

NOTE

A TEST FOR CRIMINALLY INSTRUCTIONAL SPEECH

*By Leslie Kendrick**

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INTRODUCTION

THIS Note will propose a First Amendment test for criminally instructional speech. Criminally instructional speech is expression that provides technical information about how to commit crimes. Such speech may take many different forms, ranging from personal communications between accomplices to publications disseminated to a wide audience. It includes speech that ultimately contributes to the actual commission of a crime and speech that does not.

This diversity makes it difficult to regulate criminally instructional speech in a way that both deters dangerous criminal activity and maintains strong protection for free expression. For example, most people would consider an analysis of a building's vulnerability to terrorist attack to be unprotected speech when shared between conspirators who then attempt such an attack. Such communication between conspirators in the process of planning such an attack would provoke a similar response. But what if such an analysis were posted on a website explicitly or implicitly suggesting that readers take advantage of the information? What if it were posted on a website without any such suggestion? What if it were in an engineering report on the safety of the building? What if it were in a newspaper article alerting the public to the weaknesses of a city's anti-terrorism plans? What if it were in a movie or book that depicted a fictional attack on the building?

In all of these cases, the content of the speech remains the same, but the context varies and, with it, our intuitions. This Note will contend that our intuitions change because they are responsive to reasonable concerns about the intent of speakers who utter such speech. The doctrine of aiding and abetting has long criminalized a certain subcategory of criminally instructional speech on the basis of the intent with which the speech was made. This Note will argue that a similar intent-based approach can extend to the entire category and make sound and reliable distinctions between protected and unprotected speech. A rigorous intent-based inquiry can address situations similar to those hypothesized above without encroaching on the robust protection of speech, regardless of its content.

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Part I of this Note will describe criminally instructional speech and briefly introduce a test for criminally instructional speech (“CIS Test”). Part II will consider the kind of criminally instructional speech most routinely punished under the criminal law—speech that aids and abets a crime. Part III will show how the aiding and abetting paradigm explained in Part II informs the CIS test. Part IV will apply the CIS test to forms of criminally instructional speech other than aiding and abetting. Part V will address objections to the CIS test.

I. CRIMINALLY INSTRUCTIONAL SPEECH AND THE CIS TEST

A. *What Is Criminally Instructional Speech?*

Recently, Professor Eugene Volokh classified criminally instructional speech as part of a larger category called “crime-facilitating speech.”¹ Professor Volokh defines crime-facilitating speech as any speech that provides information helpful in the commission of a crime.² The category encompasses a wide variety of activities: providing bombmaking instructions,³ holding seminars on how to commit tax fraud,⁴ exposing the identities of undercover agents,⁵ publishing the names of crime victims⁶ or witnesses,⁷ distributing

¹ Eugene Volokh, *Crime-Facilitating Speech*, 57 *Stan. L. Rev.* 1095, 1103 (2005).

² *Id.* at 1103.

³ *Id.* at 1097.

⁴ See, e.g., *United States v. Fleschner*, 98 F.3d 155, 158 (4th Cir. 1996) (rejecting a First Amendment defense against tax fraud charges); *United States v. Rowlee*, 899 F.2d 1275, 1278 (2d Cir. 1990) (same); *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (same); *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978) (same). But see *United States v. Raymond*, 228 F.3d 804, 808 n.1 (7th Cir. 2000) (enjoining the sale of an “abusive tax shelter” informational program, but noting that criminal prosecution was declined “because the Government was concerned that a criminal prosecution of the appellants would implicate the appellants’ rights under the First Amendment”).

⁵ See 50 U.S.C. § 421(c) (2000); *Haig v. Agee*, 452 U.S. 280, 286 (1981).

⁶ See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496, 497 (1975) (finding that the First Amendment bars sanctions for the media’s release of a rape victim’s name when that information was a matter of public record); *Hyde v. City of Columbia*, 637 S.W.2d 251, 263 (Mo. Ct. App. 1982) (allowing a tort action to proceed when the abduction victim’s name found not to be a matter of public record).

⁷ See *Capra v. Thoroughbred Racing Ass’n*, 787 F.2d 463, 465 (9th Cir. 1986) (finding that a publication which revealed the identity of participants in federal witness protection program was not entitled to summary judgment under First Amendment); *Times Mirror Co. v. Super. Ct.*, 244 Cal. Rptr. 556, 559 (Ct. App. 1988) (finding no

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maps of municipal water supply systems, and even flashing one's headlights to alert other drivers to a speed trap.⁸

Criminally instructional speech is just one part of this larger category of crime-facilitating speech. Some crime-facilitating speech provides technical "how-to" information, such as how to make a bomb or evade income taxes. This is criminally instructional speech. Other kinds of crime-facilitating speech supply non-technical information on committing a crime. For example, a newspaper might publish the name of a crime victim or witness, which someone might use to locate and retaliate against that person. The newspaper does not tell anyone to use the information in that manner, much less explain how to do so. Nevertheless, its speech might materially aid someone in committing a crime and thus qualify as crime-facilitating speech. Similarly, flashing one's headlights customarily warns other drivers that there is a police vehicle or speed trap ahead. This is communication that helps to facilitate law violation, but it is not how-to information. It does not explain to other drivers that they should stop speeding and not resume until they have passed the policeman ahead. It is simply a signal that might lead them to take such action on their own, if they know its meaning and choose to follow it. These are examples of crime-facilitating speech that do not constitute criminal instruction.

Although Professor Volokh is correct that these different types of speech all help facilitate crimes, distinguishing criminal instruction from other forms of crime-facilitating speech makes sense both analytically and practically. On an analytical level, different varieties of crime-facilitating speech invoke different legal doctrines: Publishing a witness's name implicates privacy issues that publishing a recipe for a Molotov cocktail does not. On a practical level, public discussion of criminally instructional speech (albeit limited) treats that category of speech as its own entity. Recent attention to crime-facilitating speech has focused on criminal instruction: the Department of Justice has produced a study, and Con-

First Amendment privilege to report a witness's name when doing so increased his risk of harm).

⁸ See Volokh, *supra* note 1, at 1102 n.40 (discussing *State v. Walker*, No. I-9507-03625 (Williamson Cty. (Tenn.) Cir. Ct. Nov. 13, 2003) (accepting a First Amendment defense to obstruction of justice charge for holding up sign reading "Radar Trap" beside the road)).

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gress has passed a law, both specifically targeting criminally instructional speech.⁹ Because such speech is at special risk of criminalization, it seems particularly important to find the test best tailored for such speech.¹⁰ Thus, rather than attempt to rationalize the larger category of crime-facilitating speech, this Note focuses exclusively upon criminal instruction.

B. Free Speech Premises

As an initial matter, certain assumptions about the purposes of the First Amendment are worth emphasizing. First, this Note assumes that First Amendment protections should extend to as much expression as possible, regardless of its perceived “value” to civic discourse.¹¹ This approach can rest on either of two rationales: first, that expression as such is worthy of protection;¹² and second, and less controversially, that the range of expression valuable to political discourse is expansive, not narrow, and therefore should be construed as broadly as possible.¹³ Although this approach, based on either or both rationales, is highly speech-protective, it need not condone the protection of criminal speech for prophylactic purposes. Under the conception of the First Amendment at work here, all expression enjoys a presumption of protection until a demonstrated harm or other compelling state interest contravenes that presumption.

⁹ See, e.g., 18 U.S.C. § 842(p)(2) (2000); U.S. Dep’t of Justice, 1997 Report on the Availability of Bombmaking Information, at <http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html> (last accessed August 26, 2005).

¹⁰ For a more comprehensive approach, see generally Volokh, *supra* note 1.

¹¹ For an opposing view of the First Amendment, see, e.g., Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 *Stan. L. Rev.* 299, 300 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 20 (1971).

¹² See, e.g., Franklyn S. Haiman, “Speech Acts” and the First Amendment 8–9 (1993) (“It often has been argued that the most defining characteristic of what it means to be human is [our] symbol-creating and symbol-transmitting capability. And if that is what being human is mainly about, what could be more important than a First Amendment that protects and nurtures it?”).

¹³ See Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell**, 103 *Harv. L. Rev.* 601, 681 (1990) (“[A]ll speech is potentially relevant to democratic self-governance . . .”).

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Second, this Note eschews distinctions based on the use or “value” of certain types of communications under the First Amendment.¹⁴ The category of criminally instructional speech requires drawing careful distinctions. It must be possible to distinguish instructions presented in, say, a conversation between co-conspirators, a law enforcement handbook, an anarchist website, and a true-crime novel. Intuitions about where to draw the line in such cases could be based on assumptions about the value of certain types of speech and its importance to the goals of the First Amendment. Line-drawing then becomes an exercise in balancing the potential harm of such speech against its potential value. Presumably a recipe for a bomb poses the same potential harm to society whether it occurs in a novel or on a website. If we want to criminalize the latter and not the former, does it mean that we believe the novel has more to contribute to our society and that the First Amendment privileges it over the website? This Note does not make that kind of determination. Furthermore, it argues that regulation of criminally instructional speech *need not* be based on such distinctions. Instead, a simple and reasoned approach can be derived from the criminal law and, more specifically, from the concept of aiding and abetting.

Third, this Note recognizes that regulation of speech is not just a First Amendment issue; rather, it is also an issue for the criminal law. Any speech that does not have the protection of the First Amendment potentially is open to regulation under the criminal law. Meanwhile, most prosecutions of speech under criminal statutes prompt a First Amendment defense of some kind, wherein the defendant claims as an issue of fact that his speech was not unprotected criminal expression but some other variety fully protected by the First Amendment. Such prosecutions also may involve facial challenges to the statute in question on First Amendment grounds.

¹⁴ Professor Volokh’s section on “single-use” and “dual-use” crime-facilitating speech comprehensively demonstrates the various purposes which such speech can serve. See Volokh, *supra* note 1, at 1126–27. While Professor Volokh distinguishes the issue of “use” from that of “value,” the two ultimately seem to coalesce. It is important that certain crime-facilitating speech has legitimate uses because we all have assumptions about what legitimate uses are and why the First Amendment protects them. These assumptions generally trace back to a larger conception of what types of speech the First Amendment protects and why. This conception, in turn, usually has something to say about why speech has value in our society.

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This Note acknowledges this relationship between the First Amendment and the criminal law and attempts to draw on both areas.

C. The CIS Test: A Basic Overview

There are at least two different kinds of criminally instructional speech. One type helps to bring about an actual criminal offense. The other, while offering criminal instruction, does not result (or has not yet resulted) in the commission of a crime. These two types of criminally instructional speech receive very different treatment under current law. Conceptually, the former is a form of aiding and abetting and as such has long incurred criminal penalties. The latter has been outlawed by some state and federal statutes, but the Supreme Court has never squarely addressed the constitutionality of such statutes under the First Amendment. Thus, the constitutionality of criminally instructional speech resulting in an actual crime is considered settled, while the constitutionality of the other type is unknown.

The aiding and abetting doctrine provides a suitable model for regulating all forms of criminally instructional speech. That doctrine represents a deliberate effort to distinguish between conduct that happens to contribute to a crime and that which is so bound up in a criminal activity as to be part of it. When the “conduct” in question is speech, this inquiry is about distinguishing between pure speech, which is protected, and “speech-acts,” which intentionally contribute to criminal activity and for that reason lack First Amendment protection.¹⁵

One of the most important features of aiding and abetting is its mens rea requirement. To be guilty of aiding and abetting, an actor must have intended to contribute to the underlying offense.¹⁶ This intent requirement was a deliberate decision on the part of criminal lawyers and legislators in the twentieth century. In the early

¹⁵ Professor Kent Greenawalt provides the best explication of this rationale. He uses the term “situation-altering utterances” to describe types of speech that are subject to regulation under the civil and criminal law because they are, at bottom, “ways of doing things, not of asserting things.” Kent Greenawalt, *Speech, Crime, and the Uses of Language* 58 (1989). Professor Greenawalt believes such speech is beyond the scope of First Amendment protection.

