

The Speech Integral to Criminal Conduct Exception

Eugene Volokh

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THE “SPEECH INTEGRAL TO CRIMINAL CONDUCT” EXCEPTION

Eugene Volokh[†]

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[†] Gary T. Schwartz Professor of Law, UCLA School of Law (volokh@law.ucla.edu). Thanks to Amy Atchison, Aaron Caplan, Ronald Collins, Leslie Kendrick, Randy Kozel, Martin Redish, Laura Weinrib, and John Wilson for their help.

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INTRODUCTION

Since 2006, the Supreme Court has been reviving a long-dormant and little-defined First Amendment exception: the exception for “speech integral to criminal [or tortious] conduct.”¹ The leading case cited as support for that exception, *Giboney v. Empire Storage & Ice Co.* (1949),² hadn’t been cited by the Court at all from 1991 to 2005. Since 2006, the Court has cited *Giboney* six times.³ “Speech integral to criminal conduct” is now a standard item on lists of First Amendment exceptions.⁴

The Court has used this exception to justify prohibitions on distributing and possessing child pornography,⁵ on soliciting crime,⁶ and on announcing discriminatory policies.⁷ Lower courts have used it to justify restrictions on speech that informs people how crimes can be committed;⁸ on doctor speech that recommends medical marijuana to their clients;⁹ on union speech that “retaliates” against union members by publicly criticizing them for their complaints;¹⁰ on intentionally distressing speech about people;¹¹ and more.¹² Government agencies have used the exception to justify restrictions on, among other things, the publication of bomb-making instructions,¹³ speech

¹ *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality opinion); *see Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 n.5 (2010); *United States v. Stevens*, 559 U.S. 460, 468–69 (2010); *United States v. Williams*, 553 U.S. 285, 297 (2008); *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006). *Rumsfeld v. FAIR* makes clear that the Court views the exception as also applicable to speech integral to civilly actionable conduct. *See* 547 U.S. at 62.

² 336 U.S. 490 (1949).

³ *See supra* note 1.

⁴ *See, e.g., Alvarez*, 132 S. Ct. at 2544 (plurality opinion); *Stevens*, 559 U.S. at 468–69; *United States v. Richards*, 755 F.3d 269, 274 (5th Cir. 2014); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1248 n.6 (Mass. 2015).

⁵ *New York v. Ferber*, 458 U.S. 747, 761–62 (1982).

⁶ *Williams*, 553 U.S. at 297.

⁷ *Rumsfeld*, 547 U.S. at 62.

⁸ *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 244 (4th Cir. 1997).

⁹ *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 121 (D.D.C. 2001); *Conant v. McCaffrey*, 172 F.R.D. 681, 698 (N.D. Cal. 1997); *see also* *Petition for a Writ of Certiorari at 20*, *Walters v. Conant*, 540 U.S. 946 (2003) (No. 03-40) (arguing that the revocation of a physician’s registration for recommending that patients use marijuana does not violate the First Amendment). *But see* *Conant v. Walters*, 309 F.3d 629, 637–38 (9th Cir. 2002) (holding such speech constitutionally protected).

¹⁰ *See, e.g., Dixon v. Int’l Bhd. of Police Officers*, 504 F.3d 73, 83–84 (1st Cir. 2007).

¹¹ *See infra* Part III.B.1.

¹² *See, e.g., Pickup v. Brown*, 740 F.3d 1208, 1222 (9th Cir. 2013).

¹³ U.S. DEP’T OF JUSTICE, 1997 REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION 15–16, <https://web.archive.org/web/20120113134329/http://www.>

by tour guides,¹⁴ and offensive speech by protesters near a highway.¹⁵

The Court has offered “speech integral to [illegal] conduct” as one of the “well-defined and narrowly limited classes of speech” excluded from First Amendment protection.¹⁶ But if this exception is indeed to be well defined and narrowly limited, courts need to explain and cabin its scope. This Article—the first, to my knowledge, to consider the exception in depth¹⁷—aims to help with that task.

