line-Drawing*, *supra* note 383.

<sup>388</sup> See 18 U.S.C. § 2319; 17 U.S.C. § 506.

<sup>389</sup> Volokh, *Crime Severity and Constitutional Line-Drawing*, *supra* note 383, at pt. V, citing the Supreme Court's logic in *Cruel and Unusual Punishments Clause* cases, where the Court has likewise been called on to draw ad hoc severity lines.

Courts may be reluctant to distinguish, for instance, bans on bomb-making information from bans on drug-making information,<sup>390</sup> given that many people find drug manufacturing to be as deadly as bomb manufacturing<sup>391</sup> (and even if the judges might themselves have taken the contrary view had they been legislators). Likewise, once courts have upheld bans on drug-making and bomb-making information, they may be reluctant to overturn a similar legislative judgment as to information that helps people break into banks or computer security systems: Though these are just property crimes rather than violent crimes or drug crimes, they are felonies that in the aggregate can lead to billions of dollars in economic harm. 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.

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.<sup>392</sup>

If one thinks that such deference is sound, then it seems to me that one should generally endorse a rule under which a broad category of crime-facilitating speech—for instance, knowingly crime-facilitating speech—would be constitutionally unprotected. This would then leave it to legislatures to decide which crime-facilitating speech should be punished and which shouldn't be.

But it seems to me that such a broad new exception would be a mistake, and that even speech which may help some listeners commit quite severe crimes, including murder, should still be protected. The First Amendment requires us to run certain risks to get the benefits that free speech provides, such as open discussion and criticism of government action, and a culture of artistic and expressive freedom. These risks may include even a mildly elevated risk of homicide, for instance when speech advocates homicide, praises it, weakens social norms against it, leads to

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<sup>390</sup> 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.

<sup>391</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 1002 (Kennedy, J., concurring in the judgment) (arguing that drug crimes are extremely serious).

<sup>392</sup> Volokh, *Crime Severity and Constitutional Line-Drawing*, *supra* note 383, at pt. V.

copycat homicides, or facilitates homicides. Each such crime is of course a tragedy, but a slightly increased risk even of death—a few extra lives lost on top of the current level of 20,000 homicides per year<sup>393</sup>—is part of the price we pay for the First Amendment, and for that matter for other Bill of Rights provisions.

b. Extraordinarily severe harms

So it seems to me that dual-use crime-facilitating speech should not be restrictable even though it may help some readers commit some very serious crimes. Yet this does not necessarily dispose of speech that causes extraordinarily severe harms—speech that, for instance, might (even unintentionally) help terrorists synthesize a smallpox plague, or might help foreign nations build nuclear bombs.<sup>394</sup>

The Bill of Rights is an accommodation of the demands of security and liberty, which is to say of security against criminals or foreign attackers and security against one's own government. The standard rules that it sets forth, and that the Supreme Court has evolved under it, ought to cover the overwhelming majority of risks, even serious ones and even ones that arise in wartime.

But it's not clear that those rules, developed against the backdrop of ordinary dangers, can dispose of dangers that are orders of magnitude greater. This is why the usual Fourth Amendment rules related to suspicionless home searches might be stretched in cases involving the threat of nuclear terrorism;<sup>395</sup> why we continue to have a debate about the propriety of torture in the ticking nuclear time bomb scenario;<sup>396</sup> and why, in a somewhat different context, the Constitution provides for

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<sup>393</sup> See National Center for Injury Prevention and Control, WISQARS Injury Mortality Reports, 2000-2001, [http://webapp.cdc.gov/sasweb/ncipc/mortrate10\\_sy.html](http://webapp.cdc.gov/sasweb/ncipc/mortrate10_sy.html) (2001 data for homicides, not including suicides or accidents).

<sup>394</sup> It's not clear that the H-bomb design information involved in *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), often seen as the classic example of such harmful speech, in fact seriously jeopardized national security. Building a hydrogen bomb requires an industrial base that only advanced countries possess, and those countries likely have scientists with the knowledge needed to deduce how such a bomb could be constructed. (Hydrogen bombs, which are fusion bombs, are much harder to build than fission bombs.) This would probably have been true even when *Progressive* was decided, 25 years after the H-bomb was invented, and it would pretty certainly be true now. See, e.g., L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55, 59 (1990). Nonetheless, the case does provide a useful hypothetical: Say that someone did publish information that would make it much easier for less advanced countries, or even sophisticated nongovernmental groups, to build either fission or fusion bombs, or to make other weapons—such as biological weapons—that could kill tens of thousands of people.

