

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

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INTRODUCTION: SPEECH AS CONDUCT

When, if ever, should speech lose its First Amendment protection on the grounds that it’s really just conduct? Let us set aside restrictions of speech or expressive conduct based on its noncommunicative aspects, for instance because the speakers are blocking traffic or are being too loud.¹ Rather, let’s focus on situations in which speech is restricted because of the harm that flows from its content.

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

¹ See *United States v. O’Brien*, 391 U.S. 367, 381–82 (1968) (upholding a restriction on willful mutilation of Selective Service certificates because the restriction was “limited to the noncommunicative aspect of O’Brien’s conduct”).

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

- (a) Publishing a book that describes how to grow marijuana might constitute intentional or knowing aiding and abetting of a crime.²
- (b) Publishing a newspaper article or web site that points to an infringing site may constitute contributory copyright infringement.³
- (c) Publishing a news story that reveals the name of a witness, and thus unintentionally helps a criminal intimidate or kill that witness, may violate laws that bar knowingly, recklessly, or negligently facilitating crimes.⁴
- (d) Publishing a news story that reveals the existence of a wiretap may help the wiretap targets escape justice, and may thus violate obstruction of justice laws.⁵
- (e) Teaching one’s child racist, pro-polygamy, or pro- or anti-homosexuality views may (in the views of some family court judges) be contrary to the best interests of the child and may therefore lead the parent to lose custody or have his visitation rights curtailed under the generally applicable “best interests of the child” standard.⁶

² See *infra* note 31 (discussing laws under which such liability could be imposed).

³ Contributory copyright infringement is generally defined as behavior that materially contributes to third parties’ copyright infringement, done with knowledge or reason to know that the behavior will contribute to that infringement. See, e.g., *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996). Contributory infringement literally covers the publication of pointers to infringing web sites, as some cases and a statute have recognized. See Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1100 n.24 (2005). The cases involved clickable links, but including the URL of an infringing site in plain text would also fit the contributory infringement definition. See *id.*

⁴ See, for example, N.Y. Penal Law § 115.00 (McKinney’s 2004):

A person is guilty of criminal facilitation . . . when, believing it probable that he is rendering aid . . . to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony.

See also Volokh, *Crime-Facilitating Speech*, *supra* note 3, at 1174 n.296 (citing other such statutes); *id.* at 1098 n.18 (citing cases in which such publications have led to civil liability, though under the speech-specific invasion of privacy tort rather than under a speech-neutral crime facilitation theory).

⁵ See, e.g., 18 U.S.C. § 1512(c) (Supp. II 2002) (outlawing “corruptly . . . imped[ing] . . . an official proceeding”); Volokh, *Crime-Facilitating Speech*, *supra* note 3, at 1100 n.30 (citing authorities that treat helping a person escape as obstruction of justice).

⁶ See, e.g., *Vilakazi v. Maxie*, Mass. Probate Ct. No. 479549 (Aug. 7, 1975) (changing custody largely based on the mother’s racist views), *aff’d*, 357 N.E.2d 763 (Mass. 1976); *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 871–72 (Mo. Ct. App. 1982) (affirming custody limita-

- (f) Making statements that create an offensive work, educational, public accommodation, or housing environment based on race, religion, sex, age, disability, or sexual orientation might violate antidiscrimination law.⁷
- (g) Speaking out against a proposed group home for the mentally disabled might violate the Federal Housing Act's ban on "interfer[ing] with any person in the exercise or enjoyment of" the right to be free from housing discrimination based on handicap.⁸
- (h) Engaging in speech that helps the election of an antiwar candidate may violate treason law—which prohibits intentionally aiding the enemy in time of war—if the speaker thinks the enemy deserves to win the war.⁹
- (i) Creating newspaper advertisements, billboards, or leaflets that praise jury nullification may be punishable under laws that prohibit all attempts to influence jurors.¹⁰

tions based on the father's pro-homosexuality views); *Shepp v. Shepp*, 821 A.2d 635, 637–39 (Pa. Super. Ct. 2003) (denying the father custody of his daughter because of his pro-polygamy views); *cf. In re E.L.M.C.*, 100 P.3d 546, 563 (Colo. Ct. App. 2004) (reversing a trial court decision ordering a parent not to teach her child religious anti-homosexuality views—the order was entered because the other parent was homosexual—but leaving open the possibility that the order may be reentered if the trial court finds that "the child's emotional development [would be] significantly impaired" by the parent's anti-homosexuality speech); *see generally* Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions* (draft manuscript, on file with author) (discussing the First Amendment implications of courts' use of the best interests of the child standard by family courts to restrict parents' speech).

⁷ *See generally* Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 L. & CONTEMP. PROBS. 299 (2000) (describing hostile environment harassment law, and giving examples of its application to otherwise protected speech).

⁸ *See* 42 U.S.C. § 3617 (2000); *White v. Lee*, 227 F.3d 1214, 1230 (9th Cir. 2000) (concluding that the Act, which primarily covers nonspeech activity, might be read as covering, for instance, "persuasive editorial[s] on a zoning dispute," but holding that such a reading should be rejected because it "would quickly run afoul of the First Amendment").

⁹ *See* 18 U.S.C. § 2381 (2000) (defining treason as including a citizen's "adher[ing] to [the United States'] enemies, giving them aid and comfort"); *Kawakita v. United States*, 343 U.S. 717, 736, 742–44 (1952) (holding that "adhering" simply requires an intent to help the enemy).

¹⁰ *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-154 (West 2001) ("A person is guilty of tampering with a juror if he influences any juror in relation to any official proceeding . . ."); FLA. STAT. ANN. § 918.12 (West 2001) ("Any person who influences the judgment or decision of any grand or petit juror . . . with intent to obstruct the administration of justice, shall be guilty of a felony . . ."); *State v. Springer-Ertl*, 610 N.W.2d 768, 777 (S.D. 2000) (holding that people could be punished for posting material urging jurors to acquit a particular defendant, but only if the speech were "designed to influence specifically jurors and persons summoned or drawn as jurors," as opposed to speech "intend[ed] to inform the public or express a public opinion, regardless of whether jurors—drawn, summoned, or sworn—may be among the public"); *id.* at 778 (Sabers, J., dissenting) (concluding that a statute banning communication intended to influence jurors' decisions was a "content-neutral statute . . . narrowly tailored to prevent criminal behavior" and was "unrelated to the suppression of free expression").

- (j) Producing and distributing movies that stimulate copycat crimes may constitute negligence under generally applicable tort principles.¹¹
- (k) Giving children sexually-themed material, or for that matter political material that most people view as evil, may violate laws that ban “impair[ing] the . . . morals of . . . [a] child.”¹²

In all these cases, the speech would be restricted because of what it communicates—because its content informs, persuades, or offends people—and because of the harms that flow from this informing, persuasion, or offense. Yet some courts and commentators argue that such speech restrictions don’t implicate the First Amendment because the law in these instances punishes conduct, not speech: “[S]peech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes.”¹³ Others argue that generally applicable laws

¹¹ See, e.g., *Olivia N. v. Nat’l Broad. Co.*, 178 Cal. Rptr. 888 (Cal. Ct. App. 1981) (holding, based on the First Amendment, that the media couldn’t be held liable for crimes that copy those that the media depicted); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989) (same); cf. *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 25 F. Supp. 2d 837, 842 (N.D. Ill. 1998) (imposing negligence liability on the National Hemophilia Foundation for its false statements about the safety of the blood supply, partly because of “the well-established principle that the protections of the First Amendment do not shield the press from laws of general applicability”).

¹² See, e.g., CONN. GEN. STAT. ANN. § 53-21(a)(1) (West 2001). People plausibly view various types of speech as potentially impairing children’s morals. See, e.g., *NASSAU COUNTY, N.Y., LOCAL LAW 11-1992* (2005) (banning the sale of trading cards depicting criminals to children under age seventeen, on the theory that such cards impair the “ethical and moral development of our youth”); *Ginsberg v. New York*, 390 U.S. 629, 641–42 (1968) (discussing a similar justification for restrictions on sexually-themed material); cf. Council Directive 89/552, art. 22, 1989 O.J. (L 298) 29 (“Member States shall take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular those that involve pornography or gratuitous violence.”). Speech-specific restrictions on speech to minors would of course trigger First Amendment scrutiny. The question posed by the hypothetical in the text is whether the government could avoid constitutional scrutiny by prosecuting such speech under a generally applicable law banning “impair[ing] the . . . the morals of . . . [a] child[.]”

¹³ *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997); see *id.* at 242–43 (arguing that publishing a book with the intent to help readers commit crime is punishable under generally applicable “criminal aiding and abetting” law); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) (concluding that “[p]ornographic” pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment”); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 862 (E.D. Mich. 1989) (dictum) (distinguishing “pure speech” from “sexually abusive and harassing conduct” such as workplace harassment); *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 854 (Cal. 1999) (plurality opinion) (defending the injunction of speech under hostile environment harassment law partly because “[a] statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity”); *Dep’t of Corrs. v. State Pers. Bd.*, 69 Cal. Rptr. 2d 34, 53 (Cal.

should be treated as content-neutral restrictions on expressive conduct, and should thus be fairly easily upheld under the deferential *O'Brien* test¹⁴ because the restrictions on speech are “incidental” to the law’s overall thrust.¹⁵

A second type of “conduct, not speech” argument is sometimes made even to defend laws that specifically target communication, such as statutes that ban the publication of bombmaking information. Such speech, the argument runs, is punishable because it is part of an illegal “course of conduct,” or is perhaps “speech brigaded with ac-

Ct. App. 1997) (Sims, J., dissenting) (concluding that an employee created an “abusive work environment” by berating a coworker for supposedly being hired because of affirmative action, and that such statements were “constitutionally unprotected conduct—unlawful discrimination—rather than protected expression”); *Trayling v. Bd. of Fire and Police Comm’rs*, 652 N.E.2d 386, 395 (Ill. App. Ct. 1995) (defending government employers’ sexual harassment rules partly on the grounds that “[p]rohibitions against sexual harassment are generally applicable laws”); *Burns v. City of Detroit*, 660 N.W.2d 85, 94 (Mich. Ct. App. 2003) (concluding that hostile environment harassment law is constitutional because the state antidiscrimination statute “is essentially directed toward discriminatory conduct, and oral remarks such as those at issue here are ‘swept up incidentally within the reach of a statute directed at conduct rather than speech’” (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992))); Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 377–78, 392 (2003) (generally endorsing “[t]he ‘speech act’ approach[, which] criminalizes speech because it is the act by which one either violates an independent criminal prohibition”—seemingly referring to prohibitions that say nothing about speech—“or facilitates the violation of such a prohibition”); Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 768 (2001) (“[A] person who breaks a law not directed at speech can claim no constitutional immunity just because he was acting for expressive reasons.”). Some commentators have also interpreted *R.A.V.*, 505 U.S. 377 (1992), as taking this view, but I believe that that interpretation is incorrect. See *infra* note 74.

¹⁴ See *United States v. O’Brien*, 391 U.S. 367, 382 (1968).

¹⁵ See *Schutz v. Schutz*, 581 So. 2d 1290, 1292 (Fla. 1991) (upholding an injunction ordering a mother to say things “necessary to restore and promote the frequent and continuing positive interaction (e.g., visitation, phone calls, letters) between the children and their father and to refrain from doing or saying anything likely to defeat that end,” on the grounds that “any burden on the mother’s first amendment rights” was simply “incidental” to protecting the best interests of the child, and should therefore be reviewed under *O’Brien*); *Borra v. Borra*, 756 A.2d 647, 651 (N.J. Super. Ct. Ch. Div. 2000) (taking a similar view); Laurel S. Banks, Note, *Schutz v. Schutz*, 31 U. LOUISVILLE J. FAM. L. 105, 115–16 (1992–1993) (approving of the *Schutz* court’s analysis); Elena Kagan, *When a Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restraints*, 29 U.C. DAVIS L. REV. 957, 965 & n.24, 968–69 (1996) [hereinafter Kagan, *When a Speech Code Is a Speech Code*] (suggesting that policies banning “harassment” in universities, presumably referring to hostile environment harassment, should be reviewed only under *O’Brien*, even when such policies apply to otherwise fully protected speech); Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 187 (1990) (defending the application of hostile environment law to restrict offensive workplace speech because “[t]he gravamen of the tortious activity in [certain] cases . . . is arguably the proscription of underlying nonspeech conduct such as . . . anti-social behavior in the workplace,” and the “penalty exacted on speech in such cases appears incidental to the governmental purpose”). But see *In re Marriage of Olson*, 850 P.2d 527, 532 (Wash. Ct. App. 1993) (treating restrictions such as those in *Schutz* as content-based and therefore unconstitutional); David L. Ferguson, Comment, *Schutz v. Schutz: More than a Mere “Incidental” Burden on First Amendment Rights*, 16 NOVA L. REV. 937, 951 (1992) (same).

tion,”¹⁶ a “speech act” rather than pure speech.¹⁷ The argument seems especially appealing to some when the speech appears likely to cause harms that would be punishable if caused by conduct rather than speech—when “words are bullets,” in the sense of being “a specific tool or weapon used . . . for the express purpose” of causing harm.¹⁸ Such arguments often quote *Giboney v. Empire Storage & Ice Co.*,¹⁹ a 1949 case which asserted that “[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute,”²⁰ and that “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”²¹

Courts have applied *Giboney* to justify, among other things, restrictions on (1) speech that advocates crime, (2) speech that explains how crimes can be committed, (3) doctors’ speech recommending medicinal marijuana to their patients, (4) speech that urges political boycotts, (5) speech that creates an offensive work environment, (6) racially offensive business names, and even (7) public profanity.²²

A third “speech as conduct” argument is made in Professor Kent Greenawalt’s influential book, *Speech, Crime, and the Uses of Language*,²³ which asserts that certain kinds of speech—such as offers, agreements, orders, permissions, and some threats—constitute “situation-altering

¹⁶ *Rice*, 128 F.3d at 244 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring)). The *Rice* court treated “speech brigaded with action,” *id.*, as equivalent to “speech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct.” *Id.* at 243.

¹⁷ For example, a U.S. Department of Justice report notes that:

[T]he constitutional analysis is quite different where the government punishes speech that is an integral part of a transaction involving conduct the government otherwise is empowered to prohibit; such “speech acts” . . . may be proscribed without much, if any, concern about the First Amendment, since it is merely incidental that such “conduct” takes the form of speech.

1997 REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, available at <http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html> (last updated Mar. 22, 1999).

¹⁸ *Cf.* LA. REV. STAT. ANN. § 14:390 (West 2004) (supporting a ban on Communist propaganda by arguing that “[w]ords are bullets’ and the communists know it and use them so,” and that “[t]he danger of communist propaganda lies . . . in the fact that it is a specific tool or weapon used by the communists for the express purpose of bringing about the forcible total destruction or subjugation of this state and nation”).

¹⁹ 336 U.S. 490 (1949).

²⁰ *Id.* at 498.

²¹ *Id.* at 498–502. This Article does not deal with situations in which speech is used only as evidence of nonspeech conduct (for instance, when the government prosecutes a defendant for homicide, and the government uses some of the defendant’s statements to show his motive). See *infra* Part II.B.2.

²² See *infra* notes 163–76.

²³ KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* (1989).

utterances” and should therefore be treated as unprotected conduct.²⁴ Finally, the “speech as conduct” argument is sometimes made to explain some of the uncharted zones of First Amendment law: categories of speech whose First Amendment status the Court has never squarely confronted, such as aiding and abetting, criminal solicitation, conspiracy, perjury, agreements to restrain trade, and professional advice to clients.²⁵ Most lawyers would likely agree that such speech generally should be unprotected, or at least less protected. A common explanation for the Court’s lack of attention to these speech restrictions is that the speech is actually conduct, which the First Amendment does not protect.

This Article argues that these “it’s not speech, it’s conduct” doctrines are misguided. Such doctrines, if followed, would require courts to focus on the wrong questions, and would often lead courts, for instance in many of the above examples, to reach the wrong results. Part I argues that generally applicable laws can’t be upheld simply because they’re *facially* content-neutral, or even *facially* speech-neutral. Rather, when a generally applicable law is content-based *as applied*—when speech triggers the law because of the harms that may flow from what the speech says—the law should be subject to full-fledged First Amendment scrutiny. Under a generally applicable law that bans interfering with the draft, for example, one who blocks the entrance to a draft office may be punished; but it should be unconstitutional to punish someone who publishes a book that persuades people to resist the draft, even though the book also interferes with the draft.

Speech and conduct—or more precisely the speech and non-speech elements of some behavior—should indeed be distinguished, and the nonspeech elements may be much more heavily regulated. The distinction, however, should be the one suggested by *United States v. O’Brien* and the other cases that distinguish content-neutral from content-based speech restrictions: Expression can generally be regulated to prevent harms that flow from its noncommunicative elements (noise, traffic obstruction, and the like), but not harms that flow from what the expression expresses.²⁶ Neither generally applicable laws nor specially targeted laws should be allowed to restrict speech because of what the speech says, unless the speech falls within one of the exceptions to protection (e.g., threats or false statements of fact) or unless the restriction passes strict scrutiny.

This analysis also cuts against some commentators’ arguments that First Amendment doctrine should focus primarily on smoking

²⁴ *Id.* at 57; *see infra* Part III.

²⁵ *See infra* Part IV.

²⁶ *See United States v. O’Brien*, 391 U.S. 367, 382 (1968).

out the legislature's impermissible, speech-restrictive motivations.²⁷ When a law generally applies to a wide range of conduct, and sweeps in speech together with such conduct, there is little reason to think that lawmakers had any motivation with regard to speech, much less an impermissible one. Nonetheless, such a law should still be unconstitutional when applied to speech based on its content—even though the legislature's motivations may have been quite benign.²⁸

Part II argues that the *Giboney* doctrine—whether framed as applying to “speech acts,” to speech “brigaded with action,” or to speech that carries out an illegal “course of conduct”²⁹—is indeterminate, dangerous, and inconsistent with more recent cases. *Giboney* and its progeny don't explain which speech should be punishable and which should not. The *Giboney* doctrine has been used to support the punishment of speech that, under current law, is rightly protected. And even when the *Giboney* argument has been used to support restricting speech that should indeed be restrictable, the argument still hasn't adequately explained where the First Amendment boundaries should be drawn.

Part III makes two observations about the “situation-altering utterances” argument. First, the category that Professor Greenawalt proposes is narrower than its name might suggest. Many utterances that can be said to alter the situation—including the speech in nearly all the above examples—remain presumptively protected speech even under his analysis. The “situation-altering utterances” argument is by its own terms inapplicable in those cases.

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

All this, though, leaves unsolved several First Amendment puzzles. Just why are criminal agreements, criminal solicitation, and most verbal aiding and abetting punishable, even when they are accom-

²⁷ See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996) [hereinafter Kagan, *Private Speech, Public Purpose*]; Rubinfeld, *supra* note 13.

²⁸ See discussion *infra* Part I.E.1.

²⁹ See *infra* note 159–62 and accompanying text.

plished solely through words? Why may some speech be restricted under antitrust law or securities law? Part IV argues that these puzzles should be solved the same way the Court has answered why incitement, libel, fraud, threats, and other speech are punishable: by recognizing that these speech restrictions are indeed speech restrictions, and by delineating the proper constitutional boundaries of these restrictions.

Such delineation requires a considerable amount of work, and this Article only outlines this task. But embracing this task is better—and more likely to produce the right results—than avoiding it by simply labeling speech “conduct,” with no explanation of why certain forms of communication are protected and certain others are not.

I

LAWS OF GENERAL APPLICABILITY

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

Consider a generally applicable law that is being applied to speech, but that on its face doesn’t mention speech. Sometimes, as in *United States v. O’Brien*, the law may be triggered by the “noncommunicative impact of [the speech], and [by] nothing else.”³⁰ A law barring noise louder than ninety decibels, for instance, might apply to the use of bullhorns in a demonstration. We might call such a generally applicable law “content-neutral as applied,” because it applies to speech without regard to its content.

But sometimes the law is triggered by what the speech communicates. The law may, for instance, prohibit any conduct that is likely to have a certain effect, and the effect may sometimes be caused by the content of speech. A person may violate a law prohibiting aiding and abetting crime, for example, by publishing a book that describes how a crime can be easily committed.³¹ We might call such a law “content-

³⁰ See, e.g., *O’Brien*, 391 U.S. at 382 (holding that a generally applicable law banning destruction of draft cards should be judged under a relatively forgiving First Amendment standard, rather than strict scrutiny, because it applied to the defendant “[f]or [the] noncommunicative impact of his conduct, and for nothing else”); see also Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 38, 45 (1973) (distinguishing laws that restrict speech because of a government “non-speech interest,” which turns on the noncommunicative impact of the speech, from laws that restrict expression because of a government “anti-speech interest,” which turns on the harms “caused by the meaning effect of the speech”). Many commentators have argued that the lawmakers who enacted the relevant parts of the law in *O’Brien* actually did intend to suppress a certain kind of expression; but the Court declined to inquire into the lawmakers’ intentions and instead focused on the fact that the law was triggered by the physical act of destroying the draft card rather than by the act’s communicative impact. See *O’Brien*, 391 U.S. at 383.

³¹ See, e.g., IND. CODE ANN. § 35-41-2-4 (Michie 2004) (“A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that

based as applied,” because the content of the speech triggers its application. The law doesn’t merely have the effect of restricting some speech more than other speech—most content-neutral laws do that.³² Rather, the law applies to speech precisely because of the harms that supposedly flow from the content of the speech: Publishing and distributing the book violates the aiding and abetting law because of what the book says.

The rest of this Part argues that laws that are content-based as applied should be presumptively unconstitutional, just as facially content-based laws are presumptively unconstitutional. Both presumptions may sometimes be rebutted, for instance if the speech falls within an exception to protection³³ or if the speech restriction passes strict scrutiny.³⁴ But generally speaking, when a law punishes speech because its content may cause harmful effects, that law should be treated as content-based.