¹⁶ See 18 U.S.C. § 2 (2000); Model Penal Code § 2.06 (1962).

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part of the century, some federal circuits crafted a stringent intent requirement for aiding and abetting. As most famously articulated by Judge Learned Hand, this standard required that the aider “in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.”¹⁷ This is commonly referred to as having a “stake in the venture.”¹⁸ Other circuits, however, required only a mens rea of knowledge.¹⁹ This difference—between having an interest in the success of the crime and merely having knowledge of its probable commission—was settled for federal criminal law in *Nye & Nissen v. United States*, where the Supreme Court quoted Judge Hand’s formulation in the course of adopting an intent standard.²⁰

A few years later, the same question sparked intense debate during the drafting of the Model Penal Code.²¹ The drafters originally proposed that liability depend upon whether a person, “acting with knowledge that [another] person was committing or had the purpose of committing the crime . . . knowingly, substantially facilitated its commission.”²² The requirement of “substantial” facilitation was an attempt to offset the lower mens rea standard of knowledge, but after a floor debate the American Law Institute rejected the provision.²³ Instead, the drafters elected to require a mens rea of intent. Thus the Model Penal Code demands that the aider have “the *purpose* of promoting or facilitating the commission of the offense.”²⁴

The intent requirement was a deliberate and significant feature in the formulation of aiding and abetting doctrine. In the context of aiding and abetting, criminal liability only attaches to someone

¹⁷ *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

¹⁸ See, e.g., Richard J. Bonnie et al., *Criminal Law* 579 (2d ed. 1997).

¹⁹ See *Backun v. United States*, 112 F.2d 635, 637 (4th Cir. 1940) (“Guilt as an accessory depends, not on ‘having a stake’ in the outcome of the crime . . . but on aiding and assisting the perpetrators The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose . . .”).

²⁰ 336 U.S. 613, 619 (1949).

²¹ See Bonnie, *supra* note 18, at 580.

²² Model Penal Code § 2.04(3)(b), Tent. Draft No. 1 (1953); see also Model Penal Code § 2.06 *in* Model Penal Code and Commentaries: Official Draft and Revised Comments, 295 (1985).

²³ See Model Penal Code § 2.06 (1962); see also Bonnie, *supra* note 18, at 580.

²⁴ Model Penal Code § 2.06 (1962).

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who is an accomplice in a literal sense—who shares with the principal an interest in the criminal venture and, in Judge Hand's words, "participate[s] in it as something that he wishes to bring about."²⁵ If intent is so crucial even where there is an underlying offense, it should be even more so when we are considering criminal liability where there is no underlying offense at all. If mere knowledge or recklessness is not enough to convict someone who has contributed to an actual crime, it certainly should be insufficient to convict someone who has not.

Drawing on the features of aiding and abetting, the proposal below formulates a test for when criminally instructional speech should lack constitutional protection. Speech that fails to merit First Amendment protection under the test is open to regulation by the criminal law. The CIS test would require the following:

I. Where a criminal offense has been committed, a speaker with a direct relationship to the principal and direct knowledge of his plans should be held liable for aiding and abetting upon a showing of his intent that his instructions assist in the commission of the criminal offense.

II. Where a criminal offense has been committed, a speaker with no direct relationship to the principal and no direct knowledge of his plans should be held liable only upon a showing of (1) his intent that his instructions assist in the commission of a criminal offense and (2) a clear connection between the type of offense he intended to foster and the type committed by the principal.

III. Where no criminal offense has been committed, a speaker giving criminal instructions should be held liable only upon a showing of (1) his intent to assist in the commission of a crime and (2) a high likelihood that his speech will facilitate a crime of the type he intended.

The CIS test applies the requirements of mens rea and actual occurrence (or high likelihood) of harm to a wide variety of situations. We can imagine a scenario in which a speaker has given information directly to a principal with the purpose that the

²⁵ *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

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information be put to criminal use, and the principal then has used the information to commit a crime. This is classic aiding and abetting and is criminalized under Part I of the test. We also can imagine a situation in which a speaker has supplied information to a more general audience with the purpose that it be put to criminal use, and some audience member has used the information to commit a crime. This is slightly different from classic aiding and abetting, but because it preserves the key elements of aiding and abetting—a mens rea of intent and the commission of an actual crime—it is unprotected under Part II of the test. In contrast, a speaker who disseminated information to a wide audience *without* the intent that it be put to criminal purpose (such as the writer of a crime novel or a chemistry textbook) would not be held criminally responsible, even if some audience member used the information to commit a crime.

Part III of the test addresses scenarios that are the farthest removed from the classic aiding and abetting paradigm. In such situations, a speaker has supplied information with criminal potential, but no one has put it to criminal use (yet). The CIS test provides that such speech is protected by the First Amendment unless the speaker intends for it to be used to commit a crime. This is, clearly, a test that focuses on the subjective intent of the speaker rather than the objective harm posed by his or her speech. Under this test, a website containing recipes for pipe bombs would be criminal if its makers intended the recipes to be used against law enforcement agents, but a mirror site with the same information would be legal if its purpose were to educate readers in the abstract, or even simply to exercise the First Amendment right to freedom of expression. So long as the website's authors did not intend anyone to use the recipes to break the law, their speech would be protected.

The CIS test is at once quite simple and quite complicated. It is simple because it is in no way novel: It merely imports the criminal law's basic concern for mens rea into First Amendment law. Some might object that mens rea inquiries are themselves quite difficult or complicated,²⁶ but that is an objection to the CIS test only to the extent that it is an objection to the criminal law in general. The criminal law requires mens rea inquiries for many crimes, and our

²⁶ See Volokh, *supra* note 1, at 1185.

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society for the most part seems comfortable with that. In addition, the CIS test is not the only First Amendment test to consider mens rea. Defamation law distinguishes between reputational harms committed with malice or recklessness and those committed with some other mens rea.²⁷ The *Brandenburg* test for incitement allows the criminalization of political advocacy when it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²⁸ The requirement that the speech be “directed to” inciting violence is, for better or worse, often glossed as an “intent” requirement, similar to that proposed in the CIS test.²⁹ While judicial incitement inquiries often have failed to take this intent requirement seriously (as will be shown below), such a requirement is evidence that the concept of mens rea is no stranger to First Amendment law.

At the same time, however, the CIS test is complicated, not in itself, but because the relationship between the aiding and abetting doctrine and the First Amendment has become deeply confused. While the doctrine of aiding and abetting is clear and well established, courts have difficulty when they encounter *speech* that aids and abets. Courts that would readily convict a defendant for supplying a handgun find themselves confounded when the defendant’s contribution to a crime is speech-based. These courts, concerned that the First Amendment must enter the analysis somehow, often reach their decisions by the wrong means, taking a detour through First Amendment doctrine that ultimately threatens to weaken protections for other types of speech. In addition, in an age of mass media, the concept of aiding and abetting could potentially extend to speech published by one person and then utilized by another entirely unknown to the speaker. This further complication in aiding and abetting doctrine has grown more important, and more confounding, in recent years.³⁰

²⁷ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964) (requiring an “actual malice” standard for defamation suits brought by public officials).

²⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

²⁹ See Volokh, *supra* note 1, at 1191 (describing the *Brandenburg* test as an “intent-plus-imminence-plus-likelihood test”).

³⁰ See *Rice v. Paladin Enters.*, 940 F. Supp. 836, 839 (D. Md. 1996), *rev’d*, 128 F.3d 233 (4th Cir. 1997), discussed *infra* Section IV.A.

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Still more uncertainty besets criminally instructional speech that lacks an underlying offense. While few cases have addressed this type of speech, the future regulation of the category lies with it. Technological advances continue to make information more accessible to increasing numbers of people. At the same time, fears about terrorism increase the pressure to regulate dissemination of potentially dangerous information. The result is a society in which technical knowledge (such as bombmaking instructions) is more easily imparted—and that prospect is more frightening—than at any previous time. In such an environment, the temptation to regulate instructional speech is high, as is the importance of regulating it properly.

The complications surrounding criminally instructional speech dictate the structure of the rest of this Note. Rather than justifying the test in the abstract and then applying it to particular cases, Part II of this Note lays the groundwork for a defense of the test by showing that the current relationship between the First Amendment and aiding and abetting doctrine is misaligned.

II. CIS TYPE I: AIDING AND ABETTING

Both state and federal law routinely criminalize a certain segment of criminally instructional speech: that which “willfully” “aids” or “abets” the commission of an underlying offense.³¹ Speech that aids and abets a crime has long been considered beyond the boundaries of First Amendment protection, the most frequent rationale being that such communication functions more as action than as speech. This speech-act rationale allows such speech to be exempted from First Amendment review without the strict scrutiny that would accompany content-based discrimination against pure speech. No less a speech protectionist than Justice Black made this argument in *Giboney v. Empire Storage & Ice Co.*: “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. We reject the contention now.”³² In general, the fact “[t]hat ‘aiding

³¹ See, e.g., 18 U.S.C. § 2 (2000); Model Penal Code § 2.06(3)(a)(ii) (1962).

³² *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). Admittedly, in at least one case the Supreme Court seemed to say otherwise. In *Griswold v. Connecti-*

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and abetting' of an illegal act may be carried out through speech is no bar to its illegality."³³

The federal accomplice liability statute supports this understanding of the relationship between speech and criminal action. Under 18 U.S.C. § 2, "[W]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."³⁴ Annotations to the statute explain that the term "causes"

makes clear the legislative intent to punish as a principal not only one who directly commits an offense and one who "aids, abets, counsels, commands, induces or procures" another to commit an offense, but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense.³⁵

This definition of "causes" clearly encompasses speech-based contributions to crime. If the defendant willfully aided or assisted another in the commission of an offense, he is guilty as an accomplice, regardless of whether his assistance took the form of speech. "The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose."³⁶

cut, the Court considered defendant physicians' convictions under Connecticut's aiding and abetting statute for assisting married couples in violating Conn. Gen. Stat. Ann. § 53-32 (1958), which forbade the use of contraception. 381 U.S. 479 (1965). Before invalidating this statute, the Court made the expansive statement that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Id.* at 482. The Court did not explicitly say that defendant physicians' convictions were void on First Amendment grounds regardless of the validity of the underlying statute, nor did it attempt to square its statement with the routine and uncontroversial criminalization of instructional speech in aiding and abetting contexts other than the teaching of contraceptive methods. This language from *Griswold* seems to have fallen by the First Amendment wayside, perhaps because it is clear from the rest of the opinion that the Court's real objection is to the underlying statute, not to the aiding and abetting charges arising from it. On the whole, it is safe to say that *Giboney*, rather than *Griswold*, represents the Court's usual approach to aiding and abetting.

³³ Nat'l Org. for Women v. Operation Rescue, 37 F.3d 646, 656 (D.C. Cir. 1994).

³⁴ 18 U.S.C. § 2(a) (2000).

³⁵ *Id.* § 2.

³⁶ United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982).

