

SPEECH AS CONDUCT: GENERALLY APPLICABLE LAWS,  
ILLEGAL COURSES OF CONDUCT, “SITUATION-ALTERING  
UTTERANCES,” AND THE UNCHARTED ZONES

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I. SPEECH AS CONDUCT

When, if ever, should speech lose its First Amendment protection on the grounds that it’s really just conduct? Let us set aside speech or expressive conduct that’s being restricted because of its noncommunicative aspects, for instance because the speakers are blocking traffic or are being too loud.<sup>1</sup> Rather, let’s focus on situations where speech causes harm because of its content.

Consider, for instance, a book that explains how a crime can be committed. May this speech be restricted on the grounds that it constitutes the “conduct” of aiding and abetting, and is thus not subject to First Amendment protection at all? Or consider racist, religiously bigoted, or sexist statements that create an offensive work, educational, or public accommodations environment. May they be freely restricted because they aren’t speech but rather the “conduct” of harassment?

There are at least three main kinds of such “it’s conduct, not speech” arguments. First, some think speech should be treated as conduct when it has the same effects as harmful conduct, and is covered by a law that restricts all conduct that has those effects. This can happen in many situations:

- (a) Publishing a book that describes how to grow marijuana might constitute intentional or knowing aiding and abetting of crime.<sup>2</sup>

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<sup>1</sup> See *United States v. O’Brien*, 391 U.S. 367, 382 (1969) (upholding a restriction because it was “limited to the noncommunicative aspect of O’Brien’s conduct”).

<sup>2</sup> See *infra* note 25 (discussing how such liability might be imposed).

- (b) Publishing a newspaper article or Web page that points to an infringing site may constitute contributory copyright infringement.<sup>3</sup>
- (c) Publishing a news story that reveals the name of a witness, and thus unintentionally helps a criminal intimidate or kill the witness, may violate laws that bar knowing, reckless, or negligent crime facilitation.<sup>4</sup>
- (d) Publishing a news story that reveals the existence of a wiretap may help the wiretap targets escape justice, and may thus violate obstruction of justice laws.<sup>5</sup>
- (e) Teaching one's child racist, pro-polygamy or pro - or anti-homosexuality views may (in the views of some family court judges) be against the best interests of the child, and may therefore lead to loss of custody or diminished visitation.<sup>6</sup>
- (f) Saying things that create an offensive work, educational, public accommodation, or housing environment based on race, religion, sex, age, disability,<sup>7</sup> or sexual orientation might violate antidiscrimination law.<sup>7</sup>

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<sup>3</sup> Contributory infringement is generally defined 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. *See, e.g.*, *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 265 (9th Cir. 1996). This literally covers the publication of pointers to infringing Web sites, as some cases and a statute, *see* Eugene Volokh, *Crime-Facilitating Speech* \_\_\_\_ (in draft), have recognized. The cases involved clickable links, but giving the URL of an infringing site in plain text would fit the contributory infringement definition, too.

<sup>4</sup> *See, e.g.*, N.Y. PENAL CODE § 115.00 ("A person is guilty of criminal facilitation . . . when, believing it probable that he is rendering aid . . . to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony."); Volokh, *Crime-Facilitating Speech*, *supra* note 3, at \_\_\_\_ (citing other such laws); *id.* at \_\_\_\_ (citing cases where such publications have led to civil liability, though under the speech-specific invasion of privacy tort rather than under a speech-neutral crime facilitation theory).

<sup>5</sup> *See, e.g.*, 18 U.S.C. § 1512(c) (outlawing "corruptly . . . imped[ing] any official proceeding"); Volokh, *Crime-Facilitating Speech*, *supra* note 3, at \_\_\_\_ (citing authorities that treat helping a person escape as obstruction of justice).

<sup>6</sup> *See, e.g.*, *Vilakazi v. Maxie*, Mass. Probate Ct. No. 479549 (Aug. 7, 1975) (changing custody largely based on mother's racist views), *aff'd*, 371 Mass. 406 (1976); *Shepp v. Shepp*, 821 A.2d 635 (Pa. Super. Ct. 2003) (likewise as to father's pro-polygamy views); *J.L.P.(H) v. D.J.P.*, 643 S.W.2d 865 (Mo. App. 1982) (likewise as to father's pro-homosexuality views); *cf. In re E.L.M.C.*, 2004 WL 1469410 (Colo. App.) (reversing a trial court decision ordering a parent not to teach her child anti-homosexuality views, but leaving open the possibility that the order may be reentered if the trial court finds that "the child's physical health would be endangered or the child's emotional development significantly impaired").

<sup>7</sup> *See* Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 L. & CONTEMP. PROBS. 299 (2000) (describing hostile

- (g) Speaking out against a proposed group home for the mentally disabled might violate the Federal Housing Act's ban on "interfer[ing] with any person in the exercise or enjoyment" of the right to be free from housing discrimination based on handicap.<sup>8</sup>
- (h) Speech that helps the election of an anti-war candidate may violate treason law—which prohibits intentionally aiding the enemy in time of war—if the speaker thinks the enemy deserves to win the war.<sup>9</sup>
- (i) Newspaper ads, billboards, or leafleting campaigns that praise jury nullification may be punishable under laws that prohibit all attempts to influence jurors.<sup>10</sup>
- (j) Producing and distributing movies that stimulate copycat crimes may be found to be tortious under general negligence principles.<sup>11</sup>
- (k) Giving children sexually themed material, or for that matter political material that most people would see as evil, may violate laws that ban "impair[ing] the . . . morals of . . . [a] child."<sup>12</sup>

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environment harassment law, and giving examples of its application to otherwise protected speech).

<sup>8</sup> See *White v. Lee*, 227 F.3d 1214, 1229-30 (9th Cir. 2000) (concluding that the Act, which primarily covers nonspeech activity, might be read as covering, for instance, "persuasive editorial[s] on a zoning dispute," but holding that such a reading should be rejected because it "would quickly run afoul of the First Amendment").

<sup>9</sup> See 18 U.S.C. § 2381 (defining treason as including a citizen's "adher[ing] to [the United States'] enemies, giving them aid and comfort"); *Kawakita v. United States*, 343 U.S. 717, 736, 742-44 (1952) (holding that "adhering" simply requires an intention to help the enemy).

<sup>10</sup> See, e.g., CONN. GEN. STAT. ANN. § 53a-154 ("A person is guilty of tampering with a juror if he influences any juror in relation to any official proceeding . . . ."); FLA. STAT. ANN. § 918.12 ("Any person who influences the judgment or decision of any grand or petit juror . . . with intent to obstruct the administration of justice, shall be guilty of a felony . . . ."); *State v. Springer-Ertl*, 610 N.W.2d 768 (S.D. 2000) (holding that people could be punished for posting material urging jurors to acquit a particular defendant, but only if the speech was "designed to influence specifically jurors and persons summoned or drawn as jurors," as opposed to speech "intend[ed] to inform the public or express a public opinion, regardless of whether jurors—drawn, summoned, or sworn—may be among the public"); *id.* at 778 (Sabers, J., dissenting) (concluding that a statute banning communication to jurors intended to influence the jurors' decisions was a "content-neutral statute" that was "narrowly tailored to prevent criminal behavior" and was "unrelated to the suppression of free expression").

<sup>11</sup> See, e.g., *Olivia N. v. NBC*, 178 Cal. Rptr. 888 (Cal. Ct. App. 1981) (rejecting negligence liability in such a case based on the First Amendment); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989) (same). See also *In re Factor VIII or IX Concentrate Blood Products Litigation*, 25 F. Supp. 2d 837, 842 (N.D. Ill. 1998) (imposing negligence liability for the National Hemophilia Foundation's negligently false statements about the safety of the blood supply, partly because of "the well-established principle that the protections of the First Amendment do not shield the press from laws of general applicability").

<sup>12</sup> See, e.g., CONN. GEN. STAT. § 53-21. Many people plausibly view many kinds of

In all these cases, the speech would be restricted because of what it communicates—because its content informs, persuades, or offends people—and because of the harms that flow from this informing, persuasion, or offense. Yet some say the First Amendment isn’t implicated, because the law punishes conduct, not speech: “[S]peech 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.”<sup>13</sup> Others

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speech as impairing the morals of a child. *Cf., e.g.,* NASSAU (N.Y.) COUNTY LOCAL LAW 11-1992 (banning the sale to children under age 17 of trading cards depicting criminals, on the theory that such cards impair the “ethical and moral development of our youth”); *Ginsberg v. New York*, 390 U.S. 629, 641-42 (1968) (discussing a similar justification for restrictions on sexually themed material); European Union Council Directive of Oct. 3, 1989 art. 22, para. 1 (“Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.”). Such a speech-specific restriction would of course trigger First Amendment scrutiny; the question posed by the hypothetical is whether the government could avoid such scrutiny by prosecuting such speech under a generally applicable law banning “impair[ing] the . . . morals of . . . [a] child.”

<sup>13</sup> *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997); *see id.* at 242 (arguing that publishing a book with the intent to help readers commit crime is punishable under generally applicable “criminal aiding and abetting” law); *Burns v. City of Detroit*, 660 N.W.2d 85, 94 (Ct. App. Mich. 2003) (concluding that hostile environment harassment law is constitutional because the state antidiscrimination statute “is essentially directed toward discriminatory conduct, and oral remarks such as those at issue here are ‘swept up incidentally within the reach of a statute directed at conduct rather than speech’”); *Aguilar v. Avis Rent a Car Sys., Inc.*, 980 P.2d 846, 854 (Cal. 1999) (plurality) (defending the injunction of speech under hostile environment harassment law partly because “A statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity.”); *Department of Corrections v. State Personnel Bd.*, 69 Cal. Rptr. 2d 34, 53 (Cal. Ct. App. 1997) (Sims, J., dissenting) (concluding that an employee’s berating a coworker for supposedly having been hired because of affirmative action created an “abusive work environment” and thus constituted “constitutionally unprotected conduct—unlawful discrimination—rather than protected expression”); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) (enjoining offensive speech in the workplace under a hostile environment theory because “[pornographic] pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment”); *Doe v. University of Mich.*, 721 F. Supp. 852, 862 (E.D. Mich. 1989) (dictum) (distinguishing “pure speech” from “sexually abusive and harassing conduct” such as workplace harassment); *Trayling v. Board of Fire and Police Comm’rs*, 652 N.E.2d 386, 395 (Ill. App. 1995) (defending sexual harassment rules partly on the grounds that “Prohibitions against sexual harassment are generally applicable laws,” though doing this in the special context of the government acting as employer); Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. OF SCI. & TECH. 273,

argue that the generally applicable law should be treated as akin to a content-neutral restriction on expressive conduct, and thus fairly easily upheld under the deferential *O'Brien* test<sup>14</sup> because the application of the law to the speech is just “incidental” to the law’s overall thrust<sup>15</sup>

Second, a different kind of “conduct, not speech” argument is sometimes made even to defend laws that do specifically target communication, such as statutes that ban the publication of bombmaking information. Speech, the argument runs, is punishable because it is part of an illegal “course of conduct,” or is perhaps “speech brigaded with action,”<sup>16</sup> a “speech act” rather than pure speech.<sup>17</sup> This is especially so

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377-78, 392 (2003) (generally endorsing “[t]he ‘speech act’ approach[, which] criminalizes speech because it is the act by which one either violates an independent criminal prohibition”—seemingly referring to prohibitions that say nothing about speech—“or facilitates the violation of such a prohibition”); Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 768 (2001) (“A person who breaks a law not directed at speech can claim no constitutional immunity just because he was acting for expressive reasons.”). Some have also interpreted *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992), as taking this view, but I believe that’s a mistake, see *infra* note 56.

<sup>14</sup> See, e.g., *United States v. O’Brien*, 391 U.S. 367, 382 (1969).

<sup>15</sup> See Rodney Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 187 (1990) (defending application of hostile environment law to restrict offensive workplace speech because “The gravamen of the tortious activity in [certain] cases . . . is arguably the proscription of underlying nonspeech conduct such as . . . anti-social behavior in the workplace. The penalty exacted on speech in such cases appears incidental to the governmental purpose . . . .”); Elena Kagan, *When a Speech Code Is a Speech Code*, 29 U.C. DAVIS L. REV. 957, 965 & n.24, 968 (1996) (seemingly suggesting that policies banning “harassment” in universities, presumably referring to hostile environment harassment, should only be reviewed under *O’Brien*, even when they’re applied to otherwise fully protected speech); *Schutz v. Schutz*, 581 So.2d 1290, 1292 (Fla. 1991) (upholding injunction ordering mother to say things “necessary to restore and promote the frequent and continuing positive interaction (e.g., visitation, phone calls, letters) between the children and their father and to refrain from doing or saying anything likely to defeat that end,” on the grounds that such an order was simply “incidental” to protecting the best interests of the child, and should therefore be reviewed under *O’Brien*); *Borra v. Borra*, 756 A.2d 647, 651 (N.J. Super. 2000) (taking a similar view); Laurel S. Banks, *Schutz v. Schutz*, 31 U. LOUISVILLE J. FAM. L. 105, 115 (1992-93) (approving of the *Schutz* analysis). But see *In re Marriage of Olson*, 850 P.2d 527, 532 (Wash. App. 1993) (treating restrictions such as those in *Schutz* as content-based); David L. Ferguson, Comment, *Schutz v. Schutz: More than a Mere “Incidental” Burden on First Amendment Rights*, 16 NOVA L. REV. 937, 951 (1992) (likewise).

<sup>16</sup> See, e.g., *Rice v. Paladin Press, Inc.*, 128 F.3d 233, 244 (4th Cir. 1997) (treating “speech brigaded with action” as equivalent to “speech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct,” citing *Giboney*).

<sup>17</sup> U.S. DEP’T OF JUSTICE, 1997 REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, available at <http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html>, Introduction (“[T]he constitutional analysis is quite different where the government punishes speech that is an integral part of a transaction involving conduct the government otherwise is empowered to

when speech seems likely to cause harms that would be punishable if caused by conduct rather than speech—when “words are bullets,” in the sense of being “a specific tool or weapon used . . . for the express purpose” of bringing about a harmful result.<sup>18</sup> Such arguments often quote *Giboney v. Empire Storage & Ice Co.*, a 1949 case that asserted that

It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. . . . [I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.<sup>19</sup>

And *Giboney* has been applied to justify, among other things, restrictions on (1) speech that advocates crime, (2) speech that explains how crimes can be committed, (3) doctors’ speech recommending medicinal marijuana to their patients, (4) speech that urges political boycotts, (5) speech that creates an offensive work environment, (6) racially offensive business names, and even (7) public profanity.<sup>20</sup>

Third, an influential book—Professor Kent Greenawalt’s *Speech, Crime, and the Uses of Language* (1989)—has argued that certain kinds of speech, such as offers, agreements, orders, permissions, and some threats constitute “situation-altering utterances” and should therefore be treated as unprotected conduct. Finally, the “speech as conduct” argument is sometimes made to explain some of the uncharted zones of First Amendment law: categories of speech whose First Amendment status the Court has never squarely confronted, such as aiding and abetting, criminal solicitation, conspiracy, perjury, agreements to restrain trade, and professional advice to clients. Most lawyers would likely agree that such speech should generally be unprotected or at least less protected; and a common explanation for the Court’s lack of attention to these speech restrictions is that the speech is actually conduct, rather than pure speech,

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prohibit; such ‘speech acts’ . . . may be proscribed without much, if any, concern about the First Amendment, since it is merely incidental that such ‘conduct’ takes the form of speech.”). Because the Justice Department report is far more easily accessible to readers on the Department Web site than it is in the limited print edition that was submitted to Congress, I will cite to the online version.

<sup>18</sup> Cf. 14 LA. REV. STAT. § 390 (enacted 1962) (supporting a ban on Communist propaganda by arguing that “‘Words are bullets’ and the communists know it and use them so”; “The danger of communist propaganda lies . . . in the fact that it is a specific tool or weapon used by the communists for the express purpose of bringing about the forcible total destruction or subjugation of this state and nation . . .”).

<sup>19</sup> 336 U.S. 490, 498, 502 (1949). I set aside for purposes of this Article situations where speech is really just used as evidence of nonspeech conduct (for instance, when a defendant is prosecuted for killing someone, and some of the defendant’s statements are used to show his motive). See *infra* Part III.B.2.

<sup>20</sup> See sources cited *infra* notes 120-129.

and thus unprotected by the First Amendment.

This Article will argue that these “it’s not speech, it’s conduct” doctrines are misguided. The doctrines, if followed, would require courts to focus on the wrong questions, and would often lead courts to reach the wrong results (for instance, in many of the situations that I give as examples above).

Part II will argue that generally applicable laws can’t be upheld simply because they’re *facially* content-neutral, or even facially speech-neutral. Rather, when a generally applicable law is content-based *as applied*—when speech triggers the law because of the harms that may flow from what the speech says—it should be subject to full-fledged First Amendment scrutiny. If someone interferes with the draft by blocking the entrance to a draft office, he may properly be punished under a law that bans interfering with the draft. If someone interferes with the draft by publishing a book that persuades people to resist the draft, he may not be punished, though his conduct might violate the same generally applicable law.

Speech and conduct, or more precisely the speech elements of some behavior and its nonspeech elements, should indeed be distinguished, and the nonspeech elements may be much more heavily regulated. But the distinction should be the one suggested by *United States v. O’Brien* and the other cases that distinguish content-neutral from content-based speech restrictions: Expression can generally be regulated to prevent harms that flow from its noncommunicative elements (noise, traffic obstruction, and the like), but not harms that flow from what the expression expresses.<sup>21</sup> Neither generally applicable laws nor specially targeted laws should be allowed to restrict speech because of what it says, unless the speech falls within one of the exceptions to protection (for instance, because it’s a threat or a false statement of fact) or unless the restriction passes strict scrutiny.

Moreover, this analysis cuts against some commentators’ arguments that First Amendment doctrine should primarily focus on smoking out impermissible speech-restrictive motivations on the legislature’s part.<sup>22</sup> When the law generally applies to a wide range of conduct, and sweeps in speech together with such conduct, there’s little reason to think that lawmakers had any motivation with regard to speech, much less an impermissible one. And yet, as I argue, such a law should still be unconstitutional when it’s applied to speech based on its content—even though the legislature’s motivations may have been quite benign.<sup>23</sup>

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<sup>21</sup> See, e.g., *United States v. O’Brien*, 391 U.S. 367, 382 (1969).

<sup>22</sup> See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Rubinfeld, *supra* note 13.

<sup>23</sup> See *infra* Part II.E.1.

Part III will argue that the *Giboney* doctrine, whether framed as applying to “speech acts,” to speech “brigaded with action,” or to speech that carries out an illegal “course of conduct,” is indeterminate, dangerous, and inconsistent with more recent cases. *Giboney* and the cases that cite it don’t explain which speech should be punishable and which should not. The *Giboney* doctrine has been used to support the punishment of speech that under current law is rightly protected. And even when the *Giboney* argument has been used to support restricting speech that should indeed be restrictable, it still hasn’t adequately explained where the First Amendment boundaries should be drawn.

Part IV will make two observations about the “situation-altering utterances” argument. First, the category that Professor Greenawalt proposes is narrower than its name might suggest. Many utterances that in many senses alter the situation would remain presumptively protected speech even under his analysis. That includes the speech in nearly all the examples given above. The “situation-altering utterances” argument is by its own terms inapplicable there.

Second, it seems to me that the key insight underlying the argument—that utterances lose their protection when they alter the speaker’s, the listener’s, or some third party’s perceived moral obligations—is not quite persuasive. As I’ll argue in Part IV.B, it’s not clear why such an effect should change the First Amendment status of speech; I’ll point to some examples of speech that likewise alters people’s felt moral obligations but that seems to be pure speech, rather than conduct. I think *Speech, Crime, and the Uses of Language* is right to conclude that agreements, offers, and other categories of speech should be unprotected. The reason for this, though, doesn’t seem to be simply that such statements are “situation-altering.”

All this, though, leaves several First Amendment puzzles. Just why are criminal agreements, criminal solicitation, and most verbal aiding and abetting punishable, even when they are accomplished solely through words? Why can some speech be restricted under antitrust law or securities law? Part V will argue that these puzzles should be solved the same way the Court has explained why incitement, libel, fraud, threats, and other speech are punishable: By recognizing that these speech restrictions are indeed speech restrictions, and by delineating the proper constitutional boundaries of these restrictions.

This delineation would require a considerable amount of work, and this Article will only sketch the outlines of this task. But embracing this task is better—and more likely to lead to right results—than avoiding it through simply labeling speech “conduct,” with no explanation for why certain forms of communication are protected and certain others are not.



## II. LAWS OF GENERAL APPLICABILITY

A. *Content-Based as Applied vs. Content-Neutral as Applied*

Let's say that a generally applicable law is applied to speech, though on its face the law doesn't mention speech. Sometimes, as in *United States v. O'Brien*, the law may be triggered by the "noncommunicative impact of [the speech], and [by] nothing else."<sup>24</sup> A law barring noise louder than 90 decibels, for instance, might apply to the use of bullhorns in a demonstration. We might call such a generally applicable law "content-neutral as applied," because it applies to speech without regard to its content.

But sometimes the law may be triggered by what the speech communicates. The law may, for instance, prohibit any conduct that is likely to have a certain effect, and the effect may sometimes be caused by the content of speech: A law prohibiting aiding and abetting crime, for example, might in some circumstances be violated by a person's publishing a book that describes how a crime can be easily committed.<sup>25</sup>

We might call this law "content-based as applied," because its application is triggered by the content of the speech. The law doesn't just have the effect of restricting some speech more than other speech—most content-neutral laws do that.<sup>26</sup> Rather, the law applies to speech precisely because of the harms that supposedly flow from the content: Publishing and distributing the book violates the aiding and abetting law because of

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<sup>24</sup> See, e.g., *United States v. O'Brien*, 391 U.S. 367, 382 (1969) (holding that a generally applicable law banning destruction of draft cards should be judged under a relatively forgiving First Amendment standard, rather than strict scrutiny, because it applied to the defendant "[f]or [the] noncommunicative impact of his conduct, and for nothing else"); Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 38, 45 (1973) (similarly distinguishing laws that restrict speech because of a government "non-speech interest," which turns on the noncommunicative impact of the speech, from laws that restrict expression because of a government "anti-speech interest," which turns on the harms "caused by the meaning effect of the speech").