B. The Supreme Court Cases

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

Consider, for instance, the World War I-era cases *Debs v. United States*,³⁵ *Frohwerk v. United States*,³⁶ and *Schenck v. United States*.³⁷ These cases, which upheld the criminal punishment of antiwar speech,³⁸ are now generally seen as wrongly decided.³⁹ But the defendants’ statements had violated a generally applicable provision of the Espionage Act, which barred all conduct—speech or not—that “willfully ob-

offense”); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 242–43 (4th Cir. 1997) (holding that publishing a book that intentionally explains how to commit a crime may constitute aiding and abetting of that crime); U.S. DEP’T OF JUSTICE, *supra* note 17, at text accompanying notes 55–60 (taking the same view as *Rice* regarding aiding and abetting); Volokh, *Crime-Facilitating Speech*, *supra* note 3, at 1096–97.

³² For instance, my sense is that bans on residential picketing in the late 1980s probably disproportionately affected speech criticizing abortion providers, since the pro-life movement seems to have used residential picketing more than many other political movements. See Leslie Gielow Jacobs, *Is There an Obligation to Listen?*, 32 U. MICH. J.L. REFORM 489, 536 n.274 (1999).

³³ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992).

³⁴ See Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418–24 (1996) (discussing strict scrutiny doctrine).

³⁵ 249 U.S. 211 (1919).

³⁶ 249 U.S. 204 (1919).

³⁷ 249 U.S. 47 (1919).

³⁸ See *Debs*, 249 U.S. at 212; *Frohwerk*, 249 U.S. at 204; *Scheck*, 249 U.S. at 48–49.

³⁹ See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 966 (2d ed. 2002); Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 569 (2000); Michael Vitiello, *The Nuremberg Files: Testing the Outer Limits of the First Amendment*, 61 OHIO ST. L.J. 1175, 1218–19 (2000).

struct[ed] the recruiting or enlistment service of the United States, to the injury of the service or the United States.”⁴⁰

The Espionage Act could have been constitutionally applied to burning a recruiting office (nonspeech conduct), or perhaps to disrupting the business of a recruiting office by using bullhorns outside the office windows (speech punished because of its noncommunicative impact).⁴¹ But under modern First Amendment law, courts would overturn convictions for antiwar leafleting or speeches, and would treat the law as content-based,⁴² because it is the content of such antiwar speech that causes the interference with the draft.⁴³

More broadly, if generally applicable laws were immune from First Amendment scrutiny, the government could suppress a great deal of speech that is currently constitutionally protected, including advocacy of illegal conduct, praise of illegal conduct, and even advocacy of legal conduct. For instance, a generally applicable ban on “assisting, directly or indirectly, conspiracies to overthrow the government” could prohibit advocacy of overthrow as well as physical

⁴⁰ Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 219; *see also* *Gara v. United States*, 178 F.2d 38, 39–41 (6th Cir. 1949) (upholding a conviction for “knowingly counsel[ing], aid[ing], or abet[ting]” draft evasion, partly on the grounds that “violation of [the law], particularly as to aiding and abetting, might be consummated without any expression of opinion,” and that the First Amendment provides no protection just because “the acts of violation are consummated, as counseling always must be, through the medium of words”), *aff’d by an equally divided Court*, 340 U.S. 857 (1950).

Debs and *Frohwerk* involved prosecutions solely under the generally applicable provision of the Espionage Act. *See Debs*, 249 U.S. at 212; *Frohwerk*, 249 U.S. at 204. Schenck was also convicted on two counts of unlawfully mailing certain material; those counts did not involve generally applicable provisions. *See Schenck*, 249 U.S. at 52–53. Most critics of the *Schenck* decision are likely at least as concerned about the generally applicable Espionage Act, which had the effect of outlawing antidraft speech generally, as about the provisions that were limited to distributing antidraft speech through the mail.

⁴¹ *Cf. Kovacs v. Cooper*, 336 U.S. 77, 86–88 (1949) (plurality opinion) (holding that the government may restrict sound amplification to some extent); *id.* at 89, 97 (Frankfurter, J., concurring in the judgment) (agreeing on this point); *id.* (Jackson, J., concurring in the judgment) (same); L.A. Powe, Jr., *Searching for the False Shout of “Fire”*, 19 CONST. COMMENT. 345, 347 (2002) (concluding that Justice Holmes reached the result in *Schenck* precisely because he saw it as involving a generally applicable law rather than a speech restriction: “The distinction between an attempt by conduct and an attempt by speech was, for Holmes, a distinction without a difference”).

⁴² *See, e.g., Carey v. Brown*, 447 U.S. 455, 465 (1980) (citing *Schenck* as an example of a case that involved a content-based distinction); *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (plurality opinion) (same).

⁴³ *See* Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 645–46 (1992) (noting that many of the cases cited above involved generally applicable laws, but arguing that the speech should nonetheless have been protected against those laws); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198–99 (1983) (characterizing the law in *Schenck* as a “content-based restriction” that “prohibited expression critical of the war and the draft,” though the portion of the Act that broadly prohibited such expression—as opposed to merely false information about the war—was generally applicable to conduct that obstructed the draft as well as to speech that obstructed the draft).

conduct such as making bombs: Advocacy of overthrow assists such overthrow by persuading people to join, or at least not oppose, the revolutionary movement. A ban on “assisting interference with the provision of abortion services” could ban speech that praises or defends anti-abortion blockaders or vandals, and not just actual blockading or vandalism.

A ban on “conduct that knowingly or recklessly aids the enemy in time of war” could, among other things, ban speech that helps the election of an antiwar candidate.⁴⁴ Such speech could even be banned by the existing law of treason—which bars intentionally aiding the enemy during wartime—if a prosecutor could persuade the jury that the speaker was motivated by a desire to help the other side.⁴⁵ A ban on “conduct that interferes with the enforcement of judicial decrees” may be applied to speech that criticizes judges or judicial actions, on the theory that such criticism may lead people to lose respect for courts and thus to disobey court orders.⁴⁶

All the speech in these examples may help bring about the harms that the generally applicable law is trying to prevent. It may even involve “words that may have all the effect of force,” an example that *Schenck* gave as quintessentially unprotected speech (citing *Gompers v. Buck's Stove & Range Co.*, which used this reasoning to uphold an injunction against newspaper articles urging a labor boycott).⁴⁷ The speech may thus have an effect that would be eminently punishable if the effect were brought about by force rather than communication. But the premise of the retreat from *Schenck*, and of the adoption of

⁴⁴ See Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, *supra* note 34, at 2425–31 (discussing this hypothetical); cf. Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1859–1865, at 459 (Don E. Fehrenbacher ed., 1989) (arguing that such antiwar speech may be punishable, though focusing more on the speech as advocacy of desertion rather than treason as such); MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE” 300–18 (2000) (discussing Lincoln’s argument); Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105, 121–31, 161 (1998) (same).

⁴⁵ See *supra* note 10 and accompanying text.

⁴⁶ See *Wood v. Georgia*, 370 U.S. 375, 395 (1962) (striking down a contempt of court citation in such a case); *Pennekamp v. Florida*, 328 U.S. 331, 349–50 (1946) (same); *Bridges v. California*, 314 U.S. 252, 272–73 (1941) (same). These cases involved the common-law crime of contempt of court, under which contempt was sometimes defined quite generally as “disregard of the authority of the court” (a definition that would cover a wide variety of conduct, such as violation of a court order, as well as speech), and sometimes more specifically as covering a long list of behavior including “[d]issemination of contemptuous publications.” See EDWARD M. DANGEL, NATIONAL LAWYERS’ MANUAL—CONTEMPT § 2 (1939). But as the example in the text shows, the same results could have been reached under a generally applicable contempt rule. See Brenner, *supra* note 13, at 321–22 (treating criminal contempt of court as a generally applicable law, though acknowledging that “when criminal contempt is based on the communicative content of speech, it is an attempt to control speech that implicates the guarantees of the First Amendment”).

⁴⁷ *Schenck v. United States*, 249 U.S. 47, 52 (1919) (citing 221 U.S. 418, 439 (1911)).

the *Brandenburg v. Ohio* rule,⁴⁸ is that the government must generally tolerate such advocacy even when the persuasiveness or the informational content of the speech can lead to eventual harm.⁴⁹

Similarly, consider *NAACP v. Claiborne Hardware Co.*,⁵⁰ where the Court held that speech constituting tortious interference with business relations may nonetheless be constitutionally protected. Tortious interference with business relations covers a variety of conduct, not just speech.⁵¹ But when the interference flows from the persuasive or informative effect of speech—for instance, when the speech in *Claiborne Hardware* persuaded people to boycott a business, publicized the names of people who weren't complying with the boycott, or persuaded others to ostracize people who refused to join the boycott—courts treat the tort as a speech restriction.⁵²

In some situations, the tort may be a constitutionally permissible restriction, for instance when the speech is a constitutionally unprotected threat, incitement, or the like.⁵³ But if the speech falls outside one of these exceptions to protection, then the First Amendment protects the speech against the generally applicable tort—so long as the speech triggers the tort through its content—and not just against facially content-based laws.⁵⁴

The same is true, in considerable measure, for antitrust laws and other laws that prohibit restraint of trade. Like the interference with business relations tort, laws that prohibit restraint of trade are gener-

⁴⁸ See *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (holding that encouraging the commission of crime is constitutionally protected except when the encouragement is intended to and likely to cause imminent illegal conduct).

⁴⁹ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 848 n.56 (2d ed. 1987) (“[H]owever a law is *written*, it may not constitutionally be *applied* to punish speech on content-related grounds where nothing beyond abstract advocacy is shown, and where incitement is thus absent.”).

⁵⁰ 458 U.S. 886 (1982).

⁵¹ See, e.g., *Lucas v. Monroe County*, 203 F.3d 964, 969, 979 (6th Cir. 2000) (allowing a cause of action based on the discriminatory refusal by a county government to deal with a contractor); *H.J., Inc. v. Int'l Tel. & Tel. Corp.*, 867 F.2d 1531, 1548 (8th Cir. 1989) (holding that selling a product below cost in order to monopolize a market constituted tortious interference); RESTATEMENT (SECOND) OF TORTS §§ 766B cmt. b, 767 cmt. c (citing *Tarleton v. McGawley*, 170 Eng. Rep. 153 (K.B. 1793), a case imposing liability for physically attacking trading partners, as the ancestor of this tort).

⁵² See *Claiborne Hardware*, 458 U.S. at 909–10.

⁵³ See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988); *Claiborne*, 458 U.S. at 927–28. One may criticize *Claiborne* on the grounds that some of the speech in that case was indeed threatening, especially against the backdrop of violence related to the boycott. But the Court concluded that the speech was neither an unprotected threat nor unprotected incitement, and given this, the Court's further holding—that presumptively protected speech couldn't be the subject of an interference with business relations tort—seems correct.

⁵⁴ See, e.g., *Hustler*, 485 U.S. at 56 (“[P]ublic officials may not recover for the tort of intentional infliction of emotional distress . . . without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice . . .’”).

ally applicable and are used to punish conduct, not speech. But when organizations help restrain trade by lobbying legislatures and the public for anticompetitive regulations, *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*⁵⁵ and *United Mine Workers v. Pennington*⁵⁶ make clear that the speech may not be punished.⁵⁷

This principle also applies when the speech causes harm because of its offensive content rather than its persuasive or informative content. Consider *Hustler Magazine v. Falwell*,⁵⁸ which held that the tort of intentional infliction of emotional distress couldn't be used to impose liability on *Hustler* for publishing a cruel and vulgar satire of Jerry Falwell.⁵⁹ Though claims under the emotional distress tort are often based on speech, speech is not an element of the tort.⁶⁰ The publisher of *Hustler*, for instance, would have been equally guilty of intentional infliction of emotional distress if he had played a highly embarrassing practical joke on Falwell.⁶¹ But when the general law was applied to the magazine because of the content of its speech, the Court held such liability to be unconstitutional.⁶²

⁵⁵ 365 U.S. 127 (1961).

⁵⁶ 381 U.S. 657 (1965).

⁵⁷ *Noerr* and *Pennington* reached speech-protective results by interpreting the Sherman Act as not applying to anticompetitive lobbying or public advocacy, but it's clear that the Court was influenced by a desire to avoid a First Amendment violation. See, e.g., *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) (noting the *Noerr* Court's interpretation of the Sherman Act "in light of the First Amendment[]"); *Noerr*, 365 U.S. at 137-38 ("[S]uch a construction of the Sherman Act would raise important constitutional questions [W]e cannot, of course, lightly impute to Congress an intent to invade these freedoms."); see also David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293, 363-66 (1994) (arguing that *Noerr-Pennington* immunity makes sense only as a First Amendment exception to antitrust law, and not as a faithful interpretation of antitrust law standing alone). These cases involved civil lawsuits, but surely speech should be at least as protected against criminal punishments as it is against civil suits.

⁵⁸ *Hustler*, 485 U.S. at 57.

⁵⁹ *Id.*

⁶⁰ See *id.* at 56; RESTATEMENT (SECOND) OF TORTS § 46 (1965).

⁶¹ Consider the illustration from the Restatement (Second) of Torts:

A is invited to a swimming party at an exclusive resort. B gives her a bathing suit which he knows will dissolve in water. It does dissolve while she is swimming, leaving her naked in the presence of men and women whom she has just met. A suffers extreme embarrassment, shame, and humiliation. B is subject to liability to A for her emotional distress.

RESTATEMENT (SECOND) OF TORTS § 46 cmt. d, illus. 3 (1965).

⁶² See *Hustler*, 485 U.S. at 57. The *Hustler* decision relied on the fact that the speech involved matters of public concern and a public figure; the Court might yet recognize a free speech exception for intentional infliction of emotional distress where private figures or statements on matters of private concern are involved. But if that happens, it would happen because the speech is seen as harmful and not valuable enough to protect, not because the tort is a law of general applicability (since the tort's general applicability wasn't enough to save it in *Hustler*).

The same is true of *Cohen v. California*,⁶³ in which Cohen had been prosecuted for violating a generally applicable breach of the peace statute.⁶⁴ The statute would have applied equally to conduct (fighting), speech that breaches the peace because of its noncommunicative impact (loud speech in the middle of the night), and speech that breaches the peace because of its content (wearing a “Fuck the Draft” jacket). But the Court struck down the application of the law in this last situation, precisely because the law’s application to Cohen was triggered by Cohen’s speech.⁶⁵

Likewise, *Hess v. Indiana*,⁶⁶ *Edwards v. South Carolina*,⁶⁷ *Terminiello v. City of Chicago*,⁶⁸ and *Cantwell v. Connecticut*⁶⁹ all set aside breach of the peace and disorderly conduct convictions, though the statutes involved were content-based only as applied, not on their face. As the Court pointed out in *Cantwell*, “breach of the peace” legitimately “embraces a great variety of conduct destroying or menacing public order and tranquility,” including “violent acts”; but the Court set aside the conviction because the speech constituted breach of the peace only because of “the effect of [the speaker’s] communication upon his hearers.”⁷⁰

⁶³ 403 U.S. 15 (1971).

⁶⁴ *Id.* at 16 n.1 (involving a statute that, in relevant part, barred people from “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by tumultuous or offensive conduct”).

⁶⁵ *See id.* at 25–26.

⁶⁶ 414 U.S. 105, 105 n.1 (1973) (involving a statute that barred people from “act[ing] in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting”).

⁶⁷ 372 U.S. 229, 234–37 (1963) (involving a statute that barred “disturbance of the public tranquility[] by any act or conduct inciting to violence,” but concluding that speech that disturbs the public tranquility is constitutionally protected even if it is covered by a breach of the peace statute, because “the opinions which [the speakers] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection”).

⁶⁸ 337 U.S. 1, 2 n.1, 3 (1949) (involving a Chicago city ordinance that barred people from “making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace”; the trial court had defined “breach of the peace” in a jury instruction as “‘misbehavior which violates the public peace and decorum . . . [or] stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or . . . molests the inhabitants in the enjoyment of peace and quiet by arousing alarm’”).

⁶⁹ 310 U.S. 296, 308 (1940) (“The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others.”).

⁷⁰ *See id.* at 308–09; *see also* *Feiner v. New York*, 340 U.S. 315, 318 n.1 (1951) (involving a statute that defined “the offense of disorderly conduct” to cover “[using] offensive, disorderly, threatening, abusive or insulting language, conduct or behavior,” “[acting] in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others,” or “[congregating] with others on a public street and refus[ing] to move on when ordered by the police,” “with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned”). The Court upheld the conviction in *Feiner*, but only on the grounds

All the laws in these examples were facially speech-neutral. Most, and probably all, were enacted by legislatures or created by courts without any censorious motive, partly because their creators were trying to punish and prevent harm, not speech as such. Yet these cases—or, as to the Espionage Act cases, the modern repudiation of those cases⁷¹—treat the application of these laws based on the content of speech just as skeptically as the Court has treated facially content-based restrictions.⁷² Likewise, later decisions treat *Cantwell*, *Cohen*, *Edwards*, and *Terminiello* as involving content-based speech restrictions.⁷³

I will argue below that the Court has indeed been right to condemn restrictions that are content-based as applied. But for now, these cases should at least show that any broad First Amendment immunity for generally applicable laws would be incompatible with many leading precedents.⁷⁴ The laws described in the Introduction should

that the speech was unprotected by the First Amendment because it posed a “clear and present danger of . . . immediate threat to public safety.” *Id.* at 320.

⁷¹ See *supra* note 39.

⁷² See Blasi, *supra* note 43, at 645–46 (noting this point); David Bogen, *Generally Applicable Laws and the First Amendment*, 26 Sw. U. L. Rev. 201, 221–23 (1997) (distinguishing generally applicable laws that are applied to speech for reasons unrelated to its content from generally applicable laws that are applied to speech precisely because of its content).

⁷³ *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (“Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities ‘simply by averting [our] eyes.’ *Cohen v. California*.”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from proscribing speech, see, e.g., *Cantwell v. Connecticut*, . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.”); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (“Listeners’ reaction to speech is not a content-neutral basis for regulation Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob. See . . . *Terminiello v. Chicago*.”); *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972) (“But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Cohen v. California* . . . ; *Terminiello v. Chicago*”); *Street v. New York*, 394 U.S. 576, 592 (1969) (“It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. See, e.g., . . . *Edwards v. South Carolina*; *Terminiello v. City of Chicago*; cf. *Cantwell v. Connecticut*.”).

⁷⁴ A few courts and commentators have cited *R.A.V. v. City of St. Paul* for the proposition that there is no First Amendment problem when speech is subjected, based on its content, to generally applicable laws. See, e.g., *supra* note 13 and accompanying text (citing *Burns v. City of Detroit*, the *Aguilar v. Avis* plurality, and the *Dep’t of Corrections v. State Personnel Bd.* dissent, which all rely on *R.A.V.*). But *R.A.V.* dealt only with whether the government may discriminate based on content among speech that falls within the existing First Amendment exceptions, such as fighting words. The Court said only that “a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech,” *R.A.V.*, 505 U.S. at 389 (emphasis added), and its logic is indeed limited to restrictions on speech that fits within one of the exceptions. See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 207–09 (3d Cir. 2001) (discussing this point); Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791, 1829–32 (1992).

be treated as involving content-based speech restrictions. They shouldn't evade serious First Amendment scrutiny on the grounds that they are generally applicable.

C. The Press Cases

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

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

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

Unfortunately, since all these laws are sometimes called "generally applicable," the three types may be confused with one another. One major argument against the position I defend in the previous section flows from this very sort of confusion. That argument cites *Cohen v. Cowles Media Co.*,⁷⁵ and the opinions on which that case relies, for the proposition that applying generally applicable laws to speech doesn't violate the First Amendment.⁷⁶

In *Cowles Media*, the Court held that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news," and cited several other cases that so held.⁷⁷ But this only means that the press gets no special exemption from press-neutral laws. The Court didn't consider whether speakers were entitled to protection from speech-neutral laws, especially when those laws are content-based as applied.

Cowles Media involved a promissory estoppel lawsuit by a source against a newspaper publisher. Cowles breached its promise not to reveal Cohen's name; Cohen sued and won on a promissory estoppel theory, and the Court held that the damages award didn't violate the

⁷⁵ 501 U.S. 663 (1991).

⁷⁶ See, e.g., *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997); U.S. DEP'T OF JUSTICE, *supra* note 17, at n.56; Bogen, *supra* note 72, at 227.

⁷⁷ See *Cowles Media*, 501 U.S. at 669.

First Amendment.⁷⁸ In the process, the Court reasoned that the case was controlled by the

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

There can be little doubt that the Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, insofar as we are advised, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.⁷⁹

The Court repeatedly stressed that it was discussing only whether the *press* gets special exemption from laws that are *equally applicable to the press and to others*; this quote mentions “the press,” “newspapers,” or “the media” nine times. Each of the examples the Court gave discussed what “the press,” “the media,” “newspaper[s],” and “newspaper reporter[s]” have no special right to do. This makes sense, because the Court was overruling the Minnesota Supreme Court’s conclusion that the First Amendment requires courts to “balance the constitutional rights of a *free press* against the common law interest in protecting a promise of anonymity.”⁸⁰

Moreover, two of the Court’s examples are consistent only with the interpretation that the Court used “generally applicable” to mean

⁷⁸ *Id.* at 665–66.

⁷⁹ *Id.* at 669–70 (internal citations omitted).

⁸⁰ *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 205 (Minn. 1990) (emphasis added), *rev’d*, 501 U.S. 663 (1991).

press-neutral rather than speech-neutral. First, copyright law (which the Court also mentions as an example later in the opinion⁸¹) is press-neutral but not speech-neutral. In 1977, when *Zacchini v. Scripps-Howard Broadcasting Co.*⁸²—the case that the *Cowles Media* Court cited when referring to copyright law⁸³—was decided, copyright law applied exclusively to communication, as it had through most of its history. Even today it applies mostly to communication, though over the past few decades it has been extended to cover architectural works and computer program object code.⁸⁴

Second, as Part II.B pointed out, the First Amendment sometimes provides a defense against antitrust law, when the alleged restraint of trade comes from defendant's speech advocating legislation. *Citizen Publishing Co. v. United States*⁸⁵ and *Associated Press v. United States*,⁸⁶ the two antitrust cases that the Court cited,⁸⁷ hold that newspapers cannot raise their status as members of the *press* as a defense to antitrust law. But *Noerr* and *Pennington* make clear that speakers can raise as a defense the fact that the law is being applied to them because of their *speech*.⁸⁸

So the *Cowles Media* Court's "general applicability" reasoning means simply that Minnesota promissory estoppel law is press-neutral, and thus shouldn't have been subject to any heightened scrutiny simply because it was applied to the press.⁸⁹ That, of course, leaves un-

⁸¹ See *Cowles Media*, 501 U.S. at 671 ("The dissenting opinions suggest that the press should not be subject to any law, including copyright law for example, which in any fashion or to any degree limits or restricts the press' right to report truthful information. The First Amendment does not grant the press such limitless protection.").