In the process, the Article observes several things, both about the current state of the law and how it evolved:

1. The “speech integral to [illegal] conduct” exception, though largely dormant during the late Burger Court and the Rehnquist Court, was very important in the early decades of free speech law, and has roots going back to the 1910s.¹⁸ The Court saw it as connected not just with the law of solicitation and conspiracy but also with the law of fighting words and threats.¹⁹ The limits on what constitutes punishable incitement, from the Holmes and Brandeis post-World War I dissents to *Brandenburg v. Ohio*²⁰ and *NAACP v. Claiborne Hardware*,²¹ were attempts to chart the boundaries of this doctrine.

2. This exception was also central to Justice Black’s (and, to some extent, Justice Douglas’s) supposedly “absolutist” vision of the First Amendment.²² Justice Black’s distinction between conduct and speech was closely linked to the view that some speech that causes or threatens illegal conduct should itself be treated as a form of conduct.

justice.gov/criminal/cybercrime/bombmakinginfo.html [https://perma.cc/63JT-WMEG].

¹⁴ Brief for Appellee District of Columbia at 23, *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (Nos. 13-7063 & 13-7064).

¹⁵ Brief for Defendants-Appellees at 29, *Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir. 2005).

¹⁶ *Stevens*, 559 U.S. at 468–69 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). Even Kent Greenawalt’s leading extended work on speech and crime mentions *Giboney* only in a footnote. KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 247 n.12 (1992).

¹⁷ Before the recent *Giboney* revival, my own earlier article discussed and criticized *Giboney*. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1314–26 (2005). But now that the “speech integral to [illegal] conduct” exception seems firmly entrenched, the important question is how the doctrine should be understood.

¹⁸ See *infra* Part I.A.1.a.

¹⁹ See *infra* Parts I.B, I.D.

²⁰ 395 U.S. 444 (1969).

²¹ 458 U.S. 886 (1982).

²² See *infra* text accompanying notes 143–45.

Indeed, though Justices Black and Douglas famously rejected First Amendment exceptions for obscenity, libel, and incitement, they had no problems with exceptions for fighting words, solicitation, and threats.²³ The "integral to [illegal] conduct" exception helps explain that position.²⁴

3. The history of the exception also helps explain its revival during the Roberts Court. Over several cases, Chief Justice Roberts and Justice Scalia have been articulating a vision of the First Amendment in which the exceptions to protection are *not* the product of "categorical balancing" by the Court,²⁵ but are rather supposed to be found in history and tradition.²⁶

Given this, the Justices have to answer a question: how to explain existing exceptions that the Justices do not reject but that (unlike, say, libel, obscenity, fighting words, and incitement) aren't solidly historically established? This is a similar question to the one that Justices Black and Douglas had to answer: how to explain existing exceptions that those Justices did not reject, but that look like they should be rejected under their absolutist test? The answer Justice Black gave is that the "speech integral to illegal conduct" doctrine left room for such exceptions.²⁷

The Court is now returning to that same doctrine, armed with that doctrine's historical provenance, and seeking the same thing: an umbrella that can cover restrictions on speech

²³ See *infra* text accompanying notes 136–42.

²⁴ Justice Black's approach may have been unsound in general, and it was definitely unsound in particular applications. Justice Black erred, I think, in joining a dissenting opinion in *Cohen v. California*, 403 U.S. 15 (1971), that rested on the proposition that Cohen's jacket was "mainly conduct and little speech." *Id.* at 27 (Blackmun, J., dissenting). Likewise, I think Justice Black was mistaken in rejecting First Amendment protection for symbolic expression. See *Street v. New York*, 394 U.S. 576, 610 (1969) (Black, J., dissenting) (citing *Giboney* for the proposition that flag burning is constitutionally unprotected); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 517 (1969) (Black, J., dissenting) (same as to the wearing of an armband); Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1057–63 (2009) (collecting evidence that the treatment of symbolic expression as tantamount to verbal expression dates back to the Framing era).