<sup>25</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"); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 242-43 (4th Cir. 1997) (arguing that publishing a book that intentionally explains how to commit a crime may constitute aiding and abetting of the crime); U.S. DEP'T OF JUSTICE, *supra* note 17, at text accompanying notes 55-60 (taking the same view as *Rice*). See generally Volokh, *Crime-Facilitating Speech*, *supra* note 3, at \_\_\_\_.

<sup>26</sup> For instance, my sense is that bans on residential picketing in the late 1980s probably disproportionately affected speech criticizing abortion providers, since the pro-life movement seems to have used residential picketing more than many other political movements did.

what the book says.

The rest of this Part will argue that laws that are content-based as applied should be presumptively unconstitutional, just as facially content-based laws are presumptively unconstitutional. Both presumptions may sometimes be rebutted, for instance if the speech falls within an exception to protection,<sup>27</sup> or if the speech restriction passes strict scrutiny.<sup>28</sup> But generally speaking, when a law punishes speech because its content may cause harmful effects, that law should be treated as content-based.

### B. Supreme Court Cases

The Court, it turns out, has actually confronted many cases where a law was content-based as applied. In all those cases, either the Court held that the speech was constitutionally protected—or, if it held otherwise, the decision is now viewed as obsolete.

Consider, for instance, the World War I-era cases *Debs v. United States*, *Frohwerk v. United States*, and *Schenck v. United States*.<sup>29</sup> These cases, which upheld the criminal punishment of antiwar speech, are now generally seen as having been wrongly decided.<sup>30</sup> But the convictions involved the violation of a generally applicable provision of the Espionage Act, which barred all conduct—speech or not—that “willfully obstruct[ed] the recruitment or enlistment service of the United States, to the injury of the service or the United States.”<sup>31</sup>

The Act could have been constitutionally applied to burning a recruiting

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<sup>27</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992).

<sup>28</sup> See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418-24 (1997).

<sup>29</sup> 249 U.S. 211 (1919); 249 U.S. 204 (1919); 249 U.S. 47 (1919).

<sup>30</sup> See, e.g., ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLITICS* 966 (2d ed. 2002); Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 569 (2000); Michael Vitiello, *The Nuremberg Files: Testing The Outer Limits of the First Amendment*, 61 OHIO ST. L.J. 1175, 1218-19 (2000).

<sup>31</sup> Espionage Act of 1917, sec. 3, 65th Cong., sess. I, ch. 30, 40 Stat. 217-31. See also *Gara v. United States*, 178 F.2d 38, 41 (6th Cir. 1949) (upholding conviction for “knowingly counsel[ing], aid[ing], or abet[ting]” draft evasion, partly on the grounds that “violation of [the law], particularly as to aiding and abetting, might be consummated without any expression of opinion,” and that the First Amendment provides no protection just because “the acts of violation are consummated, as counseling always must be, through the medium of words”), *aff’d by an equally divided Court*, 340 U.S. 857 (1949).

*Debs* and *Frohwerk* involved prosecutions solely under the generally applicable provision of the Act. *Schenck* was also convicted on two counts of unlawfully mailing certain material; those counts did not involve generally applicable provisions. I suspect, though, that most critics of the *Schenck* are at least as concerned about the generally applicable Espionage Act, which had the effect of outlawing anti-draft speech generally, as about the provisions that were limited to distributing anti-draft speech through the mails.

office (nonspeech conduct), or perhaps to disrupting the business of a recruiting office by using bullhorns outside the office windows (speech punished because of its noncommunicative impact).<sup>32</sup> But under modern First Amendment law, convictions for antiwar leafleting or speeches would be overturned, and the law treated as content-based,<sup>33</sup> because such antiwar speech interferes with the draft precisely because of its content.<sup>34</sup>

More broadly, if generally applicable laws were immune from First Amendment scrutiny, then the government could suppress much speech that is now constitutionally protected—advocacy of illegal conduct, praise of illegal conduct, or even advocacy of legal conduct. A generally applicable ban on “assisting, directly or indirectly, conspiracies to overthrow the government” could prohibit advocacy of overthrow alongside physical conduct such as making bombs: Advocacy of overthrow assists such overthrow, by persuading people to join or at least not oppose the revolutionary movement. A ban on “assisting interference with the provision of abortion services” could ban speech that praises or defends anti-abortion blockaders or vandals, and not just actual blockading or vandalism.

A ban on “conduct that knowingly or recklessly aids the enemy in time of war” could, among other things, ban speech that helps the election of an anti-war candidate.<sup>35</sup> Such speech could even be banned by the existing law

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<sup>32</sup> Cf. *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (plurality) (holding that the government may to some extent restrict sound amplification); *id.* at 97 (Frankfurter, J., concurring in the judgment) (agreeing on this point); *id.* (Jackson, J., concurring in the judgment) (likewise). Cf. L.A. Powe, Jr., *Searching for the False Shout of “Fire”*, 19 CONST. COMM. 345, 347 (2002) (concluding that Justice Holmes reached the result in *Schenck* precisely because he saw it as involving a generally applicable criminal law, rather than a speech restriction; “The distinction between an attempt by conduct and an attempt by speech was, for Holmes, a distinction without a difference.”).

<sup>33</sup> See, e.g., *Carey v. Brown*, 447 U.S. 455, 465 (1980) (citing *Schenck* as an example of a case that involved a content-based distinction); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (plurality) (likewise).

<sup>34</sup> See Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 645-46 (1992) (likewise noting that many of the cases mentioned in the text involved a generally applicable law, but that the speech should nonetheless have been protected against those laws); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198-99 (1983) (characterizing the law in *Schenck* as a “content-based restriction” “which prohibited expression critical of the war and the draft,” though the portion of the Act that generally prohibited expression critical of the war and the draft—as opposed to merely false information about the war—was generally applicable to conduct as well as speech).

<sup>35</sup> See Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, *supra* note 28, at 2425-31 (describing this hypothetical); cf. Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1859-1865, at 454 (Don E. Fehrenbacher ed. 1989) (arguing that such anti-

of treason, which bars intentionally aiding the enemy during wartime, if a prosecutor can persuade the jury that the speaker was motivated by a desire to help the other side.<sup>36</sup> A ban on “conduct that interferes with the enforcement of judicial decrees” may be applied to speech that criticizes judges or judicial actions, on the theory that such criticism may lead people to lose respect for courts, and thus to disobey court orders.<sup>37</sup>

All the speech in these examples may help bring about the harms that the government is trying to prevent using a generally applicable law. It may even involve “words that may have all the effect of force,” an example that *Schenck* gave as quintessentially unprotected speech (citing *Gompers v. Buck’s Stove & Range Co.*, which upheld an injunction against newspaper articles that urged a labor boycott).<sup>38</sup> The speech may have an effect that would be eminently punishable if it were brought about by force rather than communication. But the premise of the retreat from *Schenck*, and of the adoption of the *Brandenburg v. Ohio* rule, is that the government must generally tolerate such advocacy even when the persuasiveness or the informational content of the speech can lead to eventual harm.<sup>39</sup>

Similarly, consider *NAACP v. Claiborne Hardware*,<sup>40</sup> where the Court

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war speech may be punishable, though focusing more on the speech as advocacy of desertion rather than treason as such); MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”* 300-18 (2000) (discussing the Vallandigham incident); Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL OF RTS. J. 105, 121-22, 161 (1998) (likewise).

<sup>36</sup> See 18 U.S.C. § 2381 (defining treason as including a citizen’s “adher[ing] to [the United States’] enemies, giving them aid and comfort”); *Kawakita v. United States*, 343 U.S. 717, 736, 742-44 (1952) (holding that “adhering” simply requires an intention to help the enemy).

<sup>37</sup> See *Bridges v. California*, 314 U.S. 252 (1941) (striking down a contempt of court citation in such a case); *Pennekamp v. Florida*, 328 U.S. 331 (1946) (same); *Wood v. Georgia*, 370 U.S. 375 (1962) (same). These cases involved the common-law crime of contempt of court; contempt was sometimes defined quite generally as “disregard of the authority of the court” (a definition that would cover a wide variety of conduct, such as violation of a court order, as well as speech), and sometimes more specifically as covering a long list of behavior including “Dissemination of contemptuous publications.” See EDWARD M. DANGEL, *NATIONAL LAWYERS’ MANUAL—CONTEMPT* § 2 (1939). But as the example in the text shows, the same results could have been reached under a generally applicable contempt rule. See also Brenner, *supra* note 13 at 321 -22 (treating contempt of court law as a generally applicable rule, though acknowledging that “when criminal contempt is based on the communicative content of speech, it is an attempt to control speech that implicates the guarantees of the First Amendment”).

<sup>38</sup> 249 U.S. 47, 52 (1919) (citing 221 U.S. 418, 439 (1911)).

<sup>39</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 848 n.56 (2d ed. 1987) (“Moreover, however a law is *written*, it may not constitutionally be *applied* to punish speech on content-related grounds where nothing beyond abstract advocacy is shown, and where incitement is thus absent.”).

<sup>40</sup> 458 U.S. 886 (1982).

held that speech constituting tortious interference with business relations may nonetheless be constitutionally protected. This tort covers a variety of conduct, not just speech.<sup>41</sup> But when the interference flows from the persuasive or informative effect of speech—for instance, when the speech in *Claiborne* persuaded people to boycott a business, publicized the name of people who weren't complying with the boycott, or persuaded others to ostracize people who refused to join the boycott—the tort is treated as a speech restriction.

In some situations, the tort may be a constitutionally permissible restriction, for instance when the speech is a constitutionally unprotected threat, incitement, or the like.<sup>42</sup> But if the speech falls outside an exception to protection, and if it causes harm through its content, then the First Amendment protects the speech against the generally applicable tort just as much as it protects the speech against facially content-based laws.

The same is true, in considerable measure, for antitrust laws or more broadly laws that prohibit restraint of trade. Such laws are also generally applicable, and are generally used to punish conduct, not speech. But when organizations help restrain trade by lobbying legislatures and the public for anticompetitive regulations, *Eastern Railroad Conference v. Noerr Motors* and *United Mine Workers v. Pennington* hold that the speech may not be punished.<sup>43</sup>

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<sup>41</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 766B cmt. b, 767 cmt. c (citing *Tarleton v. McGawley*, 170 Eng. Rep. 153 (K.B. 1793), a case imposing liability for physically attacking trading partners, as the ancestor of this tort); see, e.g., *Lucas v. Monroe County*, 203 F.3d 964, 969 (6th Cir. 2000) (allowing cause of action based on discriminatory refusal by a county government to deal with a contractor); *H.J., Inc. v. International Tel. & Tel. Corp.*, 867 F.2d 1531, 1548 (8th Cir. 1989) (allowing cause of action based on defendants' selling product below cost in order to monopolize a market).

<sup>42</sup> See, e.g., *NAACP v. Claiborne Hardware*, 458 U.S. 886, 927-28 (1982); *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). *Claiborne Hardware* may be criticized on the grounds that some of the speech there was indeed threatening, especially against the backdrop of violence related to the boycott. But the Court concluded that the speech was indeed not an unprotected threat or unprotected incitement; and given this, the Court's further holding—which is that such presumptively protected speech couldn't be made the subject of an interference with business relations tort—seems quite correct.

<sup>43</sup> 365 U.S. 127 (1961); 381 U.S. 657 (1965). *Noerr* and *Pennington* reached a speech-protective result by interpreting the Sherman Act not to apply to anticompetitive lobbying or public advocacy; but it's clear that the Court's judgment was influenced by a desire to avoid a First Amendment violation. See, e.g., *Noerr*, 365 U.S. at 138; *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990). See also David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J. L. & PUB. POL'Y 293, 363-66 (1994) (arguing that *Noerr/Pennington* immunity makes sense only as a First Amendment exception to antitrust law, and not as a faithful interpretation of antitrust law standing alone).

These cases involved civil lawsuits, but surely speech should be at least as protected

This principle also applies when the speech causes harm because of its offensive content rather than its persuasive or informative content. Consider *Hustler Magazine v. Falwell*, which held that the tort of intentional infliction of emotional distress couldn't be used to punish a cruel and vulgar *Hustler* satire of Jerry Falwell.<sup>44</sup> Though claims under the emotional distress tort are often based on speech, speech is not an element of the tort. The publisher of *Hustler* for instance, would have been equally guilty of intentional infliction of emotional distress if he had played a highly embarrassing practical joke on Falwell.<sup>45</sup> But when the general law was applied to the magazine because of the content of its speech, the Court held such liability to be unconstitutional.<sup>46</sup>

The same is true of *Cohen v. California*, where Cohen was prosecuted for a violation of a generally applicable breach of the peace statute.<sup>47</sup> The statute would have applied equally to conduct (fighting), speech that breaches the peace because of its noncommunicative impact (loud speech in the middle of the night), and speech that breaches the peace because of its content (wearing a "Fuck the Draft" jacket). But the Court struck down the application of the law in this last situation, precisely because the law covered Cohen because of what he said.

Likewise, *Hess v. Indiana*,<sup>48</sup> *Te miniello v. City of Chicago*,<sup>49</sup> *Cantwell*

against criminal punishments as it is against civil suits.

<sup>44</sup> 485 U.S. 46 (1988).

<sup>45</sup> See, e.g., RESTATEMENT (SECOND) OF TORTS § 46, ill. 3 ("A is invited to a swimming party at an exclusive resort. B gives her a bathing suit which he knows will dissolve in water. It does dissolve while she is swimming, leaving her naked in the presence of men and women whom she has just met. A suffers extreme embarrassment, shame, and humiliation. B is subject to liability to A for her emotional distress.").

<sup>46</sup> The *Hustler* decision relied on the speech being on matters of public concern and about a public figure; the Court might yet recognize a free speech exception for intentional infliction of emotional distress where private figures or statements on matters of private concern are involved. But this would happen because that speech is seen as harmful and not valuable enough to be protected, not because the tort is a law of general applicability (since the tort's general applicability wasn't enough to save it in *Hustler*).

<sup>47</sup> 403 U.S. 15 (1971) (involving a statute that, in relevant part, barred people from "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by tumultuous or offensive conduct").

<sup>48</sup> 414 U.S. 105 (1973) (involving a statute barring people from "act[ing] in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting").

<sup>49</sup> 337 U.S. 1, 2 n.1 (1949) (involving a statute barring people from "making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace," with "breach of the peace" defined in a jury instruction as "misbehavior which violates the public peace and decorum" or "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or . . . molests the inhabitants in the enjoyment of peace and quiet by arousing alarm"). See also *Feiner v. New York*, 340 U.S.

*v. Connecticut*,<sup>50</sup> and *Edwards v. South Carolina*<sup>51</sup> all set aside breach of the peace and disorderly conduct convictions, though the statutes involved were content-based only as applied, not on their face. As the Court pointed out in *Cantwell*, “breach of the peace” legitimately “embraces a great variety of conduct destroying or menacing public order and tranquility,” including “violent acts”; but the First Amendment may be violated when conduct amounts to a breach of the peace due only to “the effect of [the speaker’s] communication upon his hearers.”<sup>52</sup>

So all the laws in these examples were facially speech-neutral. Most, and probably all, were enacted by legislatures or created by courts without any censorious motive, partly because their creators were trying to punish and prevent harm, not speech as such. Yet these cases—or, as to the Espionage Act cases, the modern repudiation of those cases<sup>53</sup>—treat the application of these laws based on the content of speech just as skeptically as the Court has treated facially content-based restrictions.<sup>54</sup> Likewise, later decisions treat *Cantwell*, *Cohen*, *Edwards*, and *Terminiello* as involving content-based speech restrictions.<sup>55</sup>

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315 (1951), which involved a statute stating that “Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned” “[u]ses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior,” “[a]cts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others,” or “[c]ongregates with others on a public street and refuses to move on when ordered by the police,” “shall be deemed to have committed the offense of disorderly conduct.” The conviction in *Feiner* was upheld, but only on the grounds that the speech was unprotected by the First Amendment because it posed a “clear and present danger of . . . immediate threat to public safety.”

<sup>50</sup> 310 U.S. 296, 308-09 (1940).

<sup>51</sup> 372 U.S. 229, 235-37 (1963) (involving a statute barring “disturbance of the public tranquility[] by any act or conduct inciting to violence,” but concluding that speech that disturbs the public tranquility because “the opinions which [the speakers] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection” is constitutionally protected even if it’s covered by such a breach of the peace statute).

<sup>52</sup> 310 U.S. 296, 308-09 (1940).

<sup>53</sup> See *supra* note 30.

<sup>54</sup> See Blasi, *supra* note 34, at 646 (noting this); David Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201, 222-23 (1997) (likewise distinguishing generally applicable laws that are applied to speech for reasons unrelated to its content from generally applicable laws that are applied to speech precisely because of its content).

<sup>55</sup> *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (“Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities ‘simply by averting [our] eyes.’ *Cohen v. California*.”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from proscribing speech,

I will argue below that the Court has indeed been right to condemn restrictions that are content-based as applied. But for now, these cases should at least show that any broad First Amendment immunity for generally applicable laws would be incompatible with many leading precedents.<sup>56</sup> The laws described in Part I should be treated as involving content-based speech restrictions. They shouldn't evade serious First Amendment scrutiny on the grounds that they are generally applicable.

### C. *The Press Cases*

So far, I've used the term "generally applicable law" simply to mean "a law applicable equally to a wide variety of conduct, whether speech or not." But "generally applicable law" can mean several different things, depending on context:

- (1) a facially speech-neutral law, which is to say a law applicable to a wide variety of conduct, whether speech or not;
- (2) a facially religion-neutral law, which is to say a law applicable equally to religious observers and to others; or
- (3) a facially press-neutral law, which is to say a law applicable equally to the press and to others.

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see, e.g., *Cantwell v. Connecticut*, . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid."); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation. Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob. See . . . *Terminiello v. Chicago*."); *Young v. American Theatres*, 427 U.S. 50, 64 (1976) (plurality) (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Cohen v. California*; . . . *Terminiello v. Chicago*.")); *Street v. New York*, 394 U.S. 576, 586 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. See, e.g., . . . *Edwards v. South Carolina*; *Terminiello v. City of Chicago*; cf. *Cantwell v. Connecticut*.").

<sup>56</sup> A few courts and commentators have cited *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992), for the proposition that there's no First Amendment problem when speech is subjected, based on its content, to generally applicable laws. See, e.g., *supra* note 13 (citing *Burns v. City of Detroit*, the *Avis v. Aguilar* plurality, and the *Dep't of Corrections v. State Personnel Bd.* dissent). But *R.A.V.* dealt only with whether the government may discriminate based on content among speech that falls within the existing First Amendment exceptions, such as fighting words. The Court specifically said only that "a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech," 505 U.S. at 389 (emphasis added); and its logic is indeed limited to restrictions on speech that fits within one of the exceptions, see Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1829-32 (1992) (discussing this in some detail); *Saxe v. State College Area School Dist.*, 240 F.3d 200, 207-08 (3rd Cir. 2001) (likewise).



These three meanings—facially speech-neutral, facially religion-neutral, and facially press-neutral—are different, though they sometimes share the same label “generally applicable law.” For instance, libel law principles are generally press-neutral but not speech-neutral. A tax on all books is religion-neutral but not press-neutral.

Unfortunately, since all these laws are sometimes called “generally applicable,” these definitions can get confused for one another. One major argument against the position I defend in the previous section flows from this very sort of confusion. That argument cites *Cohen v. Cowles Media*,<sup>57</sup> and the opinions on which that opinion relies, for the proposition that applying generally applicable laws to speech doesn’t violate the First Amendment.<sup>58</sup>

In *Cohen v. Cowles Media*, the Court did hold that “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news,” and cited several other cases that so held.<sup>59</sup> But this only means that *press-neutral* laws are constitutional. The Court did not say that *speech-neutral* laws, especially ones that are content-based as applied, are inherently constitutional.

*Cohen v. Cowles Media* involved a promissory estoppel lawsuit by a source against a newspaper publisher. Cowles breached its promise not to reveal Cohen’s name; Cohen sued for this breach and won, and the Court held that the damages award didn’t violate the First Amendment. In the process, the Court reasoned that the case was controlled by the

well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. As the cases relied on by respondents recognize, the truthful information sought to be published must have been lawfully acquired. The press may not with impunity break and enter an office or dwelling to gather news. Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source. The press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws. Similarly, the media must obey the National Labor Relations Act and the Fair Labor Standards Act, *Oklahoma Press Publishing Co. v. Walling*; may not restrain trade in violation of the antitrust laws; and must pay nondiscriminatory taxes. It is therefore beyond dispute that “[t]he publisher of a newspaper has no special immunity from the application of general laws.

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<sup>57</sup> 501 U.S. 663 (1991).

<sup>58</sup> See, e.g., *Rice v. Paladin Press*, 128 F.3d 233, 243 (4th Cir. 1997); Bogen, *supra* note 54, at 227; U.S. DEP’T OF JUSTICE, *supra* note 17, at n.56.

<sup>59</sup> 501 U.S. at 669.

He has no special privilege to invade the rights and liberties of others.” Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.