<sup>395</sup> See, e.g., Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1279 (2004).

<sup>396</sup> See, e.g., Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 48-49 (1991); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism And Official Disobedience*, 88 MINN. L. REV. 1481 (2004); ALAN DERSHOWITZ, *WHY TERRORISM WORKS* 141, 158-63 (2002).

the suspension of habeas corpus in cases of rebellion or invasion.<sup>397</sup> Likewise, it seems to me avoiding such extraordinary harms—especially harms caused by information that helps others construct nuclear and biological weapons, weapons that can kill tens of thousands at once—does justify restrictions on speech that would facilitate the harms.

The restrictions would indeed interfere with legitimate scientific research, and with debates about public policy that require an understanding of such scientific details. It would be harder to debate, for instance, whether the distribution of certain laboratory devices or precursor chemicals should be legal or not, or whether our civil defense strategies are adequate to deal with the possible threats, if people weren't free to explain exactly how the terrorists might operate. The restrictions would thus require more unchallenged trust of the government than free speech law normally tolerates. And there would indeed be some contested cases (for instance, what about discussions of possible gaps in security at nuclear power plants?); there would be a danger that the restrictions would over time broaden to include less dangerous speech; and there would be some undermining of our culture of political and scientific freedom.<sup>398</sup>

These are all reasons to keep the exception narrow, by reserving it for the truly extraordinary cases involving, as I mentioned, the risk of tens of thousands deaths—cases that would be widely understood as being far outside the run of normal circumstances, so that they would always be seen as highly unusual exceptions to the normal rule of protection. Still, it seems to me that the risks of the exception are worth running to try to avoid the risks of mass death.

As importantly, whether I'm right or wrong, chances are that judges will indeed allow this sort of restriction, like the trial court did for the H-bomb plans in the

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<sup>397</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>398</sup> I would not endorse a restriction on crime-*advocating* speech that advocates such severe crimes. I strongly doubt that either terrorists' or foreign governments' decisions to want to build nuclear or biological weapons are likely to be much influenced by the sort of persuasive advocacy that the law is likely to be able to reach. The law might be able to suppress the flow of information about such weapons, but not, I think, the desire to build them.

Some speech that advocates other sorts of crime, for instance denunciations of the government and promotion of violent revolution, may indeed ultimately lead to hundreds of thousands of deaths. Most civil wars and revolutions are indeed largely fomented by speech. But such speech would be harmful only to the extent that it persuades tens of thousands of people; and in the process, it is almost certain to also convey potentially valuable and legitimate criticism of the existing order to millions of people. *See* *Dennis v. United States*, 341 U.S. 494, 549 (1951) (Frankfurter, J., concurring in the judgment) ("A public interest is not wanting in granting freedom to speak their minds even to those who advocate the overthrow of the Government by force. . . . [C]oupled with such advocacy is criticism of defects in our society. . . . It is a commonplace that there may be a grain of truth in the most uncouth doctrine, however false and repellent the balance may be. Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed."). The burden on public discourse of suppressing such advocacy is even greater than the burden of suppressing crime-facilitating information.



*Progressive* case.<sup>399</sup> And if judges do uphold such restrictions, it's important to have a ready framework that would cabin the restrictions in a way that prevents them from spreading to other, less dangerous kinds of speech.

The best way to do that, I think, is to have the judges use a test that explicitly turns on the extraordinary harms that the speech facilitates, harms on the magnitude of thousands or tens of thousands of deaths in one incident, which are far outside the normal range of danger that free speech and other liberties can cause. Rationalizing restrictions on such speech in other ways—for instance, by characterizing the speech as a mere adjunct to crime (or to an act of war),<sup>400</sup> by characterizing the laws punishing the speech as generally applicable laws,<sup>401</sup> or by distinguishing political advocacy from scientific speech<sup>402</sup>—risks legitimizing much broader prohibitions that would apply even to less harmful speech, speech that ought to remain protected.<sup>403</sup>

## 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<sup>404</sup>) is more helpful than general information (resist the temptation to brag about your crimes<sup>405</sup>). Nonobvious information is more helpful than the obvious. Information that is only available from one source—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<sup>406</sup>—is more marginally helpful than information that's also available in lots of other places, such as information about how marijuana is grown.<sup>407</sup>

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<sup>399</sup> United States v. *Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

<sup>400</sup> See *supra* note 131 and accompanying text; Volokh, *Speech as Conduct*, *supra* note 136, at pt. III.

