

# CRIME-FACILITATING SPEECH

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

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

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

(a) A textbook,<sup>1</sup> magazine, Web site, or seminar describes how people can make bombs (conventional<sup>2</sup> or nuclear<sup>3</sup>), make guns,<sup>4</sup> make drugs,<sup>5</sup> commit contract murder,<sup>6</sup> engage in sabotage,<sup>7</sup> painlessly and reliably commit suicide,<sup>8</sup> fool ballistic identification systems or fingerprint recognition systems,<sup>9</sup> pick locks,<sup>10</sup> evade taxes,<sup>11</sup> or more effectively resist arrest during civil disobedience.<sup>12</sup>

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1. See *infra* note 78 for examples.
  2. See 18 U.S.C. § 842(p)(2)(A) (2000) (prohibiting distribution of “information pertaining to . . . the manufacture or use of an explosive . . . with the intent that” the information be used criminally); *id.* § 842(p)(2)(B) (prohibiting distribution of such information “to any person . . . knowing that such person intends” to use it criminally); Plea Agreement, *United States v. Austin*, No. CR-02-884-SVW (C.D. Cal. Sept. 26, 2002) (describing Web site operator’s guilty plea to a violation of 18 U.S.C. § 842(p)(2)(A)).
  3. See *United States v. Progressive, Inc.*, 486 F. Supp. 5 (W.D. Wis. 1979) (enjoining the publication of article describing how a hydrogen bomb could be constructed), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979); Atomic Energy Act, 42 U.S.C. §§ 2014, 2274 (2000) (prohibiting the revealing of certain data concerning nuclear weapons); *cf.* Invention Secrecy Act, 35 U.S.C. §§ 181, 186 (2000) (prohibiting people from disclosing details of inventions, if the inventions have been ordered kept secret on the ground that revealing them would be “detrimental to the national security”).
  4. See *infra* note 98 for examples of such speech, and the political message it may communicate.
  5. See, e.g., S. 1428, 106th Cong. § 9 (1999) (applying the approach of 18 U.S.C. § 842(p) to information about the manufacturing or use of “controlled substance[s]”).
  6. See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997) (holding that the publisher of a contract murder manual may be held liable for crimes the manual facilitated).
  7. See 18 U.S.C. § 231(a) (2000) (prohibiting “teach[ing] or demonstrat[ing] . . . the use . . . or making of any firearm or explosive . . . knowing or having reason to know or intending that the same will be unlawfully employed” in civil disorders that obstruct commerce or federal functions); *United States v. Featherston*, 461 F.2d 1119, 1121 (5th Cir. 1972) (upholding § 231(a) conviction of black militants for teaching how to make explosives for “the coming revolution”); see also *Scales v. United States*, 367 U.S. 203, 250 (1960) (affirming conviction for being a member of the Communist Party with the intent of overthrowing the government, based partly on the defendant’s organizing “training schools” where, among other things, instructors taught people “how to kill a person with a pencil”); Earth Liberation Front, *Setting Fires with Electrical Timers*, at [http://web.mit.edu/simsong/www/SettingFires\\_ELF.pdf](http://web.mit.edu/simsong/www/SettingFires_ELF.pdf) (May 2001) (describing arson techniques, and labeling itself “[t]he politics and practicalities of arson”; I first saw the article on an Earth Liberation Front site, but it has since been removed from there).
  8. See *infra* note 410 for calls to restrict such materials.
  9. See *infra* notes 99-100 for examples of such speech and of its possible noncriminal value.
  10. See *Chicago Lock Co. v. Fanberg*, 676 F.2d 400 (9th Cir. 1982) (refusing to enjoin the publication of manuals that help people make keys for certain locks given the serial number written on the outside of the lock); see also *infra* note 82 (citing a paper that discusses how people can make a master key from a nonmaster key).
  11. Compare, e.g., *United States v. Kelley*, 769 F.2d 215, 216-17 (4th Cir. 1985) (upholding criminal punishment for such speech); *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985) (same); *United States v. Buttorff*, 572 F.2d 619, 623 (8th Cir. 1978) (same); *United States v. Schiff*, 269 F. Supp. 2d 1262, 1285 (D. Nev. 2003) (containing an order item enjoining the defendants from assisting others to violate tax laws), *aff’d on other*

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

(c) A Web site or a computer science article explains how messages can be effectively encrypted (which can help stymie law enforcement),<sup>14</sup> how encrypted copyrighted material can be illegally decrypted,<sup>15</sup> what security flaws exist in a prominent computer operating system,<sup>16</sup> or how computer viruses are written.<sup>17</sup>

(d) A newspaper publishes the name of a witness to a crime, thus making it easier for the criminal to intimidate or kill the witness.<sup>18</sup>

*grounds*, 379 F.3d 621 (9th Cir. 2004), with *United States v. Dahlstrom*, 713 F.2d 1423, 1428 (9th Cir. 1983) (holding such speech to be constitutionally protected).

12. See Dana Hull, *Anti-War Activists Plan to Disrupt Daily Activities If War Breaks Out*, SAN JOSE MERCURY NEWS, Feb. 25, 2003, at 1A (“Civil disobedience advice is passed from activist to activist, can be found on the Internet, and is dispensed at training sessions. Among the tips: It is . . . harder for cops to drag you away if you go limp.”); *State v. Bay*, 721 N.E.2d 421, 423 (Ohio Ct. App. 1998) (holding that going limp to make it harder for the police to take one away constitutes resisting arrest).

13. See *infra* note 115 for examples.

14. *Bernstein v. United States Dep’t of Justice*, 176 F.3d 1132 (9th Cir. 1999) (holding that such speech is protected), *reh’g en banc granted*, 192 F.3d 1308 (9th Cir. 1999), *appeal later dismissed*; *Karn v. United States Dep’t of State*, 925 F. Supp. 1 (D.D.C. 1996) (same). I set aside for purposes of this Article the debate whether restrictions on computer source code should be treated as content-based speech restrictions. See sources cited *infra* note 223. If source code restrictions should be treated as content-based, then the analysis in this Article applies to them. If they shouldn’t—for instance, because they’re seen as restrictions on the functional aspect of the code (since the code can be directly compiled into object code and executed, without a human reading it) rather than the expressive aspect—then this Article’s analysis would still apply to the human-language descriptions of the algorithm that the source code embodies, which are dangerous precisely because they communicate to humans.

15. See sources cited *infra* note 226 (describing threatened lawsuits based on such speech); cf. *Nat’l Fed’n of the Blind, Inc. v. Loompanics Enters., Inc.*, 936 F. Supp. 1232, 1244-46 (D. Md. 1996) (holding that the publisher of a how-to book on trademark infringement could be held liable for contributory infringement).

16. See Government’s Motion for Reversal of Conviction at 6 n.3, *United States v. McDanel*, C.A. No. 03-50135 (9th Cir. Oct. 14, 2003) (taking the position that communicating such information may violate the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5)(A), (e)(8) (2000), but only if the speaker intended to facilitate security violations, rather than intending to urge the software producer to fix the problem; the government moved for reversal because it conceded that the culpable intent hadn’t been shown at trial); Letter from Kent Ferson, representing Hewlett-Packard, to Adriel T. Desautels, SnoSoft (July 29, 2002) (threatening Digital Millennium Copyright Act and Computer Fraud and Abuse Act liability based on SnoSoft’s publishing information about a security bug), <http://www.politechbot.com/docs/hp.dmca.threat.073002.html>; Declan McCullagh, *HP Backs Down on Copyright Warning*, CNET NEWS.COM, Aug. 1, 2002, at <http://news.com.com/2100-1023-947745.html> (describing the SnoSoft incident and saying that HP had withdrawn its threat); *infra* notes 109-11 and accompanying text.

17. See Clive Thompson, *The Virus Underground*, N.Y. TIMES, Feb. 8, 2004, § 6 (Magazine), at 28 (describing people who post virus source code on Web sites, where it can be used both by people who are interested in understanding and blocking viruses, and by people who want to spread the viruses; similar issues would be raised if virus-writers posted not the code but a detailed description of the algorithm).

18. See *Capra v. Thoroughbred Racing Ass’n*, 787 F.2d 463 (9th Cir. 1986) (holding

(e) A leaflet or a Web site gives the names and possibly the addresses of boycott violators, abortion providers, strikebreakers, police officers, police informants, anonymous litigants, registered sex offenders, or political convention delegates.<sup>19</sup>

(f) A Web site posts people's social security numbers or credit card numbers, or the passwords to computer systems.<sup>20</sup>

(g) A newspaper publishes the sailing dates of troopships,<sup>21</sup> secret military plans,<sup>22</sup> or the names of undercover agents in enemy countries.<sup>23</sup>

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that liability may be imposed in such a situation, under the disclosure of private facts tort, even when the newspaper isn't intending to facilitate crime); *Times-Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556 (Ct. App. 1988) (same); *Hyde v. City of Columbia*, 637 S.W.2d 251 (Mo. Ct. App. 1982) (same).

19. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (rejecting lawsuit that was based partly on distribution of boycott violators' names); *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc) (allowing lawsuit based partly on distribution of abortion providers' names and addresses, though focusing mostly on other material in the defendants' works); *City of Kirkland v. Sheehan*, No. 01-2-09513-7 SEA, 2001 WL 1751590 (Wash. Super. Ct. May 10, 2001) (refusing to enjoin distribution of police officers' names and addresses); CAL. PENAL CODE § 146e (Deering 2004) (prohibiting, among other things, "publish[ing] . . . the residence address or telephone number" of various law enforcement employees "with the intent to obstruct justice"); FLA. STAT. ANN. § 843.17 (West 2003) (likewise); *infra* note 85 (describing New Jersey's restrictions on citizens' communicating information on released sex offenders); *Probe into Republican Delegate Data Posting*, FOXNEWS.COM, Aug. 30, 2004, at <http://www.foxnews.com/story/0,2933,130629,00.html> ("The Secret Service is investigating the posting on the Internet of names[, home addresses, e-mail addresses, and hotel addresses of] thousands of delegates to the Republican National Convention . . . [because of] concerns that posting of the delegate lists could subject the delegates to harassment, acts of violence or identity theft."); *Who's a Rat*, at <http://www.whosarat.com> (last visited Nov. 30, 2004) (a site that identifies police informants and undercover agents, and asserts that it is "designed to assist attorneys and criminal defendants"); *United States v. Carmichael*, 326 F. Supp. 2d 1267, 1295-96 (M.D. Ala. 2004) (concluding that a criminal defendant's Web site containing the names of government informants and agents didn't pose enough danger to the informants and agents, and thus rejecting the government's request for an injunction ordering the defendant to take down the site); *Motion for TRO, Doe v. Omaha World Herald*, No. 4:04CV3306 (D. Neb. Sept. 20, 2004) (motion by the ACLU of Nebraska asking a court to enjoin a newspaper from revealing the name of a John Doe plaintiff in a case challenging the posting of the Ten Commandments, because the plaintiff had received death threats); *Memorandum and Order, Doe v. Omaha World Herald*, No. 4:04CV3306 (D. Neb. Sept. 21, 2004) (denying the motion).

20. See CAL. CIV. CODE § 1798.85(a)(1) (Deering 2004) (generally prohibiting publishing social security numbers); *Sheehan* (enjoining the publication of social security numbers); KAN. STAT. ANN. § 21-3755(c)(1) (2003) (prohibiting unauthorized disclosure of computer passwords); MISS. CODE ANN. 97-45-5(1)(b) (2004) (same); GA. CODE ANN. § 16-9-93(e) (2004) (same, but only when damage results).

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

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

23. See 50 U.S.C. § 421(c) (2000) (prohibiting engaging in "a pattern of activities

(h) A Web site or a newspaper article names a Web site that contains copyright-infringing material, or describes it in enough detail that readers could quickly find it using a search engine.<sup>24</sup>

(i) A Web site sells or gives away research papers, which helps students cheat.<sup>25</sup>

(j) A magazine describes how one can organize one's tax return to minimize the risk of a tax audit,<sup>26</sup> share music files while minimizing the risk of being sued as an infringer,<sup>27</sup> or better conceal one's sexual abuse of children.<sup>28</sup>

(k) A newspaper publishes information about a secret subpoena,<sup>29</sup> a secret wiretap,<sup>30</sup> a secret grand jury investigation,<sup>31</sup> or a secret impending police

intended to identify and expose covert agents . . . with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States"); *Haig v. Agee*, 453 U.S. 280, 309 (1981) (concluding that such speech is constitutionally unprotected, by analogy to *Near v. Minnesota*).

24. *See, e.g., Arista Records, Inc. v. MP3Board, Inc.*, No. 00 CIV. 4660, 2002 WL 1997918, at \*4 (S.D.N.Y. Aug. 29, 2002) (holding that the publisher of a link to an infringing site may be contributorily liable for the infringement that the link facilitates); *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1293-96 (D. Utah 1999) (enjoining defendants from "post[ing] on defendants' website, addresses to websites that defendants know, or have reason to know, contain the material alleged to infringe plaintiff's copyright"); 17 U.S.C. § 512(d) (2000) (providing a safe harbor from damages liability to people who link or refer to infringing material, but only if they didn't know it was infringing); *see also Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 455-58 (2d Cir. 2001) (enjoining publication of links to a page containing material that violated the Digital Millennium Copyright Act); *infra* note 48 (explaining in more detail why such behavior would fit within existing contributory infringement law). The cases all involved clickable links, but including the URL even as plain text would trigger copyright liability just as much as the clickable links would.

25. Academic cheating is fraud, and thus likely a tort or even a crime. The question relevant to this Article is whether term-paper mills are also constitutionally unprotected, because they help students commit such fraud. *Cf., e.g., United States v. Int'l Term Papers, Inc.*, 477 F.2d 1277, 1279 (1st Cir. 1973) (enjoining a term-paper mill on the ground that the mill used the mails to "assist[] students to make false representations to universities"); *Trustees of Boston Univ. v. ASM Communications, Inc.*, 33 F. Supp. 2d 66 (D. Mass. 1988) (dismissing a RICO case against a term-paper mill on statutory grounds).

26. *See, e.g., WorldWideWeb Tax, How to Avoid an IRS Audit?*, at [http://www.wwwwebtax.com/audits/audit\\_avoiding.htm](http://www.wwwwebtax.com/audits/audit_avoiding.htm) (last visited Jan. 14, 2005) (describing "a host of strategies you can use to ensure you aren't selected for an IRS tax audit"). Of course, this information is useful to law-abiding taxpayers who want to save themselves the hassle of an audit, as well as to cheaters.

27. *See, e.g., Elec. Frontier Found., How Not to Get Sued by the RIAA for File-Sharing*, at <http://eff.org/IP/P2P/howto-notgetsued.php> (last visited Jan. 14, 2005).

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

29. *See* 50 U.S.C. § 1861(a), (d) (2000 & Supp. I 2001) (prohibiting disclosure by any person—not just government agents—of the issuance of certain document production orders in "investigation[s] to obtain foreign intelligence information . . . or to protect against international terrorism or clandestine intelligence activities"; added by the USA Patriot Act); Family Education Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(b)(1)(J) (2000) (same

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

(I) When any of the speech mentioned above is suppressed, a self-styled anticensorship Web site posts a copy, not because its operators intend to facilitate crime, but because they want to protest and resist speech suppression or to inform the public about the facts underlying the suppression controversy.<sup>34</sup>

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as to subpoenas for certain education records); 18 U.S.C. § 3486(a)(D)(6)(A) (2000) (same as to investigations of health care violations and child abuse, though only if a court so orders, and only for “up to 90 days”); WASH. REV. CODE § 19.86.110 (2004) (same, but without a time limit, as to investigations of unfair or anticompetitive business practices, though only if a court so orders); *see also* MINN. STAT. ANN. § 609.4971 (West 2003) (prohibiting the disclosure of certain subpoenas “with intent to obstruct, impede, or prevent the investigation for which the subpoena was issued”).

30. *See* TEX. CODE CRIM. PROC. art. 18.21, §§ 4, 7, 8 (1965) (prohibiting disclosure by any person of searches or subpoenas “involving access to stored electronic communications,” if the court determines that such a disclosure may “endanger[] the life or physical safety of an individual,” lead to “flight from prosecution,” “destruction of or tampering with evidence,” or “intimidation of a potential witness,” or “otherwise seriously jeopardiz[e] an investigation or unduly delay[] a trial”); DEL. CODE ANN. tit. 11, § 2412(a) (2004) (prohibiting disclosure by any person “of an authorized interception or pending application . . . in order to obstruct, impede or prevent such interception”); 18 U.S.C. § 2332(d) (2000) (likewise).

31. *See, e.g.*, FLA. STAT. ANN. § 905.27(2) (West 2003) (banning the publication of “any testimony of a witness examined before the grand jury, . . . except when such testimony is or has been disclosed in a court proceeding”).

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

33. *See* 18 U.S.C. § 2709(c) (2000) (prohibiting communication service providers from disclosing FBI demands for subscriber or toll billing records information); 18 U.S.C. § 2705(b) (2000) (allowing court orders that bar communication service providers from disclosing administrative subpoenas for stored communications); 12 U.S.C. §§ 3406(c), 3409(b), 3413(i), 3414(a)(3), 3420 (2000) (providing for similar restrictions on financial institutions that are ordered to turn over customer records); statutes cited *supra* notes 29-30 (which restrict disclosure by subpoena recipients or by subjects of searches, as well as by newspapers and other third parties).

34. *See, e.g.*, Mike Godwin, *The Net Effect*, AM. LAW., Feb. 2000, at 47 (describing how people sometimes put up mirror sites for this purpose); sources cited *infra* notes 335-36 (citing examples).

(m) A master criminal advises a less experienced friend on how best to commit a crime, or on how a criminal gang should maintain discipline and power.<sup>35</sup>

(n) A supporter of sanctuary for El Salvadoran refugees tells a refugee the location of a hole in the border fence, and the directions to a church that would harbor him.<sup>36</sup>

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

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

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

35. Compare *McCoy v. Stewart*, 282 F.3d 626 (9th Cir. 2002) (holding that such speech is protected), with *Stewart v. McCoy*, 537 U.S. 993 (2002) (Stevens, J., respecting the denial of certiorari) (suggesting that perhaps such speech shouldn't be protected).

36. See *United States v. Aguilar*, 883 F.2d 662, 685 (9th Cir. 1989) (upholding conviction based on such speech for aiding and abetting illegal immigration), *superseded on unrelated grounds by statute as noted in* *United States v. Gonzalez-Torres*, 273 F.3d 1181, 1187 (9th Cir. 2001).

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

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

39. See, e.g., *People v. Llanos*, 77 N.Y.2d 866 (1991) (holding a defendant not liable in such a case, but only because the applicable statute covered only helping people actually commit the crime, not helping people escape from the police); see also *People v. Llanos*, 151 A.D.2d 128, 131 (N.Y. App. Div. 1989) (noting that “the record here is devoid of any proof linking defendant to the apartment occupants”), *aff'd*, 77 N.Y.2d 866 (1991).

40. This is tantamount to the driver's acting as a lookout, see *supra* notes 37-39: It lets the other drivers drive illegally before and after the speed trap without getting caught, because they have been warned to obey the law when the police are watching. See *State v. Walker*, No. 1-9507-03625 (Williamson Cty. (Tenn.) Cir. Ct. Nov. 13, 2003) (accepting a First Amendment defense in such circumstances); *For the Record*, SALT LAKE TRIB., Feb. 29, 2000, at B2 (noting a similar case in which a First Amendment defense was accepted); cf. *Bucher*, 375 F.3d at 930 (noting the First Amendment question); *Commonwealth v. Beachey*, 728 A.2d 912 (Pa. 1999) (considering a similar case, but not confronting the First Amendment question).

41. As Parts I.A and III.E explain, crime-inciting speech and crime-facilitating speech differ considerably in how they cause harm and how they are valuable, so they are usefully analyzed as separate First Amendment categories.

Likewise, crime-facilitating speech cases are different from copycat-inspiring cases, where movies or news accounts inspire copycat crimes but don't give criminals any useful and nonobvious information about how to commit those crimes. See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 265 (4th Cir. 1997) (making this distinction). The danger of speech that inspires copycat crimes is that it leads some viewers to want to commit crimes (even if that's not the speaker's purpose). This is the same sort of danger that crime-advocating speech poses, which is why copycat crime cases are generally analyzed using the incitement test. See, e.g., *Byers v. Edmondson*, 826 So. 2d 551, 557 (La. Ct. App. 2002) (rejecting copycat claim by applying *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).



When should such speech be constitutionally unprotected? Surprisingly, the Supreme Court has never squarely confronted this issue,<sup>42</sup> and lower courts and commentators have only recently begun to seriously face it.<sup>43</sup> And getting the answer right is important: Because these scenarios are structurally similar—a similarity that hasn't been generally recognized—a decision about one of them will affect the results in others. If a restriction on one of these kinds of speech is upheld (or struck down), others may be unexpectedly validated (or invalidated) as well.

In this Article, I'll try to analyze the problem of crime-facilitating speech,<sup>44</sup> a term I define to mean

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

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42. See *infra* Part II.A.

43. The most extensive treatments of this question are *Rice*, 128 F.3d 233, and U.S. DEP'T OF JUSTICE, 1997 REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION (Apr. 1997), available at <http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html>. (Because the report is far more easily accessible to readers on the Web than in the limited print edition submitted to Congress, I cite to the Web version.) KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989), treats many issues very well, but spends only a few pages on crime-facilitating speech, *id.* at 86-87, 244-45, 281-82.

44. I borrow the term from the concept of "criminal facilitation," a crime recognized in some jurisdictions, see *infra* note 296, but I apply the phrase to all crime-facilitating speech, whether it's punished by one of these criminal facilitation statutes or by some other law.

45. I include torts as well as crimes because both are generally seen as harmful actions, the facilitating of which might be potentially punishable. See *infra* note 298. Tortious but noncriminal conduct is less harmful than criminal conduct, so restrictions on speech that facilitates purely tortious conduct may be less justified. But I think it's better to consider this as a potential distinction based on how harmful the facilitated conduct is, see *infra* Part III.D, rather than to rule out tort-facilitating speech at the start.

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

46. Helping criminals get away with crimes can be as harmful as helping them commit crimes; among other things, a criminal who knows he'll have help escaping is more likely to commit the crime in the first place, and a criminal who escapes will be free to continue his criminal enterprise and to commit more crimes in the future. This is why lookouts are treated like other aiders and abettors, and why criminal law has long criminalized the accessory after the fact, who helps hide a criminal, as well as the accessory before the fact. See, e.g., material cited *infra* note 150.

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

The first observation is the one with which this Article began: *Many seemingly disparate cases are linked because they involve crime-facilitating speech*, so the decision in one such case may affect the decisions in others. The crime-facilitating speech problem looks different if one is just focusing on the *Hit Man* contract murder manual than if one is looking at the broader range of cases.

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

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47. For articles that make such broad proposals, while focusing only on the well-publicized *Hit Man* case and perhaps one or two other cases, see S. Elizabeth Wilborn Malloy, *Taming Terrorists but Not "Natural Born Killers,"* 27 N. KY. L. REV. 81, 81, 105, 111 (2000); Monica Lyn Schroth, Comment, *Reckless Aiding and Abetting: Sealing the Cracks That Publishers of Instructional Materials Fall Through,* 29 SW. U. L. REV. 567 (2000); Theresa J. Pulley Radwan, *How Imminent Is Imminent?: The Imminent Danger Test Applied to Murder Manuals,* 8 SETON HALL CONST. L.J. 47, 73 (1997).

48. Cf. the materials mentioned *supra* note 24, which impose liability in similar circumstances; *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (defining "contributory infringement" as behavior that materially contributes to third parties' copyright infringement, done with knowledge or reason to know that the behavior will contribute to that infringement, a definition that would cover giving addresses of infringing sites or even enough nonaddress information that would let people easily find the site).

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

49. See, e.g., Ethan Preston & John Lofton, *Computer Security Publications: Information Economics, Shifting Liability and the First Amendment*, 24 WHITTIER L. REV. 71 (2002) (discussing this general issue, and giving many examples); *infra* notes 109-11, 226, and accompanying text.

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

If one wants to protect the latter kinds of speech, but not the contract murder manual, one must craft a narrower rule that distinguishes different kinds of crime-facilitating speech from each other.<sup>51</sup> And to design such a rule—or to conclude that some seemingly different kinds of speech should be treated similarly—it’s helpful to think about these problems together, and use them as a “test suite” for checking any proposed crime-facilitating speech doctrine.<sup>52</sup>

The second observation, which Part I.C will discuss, is that most crime-facilitating speech is an instance of what one might call *dual-use material*.<sup>53</sup> Like weapons, videocassette recorders, alcohol, drugs, and many other things, many types of crime-facilitating speech have harmful uses; but they also have valuable uses, including some that may not at first be obvious.

Moreover, it’s often impossible for the distributor to know which consumers will use the material in which way. Banning the material will prohibit the valuable uses along with the harmful ones.<sup>54</sup> Allowing the material will allow the harmful uses alongside the valuable ones. This dual-use nature has implications for how crime-facilitating speech should be treated.

Part II then observes that *restrictions on crime-facilitating speech can’t be easily justified under existing First Amendment doctrine*. Part II.A describes the paucity of existing constitutional law on the subject, and Parts II.B, II.C, and II.D discuss the possibility that strict scrutiny, “balancing,” or deference to legislative judgment can resolve this problem.

Part III discusses *distinctions that the law might try to draw* within the crime-facilitating speech category to minimize the harmful uses and maximize the valuable ones.<sup>55</sup> These distinctions are the possible building blocks of a

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

52. *See* EUGENE VOLOKH, *ACADEMIC LEGAL WRITING* 19-24 (2d ed. 2005).

53. I adapt this term from arms control, where “dual-use” refers to products that have both military (and thus often banned) uses and civilian (and thus allowed) uses. *See, e.g.*, 10 U.S.C. § 2500(2) (2000).

54. I use “ban” to refer both to criminal prohibitions and civil liability. First Amendment law treats the two identically, and so do I, for reasons described in Part III.F.

55. I focus on distinctions that might be helpful when the government is acting as sovereign, using its regulatory power to restrict speech even by private citizens. The rules will likely be different when the government is acting as employer or as contractor, disclosing information to employees or others but on the contractual condition that they not communicate the information to others. *See, e.g.*, *Snepp v. United States*, 444 U.S. 507 (1980) (dealing with restrictions on speech by government employees); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570 n.3 (1968) (likewise); *infra* note 133 and accompanying text (discussing *United States v. Aguilar*, 515 U.S. 593 (1995), which involved a similar issue); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (dealing with restrictions on litigants who receive confidential information through discovery, on the condition that they not republish it).

I also do not deal with the special case of harm-facilitating speech that’s aimed largely at minors—for instance, material that teaches them how to conceal their anorexia from their

crime-facilitating speech exception, but it turns out that such distinctions are not easy to devise. In particular, one seemingly appealing distinction—between speech intended to facilitate crime, and speech that is merely said with knowledge that some readers will use it for criminal purposes—turns out to be less helpful than might at first appear. Many other possible distinctions end up being likewise unhelpful, though a few are promising.

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

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

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parents. See, e.g., Ana Angels, Tips and Tricks, at <http://members.fortunecity.com/kikienpointe/id19.htm> (last visited Jan. 14, 2005); Deirdre Dolan, *Learning to Love Anorexia? 'Pro-Ana' Web Sites Flourish*, N.Y. OBSERVER, Feb. 3, 2003, § 7, at 1.

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

I will *not*, however, discuss (1) how individual speakers or publishers should decide whether to endanger others by publishing crime-facilitating speech, or (2) when people should condemn speakers or publishers who publish such speech. These are important ethical questions; speakers might well conclude that though they have a constitutional right to say something, they should nonetheless refrain from exercising this right, because in their own view the harm caused by their speech outweighs whatever benefit it might have. Nonetheless, this is outside the scope of this Article, which discusses the constitutional questions, not the ethical ones.

## I. THE USES OF CRIME-FACILITATING SPEECH

A. *Harmful Uses*

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

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

- (1) the desire to commit the crime,
- (2) the knowledge and ability to do so, and
- (3) either (a) the belief that the risk of being caught is low enough to make the benefits exceed the costs,<sup>58</sup> (b) the willingness—often born of rage or felt ideological imperative—to act without regard to the risk, or (c) a careless disregard for the risk.

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

But the danger of crime-facilitating speech may be greater than the danger of crime-advocating speech (at least setting aside the speech that advocates imminent crime, which may sometimes be punished under the incitement exception<sup>59</sup>). Imagine two people: One knows how to commit a crime with little risk of getting caught, but doesn't want to commit it. The other doesn't know how to commit the crime and escape undetected, but would be willing to commit it if he knew.

Advocacy of crime may persuade the first person to break the law and to incur the risk of punishment, but it will generally do it over time, building on past advocacy and laying the foundation for future advocacy. No particular statement is likely to have much influence by itself. What's more, over time the person may be reached by counteradvocacy, and in our society there generally is plenty of counteradvocacy, explicit or implicit, that urges people to follow the law. This counteradvocacy isn't perfect, but it will often help counteract the desire brought on by the advocacy (element 1).

But information that teaches people how to violate the law, and how to do so with less risk of punishment, can instantly and irreversibly satisfy elements 2 and 3a. Once a person learns how to make a bomb, or learns where a potential

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

58. The benefits and costs can of course be tangible—financial benefit or the cost of being imprisoned or fined—or intangible, such as emotional benefit or the cost of feeling that one has hurt someone or violated social norms.

59. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

target lives, that information can't be rebutted through counteradvocacy, and needs no continuing flow of information for reinforcement. So crime-facilitating speech can provide elements 2 and 3a more quickly and less reversibly than crime-advocating speech can provide elements 1 and 3b.<sup>60</sup>

Any attempts to suppress crime-facilitating speech will be highly imperfect, especially in the Internet age. Copies of instructions for making explosives, producing illegal drugs, or decrypting proprietary information will likely always be available somewhere, either on foreign sites or on American sites that the law hasn't yet shut down or deterred.<sup>61</sup> The *Hit Man* contract murder manual, for instance, is available for free on the Web,<sup>62</sup> even though a civil lawsuit led its publisher to stop distributing it.<sup>63</sup> (If the civil lawsuit that led the publisher to stop selling the book also made the publisher more reluctant to try to enforce the now-worthless copyright, the suit might thus have actually made the book more easily, cheaply, and anonymously available.<sup>64</sup>)

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

61. For cases discussing whether the likely futility of a speech restriction may render it unconstitutional, see *infra* note 240. In this part of the text, though, I am focusing only on what the possible benefit of the restriction would be, and not on its constitutionality.

62. See *infra* text preceding note 474.

63. See *Publisher Settles Case over Killing Manual*, N.Y. TIMES, May 23, 1999, at A27 (reporting that *Hit Man* publisher Paladin settled the lawsuit by agreeing to stop publishing and selling the manual, as well as paying the victims' families millions of dollars); Mark Del Franco, *Paladin Kills Off Part of Its Product Line*, CATALOG AGE, Apr. 1, 2000, at 14 (same).

64. Future plaintiffs in crime-facilitating speech cases may try to prevent this by demanding, as part of the settlement, that defendants turn over the copyright to the work. The plaintiffs could then try to sue future online copiers of the work for copyright infringement, whether the copiers are in the United States or in foreign countries.

Plaintiffs could then also demand that search engines drop such supposedly copyright-infringing sites from their indexes: Search engines are probably under no legal obligation to exclude known crime-facilitating sites, but contributory copyright infringement law probably requires them to exclude known copyright-infringing sites. See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); Craig W. Walker, *Application of the DMCA Safe Harbor Provisions to Search Engines*, 9 VA. J.L. & TECH. 2 (2004). Plaintiffs could thus take advantage of well-established copyright law instead of having to rely on the less well-settled, potentially narrower, and less internationally recognized tort liability for crime-facilitating speech. See *Harper & Row v. Nation Enters.*, 471 U.S. 539 (1985) (upholding copyright law against a First Amendment challenge, and with no requirement that the defendant be motivated by bad intentions).

But I doubt that such copyright lawsuits aimed at suppressing a previously published work would prevail. Noncommercially posting a work that's out of print—especially when the work's contents are important to understanding the legal controversy over that work—will probably be a fair use: The use is noncommercial, and it won't affect the economic value of the work, because the plaintiffs are clearly not planning to reissue their own competing edition. Cf. *Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d

Versions of *The Anarchist Cookbook* are likewise freely available online, and likely will continue to be, even if the government tries to prosecute sites that distribute it.<sup>65</sup> Holding crime-facilitating speech to be constitutionally unprotected, and prosecuting the distributors of such speech, may thus not prevent that much crime.

Yet these restrictions are still likely to have some effect, even if not as much as their proponents might like. Crime-facilitating information is especially helpful to criminals if it seems reliable and well-tailored to their criminal tasks. If you want to build a bomb, you don't just want a bomb-making manual—you want a manual that helps you build the bomb without blowing yourself up,<sup>66</sup> and that you trust to do that. The same is true, in considerable measure, for instructions on how to avoid detection while committing crimes.<sup>67</sup>

The legal availability of crime-facilitating information probably increases the average quality—and, as importantly, the perceived reliability—of such information. An arson manual on the Earth Liberation Front's Web site,<sup>68</sup> or an article in *High Times* magazine on growing or manufacturing drugs,<sup>69</sup> will probably be seen as more trustworthy than some site created by some unknown stranger. It will often be more accurate and helpful, because of the organization's greater resources and greater access to expertise. The organization is more likely to make sure that its version is the correct one, and doesn't include any potentially dangerous alterations that versions on private sites might have. Moreover, because the information is high profile, and available at a well-known location, it's more likely to develop a reputation among (for instance) ecoterrorists or drug-growers; more people will have expressed opinions on whether it's trustworthy or not.<sup>70</sup>

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1110, 1119 & n.2 (9th Cir. 2000) (rejecting a fair use defense when defendants had copied an out-of-print work, but stressing the copied work's marketing value to the defendant, the potential economic harm to the plaintiff, and the possibility that "the [plaintiff] plans at some time to publish an annotated version of [the work]"). The plaintiffs' strongest argument would be that copying a crime-facilitating work is inherently unfair because the work is so dangerous, but I doubt that the courts will conclude that this factor is relevant to the copyright inquiry.

65. See *infra* text accompanying notes 472-82.

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

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

68. See Earth Liberation Front, *Setting Fires with Electrical Timers*, *supra* note 7.

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

70. *The Anarchist Cookbook*, for instance, seems to have developed a poor reputation. See, e.g., Ken Shirriff, *Anarchist Cookbook FAQ*, at <http://www.righto.com/anarchy/> (last visited Jan. 14, 2004) ("The Anarchist Cookbook is a book published in 1971, and you won't find the real thing online, although it is easily purchased from your local bookstore or from

On the other hand, if crime-facilitating information is outlawed, these mechanisms for increasing the accuracy and trustworthiness of the information will be weakened. The data might still be easily available through a Google search, but some of it will contain errors, and it will be less likely to have the reputation of a prominent group or magazine behind it. In marginal cases, this might lead some criminals to use less accurate and helpful information, or be scared off to less dangerous crimes by the uncertainty.

Serious criminals, who are part of well-organized criminal or terrorist networks, will likely get trustworthy crime-facilitating instructions regardless of what the law may try to do. But small-time criminals or tortfeasors may well be discouraged by the lack of seemingly reliable publicly available instructions.<sup>71</sup> Restrictions on crime-facilitating speech may thus help stop at least some extremists who want to bomb multinational corporations, abortion clinics, or animal research laboratories; some would-be novice computer hackers or solo drugmakers; and some people who want to illegally download pirate software or movies, or to cheat by handing in someone else's term paper.

Moreover, some kinds of crime-facilitating information might not be available except from a few speakers, either because the information is about a new invention,<sup>72</sup> or because it contains details about specific items, events, or places: for instance, particular subpoenas issued by government agencies who are investigating particular suspects, passwords to particular computers, or the layout of particular government buildings. This information is likely to be

amazon.com. There are various files available on the Internet that rip off the name 'Anarchist Cookbook' and have somewhat similar content, but they are not the real Anarchist Cookbook. The Anarchist Cookbook has a poor reputation for reliability and safety, and most of the online files are considerably worse." Were I to turn to a life of political crime, I would want to use material that had the imprimatur of an established organization, and that had developed a better reputation for reliability—something that would be harder if the material were outlawed.

71. For instance, if people aren't allowed to post the detailed code for viruses, then the "script kiddies"—relatively unskilled exploiters of viruses, *see* Thompson, *supra* note 17—might find it much harder to launch malicious attacks; and this may remain so even if the virus experts remain free to post English-language descriptions of the algorithms, since many script kiddies may not have the knowledge necessary to translate the algorithm into the detailed code.