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A. Incitement and the Buttorff Problem

In a number of aiding and abetting cases, however, courts have invoked the First Amendment in puzzling ways. A sample case will illustrate how the analysis works; a brief explication of the incitement doctrine will show how it errs. *United States v. Buttorff* involved the prosecution of defendants for aiding and abetting tax fraud under 26 U.S.C. § 7206(2).³⁷ The statute states:

Any person who . . . willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter. . . shall be guilty of a felony³⁸

The defendants in *Buttorff* held a series of meetings for employees of a John Deere plant in Dubuque, Iowa. At the meetings, they taught tax-evasion techniques that a number of employees subsequently used on their federal income tax returns.³⁹ The defendants were indicted for aiding and abetting these fraudulent filings. At trial, the defendants raised a First Amendment defense but were nevertheless convicted.⁴⁰ On appeal, the Eighth Circuit addressed two issues. First, the court upheld the aiding and abetting convictions, finding that the evidence had been sufficient to send the question to the jury.⁴¹ Next, it asked “whether the first amendment protections of free speech and assembly prohibit the convictions of these defendants”⁴²

The court’s discussion of the constitutional question began with some hesitation. The court cited Justice Brandeis’s observation in *Whitney v. California* that the freedom of speech is not absolute,⁴³

³⁷ 572 F.2d 619, 622 (8th Cir. 1978); see also *United States v. Raymond*, 228 F.3d 804, 816 (7th Cir. 2000); *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985); *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985); *United States v. Moss*, 604 F.2d 569, 570 (8th Cir. 1979).

³⁸ 26 U.S.C. § 7206(2) (2000).

³⁹ *Buttorff*, 572 F.2d at 622.

⁴⁰ *Id.*

⁴¹ *Id.* at 623.

⁴² *Id.*

⁴³ See *id.* (citing *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)).

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then Judge Learned Hand's statement in *Masses Publishing Co. v. Patten* that words "which have no purport but to counsel the violation of law cannot . . . be a part of that public opinion which is the final source of government in a democratic state."⁴⁴ Finally, however, the court settled on incitement. Observing that "[m]ore recently, the Supreme Court has distinguished between speech which merely advocates law violation and speech which incites imminent lawless activity,"⁴⁵ the court made clear that it would test the aiding and abetting convictions—which it had already upheld on their own terms—against the *Brandenburg* incitement standard. The court did not acknowledge the oddity of first determining guilt on aiding and abetting and then asking whether conviction for aiding and abetting is constitutionally barred. Nor did it explain why the incitement test is the appropriate constitutional standard; its applicability was simply assumed. The court concluded that the defendants' "speeches and explanations incited several individuals to activity that violated federal law" and thus were unprotected by the First Amendment.⁴⁶ The court therefore upheld the defendants' convictions.

B. Incitement and Criminal Instruction Distinguished

To anyone familiar with incitement doctrine, the Eighth Circuit's conclusion will seem rather strange. Traditionally, the doctrine has not addressed the type of speech involved in *Buttorff* (that is, instructions on evading income tax). Incitement is best described as a particular type of advocacy. For the most part, advocacy of ideas and actions—even advocacy of law-breaking—is protected speech under the First Amendment. The Supreme Court, however, has recognized incitement as one of the few types of speech that do not merit First Amendment protection.⁴⁷ In *Brandenburg v. Ohio*, the

⁴⁴ Id. at 624 (quoting *Masses Publ'g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917), rev'd, 246 F. 24 (2d Cir. 1917)).

⁴⁵ Id. (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

⁴⁶ Id.

⁴⁷ These include incitement (e.g., *Brandenburg*, 395 U.S. at 447); obscenity (e.g., *Miller v. California*, 413 U.S. 15, 23 (1973)); and fighting words (e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). In addition, the Court has recognized other types of speech that merit a middling level of protection, including private libel (e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–46 (1974)); true threat (e.g.,

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Supreme Court found it unconstitutional to “forbid or proscribe advocacy of the use of force or of law violation,” except in a special set of circumstances, “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁴⁸ That special set of circumstances constitutes incitement. *Brandenburg* provides the current test for distinguishing protected advocacy from unprotected incitement: Speech is protected unless it is (1) *intended* to incite violence or lawlessness and is (2) *likely* to incite such action (3) in the *imminent future*.⁴⁹

Criminally instructional speech differs importantly from incitement. As the third prong of the *Brandenburg* formulation suggests, incitement is time-sensitive. Persuasive speech will have its most forcible impact in the short term, just after the listener has received encouragement to act in a certain way. In the long term, other influences intervene, and the decision to act is likely to be a product of many different factors. The causal connection between the original speech and the listener’s action becomes attenuated, and the likelihood that the speech produced the action diminishes. Thus, the longer the regulation of such speech extends beyond the time of its utterance, the more it comes to look like an unreasonable restriction on pure speech.

By contrast, if the speech intends to and is likely to spur immediate violent action, it creates a danger of harm that no intervening speech or influence will have time to intercept. This speech can be regulated in the interest of averting the harm. As Justice Brandeis explained in *Whitney*, “[I]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech Only an emergency can justify repression.”⁵⁰ Incitement is unprotected because it is considered a uniquely dangerous form of advocacy, that which is likely to cause harm in the imminent future.⁵¹

Criminally instructional speech, however, works differently. Its primary function is not to encourage listeners to commit certain

Watts v. United States, 394 U.S. 705, 707 (1969)); and commercial speech (e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976)).

⁴⁸ 395 U.S. at 447.

⁴⁹ See *id.*

⁵⁰ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

⁵¹ See *Brandenburg*, 395 U.S. at 447.

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acts but to tell them how to do so. It supplies them not with intent or motivation but with the tools to carry out a pre-existing intention. For this reason, the amount of time that passes between speech and action is irrelevant. Likewise, the number of intervening forces influencing the listener's intent is irrelevant, because the speech did not supply that intent in the first place. Instead, the speech provided information that is as useful six months later as it was when the listener heard it.⁵² As Justice Stevens recently noted, "While the requirement that the consequence be 'imminent' is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function."⁵³

Realistically, of course, incitement and instructional speech have more in common than this analysis suggests. In practice, the two types of speech often are intertwined, as speakers both propound the necessity of certain acts and give advice on their successful commission. For instance, *Yates v. United States* involved meetings of Communist organizations at which "a small group of members were not only taught that violent revolution was inevitable, but they were also taught techniques for achieving that end."⁵⁴ Similarly, speakers such as the defendants in *Buttorff* often give technical information and also encourage their listeners to use that information to break the law.⁵⁵ Speech in these circumstances can be a muddle of advocacy and instruction, and the speaker might contribute both to listeners' criminal intent and to their means.

⁵² If, on the other hand, the listener, in the intervening time, heard a different recipe for bombmaking every day and took tips from different recipes to construct his destructive device, the chain of causation tracing back to the particular speaker would be broken. One could not say that this particular speaker's words had played a role in the criminal action, just as one could not show that one piece of advocacy had supplied a listener with the intent to commit a crime months later. If, however, the speaker's instructions were the sole means the listener used to commit the crime, the chain of causation would remain intact, regardless of how much time intervened.

⁵³ *Stewart v. McCoy*, 537 U.S. 993, 995 (2002) (Stevens, J., opinion regarding denial of certiorari).

⁵⁴ *Yates v. United States*, 354 U.S. 298, 331–32 (1957).

⁵⁵ 572 F.2d 619, 623 (8th Cir. 1978) ("[E]ach [defendant], by speaking to large groups of persons, sought to advance his ideas and encourage others to evade income taxes."); see also *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985) ("Freeman, a tax protestor of sorts, counseled violations of the tax laws at seminars he conducted. He urged the improper filing of returns, demonstrating how to report wages . . .").

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Furthermore, because of the special nature of First Amendment review, *Brandenburg* complicates the prosecution of aiding and abetting cases. At the trial level, defendants in these cases typically raise a First Amendment defense to the aiding and abetting charges, claiming that they were, for example, merely advocating changes to the tax system rather than willfully helping individuals commit tax fraud.⁵⁶ At the appellate level, the court must make a full independent review of the record of any findings that implicate the First Amendment.⁵⁷ This special requirement compels courts to consider the character of the defendants' speech at every level of litigation.

Nevertheless, the contours of accomplice liability determine that incitement should not infect the aiding and abetting inquiry. "Aiding and abetting" as a form of accomplice liability is usually broader than its name suggests. The general federal aiding and abetting statute, 18 U.S.C. § 2, encompasses any speech or action that "causes" a criminal offense, where "causes" includes "aids, abets, counsels, commands, induces or procures"⁵⁸ Similarly, the specific law that governs the aiding and abetting of tax fraud, 26 U.S.C. § 7206(2), punishes anyone who "[w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under . . . the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter."⁵⁹ Both of these statutes criminalize speech that "counsels" law violation, as well as that which instructs in it. Thus, in *Buttorff*, if the defendants' speech intentionally contributed to the filing of fraudulent tax returns, they were guilty of aiding and abetting, regardless of whether their instructional speech was combined with "advocacy." "Advocacy" itself could be criminal under Section 7206(2) as "counseling" or "advising."

Why does this not run afoul of the incitement doctrine? Because, under aiding and abetting law, criminal liability attaches to "counseling" or other advocacy *only* when it (1) is done with the *intention* of contributing to law violation and (2) *actually does so*. If

⁵⁶ See, e.g., *United States v. Raymond*, 228 F.3d 804, 808 n.1 (7th Cir. 2000); *Freeman*, 761 F.2d at 551; *Buttorff*, 572 F.2d at 622.

⁵⁷ See *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505-06 (1984).

⁵⁸ 18 U.S.C. § 2 (2000).

⁵⁹ 26 U.S.C. § 7206(2) (2000).

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there is no underlying crime, the speech may qualify as protected advocacy under *Brandenburg*. But once there is an underlying crime, even “advocacy” that intentionally contributed to that crime is unprotected. *Brandenburg* can no longer salvage the speech.

Table 1: Speech Classified by Its Mens Rea and Its Relation to Crime

<i>Mens Rea</i>	<i>Relation to Crime</i>	<i>Type of Speech</i>	<i>Status</i>
No intent	Not likely to incite	Advocacy	Protected
No intent	Likely to incite	Advocacy	Protected
Intent	Not likely to incite	Advocacy	Protected
Intent	Likely to incite	Incitement	Unprotected
Intent	Already caused	Aiding & Abetting	Unprotected

To summarize, mere advocacy either does not intend to foster lawless action, is not likely to do so, or both. In each case, it is completely protected. Incitement, by contrast, both intends to foster lawless action and is likely to do so. It is unprotected. Finally, speech that aids and abets both intends to foster lawless action and actually does so. It, too, is unprotected by the First Amendment and faces penalties under the criminal law. This means that, as soon as a court has established a defendant’s guilt for aiding and abetting, there is no longer any question of whether the defendant’s speech is protected by the First Amendment. Regardless of whether it was instructional, motivational, or both, *Brandenburg* has no place in the analysis.

Where *Brandenburg* might have a place—and where courts should be very careful—is in determining whether the defendants actually do meet the culpability requirements for aiding and abetting. Defendants often will attempt to characterize their speech as mere advocacy, and if they can raise a reasonable doubt about their intent then they should not be convicted.⁶⁰ Such a conclusion

⁶⁰ Then-Judge Kennedy articulated this notion in reversing twelve counts of aiding and abetting where a First Amendment defense had not been allowed by the trial judge: “Where there is some evidence . . . that the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission

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would be warranted, however, not because the First Amendment protects aiding and abetting, but because the government has failed to establish the elements of the crime. An opinion like *Buttorff*, which first affirms the defendants' guilt for aiding and abetting and then considers whether such activity is protected by the First Amendment,⁶¹ is therefore incoherent.⁶²

C. Incitement's Unintended Consequences

To speech protectionists, application of the incitement test here might seem desirable, even if incorrect. In cases where instructions are given at seminars or in publications long before the commission of a crime, the offending speech should always fail the "imminence" prong of *Brandenburg* and thus be protected.⁶³ The Ninth Circuit reached this conclusion in dicta in *United States v. Dahlstrom*.⁶⁴ In that case, the defendants were found to lack the requisite intent to aid in tax fraud, but the court went on to remark that, even if intent existed, "Nothing in the record indicates that the advocacy practiced by these defendants contemplated *imminent* lawless action. Not even national security can justify criminalizing speech unless it fits within this narrow category; certainly concern with protecting the public fisc, however laudable, can justify no

of the criminal act, a defense based on the First Amendment is a legitimate matter for the jury's consideration." *Freeman*, 761 F.2d at 551. On two other counts, where the defendants had actually assisted others in filling out fraudulent tax forms, Judge Kennedy found that a First Amendment defense had been rightly excluded. *Id.* at 552.