<sup>401</sup> See *supra* notes 132-136 and accompanying text; See Volokh, *Speech as Conduct*, *supra* note 136, at pt. II.

<sup>402</sup> See *supra* Part IV.A.3.a.

<sup>403</sup> The same is true of having the test turn on the speaker's purpose instead of the gravity of the harm; but such an intent focus also probably won't satisfy those judges who do want to restrict the speech, because in many situations—such as in the *Progressive* case itself, or when a Web site mirrors speech to protest censorship—the harmful speech is not intended to facilitate crime. See *supra* Part IV.B.2.a. And if the judges avoid this by treating knowledge of danger as “constructive intent,” then the exception would in effect broadly punish knowingly crime-facilitating speech, without the extra protection that a “extraordinary harm” prong would require.

<sup>404</sup> See, e.g., REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS ch. 3, available at <http://ftp.die.net/mirror/hitman/3.html>.

<sup>405</sup> See, e.g., *id.* ch. 8, available at <http://ftp.die.net/mirror/hitman/8.html>.

<sup>406</sup> See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

<sup>407</sup> See, e.g., <http://www.growing-marijuana.org/>, or google “growing marijuana.”

Restrictions on crime-facilitating speech would have to in some measure distinguish speech that provides substantial assistance from speech that provides very little assistance.<sup>408</sup> Some information is so obvious or so general—for instance, it’s easier to get away with murder if you hide the body well, cyanide is poisonous, and so on—that criminals are very likely to know it already, or figure it out with a moment’s thought. Restricting such speech would yield little benefit, but impose a large First Amendment cost, since such a broad restriction would cover a huge range of entertainment, news reporting, and even ordinary conversation. The line between the substantially crime-facilitating and the insubstantially crime-facilitating would necessarily be hard to draw, since generality and obviousness are such subjective criteria; and the line’s vagueness would necessarily cause uncertainty and potential underdeterrence. Nonetheless, the line indeed have to be drawn.

One could also distinguish crime-facilitating speech based on how easily the information is available from other sources. If a work is available widely 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.<sup>409</sup>

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).<sup>410</sup> If that’s so, then attempts to restrict such works may be condemned on the grounds that they don’t substantially advance the government interest in preventing crime, and thus impose a free speech cost with no corresponding benefit.<sup>411</sup>

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 name of a formerly unidentified crime witness, people’s social security numbers, or the passwords to computer systems—is less likely to be available in many places, and restrictions on such speech are therefore more likely to be effective. Each location that contains such speech will thus provide a substantial marginal benefit to

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<sup>408</sup> Some general crime facilitation laws already do that: 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.

<sup>409</sup> 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.”).

<sup>410</sup> See *supra* text accompanying notes 310-312.

<sup>411</sup> See cases cited *supra* note 218.

criminal users. And preventing such speech from being posted will thus provide a substantial marginal benefit to people or government projects that 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, perhaps the most important one.<sup>412</sup>

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.<sup>413</sup>

Crime-facilitating speech, though, generally appeals to the planner, not to the impulsive criminal. When someone tells a criminal how to build a particularly sophisticated bomb, that information is at least as dangerous when it's said months before the bombing as when it's said the day before the bombing.<sup>414</sup> It's hard to see, then, why such speech should be treated as constitutionally different depending on 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.<sup>415</sup>

To begin with, if civil liability leads the court to enjoin the speech, after a trial on

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<sup>412</sup> See *supra* Part IV.B.2.c.

<sup>413</sup> 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.")

<sup>414</sup> 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; but that's an unusual situation.