72. *Cf.* Invention Secrecy Act, 35 U.S.C. §§ 181, 186 (2000) (letting government officials order that patent applications be kept secret if they are "in the opinion of the head of the interested Government agency, . . . detrimental to the national security," and prohibiting people from disclosing the details of such inventions); Roger Funk, Comment, *National Security Controls on the Dissemination of Privately Generated Scientific Information*, 30 UCLA L. REV. 405, 435-54 (1982) (analyzing the constitutionality of the Act); Lee Ann Gilbert, *Patent Secrecy Orders: The Unconstitutionality of Interference in Civilian Cryptography Under Present Procedures*, 22 SANTA CLARA L. REV. 325, 358-64 (1982) (likewise); Sabin H. Lee, *Protecting the Private Inventor Under the Peacetime Provisions of the Invention Secrecy Act*, 12 BERKELEY TECH. L.J. 345, 379-99 (1997) (likewise); Allen M. Shinn, Jr., Note, *The First Amendment and the Export Laws: Free Speech on Scientific and Technical Matters*, 58 GEO. WASH. L. REV. 368 (1990) (likewise).



initially known to only a few people, and not widely spread on hundreds of computers. If those few people are deterred from posting the material, or if the material is quickly ordered to be taken down from the Internet locations on which it's posted (and any search engine caches that may contain it), then potential criminal users—both serious professional criminals and solo, novice offenders—might indeed be unable to get it.<sup>73</sup>

## B. Valuable Uses

Speech that helps some listeners commit crimes, however, may also help others do legal and useful things. Different people, of course, have different views on what makes speech “valuable,”<sup>74</sup> and the Supreme Court has been notoriously reluctant to settle on any theory—whether a primarily deontologically libertarian theory such as self-expression or self-definition, or a more consequentialist one such as self-government or search for truth—as being the sole foundation of First Amendment law.<sup>75</sup> But the Court has pretty consistently treated as “valuable” a wide range of commentary, whether it covers facts or ideas, whether it's argument, education, or entertainment, and whether it's politics, religion, science, or art.<sup>76</sup>

There will doubtless be much controversy about when crime-facilitating speech is so harmful that the harm justifies restricting it despite its value. But there'll probably be fairly broad agreement that, as the following Parts suggest, much crime-facilitating speech indeed has at least some First Amendment value.<sup>77</sup>

### 1. Helping people engage in lawful behavior generally

Much crime-facilitating speech can educate readers, or give them practical information that they can use lawfully. Some of this information is applied

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73. Cf. Peter P. Swire, *A Model for When Disclosure Helps Security: What Is Different About Computer and Network Security?*, 3 J. TELECOMM. & HIGH TECH. L. 163, 178-79, 190-91 (2004) (distinguishing “low uniqueness” information, which is likely to leak out despite secrecy strategies, from “high uniqueness” information, for which secrecy may be especially valuable).

74. See, e.g., Adam M. Samaha, *Litigant Sensitivity in First Amendment Law*, 98 NW. U. L. REV. 1291, 1369 (2004) (citing sources).

75. See, e.g., Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1617-19 (1986); 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).

76. See, e.g., *Winters v. New York*, 333 U.S. 507, 510 (1948) (entertainment constitutionally protected); cases cited *infra* note 217 (scientific speech constitutionally protected).

77. These Parts aren't meant to be mutually exclusive; I identify the different kinds of value only to better show that crime-facilitating speech can be valuable in different ways.

science. Books about explosives can teach students principles of chemistry, and can help engineers use explosives for laudable purposes.<sup>78</sup> Books that explain how to investigate arson, homicide, or poisoning can help detectives and would-be detectives, though they can also help criminals learn how to evade detection.<sup>79</sup>

Discussions of computer security problems, or of encryption or decryption algorithms, can educate computer programmers who are working in the field or who are studying the subjects (whether in a formal academic program or on their own). Such discussions can also help programmers create new algorithms and security systems. Scientific research is generally thought to advance more quickly when scientists and engineers are free to broadly discuss their work.<sup>80</sup>

Nonscientific information can be practically useful, too. Descriptions of common scams can help put people on their guard.<sup>81</sup> Descriptions of flaws in security systems can help people avoid these flaws.<sup>82</sup> Tips on how to minimize

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78. Some books discuss how explosives (or drugs) are made. Keay Davidson, *Bombs Easy—But Risky—to Make; Ingredients Are Common, Recipes Available*, SAN FRANCISCO EXAMINER, Apr. 20, 1995, at A-12 (discussing bombmakers' using chemistry textbooks); David Unze, *Suspected Meth Lab Found in Search near Paynesville*, ST. CLOUD TIMES (Minn.), Dec. 6, 2000, at 2B (same as to drugmakers). Others discuss how explosives can be used to effectively produce the desired destruction with minimal risk to the user. *See, e.g.*, NAT'L ASS'N OF AUSTRALIAN STATE ROAD AUTHORITIES, *EXPLOSIVES IN ROADWORKS—USERS' GUIDE* (1982); U.S. DEP'T OF THE INTERIOR, *EXPLOSIVES AND BLASTING PROCEDURES MANUAL* (1986).

79. I classify these works as applied science because they are essentially applied chemistry, medicine, or forensic science more broadly, which can be used by professionals whose job it is to apply science this way. But even if they aren't treated as science, they would still be valuable to law-abiding users, as well as to criminal users.

80. *See, e.g.*, NAT'L ACADEMY OF SCIENCES, *BALANCING THE NATIONAL INTEREST 127* (1987) (noting that mandated secrecy impairs "communication of research through professional society meetings and publications," which is "crucial to the rapid advancement of commercial and military technology in the United States and thus to national security"); Stephen Budiansky, *Retrofitting the Bomb Machine*, U.S. NEWS & WORLD REP., Feb. 5, 1990, at 66 (noting that even in nuclear research, "the tradition of secrecy . . . gets in the way of doing basic science"); Edward Teller, *Secrecy: The Road to Nowhere*, TECH. REV., Oct. 1981, at 12.

81. *See* FRANK W. ABAGNALE, *THE ART OF THE STEAL* (2001) (describing some frauds in considerable detail, for instance at pp. 40-41 and 108-13); *id.* at title page (giving the book's subtitle as "How to Protect Yourself and Your Business from Fraud—America's #1 Crime").

82. *See, e.g.*, Matt Blaze, *Cryptology and Physical Security: Rights Amplification in Master-Keyed Mechanical Locks*, IEEE SECURITY & PRIVACY, Mar.-Apr. 2003, at 24 (describing how someone can easily produce a master key for many lock designs so long as one has a nonmaster key to one of the many locks that the master key opens); *id.* (arguing that this should lead people to adopt more threat-resistant designs); Matt Blaze, *Keep It Secret, Stupid!*, at <http://www.crypto.com/papers/kiss.html> (Jan. 26, 2003) (defending the decision to publish this information); Matt Blaze, *Is It Harmful To Discuss Security Vulnerabilities?*, at <http://www.crypto.com/hobbs.html> (last revised Jan. 2005) (likewise); *see also* the discussion, *infra* note 110, of Eugene Volokh, *Burn Before Reading*, in *THOUGHTS AND DISCOURSES ON THE HP 3000* (1984).

the risk of being audited may help even law-abiding taxpayers avoid the time and expense of being audited, and not just help cheaters avoid being caught cheating. Some explanations of how some police departments catch criminals can help corporate security experts, private detectives, or other police departments investigate crimes, though the explanations can also alert criminals about what mistakes to avoid.<sup>83</sup>

Instructions on decrypting videos may help people engage in fair uses as well as unlawful ones; some of these fair uses may help the users engage in speech (such as parody and commentary) of their own.<sup>84</sup> Knowing who is a boycott violator, a strikebreaker, or an abortion provider can help people make choices about whom to associate with—choices that may be morally important to them. Knowing who is a sex offender can help people take extra precautions for themselves and for their children.<sup>85</sup>

Likewise, speech that teaches drug users how to use certain illegal drugs more safely<sup>86</sup> has clear medical value—it may prevent death and illness among many people who would have used drugs in any event—but it also facilitates crime. Just as speech that teaches people how to commit crimes with less risk of legal punishment is crime-facilitating, so is speech that teaches people how to commit crimes with less risk of injury.<sup>87</sup> Such “harm reduction” speech might embolden some people to engage in the illegal drug use; and some proposed crime-facilitation statutes would outlaw such speech (whether deliberately or inadvertently), because the speech conveys “information

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83. Thanks to my colleague Mark Greenberg for this point.

84. See, e.g., Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 539-40 (1999).

85. But see N.J. Div. of Criminal Justice, Megan’s Law Rules of Conduct, at <http://www.state.nj.us/lps/dcj/megan/citizen.htm> (last visited Jan. 14, 2005) (providing that people who receive flyers containing information on released sex offenders may not communicate the information to others, on pain of possible “court action or prosecution”). The Rules of Conduct purport to bind all people who get the information, as well as members of their households, not just those who promise to abide by the Rules as a condition of getting the information. See ATTORNEY GENERAL GUIDELINES FOR LAW ENFORCEMENT FOR THE IMPLEMENTATION OF SEX OFFENDER REGISTRATION, AND COMMUNITY NOTIFICATION LAWS, 24, 30, 43 (2000), available at <http://www.state.nj.us/lps/dcj/megan1.pdf>; *id.* at 23 (stating that the Rules should be enforced using court orders); *A.A. v. New Jersey*, 176 F. Supp. 2d 274, 281 (D.N.J. 2001) (“All those receiving notice are bound by the applicable rules of ‘Rules of Conduct.’”). If the Rules were applied only to those who promised to keep the information confidential, the First Amendment issue might be different, see *supra* note 55.

86. Ecstasy use, for instance, can be made less risky when certain precautions are taken. E-mail from Mark Kleiman, Professor of Policy Studies, UCLA School of Public Policy and Social Research, to Eugene Volokh (Aug. 9, 2004) (on file with author).

87. See definition of “crime-facilitating” at text accompanying note 46 *supra*. Many people view drug use as a less serious crime than many other kinds of crime; but whether or not that’s right, speech that makes drug use safer does indeed facilitate the commission of that particular crime.

pertaining to . . . use of a controlled substance, with the intent that . . . [the] information be used for, or in furtherance of" drug use.<sup>88</sup>

## 2. *Helping people evaluate and participate in public debates*

### a. *Generally*

Some speech that helps criminal listeners commit crimes may at the same time be relevant to law-abiding listeners' political decisions. Publishing information about secret wiretaps or subpoenas, for instance, may help inform people about supposed government abuses of the wiretap or subpoena power. And such concrete and timely examples of alleged abuse may be necessary to persuade the public or opinion leaders to press for changes in government policies: A general complaint that some unspecified abuse is happening somewhere will naturally leave most listeners skeptical.<sup>89</sup>

Likewise, publishing the names of crime witnesses can help the public evaluate whether the witnesses' stories are credible or not.<sup>90</sup> Publishing the

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88. See, for example, S. 1428, 106th Cong. § 9 (1999), which would have barred, among other things, "distribut[ing] by any means information pertaining to, in whole or in part, the manufacture or use of a controlled substance, with the intent that the . . . information be used for, or in furtherance of, an activity that constitutes a Federal crime," and also "distribut[ing]" such information to "any person . . . knowing that such person intends to use the . . . information for, or in furtherance of, an activity that constitutes a Federal crime." See Jacob Sullum, *Knowledge Control*, REASON ONLINE, June 14, 2000, at <http://www.reason.com/sullum/060700.shtml> (expressing concern that this bill might jeopardize Web sites that "offer advice for reducing the risks of drug use (say, by sterilizing needles or using vaporizers)").

89. As to the need for timely details, see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976). As to the need for concrete details, the Court has implicitly recognized this in its libel cases, where the Justices have protected concrete factual allegations about government officials (if they are true, or even if they are the product of an honest mistake) and not just general statements of opinion. The recognition has not been explicit, I think, only because the need to give facts that concretely support the general claims is so obvious that few have doubted it. See also sources cited *infra* note 309 (noting the importance of specific details).

90. *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989), for instance, reasons that the names of crime victims, who are also witnesses, may be especially important when "questions have arisen whether the victim fabricated an assault . . ." But often these questions arise only once the victim-witness's name is publicized, and people come forward to report that they know the witness to be unreliable or biased. Cf. *United States v. Carmichael*, 326 F. Supp. 2d 1267, 1297-1301 (M.D. Ala. 2004) (holding that a criminal defendant was entitled to maintain a Web site that sought information about the government informants and agents who were going to testify against him).

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

names (or even addresses) of people who aren't complying with a boycott may facilitate legal and constitutionally protected shunning, shaming, and persuasion of the noncompliers.<sup>91</sup> Publishing the names and addresses of abortion providers may facilitate legal picketing of their homes.<sup>92</sup> Publishing a description of how H-bombs operate can help explain why the government engages in certain controversial nuclear testing practices, or why it wants to build expensive and potentially dangerous new plants.<sup>93</sup>

None of this means the information is harmless: Publishing secret wiretap information may help criminals conceal their crimes, by informing them that they're under suspicion and that certain phones are no longer safe to use; publishing boycotters', abortion providers', or convention delegates' names and addresses can facilitate violence as well as lawful remonstrance and social ostracism.<sup>94</sup> But the speech would indeed be valuable to political discourse when communicated to some listeners, even if it's harmful in the hands of others.

b. *By informing law-abiding people how crimes are committed*

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

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credibility.

91. See *NAACP v. Claiborne Hardware*, 458 U.S. 886, 909-10 (1982) (concluding that trying "to persuade others to join the boycott through social pressure and the 'threat' of social ostracism" is constitutionally protected speech).

92. Even if focused residential picketing is banned by a city ordinance, parading through the targets' neighborhood is constitutionally protected. See *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 775 (1994); *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988). I think it's therefore not correct to say that information including a person's address "is intrinsically lacking in expressive content." Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 397, 404 (2003).

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

94. See, for instance, *Claiborne Hardware*, which involved both social ostracism and some violence. Only the names, and not the addresses, of boycott violators were published, but in a rural county with only 7500 black residents, see U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK 1972, at 258, it likely wouldn't have been hard for one black resident to find out where another lives. Cf. *Probe into Republican Delegate Data Posting*, supra note 19 ("There are several lists of Republican National Convention delegates posted on the Indymedia site . . . . Included are names, home addresses, e-mail addresses and the New York-area hotels where many are staying. 'The delegates should know not only what people think of the platform they will ratify, but that they are not welcome in New York City,' said one posting [on the site] . . . .").

First, such speech can help support arguments that some laws are futile. For instance, explaining how easy it is for people to grow marijuana inside their homes may help persuade the public that the war on marijuana isn't winnable—or is winnable only through highly intrusive policing—and perhaps should be abandoned.<sup>95</sup> Likewise, some argue that the existence of offshore copyright-infringing sites shows that current copyright law is unenforceable, and should thus be changed or repealed.<sup>96</sup> But the validity of the argument turns on whether such sites indeed exist, have an appealing mix of bootleg content, and are easy to use. A pointer to such a site, which law-abiding people can follow to examine the site for themselves, can thus provide the most powerful evidence for the argument.<sup>97</sup>

Explaining how easy it is to make gunpowder, ammunition, or guns may support arguments that criminals can't be effectively disarmed.<sup>98</sup> Explaining

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95. Cf. Robert Scheer, *Dole Backs the Big Lie in Drug War*, L.A. TIMES, Oct. 22, 1996, at B7 (arguing against the war on drugs in part because “the supply of drugs cannot be effectively controlled because they are too easy to grow and smuggle,” and “[e]ven if you stopped drugs from coming into the country, that wouldn't affect the supply of marijuana, which is primarily home-grown and accounts for three-quarters of drug use”).

96. See Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1427 (2004) (“A common argument against enforcement of intellectual property law online has been that infringers will simply move offshore.”); Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 162 (1999) (making such an argument); Pamela Samuelson, *Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections*, 71 U. CHI. L. REV. 223, 237 (2003) (making a modest version of such an argument); Matthew V. Pietsch, *International Copyright Infringement and the Internet: An Analysis of the Existing Means of Enforcement*, 24 HASTINGS COMM. & ENT. L.J. 273 (2002) (likewise); Michelle Dello, *P2P Company Not Going Anywhere*, WIRED NEWS, July 17, 2004, <http://www.wired.com/news/digiwood/0,1412,64233,00.html> (quoting someone who makes such an argument, and who mentions a particular offshore file sharing company as an example).

97. There is nothing illegal about a curious user's simply looking at such a site, or even listening to some bootleg content just to figure out what's available; even if any copying happens in the process, the user's actions would be fair use, because they'd be noncommercial and wouldn't affect the market for the work. See 17 U.S.C. § 107 (2000); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). The site would thus facilitate both legal use by curious users who are trying to decide whether copyright law is a lost cause, and illegal use by other users who want to get material without paying for it.

98. See Bruce Barak Koffler, *Zip Guns and Crude Cof[n]versions—Identifying Characteristics and Problems* (pt. 2), 61 J. CRIM. L. CRIMINOLOGY & POL. SCI. 115, 125 (1970) (discussing in detail the design of various homemade guns, mostly for the benefit of forensic investigators, but also concluding that “[i]n a city that has probably the most restrictive pistol laws on the continent, we have an example of how such legislation fails to achieve its purpose” because of how easily people can make their own guns, and that “[w]hen we ask for stricter gun ownership legislation in [the] future, this is something to bear in mind”); David T. Hardy & John Stompoly, *Of Arms and the Law*, 51 CHI.-KENT L. REV. 62, 99-100 (1974) (arguing that the ease of making guns at home will make gun controls futile, briefly mentioning some ways one can make homemade guns, and citing articles, including Koffler, *supra*, that describe more detailed designs); cf. J. DAVID TRUBY & JOHN MINNERY, *IMPROVISED MODIFIED FIREARMS: DEADLY HOMEMADE WEAPONS*, at outside back cover, 7, 10, 13 (1992) (arguing that “[t]he message is clear: if you take away a free

how one can deceive fingerprint recognition mechanisms can be a powerful argument against proposed security systems that rely on those mechanisms.<sup>99</sup> Explaining how easy it is to change the “ballistic fingerprint” left by a gun may rebut arguments in favor of requiring that all guns and their “fingerprints” be registered.<sup>100</sup> Pointing to specific ways that hijackers can evade airport metal-

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people’s firearms, it will make others. As these pages demonstrate, the methods, means, and technology are simple, convenient, and in place” and that “[t]he object lesson” is that “[g]un prohibition doesn’t work,” but not in fact providing specific details about how guns can be made at home); BILL HOLMES, HOME WORKSHOP GUNS FOR DEFENSE AND RESISTANCE: THE HANDGUN (1979) (providing those details). Many people might not be persuaded by the combination of these last two books—for instance, some might believe that many fewer criminals would get guns if they had to rely on homemade or black market weapons. But the two books put together still make an important political argument, one that can’t be made as effectively without the descriptions of how easy home gunmaking supposedly is.

99. See, e.g., Ton van der Putte & Jeroen Keuning, *Biometrical Fingerprint Recognition: Don’t Get Your Fingers Burned*, in IFIP TC8/WG8.8 FOURTH WORKING CONFERENCE ON SMART CARD RESEARCH AND ADVANCED APPLICATIONS 289, 291 (Josep Domingo-Ferrer et al. eds., 2000), [http://www.keuning.com/biometry/Biometrical\\_Fingerprint\\_Recognition.pdf](http://www.keuning.com/biometry/Biometrical_Fingerprint_Recognition.pdf) (“This article should be read as a warning to those thinking of using new methods of identification without first examining the technical opportunities for compromising the identification mechanism and the associated legal consequences.”); *id.* at 294 (“The biggest problem when using biometrical identification on the basis of fingerprints is the fact that, to the knowledge of the authors, none of the fingerprint scanners that are currently available can distinguish between a finger and a well-created dummy. Note that this is contrary to what some of the producers of these scanners claim in their documentation. We will prove the statement by accurately describing two methods to create dummies that will be accepted by the scanners as true fingerprints.”); *id.* at 294-99 (providing such detailed methods, which they claim can be followed in half an hour at the cost of twenty dollars).

In the past, such an article in the proceedings of a technical conference might have been unlikely to reach the eyes of criminals—though even then, the sophisticated criminals might have read even technical literature. In the Internet age, I stumbled across the article by accident through a pointer at *GeekPress*, a Weblog that posts pointers to interesting or amusing technical information. See Posting of Paul Hsieh to *GeekPress* (Nov. 17, 2003, 2:43 a.m.), at [http://geekpress.com/2003\\_11\\_17\\_daily.html#106900367854004686](http://geekpress.com/2003_11_17_daily.html#106900367854004686).

100. See, for example, Bill Twist, *Erasing Ballistic Fingerprints*, PLANET TIMES.COM, June 28, 2000, at [http://216.117.156.23/features/barrel\\_twist/2000/june/erase.shtml](http://216.117.156.23/features/barrel_twist/2000/june/erase.shtml), which describes how this can be done, and concludes with:

So why am I telling you all of this? Well, I have heard [of a proposed mandatory ballistic signature recording system] called “ballistic fingerprinting” and “gun DNA.” It is neither. . . . It is not easy to change your fingerprints, and it is impossible to change your DNA (so far). Changing the marks a firearm makes on bullets and cases is a trivial exercise. . . . [T]he calls for “ballistic fingerprinting” are a big lie, to appease those who have an ingrained fear of firearms.

The effectiveness of such registries is still very much an open question, but it’s clear that Twist’s concerns are legitimate, even if they don’t ultimately prove dispositive. See FREDERIC A. TULLENERS, TECHNICAL EVALUATION: FEASIBILITY OF A BALLISTICS IMAGING DATABASE FOR ALL NEW HANDGUN SALES 1-5, at [http://caag.state.ca.us/newsalerts/2003/03-013\\_report.pdf](http://caag.state.ca.us/newsalerts/2003/03-013_report.pdf) (Oct. 5, 2001) (report by a laboratory director in the Bureau of Forensic Services of the California Department of Justice) (noting that the supposed “fingerprint” can indeed be changed with “less than 5 minutes of labor,” though not explaining in detail how this can be done); JAN DE KINDER, REVIEW—AB1717 REPORT—TECHNICAL EVALUATION:

detecting equipment can support an argument that such equipment does little good, that the government is wasting money and unjustifiably intruding on privacy, and that it's better to invest money and effort in arming pilots, encouraging passengers to fight back, and so on.<sup>101</sup>

Second, some descriptions of how crimes can be committed may help show the public that they or others need to take certain steps to prevent the crime. Publishing detailed information about a computer program's security vulnerabilities may help security experts figure out how to fix the vulnerabilities, persuade apathetic users that there really is a serious problem, persuade the media and the public that some software manufacturer isn't doing its job, and support calls for legislation requiring manufacturers to do better.<sup>102</sup>

FEASIBILITY OF A BALLISTICS IMAGING DATABASE FOR ALL NEW HANDGUN SALES 17, at <http://www.nssf.org/PDF/DeKinder.pdf> (last visited Feb. 9, 2005) (review by the head of the Ballistics Section of the Belgian Justice Department's National Institute for Forensic Science) (agreeing that alteration of firearms creates "a real problem" for the effectiveness of the registries); Don Thompson, *Gun Registry Called Impractical*, OAKLAND TRIB., Jan. 27, 2003 (noting that the De Kinder report had been commissioned by the California attorney general).

101. See, for example, Bruce Schneier, *More Airline Insecurities*, CRYPTO-GRAM NEWSLETTER, Aug. 15, 2003, at <http://www.schneier.com/crypto-gram-0308.html>, which describes how one can supposedly smuggle plastic explosives onto a plane, or build a knife out of steel epoxy glue on the plane itself, and concludes, "The point here is to realize that security screening will never be 100% effective. There will always be ways to sneak guns, knives, and bombs through security checkpoints. Screening is an effective component of a security system, but it should never be the sole countermeasure in the system."

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

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

See also BRUCE SCHNEIER, *APPLIED CRYPTOGRAPHY* 7 (1996) ("If the strength of your new cryptosystem relies on the fact that the attacker does not know the algorithm's inner workings, you're sunk. If you believe that keeping the algorithm's insides secret improves the security of your cryptosystem more than letting the academic community analyze it, you're wrong.") (speaking specifically about the security of cryptographic algorithms); Preston & Lofton, *supra* note 49, at 81 ("At the same time that public disclosure of vulnerabilities unavoidably facilitates the exploitation of computer security vulnerabilities, the correction and elimination of those same vulnerabilities requires their discovery and disclosure. . . . Computer owners and operators who are aware of a potential vulnerability can take steps to fix it, while they are powerless to fix an unknown vulnerability."). *But see* Scott Culp, *It's Time to End Information Anarchy*, at [http://www1.microsoft.at/technet/news\\_showpage.asp?newsid=4121&secid=1502](http://www1.microsoft.at/technet/news_showpage.asp?newsid=4121&secid=1502) (Oct. 2001) (arguing that publishing detailed information on vulnerabilities does more harm than good).

Computer security experts who find a vulnerability will often report it just to the software vendor, and this is often the more responsible solution. But if the vendor pooh-poohs the problem, then the security expert may need to describe the problem as part of his



Publicly explaining how Kryptonite bicycle locks can be easily defeated with a Bic pen can pressure the company to replace such locks with more secure models.<sup>103</sup> Publishing detailed information about security problems—for instance, gaps in airport security, in security of government computer systems, or in security against bioterror—can show that the government isn't doing enough to protect us.<sup>104</sup> Likewise, publishing information about how easy it is to build a nuclear bomb may alert people to the need to rely on diplomacy and international cooperation, rather than secrecy, to prevent nuclear proliferation.<sup>105</sup>

Third, descriptions of how crimes are committed can help security experts design new security technologies. Knowledge in other fields often develops through specialists—whether academics, employees of businesses, or amateurs—publishing their findings, openly discussing them, and correcting and building on each other's work: That's the whole point of professional journals, working papers, and many conferences and online discussion groups. The same is true of security studies, whether that field is seen as a branch of computer science, cryptography, criminology, or something else.<sup>106</sup> And

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public argument that the vendor isn't doing a good enough job.

103. See David Kirpatrick et al., *Why There's No Escaping the Blog*, FORTUNE, Jan. 10, 2005, at 44 (discussing how publicizing the details eventually led Kryptonite to switch from its initial reaction—"issu[ing] a bland statement saying the locks remained a 'deterrent to theft' and promising that a new line would be 'tougher'"—to "announc[ing] it would exchange any affected lock free," which it expected would involve sending out over 100,000 new locks).

104. See, e.g., Bob Newman, *Airport Security for Beginners*, DENVER POST, May 16, 2002, at A21 ("A security screener, who when asked why he wanted to see the backside of my belt buckle, said he wasn't really sure (I told him he was supposed to be checking for a 'push' dagger built into and disguised by the buckle). Not a single security screener . . . had ever heard of a carbon-fiber or titanium-blade (nonferrous) knife, which can pass through standard magnetometers used at most airports. . . . Yet the government insists that new security procedures have made airports much more secure, despite the above incidents . . ."); Andy Bowers, *A Dangerous Loophole in Airport Security: If Slate Could Discover It, the Terrorists Will, Too*, SLATE.COM, Feb. 7, 2005, at <http://www.slate.com/id/2113157/>.

105. See *United States v. Progressive, Inc.*, 467 F. Supp. 990, 994 (W.D. Wis. 1979) (citing defendants' arguments to this effect); Morland, *supra* note 93, at 14, 17 ("People assume that even if nothing else is secret, surely hydrogen bomb designs must be protected from unauthorized eyes. The puncturing of that notion is the purpose of this report. . . . [T]here is little reason to think that any other nation that wanted to build [hydrogen bombs] would have trouble finding out how to do it."); *id.* at 23 ("No government intent upon joining the nuclear terror club need long be at a loss to know how to proceed."); see also ALEXANDER DE VOLPI ET AL., BORN SECRET (1981) (noting other ways in which the information revealed in the *Progressive* article was relevant to important policy debates).

106. See, e.g., Declan McCullagh, *Crypto Researchers Abuzz over Flaws*, CNET NEWS.COM, Aug. 17, 2004, at [http://news.com.com/Crypto+researchers+abuzz+over+flaws/2100-1002\\_3-5313655.html](http://news.com.com/Crypto+researchers+abuzz+over+flaws/2100-1002_3-5313655.html) (discussing a conference presentation by cryptographers who claimed to have uncovered flaws in an encryption system); Ed Felten, *Report from Crypto 2004*, FREEDOM TO TINKER, Aug. 18, 2004, at <http://www.freedom-to-tinker.com/archives/000664.html> (discussing this, with comments from readers that discuss it in more detail); Ed Felten, *SHA-1 Break Rumor Update*, FREEDOM TO TINKER, Aug. 17, 2004, at <http://www>.

knowledge of the flaws in existing security schemes is needed to design better ones.

In a very few fields, such as nuclear weapons research, this scientific exchange has traditionally been done through classified communications, available to only a few government-checked and often government-employed professionals.<sup>107</sup> But this is definitely not the norm in American science, and it seems likely that broadening such zones of secrecy would interfere with scientific progress.<sup>108</sup> Perhaps in some fields secrecy is nonetheless necessary, because the risks of open discussion are too great. Nonetheless, even if we ultimately conclude that the speech is too harmful to be allowed, we must concede that such open discussion does have scientific value, and, directly or indirectly, political value.

Fourth, while detailed criticisms of possible problems in a security system (whether computer security or physical security) can help alert people to the need to fix those problems, the absence of such criticisms—in a legal environment where detailed criticisms are allowed—can make people more confident that the system is indeed secure. If we know that hundreds of security experts from many institutions have been able to discuss potential problems in some security system, that journalists are free to follow and report on these debates, and that the experts and the press seem confident that no serious problems have been found, then we can be relatively confident that the system is sound.

But this confidence is justified only if we know that people are indeed free to discuss these matters, both with other researchers and with the public, and both through the institutional media and directly. Restricting speech about security holes thus deprives the public of important information: If the security holes exist, then the public can't learn about them; if they don't exist, then the public can't be confident that the silence about the holes flows from their absence, rather than from the speech restriction.<sup>109</sup>

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[freedom-to-tinker.com/archives/000663.html](http://freedom-to-tinker.com/archives/000663.html) (likewise). Ed Felten is a Princeton computer science professor and cryptography expert; his Weblog, *Freedom to Tinker*, is devoted to information technology issues.

107. The government also tried to closely regulate cryptographic research, through procedures such as export controls and invention secrecy orders, but ultimately gave up. See HERBERT N. FOERSTEL, *SECRET SCIENCE* 97-139 (1993); Gilbert, *supra* note 72.

108. See sources cited *supra* note 80.

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

And in all these situations, as elsewhere, concrete, specific details are more persuasive than generalities: People are more likely to listen if you say “Microsoft is doing a bad job—I’ll show this by explaining how easy it is for someone to send a virus through Microsoft Outlook” than if you say “Microsoft is doing a bad job—I’ve identified an easy way for someone to send a virus through Outlook, but I can’t tell you what it is.”<sup>110</sup>

Even readers who can’t themselves confirm that the details are accurate will find detailed accounts more trustworthy because they know that other, more expert readers could confirm or rebut them. If a computer security expert publishes an article that gives a detailed explanation of a security problem, other security experts could check the explanation. A journalist reporting on the allegations could call an expert whom he trusts and get the expert to confirm the charges.

The journalists could also monitor a prominent online expert discussion group to see whether the experts agree or disagree. And if there is broad agreement, a journalist can report on this, and readers can feel confident that the claim has been well vetted. That is much less likely to happen if the original discoverer of the error was only allowed to write, “There’s a serious bug in this program,” and was legally barred from releasing supporting details.<sup>111</sup>

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110. See Bruce Schneier, *Full Disclosure*, CRYPTO-GRAM NEWSLETTER, Nov. 15, 2001, at <http://www.schneier.com/crypto-gram-0111.html> (“[Revealing] detailed information is required. If a researcher just publishes vague statements about the vulnerability, then the vendor can claim that it’s not real. If the researcher publishes scientific details without example code, then the vendor can claim that it’s just theoretical.”). Compare Eugene Volokh, *Burn Before Reading*, *supra* note 82, which shows how users of HP 3000 computers who have been given a certain access privilege (so-called “PM”) can in just three commands use PM to get a higher level of privilege, called “SM” (roughly corresponding to “super-user” access in some other systems). I did this to persuade readers that they should limit PM privilege only to the most trusted users, and carefully protect those accounts that were given the privilege, something that many HP 3000 system managers didn’t properly do. I’ve never been positive that I was right to give the specific details; but I suspect I was, because many system managers wouldn’t have believed that they needed to do anything unless they could see for themselves how easily the PM privilege could be exploited.

Disclosure of specific details of a computer security problem can also motivate computer companies to fix it, simply because they know that if they don’t fix the problem immediately, hackers will exploit it. See Schneier, *Full Disclosure*, *supra* (arguing that full disclosure has thereby helped transform “the computer industry . . . from a group of companies that ignores security and belittles vulnerabilities into one that fixes vulnerabilities as quickly as possible”); see generally Preston & Lofton, *supra* note 49, at 88 (describing the debate among computer security professionals about whether security vulnerabilities should be fully disclosed).

111. See Schneier, *Full Disclosure*, *supra* note 110 (“[Without full disclosure,] users can’t make intelligent decisions on security. . . . A few weeks ago, a release of the Linux kernel came without the customary detailed information about the OS’s security. The developers cited fear of the DMCA as a reason why those details were withheld. Imagine you’re evaluating operating systems: Do you feel more or less confident about the security [of] the Linux kernel version 2.2, now that you have no details?”).

This shows the weakness of the court’s view in *United States v. Progressive, Inc.*, 467

### 3. *Allowing people to complain about perceived government misconduct*

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

Some laws aimed at preventing crime-facilitating speech eliminate or substantially weaken this protection against government overreaching. Consider laws barring people (including librarians or bookstore owners) from revealing that some of their records have been subpoenaed, or barring Internet service providers or other companies from revealing that their customers are being eavesdropped on.<sup>112</sup> Those private entities that are ordered to turn over the records or help set up the eavesdropping will no longer be legally free to complain, except perhaps much later, when the story is no longer timely and interesting to the public.<sup>113</sup>

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F. Supp. 990 (W.D. Wis. 1979), that, though the hydrogen bomb information was published to “alert the people . . . to the false illusion of security created by the government’s futile efforts at secrecy,” there was “no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue.” *Id.* at 994. When the government is claiming that its nonproliferation efforts are working, because the design of a hydrogen bomb is a successfully guarded secret, a mere “No, it’s not—I discovered without a security clearance how such bombs are built” won’t be persuasive: it will just be the author’s word against the government’s. Only providing the details, so that knowledgeable scientists can say, “Yes, the author is right, he has discovered the secret,” can really support the author’s claim. Perhaps the details of how to build a bomb should nonetheless have been suppressed, because they could help cause very grave harm. *See infra* Part III.D.1. But one ought not deny that the details are indeed needed to make the political argument work.

James R. Ferguson argues the contrary, saying that “the same point could have been made with equal force by an affidavit from the Secretary of Energy which confirmed that the information in the magazine’s possession was indeed an accurate design of a thermonuclear weapon.” James R. Ferguson, *Scientific and Technological Expression: A Problem in First Amendment Theory*, 16 HARV. C.R.-C.L. L. REV. 519, 545 n.124 (1981). I doubt, though, that the government would often be willing to provide such an affidavit, in part because doing so might itself be seen as revealing certain secrets.

112. *See supra* notes 29-30.

113. *See Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 560-61 (1976) (stressing that even temporary restrictions can substantially interfere with valuable speech); *cf.* Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1359-60 (2004) (criticizing secret subpoenas on these grounds).

Likewise, penalties for publishing the names of crime witnesses<sup>114</sup>—aimed at preventing criminals from learning the witnesses' identities and then intimidating the witnesses—may keep third parties who know a witness from explaining to the public why they think the witness is unreliable and why the government is wrong to arrest people based on the witness's word. And laws restricting the publication of detailed information about security problems may keep people from explaining exactly why they think the government or industry isn't taking sufficient steps to deal with some such problem.

#### 4. *Entertaining and satisfying curiosity*

Speech that describes how crimes are performed may also entertain readers.<sup>115</sup> A detective story might depict a murder that's committed in a particularly ingenious, effective, and hard-to-detect way. Nearly all the readers will just enjoy the book's ingeniousness, but a few may realize that it offers the solution to their marital troubles. (The precise details of the crime may be included either because they are themselves interesting, or for verisimilitude—many fiction writers try to make all the details accurate even if only a tiny fraction of readers would notice any errors.)

This may be true even for some of the crime-facilitating speech that people find the most menacing, such as the contract murder manual involved in *Rice v. Paladin Enterprises*. There were apparently thirteen thousand copies of the book sold,<sup>116</sup> and I suspect that only a tiny fraction of them were really used by

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114. See *supra* note 18 for examples.

115. See, e.g., EDWARD ABBEY, *THE MONKEY WRENCH GANG* 81, 169-79 (1975) (describing in some detail the sabotaging of heavy machinery, and the setting of explosive charges to derail a train); JAMES M. CAIN, *DOUBLE INDEMNITY* 25-29, 37, 47-51, 61, 100-03 (1989) (describing in some detail an elaborate scheme to commit a hard-to-detect murder); FREDERICK FORSYTH, *THE DAY OF THE JACKAL* 61-63 (1971) (describing a way to get a false passport); PATRICIA HIGHSMITH, *RIPLEY'S GAME* 58, 68, 78-79, 120-27 (1974) (describing schemes for committing murder); E.W. HORNUNG, *RAFFLES* 52-56, 69-74, 115-19, 131-38, 151-52, 165-67, 193-97, 204-07, 255-56, 288-90, 327-28 (1984) (describing various nonobvious and seemingly useful burglary tricks); ELMORE LEONARD, *GET SHORTY* 41-44, 158 (1990) (describing schemes for insurance fraud and for getting into people's hotel rooms); see also *Do You Remember: June 1975—MP Vanishes*, BIRMINGHAM EVENING MAIL, Apr. 19, 2001, at 10 ("Inspired by Frederick Forsyth's best-seller *The Day Of The Jackal*, [politician John Stonehouse] obtained the birth certificate of a dead man named Joseph Markham, received a passport in that name and opened bank accounts. Then he faked his own drowning in Miami and fled to Australia."). This technique is apparently known in England as the "Day of the Jackal fraud." Philip Webster, *Tax-Dodgers Run Up Bill Totalling Billions*, TIMES (London), Mar. 9, 2000; see also Marlise Simon, *Blaming TV for Son's Death, Frenchwoman Sues*, N.Y. TIMES, Aug. 30, 1993, at A5 ("Marine Laine said her son, Romain, and his friend, Cedric Nouyrigat, also 17, mixed crystallized sugar and weed-killer, stuffed it into the handlebar of a bicycle and ignited it to test a technique used by MacGyver, a television hero who is part adventurer, part scientific wizard.").

116. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 241 n.2 (4th Cir. 1997).

contract killers.<sup>117</sup> Who were the remaining readers? Many were likely armchair warriors who found it entertaining to imagine themselves as daring mercenaries who are beyond the standards of normal morality.<sup>118</sup>

Part of the fun of reading some novels is imagining yourself in the world that the book describes. People can get similar entertainment from factual works, including ones that are framed as “how-to” books, such as the travel guide *Lonely Planet: Antarctica*,<sup>119</sup> magazines about romantic hobbies,<sup>120</sup> the *Worst Case Scenario* series,<sup>121</sup> and even some cookbooks<sup>122</sup>—many readers of

117. In 1983, when *Hit Man* was published, there were only about 20,000 homicides in the U.S., see Nat'l Ctr. for Injury Prevention and Control, WISQARS Injury Mortality Reports, 1981-1998, at <http://webappa.cdc.gov/sasweb/ncipc/mortrate9.html> (last modified Feb. 24, 2005). It seems likely that very few of them are contract killings, and presumably very few of those are contract killings by people trained using a particular book. See Jacob Sullum, *Murderous Prose*, REASON ONLINE, May 27, 1998, at <http://reason.com/sullum/052798.shtml> (“[I]t’s doubtful that people like James Perry were the main audience for *Hit Man*. If they were, somehow the thousands of murders they committed have gone unnoticed.”); *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 848 (D. Md. 1996) (asserting that “out of the 13,000 copies of *Hit Man* that have been sold nationally, one person actually used the information over the ten years that the book has been in circulation,” though presumably the court meant that only one person had been discovered to have used the book to commit a crime), *rev’d*, 128 F.3d 233; see also *Publisher of Hit-Man Guidebook Settles Suit*, SEATTLE TIMES, Feb. 28, 2002, at B5 (mentioning another lawsuit flowing from an attempted murder supposedly facilitated by *Hit Man*).

118. *Rice*, 128 F.3d at 241 n.2 (listing “persons who enjoy reading accounts of crimes and the means of committing them for purposes of entertainment” and “persons who fantasize about committing crimes but do not thereafter commit them” as the respondent’s asserted target markets for the *Hit Man* book); cf. Albert Mobilio, *The Criminal Within: A Genre of How-to Manuals Indulges Our Darkest Fantasies*, HARPER’S MAG., Mar. 1999, at 66, 69 (noting that “[f]or an audience weaned on action movies, the . . . appeal” of books on building weapons, disposing of dead bodies, and committing contract murder “is obvious,” and including “vicarious thrills” as part of the appeal).

119. Cf., e.g., Juliet Coombe, *Planet Goes to China*, HERALD SUN (Melbourne, Austl.), Jan. 30, 2004, at T11 (interview with Tony Wheeler, cofounder of the company that produces the *Lonely Planet* guidebooks) (“Q The *Lonely Planet* guide to Antarctica sells about 45,000 copies a year. Why is it so popular, despite relatively few people going there? [A] Science and wildlife expeditions are getting more exposure and lots of people are armchair travellers. . . . For most of us, a trip to Antarctica is a dream.”). Naturally, some of the readers are armchair travelers in the sense of people who are curious and want to satisfy their curiosity by reading rather than by traveling; but I suspect that some of the armchair travelers really do read the books to fantasize about actually being there.

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

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

such books may want to imagine themselves as Antarctic travelers, survivors, or cooks, with no intention of acting on the fantasies. And people with grislier imaginations can be likewise entertained by books about how to pick locks, change your identity, or even kill people.

Other readers of crime-facilitating how-to manuals are probably just curious. Many nonfiction books are overwhelmingly read by people who have no practical need to know about a subject, whether it's how planets were formed, who Jack the Ripper really was, or how Babe Ruth (or, for that matter, serial killer Ted Bundy) lived his life. Some people are probably likewise curious about how hit men try to get away with murder, or how bombs are made. And satisfying one's curiosity this way may sometimes yield benefits later on—the information you learn might prove unexpectedly useful, in ways that are hard to predict.<sup>123</sup>

This of course doesn't resolve how highly we should value entertainment and satisfaction of curiosity, especially when we compare them against the danger that the book will facilitate murder; Part III.A.3 discusses this. For now, my point is simply that some crime-facilitating works do have some value as entertainment, whether because they're framed as detective stories or because they satisfy readers' curiosity or desire for vicarious thrills. It is therefore not correct to say that such works are useful only to facilitate crime,<sup>124</sup> or that the author's or publisher's purpose therefore must have been to facilitate crime.<sup>125</sup>

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122. See, e.g., Maurice Sullivan, *Last Best Books of 1997*, WINETRADER, <http://www.wines.com/winetrader/r6/r6bk.html> (1997) ("I have finally figured out that all these beautiful and expensive color cookbooks aren't for people who really want to cook, but rather are for folks on diets that want to fantasize about food!"). This is probably something of an overstatement, but I suspect that some of the cookbooks' readers do indeed use the books this way, even if others do actually use them to cook.

123. I'm speaking here specifically of the value provided by the crime-facilitating information in the book. The book as a whole can of course do more than entertain the reader and satisfy curiosity: For instance, a detective novel or a nonfiction biography of a criminal can enrich readers' understanding of human nature, affect their moral judgments about criminality, and so on. But the crime-facilitating elements, such as the exact details about how some crime was committed or could be committed, are less likely to have such a generally enriching effect. Sometimes they may indeed be relevant to political debates, a matter I discussed in Parts I.B.2-3; but often they will simply entertain the reader and satisfy his curiosity.

124. See, e.g., *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 248 (4th Cir. 1997) ("[T]he audience both targeted and actually reached is, in actuality, very narrowly confined, [presumably to criminal users]."); *id.* at 249 ("[A] jury could readily find that the provided instructions . . . have no, or virtually no, noninstructional communicative value . . ."); *id.* at 254 ("*Hit Man* . . . is so narrowly focused in its subject matter and presentation as to be effectively targeted exclusively to criminals."); *id.* at 255 ("*Hit Man*'s only genuine use is the unlawful one of facilitating . . . murders."); *id.* ("[T]he book [is devoid] of any political, social, entertainment, or other legitimate discourse."); *id.* ("[A] reasonable jury could simply refuse to accept Paladin's contention that this purely factual, instructional manual on murder has entertainment value to law-abiding citizens."); *id.* at 267 ("[The book] lack[s] . . . any even arguably legitimate purpose beyond the promotion and teaching of murder . . .").

125. See, e.g., *id.* at 267.

### 5. *Self-expression*

Finally, crime-facilitating speech may be valuable to speakers as a means of expressing their views. A scientist or engineer may feel that speaking the truth about some matter is valuable in itself. People who strongly oppose a law may feel that explaining how the law can be circumvented can help them fully express the depth of their opposition, and can help them “engage in self-definition” by “defin[ing themselves] publicly in opposition” to the law.<sup>126</sup> The same is true of people who strongly believe that all people should have the right to end their own lives if the lives have become unbearable, and who act on this belief by publicizing information about how to commit suicide.<sup>127</sup> Even people who give their criminal friends information about how to more effectively and untraceably commit a crime, or tell them when the police are coming, might be expressing their loyalty, affection, or opposition to the law that the police are trying to enforce.

As with entertainment, it’s not clear how much we should value such self-expression. Perhaps the harm caused by crime-facilitating speech is enough to justify restricting the speech despite its self-expressive value, or perhaps self-expressive value shouldn’t count for First Amendment purposes.<sup>128</sup> For now, I simply identify this as a possible source of First Amendment value.

### C. *Dual-Use Materials*

We see, then, that crime-facilitating speech is a form of dual-use material, akin to guns, knives, videocassette recorders, alcohol, and the like. These

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

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

127. See *infra* note 410 for examples of suicide-facilitating materials, and of calls to restrict them.

128. See *infra* Part III.A.2 for a discussion of when in particular the speaker’s interest in self-expression may have to yield.



materials can be used both in harmful ways—instructions and chemicals can equally be precursors to illegal bombs—and in legitimate ways; and it's usually impossible for the distributor to know whether a particular consumer will use the product harmfully or legally.

We'd like, if possible, to have the law block the harmful uses without interfering with the legitimate, valuable ones. Unfortunately, the obvious solution—outlaw the harmful use—will fail to stop many of the harmful uses, which tend to take place out of sight and are thus hard to identify, punish, and deter.

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

Any analogies we draw between dual-use speech and other dual-use materials will be at best imperfect, because speech, unlike most other dual-use items, is protected by the First Amendment. But recognizing that crime-facilitating speech is a dual-use product can help us avoid false analogies. For instance, doing something knowing that it will help someone commit a crime is usually seen as morally culpable. This assumption is sound enough as to single-use activity, for instance when someone personally helps a criminal make a bomb.<sup>129</sup> But this principle doesn't apply to dual-use materials, for instance when someone sells chemicals or chemistry books to the public, knowing that the materials will help some buyers commit crimes but also help others do lawful things.

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

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

Naturally, if existing First Amendment law already sensibly explains how crime-facilitating speech should be analyzed, there would be little need for this

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129. See *infra* notes 295-96 for examples of laws that punish such knowing assistance, even if the aider doesn't actually intend to help the criminal but simply knows that his conduct will have this effect.

Article. It turns out, though, that current law doesn't adequately deal with this problem: The Supreme Court has never announced a specific doctrine covering crime-facilitating speech, and none of the more general doctrines, such as strict scrutiny, is up to the task.

#### A. *The Existing Crime-Facilitating Speech Cases*

No Supreme Court case squarely deals with crime-facilitating speech. As Justice Stevens recently noted, referring to speech that instructed people about how to commit a crime, "Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech."<sup>130</sup>

Justice Stevens suggested that a crime-facilitating speech exception ought to be recognized, but this was in a solo opinion respecting the denial of certiorari; and the brief opinion gave no details about what the exception might look like.<sup>131</sup> Likewise, Justice Scalia's solo concurrence in the judgment in *Florida Star v. B.J.F.* acknowledged that a ban on publishing the name of rape victims might possibly be justified as a means of preventing further attacks aimed at intimidating or silencing the victim—but the opinion concluded only that the particular law involved in the case wasn't narrowly tailored to this interest, and didn't discuss what should happen if a ban is indeed precisely focused on prohibiting such crime-facilitating publications.<sup>132</sup>

*United States v. Aguilar* upheld a conviction for disclosing a secret wiretap, but the brief First Amendment analysis rested partly on the defendant's being "a federal district court judge who learned of a confidential wiretap application" through his government position as opposed to being "simply a member of the general public who happened to lawfully acquire possession of information about the wiretap."<sup>133</sup> *Scales v. United States* upheld a conviction for conspiring to advocate the propriety of Communist overthrow of the government; a small part of the evidence against Scales was that he helped organize "party training schools" where, among other things, instructors taught people "how to kill a person with a pencil," but the Court viewed that simply as

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130. *Stewart v. McCoy*, 537 U.S. 993, 995 (2002) (Stevens, J., respecting the denial of certiorari); see also U.S. DEP'T OF JUSTICE, *supra* note 43, at text accompanying n.44 (asserting the same).

131. *McCoy*, 537 U.S. at 995 (Stevens, J., respecting the denial of certiorari) (suggesting, in a case where the lower court reversed a former gang leader's conviction for giving advice about how to better enforce discipline and maintain loyalty within the gang, that *Brandenburg v. Ohio*, 395 U.S. 444 (1969), shouldn't apply "to some speech that performs a teaching function").

132. 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in the judgment).

133. 515 U.S. 593, 606 (1995); see also *id.* ("As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public.").

an example of Scales's engaging in advocacy of concrete action rather than of abstract doctrine. The Justices didn't treat the case as being primarily about crime-facilitating speech, and enunciated no rules that would broadly cover crime-facilitating speech.<sup>134</sup>

*Haig v. Agee* concluded that an ex-CIA agent's "repeated disclosures of intelligence operations and names of intelligence personnel" were as constitutionally unprotected as "the publication of the sailing dates of transports or the number and location of troops," at least when the disclosures were done for "the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel."<sup>135</sup> But the Court didn't explain the scope of this exception—it spent just a few sentences on the subject—and in particular didn't discuss whether the exception reached beyond threats to national security. And the following year, the Court held in *NAACP v. Claiborne Hardware* that knowingly publishing the names of people who weren't complying with a boycott was constitutionally protected, even though some people who weren't observing the boycott had been violently attacked, and the publication clearly could facilitate such attacks.<sup>136</sup>

Some lower court cases have considered the issue, but they haven't reached any consistent result. Several federal circuit cases have held that speech that *intentionally* facilitates tax evasion, illegal immigration, drugmaking, and contract killing is constitutionally unprotected.<sup>137</sup> Three federal circuit cases have held that speech that *knowingly* facilitates bomb-making, bookmaking, or illegal circumvention of copy protection is constitutionally unprotected.<sup>138</sup> Two federal district court cases have similarly held that speech that knowingly (or perhaps even negligently) facilitates copyright infringement is civilly actionable, though they haven't confronted the First Amendment issue.<sup>139</sup> And

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134. 367 U.S. 203, 264-65 (1961).

135. 453 U.S. 280, 309-10 (1981) (quoting *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931)).

136. 458 U.S. 886 (1982).

137. See *United States v. Raymond*, 228 F.3d 804, 815 (7th Cir. 2000); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243, 266 (4th Cir. 1997); *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989), *superseded by statute as noted in* *United States v. Gonzalez-Torres*, 273 F.3d 1181 (9th Cir. 2001); *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985); *United States v. Holecek*, 739 F.2d 331, 335 (8th Cir. 1984); *United States v. Barnett*, 667 F.2d 835, 842-43 (9th Cir. 1982); *United States v. Butterff*, 572 F.2d 619, 624 (8th Cir. 1978); see also *Wilson v. Paladin Enters., Inc.*, 186 F. Supp. 2d 1140 (D. Ore. 2001).

138. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 457 (2d Cir. 2001); *United States v. Mendelsohn*, 896 F.2d 1183, 1186 (9th Cir. 1990); *United States v. Featherston*, 461 F.2d 1119, 1122 (5th Cir. 1972). *Mendelsohn* involved the distribution of computer object code, which might not be protected by the First Amendment in any event; but the court held that even if code was potentially covered by the First Amendment, distribution of such material with the knowledge that it would likely be used for bookmaking could be punished.

139. See, e.g., *Arista Records, Inc. v. MP3Board, Inc.*, No. 00 CIV. 4660, 2002 WL 1997918, at \*4 (S.D.N.Y. Aug. 29, 2002); *Intellectual Reserve, Inc. v. Utah Lighthouse*

three appellate cases have held that a newspaper doesn't have a First Amendment right to publish a witness's name when such a publication might facilitate crimes against the witness, even when there was no evidence that the newspaper intended to facilitate such crime.<sup>140</sup> But two federal appellate cases have applied the much more speech-protective *Brandenburg v. Ohio* incitement test to speech that facilitated tax evasion and gang activity, concluding that even intentionally crime-facilitating speech is protected if it isn't intended to and likely to incite *imminent* crime.<sup>141</sup>

Legislatures at times assume that crime-facilitating speech may be punished, at least in some instances, even when the speaker doesn't intend to facilitate crime;<sup>142</sup> other statutes, though, do require such an intention.<sup>143</sup> In recent years, the U.S. Justice Department seems to have taken the view that published crime-facilitating speech may generally be restricted if it's intended to facilitate crime, but not if such an intention is absent.<sup>144</sup> But some federal statutes do not fit this understanding.<sup>145</sup>

Some lower court cases have argued that there's no First Amendment problem with punishing certain kinds of crime-facilitating speech because it is "speech brigaded with action" and "an integral part" of a crime; the Justice Department has taken the same view.<sup>146</sup> Another case has contended that certain crime-facilitating publications violated generally applicable aiding and abetting laws,<sup>147</sup> and that there is no First Amendment problem when such

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Ministry, Inc., 75 F. Supp. 2d 1290, 1293-96 (D. Utah 1999).

140. See cases cited *supra* note 18.

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

142. See, e.g., statutes cited *supra* note 29, except the Minnesota statute; Texas statute cited *supra* note 30.

143. See, e.g., Minnesota statute cited *supra* note 29; statutes cited *supra* note 30, except the Texas statute.

144. See U.S. DEP'T OF JUSTICE, *supra* note 43, pt. VI.B; Government's Motion for Reversal of Conviction at 6-7 & n.3, *United States v. McDanel*, CA No. 03-50135 (9th Cir. Oct. 14, 2003) (taking the position that communicating such information may violate the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5)(A), (e)(8) (2000), but only if the speaker intended to facilitate security violations, rather than intending to urge the software producer to fix the problem).

145. See federal statutes cited *supra* note 29.

146. See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997); *NOW v. Operation Rescue*, 37 F.3d 646, 655 (D.C. Cir. 1994); *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985); *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982); *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978); U.S. DEP'T OF JUSTICE, *supra* note 43, pt. VI.A.3.

147. Actually, as the Justice Department acknowledges, it's not clear that criminal aiding and abetting law is indeed generally applicable to the distribution of crime-facilitating dual-use products (whether speech or nonspeech) to unknown customers. See U.S. DEP'T OF JUSTICE, *supra* note 43, at text accompanying n.24. Standard definitions of aiding and abetting are broad enough to cover distribution of dual-use products, either with the intention that the products be used for criminal purposes, or in many states even if the distributor

laws are applied to speech;<sup>148</sup> one could likewise make the same argument as to crime-facilitating speech that violates laws prohibiting criminal facilitation<sup>149</sup> or obstruction of justice.<sup>150</sup> But as I argue in detail elsewhere, such attempts to

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simply knows that they'll be used for such purposes. *See infra* note 295. But in fact, providers of dual-use products—such as metal-cutting equipment—have generally been held liable only when they know that a particular sale is going to a person who intends to use the product illegally (for instance, to break into a bank), *see, e.g.*, *Regina v. Bainbridge*, 3 All E.R. 200 (Crim. App. 1959); and even then, some cases refuse to hold the providers liable based on mere knowledge, *see, e.g.*, *People v. Lauria*, 251 Cal. App. 2d 471, 481 (Ct. App. 1967), reasoning that it's too burdensome to impose on providers of such staple products a "duty to take positive action to dissociate oneself from activities helpful to violations of the criminal law" when the crimes being aided aren't serious. U.S. DEP'T OF JUSTICE, *supra* note 43, at n.24, cites some cases that punish dual-use *speech* as criminal aiding and abetting; but these of course don't show that the law is generally applicable both to speech and nonspeech.

A few tort cases have let distributors of dual-use materials be sued on some generally applicable theory that is related to aiding and abetting, whether it's conspiracy, negligent marketing (the theory being that the manufacturer almost certainly knew that some users would misuse the product, but didn't take steps to minimize this risk), or contributory infringement. *See, e.g.*, *Merrill v. Navegar, Inc.*, 89 Cal. Rptr. 2d 146, 157 (Ct. App. 1999) (rejecting motion to dismiss negligent marketing lawsuit against gun manufacturer), *rev'd on statutory grounds*, 28 P.3d 116 (Cal. 2001); *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003) (allowing negligent marketing and negligent design lawsuit to go forward); cases cited *supra* note 24 (contributory copyright infringement); *Nat'l Fed'n of the Blind, Inc. v. Loompanics Enters., Inc.*, 936 F. Supp. 1232 (D. Md. 1996) (contributory trademark infringement). *But see, e.g.*, *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001) (rejecting a negligent marketing cause of action against a handgun manufacturer); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 536 (S.D. Ohio 1987) (rejecting an aiding and abetting cause of action against a handgun manufacturer); *In re Tobacco Cases II*, No. SDSC 719446, 2002 WL 3168649, at \*11 (Cal. Super. Ct. Nov. 22, 2002) (rejecting an aiding and abetting cause of action against a cigarette manufacturer based on the theory that the manufacturers' marketing practices aided unlawful sales to minors). Perhaps courts will one day develop a general tort law rule holding producers of dual-use products liable for harms they knew would happen, or perhaps only for harms they intended to happen, but no such doctrine seems to be firmly established today.

The generally applicable law, both in tort law and in the criminal law of aiding and abetting and crime facilitation, has been developed where the defendant knew that he was helping a *particular* person commit a crime, or even intended to do so, and could therefore avoid this crime-facilitating action while still remaining free to distribute the product to law-abiding users. *Cf.* Mary M. Cheh, *Government Control of Private Ideas: Striking a Balance Between Scientific Freedom and National Security*, 23 JURIMETRICS J. 1, 24 (1982). Applying this law to distribution of dual-use speech would be a significant extension of the law, not just an application.

148. *See Rice*, 128 F.3d at 243 ("[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."); *id.* at 242 (pointing to "criminal aiding and abetting" as the generally applicable body of law); U.S. DEP'T OF JUSTICE, *supra* note 43, at text accompanying nn.55-60; *cf. infra* note 295 (describing how aiding and abetting law may be read as applying to crime-facilitating speech).

149. *See infra* notes 296-97 (describing the law of crime facilitation).

150. *See, e.g.*, 18 U.S.C. § 1512(c) (2000 & Supp. II 2002) (outlawing "corruptly . . . imped[ing] any official proceeding"); 4 WHARTON'S CRIMINAL LAW § 570 (15th ed. 2003)

escape First Amendment scrutiny for these speech restrictions are unsound, and inconsistent with modern First Amendment doctrine.<sup>151</sup>

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

### B. *Strict Scrutiny*

In recent decades, the Court has often said that “[t]he Government may . . . regulate the content of constitutionally protected speech”—speech that isn’t within one of the existing free speech exceptions—if the regulation is “narrowly tailored” to a “compelling government interest.”<sup>152</sup> In practice, the Court has almost never upheld restrictions under this test,<sup>153</sup> but in principle, the test seems like a possible justification for bans on crime-facilitating speech, since preventing crime does seem like a compelling interest.

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

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

(stating that people who “knowing that a felony has been committed, render[] aid to the felon in order to protect him, hinder his apprehension, or facilitate his escape” have traditionally been punishable as accessories after the fact). For cases in which helping someone escape has been treated as obstruction of justice or a similar crime, see, for example, *People v. Shea*, 326 N.Y.S.2d 70 (N.Y. Ct. Special Sessions 1971) (encircling officer and arrestee to let the arrestee escape); *United States v. Hare*, 49 F.3d 447 (8th Cir. 1995) (alerting someone that the FBI was pursuing him); *United States v. Bucher*, 375 F.3d 929 (9th Cir. 2004) (alerting a friend that law enforcement officers were pursuing him); *United States v. Cassiliano*, 137 F.3d 742 (2d Cir. 1998) (likewise). See also *State v. Walker*, No. I-9507-03625 (Williamson Cty. (Tenn.) Cir. Ct. Nov. 13, 2003) (accepting a First Amendment defense to a charge of knowingly interfering with an officer, when the defendant’s conduct consisted of flashing his headlights to warn oncoming motorists about a speed trap).

151. See Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. (forthcoming 2005), available at <http://www1.law.ucla.edu/~volokh/conduct.pdf>.

152. *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

153. The only case in which a majority of the Supreme Court has upheld a speech restriction—as opposed to a restriction on expressive association, or on religious practice—under strict scrutiny is *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (reaffirmed without extensive strict scrutiny analysis in *McConnell v. FEC*, 540 U.S. 93 (2003)). A plurality also upheld a speech restriction under strict scrutiny in *Burson v. Freeman*, 504 U.S. 191 (1992).

Consider, for example, the decisions involving laws that aim to shield children from sexually explicit material. The Supreme Court has said that there is a compelling government interest in such shielding, and it has upheld bans on distributing such material when the distributor knows that the buyer is a child.<sup>154</sup> But the Court has struck down laws that ban *all* distribution of sexually themed material that would be unsuitable for children, even when the laws were supported by the child-shielding interest.<sup>155</sup>

Sexually explicit but nonobscene material is dual-use speech. It can be legitimately used by adults for its serious value (or even if it lacks serious value but isn't prurient or patently offensive as to adults), but it can also be improperly distributed to children. Yet even though any sexually themed work that's sold to an adult might end up in a child's hands, the Court held that restricting all such distribution to adults in order to prevent the distribution to children is "burn[ing] the house to roast the pig."<sup>156</sup> Likewise, though works that depict sex with (fictional) children might be used by some adults to try to seduce children, the Court held that this danger doesn't justify restricting such works:

The government cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.<sup>157</sup>

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

Another example is the Court's treatment of laws banning leafleting. Some cities argued that the laws were justified by the government interest in preventing litter, and the Court agreed that littering is an evil that the city can generally try to prevent: The First Amendment doesn't "deprive a municipality of power to enact regulations against throwing literature broadcast in the streets."<sup>158</sup>

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154. *Ginsberg v. New York*, 390 U.S. 629 (1968).

155. *See Sable Communications*, 492 U.S. at 126 (reaffirming, using strict scrutiny, *Butler v. Michigan*, 352 U.S. 380 (1957)).

156. *Butler*, 352 U.S. at 383.

157. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 252-53 (2002).

158. *Schneider v. State*, 308 U.S. 147, 160-61 (1939). The case involved a content-neutral restriction, which today would be judged under a form of intermediate scrutiny, rather than strict scrutiny. But the Court's willingness to strike the law down even though the law was content-neutral—and the Court's continued adherence to *Schneider*, *see, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994)—shows that the result would a fortiori be the same under strict scrutiny.

But the Court held that the restriction could only go so far as prohibiting littering, whether by the leafleteer or the recipient; the city couldn't bar all leafleting, even though for each leaflet there is a risk that it will end up being littered.<sup>159</sup> Leaflets are dual-use products: Some recipients will read them and then lawfully dispose of them, while others will illegally throw them on the ground. Under the Court's holding, the government may not try to suppress the illegal use in a way that also blocks the lawful use.

Finally, a third example comes from *Free Speech Coalition v. Ashcroft*, where the government argued that a ban on virtual child pornography—computer-generated material that depicts children in sexual contexts, but that was generated without using real children—was needed to prevent the distribution of true child pornography.<sup>160</sup> The Court rejected this view:

The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.

The Government may not suppress lawful speech as the means to suppress unlawful speech. . . . “[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . .” The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.<sup>161</sup>

This then is the first, more demanding, sense of narrow tailoring: The law may restrict distribution of dual-use speech that leads to a harmful use (for instance, littering or selling pornography to minors), but only if the restriction doesn't interfere with the valuable use. Likewise, any restriction that lumps the valuable uses together with the harmful ones may be said to be “overinclusive.”<sup>162</sup>

But an alternative, less speech-protective, definition of narrow tailoring is that the government interest may justify whatever is the least restrictive law necessary to prevent the harmful uses, *even if this law also interferes with the valuable uses*. A classic example is the plurality opinion in *Burson v. Freeman*, which used strict scrutiny to uphold a total ban on electioneering within one hundred feet of polling places.<sup>163</sup>

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159. *Schneider*, 308 U.S. at 162-63.

160. In *Free Speech Coalition*, the government tried to defend the statute using both this justification and, separately, the justification quoted in the text accompanying note 157.

161. 535 U.S. at 255 (citation omitted).

162. *See also* *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting) (stating that a contribution limit like the one upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976), wasn't narrowly tailored because “a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent”).

163. 504 U.S. 191 (1992) (plurality opinion).



The restriction, the Court held, was necessary to effectively serve the government interests “in preventing voter intimidation and election fraud”;<sup>164</sup> but the law also restricted speech that wasn’t likely to cause intimidation or fraud. And yet, in the plurality’s view, this restriction on the legitimate speech was constitutional because it was an unavoidable side effect of the restriction on the harmful speech: It would be impossible to craft a law that effectively distinguished the intimidating and fraudulent speech from other speech, especially because the people who would draw the distinction—police officers—were “generally . . . barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process.”<sup>165</sup>

Likewise with *Buckley v. Valeo*, which upheld a \$1000 limit on campaign contributions because of the government interest in preventing contributions that are tantamount to bribes<sup>166</sup> (though under an analysis that is now seen as involving “‘closely drawn’ scrutiny” but not quite strict scrutiny<sup>167</sup>). Many contributions that exceed \$1000 are not bribes, especially in campaigns that cost millions—the contributors are often just trying to help elect an official whose views they like, rather than to gain leverage over the official once he’s elected. Moderately large contributions are thus dual-use: They can be used as bribes or as honest attempts to support one’s preferred candidates, and it’s impossible to tell for sure which is which.

The Court, though, upheld the ban on contributions of more than \$1000, partly because “it [is] difficult to isolate suspect contributions.”<sup>168</sup> Blocking the honest contributions was necessary to effectively block the corrupt ones, and this necessity justified the broad prohibition. And the restriction wasn’t treated as overinclusive, because it included only the activity that needed to be included for the law to adequately serve the government interest.

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

It’s also not even clear that the Court would apply either form of strict scrutiny to these sorts of restrictions. Though the Justices have at times suggested that strict scrutiny should be the test for any content-based restriction

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164. *Id.* at 206.

165. *Id.* at 207.

166. 424 U.S. 1, 28-29 (1976).

167. *McConnell v. FEC*, 540 U.S. 93, 134-40 & nn.42-43 (2003).

168. *Buckley*, 424 U.S. at 30.

on speech falling outside the existing First Amendment exceptions, at other times they have struck down speech restrictions without even applying strict scrutiny. Consider, for instance, *Virginia v. Black*, which held that certain kinds of cross-burning are constitutionally protected, but didn't even consider the possibility that restrictions on such cross-burning may be upheld under strict scrutiny.<sup>169</sup>

All this suggests that the strict scrutiny framework ultimately won't much help the Supreme Court decide what to do about crime-facilitating speech. The Court may conclude that the valuable uses must be protected even if this means that some harmful uses would be tolerated, or that the harmful uses must be suppressible even if this means that some valuable uses would be restrictable as well. But it is this decision that will determine how strict scrutiny is applied, and not vice versa.

Likewise, the Court's precedents are inconsistent enough that lower courts aren't really bound by any particular vision of strict scrutiny, either. Defenders of restrictions on crime-facilitating speech may quote the statement from *Sable Communications v. FCC* that "[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."<sup>170</sup> Challengers may quote *Ashcroft v. Free Speech Coalition*, saying that First Amendment law "prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."<sup>171</sup> Neither set of precedents will itself resolve the question.

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

### C. Balancing

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

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169. 538 U.S. 343 (2003); see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (holding the intentional infliction of emotional distress tort inapplicable as to certain speech, without applying strict scrutiny); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (striking down a content-based restriction without applying strict scrutiny); cf. *Am. Booksellers' Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1986) (likewise).

170. 492 U.S. 115, 126 (1989).

171. 535 U.S. 234, 255 (2002).

Unfortunately, it's not clear what the command "balance" would really refer to. "Balance" is a metaphor, and its real-world referent—the scale—works because it uses a physical force (gravity) to reduce two objects to a common measure (weight) that can then be mechanically compared. But there is no such force or mechanism in law. There are no means for methodically and objectively comparing the value of speech and the harm that it causes.<sup>172</sup>

The closest analogy to the scale might be a judge's intuitions: "Judges should balance the value of the speech against the harm that it causes" might be seen as an instruction that the judge in each free speech case should simply think hard about both the value of the speech and the harm it causes, and decide which feels more important to him. But this sort of unexamined, un-self-conscious intuitive inquiry can easily be influenced by factors that judges ought not consider, such as the ideology of the speaker or the perceived merits of the political movement to which he belongs.<sup>173</sup> And it leaves speakers uncertain about whether their speech will be constitutionally protected, or potentially subject to serious punishment.

Second, "balancing" can be a way of describing whatever courts end up doing when they decide whether a speech restriction is justified. When judges make such a decision, they can be said to have "balanced" all the factors—the constitutional text, the traditional understanding of the text, the harm and value of the speech, the possible indirect effects on future cases of deciding for or against protection in this one, and more—in the process of reaching the result.<sup>174</sup>

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172. See generally *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) ("This process is ordinarily called 'balancing,' but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 788-89 (2001); Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 167-68. William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 869 n.91 (2001), defends balancing against the charge that it is "like judging whether a particular line is longer than a particular rock is heavy" by responding that "courts make such judgments regularly, and at least in some cases they do not seem particularly hard to make. Some lines are very short, and some rocks are very heavy." I think that may be correct for the very short lines or very heavy rocks, but when the rock is moderately heavy and the line is moderately long, "balancing" stops being a useful metaphor.

173. See Melville B. Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 939-41 (1968) (criticizing ad hoc balancing for this reason); *infra* Part III.A.3 (criticizing proposals that the Court apply a more sliding-scale approach to valuing speech and inquire whether speech has not merely some value, but is of "unusual public concern").

174. "Balancing" is also sometimes used to refer to courts' applying strict scrutiny or intermediate scrutiny, since such tests require courts to consider whether the harm that the speech causes to government interests is enough to justify the speech restriction. For a discussion of why strict scrutiny is unhelpful here, see *supra* Part II.B. Intermediate scrutiny would be improper here because restrictions on crime-facilitating speech should be treated as

All First Amendment cases, including ones that announce bright-line rules, might then be seen as involving a “balancing” of the factors in favor of protection against those in favor of suppression. In this sense, “balancing” is a useful reminder that free speech questions can’t just be answered with a categorical assertion that all speech is protected, but must consider a variety of other factors in defining the proper rule.<sup>175</sup>

This definition of “balancing,” though, still doesn’t tell us just how judges should make the decision that would then be referred to as a “balancing” of the factors. It is this question that the next Parts confront. If one wants to call those Parts, and the analysis that they incorporate from Part I, “balancing,” that’s fine. The important issue is what the test should be, and the word “balancing” doesn’t really add much to that analysis.

#### D. Deference to the Legislature

Finally, courts could simply defer to legislative judgment: Legislatures, the argument would go, are better equipped to determine whether certain kinds of crime-facilitating speech are really harmful enough to be restricted, and courts shouldn’t second-guess this determination. For this approach to offer an answer to the crime-facilitating speech problem, courts would have to do more than just seriously consider legislative judgments, or pay attention to legislative fact-finding in close cases—such respectful attention would still require courts to develop their own independent crime-facilitating speech doctrine. Rather, courts would have to basically accept the legislative judgment as nearly conclusive.

I think, though, that this would be unsound. First, if the speech is being restricted by a generally applicable law, such as the law of aiding and abetting, criminal facilitation, or obstruction of justice,<sup>176</sup> then the legislature hasn’t made any specific judgment about the harmfulness and value of speech, and about whether the speech should therefore be restricted.

By enacting the law, the legislature has decided to ban a broad range of conduct, the overwhelming majority of which doesn’t consist of speech, because the conduct may cause certain harms. But this doesn’t mean that the legislators even considered whether speech—which may have the various kinds of value identified above in Part I.B—should be outlawed as well. Courts ought not defer to a legislative judgment that wasn’t made.<sup>177</sup>

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content-based, *see* Volokh, *Speech as Conduct*, *supra* note 151, at pt. II; intermediate scrutiny is applicable to content-neutral restrictions.

175. This would be what Mel Nimmer called “categorical balancing” as opposed to “ad hoc balancing.” MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* § 2.02 (1994).

176. *See supra* notes 147-51 and accompanying text.

177. I am indebted to my colleague Julian Eule for this line, which I heard him use in a talk a few years before his untimely death.

Second, while the Court at one time did defer to legislative judgments that speech ought to be restricted, for instance in *Gitlow v. New York*,<sup>178</sup> modern free speech protection rests on a rejection of this approach. The Court has read the First Amendment as broadly shielding public debate from content-based legislative restrictions on valuable speech; and this shielding can't happen if courts let legislatures restrict whatever speech the legislators think is harmful enough.<sup>179</sup> Where the Court has found that the speech lacks First Amendment value, the Court has understandably given legislatures broader discretion.<sup>180</sup> But where the speech has constitutional value, as much crime-facilitating speech does, courts independently judge—and should independently judge—whether the speech may nonetheless be banned.

### III. POSSIBLE DISTINCTIONS WITHIN THE CRIME-FACILITATING SPEECH CATEGORY

So how then can courts craft a crime-facilitating speech exception? Let's begin by identifying and evaluating the potential criteria that would distinguish protected crime-facilitating speech from the unprotected. These distinctions will be the potential building blocks of any possible test; Part III.G will then make some suggestions about which blocks should be included.

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By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. And the case is to be considered "in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare"; and that its police "statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest."

268 U.S. 652, 668 (1925).

179. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (taking the same view); *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989) (likewise); see also 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510 (1997) (refusing to take a deferential view even as to commercial advertising, which is treated as less valuable than other speech).

180. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60-64, 67 (1973); see also *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-96, 213 (1997) (giving more deference, though not complete deference, to congressional judgments when the challenged restriction is content-neutral); *id.* at 213 (stressing that "[c]ontent-neutral regulations do not pose the same 'inherent dangers to free expression that content-based regulations do, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution'").

## A. Distinctions Based on Value of Speech

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

When we decide how to deal with dual-use materials, we naturally care about how valuable the legitimate use would be. This is why, for instance, recreational drugs are treated differently than cars. Both have harmful uses: Cars kill nearly 45,000 Americans per year, cause 300,000 injuries that require hospitalization,<sup>181</sup> and are used in countless other crimes. The valuable uses of the drugs, however—generally the entertainment of those users who don't get addicted and who use the drug responsibly—are seen as less valuable than the valuable uses of cars. The more valuable one thinks drugs are, for instance for medical purposes, the more willing one would be to allow them in some circumstances, even if this means there'll be inevitable leakage from the valuable uses to the harmful ones.