⁸² 433 U.S. 562 (1977).

⁸³ See *Cowles Media*, 501 U.S. at 669.

⁸⁴ See Berne Convention Implementation Act of 1988, § 4, Pub. L. 100-568, 102 Stat. 2853 (1988) (amending Copyright Act to cover architectural works); Act of Dec. 12, 1980, § 10, Pub. L. 96-517, 94 Stat. 3015 (1980) (codified as amended at 17 U.S.C. § 17) (amending Copyright Act to mention computer programs). In its 1997 Report on Availability of Bombmaking Information, the U.S. Department of Justice argued that *Cowles Media* and *Zacchini* stand for the proposition "that generally applicable common-law causes of action typically will not offend the First Amendment in cases where they are applied to expressive conduct such as publication or broadcast," unless "an element of that cause of action inevitably (or almost always) depends on the communicative impact of speech or expression." U.S. DEP'T OF JUSTICE, *supra* note 17, at n.56. This assertion, though, ignores the fact that *Zacchini* itself involved the right of publicity, a tort that invariably involves "expressive conduct such as publication or broadcast," see 433 U.S. 562, 562 (1977), and it doesn't mention *NAACP v. Claiborne Hardware Co.*, in which a generally applicable common-law cause of action was seen as offending the First Amendment when applied to expressive conduct, see *supra* notes 50-53 and accompanying text.

⁸⁵ 394 U.S. 131 (1969).

⁸⁶ 326 U.S. 1 (1945).

⁸⁷ *Cowles Media*, 501 U.S. at 669.

⁸⁸ See *supra* note 57 and accompanying text.

⁸⁹ Compare *Turner Broadcasting Sys., Inc. v. FCC*:

[W]hile the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment . . . laws that

resolved the argument that the law couldn't be applied because it restricted speech; after all, it was Cowles Media's speech that constituted the potentially actionable breaking of a promise.⁹⁰

But later in the opinion, the Court explains why promissory estoppel law is indeed constitutionally applicable to all speakers, whether press or not: "Minnesota law simply requires those making promises to keep them. The parties themselves, as in this case, determine the scope of their legal obligations, and any restrictions which may be placed on the publication of truthful information are self-imposed."⁹¹ So the Court rejected the free speech argument based on the principle that free speech rights, like most other rights, are waivable, rather than on an assertion that speech-neutral laws are per se constitutional.⁹²

D. The Religion Cases

A second argument in favor of the categorical constitutionality of speech-neutral laws might operate by analogy to religion-neutral laws. *Employment Division v. Smith*,⁹³ the argument would go, has held that generally applicable laws (in the "religion-neutral" sense) don't violate the Free Exercise Clause;⁹⁴ likewise, generally applicable laws (in the "speech-neutral" sense) shouldn't be seen as violating the Free Speech Clause.⁹⁵

single out the press . . . for special treatment 'pose a particular danger of abuse by the State,' . . . and so are always subject to at least some degree of heightened First Amendment scrutiny.

512 U.S. 622, 640–41 (1944) (internal citations omitted).

⁹⁰ See *Cowles Media*, 501 U.S. at 671.

⁹¹ *Id.*

⁹² This reasoning made it unnecessary for the majority to decide whether promissory estoppel law was purely content-neutral or facially content-neutral but content-based as applied, since the Court's argument that free speech rights may be waived would apply in either event.

⁹³ 494 U.S. 872 (1990).

⁹⁴ *Id.* at 879.

⁹⁵ Many commentators have noted the similarity between *Cohen v. Cowles Media* and *Employment Division v. Smith*, though without taking the next step to argue that all facially speech-neutral restrictions—including ones that are content-based as applied—are per se constitutional by analogy to *Smith* (a step that I have heard some people make in person, though not in print). See, e.g., Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 650-51 (2001); Kristian D. Whitten, *The Economics of Actual Malice: A Proposal for Legislative Change to the Rule of New York Times v. Sullivan*, 32 CUMB. L. REV. 519, 570 (2001–2002). *Smith* does reason that "generally applicable laws unconcerned with regulating speech that have the effect of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment, see *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969) (anti-trust laws)," and distinguishes such generally applicable laws from those "that make classifications based . . . on the content of speech," which are indeed subject to strict scrutiny. 494 U.S. at 886 n.3. Likewise, Justice Scalia argued in *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560 (1991), that facially speech-neutral rules are per se constitutional, by analogy to *Smith*: "[I]f the law is not directed against the protected value (religion or expression) the law must be obeyed."

This analogy, I think, is weak. The Free Exercise Clause and the Free Speech Clause protect different private interests, and courts have long interpreted them differently.⁹⁶ The Free Exercise Clause, for instance, doesn't generally entitle people to inflict emotional distress on a public figure, interfere with business relations, engage in anticompetitive conduct, breach the peace, or interfere with the draft, even if the people feel religiously compelled to do so. It probably wouldn't have entitled people to do so even in the decades between *Sherbert v. Verner*⁹⁷ and *Employment Division v. Smith*,⁹⁸ when the Free Exercise Clause ostensibly provided religious objectors with some exemptions from generally applicable laws.⁹⁹ The Free Speech Clause does let one do these things, if they are done through the communicative effect of one's speech.

But to the extent that the Free Exercise Clause and the Free Speech Clause are indeed analogous, the analogy cuts in favor of my argument. With the Religion Clauses as well, some laws that are religion-neutral on their face may still be unconstitutionally religion-based as applied. For instance, in intra-church disputes, generally applicable, religion-neutral laws—such as contract law, property law, and wills and trusts law—could usually be applied with no First Amendment problems. If I leave property to a church so long as the church doesn't use the property for manufacturing purposes, such a condition can be enforced.¹⁰⁰ But if applying the generally applicable testamentary interpretation rules would require courts to make religious judgments—for instance, if I leave property to a church so long as it remains religiously orthodox and my heirs try to reclaim the property on the grounds that the church has violated the condition—the Religion Clauses prohibit courts from acting.¹⁰¹

Id. at 579 (Scalia, J., concurring in the judgment). But these statements don't speak to what would happen when the law is *facially* generally applicable but nonetheless "make[s] classifications based on the content of speech" and is thus "directed against . . . expression" as applied. Neither *Smith* nor *Barnes* had occasion to consider this issue: The law involved in *Barnes* was not just generally applicable but also content-neutral as applied (at least in Justice Scalia's view, *see id.* at 574 n.2), as was the law in *Citizen Publishing*; likewise, the law at issue in *Smith* was religion-neutral as applied.

⁹⁶ See Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1498–1501 (1999).

⁹⁷ 374 U.S. 398, 410 (1963).

⁹⁸ 494 U.S. 872 (1990).

⁹⁹ See, e.g., *Gillette v. United States*, 401 U.S. 437, 461 & n.23 (1971) (rejecting a claim that the Free Exercise Clause mandates an exemption from the draft for those who oppose a particular war on religious grounds).

¹⁰⁰ See *Jones v. Wolf*, 443 U.S. 595, 602–04 (1979) (concluding that civil courts may decide church property disputes using "neutral principles" to interpret trust documents).

¹⁰¹ See *id.* at 604 (stressing that the "neutral principles" approach requires courts to "scrutinize the document in purely secular terms, and not to rely on religious precepts in determining" the document's meaning); Ark. Presbytery of the Cumberland Presbyterian

Likewise, the law of fraud and false advertising is facially religion-neutral and may often be applicable to churches' nonreligious claims. But if the law, as applied to a claim, would require courts to evaluate the truth or falsehood of a religious assertion, the Religion Clauses would prohibit such an application.¹⁰²

The same is likely true in other situations as well. If, for example, you inflict emotional distress on a pro-choice politician by using loudspeakers outside his house at 3 a.m., you will have no Free Speech Clause defense.¹⁰³ Likewise, even if you feel religiously compelled to remonstrate with the politician this way, you will likely have no Free Exercise Clause defense either.¹⁰⁴

But if you inflict emotional distress on the politician using the content of speech, for instance by publishing a vitriolic satire, that speech is constitutionally protected under the Free Speech Clause.¹⁰⁵ Likewise, if a church inflicts emotional distress on the politician by excommunicating him, the excommunication would be constitutionally protected under the Free Exercise Clause.¹⁰⁶ Even if the excommunication causes severe emotional distress—as it may, especially if the politician or his family believes that it will damn him to hell—and even if a jury finds that the excommunication was outrageous, the excommunication would remain constitutionally protected.

Thus, emotional distress that flows from the religiosity of the offensive conduct, like emotional distress that flows from the content of people's speech, may not form the basis of legal liability even under the generally applicable emotional distress tort. Similarly, many child custody cases have held that the facially religion-neutral "best interests of the child" standard may sometimes violate the Free Exercise Clause. Courts may not diminish the custody rights of a divorced parent be-

Church v. Hudson, 40 S.W.3d 301, 307 (Ark. 2001) ("Any documents, such as the church constitution, pertinent to the dispute, must be scrutinized in purely secular terms.")

¹⁰² See *United States v. Ballard*, 322 U.S. 78, 87–88 (1944).

¹⁰³ See *supra* note 62 and accompanying text.

¹⁰⁴ See *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 652–53 (1981) (holding—even during the *Sherbert/Yoder* era, when strict scrutiny was generally applied to religious exemption claims—that religious observers' rights to engage in religiously-motivated speech are no greater than secular speakers' rights to engage in analogous secular speech).

¹⁰⁵ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

¹⁰⁶ See, e.g., *Marks v. Estate of Hartgerink*, 528 N.W.2d 539, 544–45 (Iowa 1995) (refusing to recognize a tort of wrongful excommunication); *Murphy v. I.S.K.Con. of New England, Inc.*, 571 N.E.2d 340, 346 (Mass. 1991) (rejecting intentional infliction of emotional distress claim where a church's teachings allegedly caused the harm: "Inherent in the claim that exposure to ISKCON N.E.'s religious beliefs causes tortious emotional damage is the notion that the disputed beliefs are fundamentally flawed While this issue may be the subject of a theological or academic debate, it has no place in the courts of this Commonwealth"); *Korean Presbyterian Church v. Lee*, 880 P.2d 565, 569–70 (Wash. Ct. App. 1994) (refusing to recognize a tort of wrongful excommunication).

cause of the supposed harmfulness of the religious doctrine that he is teaching his children, unless the religious teaching is not just against the child's "best interests" but is actually likely to cause the child significant secular harm.¹⁰⁷

I don't want to claim too much of an analogy here. Though some of the cases cited above rely on the Free Exercise Clause,¹⁰⁸ others just talk about the First Amendment generally,¹⁰⁹ and the reasons for some of these doctrines may have more to do with fear of government entanglement with theological questions than with concern about equal treatment as such.¹¹⁰ As I mentioned, there is no reason to expect Free Speech Clause doctrine to track Religion Clauses doctrine perfectly. Nonetheless, the Religion Clauses jurisprudence generally illustrates the broader point: When constitutional doctrine prohibits laws that facially turn on some factor—whether the factor is the content of speech or religious judgments—the doctrine should also bar courts from applying generally applicable laws in ways that are based on that factor.¹¹¹

¹⁰⁷ See, e.g., *In re Marriage of Minix*, 801 N.E.2d 1201, 1205 (Ill. App. Ct. 2003); *Pater v. Pater*, 588 N.E.2d 794, 798 (Ohio 1992); *Zummo v. Zummo*, 574 A.2d 1130, 1157 (Pa. Super. Ct. 1990); *In re Marriage of Knighton*, 723 S.W.2d 274, 282–83 (Tex. App. 1987); *In re Marriage of Jensen-Branch*, 899 P.2d 803, 808 (Wash. Ct. App. 1995). But see *In re Short*, 698 P.2d 1310, 1313 (Colo. 1985) (concluding that courts applying the "best interests of the child" standard can take into consideration the parents' religious practices, though acknowledging that even in those cases, "[c]ourts are precluded by the free exercise of religion clause from weighing the comparative merits of the religious tenets of the various faiths or basing its custody decisions solely on religious considerations"); *Rogers v. Rogers*, 490 So. 2d 1017, 1018–19 (Fla. Dist. Ct. App. 1986) (holding that the court "may consider a parent's religious beliefs or values as one of several factors aiding in its child custody determination"); *LeDoux v. LeDoux*, 452 N.W.2d 1, 5 (Neb. 1990) (concluding that "[t]he paramount consideration in all cases involving the custody or visitation of a child is the best interests of the child," and that the parents' religious practices may be considered when determining what is in the child's best interests).

¹⁰⁸ See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107–08 (1952) (holding that interference with internal church affairs violates "the free exercise of religion"); see also *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 447–48 (1969) (citing *Kedroff* for the same proposition); *United States v. Ballard*, 322 U.S. 78, 86–87 (1944) (relying on the "freedom of religious belief").

¹⁰⁹ See, e.g., *Jones v. Wolf*, 443 U.S. 595, 602 (1979) (relying on the First Amendment generally rather than the Free Exercise Clause specifically); *Zummo*, 574 A.2d at 1138, 1157–58 (discussing both the Free Exercise Clause and the Establishment Clause); *Knighton*, 723 S.W.2d at 277–78 (same); see also *Bonjour v. Bonjour*, 592 P.2d 1233, 1241 (Alaska 1979) (relying solely on the Establishment Clause); *Waites v. Waites*, 567 S.W.2d 326, 331 n.2 (Mo. 1978) (same).

¹¹⁰ See, e.g., *Jones*, 443 U.S. at 603; *Ballard*, 322 U.S. at 87.

¹¹¹ We see something similar even in Equal Protection Clause jurisprudence. Generally applicable race-neutral laws are usually constitutional—but not when they are race-based as applied. Consider *Palmore v. Sidoti*, 466 U.S. 429 (1984), where the Court held unconstitutional a child custody decision based on the mother's having remarried someone of another race: A best interests of the child standard is facially race-neutral, and usually quite permissible, but when the harm to the child's interests is said to flow from the

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

1. *The Limited Relevance of Good Government Motives*

The cases discussed in Part I.B reflect a coherent principle: The First Amendment generally makes conveying facts and opinions into a constitutionally immunized activity. Normally, the government may punish people for causing various harms, directly or indirectly. But it generally may not punish speakers when the harms are caused by what the speaker said—by the persuasive, informative, or offensive force of the facts or opinions expressed.¹¹²

This is, of course, quite compatible with the Court's general jurisprudence of content-based restrictions; it just equally covers laws that are content-based as applied and laws that are content-based on their face. And this principle makes sense, because a law that's content-based as applied—such as the Espionage Act involved in *Schenck*¹¹³ and *Debs*¹¹⁴—can restrict speech as much as a law that's content-based on its face. Moreover, such a law is indeed punishing the “speech element” of the communication rather than some “nonspeech element.”¹¹⁵

This principle is in some tension, however, with claims that the First Amendment is chiefly aimed at preventing government actions that are motivated by a desire to suppress speech.¹¹⁶ In the examples set forth above, the lawmakers may have genuinely wanted to prevent a certain kind of harm, and may have been quite indifferent to

parent's race, the Court recognizes that the application of the law involves race discrimination. *See id.* at 432.

¹¹² Unless, of course, the speech falls within one of the First Amendment exceptions, such as incitement, false statements of fact, threats, and the like.

¹¹³ *Schenck v. United States*, 249 U.S. 47 (1919).

¹¹⁴ *Debs v. United States*, 249 U.S. 211 (1919).

¹¹⁵ *See United States v. O'Brien*, 391 U.S. 367, 376 (1968).

¹¹⁶ *See, e.g., Kagan, Private Speech, Public Purpose, supra* note 27, at 414 (“First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives.”); Kagan, *When a Speech Code Is a Speech Code, supra* note 15, at 965 & n.24, 968–69 (applying this approach to suggest that generally applicable policies banning hostile environment harassment in universities should only be reviewed under *O'Brien*, even when they're applied to otherwise fully protected speech); Rubinfeld, *supra* note 13, at 784 (arguing that the Free Speech Clause is implicated “if and only if: (1) the law makes the fact that [a person] was communicating an element of the prohibited offense; (2) the legislative purpose was to target speech even though the prohibition is speech-neutral on its face; or (3) the law was selectively enforced to target speech”). I say only “in some tension” because some of the scholars who urge a focus on motive acknowledge that “[s]ome aspects of First Amendment law resist explanation in terms of motive.” Kagan, *Private Speech, Public Purpose, supra* note 27, at 415. Since Professor Kagan's claim is only that “the concern with governmental motive [is] . . . the most important[] explanatory factor in First Amendment law,” *id.*, and “most important” is necessarily a subjective term, I leave it to the reader to decide whether the cases discussed above substantially undermine that claim.

whether that harm is caused by speech or by conduct. The drafters of the Espionage Act, for instance, might have sincerely wanted to punish all interference with military recruitment. But whether the Act was well-motivated or not, it should have generally been unconstitutional when applied to interference by persuasion.

In some of the examples, one can argue that the law is open to improper government motivations in its enforcement. For instance, the “outrageousness” test in the emotional distress tort,¹¹⁷ the “offensive conduct” test in breach of the peace laws,¹¹⁸ and the “offensive work environment” test in workplace harassment law¹¹⁹ are quite vague. Prosecutors, judges, and juries might well interpret them narrowly when they agree with the speech, and broadly when they disagree with the speech.

But in other situations, the law is pretty clear. Public speech that advocates draft resistance does seem likely to obstruct recruitment.¹²⁰ A journal article that explains how fingerprint recognition systems can be evaded¹²¹ does seem likely to facilitate certain crimes by some readers. If applying the law to such speech would violate the First Amendment, the reason must flow from something other than the government’s motive, which may well be quite pure.¹²² So, if the cases discussed in Part I.B are right, then the constitutional problem lies in the law’s being content-based as applied—in its punishing speech because of the persuasive effect of the speech—and not in the government’s being motivated by a desire to suppress speech rather than to prevent harm.

Though the Supreme Court has at times said that “[i]n determining whether a regulation is content based or content neutral, we look to the purpose behind the regulation,”¹²³ it has also acknowledged

¹¹⁷ See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988).

¹¹⁸ See, e.g., *Cohen v. California*, 403 U.S. 15, 16 (1971).

¹¹⁹ See Eugene Volokh, *What Speech Does “Hostile Work Environment” Harassment Law Restrict?*, 85 GEO. L.J. 627, 635–37 (1997).

¹²⁰ See, e.g., *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring); *Masses Publ’g Co. v. Patten*, 244 F. 535, 539–40 (S.D.N.Y. 1917) (Hand, J.).

¹²¹ See, e.g., Ton van der Putte & Jeroen Keuning, *Don’t Get Your Fingers Burned*, in *IFIPTC8/WG8.8 FOURTH WORKING CONFERENCE ON SMART CARD RESEARCH AND ADVANCED APPLICATIONS* 289, 294–99 (2000) (arguing that “none of the fingerprint scanners that are currently available can distinguish between a finger and a well-created dummy” and describing two methods to create dummies that will fool the scanners), available at http://www.keunigh.com/biometry/Biometrical_Fingerprint_Recognition.pdf.

¹²² Prosecutors may still have discretion in deciding whom to charge under those laws, and they may exercise that discretion out of a desire to suppress certain viewpoints, rather than to evenhandedly prevent the harm that the law is aimed at preventing. But that risk is equally present for any law that may be applied to speech, including generally applicable laws that are both speech-neutral on their face and content-neutral as applied.

¹²³ *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

that “while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases.”¹²⁴ The better formulation is the one the Court has often used: A content-neutral law is one that is “justified without reference to the content of the regulated speech”¹²⁵—and a law that is content-based as applied is indeed justified, in that application, with reference to what the speech communicates.¹²⁶

2. *Content-Based Applications vs. Content-Neutral Applications*

a. *The Problem*

Courts, then, treat generally applicable laws that are content-based as applied differently from ones that are content-neutral as applied. The Court probably would not, and should not, have intervened if *Hustler* had inflicted emotional distress on Falwell by using loud bullhorns outside Falwell’s house. Nor would the Court have found a First Amendment violation if the NAACP had been sued for organizing a demonstration that blocked the entrance to Claiborne Hardware’s door, or if Schenck had been prosecuted for interfering with the draft by blocking a draft board office.

But why? The law, and thus the lawmakers’ motivation for enacting the law, would be the same in these hypotheticals as in the real cases. The law’s effect would be the same: The law as applied would restrict speech. What then is left to explain the difference? And if indeed the lawmakers’ motivation doesn’t have the importance that

¹²⁴ *Id.* at 526 n.9 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642–43 (1994)).

¹²⁵ *See id.* at 526; *Hill v. Colorado*, 530 U.S. 703, 720 (2000); *United States v. Playboy Entm’t Group*, 529 U.S. 803, 811 (2000); *United States v. Eichman*, 496 U.S. 310, 317–18 (1990); *Ward*, 491 U.S. at 791; *TRIBE*, *supra* note 49, at 789–90; John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496–1502 (1975); *see also* Stone, *Content Regulation and the First Amendment*, *supra* note 43, at 211–17 (taking a similar view, but limited to those restrictions where the communicative impact consists of persuading, informing, or offending people).