<sup>415</sup> 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).

the merits,<sup>416</sup> then the speech *will* become criminally punishable. If the defendant refuses to stop distributing the speech after such an injunction is issued, 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*.<sup>417</sup> The threat of losing all one's assets—which for noncorporate speakers will likely include their homes and life's savings—may, for many speakers, be a deterrent not much smaller than the threat of jail. And this deterrent effect is further increased by the risk that damages will be awarded without proof beyond a reasonable doubt and the other procedural protections available in criminal trials.

In some fields of tort law, where actors reap most of the social benefit of their conduct, purely compensatory damages may not have as large a deterrent effect as would the threat of prison or financial ruin: Such damages would merely require actors to internalize the social costs as well as the social benefits of their conduct, which would in theory foster a socially optimal level of the conduct by providing just the right level of deterrence. If your conduct (say, your using blasting for construction on your property) produces more benefits than harms, then you will still engage in the conduct despite being held liable for the harm you cause—you would just use the profits from the beneficial effects of the conduct to pay for the damages needed to compensate victims for the harmful effects.<sup>418</sup> The compensatory damages rule would only prevent the conduct if the conduct produces more total harm than benefit, and in such a situation we should want the conduct to be deterred.

But even if this argument works for some kinds of conduct, there's no reason to think that compensatory damages for speech will provide such a 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.<sup>419</sup> Requiring 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

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<sup>416</sup> See, e.g., the copyright-facilitating speech cases cited *supra* note 24 *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, 179 (1998) (discussing courts' increasing willingness to enjoin even libel, and the general constitutionality of such permanent injunctions when directed at unprotected speech).

<sup>417</sup> 376 U.S. 254, 294 (1964).

<sup>418</sup> WILLIAM LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 64-73 (1987).

<sup>419</sup> 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 information-related activities.”).

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 the legal system really wants to suppress the speech (assuming that the speech can practically be suppressed), it needs 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.<sup>420</sup> As to crime-facilitating speech, this approach seems to be correct.

### G. Summary: Combining the Building Blocks

In the above discussion, I've tried to clearly identify the pluses and minuses of each potential component of a crime-facilitating speech test. By doing this, I've tried to be thorough, to break the problem into manageable elements, and to provide a perspective that may be helpful even to those who may not agree with my bottom line.

Here, though, is the bottom line, part of which I present with some confidence and part tentatively: It seems to me that there should indeed be a First Amendment exception for speech that substantially facilitates crime, under the following conditions:

- (1) When the speech is said *to a few people who the speaker knows are likely to use it criminally* (classic aiding and abetting or criminal facilitation).<sup>421</sup> This speech, unlike speech that's broadly published, is unlikely to have any noncriminal value to its listeners. It's thus harmful, it lacks First Amendment value, and any such exception is unlikely to set a precedent for something materially broader. I feel quite confident of this.
- (2) When the speech, even though broadly published, has *virtually no noncriminal uses*, for instance when it reveals social security numbers or

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<sup>420</sup> See, e.g., *Smith v. United States*, 431 U.S. 291 (1977) (upholding criminal liability for distributing obscenity, despite Justice Stevens's arguments in dissent, 431 U.S. at 311-16, that only civil remedies should be allowed in such cases); *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, 349 (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 350.

<sup>421</sup> See *supra* Part IV.A.2.a.

computer passwords:<sup>422</sup> This speech is likewise harmful and lacks First Amendment value. Here, I'm more tentative, largely because I think the line-drawing problems increase the risk that valuable speech will be erroneously denied protection, and because I think this exception may indeed eventually be used to support other, less justifiable restrictions on broadly published speech. Nonetheless, it seems to me that these risks are sufficiently small to justify allowing a narrow exception.

- (3) When the speech facilitates *extraordinarily serious harms, such as nuclear or biological attacks*:<sup>423</sup> This speech is so harmful that it ought to be restricted even though it may have First Amendment value. Here, I'm again somewhat tentative, because I think there are serious definitional problems here, a near certainty that some valuable speech will be lost, and a substantial possibility that the restriction may lead to broader ones in the future. Nonetheless, extraordinary threats sometimes do justify extraordinary measures, if care is taken to try to keep those measures limited enough that they don't become ordinary.