This analysis is always complex, because the harm and the value of the product are hard to estimate, and hard to compare even once one has estimated them. But for crime-facilitating speech, the analysis is harder still, because First Amendment law constrains courts' and legislatures' ability to assess the value of speech. In our own lives, we routinely measure the value of speech based partly on whether it expresses good ideas or evil ones, whether it's reasoned or not, or whether it's mere entertainment or genuine advocacy. The Court, though, has generally held that each of these distinctions may *not* be part of the First Amendment analysis.<sup>182</sup>

First Amendment law doesn't assume that these kinds of speech *are* equally valuable under some commonly held moral or political standard of value. It does, however, conclude that the government *must generally treat them* as equally valuable, because courts and legislators generally can't be

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181. See Nat'l Ctr. for Injury Prevention and Control, WISQARS Injury Mortality Reports, 1999-2002, at [http://webapp.cdc.gov/sasweb/ncipc/mortrate10\\_sy.html](http://webapp.cdc.gov/sasweb/ncipc/mortrate10_sy.html) (last modified Jan. 29, 2005) (2002 data); Nat'l Ctr. for Injury Prevention and Control, WISQARS Nonfatal Injury Reports, at <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html> (last modified Jan. 29, 2005) (2003 data).

182. See, e.g., *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959) (advocacy of adultery protected just like advocacy of other ideas); *Winters v. New York*, 333 U.S. 507, 510 (1948) ("Though we can see nothing of any possible value to society in these [sensational crime] magazines, they are as much entitled to the protection of free speech as the best of literature."); *Cohen v. California*, 403 U.S. 15 (1971) (jacket with just the words "Fuck the Draft" is fully protected); *Texas v. Johnson*, 491 U.S. 397 (1989) (burning a flag is fully protected, even though such symbolic speech doesn't contain serious reasoning or argument). Obscenity is one narrow exception to this principle: To determine whether a work is obscene courts do look at whether the speech has "serious literary, artistic, political, or scientific expression." *Miller v. California*, 413 U.S. 15, 23 (1973). But obscenity law is intentionally limited to a narrow category of rather explicit sexually themed speech, and doesn't touch other speech, even speech that some see as comparatively low in value, see, e.g., *Cohen*, 403 U.S. at 20 (refusing to extend obscenity law to cover profanity).

trusted to properly decide which speech is right or useful and which is wrong or useless, and because people in a democracy are entitled to decide for themselves which ideas have value and which don't.<sup>183</sup>

Of course, First Amendment doctrine hasn't precluded the Court from making all judgments about the value of speech. Various First Amendment exceptions—such as the ones for false statements of fact, obscenity, and fighting words—are justified on the theory that certain speech has virtually no constitutional value.<sup>184</sup> Even within the zone of valuable speech, the Court has at times suggested that some speech is less valuable than “fully protected” speech.<sup>185</sup>

Still, the Court's jurisprudence in considerable measure constrains courts and legislatures in judging the value of speech; and the Court has taken this constraint seriously, often fully protecting speech that a commonsense judgment would suggest is not tremendously valuable, such as vulgar parody and speech that praises crime (unless it fits within the narrow incitement exception).<sup>186</sup> This limits the degree to which a crime-facilitating speech doctrine can distinguish the less valuable crime-facilitating speech from the more valuable. Conversely, if this limit is relaxed here, and courts are allowed to engage in free-ranging judgments about the value of various kinds of speech, then this new precedent may weaken these limitations elsewhere—a concern the Court has often expressed when rejecting proposed judgments that speech is of low constitutional value.<sup>187</sup>

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

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

185. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-65 (1976) (commercial speech); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (plurality opinion) (profanity); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opinion) (pornography); see also Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981) (criticizing *Pacifica*).

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

187. *Cohen*, 403 U.S. at 25 (reasoning that the proposed principle that profanity is unprotected but other offensive words remain protected “seems inherently boundless”); *Johnson*, 491 U.S. at 417 (reasoning that “[t]o conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries”); *Hustler Magazine*, 485 U.S. at 55 (reasoning that “[i]f it were possible by laying down a principled standard to separate [the attack on Jerry Falwell and his mother] from [traditional political cartoons], public discourse would probably suffer little or no harm,” but concluding that “we doubt that there

## 2. *Virtually no-value speech*

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

Some speech is communicated entirely to particular people who the speaker knows will use it for criminal purposes. A burglar tells his friend how he can evade a particular security system.<sup>188</sup> A lookout, or even a total stranger, tells criminals that the police are coming.<sup>189</sup> Someone tells a particular criminal (whom he knows to be a criminal) that his line is tapped.<sup>190</sup> A person tells another person how to make explosives or drugs, knowing that the listener is planning to use this information to commit a crime.

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

Restricting such speech or conduct will, at least in some situations, make it somewhat harder for the listener or buyer to successfully commit the crime, and it will interfere very little with valuable uses of the speech or other materials. The speech doesn't contribute to political or scientific debates, provide innocent entertainment, or even satisfy law-abiding users' intellectual curiosity; its sole significant effect is to help criminals commit crimes.<sup>192</sup> It makes sense,

is any such standard, and we are quite sure that the pejorative description 'outrageous' does not supply one"); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1096 (2003) (discussing this sort of argument). *But see Pacifica*, 438 U.S. 726 (plurality opinion) (concluding that profanity should be distinguished from other speech, at least where radio broadcasting is involved).

188. *Cf. United States v. Aguilar*, 883 F.2d 662, 685 (9th Cir. 1989) (upholding conviction for aiding and abetting illegal immigration in part based on a defendant's telling El Salvadoran refugees the location of a hole in the border fence, and the directions to a church that would give them sanctuary), *superseded by statute as noted in United States v. Gonzalez-Torres*, 273 F.3d 1181 (9th Cir. 2001).

189. *See supra* notes 37-39.

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

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

192. One can imagine some possible social value that might flow from the communication. A burglar who learns more about what he'd need to do to safely commit a crime might be scared off by the difficulty of the process. If you tell someone who you think is a criminal that the police are coming, and it turns out that the person's behavior is really legal but just suspicious-looking, then your statement might inadvertently prevent an



I think, to treat the speech as having so little First Amendment value that it is constitutionally unprotected, much as how threats or false statements of fact are treated.

Moreover, such a judgment, if limited to this sort of single-use speech, would create a limited precedent that seems unlikely to support materially broader speech restrictions. The speech is not only harmful, but seems to have virtually no First Amendment value. It has been traditionally seen as punishable under the law of aiding and abetting or (more recently) criminal facilitation.<sup>193</sup> It's spoken to only a few people who the speaker knows are criminals. It seems improbable that judges or citizens will see a narrow exception for this sort of speech as a justification for materially broader exceptions.<sup>194</sup>

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erroneous arrest. Even if the person you're warning is a criminal, he might have innocent friends standing nearby, so warning him might prevent the innocents from getting caught in a crossfire, or getting erroneously arrested. Information is valuable, and one can always imagine some conceivable way in which it would facilitate wise and law-abiding decisions. Nonetheless, these valuable uses seem extremely unlikely when someone knowingly conveys crime-facilitating information just to a person who wants to use it for criminal purposes, and thus seem too insubstantial to influence the analysis.

Of course, if we think that some criminal or tortious conduct—for instance, illegal immigration, drugmaking, or copyright infringement—is actually laudable, and shouldn't be illegal at all, then we might view speech that helps particular people engage in such conduct as both harmless and valuable. But I don't think it's proper for courts to reject aiding and abetting or criminal facilitation liability on these grounds, and I'm quite sure that courts won't in fact reject such liability. No judge would reason, I think, that selling marijuana is perfectly fine (though it's illegal and constitutionally unprotected), so that therefore a lookout for a marijuana dealer has a First Amendment right not to be punished for alerting the dealer that the police are coming.

193. See, e.g., *State v. Berger*, 96 N.W. 1094 (Iowa 1903); *State v. Hamilton*, 13 Nev. 386 (1878); cf. Brenner, *supra* note 92, at 373-74 (discussing the criminality of “[i]ntentionally giving advice with the purpose of facilitating the commission of a crime”).

194. See Volokh, *Mechanisms of the Slippery Slope*, *supra* note 187, at 1056-61, 1077-87 (discussing equality slippery slopes and attitude-altering slippery slopes, two common mechanisms through which a narrow exception might grow into a broader one).

Such an exception might justify some other restrictions on valueless speech said to a criminal audience—but that's likely to be good. It has long been unclear, for instance, exactly why criminal solicitation (such as a man's asking a friend to kill his wife) is punishable even when the *Brandenburg v. Ohio* imminence requirement is not satisfied. See, e.g., Larry Alexander, *Incitement and Freedom of Speech*, in *FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY* 101, 113-14 (David Kretzner & Francine Kershman Hazan eds., 2000) (asserting that solicitation should be punishable); Daniel A. Farber & Philip P. Frickey, *supra* note 75, at 1623 (suggesting that criminal solicitation shouldn't be subject to the “clear and present danger” test); GREENAWALT, *supra* note 43, at 261-63 (likewise). *But see* *People v. Salazar*, 362 N.W.2d 913 (Mich. Ct. App. 1985) (overturning a solicitation conviction under these circumstances, citing *Brandenburg*). The answer, it seems to me, is that the chief value of speech that advocates violent conduct is not that the speech will persuade people to act violently, but that it will also convey broader social criticisms, which people can act on even without committing crimes. When the speech is said to the public, some listeners—probably most—will focus on the social criticisms, rather than being moved to commit crimes. See *Dennis v. United States*, 341 U.S. 494, 549 (1951) (Frankfurter, J., concurring in the judgment). But when it's said to a few people who are

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

Strictly speaking, the retired burglar doesn't have the "conscious object . . . to cause" the crime, and is thus not acting with the intent that the crime be committed.<sup>195</sup> He may sincerely wish that his friend just give up the project; he may even have a selfish reason for that wish, because if the crime takes place, one of the criminals may be pressured into revealing the retired burglar's complicity. Nonetheless, the retired burglar's speech facilitates the crime just as much as if he wanted the crime to take place. It seems to be as constitutionally valueless, as much worth deterring, and as deserving of punishment as speech that purposefully facilitates crime.<sup>196</sup>

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selected because the speaker thinks they will be willing to commit a particular crime, listeners are much less likely to draw a broader political message from the speech, and there's thus much less reason for the speech to be protected.

195. MODEL PENAL CODE § 2.02(2)(a) (1962) (defining "intent" in this way); *see also* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 346 (1985) ("Giving disinterested advice on the pros and cons of a criminal venture is closer to the line [between intentional and knowing help], and there is sometimes doubt about whether it should suffice to establish liability. But in principle, if it was the purpose of the one giving the advice to influence the other to commit the crime, he is an accomplice; if that was not his purpose, he is not liable."). If the advisor had a cut of the proceeds—a "stake in the venture"—then the jury might infer that he wanted the crime to take place. *See, e.g.*, *Direct Sales Co. v. United States*, 319 U.S. 703, 725 (1943); *United States v. Isabel*, 945 F.2d 1193, 1203 (1st Cir. 1991). But in the hypothetical, the advisor is either unpaid or paid up front without regard to whether the criminals go on to commit the crime.

196. For an explanation of why the speech shouldn't be unprotected if it's merely negligently crime-facilitating, *see supra* note 191.

Knowingly or even intentionally providing information that helps others commit minor crimes might not be worth punishing. If I see the police pulling over speeders, and I call a friend who I know always speeds on the same route to warn him to slow down at the proper place, then I'm acting as a lookout: I'm helping him speed with impunity before and after the speed trap. (True, I'm telling him to act *legally* for the few seconds that the police are watching, but that's what lookouts often do: They tell people to pause or stop their illegal activity when the police are watching, so that the illegal activity isn't discovered.)

Likewise, if I tell a friend how to set up a file-sharing program so that he can illegally download music, my advice would be crime-facilitating (or at least tort-facilitating). Still, it seems harsh to punish people who help their friends this way, when the friends' offenses are petty and when many mostly law-abiding people would help each other this way. *See United States v. Bucher*, 375 F.3d 929, 930 (9th Cir. 2004) (upholding criminal liability for alerting a friend that park rangers were planning to arrest him for a minor offense, but expressing some misgivings about holding people liable for helping friends or relatives this way).

This, though, should be reflected in decisions by prosecutors, or in legislative

Finally, I acknowledge that even single-use speech may be valuable as self-expression: Telling a criminal friend how to commit a crime, or telling him that the police are coming, may express loyalty and affection, and thus contribute to the speaker's self-fulfillment and self-definition.<sup>197</sup> But it seems to me that speech stops being legitimate self-expression when the speaker knows that its only likely use is to help bring about crime.<sup>198</sup>

Self-expression must be limited in some measure by a speaker's responsibility not to help bring about illegal conduct. When speech contributes to public debate as well as constituting self-expression, the speech may deserve protection despite its harmful effects.<sup>199</sup> But when its value is solely self-expression, its contribution to the listener's crimes should strip it of its protection just as its coerciveness or deception would strip it of protection.<sup>200</sup>

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judgments (or possibly common-law decisions by judges) to limit some forms of aiding and abetting liability to more serious crimes, or at least to punish aiders of less serious crimes only when the aid is intentional. *See, e.g.,* *People v. Lauria*, 251 Cal. App. 2d 471, 481 (Ct. App. 1967) (concluding that aiding and abetting liability shouldn't be applied to people who knowingly, but not intentionally, aid and abet minor crimes); TEX. PENAL CODE. ANN. § 7.02 (Vernon 2004) (limiting aiding and abetting liability to intentional assistance). I don't think the First Amendment should be interpreted as protecting such speech; the reasons not to prosecute it are not First Amendment reasons.

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

197. *See Baker, Scope of the First Amendment Freedom of Speech, supra* note 126, at 994.

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

199. *See infra* Part III.B.1.

200. *See Baker, Scope of the First Amendment Freedom of Speech, supra* note 126, at 997-99 (arguing that coercive speech isn't legitimate self-expression); *id.* at 1005 (arguing that speech which "increases the coercive power of another country" isn't legitimate self-expression, though limiting this to situations where such an increase in coercive power is "the purpose of the espionage activity"); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 909-10 (2002) (arguing that deceptive speech isn't legitimate self-expression).

Professor Baker takes a different approach than I do to the speech described in this Part: He reasons that such speech (his example is informing "[one's bank robber] associates about the bank's security and layout") should be unprotected because the speech constitutes "participating in an activity that used illegal force," and is "merely one's method of involvement in a coercive or violent project." Baker, *Scope of the First Amendment Freedom of Speech, supra* note 126, at 1005. But this argument doesn't quite explain why such speech constitutes constitutionally unprotected "participat[ion]" in crime, but revolutionary advocacy—which is intended to bring about coercion and violence but which Professor

b. *Speech communicating facts that have very few lawful uses*

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

Consider social security numbers and computer passwords. Publicly distributing such information is unlikely to facilitate any political activity (unlike, say, publicly distributing abortion providers' or boycott violators' names, which may facilitate lawful shunning and social pressure, or even their addresses, which may facilitate lawful residential picketing and parading<sup>201</sup>). It's unlikely to contribute to scientific or business decisions (unlike, say, publicly distributing information about a computer security vulnerability<sup>202</sup>). And unlike detective stories or even contract murder manuals, social security numbers and computer passwords are unlikely to have any entertainment value.<sup>203</sup>

Even in these cases, there may be some conceivable legitimate uses. For instance, say that a newspaper or a Web log gets an e-mail that says, "I have

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Baker would protect, *see* C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181, 1208 (1994)—doesn't constitute such "participat[ion]."

Nor does informing a known criminal about how to commit a crime fit within Professor Baker's categories of speech that doesn't constitute legitimate self-expression—speech that coerces a listener, intentionally deceives a listener, or causes harm through means other than "mental intermediation" or "the expression being comprehended by" the listener. *See* Baker, *Scope of the First Amendment Freedom of Speech*, *supra* note 126, at 997-99; Baker, *First Amendment Limits on Copyright*, *supra*, at 909-10. Finally, not all such speakers have a purpose to bring about crime, another factor that Professor Baker suggests is important. *See* Baker, *Scope of the First Amendment Freedom of Speech*, *supra* note 126, at 1004 (suggesting that "purpose" is generally an important inquiry in determining whether something is proper self-expression); *id.* at 1005 (arguing that espionage should be distinguished from lawful speech "because the purpose of the espionage activity" is to "increase[] the coercive power of another country"). Rather, I think that the speech stops being legitimate self-expression for the reason given in the text: People's rights to self-expression should be limited by their responsibility not to help bring about illegal conduct, when that illegal conduct is the only likely effect of the speech.

201. *See supra* note 92 and accompanying text.

202. *See supra* text accompanying note 102.

203. Some have urged that social security numbers be protected because they're supposedly "private information" about particular individuals. I have argued in the past that a broad constitutional exception for speech that communicates such allegedly private information is unsound. *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000). Nonetheless, I think that publication of this particular form of data should probably be restricted, not because it's "private" but because—unlike some other data about people, such as whether they shop at stores that are being boycotted, *see, e.g.*, text preceding note 85—it's both crime-facilitating and likely to have nearly no non-crime-facilitating value.

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

Still, these valuable uses would be extremely rare, and people can easily accomplish the same goal in a less harm-facilitating way simply by releasing only the first few digits or characters of the social security numbers (still coupled with the owners' names) or of the computer passwords. Restricting the publication of full social security numbers or passwords thus will not materially interfere with valuable speech.<sup>204</sup>

Moreover, because such purely crime-facilitating information tends to be specific information about particular people or places, restricting it might actually do some good, as Part III.A.3 below discusses in more detail. General knowledge, such as information about encryption or drugmaking, is very hard to effectively suppress, especially in the Internet age: Whatever the government may realistically do, some Web sites containing this information will likely remain. But specific details about particular people or computers are more likely to be initially known to only a few people. If you deter those people from publishing the information, then the information may well remain hidden.<sup>205</sup>

Here, too, crime-facilitating speech is analogous to some crime-facilitating products. For example, some states that allow guns nonetheless forbid silencers,<sup>206</sup> presumably because silencers are seen as having virtually no civilian purposes other than to make it easier to criminally shoot people without being caught. People view silencers as single-use devices; prohibiting them

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204. Such equally effective but less harmful alternative channels wouldn't be available for any of the other examples I describe: For instance, if you're trying to prove the existence of a security problem by describing the *problem* rather than by showing the *fruits of exploiting it*, then describing half the problem isn't going to be proof enough that the problem exists. See *supra* note 110 and accompanying text.

205. See Swire, *A Model for When Disclosure Helps Security*, *supra* note 73, at 190-91.

206. See 26 U.S.C. §§ 5841, 5845, 5861(d), 5871 (2000) (requiring registration of silencers); CAL. PENAL CODE § 12520 (Deering 2004) (prohibiting possession of silencers by civilians); DEL. CODE ANN. tit. 11, § 1444 (2004) (same); GA. CODE ANN. § 16-11-123 (2004) (same); HAW. REV. STAT. § 134-8 (2003) (same); 720 ILL. COMP. STAT. 5/24-1 (same); IOWA CODE § 724.3 (2004) (same); KAN. STAT. ANN. § 21-4201 (2003) (same); MASS. GEN. LAWS ch. 269, § 10A (2004) (same); MICH. COMP. LAWS ANN. § 750.224 (West 2004) (same); MINN. STAT. ANN. § 609.66 (West 2003) (same); MO. ANN. STAT § 571.020 (West 2004) (same); N.J. STAT. ANN. § 2C:39-3 (West 2004) (same); N.Y. PENAL LAW § 265.02 (McKinney 2004) (same); N.D. CENT. CODE § 62.1-05-01 (2003) (same); R.I. GEN. LAWS § 11-47-20 (2004) (same); VT. STAT. ANN. tit. 13, § 4010 (2003) (same).

may help diminish crime, or make criminals easier to catch, without materially affecting any law-abiding behavior.<sup>207</sup>

Likewise, if a product has no substantial uses other than to infringe copyrights or patents, then distributing it is legally actionable.<sup>208</sup> Distribution of dual-use products is legal, because making it actionable would interfere with the substantial lawful uses as well as the infringing ones.<sup>209</sup> But when a product has virtually no lawful uses, then there is little reason to allow it, and ample reason—the prevention of infringement—to prohibit it.<sup>210</sup> The same sort of argument would apply to the crime-facilitating speech described here.

There are two major arguments in favor of protecting even these publications. The first is the risk that the category will be applied erroneously, or will stretch over time to cover material that it shouldn't cover. As I mentioned, even publishing others' passwords and social security numbers might have some theoretically possible law-abiding uses. I think these uses are pretty far-fetched; but once courts are allowed to find speech valueless on the ground that it has very few (rather than just no) law-abiding uses, the term

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207. See, e.g., *United States v. Hall*, 171 F.3d 1133, 1155 (8th Cir. 1999) (Panner, J., concurring in part and concurring in the judgment) (“It is difficult to conceive of any legitimate purpose for which a private citizen needs a silencer.”); *Desimone v. United States*, 423 F.2d 576, 583 (2d Cir. 1970) (Bonsal, J., dissenting) (likewise); 132 CONG. REC. H1757 (daily ed. Apr. 10, 1986) (statement of Rep. Volkmer) (distinguishing modifications aimed at muffling sound from “common sporting purpose[s]”; Volkmer was the cosponsor of the Firearms Owners’ Protection Act of 1986). It’s not clear that silencers in fact lack legitimate purposes: Though civilian self-defense uses of silencers seem extremely unlikely (theoretically possible, but practically far-fetched), using silencers might enhance the pleasure of target-shooting. One of the annoying things about target-shooting is the noise, which remains bothersome even when one wears earplugs or earmuffs, and shooting with silencers might thus be more pleasant; if this is so, then perhaps silencers should still be banned because the law-abiding use is not very valuable, but at least one can no longer say that there are no law-abiding uses. Still, the target-shooting point is rarely seen in discussions about silencers. The most common argument (right or wrong) given for the bans on silencers seems to be that they are indeed single-use products, at least in civilian hands.

208. 35 U.S.C. § 271(c) (2000) (prohibiting selling products that are “especially made or especially adapted for use in an infringement of [a] patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use”); *Sony Corp. of Am. v. Universal Studios*, 464 U.S. 417, 441 (1983).

209. The Digital Millennium Copyright Act, on the other hand, sets forth a standard that would allow somewhat more restrictions on dual-use products: 17 U.S.C. § 1201(a)(2) (2000) bars, among other things, distributing certain kinds of products when the product “has only limited commercially significant purpose or use other than to circumvent a technological [data protection] measure.”

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

“very few” could eventually broaden to cover more and more.<sup>211</sup> If one thinks that this is likely to happen, or if one thinks that courts will often erroneously fail to see the valuable uses of truly dual-use speech,<sup>212</sup> one might prefer to reject any distinction that asks whether speech has “virtually no” lawful uses.

Second, such a distinction would add to the set of reasons why a publication—not just speech to a few known criminals, but speech to the public—might be suppressed; and each new exception makes it easier to create still more exceptions in the future. Arguments for exceptions are often made through analogies, which may be imperfect but still sometimes persuasive. (My own argument above, for instance, uses the existence and propriety of the exceptions for threats and false statements of fact as an analogy supporting an exception for certain kinds of crime-facilitating speech.<sup>213</sup>) As the exceptions increase, these arguments by analogy become easier to make.<sup>214</sup>

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

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

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211. See Volokh, *Mechanisms of the Slippery Slope*, *supra* note 187, at 1064-71 (discussing how this process can operate).

212. See, e.g., *infra* text accompanying notes 219-24 (criticizing the California Supreme Court’s finding that a Web page containing the source code to a DVD decryption algorithm was irrelevant to public debate); *supra* note 111 and accompanying text (criticizing the court’s finding in *United States v. Progressive, Inc.* that the details of the hydrogen bomb plans were irrelevant to public debates); *supra* notes 116-24 and accompanying text (criticizing the court’s conclusion in *Rice v. Paladin Enterprises* that *Hit Man* was “effectively targeted exclusively to criminals”).

213. See *supra* text preceding note 192.

214. See Volokh, *Mechanisms of the Slippery Slope*, *supra* note 187, at 1093-98 (discussing how a large set of exceptions can strengthen arguments for still more exceptions); see, e.g., *California v. Acevedo*, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring in the judgment) (“Even before today’s decision, the ‘warrant requirement’ had become so riddled with exceptions that it was basically unrecognizable. . . . Unlike the dissent, therefore, I do not regard today’s holding as some momentous departure, but rather as merely the continuation of an inconsistent jurisprudence that has been with us for years. . . . In my view, the path out of this confusion should be sought by returning to the first principle that the ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded.”).

### 3. *Low-value speech?*

Once we set aside the speech that has only, or nearly only, illegal uses, the remainder is genuinely dual-use: Some listeners will be enlightened or entertained by the information, while others will misuse it. Is it possible to say that some categories of dual-use speech are nonetheless less valuable than others, so that they can be excluded from full First Amendment protection while the others remain protected? (I set aside, for Part III.D, distinctions based on whether some such speech is more *harmful* than other speech; I focus here just on whether it can be distinguished on the ground that it has less value.)

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

Some crime-facilitating speech is directly tied to policy debates. A newspaper article that discusses a secret federal subpoena of library records can help readers judge whether the federal government is abusing subpoenas, though it can also alert the subject of the investigation (who may be a terrorist) that the police are after him.<sup>215</sup> Other speech discusses scientific or engineering questions: Some chemistry textbooks discuss how explosives are made, some posts to computer security discussion groups discuss security bugs in a leading operating system, and some works on criminology or forensics discuss how hard-to-solve murders are committed.<sup>216</sup> May the explicitly politically connected speech be treated as more valuable than the scientific speech?

The Supreme Court has never decided a case squarely involving the suppression of scientific speech, but it has repeatedly described scientific speech as constitutionally equal in value to political speech.<sup>217</sup> Though the

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215. See 50 U.S.C. § 1861(d) (2000 & Supp. I 2001) (providing that “[n]o person shall disclose to any other person . . . that the Federal Bureau of Investigation has sought or obtained tangible things” under a section that deals with “order[s] requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities,” 50 U.S.C. § 1861(a)(1); added by the Patriot Act). This section has aroused a good deal of controversy. See, e.g., 149 CONG. REC. S10621-87 (daily ed. July 31, 2003) (statement of Sen. Feingold on introducing S. 1507, 108th Cong. (2003), entitled “A bill to protect privacy by limiting the access of the government to library, bookseller, and other personal records for foreign intelligence and counterintelligence purposes”).

216. I define forensics and criminology as sciences for the purposes of this discussion. Like chemistry or computer science, they involve knowledge about the world that can inform people about how to do socially valuable things, and that is advanced by people (academics, professional practitioners, and amateurs) building on each others’ published work.

217. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (“It is no doubt true that a central purpose of the First Amendment ‘was to protect the free discussion of governmental affairs.’ But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive



Court has sometimes defended the protection of speech on “public issues” such as “economic, social, and political subjects” as being on “the highest rung” of constitutional protection,<sup>218</sup> the Justices have found room on that same rung for scientific subjects as well.

One reason for this is that scientific questions are often relevant to policy matters, at least indirectly. For instance, are software manufacturers negligently failing to correct security problems, so that they should be regulated by Congress, punished through tort liability, or pressured by consumers to change their ways? Is the government negligently failing to correct security problems in its own computer systems? That’s hard to tell unless we can hear just what security problems are being left unaddressed, how serious the problems are, and how hard it is to fix them.

Likewise, what’s the proper way to regulate chemicals that are precursors to explosives? Again, it’s hard to tell for sure unless we can hear which chemicals can be used in explosives, what mechanisms there are for making it harder to use the chemicals this way (though unfortunately this information may also help people defeat the mechanisms), and just how hard it is to make the explosives regardless of what laws one might enact. These scientific details—and not just the generalities, as the next subsection will discuss—are as important to these debates as are the legal or political arguments that can be built on these details.

The one recent lower court case that has treated scientific speech as being of low value, *DVD Copy Control Ass’n v. Bunner*,<sup>219</sup> helps illustrate this. Bunner had published on his Web site a computer program that decrypts encrypted DVDs, and that could thus help people infringe the copyrights in those DVDs. The California Supreme Court assumed, given the case’s

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list of labels—is not entitled to full First Amendment protection.”) (citations and some quotation marks omitted); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (determining the protection offered commercial speech by considering whether the speech “is so removed from any ‘exposition of ideas,’ and from ‘truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,’ that it lacks all protection”) (citations omitted); *Miller v. California*, 413 U.S. 15, 22-23 (1973) (“[I]n the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.”).

Lower courts have repeatedly held that scientific speech is as valuable as political speech. *See, e.g.*, *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 447 (2d Cir. 2001); *Junger v. Daley*, 209 F.3d 481, 484-85 (6th Cir. 2000). But see *DVD Copy Control Ass’n v. Bunner*, 75 P.3d 1 (Cal. 2003), which said the same, *id.* at 10, but went on to treat the scientific speech as unprotected because “only computer encryption enthusiasts,” *id.* at 16—i.e., people interested predominantly in the scientific issue—were likely to find the speech useful.

218. *Carey v. Brown*, 447 U.S. 455, 466-67 (1980).

219. 75 P.3d 1.

procedural posture,<sup>220</sup> that the program was derived from algorithms that were the plaintiffs' trade secrets, and that had been improperly leaked to Bunner.<sup>221</sup>

The court acknowledged that source code "is an expressive means for the exchange of information and ideas about computer programming"<sup>222</sup>—computer professionals can and do read such code to understand how an algorithm works—and concluded that publishing such code is protected by the First Amendment. But, the court concluded, Bunner's publication could be enjoined, because Bunner "did not post [the source code] to comment on any public issue or to participate in any public debate," and "only computer encryption enthusiasts are likely to have an interest in the *expressive* content—rather than the uses—of DVD CCA's trade secrets."<sup>223</sup> Therefore, in the court's view, "[d]isclosure of this highly technical information adds nothing to the public debate over the use of encryption software or the DVD industry's efforts to limit unauthorized copying of movies on DVD's. . . . The expressive content of these trade secrets therefore does not substantially relate to a legitimate matter of public concern."<sup>224</sup>

Contrary to the court's assertions, though, the code is indeed relevant to debate about encryption policy and intellectual property policy. Many new and proposed intellectual property rules—such as the Digital Millennium Copyright Act<sup>225</sup>—rest on the assumption that technological protections are a good way to secure intellectual property, and that the legal system should prevent people from circumventing such protections. These legal rules involve the use of the government's coercive force, as well as the spending of enforcement dollars. And they also have opportunity costs, as Congress focuses on one set of enforcement techniques rather than another.

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

221. Much of the analysis of *Bunner* in these paragraphs is drawn from Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart, and Bartnicki*, 40 *HOUS. L. REV.* 697, 745-48 (2003).

222. *Bunner*, 75 P.3d at 10.

223. *Id.* at 16. As note 14 mentioned, I don't take a position in this Article on whether restrictions on computer source code should be viewed as content-based or content-neutral. See, e.g., Lee Tien, *Publishing Software as a Speech Act*, 15 *BERKELEY TECH. L.J.* 629 (2000); Steven E. Halpern, *Harmonizing the Convergence of Medium, Expression, and Functionality: A Study of the Speech Interest in Computer Software*, 14 *HARV. J.L. & TECH.* 139 (2000); Robert Post, *Encryption Source Code and the First Amendment*, 15 *BERKELEY TECH. L.J.* 713 (2000); David McGowan, *From Social Friction to Social Meaning: What Expressive Uses of Code Tell Us About Free Speech*, 64 *OHIO ST. L.J.* 1515 (2003). My criticism here is of the California Supreme Court's view that the code is of low value, not of its conclusion that the restriction on the code was content-neutral.

224. *Bunner*, 75 P.3d at 16.

225. See 17 U.S.C. § 1201 (2000).

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

Descriptions of how copy protection measures can be evaded help interested observers—researchers, journalists, computer hobbyists, advocacy group staff, and others—answer this question. When a Princeton computer science graduate student discovers that a copy protection feature of some CDs can be defeated by holding down the “shift” key while the CD is being loaded, that’s an important piece of information about whether copy protection is effective.<sup>226</sup> The same is true when someone discovers that the CSS DVD scrambler can be defeated using a short computer program consisting only of about 120 lines of source code.<sup>227</sup> And providing the specific source code is often the most effective way of persuading expert readers that the copy protection measure can be evaded. General claims that one has found a flaw will often be unpersuasive; only providing the source code will prove that the flaw really exists.

Of course, distributing the source code, or even the information that one can defeat a copy protection scheme by hitting a key at the right time, itself helps contribute to the copy protection mechanisms’ failure. But if a mechanism can be so easily defeated by the distribution of simple instructions,

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226. See John Borland, *Student Faces Suit over Key to CD Locks*, CNET NEWS.COM, Oct. 9, 2003, at <http://news.com.com/2100-1025-5089168.html> (describing threatened lawsuit against a graduate student who posted an academic article on how people can avoid a certain kind of copy protection—the article is J. Alex Halderman, *Analysis of the MediaMax CD3 Copy-Prevention System* (Princeton Univ. Computer Science Tech. Rep. TR-679-03, 2003), <http://www.cs.princeton.edu/~jhalderm/cd3/>); *id.* (noting that the lawsuit threat was later withdrawn); Letter from Matthew J. Oppenheim, Representing the RIAA, to Prof. Edward Felten (Apr. 9, 2001), at <http://cryptome.org/sdmi-attack.htm> (cautioning a Princeton computer science professor that publishing an article that revealed security holes in a content protection mechanism might violate the Digital Millennium Copyright Act); Statement by Matthew Oppenheim on Professor Felten, at <http://www.riaa.com/news/newsletter/press2001/042501.asp> (July 13, 2001) (disclaiming any desire to sue Felten under the DMCA); Joseph P. Liu, *The DMCA and the Regulation of Scientific Research*, 18 BERKELEY TECH. L.J. 501, 513-14 (2003) (discussing the Felten matter and other incidents); Neils Ferguson, *Censorship in Action: Why I Don’t Publish My HDCP Results*, at <http://www.macfergus.com/niels/dmca/cia.html> (Aug. 15, 2001) (asserting that Ferguson, a leading Dutch cryptographer, refrained from publishing a paper discussing certain security vulnerabilities for fear of being sued or prosecuted under the DMCA).

227. See [http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/css\\_descramble.c](http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/css_descramble.c) (last visited Jan. 14, 2004) (found using a quick Google search for “decss source code”).

reasonable legislators and voters may conclude that the legal system shouldn't invest its resources into protecting such an ineffective mechanism. These legislators and voters can't, however, have the necessary inputs to that decision unless the law allows speech that describes the circumvention mechanism—crime-facilitating as such a description may be.

So scientific speech, even crime-facilitating scientific speech, can be relevant to policy debates. Speech of that sort therefore deserves the same sort of protection that other policy-related speech gets.<sup>228</sup>

The harder question is whether scientific speech should also be entitled to full protection for its scientific value alone, even if a court concludes (rightly or wrongly) that some scientific speech has only a very slight connection to policy issues. Say, for instance, that the government prohibits certain kinds of genetic modification of plants or animals. A scientist wants to publish an article discussing theories or techniques that will make genetic modification much easier, perhaps allowing it to be done with many fewer resources, and thus by many more researchers (maybe including amateurs). Even independently of any political value that the article may have,<sup>229</sup> the article may advance scientists' thinking about forbidden genetic modification, about permitted genetic modification, or about biology more generally.

At the same time, the article would indubitably make it easier for people to engage in prohibited research, research that might jeopardize the environment or public health. Should the article be treated differently than political speech because a judge finds its value to be purely scientific rather than political?<sup>230</sup>

228. See Diane Leenheer Zimmerman, *Scientific Speech in the 1990s*, 2 N.Y.U. ENVTL. L.J. 254, 263 (1993) (making a similar point).

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

230. Compare Ferguson, *supra* note 111, at 543 (arguing for full protection), and Martin H. Redish, *Limits on Scientific Expression and the Scope of First Amendment Values: A Comment on Professor Kamenshine's Analysis*, 26 WM. & MARY L. REV. 897 (1985) (likewise), and Zimmerman, *supra* note 228 (likewise), and Cheh, *supra* note 147, at 22-28 (likewise), and Ruth Greenstein, *National Security Controls on Scientific Information*, 23 JURIMETRICS J. 50, 77-83 (1982) (likewise), with Elizabeth R. Rindskopf & Marshall L. Brown, Jr., *Scientific and Technological Information and the Exigencies of Our Period*, 26 WM. & MARY L. REV. 909, 916-18 (1985) (arguing for reduced protection for much scientific expression), and Robert D. Kamenshine, *Embargoes on Exports of Ideas and Information: First Amendment Issues*, 26 WM. & MARY L. REV. 863 (1985) (likewise), and Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 908-12 (1986) (likewise, though limiting his argument to "technical data," such as "algorithms, equations, charts, or blueprints").

It seems to me that the Rindskopf & Brown and Kamenshine articles make a major mistake: they formulate much of their argument around the notion that speech that has "identifiable commercial applications" (Rindskopf & Brown) or that is distributed by a commercial company (Kamenshine) is "commercial speech" and should thus get less protection than other speech. But the Court has limited the commercial speech doctrine to advertising (explicit or implicit) for some product or service. The Court has clearly held that

(Set aside for now whether this speech, like some nonscientific speech, might be restrictable because of its dangerousness, a matter that will be discussed in Part III.D.1 below.)

