
NOTES

CRIMINAL COOKBOOKS: PROPOSING A NEW CATEGORICAL EXCLUSION FOR THE FIRST AMENDMENT

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I. INTRODUCTION

This Note will propose a new categorical exclusion from the First Amendment for speech that specifically details how to commit a crime and, “as a whole, lacks serious literary, artistic, political, or scientific value.”¹ This exclusion—the crime plans exclusion—may be tailored in various ways to reflect an accommodation of free speech principles and government interests. Ultimately, this Note will advocate a two-plank definition of crime plans speech requiring (1) that the speech be sufficiently specific so that a reasonable person who has never committed the described crime could follow the instructions and expect to carry out the crime or conceal evidence, and (2) that the speech, “as a whole, lacks serious literary, artistic, political, or scientific value,” which will be referred to collectively as “redemption value.”

While this Note will advocate a new categorical exclusion, it will also suggest that crime plans speech can be denied First Amendment protection under traditional strict scrutiny analysis. Moreover, when crime-facilitating speech does not fall into the crime plans exclusion, it still may be denied First Amendment protection under strict scrutiny analysis if the state’s compelling interest in prohibiting that speech outweighs the individual’s free speech interest. Though strict scrutiny analysis can often yield the same result as a categorical exclusion, categorically excluded speech does not have presumptive constitutional protection and is subject only to the minimal rational basis test.² Thus, the argument structure of the categorical

1. The latter criterion mirrors the test for obscenity as articulated in *Miller v. California*, 413 U.S. 15, 23–24 (1973).

2. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–74 (1942); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 53 (3d ed. 2007).

exclusion conveys a message that specific crime-facilitating speech that has virtually no noncriminal redemptive value is undeserving of First Amendment protection.

In addition to a categorical exclusion, this Note will propose that specific crime-facilitating speech that poses dangers of catastrophic magnitude should be subject to prior restraints. Such restraints are constitutionally permissible so long as they implement procedural safeguards to combat standardless discretion.³

Crime-facilitating speech is any speech that abets crime or provides information that may be useful in a criminal endeavor. Such speech can take various forms, ranging from one-on-one conversations to electronic publications disseminated throughout the world. Crime-facilitating speech makes some crimes achievable that would not otherwise be possible, such as divulging social security numbers to facilitate identity theft.⁴ This speech also makes some crimes easier to commit or harder to detect and thus harder to deter and punish.⁵

This Note will not propose a wholesale exclusion of crime-facilitating speech. Rather, it will propose a specificity requirement that will significantly narrow the universe of excludable crime-facilitating speech, and it will present three possible secondary definitional planks to further attenuate the scope of the exclusion. These proposed definitional planks will reflect the premium placed on First Amendment principles, acknowledge the potential noncriminal uses of crime-facilitating speech, and impress the government's substantial interest in prohibiting crime abetment.

Part II of this Note will define crime plans speech, detail the dangerous and valuable uses of this speech, and set out the difficulties of suppressing the dangerous uses while protecting the valuable uses. Part III

3. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 721–22 (1931). Note, however, that the Court in *Near* ruled against the contested prior restraint and even stated that prior restraints are limited to “exceptional cases.” *Id.* at 716. *See also, e.g.*, *United States v. Progressive, Inc.*, 467 F. Supp. 990, 993–96, 1000 (W.D. Wis. 1979) (enjoining a monthly magazine from publishing technical material on hydrogen bomb design because the speech posed a threat of direct, immediate, and irreparable injury to the nation, which placed the speech in the “extremely narrow recognized area, involving national security, in which a prior restraint on publication is appropriate”).

4. Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1103, 1107–09 (2005). Volokh defines crime-facilitating speech as “(1) any communication that, (2) intentionally or not, (3) conveys information that, (4) makes it easier or safer for some listeners or readers (a) to commit crimes, torts, acts of war (or other acts by foreign nations that would be crimes if done by individuals), or suicide, or (b) to get away with committing such acts.” *Id.* at 1103.

5. *Id.* at 1107–09.

will compare two argument structures for examining crime plans speech: categorization and strict scrutiny. It will show that crime plans speech may be denied First Amendment protection under strict scrutiny—the analytical structure for handling abridgments of fundamental rights—or a new categorical exclusion. Part IV will explain why currently recognized categorical exclusions do not adequately cover crime plans speech, and why a new exclusion is needed. Part V will propose four possible definitions for the new exclusion and will conclude that the criteria akin to that of the obscenity exclusion are the best fit. Part VI will address another potential objection to a new categorical exclusion. Part VII concludes.

II. CRIME PLANS SPEECH AND FIRST AMENDMENT PREMISES

At a definitional level, a categorical exclusion must reflect the government's substantial interest in prohibiting a certain type of speech as well as the values underlying the First Amendment. Thus, the criteria for defining an exclusion represent a compromise between the state's interest in suppressing certain speech and the speaker's fundamental right to free speech.

A. DEFINING CRIME PLANS SPEECH: AN OVERVIEW

Crime plans speech is speech that (1) explains how to commit a crime with sufficient detail so that a person following the instructions would expect to execute or conceal evidence of the crime, and (2) taken as a whole, lacks serious literary, artistic, political, or scientific value—referred to as “redemption value.” Crime plans speech is a subset of what Eugene Volokh classifies as “crime-facilitating speech,” which is any speech that provides information helpful to the commission of a crime.⁶ Crime-facilitating speech encompasses a wide range of speech activities: providing bomb-making instructions,⁷ holding seminars on how to commit tax fraud,⁸ exposing the identities of undercover agents,⁹ publishing

6. *See id.* at 1103.

7. *See* Loris L. Bakken, Comment, *Providing the Recipe for Destruction: Protected or Unprotected Speech?*, 32 MCGEORGE L. REV. 289, 290 (2000); Ian A. Kass, Note, *Regulating Bomb Recipes on the Internet: Does First Amendment Law Permit the Government to React to the Most Egregious Harms?*, 5 S. CAL. INTERDISC. L.J. 83, 83–85 (1996).

8. *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, 1277–78 (2d Cir. 1990) (same); *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985) (same); *United States v. Moss*, 604 F.2d 569, 570–72 (8th Cir. 1979) (same).

9. *See* 50 U.S.C. § 421(c) (2006); *Haig v. Agee*, 453 U.S. 280, 283–86 (1981).

instructions on how to be a contract killer,¹⁰ reporting in a news story a piracy website that allows users to infringe copyright,¹¹ and even flashing one's headlights to alert drivers to an upcoming speed trap.¹²

To qualify more narrowly as crime plans speech, the speech must take an instructional form, detailing specifically how to commit a crime or how to create an apparatus to be used in a crime, such as a bomb. To merely allude to a crime or provide a vague description of a crime that cannot be followed by a reasonable listener is insufficient to constitute crime plans speech. Although crime-facilitating information can take any form—technical or nontechnical, instructional or noninstructional, specific or general—crime plans speech must provide specific, instructional information that generally has some technical, unintuitive aspect.

To be sure, it would significantly chill valuable speech to exclude all crime-facilitating information, as even publicly available information in a phone book might be “crime-facilitating” in certain circumstances.¹³ The specificity requirement of the crime plans exclusion is a narrowing device, drawing in only instructional speech that is sufficiently specific to pose a serious risk of crime abetment. Moreover, because crime plans speech is criminally instructive and generally technical, the speech also tends to have little, if any, noncriminal value.¹⁴ In some cases, however, particularly in the sciences, crime plans speech does have noncriminal value that may be suppressed or chilled by a crime plans exclusion defined solely by the specificity requirement. Thus, the crime plans exclusion likely needs a second definitional plank to accommodate the valuable uses of such speech. Part V will define and compare four proposed criteria for the second definitional plank.

B. A BRIEF DISCUSSION OF FREE SPEECH PREMISES

The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a

10. See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 251–52 (4th Cir. 1997).

11. Volokh, *supra* note 4, at 1104 n.48.

12. See *id.* at 1102 & n.40.

13. Consider a terrorist who uses the Yellow Pages to find the address of a Planned Parenthood clinic and rigs the clinic with bombs. The Yellow Pages serve as “crime-facilitating” speech, but this speech would certainly not fall into the crime plans exclusion.

14. See Beth A. Fagan, Note, *Rice v. Paladin Enterprises: Why Hit Man Is Beyond the Pale*, 76 CHI.-KENT L. REV. 603, 620–25 (2000).

redress of grievances.”¹⁵ The constitutional guarantee of free speech “reflects the important political principle that government should not suppress the communication of ideas.”¹⁶ Free speech is the very “cornerstone of liberal democracy.”¹⁷ Justice Cardozo characterized the protection of free speech as a fundamental liberty in part because “our history, political and legal,” recognized “freedom of thought[] and speech” as “the matrix, the indispensable condition, of nearly every other form of freedom.”¹⁸ Indeed, First Amendment speech—that is, speech that is not categorically excluded or classified as crime speech¹⁹—is afforded presumptive constitutional protection, and any limitation based on the content of First Amendment speech is subject to the rigorous strict scrutiny standard of review afforded to fundamental rights. The strict scrutiny argument structure reflects the constitutional premium placed on free speech.²⁰ It is axiomatic, however, that the First Amendment does not confer an absolute right to express anything at any time or place, or in any manner one chooses.²¹

The constitutional protection accorded to free speech is “not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.”²²

15. U.S. CONST. amend. I. The First Amendment was first applied to the States in *Gitlow v. New York*, 268 U.S. 652 (1925), in which the First Amendment was assumed *arguendo*—a direct contradiction to the Court’s well-established precedent to consider the States free of any Fourteenth Amendment restrictions concerning freedom of speech. *Id.* at 666 & n.9. Thereafter, the First Amendment was found to have been “incorporated” against the States through the Fourteenth Amendment. *See, e.g.,* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (“Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution.”); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 242–44 (1936); *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931).

16. KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 4 (1989) [hereinafter GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE*]. For an in-depth discussion of free speech principles, see Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

17. GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE*, *supra* note 16, at 4.

18. *Palko v. Connecticut*, 302 U.S. 319, 326–27 (1937).

19. GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE*, *supra* note 16, at 57. Kent Greenawalt refers to crime speech as “situation-altering” speech. *Id.* When speech itself is a criminal action, such as committing perjury or extortion, the speech is crime speech. *See id.* at 228–29.

20. *See* Michael H. Shapiro, *Argument Selection in Constitutional Law: Choosing and Reconstructing Conceptual Systems*, 18 S. CAL. REV. L. & SOC. JUST. 209, 209–10 (2009).

21. *E.g.,* *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981).

22. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1019, 1025 (5th Cir. 1987) (holding that the magazine was not liable for the death of a boy who died attempting autoerotic asphyxia, which he had read about in *Hustler*). *See also* *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of

There is, however, a threshold at which the risks of harm imposed by a particular type of speech exceed the benefits gained from having that speech in the marketplace of ideas. At that threshold point, a categorical exclusion for that speech may be conceived.

C. MULTI-USE SPEECH AND THE DIFFICULTY OF CHOOSING CRITERIA FOR THE CRIME PLANS CATEGORICAL EXCLUSION

It is difficult to articulate a categorical exclusion for crime-facilitating speech because this broad category of speech has some noncriminal, valuable uses in the marketplace of ideas, yet also has the potential to abet crime.²³ These valuable and criminal uses are largely indivisible—it is impossible to criminalize all bad uses of such speech without chilling the good uses as well. For example, an article on the flaws of music piracy that mentions a website where users may illegally download music files will inevitably lead some readers to misuse the article and infringe copyrights.²⁴ Some argue that the harms of criminally instructive speech always outweigh its contribution to the marketplace of ideas, and thus all crime-facilitating speech should be categorically excluded;²⁵ however, this sweeping justification may suppress some speech worthy of presumptive protection.

1. Harmful Uses of Crime-Facilitating Speech

The harm posed by crime-facilitating speech is evident from its name: it facilitates crime. Crime-facilitating speech that specifically details how to commit a crime, particularly when the instructions are not self-evident or widely available, threatens harm against society, property, and our system of law. To deem crime-facilitating speech within the First Amendment's protection is to implicitly ratify speech that undermines the American legal system. On a practical level, such classification gives presumptive protection to speech that facilitates crimes that otherwise may not have been committed had the instructions not been readily accessible. Further,

an idea simply because society finds the idea itself offensive or disagreeable."); *United States v. White*, 638 F. Supp. 2d 935, 942 (N.D. Ill. 2009) ("In a democratic society, it is axiomatic that the Amendment's protections are not limited to the genteel, the enlightened or the tasteful.")

23. Volokh coined the term "dual-use" speech to convey the same idea that crime-facilitating speech can often have both valuable and criminal uses. Volokh, *supra* note 4, at 1105.

24. *Id.* at 1104 & n.48.

25. See, e.g., S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1166–70 (2000); Theresa J. Pulley Radwan, *How Imminent Is Imminent?: The Imminent Danger Test Applied to Murder Manuals*, 8 SETON HALL CONST. L.J. 47, 72–73 (1997).

the sheer ubiquity of criminal instructions in print and electronic media means that there are virtually no search costs for finding these instructions, which may increase the frequency of crime.²⁶

The risk posed by crime-facilitating speech is, in part, aptly illustrated through a comparison with incitement to unlawful activity (“incitement”), a subset of criminal advocacy for which the Supreme Court has carved out a categorical exclusion.²⁷ Incitement is categorically excluded speech because its harms outweigh an individual’s free speech interest, and thus the government has a substantial²⁸ interest in preventing it. It follows that if the general harms of crime-facilitating speech equal or eclipse the harms of incitement, the Court could, and perhaps should, carve out a categorical exclusion for some crime-facilitating speech as well.

In many cases, crime-facilitating speech is just as dangerous as incitement, if not more.