It also seems to me—though it didn't seem to me when I first set out to write this article—that two other kinds of restrictions are somewhat plausible, though I ultimately conclude that they aren't worthwhile:

- (1) There is a plausible argument that speech should be restrictable when *its only value (other than to criminals) seems to be entertainment*.<sup>424</sup> The Court has rightly held that entertainment should generally be protected because it often comments on moral, political, spiritual, or scientific matters—but this need not mean that particular details in works of entertainment should be categorically protected even when they're unnecessary to the broader themes. At the same time, any special exception for entertainment is likely to be not very beneficial, and is likely to pose substantial risks of error, excessive caution on the part of authors, and potential slippage to broader restrictions.
- (2) Though *Ginzburg v. New York*, which held that how a work is marketed may affect its First Amendment status, does not enjoy a great reputation, it may actually make a surprising amount of sense: When a work is dual-use, *some marketing or framing of the work may be intended to appeal predominantly to those who would engage in the harmful and valueless use*, rather than the valuable use.<sup>425</sup> Such marketing or framing might be outlawed without outlawing the underlying information. Nonetheless, here too the marginal benefit of banning works that are marketed or framed as crime-facilitating is low enough, and the potential costs are high enough, that on balance such bans are probably not worthwhile.

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<sup>422</sup> See *supra* Part IV.A.2.b.

<sup>423</sup> See *supra* Part IV.D.1.b.

<sup>424</sup> See *supra* Part IV.A.3.c.

<sup>425</sup> See *supra* Part IV.C.1.b.

Finally, I feel fairly confident that some other potential distinctions—for instance, those based on the speaker’s intent,<sup>426</sup> on whether the speech is about scientific questions rather than political ones,<sup>427</sup> or whether it is on a matter of “private concern,” “public concern,” or “unusual public concern”<sup>428</sup>—are not terribly helpful.

## V. CONCLUSION

The above analysis has suggested a test for crime-facilitating speech. More importantly, though, I hope it has shown several other things, which should be relevant even to those who disagree with my specific proposal.

1. Many important First Amendment problems—such as the ones with which the Introduction begins—turn out to be about 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 the general problem may thus help solve many specific ones.

2. Precisely because the specific problems are connected, they ought to 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<sup>429</sup>—may set an unexpected and unwelcome precedent for other situations.

3. Much crime-facilitating speech has many lawful, valuable uses.<sup>430</sup> Among other things, knowing just how people commit crimes can help the law-abiding learn 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, though it can also help 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.

4. Some initially appealing answers—for instance, punishing intentionally crime-facilitating speech but not knowingly crime-facilitating speech, allowing crime-facilitating speech to be restricted when the restriction is done using laws of general applicability, and applying strict scrutiny—ultimately prove not very

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<sup>426</sup> See *supra* Part IV.B.2.

<sup>427</sup> See *supra* Part IV.A.3.a.

<sup>428</sup> See *supra* Part IV.A.3.d.

<sup>429</sup> See, e.g., *supra* note 47

<sup>430</sup> See *supra* Part II.B.

helpful.<sup>431</sup> Whatever one might think is the right answer here, I hope I've demonstrated that these are wrong answers, or at least seriously incomplete ones. Likewise, it's simply wrong to say that works such as *Hit Man* have no noncriminal value,<sup>432</sup> or to think that such works could be easily banned on the grounds that the publisher's purpose is to promote crime.<sup>433</sup> Perhaps such works should indeed be restrictable, but they can't be restricted on these grounds.

5. The problems with applying these initially appealing proposals to crime-facilitating speech suggest that the proposals 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.<sup>434</sup> Likewise for assuming that strict scrutiny can provide the answer,<sup>435</sup> 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.<sup>436</sup> Conversely, other approaches—such as, for instance, focusing 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.<sup>437</sup>

6. The existence of the Internet may indeed make a significant difference for First Amendment analysis.<sup>438</sup> Though crime-facilitating speech on the Internet should be treated the same as crime-facilitating speech elsewhere, the creation of the Internet makes it much more difficult to fight crime-facilitating speech anywhere.<sup>439</sup>

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<sup>431</sup> See *supra* Parts IV.B.2, III.A, and III.B.