⁶¹ See *Buttorff*, 572 F.2d at 623–24.

⁶² This discussion has focused on cases that misguidedly conflate incitement and aiding and abetting, but a handful of cases have avoided the *Buttorff* mistake. See *United States v. Rowlee*, 899 F.2d 1275, 1280 (2d Cir. 1990) (upholding a conviction under 26 U.S.C. § 7206(2) while criticizing the trial court for instructing the jury to consider both elements of the crime and the "duplicative and unnecessary issue" of First Amendment protection); *United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990) (rejecting the invocation of *Brandenburg* and upholding convictions for aiding and abetting interstate transportation of wagering paraphernalia); *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982) (rejecting as "specious syllogism" the First Amendment defense of a defendant charged with aiding and abetting for selling mail-order instructions on the manufacture of illegal drugs).

⁶³ See *id.* at 622–23.

⁶⁴ 713 F.2d 1423, 1428 (9th Cir. 1983).

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more.”⁶⁵ The *Dahlstrom* court thus suggested that it would have refused to convict the defendants on aiding and abetting if their speech had not also met the incitement standard. While this analysis is flawed, it is also highly speech protective, and this could be seen as a good thing in and of itself.

But *Dahlstrom* represents the exceptional application of incitement doctrine. In most cases, after invoking *Brandenburg*, courts do not let it stand in the way of conviction. Rather than deal with the unsettled status of criminally instructional speech, many courts find that the speech in question actually qualifies as incitement and may be prosecuted without violating the First Amendment. Thus, the *Buttorff* court found that the defendants “incited several individuals to activity that violated federal law,” even though their speech “[did] not incite the type of imminent lawless activity referred to in criminal syndicalism cases.”⁶⁶

Five other appellate court decisions have reached the same conclusion.⁶⁷ In one case, the Seventh Circuit justified enjoining defendants from publishing tax-related materials by noting that the injunction was narrowly tailored so that “it clearly applie[d] only to activities that *incite* others to violate the tax laws.”⁶⁸ Similarly, in *United States v. Freeman*, then-Judge Kennedy found that there was a question of fact as to whether the defendant had “incited” violations of tax law.⁶⁹ While there was evidence that the defendant’s speech was mere advocacy, “[t]here was [also] substantial evidence of Freeman’s use of words of incitement quite proximate to the crime of filing false returns.”⁷⁰ Here “imminent” becomes “quite proximate” in order to create the possibility that the speech in question might satisfy the *Brandenburg* test. Such modifications of the incitement doctrine, however, undermine its traditional pur-

⁶⁵ *Id.*; see also *id.* (“Even if the defendants knew that a taxpayer who actually performed the actions they advocated would be acting illegally, the first amendment would require a further inquiry before a criminal penalty could be enforced.”).

⁶⁶ *Buttorff*, 572 F.2d at 624.

⁶⁷ See *United States v. Raymond*, 228 F.3d 804, 815 (7th Cir. 2000); *United States v. Fleschner*, 98 F.3d 155, 158–59 (4th Cir. 1996); *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985); *United States v. Freeman*, 761 F.2d 549, 551–52 (9th Cir. 1985); *United States v. Moss*, 604 F.2d 569, 571–72 (8th Cir. 1979).

⁶⁸ *Raymond*, 228 F.3d at 815 (emphasis added).

⁶⁹ 761 F.2d at 551–52.

⁷⁰ *Id.* at 552.

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pose. As Justice Brandeis said, “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech Only an emergency can justify repression.”⁷¹ A scenario in which there would be no time to avert the “emergency” of “imminent” tax code violations is difficult to imagine.

Thus, in order to find defendants guilty of incitement, courts must distort the *Brandenburg* test, either by ignoring the imminence provision or by attenuating it into meaninglessness. The danger of such distortion is clear: Courts might import the revised test back into true *Brandenburg* cases. If, in distinguishing between political advocacy and incitement, courts were able to dismiss the imminence factor, a great deal of speech that is currently protected would be subject to punishment. One can imagine such a regime by considering how *Hess v. Indiana*,⁷² or *Brandenburg* itself, might have come out without an imminence component. Alternatively, one can imagine such a regime simply by reading *United States v. Kelley*. In this tax fraud case, the Fourth Circuit affirmed an aiding and abetting conviction, claiming that the First Amendment protects “critical, but abstract, discussions of existing laws” but not “speech which urges the listeners to commit violations of current law.”⁷³ Encouragements to lawless action are precisely what the *Brandenburg* standard does protect, so long as they stay within certain permissible parameters. The entire point is that even speech that advocates lawlessness will not be regulated on the basis of content, except under certain extreme conditions.

These misinterpretations of First Amendment doctrine ramify as they become precedent for new cases. In one case, a court addressed a defendant’s First Amendment claim simply by quoting at length from *Buttorff’s* incitement analysis.⁷⁴ In another, the court reproduced verbatim the *Kelley* court’s construal of *Brandenburg*.⁷⁵ Such flawed applications of *Brandenburg* not only fail to address

⁷¹ *Whitney v. California*, 274 U.S. 357, 377 (Brandeis, J., concurring) (emphasis added).

⁷² 414 U.S. 105, 108–09 (1973) (holding that an antiwar protestor’s statement “We’ll take the fucking street later” (or “We’ll take the fucking street again”) was protected speech under *Brandenburg* standard).

⁷³ 769 F.2d 215, 217 (4th Cir. 1985).

⁷⁴ See *United States v. Moss*, 604 F.2d 569, 571 (8th Cir. 1979).

⁷⁵ See *United States v. Fleschner*, 98 F.3d 155, 158 (4th Cir. 1996).

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the unique character of criminally instructional speech but also pose the danger of being re-imported into the classic advocacy setting and leveraged against any kind of unpopular speech.

III. THE CIS TEST

The appellate decisions cited in Part II illustrate the logic of applying traditional aiding and abetting doctrine to cases of speech-based aiding and abetting. They also demonstrate the confusion that can arise if such principles are not applied carefully and consistently. Each case should involve a detailed factual inquiry, but the conceptual relationship between the First Amendment and the criminal law need not be complex. When a speaker intends his words to contribute to a crime, and they in fact do so, he is guilty of aiding and abetting.

If legislatures decide to regulate criminally instructional speech, they can avoid endangering the First Amendment by following closely the model of aiding and abetting. Similarly, in enforcing such laws, courts would best protect free speech rights by pursuing a demanding factual inquiry, patterned after the standard employed in aiding and abetting cases. The three-part CIS test, articulated in Section I.C. above, provides practical guidance for both legislatures and courts in dealing with the problems posed by the category of criminally instructional speech. For the sake of clarity in the discussion that follows, restating the proposed test may be helpful:

I. Where a criminal offense has been committed, a speaker with a direct relationship to the principal and direct knowledge of his plans should be held liable for aiding and abetting upon a showing of his intent that his instructions assist in the commission of the criminal offense.

II. Where a criminal offense has been committed, a speaker with no direct relationship to the principal and no direct knowledge of his plans should only be held liable upon a showing of (1) his intent that his instructions assist in the commission of a criminal offense and (2) a clear connection between the type of offense he intended to foster and the type committed by the principal.

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III. Where no criminal offense has been committed, a speaker giving criminal instructions should only be held liable upon a showing of (1) his intent to assist in the commission of a crime and (2) a high likelihood that his speech might facilitate a crime of the type he intended.

The reasons for the test's focus on intent should be clear from the foregoing discussion of the aiding and abetting doctrine. In addition, the test requires an actual crime in Parts I and II and the "high likelihood" of a crime in Part III. These requirements attempt to extend the traditional aiding and abetting doctrine's demand of an underlying offense into more attenuated circumstances, where the speaker does not know the principal or where an offense is not committed. Furthermore, the likelihood prong in Part III serves to protect speech in cases of impossibility. If someone were to post inaccurate bombmaking instructions that had no capability of hurting anyone, those instructions would be protected, because they would have no likelihood of bringing about the violent crime that the speaker intended to facilitate.⁷⁶ The likelihood prong also serves the prophylactic function of making conviction more difficult in instances where an offense has not occurred. Unless the state can show that the defendant's words posed a high probability of harm, they will be protected. This vagueness could have a chilling effect on some speech, but that effect would be less than if there were no likelihood requirement at all.

The test, in essence, attempts to preserve the two key elements of aiding and abetting: (1) actual intent on the part of the speaker and (2) as close a relationship as possible to an actual crime. It also might look familiar from another context since, in its focus on intent and likelihood, it resembles the *Brandenburg* test without the

⁷⁶ Some commentators say that much of the bombmaking information available in books or online is faulty. See Ken Shirriff, "Does the Anarchist Cookbook really contain errors?" at <http://www.righto.com/anarchy/index.html> (last accessed Nov. 2, 2005) (analyzing a passage of the classic instruction manual and concluding that "there are four obvious errors and a totally useless recipe in one short paragraph"). A number of websites have grown up that review the accuracy of information on other websites; many recommend checking multiple sources before attempting to construct any device. See, e.g., http://www.totse.com/en/bad_ideas/ka_fucking_boom/partialreviewo170773.html.

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imminence element. This is in some ways a positive sign: The imminence prong was the only real problem with the incitement test, and it is reassuring to note that the Supreme Court has already approved a First Amendment test with intent and likelihood requirements. It is, however, more conceptually accurate—and perhaps also constitutionally protective—to understand the test as an outgrowth of aiding and abetting rather than a modification of incitement. Aiding and abetting is a form of criminally instructional speech, while the incitement doctrine developed for an entirely different kind of expression. Furthermore, the incitement analysis has a habit of turning on the imminence question and addressing intent and likelihood cursorily. The aiding and abetting analysis attempts to impose a demanding reasonable-doubt standard on both. Conceptualizing the test as an aiding-and-abetting-type test rather than an incitement-type test helps ensure that it performs its function of drawing the truest line possible between “speech” and “speech-act.”

This is not to say that the CIS test draws a perfect and easy line. Imagine that someone arrested for detonating a bomb in front of a police station directs authorities to the website from which he obtained the recipe for the bomb. The website contains only the recipe and has a neutral, unoffending URL. Is the person who posted the recipe guilty of aiding and abetting? Imagine, instead, that the recipe still appears without comment, but at a website called “www.copkiller.com.” Is this speaker criminally liable? What if the site is called “www.forkillingcops.com?” What if the recipe appears with the comment, “Use this to kill cops!”? Alternatively, what if the instructions appeared on an anti-abortion website but were used to bomb a police station? What if they were used by an individual to kill his own family? Finally, imagine that each of these websites exists but has not yet been used by anyone in making a bomb. Which websites should be protected? Can speakers ever possess meaningful intent when they are not involved in the planning of a specific criminal venture and have no knowledge of the contexts in which others may choose to use their information? If we are speaking in terms of “stake in the venture,” how do we determine such a thing when the speaker does not know his listeners and has no idea about their specific plans? Stake in *what* venture?

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These are difficult questions, and no test can make them easy. The CIS test assumes that, while the speech in many of these scenarios is protected, not all of it should be. To throw up our hands and declare it all protected because the line is hard to draw would be no more equitable than declaring it all criminal. Under the CIS test, liability will be governed by the speaker's intent. In situations where a crime is committed, the speaker's liability will depend upon whether he intended to contribute to a crime of that type. In situations where no crime has been committed, liability will depend upon whether the speaker communicated his message for the purpose of contributing to someone else's crime. If the speaker intended to facilitate a crime, he may be criminally liable. If he did not, or if there is not sufficient evidence that he did, then he is not. And obviously, as in every area of the criminal law, the defendant is innocent until the elements of his crime are proven beyond reasonable doubt.