To commit a typical crime, a criminal generally needs to have three things: (1) the desire to commit the crime, (2) the knowledge and ability to do so, and (3) either (a) the belief that the risk of being caught is low enough to make the benefits exceed the costs, (b) the willingness—often born of rage or felt ideological imperative—to act without regard to the risk, or (c) a careless disregard for the risk.²⁹

Receiving or hearing incitement—speech that advocates, praises, or condones crimes—can help provide the desire to commit the crime, and perhaps the willingness to act without regard to risk. By contrast, crime plans speech supplies knowledge to carry out the crime and, if the speech details how to evade detection, may cause the listener to think the risks of

26. This Note does not present empirical evidence demonstrating that the availability of criminal instructions is directly tied to the frequency of crime, but Part VI will further discuss the relationship between the availability of crime plans and the frequency of criminal activity.

27. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”). In *Brandenburg*, the state failed to distinguish “mere advocacy,” which is presumptively protected, from “incitement to imminent lawless action,” which is categorically excluded from First Amendment protection. *Id.* at 449. It is important not to confuse incitement, which can be viewed as categorically excluded speech, with “mere advocacy.” See, for example, Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of “Definitional Balancing” as a Methodology for Determining the “Visible Boundaries of the First Amendment,”* 39 AKRON L. REV. 483, 505–07 (2006).

28. I say “substantial” instead of “compelling” to avoid conflating the argument structures of strict scrutiny analysis and the categorical exclusion analysis. Here, I am referring to the interests one compares at the wholesale definitional level of the categorical exclusion as opposed to the interests that are balanced in strict scrutiny analysis. See discussion *infra* Part III.

29. Volokh, *supra* note 4, at 1107 (footnotes omitted).

being caught are low. Moreover, the very presentation of crime plans may act as an explicit or implicit call to crime, thus implicating the first requirement as well. Crime plans speech, particularly that which details how to commit sophisticated crimes or that require scientific knowledge, is often more harmful than incitement for two reasons. First, the desire to commit a crime is often satisfied by sources other than incitement.³⁰ For instance, a contract killer needs no other motivation to kill than the promise of compensation. A music aficionado may illegally download music for the sole purpose of enjoying or possessing it—not because she was urged to do so. Second, crime plans speech can “instantly and irreversibly satisfy elements 2 and 3a” by teaching how to violate the law and get away with it,³¹ whereas the effect of incitement is not always instant, but gradual,³² and not always irreversible, as it may (at least in theory and at least in some cases) be combated with counteradvocacy encouraging an individual to follow the law.³³ Consider this thought experiment: Would it be more dangerous to give incitement speech to a person who knows how to commit a crime with little risk, but does not have the desire to commit it, or to give crime plans speech to a person who does not know how to commit the crime (or escape undetected), but has the desire to do so? Surely the latter is more dangerous, and thus the general availability of such information creates a strong probability that it will fall into the hands of people with the desire to commit crimes.

By virtue of its speed and scope, the Internet plays host to much criminal advocacy, counteradvocacy, and crime-facilitating speech. In articulating a principled crime plans categorical exclusion, it is important to note that speech on the Internet is subject to no lesser constitutional protection than spoken word, print, or other speech vehicles.³⁴ But the Internet has special qualities that no other media has ever known: it is the great democratizing media, making information instantaneously and almost universally available.³⁵ These qualities make the Internet both infinitely

30. Likewise, incitement is not necessary to instill a willingness to disregard the risk of being caught: rage or moral imperative has many sources.

31. Volokh, *supra* note 4, at 1107.

32. But note that incitement must be an immediate call to action to satisfy the criteria of the categorical exclusion (or strict scrutiny, if viewing the incitement test as a form of heightened scrutiny). See *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973).

33. Volokh, *supra* note 4, at 1107. See also Fagan, *supra* note 14, at 627 (describing crime plans speech as a “dormant threat, [which] may be *more dangerous* than a readily apparent threat because it cannot be predicted or prevented until discovered, when it is already too late to engage in counterspeech and to protect citizens from the evil planned”).

34. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

35. See William Funk, *Intimidation and the Internet*, 110 PENN ST. L. REV. 579, 591–92 (2006).

useful and patently dangerous.

Since the 1980s, the Internet has been a one-stop shop for aspiring bombmakers.³⁶ Between 1985 and June 1986, thirty bomb investigations connected the perpetrators to Internet bomb-making instructions.³⁷ Computer bulletin boards, websites, chat rooms, and news groups display recipes for building explosives out of household cleaning products, fertilizers,³⁸ light bulbs, and even tennis balls.³⁹ From a simple search, one can learn how to make a panoply of explosives, “including pipe bombs, plastic explosives, grenades, smoke bombs, gunpowder and napalm.”⁴⁰ Online discussion groups exchange information on how to best recreate the 1995 Oklahoma City bomb;⁴¹ white supremacist sites have links to legal and illegal bomb-making manuals; an online manual called *The Terrorist’s Handbook* provides instructions for constructing “High Order Explosive[s],” such as ammonium nitrate, dynamite, TNT, Molotov cocktails, and phone bombs.⁴² In 2010, a man from Concord, North Carolina, collaborated with a confidential informant on the Internet to help plan an abortion clinic bombing.⁴³ The Concord man met the informant

36. The following examples in the text raise some formal causation issues that must be addressed in adjudicating these criminal facilitations. The Fourth Circuit intimated that a reasonable jury could determine that causation is shown when the evidence of the crime bears a strong resemblance to the methods suggested in the criminal instructions. *See Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 252 (4th Cir. 1997).

37. Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 *CARDOZO L. REV.* 233, 282 (2005).

38. Kass, *supra* note 7, at 83 & n.1.

39. Bakken, *supra* note 7, at 290. The Department of Justice conducted a study on the availability of bomb-making information and the constitutionality of restricting it in the wake of the 1995 Oklahoma City bombing, and in connection to the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA). U.S. DEP’T OF JUSTICE, 1997 REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, <http://www.justice.gov/criminal/cybercrime/bombmakinginfo.html> (last visited May 9, 2011). The DOJ noted the ubiquity of bomb-making information in “reference books, the so-called underground press, and the Internet.” *Id.* It found one website alone that yielded more than 110 bomb-making recipes. *Id.*

40. Kass, *supra* note 7, at 83–84 (quoting John M. Moran, *Free Speech and Computers Central to Bomb-Recipe Case*, *HARTFORD COURANT*, Sept. 27, 1993, at A1). Furthermore, “[a]nyone can easily follow these instructions, which have an appearance similar to cookbook recipes: ingredients at the top and directions below.” *Id.* at 84.

41. *Id.* at 85.

42. Bakken, *supra* note 7, at 296 (citing *Hate Crime on the Internet: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 47–48 (1999) (statement of Howard Berkowitz, Nat’l Chairman of the Anti-Defamation League)). The Terrorist’s Handbook has been reproduced on at least two websites. *See Akira*, <http://www.capricorn.org/~akira/home/terror.html> (last visited May 9, 2011); Skeptic Files, <http://www.skepticfiles.org/conspire/terrordo.htm> (last visited May 9, 2011).

43. Ely Portillo, *Man Posts Bomb Instructions on Facebook, Is Charged in Plot*, *CHARLOTTE OBSERVER*, Sept. 10, 2010, http://www.charlotteobserver.com/2010/09/10/1680125_man-charged-in-abortion-clinic.html.

through the social networking site Facebook, where the Concord man had previously “posted detailed instructions for making TATP, an acronym for an explosive like that used by terrorists in the 2005 London subway bombings.”⁴⁴

In an age where “tech-savvy youth” is redundant, these Internet sources are particularly harmful for impressionable adolescents. The following are just a few examples of the harm posed by the availability of this information. A fourteen-year-old boy in California was killed while trying to build a pipe bomb.⁴⁵ A twelve-year-old boy suffered first- and second-degree burns while trying to cook a bomb on his mother’s stove; he had purchased the bomb-making instructions from a child who was selling them at four different schools.⁴⁶ A fifteen-year-old girl in Alabama lost part of her hand detonating a bomb her boyfriend made.⁴⁷ A five-year-old boy in Ohio suffered severe burns to his arm, face, and eye when picking up an unassuming two-liter bottle that exploded in his hand.⁴⁸ In each of these incidents, Internet sources provided the recipe for the explosive.⁴⁹

Along with creating explosives, children are also learning how to commit murder and how to kill themselves using step-by-step instructions found on the Internet. A site containing *The Complete Guide on How to Kill Your Parents* was linked to a triple homicide committed by a boy who killed his mother, father, and sister.⁵⁰ The guide instructs children on how to kill their parents by electrocution, poison, shooting, or choking them while they are asleep, and then explains how to get rid of the corpses.⁵¹ Just a week before the boy murdered his family, he had attempted to kill his mother with poisonous seeds he ordered from a website listing poisonous plants and explaining how to administer poison to kill a victim within sixty seconds.⁵² Internet sources also explain how to take one’s own life: a

44. *Id.* The criminal complaint charges the man with violating 18 U.S.C. § 842(p)(2)(B) (2006), Distribution of Information Relating to Explosives, Destructive Devices, and Weapons of Mass Destruction. Press Release, Fed. Bureau of Investigation, Charlotte Div., Concord Man Arrested for Providing Bomb-Making Advice: Complaint Alleges Women’s Health Clinic Was Target (Sept. 9, 2010), available at <http://charlotte.fbi.gov/dojpressrel/pressrel10/ce090910.htm>. If convicted, the man faces up to twenty years in prison and a \$250,000 fine. *Id.*

45. Kass, *supra* note 7, at 84.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 83–84. The list of examples goes on. For more examples of explosive-related injuries and fatalities linked to Internet sources, see Kass, *supra* note 7.

50. Liam Houlihan, *Clamp Bid on Dangerous Websites*, HERALD SUN (Austl.), Nov. 26, 2004, at 31.

51. *Id.*

52. *Id.*

simple search will host more than ninety sites detailing methods for committing suicide.⁵³

Government efforts to prevent children from viewing harmful information on the Internet have not addressed the dangers of crime-facilitating speech. The Children's Internet Protection Act, signed into law in December 2000, provides that schools and libraries that receive federal technology money must ban access to materials that are obscene or contain child pornography, and to the extent the computer is accessible to children, it must filter other material "harmful to minors."⁵⁴ But the term "harmful to minors," as defined in the law, is a broad (if incomplete) restatement of obscenity, effectively leaving crime instructions untouched.⁵⁵ Though the law withstood challenges from the American Civil Liberties Union and the American Library Association at the Supreme Court,⁵⁶ the law is criticized for being overbroad. For example, teachers have lamented that the district's Internet filters have blocked websites about the Holocaust and newspaper websites that contain articles about pornography-related arrests.⁵⁷ The law is also underinclusive, as the accounts above illustrate that crime instructions should be filtered as material that is "harmful to minors."⁵⁸

Perhaps the most notorious criminally instructive publication is William Powell's *The Anarchist's Cookbook*, a step-by-step instruction manual for crimes such as "how to kill someone with a knife, how to grow marijuana, and how to make the explosive nitroglycerin."⁵⁹ Columbine

53. *Suicide Websites 'Encourage Rather than Help,'* YORKSHIRE POST, Apr. 11, 2008 available at http://www.yorkshirepost.co.uk/news/around-yorkshire/local-stories/suicide_websites_encourage_rather_than_help_1_2497117 (citing a study in which the researchers found that in conducting searches related to suicide, about one-fifth of the hits were dedicated to suicide, and half of those were "judged to be encouraging, promoting, or facilitating suicide").

54. Children's Internet Protection Act, Pub. L. 106-554, § 1721, 114 Stat. 2763 (2000) (codified as amended at 47 U.S.C. § 254(h) (2006)).

55. Under the Children's Internet Protection Act, [t]he term "harmful to minors" means any picture, image, graphic image file, or other visual depiction that (i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors. 114 Stat. at 2763A-336.

56. *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003); *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564 (2002).

57. Jennifer Booth Reed, *Lee Schools Stuck in Web of Safeguards*, THE NEWS-PRESS, Aug. 21, 2001, at 1B.

58. The law is criticized for being both overbroad and underinclusive. *See, e.g.*, Editorial, *Librarians Should Assess All Materials*, LANCASTER NEW ERA, June 27, 2003, at A6.

59. Bakken, *supra* note 7, at 293 & n.33. *The Anarchist's Cookbook* was first published in 1971. *Id.*

killers Dylan Klebold and Eric Harris used *The Anarchist's Cookbook* to build two propane bombs, which they planted in the school cafeteria.⁶⁰ In another example, the FBI found a copy of *The Anarchist's Cookbook* and ingredients for the deadly chemical ricin in a laboratory maintained by James Gluck, who threatened a Colorado judge that he could flatten the Jefferson County Administration Building with a ricin "bullet."⁶¹ Seventeen-year-old Henry Lee Dreyer used *The Anarchist's Cookbook* to learn how to kill with a knife before slitting his mother's and her boyfriend's throats.⁶² Neil Entwistle consulted *The Anarchist's Cookbook* and searched the Internet for information on how to commit murder and suicide before murdering his wife and child in their family home in Boston.⁶³

Other criminally instructive publications have abetted murder and drug manufacture. In 2003, a fugitive serial killer linked to four murders and child molestation was captured with a crime instruction manual, a shotgun, and several fraudulent identification papers in his possession.⁶⁴ In an FBI bust of a methamphetamine lab operated out of a trailer home in suburban Colorado, agents found two how-to manuals for producing the drug.⁶⁵ Paladin Enterprises' *Hit Man: A Technical Manual for Independent Contractors* gave James Perry step-by-step instructions for murdering Mildred Horn, her eight-year-old quadriplegic son Trevor, and Trevor's nurse Janice Saunders.⁶⁶ Lawrence Horn, Mildred's ex-husband, hired Perry to kill his family so he could inherit the two-million-dollar settlement

60. *Id.* Dylan Klebold and Eric Harris were members of the Trench Coat Mafia, an anarchist group touting *The Anarchist's Cookbook* as its manifesto. *Id.*

61. *Id.*

62. Angela Lau, *Teen Bragged of Killings, Hearing Told*, SAN DIEGO UNION-TRIB., June 17, 1998, at B1. Dreyer's friend shouted encouragements and beat the boyfriend with a baseball bat. *Id.* Dreyer then stuffed their bodies in the trunk of the family car and paid another friend to dispose of it. The pair bragged about it the next day at school but surrendered to the police two days after the murder. *Id.*

63. *Did Entwistle Delay Return?*, NOTTINGHAM EVENING POST (U.K.), June 2, 2008, at 2. See also Jonathan Saltzman, *Entwistle to Oppose Request for DNA*, BOSTON GLOBE, Oct. 4, 2006, at B2.