I think the answer is “no,” because the search for truth about scientific questions should be as protected by the First Amendment as the search for truth about morality or politics. Deeper scientific understanding is as necessary for our society’s development as deeper political understanding. In the words of the Continental Congress’s *Appeal to the Inhabitants of Quebec*, the freedom of the press is important to the “advancement of truth [and] science,” just as it is to the “advancement of . . . morality [and] arts” and “diffusion of liberal sentiments on the administration of Government.”<sup>231</sup>

And just as we should be skeptical of government officials’ ability to accurately evaluate the harms and benefits of political speech, which may run counter to the current majority’s political preferences,<sup>232</sup> so we should be skeptical of their ability to accurately evaluate the harms and benefits of scientific speech, which may also run counter to the current majority’s political preferences. Recent debates about stem cell research, cloning, genetic modification of agricultural products and of people, and copyright protection mechanisms show how deep the political disagreements about science and technology can be. And the debates show how decisions are generally made not just based on a dispassionate, technocratic evaluation of likely danger, but also on ideological perspectives about change and stasis,<sup>233</sup> and about the morality of particular practices. There is no First Amendment problem with legislators using these moral and ideological perspectives as justifications for restricting what scientists do, to fetuses, life forms, or electronic devices. But the government shouldn’t be trusted to use these perspectives as justifications for restricting what scientists say about science, any more than for restricting what people say about politics.

So the relevance of much scientific speech to political debates, coupled with its value to the search for scientific truth, should, I think, lead scientific speech to be treated the same as political speech. The matter is not as well settled as one might at first assume—the Court has never squarely confronted

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the speaker’s economic motivation, the utility of the speech for economic purposes, and the sale of the speech for money do *not* make speech into “commercial speech.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

231. See Continental Congress, *Appeal to the Inhabitants of Quebec* (Oct. 26, 1774), in 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774), cited in *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs.”).

232. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 106 (1980).

233. See, e.g., VIRGINIA POSTREL, *THE FUTURE AND ITS ENEMIES*, at xi-xviii (1999).

the question, and when it does so, it might be facing a case where the government's argument for suppression will be hard for the Justices to resist. Scientific speech is most likely to be restricted precisely when it's harm-facilitating, and some scientific speech is now capable of facilitating some extremely serious harms. Nonetheless, for the reasons discussed above, the Court's dicta (and lower courts' holdings) that scientific speech should be as protected as political speech are likely correct.<sup>234</sup>

b. *General knowledge vs. particular incidents*

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

Some might argue that the particular information is materially less valuable than the general, precisely because the particular discusses only one specific incident. But the Court has not taken this view. A wide range of cases—such as libel cases, cases dealing with criticism of judges' performance in particular cases, cases dealing with the publication of the names of sex crime victims, and more—have involved statements about particular incidents and often particular people, rather than general assertions about politics or morality.<sup>235</sup> All those cases have treated speech about particular incidents as being no less protected than speech about general ideas.

And the Court has been right about this. First, people's judgment about general problems is deeply influenced by specific examples; and any side that is barred from giving concrete, detailed examples will thus be seriously handicapped in public debate. Generalities alone rarely persuade people—to be sound and persuasive, an argument typically has to rest both on a general assertion and on specific examples. To decide whether library borrowing records should be subject to subpoena, for instance, people will often need to know just how such subpoenas are being used. Statistical summaries (especially ones that can't be verified by the media, because it's a crime to reveal the subpoena to the media) won't be enough.

Likewise, people are much less likely to be persuaded by accounts that omit names, places, and details of the investigation. People are rightly skeptical of accounts that lack corroborating detail—saying “trust me” is a good way to

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234. *See supra* note 217.

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

get people not to trust you, especially when, as now, people doubt the media as much as they do other institutions.<sup>236</sup>

Second, speech about particular incidents is often needed to get justice in those incidents, and to deter future abuses. One important limit on government power is its targets' ability to publicly denounce its exercise. If a librarian who is served with a subpoena can't publicize the subpoena, and can't explain in detail how he thinks this subpoena unnecessarily interferes with patrons' and librarians' privacy and freedom, then it will be more likely that such a subpoena may stand even if it's illegal or unduly intrusive.

Likewise, if a newspaper may not publish the names of crime witnesses, then it's less likely that others who may know that the witnesses are unreliable will come forward, and tell their story either to the court or to the journalists. Justice in general can only be done by working to get the right results in each case in particular. And public speech about the concrete details of the particular cases is often needed to find the truth in those cases.

Finally, even temporary restrictions on publishing specific information raise serious First Amendment problems, because the value of speech can be lost even if the speech is just delayed, rather than prohibited altogether—this is why the Court has generally rejected proposals to suppress speech during trials, even if the speech were to be freely allowed after the trial.<sup>237</sup> The same should apply to, for instance, rules that bar revealing witnesses' identities before they testify, or that bar revealing subpoenas before the investigation is over.<sup>238</sup>

Often, if the speech is delayed, any harm the speech seeks to avoid may become hard to remedy: Many people's personal reading habits might be wrongly revealed to the government by an overbroad subpoena, or a person may be wrongly convicted and the conviction may be hard to overturn even if new evidence is revealed after trial.<sup>239</sup> Moreover, the public is often less interested in discussing alleged past wrongs than it is in confronting supposed injustice in a prosecution or an investigation that's now taking place. Just as any side of the debate that can't produce concrete details is greatly

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236. Newspapers and other speakers sometimes do use anonymous reports in their stories, because of other constraints (such as promises to sources), but that's certainly not the optimal means of persuading a skeptical public.

Some readers may trust the newspaper that says "Trust us" more if it says "Trust us; we'd give the supporting facts, but the law prohibits us from doing so." But other readers might reasonably fear that the newspaper actually doesn't have all the facts—or they might fear that the newspaper thinks it has the facts, but that those facts are less accurate or more ambiguous than the newspaper thinks. There's no substitute for seeing the underlying facts, and knowing that other people, who may know more about the subject than you do, see the facts. Anything else will be inherently less credible.

237. *See* *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976).

238. *See supra* notes 18 and 29.

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

handicapped, so is any side that can't bring its evidence before the public when the evidence is most timely.

But while specific information about particular incidents ought not be distinguished from general knowledge on grounds of value, it is indeed different in another way: Trying to restrict the spread of some such specific information may be less futile than trying to restrict general knowledge. General knowledge, such as drugmaking or bomb-making information, is likely to already be known to many people, and published in many places (including foreign places that are hard for U.S. law to reach). People will therefore probably be able to find it somewhere, especially on the Internet, with only modest effort. If the knowledge is available on five sites rather than fifty, that will provide little help to law enforcement.

On the other hand, any particular piece of specific information—such as the existence of a particular subpoena or the password to a particular computer system—is less likely to be broadly available at the outset. If the law can reduce the amount of such information that's posted, then fewer investigations will be compromised and fewer computer systems will be broken into; it's better that there be fifty incidents of computer system passwords being revealed than five hundred. So to the extent that the futility of a speech restriction cuts against its constitutionality,<sup>240</sup> restrictions on general knowledge are less defensible than restrictions on specific information about particular people or places.

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240. See, e.g., *Neb. Press Ass'n*, 427 U.S. at 567 (concluding that a ban on a newspaper's pretrial coverage was unconstitutional, partly because it was unlikely to serve its goal of preventing juror prejudice, since in the small 850-person town, "[i]t is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it."); *id.* at 599 n.22 (Brennan, J., concurring in the judgment) (emphasizing that in small towns such restrictions are likely to be ineffective because "the smaller the community, the more likely such information would become available through rumors and gossip, whether or not the press is enjoined from publication"); *Buckley v. Valeo*, 424 U.S. 1, 45-47, 53 (1976) (concluding that restrictions on independent expenditures were unconstitutional, partly because they could so easily be skirted and would thus likely prove ineffective); *ACLU v. Reno*, 31 F. Supp. 2d 473, 496 (E.D. Pa. 1999) (concluding that the Child Online Protection Act was unconstitutional partly because it didn't substantially advance the government interest, given that children would still be able to access material from foreign sites), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *rev'd on other grounds sub nom.* *Ashcroft v. ACLU*, 535 U.S. 564 (2002).



c. *Commentary vs. entertainment and satisfaction of curiosity*

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

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

In some of these situations, a court might conclude that the only (or nearly only) noncriminal value of some crime-facilitating details would be entertainment. The work itself may have a substantial ideological component—for instance, a thriller may send the message that big business is evil, or that espionage agencies corrupt even the idealistic. But the detail, for instance, the nonobvious and hard-to-detect way that the hero kills his enemy, may have little connection to the work's ideas. The thriller would convey the same message if the killing were described more vaguely, or if some key element of a bomb recipe were omitted or changed.<sup>241</sup>

May the law properly treat speech that has purely entertainment value as less constitutionally protected than speech which has political, scientific, technical, or educational value? Ever since *Winters v. New York* in 1948, the Supreme Court has generally treated works of entertainment as no less protected than works of advocacy:

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

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

242. *Winters v. New York*, 333 U.S. 507, 510 (1948); see also *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995) (stating that even nonsense poetry, instrumental music, and abstract art are fully constitutionally protected); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989)

And this is quite right: Precisely because entertainment is more entertaining, it can reach and persuade more viewers than a political tract might. *Dirty Harry* is a powerful piece of advocacy,<sup>243</sup> and ought not be restricted even if a court concludes that it defends, praises, and thus advocates (among other things) illegal behavior in the service of fighting crime. Likewise, the communication of facts is constitutionally protected even if it's done in a docudrama or a novel rather than in a documentary or a work of serious biography.

Nonetheless, *Winters* doesn't fully resolve whether crime-facilitating details that have purely entertainment value should get full First Amendment protection. First, *Winters* and the cases that followed it involved potential harms that were relatively indirect—long-term harm caused by reading supposedly degrading crime stories<sup>244</sup>—or relatively slight, such as the use of another's name without permission.<sup>245</sup> They did not involve speech that could help others commit serious crimes.

Second, the *Winters* rationale concludes, quite correctly, that even works of entertainment are generally protected because of the ideological message that they contain. As I discuss below, fictional details of the work that are connected to the ideological message should thus also be protected.<sup>246</sup>

But *Winters* doesn't resolve whether this protection should extend even to those crime-facilitating elements of the work that are unnecessary to express that ideological message, or whether authors may be required to exclude those elements even from an otherwise valuable work. Libel and child pornography

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("Music, as a form of expression and communication, is protected under the First Amendment."); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection."); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("We have no doubt that the subject of the *Life* article, the opening of a new play linked to an actual incident, is a matter of public interest. 'The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press].'" (citing *Winters*); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (echoing *Winters*).

The one narrow exception comes in obscenity law, which treats a subset of sexually titillating speech as less protected; but even sexually themed works are just as protected when they have serious artistic or literary value as when they have serious scientific or political value. *Miller v. California*, 413 U.S. 15 (1973).

243. See, e.g., John Vinocur, *Clint Eastwood, Seriously*, N.Y. TIMES, Feb. 24, 1985, § 6 (Magazine), at 16.

244. *Winters*, 333 U.S. at 515.

245. *Zacchini*, 433 U.S. at 562; *Time*, 385 U.S. at 374.

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

law, for instance, forbid the use of knowing falsehoods or pictures of real children even in works that have substantial value.<sup>247</sup> Such details are seen as being harmful and constitutionally valueless (or nearly valueless),<sup>248</sup> and their potential entertainment value does not save them.

Obscenity law takes a different approach: There, the constitutional value of the work taken as a whole does protect even isolated scenes that might otherwise be obscene.<sup>249</sup> But, as with the speech in *Winters*, the potential harm of obscenity (even if one accepts, as the Court has, that there is such potential harm) is relatively indirect. The question is whether crime-facilitating speech for which entertainment is the only noncriminal use should be treated like potentially entertaining false statements of fact or child pornography—which authors must exclude even from their otherwise valuable works—or like other potentially entertaining sexually explicit material, which may be retained if the surrounding work has serious value.

Finally, *Winters* holds that works of entertainment are categorically protected without the need for any case-by-case judgment of whether they have an ideological message.<sup>250</sup> This makes sense: Even overtly ideological entertainment is commonplace (“Everyone is familiar with instances of propaganda through fiction”), and probably most entertainment makes at least some implicit statements about human nature, morality, or politics.<sup>251</sup>

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247. See *New York v. Ferber*, 458 U.S. 747, 761, 764 (1982) (noting that in child pornography cases, “the material at issue need not be considered as a whole,” and thus may be punished even if isolated scenes in an otherwise valuable work are child pornography); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (concluding that a false statement could lead to defamation liability even when the statement appears in a magazine article that also contains protected political opinion).

248. *Ferber*, 458 U.S. at 758, 762-63; *Gertz*, 418 U.S. at 340-41.

249. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 89 (1973).

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

251. Even the *Hit Man* contract murder manual conveys a message—a rejection of morality, and a sort of bargain basement Nietzschean praise for the “man of action” who is able and willing “to step in and do what is required: a special man for whom life holds no real meaning and death holds no fear . . . [a] man who faces death as a challenge and feels the victory every time he walks away the winner.” REX FERAL, *Preface to HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS* (1983), available at <http://ftp.die.net/mirror/hitman/> (last visited Jan. 14, 2005). This message is one thing that leads many people to find the book repellent. See, e.g., RODNEY A. SMOLLA, *DELIBERATE INTENT* 38-39 (1999) (“The first time I read the book, I was totally disgusted. . . . I was depressed at the absolute incarnate *evil* of the thing, the brazen, cold-blooded, calculating, meticulous instruction, and repeated encouragement in the black arts of assassination.”). If *Hit Man* were being restricted precisely because of its potential to persuade—because of its nihilistic moral message—the rationale of *Winters* would squarely apply to it.

*Rice v. Paladin Enterprises* dismissed the possibility that *Hit Man* may convey an ideological message: “Ideas simply are neither the focus nor the burden of the book,” the court concluded; “[t]o the extent that there are any passages within *Hit Man*’s pages that arguably are in the nature of ideas or abstract advocacy, those sentences are so very few in

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

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

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

(1) Much purely entertaining crime-facilitating speech would have considerable value, beyond just entertainment, in other contexts. Details about a hard-to-detect poison may just be a plot device in a novel; but they have scientific and practical value in a medical textbook or forensics textbook, and political value in debates about how such chemicals should be regulated or about whether the police properly investigated a case in which the poison might have been used. The explanation of how one can get a fake identity is entertainment in *The Day of the Jackal*<sup>252</sup> but would be relevant to policy debates in an article criticizing lax government identity checks or even in a news story on how crimes are committed. Most of the details in the *Hit Man* manual for aspiring contract killers could valuably appear in a textbook on how contract killers operate, and how they can be identified, stopped, deterred, or avoided.<sup>253</sup>

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number and isolated as to be legally of no significance whatsoever." 128 F.3d 233, 262 (4th Cir. 1997). But this, I think, is mistaken: While the idea underlying *Hit Man*—that the "man of action" should be willing, even glad, to violate generally accepted moral commands—is evil, it is an idea, and the content and tone of the book pervasively support that idea. This is, I think, a form of "propaganda" through entertainment, and does "teach[]" a nihilistic "doctrine," even if the *Rice* court, like the *Winters* Court, could "see nothing of any possible value to society" in the book. (*Winters* itself struck down a ban on the distribution of "true crime" magazines, as applied to magazines that the lower court said were "collection[s] of crime stories which portray in vivid fashion tales of vice, murder and intrigue." *People v. Winters*, 48 N.Y.S.2d 230, 231 (App. Div. 1944). As a class, these magazines seem likely to have not much more overtly political content than *Hit Man*.) If *Hit Man* is to be unprotected, it would be despite its overall political content—for instance, on the theory that some of the crime-facilitating details are unneeded to convey the political message—and not because such content is supposedly absent.

252. See *supra* note 13.

253. See also *infra* Part III.C.2, which argues that information relevant to political, scientific, and practical matters should be protected even when it's presented without an explicit connection to those matters—for instance, in a "just the facts" newspaper article. It

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

So the facts banned from novels or from other works that are mostly consumed for entertainment would still be available in other places. The only way to prevent that would be to shift to a system where fairly basic medical, forensic, criminological, and security literature is classified and available on a need-to-know basis—something that’s unlikely in a free and large country, where tens of thousands of professionals and students work in each field.<sup>254</sup> A restriction on crime-facilitating entertainment would thus have little crime-fighting benefit, precisely because the restriction would be limited to entertainment. (Recall that the whole question in this Part is whether entertainment should be treated as specially regulable, even when serious works containing the same facts are protected.)

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

More broadly, crimes committed using nonobvious instructions derived from a work of fiction, or even from an entertaining how-to manual, seem fairly rare. There’s no reliable data that I know of, but I’ve seen relatively few such instances.<sup>255</sup> If one sets aside those crimes that would have been

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seems to me that this argument is weaker when the information is presented as entertainment, especially as fiction. Readers expect fiction to be false. They may expect it to contain real ideological advocacy, or real information about the era or milieu in which the fiction is set, for instance when an author of historical fiction has a reputation for accuracy. But even fiction authors who have reputations for verisimilitude are traditionally given a great deal of latitude in changing details. Few people, therefore, are likely to treat fiction—as opposed to a newspaper article—as an especially helpful source of specific data about how crimes can be committed.

254. See also *supra* text accompanying note 108.

255. The chief example seems to be the *Day of the Jackal* fraud. See *supra* note 115. The prosecution in the Timothy McVeigh case argued that the novel *The Turner Diaries* “served as a blueprint for McVeigh and for his planning and execution of the bombing in Oklahoma City”; the novel does talk about blowing up a federal building with a homemade truck bomb, describes how a bomb can be made using ammonium nitrate and fuel oil, and

committed in any event, even had the criminals had to rely on other, more constitutionally protected sources, the number seems likely to be smaller still.

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

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

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

So perhaps here, as in *Winters*, "[t]he line between the informing and the entertaining is too elusive" for constitutional purposes.<sup>256</sup> First, the vagueness of the line between the purely entertaining and the ideologically linked may make it hard for authors to know what they may safely write about. This may lead the authors to avoid more speech, including speech that has ideological

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suggests that the ammonium nitrate be obtained from a farm supply store. See Closing Argument, *United States v. McVeigh*, No. 96-CR-68 (D. Colo. May 29, 1997), available at 1997 WL 280943; ANDREW MACDONALD, *THE TURNER DIARIES* 36 (2d ed. 1999). Nonetheless, the instructions the government pointed out in the book were fairly general; and the prosecution pointed out that McVeigh learned exactly how to make the bomb from another book, *Home Made C4*, which was an instruction manual rather than a novel. Closing Argument, *supra*. *The Turner Diaries* may have helped motivate him to do what he did, but I doubt that it helped teach him how to do it.

256. See *supra* text accompanying note 242.

value beyond just entertainment, than the legal rule would ultimately require.<sup>257</sup> (Likewise, courts would have to draw some line between substantially crime-facilitating pure entertainment and entertainment whose crime-facilitating effect is too modest to count, perhaps because the instructions that it gives are obvious.<sup>258</sup> The vagueness of this line would also end up deterring some speech that has some First Amendment value, even if only entertainment value.)

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

Third, the vagueness may increase the risk that prosecutors', judges', and juries' decisions will be based on impermissible factors, such as the ideology that the work as a whole expresses.<sup>259</sup> And fourth, the vagueness may increase the risk that courts will over time move the line to restrict more and more speech, including speech that is indeed necessary to most effectively present the author's ideological argument.<sup>260</sup> Some of these are the same reasons mentioned in Part III.A.2 as reasons to hesitate even about an exception for speech that seems to have no noncriminal value, including no entertainment value. But the reasons are more powerful here, precisely because this exception

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257. One can argue that both the existence of any new exception for the purely entertaining crime-facilitating speech and its vagueness would also have a less direct effect on author's work: By undermining the sense of freedom that authors in America now enjoy, and making them feel that their work is being regulated by the government, such a restriction might hurt our cultural life even when the writer doesn't feel any specific fear that a particular work is going to be restricted.

But while this is possible, it strikes me as not being especially likely. I've seen no substantial evidence of such an atmospheric fear (as opposed to specific concern about particular items) flowing from copyright law, which does regulate the writing of parodies, quotation of songs in books, and more. Many great works both of literature and entertainment have been written in places and times in which the legal system allowed many more speech restrictions—for instance, on novels that relate to sex—than the U.S. legal system does today. A regime with a truly oppressive censorship system, such as the one that existed in the Soviet Union, would likely create such a broadly stifling environment; but I doubt that simply allowing modest restrictions on crime-facilitating details would do so.

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

259. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

260. See Volokh, *Mechanisms of the Slippery Slope*, *supra* note 187, at 1056-61, 1077-87 (discussing such slippery slope phenomena).

is potentially broader, since it would deliberately cover even speech that has some First Amendment value.

For all these reasons, as Part III.A.2 also discussed, there is good reason to hesitate before creating any new exception. In a legal system built on precedent and analogy, each new free speech exception strengthens the case for still broader and more dangerous exceptions in the future.<sup>261</sup> In some cases, we may have to run that risk, because the need for a new exception is so pressing. But crime-facilitating entertainment seems like a relatively small problem. The benefits of carving out a special restriction for such entertainment thus seem fairly modest. And the potential harm of more broadly eroding constitutional protection for fiction—material that often has serious value, and that even Western democracies have in the past tried to restrict precisely because of its ideological component<sup>262</sup>—seems substantial enough that the risk doesn't seem worth running here.

d. *Speech on matters of "public concern"*

The Supreme Court has occasionally tried to create tests that distinguish speech on matters of "public concern" from speech on matters of merely "private concern" (though it has unfortunately never set forth a clear definition of either phrase). Both categories refer to speech that has at least some value, and thus deserves at least some protection;<sup>263</sup> but, the theory goes, speech on matters of merely private concern has comparatively little value, and so may be subject to more restrictions than speech on matters of public concern. The "newsworthiness" test in the disclosure of private facts tort reflects a similar judgment.<sup>264</sup> So does the suggestion, expressed by many commentators, that

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261. See *supra* notes 213-14 and accompanying text.

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

263. See, e.g., *Connick v. Myers*, 461 U.S. 138, 147 (1983) (citations omitted, brackets in original):

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

264. See, e.g., RESTATEMENT (SECOND) OF TORTS § 652D (1977) (describing what many cases call lack of "newsworthiness" as lack of "legitimate concern to the public"); *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998) (treating "of legitimate public



free speech protection should be limited to speech that's part of "public discourse."<sup>265</sup>

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

One possible definition of "public concern" would rest on whether the speech is relevant to any political, social, or scientific controversy, be it general or specific. The Court seems to have taken this view in *Florida Star v. B.J.F.*, where it concluded that the name of a rape victim was a matter of "public significance" because of its connection to a report of a crime, and that therefore publishing the name was fully protected speech.<sup>266</sup> Under such an approach, only "domestic gossip,"<sup>267</sup> such as discussions of a private figure's (noncriminal) sex life,<sup>268</sup> would qualify as being of "private concern."<sup>269</sup>

Little crime-facilitating speech would be of merely private concern under this test, for the reasons described in Part I.B.<sup>270</sup> Perhaps this definition of

concern" and "newsworth[y]" as interchangeable); *Peckham v. Boston Herald, Inc.*, 719 N.E.2d 888 (Mass. App. Ct. 1999) (likewise); *Winstead v. Sweeney*, 517 N.W.2d 874 (Mich. Ct. App. 1994) (likewise); *Montesano v. Donrey Media Group*, 668 P.2d 1081 (Nev. 1983) (likewise); *see also Joe Dickerson & Assocs. v. Dittmar*, 34 P.3d 995 (Colo. 2001) (likewise, as to the related tort of "invasion of privacy by appropriation of name and likeness"). The Supreme Court has never decided whether this tort is constitutional, though some courts have upheld it if it is limited to "nonnewsworthy" facts. *See, e.g., Shulman*, 955 P.2d at 482-83.

265. *See, e.g., Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990).

266. 491 U.S. 524, 536 (1989). The Court said that "the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities," *id.* at 536-37, but ultimately held that the publication even of the specific identity was constitutionally protected as "truthful information about a matter of public significance," *id.* at 533.

267. *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001).

268. *See Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 761 n.7 (1985) (plurality opinion).

269. For criticisms of such lower protection, *see Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting) ("[A]ssuming that . . . courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject [and thus on] what information is relevant to self-government. . . . The danger such a doctrine portends for freedom of the press seems apparent."); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 30 (1990) (taking a similar view); Volokh, *Freedom of Speech and Information Privacy*, *supra* note 203, at 1088-1106.

270. *Times-Mirror Co. v. Superior Court*, 198 Cal. App. 3d 1420 (Ct. App. 1988), a disclosure tort case, held that a jury might properly find that the witness's name isn't "newsworthy"; but it did so by "balancing the value to the public of being informed" of the witness's name "against the effect publication of her name might have upon [the witness]'s safety and emotional well being." *Id.* at 1429. The court was thus effectively raising the

“private concern” speech would include the nearly no-value speech discussed in Part III.A.2: the speech that only helps listeners commit crime, and has virtually no other value. So lower protection for “private concern” speech under this definition would further support the Part III.A.2 analysis, but it wouldn’t do any work beyond that.

ii. “Public concern” as defined in other Supreme Court cases

An alternative public/private concern line would try to track the narrower definition of “public concern” that the Supreme Court has applied in three cases: *Connick v. Myers*, *Dun & Bradstreet v. Greenmoss Builders*, and *Bartnicki v. Vopper*.<sup>271</sup> Unfortunately, it’s not clear exactly where these cases drew the line, why they drew it there, or why the line is correct.

In *Connick*, the Court held that the First Amendment doesn’t protect government employees from being fired for speech unless the speech is on matters of public concern. The speech, which the Court found to be “not [speech] of public concern,” was a questionnaire Myers distributed to her District Attorney’s office coworkers about “the confidence and trust that [employees] possess in various supervisors, the level of office morale, and the need for a grievance committee.”<sup>272</sup> Yet discussions of dissatisfaction in a District Attorney’s office would likely be seen as being of quite substantial public concern under any familiar definition of that phrase. We wouldn’t be at all surprised or offended, for instance, if we saw a newspaper article discussing morale at the District Attorney’s office.<sup>273</sup>

Likewise, *Dun & Bradstreet* held that presumed and punitive damages in libel cases could be imposed without a showing of “actual malice” when a false statement of fact was on a matter of merely private concern—a category in which the Court included a credit report that noted a company’s supposed bankruptcy. This conclusion, though, would likely surprise the company’s employees, creditors, and customers, as well as local journalists who might well cover the bankruptcy of even a small company in their small town.<sup>274</sup>

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newsworthiness threshold in those cases where the witness’s safety was at stake, so that the publication of the name might be restricted even if the name would be in some measure valuable to public discussion. *See also* *Capra v. Thoroughbred Racing Ass’n*, 787 F.2d 463, 464-65 (9th Cir. 1986) (same); *Hyde v. City of Columbia*, 637 S.W.2d 251, 269 (Mo. Ct. App. 1982) (same).

271. 461 U.S. 138 (1983); 472 U.S. 749 (1985); 532 U.S. 514 (2001).

272. *Connick*, 461 U.S. at 148 (1983).

273. Lower courts have likewise found that speech wasn’t of public concern even when it alleged race discrimination by a public employer, criticized the way a public university department is run, or criticized the FBI’s layoff decisions. *See Murray v. Gardner*, 741 F.2d 434 (D.C. Cir. 1984); *Lipsey v. Chi. Cook County Criminal Justice Comm’n*, 638 F. Supp. 837 (N.D. Ill. 1986); *Landrum v. Eastern Ky. Univ.*, 578 F. Supp. 241 (E.D. Ky. 1984); *Volokh, Freedom of Speech and Information Privacy*, *supra* note 203, at 1097.

274. *See Dun & Bradstreet*, 472 U.S. at 789 (Brennan, J., dissenting) (“[A]n

Finally, in *Bartnicki*, the Court held that the media was generally free to publish material on matters of public concern even if it was drawn from telephone conversations that were illegally gathered by third parties, and then passed along to the media. In the process, the Court said, in dictum, that “[w]e need not decide whether that interest [in preserving privacy] is strong enough to justify the application of §2511(c) to disclosures of trade secrets or domestic gossip or other information of purely private concern.”<sup>275</sup> But this too doesn’t seem quite right: Any confidential and valuable business information may be a trade secret, including decisions that are of great concern to a company’s employees, customers, neighbors, or regulators—for instance, whether a company is planning to locate an allegedly polluting plant in a particular area, to manufacture a product that some may see as dangerous, or to close a plant and lay off hundreds of people.<sup>276</sup>

Perhaps the relevant distinction is whether the speech was said to the public, or only to a small group—in *Dun & Bradstreet*, the bankruptcy report was sent only to five subscribers, and in *Connick*, the questionnaire was handed out to a few coworkers.<sup>277</sup> But it’s not clear why this distinction should matter much: Much important speech is said to small groups or even one-on-one, and not just in mass publications; in fact, the Court has held that government employee speech may be treated as being “of public concern” even when it’s said to one person.<sup>278</sup> The distinction also wouldn’t explain *Bartnicki*, where the Court seemed to be talking about media publication of trade secrets. And

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announcement of the bankruptcy of a local company is information of potentially great concern to residents of the community where the company is located . . . .”). Greenmoss Builders was located in Waitsfield, Vermont, a town that in 2000 had under two thousand residents. See Superior Court Complaint, in Joint Appendix, *Dun & Bradstreet*, 472 U.S. 749 (No. 83-18); Cent. Vt. Reg’l Planning Comm’n, Waitsfield Town: Census 2000 Data Report, <http://www.badc.com/towns/census00/waitsfield00.pdf> (last visited Jan. 14, 2005).

275. *Bartnicki*, 532 U.S. at 533.

276. See, e.g., RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995) (defining a “trade secret” as “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others”); OHIO REV. CODE ANN. § 1333.61(D) (Anderson 2003) (defining trade secrets as including “any scientific or technical information, design, process, procedure, formula . . . or improvement, or any business information or plans, [or] financial information” that “derives independent economic value, actual or potential, from not being generally known to . . . persons who can obtain economic value from its disclosure or use” and that “is the subject of efforts . . . to maintain its secrecy”).

277. *Connick* and *Dun & Bradstreet* justify their conclusions by saying that a court should look at the “form and context” of speech as well as the “content.” 461 U.S. at 147-48; 472 U.S. at 761.

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

even if this is the right distinction, then again nearly all crime-facilitating speech (except that discussed in Part III.A.2.a) will be of public concern.

Another possible explanation of *Connick* and *Dun & Bradstreet*—though not of the trade secret discussion in *Bartnicki*—is that the Court is focusing on the speaker's motive, and only secondarily on the content: In both cases, the speakers and likely the listeners seemed to be motivated by their own economic or professional concerns, rather than by a broader public-spirited desire to change society.<sup>279</sup> Lower court cases have sometimes treated the public concern test as being focused largely, though not entirely, on the speaker's motive.<sup>280</sup>

But again, it's not clear just how this line would be drawn—Myers, for instance, was apparently motivated partly by ethical concerns as well as by her own professional advancement<sup>281</sup>—and why such a line would be proper. As *Connick* itself acknowledged, questions about whether employees were being illegally pressured to work on political campaigns are of public concern, even if the speaker (Myers) and the listeners (her coworkers) were largely concerned about how this illegality affected them.<sup>282</sup> Why wouldn't the same be true for questions about whether the office is being managed inefficiently or dishonestly? And even if the speech is selfishly motivated, selfishly motivated speech (such as, for instance, unions' advocacy for higher wages) is generally fully protected, so long as it doesn't propose a commercial transaction between the speaker and the listeners. Finally, under this distinction most crime-facilitating speech would again be seen as of public concern, because it's usually motivated by matters other than the speaker's professional or economic grievances.

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

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

280. See, e.g., *Salehpoor v. Shahinpoor*, 358 F.3d 782, 788 (10th Cir. 2004); *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 341 (5th Cir. 2003).

281. 461 U.S. at 140 n.1.

282. *Id.* at 149.

a local company's bankruptcy should be denied full First Amendment protection.

So whatever one thinks of the *Connick* and *Dun & Bradstreet* results, the cases offer little helpful precedent for a more broadly applicable public concern test. If anything, the flaws in the Court's analysis of what is and what isn't a matter of public concern should lead us to be hesitant about such a test more generally. What's a matter of legitimate public concern is a highly subjective judgment, with few clear guideposts. Perhaps the line simply can't be effectively drawn;<sup>283</sup> but even if there is a theoretically possible definition of the line, the Court's stumbling in this area suggests that the Court is unlikely to draw it well.

iii. "Unusual public concern"

In *Bartnicki v. Vopper*, Justices Breyer and O'Connor suggested another distinction, between speech on matters of "unusual public concern"—such as "a threat of potential physical harm to others"<sup>284</sup>—and matters that are presumably merely of modest public concern. This approach may seem appealing to those who think that in some situations protecting speech should be the exception rather than the rule: That seems to have been Justices Breyer's and O'Connor's view as to publication of illegally intercepted conversations, and some might take the same view for crime-facilitating speech, too.<sup>285</sup> For instance, some might argue that information about possibly illegal subpoenas needs to be constitutionally protected, but less important crime-facilitating speech (for instance, speech that doesn't allege improper government behavior) should remain restrictable.

Such a distinction, though, seems hard to apply in a principled way. The *Bartnicki* concurrence appears to use "unusual public concern" in a normative sense, referring to speech that the public *should* be unusually concerned about, rather than in an empirical sense, referring to speech that the public is *actually* unusually concerned about.<sup>286</sup> But deciding how much the public should be concerned about something, especially once one concedes that there's some legitimate public concern about the matter, is usually closely tied to the decisionmakers' political and moral preconceptions.

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283. See sources cited *supra* note 269 (reaching such a conclusion).

284. *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring).

285. See also David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957, 996 (2002) (suggesting that even if negligence law were to generally make crime-facilitating speech actionable, speakers might be immune if the speech "is justifiable because of the importance of the particular information," for instance, when the media "disclos[es] weaknesses in the bomb-screening system for airline luggage or publish[es] detailed information about construction of a 'dirty' radiological bomb").

286. See *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring).

Is there something of “unusual public concern” in the names of abortion providers, strikebreakers, or blacks who refuse to comply with civil rights boycotts? Those who want to publish these names would argue that there is, because the named people’s actions are so morally reprehensible that the people deserve to be held morally accountable by their neighbors and peers: publicly condemned, personally berated, or ostracized. Others disagree; the people’s behavior, they would argue, should be nobody else’s business, presumably because it’s morally legitimate. After all, the more morally reprehensible someone’s behavior is, the more it legitimately becomes others’ business (so long as it has at least some effect, direct or indirect, on others’ welfare).

Restricting the speech on the ground that the names aren’t matters of “legitimate public concern” is thus restricting speech based on a judgment about which side of this contested political debate is right—something judges generally ought not be doing.<sup>287</sup> The Court has sometimes made such decisions: The obscenity exception, for instance, rests on the notion that sexually themed speech is less likely to be relevant to public debate than is other speech, and thus rests on rejecting the argument that pornography inherently conveys a powerful and valuable message about the social value of uninhibited sex.<sup>288</sup> But partly for this very reason, the obscenity exception has long been controversial. And even if that particular exception is sound, we should still be skeptical of a doctrine that would require courts to routinely make such ideological judgments about a wide range of speech that is potentially related to public affairs.

Moreover, there will always be some errors in applying any First Amendment test. If the test purports to distinguish public concern speech from purely private concern speech, there will be some public concern speech that is erroneously labeled private concern (and vice versa); but this would probably tend to be speech that’s close to the line, which is to say speech that has only slight public concern. Something would be lost to public debate when that speech is suppressed, but perhaps not a vast amount.<sup>289</sup>

But if the test distinguishes speech of unusual public concern from speech of modest public concern, then the line-drawing errors will suppress some

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

288. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 56 n.1 (1986) (Brennan, J., dissenting); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 111-12 (1978).

289. Cf. *Pacifica*, 438 U.S. at 743 (dismissing the risk that an order applying a vague standard “may lead some broadcasters to censor themselves”—presumably to censor themselves too much—because “[a]t most . . . the Commission’s definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities,” and “[w]hile some of these references may be protected, they surely lie at the periphery of First Amendment concern”) (footnote omitted).

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

In this respect, the “unusual public concern” test would also differ from the “serious value” prong of the obscenity test.<sup>290</sup> The risk of erroneous judgments about serious value is mitigated in obscenity law by the presence of the other two prongs—the requirements that the speech appeal to the prurient interest and that the speech contain patently offensive depictions of sexual conduct. Because of these prongs, errors in the serious value prong affect only a narrow category of speech: those works that are sexually explicit and arousing *and* that a court erroneously concludes lack serious value.

Any facts and ideas that the speaker wants to convey are thus conveyable despite the obscenity exception, even if a court erroneously misjudges their value. At worst, the facts and ideas couldn’t be conveyed using sexually explicit and arousing depictions—a limitation on free speech, but still a relatively narrow one.<sup>291</sup> A crime-facilitating speech exception, though, would not be so limited: If it lets the government suppress speech that lacks “unusual public concern,” then errors in applying this test would altogether block the communication of certain facts, and thus entirely prevent the spread of information that may be closely tied to public debate.

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

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290. See *Miller v. California*, 413 U.S. 15 (1973).