Some will object to the CIS test as overprotective, others as underprotective. Some will suggest that the test is too vague or based on the wrong criteria. Part V addresses these objections, but first Part IV applies the test to cases that demonstrate some of the difficulties posed by criminally instructional speech.

IV. THE FUTURE OF CRIMINALLY INSTRUCTIONAL SPEECH

Part II of this Note demonstrated the problems of prosecuting speech-based aiding and abetting and clarified the standard that should govern such cases. That standard is addressed in Part I of the CIS test. Parts II and III of the test are designed to handle situations where the connections between speaker and listener or speaker and incident are more attenuated, even non-existent. The few cases treating these scenarios illustrate the difficulties with existing approaches to criminally instructional speech. Applying the CIS test to them shows how judicial decisionmaking could be simplified and improved through the use of aiding and abetting analysis.

A. *CIS Type II: Rice v. Paladin Enterprises*

As mentioned above, Part II of the CIS test deals with so-called "aiding and abetting" situations where there is not a close relation-

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ship between a speaker and his audience. This type of speech can take many forms, ranging from mainstream news reports and blockbuster movies to online recipes for explosives. Perhaps the best example of such speech—and the inadequacies of the current approach to it—is presented in *Rice v. Paladin Enterprises, Inc.*⁷⁷

Paladin was a wrongful death suit against publishing company Paladin Enterprises and its President, Peter Lund, for two books, *Hit Man: A Technical Manual for Independent Contractors* (“*Hit Man*”) and *How To Make a Disposable Silencer, Vol. II* (“*Silencers*”).⁷⁸ The plaintiffs were survivors of three individuals murdered by contract killer James Perry, who had used the two books to plan the killings and followed their instructions in painstaking detail.⁷⁹ According to the plaintiffs, by publishing the two books, Paladin had aided and abetted in the murders.⁸⁰ Paladin moved for summary judgment, arguing that it was protected by the First Amendment.⁸¹

Paladin was decided on a motion for summary judgment. Both parties stipulated to certain facts, which ultimately proved crucial to the case’s disposition and disastrous to Paladin. Paladin stipulated that after agreeing to commit the murders, Perry ordered *Hit Man* and *Silencers* from Paladin’s mail-order catalogue, and that in carrying out the murders, he followed many of the books’ instructions.⁸² Furthermore, Paladin made certain stipulations regarding its mens rea. First, in relation to Perry himself, Paladin stipulated that it had “no specific knowledge” that Perry planned to commit a crime.⁸³ Second, Paladin stipulated that, in publishing, marketing, and distributing *Hit Man* and *Silencers*, it knew and intended that

⁷⁷ 940 F. Supp. 836 (D. Md. 1996), rev’d, 128 F.3d 233 (4th Cir. 1997).

⁷⁸ As part of this case’s settlement agreement, Paladin agreed to cease publication of both books. The text of *Hit Man* can be viewed at <http://ftp.die.net/mirror/hitman/>.

⁷⁹ See 940 F. Supp. at 838–39. James Perry contracted with Lawrence Horn to murder Horn’s ex-wife and disabled son, so that Horn would obtain the two million dollars his son had received in a medical malpractice settlement. Perry strangled eight-year-old Trevor Horn and shot his mother, Mildred Horn, and his nurse, Janice Saunders. See *Paladin*, 128 F.3d at 239.

⁸⁰ *Paladin*, 940 F. Supp. at 838.

⁸¹ *Id.*

⁸² *Id.* at 839.

⁸³ *Id.*

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the publications would be used by criminals to commit murder and that its marketing strategy intended to attract such individuals.⁸⁴

Paladin made such incriminating stipulations because it believed that the First Amendment offered full protection against all charges. Paladin argued that, unless *Hit Man* and *Silencer* fell into one of the few categories of constitutionally unprotected speech, the books were fully protected under the First Amendment, regardless of their intent or their connection to a criminal event.⁸⁵ This rationale explains why Paladin was willing to stipulate both its own criminal intent and the books' material assistance in Perry's crime. Adopting Paladin's reasoning,⁸⁶ the district court identified five categories of constitutionally unprotected speech and summarily rejected the applicability of four: obscenity, fighting words, libel, and commercial speech.⁸⁷ The court found that "the only category of unprotected speech under which *Hit Man* could conceivably be placed is incitement to imminent, lawless activity under *Brandenburg*" and that, therefore, the court would "conduct its analysis of whether the book [was] protected by the First Amendment under the *Brandenburg* standard."⁸⁸

This approach, urged and anticipated by Paladin's motion, led the district court to apply the three prongs of *Brandenburg* and to find, unsurprisingly, that *Hit Man* failed the "imminence" test:

Under *Brandenburg*, the Defendants must have intended imminent lawless action. In other words, Defendants must have intended that James Perry would go out and murder Mildred Horn, Trevor Horn, and Janice Saunders *immediately*. That did not happen in this case since the parties have stipulated to the fact that James Perry committed these atrocious murders a year after receiving the books. . . . [N]othing in *Hit Man* and *Silencers* could be characterized as a command to immediately murder the three victims.⁸⁹

⁸⁴ Id. at 840.

⁸⁵ Id. at 838.

⁸⁶ See id. at 840–41 ("The First Amendment bars the imposition of civil liability on Paladin unless *Hit Man* falls within one of the well-defined and narrowly limited classes of speech that are unprotected by the First Amendment.").

⁸⁷ Id. at 841–49.

⁸⁸ Id. at 841.

⁸⁹ Id. at 847 (internal citations omitted).

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Unlike many other courts that have applied the incitement test to criminally instructional speech, the district court in *Paladin* at least applied it correctly. Under *Brandenburg*, a book published in 1983 and purchased and read in 1992 can in no way be said to have “incited” a murder in 1993. The court accordingly granted defendant’s motion for summary judgment.⁹⁰

As we have seen, however, the incitement analysis has proved susceptible to manipulation in cases involving criminally instructional speech. On appeal, Judge Michael Luttig of the Fourth Circuit, speaking for a unanimous panel, reversed and remanded the case for trial.⁹¹ Judge Luttig devoted most of his opinion to arguing that the *Paladin* books are “tantamount to legitimately proscribable nonexpressive conduct” and thus “may [themselves] be legitimately proscribed.”⁹² This argument suggests a rejection of the incitement analysis and an endorsement of the speech-act paradigm traditionally used to justify the criminalization of aiding and abetting. Yet when Judge Luttig addressed incitement directly, he found that *Hit Man* squarely qualified as such. Judge Luttig rejected the district court’s portrayal of *Hit Man* as protected advocacy. Instead, he wrote, “this book constitutes the archetypal example of speech which, because it methodically and comprehensively prepares and steels its audience to specific criminal conduct . . . finds no preserve in the First Amendment.”⁹³

How was Judge Luttig able to make this argument in light of the imminence requirement? Unlike the courts in the tax fraud cases, he did not insist that the speech in question actually qualified as imminent under *Brandenburg*.⁹⁴ Rather, he criticized *Brandenburg* and substituted another form of the incitement test.⁹⁵ In the pas-

⁹⁰ Id. at 849.

⁹¹ Judges Wilkins and Williams both joined Judge Luttig’s opinion. *Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997).

⁹² See id. at 243.

⁹³ Id. at 256.

⁹⁴ See, e.g., *United States v. Raymond*, 228 F.3d 804, 815–16 (7th Cir. 2000); *United States v. Fleschner*, 98 F.3d 155, 158–59 (4th Cir. 1996); *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985); *United States v. Freeman*, 761 F.2d 549, 551–52 (9th Cir. 1985); *United States v. Moss*, 604 F.2d 569, 571 (8th Cir. 1979).

⁹⁵ In this part of the opinion, Judge Luttig also digresses from doctrinal analysis to go through all nine chapters of *Hit Man*, quoting liberally from each, for five pages, 128 F.3d at 257–62, after already having opened the opinion with almost four pages of

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sage above, Judge Luttig deliberately invoked the Supreme Court's decision in *Noto v. United States*,⁹⁶ a pre-*Brandenburg* case that differentiated between "the mere abstract teaching of Communist theory" and "preparing a group for violent action and steeling it to such action."⁹⁷ That passage represents a potential conflation of criminally instructional speech (speech "preparing a group for violent action") and unprotected incitement (speech "steeling it to such action"). Judge Luttig read the *Noto* formulation as "approving" exactly that conflation and, consequently, as demanding that criminally instructional speech be unprotected.⁹⁸ Judge Luttig then argued that the later *Brandenburg* ruling did not modify the *Noto* Court's alleged denial of protection for criminally instructional speech:

[T]o understand the Court [in *Brandenburg*] as addressing itself to speech other than advocacy would be to ascribe to it an intent to revolutionize the criminal law, in a several paragraph *per curiam* opinion, by subjecting prosecutions to the demands of *Brandenburg*'s "imminence" and "likelihood" requirements whenever the predicate conduct takes, in whole or in part, the form of speech.⁹⁹

This criticism of the inappositeness of *Brandenburg* largely tracks the earlier discussion in Section II.B. But Judge Luttig responded to this problem much differently, by essentially bootstrapping *Noto* into an entire Supreme Court doctrine on criminally instructional speech. He found that *Hit Man* failed to constitute "mere advocacy," rooted this finding in Supreme Court precedent (*Noto*), and declared the speech unprotected.

direct quotation. *Id.* at 235–39. It is difficult to escape the sense that Judge Luttig believes this expostulation somehow makes the case for incitement.

⁹⁶ 367 U.S. 290 (1961).

⁹⁷ *Id.* at 297–98. Professor Rodney Smolla put forth the *Noto* argument in oral and written argument, and he emphasizes its importance in his book. See Rodney Smolla, *Deliberate Intent* 131 (1999) ("This was our ticket. We needed to emphasize that *Hit Man* was not abstract teaching but was about preparation and steeling."); see also Brief for Respondents at 3, *Paladin Enters. v. Rice*, 523 U.S. 1074 (1998) (No. 97-1325).

⁹⁸ *Paladin*, 128 F.3d at 263–64.

⁹⁹ *Id.* at 265.

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Practically speaking, Judge Luttig had strong incentive to follow such a course. In the absence of a clear rule about what test applies to such speech, he quite sensibly hedged on the *Brandenburg* question. Even if he could not in good conscience find that *Hit Man* constituted incitement under the *Brandenburg* standard, he at least found that it was *not* “mere advocacy” and made a case for why, if advocacy is the issue, *Noto* should control rather than *Brandenburg*. One still has the sense that Judge Luttig would have been more comfortable if incitement were left out altogether, but he protected his judgment from all sides.

Under the CIS test, neither the trial court nor the appeals court was quite right. Paladin and the district court were correct that the First Amendment fully protects *Hit Man*, but not under *Brandenburg*. The questions under Part II of the CIS test should have been (1) is there an underlying offense (and obviously there was), and (2) was this speech *intended* to assist in such an offense? From this standpoint, Paladin’s stipulations were a disaster. It stipulated both that its publications assisted in committing the underlying offense and that it intended for them to contribute to such offenses. If the CIS test were the clear standard, Paladin still would have claimed absolute protection but never would have made such stipulations. If Paladin had indeed intended to assist readers in murdering people, then the company should of course have been held liable. But it is highly unlikely that any commercial publishing house would make such an intent part of its business plan, and it is equally unlikely that the plaintiffs could have successfully imputed such an intent to Paladin, even under the looser standard of civil liability.¹⁰⁰

Of course, the case could not proceed in this way, because courts must apply existing precedent. The lower court recognized this, emphasizing that a “federal court sitting in diversity cannot create new causes of action” and thus cannot “create another category of

¹⁰⁰ It is important to note that Judge Luttig disagreed with this last prediction. He insisted that “[w]holly apart from Paladin’s stipulations, . . . a reasonable jury could find that Paladin possessed the intent required under Maryland law, as well as the intent required under any heightened First Amendment standard.” *Id.* at 253. But there is a difference between what a jury *could* find and what a jury is *likely* to find. Judge Luttig diminished both the entertainment value of the book and the multiple categorical disclaimers that warned of the illegality of the actions described and proclaimed the publisher’s intention that the book be used “For Informational Purposes Only!” *Paladin*, 940 F. Supp. at 838–39.