64. Todd Billiot, *DNA to Be Taken from FBI Fugitive Caught in Franklin; Serial Killer*, DAILY ADVERTISER, Jan. 7, 2003, at 2B.

65. Larry Fish, *Meth How-To Manuals Sting Bookstore; a Drug Raid on a Colo. Lab Led Police to a Store. Its Owner Is Fighting for Customers' Privacy*, PHILA. INQUIRER, Nov. 19, 2000, at A03.

66. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 239, 242 (4th Cir. 1997) (holding that the First Amendment does not pose a bar to finding the publisher of *Hit Man* civilly liable as an aider and abetter of the triple contract murder). Cf. *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989) (declining to address First Amendment arguments, but holding that a magazine had not acted negligently in publishing an ambiguous personal-services classified advertisement through which the victim's husband hired an assassin to kill her).

his son had received for the injury that left him paralyzed for life.⁶⁷

2. Valuable Uses of Crime-Facilitating Speech

The potential dangers of crime-facilitating speech are readily apparent,⁶⁸ but understanding what constitutes “valuable speech” under the Constitution is less intuitive, unsettled territory.⁶⁹ The Supreme Court is loath to define “valuable speech,” but it has given us some guidance on what speech has little or no value.⁷⁰ Between “valuable” and “little or no value” speech, the Court has generally refused to assign a hierarchy of values to speech types,⁷¹ with the important exception of political speech, which is considered the most valuable.⁷² Because non-categorically excluded speech draws strict scrutiny in most contexts,⁷³ it can be inferred that the Court considers a wide array of communications to be “valuable.” Indeed, this is a fairly straightforward result of the place of free speech in the constitutional hierarchy of values: for government to actively and routinely sort the value of speech would be extremely damaging to a regime of free speech as specially protected.⁷⁴

67. *Rice*, 128 F.3d at 239, 242.

68. *But see* Volokh, *supra* note 4, at 1212–14 (arguing that the ubiquity of criminal instructions in various media makes any one source of such speech largely unhelpful in the commission of crimes unless it contains unique information that will aid in the commission of a specific crime).

69. *See, e.g.*, Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1617–19 (1987); Adam M. Samaha, *Litigant Sensitivity in First Amendment Law*, 98 NW. U. L. REV. 1291, 1369–72 (2004).

70. This speech will be discussed in the context of categorical exclusions in Part III.

71. Note, however, that Justice Stevens has long eschewed the rigid categorical approach of presumptively protected and categorically excluded speech, opting for a flexible framework of “low” and “high” value speech. He argues that society’s interest in protecting a type of speech depends on the value of that speech. Justice Stevens’s approach, however, has not carried much favor in the Court. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 415–36 (1992) (Stevens, J., concurring); *FCC v. Pacifica Found.*, 438 U.S. 726, 744–48 (1978) (Stevens, J., dictum); *Young v. Am. Mini Theaters*, 427 U.S. 50, 63–70 (1976) (Stevens, J., plurality opinion). To be sure, the commercial speech doctrine does reflect a subcategorical “lesser value” approach. *See* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 758–73 (1976).

72. *See, e.g.*, *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”).

73. There are important exceptions for media speech, symbolic conduct, and commercial speech, each of which draws some form of intermediate scrutiny. *See* *Pacifica*, 438 U.S. at 726 (media speech); *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968) (symbolic conduct); *Va. State Bd. of Pharmacy*, 425 U.S. at 748 (commercial speech).

74. *See* *Cohen v. California*, 403 U.S. 15, 25 (1971) (“Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the

Crime-facilitating speech can provide readers with practical information that they can use lawfully, particularly in the sciences. For example, a book on explosives can teach students the fundamentals of chemistry⁷⁵ or show “engineers how to blow up buildings slated for demolition.”⁷⁶ If all publications describing how to build and safely detonate explosives were pulled from the marketplace of ideas and from specialized uses such as military and law enforcement training,⁷⁷ it would stymie public discourse (and valuable specialized, if not “public,” discourse). Because scientific research generally advances more quickly when scientists and engineers are permitted to discuss their work freely and broadly,⁷⁸ denying this speech presumptive protection could chill technological advancement. Moreover, suppression of this information might lead to more hazardous demolitions, as the methodologies would have fewer opportunities for peer review by experts in the field.

Crime-facilitating speech can undermine home and business security systems, but it can also help improve them or spark public debate to improve them. Descriptions of “computer security problems, or of encryption or decryption algorithms,” can facilitate computer hacking, but can also teach computer programmers to improve computer security systems and to create new security and protection algorithms.⁷⁹ Speech that explains how to perform a criminal investigation is essential to law enforcement, though it may also help a criminal evade the police. A newspaper article “describing gaps in airport security can help terrorists avoid detection, but it can also stimulate public debate about improving security”⁸⁰ and put pressure on the government to address these problems. Because public discourse is a powerful impetus for government action, potentially crime-facilitating speech can be a valuable tool for expediting responses to national concerns, including border security and abuses of government power. As Volokh points out, people need concrete examples of alleged government abuse to be persuaded to push for change; a general complaint about an unspecified abuse may be unconvincing.⁸¹

Finally, crime-facilitating speech is deeply entrenched in storytelling.

judgment below.”).

75. Volokh, *supra* note 4, at 1112.

76. Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 703 (2009).

77. Note that these specialized uses such as military and law enforcement training may not qualify as the “marketplace” of ideas.

78. Volokh, *supra* note 4, at 1112.

79. *Id.*

80. Healy, *supra* note 76, at 703.

81. Volokh, *supra* note 4, at 1114–15.

Portrayals of ingenious ways of committing crimes in detective novels, films, or television shows may facilitate some of the most heinous crimes.⁸² Unsurprisingly, the Supreme Court has held that entertainment speech is presumptively protected.⁸³ Moreover, to extricate all speech that facilitates crime would strip away constitutional protection from a vast body of artistic work that we commonly hold as valuable. Taken to its logical extreme, it would categorically exclude any portrayal of criminal activity that could be replicated by a viewer.

III. STRICT SCRUTINY AND CATEGORICAL EXCLUSION: TWO ARGUMENT STRUCTURES THAT COULD EXCLUDE CRIME PLANS SPEECH

Both categorization and the strict scrutiny framework can be used to leave crime plans speech unprotected by the First Amendment, either by a categorical exclusion, or by the government action's survival under strict scrutiny.

A. CATEGORICAL EXCLUSION

Since categorical exclusions are well defined in constitutional law, I will not dwell too long on their inception. The widely recognized

82. This issue was brought to light recently when a slighted ex-boyfriend copied a crime meticulously portrayed on *Law and Order: Special Victims Unit*. Kashmir Hill, *A Reason Not to Respond to Rape Fantasy Ads on Craigslist*, ABOVE THE LAW (Feb. 16, 2010, 10:12 AM), <http://abovethelaw.com/2010/02/a-reason-not-to-respond-to-rape-fantasy-ads-on-craigslist/>. Pretending to be his ex-girlfriend, he put an advertisement on Craigslist soliciting “a real aggressive man with no concern for women” to fulfill her sexual fantasy of being raped at knifepoint. *Id.* A man responded to the ad, unknowingly corresponding with the ex-boyfriend, and received pictures of the woman and her home address. *Id.* The man then showed up at her front door, raped her at knifepoint, and left her bound on her living room floor. *Id.* Responding to the incident, the executive producer of *Law and Order: Special Victims Unit* wrote,

If we let ourselves be frozen by the fear that someone might copy something they've seen on television, in a novel, or on the Internet, we would soon cease telling stories. Our intent on SVU is not to provide a blueprint for how to commit a crime, it's to engage the viewer in complex stories that raise ethical issues.

Id.

83. See *Winters v. New York*, 333 U.S. 507, 510 (1948). See also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 568–70 (1995) (holding that nonsense poetry, instrumental music, and abstract art have presumptive constitutional protection). The Seventh and Eighth Circuits have also held that violent video games are First Amendment speech. See, e.g., *Interactive Digital Software Ass'n v. St. Louis Cnty.*, 329 F.3d 954, 957–58 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574–75 (7th Cir. 2001). The question is now pending before the Supreme Court. *Schwarzenegger v. Entm't Merchs. Ass'n*, 556 F.3d 950 (9th Cir. 2008), *cert. granted*, No. 07-166620, 2010 U.S. LEXIS 3573 (U.S. Apr. 26, 2010).

categorical exclusions are fighting words,⁸⁴ incitement to unlawful activity,⁸⁵ true threats,⁸⁶ obscenity,⁸⁷ child pornography,⁸⁸ and some forms of defamation.⁸⁹ Categorical exclusions were first recognized by the Supreme Court in *Chaplinsky v. New Hampshire*, in which the Court said:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are 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.⁹⁰

In *Chaplinsky*, the bellwether case for the fighting words categorical exclusion, the Court attached a low value to the speech, reasoning it was “no essential part of any exposition of ideas” and had only “slight social value as a step to truth.”⁹¹ The Court measured the speech’s low value against the significant state interest “in order and morality.”⁹² The balancing, however, occurred “at the general, wholesale or definitional level, producing a total exclusion of a class of speech from First Amendment coverage,” as opposed to the case-specific balancing that takes place in strict scrutiny analysis.⁹³

This more general balancing of competing interests defines what type of speech lies outside First Amendment protection, and thus is referred to as “definitional balancing.”⁹⁴ Definitional balancing produces a total

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

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

86. *Virginia v. Black*, 538 U.S. 343, 360, 363–64 (2003) (O’Connor, J., plurality) (describing “true threats” as “only those forms of intimidation that are most likely to inspire fear of bodily harm”).

87. *Miller v. California*, 413 U.S. 15, 23, 36 (1973).

88. *New York v. Ferber*, 458 U.S. 747, 763–64 (1982).

89. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). Note that this is another reverse categorical exclusion case—defamation against public figures is only categorically excluded with a showing of “actual malice.” *Id.* The speech protection for private figures is higher—states have discretion to choose appropriate liability. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343–48 (1974). If there is no issue of public interest, the state may implement strict liability for defamation. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759–61 (1985); *Sleem v. Yale Univ.*, 843 F. Supp. 57, 62 (M.D.N.C. 1993); *Pearce v. E.F. Hutton Grp., Inc.*, 664 F. Supp. 1490, 1505 & n.21 (D.D.C. 1987); 1 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 3:17 (2d ed. 2010).

90. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (citations omitted).

91. *Id.* at 572.

92. *Id.*

93. SULLIVAN, *supra* note 2, at 53.

94. *See Deutsch, supra* note 27, at 499.

exclusion of a class of speech from First Amendment coverage; if a type of speech falls into the exclusion, no particularized inquiry is required. Importantly, however, categorical exclusion analysis is not entirely devoid of case-specific inquiry, because in each case one must consider whether the speech falls into the categorical exclusion, and that inquiry takes into account many of the factors considered in the balancing test of strict scrutiny.⁹⁵ Indeed, “what one *looks at* in running the comparisons and weighings done by strict scrutiny are the same things one *looks at* (with somewhat different lenses) in announcing and then implementing a categorical exclusion.”⁹⁶ Thus, the argument structure in a case establishing a particular categorical exclusion may look a lot like the strict scrutiny argument structure.⁹⁷ Moreover, speech that is categorically excluded is generally the type of speech that would be consistently proscribed under strict scrutiny.⁹⁸ That is, government actions regulating that type of speech would habitually survive strict scrutiny.

In the context of crime-facilitating speech, the government’s interest in preventing the speech from circulating in the marketplace of ideas is pitted against the First Amendment interest in free expression. The balance focuses on “whether the speech values justify . . . sweeping away” most of the protection for specific crime-facilitating speech.⁹⁹ Melville B. Nimmer discusses this balance in the context of defamation speech, which is categorically excluded in the public figure context only where there is a showing of actual malice.¹⁰⁰ Though the actual malice requirement does not mitigate the harm imposed by defamatory speech, it represents a balance between the government interest and the free speech interest at the definitional level.

Under a categorical approach, speech that satisfies the criteria of the crime plans exclusion will be excluded from presumptive First Amendment protection, and laws abridging that speech will be subject only to rational basis review.¹⁰¹ Under the rational basis test, a court will uphold a

95. Shapiro, *supra* note 20, at 339 & n.356 (“[T]he factors considered within the definitional balancing stage generally come up again in deciding whether any given communication falls into the excluded bin, but they are, in theory, addressed in a different manner . . .”).

96. *Id.*

97. *Id.*

98. This generalization, however, does not hold true for all of the categorical exclusions. Where it would likely be true of child pornography or incitement cases (and possibly true threats), it would probably not be the case with obscenity.

99. Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 950 (1968).

100. *Id.* at 956–58.

101. Note, though, that there are some puzzling exceptions in equal protection jurisprudence that

government action if it finds its rationale reasonably related to a legitimate government interest.¹⁰² Applied to a law abridging crime plans speech, the government's interest in preventing law breaking would certainly pass constitutional muster under rational basis review.

B. STRICT SCRUTINY

Under the strict scrutiny framework, content-based regulations of presumptively protected speech draw strict scrutiny.¹⁰³ A law is content-based if, by its terms, it “distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed.”¹⁰⁴ A law passes strict scrutiny only if it is the least restrictive means to advancing the government's interest; that is, if the law abridges more speech than is necessary to satisfy the government's interest, the law fails strict scrutiny.¹⁰⁵ Conversely, if a law is the least restrictive abridgment of speech, it passes strict scrutiny even if it prohibits some presumptively protected speech.¹⁰⁶ Unlike rational basis review, under which courts will allow laws that are both significantly underinclusive¹⁰⁷ and

are beyond the scope of this Note.

102. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 677–78 (3d ed. 2006).

103. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95, 101–02 (1972) (invalidating a Chicago ordinance that prohibited picketing within 150 feet of a school building while school was in session, but that carved out an exception for peaceful labor picketing, as an impermissible content-based distinction between what could and could not be protested). The Court in *Mosley* held that content-based regulations draw strict scrutiny. *See id.* at 101–02. The exception for peaceful labor picketing vitiated the narrow tailoring of the law, as there was no justification for this exception. *Id.* Thus, the law failed strict scrutiny. *Id.* at 102.

104. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994). A content-neutral law, by contrast, “confer[s] benefits or impose[s] burdens on speech without reference to the ideas or views expressed.” *Id.*

105. *See, e.g., Boos v. Barry*, 485 U.S. 312, 350 (1988) (invalidating a statute as violative of the First Amendment because, “even assuming . . . that the dignity interest is ‘compelling,’ we hold that the [statute] is inconsistent with the First Amendment” because “it is not narrowly tailored; a less restrictive alternative is readily available”).

106. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992). In this plurality opinion, the Court upheld a Tennessee law that prohibited solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance of a polling place. *Id.* at 193, 211. The case was a “particularly difficult reconciliation” of “the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy.” *Id.* at 198. The law withstood strict scrutiny analysis because it was the least restrictive alternative to advancing the government's compelling interest in prohibiting coercion and the “taint of intimidation” in the voting process. *Id.* at 211. *Cf. Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (applying strict scrutiny in the form of the compelling state interest test, and striking down the government action).

107. *E.g., Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 109–10 (1949).

overinclusive,¹⁰⁸ under strict scrutiny, a law is struck down if it is not specifically and narrowly framed to accomplish a compelling state interest.¹⁰⁹

Under strict scrutiny, crime-facilitating speech would receive presumptive constitutional protection, and any law abridging it would be subject to strict scrutiny. The government would bear the burden of showing that the law advances a compelling government interest and that the law is the least restrictive alternative to achieving that government interest. The state has a compelling interest in regulating detailed crime-facilitating speech because the speech itself, and the state's failure to prohibit it, undermines the integrity of the law and poses a high risk of crime.¹¹⁰ Thus, if the law is (1) narrowly tailored to advance the government's compelling interest in preserving the integrity of the law and thwarting crime abetment, and (2) no less restrictive alternative could achieve the state's goal, the law would be upheld even if it did abridge some valued speech.¹¹¹

C. WHY HAVING A CATEGORICAL EXCLUSION MATTERS

One could argue that a crime plans categorical exclusion is unnecessary because the type of speech it excludes would be prohibited under strict scrutiny analysis; however, the fact that strict scrutiny would consistently produce the same outcome—prohibiting the speech—is a reason to have, not reject, the exclusion. Speech protected by the First Amendment is cloaked in a formidable armor. When speech falls under the protection of the First Amendment, any law abridging that speech is presumptively unconstitutional. The impression conveyed is that there is something about the speech that bears value because the law is subject to a heightened standard of review that reflects the premium the Constitution places on free speech. Because the value of free speech is of the highest constitutional order, it receives the greatest form of protection. By deeming speech within the scope of the First Amendment, it is ascribed a certain

108. *E.g.*, *N.Y. Transit Auth. v. Beazer*, 440 U.S. 568, 590 (1979).

109. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986).

110. *See Fagan*, *supra* note 14, at 626 & n.167 (“[T]he government has a compelling interest in prevention of speech that will engender crime.”).

111. Indeed, suppression of some crime-facilitating speech to advance the government's compelling interest in prohibiting crime abetment is probably less of an affront to the First Amendment than the compromise the Court had to make in *Burson*. There, the Court upheld a law abridging political speech—speech at the core of the First Amendment—because it was the least restrictive alternative for advancing the government's compelling interest in preventing electioneering. *Burson*, 504 U.S. at 198–200.

value that may be overcome only by a compelling government interest and a law that abridges the minimum amount of speech necessary to satisfy that interest.¹¹² Thus, without the categorical exclusion, crime plans speech is presumptively constitutional and bears the constitutional dignity that we afford First Amendment speech—whether or not we ultimately protect it at the bottom line. In effect, speech detailing how to break laws, designed with the purpose of breaking those laws would, paradoxically, be afforded the greatest form of protection under the ultimate source of our laws.

Consider Michael H. Shapiro's argument about the Francophobic assassin who kills the heir to the French throne and claims that the assassination embodies her message that "Frenchness is intrinsically and instrumentally evil."¹¹³ The defendant claims her homicide was a speech act, and to punish her "for this homicide would constitute a penalty based on the content of her speech."¹¹⁴ The Court applied the standard articulated in *United States v. O'Brien*, postulating that the ordinarily noncommunicative act of homicide is indeed a communication and has communicative value, and thus draws something less than strict scrutiny but more than the ultrathin rational basis test: "scrutiny with punch."¹¹⁵ Under this heightened—but not strict—scrutiny, the defendant loses because the government's "important interest in protecting persons against termination of life without due process of law . . . overcomes the free speech claim."¹¹⁶ Though the free speech claim is easily defeated in this case, defeat of the claim is not the sole point. Even pausing for a moment to consider the defendant's First Amendment claim effectively says that the First Amendment could, possibly, legitimize the homicide. As Shapiro

112. As Michael H. Shapiro explains, argument structures reinforce the value accorded to various rights: "The reason for focusing on arguments in the first place is that . . . the expression and operational meaning of a constitutional value *is* the argument that implements it—loosely, the argument is the value is the argument . . ." Shapiro, *supra* note 20, at 209–10. Thus, to subject crime plans speech to strict scrutiny is to assign it the highest constitutional value.

113. *Id.* at 331.

114. *Id.*

115. *Id.* Justice Marshall made a similar "conduct-as-speech" argument in his dissent in *Clark v. Community for Creative Non-Violence*, in which he argued that a park camp-out to raise awareness for the plight of the homeless was "symbolic speech protected by the First Amendment." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 301 (1984) (Marshall, J., dissenting). Chief Justice Burger attacked this position in his concurrence, emphatically stating that camping in the park was not speech, but conduct. *Id.* at 300 (Burger, C.J., concurring). Even if the act was a vehicle for a message (akin to picketing, which is a vehicle for speech, but not speech itself), it could not hijack the protection of the First Amendment, just as the Francophobe cannot appropriate First Amendment protection in her "political" killing. Shapiro, *supra* note 20, at 333–35.

116. Shapiro, *supra* note 20, at 331 ("Without a system of criminal punishment, or some other severe sanction, the purposes of criminalizing homicide (or anything else) are unacceptably diminished.").

points out, “[I]t is offensive to grace such conduct with constitutional dignity. Any characterization that grants constitutional merit, in the form of presumptive protection as a fundamental right, to expressive political assassination (or to various other serious crimes) is an abomination within our moral/constitutional system.”¹¹⁷ Granting presumptive protection to such conduct “renders the First Amendment complicit in evil: it contaminates free speech values by associating them not merely with evil ideas but with intrinsically evil and maximally harmful acts.”¹¹⁸ In essence, Shapiro argues, it impairs the coin of the First Amendment to grant presumptive constitutional protection to conduct (“speech acts”) unworthy of such distinction.

The same logic applies to affording presumptive constitutional protection to crime plans speech. By applying strict scrutiny to crime plans speech, speech that is unworthy of presumptive protection is cloaked in First Amendment armor. Though the compelling government interest in preserving a uniform criminal justice system that does not tolerate crime-abetting speech overrides the individual’s free speech interest, the nefarious speech still receives presumptive constitutional protection. This presumptive protection thus aligns the First Amendment with the commission—or at least abetting—of crimes. The presumed constitutionality for such speech thus impairs the First Amendment coin.

IV. WHY A CATEGORICAL EXCLUSION IS NEEDED

“If we are driven to revise doctrine, doing so requires us to identify an argument with properties superior to whatever is currently in place, and to explain why it is superior.”¹¹⁹ Currently, crime plans speech is commonly analyzed within one of two conceptual systems: (1) the *Brandenburg* incitement test, or (2) aiding and abetting liability. In this part, I will argue that both of these systems are flawed in their application to crime plans speech. Therefore, in Part V, I will recommend a new conceptual system—the crime plans exclusion—and explain why it is superior to these argument structures.

A. WHY THE INCITEMENT TEST IS FLAWED

Crime plans and incitement speech are definitionally different speech

117. *Id.* at 332–33.

118. *Id.* at 334 (commenting on the Burgerian view, as expressed in Chief Justice Burger’s concurrence in *Clark*, 468 U.S. at 300).

119. *Id.* at 219.

that cannot be analyzed under the same argument system. The incitement test articulated in *Brandenburg v. Ohio* is highly speech protective, as it is designed to distinguish and protect political advocacy speech while excluding speech that is likely to incite imminent unlawful activity.¹²⁰ Because political advocacy is among the most highly valued forms of speech, *Brandenburg* carefully delimits the type of speech that may be abridged. In *Brandenburg*, the Court defined constitutionally protected advocacy as “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence,” and suggested that incitement was something more than that: “[P]reparing a group for violent action and steeling it to such action.”¹²¹

Crime plans speech is neither advocacy speech nor incitement speech. Though crime plans speech facilitates crimes and thus could be viewed as “preparing” someone for violent action, it does not necessarily “steel” the person to such action.¹²² “Steeling” one to action requires that the speech mentally prepare one to commit a crime. It appeals to a moral necessity or justification to commit a crime. Crime plans speech, on the other hand, does not provide a justification for committing a crime, but it provides the means for doing so if one chooses to commit a crime. Some scholars argue that crime plans speech can fit in the incitement exclusion because the very knowledge of how to commit a crime might encourage one to commit it.¹²³ This, however, is a rather loose reading of advocacy. To say that someone may be “steeled” by the very fact that they are “prepared” tenuously bootstraps the first part of a conjunctive requirement to conclude that both criteria are met.

The Court in *Brandenburg* further defined incitement as speech that is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹²⁴ Thus, incitement speech has three elements: (1) imminence, (2) likelihood, and (3) intent. Importantly, *Brandenburg* can be understood as establishing a new form of strict scrutiny tailored for advocacy speech, or as creating a categorical exclusion for incitement. In either system, all three criteria must be met to deprive the

120. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (per curiam) (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

121. *Id.*

122. See *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 847 (S.D. Md. 1996), *rev'd*, *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997) (describing why *Brandenburg* was the improper test for analyzing murder manuals).

123. See, e.g., Radwan, *supra* note 25, at 65 (“[I]t is conceivable that some speech might advocate the commission of a crime without an explicit demand for the listener to do so.”).

124. *Brandenburg*, 395 U.S. at 447.

speech of constitutional protection. This is different from crime plans speech, because while the intent requirement may be helpful in excluding crime plans speech, the imminence and likelihood requirements are not.

Whereas incitement speech has a kinetic force that mobilizes a group to take action, crime plans speech is a dormant source of dangerous information. Requiring that speech pose an imminent harm in order to be excluded is helpful only when the harm posed by that speech dissipates over time. Indeed, this is the case with incitement speech. The state's interest in suppressing crime advocacy speech outweighs the speaker's free speech interest only when the threat posed is imminent because the listener is less likely to take action if the listener is not urged to take action immediately. If the listener is not called to immediate action, many intervening circumstances could dissuade the listener from taking action: the police might arrive, the listener could get bored, or a persuasive counterargument could dissuade the listener.¹²⁵ As the harm becomes more speculative, the government has less of an interest in prohibiting the speech. Unlike incitement, the knowledge of how to commit a crime cannot be reversed or counteracted over time. If four out of five incited listeners abandon their criminal agenda, the crime plans are there to instruct the fifth. Unlike an ignorable call to action, omnipresent crime plans speech effectively provides a readied arsenal to a potential criminal. It should not matter whether a criminal uses the crime plans speech to commit murder the next day or the next month—the state has a compelling interest in preventing the use of such speech at either time.¹²⁶

Crime-facilitating speech of certain specificity will inevitably facilitate crimes if consumed by a person who lacks the know-how but has the desire to commit that crime. With widely disseminated crime-facilitating speech, particularly Internet speech, it is impossible to know if the speech will be consumed by someone with a criminal propensity. As Volokh points out, for example, instructions on decrypting videos may help some people engage in fair uses, but they may help others infringe copyright.¹²⁷ Likewise, a bomb recipe could teach a student the principles

125. Healy, *supra* note 76, at 716 (“As the time frame expands outward, however, the prediction becomes increasingly difficult because of the many unknowable variables involved.”).

126. At either point, the speech is used to deny someone life without due process of the law. The imminence of the crime should not matter. Radwan suggests that the trial court in *Rice v. Paladin Enterprises, Inc.* erred in focusing on the imminence requirement of the *Brandenburg* test because the result of the case should not have hinged on whether the contract killer committed the murders a week or a year after purchasing the book. Radwan, *supra* note 25, at 67.

127. Volokh, *supra* note 4, at 1113.

of chemistry,¹²⁸ but it could also aid an aspiring arsonist. The likelihood of such speech facilitating a crime is not intrinsically knowable; it is audience-dependent.

Moreover, that specific crime-facilitating speech is readily available on the Internet at any time makes the likelihood requirement largely irrelevant, as some crime-facilitating speech will invariably facilitate crime. The frequency with which such speech facilitates crime is not a proper consideration under the likelihood requirement. In *Rice v. Paladin Enterprises, Inc.*, Paladin Enterprises sold 13,000 copies of the murder manual *Hit Man: A Technical Manual for Independent Contractors*, but the manual was only known to be connected to one murder.¹²⁹ While the court was misguided in applying the incitement test to crime-facilitating speech, in analyzing the likelihood prong, the court properly focused on the fact that the manual's specificity imbued it with strong potential for facilitating murder, even if only one murder in fact resulted. This case demonstrates that a likelihood inquiry misses the point that specific crime-facilitating plans pose a great risk of facilitating crime and in fact do facilitate crime in some cases. Thus, the likelihood that a particular example of specific crime-facilitating speech will in fact facilitate crime is not only difficult to ascertain, but also largely irrelevant in determining whether the speech should be afforded presumptive constitutional protection.