¹²⁶ In *Thornburgh v. Abbott*, 490 U.S. 401 (1989), a prison speech case, the Court did interpret a “content-neutrality” rule as focusing on the government’s ultimate motive rather than on whether the rule restricted speech based on its content. The *Thornburgh* Court upheld a restriction on speech with certain content on the ground that the restriction was “neutral,” in the sense of being ultimately justified by an interest in prison security, rather than by a dislike for certain viewpoints. *See id.* at 404–05 & n.5, 415–16 (upholding ban on information about weapons construction or alcohol production, encouragement of escape or other crimes, or “sexually explicit material” and especially homosexually-themed material that “poses a threat to the security, good order, or discipline of the institution”). If a similar rule were applied outside prisons, a wide range of speech restrictions—for instance, bans on advocacy of violence, draft evasion, sexism, and so on—would be treated as “content-neutral” simply because the government’s ultimate purpose would be to prevent harmful conduct. Fortunately, this approach seems to be limited to restrictions on prisoner speech; *Thornburgh* itself stressed that it was applying an unusual definition of neutrality. *See id.* at 415–16 (referring to “the technical sense” in which the Court used the term ‘neutral’ in [a prior case that discussed this test]).

some assign to it, then what is the difference even between facially content-based laws and facially content-neutral ones? There are, I think, two main answers to these questions—a conceptual one and a pragmatic one.

b. *The Conceptual Distinction*

Under nearly every theory of free speech, the right to free speech is at its core the right to communicate—to persuade and to inform people through the content of one’s message. The right must also generally include in considerable measure the right to offend people through that content, since much speech that persuades some people also offends others.¹²⁷

Persuading and informing people may certainly cause harm; the listeners might be persuaded to do harmful things. But the premise of modern First Amendment law is that the government generally may not (with a few narrow exceptions) punish speech because of a fear, even a justified fear, that people will make the wrong decisions based on that speech: “[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. . . . [I]f there be any danger that the people cannot evaluate the information and arguments advanced by [speakers], it is a danger contemplated by the Framers of the First Amendment.”¹²⁸ Thus, punishing speech because its content persuades, informs, or offends especially conflicts with the free speech guarantee, more so than punishing speech for reasons unrelated to its potential persuasive, informative, or offensive effect.

¹²⁷ There might be some limits on this right to offend, for instance if (1) the speaker is communicating to someone who has already said that he doesn’t want to hear the message, and (2) the speaker can stop speaking to this unwilling listener, while still continuing to try to persuade or inform other potentially willing listeners. See, e.g., *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970) (adopting this view as to unwanted mailings sent to people’s homes); *Frisby v. Schultz*, 487 U.S. 474, 486 (1988) (adopting this view as to residential picketing, though in my view not so persuasively as in *Rowan*); Volokh, *Freedom of Speech and Workplace Harassment*, *supra* note 74, at 1863–66 (suggesting such an approach as to hostile environment harassment law).

¹²⁸ *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 791–92 (1978); see also *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 96–97 (1977) (ruling that a Township Council ordinance “restrict[ing] the free flow of . . . data because [the Council] fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners self interest” is unconstitutional and “paternalistic”); Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 579–81 (2004) (“[I]n the law of free speech . . . paternalism has been largely rejected.”); Stone, *Content Regulation and the First Amendment*, *supra* note 43, at 213–14 (“Government ordinarily may not restrict the expression of particular ideas, viewpoints, or items of information because it does not trust its citizens to make wise or desirable decisions if they are exposed to such expression.”).

c. *Practical Effects*

i. *Content-Based Restrictions as Likely Greater Burdens on Speech*

I suspect that the Court's skepticism about content-based laws (whether facially content-based or content-based as applied) flows in large part from this conceptual distinction.¹²⁹ But the conceptual argument is also reinforced by a pragmatic one: Allowing content-based restrictions (whether facially content-based or content-based as applied) is likely to burden speech more than allowing content-neutral restrictions.¹³⁰

To begin with, a typical law aimed at noncommunicative effects is unlikely to excessively inhibit the communication of some viewpoint or fact, because many different media would remain available to the speakers.¹³¹ For instance, even a total ban on leafleting, justified by the desire to prevent litter, would still leave people free to communicate their views by the many media that don't create litter—by displaying signs, using radio broadcasts, advertising in newspapers, and so on.

I think the leafleting ban would indeed interfere with public debate too much, but it can't even come close to driving certain views entirely from public debate. Moreover, because the content-neutral law can potentially apply to a wide range of speakers, its scope will likely be limited by political forces.¹³² Thus, the most severe hypothet-

¹²⁹ See, e.g., *United States v. O'Brien*, 391 U.S. 367, 382 (1968) (distinguishing restrictions aimed at the "communicative" elements of expressive conduct from those aimed at its "noncommunicative" elements); *Police Dep't v. Mosley*, 408 U.S. 92, 94–96 (1972) (holding that the government generally may not "restrict expression because of its message, its ideas, its subject matter, or its content").

¹³⁰ I'll treat the term "content-based restrictions" as roughly interchangeable with the phrase "restrictions triggered by the communicative effects of speech," and the term "content-neutral restrictions" as roughly interchangeable with the phrase "restrictions triggered by the noncommunicative effects of speech." Some commentators have also argued that content-based restrictions are more dangerous than content-neutral restrictions, because content-based restrictions often distort public debate by burdening one side of a debate while allowing another to be heard free of any such burden. See, e.g., Stone, *Content Regulation and the First Amendment*, *supra* note 43, at 217–27. Others have disagreed. See, e.g., Kagan, *Private Speech, Public Purpose*, *supra* note 27, at 445–51. My analysis neither relies on nor rejects the distortion argument—I focus on whether a restriction is likely to substantially interfere (as opposed to only modestly interfere) with the expression of certain facts or viewpoints.

¹³¹ See Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 75 (1987) ("[E]ven in such cases [where a content-neutral restriction has a strong content-differential effect], the harm that can flow from judicial miscalculation is limited. Content-neutral restrictions usually limit the availability of only particular means of expression. They are thus unlikely substantially to block the communication of particular messages.").

¹³² See *Boos v. Barry*, 485 U.S. 312, 336–37 (1988) (Brennan, J., concurring in part and concurring in the judgment) ("[T]he best protection against governmental attempts to squelch opposition . . . [has been] the requirement that the government act through con-

ical content-neutral restrictions—for instance, a ban on printing, justified by the environmental harms caused by the process of making paper¹³³—are sure to remain just hypotheticals: They are politically implausible precisely because they burden so much speech.

On the other hand, a content-based restriction, whether facially content-based or content-based as applied, can outlaw most expression of certain facts or opinions. If a law, such as the laws in *Schenck v. United States*¹³⁴ or *NAACP v. Claiborne Hardware Co.*,¹³⁵ bans any conduct that may cause a certain harm, and persuading people to act in certain ways can cause that harm, then any viewpoints that have the potential for such persuasion—the draft is evil, blacks should boycott white-owned businesses—would largely be prohibited. Because the law focuses either on the content of the speech or on the harm that the speech causes, it can block the speech in all media. And because it's limited to a narrow range of speech, it may face less political opposition than broader bans might provoke.¹³⁶

Even narrower content-based restrictions, such as the laws involved in *Cohen v. California*¹³⁷ or *Hustler Magazine v. Falwell*,¹³⁸ can be quite burdensome. True, such restrictions only limit the particular words (in *Cohen*) or the level of vitriol (in *Hustler*) a speaker can use, and don't ban the expression of a particular fact or idea. But as Justice Harlan rightly concluded in *Cohen*, even such restrictions can seriously interfere with people's ability to express the "otherwise inexpressible emotions" that only certain kinds of words can effectively capture.¹³⁹ Harsh contempt for a policy (the draft) or a person (Jerry Falwell) is itself a viewpoint that is subtly different from mild-

tent-neutral means that restrict expression the government favors as well as expression it disfavors.”).

¹³³ See Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 721–22 (2000) (suggesting as an example a law that bans newsprint to save trees); see also Stone, *Content-Neutral Restrictions*, *supra* note 131, at 58 (discussing a hypothetical law that would neutrally ban all speeches, leaflets, newspapers, magazines, and radio or television broadcasts).

¹³⁴ 249 U.S. 47 (1919).

¹³⁵ 458 U.S. 886 (1982).

¹³⁶ Of course, restrictions on popular conduct, or on conduct engaged in by a politically powerful minority, may indeed face serious political opposition. Conduct restrictions in a democracy tend to ban only unpopular conduct, however, such as interference with the war effort (as in *Schenck*), and with it equally unpopular speech. Such generally applicable restrictions may therefore be fairly easy to enact, since they target only a relatively small and unpopular group. Content-neutral restrictions on speech (such as leafleting or picketing), on the other hand, would restrict many political groups from all over the political spectrum. If such content-neutral restrictions are too burdensome, they would thus likely arouse a wide range of opposition, which provides a natural political check on their scope.

¹³⁷ 403 U.S. 15 (1971).

¹³⁸ 485 U.S. 46 (1988).

¹³⁹ See *Cohen*, 403 U.S. at 25–26.

mannered condemnation, and prohibitions on harsh language seriously interfere with the ability to convey this viewpoint.

- ii. *The Limits of the “Ample Alternative Channels” Inquiry, Both as to Content-Neutral Restrictions and as to Content-Based Restrictions*

I have argued that content-based restrictions are dangerous because they risk broadly suppressing certain viewpoints or facts. But one could respond that, instead of presumptively prohibiting content-based speech restrictions, courts could try to prevent serious burdens on speech the same way they do with content-neutral restrictions: by asking whether the restrictions leave open “ample alternative channels” for expression.¹⁴⁰

I think, though, that the Court has been right to reject such proposals and to treat content-based restrictions as presumptively unconstitutional without an inquiry into how much the restriction burdens speech or into whether the restriction leaves open ample alternative channels.¹⁴¹ To begin with, the record of the ample alternative channels inquiry in the content-neutral restriction test hasn’t been very good. The Court has at times applied it in a demanding manner, for instance insisting that alternative channels aren’t ample if they materially raise the price of speaking, make it harder for speakers to reach the same listeners, or subtly influence the content of the message by changing the medium.¹⁴² But at other times, the Justices have treated this requirement as only a weak constraint.¹⁴³ Such a disparity is to be expected given the vagueness of the term “ample.”

¹⁴⁰ See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 56–57 (1994).

¹⁴¹ See *Reno v. ACLU*, 521 U.S. 844, 879–80 (1997); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 430 (1993); *Consol. Edison Co v. Public Serv. Comm’n*, 447 U.S. 530, 535–38 (1980).

¹⁴² See, e.g., *Gilleo*, 512 U.S. at 56–57.

¹⁴³ See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53–54 (1986) (holding that a zoning law that banned adult theaters from 95% of the land in a city left open ample alternative channels, though it apparently substantially increased the likely expense of renting or buying space, and likely made the theaters less accessible); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 & n.30 (1984) (holding that a ban on posting leaflets on city-owned utility poles left open ample alternative channels, though the alternatives were likely considerably more expensive); see also *Bartnicki v. Vopper*, 532 U.S. 514, 544 (2001) (Rehnquist, C.J., dissenting) (articulating and applying the test for content-neutral speech restrictions without even mentioning the ample alternative channels inquiry, in a case where the speech restriction probably left open very few realistic channels for communicating the facts that the speaker wanted to communicate); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1992) (articulating and applying the test for content-neutral speech restrictions without mentioning the ample alternative channels inquiry); cf. JAMES WEINSTEIN, *HATE SPEECH, PORNOGRAPHY, AND THE RADICAL ATTACK ON FREE SPEECH DOCTRINE* 35, 39 (1999) (pointing out that content-neutral restrictions are nearly always upheld); Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1262–63 (1995) (concluding that the ample alternative channels prong is “read as extraordinarily lenient”).

In fact, the chief practical limit on content-neutral restrictions has not been the “ample alternative channels” inquiry, but rather the political reality mentioned above: Most realistically enactable restrictions on the noncommunicative aspects of speech do leave open fairly substantial alternative channels for expressing the same ideas. So even if the Court underenforces the ample alternative channels prong, few views or subjects will likely be broadly silenced.¹⁴⁴

But it’s much more likely that a politically feasible restriction on the communicative aspects of speech will substantially block people from expressing a particular viewpoint. This is true even when the restriction is framed as facially content-neutral, or even as speech-neutral—consider, for instance, the Espionage Act in *Schenck*.¹⁴⁵ Judicial underenforcement of the ample alternative channels prong for content-based restrictions would thus be much more dangerous than underenforcement in the context of content-neutral restraints.

iii. *The Limits of the “Ample Alternative Channels” Inquiry as to Content-Based Restrictions*

Judicial underenforcement of the ample alternative channels prong would also be more likely when the case involves content-based restrictions, whether they are facially content-based or content-based as applied. “Ample” is a vague term, and one that requires contestable predictions about the law’s effects on a complex system of speakers and listeners. There is a large gray area in which the quality of the alternative channels would be hard to estimate. And when the restriction will likely cover only a particular message—pro-boycott speech, anti-draft speech, and so on—the normal risk of judicial error and deliberate or subconscious prejudice is magnified because the judges know well which side of the political debate will lose as a result of their decision.¹⁴⁶ In such a scenario, it’s especially likely that judges will apply the vague “ample alternative channels” standard in a way that’s not protective enough of unpopular speakers. It is probably no accident that the low water mark of the requirement, *City of Renton v. Playtime Theatres, Inc.*,¹⁴⁷ involved a restriction that was limited to sexually-themed speech, even though the Court treated the restriction as content-neutral.¹⁴⁸

¹⁴⁴ See Stone, *Content Regulation and the First Amendment*, *supra* note 43, at 226; *supra* note 131.

¹⁴⁵ See *supra* note 40 and accompanying text.

¹⁴⁶ See WEINSTEIN, *supra* note 143, at 40 (noting the risk of deliberate or subconscious judicial viewpoint discrimination); Stone, *Content Regulation and the First Amendment*, *supra* note 43, at 225 (“[J]udicial evaluations of viewpoint-based restrictions are especially likely to ‘become involved with the ideological predispositions of those doing the evaluating.’” (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST* 112 (1980))).

¹⁴⁷ 475 U.S. 41, 53–54 (1986).

¹⁴⁸ *Id.* at 46–49.

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

If such a group succeeds in restricting, say, Communist speech in some contexts, it seems likely that it will also want to restrict Communist speech in other contexts. Likewise, if a movement tries to restrict bigoted speech in workplaces, perhaps using generally applicable hostile work environment harassment law, it will also likely try to use similar educational and public accommodations harassment rules to restrict speech in educational institutions or places of public accommodation.¹⁴⁹ (That has in fact been the pattern of restrictions on Communist advocacy, antiwar speech, sexually themed speech, pro-civil-rights speech, and racist speech.¹⁵⁰)

Each success will help validate the pro-restriction forces' positions in the eyes of voters and legislators who are on the fence.¹⁵¹ Moreover, each success may reinforce the enthusiasm of the supporters of the restrictions.¹⁵² And government restrictions on such speech are also likely to be accompanied by private restrictions on such speech, for instance by private broadcasters, publishers, employers, and commercial property owners. As a result, even when each restriction standing alone imposes only a modest burden on speech, the aggregate of all the restrictions can end up being quite burdensome.

It is, of course, possible for courts to consider this risk, to allow only the first few restrictions, and then to strike down any new restrictions once the alternative channels no longer seem to be ample. But that's a hard project for courts to engage in, especially when they are armed only with the vague "ample alternative channels" standard.

¹⁴⁹ See generally Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, *supra* note 7, at 303, 317–33 (noting this tendency).

¹⁵⁰ See GEOFFREY R. STONE, *PERILOUS TIMES* 311–426 (2004) (Communist speech); *id.* at 135–231 (antiwar speech); Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, *supra* note 7, at 303, 317–33 (sexually-themed and racist speech); ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 35–36, 44 (1991) (pro-civil-rights speech).

¹⁵¹ See Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 *Geo. L.J.* 727, 737–38 (1980) (noting that content-based classifications may “stigmatiz[e] the categories they single out for special treatment”); Eugene Volokh, *Mechanisms of the Slippery Slope*, 116 *HARV. L. REV.* 1026, 1077–1105 (2003) (describing such “attitude-altering slippery slopes”).

¹⁵² See Volokh, *Mechanisms of the Slippery Slope*, *supra* note 151, at 1121–27 (describing such “political momentum slippery slopes”).

Judges may find it hard to explain why they are treating two seemingly similar restrictions differently, simply because of the order in which the restrictions were enacted. And because “ample” lacks an objective, absolute definition, courts may end up applying a relative criterion—how many channels the restriction leaves open compared to those available before this restriction was enacted, or how many it leaves open compared to those that it shuts down. If that is so, courts might indeed allow a sequence of restrictions that gradually but substantially reduces the alternative channels, even if the courts would have struck down a restriction that tried to impose the same burden all at once.¹⁵³

d. *Conclusion*

For all these reasons, the Court has been right to treat restrictions that are content-based as applied—even if they are facially generally applicable to both speech and conduct—with the same skepticism as it has used for restrictions that are content-based on their face. It’s the only approach that is consistent with *Hustler*, *Claiborne Hardware*, and the other similar cases. It’s properly hostile to the government’s attempts to restrict speech because of the informative or persuasive power of the speech. And it’s necessary to prevent the government from having the power to broadly suppress certain facts and ideas.

When speech is punished precisely because of what it communicates—for instance, because it may persuade people to violate the law or to boycott someone, because it may offend some listeners, or because it may convey information that helps people commit crimes—the law is operating as a content-based speech restriction. The law is restricting speech precisely because of what is spoken. Therefore, courts should subject such a law to serious First Amendment analysis;

¹⁵³ See *id.* at 1105–14 (describing such “small change tolerance slippery slopes”).

This tendency might also occur with restrictions aimed at the noncommunicative impact of speech. A billboard ban, a home sign ban, or a leafleting ban, for instance, may be part of a broader movement that values calm and esthetics above free speech. See Stone, *Content-Neutral Restrictions*, *supra* note 131, at 74–75 (observing that government officials “are usually deeply committed to the maintenance of order and the conservation of resources,” which may lead them to systematically support even content-neutral speech restrictions that seem to make public places calmer, or diminish the government’s administrative or police protection burdens). Such a movement may indeed end up yielding a sequence of these sorts of restrictions.

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

they ought not dodge this analysis by simply relabeling the speech as “conduct.”

II

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

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

“It rarely has been suggested,” Justice Black wrote for the Court in *Giboney v. Empire Storage & Ice Co.*¹⁵⁴ in 1949, “that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”¹⁵⁵ “[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”¹⁵⁶ Likewise, Justice Black joined two opinions characterizing *Giboney* as stating that speech may be punished when it’s “brigaded with illegal action.”¹⁵⁷ Others have described the *Giboney* principle as authorizing speech restrictions when the speech is tantamount to a “speech act[].”¹⁵⁸

Giboney used this reasoning to uphold an injunction against peaceful picketers who were trying to pressure a business “to agree to stop selling ice to nonunion peddlers.”¹⁵⁹ Such an agreement, the Court said, would have violated Missouri trade restraint law; therefore, enjoining such picketing did not violate the First Amendment.¹⁶⁰ But the *Giboney* argument has also been used to justify many other kinds of speech restrictions:

¹⁵⁴ 336 U.S. 490 (1949).

¹⁵⁵ *Id.* at 498.

¹⁵⁶ *Id.* at 502.

¹⁵⁷ See *Garrison v. Louisiana*, 379 U.S. 64, 82 (1964) (Douglas, J., concurring); *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting); cf. *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring) (not joined by Justice Black on this point).

¹⁵⁸ See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 248 (4th Cir. 1997); U.S. DEP’T OF JUSTICE, *supra* note 17, at text accompanying nn.55–60. Occasionally, as in the arguments about crime-facilitating speech, the *Giboney* argument may overlap with the “generally applicable law” argument, but the *Giboney* argument is sometimes used even to defend laws that explicitly restrict speech, such as laws prohibiting the solicitation of crime. See *Rice*, 128 F.3d at 243–44.

¹⁵⁹ *Giboney*, 336 U.S. at 492.

¹⁶⁰ *Id.* at 504.

- (a) The Justice Department¹⁶¹ and a court of appeals¹⁶² have recently reasoned that *Giboney* lets the government restrict books that may inform people how to violate the law, at least when the publisher intends that those books help people commit crimes.
- (b) Justice Goldberg's majority opinion in *Cox v. Louisiana*¹⁶³ described *Giboney* as supporting the proposition that "[a] man may be punished for encouraging the commission of a crime."¹⁶⁴ The Court cited as an example *Fox v. Washington*,¹⁶⁵ a 1915 case that upheld the punishment of a newspaper editor who endorsed the propriety of nudism.¹⁶⁶

¹⁶¹ See U.S. DEP'T OF JUSTICE, *supra* note 17, at text accompanying nn.55-56. The DOJ's Report noted:

[I]t is hard to imagine that the First Amendment would permit culpability or liability for publication of other bombmaking manuals that have a propensity to be misused by some unknown, unidentified segment of the readership, since sources of the same information inevitably will remain in the public domain, readily available to persons who wish to manufacture and use explosives. . . . On the other hand, the constitutional analysis is radically different where the publication or expression of information is "brigaded with action," in the form of what are commonly called "speech acts." If the speech in question is an integral part of a transaction involving conduct the government otherwise is empowered to prohibit, such "speech acts" typically may be proscribed without much, if any, concern about the First Amendment, since it is merely incidental that such "conduct" takes the form of speech. "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Id. Despite the opening sentence of the quotation, the Justice Department used this argument to defend the constitutionality of a ban on "publication of . . . bombmaking manuals that have a propensity to be misused by some unknown, unidentified segment of the readership," so long as the ban was limited to publishers who were "motivated by a desire to facilitate the unlawful use of explosives." *Id.* at text accompanying nn.55 & 68.

¹⁶² See *Rice*, 128 F.3d at 243 (relying on *Giboney* in allowing liability for publishing a book that described how to commit contract murders); see also *United States v. Savoie*, 594 F. Supp. 678, 682, 685-86 (W.D. La. 1984) (relying on *Giboney* in issuing an injunction against, among other things, the distribution of any document explaining how taxpayers could "avoid the payment of, or to obtain the refund of, federal income taxes . . . based on the false proposition that wages, salaries or other forms of compensation for labor or services not specifically excluded from taxation under Title 26 of the United States Code are not taxable income").

¹⁶³ 379 U.S. 559 (1965).

¹⁶⁴ *Id.* at 563.

¹⁶⁵ 236 U.S. 273 (1915).