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unprotected speech, i.e., speech that aids and abets murder.”¹⁰¹ This suggests that the lower court, like the appeals court, was uncomfortable with the incitement analysis and yet felt bound by Supreme Court precedent to employ it. The establishment of a clear test for criminally instructional speech would tell courts what standard to use, thereby making elaborate rationalizations unnecessary. A clear rule would also help litigants. The establishment of the CIS test, and the concomitant disentanglement from *Brandenburg*, would result in more predictable and more doctrinally satisfying outcomes. *Brandenburg* would be preserved for its original purpose; defendants like Paladin would know at the outset how to defend themselves; and inquiries would reliably turn on the culpability of the defendant, rather than on a given court’s manipulation of an incitement standard. The *Hit Man* case illustrates both why a clear standard is needed and why the CIS test should be that standard.

B. CIS Type III: Instructional Speech with No Underlying Offense

Aiding and abetting represents only that part of criminally instructional speech most proximately tied to a criminal action and thus most easily punishable. The more difficult question is how to treat criminally instructional speech that is not linked to any known criminal action. Should such “pure speech” be regulated, or is it constitutionally protected? The Supreme Court has never recognized such instructional speech as a category and thus has never pronounced upon its constitutionality. This might suggest that such speech is protected. The sparse commentary that does exist, however, suggests that various Justices have at times assumed that it lacks protection. In *Near v. Minnesota*, for instance, the Court took for granted that the First Amendment did not extend to “the publication of the sailing dates of transports or the number and location of troops.”¹⁰² And in *Dennis v. United States*, Justice Douglas con-

¹⁰¹ *Paladin*, 940 F. Supp. at 842.

¹⁰² 283 U.S. 697, 716 (1931). The example is technically one of crime-facilitating speech that is *not* criminally instructional. (It is more like the publication of a witness’s name than directions on how to kill him or her.) It is still useful, however, as an indication of a general attitude toward all crime-facilitating speech.

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demned criminally instructional speech in no uncertain terms in his dissent:

If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality.¹⁰³

Similarly, in *Yates v. United States*,¹⁰⁴ the Court upheld convictions of the leaders of Communist meetings at which “a small group of members were not only taught that violent revolution was inevitable, but they were also taught techniques for achieving that end.”¹⁰⁵

Finally, in a much more recent case, discussed below, the Supreme Court declined review of a Ninth Circuit decision reversing a conviction under an Arizona law that prohibits advising gang members on gang policy and practices.¹⁰⁶ Justice Stevens appended an individual statement to the denial of certiorari, saying that the Court had “not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech.”¹⁰⁷ He also stated that “[l]ong range planning of criminal enterprises—which may include oral advice, training exercises, and perhaps the preparation of written materials—involves speech that should not be glibly characterized as mere ‘advocacy’ and certainly may create significant public danger.”¹⁰⁸

In addition, while the Court has withheld judgment on the constitutionality of criminally instructional speech, Congress and state legislatures have passed laws criminalizing it. Cases involving these

¹⁰³ 341 U.S. 494, 581 (1951) (Douglas, J., dissenting).

¹⁰⁴ 354 U.S. 298 (1957).

¹⁰⁵ *Scales v. United States*, 367 U.S. 203, 233 (1961) (describing the factual circumstances of *Yates*).

¹⁰⁶ *McCoy v. Stewart*, 537 U.S. 993 (2002).

¹⁰⁷ *Id.* at 995.

¹⁰⁸ *Id.* at 995.

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statutes provide an opportunity to apply the CIS test and to witness the dangers of other approaches to criminally instructional speech.

1. Facilitating "Civil Disorders" Under Federal Law

Under 18 U.S.C. § 231(a)(1), it is forbidden to teach or demonstrate "to any other person . . . the use, application, or making of any firearm or explosive or incendiary device . . . knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder."¹⁰⁹ This statute thus outlaws Type III criminal instruction, speech with no connection to a committed crime.

The statute has at least two facial problems. First, it is vague about the "civil disorder" at issue. It is unclear whether the defendant must foresee (or have reason to foresee) his contribution to a particular civil disorder, a particular type of civil disorder, or merely any kind of civil disorder. Second, the required mens rea—"knowing or having reason to know or intending"—is fatally flawed. Whereas 18 U.S.C. § 2 requires a mens rea of intent to find a speaker guilty of contributing to a committed crime,¹¹⁰ 18 U.S.C. § 231(a)(1) would punish knowing, reckless, or even negligent teachings about firearms, even when such teachings had resulted in no criminal conduct. Putting the two problems together reveals a statute that would criminalize instruction given with recklessness or negligence toward its potential furtherance of some unspecified, hypothetical event. As written, 18 U.S.C. § 231(a)(1) fails the CIS test and constitutes an impermissibly overbroad regulation of speech.

The lower courts that have addressed this statute have evinced some discomfort with its mens rea requirement. In *National Mobilization Committee to End the War in Viet Nam v. Foran*, the members of the Chicago Seven challenged 18 U.S.C. § 231(a)(1) on First Amendment grounds as unconstitutionally overbroad, pointing out that the statute's mens rea requirement would criminalize legitimate activities, such as the teaching of self-defense and martial arts techniques.¹¹¹ The Seventh Circuit responded by construing

¹⁰⁹ 18 U.S.C. § 231(a)(1) (2000).

¹¹⁰ See *supra* note 34 and accompanying text.

¹¹¹ 411 F.2d 934, 937 (7th Cir. 1969).

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the statute's language—"knowing, or having reason to know or intending"—as requiring a mens rea of intent.¹¹² This spectacular reinterpretation of "or" as "and" saved the statute from the facial challenge.

In *United States v. Featherston*, the Fifth Circuit rejected a similar challenge to convictions under 18 U.S.C. § 231(a)(1).¹¹³ The defendants were members of the Black Afro Militant Movement ("BAMM") who taught others how to assemble explosive devices in preparation for "the coming revolution."¹¹⁴ There was no evidence of plans by the group to instigate this revolution; the defendants were awaiting such an event, as one of them put it, "whenever it came."¹¹⁵ In upholding the convictions, the Fifth Circuit referenced (and apparently adopted) the Seventh Circuit's construction of the statute and concluded that it was "sufficiently definite to apprise men of common intelligence of its meaning and application."¹¹⁶ The court characterized the defendants as "standing ready to strike transportation and communication facilities and law enforcement operations at a moments [sic] notice" and asserted that "[t]he words 'clear and present danger' do not require that the government await the fruition of planned illegal conduct of such nature as is here involved."¹¹⁷

These cases suggest two conclusions. First, in theory, at least some courts find it important to have a mens rea of intent for criminally instructional speech. Second, in practice, the same courts are reluctant to let a poorly drafted statute stand in the way of a conviction. In both cases, the courts preserved the statute and allowed prosecutions to continue by imposing a mens rea much higher than required on the statute's face. As a result, 18 U.S.C. § 231(a)(1) remains on the books with an apparent mens rea requirement of "knowing or having reason to know or intending." The statute in this form poses two dangers: first, that future convic-

¹¹² Id. ("But [petitioner's argument] ignores the 'knowing, or having reason to know or intending' language of the statute. The requirement of intent of course 'narrows the scope of the enactment by exempting innocent or inadvertent conduct from its proscription.'" (citations omitted)).

¹¹³ 461 F.2d 1119, 1121 (5th Cir. 1972).

¹¹⁴ Id.

¹¹⁵ Id. at 1122–23 n.4.

¹¹⁶ Id. at 1121–22.

¹¹⁷ Id. at 1122–23.

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tions will follow its plain language; and second, that the mere existence of the statute, with its overbroad mens rea, will have a chilling effect on permissible speech.

Prosecutions under 18 U.S.C. § 231(a)(1) suggest a place for Part III of the CIS test. Under the CIS test, courts should strike down statutes such as 18 U.S.C. § 231(a)(1) as facially overbroad, rather than patching their defects and leaving them on the books. Also, were Congress to pass a version of the statute that required a mens rea of intent, the CIS test would demand that courts consider whether defendants had intent toward a specific criminal goal and whether that goal was likely to occur. Realistically, no test will change lawmakers' and judges' attitudes toward certain types of behavior, but the CIS test at the very least would add structure and rigor to their inquiries.

2. *A Recent Case Under State Law*

A more recent case, *McCoy v. Stewart*,¹¹⁸ suggests that such inquiries are no more structured now than they were in the early 1970s. If anything, there is more confusion over the appropriate standard, and intent and imminence remain entangled.

Jerry Dean McCoy was indicted in Arizona Superior Court on one count of participating in a criminal street gang, a class two felony.¹¹⁹ The Arizona statute under which he was indicted provided that participation in a criminal street gang includes, among other things, “[f]urnishing advice or direction in the conduct, financing or management of a criminal syndicate’s affairs with the intent to promote or further the criminal objectives of a criminal syndicate.”¹²⁰ McCoy, a former member of a California gang, allegedly had given advice on at least two occasions to members of a teenage Tucson gang called the “Bratz” or “Traviesos.”¹²¹ McCoy was dating the mother of one gang member and thereby came into contact with the teens at a barbeque and another gathering.¹²² McCoy advised gang members to formalize their gang by electing officers, to establish a treasury for bail money, to increase graffiti “tagging” in

¹¹⁸ 282 F.3d 626 (9th Cir. 2002).

¹¹⁹ *Id.* at 628.

¹²⁰ Ariz. Rev. Stat. Ann. § 13-2308(A)(3) (2001).

¹²¹ 282 F.3d at 628.

¹²² *State v. McCoy*, 928 P.2d 647, 648 (Ariz. Ct. App. 1996).

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their territory, to recruit new members, to beat and expel disloyal current members, and to develop friendly relationships with some other gangs.¹²³ An Arizona Superior Court convicted McCoy and sentenced him to fifteen years; the Arizona Court of Appeals affirmed; and the Arizona Superior Court denied a petition for review.¹²⁴

In convicting McCoy, the Arizona courts focused upon the intent required by Section 13-2308 of the Arizona code. McCoy brought a First Amendment challenge, claiming that the statute was unconstitutionally overbroad and criminalized protected speech. The Arizona Court of Appeals disagreed, noting that the statute only proscribed spoken advice “when it is given ‘with the intent to promote or further the criminal objectives of a criminal syndicate.’”¹²⁵ “Words spoken with the intent to cause the commission of a criminal act,” the court said, “are not protected by the First Amendment.”¹²⁶ Because the prosecution had provided sufficient evidence for a jury to find that McCoy spoke with such an intent, his words were not protected by the First Amendment.¹²⁷

McCoy then filed a petition for habeas corpus in the U.S. District Court for the District of Arizona. The district court granted the petition, which was later affirmed by the Ninth Circuit.¹²⁸ In granting the defendant’s habeas corpus petition, the district court “measure[d] this articulated rationale [of the Arizona courts] against Supreme Court precedent to determine whether McCoy’s conviction was reasonable.”¹²⁹ The court rejected the intent-based paradigm of the Arizona courts, agreeing instead with McCoy that *Brandenburg* was the proper test for his behavior.¹³⁰ The district court endorsed *Brandenburg* explicitly, but, on review, the appellate court purported to hinge its consideration on intent.¹³¹ In fact,

¹²³ *Id.*

¹²⁴ *McCoy*, 282 F.3d at 628–29.

¹²⁵ *State v. McCoy*, 928 P.2d at 649.