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

*B. Distinctions Based on the Speaker's Mens Rea*

*1. Focusing on knowledge that speech will likely facilitate crime or recklessness about this possibility*

Some First Amendment doctrines, most famously libel law, seek to avoid First Amendment problems partly by distinguishing reasonable or even negligent mistakes from situations where the speaker knows the speech will cause harm<sup>292</sup> or is reckless about this possibility.<sup>293</sup> Would it make sense for First Amendment law to likewise treat crime-facilitating speech as unprotected if the speaker knows that the speech will help facilitate crime, or perhaps if he is reckless about that possibility?<sup>294</sup>

Indeed, knowingly doing things that help people commit crimes (for instance, lending a criminal a gun knowing that he will use it to rob someone) is often punishable. In some jurisdictions, it may be treated as aiding and abetting,<sup>295</sup> in others, as the special crime of criminal facilitation<sup>296</sup> (which

292. See *infra* note 299. The test in public figure/public concern libel cases, of course, is whether the speaker knows or is reckless about the falsehood of the speech, but since the key harm in libel law is unjustified injury to another's reputation, knowledge of falsehood is tantamount to knowledge of unjustified, improper harm.

293. See MODEL PENAL CODE § 2.02(2)(c) (1962) (defining "recklessness" as knowledge of a substantial and unjustifiable risk that conduct will produce a certain effect).

294. See cases cited *supra* notes 18 and 138-39 (allowing liability for, among other things, disseminating information about bomb-making when the speaker knows that the information "would be used in the furtherance of a civil disorder," disseminating information that the speaker knows, or perhaps even should know, could be used to infringe copyright, or publishing the names of witnesses when the speaker knows that criminals could use the information to kill or intimidate the witnesses); sources cited *supra* note 47 (urging civil liability for certain kinds of crime-facilitating speech based on knowledge or on recklessness); Crump, *supra* note 291, at 33-37, 63, 67 (likewise).

295. See, e.g., IND. CODE ANN. § 35-41-2-4 (West 2004) ("A person who knowingly or intentionally aids . . . another person to commit an offense commits that offense."); W. VA. CODE § 17C-19-1 (2004) (likewise); WYO. STAT. ANN. § 6-1-201(a) (Michie 2004) (likewise); N.Y. PENAL LAW §§ 230.15, 230.20 (McKinney 2004) (prohibiting knowing aiding of prostitution); *Backun v. United States*, 112 F.2d 635 (4th Cir. 1940) (treating knowing help as aiding and abetting); *People v. Spearman*, 491 N.W.2d 606, 610 (Mich. Ct. App. 1992) (likewise), *overruled as to other matters*, *People v. Veling*, 504 N.W.2d 456 (Mich. 1993); *People v. Lauria*, 59 Cal. Rptr. 628, 633-35 (Ct. App. 1967) (dictum) (suggesting knowledge liability would be proper when the person is aiding a "[h]einous crime" as opposed to merely a "[v]enial" one).

In other jurisdictions, intent to aid the criminal is required. See, e.g., ALA. CODE § 13a-2-23 (2004) (defining only intentional aiding as aiding and abetting); COLO. REV. STAT. ANN. § 18-1-603 (West 2003) (likewise); 18 PA. CONS. STAT. ANN. § 306 (West 2004) (likewise); TEX. PENAL CODE ANN. § 7.02 (Vernon 2004) (likewise); *United States v. Pino-Perez*, 870 F.2d 1230, 125 (7th Cir. 1989) (likewise); *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938) (likewise); *People v. Lauria*, 59 Cal. Rptr. 628 (Ct. App. 1967) (likewise); see generally Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169 (1988).

296. See ARIZ. REV. STAT. ANN. § 13-1004 (West 2004); 9 GUAM CODE ANN. § 4.65



may also cover reckless conduct<sup>297</sup>). In most jurisdictions, it's considered a civilly actionable tort.<sup>298</sup> Similarly, knowing (and likely reckless) distribution of falsehood, obscenity, and child pornography is constitutionally unprotected.<sup>299</sup>

Under this knowledge-or-recklessness test, most of the speakers mentioned in the Introduction would probably be punishable, because they generally know that some of their readers will likely misuse the information that the speaker conveys. For instance, a thoughtful journalist who writes a newspaper article about a pirate Web site would have to know that some of his many thousands of readers will probably find the site and will then use it to infringe copyright.<sup>300</sup> Even if the journalist doesn't subjectively know this, that will quickly change once a copyright owner notifies the journalist and the publisher that the article is indeed helping people infringe. Future articles will thus be published knowing the likely crime-facilitating effect; and if the article is on

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(2004); KY. REV. STAT. ANN. § 506.080 (Banks-Baldwin 2004); N.Y. PENAL LAW § 115.00 (McKinney 2004); N.D. CENT. CODE § 12.1-06-02 (2003); TENN. CODE ANN. § 39-11-403 (2004).

297. See, e.g., N.Y. PENAL LAW § 115.00 (McKinney 2004) ("A person is guilty of criminal facilitation in the fourth degree when, believing it probable that he is rendering aid . . . to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony.").

298. See, e.g., RESTATEMENT (SECOND) OF TORTS § 876 (1979) ("For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . ."); *Halberstam v. Welch*, 705 F.2d 472, 482 (D.C. Cir. 1983).

299. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (knowing or reckless distribution of falsehood); *Smith v. California*, 361 U.S. 147, 153 (1959) (knowing distribution of obscenity); *Gottlieb v. State*, 406 A.2d 270, 276-77 (Del. 1979) (reckless distribution of obscenity); *Osborne v. Ohio*, 495 U.S. 103, 112 n.9 (1990) (reckless possession of child pornography); cf. *Schroth*, *supra* note 47, at 582, 584 (arguing that a knowledge/recklessness standard should be imported from *New York Times v. Sullivan* into crime-facilitating speech law, on the theory that a publisher of a crime-facilitating book is equivalent to "a security guard who gives his accomplice the combination to a safe in the bank where he works"); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 248 (4th Cir. 1997) (reasoning that the conclusion that intentionally crime-facilitating speech is unprotected "would seem to follow a fortiori" from *New York Times v. Sullivan*'s endorsement of liability "for reputational injury caused by mere reckless disregard of the truth of . . . published statements"); *Hyde v. City of Columbia*, 637 S.W.2d 251, 264-67 (Mo. Ct. App. 1982) (reasoning that negligently crime-facilitating speech—there, the publication of a crime witness's name, where the criminal was still at large and could use the information to intimidate or attack the witness—should be actionable just as negligently false and defamatory statements of fact about private figures are actionable).

300. See MODEL PENAL CODE § 2.02(2)(b) (1962) (defining "knowingly" to mean that the actor "is aware that it is practically certain that his conduct will cause" a certain result). This would be true even if the site's URL isn't included in the article, since the article may well provide information that enables people to find the site using a search engine.

the newspaper's Web site, then the publisher will be continuing to distribute the article knowing its likely effects.

Likewise for authors and publishers of prominent chemistry reference books that discuss explosives. The authors and publishers probably know that some criminals will likely misuse their books; and even if they don't, they will know it once the police inform them that the book was found in a bomb-maker's apartment.<sup>301</sup>

Yet it's a mistake to analogize knowingly producing harm through dual-use speech (such as publishing chemistry books) to knowingly producing harm through single-use speech, single-use products, or single-effect conduct. Such single-use or single-effect behavior involves a strong case for liability precisely because the speaker or actor knows his conduct will produce harm but no (or nearly no) good. That's true if he gives a gun to a particular person who he knows will use it to commit crime (which is analogous to the no-value one-to-one speech discussed in Part III.A.2), or if he broadly distributes false statements of fact, which are generally seen as lacking in constitutional value (analogous to the no-value public speech discussed in Part III.A.2).<sup>302</sup>

If, however, a speaker is distributing material that has valuable uses as well as harmful ones, and he has no way of limiting his audience just to the good users—the classic dual-use product scenario—then the case for restricting his actions is much weaker. For instance, a distributor who sells alcohol to a particular minor, knowing that he's a minor, is breaking the law.<sup>303</sup> A manufacturer who sells alcohol to distributors in a college town, while being

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

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

302. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact."). On rare occasions, the Court has suggested that false statements may have value, see, e.g., *Sullivan*, 376 U.S. at 279 n.19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'") (citation omitted), but most of the time it has treated false statements said with actual malice as valueless; and in *New York Times v. Sullivan* itself, it concluded that they could be punished. 376 U.S. at 279-80.

303. See, e.g., TEX. ALCO. BEV. CODE ANN. § 106.06 (Vernon 2004).

quite certain that some substantial fraction of the alcohol will fall into the hands of minors, is acting lawfully.

Likewise, knowingly helping a particular person infringe copyright is culpable, and constitutes contributory infringement.<sup>304</sup> Knowingly selling VCRs is not, even if you know that millions of people will use them to infringe.<sup>305</sup> Under the “substantial noninfringing uses” prong of the contributory copyright infringement test, product distributors can only be held liable if the product is nearly single-use (because nearly all of its uses are infringing) rather than dual-use.<sup>306</sup> Where speech is concerned, the First Amendment should likewise protect dual-use speech from liability even when the speaker knows of the likely harmful uses as well as the likely valuable ones.

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

One may likewise argue that knowingly crime-facilitating speech should be unprotected, because it can cause such serious harm: bombings, killings of crime witnesses, computer security violations that may cause millions or billions of dollars in damage, and the like.<sup>307</sup> Moreover, the argument would go, restricting crime-facilitating speech will injure discussion about public affairs less than restricting crime-advocating speech would—people could still express whatever political ideas they might like, just without using the specific factual details.<sup>308</sup>

Such restrictions may interfere more seriously with scientific speech, whether about chemistry, computer security, drugs, criminology, or cryptography, since such speech particularly requires factual detail. But, the argument would go, the government is unlikely to regulate such speech more than necessary, because legislators won’t want to stifle useful and economically valuable technological innovation. Chemistry textbooks on explosives,

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304. See, e.g., *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 265 (9th Cir. 1996).

305. *Sony Corp. of America v. Universal Studios*, 464 U.S. 417 (1983).

306. See *supra* text accompanying note 208.

307. See *supra* Part I.A. The argument would be reinforced by the growing ease of public communication: In the past, it may have been possible to rely on publishers’ refraining from printing really dangerous material, but now that Internet publication is cheap, this constraint vanishes. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1836-38 (1995).

308. Cf. Scanlon, *supra* note 126, at 211-12, 214 (seemingly endorsing broad restrictions on crime-facilitating speech, and distinguishing speech that provides “reasons for action” from speech that simply informs people how to do things). The Court has recognized that providing specific factual details is important, even when they may harm reputation or privacy, *Sullivan*, 376 U.S. at 273; *Florida Star v. B.J.F.*, 491 U.S. 524, 531 (1989); but the argument described in the text would distinguish such speech on the ground that harm to reputation or privacy is less serious than that caused by crime-facilitating speech.

publications that name boycott violators or abortion providers, and detective novels that describe nonobvious but effective ways to commit crime would thus be stripped of First Amendment protection—the decision about whether to allow them would be left to legislatures.

I think, though, that creating such a broad new exception would be a mistake. As Part I.B described, dual-use crime-facilitating speech can be highly relevant to important public debates, and few public policy debates are resolved by abstractions. To be persuaded, people often need concrete examples that are rich with detail; and requiring speakers on certain topics to omit important details will systematically undermine the credibility of their arguments.<sup>309</sup>

“Mandatory ballistic fingerprinting of guns won’t work” isn’t enough to make a persuasive argument.<sup>310</sup> “Mandatory ballistic fingerprinting won’t work because it’s easy to change the gun’s fingerprint; I’m not allowed to explain why it’s easy, but trust me on it” isn’t enough. Often only concrete details—a description of the supposedly easy techniques for changing the fingerprint—can really make the argument effective, and can rebut the government’s assertions defending the proposed program. And this is true even if the details don’t themselves mean much to the typical reader: Once the details are published, lay readers will be able to rely on further information brought forward by more knowledgeable readers, or by experts that newspapers can call on to evaluate the claims.<sup>311</sup>

Also, as Part I.B.3 discusses, the ability to communicate details may be a check on potential government misconduct. Bans on publishing information about subpoenas, wiretaps, witnesses, or security flaws, for instance, can prevent people from blowing the whistle on what they see as government misbehavior. It is indeed unfortunately true that if librarians can publicize subpoenas for library records, the criminals who are being investigated may learn of the subpoenas and flee. But if librarians can’t publicize such subpoenas, even if they think that the subpoenas are overbroad and unjustified, then the government will have more of an incentive to issue subpoenas that are too broad or even illegal. Here, as in other areas, the First Amendment may require us to tolerate some risks of harm—even serious harm—in order to preserve people’s ability to effectively debate policy and science.

A broad exception for knowingly crime-facilitating speech would also, I think, set a precedent for other broad exceptions in the future. The exception,

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309. Cf. *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 303 (Iowa 1979) (“[A]t a time when it was important to separate fact from rumor, the specificity of the report would strengthen the accuracy of the public perception of the merits of the controversy.”); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 356 (1983) (“A factual report that fails to name its sources or the persons it describes is properly subject to serious credibility problems.”).

310. See *supra* note 100 for more on this example.

311. See *supra* text accompanying note 111.

after all, would empower the government to restrict speech that concededly has serious value (unlike, for instance, false statements of fact, fighting words, or even obscenity) and is often connected to major political debates.<sup>312</sup> It would empower the government to completely ban the publication of certain facts, and wouldn't leave the speaker with any legal means to communicate those facts.<sup>313</sup> And it would let the government do so in a wide variety of cases, not just those involving extraordinarily dangerous speech such as the publication of instructions on how to make H-bombs or biological weapons.<sup>314</sup> That's quite a step beyond current First Amendment law, as I hope some of the examples in the Introduction illustrate.

Moreover, even the existing First Amendment exceptions, which are comparatively narrow, are already often used to argue for broader restraints.<sup>315</sup> Each new exception strengthens those arguments—and an exception for all knowingly or recklessly crime-facilitating speech, including speech that is potentially an important contribution to political debate among law-abiding voters, would strengthen them still further.<sup>316</sup> In a legal system built on analogy and precedent,<sup>317</sup> broad new exceptions can have influence considerably beyond their literal boundaries.

## 2. *Focusing on purpose to facilitate crime*

So the speakers and publishers of most crime-facilitating speech likely know that it may help some readers commit crime, or are at least reckless about the possibility. Punishing all such knowingly or recklessly crime-facilitating speech would punish a wide range of speech that, I suspect, most courts and commentators would agree should remain protected. But what about a distinction, endorsed by the Justice Department and leading courts and

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

313. *Cf.* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (stressing that the prohibited fighting words were “no essential part of the exposition of ideas”); *FCC v. Pacifica Found.*, 438 U.S. 726, 773 (1978) (plurality opinion) (stressing that the profanity restriction left the speaker free to convey his message in other ways); *New York v. Ferber*, 458 U.S. 747, 763 (1982) (likewise as to child pornography law); *Harper & Row v. Nation Enters.*, 471 U.S. 539, 585-86 (1985) (likewise as to copyright law).

314. For more on the possibility of a narrow exception for knowing publication of material that facilitates extraordinary harms, see *infra* Part III.D.1.

315. See Volokh, *Mechanisms of the Slippery Slope*, *supra* note 187, at 1059-60.

316. See *id.* at 1093-94.

317. See *supra* text accompanying note 261.

commentators,<sup>318</sup> based on intent (or “purpose,” generally a synonym for intent<sup>319</sup>)—on whether the speaker has as one’s “conscious object . . . to cause such a result,” rather than just knowing that the result may take place?<sup>320</sup>

Most legal rules don’t actually distinguish intent and knowledge (or recklessness), even when they claim to require “intent.” Murder, for instance, is sometimes thought of as intentional killing,<sup>321</sup> but it actually encompasses knowing killing and reckless killing as well.<sup>322</sup> Blowing up a building that one knows to be occupied is murder even when one’s sole purpose was just to destroy the building, and one sincerely regrets the accompanying loss of life.

Similarly, the mens rea component of the intentional infliction of emotional distress tort can usually be satisfied by a showing of recklessness or knowledge and not just intent.<sup>323</sup> Likewise, so-called intentional torts generally require a mens rea either of intent or of knowledge.<sup>324</sup> Concepts such as “constructive intent” or “general intent,” which generally don’t require a finding of intent in the sense of a “conscious object . . . to cause [a particular] result,” further muddy the intent/knowledge distinction,<sup>325</sup> and risk leading people into confusion whenever the distinction does become important.

Yet some legal rules do indeed distinguish intent to cause a certain effect from mere knowledge that one’s actions will yield that effect. For instance, if a

318. See *supra* notes 137 and 144; GREENAWALT, *supra* note 43, at 273; Brenner, *supra* note 92, at 373-78, 411-12.

319. See, e.g., MODEL PENAL CODE § 2.02(2)(a) (1962).

320. *Id.* § 2.02(2)(a)(i).

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

322. See, e.g., N.Y. PENAL LAW § 125.25 (McKinney 2004).

323. See, e.g., RESTATEMENT (SECOND) OF TORTS § 46 (1965).

324. See, e.g., *id.* § 8A (“The word ‘intent’ . . . denote[s] that the actor desires to cause consequences of his act, or that *he believes that the consequences are substantially certain to result* from it.”) (emphasis added); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 251 (4th Cir. 1997) (taking the view that in civil aiding and abetting cases, intent “requires only that the criminal conduct be the ‘natural consequence of [one’s original act],” as opposed to “a ‘purposive attitude’ toward the commission of the offense”).

325. See RESTATEMENT (THIRD) OF TORTS (PHYSICAL HARMS) § 1 (Tentative Draft No. 1, 2001) (“A person acts with the intent to produce a consequence if: (a) The person has the purpose of producing that consequence; or (b) The person knows to a substantial certainty that the consequence will ensue from the person’s conduct.”); *id.* § 5 (imposing liability for physical harm that’s caused “intentionally” under the section 1 definition); BLACK’S LAW DICTIONARY 813 (7th ed. 1999) (defining “constructive intent” as “[a] legal principle that actual intent will be presumed when an act leading to the result could have been reasonably expected to cause that result. ‘Constructive intent is a fiction which permits lip service to the notion that intention is essential to criminality, while recognizing that unintended consequences of an act may sometimes be sufficient for guilt of some offenses.’”) (citation omitted); *id.* (defining “general intent” as “[t]he state of mind required for the commission of certain common-law crimes not requiring a specific intent or not imposing strict liability. General intent [usually] takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence”).

doctor knowingly touches a fifteen-year-old girl's genitals during a routine physical examination, the doctor isn't guilty of a crime simply because he knows that either he or the girl will get aroused as a result. But if he does so with the *intent* of sexually arousing himself or the girl, in some states he may be guilty of child molestation.<sup>326</sup>

Likewise, if your son comes to the country in wartime as an agent of the enemy, and you help him simply because you love him, then you're not intentionally giving aid and comfort to the enemy—and thus not committing treason—even if you know your conduct will help the enemy. But if you help your son partly because you want to help the other side, then you are acting intentionally and not just knowingly, and are guilty of treason. (This is the distinction the Court drew in *Haupt v. United States*,<sup>327</sup> a World War II case, and it's a staple of modern treason law.<sup>328</sup>) To quote Justice Holmes in *Abrams v. United States*,

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

A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime [under a statute limited to statements made "with intent . . . to cripple or hinder the United States in the prosecution of the war"].<sup>329</sup>

Might courts follow this exact usage of "intent"—meaning purpose, as opposed to mere knowledge—and draw a useful distinction between dual-use speech distributed with the purpose of promoting the illegal use, and dual-use material distributed without such a purpose?

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326. See, e.g., IDAHO CODE § 18-1506 (Michie 2004); TEX. PENAL CODE ANN. § 21.11 (Vernon 2004); UTAH CODE ANN. § 76-5-401.1(2) (2004). But see CAL. PENAL CODE § 11165.1(b)(4) (Deering 2004) (defining sexual assault as intentional touching of a child's genitals "for purposes of sexual arousal or gratification," but excluding "acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose," presumably in order to prevent prosecution based on a theory that seemingly normal caretaking, affection, or medical care was actually motivated by sexual desires).

327. 330 U.S. 631, 641-42 (1947).

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

329. 250 U.S. 616, 626 (1919) (Holmes, J., dissenting).

a. *Crime-facilitating speech and purpose*

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

(1) Some speakers do have the "conscious object" or the "aim" of producing crime: For instance, some people who write about how to effectively resist arrest at sit-ins, engage in sabotage, or make bombs may do so precisely to help people commit those crimes.<sup>330</sup> The deeper motive in such cases is generally ideological, at least setting aside speech said to a few confederates in a criminal scheme. Speakers rarely want unknown strangers to commit a crime unless the crime furthers the speaker's political agenda.

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

(3) Other speakers may be motivated by a desire for profit, without any intention of facilitating crime. The speaker may be aware that he's making money by helping criminals, but he might sincerely prefer that no one act on his speech.

The contract murder manual case is probably a good example: If you asked the publisher and the writer, "What is your purpose in publishing this book?" they'd probably sincerely tell you, "To make money." If you asked them, "Is your purpose to help people commit murder?" they'd sincerely say, "Most of our readers are armchair warriors, who just read this for entertainment; if we had our choice, we'd prefer that none of them use this book to kill someone, because if they do, we might get into legal trouble."<sup>331</sup>

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330. See, e.g., Plea Agreement, *United States v. Austin*, No. CR-02-884-SVW (C.D. Cal. Sept. 26, 2002) (stating that the defendant admits he put up a Web site contain bombmaking information intending to help people make bombs); Travis Bemann, *Targeting the Capitalist Propaganda/Media System*, EXPERTS AGAINST AUTHORITY, July 1, 2001, at <http://free.freespeech.org/xaa/xaa0001.txt> (posting, in "[a] textfile zine on anarchy, technology, direct action, and generally deconstructing our wonderful society and culture," focusing on physical sabotage of communications channels); Earth Liberation Front, *Setting Fires with Electrical Timers*, *supra* note 7 (publication described as "[t]he politics and practicalities of arson"); materials cited *supra* note 12 (giving advice about how to effectively resist arrest at sit-ins).

331. Cf. Schroth, *supra* note 47, at 575 (acknowledging that "the intent that derives from knowledge is probably not as easily inferred in the case of a publisher of a book that teaches how to commit a murder" as when an ideologically minded author self-publishes his crime-advocating and crime-facilitating work, but arguing that the publisher should be held liable under a recklessness standard rather than an intent standard).



Perhaps this intention to make money, knowing that some of the money will come from criminals, is unworthy. But “when words are used exactly,”<sup>332</sup> the scenario described in the preceding paragraph does not involve speech purposefully said to facilitate crime. If crime-facilitating speech doctrine is set up to distinguish dual-use speech said with the intent to facilitate crime from dual-use speech said merely with knowledge that it will facilitate crime (as well as the knowledge that it will have other, more valuable, effects), the profit-seeking scenario falls on the “mere knowledge” side of the line.

In the *Rice v. Paladin Enterprises* litigation, the defendants stipulated for purposes of their motion to dismiss that they intended to facilitate crime, but that was done simply because they couldn’t debate the facts, including their mental state, at that stage of the litigation.<sup>333</sup> In reality, there was little practical or ideological reason for them to intend to help criminals (as opposed to merely knowing that they were helping criminals).

(4) Still other speakers may be motivated solely by a desire to speak, or to fight speech suppression, rather than by an intention to help people commit crimes or torts.<sup>334</sup> A journalist who publishes information about a secret subpoena might do so only because he believes that the public should know what the government is doing, and that all attempts to restrict publication of facts should be resisted.

Some people who posted information on decrypting encrypted DVDs, for instance, likely did so because they wanted people to use this information. But after the first attempts to take down these sites, others put up the code on their own sites, seemingly intending only to frustrate what they saw as improper speech suppression—many such “mirror sites” are put up precisely with this intention.<sup>335</sup> Still others put up crime-facilitating material because it was the

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332. See *supra* text accompanying note 329.

333. 128 F.3d 233, 241 (4th Cir. 1997).

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

Toward the other end of the free speech spectrum are such people as John Young, a New York architect who created a Web site with a friend, featuring aerial pictures of nuclear weapons storage areas, military bases, ports, dams and secret government bunkers, along with driving directions from Mapquest.com. He has been contacted by the FBI, he said, but the site is still up.

“It gives us a great thrill,” Young said. “If it’s banned, it should be published. We like defying authority as a matter of principle.”

This is a pretty irresponsible intention, I think, at least in this situation—but it is not the same as an intention to facilitate harmful conduct (though it may show a knowledge that the site will facilitate harmful conduct). The site is at <http://eyeball-series.org/>; I found it through a simple Google search.

335. See, e.g., Russ Kick, *About the Memory Hole*, MEMORY HOLE, at <http://www.thememoryhole.org/about.htm> (last visited Jan. 15, 2005) (describing a broad-ranging mirror site for a wide variety of documents that people have been trying to delete or suppress); Russ Kick, *CDC Deletes Sensitive Portion of Ricin Factsheet*, MEMORY HOLE, Oct. 28, 2003, at <http://www.thememoryhole.org/feds/cdc-ricin.htm> (reporting the substance of a subsequently redacted CDC report that said that “[a]mateurs can make [the deadly gas]

subject of a noted court case, reasoning that people should be entitled to see for themselves what the case was about.<sup>336</sup> Again, while the mirror site operators knew that their posting was likely to help infringers, that apparently wasn't their intention.

(5) Some speakers may be motivated by a desire to help the criminal, though not necessarily to facilitate the crime. That was Haupt's defense in *Haupt v. United States*—he sheltered his son because of parental love, not because he wanted the son's sabotage plans to be successful. The Court acknowledged that such a motivation does *not* qualify as an intention to assist the crime.<sup>337</sup>

Likewise, consider the burglar who asks a friend for information on how to more effectively break into a building (or a computer system).<sup>338</sup> "Don't do it,"

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ricin from castor beans" because "[r]icin is part of the waste 'mash' produced when castor oil is made"); *MPAA Continues Intimidation Campaign*, 2600NEWS, Mar. 12, 2000, at <http://www.2600.com/news/view/article/331> ("We joined in the mirroring campaign to lend our support to those who had been subjected to hollow threats and harassment from the DVD industry, but were forced into compliance due to circumstances beyond their control. . . . Our modest mirror list has grown substantially and continues to grow, despite mirrors being removed from time to time. The success of the DeCSS mirroring campaign demonstrates the futility of attempts to suppress free speech on the Internet."); Karin Spaink, *The Nuremberg Files: Motivation and Introduction*, at <http://www.xs4all.nl/~oracle/nuremberg/index.html> (last modified Feb. 25, 1999) ("While I strongly hold that every woman should have an abortion if she needs one, I do not think that other opinions about the subject should be outlawed or fined, no matter how harshly they are put. Yet this is precisely what happened in the case of the Nuremberg Files."). The Nuremberg Files site was shut down because it was found to have threatened abortion providers' lives, but it also listed their names and home addresses, which might have facilitated crimes against them; the names and addresses are faithfully mirrored on the mirror site. See also Kristin R. Eschenfelder & Anuj C. Desai, *Software as Protest: The Unexpected Resiliency of U.S.-Based DeCSS Posting and Linking*, 20 INFO. SOC'Y 101, 109-13 (2004), which describes many sites' posting of the DeCSS code, or links to such posted code; my sense is that the purpose of many of these sites is simply to express their creators' hostility to the attempts to suppress DeCSS.

336. See David S. Touretzky, *What the FBI Doesn't Want You to See at RaisetheFist.com*, at <http://www-2.cs.cmu.edu/~dst/raisethefist/> (last modified Sept. 7, 2004) ("I don't share [the politics of Sherman Austin, the creator of the Reclaim Guide bomb-making information site involved in *United States v. Austin*, No. CR-02-884-SVW (C.D. Cal. Sept. 26, 2002) (discussed *supra* note 2)]. I'm a registered Republican, a proud supporter of President Bush (despite the USA PATRIOT Act), and I have nothing but contempt for the mindless anarchism people like Austin mistake for political thought. My reason for republishing the Reclaim Guide is to facilitate public scrutiny of the law under which Austin was charged, and the government's application of the law in this particular case."); David S. Touretzky, *Gallery of CSS Descramblers*, at <http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/> (last modified July 10, 2004) ("If code that can be directly compiled and executed may be suppressed under the DMCA, as Judge Kaplan asserts in his preliminary ruling, but a textual description of the same algorithm may not be suppressed, then where exactly should the line be drawn? This web site was created to explore this issue, and point out the absurdity of Judge Kaplan's position that source code can be legally differentiated from other forms of written expression.").

337. 330 U.S. 631, 641 (1947).

338. See *supra* text accompanying note 194.

the friend at first says, “it’s too dangerous”; but then the friend relents and provides the information, either from friendship or from a desire to get a flat sum of money up front (as opposed to a share of the proceeds). The advisor’s goal is not to help the burglary take place: The advisor would actually prefer that the burglar abandon his plans, because that would be safer for the advisor himself. Thus, the advisor isn’t intending to facilitate crime with his advice, though he knows he is facilitating the crime.

We see, then, several kinds of motivations, but only the first actually fits the definition of “intent” or “purpose,” as opposed to “knowledge” (at least when “intent” is used precisely and narrowly, which it would have to be if the law is indeed to distinguish intent from knowledge). Some of the other motivations may well be unworthy. But if they are to be punished, they would be punished despite the absence of intent, not because of its presence.

This list also shows that the presumption that “each person intends the natural consequences of his actions”<sup>339</sup> is generally misplaced here. This presumption causes few problems when it’s applied to most crimes and torts, for which a mens rea of recklessness or knowledge usually suffices: It makes sense to presume that each person knows the natural consequences of his actions (the loose usage of “intent” to which Justice Holmes pointed).<sup>340</sup> But when the law really aims to distinguish intent from mere knowledge, and the prohibited conduct involves dual-use materials, the presumption is not apt.

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

*b. Difficulties proving purpose, and dangers of guessing at purpose*

So most speakers of crime-facilitating speech will know that the speech may facilitate crime, but relatively few will clearly intend this. For many speakers, their true mental state will be hard to determine, because their words may be equally consistent with intention to facilitate crime and with mere knowledge.

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

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

This means that any conclusion about the speaker's purpose will usually just be a guess. There will often be several plausible explanations for just what the speaker wanted—to push an ideology, to convey useful information, to sell more books, to titillate readers by being on the edge of what is permitted, and more. The legal system generally avoids having to disentangle these possible motives, because most crimes and torts (such as homicide or intentional infliction of emotional distress) require only knowledge or even just recklessness, rather than purpose.<sup>341</sup> But when the law really requires a mens rea of purpose, and protects speech said with knowledge of its likely bad consequences but punishes speech said with a purpose to bring about those consequences, decisionmaking necessarily requires a good deal more conjecture.<sup>342</sup>

And this conjecture will often be influenced by our normal tendency to assume the best motives among those we agree with, and the worst among those we disagree with. This may have taken place in some of the World War I antiwar speech cases: Eugene Debs's speech condemning the draft, for instance, didn't clearly call on people to violate the draft law;<sup>343</sup> I suspect his conviction stemmed partly from some jurors' assumption that socialists are a suspicious, disloyal, un-American sort, whose ambiguous words generally hide an intent to promote all sorts of illegal conduct.<sup>344</sup>

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341. See, e.g., sources cited *supra* notes 322-23.

342. Purpose tests may be familiar from some other contexts, such as burglary (which is usually defined as breaking and entering with the intent to commit a crime, see BLACK'S LAW DICTIONARY 211 (8th ed. 2004)); but their administrability in such areas doesn't mean they would equally work as to crime-facilitating speech. Burglary, for instance, requires a purpose to engage in a further act, rather than to bring about a consequence. Because we generally have control over our own actions, knowing that we will do something means that we have the intention of doing it—it's hard to imagine a burglar who knows that he will commit theft after he breaks into a building, but doesn't intend to commit theft. Juries in burglary cases thus aren't generally called on to distinguish breaking and entering with the purpose to commit a felony from breaking and entering with the knowledge that one will commit a felony, even though burglary requires a mens rea of purpose.

On the other hand, we often don't have control over all the consequences of our actions, and aren't able to accomplish some consequences without regrettably causing others. Thus, knowing that some consequence will result (for instance, that our speech will help others commit crime) does not necessarily equal intending that the consequence will result; and if bans on crime-facilitating speech turn on an intent to facilitate crime, juries will indeed have to draw lines between knowing facilitation and intentional facilitation. See also *infra* note 357 (discussing other purpose-based crimes, such as attempt or conspiracy).

343. Debs v. United States, 249 U.S. 211 (1919).

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

Even if judges, jurors, and prosecutors try to set aside their prejudices and look instead to objective evidence, an intent test will tend to deter ideological advocacy, and not just intentionally crime-facilitating speech. The most reliable objective evidence of speakers' intentions is often their past political statements and affiliations.<sup>345</sup> If the author of an article on infringing Web sites has in the past written that copyright is an immoral restraint on liberty, and that free copying helps advance knowledge, then this past work is evidence that he wrote the new article with the intent to help people infringe. The same is true if the author of an article on how marijuana is grown is active in the medical marijuana movement.<sup>346</sup> But if the authors are apolitical, or have publicly supported copyright law or drug law, then that's evidence that they intended simply to do their jobs as reporters or scholars.

Considering people's past statements as evidence of their intentions is quite rational, and not itself unconstitutional<sup>347</sup> or contrary to the rules of evidence:<sup>348</sup> The inferences in the preceding paragraph make sense, and are

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reckless—a jury may be tempted to find liability because it “is hostile to the message conveyed in the information and does not believe that it serves any social utility to distribute such information”).

345. *Cf.* Brief for the United States at 32-44, *Debs*, 249 U.S. 211 (No. 714), in 19 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 637-49 (Philip B. Kurland & Gerhard Casper eds., 1975) (arguing that the Socialist Party platform, which expressed opposition to the war and to the draft, was properly admitted to show that Debs's facially ambiguous words were indeed intended to advocate draft resistance).

346. *Rice v. Paladin Enterprises*, 128 F.3d 233, 265 (4th Cir. 1997), defended its holding by saying that there will be very few works that would be punishable under the court's test, which required intent to facilitate crime:

[T]here will almost never be evidence proffered from which a jury even could reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity.

In only the rarest case . . . will there be evidence extraneous to the speech itself which would support a finding of the requisite intent.

Likewise, the court said, “[n]ews reporting . . . could never serve as a basis for aiding and abetting liability consistent with the First Amendment,” because “[i]t will be self-evident . . . that neither the intent of the reporter nor the purpose of the report is to facilitate [crime] . . . but, rather, merely to report on the particular event, and thereby to inform the public.” *Id.* at 266.

But those statements are mistaken: If the author or the publisher has in the past taken political stands supporting the violation of a particular law, the jury could quite reasonably (even if perhaps incorrectly) infer that the current statement—including a news report—was intended to help some readers commit crime. If Haupt could be convicted of treason based on his past statements about the Nazis (see the next paragraph in the text), so the author of the article on infringing sites or on how marijuana is grown could be convicted of aiding and abetting based on his past statements about the evils of copyright law or marijuana law.

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

348. As the cases discussed in the text show, intent is commonly proved by a person's past statements; and even if the statements are treated as character evidence, they would be admissible because character evidence may be used to show intent. *See, e.g.*, FED. R. EVID. 404(b); *United States v. Franklin*, 704 F.2d 1183 (10th Cir. 1983) (allowing the admission of

probably the most reliable way to determine the speaker's true intentions. Where intent is an element of the offense, such evidence is often needed. For instance, in *Haupt v. United States*, where Haupt's treason prosecution rested on the theory that he helped his son (a Nazi saboteur) with the intention of aiding the Nazis and not just from "parental solicitude," the Court stressed that the jury properly considered Haupt's past statements "that after the war he intended to return to Germany, that the United States was going to be defeated, that he would never permit his boy to join the American Army, that he would kill his son before he would send him to fight Germany, and others to the same effect."<sup>349</sup>

Likewise, in *United States v. Pelley*, a World War II prosecution for spreading false reports with the intent to interfere with the war effort, the government relied, among other things, on Pelley's pro-German statements in a 1936 third-party presidential campaign, and on "his genuine admiration of the Hitler regime."<sup>350</sup> Likewise, in hate crimes prosecutions, evidence of a person's past racist statements may be introduced to show that he intentionally attacked someone because of the victim's race, rather than for other reasons.<sup>351</sup>

But the inferences are imperfect. The anticopyright or pro-medical-marijuana reporter may genuinely oppose illegal conduct at the same time that he opposes the underlying law: He may be writing his article simply because he finds the subject matter interesting and thinks readers ought to know more about how the law is violated, perhaps because this will show them that the law needs to be changed. And if the factfinder's inference is indeed mistaken, then the error is particularly troublesome, because it involves a person's being convicted because of his political beliefs, and not because of his actual intention to help people commit crimes.<sup>352</sup>

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prior racist acts, coupled with the defendant's statement explaining their racial motivation, as evidence of racist motive in a subsequent case). And because the statements are indeed powerful evidence of motivation, they would be admissible despite the risk that they may prejudice the jury against a defendant; evidence law generally allows the exclusion of such statements only when "its probative value is *substantially outweighed* by the danger of unfair prejudice." FED. R. EVID. 403 (emphasis added).

349. 330 U.S. 631, 642 (1947).

350. 132 F.2d 170, 176 (7th Cir. 1942).

351. See, e.g., *United States v. Allen*, 341 F.3d 870, 885-86 (9th Cir. 2003) (holding that it was proper for the prosecution to introduce "color photographs of [the defendants'] tattoos (e.g., swastikas and other symbols of white supremacy), Nazi-related literature, group photographs including some of the defendants (e.g., in 'Heil Hitler' poses and standing before a large swastika that they later set on fire), and skinhead paraphernalia (e.g., combat boots, arm-bands with swastikas, and a registration form for the Aryan Nations World Congress)"); *United States v. Dunnaway*, 88 F.3d 617, 619 (8th Cir. 1996) (likewise); *People v. Slavin*, 1 N.Y.3d 392 (2004) (likewise).