There can be little doubt that the Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, insofar as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.<sup>60</sup>

The Court repeatedly stressed that it was discussing only whether the press gets special exemption from laws that are *equally applicable to the press and to others*; this quote mentions “the press,” “newspapers,” or “the media” nine times. Each of the examples mentions what “the press,” “the media,” “newspaper[s],” and “newspaper reporter[s]” have no special right to do. And this makes sense, because the Court was overruling the Minnesota Supreme Court’s conclusion that the First Amendment requires courts to “balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity.”<sup>61</sup>

Moreover, two of the Court’s examples are consistent only with the interpretation that the Court used “generally applicable” to mean press-neutral rather than speech-neutral. First, copyright law (which the Court also mentions as an example later in the opinion<sup>62</sup>) is press-neutral but *not* speech-neutral. In 1977, when *Zacchini v. Scripps-Howard Broadcasting*—the case that the Court cited when mentioning copyright—was decided, copyright law applied exclusively to speech and other communication, as it had through most of its history. Even today it applies mostly to such communication, though over the past few decades it has been extended to cover architectural works and computer program object code.<sup>63</sup>

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<sup>60</sup> *Id.* at 669-70 (citations omitted).

<sup>61</sup> 457 N.W.2d 199, 205 (Minn. 1990) (emphasis added).

<sup>62</sup> See 501 U.S. at 671 (“The dissenting opinions suggest that the press should not be subject to any law, including copyright law for example, which in any fashion or to any degree limits or restricts the press’ right to report truthful information. The First Amendment does not grant the press such limitless protection.”).

<sup>63</sup> See Berne Convention Implementation Act of 1988, Pub. L. 100-568, 102 Stat. 2853, sec. 4 (1988) (amending Copyright Act to cover architectural works); Pub. L. 96-517, 94 Stat. 3015, sec. 10 (1980) (amending Copyright Act to mention computer programs). U.S. DEP’T OF JUSTICE, *supra* note 17, at n.56, argues that *Cohen v. Cowles Media* and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), stand for the proposition “that generally applicable common-law causes of action typically will not offend the First Amendment in cases where they are applied to expressive conduct such as publication or broadcast,” unless “an element of that cause of action inevitably (or almost always) depends on the communicative impact of speech or expression.” This assertion, though, ignores the fact that *Zacchini* itself involved the right of publicity, a tort that invariably involves “expressive conduct such as publication or broadcast”; and it doesn’t

Second, as Part II.B pointed out, the First Amendment sometimes does provide a defense against antitrust law, when the alleged restraint of trade comes from a defendant's speech that advocates legislation. *Citizen Publishing Co. v. United States* and *Associated Press v. United States*, the two antitrust cases that the Court cited, hold that newspapers can't raise their status as members of the *press* as a defense to antitrust law. But *Noerr* and *Pennington* make clear that speakers can raise as a defense the fact that the law is being applied to them because of their *speech*.<sup>64</sup>

So the Court's "general applicability" reasoning that I quote above means simply that the law was press-neutral, and thus not subject to any heightened scrutiny because it was applied to the press.<sup>65</sup> That, of course, left the argument that the law did restrict speech: After all, it was Cowles Media's speech that constituted the potentially actionable breaking of a promise.

But later in the opinion, the Court does explain why promissory estoppel law is indeed constitutionally applicable to all speakers, whether press or not: "Minnesota law," the Court holds, "simply requires those making promises to keep them. The parties themselves, as in this case, determine the scope of their legal obligations, and any restrictions which may be placed on the publication of truthful information are self-imposed."<sup>66</sup> The free speech argument was rejected based on the principle that free speech rights, like most other rights, can be waived.<sup>67</sup> It wasn't rejected based on an assertion that speech-neutral laws are per se constitutional.

#### D. The Religion Cases

A second argument in favor of the categorical constitutionality of

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mention *NAACP v. Claiborne Hardware*, in which a generally applicable common-law cause of action was seen as offending the First Amendment when applied to expressive conduct.

<sup>64</sup> 365 U.S. 127 (1961); 381 U.S. 657 (1965).

<sup>65</sup> Cf. *Turner Broadcasting v. FCC*, 512 U.S. 622, 640-41 (1994) ("But while the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment, compare *Cohen v. Cowles Media Co.* with *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566-567 (1991), laws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny.") (some internal citations omitted).

<sup>66</sup> 501 U.S. at 671.

<sup>67</sup> This reasoning made it unnecessary for the majority to decide whether promissory estoppel law was purely content-neutral or facially content-neutral but content-based as applied—the Court's argument, which is that free speech rights may be waived, would apply in either event.

speech-neutral laws might operate by the analogy to religion-neutral laws. *Employment Division v. Smith*,<sup>68</sup> the argument would go, has held that generally applicable laws (in the “religion-neutral” sense) don’t violate the Free Exercise Clause; likewise, generally applicable laws (in the “speech-neutral” sense) shouldn’t be seen as violating the Free Speech Clause.<sup>69</sup>

This analogy, I think, is weak. The Free Exercise Clause and the Free Speech Clause protect different private interests and have long been interpreted differently.<sup>70</sup> The Free Exercise Clause, for instance, doesn’t generally entitle people to inflict emotional distress on a public figure, interfere with business relations, engage in anticompetitive conduct, breach the peace, or interfere with the draft, even if the people feel religiously compelled to do so. It probably wouldn’t have entitled people to do so even in the decades between *Sherbert v. Verner* and *Employment Division v. Smith*,<sup>71</sup> when the Free Exercise Clause ostensibly provided religious objectors with some exemptions from generally applicable laws.<sup>72</sup> The Free Speech Clause does let one do these things, if they’re done through the communicative effect of one’s speech

But to the extent that the Free Exercise Clause and the Free Speech Clause are indeed analogous, the analogy actually cuts in favor of my argument. With the Religion Clauses, too, some laws that are religion-neutral on their face may still be unconstitutionally religion-based as applied.

Consider, for instance, the law of intra-church disputes. Generally applicable, religion-neutral laws, such as contract law, property law, and wills and trusts law may generally be applied to resolve such disputes, with

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<sup>68</sup> 494 U.S. 872 (1990).

<sup>69</sup> Many commentators have noted the similarity between *Cohen v. Cowles Media* and *Employment Division v. Smith*, though without taking the next step to argue that all facially speech-neutral restrictions are per se constitutional by analogy to *Smith* (a step that I have heard some people make in person, though not in print). See, e.g., Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 650-51 (2001); Kristian D. Whitten, *The Economics of Actual Malice*, 32 CUMB. L. REV. 519, 570 (2001-02). Justice Scalia in *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560, 579 (1991) (Scalia, J., concurring in the judgment), does argue that facially speech-neutral rules are per se constitutional, by analogy to *Smith*, but the law involved in *Barnes* was not just generally applicable but also content-neutral as applied (at least in Justice Scalia’s view, see *id.* at 574 n.2). Justice Scalia’s statement that “if the law is not directed against the protected value (religion or expression) the law must be obeyed,” *id.*, doesn’t indicate how he would treat a law that’s generally applicable (and thus not directed against expression on its face) but content-based, and thus directed against the content of expression, as applied.

<sup>70</sup> See Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1498-1501 (1999).

<sup>71</sup> 374 U.S. 398 (1963); 494 U.S. 872 (1990).

<sup>72</sup> See, e.g., *Gillette v. United States*, 401 U.S. 437, 460 (1971) (rejecting a claim that the Free Exercise Clause mandates a religious exemption from the draft).

no First Amendment problems. If I leave property to a church so long as the church doesn't use the property for manufacturing purposes, such a condition can be enforced.<sup>73</sup> But when the generally applicable will interpretation rules would, as applied, require courts to make religious judgments—for instance, if I leave property to a church so long as it remains religiously orthodox and my heirs try to reclaim the property on the grounds that the church has violated the condition—the Religion Clauses prohibit courts from acting.<sup>74</sup>

Likewise, the law of fraud and false advertising is facially religion-neutral, and may often be applicable to churches' nonreligious claims. But if the law as applied to a claim would require courts to evaluate the truth or falsehood of a religious assertion, the Religion Clauses would prohibit such an application.<sup>75</sup>

The same is likely true in other situations as well. Consider, for instance, the tort of intentional infliction of emotional distress. If you inflict emotional distress on a pro-choice politician by using loudspeakers outside his house at 3 a.m., you will have no Free Speech Clause defense.<sup>76</sup> Likewise, even if you feel religiously compelled to remonstrate with the politician this way, you will likely have no Free Exercise Clause defense.<sup>77</sup>

But if you inflict emotional distress on him using the content of speech, for instance by publishing a vitriolic satire, that's constitutionally protected under the Free Speech Clause.<sup>78</sup> Likewise, if a church inflicts emotional distress on him by excommunicating him, that's constitutionally protected under the Free Exercise Clause.<sup>79</sup> Even if the excommunication causes

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<sup>73</sup> *Jones v. Wolf*, 443 U.S. 595, 602-04 (1979) (concluding that civil courts may decide church property disputes using “neutral principles” to interpret trust documents).

<sup>74</sup> *Id.* at 602-04 (stressing that the “neutral principles” approach was permissible only to the extent that a court can avoid “rely[ing] on religious precepts” and resolving controversies related to “religious concepts” in the trust documents); *Arkansas Presbytery of Cumberland Presbyterian Church v. Hudson*, 40 S.W.3d 301, 307 (Ark. 2001) (“Any documents, such as the church constitution, pertinent to the dispute, must be scrutinized in purely secular terms.”).

<sup>75</sup> *See United States v. Ballard*, 322 U.S. 78 (1944).

<sup>76</sup> *See supra* note 32.

<sup>77</sup> *See Heffron v. ISKCON, Inc.*, 452 U.S. 640 (1981) (holding, even during the *Sherbert/Yoder* era, when strict scrutiny was generally applied to religious exemption claims, that religious observers' rights to engage in religiously motivated speech are no greater than secular speakers' rights to engage in analogous secular speech).

<sup>78</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

<sup>79</sup> *Cf., e.g., Marks v. Estate of Hartgerink*, 528 N.W.2d 539, 544-45 (Iowa 1995) (refusing to recognize a tort of wrongful excommunication); *Korean Presbyterian Church v. Lee*, 880 P.2d 565, 569-70 (Wash. Ct. App. 1994) (same); *Murphy v. I.S.K.CON. of New England, Inc.*, 571 N.E.2d 340, 346 (Mass. 1991) (rejecting intentional infliction of emotional distress claim when the distress was caused by allegedly harmful religious teachings; “Inherent in the claim that exposure to ISKCON N.E.’s religious beliefs causes

severe emotional distress—as it may, especially if the politician or his family believes that it will damn him to hell—and even if a jury finds that the excommunication was outrageous, the excommunication is constitutionally protected.

Emotional distress that flows from the religiosity of the offensive conduct, like emotional distress that flows from the content of people’s speech, thus may not form the basis of legal liability even under the generally applicable emotional distress tort. Similarly, many child custody cases have held that the facially religion-neutral “best interests of the child” standard may sometimes violate the Free Exercise Clause: Courts may not diminish the custody rights of a divorced parent because of the supposed harmfulness of the religious doctrine that he’s teaching his children, unless there’s serious evidence that the teaching is not just against the child’s “best interests” but is actually likely to cause significant harm to the child.<sup>80</sup>

Again, I don’t want to claim too much of an analogy here: Some of the cases cited above rely on the Free Exercise Clause,<sup>81</sup> but others just talk about the First Amendment generally;<sup>82</sup> and the reasons for some of these

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tortious emotional damages is the notion that the disputed beliefs are fundamentally flawed and inconsistent with a proper notion of human development. While this issue may be the subject of a theological or academic debate, it has no place in the courts of this Commonwealth.”).

<sup>80</sup> See, e.g., *In re Marriage of Minix*, 801 N.E.2d 1201, 1203, 1205 (Ill. App. 2003); *In re Marriage of Jensen-Branch*, 899 P.2d 803, 808 (Wash. App. 1995); *Pater v. Pater*, 588 N.E.2d 794, 798 (Ohio 1992); *Zummo v. Zummo*, 574 A.2d 1130, 1157 (Pa. Super. Ct. 1990); *In re Marriage of Knighton*, 723 S.W.2d 274, 282-83 (Tex. App. 1987). But see *In re Short*, 698 P.2d 1310, 1313 (Colo. 1985) (concluding that courts applying the “best interests of the child” standard can take into consideration the parents’ religious practices, though acknowledging that even there “[c]ourts are precluded by the free exercise of religion clause from weighing the comparative merits of the religious tenets of the various faiths or basing its custody decisions solely on religious considerations”); *LeDoux v. LeDoux*, 452 N.W.2d 1, 5 (Neb. 1990) (concluding that “The paramount consideration in all cases involving the custody or visitation of a child is the best interests of the child,” and that the parents’ religious practices may be considered when determining what is in the child’s best interests); *Rogers v. Rogers*, 490 So.2d 1017, 1018-19 (Fla. App. 1986) (likewise).

<sup>81</sup> See *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 107 (1952) (holding that interference with internal church affairs violates “the free exercise of religion”); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 448 (1969) (citing *Kedroff* for the same proposition); *United States v. Ballard*, 322 U.S. 78, 86-87 (1944) (relying on the “freedom of religious belief”).

<sup>82</sup> See, e.g., *Jones v. Wolf*, 443 U.S. 595 (1979) (just talking about the First Amendment); *Zummo v. Zummo*, 574 A.2d 1130, 1157 (Pa. Super. Ct. 1990) (talking about both the Free Exercise Clause and the Establishment Clause); *In re Marriage of Knighton*, 723 S.W.2d 274, 277-78 (Tex. App. 1987) (likewise); see also *Waites v. Waites*, 567 S.W.2d 326, 331 n.2 (Mo. 1978) (reaching a similar result solely under the

doctrines have more to do with fear of government entanglement with theological questions than with concern about equal treatment as such.<sup>83</sup> As I mentioned, there's no reason to expect Free Speech Clause doctrine to track Religion Clauses doctrine perfectly.

Nonetheless, the Religion Clauses jurisprudence generally illustrates my broader point: When constitutional doctrine prohibits laws that facially turn on some factor—whether the factor is the content of speech or religious judgments—the doctrine should also bar courts from considering the same factor when applying generally applicable laws.<sup>84</sup>

*E. Free Speech and the Constitutional Immunity for Persuasion, Information, and Content-Based Offensiveness*

1. The limited relevance of good government motives

The cases discussed in Part II.B reflect, I think, a coherent principle: The First Amendment generally makes conveying facts and opinions into a constitutionally immunized activity. Normally, the government may punish people for causing various harms, directly or indirectly. But it generally may not punish speakers when the harms are caused by what the speaker is saying—by the persuasive, informative, or offensive force of the facts or opinions that the speaker expressed.<sup>85</sup>

This is of course quite compatible with the Court's general jurisprudence of content-based restrictions; it just equally covers laws that are content-based as applied and laws that are content-based on their face. And this principle makes sense: As we see from the cases, a law that's content-based as applied (such as the Espionage Act involved in *Schenck and Debs*) can restrict speech as much as a law that's content-based on its face. Moreover, such a law is indeed punishing the "speech element" of the communication rather than some "nonspeech element."<sup>86</sup>

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Establishment Clause); *Bonjour v. Bonjour*, 592 P.2d 1233, 1241 (Alaska 1979) (likewise).

<sup>83</sup> See, e.g., *Jones*, 443 U.S. at 603; *Ballard*, 322 U.S. at 87.

<sup>84</sup> We see something similar even in Equal Protection Clause jurisprudence. Generally applicable race-neutral laws are usually constitutional—but not when they're race-based as applied. Consider *Palmore v. Sidoti*, 466 U.S. 429 (1984), where the Court held unconstitutional a child custody decision based on the mother's having remarried someone of another race: A best interests of the child standard is facially race-neutral, and usually quite permissible; but when the harm to the child's interests is said to flow from the parent's race, the Court recognizes that the application of the law involves race discrimination.

<sup>85</sup> Of course, unless the speech falls within the usual First Amendment exceptions, such as incitement, false statements of fact, threats, and the like.

<sup>86</sup> See *United States v. O'Brien*, 391 U.S. 367 (1968).

The principle is in some tension, however, with the theory that the First Amendment is chiefly aimed at preventing government actions that are motivated by a desire to suppress speech.<sup>87</sup> In the examples I gave above, the lawmakers may have genuinely wanted to prevent a certain kind of harm, and may have been quite indifferent to whether that harm is caused by speech or by conduct. The drafters of the Espionage Act, for instance, might have sincerely wanted to punish all interference with military recruitment, whether through conduct or speech. But whether the Act was well-motivated or not, it should have generally been unconstitutional when applied to interference by persuasion.

In some of the examples I give above, one can argue that the law is open to improper government motivations in its enforcement. For instance, the “outrageousness” test in the emotional distress tort, the “offensive behavior” test in breach of the peace laws, and the “offensive work environment” test in workplace harassment law are quite vague. Prosecutors, judges, and juries might well interpret them narrowly when they agree with the speech, and broadly when they disagree with the speech.

But in other situations, the law is pretty clear. Public speech that advocates draft resistance does seem likely to willfully obstruct recruitment.<sup>88</sup> A journal article that explains how fingerprint recognition systems can be evaded<sup>89</sup> does seem likely to facilitate certain crimes by some readers. If applying the law to some such speech would violate the First Amendment, the reason must flow from something other than the

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<sup>87</sup> See, e.g., Kagan, *Private Speech, Public Purpose*, *supra* note 22, at 413 (“First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives.”); Kagan, *When a Speech Code Is a Speech Code*, *supra* note 15, at 965 & n.24, 968 (applying this approach to suggest that generally applicable policies banning hostile environment harassment in universities should only be reviewed under *O’Brien*, even when they’re applied to otherwise fully protected speech); Rubinfeld, *supra* note 13, at 784 (arguing that the Free Speech Clause is implicated “if and only if: (1) the law makes the fact that [a person] was communicating an element of the prohibited offense; (2) the legislative purpose was to target speech even though the prohibition is speech-neutral on its face; or (3) the law was selectively enforced to target speech”). I say only “in some tension with” because some of the scholars who urge a focus on motive acknowledge that “[s]ome aspects of First Amendment law resist explanation in terms of motive,” Kagan, *Private Speech, Public Purpose*, *supra* note 22, at 415. Since Professor Kagan’s claim is only that “the concern with governmental motive [is] . . . the most important[] explanatory factor in First Amendment law,” *id.* at 416, and “most important” is necessarily a subjective factor, I leave it to the reader to decide whether the cases discussed above substantially undermine that claim.

<sup>88</sup> See, e.g., *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring); *Masses Publishing Co. v. Patten*, 244 F. 535, 539-40 (D.D.C. 1917) (Learned Hand, J.).

<sup>89</sup> See Volokh, *Crime-Facilitating Speech*, *supra* note 3, at \_\_\_ n. \_\_\_ (discussing such an article).



government's motive, which may well be quite pure.<sup>90</sup> So if the cases in Part II.B are right, the constitutional problem lies in the law's being content-based as applied—in its punishing speech because of the persuasive effect of the speech—and not in the government's being motivated by a desire to suppress speech rather than to prevent harm.

It's true that the Supreme Court has at times said that “In determining whether a regulation is content based or content neutral, we look to the purpose behind the regulation.”<sup>91</sup> But the Court has also acknowledged that “while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases.”<sup>92</sup> The better formulation is the one the Court has often used: A content-neutral law is one that is “justified without reference to the content of the regulated speech”<sup>93</sup>—and a law that is content-based as applied is indeed justified, in that application, with reference to what the speech communicates.<sup>94</sup>

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<sup>90</sup> Prosecutors may still have discretion in deciding whom to charge under those laws, and they may exercise that discretion out of a desire to suppress certain viewpoints, rather than to evenhandedly prevent the harm that the law is aimed at preventing. But that risk is equally present for any law that may be applied to speech, including generally applicable laws that are speech-neutral on their face and content-neutral as applied.

<sup>91</sup> See *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>92</sup> *Bartnicki*, 532 U.S. at 526 n.9 (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642-643 (1994)).

<sup>93</sup> See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001); *Hill v. Colorado*, 530 U.S. 703, 719 (2000); *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811 (2000); *United States v. Eichman*, 496 U.S. 310, 318 (1990); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *TRIBE*, *supra* note 39, at 789; John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496-1502 (1975); Stone, *supra* note 25, at 211-17 (taking a similar view, but limited to those restrictions where the communicative impact consists of persuading, informing, or offending people).

<sup>94</sup> *Thornburgh v. Abbott*, 490 U.S. 401 (1989), a prison speech case, did interpret a “content-neutrality” rule as focusing on the government's ultimate motive rather than whether the rule restricted speech based on its content. The Court upheld a restriction on speech with certain kinds of content (for instance, information on weapons construction or alcohol production, encouragement of escape or other crimes, or “sexually explicit material” and especially homosexually themed material that “poses a threat to the security, good order, or discipline of the institution”) on the ground that it was “neutral” in the sense of being ultimately justified by an interest in prison security, rather than by dislike for certain viewpoints. *Id.* at 415-16. If a similar rule were applied outside prisons, then a wide range of speech restrictions—for instance, bans on advocacy of violence, draft evasion, sexism, and so on—would be treated as “content-neutral” simply because the government's ultimate purpose is to prevent harmful conduct. Fortunately, this approach seems to be limited to restrictions on prisoner speech; *Thornburgh* itself stressed that it was applying an unusual definition of neutrality (“the technical sense in which we meant and used that term [‘neutral’] in *Turner v. Safley*,” *id.* at 415-16).

## 2. Content-based applications vs. content-neutral applications

### a. The problem

This still leaves something of a question: Why, exactly, should a generally applicable law that is content-based as applied be treated differently from a generally applicable law that is content-neutral as applied? The Court probably would not and should not have intervened if *Hustler* had inflicted emotional distress on Falwell by using loud bullhorns outside Falwell's house. Nor would there be any First Amendment violation if the NAACP had been sued for organizing a demonstration that blocked the entrance to Claiborne Hardware's door, or if Schenck had been prosecuted for interfering with the draft by blocking a draft board office.