Aiding and abetting speech has long been considered "crime speech," which falls outside the scope of First Amendment protection because its very utterance is a crime. Because the imminence and likelihood criteria for incitement are ill suited for the crime plans exclusion, finessing the criteria to make them fit would likely undermine the protection afforded to advocacy speech. It would be particularly dangerous to stretch the imminence requirement to say that speech read in a murder manual a year before the murder "imminently incited" the murder. This would be in direct conflict with *Hess v. Indiana*, in which the Court held that the statement "We'll take the fucking street later" was not an imminent threat because it proposed action at an indefinite point in the future.¹³⁰ Such a narrow holding of imminence is imperative to the protection of advocacy speech, and to stretch the doctrine to hold that the indeterminate fruition of crime plans speech poses an imminent threat would severely attenuate advocacy speech protection. Additionally, taking the approach that the likelihood inquiry is irrelevant when the harm is inevitable is a dangerous approach

128. *Id.* at 1112.

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

130. *Hess v. Indiana*, 414 U.S. 105, 107-08 (1973).

with incitement speech because lawless behavior is rarely an inevitable consequence of incitement speech. The likelihood requirement importantly delimits the type of speech that can be excluded as incitement. To dismiss the likelihood requirement and presume automatically that crime advocacy produces inevitable harm would significantly infringe the First Amendment right to criminal advocacy speech.

B. WHY THE AIDING AND ABETTING MODEL IS FLAWED

Federal aiding and abetting law provides that a person who “aids, abets, counsels, commands, induces or procures” the commission of an offense against the United States “is punishable as a principal.”¹³¹ “That ‘aiding and abetting’ of an illegal act may be carried out through speech is no bar to its illegality.”¹³² Indeed, the First Amendment provides no defense to a criminal charge “simply because the actor uses words to carry out his illegal purpose.”¹³³ Whether a defendant abets homicide by giving the murderer a knife or detailed instructions for slitting the carotid artery, the defendant is guilty of aiding and abetting the crime.

Aiding and abetting speech has long been considered “crime speech,” which falls outside the scope of First Amendment protection.¹³⁴ Some might wonder why we need a crime plans exclusion if crime plans speech can be excluded as “crime speech.” In short, the crime speech classification is too narrow. The Model Penal Code demands that the aider have “the purpose of promoting or facilitating the commission of the offense.”¹³⁵ Thus, aiding and abetting liability requires two elements the crime plans exclusion may not have. First, it requires that the aider have the “purpose”

131. 18 U.S.C. § 2 (2006); *United States v. Barnett*, 667 F.2d 835, 841 (9th Cir. 1982) (finding that a search warrant established probable cause for aiding and abetting where the defendant sold a manual on how to manufacture drugs). State laws use similar language, criminalizing “willful” aiding and abetting. *See, e.g.*, MODEL PENAL CODE § 2.06(3)(a)(ii) (1962) (calling for liability when a person “aids or agrees or attempts to aid” another person in planning or committing an offense).

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

133. *Barnett*, 667 F.2d at 842. “[T]he 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.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 837 (2d ed. 1988).

134. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (“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.”). *See generally* GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE*, *supra* note 16 (discussing the limitations of free speech when the speech involves criminal activity).

135. MODEL PENAL CODE § 2.06(3)(a) (2007). *See also* MODEL PENAL CODE AND COMMENTARIES § 2.06 cmt. at 297 (1985).

of abetting a specific, identifiable crime.¹³⁶ Second, it requires that an underlying offense occur to hold the aider criminally liable.

The first requirement is too narrow because it demands some connection or exchange between the aider and the principal. The aider has the “purpose” of abetting crime when the aider sells criminal instructions to the principal. For example, in *United States v. Barnett*, the aider sold the principal drug-making instructions through a mail exchange.¹³⁷ Though the aider never had personal contact with the principal, furnishing the instructions was sufficient to make the aider criminally responsible.¹³⁸ While this standard may work for one-on-one communications and commercial exchanges for criminal instructions, it is difficult to stretch the aider-principal relationship to cover all crime plans speech widely disseminated by aiders and used by completely anonymous principals. Indeed, imputing intent to aiders with no relationship to the principal would contort the traditional understanding of aiding and abetting liability.¹³⁹ Aiding and abetting liability is certainly a good template for the crime plans exclusion, particularly if we adopt the intent requirement as the second definitional plank; however, it alone is insufficient as an alternative to the crime plans exclusion.

The second problem with excluding crime plans speech under an aiding and abetting theory is that it would implicate speech only if it produced a criminal offense. Thus, there would be no criminal liability for speech that is intended to facilitate crimes, and that is sufficiently specific

136. Note that the aider need not “know all the details of the crime, or all of the persons who were perpetrating the crime,” *United States v. Lane*, 514 F.2d 22, 27 (9th Cir. 1975) (citation omitted), but the aider must have some connection to the principal. For example, in *Barnett*, the aider sold the principal drug-making instructions through a mail exchange. *Barnett*, 667 F.2d at 840–41.

137. *Barnett*, 667 F.2d at 840–41.

138. *Id.* at 841.

139. Some courts, however, have departed from that traditional application of aiding and abetting law. For example, in *United States v. Buttorff*, the defendants were convicted for aiding and abetting fraudulent filings of income taxes by individuals who had attended the defendants’ seminar on how to commit tax evasion. *United States v. Buttorff*, 572 F.2d 619, 621–23 (8th Cir. 1978). In this case, the defendants held public and private meetings encouraging listeners to file fraudulent income tax and showing them how to do so. *Id.* at 622–23. Though the defendants had virtually no personal contact or connection with the persons who filed false income taxes, they were held liable on an aiding and abetting theory. *Id.* at 623–24, 628. This case seems to dispel the need for a connection between the principal and aider; however, this Note’s discussion of aiding and abetting liability does not rely on this case because the court applied the aiding and abetting doctrine in a very strange manner. The court upheld the aiding and abetting conviction, but then asked if the First Amendment was a defense to the conviction under the *Brandenburg* test. *Id.* at 623–24. Not only did the court fail to explain why *Brandenburg* was the appropriate test here, but it also defied the well-established principle that aiding and abetting through speech is no different from any other form of aiding and abetting, and thus could not be insulated by a First Amendment defense. *Id.* at 624.

to do so, until the speech did indeed abet a crime. Aiding and abetting liability offers no prophylaxis; it punishes speech only after a crime has occurred. The crime plans exclusion, conversely, should categorically exclude speech that has the potential to facilitate crime because the government has a substantial interest in preventing crime abetment. Thus, while aiding and abetting liability may be a good template for a possible categorical exclusion—an exclusion with an intent requirement—it is not independently sufficient for crime plans speech.

V. PROPOSED CRITERIA FOR A NEW CATEGORICAL EXCLUSION: FOUR POSSIBLE DEFINITIONS

Each of the four proposals has the same first plank: specificity. That is, the definition of the crime plans exclusion requires that the speech explain how to commit a crime with sufficient detail that a person who has never before committed the crime described could follow the instructions expecting to carry out the crime or conceal evidence. This specificity requirement is a narrowing device that keeps more speech under the umbrella of First Amendment protection. Moreover, the risks posed by crime-facilitating speech generally increase with the specificity of the plans. Consider a set of bomb-making instructions that describe how to properly handle deadly ricin when adding it to a detonating device and a set of instructions that do not. Or consider two different forms of speech: a bank robbery manual that details exactly how to crack a vault code and a novel with an intricate robbery scene that describes the criminal's preparation, but not how to crack the safe. One could distinguish between the harms of these types of speech and delimit the speech excluded by asking: "Would a person following the criminal instructions for a crime she had never committed before expect to carry out the crime explained or conceal evidence from that crime?" If the answer is yes, the speech satisfies the first definitional plank of the crime plans exclusion. If no, the speech maintains presumptive constitutional protection and is analyzed under strict scrutiny.

Some may argue that the specificity requirement is overly vague and creates uncertainty as to what speech is categorically excluded or presumptively protected.¹⁴⁰ They would argue that there is no principled

140. This is similar to Volokh's criticism that it is difficult to draw a line between "substantially" and "insubstantially" crime-facilitating speech because "generality and obviousness are such subjective criteria." Volokh, *supra* note 4, at 1213. He asserts that "the line's vagueness would necessarily cause uncertainty" that would lead to both over- and underdeterrence. *Id.* Note, however, that Volokh concedes that some line drawing must be done because restrictions on crime-facilitating speech must

way to apply the specificity requirement. This, however, is not a forceful objection to the specificity requirement because the definition is not overly vague.¹⁴¹ In reading crime-facilitating speech, one can decipher whether the speech was sufficiently specific as to instruct a person who has little or no experience in committing the crime described in the speech. Viewing the speech from the perspective of someone who has never committed the crime described (regardless of that person's general criminal history) is an important element because criminal instructions are particularly useful—and thus pose the greatest risk—to a person attempting that particular crime for the first time. If only a seasoned criminal could follow the instructions given the vagueness of the details, the speech would not be nearly as useful to aspiring criminals, and thus would pose a much lesser risk. Because novices are more likely to use criminal instructions,¹⁴² and because they generally require detailed instructions, the specificity requirement directly targets crime-facilitating speech that poses the greatest risk of abetting crime.¹⁴³

The crime plans exclusion could take many forms, but this Note proposes four alternatives for the second plank of the crime plans exclusion. First, the exclusion could have no second plank at all, requiring only specificity. Second, the exclusion could have an intent requirement, in addition to the specificity requirement, thereby excluding only speech that is intended to abet crime. Third, the exclusion could encompass only crime-facilitating speech that meets the specificity requirement, and that has no redemption value, meaning it would exclude speech that, “taken as a whole, lacks serious literary, artistic, political, or scientific value.”¹⁴⁴ Fourth, the second plank of the exclusion could combine the intent and redemption value requirements, in addition to the specificity requirement.

A. SINGLE PLANK CATEGORICAL EXCLUSION

Under the first proposal, presumptive First Amendment protection

distinguish between speech that provides less assistance and speech that provides substantial assistance. *Id.*

141. Though all language poses a risk of vagueness, at some point, lawmakers and judges must be able to articulate rules of law or principles that guide their decisionmaking. *See, e.g.*, CHEMERINSKY, *supra* note 102, at 943 (“Ambiguity is inherent in language, and all laws will have some vagueness.”).

142. This is in comparison to criminals who are experienced with the crime described.

143. Additionally, the court could adopt a rule that if a criminal is found in possession of crime instructions and successfully carried out the crime for the first time, the commission of the crime is *per se* evidence that the instructions were sufficiently specific. Of course, this might still raise some causation issues beyond the scope of this Note.

144. *Miller v. California*, 413 U.S. 15, 24 (1973).

would be denied to all crime-facilitating speech that explains how to commit a crime with sufficient detail that a person with little or no experience in committing the crime described could follow the instructions and expect to carry out the crime or conceal evidence of the crime. Thus, the exclusion would encompass all crime-facilitating speech that met the specificity requirement regardless of the speaker's intent or the speech's redemptive value. Of the four proposals, this is the least speech protective, but it is the most effective in eradicating the risks posed by crime-facilitating speech.

There are several advantages to a single plank categorical exclusion with no intent or redemption value criterion. Most importantly, it distinguishes between presumptively protected and categorically excluded speech on the basis of risk alone. It denies presumptive protection to the most dangerous crime plans speech—that which gives specific instructions for committing a crime—and maintains presumptive protection for speech that does not meet that criterion. Whereas the intent and redemption value requirements presumptively protect speech that may be equally as dangerous as speech that is categorically excluded, the single plank exclusion draws lines based only on the risk associated with the speech. Perhaps the risks posed by specific crime-facilitating speech are so great that no purpose for the speech could outweigh the interest in preventing it.¹⁴⁵

Moreover, the single plank exclusion is not prone to the vagueness criticism that surrounds the intent and redemption value planks. With much crime-facilitating speech, the speaker's intent is, at best, speculative and often unascertainable.¹⁴⁶ Consider the following three websites. First, totse.info is an online discussion board that hosts a wide array of criminal

145. Several scholars argue this convincingly. See, e.g., Malloy, *supra* note 25, at 1221–22; Radwan, *supra* note 25, at 48, 72–73; Monica Lyn Schroth, *Reckless Aiding and Abetting: Sealing the Cracks That Publishers of Instructional Materials Fall Through*, 29 SW. U. L. REV. 567, 569, 584 (2000).

146. Furthermore, it is difficult to prove purpose with crime plans speech because the actual words will likely be consistent with an intention to facilitate crime *and* mere knowledge that the words will facilitate crime. Volokh, *supra* note 4, at 1184–85. Consider a webpage that contains bomb instructions with no other text on the page and has the URL address “howtomakeabomb.com.” Here, there is virtually no context to help surmise the speaker's intent. Is the speaker intending to facilitate a crime or is the speaker motivated solely by a desire to speak or fight against speech suppression? Volokh mentions the latter as one of five potential motivations in crime-facilitating speech. *Id.* at 1183–84. Because the instructions are harmful regardless of the speaker's motivation and the speech has little or no value beyond the exercise of speech for the sake of speech, the instructions should, arguably, fall into the exclusion.

instructions, including how to launder money,¹⁴⁷ how to make a sparkler bomb,¹⁴⁸ how to make an improvised explosive device (“IED”),¹⁴⁹ how to make lysergic acid diethylamide (“LSD”),¹⁵⁰ and how to deface billboards.¹⁵¹ Aside from a boilerplate disclaimer that the instructions are for “informational purposes only” and that the website assumes no liability for damages resulting in the use of these instructions, the website does not indicate whether it intends to abet crime.¹⁵² Indeed, the disclaimer could be either a thinly veiled attempt to avoid aiding and abetting liability or a genuine attempt to limit the uses of the instructions. One scholar reasons that because the specific criminal instructions are not provided for a stated, noncriminal purpose, it could be inferred that they are offered to abet crime.¹⁵³ Though the speaker would be reckless in posing a substantial risk of facilitating crime, it would be difficult to prove the speaker intended to facilitate crime.¹⁵⁴ Now consider the website reactor1967.fortunecity.com, which explains “[h]ow to build homemade nuclear weapons for peaceful [sic] and defensive purposes.”¹⁵⁵ Like totse.info, this site has a generic legal disclaimer, but unlike totse.info, its author clearly expresses an intent to aid others in the creation of illegal and catastrophically dangerous weapons, albeit it for “peaceful and defensive purposes.” Finally, consider a formerly operating website entitled Death 2 ZOG, which promoted killing Jewish people, advocated violence by African-Americans against other African-Americans, and which was plastered with Nazi and other White Power symbols.¹⁵⁶ The site provided downloadable versions of books with

147. *Old School Money Laundering*, TOTSE.INFO (Mar. 22, 2011, 04:53 AM), <http://www.totse.info/cms/old-school-money-laundering>.