352. Independent judicial review, see *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), will do little to prevent such errors. In First Amendment cases, appellate courts and trial courts are indeed required to independently review findings that speech is unprotected. See generally Eugene Volokh & Brett McDonnell, *Freedom of*

For all these reasons, an intent test tends to deter speakers who fear that they might be assumed to have bad intentions. Say you are an outspoken supporter of legalizing some drug, because you think it can help people overcome their psychiatric problems.<sup>353</sup> Would you feel safe writing an article describing how easily people can illegally make the drug, and using that as an argument for why it's pointless to keep the drug illegal, when you know that your past praise of the drug might persuade a jury that the article is really intended to facilitate crime?<sup>354</sup>

Likewise, say that you often write about the way drugs are made, perhaps because you're a biochemist or a drug policy expert. Would you feel safe publicly announcing that you also think drugs should be legal and people should use them, given that you know such speech could be used as evidence if you are prosecuted or sued for your writings on drugmaking?<sup>355</sup> More likely, if you're the drug legalization supporter, you'd be reluctant to write the article about drug manufacturing; and if you're the biochemist, you'd be reluctant to write the article favoring legalization. There would be just too much of a chance that the two pieces put together could get you sued or imprisoned.

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

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*Speech and Appellate and Summary Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998). But while courts independently review the application of legal standards to the facts that the jury has found, *id.* at 2442, and independently determine whether the jury had sufficient evidence to make the finding that it did, *Bose*, 466 U.S. at 511, they generally do not reexamine juries' findings of credibility. See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688-89 (1989); *Bose*, 466 U.S. at 499-500. So if a journalist testifies that he had no intention of helping people infringe copyright or make drugs, and the jury concludes—based partly on his past anticopyright or prodrug political statements—that he's lying, appellate courts will not meaningfully review this conclusion.

353. See, e.g., *FDA Permits Test of Ecstasy as Aid in Stress Disorder*, WALL ST. J., Nov. 6, 2001, at B1; Rick Doblin, *A Clinical Plan for MDMA (Ecstasy) in the Treatment of Post-Traumatic Stress Disorder (PTSD): Partnering with the FDA*, 34 J. PSYCHOACTIVE DRUGS 185 (2002), <http://www.maps.org/research/mdmaplan.html> (describing the study); Multidisciplinary Ass'n for Psychedelic Studies, Multidisciplinary Association for Psychedelic Studies, <http://www.maps.org> (last visited Oct. 10, 2004) ("MAPS' mission is to sponsor scientific research designed to develop psychedelics and marijuana into FDA-approved prescription medicines, and to educate the public honestly about the risks and benefits of these drugs.").

354. Even if you stress in your article that you don't want readers to violate the law, but are giving the information only to support your argument for changing the law, the jury may well conclude (even if wrongly) that you're insincere.

355. Note that in these situations, the deterrent effects that I describe may operate with special strength. The hypothetical speaker is no hothead or fool, who may think little about legal risk. He's a scholar, an educated, thoughtful, reflective person with a good deal to lose from a criminal conviction or even a criminal prosecution, and time to consider whether publishing is safe or dangerous. He may thus be especially likely to rationally fear the law's deterrent effect—even though the same attributes (his thoughtfulness and rationality) may make his speech especially valuable to public debate.

beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits . . . [an] offense against person or property [more serious than a minor misdemeanor].”<sup>356</sup> Few of us plan on committing such offenses, and we can largely avoid any deterrence of our speech simply by obeying the other laws.<sup>357</sup>

If, however, the purpose-based law restricts not conduct, but speech, its deterrent effect on protected speech would be considerably greater. Citizens might well suppress their pro-drug legalization beliefs for fear that evidence of such beliefs will be introduced against them at trial if they publish information about how drugs are made—especially if discussing drugmaking is part of their job or academic mission.

These concerns about the difficulty of proving intent, and the risk of deterring speech that might be used as evidence of intent, haven’t led the Supreme Court to entirely avoid intent inquiries. Most prominently, for instance, modern incitement law retains the inquiry into whether the speaker intended to incite crime.<sup>358</sup> But in most cases, any serious inquiry into intent is made unnecessary by the requirement that the speech be intended to and likely to incite *imminent* crime; it is this, I think, that has kept the incitement exception narrow.<sup>359</sup> There will rarely be enough evidence to create a jury question on whether a speaker was intending to incite imminent crime.

Had the imminence requirement not been part of the test, though—had the test been simply intent plus likelihood—a jury could often plausibly decide that a speaker, especially a speaker known for hostility to a particular law, was intending to persuade people to violate the law at some future time. Concerned about this, many speakers would avoid any statements to which a jury might eventually impute an improper intent.<sup>360</sup> And to the extent that incitement

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356. 508 U.S. 476, 489 (1993).

357. Moreover, for other crimes that require intent, such as attempt or conspiracy, there’ll often be powerful corroborating evidence of intent other than the defendant’s past political statements—for instance, the defendant’s getting a share of the crime’s proceeds, or the defendant’s having taken physical steps that strongly point towards the defendant’s purpose being to commit a crime. Proof that someone is involved in a conspiracy to distribute marijuana will rarely rest on the person’s past promarijuana statements. But when the crime itself consists solely of speech, the defendant’s political opinions will often be the strongest evidence of his purpose. *See also supra* note 342 (discussing the purpose prong of burglary).

358. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

359. Though I think the imminence requirement is valuable as part of the incitement test, Part III.E below explains why it couldn’t effectively be transplanted to the crime-facilitating speech test.

360. Say, for instance, that Congress enacts a statute barring speech that’s intended to and likely to lead to draft evasion or to interfere with war production. Would people then feel free to criticize the war even if they do this with the purest of intentions? Or will they be reluctant to speak, for fear that juries or judges would conclude, as did the judges in *United States v. Pelley*, 132 F.2d 170, 177 (7th Cir. 1942), that “[n]o loyal citizen, in time of war, forecasts and assumes doom and defeat . . . when his fellow citizens are battling in a war for



might be civilly actionable (for instance, in a lawsuit by the victims of the allegedly incited crime), the jury wouldn't even have to find this improper intent beyond a reasonable doubt, but only guess at it by a preponderance of the evidence or at most by clear and convincing evidence.<sup>361</sup> This is in fact one reason the intent-plus-likelihood test developed in *Schenck v. United States* and *Debs v. United States* was criticized,<sup>362</sup> and perhaps one reason that the Court rejected it in favor of the *Brandenburg v. Ohio* intent-plus-imminence-plus-likelihood test.

The risk of jury errors in determining purpose likewise led the Supreme Court to hold that liability for defamation and for infliction of emotional distress<sup>363</sup> may not be premised only on hateful motivations. Before 1964, many states imposed defamation liability whenever the speaker was motivated by "ill will" or "hatred" rather than "good motives."<sup>364</sup> But the Court rejected this approach, reasoning that "[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred," especially since "[i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish

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their country's existence, except with an intent to retard their patriotic ardor in a cause approved by the Congress and the citizenry?"

361. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (requiring that actual malice be proven by clear and convincing evidence in libel cases); *People v. Mitchell Bros. Santa Ana Theater*, 180 Cal. Rptr. 728, 730 (Ct. App. 1982) (same as to obscenity in civil injunction cases). But see *Ratray v. City of National City*, 51 F.3d 793, 801 (9th Cir. 1995) (concluding that falsity, as opposed to actual malice, in libel cases need only be proven by a preponderance of the evidence); *Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2d Cir. 1969) (same).

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

363. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988) ("Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude . . . . But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. . . . [While] a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.") (citing *Garrison v. Louisiana*, 379 U.S. 64 (1964)); see also *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 857-58 (10th Cir. 1999) (citing *Hustler Magazine* to reject a "reading of state [interference with contract] tort law . . . [under which] the protection afforded to an expression of opinion under the First Amendment might well depend on a trier of fact's determination of whether the individual who had published the article was motivated by a legitimate desire to express his or her view or by a desire to interfere with a contract").

364. See *Garrison*, 379 U.S. at 72 n.7.

political motives.”<sup>365</sup> The same risk, and the same inhibition of public debate, appears with crime-facilitating speech: Speakers who are genuinely not intending to facilitate crime might nonetheless be deterred by the reasonable fear that a jury will find the contrary.

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

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

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

Is there a reason to treat the two reporters differently? Both articles facilitate crime. Both convey valuable information to readers. The second reporter’s bad motivation doesn’t decrease that value or increase the harm, which suggests that this bad motivation ought not strip the speech of protection.

The Court has, for instance, rejected the theory that statements about public figures lose protection because the speaker was motivated by hatred and an intention to harm the target: “[E]ven if [the speaker] did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.”<sup>366</sup> Likewise, the Court has held that lobbying or public advocacy is protected against antitrust liability even if the speaker’s “sole purpose” was anticompetitive: “The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so,” partly because even people who are trying to restrict competition may be “a valuable source of information.”<sup>367</sup> The ability of dual-use crime-facilitating speech to contribute to the exchange of facts and ideas is likewise independent of whether it’s motivated by a bad purpose.

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365. *Id.* at 73-74.

366. *Id.* at 73 (rejecting the argument that unintentionally false statements should be punishable when they’re motivated by hatred); *Hustler Magazine*, 485 U.S. at 53 (rejecting the argument that outrageous opinion should be punishable when it’s intended to inflict emotional distress).

367. *E. R.R. Conference v. Noerr Motors*, 365 U.S. 127, 138-40 (1961).

Similarly, say that the intentionally crime-facilitating article is posted on some Web sites, the government tries to get the site operators to take down the articles, and the operators refuse. The site operators—who might be the publishers for whom the reporter works, or the hosting companies from whom the reporter rents space—probably have the same knowledge as the reporter, at least once the government alerts them about the situation. But they quite likely have no intention to facilitate crime. Their decision not to take down the articles may have been simply motivated by a desire to let the reporter say what he wants to say.

And yet the value and the harm of the speech are the same whether the government is pursuing a reporter who intends the speech to help facilitate crime, or site operators who merely know that the speech has this effect.<sup>368</sup> The one difference between the two articles might be the moral culpability of the speakers, which I'll discuss shortly. For now, though, we see that the practical effects of the articles are quite similar.

Of course, there is precedent for using intent (and not just knowledge or recklessness) as part of First Amendment tests: Under the incitement test, speech that is intended to and likely to cause imminent harm is unprotected.<sup>369</sup> Speech that the speaker merely knows is likely to cause imminent harm is protected.

The incitement cases, though, have never fully explained why an intent-imminence-likelihood test is the proper approach (as opposed to, say, a knowledge-imminence-likelihood test). Moreover, as the preceding subsection mentioned,<sup>370</sup> the main barrier to liability under the *Brandenburg* test has generally been the imminence prong, not the intent prong; and given the imminence prong, it's not really clear whether it makes much of a difference whether the incitement test requires intent or mere knowledge.

Considering the quintessential incitement example—the person giving a speech to a mob in front of someone's house<sup>371</sup>—reinforces this. One can imagine some such person simply knowing (but regretting) that the speech would likely lead the mob to attack, as opposed to intending it. But, first, this scenario would be quite rare. Second, it's not clear how a jury would reliably determine whether the speaker actually intended the attack or merely knew that it would happen. And, third, if the speaker did know the attack would happen as a result of his words, it's not clear why the protection given to his speech should turn on whether he intended this result.

In the era before the Court adopted the imminence prong, Justice Holmes did defend the distinction between an intent-plus-likelihood test and a mere

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368. Cf. Alexander, *supra* note 194, at 107-08 (making a similar point in criticizing the intent prong of *Brandenburg*).

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

370. See *supra* note 359.

371. See, e.g., *Hecceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1023 (5th Cir. 1987).

knowledge-plus-likelihood test.<sup>372</sup> And indeed, if no imminence prong were present, a knowledge-plus-likelihood test would be inadequate: People would then be barred from expressing their political views whenever they knew that those views could lead some listeners to misbehave, and this would be too broad a restriction.<sup>373</sup> But an intent-plus-likelihood test proved inadequate, too, partly because of the risk that jurors would err in finding intent.<sup>374</sup> So while the intent-plus-likelihood and the intent-imminence-likelihood tests have long been part of the incitement jurisprudence, it's not clear that either of them offers much support for focusing on intent in other free speech exceptions: The intent prong proved to be not speech-protective enough in the intent-plus-likelihood test; and in the intent-imminence-likelihood test it is the imminence requirement, not the intent requirement, that strongly protects speech.

#### d. *Moral culpability*

So the one remaining potential distinction between intentionally and knowingly crime-facilitating speech is the speaker's moral culpability. Trying to help people commit or get away with their crimes is generally reprehensible. Trying to inform the public about perceived government misconduct, persuade the public that some laws are futile, or even to entertain people, while regretfully recognizing that this will as a side effect help people get away with their crimes, is much more defensible.<sup>375</sup>

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

As a result, many speakers who do not intend to facilitate crime will be deterred from speaking. Some speech will be punished when equally harmful and valueless speech—perhaps including copies of the punished speech, posted on mirror Web sites—will be allowed. And the one ostensible advantage of the

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372. See *Abrams v. United States*, 250 U.S. 616, 626-27 (1919) (Holmes, J., dissenting).

373. See *id.* at 627 (“A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime [under a statute limited to statements made ‘with intent . . . to cripple or hinder the United States in the prosecution of the war’].”).

374. See *supra* note 362.

375. See Cheh, *supra* note 147, at 24 & n.28 (arguing that intention may be an important factor distinguishing the publisher of a bomb-making manual for terrorists from the publisher of a work on explosives that's not aimed at terrorists—“[i]ntention is irrelevant to the issue of whether harm is or will be caused, but it is crucial to establish culpability”).

intent test, which is distinguishing the morally culpable intentional speakers from the morally guiltless knowing speakers, won't be much served, precisely because of the substantial risk that factfinders won't be able to easily tell the two apart.

*C. Distinctions Based on How Speech Is Advertised or Presented*

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

*a. The inquiry*

Dual-use products are sometimes specially regulated when they have features that seem especially designed for the criminal use, or that are promoted in a way that seems to emphasize the criminal use. For instance, products that circumvent technological copy protection are prohibited if (among other circumstances) they are "primarily designed or produced for the purpose of" circumvention, or are "marketed . . . for use" in circumvention.<sup>376</sup> Drug paraphernalia laws focus on whether a product has been "designed or marketed for use" with drugs.<sup>377</sup> Likewise, one court has concluded that a gun manufacturer could be held liable for injuries caused by its product in part because the manufacturer advertised the gun as being "resistant to fingerprints."<sup>378</sup>

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

Likewise, I suspect that the *Hit Man* court was wrong to argue that the framing or advertising of the book—there, its characterization as a manual for contract killers—is "highly probative of the publisher's intent" to facilitate crime.<sup>379</sup> As I've mentioned above, 13,000 copies of the book were sold.<sup>380</sup>

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376. 17 U.S.C. § 1201(2)(A), (C) (2000).

377. See generally *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

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

379. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 253 (4th Cir. 1997).

That seems to be much greater than the likely set of would-be contract killers who would learn their trade from a book (especially a book written by a person using the pseudonym “Rex Feral”). The publisher and the author must have known this, and thus likely intended their market to be armchair soldiers of fortune who like to fantasize about being Nietzschean *ubermensches*. Perhaps, as I discuss below, distributing *Hit Man* should still be punished because of the way the book was framed or promoted. But this would have to be because of something other than the light that the framing and promotion sheds on the publisher’s intent.

On the other hand, the “designed or marketed for criminal uses” inquiry doesn’t simply ask whether the defendant knew of the crime-facilitating uses—a seller of cigarette rolling paper wouldn’t be held liable simply because he knows that many buyers use it for marijuana rather than tobacco.<sup>381</sup> Rather, the test for distributors would be whether the distributor is knowingly distributing material that’s being advertised (by him) or designed or presented (by the author) in a way that’s intended to especially appeal to criminals. And the test for authors would be whether they are purposefully producing material that especially appeals to criminals, though not necessarily whether their purpose is actually to help those criminals.<sup>382</sup>

Some of the examples of crime-facilitating speech seem to fit within this definition, and the definition would often track many people’s moral intuitions. The *Hit Man* murder manual and *The Anarchist Cookbook*, for instance, seem particularly blameworthy precisely because their content and their promotional advertising portray them as tools for committing crime; they are different in this from a novel about contract killers and a chemistry book about explosives.<sup>383</sup> A Web site that presents itself as a source of research papers that students can plagiarize seems different from an online encyclopedia, though the encyclopedia can also be used for plagiarism and the papers can also be used for legitimate research. And this is true even if the books and Web sites are published by people who intend only to make money, not to facilitate crime.

The definition would also cover Web pages that mirror the contents of suppressed crime-facilitating works, such as some of the pages that mirror *Hit Man* itself. The mirror page operator may intend only to strike a blow against

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380. See *supra* note 116.

381. See, e.g., *Dubose v. State*, 560 So. 2d 323, 325-26 (Fla. Dist. Ct. App. 1990).

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

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

ensorship, and not to facilitate crime;<sup>384</sup> and I suspect that many people would be less eager to punish him than they would be to punish the publisher or the author of the original site. But the mirror page operator likely does know that the material he's distributing was designed or presented—not by him, but by its author—to especially appeal to criminals. His actions would thus be on the punishable side of the line discussed here, even if he's motivated by love of free speech rather than by love of money.

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

This inquiry into how a work is promoted or framed already takes place in some measure—though controversially<sup>385</sup>—in the “pandering” doctrine, which is part of obscenity law.

Obscenity law is based on the view that sexually themed material can have “a corrupting and debasing impact [on its consumers,] leading to antisocial behavior.”<sup>386</sup> On the other hand, obscenity law also recognizes that much sexually themed material can also have serious value to its other consumers.

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

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384. See, for example, the Web site noted in *supra* note 251, which provides a copy of the *Hit Man* contract murder manual, denounces the lawsuit and court decision that ordered *Hit Man* to be taken off the market, and concludes:

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

That said, here is *Hit Man* . . .

385. See, e.g., *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 249 (1990) (Stevens, J., concurring in part and dissenting in part) (criticizing *Ginzburg v. United States*, 383 U.S. 463 (1966)); *Splawn v. California*, 431 U.S. 595, 602 (1977) (Stevens, J., dissenting) (likewise); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 911 n.53 (2d ed. 1988) (likewise); G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 258 (1982) (discussing *Ginzburg* in unflattering terms).

386. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

But under the pandering cases, of which the leading one is *Ginzburg v. United States*, a work that would otherwise not be obscene—perhaps because it has serious value—may be treated as obscene if it’s “openly advertised to appeal to the erotic interest of . . . customers.”<sup>387</sup> For instance, one of the works in *Ginzburg* was a text called *The Housewife’s Handbook on Selective Promiscuity*. According to the Court, “[t]he Government [did] not seriously contest the claim that the book has worth” for doctors and psychiatrists. The book apparently sold 12,000 copies when it was marketed to members of medical and psychiatric associations based on its supposed “value as an adjunct to therapy,” and “a number of witnesses testified that they found the work useful in their professional practice.”<sup>388</sup>

Because *Ginzburg* marketed the work as pornographic, however, his distribution of the book was treated as constitutionally unprotected, though distributing the same book in ways that didn’t appeal to consumers’ erotic interest would have been protected. The obscenity inquiry, the Court held, “may include consideration of the setting in which the publication [was] presented,” even if “the prosecution could not have succeeded otherwise.”<sup>389</sup>

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

The sexy advertisement neither adds to nor detracts from the quality of the merchandise being offered for sale. And I do not see how it adds to or detracts one whit from the legality of the book being distributed. A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it.<sup>390</sup>

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

There are three plausible responses to this, though for reasons I’ll explain below I think they are ultimately inadequate. First, and most important, when a dual-use work is promoted as crime-facilitating or is designed to be useful to criminals, more of its users are likely to be criminal. The advertisements or

387. 383 U.S. at 467; *see also* *Pinkus v. United States*, 436 U.S. 293, 302 (1978); *Splawn*, 431 U.S. at 598; *Hamling v. United States*, 418 U.S. 87, 130 (1974).

388. *Ginzburg*, 383 U.S. at 472.

389. *Id.* at 465-66.

390. *Id.* at 482 (Douglas, J., dissenting); *see also* *FW/PBS*, 493 U.S. at 249 (Stevens, J., concurring in part and dissenting in part) (“If conduct or communication is protected by the First Amendment, it cannot lose its protected status by being advertised in a truthful and inoffensive manner.”). The inoffensiveness of the advertising in *FW/PBS* was relevant because patent offensiveness is part of the obscenity test, so a sufficiently offensive sexually themed advertisement may itself be obscene.



internal design elements will tend to attract the bad users and repel the law-abiding ones.<sup>391</sup>

Restricting this speech will thus mostly obstruct the illegal uses, especially since the law-abiding readers will still be able to read material that contains the same facts but isn't promoted or framed as crime-facilitating. A criminologist interested in contract killing, a novelist who wants to write plausibly about contract killers,<sup>392</sup> or just a layperson who's curious about the subject would still be able to get information from books that aren't framed as contract murder manuals. A high-school student who genuinely wants to research, not plagiarize, would still be able to get information from encyclopedias and other Web pages that aren't pitched as term-paper mills.

The *Ginzburg* Court justified its decision partly in this way: It suggested that the book could lawfully be distributed "if directed to those who would be likely to use it for the scientific purposes for which it was written"; but though sales of the book to psychiatrists would have value, "[p]etitioners . . . did not sell the book to such a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed."<sup>393</sup> As Justice Scalia—the most prominent modern supporter of the *Ginzburg* approach—put it, "it is clear from the context in which exchanges between such businesses and their customers occur that neither the merchant nor the buyer is interested in the work's literary, artistic, political, or scientific value."<sup>394</sup>

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

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

392. See Brief of Amicus Curiae Curiae Horror Writers Ass'n at 5, *Rice*, 128 F.3d 233 (No. 96-2412) (claiming that *Hit Man* "is a research tool that offers verisimilitude and authenticity to writers of fiction as well as intelligence to law enforcement and security officials").

393. 383 U.S. at 472-73 (internal citation omitted); cf. WHITE, *supra* note 385, at 258 (linking *Ginzburg* with Chief Justice Warren's view in *Jacobellis v. Ohio*, 378 U.S. 184, 201 (1964), that "'the use to which various materials are put—not just the words and pictures themselves'—was to be considered in determining whether a work was obscene").

394. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 832 (2000) (Scalia, J., dissenting).

actions) that would be missing in books aimed at chemistry students or lawful drug producers.

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

Third, distributing or framing material in a way that stresses its illegal uses seems especially shameless. Even if the public promotion of the illegal uses is insincere—if the speaker or publisher actually doesn't intend to facilitate the illegal uses, but simply wants to make money (for instance, through the edgy glamour that the promotion provides)—the promotion may appear particularly reprehensible.<sup>395</sup> It's therefore tempting to hold the speaker at his word, to treat his speech as solely focused on those things that the advertising or framing of the speech stressed, and not to let him defend himself by citing the entertainment value (as with *Hit Man*) of the speech.

So, the theory goes, restrictions on advertising that promotes the improper uses of a work burden lawful uses only slightly, because the same material could be distributed if it weren't billed as promoting illegal uses.<sup>396</sup> And these restrictions have some benefit, because they somewhat decrease the illegal uses. The same can be said of restrictions on speech whose text (rather than its promotional advertising) describes the work as crime-facilitating or sexually titillating. The line between material that's advertised or framed as crime-facilitating and material that's advertised or framed in other ways despite its crime-facilitating uses is thus conceptually plausible.

At the same time, the line often requires subtle and difficult judgments, because the suggested use of a statement will sometimes be unstated or ambiguous, and different factfinders will draw different inferences about it. Is a list of abortion providers, boycott violators, strikebreakers, police officers, or political convention delegates crafted to especially appeal to readers who want to commit crimes against these people, or to readers who want to lawfully remonstrate with them, socially ostracize them, or picket them? Is an article that describes the flaws in some copy protection system crafted to especially appeal to would-be infringers, or to readers who are curious about whether technological attempts to block infringement are futile? Many publications simply present facts, and leave readers to use them as they like. Unless we require that each publication explicitly define its intended audience, it may often be hard to determine this audience.

And lacking much objective evidence about the intended audience, factfinders may end up turning to their own political predilections. As Part

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395. Cf. *Rice*, 128 F.3d at 254 (noting the “almost taunting defiance” of the publisher’s stipulation “that it intended to assist murderers and other criminals”).

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

III.B.2 suggested, guesses about a person's purposes—here, about the audience to which the author is intending the work to appeal<sup>397</sup>—tend to be influenced by the factfinder's sympathy or antipathy towards the person. If we think antiabortion activists are generally good people trying to save the unborn from murder, we are likely to give the writer and the readers of a list of abortion providers the benefit of the doubt, and to assume the list was aimed only at lawful picketers and protesters. If we think antiabortion activists are generally religious fanatics who seek to suppress women's constitutional rights, we are likely to assume the worst about their intentions. There is thus a substantial risk that factfinders will err, and will err based on the speaker's and their own political viewpoints, in deciding whether something is “designed to appeal to criminals.”

Finally, if the law starts focusing on how the speech is framed or marketed, many speakers—both those who are really trying to appeal to criminals and those who aren't—will just slightly change their speech so that it doesn't look like an overt appeal to illegal users. (Some term-paper Web sites, for instance, already present themselves as offering mere “example essays,” and say things like “the papers contained within our web site are for research purposes only!”<sup>398</sup>) Recall that one of the purported advantages of the focus on “pandering” is precisely that it won't burden speech much, since the underlying information could still be communicated if it's not presented in a way that stresses the illegal uses.

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

The other possibility is that lawmakers and judges will understandably seek to prevent these “end runs” around the prohibition—and the steps taken to

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397. See *supra* text accompanying note 382 (pointing out that the inquiry here is into whether the work is intended or promoted in a way that's intended to especially appeal to criminals).

398. See, e.g., Example Essays.com, Acceptable Use Policy / Site License, at <http://exampleessays.com/aup.php> (last visited Jan. 15, 2005) (“The papers contained within our web site are for research purposes only! You may not turn in our papers as your own work! You must cite our website as your source! Turning in a paper from our web site as your own is plagiarism [sic] and is illegal!”). Likewise, the *Hit Man* contract murder manual included a disclaimer stating,

IT IS AGAINST THE LAW TO manufacture a silencer without an appropriate license from the federal government. There are state and local laws prohibiting the possession of weapons and their accessories in many areas. Severe penalties are prescribed for violations of these laws. Neither the author nor the publisher assumes responsibility for the use or misuse of information contained in this book. *For informational purposes only!*

FERAL, *supra* note 251 (emphasis in original). In *Rice*, though, the court wasn't impressed: “[A] jury could readily find [the book's disclaimer] to be transparent sarcasm designed to intrigue and entice . . . .” 128 F.3d at 254.

prevent them may end up covering not just those end runs, but also legitimate speech. The rule may start as a narrow First Amendment exception for speech that's explicitly promoted in a way that makes it appealing to criminals; but then even legitimate, well-intentioned promotion of dual-use speech would be perceived as exploiting a "loophole" in the rule. This perception would then tend to yield pressure for categorizing more and more speech under the "promoted as crime-facilitating" label. And this tendency will be powerful because it would reflect a generally sensible attitude: the desire to make sure that rules aren't made irrelevant by easy avoidance.<sup>399</sup>

This pressure for closing supposed loopholes has been visible with other speech restrictions. For instance, the characterization of obscenity as being "utterly without redeeming social importance" led some pornographers to add token political or scientific framing devices: a purported psychologist introducing a porn movie with commentary on the need to explore sexual deviance, or a political aside on the evils of censorship. The Court reacted by rejecting the "utterly without redeeming social importance" standard and demanding "serious literary, artistic, political, or scientific value."<sup>400</sup> This change helped close the loophole to some extent<sup>401</sup>—but only at the cost of punishing speech that "clearly ha[s] some social value," though "measured by some unspecified standard, [the value] was not sufficiently 'serious' to warrant constitutional protection."<sup>402</sup> A seemingly very narrow restriction proved so easy to circumvent that the Court shifted to a broader one.

Likewise, in *Buckley v. Valeo*, the Court—aiming to minimize the burden on free speech rights—narrowly interpreted the Federal Election Campaign Act's restrictions on independent expenditures "relative to a clearly identified candidate" as covering only speech "that include[s] explicit words of advocacy

399. Volokh, *Mechanisms of the Slippery Slope*, *supra* note 187, at 1051 (describing such "enforcement need slippery slopes"); *see also* Hall, *supra* note 362, at 531-35 (describing such a phenomenon at work in the World War I-era antidraft speech cases, though concluding that those prosecutions were nonetheless sound).

400. *See* *Miller v. California*, 413 U.S. 15, 21-24 (1973).

401. Nonetheless, similar devices still seem to be used sometimes, with occasional success. *See, e.g.*, *Main St. Movies, Inc. v. Wellman*, 598 N.W.2d 754, 761 (Neb. 1999):

The district court determined that exhibit 9, "Takin' It to the Jury," has serious literary or artistic value . . . and, therefore, found as a matter of law that [this movie is] not obscene. "Takin' It to the Jury" depicts the deliberation of a six-person jury in an obscenity case. The jurors discuss the community standard requirements, and when they discuss specific scenes of the movie that they are reviewing for obscenity, various jurors fantasize about themselves in similar scenes.

Based on our de novo review . . . we conclude that the State did not prove beyond a reasonable doubt that "Takin' It to the Jury" lacked any serious literary, artistic, political, or scientific value. The movie appears to be an attempt by the producers to instruct viewers in the basics of obscenity law with political commentary regarding the lack of validity and usefulness of obscenity laws.

402. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 97 (1973) (Brennan, J., dissenting). Justice Brennan had originated the "utterly without redeeming social importance" test sixteen years before, in *Roth v. United States*, 354 U.S. 476 (1957).

of election or defeat of a candidate.”<sup>403</sup> Political advertisers then understandably avoided the restrictions by avoiding such explicit words, so that the advertisements would be treated as issue advocacy rather than candidate advocacy.

Supporters of campaign finance regulation then naturally responded by condemning such speech as “sham issue advocacy” and urging that it be restricted.<sup>404</sup> The Bipartisan Campaign Reform Act ultimately changed the express advocacy definition to cover any ad that “refers to a clearly identified [federal] candidate” within sixty days of the election.<sup>405</sup> And the Supreme Court upheld the new rule, citing among other things the need to close the loophole.<sup>406</sup> The original narrow restriction set forth by the Court proved so easy to circumvent that this circumvention created considerable pressure for a broader restriction.

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

The main advantages of focusing on how the work is promoted and framed would thus disappear. Such a focus offers the prospect that (1) the material would still remain distributable when properly promoted, and (2) courts could apply the rule by focusing on the objective terms of the work and its advertising, while minimizing investigations of distributors’ or authors’ hidden intentions. But the attempts to prevent end runs, code words, and exploitation of loopholes will tend to make it harder to distribute the material even to law-abiding buyers, since people will always suspect that the supposed attempt to focus on law-abiding buyers is just a sham, and that the real market is criminals. And courts may then have to return to trying to determine distributors’ or authors’ presumed intentions, now by asking whether, for instance, a statement that “Here’s how common copyright piracy sites are” is an insincere cover for what the author really wanted to say, which is “Here’s how you can infringe copyright.”

So on balance, a focus on whether the work panders to the criminal users will probably do more harm than good. It offers only a small degree of protection from crime—the premise of the proposed distinction, after all, is that the work will still remain available if it’s promoted in a way that isn’t aimed at

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403. 424 U.S. 1, 43 (1976).

404. *McConnell v. FEC*, 540 U.S. 93, 132 (2003).

405. 2 U.S.C. § 434(f)(3)(A)(i) (2000 & Supp. II 2002).

406. *McConnell*, 540 U.S. at 193-94.

a criminal audience. It will likely be hard to accurately and fairly apply. And it carries the risk that the narrow restrictions will end up growing into broad ones.

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

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

It would be a mistake, though, to protect such purely factual speech less than expressly political speech.<sup>407</sup> Information is often especially useful to people’s political decisionmaking when it comes to them as just the facts, without the author’s political spin. Many newspapers generally operate this way, at least most of the time: They give readers the facts on the news pages, and usually save the policy conclusions for the editorial page.

Some of the news articles include commentary from both sides as well as the news, but many don’t. They present just the information, in the hope that readers will be able to use that information—for instance, that secret wiretaps were employed on this or that occasion—to make up their own minds. This is a legitimate and useful way of informing the public.

Moreover, a rule distinguishing purely factual accounts from factual accounts that are coupled with political commentary seems easy to evade, even more so than the “pandering” rule discussed in the preceding pages. Just as the Court saw “little point in requiring” advertisers who sought constitutional protection to add an explicit “public interest element” to their advertising of prices, “and little difference if [they did] not” add such an element,<sup>408</sup> so there

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

408. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-65 (1976). Of course, the claim here is that such factual assertions should generally be fully protected, unlike commercial speech, which gets a lower level of protection. But the lower protection offered to commercial speech comes from its subject matter, not its being purely factual. (After all, even commercial advertising that is coupled with political advocacy still remains merely commercial advertising. *See Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562 n.5 (1980).) The *Virginia Pharmacy* quotes simply

seems to be little benefit in requiring people to add political advocacy boilerplate in order to make their factual assertions constitutionally protected.<sup>409</sup>

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

##### 1. Focusing on whether the speech facilitates severe harms

###### a. Generally

Some speech facilitates very grave harms: the possible construction of a nuclear bomb or a biological weapon, the torpedoing of a troopship, or the murder of witnesses, abortion providers, or boycott violators. Some facilitates less serious harms: drugmaking, suicide,<sup>410</sup> burglary, or copyright infringement.

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show that the purely factual component of speech doesn't itself justify lower protection than when the speech is set forth together with its political implications.

409. See, e.g., books cited *supra* note 98. The first, *Improvised Modified Firearms*, describes how people have throughout recent history made guns themselves, and argues that "[t]he message is clear: if you take away a free people's firearms, it will make others. As these pages demonstrate, the methods, means, and technology are simple, convenient, and in place." TRUBY & MINNERY, *supra* note 98, at outside back cover. The second, *Home Workshop Guns for Defense and Resistance*, describes "the methods, means, and technology," and thus helps show whether they are indeed "simple, convenient, and in place." HOLMES, *supra* note 98. There is little reason to conclude that the two books should be constitutionally protected if they are published in one volume, but that the second book should be unprotected if published separately, because it lacks the political argument that the first book provides. Both books, incidentally, come from the same publisher.

410. See Criminal Code Amendment (Suicide Related Material Offences), Austl. H.R. 4150, § 474.29A(2)(b), (2)(b)(ii), (2)(c)(iii) (2004) (proposing a ban on electronically distributing material that "directly or indirectly" "provides instruction on a particular method of committing suicide" with the intent that "the material . . . be used by another person to commit suicide"); Criminal Code Act, 1995, § 5.2(3) (Austl.) (defining "intention" as including cases where the actor is "aware that [a result] will occur in the ordinary course of events," thus covering what the Model Penal Code would call "knowledge" as well as "intent"); Rebecca Sinderbrand, *Point, Click and Die*, NEWSWEEK, June 30, 2003, at 28 (stating that a woman's family is suing the operator of a suicide information Web site that the woman seemingly used to learn how to hang herself); *id.* (quoting prosecutor saying that "[w]hen we can definitely prove that someone assisted a suicide, we'll prosecute, no matter what form that help takes"); David Wharton, *Librarians Rely on Book Sense, Reviews in Stocking Shelves*, L.A. TIMES, Dec. 25, 1986, § 4, at 34 (describing a library's deciding not to order a suicide manual because of a warning from the city attorney about the risk of liability); Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech*, 34 ARIZ. L. REV. 231, 286 n.357 (1992) (suggesting that suicide manual publishers might be liable under current tort law, though concluding this is unlikely); *cf.* Jerry Hunt, *How to Kill Yourself Using the Inhalation of Carbon Monoxide Gas*, at <http://www.jerryhunt.org/JerryHunt/kill.asp> (last visited Jan. 15, 2004) (found using a Google search for "how to kill yourself").

When legislatures decide how to deal with dual-use technologies, they normally and properly consider how severe the harmful uses can be. Machine guns and VCRs can both be used for entertainment as well as for criminal purposes. Yet machine guns are much more heavily regulated, because their illegal uses are more dangerous.<sup>411</sup> It's likewise appealing to have the constitutional protection of crime-facilitating speech turn to some extent on the magnitude of the crime being facilitated.

But these severity distinctions are much harder for courts to draw in constitutional cases than they are for legislatures to draw when drafting statutes. Courts are understandably reluctant to decide which crimes are, as a matter of constitutional law, serious and which—despite the legislature's assertions to the contrary—are not serious enough. At times, the Supreme Court has been so concerned about this difficulty that it has asserted that such line-drawing is actually impermissible.<sup>412</sup> In other cases, the Court has been willing to draw such constitutional severity lines,<sup>413</sup> and I think such line-

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411. Technologies that facilitate copyright infringement have traditionally been protected so long as they have the potential for "substantial noninfringing uses." Even if most uses are likely to be illegal, so long as a substantial number of uses—current or future—are legal, courts have judged it better to tolerate both the legal uses and the illegal ones than to prevent both. *See supra* text accompanying note 306. But where risk of death is involved, the calculus has been different. Machine guns do have substantial noninfringing uses: People collect them, and use them for target-shooting, though naturally in exercises different from normal single-shot target-shooting. Nonetheless, civilians are generally banned from owning machine guns—except for the some 100,000 machine guns grandfathered from before the ban, *see* GARY KLECK, *TARGETING GUNS* 108 (1997)—because their potential criminal use is seen as harmful enough to justify such a ban. The actual criminal uses of machine guns seem fairly rare, and machine guns are actually not dramatically more dangerous in criminal hands than non-machine gun firearms. *See id.* at 108. But because machine guns are seen as having less value than other firearms (because they aren't particularly effective for self-defense and their chief lawful civilian use is thus entertainment), and as posing more risk of harm than other entertainment devices such as VCRs, they are more heavily regulated than either sort of device.