<sup>432</sup> Compare, e.g., note 362 (quoting the *Rice v. Paladin Enterprises* decision's arguments to this effect) with *supra* Part II.B.4 (arguing that most of *Hit Man*'s readers likely aren't potential criminals, but are merely curious or interested in vicarious thrills, which is a form of noncriminal value).

<sup>433</sup> See *supra* text accompanying notes 307-309.

<sup>434</sup> 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, 1548 (2003); cf. Jennifer Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 308 (2002) (describing the pre-*Black* lower court caselaw, which generally did not require intent); see also Robert Austin Ruescher, *Saving Title VII: Using Intent To Distinguish Harassment from Expression*, 23 REV. LITIG. 349 (2004) (proposing an intent test for hostile environment harassment cases, which I think would be a mistake for reasons similar to those discussed in Part IV.B.2). Likewise, I think some lower courts have erred in concluding that knowledge that speech will cause a certain harm, or recklessness about that possibility, should suffice to justify restricting the speech. See *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*); *Falwell v. Flynt*, 797 F.2d 1270, 1275 (4th Cir. 1986) (same), *rev'd sub nom. Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

<sup>435</sup> See *supra* note III.B.

<sup>436</sup> See Volokh, *Speech as Conduct*, *supra* note 136.

<sup>437</sup> See *supra* note 174.

<sup>438</sup> 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, 334 (2000); Volokh, *Cheap Speech and What It Will Do*, *supra* note 285, at 1846-47.

<sup>439</sup> See Godwin, *supra* note 34 (making this point in the wake of the *Hit Man* case).



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 first 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,” “manual for independent contractors,” and “rex feral,” the pseudonym of the author) found seven more copies. And because many such sites appear to be mirror sites run by people who intend only to fight censorship, not to facilitate crime,<sup>440</sup> they are legally immune from laws that punish intentionally crime-facilitating speech.<sup>441</sup>

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 broad ban indeed, which may encompass many textbooks, newspapers, and other reputable publishers.<sup>442</sup> 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,<sup>443</sup> here most of the would-be criminal users are likely to be willing to invest a little effort into finding the crime-facilitating text. And a little effort is all they’re likely to need.

This substantially decreases the benefits of banning crime-facilitating speech—though, as Part II.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,<sup>444</sup> might seem appealing to some if it will probably 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, this presupposes the current Internet regulatory framework, where the government generally leaves intermediaries, such as service providers and search engines, largely unregulated.<sup>445</sup> Under this approach, civil lawsuits or criminal prosecutions will do little to suppress the online distribution of *Hit Man* or *The*

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<sup>440</sup> See, e.g., sites cited *supra* notes 311-312.

<sup>441</sup> See, e.g., *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 252 (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).

<sup>442</sup> See *supra* Part II.B.

<sup>443</sup> For instance, when the speech is libel, tangible copies that infringe copyright, speech that reveals private facts about a person, and obscene spam that’s sent to unwilling viewers, reducing the dissemination of the speech would roughly proportionately reduce the harm done by that speech.

<sup>444</sup> See, e.g., Part IV.B.2.

<sup>445</sup> See 47 U.S.C. § 230; *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). *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).

*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 wouldn't block 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 relay sites 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).<sup>446</sup>

This law, though, would be much more intrusive—though perhaps much more effective—than any Internet regulation that we have today; and I suspect that such a law would face much greater opposition than, say, 18 U.S.C. § 842(p) (the new bombmaking information ban) did.<sup>447</sup> 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.<sup>448</sup> 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.

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<sup>446</sup> 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); Emma Kate Symons, *Labor Plan To Shield Kids from Net Porn*, AUSTRALIAN, Aug. 16, 2004, at 5 (likewise, aimed at ordering service providers to block access by children to hard-core pornography).

<sup>447</sup> See *supra* note 2. 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 hypothetical new proposal would go after *knowingly* crime-facilitating speech. The hypothetical regulation would also mean more work and 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 the regulation 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>.

<sup>448</sup> See Vandana Pednekar-Magal & Peter Shields, *The State and Telecom Surveillance Policy: The Clipper Chip Initiative*, 8 COMM. L. & POL'Y 429 (2003) (discussing the political defeat of the Clipper Chip proposal, which would have mandated that encryption hardware contain a back door for government surveillance).

Crime-facilitating speech thus remains one of the most practically and theoretically 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.