148. *How-To: Make a Sparkler Bomb*, TOTSE.INFO (Mar. 12, 2011, 7:19 PM), <http://www.totse.info/cms/how-to-make-a-sparkler-bomb>. Totse.com hosts several additional bomb recipes, including one for making an OxyAcetylene bomb with readily accessible ingredients such as a propane tank and a balloon. *Make an OxyAcetylene Bomb*, TOTSE.INFO (Apr. 26, 2011, 2:25 AM), <http://www.totse.info/cms/how-to-make-an-oxyacetylene-bomb>.

149. *How to Make an Improvised Explosive Device (IED)*, TOTSE.INFO (Mar. 8, 2011, 1:42 AM), <http://www.totse.info/cms/how-to-make-an-improvised-explosive-device-IED>.

150. *How to Make LSD*, TOTSE.INFO (Apr. 25, 2011, 10:35 PM), <http://www.totse.info/cms/how-to-make-isd>.

151. *How to Deface and Vandalize Billboards*, TOTSE.INFO (Jan. 26, 2011, 5:57 AM), <http://www.totse.info/cms/vandalizing-billboards>.

152. *Bad Ideas*, TOTSE.INFO, http://www.totse.info/en/bad_ideas/index.html (last visited Apr. 26, 2011).

153. Bakken, *supra* note 7, at 314–15.

154. Consider Volokh’s five potential speaker motivations, including speech for the sake of speech or speech in retaliation to free speech suppression. Volokh, *supra* note 4, at 1182–84.

155. *How to Build a Homemade Nuclear Bomb*, REACTOR1967, <http://reactor1967.fortunecity.com/nuke.html> (last visited Mar. 31, 2011).

156. Bakken, *supra* note 7, at 314–15 (citing *Hate Crime on the Internet: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 24 (1999) (statement of Howard Berkowitz, Nat’l Chairman of

detailed criminal instructions.¹⁵⁷ In this case, the context of the site alone is likely sufficient to infer the speaker's intent to facilitate harm.¹⁵⁸ Though the third website is more morally repugnant than the first or second site, they each pose a serious risk of facilitating crime and perhaps should fall into the categorical exclusion regardless of the speaker's intent.¹⁵⁹ Indeed, an intent requirement would not help resolve whether any of these sites is deserving of presumptive protection.¹⁶⁰

A single plank categorical exclusion is not as speech restrictive as some critics contend.¹⁶¹ The specificity requirement is an effective narrowing device that promotes free speech principles while proscribing speech with the greatest potential of facilitating crime. Moreover, it is important to remember that categorically excluding speech is not the same as criminalizing or imposing liability for the speech. Indeed, criminal and civil statutes have mens rea requirements that assign liability in proportion to culpability, and thus speech cannot be illegal without some requisite intent.¹⁶² In other words, culpability is required by law, but it is not mandated by the First Amendment in carving out categorical exclusions.¹⁶³ Many categorical exclusions, such as obscenity, child pornography, fighting words, and true threats, have no requisite speaker intent.

The greatest problem, however, with eschewing an intent or redemption value plank is the potential chilling effect of the threat of civil

the Anti-Defamation League)).

157. *Id.*

158. *Id.*

159. In fact, the hate speech in the context of the third website is presumptively protected. *See, e.g., Beauharnais v. Illinois*, 343 U.S. 250 (1952). Thus, it is conceivable that a court would simply instruct the speaker to remove the criminal instructions, but would allow the hate speech to remain intact.

160. Bakken seems to advocate liability for speech that knowingly abets crime, so her proposal does include a mens rea level; however, comparison of these three websites illustrates the inadequacy of the intent requirement in excluding harmful crime-facilitating speech. *See Bakken, supra* note 7, at 313–14.

161. *See generally, e.g., Volokh, supra* note 4 (rejecting a single plank categorical exclusion and instead defining several factors to consider, including the size of the audience, the ability to use the information for crime, and the seriousness of the potential harm).

162. Congress has made it a crime for any person 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 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.

18 U.S.C. § 842(p)(2)(B) (2006). This statute has the mens rea requirement of at least knowledge, making it unlawful to supply information “knowing” that it be used in furtherance of a crime. *Id.*

163. *Id.*

liability on valuable speech. Because tort liability generally requires a negligence or recklessness standard, crime-facilitating speech that is intended for noncriminal use and has noncriminal value could be implicated in civil liability for inadvertently facilitating crimes. This is particularly true in the science, technology, military, and law enforcement domains. For example, an organic chemistry textbook that describes in great detail how to create an arsenal of bombs could fall into criminal hands and be used to create a devastating explosion akin to the Oklahoma City bombing. Of course, the textbook publisher did not intend to facilitate crimes, but must have known that the textbook's intricate details of bomb making could facilitate terrorist acts. Moreover, a law enforcement guide describing how to fire a weapon or to disarm a suspect, or a military manual explaining how to kill in combat have valuable noncriminal uses, but if they were posted on the Internet or disseminated to the general public, they could certainly be appropriated for criminal uses. These examples demonstrate that there are some forms of speech that are difficult to protect without an intent or redemption value plank, as a negligence or recklessness standard could yield civil liability for innocent publishers.

Additionally, a crime plans exclusion without an intent requirement does not reinforce free speech values because it does not strike a balance at the definitional level between First Amendment principles and the state's substantial interest in prohibiting crime-facilitating speech. Without an intent or redemption value requirement, the crime plans exclusion is a wholesale extraction of specific, crime-facilitating information, regardless of the noncriminal value that the speech may possess.

B. INTENT REQUIREMENT

Under the second proposal, the crime plans exclusion would require specificity plus intent, and thus would cover only speech that is aimed at facilitating crime. The intent requirement would distinguish presumptively protected and categorically excluded speech based on the culpability of the speaker. Unlike the specificity requirement, which delimits protected speech based on criteria that are generally tied to the risk posed by the speech, the intent requirement does not help eradicate harmful speech. In fact, the intent requirement presumptively protects speech that may be equally as harmful as the speech that is categorically excluded. But importantly, the intent requirement reinforces First Amendment values by promoting more free speech.

Symbolically, the intent requirement conveys the message that the

First Amendment does not dignify speech aimed at crime facilitation with presumptive protection. It says that the First Amendment is not aligned with criminal activity and provides no justification for those who aim to abet crime through speech.¹⁶⁴ But the intent requirement does afford presumptive protection to crime-facilitating speech that touts valuable, noncriminal uses. The intent requirement is the result of compromise at the definitional level of the categorical exclusion—it is a plausible outcome of balancing the state’s substantial interest in prohibiting crime-abetting speech with fundamental free speech interests.

The Court struck this sort of balance when imposing an actual malice requirement in the categorical exclusion for false defamation against public figures and officials.¹⁶⁵ Because false defamation is harmful regardless of the speaker’s intent, the actual malice requirement did little, if anything, to eradicate the harms of defamatory speech.¹⁶⁶ Instead, the requirement prevented the chilling of speech that would result from the fear of civil liability for negligently published, false defamatory speech. The Court reasoned that because critical speech about public leaders is imperative in a liberal democracy, it would be impermissible to chill such speech with the threat of liability.¹⁶⁷ The requirement also reinforced First Amendment values by suggesting that the First Amendment does not ratify malicious false speech about public figures that in no way advances the search for truth in the marketplace of ideas. Indeed, this nod to culpability considerations demonstrates that categorical exclusions may be narrowed to reinforce First Amendment values—not just to target harmful speech.¹⁶⁸

164. See Shapiro’s *reductio ad absurdum* argument inspired by *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984), demonstrating that there would be no logical stopping point for recognizing conduct as communicative (and thereby insulated with First Amendment protection) if the Court were to hold that sleeping in the park was a form of communication within the ambit of the First Amendment. See Shapiro, *supra* note 20, at 333. Taken to its logical extreme, one might have to pause and consider whether a particular homicide has communicative value that falls within the First Amendment. Even if this inquiry is brief and quickly dismissed, it nonetheless “trivializes the First Amendment to seek to use it as a shield in the manner asserted here’ by touting the park sleep-in as speech.” *Id.* at 333 & n.340 (quoting *Clark*, 468 U.S. at 301 (Burger, C.J., concurring)). In the same vein, it trivializes the First Amendment to make it “complicit in [the] evil” of abetting crime. *Id.* at 334.

165. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 134, 154–55 (1967) (recognizing a categorical exclusion for false defamation against public figures); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283–92 (1964) (recognizing a categorical exclusion for false defamation against public officials).

166. Though the actual malice requirement did not reduce the intrinsic harm of false defamatory speech, it may have reduced the aggregate harm of the speech by decreasing its volume, as it disallowed the publication of speech, a media the defendant knew was false or published with reckless indifference to the truth. See *Sullivan*, 376 U.S. at 287–88.

167. *Id.* at 290–92.

168. Greenawalt posits that free speech principles provide a powerful reason why liability “should not extend to all negligent or reckless acts of communication, that is, to situations where the speaker is

In *Rice v. Paladin Enterprises, Inc.*, the Fourth Circuit intimated that specific crime-facilitating speech was, or could be, categorically excluded with an intent requirement. The court reasoned that “at the very least where a speaker—individual or media—acts with the purpose of assisting in the commission of crime, we do not believe that the First Amendment insulates that speaker from responsibility for his actions simply because he may have disseminated his message to a wide audience.”¹⁶⁹ By stating that the First Amendment does not insulate speakers who disseminate crime-facilitating information with the purpose of abetting crime, the court suggested that this speech is not covered by the First Amendment, and is thus categorically excluded.¹⁷⁰ The court further intimated that crime plans speech is not presumptively protected by stating that “[a]s such, the murder instructions in *Hit Man* are, collectively, a textbook example of the type of speech that the Supreme Court has quite purposely left unprotected, and the prosecution of which, criminally or civilly, has historically been thought subject to few, if any, First Amendment constraints.”¹⁷¹

Critics might reject the intent requirement because it is difficult to surmise a speaker’s intent.¹⁷² Often there is little evidence of intent and what does exist is frequently subject to differing interpretations.¹⁷³ Of course, this same criticism could be made of any criminal law with an intent inquiry. As Justice Brennan has noted, “[I]t has been some time now since the law viewed itself as impotent to explore the actual state of a

wholly unaware of the use to be made of what he says or thinks there is only some modest risk it will be used for a criminal purpose.” GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE, *supra* note 16, at 87. He argues that “the values of speech are more fully implicated” when a person’s conduct is not intended to advance criminal activity, but does so recklessly or negligently. *Id.* at 281. In those situations, “the requirements for liability should generally be more stringent.” *Id.* Still, as mentioned in the discussion of the single plank categorical exclusion, culpability can attach at the statutory level; the categorical exclusion does not mandate an intent requirement.

169. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 248 (4th Cir. 1997). *See also* *United States v. Mendelsohn*, 896 F.2d 1183, 1185–86 (9th Cir. 1990) (holding that the First Amendment did not prohibit prosecution of aiding and abetting interstate transportation of wagering paraphernalia where computer programs for recording and analyzing illegal wagers were publicly disseminated); *United States v. Barnett*, 667 F.2d 835, 841–42 (9th Cir. 1982) (holding that drug manufacturing instructions mailed to numerous customers with whom the defendant had not had personal contact was sufficient for aiding and abetting liability).

170. *See Rice*, 128 F.3d at 248–49. Because the court implicated the publishers under an aiding and abetting theory, this is likely a broad statement of aiding and abetting; however, as discussed *infra* Part III, aiding and abetting is a good template for a crime plans exclusion with an intent requirement.

171. *Id.* at 249–50 (holding that the First Amendment did not bar the plaintiff’s civil aiding and abetting cause of action).

172. Healy, *supra* note 76, at 698–700; Volokh, *supra* note 4, at 1179–81, 1185–88.

173. Healy, *supra* note 76, at 699–700. *See* Volokh, *supra* note 4, at 1179–81, 1185–88.

man's mind."¹⁷⁴ Given our longstanding legal tradition of inquiring into intent, courts are well equipped to handle a categorical exclusion with an intent requirement. Moreover, as the *Rice* court suggested, the speaker's mode of disseminating the speech and the nature of the speech itself can strongly imply a criminal or noncriminal purpose.¹⁷⁵

Other critics might say that the harm of crime-facilitating speech is comparable to the harm associated with child pornography, and thus the exclusion should be tantamount to the child pornography exclusion. In *New York v. Ferber*, the bellwether case for the child pornography exclusion, the Court essentially deferred the question as to what it would do with arguably valuable uses of child pornography.¹⁷⁶ Because it would be morally offensive to dignify any child pornography with presumptive protection, the Court categorically excluded all child pornography regardless of the speaker's intent.¹⁷⁷ Moreover, it is hard to imagine any valuable use of child pornography.¹⁷⁸ Crime plans speech, on the other hand, can have valuable uses, and thus questions of value are not as easily deferrable. Indeed, a crime plans exclusion that deferred questions of potentially valuable uses of crime-facilitating speech would be largely unhelpful because it would create uncertainty about major domains of valuable crime-facilitating speech. Even if the proscribable, valuable speech were not criminalized, civil action (or the threat of civil action) would chill such speech, as the standard for liability in tort actions is negligence, and the authors of such material would know, or should know, the potential for its misuse. Indeed, there are many important distinctions between child pornography and crime plans speech that make *Ferber* an inadequate

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

175. *Rice*, 128 F.3d at 248, 253–54. In the context of civil liability for publications of crime-facilitating speech, the marketing strategy for the speech can also be telling of the speaker or publisher's intent. *Id.*

176. *New York v. Ferber*, 458 U.S. 747, 773 (1982) (“How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute’s reach.”).

177. *See id.* at 756–58.