¹⁶⁶ *Id.* at 273; see also *State v. Musser*, 175 P.2d 724, 731 (Utah 1946) (upholding criminal punishment for conspiracy to teach the propriety of polygamy, on the theory that "[e]xpressions and the use of words may constitute verbal acts," and that therefore "an agreement to advocate, teach, counsel, advise and urge other persons to practice polygamy and unlawful cohabitation, is an agreement to commit acts injurious to public morals within the scope of the conspiracy statute"), *vacated and remanded*, 333 U.S. 95 (1948); *Rubinfeld*, *supra* note 13, at 827-28 (justifying *Brandenburg* on the grounds that incitement

- (c) Some courts have recently used *Giboney* to defend restrictions on doctors' recommending medicinal marijuana to their patients.¹⁶⁷
- (d) Courts have similarly used the "conduct not speech" argument to justify restricting speech that creates an offensive work environment.¹⁶⁸
- (e) Judges have relied on *Giboney* to support restrictions on speech that urges political boycotts aimed at pressuring governments to change their policies.¹⁶⁹
- (f) A state administrative agency has relied on *Giboney* to justify a restriction on racially offensive business names.¹⁷⁰
- (g) The dissent in *Cohen v. California*¹⁷¹ (joined by Justice Black) cited *Giboney* to argue that wearing a jacket containing the phrase "Fuck the Draft" should be constitutionally unprotected: "Cohen's absurd and immature antic . . . was mainly conduct and little speech."¹⁷²

intended to and likely to cause imminent illegal conduct is "participat[ion] in[] that course of conduct").

¹⁶⁷ See *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 121 (D.D.C. 2001); *Conant v. McCaffrey*, 172 F.R.D. 681, 698 (N.D. Cal. 1997); see also *Petition for a Writ of Certiorari* at 20, *Walters v. Conant*, 540 U.S. 946 (2003) (No. 03-40). But see *Conant v. Walters*, 309 F.3d 629, 637-38 (9th Cir. 2002) (holding such speech constitutionally protected). These particular restrictions might be justifiable under a possible professional-client speech exception, see *infra* text accompanying notes 338-53, though I'm not sure that this is so.

¹⁶⁸ See *Jarman v. City of Northlake*, 950 F. Supp. 1375, 1379 (N.D. Ill. 1997) (not citing *Giboney*, but reasoning that "verbal acts of sexual harassment are not protected speech"); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) (not citing *Giboney*, but reasoning that "[pornographic] pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment"); see also Robert A. Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech": The View from Without and Within*, 53 U. PITT. L. REV. 631, 673 n.159, 674 (1992) (taking a similar view, at least with respect to speech by supervisors).

¹⁶⁹ See *Missouri v. Nat'l Org. for Women*, 620 F.2d 1301, 1324 n.15 (8th Cir. 1980) (Gibson, J., dissenting) (arguing, citing *Giboney*, that NOW's advocacy of a boycott of Missouri businesses, aimed at getting Missouri to ratify the Equal Rights Amendment, might be constitutionally punishable as an antitrust law violation); *Searle v. Johnson*, 646 P.2d 682, 685 (Utah 1982) (holding, citing *Giboney*, that the state Humane Society's advocacy of a tourist boycott of a county, aimed at getting the county to improve its dog pound, could be constitutionally punishable as interference with prospective business advantage).

¹⁷⁰ *In re Urban League v. Sambo's*, No. 79 PRA 074-06/06, at 9 (R.I. Comm'n for Hum. Rts. Mar. 16, 1981) (relying partly on *Giboney* to conclude that the name "Sambo's Restaurants" violated public accommodations laws because it was offensive to black customers). But see *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 694 (6th Cir. 1981) (stating that use of the name was protected by the First Amendment even if it was offensive to black customers); *Sambo's of Ohio v. City Council of Toledo*, 466 F. Supp. 177, 179 (N.D. Ohio 1979) (holding that it was unconstitutional for a city to deny sign permits to Sambo's because of its name).

¹⁷¹ 403 U.S. 15 (1971).

¹⁷² *Id.* at 27 (Blackmun, J., dissenting).

B. But What Exactly Does *Giboney* Mean?

These applications of *Giboney* may seem puzzling, and in many respects inconsistent with recent First Amendment cases such as *Cohen*, *Brandenburg*, and *Claiborne Hardware*.¹⁷³ This is so because the logic of *Giboney* itself is puzzling, and inconsistent with the logic of the more recent Supreme Court cases. In particular, none of the obvious interpretations of *Giboney*'s rather ambiguous language makes much sense.

1. "Course of Conduct" Referring to the Noncommunicative Harms of Speech

The modern Supreme Court case law has, of course, recognized a sort of conduct/speech distinction. Speech or expressive conduct may be restricted because of harms flowing from its noncommunicative component (noise, obstruction of traffic, and the like)—which one might view as its "conduct" element—but not because of harms flowing from its communicative component, the "speech" element.¹⁷⁴ This is the now-standard distinction that the Court introduced in *O'Brien* and on which it has continued to rely. But this can't be the distinction *Giboney* or the above cases that cite *Giboney* are using, since

¹⁷³ Justice Blackmun's dissent in *Cohen* is of course inconsistent with the majority's result. The approval in *Cox* of restrictions on speech that urges illegal conduct is inconsistent with *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The approval of restrictions on speech urging boycotts is inconsistent with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

¹⁷⁴ See *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Occasionally, courts indeed cite *Giboney* as supporting this conduct/speech distinction, and there it poses little difficulty. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 555 (1965) (citing *Giboney* for the proposition that the law may bar "cordon[ing] off a street[] or entrance to a public or private building," or might even nondiscriminatorily "forbid[] all access to streets and other public facilities for parades and meetings," in order to prevent, for instance, interference with traffic); *Bell v. Maryland*, 378 U.S. 226, 325 (1964) (Black, J., dissenting) (citing *Giboney* for the proposition that private property owners may use trespass law to remove speakers from their property).

The Court has also suggested that some conduct is so unlike the traditional media of communication that it should be viewed as entirely outside the First Amendment, perhaps even when it's being restricted for its communicative effects. See, e.g., *O'Brien*, 391 U.S. at 376 ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."); see also *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (citing *O'Brien*, and stating that "[w]e assume for present purposes, but do not decide," that overnight sleeping in a park to protest against homelessness may qualify as expressive conduct); WEINSTEIN, *supra* note 143, at 33 (taking a similar view). But see *Cmty. for Creative Non-Violence v. Watt*, 703 F.2d 586, 622 (D.C. Cir. 1983) (Scalia, J., dissenting) (rejecting the view that "sleeping is or can ever be speech for First Amendment purposes," when the restriction on sleeping is aimed at the noncommunicative impact of the conduct, but reasoning that a "law directed at the communicative nature of conduct" must still face First Amendment scrutiny), *rev'd sub nom.* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984). This suggestion, though, wouldn't apply to the examples in this Part, which involve traditional forms of expression (conversation, books, picketing, and the like).

those cases involve speech that's restricted because of harms that flow from its content.

2. *Conduct Evidenced by Means of Language*

Nor are the above cases simply relying on *Giboney's* assertion that conduct can be punished even though it is "in part . . . evidenced . . . by means of language."¹⁷⁵ Speech can indeed be used as evidence of prohibited conduct, or of a punishable intent that accompanies prohibited conduct. A person's expression of pro-Nazi opinions, for instance, may be evidence that the reason he helped a Nazi saboteur was to aid the Nazi cause.¹⁷⁶ But in *Giboney* and the other cases discussed above, the law punished the speech itself, not some other behavior of which speech was simply the evidence.

3. *Illegal Course of Conduct Meaning Speech that Itself Violates a Law*

One could try to explain the opinions that rely on *Giboney* by reasoning that the speech itself—picketing to achieve a certain result, advocating nudism, wearing profanities on one's jacket, publishing a book describing how to commit a crime—violates a law, and in that sense becomes an "illegal" "course of conduct." Likewise, one article suggests (though without citing *Giboney*) that "speech that amounts to the commission of an independently illegal act," such as "bribery, perjury, and threats," is constitutionally unprotected because it "is properly treated as action, even if it consists solely of words."¹⁷⁷

But the point of modern First Amendment law is that speech is often protected even though it violates a law restricting it. Speech that violates a latter-day Sedition Act,¹⁷⁸ public profanity (as in *Cohen v. California*¹⁷⁹), and speech "encouraging the commission of a crime" (as in *Cox v. Louisiana*¹⁸⁰) would indeed be "illegal" "course[s] of conduct" under laws that prohibit such speech. Such laws, though, are

¹⁷⁵ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

¹⁷⁶ See *Haupt v. United States*, 330 U.S. 631, 641–42 (1947); see also *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (same as to racist opinions being used as evidence that the defendant selected a victim because of the victim's race).

¹⁷⁷ Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 836–37, 839 (1993) (theorizing that in such situations "[t]he words do not cause the act[;] [t]he words are the act"). Professor Sunstein's argument may well rest on an implicit theory about which words are unprotected *because* they are acts, and which words are protected *even though* they are acts (for instance, the act of sedition or encouragement of crime). The portions of the article that I quote, however, unfortunately do not make such a theory explicit.

¹⁷⁸ 1 Stat. 596 (1798); Sedition Act of 1918, 40 Stat. 553 (1918), *repealed by* Act of March 3, 1921, ch. 136, 41 Stat. 1359.

¹⁷⁹ 403 U.S. 15 (1971).

¹⁸⁰ 379 U.S. 436 (1965).

nonetheless speech restrictions, and courts rightly evaluate them—and often strike them down—under the First Amendment.¹⁸¹

Perjury is no less speech, and no more action, than was speech in violation of the Sedition Act, which sought to punish another form of falsehood. Perjury is speech in a particular context, such as in court or on an official form, but it is still communication that is punished because of what it communicates. Perjury and threats should be punishable, but only because they fall within an exception to free speech protection and not because they are somehow not speech.¹⁸²

4. *Illegal Course of Conduct Meaning Speech That Violates a Generally Applicable Law*

Some, though not all, of the cases that cite *Giboney* might be explained on the grounds that the speech violates a generally applicable law that bans a wide range of conduct including speech.¹⁸³ Such an argument, though, would reduce the *Giboney* principle to the principle described and criticized in Part I.

5. *Conduct Referring to a Broader Course of Illegal Behavior by the Speaker*

“[C]ourse of conduct” “in part initiated . . . or carried out by means of language”¹⁸⁴ might be read as referring to some course of behavior that consists of both speech and other illegal behavior (or planned illegal behavior) by the speaker. For example, if I’m planning to kill someone at a particular place, and I lure the victim by telling him to meet me there, then I might well be guilty of attempted murder, even though my behavior partly consists of communica-

¹⁸¹ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that encouraging the commission of crime is not punishable except when the encouragement is intended to and likely to cause imminent illegal conduct); *New York Times Co. v. Sullivan*, 376 U.S. 254, 288–92 (1964) (holding that seditious libel is not punishable); *id.* at 269 (condemning attempts to restrict speech that rely simply on “epithets” or “labels” such as “insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression”). Professor Sunstein takes the view that advocacy of crime—even including punishable incitement—is speech rather than “action,” but doesn’t explain how a criminally punishable threat (action, in the article’s view) and criminally punishable incitement (not action) would differ in this respect. See Sunstein, *supra* note 177, at 837.

¹⁸² For perjury, the exception would be the one for knowingly false statements of fact. See *N.Y. Times*, 376 U.S. at 291–92 (stating that such statements are generally unprotected, unless they are seditious libel against the government); see also *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 620–21 (2003) (holding the same as to statements that are fraudulent but not defamatory); *infra* quote accompanying note 297 (stressing that perjury laws are speech restrictions). Bribery might indeed involve action—the transfer of money—as well as speech, or might be punishable on the grounds that it involves a promise, which may be properly restrictable. See *infra* text accompanying notes 321–27.

¹⁸³ See, e.g., *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997).

¹⁸⁴ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

tion.¹⁸⁵ This example, however, wouldn't fit the facts of *Giboney*, where the defendants were simply speaking. Nor would it fit any of the other cases described above, where the speakers were likewise simply communicating, and not engaging in any nonspeech conduct.

6. *Conduct Referring to a Broader Course of Illegal Behavior by People Other Than the Speaker*

One might read "course of conduct" "in part initiated . . . or carried out by means of language"¹⁸⁶ as referring to the aggregate of the speaker's speech and the conduct of people whom the speech might affect. If the course of conduct includes illegality, the theory would go, then the speech part of the course of conduct would be just as illegal as the action that the speech brings about. This might fit the facts of *Giboney*—in which the speaker was trying to pressure the employer into acting illegally—and of some of the lower court cases that cite *Giboney*.

But such a reading would be inconsistent with *Brandenburg*, and with the modern repudiation of cases such as *Schenck* and *Debs*.¹⁸⁷ *Schenck's*¹⁸⁸ and *Debs' speech*,¹⁸⁹ for instance, would be protected today under the *Brandenburg* test,¹⁹⁰ though both speakers were convicted for trying to produce some illegal nonspeech behavior—the crime of draft evasion—on the part of others. *Brandenburg* shows that speech is protected even when it tries to trigger illegal behavior by listeners, except for the unusual situations in which the speech is intended to *and likely to* produce *imminent* lawless conduct.¹⁹¹ So if *Giboney* ever meant that speech may be restricted when it can indirectly bring about illegal conduct, the Court has overruled that principle in *Brandenburg*.

7. *Conduct Carried Out by Means of Language Referring to Threat of Action*

One could interpret *Giboney* as standing for the rather narrow proposition that *threats* of conduct may be constitutionally unprotected. In addition to advocating a boycott, and advocating that Empire Storage & Ice stop dealing with nonunion ice peddlers, the

¹⁸⁵ Cf. *Aikens v. Wisconsin*, 195 U.S. 194, 206 (1904) ("The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.").

¹⁸⁶ *Giboney*, 336 U.S. at 502.

¹⁸⁷ See *supra* note 39 and accompanying text.

¹⁸⁸ See *Schenck v. United States*, 249 U.S. 47, 48–49 (1919).

¹⁸⁹ See *Debs v. United States*, 249 U.S. 211, 216 (1919).

¹⁹⁰ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁹¹ See *id.* at 447–49.

picketers in *Giboney* made two sorts of threats: the threat of a boycott (essentially, “Stop dealing with nonunion ice peddlers, or our friends will stop dealing with you”) and the threat that union members who crossed the picket line would be ejected from their union.¹⁹²

The Court seemed to rest its judgment partly on these threats.¹⁹³ The Justices argued that “all of appellants’ activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri’s valid law.”¹⁹⁴ In so doing, the Court reasoned that “appellants were doing more than exercising a right of free speech or press” because “[t]hey were exercising their economic power together with that of their allies.”¹⁹⁵ The Court’s characterization of the appellant’s conduct as “exercising . . . economic power” might have been referring to threatening to use one’s economic power to pressure people into changing their behavior.¹⁹⁶

Likewise, consider two early 1980s opinions citing *Giboney*. *Searle v. Johnson*¹⁹⁷ held that the Humane Society’s advocacy of a boycott of a Utah county, aimed at getting the county to improve its dog pound, was unprotected speech that was punishable under the interference with business relations tort.¹⁹⁸ Similarly, a dissenting opinion in *Missouri v. NOW*¹⁹⁹ seemingly would have held the same about NOW’s speech urging a boycott of Missouri, aimed at getting the state legislature to ratify the Equal Rights Amendment.²⁰⁰ Both of these opinions might be understood as suggesting that because the urged boycotts would have been illegal, threats of such boycotts are unprotected.²⁰¹

Nonetheless, a rule that threats of boycott are constitutionally unprotected would probably be unsound today, given *Claiborne Hardware*.²⁰² *Claiborne* also involved a threat of boycott, and a threat of ostracism (though social ostracism rather than ejection from a union) of people who refused to comply with the boycott.²⁰³ Yet the Court held the speech to be constitutionally protected, even without any inquiry into whether such boycotts and organized ostracism might have

¹⁹² *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 492–93 (1949).

¹⁹³ *See id.*

¹⁹⁴ *Id.* at 498.

¹⁹⁵ *Id.* at 503.

¹⁹⁶ *See id.*

¹⁹⁷ 646 P.2d 682 (Utah 1982).

¹⁹⁸ *Id.* at 683.

¹⁹⁹ 620 F.2d 1301 (8th Cir. 1980).

²⁰⁰ *Id.* at 1324 n.15 (Gibson, J., dissenting).

²⁰¹ *See Searle*, 646 P.2d at 686–89; *Missouri v. NOW*, 620 F.2d at 1321–25.

²⁰² *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

²⁰³ *Id.* at 926–27.

themselves violated Mississippi law. This suggests that threats of a boycott, or at least of a politically motivated boycott, are indeed constitutionally protected speech.²⁰⁴

Even if the true meaning of *Giboney* is focused on threats, and survives *Claiborne Hardware*, the *Giboney* principle is far better captured simply by saying that threats of certain kinds of retaliation—and especially threats of illegal retaliation—are constitutionally unprotected, rather than by saying that speech is unprotected when it “carrie[s] out” an illegal “course of conduct.”²⁰⁵ And most of the applications of *Giboney* that I cited in the Introduction would then have to be rejected, because they have nothing to do with threats.²⁰⁶

8. *Conduct Referring to Picketing*

Finally, *Giboney* involved another form of conduct—picketing. The Court described picketing as “more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.”²⁰⁷

Peaceful picketing, it seems to me, should be treated no differently than any other kind of behavior used to communicate a mes-

²⁰⁴ *Claiborne* distinguished *Giboney* on the grounds that *Giboney* involved “regulat[ion] of economic activity,” rather than “prohibit[ion of] peaceful political activity such as that found in the boycott in [*Claiborne*],” *id.* at 913, but this strikes me as unsound. *Giboney* and *Claiborne* both involved advocacy that was aimed at improving the position of a certain social group (union members in *Giboney* and blacks in *Claiborne*), and that worked by threat of economic activity (or inactivity), namely boycott of a certain business. *See id.* at 886; *Giboney*, 336 U.S. at 491–92. Of course, the speech in *Claiborne* was also motivated by the speakers’ beliefs about morality and justice, and sought to appeal to listeners’ beliefs about morality and justice, but union speech aimed at benefiting workers is also motivated by concerns about morality and justice as well as money. Certainly the labor movement has been an ideological and political movement and not just an economic one. *See* Julius G. Getman & F. Ray Marshall, *The Continuing Assault on the Right to Strike*, 79 TEX. L. REV. 703, 719 n.97 (2001).

The one possible distinction is that the *Giboney* picketers were trying only to get Empire Storage & Ice to change its economic practices, while the *Claiborne* boycotters were trying to get stores to change their hiring practices and also to get county officials both to change their hiring practices and to make other political decisions. *Claiborne*, 458 U.S. at 899–900. Nonetheless, in an economy dominated by private business, trying to influence private sector decisions is political activity just as is trying to influence public sector decisions. In any event, if *Giboney* is indeed limited to activity aimed at accomplishing purely economic ends, then it would be inapplicable in all the examples I gave at the start of this section. *See supra* Part II.A.

²⁰⁵ *See infra* note 319 and accompanying text (discussing this issue).

²⁰⁶ *See supra* Introduction.

²⁰⁷ *See Giboney*, 336 U.S. at 503 n.6 (quoting *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776 (1942) (Douglas J., concurring)); *see also* *Dennis v. United States*, 341 U.S. 494, 529–30 (1951) (Frankfurter, J., concurring in the judgment) (reasoning that picketing should be less constitutionally protected because “the loyalties and responses evoked and exacted by picket lines differentiate this form of expression from other modes of communication”).

sage. It should be restrictable to the extent that its noncommunicative elements cause harm—for instance if it is too loud or blocks the entrance to a building—but not restrictable based on its message (again, unless the message falls within an exception to protection²⁰⁸). This protection should exist even when the message on the picket signs is very simple—“the labor movement wants you to boycott this business”—and not backed with a detailed explanation. First Amendment law protects even simple symbols, from flagburning to black armbands.²⁰⁹ The same should be true for the simple message “don’t patronize places, such as this one, that the union movement condemns.”²¹⁰

Nonetheless, *Giboney* belongs to a long line of cases that imposed special restraints on picketing, restraints that would likely be unconstitutional as to other media.²¹¹ The speech in *Giboney*—speech urging a business to violate state restraint of trade laws and urging people not to patronize the business until it so acted—would probably be protected today if it were printed in a newspaper or on leaflets. Such advocacy doesn’t seem to be both intended to and likely to produce

²⁰⁸ It’s possible that some of the Court’s willingness to restrict even peaceful picketing stems from the Justices’ sense that labor picketing is inherently threatening to some extent—perhaps because labor picketing involves face-to-face confrontations between picketers who feel their livelihoods are at stake and others whom the picketers might see as jeopardizing those livelihoods, and because historically, some labor picketing has indeed turned violent. I don’t think that this potential for violence should suffice to strip peaceful picketing of protection. But to the extent that this reasoning suggests that *Giboney* and similar cases flowed from the Court’s tendency to protect picketing—or at least labor picketing—less than other speech, it further shows the impropriety of applying *Giboney* outside the picketing context.

²⁰⁹ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 405–06 (1989); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

²¹⁰ I thus think that the distinction drawn by Justice Stevens in his concurrence in the judgment in *NLRB v. Retail Store Employees Union*, 447 U.S. 607 (1980)—where he voted to uphold a secondary picketing ban because it affected “only that aspect of the union’s efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea,” *id.* at 619—is unsound. See Getman & Marshall, *supra* note 204, at 719 n.97 (reasoning that “appeal to one’s obligations as a union member or supporter” should be just as protected as “more cerebral appeals”); Theodore J. St. Antoine, *Justice Frank Murphy and American Labor Law*, 100 MICH. L. REV. 1900, 1908 (2002) (“[I]f the viewer’s reaction is a genuinely voluntary, though relatively unthinking, reflex, how can the picketing that triggers the reaction be distinguished from the cryptic bumper stickers ‘Vote Free Choice’ or ‘Vote Right to Life?’”).