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

[B]y considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.

*See also* *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (taking a similar view in the Fourth Amendment context); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985) (likewise); Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1961-67 (2004) (discussing these cases).

413. Some cases have drawn lines based on a crime's inherent severity. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding that shooting at a fleeing suspect is an unreasonable seizure unless there is probable cause to believe that the suspect is guilty of a



drawing is theoretically defensible (as I discuss in much more detail elsewhere<sup>414</sup>). But in practice, most constitutional severity distinctions that are available for crime-facilitating speech would likely be drawn at quite low levels, and would authorize the restriction of a wide range of valuable speech.

For instance, the Court has at times made constitutional rules turn on the legislature's own judgments of severity, as reflected in the sentences the legislature has authorized for a crime. Thus, for instance, the Court has concluded that the Fourth Amendment doesn't let the police engage in some seizures when the underlying offense doesn't carry the risk of jail time.<sup>415</sup> But the most obvious legislatively defined lines that the courts can adopt, such as the lines between crimes and torts, jailable offenses and nonjailable offenses, and between felonies and misdemeanors, would classify most of the examples in the Introduction as being on the "severe" side of the line: For example, a newspaper article that provides the URL of an infringing Web site may facilitate criminal copyright infringement, which is potentially a felony.<sup>416</sup>

Likewise, if courts rely on fairly bright-line inherent severity distinctions, such as between violent crimes and nonviolent crimes,<sup>417</sup> most such distinctions would authorize restricting a wide range of crime-facilitating speech. Chemistry textbooks that describe explosives, novels that describe nonobvious ways of poisoning someone, newspaper articles that mention the name of a crime witness, and publication of the names of boycott violators or strikebreakers can all facilitate violent crimes.

Courts could try to draw the line at a higher level, without pegging it to some established or intuitively obvious distinction. But such ad hoc line-drawing may prove unpredictable both for speakers and for prosecutors; and it may also over time lead the severity line to slip lower and lower, when courts conclude—as the Supreme Court has done as to the Cruel and Unusual Punishment Clause—that they ought to "defer[]" to "rational legislative judgment" about the "gravity of the offense."<sup>418</sup>

Courts may be reluctant to distinguish, for instance, bans on bomb-making information from bans on drugmaking information,<sup>419</sup> given that many people

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violent crime, as opposed to just a property crime). Some have turned on the legislature's own severity distinctions—for instance, based on whether the crime is punishable by jail time or only by a fine. And in some contexts, the Court has decided case by case that a particular offense is severe enough to justify a special constitutional rule: For instance, the First Amendment child pornography exception is based partly on the Court's conclusion that sexual exploitation of children is such a serious crime. *See New York v. Ferber*, 458 U.S. 747, 764 (1982).

414. Volokh, *Crime Severity and Constitutional Line-Drawing*, *supra* note 412.

415. *See id.* at 1971-75.

416. *See* 18 U.S.C. § 2319 (2000); 17 U.S.C. § 506 (2000).

417. *See* Volokh, *Crime Severity and Constitutional Line-Drawing*, *supra* note 412, at 1967-71.

418. *Id.* at 1975-82.

419. So far Congress has treated the two differently. *Compare* 18 U.S.C. § 842(p)

find drug manufacturing to be as deadly as bomb manufacturing<sup>420</sup> (and even if the judges might themselves have taken the contrary view had they been legislators). Likewise, once courts have upheld bans on drugmaking and bomb-making information, they may be reluctant to overturn a similar legislative judgment as to information that helps people break into banks or computer security systems: Though these are just property crimes rather than violent crimes or drug crimes, they are felonies that in the aggregate can lead to billions of dollars in economic harm. And once courts uphold bans on that sort of crime-facilitating information, they may find it hard to distinguish, say, information that describes how people evade taxes, that points to copyright-infringing sites, or that discusses holes in copy protection schemes.

Such deference to legislatures seems particularly likely because many judges would find it both normatively and politically attractive. Deference avoids a conflict with legislators and citizens who may firmly and plausibly argue that certain crimes are extremely serious, and who may resent seeing those crimes treated as being less constitutionally significant than other crimes. Deference shifts from the judges the burden of drawing and defending distinctions that don't rest on any crisp rules. Deference fits the jurisprudential notion that arbitrary line-drawing decisions, such as arbitrary gradations of crime, arbitrary threshold ages for driving or drinking, and so on—decisions where one can logically deduce that there's a continuum of gravity or maturity, but where one can't logically deduce the proper dividing line—are for the legislature rather than for judges.<sup>421</sup>

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

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

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(2000) (banning the distribution of certain kinds of speech that facilitate bomb-making), *with* S. 1428, 106th Cong. § 9 (1999) (unsuccessfully proposing a similar ban as to speech related to drugmaking). The question is what might happen if Congress does enact the ban on drugmaking information.

420. *See Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in the judgment) (arguing that drug crimes are extremely serious).

421. Volokh, *Crime Severity and Constitutional Line-Drawing*, *supra* note 412, at 1978-82.

homicides. Each such crime is of course a tragedy, but a slightly increased risk even of death—a few extra lives lost on top of the current level of over 17,000 homicides per year<sup>422</sup>—is part of the price we pay for the First Amendment, and for that matter for other Bill of Rights provisions.

b. *Extraordinarily severe harms*

So it seems to me that dual-use crime-facilitating speech should not be restrictable even though it may help some readers commit some very serious crimes. Yet this does not necessarily dispose of speech that may cause extraordinarily severe harms—speech that, for instance, might (even unintentionally) help terrorists synthesize a smallpox plague, or might help foreign nations build nuclear bombs.<sup>423</sup>

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

But it's not clear that those rules, developed against the backdrop of ordinary dangers, can dispose of dangers that are orders of magnitude greater. This is why the usual Fourth Amendment rules related to suspicionless home searches might be stretched in cases involving the threat of nuclear terrorism;<sup>424</sup> why we continue to have a debate about the propriety of torture in the ticking nuclear time bomb scenario;<sup>425</sup> and why, in a somewhat different

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422. See Nat'l Ctr. for Injury Prevention and Control, WISQARS Injury Mortality Reports, 1999-2002, *supra* note 181 (2002 data).

423. It's not clear that the H-bomb design information involved in *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), often seen as the classic example of such harmful speech, in fact seriously jeopardized national security. Building a hydrogen bomb requires an industrial base that only advanced countries possess, and those countries likely have scientists with the knowledge needed to deduce how such a bomb could be constructed. (Hydrogen bombs, which are fusion bombs, are much harder to build than fission bombs.) This would probably have been true even when *Progressive* was decided, twenty-five years after the H-bomb was invented, and it would pretty certainly be true now. See, e.g., L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55, 59 (1990). Nonetheless, the case does provide a useful hypothetical: What should be done if someone did want to publish information that would make it much easier for less advanced countries, or even sophisticated nongovernmental groups, to build either fission or fusion bombs, or to make other weapons—such as biological weapons—that could kill tens of thousands of people? See, e.g., Christopher F. Chyba & Alex L. Greninger, *Biotechnology and Bioterrorism: An Unprecedented World*, 46 SURVIVAL 143, 148-53 (2004).

424. See, e.g., Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1279 (2004).

425. See, e.g., Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 48-49 (1991); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004); ALAN DERSHOWITZ, WHY TERRORISM WORKS 141, 158-63 (2002); see generally TORTURE: A COLLECTION

context, the Constitution provides for the suspension of habeas corpus in cases of rebellion or invasion.<sup>426</sup>

Likewise, avoiding extraordinary harms—especially harms caused by information that helps others construct nuclear and biological weapons,<sup>427</sup> weapons that can kill tens of thousands at once—may justify restrictions on speech that would facilitate the harms.<sup>428</sup> The government might, for instance, prohibit publication of certain highly dangerous information, even when the information is generated by private entities that have never signed nondisclosure agreements with the government.<sup>429</sup> In effect, research in these fields could then only be conducted by government employees or contractors, or at least people who are operating with government permission: They might be able to share their classified work product with others who have similar security clearances, but they couldn't engage in traditional open scientific discussion.

The restrictions would indeed interfere with legitimate scientific research, and with debates about public policy that require an understanding of such scientific details.<sup>430</sup> For instance, if people weren't free to explain exactly how the terrorists might operate, then it would be harder to debate, for instance, whether the distribution of certain laboratory devices or precursor chemicals should be legal or not, or whether our civil defense strategies are adequate to deal with the possible threats. The restrictions may even prove

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(Sanford Levinson ed., 2004).

426. U.S. CONST. art. I, § 9, cl. 2.

427. See, e.g., Chyba & Greninger, *supra* note 423, at 148-53 (pointing out the danger posed by legitimate scientific research such as the 2001 publication of a paper that detailed the construction of a vaccine-resistant mousepox virus, technology that might also be usable to create a vaccine-resistant smallpox virus).

428. A standard cost-benefit analysis might ask what the expected value of the harm would be—the magnitude of the harm multiplied by its probability. Nonetheless, here the probability of harm is so hard to estimate that it can't be a practically useful part of the test. I would therefore (tentatively) support the restriction of speech that explains how nuclear or biological weapons can be built, without asking courts to guess the likelihood that the speech will indeed be used this way; and I suspect that courts will in fact allow such restrictions.

This question of course echoes the opinions in *Dennis v. United States*, 341 U.S. 494 (1951). See *id.* at 510 (plurality); *id.* at 551-52 (Frankfurter, J., concurring in the judgment); *id.* at 570 (Jackson, J., concurring); *id.* at 588-89 (Douglas, J., dissenting), though, as I argue below in note 431, speech that may help facilitate very serious harms may be less protectable than speech that advocates very serious harms.

429. As I mentioned in note 55, this Article sets aside what rules constrain the government acting as employer or contractor, when it tries to control disclosures by people who learned information while working for the government.

430. Consider, for instance, the mousepox virus paper discussed in Chyba & Greninger, *supra* note 427: By pointing out that vaccine-resistant pox viruses can be created without vast difficulty, the paper both advanced scientific knowledge and helped prove that this was a threat that governments need to confront—since of course even without the paper terrorists or hostile governments might have been able to perform the same work. At the same time, though, the paper also unfortunately exacerbated the threat.

counterproductive, especially if they are badly designed or if classified research into countermeasures is inevitably much less effective than open research: They might interfere with the good guys' ability to produce effective defenses—for instance, effective defenses against biological weapons, or effective detection mechanisms for smuggled nuclear bombs—more than they interfere with the bad guys' ability to create and deploy weapons.

The restrictions would thus require more unchallenged trust of the government than free speech law normally contemplates. And there would indeed be some contested cases (for instance, what about discussions of possible gaps in security at nuclear power plants?); there would be a danger that the restrictions would over time broaden to include less dangerous speech; and there would be some undermining of our culture of political and scientific freedom.<sup>431</sup>

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

As importantly, whether I'm right or wrong, chances are that judges will indeed allow this sort of restriction, as the trial court did for the H-bomb plans in *United States v. Progressive, Inc.*<sup>432</sup> And if judges do uphold such restrictions, it's important to have a ready framework that would cabin the

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

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

432. 467 F. Supp. 990 (W.D. Wis. 1979).

restrictions in a way that prevents them from spreading to other, less dangerous kinds of speech.

The best way to do that, I think, is to have the judges use a test that explicitly turns on the extraordinary harms that the speech facilitates, harms on the magnitude of tens of thousands of deaths in one incident, which are far outside the normal range of danger that free speech and other liberties can help create. Rationalizing restrictions on such speech in other ways—for instance, by characterizing all crime-facilitating speech as definitionally unprotected conduct rather than speech,<sup>433</sup> by characterizing the laws punishing the speech as generally applicable laws that are immune from serious First Amendment scrutiny,<sup>434</sup> or by distinguishing political advocacy from scientific speech<sup>435</sup>—risks legitimizing much broader prohibitions that would apply even to less harmful speech, speech that ought to remain protected.<sup>436</sup>

## 2. *Focusing on whether the speech is very helpful to criminals*

Some information is especially helpful to criminals: Committing the crime is considerably easier when the information is available. All things being equal, detailed information (e.g., here's how you can make a silencer<sup>437</sup>) is more helpful than general information (e.g., resist the temptation to brag about your crimes<sup>438</sup>). Nonobvious information is more helpful than the obvious. Information that is only available from one source—for instance, a mimeographed list of the names of shoppers who aren't complying with a boycott, distributed only by the organization whose members stand outside the stores taking down names<sup>439</sup>—is more helpful than information that's also available in lots of other places, such as information about how marijuana is grown.<sup>440</sup>

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433. See *supra* note 146 and accompanying text; Volokh, *Speech as Conduct*, *supra* note 151, pt. III.

434. See *supra* notes 147-51 and accompanying text; Volokh, *Speech as Conduct*, *supra* note 151, pt. II.

435. See *supra* Part III.A.3.a.

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

437. See, e.g., FERAL, *supra* note 251, ch. 3.

438. See, e.g., *id.* ch. 8.

439. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

440. See, for example, *Growing Marijuana: How to Grow Marijuana Guide*, at <http://www.growing-marijuana.org/> (last updated Oct. 19, 2004), or Google “growing marijuana.”

Restrictions on crime-facilitating speech would have to in some measure distinguish speech that provides substantial assistance from speech that provides very little assistance.<sup>441</sup> Some information is so obvious or so general—for instance, it’s easier to get away with murder if you hide the body well, cyanide is poisonous, and so on—that criminals are very likely to know it already, or figure it out with a moment’s thought. Restricting such speech would yield little benefit, but impose a large First Amendment cost, since such a broad restriction would cover a huge range of entertainment, news reporting, and even ordinary conversation. The line between the substantially crime-facilitating and the insubstantially crime-facilitating would necessarily be hard to draw, since generality and obviousness are such subjective criteria; and the line’s vagueness would necessarily cause uncertainty and potential overdeterrence of some people and underdeterrence of others. Nonetheless, the line would indeed have to be drawn.

One could also distinguish crime-facilitating speech based on how easily the information is available from other sources. If a work is available widely enough, then any particular copy will be of little marginal value to a criminal—for instance, if one Web site containing *The Anarchist Cookbook* were unavailable, the criminal would use another.<sup>442</sup>

The government can argue that it’s trying to reduce the availability of such works by going after each posting, just as it tries to prosecute each drug dealer and illegal gun seller. But sometimes it might seem unlikely that the government can effectively reduce the work’s availability: The work might be available from overseas mirror sites, or the speech restriction might not even prohibit domestic mirror sites (for instance, if the restriction applies only to copies of the work that are posted with the intent to facilitate crime, and the mirror copies are posted without such an intent).<sup>443</sup> If that’s so, then attempts to restrict such works may be condemned on the ground that they don’t substantially advance the government interest in preventing crime, and thus impose a free speech cost with no corresponding benefit.<sup>444</sup>

On the other hand, as Part III.A.3 points out, speech about particular people, places, or events—for instance, speech that reveals the existence of a wiretap, the name of a formerly unidentified crime witness, people’s social

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441. Some general crime facilitation laws already do that: For instance, of the six jurisdictions that explicitly define the crime of “criminal facilitation,” three limit it to knowingly providing “substantial” assistance, 9 GUAM CODE ANN. § 4.65 (2004); N.D. CENT. CODE § 12.1-06-02 (2003); TENN. CODE ANN. § 39-11-403 (2004), and three do not, ARIZ. REV. STAT. ANN. § 13-1004 (West 1997); KY. REV. STAT. ANN. § 506.080 (Banks-Baldwin 2004); N.Y. PENAL LAW § 115.00 (McKinney 2004).

442. See, e.g., N.D. CENT. CODE § 12.1-06-02 (“The ready lawful availability from others of the goods or services provided by a defendant is a factor to be considered in determining whether or not his assistance was substantial.”).

443. See *supra* text accompanying notes 334-36.

444. See cases cited *supra* note 240.

security numbers, or the passwords to computer systems—is less likely to be available in many places, and restrictions on such speech are therefore more likely to be effective. Each location that contains such speech will thus provide a substantial marginal benefit to criminal users. And preventing such speech from being posted will thus provide a substantial marginal benefit to people or government projects that might otherwise have been victimized.

#### *E. Distinctions Based on Imminence of Harm*

Some crime-facilitating speech, such as a warning that the police are coming, facilitates imminent harm or imminent escape from justice. In the incitement test, which is applicable to crime-advocating speech, imminence is an important requirement, perhaps the most important one.<sup>445</sup>

But there is little reason to apply such a requirement to crime-facilitating speech. The standard argument for punishing only advocacy of imminent crime is that such advocacy is especially harmful: It increases the chance that people will act right away, in the heat of passion, without any opportunity to cool down or to be dissuaded by counterarguments.<sup>446</sup>

Crime-facilitating speech, though, generally appeals to the planner, not to the impulsive criminal. When someone tells a criminal how to build a particularly sophisticated bomb, that information is at least as dangerous when it's said months before the bombing as when it's said the day before the bombing.<sup>447</sup> It's hard to see, then, why such speech should be treated as constitutionally different depending on whether it facilitates imminent crime or the criminal's future plans.

#### *F. Distinctions Between Criminal Punishments and Civil Liability*

Finally, one might distinguish restrictions on crime-facilitating speech based on whether they criminalize such speech or just impose civil liability. This, though, would be unsound. If crime-facilitating speech is valuable enough to be protected against criminal punishment, then it should be protected even

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445. See *supra* Part III.B.2.

446. See, e.g., *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.”).

447. Occasionally, crime-facilitating information may be useful only for a limited time—for instance, when it reveals a password that's changed every couple of days—but that's unusual.



against civil liability. If it isn't valuable enough to be protected against civil liability, then there is little reason to immunize it against criminal punishment.<sup>448</sup>

To begin with, if a lawsuit leads the court to enjoin the speech, after a trial on the merits,<sup>449</sup> then the speech *will* become criminally punishable. If the defendant refuses to stop distributing the speech after such an injunction is issued, he may be sent to jail for criminal contempt.

Furthermore, the threat of punitive damages or even compensatory damages can be a powerful deterrent to speech, as the Court recognized in *New York Times v. Sullivan*.<sup>450</sup> The threat of losing all one's assets—which for noncorporate speakers will likely include their homes and life's savings—may, for many speakers, be a deterrent not much smaller than the threat of jail. And this deterrent effect is further increased by the risk that damages will be awarded without proof beyond a reasonable doubt and the other procedural protections available in criminal trials.

In some fields of tort law, where actors reap most of the social benefit of their conduct, purely compensatory damages may not have as large a deterrent effect as would the threat of prison or financial ruin. Such damages would merely require actors to internalize the social costs as well as the social benefits of their conduct, which would in theory foster a socially optimal level of the conduct by providing just the right amount of deterrence. If your conduct (say, your using blasting for construction on your property) produces more benefits than harms, then you will still engage in the conduct despite being held liable for the harm you cause—you would just use the profits from the beneficial effects of the conduct to pay for the damages needed to compensate victims for the harmful effects.<sup>451</sup> The availability of compensatory damages would only prevent the conduct if the conduct produces more total harm than benefit, and in such a situation we should want the conduct to be deterred.

But even if this argument works for some kinds of conduct, there's no reason to think that compensatory damages for speech will provide such a socially optimal deterrent. Valuable speech is generally a public good, which has social benefits that aren't fully internalized (or aren't internalized at all) by

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448. See, e.g., *Bridges v. California*, 314 U.S. 252 (1941) (treating criminal contempt punishment for speech as tantamount to any other criminal punishment for speech).

449. See, e.g., cases cited *supra* note 24, which involve speech that facilitates copyright infringement; *City of Kirkland v. Sheehan*, No. 01-2-09513-7 SEA, 2001 WL 1751590 (Wash. Super. Ct. May 10, 2001) (enjoining the publication of social security numbers); see also Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 *DUKE L.J.* 147, 179 (1998) (discussing courts' increasing willingness to enjoin even libel, and the general constitutionality of such permanent injunctions when directed at unprotected speech).

450. 376 U.S. 254, 279 (1964).

451. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 64-73 (1987).

the speakers.<sup>452</sup> Requiring people who communicate dual-use speech to pay for its harms when they aren't paid for its social benefits will thus overdeter many speakers.

At the same time, purely compensatory liability will also underdeter many other speakers, who are relatively judgment-proof. If a college student is thinking about setting up a Web site that mirrors some crime-facilitating material, the risk of compensatory liability in the highly unlikely event that his particular site will lead to harm will probably do little to stop him.<sup>453</sup> The compensatory damages award against the *Hit Man* murder manual publishers has actually led the book to become *more* available, because several people who aren't worried about liability have posted copies on the Web; the copies are now available for free to the whole world, and not just by mail order from Paladin Press. The speech has simply been shifted from easily deterrable speakers to the harder-to-deter ones. If the legal system really wants to suppress the speech (assuming that the speech can practically be suppressed), it needs a more forceful tool than compensatory damages.

The Court has routinely declined to distinguish criminal liability from civil liability for First Amendment purposes, at least when the speaker is acting recklessly, knowingly, or intentionally.<sup>454</sup> As to crime-facilitating speech, this approach seems correct.

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452. Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 555 (1991) (“[B]ecause information is a public good, it is likely to be undervalued by both the market and the political system. . . . Consequently, neither market demand nor political incentives fully capture the social value of public goods such as information. Our polity responds to this undervaluation of information by providing special constitutional protection for information-related activities.”).

453. Some college students might worry about litigation: The recording industry's lawsuits against college students for illegally trading copyrighted works may have deterred some such trading. Compare Lee Rainie et al., *The State of Music Downloading and File-Sharing Online 4*, at [http://www.pewinternet.org/pdfs/PIP\\_Filesharing\\_April\\_04.pdf](http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf) (Apr. 2004) (reporting that peer-to-peer file sharing declined after the music industry's lawsuits against illegal file sharers, and that 38% of music downloaders reported that they are downloading less because of the lawsuits), with Thomas Karagiannis et al., *Is P2P Dying or Just Hiding?*, at <http://www.caida.org/outreach/papers/2004/p2p-dying/p2p-dying.pdf> (Nov.-Dec. 2004) (reporting that peer-to-peer file sharing has not declined at all). But the chances that one's mirror page will be implicated in a future *Rice v. Paladin Enterprises*-like case seem so small—even smaller than the chances that one will be among the hundreds of people that copyright owners decide to sue—that many judgment-proof students are unlikely to be much deterred by this risk. ○

454. See, e.g., *Smith v. United States*, 431 U.S. 291 (1977) (upholding criminal liability for distributing obscenity, despite Justice Stevens's arguments in dissent, *id.* at 311-16, that only civil remedies should be allowed in such cases); *Garrison v. Louisiana*, 379 U.S. 64 (1964) (accepting the possibility of criminal penalties for libel, if the *New York Times v. Sullivan* standards are satisfied). *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), held that punitive damages may not be awarded in private figure libel cases when the speaker is merely negligent, which suggests that criminal liability would likewise be improper in such cases; but this judgment rested on the special dangers of holding speakers liable based on honest mistakes. *Id.* at 350.

G. *Summary: Combining the Building Blocks*

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

Here, though, is my bottom line, which I can present quickly because it builds so heavily on the long discussion above. In my view (which I express in part with some confidence and in part tentatively), there should indeed be a First Amendment exception for speech that substantially facilitates crime, when one of these three conditions is satisfied:

(1) When the speech is said *to a few people who the speaker knows are likely to use it to commit a crime or to escape punishment* (classic aiding and abetting, criminal facilitation, or obstruction of justice):<sup>455</sup> This speech, unlike speech that's broadly published, is unlikely to have noncriminal value to its listeners. It's thus harmful, it lacks First Amendment value, and any such exception is unlikely to set a precedent for something materially broader. I feel quite confident of this.

(2) When the speech, even though broadly published, has *virtually no noncriminal uses*—for instance, when it reveals social security numbers or computer passwords:<sup>456</sup> This speech is likewise harmful and lacks First Amendment value. Here, I'm more tentative, largely because I think the line-drawing problems increase the risk that valuable speech will be erroneously denied protection, and because I think this exception may indeed eventually be used to support other, less justifiable restrictions on broadly published speech. Nonetheless, it seems to me that these risks are sufficiently small to justify allowing a narrow exception.

(3) When the speech facilitates *extraordinarily serious harms, such as nuclear or biological attacks*:<sup>457</sup> This speech is so harmful that it ought to be restricted even though it may have First Amendment value. Here, I'm again somewhat tentative, because I think there are serious definitional problems here, a near certainty that some valuable speech will be lost, and a substantial possibility that the restriction may lead to broader ones in the future. Nonetheless, extraordinary threats sometimes do justify extraordinary measures, if care is taken to try to keep those measures limited enough that they don't become ordinary.

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

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455. See *supra* Part III.A.2.a.

456. See *supra* Part III.A.2.b.

457. See *supra* Part III.D.1.

(1) There is a plausible argument that speech should be restrictable when *its only value (other than to criminals) seems to be entertainment*.<sup>458</sup> The Court has rightly held that entertainment should generally be protected because it often comments on moral, political, spiritual, or scientific matters—but this need not mean that particular crime-facilitating details in works of entertainment should be categorically protected even when they're unnecessary to the broader themes. At the same time, any special exception for entertainment is likely to be not very beneficial, and is likely to lead to substantial risks of error, excessive caution on the part of authors, and potential slippage to broader restrictions.

(2) Though *Ginzburg v. New York*, which held that how a work is marketed may affect its First Amendment status, does not enjoy a great reputation, it may actually make a surprising amount of sense: When a work is dual-use, *some marketing or framing of the work may be intended to appeal predominantly to those who would engage in the harmful and valueless use*, rather than in the valuable use.<sup>459</sup> Such marketing or framing might be outlawed without outlawing the underlying information. Nonetheless, here too the marginal benefit of banning works that are marketed or framed as crime-facilitating is low enough, and the potential costs are high enough, that on balance such bans are probably not worthwhile.

Finally, I feel fairly confident that some other potential distinctions—for instance, those based on the speaker's intent,<sup>460</sup> on whether the speech is about scientific questions rather than political ones,<sup>461</sup> or on whether it is on a matter of "private concern," "public concern," or "unusual public concern"<sup>462</sup>—are not terribly helpful.

#### CONCLUSION

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

(1) Many important First Amendment problems—such as the ones with which the Introduction begins—turn out to be about crime-facilitating speech. They may at first seem to be problems of aiding and abetting law, national security law, copyright law, invasion of privacy law, or obstruction of justice law. But they are actually special cases of the same general problem. Solving the general problem may thus help solve many specific ones.

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458. See *supra* Part III.A.3.c.

459. See *supra* Part III.C.1.

460. See *supra* Part III.B.2.

461. See *supra* Part III.A.3.a.

462. See *supra* Part III.A.3.d.

(2) Precisely because the specific problems are connected, they ought to be resolved with an eye towards the broader issue. Otherwise, a solution that may seem appealing in one situation—for instance, concluding that the *Hit Man* murder manual should be punishable because all recklessly or knowingly crime-facilitating speech is unprotected<sup>463</sup>—may set an unexpected and unwelcome precedent for other situations.

(3) Much crime-facilitating speech has many lawful, valuable uses.<sup>464</sup> Among other things, knowing just how people commit crimes can help the law-abiding learn which security holes need to be plugged, which new laws need to be enacted, and which existing laws are so easy to avoid that they should be either strengthened or repealed. Similarly, knowing how the police are acting—which wiretaps they’re planting or which records they’re subpoenaing—can help the law-abiding monitor police misconduct, though it can also help criminals evade police surveillance. As with many other dual-use products, the very things that make dual-use speech useful in the right hands are often what make it harmful in the wrong hands.

(4) Some initially appealing answers—for instance, punishing intentionally crime-facilitating speech but not knowingly crime-facilitating speech, allowing crime-facilitating speech to be restricted when the restriction is done using laws of general applicability, and applying strict scrutiny—ultimately prove not very helpful.<sup>465</sup> Whatever one might think is the right answer here, I hope I’ve demonstrated that these are wrong answers, or at least seriously incomplete ones. Likewise, it’s wrong to say that works such as *Hit Man* have no noncriminal value,<sup>466</sup> or to think that such works could be easily banned on the ground that the publisher’s purpose is to promote crime:<sup>467</sup> Perhaps such works should indeed be restrictable, but they can’t be restricted on this ground.

(5) The problems with applying these initially appealing proposals to crime-facilitating speech suggest that the proposals may be unsound in other contexts, too. For instance, letting speakers be punished based on their inferred intentions—as opposed to either categorically protecting a certain kind of speech or letting protection turn on the speaker’s knowledge or recklessness rather than intention—may prove to be a mistake in a broader range of cases (though not in all cases).<sup>468</sup> Likewise for assuming that strict scrutiny can

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463. See, e.g., *supra* note 47.

464. See *supra* Part I.B.

465. See *supra* Parts III.B.2, II.A, and II.B.

466. Compare, e.g., *supra* note 391 (quoting the *Rice v. Paladin Enterprises* decision’s arguments to this effect), with *supra* Part I.B.4 (arguing that most of *Hit Man*’s readers likely aren’t would-be criminals, but are merely curious or interested in vicarious thrills, which is a form of noncriminal value).

467. See *supra* text accompanying notes 331-33.

468. Thus, for instance, it’s not clear whether the Court’s newfound focus on intent in threat cases is wise. See *Virginia v. Black*, 538 U.S. 343, 359-60 (2003); cf. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283, 308

provide the answer,<sup>469</sup> or for assuming that speech may generally be restricted by laws of general applicability, even when the law applies to the speech precisely because of the communicative impact that the speech has.<sup>470</sup> Conversely, other approaches—such as, for instance, focusing on whether the speech is said only to listeners whom the speaker knows to be criminal—may be promising in other contexts, such as criminal solicitation.<sup>471</sup>

(6) The existence of the Internet may indeed make a significant difference to the analysis.<sup>472</sup> Though crime-facilitating speech on the Internet should be treated the same as crime-facilitating speech elsewhere, the creation of the Internet makes it much more difficult to fight crime-facilitating speech anywhere.<sup>473</sup>

In 1990, banning *Hit Man* or *The Anarchist Cookbook* would have likely made it substantially harder for people to get the information contained in those books. Today, the material is a Google search away, and thus easier to access than ever before (despite the lawsuit that led to the *Hit Man* book being taken off the market): The first entry returned by the search for the text “hit man,” for instance, pointed me to a site that contained the book’s text, and another Google search—for “hit man,” “manual for independent contractors,” and “rex feral,” the pseudonym of the author—found seven more copies. And because many such sites appear to be mirror sites run by people who intend only to fight censorship, not to facilitate crime,<sup>474</sup> they are legally immune from laws that punish intentionally crime-facilitating speech.<sup>475</sup>

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(2002) (describing the pre-*Black* lower court case law, which generally did not require intent); see also Robert Austin Ruescher, *Saving Title VII: Using Intent to Distinguish Harassment from Expression*, 23 REV. LITIG. 349 (2004) (proposing an intent test for hostile environment harassment cases, which I think would be a mistake for reasons similar to those discussed in Part III.B.2). Likewise, I think some lower courts have erred in concluding that knowledge that speech will cause a certain harm, or recklessness about that possibility, should suffice to justify restricting the speech. See *Taylor v. K.T.V.B., Inc.*, 525 P.2d 984 (Idaho 1974) (holding that an invasion of privacy claim could prevail if the jury found that the private facts were disclosed “with reckless disregard that the disclosure would embarrass or humiliate” the plaintiff, by analogy—in my view, misguided analogy—to *New York Times v. Sullivan*); *Falwell v. Flynt*, 797 F.2d 1270, 1275 (4th Cir. 1986) (allowing an intentional infliction of emotional distress claim on the same theory), *rev’d sub nom.* *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

469. See *supra* Part II.B.

470. See Volokh, *Speech as Conduct*, *supra* note 151.

471. See *supra* note 194.

472. This has generally not been my view for most areas of First Amendment law in cyberspace. See, e.g., Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299, 334 (2000); Volokh, *Cheap Speech and What It Will Do*, *supra* note 307, at 1846-47.

473. See Godwin, *supra* note 34 (making this point in the wake of the *Hit Man* case).

474. See, e.g., sites cited *supra* notes 335-36.

475. See, e.g., *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 252-53 (4th Cir. 1997) (stressing that the *Hit Man* publisher might be held liable because of its unusual stipulation, entered for purposes of the motion to dismiss, that it intended to help criminals).

To try to adequately suppress these sites, then, the U.S. government would have to prohibit *knowingly* crime-facilitating speech and not just intentionally crime-facilitating speech—a broad ban indeed, which may encompass many textbooks, newspapers, and other reputable publishers.<sup>476</sup> And even that would do little about foreign free speech activists who may respond to the crackdown by putting up new mirror sites, unless the United States gets nearly worldwide support for its new speech restriction. Moreover, unlike in other contexts, where making unprotected material just a little less visible may substantially decrease the harm that the material causes,<sup>477</sup> here most of the would-be criminal users are likely to be willing to invest a little effort into finding the crime-facilitating text. And a little effort is all they're likely to need.

This substantially decreases the benefits of banning crime-facilitating speech—though, as Part I.A described, it doesn't entirely eliminate those benefits—and thus makes it harder to argue that these benefits justify the costs. Broadly restricting all intentionally crime-facilitating speech, for instance,<sup>478</sup> might seem appealing to some if it will probably make it much harder for people to commit crimes. It should seem less appealing if it's likely to make such crimes only a little harder to commit, because the material could be freely posted on mirror sites.

Of course, this presupposes the current Internet regulatory framework, where the government generally leaves intermediaries, such as service providers and search engines, largely unregulated.<sup>479</sup> Under this approach, civil lawsuits or criminal prosecutions will do little to suppress the online distribution of *Hit Man* or *The Anarchist Cookbook*, even if the law purports to broadly ban knowingly crime-facilitating speech.

But say Congress enacts a law that requires service providers or search engines to block access by the provider's subscribers or search engine's users to any site, anywhere, that contains the prohibited crime-facilitating works. Presumably, the law would have to require that providers and search engines (a) block access to Web sites that are on a government-maintained list of sites containing those works, and (b) electronically examine the content of other sites for certain tell-tale phrases that identify the prohibited works. There would also have to be a way for prosecutors to quickly get new sites and phrases added to the prohibited lists.

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476. See *supra* Part I.B.

477. For instance, when the speech is libel, tangible copies that infringe copyright, speech that reveals private facts about a person, or obscene spam that's sent to unwilling viewers, reducing the dissemination of the speech would roughly proportionately reduce the harm done by that speech.

478. See, e.g., Part III.B.2.

479. See 47 U.S.C. § 230 (2000); *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). But see 17 U.S.C. § 512(d) (2000) (seeming to require search engine companies to remove links to copyright-infringing pages, when the companies are notified that the pages are infringing).

Service providers would also have to block access to any offshore relay sites that might make it possible to evade these U.S. law restrictions. This might indeed make the material appreciably harder to find, though of course not impossible (after all, the bomb recipes in *The Anarchist Cookbook* are also available, though perhaps in less usable form, in chemistry books).<sup>480</sup>

This law, though, would be much more intrusive—though perhaps much more effective—than any Internet regulation that we have today; and I suspect that such a law would face much greater opposition than, say, 18 U.S.C. § 842(p) (the bomb-making information ban) did.<sup>481</sup> This sort of control would return us, in considerable measure, to the sort of government power to restrict access to material that we saw in 1990: far from complete power, but still greater than we see today. Yet I doubt, at least given today's political balance, that such a proposal would succeed.<sup>482</sup> So the example of crime-facilitating speech shows how far the Internet has reduced the effectiveness of at least a certain form of government regulatory power—and how much would have to be done to undo that reduction.

Crime-facilitating speech thus remains one of the most practically and theoretically important problems, and one of the hardest problems, in modern First Amendment law. I hope this Article will help promote a broader discussion about how this problem should be solved.

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480. Cf. 18 PA. CONS. STAT. § 7626 (2004) (trying to institute a much narrower version of this aimed at ordering service providers to block access to child pornography); Emma-Kate Symons, *Labor Plan to Shield Kids from Net Porn*, AUSTRALIAN, Aug. 16, 2004, at 5 (discussing proposal aimed at ordering service providers to block access by children to hard-core pornography).

481. See *supra* note 2. Among other things, 18 U.S.C. § 842(p) (2000) prohibits only *intentionally* crime-facilitating speech (unless it's said to a particular person, rather than broadly published); the hypothetical new proposal would go after *knowingly* crime-facilitating speech. The hypothetical regulation would also mean more work and potential legal risk for service providers, including universities and businesses that provide their own Internet connections—powerful and reputable organizations that might object to the new obligations. And the regulation sounds like the very sort of national firewall that many Americans have condemned as repressive when it has been instituted by countries such as China.

Such a service provider mandate might also be an unconstitutional prior restraint, because it would coerce providers into blocking access to material even without a final judgment that the particular material was constitutionally unprotected. See Ctr. for Democracy & Tech., *The Pennsylvania ISP Liability Law: An Unconstitutional Prior Restraint and a Threat to the Stability of the Internet*, at <http://www.cdt.org/speech/030200pennreport.pdf> (Feb. 2003).

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