¹²⁶ *Id.*

¹²⁷ See *id.* at 649–50.

¹²⁸ 282 F.3d at 633.

¹²⁹ *Id.* at 630.

¹³⁰ See *id.* at 630–31.

¹³¹ *Id.* at 631 (“Far from demonstrating a specific intent to further illegal goals, McCoy’s speech appears to fit more closely the profile of mere abstract advocacy of lawlessness.”).

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however, the circuit court's findings were focused not at all upon whether McCoy intended to "further the criminal objectives of a criminal syndicate,"¹³² but rather upon whether "anyone would act on [his speech] imminently."¹³³ The court found that it was unlikely that anyone would have done so and that McCoy merely advised the gang members to follow certain procedures "at some time in the future," "if and when" they should decide to expand their operations in the ways McCoy advised.¹³⁴ The court concluded that, "[b]ecause McCoy's speech to the Bratz . . . at most advocated lawlessness at some indefinite future time, and did not incite lawlessness, it was protected by the First Amendment."¹³⁵ Hence, the Ninth Circuit's inquiry ultimately turned on *Brandenburg's* imminence prong. The court felt so strongly about *Brandenburg's* relevance that it overturned the state courts' rulings as "an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," as required for the granting of habeas petitions from state convictions under the Anti-terrorism and Effective Death Penalty Act of 1996.¹³⁶

At least one Supreme Court Justice disagreed with this analysis by the lower federal courts. When the Court denied review of the Ninth Circuit decision in *McCoy*, Justice Stevens appended a statement to the denial of certiorari.¹³⁷ Justice Stevens observed that the "harsh sentence for a relatively minor offense" was reason enough for the Court to refuse to consider reinstating the conviction.¹³⁸ As to the circuit court's *Brandenburg* analysis, however, Justice Stevens said that "[w]hile the requirement that the consequence be 'imminent' is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function."¹³⁹ He suggested that "[l]ong range planning of criminal enterprises—which may include oral advice, training exercises, and perhaps the preparation of written

¹³² Ariz. Rev. Stat. Ann. § 13-2308(A)(3) (2001).

¹³³ 282 F.3d at 632.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*; see 28 U.S.C. § 2254(d) (2000).

¹³⁷ *Stewart v. McCoy*, 537 U.S. 993 (2002) (Stevens, J., opinion regarding denial of certiorari).

¹³⁸ *Id.* at 993.

¹³⁹ *Id.* at 995.

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materials—involves speech that should not be glibly characterized as mere ‘advocacy’ and certainly many create significant public danger.”¹⁴⁰ Justice Stevens observed that the Court had “not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech” and concluded that “denial of certiorari in this case should not be taken as an endorsement of the reasoning of the Court of Appeals.”¹⁴¹ Justice Stevens appeared as certain about the Ninth Circuit’s error as the Ninth Circuit had been about the error of the Arizona courts.

This case succinctly demonstrates the level of confusion currently plaguing courts’ understanding of criminally instructional speech. Not only did the Arizona and federal courts disagree about McCoy’s mens rea and the danger posed by his speech, but the Arizona courts, the lower federal courts, and the Supreme Court all disagreed about the appropriate standard to apply. The creation of the formal category of criminally instructional speech and the implementation of a clear standard could help to eliminate this confusion. The CIS test would be particularly effective at focusing the inquiry on the most crucial elements: whether McCoy intended to facilitate criminal activity, and how likely his speech was to do so (not, as the Ninth Circuit said, how imminent such activity was). In this case, there was serious disagreement about exactly these matters. This disagreement may indicate an underlying difference of opinion between state and federal courts too severe for any test to remedy. But if the CIS test were in place at the time of McCoy’s conviction, then the Arizona courts would at least have had to conform to an agreed-upon constitutional standard that required more structured inquiries and more demanding findings.

3. A Recent Case Under Federal Law

In 1999, Congress passed an amendment to the Antiterrorism and Effective Death Penalty Act (“AEDPA”) that criminalizes broad categories of criminally instructional speech.¹⁴² Senator Dianne Feinstein first proposed the amendment in the aftermath of

¹⁴⁰ Id.

¹⁴¹ Id.

¹⁴² 18 U.S.C. § 842(p)(2) (2000).

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the 1995 Oklahoma City bombing,¹⁴³ when investigators discovered that Timothy McVeigh had relied on bombmaking instructions from books and perhaps also from the internet.¹⁴⁴ Rather than passing the amendment at that time, Congress required the Attorney General to prepare a report on the necessity, feasibility, and constitutionality of restricting information on building bombs and other explosives.¹⁴⁵ The resulting Department of Justice study recommended a few changes to the language of the Feinstein Amendment.¹⁴⁶ When the shootings at Columbine High School again thrust the issue into the spotlight in 1999,¹⁴⁷ Congress was ready with a statutory response. The amendment, enacted within four months of the Columbine shootings, provides in pertinent part:

(2) Prohibition. It shall be unlawful for any person—

(A) to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, with the intent that the teaching, demonstration, or information be used for, or in furtherance of, an activity that constitutes a Federal crime of violence; or

(B) to teach or demonstrate to any person the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute to any person, by any means, information

¹⁴³ See 143 Cong. Rec. 11,426–29 (1997).

¹⁴⁴ The books discovered in McVeigh's possession were Ragnar Benson, *Homemade C-4 A Recipe for Survival: A Recipe for Survival* (1990) and Ragnar Benson, *Ragnar's Big Book of Homemade Weapons: Building and Keeping Your Arsenal Secure* (1992).

¹⁴⁵ See 143 Cong. Rec. 11,427 (1997).

¹⁴⁶ See U.S. Dep't of Justice, 1997 Report on the Availability of Bombmaking Information, at <http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html> (last accessed Aug. 26, 2005).

¹⁴⁷ The Columbine High School shooters, Eric Harris and Dylan Klebold, used explosives as well as guns in their attack. Police found a total of seventy-six explosive devices at the school, as well as additional devices in the shooters' cars and at their homes. See Jefferson County, Co. Sheriff, Bomb Summary, available at http://www.cnn.com/SPECIALS/2000/columbine.cd/Pages/BOMBS_TEXT (last accessed Aug. 26, 2005). Harris's website discussed his experiments with building pipe bombs and provided links to anarchy websites. See Mike Anton & Lisa Ryckman, In Hindsight, Signs to Killings Obvious, Rocky Mountain News, May 2, 1999, at <http://denver.rockymountainnews.com/shooting/0502why10.shtml> (last accessed Sept. 24, 2005).

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pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, knowing that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence.¹⁴⁸

Part (B) of this provision would be unacceptable under the CIS test because it only requires the mens rea of knowledge. The first part of the statute has no likelihood requirement, but its mens rea requirement conforms to the demands of the CIS test. The first prosecution under the statute, *United States v. Austin*,¹⁴⁹ was under part (A) and illustrates the complexity of prosecuting pure speech, with or without the CIS test. The defendant, Sherman Austin, was eighteen years old and living with his mother at the time of his arrest.

Austin was charged under 18 U.S.C. § 842(p)(2)(A) for material posted on his website, www.raisethefist.com. The site expressed Austin's anarchist views and included a "Reclaim Guide" with instructions for disrupting International Monetary Fund and World Bank events.¹⁵⁰ The guide, which Austin claimed not to have written but to have mirrored from another website,¹⁵¹ contained sections on "Police Tactics and How To Defeat Them" and "Defensive Weapons" that included bombmaking instructions.

Under proper application of the CIS test, it is doubtful, though not impossible, that Austin could be convicted for his activities. It is not clear that anyone was likely to use the instructions or that Austin actually intended them to be used. The defense submitted the assessment of a clinical psychologist who found that Austin "d[id] not appear to have seriously considered the ramifications" of posting the Reclaim Guide "and would have been horrified had someone been injured."¹⁵² Too little information is available to

¹⁴⁸ 18 U.S.C. § 842(p)(2) (2000).

¹⁴⁹ *United States v. Austin*, No. CR-02-884-SVW (C.D. Cal. Aug. 4, 2003).

¹⁵⁰ The original [raisethefist.com](http://www.raisethefist.com) web site has been shut down. The Reclaim Guide is available for viewing at <http://forbiddenspeech.org/ReclaimGuide/reclaim.shtml> (last accessed Aug. 26, 2005).

¹⁵¹ See David Rosenzweig, *Man Gets 1 Year for How-To on Explosives*, L.A. Times, Aug. 5, 2003, at B3.

¹⁵² *Id.*

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make a complete assessment of either Austin's intent or the likely use of his website by others.

The saga of Austin's prosecution shows how unpredictable and subjective such inquires as to intent or facilitation can be. The federal prosecutor in the case offered Austin a plea of four months in jail and four months in a halfway house. Austin accepted the offer, but presiding Judge Stephen Wilson rejected the agreement, saying that the prosecution was not "taking the case seriously enough" and ordered the federal prosecutor to clear the proposed plea bargain with FBI and Justice Department officials in Washington, D.C.¹⁵³ When the prosecutor returned with the same proposed agreement at a second hearing, Judge Wilson again rejected it and imposed a sentence of one year in federal prison.¹⁵⁴ Judge Wilson's difference of opinion with the Justice Department prosecutor (the very agency which had contributed to the drafting of the Feinstein Amendment) illustrates the degree of subjectivity involved in assessing the danger imposed by the activities of individuals like Austin. Adoption of the CIS test may alleviate, but cannot entirely remove the risk of, such subjectivity.

V. OBJECTIONS

This final Part attempts to address the most obvious objections to the CIS test. These criticisms include the arguments that: (1) it models the wrong doctrinal paradigm, (2) its requirements are too vague, (3) it is overprotective of speech, and (4) it is underprotective of speech.

A. Low-Value Speech as an Alternative Paradigm

In confronting criminally instructional speech, there is a strong tendency to deny First Amendment protection by assimilating it to low-value speech. The Court has used the low-value rationale to deny constitutional protection to fighting words¹⁵⁵ and obscenity¹⁵⁶

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

¹⁵⁶ See *Miller v. California*, 413 U.S. 15, 23–24 (1973) (denying constitutional protection to defendant who mailed unsolicited materials depicting sexually explicit acts to California residents).

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and to provide lesser protection for private libel,¹⁵⁷ certain disclosures of private information,¹⁵⁸ and commercial speech.¹⁵⁹ The low-value doctrine, however, generally is problematic and would be particularly so in its application to criminally instructional speech.

The low-value doctrine has its roots in dicta in *Chaplinsky v. New Hampshire*, where the Court found that “certain well-defined and narrowly limited classes of speech” made no contribution to the goals of the First Amendment and thus did not merit protection.¹⁶⁰ These classes of speech included “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words,” all of which were found to be “no essential part of any exposition of ideas” and “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”¹⁶¹

This presentation itself implies some of the doctrine’s difficulties. At first, the Court suggests that such speech is unprotected because it has no meaningful content and makes no contribution to public discourse—the speech might as well be nonsense. Because such expression does not contribute to the goals of the First Amendment, it need not be afforded any protection. Yet, the Court then suggests that the real problem is not that the words lack positive value, but that they pose a negative risk to “order and morality.”¹⁶² It thus becomes unclear whether the doctrine is founded on the premise that the speech has “slight social value” or that it has *negative* social value. The analysis of “fighting words” in *Chaplinsky* confirms the ambiguity, as the Court first asserts the low value of fighting words but later seems to test them based on their likelihood of “provok[ing] the average person to retaliation.”¹⁶³

Thus, from the outset, the doctrine has exuded a dual focus on positive and negative value. This leaves open the possibility that in

¹⁵⁷ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–46 (1974).

¹⁵⁸ See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (providing constitutional protection to a reporter who published the name of a rape victim obtained from public records).

¹⁵⁹ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

¹⁶⁰ 315 U.S. 568, 571–72 (1942).