178. There is some mention of medical works displaying nude images of children, but that speech would not likely be considered pornographic. *Id.* at 773. Ostensibly, the photography of nude children in the highly professional and nonexploitative context of medical studies (or other educational works) where the children are not placed in sexually compromising positions would not have the same harmful effects as the production of child pornography for entertainment value. Though the Court declined to address this issue, it is likely that photography of nude children for medical purposes would not constitute child pornography. Thus, the issue of valuable uses of child pornography may be circumvented in the specific use of “pornography” (as opposed to “nudity” or some broader term) in the description of the exclusion.

paradigm for the crime plans exclusion.

Whereas the production of child pornography is itself a harm the government has a substantial interest in preventing, the harm produced by crime plans speech is contingent on an audience. For example, if a person took pornographic pictures of a child and locked them in a drawer, those pictures would fall within the categorical exclusion because the production of the pictures itself, insofar as they involved a child,¹⁷⁹ is a harm the state has a substantial interest in preventing.¹⁸⁰ Now imagine that a skilled contract killer wrote down his precise methodology for killing and locked it in a drawer. Here, the state would have no interest in preventing the speech because it could not create any harm without being viewed by an audience.¹⁸¹ Thus, the intrinsic harm logic from *Ferber* does not aptly translate to the crime plans exclusion.

The rationale for excluding crime plans is more akin to the obscenity exclusion rationale. In categorically excluding obscenity, the Court reasoned that the harm stems from the use—not the production—of obscene materials, namely, the objectification of people as mere sex objects.¹⁸² Similarly, the harm flowing from crime plans speech is the use of the materials to commit crimes—not the production of the speech. Thus, the crime plans exclusion requires more rigorous criteria than the wholesale prohibition employed in the child pornography exclusion.

C. THE REDEMPTION VALUE PLANK

Under the third proposal, the crime plans exclusion would encompass only crime-facilitating speech that meets the specificity requirement, and that, “taken as a whole, lacks serious literary, artistic, political, or scientific value.”¹⁸³ This plank, the redemption value criterion, is modeled after the

179. *Cf. Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (striking down a law prohibiting virtual child pornography generated by computer imaging and adults portraying children; because the production of virtual pornography does not harm children, this speech does not fit the justification for the categorical exclusion, and thus it does not fall into the exclusion).

180. *Osborne v. Ohio*, 495 U.S. 103 (1990) (holding that the mere possession of child pornography can be made unlawful because the same interests in eliminating the entire chain of distribution that justified the holding in *Ferber* also justify eliminating the demand by criminalizing possession of child pornography).

181. More specifically, it would have to be viewed by a person with the desire or propensity to commit homicide.

182. *Miller v. California*, 413 U.S. 15, 27–28 (1973).

183. *Id.* at 24 (affirming the conviction of an individual for mailing unsolicited sexually explicit material in violation of a California statute and announcing more concrete standards for regulating obscene works).

narrowing principle used in obscenity speech. Like the intent requirement, this criterion would bestow presumptive protection on speech that is equally as harmful as speech categorically excluded under the crime plans exclusion; but also like the intent requirement, this criterion would reinforce free speech values. Though the redemption value plank would not exclude speech based on the risk it poses, it would promote more free speech than the first proposal. Like the intent requirement, the redemption value proposal represents a compromise at the definitional level of the exclusion, balancing the state interest in prohibiting crime-abetting speech with First Amendment principles.

The redemption value plank is a helpful addition to the definition of the crime plans exclusion because it validates noncriminal uses of crime-facilitating speech and excludes crime-facilitating speech that has little or no noncriminal value. The redemption value criterion would likely cause more speech to be excluded than the intent requirement because the redemption value plank requires an affirmative showing that the speech has some serious literary, artistic, political, or scientific value. If speech is intended to facilitate crime, it likely does not have independent, noncriminal value to society. For example, a detailed guide to contract killing with a preface extolling the virtues of contract killing has virtually no noncriminal value.¹⁸⁴ Thus, the redemption value criterion generally envelops much of the speech that would be categorically excluded under the intent requirement and adds an additional caveat that the speech must contribute some affirmative value to public discourse. Consider the same three websites described in the intent requirement analysis under the redemption value criterion. Under the intent requirement, only the third website, the site advocating the slaughtering of Jewish and African-American people and providing explicit crime plans for doing so, could be definitively excluded. Under the redemption value criterion, however, both the hate site and the criminal instructions site with no particular message or indication of intent could be excluded because both, in their entirety, lack redemptive value.

The redemption value standard may be criticized for being vague as to what constitutes “literary, artistic, political, or scientific value,” but this objection is not fatal to the standard. In announcing the redemption value criterion for the first time in *Miller v. California*, the Court implicitly preempted vagueness concerns by stating that “[i]n resolving the inevitably

184. Arguably, the manual might have some entertainment value, but given the harm posed by the speech, this is probably an easily dismissed consideration.

sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with . . . other offenses against society and its individual members.”¹⁸⁵ By describing the procedural safeguards immediately after articulating the redemption value prong, the Court intimated that the redemption value standard is not impermissibly vague when it is coupled with the traditional protective features of the adversarial system.¹⁸⁶ Furthermore, as the Court noted in *Miller*, “That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.”¹⁸⁷

Moreover, the standard may be more easily applied in the context of the crime plans exclusion than it is with obscenity, as the context of the crime plans is typically telling of the speech’s value. For example, a murder manual touting the virtues of contract killing, mentally preparing a novice killer for the kill, providing detailed instructions on how to perform the kill, and explaining how to conceal the evidence has compelling criminal value. Though the manual may be somewhat entertaining to “armchair warriors,”¹⁸⁸ the manual as a whole lacks “serious literary, artistic, political, or scientific value.”¹⁸⁹ Because the manual has nearly no

185. *Miller*, 413 U.S. at 26. Note that in *Miller* the Court rejected the standard in *Memoirs v. Massachusetts*, 383 U.S. 413, 418–19 (1966), that the speech must be “utterly without redeeming social value.” *Miller*, 413 U.S. at 23 (quoting *Memoirs*, 383 U.S. at 418). Under the *Memoirs* test, the prosecution had to affirmatively establish that the material was “utterly without redeeming social value,” which required the “prosecution to prove a negative . . . a burden virtually impossible to discharge under our criminal standards of proof.” *Id.* at 22 (quoting *Memoirs*, 383 U.S. at 418–19). In *Miller*, the Court articulated a lesser, but more pointed, inquiry as to whether the speech, “taken as a whole, lack[s] serious literary, artistic, political, or scientific value.” *Id.* at 24.

186. *See id.* at 26–28 & n.10 (“The Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices These words, applied according to the proper standard for judging obscenity . . . give adequate warning of the conduct proscribed and mark . . . boundaries sufficiently distinct for judges and juries fairly to administer the law”) (quoting *United States v. Petrillo*, 332 U.S. 1, 7–8 (1947)) (internal quotation marks omitted).

187. *Id.* at 27–28 n.10 (quoting *Petrillo*, 332 U.S. at 7).

188. Volokh, *supra* note 4, at 1124 (“[A]rmchair warriors [are people] who [find] it entertaining to imagine themselves as daring mercenaries who are beyond the standards of normal morality.”).

189. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 255 (4th Cir. 1997) (quoting *Miller*, 413 U.S. at 15, 24). In *Rice*, the Court stated that “[t]he likelihood that *Hit Man* actually is, or would be, used in . . . legitimate manners,” such as “incidentally inform[ing] law enforcement on the techniques that the book’s readers will likely employ in the commission of their murders” or providing entertainment to law-abiding citizens, is slim and a reasonable jury could properly disregard these arguments. *Id.* Under the redemptive value standard, the jury would have a more principled method for analyzing these arguments rather than simply dismissing them. With the redemptive value criteria in mind, the jury

noncriminal value, it does not make a contribution to the marketplace of ideas recognizable under the First Amendment.¹⁹⁰

D. THE INTENT-REDEMPTION VALUE PLANK

Combining the specificity requirement with the intent and redemption value planks would likely be the most speech-protective definition for the crime plans exclusion. Under this proposal, crime-facilitating speech would be categorically excluded only if it was aimed at abetting crime and had no serious literary, artistic, political, or scientific value. This approach is similar to Beth A. Fagan's three-prong test for the crime plan categorical exclusion, which requires that (1) the speaker have "*specific intent* to assist, instruct, and encourage" a crime; (2) to impose liability, the speaker's intent must be "to promote or instruct *criminal* conduct"; and (3) the speech "must have taken an instructional, nonexpressive form, virtually devoid of 'political, informational, educational, entertainment, or other wholly legitimate purpose.'"¹⁹¹ Fagan argues that this approach takes into account the form and purpose of the speech, promotes free speech interests, and still permits liability for culpable speakers. The third prong, she contends, promotes First Amendment interests by protecting speech with expressive content and avoiding a chilling effect on valuable speech.¹⁹²

would assess whether those two legitimate uses imbued the work as a whole with serious literary, artistic, political, or scientific value. Under this framework, a jury could likely find that the manual fails the redemptive value test. See also S. Elizabeth Wilborn Malloy's "Harm Advocacy" exclusion: a "how-to" manual might have some value in assisting law enforcement in identifying the modus operandi of a criminal, but speech need not be totally devoid of merit to qualify as categorically excludable speech. Malloy, *supra* note 25, at 1227. That harmful speech may have some hypothesized social benefit is typically not a sufficient condition to deem the speech protected. *Id.*; *Rice*, 128 F.3d at 255.

190. In *Rice*, the Fourth Circuit alluded to an application of the obscenity criteria in holding that *Hit Man*, a highly detailed instruction manual on how to be a contract killer, was completely devoid of "any political, social, entertainment, or other legitimate discourse." *Rice*, 128 F.3d at 255. By reasoning the murder manual had little or no noncriminal value, the court determined the manual would utterly fail the obscenity criteria. *Id.* Note, however, that the comparison to the obscenity criteria was dicta. The decision rested on an aiding and abetting theory that was established by a stipulation that the publishers intended the manual to be used for criminal purposes; however, the court suggested that even without the stipulation, the publishers' culpable intent could likely have been determined by the jury. *Id.* at 248.

191. Fagan, *supra* note 14, at 635 (quoting *Rice*, 128 F.3d at 266).

192. *Id.* See also Malloy's "Harm Advocacy" exclusion, which encompasses "the narrow spectrum of expression that both advocates and facilitates illegal or tortious activities against others." Malloy, *supra* note 25, at 1220–21. The exclusion requires that the author of the speech either knew or acted with reckless disregard as to whether recipients of the speech might act on that author's detailed suggestions on how to commit a particular unlawful or tortious act and that the speech at issue actually caused or was a substantial factor in the commission of a criminal act or intentional tort.

Though the combination of the intent and redemption value criteria is, in theory, the most speech-protective plank, in practice, it would not be much more protective than the intent requirement. In fact, the only speech that would be protected under this standard that would not be protected under the intent requirement is speech that is aimed at facilitating crime, but has some serious literary, artistic, political, or scientific value. Not only is this a very narrow class of speech, but also this is a class of speech that is likely undeserving of presumptive protection. As the court said in *Rice*, even if the murder manual had some entertainment value or could incidentally inform police about criminal techniques, the harm posed by criminal instructions aimed at abetting crime vastly outweighed these rather minimal values.¹⁹³

E. PRIOR RESTRAINTS

In addition to a categorical exclusion for crime plans speech, the most dangerous criminal instructions, such as plans to build atomic bombs or to synthesize smallpox, should be subject to a prior restraint, regardless of the speaker's intent or the speech's redemptive value.¹⁹⁴ Crime-facilitating speech that threatens catastrophic destruction is undoubtedly among the most dangerous types of speech, if not the most dangerous. Thus, in this narrow category of speech, the government's interest in preventing facilitation of apocalyptic crimes will consistently outweigh the speaker's intent, regardless of the speaker's motivations or message. This speech should be subject to a prior restraint so long as it satisfies the specificity requirement of the crime plans exclusion and proper procedures are followed to ensure the constitutionality of the restraint.¹⁹⁵

Id. at 1221. Malloy acknowledges that the Harm Advocacy exclusion "still might implicate certain First Amendment values like speaker and listener autonomy, but the state's interest in protecting the lives of citizens outweighs whatever value inheres in permitting access to detailed information about criminal methods." *Id.* at 1221–22. Though Malloy does not expressly lay out the obscenity criteria in her proposed exclusion, she intimates as much by saying the exclusion should not include any "work that, taken as a whole, possesses serious artistic, literary, scientific, political, or philosophical value." *Id.* at 1226.

193. See *supra* note 189 and accompanying text.

194. The government might prohibit publication of certain highly dangerous information. Research in these fields could then be conducted only by government employees or contractors, or those with government permission to conduct such research. While these researchers could not openly discuss their findings in public discourse, they likely would be able to share information with others who have similar security clearances.

195. Some critics think that the Constitution bars any type of prior restraint, but this theory was debunked in *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931), in which the Court stated that "the protection even as to previous restraint is not absolutely unlimited." See also *Freedman v. Maryland*, 380 U.S. 51, 54–57 (1965). Other critics think that prior restraints should operate only on

Though its definition is somewhat elusive,¹⁹⁶ prior restraints have been described as “administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.”¹⁹⁷ Prior restraints generally “involve either an administrative rule requiring some form of license or permit before one may engage in expression, or a judicial order directing an individual not to engage in expression, on pain of contempt.”¹⁹⁸

Prior restraints are reserved for the most dangerous or offensive forms of speech. Indeed, “[a]ny system of prior restraints of expression comes to [the Supreme] Court bearing a heavy presumption against its constitutional validity.”¹⁹⁹ To pass constitutional muster, a prior restraint must have procedural safeguards that disallow standardless discretion in reviewing the speech. Standardless discretion is tantamount to allowing content- or viewpoint-based discrimination.