But why? The law, and thus the lawmakers' motivation for enacting the law, would be the same in these hypotheticals as in the real cases. The law's effect would be the same: The law as applied would restrict speech. What then is left to explain the difference? And if indeed the lawmakers' motivation doesn't have the importance that some assign to it, then what is the difference even between facially content-based laws and facially content-neutral ones? There are, I think, two main answers to this—a conceptual one and a pragmatic one.

### b. The conceptual distinction

Under nearly every theory of free speech, the right to free speech is at its core the right to communicate—to persuade and to inform people through the content of what a speaker says. The right must also generally include in considerable measure the right to offend people through the content of one's message, since much speech that persuades some people also offends others.<sup>95</sup>

Persuading and informing people may certainly cause harm; the listeners might be persuaded to do harmful things. But the premise of modern First Amendment law is that the government generally may not

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<sup>95</sup> There might be some limits on this right to offend, for instance if (1) the speaker is communicating to someone who has already said that he doesn't want to hear the message, and (2) the speaker can stop speaking to this unwilling listener, while still continuing to try to persuade or inform other potentially willing listeners. *Cf.* *Rowan v. Post Office Dep't*, 397 U.S. 728, 738 (1970) (adopting this view as to unwanted mailings sent to people's homes); *Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (adopting this view as to residential picketing, though in my view not so persuasively as in *Rowan*); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1863-66 (1992) (suggesting such an approach as to hostile environment harassment law).

(with limited exceptions) punish speech because of a fear, even a justified fear, that people will make the wrong decisions based on that speech.

“The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. . . . [I]f there be any danger that the people cannot evaluate the information and arguments advanced [by speakers], it is a danger contemplated by the Framers of the First Amendment.”<sup>96</sup> Punishing speech because its content persuades, informs, or offends thus conflicts especially seriously with the free speech guarantee, more so than punishing speech for reasons unrelated to its potential persuasive, informative, or offensive effect.

c. Practical effects

i. Content-based restrictions as likely greater burdens on speech

This conceptual distinction may itself help explain the Court’s judgments both as to facially content-based laws and as to laws that are content-based only as applied.<sup>97</sup> But it also reflects the likelihood that allowing content-based restrictions (whether they are facially content-based or content-based as applied) is likely to end up burdening speech more than allowing content-neutral restrictions would<sup>98</sup>

To begin with, a typical law aimed at noncommunicative effects is unlikely to excessively inhibit the communication of some viewpoint or fact, because many different media would remain available to the speakers.<sup>99</sup> For instance, even a total ban on leafleting, justified by the

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<sup>96</sup> *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 791-92 (1978); *see also* *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 97 (1977); Stone, *Content Regulation and the First Amendment*, *supra* note 34, at 213; Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, \_\_\_ CREIGHTON L. REV. \_\_\_ (forthcoming 2004).

<sup>97</sup> *See, e.g.*, *United States v. O’Brien*, 391 U.S. 367, 382 (1969) (distinguishing restrictions aimed at the “speech” elements of expressive conduct from those aimed at “nonspeech” elements); *Police Dep’t v. Mosley*, 408 U.S. 92, 95-96 (1972).

<sup>98</sup> I’ll use these terms as roughly interchangeable with restrictions triggered by the communicative effects of speech and restrictions triggered by the noncommunicative effects, though there might be some differences in some situations.

Some commentators have also argued that content-based restrictions are more dangerous than content-neutral ones because they often distort public debate, by burdening one side of a debate while allowing another to be heard free of any such burden. *See, e.g.*, Stone, *Content Regulation and the First Amendment*, *supra* note 22, at 217-27. Others have disagreed. *See, e.g.*, Kagan, *Private Speech, Public Purpose*, *supra* note 22, at 445-51. My analysis neither relies on nor rejects the distortion argument—I focus on whether a restriction is likely to substantially interfere (as opposed to only modestly interfere) with the expression of certain facts or viewpoints, not on whether it’s likely to interfere more with one side of the debate than with another.

<sup>99</sup> *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 75

desire to prevent litter, would still leave people free to communicate their views by the many media that don't create litter—by displaying signs, by using radio broadcasts, by advertising in newspapers, and so on.

The leafleting ban would indeed interfere with public debate, in my view too much. But it can't entirely drive certain views from public debate, or even come close to it. Moreover, because the content-neutral law can potentially apply to a wide range of speakers, its scope will likely be limited by political forces.<sup>100</sup> The most severe hypothetical content-neutral laws—for instance, a ban on printing, justified by the environmental harms caused by the process of making paper<sup>101</sup>—are thus sure to remain just hypotheticals: They are politically implausible precisely because they burden so much speech.

On the other hand, a content-based restriction, whether facially content-based or content-based as applied, can outlaw most expression of certain facts or opinions. If a law—such as the laws in *Schenck* or *Claiborne*—bans any conduct that may cause a certain harm, and that harm can be caused by people's being persuaded to act in certain ways, then any viewpoints that have the potential for such persuasion (the draft is evil, blacks should boycott white-owned businesses) would end up being largely prohibited. Because the law focuses either on the content of the speech, or on the harm that the speech causes, it can block the speech in all media. And because it's limited to a narrow range of speech, it may face less political opposition than broader bans might provoke.<sup>102</sup>

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(1987) (“[E]ven in such cases [where a content-neutral restriction has a strong content-differential effect], the harm that can flow from judicial miscalculation is limited. Content-neutral restrictions usually limit the availability of only particular means of expression. They are thus unlikely substantially to block the communication of particular messages.”).

<sup>100</sup> See *Boos v. Barry*, 485 U.S. 312, 336-37 (1989) (Brennan, J., concurring in part and concurring in the judgment) (“the best protection against governmental attempts to squelch opposition . . . [has been] the requirement that the government act through content-neutral means that restrict expression the government favors as well as expression it disfavors”).

<sup>101</sup> See Robert Post, *Encryption Source Code and the First Amendment*, 14 BERK. TECH. L.J. 713, 722-23 (2000) (suggesting as an example a law that bans newsprint to save trees); cf. Stone, *Content-Neutral Restrictions*, *supra* note 99, at 58 (suggesting as an example a law that would neutrally ban all speeches, leaflets, newspapers, magazines, and radio or television broadcasts).

<sup>102</sup> Of course, restrictions on popular conduct, or on conduct engaged in by a politically powerful minority, may indeed face serious political opposition. But conduct restrictions in a democracy tend to ban only unpopular conduct, such as interference with the war effort (as in *Schenck*), and with it equally unpopular speech. Such generally applicable restrictions may therefore be fairly easy to enact, since they target only a relatively small and unpopular group. Content-neutral restrictions on speech (such as leafleting or picketing), on the other hand, would restrict many political groups from all over the political spectrum. If such content-neutral restrictions are too burdensome, they would thus

Even a narrower content-based restriction, such as the law involved in *Cohen v. California* or *Hustler v. Falwell*, can be quite burdensome. True, because the restriction restricts only the words one can use (in *Cohen*) or the level of vitriol (in *Hustler*), it wouldn't broadly prohibit the expression of a particular fact or idea. But, as Justice Harlan rightly concluded in *Cohen*, even such restrictions can seriously interfere with people's ability to express the "otherwise inexpressible emotions" that only certain kinds of words can effectively capture.<sup>103</sup> Harsh contempt for a policy (the draft) or a person (Jerry Falwell) is itself a viewpoint that's subtly different from mild-mannered condemnation, and prohibitions on harsh language seriously interfere with the ability to convey this viewpoint.

ii. The limits of the "ample alternative channels" inquiry, both as to content-neutral and content-based restrictions

I have argued that content-based restrictions are dangerous because they risk broadly suppressing certain viewpoints or facts. But one could respond that, instead of presumptively prohibiting content-based speech restrictions, courts could try to prevent serious burdens on speech the same way they do with content-neutral restrictions—by asking whether the restrictions leave open "ample alternative channels" for expression.<sup>104</sup> I think, though, that the Court has been right to reject such proposals,<sup>105</sup> and to treat content-based restrictions as presumptively unconstitutional without an inquiry into how much the restriction burdens speech or into whether it leaves open ample alternative channels.

To begin with, the record of the ample alternative channels inquiry in the content-neutral restriction test hasn't been very good. The Court has at times applied it in a demanding manner, for instance insisting that alternative channels aren't ample if they materially raise the price of speaking, make it harder for speakers to reach the same listeners, or subtly influence the content of the message by changing the medium.<sup>106</sup> But at other times, the Justices have treated this requirement as only a weak constraint.<sup>107</sup> And this is to be expected, given the vagueness of the term

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likely arouse a wide range of opposition, which provides a natural political check on their scope.

<sup>103</sup> 403 U.S. 15, 25-26 (1971).

<sup>104</sup> See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994).

<sup>105</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844, 879-80 (1997); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 430 (1993); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537-38 (1980).

<sup>106</sup> *Id.* at 56-57.

<sup>107</sup> See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53-54 (1986) (holding that a zoning law that banned adult theaters from 95% of the land in a city left

“ample.”

In fact, the chief practical limit on content-neutral restrictions has not been the “ample alternative channels” inquiry, but the political reality I mentioned above: Most practically enactable restrictions on the noncommunicative aspects of speech do leave open fairly substantial alternative channels for expressing the same ideas. So even if the Court underenforces the ample alternative channels prong, few views or subjects will likely be broadly silenced.<sup>108</sup>

But it’s much more likely that a politically feasible restriction on the communicative aspects of speech will substantially block people from expressing a particular viewpoint. That’s so even if the restriction has to be framed as facially viewpoint-neutral, or even as speech-neutral—consider, for instance, the Espionage Act in *Schenck*. So judicial underenforcement of the ample alternative channels prong for content-based restrictions would be much more dangerous than it is for content-neutral restraints.

iii. The limits of the “ample alternative channels” inquiry as to content-based restrictions

So underenforcement of the ample alternative channels prong is especially likely to yield serious harms to free speech if the prong were applied to content-based restrictions. But there’s also more reason to worry that the prong would indeed be underenforced when applied to content-based restrictions (whether they are facially content-based or content-based as applied).

“Ample” is a vague term, and one that requires contestable predictions about the law’s effects on a complex system of speakers and listeners. There is a large gray area in which the quality of the alternative channels

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open ample alternative channels, though this apparently substantially increased the likely expense of renting or buying space, and likely made the theaters less accessible); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 & n.13 (1984) (holding that a ban on posting leaflets on city-owned utility poles left open ample alternative channels, though the alternatives seemed likely to be considerably more expensive); *Bartnicki v. Vopper*, 532 U.S. 514, 544 (2001) (Rehnquist, C.J., dissenting) (articulating and applying the test for content-neutral speech restrictions without even mentioning the ample alternative channels inquiry, in a case where the speech restriction probably left open very few realistic channels for communicating the facts that the speaker wanted to communicate); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) (articulating and applying the test for content-neutral speech restrictions without even mentioning the ample alternative channels inquiry); cf. JAMES WEINSTEIN, *HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE* 35, 39 (1999) (pointing out that content-neutral restrictions are nearly always upheld).

<sup>108</sup> See Stone, *Content Regulation and the First Amendment*, *supra* note 34 at 226; *supra* note 99.

would be hard to estimate. And when the restriction will likely cover only a particular message—pro-boycott speech, anti-draft speech, and so on—the normal risk of judicial error and deliberate or subconscious prejudice becomes magnified, because the judges know well which side of the political debate will lose and which will win as a result of their decision.<sup>109</sup> In such a scenario, it's especially likely that judges will apply the vague "ample alternative channels" standard in a way that's not protective enough of unpopular speakers. It's probably no accident that the low water mark of the requirement, *City of Renton v. Playtime Theatres, Inc.*,<sup>110</sup> involved a restriction that was limited to sexually themed speech, even though the Court treated it as content-neutral.<sup>111</sup>

Moreover, one restriction aimed at the communicative impact of certain speech is likely to be followed by other such restrictions. Content-based restrictions don't appear randomly: They arise because some fairly powerful political group (in government or out of it), believes a certain kind of speech is dangerous—or, as to laws that are content-based as applied, believes that all conduct that's likely to cause certain effects is dangerous.

If this group succeeds in restricting, say, Communist speech in some contexts, it seems likely that it will also want to restrict Communist speech in other contexts. If a movement tries to restrict bigoted speech in workplaces, perhaps using generally applicable hostile work environment harassment law, it will also likely try to use similar educational and public accommodations harassment rules to restrict speech in educational institutions or places of public accommodation.<sup>112</sup> (That has in fact been the pattern of restrictions on Communist advocacy, antiwar speech, sexually themed speech, pro-civil-rights speech, and racist speech.)

Each success will help validate the pro-restriction group's positions in the eyes of voters and legislators who are on the fence.<sup>113</sup> Moreover, each success may reinforce the enthusiasm of the supporters of the

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<sup>109</sup> See Stone, *Content Regulation and the First Amendment*, *supra* note 34, at 225 ("judicial evaluations of viewpoint-based restrictions are especially likely to 'become involved with the ideological predispositions of those doing the evaluating'") (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST* 112 (1980)); WEINSTEIN, *supra* note 107, at 40 (noting this risk of judicial viewpoint discrimination, whether deliberate or subconscious).

<sup>110</sup> 475 U.S. 41, 53-54 (1986).

<sup>111</sup> *Id.* at 46-49.

<sup>112</sup> See Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, *supra* note 7.

<sup>113</sup> See Eugene Volokh, *Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1077-1105 (2003) (describing such "attitude-altering slippery slopes"); Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 737-38 (1980) (noting that content-based classifications may "stigmatiz[e] the categories they single out for special treatment").

restrictions.<sup>114</sup> And government restrictions on such speech are also likely to be accompanied by private restrictions on such speech, for instance by private broadcasters, publishers, employers, and commercial property owners.

This means that even when each restriction standing alone imposes only a modest burden on speech, the aggregate of all the restrictions can end up being quite burdensome. It is, of course, possible for courts to consider this risk, to allow only the first few restrictions, and then to strike down any new restrictions once the alternative channels seem to no longer be ample. But that's a hard project for courts to engage in, especially when they are armed only with a vague standard like "ample alternative channels."

Judges may find it hard to explain why two seemingly similar restrictions are being treated differently, just because of the order in which they were enacted. And because "ample" lacks an objective absolute definition, courts may end up applying a relative criterion—how many channels the restriction leaves open compared to those available before this restriction was enacted, or how many it leaves open compared to those that it shuts down. If that's so, then courts might indeed allow a sequence of restrictions that gradually substantially reduces the alternative channels, even if the courts would have struck down a restriction that tried to impose the same burden at once.<sup>115</sup>

#### d. Conclusion

For all these reasons, the Court has been right to treat restrictions that

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<sup>114</sup> See *id.* at 1121-27 (describing such "political momentum slippery slopes").

<sup>115</sup> See *id.* at 1105-14 (describing such "small change tolerance slippery slopes").

This tendency might also occur with restrictions aimed at the noncommunicative impact of speech. A billboard ban, a home sign ban, or a leafleting ban, for instance, may be part of a broader movement that values calm and esthetics above free speech. See Stone, *Content-Neutral Restrictions*, *supra* note 99, at 74 (observing that government officials "are usually deeply committed to the maintenance of order and the conservation of resources," which may lead them to systematically support even content-neutral speech restrictions that seem to make public places calmer, or diminish the government's administrative or police protection burdens). Such a movement may indeed end up yielding a sequence of these sorts of restrictions.

Still, this seems considerably less likely than with restrictions aimed at the communicative impact of speech. First, the movement will be more likely to run up against political opposition from a range of speakers, including some possibly fairly popular ones. Second, the restrictions are less likely to draw from the same base of support: For instance, many people who hate billboards will likely not be as troubled by leaflets or signs on people's homes, since the noncommunicative impact of these media is quite different. People who want to suppress Communist or racist speech, on the other hand, are more likely to want to suppress it in a wide range of media and locations.



are content-based as applied—even if they are facially generally applicable to both speech and conduct—just like restrictions that are content-based on their face. It’s the only approach that’s consistent with cases such as *Hustler Magazine v. Falwell*, *NAACP v. Claiborne Hardware*, and the others. It’s properly hostile to the government’s attempts to restrict speech because of the informative or persuasive power of the speech. And it’s necessary to prevent the government from being able to broadly suppress certain facts and ideas.

When speech is punished precisely because of what it communicates—for instance, because it may persuade people to violate the law or to boycott someone, because it may offend some listeners, or because it may convey information that helps people commit crimes—the law is operating as a content-based speech restriction. It is restricting speech precisely because of what it speaks, and it must therefore be subjected to serious First Amendment analysis. We ought not dodge this analysis by simply relabeling the speech as “conduct.”

### III. SPEECH “BRIGADED WITH ACTION,” SPEECH AS AN ILLEGAL “COURSE OF CONDUCT,” AND SPEECH AS A “SPEECH ACT”

#### A. *Giboney v. Empire Storage & Ice Co.*

“It rarely has been suggested,” Justice Black wrote for the Court in *Giboney v. Empire Storage & Ice Co.*, in 1949, “that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”<sup>116</sup> “It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”<sup>117</sup> Likewise, Justice Black joined two opinions characterizing *Giboney* as stating that speech may be punished when it’s “brigaded with illegal action.”<sup>118</sup> Others have described the *Giboney* principle as authorizing restrictions on speech that is tantamount to a “speech act[.]”<sup>119</sup>

<sup>116</sup> 336 U.S. 490, 498, 502 (1949).

<sup>117</sup> *Id.* at 502.

<sup>118</sup> *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting); *Garrison v. Louisiana*, 379 U.S. 64, 82 (1964) (Douglas, J., concurring); *see also* *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., dissenting) (not joined by Justice Black on this point).

<sup>119</sup> U.S. DEP’T OF JUSTICE, *supra* note 17, at text accompanying nn.55-60; *Rice v. Paladin Press, Inc.*, 128 F.3d 233, 248 (4th Cir. 1997). Occasionally, as in the arguments about crime-facilitating speech, the *Giboney* argument may overlap with the “generally

*Giboney* used this reasoning to uphold an injunction against peaceful picketers who were trying to pressure a business “to agree to stop selling ice to nonunion peddlers.”<sup>120</sup> Such an agreement, the Court said, would have violated Missouri trade restraint law, and enjoining such picketing therefore didn’t violate the First Amendment. But the *Giboney* argument has also been used to justify many other kinds of speech restrictions as well:

- (a) The Justice Department<sup>121</sup> and a court of appeals<sup>122</sup> have recently reasoned that *Giboney* lets the government restrict books that may inform people how to violate the law, at least when the publisher intends that those books help people commit crimes.
- (b) Justice Goldberg’s majority opinion in *Cox v. Louisiana* described *Giboney* as supporting the proposition that “[a] man may be

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applicable law” argument; but the *Giboney* argument is sometimes used even to defend laws that explicitly restrict speech, such as laws prohibiting the solicitation of crime.

<sup>120</sup> 336 U.S. at 492.

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[I]t is hard to imagine that the First Amendment would permit culpability or liability for publication of other bombmaking manuals that have a propensity to be misused by some unknown, unidentified segment of the readership, since sources of the same information inevitably will remain in the public domain, readily available to persons who wish to manufacture and use explosives.

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

U.S. DEP’T OF JUSTICE, *supra* note 17 at text accompanying n.56. Despite the opening sentence of the quote, the Justice Department used this argument to defend the constitutionality of a ban on “publication of . . . bombmaking manuals that have a propensity to be misused by some unknown, unidentified segment of the readership,” so long as the ban was limited to publishers who were “motivated by a desire to facilitate the unlawful use of explosives.” *Id.* at text accompanying n.68.

<sup>122</sup> *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 243 (4th Cir. 1997) (relying on *Giboney* in allowing liability for publishing a book that described how contract murders can be committed); *United States v. Savoie*, 594 F. Supp. 678, 682 (W.D. La. 1984) (relying on *Giboney* in issuing injunction against, among other things, “distributing any document or other information to be used by taxpayers to avoid the payment of, or to obtain the refund of, federal income taxes, that is based on the false proposition that wages, salaries or other forms of compensation for labor or services not specifically excluded from taxation under Title 26 of the United States Code are not taxable income”).

punished for encouraging the commission of a crime.”<sup>123</sup> The Court cited as an example *Fox v. Washington*, a 1915 case that upheld the punishment of a newspaper editor who endorsed the propriety of nudism.<sup>124</sup>

- (c) Some courts have likewise recently used *Giboney* to defend restrictions on doctors’ recommending medicinal marijuana to their patients.<sup>125</sup>
- (d) Courts have similarly used the “conduct not speech” argument to justify restricting speech that creates an offensive work environment.<sup>126</sup>
- (e) Courts have relied on *Giboney* to support restrictions on speech that urges political boycotts aimed at pressuring governments to change their policies.<sup>127</sup>
- (f) A state administrative agency has relied on *Giboney* to justify a

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<sup>123</sup> 379 U.S. 559, 563 (1965).

<sup>124</sup> 236 U.S. 273 (1915). *See also* State v. Musser, 175 P.2d 724, 731 (Utah 1946) (upholding criminal punishment for conspiracy to teach the propriety of polygamy, on the theory that “Expressions and the use of words may constitute verbal acts,” and therefore “an agreement to advocate, teach, counsel, advise and urge other persons to practice polygamy and unlawful cohabitation, is an agreement to commit *acts* injurious to public morals within the scope of the conspiracy statute”) (emphasis in original), *vacated and remanded*, 333 U.S. 95 (1948); Rubinfeld, *supra* note 13, at 827-29 (likewise justifying *Brandenburg v. Ohio* on the grounds that incitement intended to and likely to cause imminent illegal conduct is “participat[ion] in[] that course of conduct”).