¹⁶¹ *Id.* at 572.

¹⁶² *Id.*

¹⁶³ *Id.* at 574.

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areas, such as fighting words, libel, and obscenity, the “low-value” label is a misnomer, disguising the Court’s real interest in regulating speech based on harm.¹⁶⁴ Another problem with the low-value test is the subjectivity of any assessment of “social value.” This subjectivity is perhaps most pronounced in the obscenity cases, where reasonable people disagree strongly about both the value of the speech and the harm it poses. For some observers, the fact that “one man’s vulgarity is another’s lyric”¹⁶⁵ makes “low value” a far too tenuous foundation on which to rest First Amendment freedoms.¹⁶⁶

Even if the low-value doctrine’s general problems do not overwhelm it, its application to criminally instructional speech has particular difficulties. The doctrine is founded on an assumption that certain expressions have virtually no content worth protecting. Yet, expressions of the same kind that *do* have valuable elements are protected. Thus, pornographic material that “taken as a whole, lacks serious literary, artistic, political, or scientific value” is unprotected, while that which has a modicum of such value is protected.¹⁶⁷ Similarly, defamation of private individuals is less pro-

¹⁶⁴ See Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. Rev. 297, 348 (1995) (arguing that to the extent that so-called “low value” categories are regulated, “it should be because they cause harm and not because they are presumed to be low in communicative value”).

¹⁶⁵ *Cohen v. California*, 403 U.S. 15, 25 (1971).

¹⁶⁶ See Post, *supra* note 13, at 681 (“[A]ll speech is potentially relevant to democratic self-governance . . .”).

¹⁶⁷ *Miller v. California*, 413 U.S. 15, 24 (1973). This is the case for obscenity but not, as it turns out, for child pornography. The Court suggested in *New York v. Ferber* that child pornography might be low-value speech, 458 U.S. 747, 762 (1982), but that interpretation later was rejected categorically by the Court. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 251 (2002) (“*Ferber* did not hold that child pornography is by definition without value. On the contrary, the Court recognized some works in this category might have significant value.” (internal citations omitted)). Rather, the *Ashcroft* Court said, “*Ferber* upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were ‘intrinsically related’ to the sexual abuse of children.” *Id.* at 249. This suggests yet another way in which the Court might ban speech: explicitly for its harmful collateral consequences, regardless of its value. This rationale is rarely used and to consider it here would drastically widen the scope of this Note. But it is an interesting consideration for further research whether the Court might take a collateral-damage approach to highly dangerous forms of criminally instructional speech, such as instructions for biological or chemical weapons. Such an approach is suggested in at least one relevant district court case, *United States v. The Progressive, Inc.*, where a court enjoined publication of nuclear weapons-making instructions (despite the fact that the information had been obtained

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tected than that of public figures because speech about public figures is thought to have more value to our society's "free debate" of ideas.¹⁶⁸ Such distinctions present an immediate problem for criminally instructional speech. Consider an environmental activist who expresses her opposition to the timber industry while also explaining to a few peers how to "spike" trees in order to obstruct logging.¹⁶⁹ This speech is simultaneously criminal instruction and political expression, the type of speech most universally recognized as within the ambit of First Amendment protection.¹⁷⁰ Under a low-value analysis, the speech's political content might argue for protection. In contrast, if a listener followed her instructions, with the result that the speaker was prosecuted for aiding and abetting, the political nature of her speech would become irrelevant. Assuming the presence of the requisite intent, she would be convicted for the criminal content of her speech, regardless of its political content.

Aiding and abetting is the most easily restricted and least constitutionally problematic form of criminally instructional speech. And yet it is clear that, in criminalizing aiding and abetting, *the value of the speech is not what we are tracking*. The fact that aiding-and-abetting speech also might double as valuable political expression is immaterial to the definition of the offense or its prosecution. If this is true for the most easily identifiable type of criminally instructional speech, the low-value analysis has little place in the conceptualization of the larger category.

B. The Vagueness of an Intent Test

Some critics might point out that application of an intent-based test for criminally instructional speech has its own inherent problems. While it is easy to say that criminal intent should govern criminal liability, in reality the intent inquiry is practically impossible. The most obvious response is that many other criminal of-

from the public domain) on the basis of national security interests. 467 F. Supp. 990 (W.D. Wis. 1979).

¹⁶⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

¹⁶⁹ See 18 U.S.C. § 1864 (2000) (discussing "tree spiking" law and criminalizing use of an "injurious device" on federal land "with the intent to obstruct or harass the harvesting of timber").

¹⁷⁰ See, e.g., Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1960); BeVier, *supra* note 11, at 299; Bork, *supra* note 11, at 20.

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fenses also require intent inquiries. As Justice Brennan noted, it “has been some time now since the law viewed itself as impotent to explore the actual state of a man’s mind.”¹⁷¹ That inquiry is one with which the criminal law is quite familiar and for which it is equipped.

Still, critics might predict that either the elements of the test will be so difficult to prove that it will be worthless, or it will have a slippery-slope effect of encouraging ill-advised imputations of constructive intent. Both of these are certainly possibilities, but they are also possibilities with a host of other criminal offenses. That circumstance has not prevented our society from outlawing behavior that we believe is wrong. The difficulty of an intent inquiry in any context simply requires us to make inquiries in the most disciplined and rigorous way possible, with utmost concern for the reasonable doubt standard.

C. Overprotection

Some might argue that the CIS test restricts too little speech. After all, a speaker who lacks criminal intent can get away with publishing the exact same information for which a criminally-minded person is prosecuted.¹⁷² The test thus has no effect on the availability of dangerous information.

The problem with this objection is that a more restrictive regime would inevitably criminalize speech at the heart of the First Amendment. First, as already noted, it is practically impossible to devise a test with a lower intent requirement that would not interfere with legitimate reporting practices. Someone who publishes potentially harmful information in order to exercise his expressive

¹⁷¹ *Smith v. California*, 361 U.S. 147, 154 (1959).

¹⁷² See, e.g., *Hit Man On-Line: A Technical Manual for Independent Contractors*, at <http://ftp.die.net/mirror/hitman/> (last accessed Oct. 24, 2005) (claiming a First Amendment right to post the book online). For a site pushing the boundary between protected exercise of free expression and unprotected criminal instruction, see “Parazite” website at <http://members.fortunecity.com/parazite/files.html> (last accessed Oct. 25, 2005) (protesting censorship by mirroring material including *Hit Man* and Sherman Austin’s Reclaim page while also stating, “I do share (more or less) Mr. Austin’s political views, and I do condone, advocate and incite the use of violence against law enforcement authorities and political figures including the president of USA. This file and all information on this site (a.k.a. Parazite) is violating 18 U.S.C. § 842(p)(2)(A) . . . So SUE me FBI CLOWNZ! readers please notify the police”).

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freedom might seem frivolous, but it is difficult to distinguish this person from a reporter who reports similar information in the course of a news story. Similarly, someone who posts a poisoning method for no particular reason is hard to differentiate from Agatha Christie. An approach that attempted to screen all potentially harmful information would restrict a great deal of speech that we generally recognized as protected and, in some cases, fundamental.

Second, the speech in question itself has a role in contributing to the goals of the First Amendment. A good deal of what many people would characterize as “low-value,” dangerous speech actually has political and cultural aspects that should not be discounted. In many publications, criminally instructional speech is part of political discourse. When that discourse spills over into an actual intent to break the law, and the intent is likely to be actualized, then the speech loses its protection. But it is possible that Sherman Austin’s decision to link to bombmaking recipes reflected his political stance toward the World Trade Organization more than an actual desire to attack police or anyone else. Less controversially, an interest in “backyard ballistics” can simply express a libertarian impulse to do what one wants with one’s property and resources.

Criminally instructional speech also has its cultural aspects. Most obviously, it can be educational. Teachers and producers for children’s television have long understood that the best way to get children interested in science is to blow something up. There are parents who will not let their teenagers play video games but will give them free rein with the family copy of *Backyard Ballistics*.¹⁷³ Less obviously, criminally instructional speech supports subcultures not unlike those dedicated to extreme sports or other high-risk activities. The parallel to gun culture, while it may not salvage this type of speech in some people’s eyes, is a very apt one: The culture surrounding guns and gun publications involves a great deal more than shooting things, let alone shooting people. It involves politics, sex, and power, as well as more mundane interests in outdoor recreation and mechanical design. We might hold some of these aspects of gun culture in low esteem, but we are probably correct in regarding gun magazines more as vehicles for a general

¹⁷³ See William Gurstelle, *Backyard Ballistics* (2001).

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worldview than as inherently dangerous killing manuals that do not merit First Amendment protection. A Google search of bombmaking websites will uncover a similarly textured subculture. Again, this does not make a gun or bomb fetish the cultural equivalent of a penchant for Keats. The point is simply that people can be interested in criminal instruction without necessarily being interested in committing crimes.

D. Underprotection

If the above is true, then why criminalize any speech at all? There are a few responses. First, on the most practical level, we are already doing it. Legislatures pass laws criminalizing pure speech, and courts, even when they think the incitement doctrine stands in their way, manipulate it to allow convictions. A clear standard is preferable to the de facto criminalization that is currently the norm.

Second, to put it bluntly, people who communicate dangerous messages with criminal intent deserve to be punished. The freedom of speech should be one of our most robust rights, but it should not extend to words that seek a stake in a criminal venture, whether they succeed in finding such a venture or not. Scholars otherwise concerned to protect free expression have taken a similar stance. Professor Kent Greenawalt, considering intentionally criminal instruction, concludes that “the justifications for free speech . . . do not reach communications that are simply means to get a crime successfully committed.”¹⁷⁴ Professor Thomas Emerson has proposed a system of speech regulation under which “conduct that amounts to ‘advice’ or ‘persuasion’ would be protected; conduct that moves into the area of ‘instructions’ or ‘preparations’ would not.”¹⁷⁵ And Professor Laurence Tribe has said that “the law need not treat differently the crime of one man who sells a bomb to terrorists and that of another who publishes an instructional manual for terrorists on how to build their own bombs out of old Volkswagen parts.”¹⁷⁶

¹⁷⁴ Kent Greenawalt, *Speech, Crime, and the Uses of Language* 85 (1989).

¹⁷⁵ Thomas I. Emerson, *The System of Freedom of Expression* 75 (1970).

¹⁷⁶ Laurence H. Tribe, *American Constitutional Law* 837 (2d ed. 1988).

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The best objection is not that the CIS test is too restrictive on its face but that it risks a slippery slope effect. Even a well-crafted standard can cause harm when applied by judges uninterested in the rights of tax evaders and World Trade Organization protestors. Sherman Austin's prosecution vividly illustrates this danger. In light of the unpredictability of courts and the possible chilling effects of any regulation, some speech protectionists would argue that all criminally instructional speech should be protected for prophylactic reasons.

This is a compelling objection. At a normative level, however, predictions about what might occur should not deter us from seeking to understand what the proper standard should be. Moreover, and more practically, statutes like 18 U.S.C. § 842(p), 18 U.S.C. § 231(a)(1), and Ariz. Rev. Stat. § 13-2308 exist at the federal and state level. Even more intractably, the crime of aiding and abetting will continue to involve prosecutions for some forms of criminally instructional speech. Under current conditions, defendants have no idea how best to defend themselves. Refusing to implement a clear standard for such speech does not mean that it will not be prosecuted, just that it will not be prosecuted predictably or fairly.

CONCLUSION

This Note has argued for the recognition of the category of criminally instructional speech and the institution of the CIS test to evaluate such speech under the First Amendment. It has examined the existing case law on criminally instructional speech and concluded that the current approach is crippled by general confusion over the proper standard and a dangerous reliance on the incitement doctrine. Adoption of the CIS test, with its intent and likelihood requirements, would bring much-needed structure and clarity to an underdeveloped but potentially potent area of law.