As articulated in *Freedman v. Maryland*, there are four constitutionally mandated safeguards necessary in prior restraints.²⁰⁰ First, the censor has the burden of proving the speech is unprotected.²⁰¹ “Where the transcendent value of speech is involved, due process certainly

material that is categorically excluded. My prior restraint proposition requires only that the speech satisfy the first plank of the categorical exclusion. Under the three proposals of categorical exclusions that have a second plank—intent, redemption value, or both—this speech would not necessarily fall into the categorical exclusion. Yet, prior restraints are not restricted to categorically excluded speech. For example, if election officials got wind of a plan to electioneer in violation of rules like those involved in *Burson v. Freeman*, that speech could be enjoined. See *Burson v. Freeman*, 504 U.S. 191, 210–11 (1992). Thus, even though political speech is certainly not categorically excluded (it is, of course, considered the most valuable speech), in these circumstances it could be subject to a prior restraint in the form of an injunction. *Id.*

196. See, e.g., CHEMERINSKY, *supra* note 102, at 949.

197. *Alexander v. United States*, 509 U.S. 544, 550 (1993) (quoting M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, at 4–14 (1984)).

198. CHEMERINSKY, *supra* note 102, at 950 (quoting RODNEY SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 8-4 (1994)). For examples of injunctions, see *Near*, 283 U.S. at 697 and *United States v. Carmichael*, 326 F. Supp. 2d 1267 (M.D. Ala. 2004). See *Freedman v. Maryland*, 380 U.S. 51 (1965) for an example of a licensing system.

199. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 592 (1976) (quoting *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971)). Because prior restraints carry such a stigma, the Court has been loath to characterize some government actions as prior restraints, even when the action shares striking similarities with traditional notions of prior restraints. See, e.g., *Alexander v. United States*, 509 U.S. 544, 549–55 (1993) (holding that the seizure and destruction of books, magazines, and films from a person convicted of an obscenity law violation did not constitute a prior restraint); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 389–91 (1973) (holding that an agency’s order to newspapers to stop publishing gender-based employment advertisements did not constitute a prior restraint).

200. See *Freedman*, 380 U.S. at 58–59.

201. *Id.* at 58.

requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.”²⁰² Second, the censorship board’s decision must be appealable. In *Freedman*, the Court reasoned that because a judicial determination is required in an adversarial proceeding to ensure “necessary sensitivity to freedom of expression,” that “only a procedure requiring a judicial determination suffices to impose a valid final restraint.”²⁰³ Third, the censorship board’s review must be completed within a “specified brief period,” and the restraint imposed until final review must be “the shortest fixed period compatible with sound judicial resolution.”²⁰⁴ Fourth, the appeal decision must be timely “to minimize the deterrent effect of an interim and possibly erroneous denial of a license.”²⁰⁵ If these procedural safeguards are built into the prior restraint and adhered to, the prior restraint will pass procedural due process review.

Prior restraint on patently dangerous crime-facilitating speech is not a novel concept. The United States has historically placed strictures on scientifically important speech that has presumptive value under the First Amendment, but that poses a grave threat to national security.²⁰⁶ For example, in 1917, Congress introduced the Voluntary Tender Act,²⁰⁷ “which gave the Commissioner of Patents the authority to withhold certification from inventions that might harm U.S. national security, and to turn the invention over to the United States government for its use.”²⁰⁸ In 1951, the Invention Secrecy Act “established a prior restraint on government employees and . . . private inventors, to prevent them from publishing inventions deemed to be ‘detrimental to the national security.’”²⁰⁹ The Act granted the government power to review every patent application to determine the invention’s national security implications, and allowed it to forestall production of any invention and to bar the inventor from sharing the information with others.²¹⁰ The patent applicants could appeal only to the Secretary of Commerce.²¹¹ The orders typically last one year but could be extended indefinitely if the government

202. *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

203. *Id.*

204. *Id.* at 59.

205. *Id.*

206. For a detailed history of these restraints, see Donohue, *supra* note 37, at 272–87.

207. Voluntary Tender Act, ch. 95, 40 Stat. 394 (1917), *repealed by* Invention of Secrecy Act of 1951, ch. 4, 66 Stat. 3 (current version at 35 U.S.C. § 181 (2006)).

208. Donohue, *supra* note 37, at 274. If the government used the invention, it was required to compensate the inventor; if it did not use the invention, it was tough luck for the inventor. *Id.*

209. *Id.* at 275 (quoting the Invention Secrecy Act of 1951, ch. 4.)

210. *Id.*

211. *Id.*

found that the patent threatened national security.²¹² The aim of this legislation was to promote the development of new national security technology while preventing other countries' access to it.²¹³ The government issued between 4100 and 5000 secrecy orders between 1959 and 1979, and that number nearly doubled in the next decade.²¹⁴ Such orders are still alive and well. Between 1991 and 2003, the state issued about 5200 per year.²¹⁵

The 1954 Atomic Energy Act imposed a prior restraint on the dissemination of nuclear energy information.²¹⁶ Neither private actors nor the State could share this type of information with anyone lacking the proper clearances.²¹⁷ The restricted information included "all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy."²¹⁸ The statute gave the Atomic Energy Commission the authority to declassify information if it could demonstrate the information could be released "without undue risk to the common defense and security."²¹⁹ Unsurprisingly, scientists denounced the statute, arguing its chilling effect on scientific advancement would stymie, not secure, national defense.²²⁰

With the proper procedures in place, the most dangerous crime-facilitating speech could be subject to prior restraints. These principled restraints would not only bolster our national security, but would also force the government to adhere to procedural safeguards that prevent standardless discretion and promote free speech principles.

212. *Id.*

213. *Id.* at 276.

214. *Id.*

215. *Id.*

216. *Id.* at 279 (citing the Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919 (current version at 35 U.S.C. § 2011 (2006))).

217. *Id.*

218. *Id.* (quoting the Atomic Energy Act of 1954, ch. 1073, § 11(r), 68 Stat. at 924).

219. *Id.*

220. *Id.* Note that in addition to formal strictures on nuclear data, the state "used informal pressure to censor publications on the subject." *Id.* In 1979, for example, the state obtained an injunction to prevent a science journal from publishing an article entitled "The H-Bomb Secret; How We Got It, Why We're Telling It." *Id.* at 279-80. The judge reasoned that "citizens could discuss proliferation and disarmament issues without intimate knowledge of how the H-bomb worked." *Id.* (citing *United States v. Progressive, Inc.*, 467 F. Supp. 990, 994 (W.D. Wis. 1979)). In *Progressive*, the court explained, "What is involved here is information dealing with the most destructive weapon in the history of mankind, information of sufficient destructive potential to nullify the right to free speech and to endanger the right to life itself." *Progressive*, 467 F. Supp. at 995.

VI. A POTENTIAL OBJECTION: WOULD A CRIME PLANS
EXCLUSION REALLY MAKE A DIFFERENCE?

This question is inspired by Volokh's suggestion that attempting to categorically exclude a wide range of crime-facilitating speech is a fool's errand given the ubiquity of such speech on the Internet and the likelihood that it will always be available in some form, either on a foreign website or on one the U.S. government has not yet discovered.²²¹ This logic, however, does not fully consider the purposes of having categorical exclusions, or is at least partially at odds with the goals of categorical exclusions, which exist not solely to prevent palpable harms. The categorical exclusion symbolically identifies the types of speech undeserving of presumptive constitutional protection. Saying that a type of speech is categorically excluded conveys a message that the speech is not dignified by First Amendment protection. That such speech would be hard to extricate from the marketplace of ideas does not justify giving it presumptive constitutional protection. Thus, even if some crime plans speech will not be prosecuted, it should not be grouped with the type of valuable speech afforded presumptive constitutionality.²²² Moreover, that some instances of crime plans speech will slip under the radar does not negate the utility of criminalizing such speech. A significant reduction in the availability of crime plans speech would reduce the frequency of crime facilitated by such speech for two reasons: (1) it would make it more difficult to find this information, and (2) it would impair the accuracy of such information.

First, the more widely disseminated the speech, the easier it is to access, and the more harmful the existence of that speech becomes. If bomb-making instructions were more than a few clicks away, some people would not invest the time needed to procure those instructions. Bored adolescents would find something else to do besides inadvertently blowing off their limbs with homemade bombs. Additionally, if a person were to use a public computer to avoid detection, the prolonged search of suspicious websites resulting from reduced availability of the instructions might draw the attention of others in the area and cause that person to abandon the search.

221. Volokh, *supra* note 4, at 1108–09. While the Internet hosts much crime plans speech, it also helps detect it. Law enforcement can track criminal activity on the Internet using IP addresses, which identify every machine on the Internet in a decimal format. Brad Dickerson, *Colorado Author's Arrest Sheds Light on Child Porn, Pedophiles*, HIGHLANDS TODAY, Dec. 23, 2010, <http://www2.highlandstoday.com/content/2010/dec/23/colo-authors-arrest-sheds-light-on-child-porn-pedo/>.

222. Some murderers are not prosecuted, but we do not throw up our hands and say murder cannot be regulated because some people will get away with it.

Second, when information is more widely available, a criminal is more likely to get accurate instructions. As even Volokh concedes, “The legal availability of crime-facilitating information probably increases the average quality—and, just as importantly, the perceived reliability—of such information.”²²³ For example, if an Internet search produced twenty different instructional guides for making the explosive C-4, an aspiring bombmaker could compare the instructions from each site and weed out the uncorroborated instructions, thereby increasing the bombmaker’s chance of successfully producing a weapon. But if an Internet search yielded only one or two hits for making C-4, the bombmaker would have fewer instructions to compare, thus increasing his chance of failure. Moreover, if crime plans speech were criminalized, the instructions would be less likely to have a prominent group or magazine behind it,²²⁴ thus decreasing the reader’s confidence in the reliability of the instructions.²²⁵ If crime plans speech were criminalized, its availability would not decrease significantly overnight, but it would diminish over time as law enforcement would become more adept at locating and dismantling these sources of information.²²⁶ It is incorrect to think that anything short of total eradication of crime plans speech would be ineffective; a significant decrease in the availability of crime plans speech could have a substantial effect on the harmful uses of such information.²²⁷

Though criminalizing crime plans speech would have little, if any, effect on sophisticated organized crime, it could thwart “some extremists who want to bomb multinational organizations, abortion clinics, or animal research laboratories”;²²⁸ some impressionable youths who turn to bombmaking as a hobby;²²⁹ “some would-be novice computer hackers or solo drugmakers”;²³⁰ and some people who want to cheat on their income taxes.²³¹

223. Volokh, *supra* note 4, at 1109.

224. *Id.* at 1109–10.

225. Indeed, in the case of amateur bombmakers, the mere apprehension of injuring or killing oneself while following uncorroborated or highly suspect bomb-making instructions would likely deter some from attempting the crime.

226. Of course, there is a risk that the rate at which disseminators figure out new tactics might be greater.

227. In any case, if we can save only a few persons rather than many, why would it not be worth the cost of a categorical exclusion that, in light of the narrowing principles proposed in this Note, does not target particularly valuable speech? This, of course, is a comparative judgment of value that is properly considered at the threshold definitional balancing test discussed in Part III.

228. Volokh, *supra* note 4, at 1110.

229. *See supra* Part II.C.1.

230. Volokh, *supra* note 4, at 1110.

231. *See supra* note 8 and accompanying text.

VII. CONCLUSION

By carving out categorical exclusions for incitement to unlawful action, fighting words, obscenity, true threats, child pornography, and false defamation with actual malice in the public figure context, the Supreme Court has already found that some speech pollutes the marketplace of ideas.²³² As Shapiro notes, “It is quite mistaken to think that all communication among sentient beings comes armed with moral or constitutional value.”²³³

This Note has argued for the recognition of a new categorical exclusion from the First Amendment for specific criminally-instructive speech that, as a whole, has no serious literary, artistic, political, or social value. This definition of the exclusion reflects a compromise between free speech principles and the government’s substantial interest in thwarting crime abetment through speech or any other form. This Note has examined four possible sets of criteria for the exclusion, and has advocated the redemption value definition because it reinforces the fundamentality of the First Amendment right to free speech by narrowly excluding only speech that has virtually no noncriminal value. Of course, this exclusion is not without its faults, as it could be criticized for being both somewhat under- and overinclusive; however, I propose that these are not fatal objections. While a total ban on crime-facilitating speech would be the most effective

232. Indeed, in *United States v. Stevens*, the Supreme Court recently noted that there may be “[s]ome categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.” *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010) (declining to carve out a categorical exclusion for depictions of animal cruelty, finding the expressive content of these images merited presumptive protection). Crime plans speech may be an example of such a category, given our history of laws prohibiting certain types of instructional, crime-abetting speech. For example, federal law bars any person from distributing “information 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] information for, or in furtherance of, an activity that constitutes a Federal crime of violence.” 18 U.S.C. § 842(p)(2)(B) (2006). Likewise, several courts have held that holding seminars on how to commit tax evasion is a criminal offense under a (loose) theory of aiding and abetting liability. *See supra* note 8. Prohibitions against the dissemination of instructions for bomb-making and tax evasion are prohibitions that fall into the category of “certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). One might argue that this is because bombing and widespread tax evasion jeopardize the functioning of government. It is incoherent, however, to think the First Amendment protects criminal instructions for some crimes and not others. While the consequences of a targeted bombing are more devastating than copyright infringement, that disparity is reflected in the severity of punishment—not the First Amendment protection afforded to the speech. The First Amendment cannot be an accomplice to crime. Thus, a crime plans exclusion is consistent with the Supreme Court’s analysis of categorical exclusions.

233. Shapiro, *supra* note 20, at 332.

way to eradicate crime abetment through speech, it would also neglect the great weight of First Amendment principles. Indeed, this categorical exclusion strikes a balance between the competing interests and brings clarity and force to the confused history of crime-facilitating speech—a history in which courts have applied either *Brandenburg*-esque analysis, thereby undermining the robust incitement doctrine and overprotecting crime plans speech, or standards of aiding and abetting liability, thus overprotecting crime plans speech by requiring that an underlying offense occur. Reliance on these other doctrines is misplaced. If any speech is dangerous enough to fall wholly outside the umbrella of the First Amendment, it is speech that specifically instructs crime. Because crime-facilitating speech can have noncriminal value, however, the redemption criteria narrows the universe of excludable speech, thereby honoring First Amendment principles and thwarting the distribution of criminally-instructive speech.