²¹¹ See, e.g., *Retail Store Employees Union*, 447 U.S. at 619; *Int’l Bhd. of Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769 (1942); *TRIBE*, *supra* note 49, at 826 (describing this line of cases); see also *Cox v. Louisiana*, 379 U.S. 536, 578 (1965) (Black, J., concurring in the judgment in part and dissenting in part) (“Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment.” (citing *Giboney* and *Hughes*)).

imminent illegal conduct, the criteria set forth in *Brandenburg* as necessary for making speech into punishable incitement of illegal action.²¹²

Likewise, consider *Hughes v. Superior Court*,²¹³ a case that shortly followed *Giboney*.²¹⁴ *Hughes* rejected the First Amendment claims of people who were peacefully picketing a store to pressure it into hiring black workers in proportion to the fraction of blacks among the store's clientele.²¹⁵ There was no powerful union acting with the benefit of special legal protections. There was no violence or trespass by the picketers. The picketers had no power to eject people from a union.

The picketers simply patrolled and expressed sentiments aimed at getting a store to act in a perfectly legal way—under California law in 1950, discriminatory hiring was not illegal.²¹⁶ Newspaper articles urging a consumer boycott of businesses aimed at getting the businesses to adopt some legally permissible race-based hiring practice

²¹² *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969); see also *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (holding that advocacy of illegal conduct at some unspecified future time doesn't satisfy the imminence requirement). In the closely-related context of secondary boycotts—union boycotts of a third party aimed at pressuring the third party to stop doing business with an employer that's the subject of a strike—the Supreme Court has strongly suggested that leafleting and other speech would be constitutionally protected, even though picketing is not. Compare *Int'l Bhd. of Elec. Workers, Local 501 v. NLRB*, 341 U.S. 694, 705 n.10 (1951) (holding picketing in aid of secondary boycotts is not protected, citing *Giboney* and cases that cited *Giboney*), with *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575–76, 580, 588 (1988) (holding that the National Labor Relations Act should not be read as banning leafleting aimed at persuading consumers to engage in a secondary boycott, because such a reading would pose “serious constitutional questions,” and resting its decision on the view that “picketing is qualitatively ‘different from other modes of communication’” (quoting *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 280, 311 n.17 (1950))).

²¹³ 339 U.S. 460 (1950).

²¹⁴ *Hughes* relied on *Giboney*, among other cases, for the proposition that picketing may be restricted. See *id.* at 465–66, 468. Three Justices relied solely on *Giboney*. See *id.* at 469 (Black, J., joined by Minton, J., concurring in the judgment); *id.* (Reed, J., concurring); see also *Int'l Bhd. of Teamsters*, 354 U.S. at 292 (characterizing *Hughes* as an “elaborat[ion]” of *Giboney*).

²¹⁵ See *Hughes*, 339 U.S. at 461, 468.

²¹⁶ Justice Reed took the view that the California Supreme Court opinion held race discrimination to be unlawful, *id.* at 469 (Reed, J., concurring), but he was mistaken. The California Supreme Court majority opinion, *Hughes v. Superior Court*, 198 P.2d 885 (Cal. 1948), never held this, and Justice Traynor's dissenting opinion specifically pointed out that employers remained free to discriminate based on race. See *Hughes*, 198 P.2d at 896 (Traynor, J., dissenting); see also *Jones v. American President Lines, Ltd.*, 308 P.2d 393, 395 (Cal. Ct. App. 1957) (stating, several years after *Hughes*, that “[t]he right to private employment without discrimination on the basis of race is not one protected by the Constitution, by common law or any statute of the state that we are aware of; and so plaintiff has not alleged any violation of state or federal laws”). The California Supreme Court held only that picketing to pressure employers into discrimination was unlawful, not that employer discrimination was itself unlawful. See Osmond K. Fraenkel, *Peaceful Picketing—Constitutionally Protected?*, 99 U. PA. L. REV. 1, 9 (1950) (recognizing this distinction); Elliot L. Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 20 n.86 (1951) (same).

would likely have been constitutionally protected. The advocacy, the Court stressed, was unprotected because it was conveyed through picketing.²¹⁷

The lesser protection for picketing than for other speech, at least as to labor picketing, continues to be the law,²¹⁸ and *Giboney* reflects this exception to First Amendment protection. But even if one endorses this lesser protection for picketing, such an exception offers no support for applying *Giboney* to other speech.

C. Supreme Court Applications of *Giboney*

So far, I've argued that it's hard to figure out just what line *Giboney* purported to draw—and the cases in which the Court has cited *Giboney* to support its results only further suggest that *Giboney* is unhelpful for First Amendment analysis. Even when the results of those cases might be right, the “illegal course of conduct” principle generally doesn't help justify the results.

I've already alluded to one example—the majority opinion in *Cox v. Louisiana*,²¹⁹ which tried to use *Giboney* to explain restrictions on crime-advocating speech and on fighting words:

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

²¹⁷ See *Hughes*, 339 U.S. at 464–65 (stressing that the case involved picketing and not newspaper articles).

Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.

Id. at 465.

²¹⁸ Compare *NLRB v. Retail Store Employees Union*, 447 U.S. 607, 616 (1980) (upholding restrictions on secondary picketing), with *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575–76, 588 (1988) (suggesting that leafletting aimed at the same end may well be constitutionally protected).

²¹⁹ 379 U.S. 559 (1965).

make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.’ *Giboney v. Empire Storage & Ice Co.* . . .²²⁰

But four years later, the *Brandenburg* Court held that encouraging the commission of a crime was constitutionally protected, except under narrow circumstances.²²¹ Thus, the prosecution in *Fox*, for publishing a newspaper article praising the practice of nudism,²²² would clearly be unconstitutional today.²²³

Likewise, uttering words that may cause a fight would also be constitutionally protected today, unless the words are specifically targeted at the offended party.²²⁴ This distinction in modern fighting words law between unprotected speech “directed to the person of the hearer”²²⁵ (“Fuck you” said to a particular person) and protected speech said to the world at large (“Fuck the draft” said on a jacket) may be sound. But the *Giboney* principle that speech may be punishable when it carries out an illegal course of conduct doesn’t help justify that distinction.

Similarly, consider *Ohralik v. Ohio State Bar Ass’n*,²²⁶ in which the Court upheld *Ohralik*’s punishment for “[i]n-person solicitation by a lawyer of remunerative employment.”²²⁷ The Court cited *Giboney* in arguing that such solicitation was constitutionally unprotected, and characterized the solicitation as “a business transaction in which speech is an essential but subordinate component.”²²⁸ But in *Ohralik*’s companion case, *In re Primus*,²²⁹ the Court made clear that direct solicitation by a lawyer of pro bono employment in a politically charged case may *not* be restricted.²³⁰

Both transactions were equally “course[s] of conduct,” in which speech to the client played an equal role. If the *Giboney* principle

²²⁰ *Id.* at 563 (internal citations abbreviated); see also Rubinfeld, *supra* note 13, at 830 (defending bans on fighting words on the grounds that “such speech is properly regarded as an attempt to commence a fight—a particularized, prohibited course of conduct”).

²²¹ See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

²²² See *Fox v. Washington*, 236 U.S. 273, 273, 267–78 (1915).

²²³ Likewise, *American Communications Ass’n v. Douds*, 339 U.S. 382, 399–400 (1950), which upheld restrictions on Communists’ serving as union leaders, *id.* at 399–400 (citing *Giboney*, among other cases), is also probably not good law today. See *United States v. Robel*, 389 U.S. 258, 262 (1967) (striking down restrictions on Communists’ working in defense plants).

²²⁴ See *Gooding v. Wilson*, 405 U.S. 518, 524 (1972); *Cohen v. California*, 403 U.S. 15, 20 (1971).

²²⁵ *Cohen*, 403 U.S. at 20.

²²⁶ 436 U.S. 447 (1978).

²²⁷ *Id.* at 457.

²²⁸ *Id.* at 456–57.

²²⁹ 436 U.S. 412 (1978).

²³⁰ *Id.* at 438–39.

stripped one solicitation of constitutional protection on the ground that the solicitation carried out an illegal course of conduct, it should have done the same to the other, yet the two were treated differently. The Court's other justification for its *Ohralik* decision—that the speech in *Ohralik* was commercial speech said face-to-face,²³¹ while the speech in *Primus* was noncommercial speech communicated in a letter²³²—may be a sound basis for distinguishing the two cases. *Giboney*, though, is not.

Likewise, *California Motor Transport Co. v. Trucking Unlimited*²³³ held that while legitimate litigation constitutes the exercise of the First Amendment right to petition the courts and is thus immune from antitrust liability, “sham” litigation aimed at “eliminat[ing] an applicant as a competitor by denying him free and meaningful access to the agencies and courts” is unprotected.²³⁴ The Court relied primarily on *Giboney*, reasoning that “First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.”²³⁵

But in *Professional Real Estate Investors v. Columbia Pictures Industries*,²³⁶ the Court explicitly limited this “sham litigation” exception to litigation that is both objectively frivolous and subjectively ill-motivated.²³⁷ Under the *Giboney* rationale, objectively reasonable and unreasonable litigation would equally be “integral part[s] of conduct”²³⁸ aimed at monopolization; they should thus be treated equally. Yet *Professional Real Estate Investors* recognizes that objectively reasonable litigation is a constitutionally protected exercise of the right to petition, and that's true whether or not it is “an integral part of conduct” aimed at securing a monopoly. The constitutionally significant distinction is between frivolous petitioning of the courts, which is unprotected by the Petition Clause against a wide range of liability, and objectively reasonable petitioning, which is protected. It is not, as *Giboney* would suggest, between petitioning that is an integral part of a broader pattern of conduct and petitioning that can't be so described.

*New York v. Ferber*²³⁹ and *Osborne v. Ohio*,²⁴⁰ which upheld bans on distributing and possessing child pornography,²⁴¹ similarly illustrate

²³¹ See *Ohralik*, 436 U.S. at 455–56.

²³² See *Primus*, 436 U.S. at 437–38.

²³³ 404 U.S. 508 (1972).

²³⁴ *Id.* at 515.

²³⁵ *Id.* at 514.

²³⁶ 508 U.S. 49 (1993).

²³⁷ *Id.* at 60–61.

²³⁸ *Cal. Motor Transp. Co.*, 404 U.S. at 514.

²³⁹ 458 U.S. 747 (1982).

²⁴⁰ 495 U.S. 103 (1990).

²⁴¹ *Osborne*, 495 U.S. at 108–09; *Ferber*, 458 U.S. at 774.

the error of relying on *Giboney*. *Ferber* and *Osborne* both argued in passing:

[T]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney*.²⁴²

Yet not all speech that provides a motive for illegal conduct can be outlawed simply because it is "an integral part of conduct in violation of a valid criminal statute." When the *New York Times* publishes illegally leaked documents,²⁴³ or transcripts of an illegally excerpted conversation, it would have a strong First Amendment defense (assuming that it got the documents or tapes from an independent third party), even though the prospect of such publication may provide a motive for the illegal leak or illegal interception.²⁴⁴

In some narrow circumstances, there might be some constitutional justification for restricting the publication of the leaked material—for instance, if there is some extraordinarily pressing national security concern.²⁴⁵ This would be similar to the reasons the Court articulated in *Ferber* and *Osborne* to justify the child pornography exception to the First Amendment.²⁴⁶ But the broad *Giboney* "speech . . . used as an integral part of conduct" argument cannot, by itself, justify the restriction, or else all publication of illegally leaked documents would be treated the same way as publication of illegally created child pornography.²⁴⁷

²⁴² *Ferber*, 458 U.S. at 761–62, quoted in *Osborne*, 495 U.S. at 110 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

²⁴³ The leak may be illegal because it violates a law that requires government employees to keep certain information confidential, a law that imposes a duty of loyalty on corporate employees, or trade secret law. See Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred*, 44 *Liquormart*, and *Bartnicki*, 40 *Hous. L. Rev.* 697, 739–48 (2003) (discussing this point).

²⁴⁴ See *Bartnicki v. Vopper*, 532 U.S. 514, 533–34 (2001); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841–42 (1978).

²⁴⁵ Cf. *New York Times Co. v. United States*, 403 U.S. 713, 735–40 (1971) (White, J., concurring in the judgment, joined by Stewart, J.) (suggesting that publishing illegally leaked national security secrets might well be criminally punishable); *id.* at 752–59 (Harlan, J., dissenting, joined by Burger, C.J., and Blackmun, J.) (concluding that such publication could even be enjoined).

²⁴⁶ See *Ferber*, 458 U.S. at 758–59 n.10 (stressing the harmful and valueless nature of child pornography); *Osborne*, 495 U.S. at 108–11 (same).

²⁴⁷ See Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 *Sup. Ct. Rev.* 285, 300 (criticizing *Ferber's* use of *Giboney*).

D. Rejecting *Giboney*

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

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

III

SITUATION-ALTERING UTTERANCES

I turn now to a third category of "speech as conduct" arguments, made famous in the First Amendment literature by Kent Greenawalt's *Speech, Crime, and the Uses of Language*,²⁴⁸ and in the philosophy of language literature by J.L. Austin²⁴⁹ and John Searle.²⁵⁰ I will focus on Greenawalt's approach; since Austin and Searle were philosophers of language rather than lawyers, their concern was with discussing how words are used by people, rather than with drawing legally significant distinctions, and their arguments are thus of limited help for First Amendment doctrine.²⁵¹

²⁴⁸ See GREENAWALT, *supra* note 23.

²⁴⁹ See J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962).

²⁵⁰ See JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969).

²⁵¹ Austin, for instance, casts his book as a criticism of the "assumption of philosophers that the business of a 'statement' can only be to 'describe' some state of affairs, or to 'state some fact,' which it must do either truly or falsely." AUSTIN, *supra* note 249, at 1. He then proceeds to disprove that assumption, by pointing out how words can be used in a "performative" sense as well as the fact-declaring "constative" sense, and in the process includes within the "performative" category statements that "criticize," "predict," "estimate," "advise," "recommend," "warn," "urge," and "plead." *Id.* at 83, 85-86, 140, 147, 155. This makes clear that the performative/constative line isn't immediately helpful to lawyers who are trying to distinguish protected speech from unprotected speech-as-conduct, even if it is helpful to philosophers who are trying to understand how people communicate. *Cf.* GREENAWALT, *supra* note 23, at 58 (making the same observation about Austin's "performa-

Speech, Crime, and the Uses of Language contends that some kinds of statements—for instance, “I promise to help you commit this crime,” “I’ll raise my prices if you raise yours,” or “I will” said in a wedding ceremony—are constitutionally unprotected conduct rather than protected speech²⁵² because they impose, as a matter of social convention, a felt moral obligation (on the speaker or on listeners):²⁵³

Utterances are often a means for changing the social context in which we live. . . . The conventions of language and of ordinary social morality make certain utterances, such as promises, count as far as one’s moral obligations are concerned. My essential claim—a central claim for this book—is that utterances of these sorts are situation-altering and are outside the scope of a principle of free speech. Such utterances are ways of doing things, not of asserting things²⁵⁴

Such “situation-altering utterances” (the book’s term) aren’t limited to statements that create legal obligations.²⁵⁵ For instance, even a legally unenforceable agreement to commit a crime or to set prices, or a legally ineffective wedding (for instance, a wedding that all observers know to be a legally unrecognized same-sex or polygamous wedding), would qualify. Nor are “situation-altering utterances” limited to statements that create obligations that most of us would recognize as morally binding; a promise to kill someone may not be morally binding, but it is treated as situation-altering.²⁵⁶ Rather, the argument goes, “situation-altering utterances” encompass all statements that affect someone’s *felt* moral obligations, simply by virtue of the statement’s having been made.²⁵⁷

tive” utterances, and stressing that “situation-altering utterances” are a “much narrower [category] than Austin’s category of performatives”).

Austin’s categories of “locutionary act[s]” (“uttering a certain sentence with a certain sense and reference”), “illocutionary acts” (for instance, “informing, ordering, warning, undertaking, &c, i.e., utterances which have a certain (conventional) force”), and “perlocutionary acts” (“what we bring about or achieve by saying something, such as convincing, persuading, deterring, and even, say, surprising or misleading”), are even less suited to providing constitutionally significant distinctions. AUSTIN, *supra* note 249, at 108. I have no reason to think that Austin or Austin’s modern heirs would argue otherwise. Even if some kinds of illocutionary acts, such as undertaking in the sense of promising to do something, might be constitutionally unprotected, other illocutionary acts—for instance, “informing”—surely are protected. Likewise, the perlocutionary acts of “convincing” and “persuading” must certainly be constitutionally protected. *Id.*; *see also id.* at 102 (distinguishing “the locutionary act ‘he said that . . .’ from the illocutionary act ‘he argued that . . .’ and the perlocutionary act ‘he convinced me that . . .’”).

²⁵² GREENAWALT, *supra* note 23, at 239.

²⁵³ *See id.* at 57–58.

²⁵⁴ *Id.* (footnotes omitted).

²⁵⁵ *See id.* at 60.

²⁵⁶ *See id.* at 63.

²⁵⁷ *See id.* (“Whether or not an agreement to perform an evil act has genuine moral force, the agreement will usually be viewed by the people who have made it as having such force, and it will also accomplish a change in their expectations and perceived responsibili-

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

A. The Doctrine's Limited Scope

First, it is important to recognize that *Speech, Crime, and the Uses of Language* itself limits this "speech as conduct" category. "Situation-altering utterances," as the book defines them, certainly do *not* cover all attempts to "do things with words" or to "alter" the "situation" by speaking. People often use simple assertions of facts or ideas, which the book excludes from the definition of situation-altering utterances,²⁵⁸ to do things. When a newspaper publishes an editorial advocating some new welfare policy, or urging citizens to recycle, it is trying to accomplish a certain result—a substantive change in people's conduct. Such clearly constitutionally protected speech often "alters" the "situation" by its persuasive or informative force, through the process of "alter[ing] the listener's understanding of the world he inhabits."²⁵⁹ But that doesn't place it within the definition of "situation-altering."²⁶⁰

The definition also does not include all statements that change people's felt moral obligations. Telling people that some seemingly benign behavior is harmful to others, for instance, may impose on them a moral obligation to avoid such harm. A man who is told that he has a communicable disease has different moral (and perhaps legal) obligations to others than one who thinks that he is healthy. But such statements that reveal preexisting facts are treated as protected speech, not as constitutionally unprotected "situation-altering" conduct, even though they do change people's moral obligations.²⁶¹

Rather, the "situation-altering utterances" category is limited to statements that "actually alter the normative world, shifting rights or obligations" because of their very assertion, and not because of any facts or ideas that they reveal.²⁶² A promise, for instance, imposes a

ties."). Thus, under this definition, one's statement agreeing to participate in a criminal conspiracy is situation-altering, so long as one's fellow criminals feel that the statement is morally binding.

²⁵⁸ See *id.* at 57, 59–60 (distinguishing situation-altering utterances from "claims of fact or value").

²⁵⁹ *Id.* at 59.

²⁶⁰ *Id.* at 59–60. Under the *Speech, Crime, and the Uses of Language* framework, it might, at least in some cases, qualify as a "weak imperative," *id.* at 68–71, or as "action-inducing," Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 683–85. But the book makes clear that such speech is still presumptively protected, and doesn't count as situation-altering in the book's scheme. See GREENAWALT, *supra* note 23, at 59–60.

²⁶¹ See GREENAWALT, *supra* note 23, at 61–62.

²⁶² See *id.* at 59–60.

perceived moral obligation on the promisor.²⁶³ An order by someone in a position of authority obligates the ordered person to do something.²⁶⁴

Situation-altering statements affect people, but not by communicating some preexisting fact or idea that exists outside the speaker's control. Rather, such statements—"exercises of official authority, agreements, promises, orders, offers, manipulative inducements, and manipulative threats"²⁶⁵—affect people chiefly because the speaker has made them. Thus, the argument goes, the statements should be treated as constitutionally unprotected action, not constitutionally protected speech.²⁶⁶

This definition means that very little, if any, of the speech I described in previous sections—speech that some people have argued should be treated as merely "conduct"²⁶⁷—would constitute "situation-altering utterances." Speech that communicates information about how a crime can be effectively committed would not be situation-altering. Such speech, whether in a novel, chemistry textbook, or murder manual, would simply be an "assertion[] of fact,"²⁶⁸ albeit a potentially dangerous one.

Likewise, speech that creates an offensive work environment, offensive educational environment, or offensive public accommodations environment is generally the assertion of offensive ideas²⁶⁹ and not an agreement, promise, order, or the like. The same principle applies to speech praising jury nullification, speech that urges the moral propriety of a boycott, or speech that recommends marijuana to a patient.

²⁶³ See *id.* at 63–65. I will generally speak in this section of "felt moral obligations" or "perceived moral obligations," which is to say moral obligations that some people are likely to recognize, whether or not the obligation is legally enforceable, and whether or not the obligation is morally valid. This definition reflects the *Speech, Crime, and the Uses of Language* definition of what statements are situation-altering, see *id.* at 59–60, and it's necessary for the book's argument to work: An agreement to commit a crime or to fix prices, for instance, is "situation-altering" even if it's legally unenforceable and morally valid, because the parties will perceive it as imposing a moral obligation on them. See *id.* at 63–65.

²⁶⁴ *Id.* at 65–66.

²⁶⁵ *Id.* at 58.

²⁶⁶ *Id.* Greenawalt excludes from this list agreements that themselves concern speech; as to such agreements, "the subject of the agreement makes a free speech principle relevant." *Id.* at 64, 335–37.

²⁶⁷ See *supra* notes 2–18 and 163–76 and accompanying text.

²⁶⁸ GREENAWALT, *supra* note 23, at 58, 60–63 (distinguishing situation-altering utterances from assertions of fact).

²⁶⁹ For instance, ideas that some groups are inferior, or that women should be seen as sex objects rather than equals in the workplace. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1502–07 (M.D. Fla. 1991); *Barbetta v. Chemlawn Servs. Corp.*, 669 F. Supp. 569, 573 (W.D.N.Y. 1987); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1212 n.118 (1989); Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 438 (1991).