<sup>125</sup> Conant v. McCaffrey, 172 F.R.D. 681, 698 (N.D. Cal. 1997); Pearson v. McCaffrey, 139 F. Supp. 2d 113, 121 (D.D.C. 2001); *see also* Petition for Certiorari, Walters v. Conant, No. 03-40, at 20 (U.S. filed June 7, 2003, by the Solicitor General). *But see* Conant v. Walters, 309 F.3d 629, 637-38 (9th Cir. 2002) (holding such speech constitutionally protected). These particular restrictions might be justifiable under a possible professional-client speech exception, *see infra* text accompanying notes 245-256, though I’m not sure that this is so.

<sup>126</sup> Jarman v. City of Northlake, 950 F. Supp. 1375, 1379 (N.D. Ill. 1997) (not citing *Giboney*, but reasoning that “verbal acts of sexual harassment are not protected speech”); Robinson v. Jacksonville Shipyards, 860 F. Supp. 1486, 1535 (M.D. Fla. 1991) (not citing *Giboney*, but reasoning that “[pornographic] pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment”); *see also* Robert A. Sedler, *The Unconstitutionality of Campus Bans on “Racist Speech:” The View From Without and Within*, 53 U. PITT. L. REV. 631, 673 n.159, 674 (1993) (taking a similar view, at least to speech by supervisors).

<sup>127</sup> *See* Missouri v. National Org. for Women, 620 F.2d 1301, 1324 n.15 (8th Cir. 1980) (Gibson, C.J., dissenting) (arguing, citing *Giboney*, that NOW’s advocacy of a boycott of Missouri businesses, aimed at getting Missouri to ratify the Equal Rights Amendment, might be constitutionally punishable as an antitrust law violation); Searle v. Johnson, 646 P.2d 682, 685 (Utah 1982) (holding, citing *Giboney*, that state Human Society’s advocacy of a tourist boycott of a county, aimed at getting the county to improve its dog pound, could be constitutionally punishable as interference with prospective business advantage).

restriction on racially offensive business names.<sup>128</sup>

- (g) The dissent in *Cohen v. California* (joined by Justice Black) cited *Giboney* to argue that wearing a jacket containing the phrase “Fuck the Draft” should be constitutionally unprotected: “Cohen’s absurd and immature antic was mainly conduct and little speech.”<sup>129</sup>

### B. *But What Exactly Does Giboney Mean?*

These applications of *Giboney* may seem puzzling, and in many respects inconsistent with recent First Amendment cases, such as *Cohen*, *Brandenburg v. Ohio* and *NAACP v. Claiborne Hardware*.<sup>130</sup> And this is so because the logic of *Giboney* itself is puzzling, and inconsistent with the logic of the more recent Supreme Court cases. In particular, none of the obvious interpretations of *Giboney*’s rather ambiguous language makes much sense.

1. “Course of conduct” referring to the noncommunicative harms of speech

The modern Supreme Court caselaw has, of course, recognized a sort of conduct/speech distinction: Speech or expressive conduct may be restricted because of harms flowing from its noncommunicative component (noise, obstruction of traffic, and the like)—which one might view as its “conduct” element—but not because of harms flowing from its communicative component, the “speech” element.<sup>131</sup> This is the now-standard distinction

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<sup>128</sup> *In re* Urban League of R.I. v. Sambo’s of R.I., Inc., R.I. Comm. for Hum. Rts., Nos. 79 PRA 074-06/06, 073-06/06, at 9 (Mar. 16, 1981) (relying partly on *Giboney* to conclude that the name “Sambo’s Restaurants” violated public accommodations laws because it was offensive to blacks). *But see* *Sambo’s Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686 (6th Cir. 1981) (stating that use of the name was protected by the First Amendment even if it was offensive to black customers); *Sambo’s v. City Council of City of Toledo*, 466 F. Supp. 177 (N.D. Ohio 1979) (holding that it was unconstitutional for a city to deny sign permits to Sambo’s because of its name).

<sup>129</sup> 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting).

<sup>130</sup> Justice Blackmun’s dissent in *Cohen* is of course inconsistent with the majority’s result. The approval in *Cox* of restrictions on speech that urges illegal conduct is inconsistent with *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The approval of restrictions on speech urging boycotts is inconsistent with *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).

<sup>131</sup> *See* *United States v. O’Brien*, 391 U.S. 367 (1969). Occasionally, *Giboney* is indeed cited as supporting this conduct/speech distinction, and there it poses little difficulty. *See, e.g., Cox v. Louisiana*, 379 U.S. 536, 555 (1965) (citing *Giboney* for the proposition that the law may bar “cordon[ing] off a street[] or entrance to a public or private building,” or might even nondiscriminatorily “forbid[] all access to streets and other public facilities for parades and meetings,” in order to prevent, for instance, interference

embodied in *United States v. O'Brien* and the many cases that rely on it.

But this can't be the distinction *Giboney*, or the cases mentioned above that cite *Giboney*, is using: All those cases, including *Giboney*, involve speech that's restricted because of harms that flow from its content.

## 2. Conduct "evidenced . . . by means of language"

Nor are the cases simply relying on *Giboney*'s assertion that conduct can be punished even though it is "in part . . . evidenced . . . by means of language." Speech can indeed be used as evidence of prohibited conduct, or of a punishable intent that accompanies prohibited conduct. A person's expression of pro-Nazi opinions, for instance, may be evidence that the reason he helped a Nazi saboteur was to aid the Nazi cause.<sup>132</sup>

But this likewise doesn't explain any of the cases mentioned above, nor *Giboney* itself. In all those cases, it is the speech that's being punished, not some other behavior of which speech is just the evidence.

## 3. "[I]llegal" "course of conduct" meaning speech that itself violates a law

One could try to explain the opinions that rely on *Giboney* by reasoning that the speech—picketing to achieve a certain result, advocating nudism, wearing profanities on one's jacket, publishing a book describing how to commit a crime—violates a law, and in that sense becomes an "illegal"

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with traffic); *Bell v. Maryland*, 378 U.S. 226, 325 (1964) (Black, J., dissenting) (citing *Giboney* for the proposition that private property owners may use trespass law to remove speakers from their property).

The Court has also at times suggested that some conduct is so unlike the traditional media of communication that it should be viewed as entirely outside the First Amendment, perhaps even when it's being restricted for its communicative effects. See *O'Brien*, 391 U.S. at 376 ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (citing the above-cited page from *O'Brien*, and stating that "We assume for present purposes, but do not decide," that overnight sleeping in a park to protest against homelessness may qualify as expressive conduct); WEINSTEIN, *supra* note 107, at 32 (1999) (taking a similar view). But see *Community for Creative Non-Violence v. Watt*, 703 F.3d 586, 622 (D.C. Cir. 1983) (Scalia, J., dissenting) (rejecting the view that "sleeping is or can ever be seen for First Amendment purposes," when the restriction on sleeping is aimed at the noncommunicative impact of the conduct, but reasoning that a "law directed at the communicative nature of conduct" must still face First Amendment scrutiny), *rev'd sub nom.* *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). This, though, wouldn't apply to the examples in this Part, which involve traditional forms of expression (conversation, books, picketing, and the like).

<sup>132</sup> See *Haupt v. United States*, 330 U.S. 631, 641-42 (1947); see also *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

“course of conduct.” Likewise, one article suggests (though without citing *Giboney*) that “speech that amounts to the commission of an independently illegal act,” such as “bribery, perjury, and threats,” is constitutionally unprotected because it “is properly treated as action, even if it consists solely of words.”<sup>133</sup>

But the point of modern First Amendment law is that speech is sometimes protected even though it violates a law that restricts it. Speech that violates a latter-day Sedition Act,<sup>134</sup> public profanity (as in *Cohen v. California*), and speech “encouraging the commission of a crime” (as in *Cox v. Louisiana*) would indeed be “illegal” “course[s] of conduct” under laws that prohibit such speech. Such laws, though, are still speech restrictions, and are still rightly judged—and often struck down—under the First Amendment.<sup>135</sup>

Perjury is no less speech, and no more action, than was speech in violation of the Sedition Act, another form of falsehood that the law has sought to punish. It may be speech in a particular context, such as in court or in an official form, but it is still communication that is punished because of what it communicates. Perjury and threats should indeed be punishable, but because they fall within an exception to free speech protection, not because they are somehow not speech.<sup>136</sup>

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<sup>133</sup> Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 836-37, 839 (1993) (also theorizing that in such situations “The words do not *cause* the act. The words *are* the act.”). Professor Sunstein’s argument may well rest on an implicit theory about which words are unprotected because they’re acts, and which are protected even though they are acts (for instance, the act of sedition, encouragement of crime, and so on); but the portions of the article that I quote unfortunately do not make such a theory explicit.

<sup>134</sup> 1 Stat. 596 (1798); Sedition Act of 1918, 40 Stat. 553 (1918), *repealed by* Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359.

<sup>135</sup> *See, e.g.,* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that encouraging the commission of crime is not punishable except when the encouragement is intended to and likely to cause imminent illegal conduct); *New York Times Co. v. Sullivan*, 376 U.S. 254, 288-92 (1964) (holding that seditious libel is not punishable); *id.* at 269 (condemning attempts to restrict speech that rely simply on “epithets” or “labels” such as “insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression”). Sunstein, *supra* note 133, at 837, takes the view that advocacy of crime—even including punishable incitement—is speech rather than “action,” but doesn’t explain how a criminally punishable threat (action, in the article’s view) and criminally punishable incitement (not action) would differ in this respect.

<sup>136</sup> For perjury, the exception would be the one for knowingly false statements of fact. *See New York Times v. Sullivan* (stating that such statements are generally unprotected, unless they are seditious libel against the government); *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 123 S. Ct. 1829, 1841 (2003) (holding the same as to statements that aren’t defamatory but are fraudulent); quote accompanying note 209 (likewise stressing that perjury laws are speech restrictions). Bribery might indeed involve action—the transfer of money—as well as speech, or might be punishable on the grounds

4. “[I]llegal” “course of conduct” meaning speech violating a generally applicable law

Some, though not all, of the cases that cite *Giboney* might be explained on the grounds that the speech violates a generally applicable law that bans a wide range of conduct including speech.<sup>137</sup> This, though, would just reduce the *Giboney* principle to the principle described and criticized in Part II.

5. “Conduct” referring to a broader course of illegal behavior by the speaker

“[C]ourse of conduct” “in part initiated . . . or carried out by means of language” might be read as referring to some course of behavior that consists of both speech and other illegal behavior (or planned illegal behavior) by the speaker. If I’m planning to kill someone at a particular place, and I lure him there by telling him to meet me there, then I might well be guilty of attempted murder, though my behavior partly consists of communication.<sup>138</sup> This, though, wouldn’t fit the facts of *Giboney*, where the defendants were simply speaking. Nor would it fit any of the other cases described above, where the speakers were likewise simply communicating, and not engaging in any nonspeech conduct.

6. “Conduct” referring to a broader course of illegal behavior by people other than the speaker

One might therefore read “course of conduct” “in part initiated . . . or carried out by means of language” as referring to the aggregate of the speaker’s speech and the conduct of people whom the speech might affect. If the course of conduct includes illegality, the theory would go, then the speech part of the course of conduct would be just as illegal as the action that the speech brings about. This might fit the facts of *Giboney*, where the speaker was trying to pressure the employer into acting illegally, and of some of the lower court cases that cite *Giboney*.

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that it involves a promise, which may be properly restrictable. *See infra* text accompanying notes 228-232.

<sup>137</sup> *See, e.g.,* *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 243 (4th Cir. 1997).

<sup>138</sup> *Cf. Aiken v. Wilson*, 195 U.S. 194, 206 (1904) (“The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.”).

But such a reading would be inconsistent with *Brandenburg v. Ohio*, and with the modern repudiation of cases such as *Schenck* and *Debs*. Schenck’s and Debs’s speech, for instance, would be protected today under the *Brandenburg* test, though both speakers were convicted for trying to produce some illegal nonspeech behavior—the crime of draft evasion—on the part of others.<sup>139</sup> *Brandenburg* shows that speech is protected even when it tries to trigger illegal behavior by listeners, except for the unusual situations where the speech is intended to *and likely to produce imminent* lawless conduct. So if *Giboney* ever meant that speech may be restricted when it can indirectly bring about illegal conduct, that meaning has been overruled by *Brandenburg*.

7. “Conduct . . . carried out by means of language” referring to threat of action

*Giboney* might be interpreted as standing for the rather narrow proposition that *threats* of conduct may be constitutionally unprotected. In addition to advocating a boycott, and advocating that Empire Storage & Ice stop dealing with nonunion ice peddlers, the picketers in *Giboney* made two sorts of threats: the threat of a boycott (essentially “Stop dealing with nonunion ice peddlers, or our friends will stop dealing with you”) and the threat that union members who crossed the picket line would be ejected from their union.

The Court seemed to rest its judgment partly on these threats. The Justices argued that “all of appellants’ activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri’s valid law.”<sup>140</sup> In doing so, the Court reasoned, “appellants were doing more than exercising a right of free speech or press” because “[t]hey were exercising their economic power together with that of their allies.”<sup>141</sup> This “exercising . . . economic power” might have been referring to threatening to use one’s economic power to pressure people into changing their behavior.

Likewise, consider two early 1980s opinions citing *Giboney*. *Searle v. Johnson* held that the Humane Society’s advocacy of a boycott of a Utah county, aimed at getting the county to improve its dog pound, was unprotected speech that could be punished under the interference with

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<sup>139</sup> *Schenck v. United States*, 249 U.S. 47, 48-49 (1919); *Debs v. United States*, 249 U.S. 211, 216 (1919).

<sup>140</sup> 336 U.S. at 498.

<sup>141</sup> *Id.* at 503.



business relations tort.<sup>142</sup> Similarly, a dissenting opinion in *Missouri v. NOW* seemingly would have held the same about NOW's speech urging a boycott of Missouri, aimed at getting the state legislature to ratify the Equal Rights Amendment.<sup>143</sup> Both of these opinions might be understood as suggesting that the urged boycotts would have been illegal, and that threats of such boycotts are therefore unprotected.<sup>144</sup>

Nonetheless, a rule that threats of boycott are constitutionally unprotected would probably be unsound today, given *NAACP v. Claiborne Hardware*. *Claiborne* also involved a threat of boycott, and a threat of ostracism (though only social ostracism rather than ejection from a union) of people who refused to comply with the boycott. Yet the Court held the speech to be constitutionally protected, even without any inquiry into whether such boycotts and organized ostracism might have themselves violated Mississippi law. This suggests that threats of a boycott, or at least of a politically motivated boycott, are indeed constitutionally protected speech.<sup>145</sup>

But even if the true meaning of *Giboney* is indeed focused on threats, and survives *Claiborne Hardware*, then the *Giboney* principle is far better captured simply by saying that threats of certain kinds of retaliation—and especially threats of illegal retaliation—are constitutionally unprotected,

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<sup>142</sup> 646 P.2d 682, 685 (Utah 1982).

<sup>143</sup> 620 F.2d 1301, 1324 n.15 (8th Cir. 1980) (Gibson, C.J., dissenting).

<sup>144</sup> 646 P.2d at 686-89; 620 F.2d at 1321-25.

<sup>145</sup> *Claiborne* distinguished *Giboney* on the grounds that *Giboney* involved “regulat[ion] of] economic activity,” rather than “prohibit[ion of] peaceful political activity such as that found in the boycott in [*Claiborne*],” 458 U.S. 886, 913 (1982), but this strikes me as unsound. *Giboney* and *Claiborne* both involved advocacy that was aimed at improving the position of a certain social group (union members in *Giboney*, blacks in *Claiborne*), and that worked by threat of economic activity (or inactivity), namely boycott of a certain business. Of course, the speech in *Claiborne* was also motivated by the speakers' beliefs about morality and justice, and sought to appeal to listeners' beliefs about morality and justice; but union speech aimed at benefiting workers is also motivated by concerns about morality and justice as well as economics. Certainly the labor movement has been an ideological and political movement and not just an economic one. See Getman & Marshall, *infra* note 149, at 719 n.97.

The one possible distinction is that the *Giboney* picketers were trying only to get Empire Storage & Ice to change its economic practices; the *Claiborne* boycotters were trying to get stores to change their hiring practices but also (perhaps primarily) to get County officials to change their political decisions (as well as to stop engaging in some allegedly unconstitutional activity) as well as the County's hiring practices. 458 U.S. at 899-900. Nonetheless, in an economy dominated by private business, trying to influence the decisions of the private sector is political activity just as is trying to influence the decisions of the public sector.

In any event, though, if *Giboney* is indeed limited to activity aimed at accomplishing purely economic ends, then it would be inapplicable in all the examples I gave at the start of this section.

rather than by saying that speech is unprotected when it “carrie[s] out” an illegal “course of conduct.”<sup>146</sup> And most of the applications of *Giboney* that I cited in Part III.A would then have to be rejected, because they have nothing to do with threats.

#### 8. “Conduct” referring to picketing

Finally, *Giboney* also involved one other form of conduct—picketing itself, which the Court described as “more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.”<sup>147</sup>

Peaceful picketing, it seems to me, should be treated no differently than any other kind of behavior used to communicate a message: It should be restrictable to the extent that its noncommunicative elements cause harm, for instance if it’s too loud or blocks the entrance to a building, but not restrictable based on its message (again, unless the message falls within an exception to protection<sup>148</sup>). And this should be so even if the message on the picket signs is very simple—essentially, “the labor movement wants you to boycott this business”—and not backed with a detailed explanation. First Amendment law protects even simple symbols, from flagburning to black armbands. The same should be true for the simple message “don’t patronize places, such as this one, that the union movement condemns.”<sup>149</sup>

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<sup>146</sup> See *infra* note 227 and accompanying text (discussing this issue).

<sup>147</sup> 336 U.S. at 503 n.6. See also *Dennis v. United States*, 341 U.S. 494, 529-30 (1950) (Frankfurter, J., concurring in the judgment) (reasoning that picketing should be less constitutionally protected because “the loyalties and responses evoked and exacted by picket lines differentiate this form of expression from other modes of communication”).

<sup>148</sup> It’s possible that some of the Court’s willingness to restrict even peaceful picketing stems from the Justices’ sense that labor picketing generally is indeed inherently threatening to some extent—perhaps because it involves face-to-face confrontations between picketers who feel their livelihoods are at stake and others whom the picketers might see as jeopardizing those livelihoods, and because some labor picketing has historically indeed turned into violence. I don’t think that this potential for violence should suffice to strip peaceful picketing of protection. But to the extent that this reasoning suggests that *Giboney* and similar cases flowed from the Court’s tendency to protect picketing (or at least labor picketing) less than other speech, it further shows the impropriety of applying *Giboney* in other contexts.

<sup>149</sup> I thus think that the distinction drawn by Justice Stevens in his concurrence in the judgment in *NLRB v. Retail Store Employees Union*, 447 U.S. 607, 619 (1980)—where he voted to uphold a secondary picketing ban because it affected “only that aspect of the union’s efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea”—is unsound. See Julius G. Getman & F. Ray Marshall, *The Continuing Assault on the Right to Strike*, 79 TEX. L. REV. 703, 719 n.97 (2001) (reasoning that “appeal to one’s obligations as a union member or supporter” should

Nonetheless, *Giboney* was part of a long line of cases that did impose special restraints on picketing, restraints that would likely be unconstitutional as to other media.<sup>150</sup> The speech in *Giboney* itself—speech urging a business to violate state restraint of trade laws and urging people not to patronize the business until it so acted—would probably be protected today if it were printed in a newspaper or on leaflets. Such advocacy doesn't seem to be both intended to and likely to produce *imminent* illegal conduct, the criteria set forth by *Brandenburg v. Ohio* as necessary for making speech into punishable incitement of illegal action.<sup>151</sup>

Likewise, consider a case that shortly followed *Giboney*, *Hughes v. Superior Court*.<sup>152</sup> *Hughes* rejected the First Amendment claims of people who were peacefully picketing a store to pressure it into hiring black workers in proportion to the fraction of blacks in the store's clientele. There was no powerful union, acting with the benefit of special legal

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be just as protected as "more cerebral appeals"); Theodore J. St. Antoine, *Justice Frank Murphy and American Labor Law*, 100 MICH. L. REV. 1900, 1908 (2002) ("if the viewer's reaction is a genuinely voluntary, though relatively unthinking, reflex, how can the picketing that triggers the reaction be distinguished from the cryptic bumper stickers 'Vote Free Choice' or 'Vote Right to Life'?").

<sup>150</sup> See, e.g., *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U.S. 769 (1942); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Int'l Bhd. of Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957); *NLRB v. Retail Store Employees Union*, 447 U.S. 607, 619 (1980); *TRIBE, supra* note 39, at 826 (2d ed. 1987) (describing this line of cases). See also *Cox v. Louisiana*, 379 U.S. 536, 578 (1965) (Black, J., concurring in the judgment in part and dissenting in part) ("Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment," citing *Giboney* and *Hughes v. Superior Court*, 339 U.S. 460 (1950)).

<sup>151</sup> 395 U.S. 444 (1969); *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (holding that advocacy of illegal conduct at some unspecified future time doesn't satisfy the imminence requirement). In the closely related context of secondary boycotts—union boycotts of a third party aimed at pressuring it to stop doing business with a struck employer—the Supreme Court has strongly suggested that leafleting and other speech would be constitutionally protected, even though picketing is not. Compare *Int'l Bhd. of Electrical Workers v. NLRB*, 341 U.S. 694, 705 n.10 (1951) (holding picketing in aid of secondary boycotts to be unprotected, citing *Giboney* and cases that cited *Giboney*) with *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575-76, 580, 588 (1988) (holding that the National Labor Relations Act should not be read as banning leafleting aimed at persuading consumers to engage in a secondary boycott, because such a reading would pose "serious constitutional questions," and resting its decision on the view that "picketing is qualitatively 'different from other modes of communication'").

<sup>152</sup> 339 U.S. 460, 466 (1950). *Hughes* relied on *Giboney*, among other cases, for the proposition that picketing may be restricted, see *id.* at 468; and three Justices relied solely on *Giboney*, *id.* at 468 (Black, J., joined by Minton, J., concurring in the judgment); *id.* (Reed, J., concurring) (likewise relying solely on *Giboney*). See also *Int'l Bhd. of Teamsters v. Vogt, Inc.*, 354 U.S. 284, 292 (1957) (characterizing *Hughes* as an "elaborat[ion]" of *Giboney*).

protections. There was no violence or trespass by the picketers. The picketers had no power to eject people from a union.

The picketers simply patrolled and expressed sentiments aimed at getting a store to act in a perfectly lawful way—under California law in 1950, discriminatory hiring was not illegal.<sup>153</sup> Newspaper articles urging a consumer boycott of businesses aimed at getting the businesses to adopt some legally permissible race-based hiring practice would likely have been constitutionally protected. The advocacy, the Court stressed, was unprotected because it was conveyed through picketing.<sup>154</sup>

The lesser protection for picketing than for other speech continues to be the law, at least as to labor picketing.<sup>155</sup> So long as it continues to be the law, *Giboney* reflects this exception to First Amendment protection. But even if one endorses this lesser protection for picketing, such an exception offers no support for applying *Giboney* to other speech.

### C. Supreme Court Applications of *Giboney*

So it's hard to figure out just what line *Giboney* purported to draw—and the cases where the Court has cited *Giboney* to support its results only further suggest that *Giboney* is unhelpful for First Amendment analysis. Even when the results of those cases might be right, the “illegal course of

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<sup>153</sup> Justice Reed took the view that the California Supreme Court opinion held race discrimination to be unlawful, *id.* at 468 (Reed, J., concurring), but he was mistaken. The California Supreme Court majority opinion, 198 P.2d 885 (Cal. 1948), never held this, and Justice Traynor's dissenting opinion specifically pointed out that employers remained free to discriminate based on race. 198 P.2d at 896; *see also* *Jones v. American President Lines, Ltd.*, 308 P.2d 393, 395 (Cal. App. 1957) (stating, several years after *Hughes*, that “The right to private employment without discrimination on the basis of race is not one protected by the Constitution, by common law or any statute of the state that we are aware of; and so plaintiff has not alleged any violation of state or federal laws.”). The California Supreme Court held only that picketing to pressure employers into discrimination was unlawful, not that employer discrimination was itself unlawful. *See* Elliot L. Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 20 n.86 (1951) (recognizing this); Osmond K. Fraenkel, *Peaceful Picketing—Constitutionally Protected?*, 99 U. PA. L. REV. 1, 9 (1950) (likewise).

<sup>154</sup> *See Hughes*, 339 U.S. at 464 (stressing that the case involved picketing and not newspaper articles: “Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.”).

<sup>155</sup> *Compare* NLRB v. Retail Store Employees Union, 447 U.S. 607 (1980) (upholding restrictions on secondary picketing) *with* *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575-76, 588 (1988) (suggesting that leafleting aimed at the same end may well be constitutionally protected).

conduct” principle generally doesn’t help justify those results.

I’ve already alluded to one example—the majority opinion in *Cox v. Louisiana*, which tried to use *Giboney* to explain restrictions on crime - advocating speech and on fighting words:

The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited. The most classic of these was pointed out long ago by Mr. Justice Holmes: “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” *Schenck v. United States*. A man may be punished for encouraging the commission of a crime, *Fox v. Washington*, or for uttering “fighting words,” *Chaplinsky v. New Hampshire*. This principle has been applied to picketing and parading in labor disputes. See *Hughes v. Superior Court*; *Giboney v. Empire Storage & Ice Co.*; *Building Service Employees, etc. v. Gazzam*. But cf. *Thornhill v. Alabama*. These authorities make it clear, as the Court said in *Giboney*, that “it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”<sup>156</sup>

“Encouraging the commission of a crime,” though, was held to be constitutionally protected (except under narrow circumstances) just four years later, in *Brandenburg v. Ohio*.<sup>157</sup> The prosecution in *Fox*, for publishing a newspaper article praising the practice of nudism, would clearly be unconstitutional today.<sup>158</sup>

Likewise, uttering words that may cause a fight would also be constitutionally protected today unless the words are specifically targeted at the offended party.<sup>159</sup> This distinction in modern fighting words law between unprotected speech “directed to the person of the hearer”<sup>160</sup> (“Fuck you” said to a particular person) and protected speech said to the world at large (“Fuck the draft” said on a jacket) may be sound. But the *Giboney* principle that speech may be punishable when it carries out an illegal course of conduct doesn’t really help justify that distinction.

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<sup>156</sup> 379 U.S. 559, 563 (1965) (citations abbreviated); see also Rubinfeld, *supra* note 13, at 830 (defending bans on fighting words on the grounds that “such speech is properly regarded as an attempt to commence a fight—a particularized, prohibited course of conduct”).

<sup>157</sup> 395 U.S. 444 (1969).

<sup>158</sup> Likewise, *American Communications Ass’n v. Douds*, 339 U.S. 382, 399 (1950), which upheld restrictions on Communists’ serving as union leaders, citing (among other cases) *Giboney*, *id.* at 399-400, is also probably not good law today. See *United States v. Robel*, 389 U.S. 258 (1967) (striking down restrictions on Communists working in defense plants).

<sup>159</sup> *Gooding v. Wilson*, 405 U.S. 518, 524 (1972); *Cohen v. California*, 403 U.S. 15, 20 (1971).

<sup>160</sup> *Cohen*, 403 U.S. at 20.

Similarly, consider *Ohralik v. Ohio State Bar Ass'n*, where the Court upheld *Ohralik's* punishment for “[i]n-person solicitation by a lawyer of remunerative employment.”<sup>161</sup> The Court cited *Giboney* in arguing that such solicitation was constitutionally unprotected, and characterized the solicitation as “a business transaction in which speech is an essential but subordinate component.”<sup>162</sup> But in *Ohralik's* companion case, *In re Primus*, the Court made clear that direct solicitation by a lawyer of pro bono employment in a politically charged case may *not* be restricted.<sup>163</sup>

Both transactions were equally “course[s] of conduct,” in which speech to the client played an equal role. If the *Giboney* principle stripped one solicitation of constitutional protection on the ground that the solicitation carried out an illegal course of conduct, it should have done the same to the other, and yet the two were treated differently. The Court’s other justification for its *Ohralik* decision—that the speech in *Ohralik* was commercial speech said face-to-face, and the speech in *Primus* was noncommercial speech communicated in a letter<sup>164</sup>—may be a sound basis for distinguishing the two cases. *Giboney*, though, is not.

Similarly, *California Motor Transport Co. v. Trucking Unlimited* held that while legitimate litigation is immune from antitrust liability, because litigation constitutes the exercise of the First Amendment right to petition the courts, “sham” litigation aimed at “eliminat[ing] an applicant as a competitor by denying him free and meaningful access to the agencies and courts” is unprotected.<sup>165</sup> The Court relied primarily on *Giboney*, reasoning that “First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.”<sup>166</sup>

But in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, the Court explicitly limited this “sham litigation” exception to litigation that is both objectively frivolous and subjectively ill-motivated.<sup>167</sup> Under the *Giboney* rationale, objectively reasonable and unreasonable litigation would equally be “integral part[s] of conduct” aimed at monopolization; they should thus be treated equally. Yet *Professional Real Estate Investors* recognizes that objectively reasonable litigation is a constitutionally protected exercise of the right to petition, and that’s true whether or not it is “an integral part of conduct” aimed at securing a monopoly.

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<sup>161</sup> 436 U.S. 447, 449 (1978).

<sup>162</sup> *Id.* at 456.

<sup>163</sup> 436 U.S. 412, 434-35 (1978).

<sup>164</sup> *Ohralik*, 436 U.S. at 455-56; *Primus*, 436 U.S. at 437-38.

<sup>165</sup> 404 U.S. 508, 514-15 (1972).

<sup>166</sup> *Id.*

<sup>167</sup> 508 U.S. 49, 60 (1993).

The constitutionally significant distinction is between frivolous petitioning of the courts, which is unprotected by the Petition Clause against a wide range of liability, and objectively reasonable petitioning, which is protected. It is not, as *Giboney* would suggest, between petitioning that's an integral part of a broader pattern of conduct and petitioning that can't be so described.

Likewise for *New York v. Ferber* and *Osborne v. Ohio*, which upheld bans on distributing and possessing child pornography, and argued in passing that

[T]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney*.<sup>168</sup>

But not all speech that provides a motive for illegal conduct can be outlawed simply because it is "an integral part of conduct in violation of a valid criminal statute." When the *New York Times* publishes illegally leaked documents,<sup>169</sup> or transcripts of an illegally excerpted conversation, it would have a strong First Amendment defense (assuming that it got the documents or tapes from an independent third party), even though the prospect of such publication may provide a motive for the illegal leak or illegal interception.<sup>170</sup>

In some narrow circumstances, there might be some constitutional justification for restricting the publication of the leaked material—for instance, if there is some extraordinary pressing national security concern<sup>171</sup>—just like there were other First Amendment reasons in *Ferber* and *Osborne* which justified the child pornography exception to the First Amendment.<sup>172</sup> But the broad *Giboney* "speech . . . used as an integral part

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<sup>168</sup> *New York v. Ferber*, 458 U.S. 747, 762-63 (1982), *quoted in Osborne v. Ohio*, 495 U.S. 103, 110 (1990).

<sup>169</sup> The leak may be illegal because it violates a law that requires government employees to keep certain information confidential, a law that imposes a duty of loyalty on corporate employees, or trade secret law. See Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart, and Bartnicki*, 40 *HOUS. L. REV.* 697, 739-48 (2003) (discussing this).

<sup>170</sup> See *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978).

<sup>171</sup> *Cf. New York Times Co. v. United States*, 403 U.S. 713, 735-40 (1971) (White, J., concurring in the judgment, joined by Stewart, J.) (suggesting that publishing illegally leaked national security secrets might well be criminally punishable); *id.* at 752-59 (Harlan, J., dissenting, joined by Burger, C.J., and Blackmun, J.) (concluding that such publication could even be enjoined).

<sup>172</sup> See, e.g., *New York v. Ferber*, 458 U.S. 747, 759 (1982) (stressing how harmful and how valueless child pornography is); *Osborne v. Ohio*, 495 U.S. 103, 108, 110-11

of conduct” argument can’t itself justify the restriction, or else all publication of illegally leaked documents would be treated the same way as publication of illegally created child pornography<sup>173</sup>

#### D. Rejecting *Giboney*

*Giboney*, then, is a poor basis for analyzing speech restrictions. The case itself provides no clear rule distinguishing speech that’s constitutionally protected from speech that’s stripped of constitutional protection. The cases applying *Giboney* don’t help, either. Some of those cases use *Giboney* to reach results that are inconsistent with modern First Amendment law. Others may reach results that fit the rest of the doctrine, but in those cases the real foundation for the decision is something other than the *Giboney* principle, and the citation of *Giboney* only obscures the true rationale.

The Supreme Court decided *Giboney* in 1949, when the Justices were still in the early stages of developing free speech doctrine. Many of the speech-protective Supreme Court decisions of the modern era, such as *Brandenburg v. Ohio*, *Cohen v. California*, and *NAACP v. Claiborne Hardware* were still decades in the future. It isn’t surprising that some of the applications of *Giboney* have proven to be inconsistent with these more recent cases. If we endorse these more recent decisions, this should lead us to reject *Giboney* as a guide to modern free speech law.

#### IV. “SITUATION-ALTERING UTTERANCES”

I turn now to a third category of “speech as conduct” arguments, made famous in the First Amendment literature by Kent Greenawalt’s *Speech, Crime, and the Uses of Language*,<sup>174</sup> and in the philosophy of language literature by J.L. Austin and John Searle.<sup>175</sup> I will focus on Greenawalt’s approach; since Austin and Searle were philosophers of language rather than lawyers, their concern was with discussing how words are used by people, rather than with drawing legally significant distinctions, and their arguments are thus of limited help for First Amendment doctrine.<sup>176</sup>

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(1990) (same).

<sup>173</sup> See also Frederick Schauer, *Codifying the First Amendment*: New York v. Ferber, 1982 SUP. CT. REV. 285, 300 (1982) (likewise criticizing *Ferber*’s use of *Giboney*).

<sup>174</sup> KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* (1989).

<sup>175</sup> J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962); JOHN R. SEARLE, *SPEECH ACTS* (1970).

<sup>176</sup> Austin, for instance, casts his book as a criticism of the “assumption of philosophers that the business of a ‘statement’ can only be to ‘describe’ some state of affairs, or to ‘state some fact,’ which it must do either truly or falsely.” AUSTIN, *supra* note



*Speech, Crime, and the Uses of Language* contends that some kinds of statements—for instance, “I promise to help you commit this crime,” “I’ll raise my prices if you raise yours,” or “I will” said in a wedding ceremony—are constitutionally unprotected conduct rather than protected speech.<sup>177</sup> And, the argument goes, the statements are conduct rather than speech for a peculiar reason: They impose, as a matter of social convention, a felt moral obligation (on the speaker or on listeners).

Utterances are often a means for changing the social context in which we live. . . . The conventions of language and of ordinary social morality make certain utterances, such as promises, count as far as one’s moral obligations are concerned. My essential claim—a central claim for this book—is that utterances of these sorts are situation-altering and are outside the scope of a principle of free speech. Such utterances are ways of doing things, not of asserting things.<sup>178</sup>

Such “situation-altering utterances” (the book’s term) aren’t limited to statements that create *legal* obligations: For instance, even a legally unenforceable agreement to commit a crime or to set prices, or even a legally ineffective wedding (for instance, a wedding that all observers know to be a legally unrecognized same-sex or polygamous wedding), would qualify. Nor are they limited to statements that create obligations that most of us would recognize as morally binding; a promise to kill someone may

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175, at 1. He then proceeds to disprove that assumption, by pointing out how words can be used in a “performative” sense as well as the fact-declaring “constative” sense, and in the process includes within the “performative” category statements that “criticize,” “predict,” “estimate,” “advise,” “recommend,” “warn,” “urge,” and “plead,” *id.* at 83, 85-86, 140, 147, 155. This makes clear that the performative/constative line isn’t immediately helpful to lawyers who are trying to distinguish protected speech from unprotected speech-as-conduct, even if it is helpful to philosophers who are trying to understand how people communicate. Cf. GREENAWALT, *supra* note 174, at 58 (making the same observation about Austin’s “performative” utterances, and stressing that “situation-altering utterances” are a “much narrower [category] than Austin’s category of performatives”).

Austin’s categories of “locutionary act[s]” (“uttering a certain sentence with a certain sense and reference), “illocutionary acts” (for instance, “informing, ordering, warning, undertaking, &c, i.e., utterances which have a certain (conventional) force”), and “perlocutionary acts” (“what we bring about or achieve by saying something, such as convincing, persuading, deterring, and even, say, surprising or misleading”), are even less suited to providing constitutionally significant distinctions, and I have no reason to think that Austin or Austin’s modern heirs would argue otherwise. Even if some kinds of illocutionary acts, such as undertaking in the sense of promising to do something, might be constitutionally unprotected, other illocutionary acts—for instance, “informing”—surely are. Likewise, the perlocutionary acts of “convincing” and “persuading” must certainly be constitutionally protected. Austin, *supra* note 175, at 108; *see also id.* at 102 (distinguishing “the locutionary act ‘he said that . . .’ from the illocutionary act ‘he argued that . . .’ and the perlocutionary act ‘he convinced me that . . .’”).

<sup>177</sup> *Id.* at 239.

<sup>178</sup> *Id.* at 57-58 (footnotes and paragraph break omitted).

not be morally binding, but it's treated as situation-altering. Rather, the argument goes, they encompass all statements that affect someone's *felt* moral obligations, simply by virtue of the statement's having been made—so long as one's fellow criminals feel that one is morally bound by a criminal conspiracy, one's statement agreeing to participate in the conspiracy is considered situation-altering.

*Speech, Crime, and the Uses of Language* has been justly lauded, and while I disagree with it in some measure, I don't intend to critique it in detail here. I do, however, want to offer two observations about its "situation-altering utterance" theory.

#### A. *The Doctrine's Limited Scope*

First, it's important to recognize the limits that *Speech, Crime, and the Uses of Language* itself imposes on this "speech as conduct" category.

"Situation-altering utterances," as the book defines them, certainly do *not* cover all attempts to "do things with words" or to "alter" the "situation" by speaking. People often use simple assertions of facts or ideas, which the book excludes from the definition of situation-altering utterances,<sup>179</sup> to do things. When a newspaper publishes an editorial advocating some new welfare policy, or urging citizens to recycle, it is trying to accomplish a certain result—a substantive change in people's conduct. Such clearly constitutionally protected speech often "alters" the "situation" by its persuasive or informative force, through the process of "alter[ing] the listener's understanding of the world he inhabits."<sup>180</sup> But that doesn't make it fit within the definition of "situation-altering."<sup>181</sup>

Nor does the definition include all statements that change people's felt moral obligations. Telling people that some seemingly benign behavior is harmful to others, for instance, may impose on them a moral obligation to avoid such harm. A man who is told that he has a communicable disease has different moral (and perhaps legal) obligations to others than one who thinks he's well. But such statements that reveal preexisting facts are treated as speech, not as constitutionally unprotected "situation-altering" conduct, even though they do change people's moral obligations.<sup>182</sup>

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<sup>179</sup> See *id.* at 57 (distinguishing situation-altering utterances from "claims of fact or value").

<sup>180</sup> *Id.* at 59.

<sup>181</sup> *Id.* at 59-60. Under the *Speech, Crime, and the Uses of Language* framework it might, at least in some cases, qualify as a "weak imperative," *id.* at 68-71, or as "action-inducing," Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 683-85, but the book makes clear that such speech is still presumptively protected, and doesn't count as situation-altering in his scheme, GREENAWALT, *supra* note 174, at 59-60.

<sup>182</sup> GREENAWALT, *supra* note 174, at 61-62.

Rather, the “situation-altering utterances” category is limited to statements that “actually alter the normative world, shifting rights or obligations” because of their very assertion, and not because of any facts or ideas that they reveal.<sup>183</sup> A promise, for instance, imposes a perceived moral obligation on the promisor.<sup>184</sup> An order by someone in a position of authority obligates the ordered person to do something.<sup>185</sup>

These statements affect people not because they communicate some pre-existing fact or idea that exists outside the speaker’s control. Rather, such statements—“exercises of official authority, agreements, promises, orders, offers, manipulative inducements, and manipulative threats”—affect people chiefly because the speaker has made them. And, the argument goes, the statements should therefore be treated as constitutionally unprotected action rather than constitutionally protected speech.<sup>186</sup>

This definition means that very little, if any, of the speech I described in previous sections—speech that some people have argued should be treated as merely “conduct”<sup>187</sup>—would constitute “situation-altering utterances.” Speech that communicates information about how a crime can be effectively committed would not be situation-altering. Such speech, whether in a novel, chemistry textbook, or murder manual, would simply be an “assertion[] of fact,”<sup>188</sup> albeit a potentially dangerous one.

Likewise, speech that creates an offensive work, educational, or public accommodations environment is generally the assertion of offensive ideas (for instance, that some groups are inferior, or that women should be seen as sex objects rather than equals in the workplace<sup>189</sup>) and not an agreement,

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<sup>183</sup> *Id.* at 59-60.

<sup>184</sup> *Id.* at 63-65. I will generally speak in this section of “felt moral obligations” or “perceived moral obligations,” which is to say moral obligations that some people are likely to recognize, whether or not the obligation is legally enforceable or morally valid. This definition reflects the *Speech, Crime, and the Uses of Language* definition of what statements are situation-altering, *see id.* at 59-60, and it’s necessary for the book’s argument to work: An agreement to commit a crime or to fix prices, for instance, is “situation-altering” even if it’s legally unenforceable and morally valid—it is “situation-altering” because the parties will perceive it as imposing a moral obligation on them.

<sup>185</sup> *Id.* at 65.

<sup>186</sup> *Id.* at 58. Greenawalt excludes from this list agreements that themselves concern speech; as to such agreements, “the subject of the agreement makes a free speech principle relevant,” *id.* at 64; *see also id.* at 335-37.

<sup>187</sup> *See supra* text accompanying notes 2-18 and notes 120-129.

<sup>188</sup> GREENAWALT, *supra* note 174, at 58 (distinguishing situation-altering utterances from assertions of fact).

<sup>189</sup> *See Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1502-07 (M.D. Fla. 1991); *Barbetta v. Chemlawn Servs. Corp.*, 669 F. Supp. 569, 573 (W.D.N.Y. 1987); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1212 n.118 (1989); Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship*, 46 U. MIAMI L. REV. 403, 438 (1991).

promise, order, or the like. Same for speech praising jury nullification, speech that urges the moral propriety of a boycott, or speech that recommends marijuana to a patient.

*Speech, Crime, and the Uses of Language* actually deals with more than situation-altering utterances; other sections of the book discuss crime-facilitating speech, offensive speech, speech urging illegal or harmful behavior, and the like.<sup>190</sup> But the book correctly treats the latter categories of speech as assertions of fact and value, and thus as presumptively constitutionally protected speech, rather than as unprotected situation-altering utterances. And the book then analyzes the costs and benefits of restricting the speech, and concludes that a good deal of such speech should indeed be protected, though some can be properly restricted under some exception to First Amendment protection.