Speech, Crime, and the Uses of Language actually deals with more than situation-altering utterances; other sections of the book discuss crime-facilitating speech, offensive speech, speech urging illegal or harmful behavior, and the like.²⁷⁰ But the book correctly treats the latter categories of speech as assertions of fact and value, and thus as presumptively constitutionally protected speech, rather than as unprotected situation-altering utterances.²⁷¹ And the book then analyzes the costs and benefits of restricting the speech, and concludes that a good deal of such speech should indeed be protected, though some can be properly restricted under some exception to First Amendment protection.²⁷²

B. The Questionable Relevance of Altering Felt Moral Obligations

As I explained above, the premise of the “situation-altering utterances” argument is that when a statement’s utterance imposes—as a matter of social convention—a felt moral obligation on the speaker or on the listeners, the statement stops being speech and becomes conduct.²⁷³ This argument is how the book explains the widely shared belief that agreements and offers are not protected as free speech.²⁷⁴ Promises create a felt moral obligation, which “the people who have made [the promise perceive] as having [moral] force.”²⁷⁵ The promises trigger a “convention[] . . . of ordinary social morality”²⁷⁶ that one should keep one’s promises, and the violation of this convention “renders [the promisors] vulnerable to counterresponses,”²⁷⁷ which is what makes the promise situation-altering. Similarly, speech the book calls a “permission” waives felt moral obligations rather than creating them, and thus it too is situation-altering.²⁷⁸

But why should a statement’s creating a felt moral obligation turn that statement from presumptively constitutionally protected speech into unprotected conduct? After all, there are many social conven-

²⁷⁰ See, e.g., GREENAWALT, *supra* note 23, at 85–87, 110–29, 141–57, 260–80, 287–313.

²⁷¹ See *id.*

²⁷² See *id.*

²⁷³ *Id.* at 57–58.

²⁷⁴ See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 55 (1982) (explaining that “the fact that an agreement [to engage in illegal conduct] necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities the First Amendment extends to speech,” and that “while solicitation to enter into an agreement arguably crosses the hazy line distinguishing conduct from pure speech . . ., [it] remains in essence an invitation to engage in an illegal exchange . . ., and may properly be prohibited”).

²⁷⁵ GREENAWALT, *supra* note 23, at 63; *id.* at 64–65 (making clear that the same analysis applies to unilateral promises as well as to bilateral agreements).

²⁷⁶ *Id.* at 58.

²⁷⁷ *Id.* at 63.

²⁷⁸ See *id.* at 58, 63.

tions under which the making of a statement will be seen by some as increasing the speaker's moral obligations, or increasing or decreasing the listener's moral obligations.²⁷⁹ Consider just four examples:

- (a) *The felt moral impropriety of hypocrisy.* There is a perceived moral duty to avoid hypocrisy—to act consistently with what one says. If a speaker says that all soldiers fighting in a war are murderers, he is implicitly undertaking a moral obligation to refuse to fight in the war. His very statement makes many people expect that he will practice what he preaches. As with promises, “utterances can alter one’s normative obligations, what one should do in the future. The conventions of language and of ordinary social morality,” here the moral condemnation of hypocrisy, make this utterance “count as far as one’s moral obligations are concerned.”²⁸⁰
- (b) *The felt moral relevance of peers’ and leaders’ moral permissions.* People perceive—rightly or wrongly—that they may do what the leaders of their community, or their peers, think is permissible. When either a leader or a large peer group says that “it’s fine to refuse to deal with people of other ethnic groups,” many people might feel less of an obligation to act in a nondiscriminatory way.²⁸¹
- (c) *The felt moral relevance of peers’ and leaders’ moral demands.* People also sometimes feel that they *should* do what leaders or peers think is necessary. For instance, when the leaders or peers say, “One should refuse to deal with people of other ethnic groups,” many people might feel something of an obligation to engage in such an ethnic boycott. In both this example and the previous one, the leader’s or peers’ “utterance[has] alter[ed the listener’s] normative obligations, what [he] should do in the future”²⁸²—in the earlier exam-

²⁷⁹ Under the *Speech, Crime, and the Uses of Language* framework, any of these three types of change to moral obligations would make a statement situation-altering. See *id.* at 63–65 (stating that promises are situation-altering because they increase the speaker’s felt moral obligations); *id.* at 65 (stating that permissions are situation-altering because they decrease the listener’s felt moral obligations, by allowing the listener to do something that he might have otherwise seen as immoral); *id.* at 65 (stating that orders are situation-altering because they increase the listener’s felt moral obligations). The missing fourth category is statements that decrease a speaker’s own moral obligations, but I take it that people can rarely decrease their own felt moral obligations just by speaking, and if they can do so, then perhaps the obligations were not so obligatory in the first place.

²⁸⁰ See *id.* at 57–58. Perhaps the utterance counts less than the statement, “I promise not to drink alcohol,” or especially, “We mutually promise to each other not to drink alcohol,” but it does count.

²⁸¹ “Situation-altering utterances” include statements that diminish a listener’s moral obligations—for instance, a permission such as, “Go ahead and hit me, I wish you’d try it.” *Id.* at 65.

²⁸² *Id.* at 58.

ple, by weakening the listener's normative obligation not to discriminate, and in this example by imposing a new obligation to discriminate.²⁸³

- (d) *The felt professional obligation to respond.* In scholarship, and likely in other fields, there is a social convention that people ought to respond to their serious critics. A scientist who fails to respond to his critics may be condemned by his peers, just as a scientist who fails to keep his promises may be condemned by his peers. This is true regardless of whether the critics persuade the peers: The critics' very making of the statements creates something of an obligation to respond.²⁸⁴

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

Yet it's not clear that any of these statements "are ways of doing things, not of asserting things";²⁸⁵ and even if these statements are both ways of doing things and of asserting things, it's not clear that what they do should be any less constitutionally protected than what they assert. While the statements create or waive felt moral obligations, they do so by communicating, just as pure statements of fact or value sometimes create or waive felt moral obligations. I suspect that most people's first reaction to the statements described above would be that they are pure speech, and the "situation-altering utterance" theory doesn't explain why we should take a different view. I share the intuition that agreements and offers should be constitutionally unprotected. But it seems to me that the "situation-altering utterances" framework—which theorizes that agreements and offers alter felt

²⁸³ The obligation may be morally controversial, not very strong, and not equally felt by everyone, but the same is true of many promises, especially promises to do illegal things.

²⁸⁴ See GREENAWALT, *supra* note 23, at 144 (suggesting that some fighting words might be situation-altering because they create a felt moral obligation on the target to respond; a professional challenge may have even more obligatory force). Of course, the felt moral obligation in one situation might be to fight, and in the other to speak. But under the "situation-altering utterance" theory, both seem to be situation-altering utterances, because both *do* something (create a moral obligation, even if it is just a moral obligation to say something) rather than merely communicating assertions of fact or value.

²⁸⁵ *Id.* at 58.

moral obligations, and that speech that alters felt moral obligations is unprotected—is not entirely persuasive.

It's possible, even accepting the "situation-altering utterance" theory, to explain why the examples I give should remain constitutionally protected despite their situation-altering component: Banning such statements would also make it hard to convey the facts and opinions that the statements convey; banning overt promises or offers, on the other hand, would probably still leave people free to convey the same facts and opinions, just by changing their statements in some measure. *Speech, Crime, and the Uses of Language* in fact suggests this sort of distinction,²⁸⁶ though it sometimes seems to take a different approach.²⁸⁷

This approach may even fit the way the First Amendment generally deals with behavior that consists of both conduct and of speech. Suppose that someone expresses facts or opinion using physical con-

²⁸⁶ See *id.* at 60 (acknowledging that agreements to marry convey certain facts and opinions, but reasoning that "if we focus on opportunities for communication, whatever one wants to communicate about facts and values can typically be asserted much more straightforwardly by means other than a situation-altering utterance"); *id.* at 60–61 (acknowledging that offers to bet convey "intensity of belief," but reasoning that "[s]ince a prohibition on betting would exert only a slight effect on people's ability to express the certainty of their opinions, the betting example does not yield a very strong argument for treating situation-altering utterances like statements of fact").

²⁸⁷ At times the book asks whether the situation-altering aspect of an utterance "dominates" the assertions of fact or opinion. See, e.g., *id.* at 57 (saying, in the first paragraph of the "Situation-Altering Utterances" section, that "I here examine some major uses [of language] which are common subjects of criminal statutes and which do not dominantly involve claims of fact or value"); *id.* at 60 ("Because the 'performative' aspect of most such utterances [such as agreements to marry] so entirely dominates any implicit claims of fact and value and because similar implicit claims are present in virtually all noncommunicative behavior, we need not alter our conclusion that a principle of free speech does not apply to situation-altering utterances as it applies to claims of fact and value."). This, though, strikes me as a mistaken approach. As John Hart Ely famously put it, much expressive conduct is "100% action and 100% expression." Ely, *supra* note 125, at 1495. Neither aspect is "domina[nt]" in principle, and even if it could be, courts couldn't practically decide which component dominates the other. See *id.* The same is true of supposedly situation-altering utterances: A speech by a respected community leader praising a race-based boycott is both a means of trying to persuade people, and a means of making them feel a moral obligation (or at least giving them moral permission) to act as the respected leader suggests. The same goes for peer pressure from fellow community members. It is not clear whether either factor can predominate in theory, and in any event, it is difficult to see how one can decide which factor predominates in practice.

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

duct that is harmful for reasons unrelated to the facts or opinions conveyed—for instance, he uses loud amplification to express his message. The government may then generally restrict this mixture of expression and physical conduct if the restriction (1) focuses on the conduct element, (2) is narrowly tailored to an important government interest in restricting the conduct, and (3) leaves open ample alternative channels for expressing the message.²⁸⁸ The same rule should apply, the argument would go, to expressions of fact or opinion (pure speech) that are also “situation-altering utterances” (speech that ought to be treated as conduct).

But such an argument, I think, misses the point: In the examples given above, all aspects of the speech—both its informational and persuasive value, and any felt change in moral obligation that the speech might yield—should be constitutionally protected. True, the speech may change people’s felt moral obligations by creating peer pressure, by taking advantage of professional norms, or by committing the speaker to act in a certain way lest he face charges of hypocrisy. Even if the government’s aim in restricting the speech is only to prevent such changed moral obligations, however, the restriction should be unconstitutional, unless the speech falls within one of the exceptions to protection. There should be no need for any complicated and likely subjective inquiry into whether the prohibition would still leave the speaker relatively free to convey the bare factual or ideological assertions without the supposedly “situation-altering” factors.

C. The Problem of Agreements and Offers

Professor Greenawalt has certainly identified an important unresolved problem: Judges, scholars, and others generally believe (and likely correctly believe) that certain statements—“exercises of official authority, agreements, promises, orders, offers, manipulative inducements, and manipulative threats”²⁸⁹—are constitutionally unprotected. Still, neither the Supreme Court nor the legal academy has fully explained why this is so.²⁹⁰

I suspect that this unresolved problem isn’t that complex or novel for exercises of official authority, official orders, orders within a business, or orders within a criminal gang. These are threats: Do this or you’ll be fired, jailed, or perhaps even killed.²⁹¹ *Speech, Crime, and the Uses of Language* itself acknowledges that unconditional threats should

²⁸⁸ See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

²⁸⁹ See GREENAWALT, *supra* note 23, at 58.

²⁹⁰ See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 55–56 (1982) (reasoning that many, though not all, promises are constitutionally unprotected, but not explaining why this is so, or where the line should be drawn).

²⁹¹ See GREENAWALT, *supra* note 23, at 65–66.

be analyzed as speech rather than as situation-altering utterances, and concludes (correctly) that they should generally be unprotected speech.²⁹² Likewise, the lack of protection given to manipulative threats can also be justified under the general threats exception,²⁹³ though I agree that this exception should be limited to exclude “warning threats.”²⁹⁴

For agreements, offers, and manipulative inducements (which are essentially a form of offer), the problem is considerably harder.²⁹⁵ I can’t claim to have a solution to the problem, and this may be reason to consider my criticisms of the “situation-uttering utterances” framework with some skepticism: That framework, at least, proposes a solution, and I do not. Yet it seems to me that the expression of moral commitment does not itself suffice to make speech into nonspeech conduct.

Here, as elsewhere, it may be better to recognize that speech which conveys an offer or a promise—and certainly the broader range of speech that changes people’s felt moral obligations—is indeed speech, not merely conduct. Such speech sometimes does communicate facts and ideas. It sometimes should be protected, for instance in the examples mentioned above. But it should also sometimes be restrictable for certain reasons, related to the harm that the speech can cause and to its likely lack of First Amendment value. This is the very sort of analysis that *Speech, Crime, and the Uses of Language* itself applies to other kinds of speech, such as false statements of fact, unconditional threats, and solicitation of crime²⁹⁶—speech that should be restrictable even though it isn’t situation-altering.

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

²⁹² See *id.* at 90–91, 290–92.

²⁹³ See, e.g., *id.* at 91.

²⁹⁴ See *Wurtz v. Risley*, 719 F.2d 1438, 1443 (9th Cir. 1983); *State v. Robertson*, 649 P.2d 569, 578 (Or. 1982); John Sauer, *Conditional Threats and the First Amendment* (draft manuscript, on file with author).

²⁹⁵ Agreements literally involve nothing but speech. A conspiracy is formed not by the agreement inside each conspirator’s head, which co-conspirators and jurors usually won’t learn about, but by the expression of that agreement to the co-conspirators. Sometimes the conspirator may agree without words, for instance by nodding, or by carrying out a task on behalf of the conspiracy. But if there is a conspiracy, it must be that one conspirator’s action has intentionally expressed to another conspirator his agreement to work together.

²⁹⁶ See GREENAWALT, *supra* note 23, at 110–18, 130–40, 260–80, 290–92, 314–27.

IV

THE UNCHARTED ZONES OF FREE SPEECH

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

Lying on the witness stand is not less speech than lying about the weather . . . , although it may also be perjury. The shout of "Fire!" is not less speech in the Holmes instance than the shout of "Fire!" from the mouth of an actor on the stage of the same theater, spoken as but a word in a play. It is futile to argue that an appropriately tailored law that punishes any or all of these utterances does not abridge speech. It does, it is *meant* to, and one should not take recourse to verbal subterfuge, *e.g.*, that it is "speech-brigaded-with-action" or "conduct" alone that is curtailed²⁹⁷

But what, then, of the classic examples of speech that people say ought to be restricted under this rubric? *Ohralik v. Ohio State Bar Ass'n*²⁹⁸ followed its citation of *Giboney* by pointing to "the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees" as evidence that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."²⁹⁹ Similarly, the Justice Department followed its *Giboney* argument by listing a series of "inchoate crimes," such as "conspiracy, facilitation, solicitation, bribery, coercion, blackmail, and aiding and abetting,"³⁰⁰ as examples of speech that can be prohibited as conduct.³⁰¹ *Rice v. Paladin Enterprises*,

²⁹⁷ William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 114 (1982). Professor Van Alstyne is of course not condemning these speech restrictions—he is only condemning the attempt to deny that these are indeed speech restrictions. *See id.* at 113–14.

²⁹⁸ 436 U.S. 447 (1978).

²⁹⁹ *Id.* at 456 (internal citations omitted).

³⁰⁰ *See* U.S. DEP'T OF JUSTICE, *supra* note 17, at text accompanying n.57.

³⁰¹ For a broader analysis of the political and institutional reasons that these examples have long gone undiscussed, see Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004) [hereinafter Schauer, *The Boundaries of the First Amendment*]. Professor Schauer argues that the existence of these examples shows that "the speech with which the First Amendment is even slightly concerned"—apparently using "concerned" as a descriptive rather than a normative term—"is but a small subset of the speech that pervades every part of our lives," *id.* at 1784, but I don't think this ratio is quite right. It seems to me that most speech that "pervades every part of our lives"—most of the conversations we have, most of the e-mails we get or send, and most of the mass media we read and hear—is indeed protected by the First Amendment.

In any event, my point is normative, not descriptive. I am arguing that courts should not ignore the First Amendment this way; whenever speech is being restricted based on its

Inc.,³⁰² which held that some crime-facilitation speech was unprotected,³⁰³ defended its position by arguing that

[w]ere the First Amendment to bar or to limit government regulation of such “speech brigaded with action,” the government would be powerless to protect the public from . . . extortion or blackmail[]; . . . threats and other improper influences in official and political matters[]; . . . perjury and various cognate crimes[]; . . . criminal solicitation[]; . . . conspiracy[]; . . . [criminal] harassment[]; . . . forgery[]; . . . successfully soliciting another to commit suicide[]; . . . and the like.³⁰⁴

Some judicial opinions have likewise pointed to speech by professionals to their clients as examples of speech that should be treated as punishable conduct.³⁰⁵

The explanation for why some such speech is unprotected, it seems to me, should be the one that First Amendment law generally gives: There are exceptions to the First Amendment’s protection, and the courts ought to identify the boundaries of those exceptions.³⁰⁶ For instance, the Court in *Brandenburg v. Ohio*³⁰⁷ didn’t deal with advocacy of illegal conduct simply by describing it as the “inchoate crime[]” of illegal advocacy, or by citing *Giboney*.³⁰⁸ Rather, the Court acknowledged that such advocacy is presumptively protected speech and carefully defined the narrow circumstances under which such advocacy can be punished.³⁰⁹

content, courts should explicitly explain why the restriction is permissible. And I am encouraged by Professor Schauer’s acknowledgment that “the boundaries of the First Amendment”—which at least include the rules about what speech courts recognize as raising First Amendment concerns—are being “push[ed] . . . generally outward.” See *id.* at 1797.

³⁰² 128 F.3d 233 (4th Cir. 1997).

³⁰³ *Id.* at 267.

³⁰⁴ *Id.* at 244 (internal citations omitted).

³⁰⁵ See, e.g., *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring in the result) (citing *Giboney* to support the proposition that “[t]he power of government to regulate the professions is not lost whenever the practice of a profession entails speech”); *Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1053–55 (9th Cir. 2000) (citing *Giboney* for the same proposition, though noting that “communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation”).

³⁰⁶ See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245–46 (2002) (“As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.”).

³⁰⁷ 395 U.S. 444 (1969).

³⁰⁸ See *id.* at 447–49. But see *Cox v. Louisiana*, 379 U.S. 559, 563 (1965) (suggesting four years earlier that “encouraging the commission of a crime” is indeed punishable, and citing the *Giboney* language as supporting that position).

³⁰⁹ See *Brandenburg*, 395 U.S. at 447 (“[C]onstitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation

Similarly, fraud, perjury, and forgery can be punished under the false statements of fact exception.³¹⁰ “[E]mployers’ threats of retaliation for employees’ labor activities”³¹¹ and other threats could be punished under the threats exception.³¹² These exceptions aren’t just special cases of a “conduct unprotected, speech protected” principle. They are separately crafted rules that let the government punish speech in particular circumstances, based on arguments about the harm and value of speech that are specific to each exception. The same goes for some of the examples that I cite in the Introduction.³¹³ Some speech that might qualify as “facilitation” or “aiding and abetting,” for instance, might be punished under a new “crime-facilitating speech” exception, the possible boundaries of which I discuss elsewhere.³¹⁴

These boundaries, however, shouldn’t be those of the crimes of criminal facilitation (generally defined as recklessly or knowingly, and sometimes even negligently, helping a criminal)³¹⁵ and aiding and abetting (generally defined as intentionally, or sometimes knowingly, helping a criminal).³¹⁶ Not all such speech should be restrictable, even if may fit within the definitions of those crimes: For instance, a chemistry textbook that describes how explosives are made should be constitutionally protected, even if it recklessly facilitates the construction of bombs by criminals. Rather, courts should develop the bound-

except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

I think solicitation of crime should be dealt with by modifying incitement doctrine. Solicitation, like incitement, is a form of crime advocacy, but it is generally aimed at only one person, and it is unlikely to persuade or inform that person of any political ideas. This might justify relaxing the imminence standard for solicitation. *Cf.* *Cherry v. State*, 306 A.2d 634, 639–41 (Md. Ct. Spec. App. 1973). *But see* *People v. Salazar*, 362 N.W.2d 913, 917–18 (Mich. Ct. App. 1985) (relying on *Brandenburg* to overturn a solicitation conviction on the grounds that the defendant was trying to solicit someone to commit a crime some time in the future, rather than imminently). *See generally* Volokh, *Crime-Facilitating Speech*, *supra* note 3, at 1107–08, 1127 (discussing why speech that is aimed solely at an audience that one knows to consist of criminals and that is likely to help bring about crime should be unprotected).

³¹⁰ *See, e.g.*, *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620–21 (2003) (applying the false statements of fact exception to knowingly false statements even outside defamation law).

³¹¹ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 456 (1978).

³¹² *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 386 (1998); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–19 (1969).

³¹³ *See supra* text accompanying notes 2–12.

³¹⁴ *See* Volokh, *Crime-Facilitating Speech*, *supra* note 3. The crime-facilitating speech exception may also cover insiders’ leaks of information about securities. Such leaks are an example of crime-facilitating speech said to a small audience that the speaker knows is likely to use the speech for criminal purposes: Trading based on inside information is illegal, and the tip provides information that lets people engage in such conduct.

³¹⁵ *See supra* note 4.

³¹⁶ *See supra* note 31.

aries by considering the usual First Amendment factors—the value of the speech,³¹⁷ the harm that it causes, the difficulty of drawing certain lines, the risk that punishing some speech will deter other speech, and so on—and not just asking whether the speech constitutes “criminal conduct.”³¹⁸

The same is true, I think, for blackmail and coercion. Some speech that might be called blackmail and coercion should surely be unprotected. Other speech—for instance, statements like, “Stop shopping at these white-owned stores, or we’ll publicize your noncompliance with our boycott” or, “Stop engaging in certain real estate selling practices, or we’ll distribute leaflets to your neighbors criticizing you”—is constitutionally protected.³¹⁹ The lines between protected and unprotected speech must be drawn, and scholars and courts have suggested such lines (which would presumably become part of the threats exception).³²⁰ But the lines can’t be drawn based simply on assertions that some speech is speech and other speech is conduct.

³¹⁷ This, of course, implicates the perennial debates about which theory of First Amendment value courts should use. See Adam M. Samaha, *Litigant Sensitivity in First Amendment Law*, 98 NW. U. L. REV. 1291, 1303 n.53 (2004) (citing the leading articles advocating the various views). The Supreme Court has been notoriously reluctant to resolve those debates and to settle on any theory—self-government, the search for truth, self-expression, and so on—as being the sole foundation of First Amendment law. See, e.g., Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1617–19 (1987); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1217–23 (1983).

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

³¹⁸ See Volokh, *Crime-Facilitating Speech*, *supra* note 3 (going through this analysis). One can of course argue that a good deal of crime-facilitating speech—or other speech, such as solicitation, agreements, and the like—should be unprotected on the grounds that it isn’t part of “public discourse,” or is not expressed within one of the “social contexts that envelop and give constitutional significance to acts of communication.” See Post, *Recuperating First Amendment Doctrine*, *supra* note 143, at 1255, 1276–77, 1279; Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990); see also WEINSTEIN, *supra* note 143, at 44–48. These inquiries are closely related, I think, to the inquiries mentioned in the text, especially inquiries into the value of the speech. But as I argue in Volokh, *Crime-Facilitating Speech*, *supra* note 3, at 1114–22, much speech that helps some people commit crime is, at the same time, also a potentially valuable contribution to other people’s public discourse. The label “aiding and abetting” is not an adequate way of drawing the line between public discourse and other speech, or between valuable speech and valueless speech.

³¹⁹ See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982); Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (“The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent’s conduct by their activities; this is not fundamentally different from the function of a newspaper.”).

³²⁰ See, e.g., Wurtz v. Risley, 719 F.2d 1438, 1443 (9th Cir. 1983); State v. Robertson, 649 P.2d 569, 578 (Or. 1982); GREENAWALT, *supra* note 23, at 90–92; Sauer, *supra* note 294.

Some of the other categories of speech haven't gotten the attention that they deserve. Conspiracy and bribery, for instance, involve agreements and offers of agreement. Not everything that is called conspiracy or bribery, however, should be unprotected: A conspiracy to teach Communist doctrine³²¹ or the propriety of polygamy,³²² or a conspiracy to obstruct the draft by persuading people that the draft is wrong,³²³ should be protected.³²⁴ So should a bribe in the form of "If you vote for this law, our advocacy group will give you its valuable endorsement during the next election season,"³²⁵ or a candidate's promise to refund some of his salary to the county and thus to the voters.³²⁶ As I suggest in Part III.A, courts and commentators ought to explain how one can distinguish constitutionally unprotected promises from constitutionally protected ones—just as the law draws lines between the constitutionally unprotected and the constitutionally protected within the categories of insults, false statements of fact, and statements advocating illegal conduct.³²⁷

Courts and commentators should also do the same sort of line-drawing for speech that might violate antitrust law or securities law.³²⁸ For instance, as Justice Holmes recognized, it's not obvious when the publication of price and production information should be constitutionally unprotected³²⁹ (as opposed to just being admissible as evi-

³²¹ See *Dennis v. United States*, 341 U.S. 494 (1951) (upholding conviction of conspiracy for teaching Communist doctrine); TRIBE, *supra* note 49, at 846 ("Dennis is generally deemed to mark the temporary eclipse of the Holmes-Brandeis formulation of the clear and present danger test."); Vitiello, *supra* note 39, at 1219 (arguing that "were *Dennis* or the World War I Era cases to arise today, the results would almost certainly be different"); John F. Wirenius, *The Road to Brandenburg: A Look at the Evolving Understanding of the First Amendment*, 43 DRAKE L. REV. 1, 48 (1994) (concluding that "[t]he basic holding of *Dennis* was overruled" in *Brandenburg v. Ohio*).

³²² *State v. Musser*, 175 P.2d 724, 731 (Utah 1946) (upholding conspiracy conviction for teaching the propriety of polygamy), *vacated and remanded by* 333 U.S. 95 (1948).

³²³ See *Schenck v. United States*, 249 U.S. 47, 52–53 (1919) (noting that Schenck was prosecuted for, among other things, conspiracy to obstruct the draft).

³²⁴ See GREENAWALT, *supra* note 23, at 64, 335–37.

³²⁵ See Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 809–11 (1985) (discussing this issue).

³²⁶ See *Brown v. Hartlage*, 456 U.S. 45, 57–58 (1982).

³²⁷ See *Cohen v. California*, 403 U.S. 15 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³²⁸ See *Long Island Lighting Co. v. Barbash*, 779 F.2d 793, 798–99 (2d Cir. 1985) (Winter, J., dissenting) (suggesting that proxy solicitation rules can't constitutionally be applied to certain kinds of speech); Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 40–63 (1989) (outlining some principles for analyzing securities laws under the First Amendment); Schauer, *The Boundaries of the First Amendment*, *supra* note 301, at 1777–82 (noting this issue as to securities and antitrust laws).

³²⁹ See *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 412–13 (1921) (Holmes, J., dissenting). See also *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697–99 (1978), which upheld a Sherman Act injunction barring a professional society "from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical." *Id.* The Court justified the injunction on the ground

dence to prove that price-setting was actually price-fixing³³⁰). But wherever such a line should be drawn, it can't be drawn just by saying that certain speech constitutes the conduct of attempted monopolization, just as lobbying for anticompetitive legislation can't be outlawed on the grounds that it constitutes attempted monopolization.³³¹

Treason poses a similar sort of problem. Some speech may well be treasonous, even if we set aside speech that reveals state secrets³³² or that informs the enemy of the sailing dates of troop transports.³³³ Axis Sally, for instance, was rightly punished for broadcasting, while working for the Nazis, a radio program aimed at decreasing the morale of American soldiers.³³⁴

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

An American during the Vietnam War, for instance, should have had the right to argue to his fellow citizens that the war was unwinnable, that the United States should pull out, and that voters should

that the Society had already been found guilty of illegally entering into agreements prohibiting competitive bidding, *id.* at 684 & n.5, and that courts have the power “to fashion appropriate restraints” to prevent and to remedy such illegal behavior, *id.* at 697. In the absence of illegal past agreement, an organization's claims about business ethics—for instance, claims that it is unethical for professionals or businesses to deal with oppressive governments or to employ cheap foreign labor—would be constitutionally protected even if a law purported to condemn them as attempted “restraint[s] of trade.”

³³⁰ *Cf.* *Wisconsin v. Mitchell*, 508 U.S. 476, 488–90 (1993) (holding that speech may be used as evidence of criminal intent or of physical behavior); *Haupt v. United States*, 330 U.S. 631, 642 (1947) (same, as to intent).

³³¹ *See* *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 665–66 (1965); *Eastern R.R. Presidents Conference v. Noerr Motors Freight, Inc.*, 365 U.S. 127, 136–37 (1961). For an example of an article that seriously addresses this First Amendment issue, see Stephen G. Thompson, *Antitrust, the First Amendment, and the Communication of Price Information*, 56 *TEMPLE L.Q.* 939 (1983).

³³² *See* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (suggesting that such speech may be treason); *see also* *United States v. Aguilar*, 515 U.S. 593, 606 (1995) (upholding criminal punishment for releasing confidential information on the grounds that “[a]s to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public”); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668–69 (1991) (holding that the First Amendment doesn't give people a right to breach nondisclosure agreements); *Snapp v. United States*, 444 U.S. 507, 509 n.3 (1980) (same).

³³³ *See* *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

³³⁴ *See* *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950).

support an antiwar candidate.³³⁵ Such arguments and others like them might well have helped the enemy if they weakened United States' resolve, made it more likely that the United States would indeed withdraw, or emboldened the Viet Cong. Moreover, if the speaker thought the Viet Cong was in the right, he might well have wanted and intended the enemy to win.

Still, such antiwar speech should probably have been protected, because it might well have contributed valuable arguments to an important public debate. And even if the speaker's intentions made him morally culpable and thus theoretically deserving of punishment, prohibiting all speech that intentionally helps the enemy risks punishing even speakers who intend only to protect American interests, but whose intentions are mistaken by prosecutors and juries.³³⁶

Perhaps the proper test in such treason cases is whether the speaker was getting paid by the enemy³³⁷ or otherwise coordinated his actions with the enemy.³³⁸ Perhaps the test could be whether the speech was aimed at American voters generally or whether it was aimed at soldiers specifically. Perhaps it should be something else altogether; or perhaps I'm mistaken, and a sound First Amendment analysis would conclude that the pro-Viet Cong speech I describe should indeed have been unprotected.

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

Finally, courts need to develop First Amendment standards to judge the constitutionality of laws that restrict professionals' speech to

³³⁵ See *supra* notes 42–43 and accompanying text; Tom Bell, *Treasonous Speech, Technology, and the First Amendment* (draft manuscript, available at <http://www.tomwbell.com/writings/Treason&Tech.pdf>).

³³⁶ See Volokh, *Crime-Facilitating Speech*, *supra* note 3, at 1182–95 (pointing out the shortcomings of intent standards in free speech law).

³³⁷ This might indeed be a sort of conduct/speech distinction, but one that is focused on what is truly a conduct element (receipt of money) rather than the content of what the speech communicates. See *Chandler v. United States*, 171 F.2d 921, 939, 941 (1st Cir. 1948).

³³⁸ See *id.* at 939 (holding that defendant's conduct constituted treason and not protected speech because "[h]e trafficked with the enemy and as their paid agent in the execution of a program . . . designed by the enemy to weaken the power of the United States to wage war successfully).

clients;³³⁹ here too, *Giboney* and the speech/conduct distinction are inadequate tools for developing such standards. Most of what many lawyers, investment advisors, accountants, psychotherapists, and even doctors do is speech. Even if we conclude that speech in special government-created fora, such as courtrooms, should be treated differently from other speech, that still doesn't address the many lawyer-client relationships that consist simply of lawyers' advising their clients.³⁴⁰

Professional-client speech, I think, should be subject to greater regulation than speech to the public at large. For instance, licensing requirements for professionals who give personalized advice should probably be constitutionally permissible;³⁴¹ a licensing requirement for writing self-help books should be unconstitutional. Likewise, seemingly unsound advice by a lawyer—including advice that includes what the profession may view as unreasonable predictions, even when no false statements of fact are involved—should be regulable; equally bad recommendations in books and radio programs ought not be.³⁴²

Similarly, laws constraining the sexual choices of advice book authors or of movie stars who project an image of trustworthiness would violate both the First Amendment³⁴³ and the *Lawrence v. Texas*³⁴⁴ sexual autonomy right. Rules restricting psychotherapists from having sex with their clients, on the other hand, are likely constitutional.³⁴⁵

³³⁹ For a fine analysis of this issue, see Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885 (2000). See also Schauer, *The Boundaries of the First Amendment*, *supra* note 301, at 1783–84 (noting that “almost all of the regulation of professionals” is “unencumbered by the First Amendment’s constraints,” though not discussing whether this is indeed proper).

³⁴⁰ See Kry, *supra* note 339, at 893 (“When a professional does no more than render advice to a client, the government’s interest in protecting the public from fraudulent or incompetent practice is quite obviously directed at the expressive component of the professional’s practice rather than the nonexpressive component (if such a component even exists).”); cf. Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201 (1994) (discussing doctor-patient speech); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999) (discussing professional speech).

³⁴¹ See, e.g., *Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychiatry*, 228 F.3d 1043, 1053–55 (9th Cir. 2000) (upholding a licensing requirement for psychoanalysts). *But see* Kry, *supra* note 339, at 967–73 (arguing that such requirements should be held unconstitutional).

³⁴² See, e.g., *Smith v. Linn*, 563 A.2d 123, 125–26 (Pa. Super. Ct. 1989) (holding that a diet book publisher couldn’t constitutionally be held liable for the death of a reader from complications caused by the diet).

³⁴³ A restriction on the behavior of people who speak on certain subject matters should be at least as unconstitutional as a tax on people who speak on certain subject matters. See *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 228–30 (1987).

³⁴⁴ 539 U.S. 558, 578 (2003).

³⁴⁵ See *Caddy v. State*, 764 So. 2d 625, 629–30 (Fla. Dist. Ct. App. 2000) (holding that such restrictions don’t violate the Florida Constitution’s sexual autonomy guarantee as to current patients, and as to former patients when applied “on a case by case basis with consideration given to the nature, extent, and context of the professional relationship be-

When a professional “takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client’s individual needs and circumstances,”³⁴⁶ the government may properly try to shield the client from the professional’s incompetence or abuse of trust.

At the same time, it’s far from clear that the government should be completely free to regulate professionals’ speech to their clients. For instance, I doubt that the government may simply ban doctors from informing patients that marijuana is the best solution to their problems.³⁴⁷ Perhaps doctors could be prevented from writing recommendations that, by operation of state law, free patients from state liability for marijuana possession, though even that is not clear.³⁴⁸ But I’m fairly certain that doctors at least have the constitutional right to inform their patients of the medical benefits of marijuana, and to urge the patients to lobby their legislators to enact a medical marijuana exception.

Likewise, I doubt that it would be constitutional for the government to prohibit psychotherapists or family counselors from advising patients to get a divorce, or to ban the counselors from advocating (or condemning) interracial marriages or adoptions. The *Planned Parenthood v. Casey*³⁴⁹ Court may have been right to reject the doctors’ First Amendment objection to the informed consent requirement, but the plurality opinion’s dismissal of that objection was likely too quick:

All that is left of petitioners’ argument is an asserted First Amendment right of a physician not to provide information about the risks

tween the physician and the person,” though holding unconstitutional a flat ban on all sexual relationships with ex-patients).

³⁴⁶ See *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring in the result).

³⁴⁷ See Robert D. Goldstein, *Reading Casey: Structuring the Woman’s Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 853, 860, 863–64, 866–67 (1996) (arguing that physician-patient speech should generally be constitutionally protected, at least when it conveys valuable knowledge to the patient).

³⁴⁸ See Kry, *supra* note 339, at 894–95 (distinguishing pure advice from speech that creates or affects a legal relationship, and arguing that the latter should be regulable). Compare *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 121 (D.D.C. 2001) (holding that doctors and patients may “freely discuss the risks and benefits of medicinal marijuana . . . [and] short of a prescription or recommendation for marijuana, the federal government will not get involved in communication between doctors [and] patients”), *Conant v. McCaffrey*, 172 F.R.D. 681, 698 (N.D. Cal. 1997) (citing *Giboney*, and concluding that “[i]f physicians’ conduct, which could include speech, rises to the level of aiding and abetting or conspiracy, in violation of valid federal statutes, such conduct is punishable under federal law,” though not explaining when recommending marijuana constitutes aiding and abetting or conspiracy and when it does not), and *Petition for a Writ of Certiorari* at 20, *Walters v. Conant*, 540 U.S. 946 (2003) (No. 03-40) (same), with *Conant v. Walters*, 309 F.3d 629, 637–38 (9th Cir. 2002) (holding that doctor-patient speech about marijuana is constitutionally protected) and *id.* at 643–44 (Kozinski, J., concurring) (stressing that a prohibition on such speech violated the patients’ rights as listeners as well as the doctors’ rights as speakers).

³⁴⁹ 505 U.S. 833 (1992) (plurality opinion).

of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard*, 430 U.S. 705 . . . (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe*, 429 U.S. 589, 603 . . . (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.³⁵⁰

Maybe there should be no restrictions on government-*compelled* speech in the professional-client relationship, perhaps because such speech compulsions don't keep the client from being informed. But if the government *prohibited* doctors from informing their patients about all the possible abortion procedures (including legal ones), or even about procedures that are not themselves constitutionally protected, such a prohibition may well be unconstitutional.³⁵¹

Courts, then, need to answer some First Amendment questions. First, in which kinds of relationships should speech be more regulable? For instance, what about professor-student relationships, career advisor-advisee relationships, or fortuneteller-client relationships?³⁵² Second, should the special doctrine be limited to personalized advice, or should more general advice to the public also be more regulable?

³⁵⁰ *Id.* at 884.

³⁵¹ *Rust v. Sullivan*, 500 U.S. 173 (1991), upheld a restriction on government-funded doctors informing patients about abortions; but the Court's decision rested entirely on the restriction's being a condition attached to funding—nothing in the case suggests that the result would be the same if the ban applied to all doctors, including privately funded ones.

³⁵² Several courts have struck down bans on fortunetelling on First Amendment grounds, concluding that such bans are content-based restrictions on the fortuneteller's constitutionally protected opinions and predictions, but none of these decisions considered whether the fortuneteller-client relationship should be subject to lower scrutiny because the fortuneteller is a professional advisor. See *Argello v. City of Lincoln*, 143 F.3d 1152 (8th Cir. 1998); *Trimble v. City of New Iberia*, 73 F. Supp. 2d 659 (W.D. La. 1999); *Angeline v. Mahoning County Agr. Soc.*, 993 F. Supp. 627 (N.D. Ohio 1998); *Rushman v. City of Milwaukee*, 959 F. Supp. 1040 (E.D. Wis. 1997); see also *Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa*, 703 P.2d 1119 (Cal. 1985) (applying the California Constitution's free speech provision).

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

Third, what should the test be: Should the government have a free hand? Should it only allow restrictions aimed at protecting clients from negligence or undue pressure?³⁵³

And again, whatever the right result might be, the “conduct-speech” distinction is likely to be more misleading than helpful here. When the government restricts professionals from speaking to their clients, it’s restricting speech, not conduct. And it’s restricting the speech precisely because of the message that the speech communicates, or because of the harms that may flow from this message.³⁵⁴ The restriction is not a “legitimate regulation of professional practice with only incidental impact on speech”;³⁵⁵ the impact on the speech is the purpose of the restriction, not just an incidental matter. Such regulation may be valid because of the harm that negligent speech can cause, the potential value of the mandated speech to the patient or to third parties, or the risk that the speech may exploit the patient’s psychological dependency on the speaker—but not because the regulated speech is somehow conduct.

³⁵³ For an interesting recent controversy that raises this question, see Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 227(a)(4), which bars debt relief agencies from “advise[ing] an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.” Is such personal advice by debt relief agencies (a category that may include lawyers, see *id.* § 226(a)(3)) constitutionally protected speech? Some such advice may counsel people to engage in unlawful fraud, and perhaps it may be punishable on that score (it’s not obvious, given *Brandenburg v. Ohio*, 395 U.S. 444 (1969), that all counseling of fraud is constitutionally unprotected outside the professional-client relationship, but perhaps the rule should be different within such a relationship). But the provision also applies to counseling actions that are likely legal, such as advising a debtor to borrow from creditors who would extend credit fully knowing of the likely bankruptcy action—a plausible scenario if the creditors are family members or if they would become secured creditors who are getting a property interest as collateral. See *Wudrick v. Clements*, 451 F.2d 988 (9th Cir. 1971) (holding that some debts in contemplation of bankruptcy are not fraudulent); *In re Stern*, 345 F.3d 1036, 1044 (9th Cir. 2003) (reaffirming *Wudrick*). Cf. Garry Neustadter, 2005: A Consumer Bankruptcy Odyssey (draft manuscript, on file with author) (discussing this issue); see also *New York State Bar Ass’n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998) (holding that a similar provision banning “counsel[ing] or assist[ing] an individual [for a fee] to dispose of assets . . . in order for the individual to become eligible for medical assistance” under certain circumstances was likely unconstitutional; the government had conceded the issue in that case); *Magee v. United States*, 93 F. Supp. 2d 161 (D.R.I. 2000) (noting that the Justice Department took the view that the restriction was unconstitutional).

³⁵⁴ See *supra* note 339.

³⁵⁵ *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring in the result); see also *State v. Niska*, 380 N.W.2d 646, 649 (N.D. 1986) (using the same argument to justify a ban on unlicensed dispensing of legal advice); *Oregon State Bar v. Smith*, 942 P.2d 793, 801 (Or. Ct. App. 1997) (upholding unauthorized practice of law statute on the grounds that it focuses only on “the conduct of a profession—the practice of law”).

CONCLUSION

It is often tempting to dismiss First Amendment problems by resorting to labels. “It’s not speech,” the argument goes, “it’s conduct/contempt/libel/sedition/aiding and abetting/professional speech.” Sometimes, the dismissal is sound. For instance, some behavior is indeed conduct that is punished because of its noncommunicative elements, not because of what it communicates.³⁵⁶ Often the label does capture something important even as to speech, though only as a step in the First Amendment inquiry: Some speech that constitutes aiding and abetting or common-law libel is indeed unprotected, for reasons related to why criminal law or tort law seeks to punish it.³⁵⁷

But sometimes the label is used as a substitute for serious First Amendment analysis, rather than as the starting point for it; hence the Court’s repeated complaint about the government’s attempting to “foreclose the exercise of constitutional rights by mere labels,”³⁵⁸ such as by labeling speech “solicitation,” “contempt,” or “breach of the peace.” Sometimes such attempts are made by people who want to justify restricting certain kinds of speech. Sometimes they are made by people who want to protect other kinds of speech, and who therefore articulate supposedly absolutist First Amendment rules—for instance, Justice Black’s “no law means no law”³⁵⁹—and dismiss inconvenient counterexamples by calling them mere “conduct.”³⁶⁰

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

³⁵⁶ See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984).

³⁵⁷ See, e.g., Volokh, *Crime-Facilitating Speech*, *supra* note 3, at 1174–76.

³⁵⁸ See *NAACP v. Button*, 371 U.S. 415, 429 (1963) (referring to the label “solicitation”); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (internal citations and footnotes omitted) (“In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet ‘libel’ than we have to other ‘mere labels’ of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations.”).

³⁵⁹ See *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring); ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 512 (1994).

³⁶⁰ See, e.g., *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting, joined by Black, J.) (reasoning that profanity on a person’s jacket is unprotected because it is “mainly conduct and little speech”); *Brandenburg v. Ohio*, 395 U.S. 444, 456–67 (1969) (Douglas, J., concurring) (reasoning that “speech is . . . immune from prosecution,” and distinguishing falsely shouting fire in a crowded theatre on the grounds that such a shout is “speech brigaded with action”); *id.* at 449–50 (Black, J., concurring) (endorsing Justice Douglas’s opinion); *Van Alstyne*, *supra* note 297, at 114 n.15 (faulting Justice Black for this approach).

Such justifications may at times be available. The Court has so held as to incitement, false statements of fact, obscenity, threats, and other unprotected categories of speech. Courts should also develop similar rules for certain kinds of crime-facilitating speech, professional speech, treasonous speech, and so on. But courts and scholars ought to develop these rules with the recognition that the rules are indeed speech restrictions—not by asserting that the rules merely restrict “conduct.”