### B. *The Questionable Relevance of Altering Felt Moral Obligations*

As I mentioned, the premise of the “situation-altering utterances” argument is that when a statement’s utterance imposes—as a matter of social convention—a felt moral obligation (on the speaker or on listeners), the statement stops being speech and becomes conduct.<sup>191</sup>

This is how the book explains the widely shared belief that agreements and offers aren’t protected as free speech.<sup>192</sup> Promises create a felt “moral obligation,” which “the people who have made [the promise perceive] as having [moral] force.”<sup>193</sup> The promises trigger a “convention[] . . . of ordinary social morality” that one should keep one’s promises; and the violation of this convention “renders [the promisors] vulnerable to counterresponses,”<sup>194</sup> which is what makes the promise situation-altering. Likewise, some other speech (what the book calls “permissions”) waives felt moral obligations rather than creating them, and it too is thus situation-altering.

But why should a statement’s creating a felt moral obligation turn the statement from presumptively constitutionally protected speech into unprotected conduct? There are, after all, lots of social conventions under which the very making of a statement will be seen by some as increasing the speaker’s moral obligations, or increasing or decreasing the listener’s

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<sup>190</sup> See, e.g., GREENAWALT, *supra* note 174, at 85-87, 110-29, 141-57, 260-80, 287-313.

<sup>191</sup> *Id.* at 57-58 (footnotes and paragraph break omitted).

<sup>192</sup> See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 55 (1982).

<sup>193</sup> *Id.* at 63; *id.* at 65 (making clear that the same analysis applies to unilateral promises as well as to bilateral agreements).

<sup>194</sup> *Id.* at 58, 63.

moral obligations.<sup>195</sup> Consider just four examples:

- (a) *The felt moral impropriety of hypocrisy.* There is a perceived moral duty to avoid hypocrisy—to act consistently with what one says. If a speaker says that all soldiers fighting in a war are murderers, he is implicitly undertaking a moral obligation to refuse to fight in the war. His very statement makes many people expect that he will practice what he preaches. As with a promise, the “utterance[ has] alter[ed the speaker’s] normative obligations, what [he] should do in the future.” “The conventions of language and of ordinary social morality,” here the moral condemnation of hypocrisy, make this utterance “count as far as one’s moral obligations are concerned.”<sup>196</sup>
- (b) *The felt moral relevance of peers’ and leaders’ moral permissions.* People perceive—rightly or wrongly—that they may do what the leaders of their community, or their peers, think is permissible. When either a leader or a large peer group says that “it’s fine to refuse to deal with people of other ethnic groups,” many people might feel less of an obligation to act in a nondiscriminatory way.<sup>197</sup>
- (c) *The felt moral relevance of peers’ and leaders’ moral demands.* People also sometimes feel that they should do what leaders or peers think is necessary. For instance, when the leader or the peers say “one should refuse to deal with people of other ethnic groups,” many people might feel something of an obligation to engage in such an ethnic boycott. In both this example and the last one, the leader’s or peers’ “utterance[ has] alter[ed the listener’s] normative obligations, what [he] should do in the future”—in the earlier example, by weakening the listener’s normative obligation not to discriminate, and in this example by imposing a new obligation to discriminate. (The obligation may be morally controversial, not

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<sup>195</sup> Under the *Speech, Crime, and the Uses of Language* framework, either of these three kinds of change to moral obligations would make a statement situation-altering. See *id.* at 63-65 (promises are situation-altering because they increase the speaker’s felt moral obligations); *id.* at 65 (permissions are situation-altering because they decrease the listener’s felt moral obligations, by allowing the listener to do something that he might have otherwise seen as immoral); *id.* at 65 (orders are situation-altering because they increase the listener’s felt moral obligations). The missing fourth category is statements that decrease a speaker’s moral obligations, but I take it that it’s rare that people can decrease their own felt moral obligations just by speaking, and if they can do so, then perhaps the obligations weren’t that obligatory in the first place.

<sup>196</sup> *Id.* at 57-58. Perhaps it might not count as much as a statement that “I promise not to drink alcohol,” or especially “we mutually promise to each other not to drink alcohol,” but it does count.

<sup>197</sup> “Situation-altering utterances” include statements that diminish a listener’s moral obligations—for instance, a permission such as “Go ahead and hit me, I wish you’d try it.” *Id.* at 65.

very strong, and not equally felt by everyone; but the same is true of many promises, especially promises to do illegal things.)

- (d) *The felt professional obligation to respond.* In scholarship, and likely in other fields, there is a social convention that people ought to respond to their serious critics. A scientist who fails to respond to his critics may be condemned by his peers, just as a scientist who fails to keep his promises may be condemned by his peers. And this is so regardless of whether the critics persuade the peers: The critics' very making of the statements creates something of an obligation to respond.<sup>198</sup>

So all these cases satisfy the criteria for situation-altering utterances: The statements change the speaker's, the listener's, or the criticized person's felt moral obligations. The statements change the obligations simply by the statements' having been made. Naturally, if the statements are especially persuasive, they also create an obligation through their persuasiveness. But they create such an obligation even independently of their persuasiveness: Even if most of the anti-war speaker's audience isn't persuaded that the war is evil, the speaker will still have incurred a felt moral obligation to act consistently with what he had said.

Yet it's not clear that any of these statements "are ways of doing things, not of asserting things"; and even if they are both ways of doing things and of asserting things, it's not clear that what they do should be any less constitutionally protected than what they assert. Yes, they create or waive felt moral obligations. But they do so by communicating, just as pure statements of fact or value sometimes create or waive felt moral obligations. I suspect that most people's first reaction to the statements described above is that they're pure speech; and the "situation-altering utterance" theory doesn't explain why we should take a different view.

I share the intuition that agreements and offers should be constitutionally unprotected. But it seems to me that the "situation-altering utterances" framework—which theorizes that agreements and offers alter felt moral obligations, and that speech that alters felt moral obligations is unprotected—is not entirely persuasive.

It's possible, even accepting the situation-altering utterance theory, to explain why the examples I give should remain constitutionally protected

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<sup>198</sup> See *id.* at 144 (suggesting that some fighting words might be situation-altering because they create a felt moral obligation on the target to respond; a professional challenge may have even more obligatory force). Of course, the felt moral obligation in one situation might be to fight, and in the other to speak. But under the "situation-altering utterance" theory, both seem to be situation-altering utterances, because both *do* something (create a moral obligation, even if it's just a moral obligation to say something) rather than merely communicating assertions of fact or value.

despite their situation-altering component: Banning such statements would also make it hard to convey the facts and opinions that they convey; banning overt promises or offers, on the other hand, would probably still leave people free to convey the same facts and opinions, just by changing their statements in some measure. *Speech, Crime, and the Uses of Language* in fact sometimes suggests this sort of distinction,<sup>199</sup> though it sometimes seems to take a different approach.<sup>200</sup>

This approach may even fit the way the First Amendment generally deals with behavior that consists both of conduct and of speech. Say that expression of fact or opinion is done using physical conduct that's harmful

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<sup>199</sup> See *id.* at 60 (acknowledging that agreements to marry convey certain facts and opinions, but reasoning that “if we focus on opportunities for communication, whatever one wants to communicate about facts and values can typically be asserted much more straightforwardly by means other than a situation-altering utterance”); *id.* at 60-61 (acknowledging that offers to bet convey “intensity of belief,” but reasoning that “Since a prohibition on betting would exert only a slight effect on people’s ability to express the certainty of their opinions, the betting example does not yield a very strong argument for treating situation-altering utterances like statements of fact, and we can rest with the generalization that a free speech principle does not reach situation-altering utterances”).

<sup>200</sup> At times the book inquires whether the situation-altering aspect of an utterance “dominates” the assertions of fact or opinion. See, e.g., *id.* at 57 (saying, in the first paragraph of the “Situation-Altering Utterances” section, that “I here examine some major uses [of language] which are common subjects of criminal statutes and which do not dominantly involve claims of fact or value”); *id.* at 60 (“Because the ‘performative’ aspect of most such utterances [such as agreements to marry] so entirely dominates any implicit claims of fact and value and because similar implicit claims are present in virtually all noncommunicative behavior, we need not alter our conclusion that a principle of free speech does not apply to situation-altering utterances as it applies to claims of fact and value.”). This, though, strikes me as a mistaken approach. As John Hart Ely famously put it, much expressive conduct is “100% action and 100% expression.” Ely, *supra* note 93, at 1495. Neither aspect is “dominant” in principle, and even if it could be, courts couldn’t practically decide which component dominates the other. *Id.* Likewise as to supposedly situation-altering utterances: A speech by a respected community leader praising a race-based boycott is both a means of trying to persuade people, and a means of making them feel a moral obligation (or at least giving them a moral permission) to act as the respected leader suggests. The same goes for peer pressure from fellow community members. It’s not clear whether either factor can predominate in theory, and in any event it’s hard to see how one can decide which factor predominates in practice.

And the same is also true for the matters that the “situation-altering utterance” theory is trying to explain, such as agreements and offers. A person’s going through a marriage ceremony—again, let’s assume that it’s not a legally binding ceremony—creates moral obligations, conveys facts about the person’s mental state, and often conveys the person’s moral beliefs (especially when the ceremony is controversial, for instance because it is a same-sex ceremony). An offer to join a political conspiracy may likewise be at least as much a political statement as a statement that changes people’s felt moral obligations. Yet the law would treat such offers and agreements as punishable offers and agreements, without any inquiry into which element “predominates.” And Professor Greenawalt would presumably reach the same result.

for reasons unrelated to the facts or opinions it conveys—for instance, when someone uses loud amplification to express his message. The government may then generally restrict this mixture of expression and physical conduct if the restriction (1) focuses on the conduct element, (2) is narrowly tailored to an important government interest in restricting the conduct, and (3) leaves open ample alternative channels for expressing the message.<sup>201</sup> The same rule should apply, the argument would go, to expressions of fact or opinion (pure speech) that are also situation-altering utterances (speech that ought to be treated as conduct).

But such a defense, I think, would miss the point: In the examples given above, all aspects of the speech—both its informational and persuasive value, and any felt change in moral obligation that the speech might yield—should be constitutionally protected.

True, the speech may change people’s felt moral obligations by creating peer pressure, by taking advantage of professional norms, or by committing the speaker to act in a certain way lest he face charges of hypocrisy. But even if the government’s aim in restricting the speech is only to prevent such changed moral obligations, the restriction should be unconstitutional, period (unless the speech falls within one of the exceptions to protection). There should be no need for any complicated and likely subjective inquiry into whether the prohibition would still leave the speaker relatively free to convey the bare factual or ideological assertions without the supposedly “situation-altering” factors.

### C. *The Problem of Agreements and Offers*

Professor Greenawalt has certainly identified an important unresolved problem: Judges, scholars, and others generally believe (and likely correctly believe) that certain statements—“exercises of official authority, agreements, promises, orders, offers, manipulative inducements, and manipulative threats”<sup>202</sup>—are constitutionally unprotected; but neither the Supreme Court nor the legal academy has fully explained why this is so.<sup>203</sup>

I suspect that the problem isn’t that complex or novel for exercises of official authority, official orders, orders within a business, or orders within a criminal gang. These are threats: Do this or you’ll be fired, jailed, or perhaps even killed.<sup>204</sup> *Speech, Crime, and the Uses of Language* itself

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<sup>201</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>202</sup> See GREENAWALT, *supra* note 174, at 58.

<sup>203</sup> See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 55-56 (1982) (reasoning that many though not all promises are constitutionally unprotected, but not explaining why this is so, or where the line should be drawn).

<sup>204</sup> See *id.* at 65-66.



acknowledges that direct threats should be analyzed as speech rather than as situation-altering utterance, and concludes (for good reason) that they should be unprotected speech.<sup>205</sup> Likewise, the lack of protection given to manipulative threats can also be justified under the general threats exception, though I agree that this exception should be limited to exclude “warning threats.”<sup>206</sup>

For agreements, offers, and manipulative inducements (which are essentially a form of offer), the problem is considerably harder.<sup>207</sup> I can’t claim to have a solution to the problem, and this may be reason to consider my criticisms of the “situation-uttering utterances” framework with some skepticism: That framework, at least, proposes a solution, and I do not. Yet it seems to me that the expression of moral commitment does not itself suffice to make speech into nonspeech conduct.

Here, as elsewhere, it may be better to recognize that speech which conveys an offer or a promise—and certainly the broader range of speech that changes people’s felt moral obligations—is indeed speech, not merely conduct. Such speech sometimes does communicate facts and ideas. It sometimes should be protected, for instance in the examples I mention above. But it should also be sometimes restrictable for certain reasons, related to the harm that it can cause, and its likely lack of First Amendment value. This is the very sort of analysis that *Speech, Crime, and the Uses of Language* itself applies to other kinds of speech, such as false statements of fact, unconditional threats, and solicitation of crime<sup>208</sup>—speech that should be restrictable even though it isn’t situation-altering.

But even if I’m mistaken, and even if agreements, offers, orders, and manipulative threats should be seen as conduct rather than speech, it’s important to recognize that this “situation-altering utterance” category is quite narrow. Statements of fact and value remain speech, not conduct. Crime-facilitating speech, offensive speech, and copycat-inspiring speech all remain speech, even if one accepts the “situation-altering utterances” framework.

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<sup>205</sup> *Id.* at 90-91, 290-92.

<sup>206</sup> See, e.g., *id.* at 91; see also John Sauer, *Conditional Threats and the First Amendment* (in draft); *State v. Robertson*, 649 P.2d 569, 578 (Ore. 1982); *Wurtz v. Risley*, 719 F.2d 1438, 1443 (9th Cir. 1983).

<sup>207</sup> Agreements literally involve nothing but speech: After all, a conspiracy is formed not by the agreement inside each conspirator’s heads, which coconspirators and jurors usually won’t learn about, but by the expression of that agreement to the coconspirators. Sometimes that expression could be wordless—as with a nod—or even entirely tacit. But if there is a conspiracy, it must be that one conspirator’s action has intentionally expressed to another conspirator his agreement to work together.

<sup>208</sup> See GREENAWALT, *supra* note 174, at 110-18, 130-40, 260-80, 290-92, 314-27.

## V. THE UNCHARTED ZONES OF FREE SPEECH

I've argued above that when speech is restricted because of harms caused by its content, we ought not try to evade the First Amendment problem by simply renaming the speech "conduct." As Bill Van Alstyne has written, pointing to two examples:

Lying on the witness stand is not less speech than lying about the weather . . . , although it may also be perjury. The shout of "Fire!" is not less speech in the Holmes instance than the shout of "Fire!" from the mouth of an actor on the stage of the same theater, spoken as but a word in a play. It is futile to argue that an appropriately tailored law that punishes any or all of these utterances does not abridge speech. It does, it is *meant* to, and one should not take recourse to verbal subterfuge, *e.g.*, that it is "speech-brigaded-with-action" or "conduct" alone that is curtailed . . . .<sup>209</sup>

But what, then, of the classic examples of speech that people say ought to be restricted under this rubric? *Ohralik v. Ohio State Bar Association* followed its citation of *Giboney* by citing "exchange of securities information; corporate proxy statements; exchange of information among competitors; and employers' threats of retaliation for employees' labor activities" as evidence that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."<sup>210</sup> The Justice Department likewise followed its *Giboney* argument by citing "inchoate crimes" such as "conspiracy, facilitation, solicitation, bribery, coercion, blackmail, and aiding and abetting"<sup>211</sup> as examples of speech that can be prohibited as conduct.<sup>212</sup>

*Rice v. Paladin Press* argued that "Were the First Amendment to bar or to limit government regulation of such 'speech brigaded with action,' the government would be powerless to protect the public from . . . extortion or blackmail[;] . . . threats and other improper influences in official and political matters[;] . . . perjury and various cognate crimes[;] . . . criminal solicitation[;] . . . conspiracy[;] . . . [criminal] harassment[;] . . . forgery[;] . . . successfully soliciting another to commit suicide . . . ; and the like."<sup>213</sup> Some judicial opinions have likewise pointed to speech by professionals

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<sup>209</sup> William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 114 (1982). Van Alstyne is of course not condemning these speech restrictions—he is only condemning the attempt to deny that these are indeed speech restrictions.

<sup>210</sup> 436 U.S. 447, 456 (1978).

<sup>211</sup> See U.S. DEP'T OF JUSTICE, *supra* note 17, at text accompanying n.57.

<sup>212</sup> For a broader analysis of why these examples have long gone undiscussed, see Frederick Schauer, *The Boundaries of the First Amendment*, 117 HARV. L. REV. 1765 (2004).

<sup>213</sup> 128 F.2d 233, 244 (4th Cir. 1997).

said to their clients.<sup>214</sup>

The answer, it seems to me, is the one that First Amendment law generally gives: There are exceptions to the First Amendment's protection, and the courts ought to identify the boundaries of those exceptions.<sup>215</sup> For instance, the Court in *Brandenburg v. Ohio* didn't deal with advocacy of illegal conduct simply by describing it as the "inchoate crime[]" of illegal advocacy, or by citing *Giboney*.<sup>216</sup> Rather, the Court acknowledged that such advocacy is presumptively protected speech, and carefully defined the narrow circumstances under which such advocacy can be punished.<sup>217</sup>

Similarly, fraud, perjury, and forgery can be punished under the false statements of fact exception.<sup>218</sup> "[E]mployers' threats of retaliation for employees' labor activities"<sup>219</sup> and other threats could be punished under the threats exception. These exceptions aren't just special cases of a "conduct unprotected, speech protected" principle. They are separately crafted rules that let the government punish speech in particular circumstances, based on arguments about the harm and value of speech that are specific to each exception.

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<sup>214</sup> See, e.g., *SEC v. Lowe*, 472 U.S. 181, 228 (1985) (White, J., concurring in the judgment) ("The power of government to regulate the professions is not lost whenever the practice of a profession entails speech," citing *Giboney*); *Nat'l Ass'n for the Advancement of Psychoanalysis v. California Bd. of Psychiatry*, 228 F.3d 1043, 1053-55 (9th Cir. 2000) (likewise).

<sup>215</sup> See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002) ("As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.").

<sup>216</sup> Cf. *Cox v. Louisiana*, 379 U.S. 559, 563 (1965) (suggesting in passing that "encouraging the commission of a crime" is indeed punishable, and citing the *Giboney* language as supporting that position).

<sup>217</sup> I think solicitation of crime should be dealt with by modifying incitement doctrine. Solicitation, like incitement, is a form of crime advocacy; but it is generally aimed at one person and is unlikely to persuade or inform that person of any political ideas, and this might justify relaxing the imminence standard. Cf. *Cherry v. State*, 306 A.2d 634, 639-41 (Md. Ct. Spec. App. 1973). But see *People v. Salazar*, 362 N.W.2d 913 (Mich. App. 1985), which overturned a solicitation conviction on the grounds that the defendant was trying to solicit someone to commit a crime some time in the future, rather than imminently, citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See generally Volokh, *Crime-Facilitating Speech*, *supra* note 3, at pts. II.C, IV.A.2.a, V.C (discussing why speech that is aimed solely at an audience that one knows to consist of criminals, and that is likely to help bring about crime, should be unprotected).

<sup>218</sup> See, e.g., *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 123 S. Ct. 1829, 1841 (2003) (applying the false statements of fact exception to knowingly false statements even outside defamation law).

<sup>219</sup> See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 386 (1998).

The same goes for some of the examples that I cite in the Introduction. I suggest elsewhere,<sup>220</sup> for instance, the proper boundaries of a “crime-facilitating speech” exception under which some speech that might qualify as “facilitation” or “aiding and abetting” may be punished.<sup>221</sup>

These boundaries shouldn’t be those of the crime of criminal facilitation (generally defined as recklessly or knowingly, and sometimes even negligently, helping a criminal)<sup>222</sup> or of aiding and abetting (generally defined as intentionally, or sometimes knowingly, helping a criminal).<sup>223</sup> Not all such speech should be restrictable, even if may fit within the definitions of those crimes: A chemistry textbook that describes how explosives are made, for instance, should be constitutionally protected even if it recklessly facilitates the construction of bombs by criminals. Rather, the boundaries ought to be developed by considering the usual First Amendment factors—the value of the speech,<sup>224</sup> the harm that it causes, the difficulty of drawing certain lines, the risk that punishing some speech will deter other speech, and so on—and not just asking whether the speech constitutes “criminal conduct.”<sup>225</sup>

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<sup>220</sup> Volokh, *Crime-Facilitating Speech*, *supra* note 3.

<sup>221</sup> This may also justify restrictions on insiders’ leaks of information about securities. Such leaks are actually an example of crime-facilitating speech said to a small audience that the speaker knows is likely to use the speech for criminal purposes: Trading based on inside information is illegal, and the tip provides information that lets people engage in such conduct. See Volokh, *Crime-Facilitating Speech*, *supra* note 3, at pt. V.B (explaining why such speech may be restricted).

<sup>222</sup> See *supra* note 4.

<sup>223</sup> See *supra* note 25.

<sup>224</sup> This of course implicates the perennial debates about what theory of First Amendment value courts should use. See Adam M. Samaha, *Litigant Sensitivity in First Amendment Law* 12 n.49 (draft) (citing the leading articles advocating for the various views). The Supreme Court has been notoriously reluctant to resolve those debates, and to settle on any theory—self-government, search for truth, self-expression, and so on—as being the sole foundation of First Amendment law. 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).

I need not, however, take sides on this subject. My argument here is simply that, whatever one thinks is the proper metric of First Amendment value, the decisions about what speech should be protected must turn on the factors I mention in the text (which include the value of the speech). They should not turn on the characterization of speech as “conduct,” at least when the speech is being restricted precisely because of what it communicates, and the harms that may supposedly flow from that communication.

<sup>225</sup> See Volokh, *Crime-Facilitating Speech*, *supra* note 3 (going through this analysis). One can of course argue that a good deal of such speech—or other speech, such as solicitation, agreements, and the like—should be unprotected on the grounds that it isn’t part of “public discourse,” a concept most prominently explored by Robert Post. See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion*,

The same is true, I think, for blackmail and coercion. Some speech that might be called blackmail and coercion should surely be unprotected. Other speech—for instance, “stop shopping at these white-owned stores, or we’ll publicize your noncompliance with our boycott” or “stop engaging in certain real estate selling practices, or we’ll distribute leaflets to your neighbors criticizing you”<sup>226</sup>—is constitutionally protected. The lines between the protected and unprotected must be drawn, and scholars and courts have suggested such lines (which would presumably become part of the threats exception).<sup>227</sup> But the lines can’t be drawn based simply on assertions that some speech is speech and other speech is conduct.

Some of the other categories haven’t gotten the attention that they deserve. Conspiracy and bribery, for instance, involve agreements and offers of agreement. Not everything that is called conspiracy or bribery should be unprotected: A conspiracy to teach Communist doctrine or the propriety of polygamy<sup>228</sup> or a conspiracy to obstruct the draft by persuading people that the draft is wrong<sup>229</sup> should be protected.<sup>230</sup> So should a bribe in

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*Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990); Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1276 (1995); see also WEINSTEIN, *supra* note 107, at 44-48. This inquiry is closely related, I think, to the inquiries I mention in the text, especially the value of the speech. But as I argue in Volokh, *Crime-Facilitating Speech*, *supra* note 3, at pt. II.B, much speech that helps people commit crime is indeed a potentially valuable contribution to public discourse. The label “aiding and abetting” is not an adequate way of drawing the line between public discourse and other speech, or between valuable speech and valueless speech.

<sup>226</sup> See NAACP v. Claiborne Hardware, 458 U.S. 886 (1982); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). See also Keefe, 402 U.S. at 419 (“The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent’s conduct by their activities; this is not fundamentally different from the function of a newspaper.”).

<sup>227</sup> See, e.g., GREENAWALT, *supra* note 174, at 91; Sauer, *supra* note 206; State v. Robertson, 649 P.2d 569, 578 (Ore. 1982); Wurtz v. Risley, 719 F.2d 1438, 1443 (9th Cir. 1983).

<sup>228</sup> See Dennis v. United States, 341 U.S. 494 (1951) (upholding conviction for conspiracy to teach Communist doctrine); State v. Musser, 175 P.2d 724, 731 (Utah 1946) (upholding conviction for conspiracy to teach the propriety of polygamy), *vacated and remanded*, 333 U.S. 95 (1948); TRIBE, *supra* note 39, at 846 (“Dennis is generally deemed to mark the temporary eclipse of the Holmes-Brandeis formulation of the clear and present danger test.”); John T. Wirenius, *The Road to Brandenburg: A Look at the Evolving Understanding of the First Amendment*, 43 DRAKE L. REV. 1, 48 (1994) (concluding that “The basic holding of Dennis was overruled” in *Brandenburg v. Ohio*); Vitiello, *supra* note 30, at 1219 (“were Dennis or the World War I Era cases to arise today, the results would almost certainly be different”).

<sup>229</sup> See Schenck v. United States, 249 U.S. 47 (1919) (noting that Schenck was prosecuted for, among other things, conspiracy to obstruct the draft).

the form of “If you vote for this law, our advocacy group will give you its valuable endorsement during the next election season,”<sup>231</sup> or a candidate’s promise to refund to the county and thus to the voters some of his salary.<sup>232</sup> As I suggest in Part IV.C, courts and commentators ought to explain how one can distinguish constitutionally unprotected promises from constitutionally protected ones—just as the law distinguishes constitutionally unprotected personal insults, false statements of fact, or statements advocating illegal conduct from constitutionally protected ones.<sup>233</sup>

The same goes for certain speech that might violate antitrust law or securities law.<sup>234</sup> For instance, as Justice Holmes recognized, it’s not obvious when the publication of price and production information should be constitutionally unprotected<sup>235</sup> (as opposed to just being admissible as evidence to prove that price-setting was actually price-fixing<sup>236</sup>). But wherever the lines should be drawn, these decisions can’t just be made by saying that such speech constitutes the conduct of attempted monopolization, just as lobbying for anticompetitive legislation can’t be outlawed on the grounds that it constitutes attempted monopolization.<sup>237</sup>

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<sup>230</sup> See GREENAWALT, *supra* note 174, at 64, 335-37.

<sup>231</sup> See Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 809-11 (1985) (discussing this issue).

<sup>232</sup> *Brown v. Hartlage*, 456 U.S. 45, 57-58 (1982).

<sup>233</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Cohen v. California*, 403 U.S. 15 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>234</sup> See Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 40-63 (1989) (outlining some principles for analyzing securities laws under the First Amendment); *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 798-99 (2d Cir. 1985) (Winter, J., dissenting) (suggesting that proxy solicitation rules can’t constitutionally be applied to certain kinds of speech).

<sup>235</sup> See *American Column & Lumber Co. v. United States*, 257 U.S. 377, 413 (1921) (Holmes, J., dissenting). *Cf. also* *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697-99 (1978), which upheld a Sherman Act injunction barring a professional society “from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical.” The Court justified the injunction on the ground that the Society had already been found guilty of illegally entering into agreements prohibiting competitive bidding, *id.* at 684 & n.5, and that courts have the power “to fashion appropriate restraints” to prevent and to remedy such illegal behavior. It seems to me that without some such illegal past agreement, an organization’s claims about business ethics—for instance, claims that it’s unethical for professionals or businesses to deal with oppressive governments or to employ cheap foreign labor—would be constitutionally protected even if some law purported to condemn them as attempted “restraint of trade.”

<sup>236</sup> See *Wisconsin v. Mitchell*, 508 U.S. 476, 488-89 (1993) (holding that speech may be used of evidence of criminal intent or of physical behavior); *Haupt v. United States*, 330 U.S. 631, 642 (1947) (same).

<sup>237</sup> See *Eastern Railroad Conference v. Noerr Motors*, 365 U.S. 127 (1961); *United*

Treason poses a similar sort of problem. Some speech may well be treasonous, even if we set aside speech that reveals state secrets<sup>238</sup> or tells the enemy the sailing dates of troopships.<sup>239</sup> Axis Sally, for instance, was rightly punished for broadcasting, while working for the Nazis, a radio program aimed at decreasing the morale of American soldiers.<sup>240</sup>

But at the same time, much speech that does help the enemy must remain constitutionally protected. During war as during peace, Americans have a right and responsibility to evaluate their government's actions, and decide whether the actions—or the administration—need changing. To make these decisions we need to hear various views on whether the war is going well, whether we're morally in the right in our actions, and so on.

An American during the Vietnam War, for instance, should have had the right to argue to his fellow citizens that the war was unwinnable, that the U.S. should pull out, and that voters should support an antiwar candidate.<sup>241</sup> His arguments and others like his might well have helped the enemy, if they weakened U.S. resolve, made it more likely that the U.S. would indeed withdraw, or emboldened the Viet Cong. Moreover, if he thought the Viet Cong was in the right, he might well have wanted and intended the enemy to win.

Still, his speech should probably have been protected, even despite his intent to help our enemies. The speech might well have contributed valuable arguments to an important public debate, regardless of his intentions. And even if his intentions made him morally culpable and thus theoretically deserving of punishment, in practice prohibiting all speech that intentionally helps the enemy risks punishing even speakers who intend only to protect American interests, but whose intentions are mistaken by prosecutors and juries.<sup>242</sup>

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Mine Workers v. Pennington, 381 U.S. 657 (1965). For an example of an article that takes this First Amendment issue seriously, see Stephen G. Thompson, *Antitrust, the First Amendment, and the Communication of Price Information*, 56 TEMPLE L.Q. 939 (1983).

<sup>238</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (suggesting that such may be treason). As to speech that reveals secrets that the speaker has promised not to reveal, see *United States v. Aguilar*, 515 U.S. 593, 606 (1995) (upholding criminal punishment for releasing confidential information, on the grounds that “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.”); *Cohen v. Cowles Media*, 501 U.S. 663 (1991) (holding that the First Amendment doesn't give people a right to breach nondisclosure agreements); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (likewise).

<sup>239</sup> See *Near v. Minnesota*, 283 U.S. 697, 716 (1931) .

<sup>240</sup> See, e.g., *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950).

<sup>241</sup> See *supra* notes 35-36 and accompanying text; Tom Bell, *Treasonous Speech, Technology, and the First Amendment* (in draft).

<sup>242</sup> See Volokh, *Crime-Facilitating Speech*, *supra* note 3, at pt. IV.B.2 (pointing out the

Perhaps the proper test is whether the speaker was getting paid by the enemy<sup>243</sup> or otherwise coordinated his actions with the enemy.<sup>244</sup> Perhaps it's whether the speech was aimed at American voters generally or whether it was aimed at soldiers specifically. Perhaps it's something else altogether; or perhaps I'm mistaken, and a sound First Amendment analysis would conclude that the pro-Viet Cong speech I describe should indeed have been unprotected.

But again the problem should be solved by recognizing that treason law as applied to such speech is indeed a speech restriction, and inquiring whether the success of the war effort and the protection of our soldiers justifies restricting the speech. It's a mistake to try to avoid the First Amendment problem by categorically concluding that speech which helps the enemy is conduct rather than speech, or that treasonous speech is unproblematically punishable because the treason statute is a law of general applicability.

Finally, courts need to develop First Amendment standards for regulations of professionals' speech to clients;<sup>245</sup> and here too *Giboney* and the speech/conduct distinction is an inadequate tool for helping develop such standards. Most of what many lawyers, investment advisors, accountants, psychotherapists, and even doctors do is speech. Even if we conclude that speech in special government-created fora, such as courtrooms, should be treated differently from other speech, many lawyer-client relationships consist simply of lawyers' advising their clients.<sup>246</sup>

Such speech, I think, should be subject to greater regulation than speech to the public at large. For instance, licensing requirements for professionals who give personalized advice should probably be constitutionally permissible;<sup>247</sup> rules that one needs a license to write self-help books should

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shortcomings of intent standards in free speech law).

<sup>243</sup> This might indeed be a sort of conduct/speech distinction, but one that is focused on what is truly a conduct element (receipt of money) rather than the content of what the speech communicates.

<sup>244</sup> See *United States v. Chandler*, 171 F.2d 921, 939 (1st Cir. 1948) (focusing on both these elements).

<sup>245</sup> For a fine analysis of this issue, see Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885 (2000).

<sup>246</sup> See *id.* at 893 ("When a professional does no more than render advice to a client, the government's interest in protecting the public from fraudulent or incompetent practice is quite obviously directed at the expressive component of the professional's practice rather than the nonexpressive component (if such a component even exists)."). See also Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999) (generally discussing professional speech); Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201 (1994) (likewise).

<sup>247</sup> See, e.g., *Nat'l Ass'n for the Advancement of Psychoanalysis v. California Bd. of*



not be. Likewise, seemingly unsound advice by a lawyer—including advice that’s based on what the profession may view as unreasonable predictions, even when no false statements of fact are involved—should be regulable. Equally bad recommendations in books and radio programs ought not be.<sup>248</sup>

Similarly, laws that constrain the sexual choices of authors of advice books, or of movie stars who project an image of trustworthiness, would violate both the First Amendment<sup>249</sup> and the *Lawrence v. Texas* sexual autonomy right.<sup>250</sup> Rules restricting psychotherapists from having sex with their clients, on the other hand, are likely constitutional.<sup>251</sup> When a professional “takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client’s individual needs and circumstances,”<sup>252</sup> the government may properly try to shield the client from the professional’s incompetence or abuse of trust.

At the same time, it’s far from clear that the government should be completely free to regulate speech by professionals to their clients. For instance, I doubt that the government may simply ban doctors from informing patients that marijuana is the best solution to their problems.<sup>253</sup> Perhaps doctors could be prevented from writing recommendations that, by operation of state law, free patients from state liability for marijuana possession, though even that’s not clear.<sup>254</sup> But I’m fairly certain that

Psychiatry, 228 F.3d 1043, 1053-55 (9th Cir. 2000) (upholding licensing requirement for psychoanalysts). *But see* Kry, *supra* note 246, at 967-73 (arguing the contrary).

<sup>248</sup> *See, e.g.,* Smith v. Linn, 563 A.2d 123, 125-26 (Pa. Super. 1989).

<sup>249</sup> A restriction on the behavior of people who speak on certain subject matters should be at least as unconstitutional as a tax on people who speak on certain subject matters. *See* Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 228-30 (1987).

<sup>250</sup> 123 S. Ct. 2472 (2003).

<sup>251</sup> *See* Caddy v. State, 764 So.2d 625, 629-30 (Fla. App. 2000) (holding that such restrictions don’t violate the Florida Constitution’s sexual autonomy guarantee as to current patients, and as to former patients when applied “on a case by case basis with consideration given to the nature, extent, and context of the professional relationship between the physician and the person,” though holding unconstitutional a flat ban on all sexual relationships with ex-patients).

<sup>252</sup> *SEC v. Lowe*, 472 U.S. 181, 232 (1985) (White, J., concurring in the judgment).

<sup>253</sup> *See* Robert D. Goldstein, *Reading Casey: Structuring the Woman’s Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 852, 863-64, 866-67 (1996) (arguing that physician-patient speech should generally be constitutionally protected, at least when it conveys valuable knowledge to the patient).

<sup>254</sup> *See* Kry, *supra* note 246, at 894-95. *Compare* Conant v. McCaffrey, 172 F.R.D. 681, 698 (N.D. Cal. 1997) (citing *Giboney* in the course of concluding that “If physicians’ conduct, which could include speech, rises to the level of aiding and abetting or conspiracy, in violation of valid federal statutes, such conduct is punishable under federal law,” without explaining when recommending marijuana constitutes aiding and abetting or conspiracy and when it doesn’t), *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 121 (D.D.C. 2001) (likewise), *and* *Petition for Certiorari, Walters v. Conant*, No. 03-40, at 20 (filed June 7, 2003, by the Solicitor General) (likewise) *with* *Conant v. Walters*, 309 F.3d 629, 637-38

doctors at least have the constitutional right to inform their patients of the medical benefits of marijuana, and to urge the patients to lobby their legislators to enact a medical marijuana exception.

Likewise, I doubt that it would be constitutional for the government to prohibit psychotherapists or family counselors from telling their patients that divorce may be the best solution, or to ban the counselors from advocating (or condemning) interracial marriages or adoptions. The *Planned Parenthood v. Casey* Court may have been right to reject the doctors' First Amendment objection to the informed consent requirement. But the plurality opinion's dismissal of the objection was likely too quick:

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard*, 430 U.S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe*, 429 U.S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.<sup>255</sup>

Maybe there should generally be no restrictions on government-*compelled* speech in the professional-client relationship, perhaps because such speech compulsions don't keep the client from being informed. But if the government *prohibited* doctors from informing their patients about all the possible abortion procedures (including legal ones), or even about procedures that are not themselves constitutionally protected, such a prohibition may well be unconstitutional.<sup>256</sup>

Courts, then, need to answer some First Amendment questions here. First, in which kinds of relationship should speech be more regulable? For instance, what about professor-student relationships, career advisor-advisee relationships, or fortuneteller-client relationships?<sup>257</sup> Second, should the

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(9th Cir. 2002) (holding such speech constitutionally protected) *and id.* at 643-44 (Kozinski, J., concurring) (stressing that a prohibition on such speech violated the patients' rights as listeners as well as the doctors' rights as speakers).

<sup>255</sup> 505 U.S. 833, 884 (1992) (plurality).

<sup>256</sup> *Rust v. Sullivan*, 500 U.S. 173 (1991), upheld a restriction on *government-funded* doctors informing patients about abortions; but the Court's decision rested entirely on the restriction's being a condition attached to funding—nothing in the case suggests that the result would be the same if the ban applied to all doctors, including privately funded ones.

<sup>257</sup> Several courts have struck down bans on fortunetelling on First Amendment grounds, concluding that such bans are content-based restrictions on the fortuneteller's constitutionally protected opinions and predictions; none considered whether the fortuneteller-client relationship should be subject to lower scrutiny because the fortuneteller is a professional advisor. See *Argello v. City of Lincoln*, 143 F.3d 1152 (8th Cir. 1998); *Spiritual Psychic Science Church Of Truth, Inc. v. City Of Azusa*, 703 P.2d 1119 (1985) (applying the California Constitution's free speech provision), *disapproved in part on other grounds*, *Kasky v. Nike, Inc.*, 45 P.3d 243, 318 (2002); *Trimble v. City of*

special doctrine be limited to personalized advice, or would more general advice to the public also be more regulable? Third, what should the test be: Should it give the government a free hand? Should it only allow restrictions aimed at protecting clients from negligence or undue pressure?

Again, though, whatever the right result might be, the “conduct-speech” distinction is likely to be more misleading than helpful. When the government restricts professionals from speaking to their clients, it’s restricting speech, not conduct. And it’s restricting the speech precisely because of the message that it communicates, or the harms that may flow from this message.<sup>258</sup>

The restriction is not a “legitimate regulation of professional practice with only incidental impact on speech”;<sup>259</sup> the impact on the speech is the purpose of the restriction, not just an incidental matter. The restriction may be valid, but for reasons having to do with the harm that negligent speech can cause, the potential value to the patient or to third parties of mandated speech, or the danger that the speech may make the patient psychologically dependent on the speaker—not because the regulated speech is somehow conduct.

## VI. CONCLUSION

It’s often tempting to dismiss First Amendment problems by labeling. “It’s not speech,” the argument goes, “it’s conduct / contempt / libel / sedition / aiding and abetting / professional speech.” Sometimes, the

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New Iberia, 73 F. Supp. 2d 659 (W.D. La. 1999); *Angeline v. Mahoning County Agr. Soc.*, 993 F. Supp. 627 (N.D. Ohio 1998); *Rushman v. City of Milwaukee*, 959 F. Supp. 1040 (E.D. Wis. 1997).

I’ve found only one case that allowed government regulations of professional-client speech and considered the relevance of the fortune-telling cases—*National Ass’n for the Advancement of Psychoanalysis v. California Bd. of Psychiatry*, 228 F.3d 1043, 1056 n.9 (9th Cir. 2000), which cited *Spiritual Psychic Science Church* and distinguished it on the grounds that “California’s licensing scheme does not prohibit psychoanalysis [as did the anti-fortunetelling ordinance], but merely regulates who can engage in it for a fee.” This, though, can’t be the right distinction by itself: If speech is protected from a content-based ban, then it’s also normally protected from a content-based requirement that all people who engage in such speech for money be licensed and trained. *Cf. Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116-18 (1991). Rather, the distinction must be that the government has more authority to regulate psychotherapist-speech than fortuneteller-client speech.

<sup>258</sup> See *supra* note 246.

<sup>259</sup> *SEC v. Lowe*, 472 U.S. 181, 232 (1985) (White, J., concurring in the judgment). See also *Oregon Bar v. Smith*, 942 P.2d 793, 801 (Or. Ct. App. 1997) (upholding unauthorized practice of law statute on the grounds that it focuses only on “the conduct of a profession—the practice of law”); *State v. Niska*, 380 N.W.2d 646, 648-49 (N.D. 1986) (likewise).

dismissal is sound: For instance, some behavior is indeed conduct that is punished because of its noncommunicative elements, not because of what it communicates.<sup>260</sup> And often the label does capture something important even as to speech, though only as a step in the First Amendment inquiry: Some speech that constitutes aiding and abetting or common-law libel is indeed unprotected, for reasons related to why criminal law or tort law seeks to punish it.<sup>261</sup>

But sometimes the label is used as a substitute for serious First Amendment analysis, rather than as the starting point for it; hence the Court's repeated complaint about the government's trying to "foreclose the exercise of constitutional rights by mere labels,"<sup>262</sup> such as by labeling speech "solicitation," "contempt," or "breach of the peace." Sometimes such attempts are made by people who want to justify restricting certain kinds of speech. Sometimes they're made by people who want to protect other kinds of speech, and who therefore articulate supposedly absolutist First Amendment rules—for instance, Justice Black's "no law means no law"<sup>263</sup>—and dismiss inconvenient counterexamples by calling them mere "conduct."<sup>264</sup>

I have argued above that we should resist this temptation. When the law restricts speech because of what the speech communicates—because the speech causes harms by persuading, informing, or offending—we shouldn't deny that the law is a speech restriction, and requires some serious justification.

Such justifications may at times be available. The Court has so held as to incitement, false statements of fact, obscenity, threats, and other

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<sup>260</sup> See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

<sup>261</sup> See, e.g., Volokh, *Crime-Facilitating Speech*, *supra* note 3, at pt. V.B.

<sup>262</sup> *NAACP v. Button*, 371 U.S. 415, 429 (1963) (referring to the label "solicitation"); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) ("In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations.").

<sup>263</sup> See *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring); ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 512 (1994).

<sup>264</sup> See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 457 (1969) (Douglas, J., concurring) (reasoning that "speech is . . . immune from prosecution," and distinguishing falsely shouting fire in a crowded theatre on the grounds that such a shout is "speech brigaded with action"); *id.* at 449-50 (Black, J., concurring) (endorsing Justice Douglas's opinion); *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting, joined by Black, J.) (reasoning that profanity on a person's jacket is unprotected because it's "mainly conduct and little speech"); *Van Alstyne*, *supra* note 136, at 114 n.15 (rightly faulting Justice Black for this approach).

unprotected categories of speech. Courts should also develop similar rules for certain kinds of crime-facilitating speech, professional speech, treasonous speech, and so on. But courts and scholars ought to develop these rules with the recognition that the rules are indeed speech restrictions—not by asserting that the rules merely restrict “conduct.”