My point in this Article, though, is simply that Justice Black's approach makes more internal sense if one sees the *Giboney* opinion as central to that approach.

²⁵ See GREENAWALT, *supra* note 16, at 223–24 (arguing that First Amendment exceptions develop through "categorical balancing"); Melville Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942–45 (1968) (same).

²⁶ See *United States v. Alvarez*, 132 S. Ct. 2537 (2012); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011); *United States v. Stevens*, 559 U.S. 460 (2010).

²⁷ See *infra* text accompanying note 184.

such as child pornography, solicitation, threats of discrimination, and the like. Labeling such speech “conduct”—or, as Justice Douglas tended to call it, speech “brigaded” with conduct²⁸—helps avoid (or, in the view of cynics, conceal) more thoroughgoing balancing.

4. But the historical “speech integral to illegal conduct” doctrine—together with its links to the threats and fighting words exceptions—was not just a convenient safety valve to protect what would otherwise be an excessive absolutism. Rather, it was consistent with a particular understanding of free speech, which one might call a “rule-of-law” model of speech.

Under this model, people have to be free to advocate for changes in the law, the economy, and society, and to use social and economic pressure to push for such changes. But people must comply with valid laws that regulate nonspeech conduct. And they must also avoid speech that helps cause illegal conduct, or that threatens to commit illegal conduct.

Given that speech sometimes both constitutes advocacy of social change and helps cause illegal conduct, the question is where the rule of law calls for the line to be drawn. In many ways, that was the question that the Court was facing during Justice Black’s tenure, and that Justice Holmes was struggling with in his shifting free speech votes from 1911 to 1927.

5. The *Giboney* opinion and the ones that followed it, especially in the 1950s, were not clear in their scope. That is unsurprising, since the Court was then just beginning to develop free speech doctrine, and since the more libertarian Justice Black wing of the Court was struggling with the more pro-restriction Justice Frankfurter wing. And precedents since the 1960s have cut back on some of the broader implications of *Giboney* and its earlier progeny.²⁹

6. Given all these precedents, the best understanding of the “integral to illegal conduct” exception is this:

- (a) When speech tends to cause, attempts to cause, or makes a threat to cause some illegal conduct (illegal conduct other than the prohibited speech itself)—such as murder, fights, restraint of trade, child sexual abuse,

²⁸ See, e.g., *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 398 (1973) (Douglas, J., dissenting); *Miller v. California*, 413 U.S. 15, 42 n.6 (1973) (Douglas, J., dissenting); *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting).

²⁹ See *infra* Part II.

discriminatory refusal to hire, and the like—this opens the door to possible restrictions on such speech.

- (b) But the scope of such restrictions must still be narrowly defined, in order to protect speech that persuades or informs people who will not engage in illegal conduct. That some category of speech was historically unprotected, because it causes or threatens illegal conduct, does not tell us where the boundaries of the exception should be drawn. The history of the incitement and fighting words doctrines, for instance, shows the Court narrowing the historically unprotected zone (as the Court has done with regard to some of the historical exceptions that aren’t tied to other illegal conduct, such as the obscenity and libel exceptions).

In a sense, then, the *Giboney* doctrine should be seen less as a single exception than as a guide to generating other exceptions. For instance, *Giboney* cited cases authorizing punishment for advocacy of illegal conduct and for insulting speech as involving speech integral to illegal conduct.³⁰ But while the risk of illegal conduct posed by such speech has indeed led the Court to recognize First Amendment exceptions (for incitement and fighting words), the Court has been careful to define those exceptions separately and narrowly, to protect potentially valuable speech.³¹

Likewise, the child pornography exception has been explained as an application of the *Giboney* principle, because distribution and possession of child pornography helps cause criminal production of child pornography.³² But there, too, the Court has made clear that not all speech that creates a market for criminally obtained speech (for instance, for unlawful interception of cell phone calls) is constitutionally unprotected.³³

7. On the other hand, the *Giboney* doctrine can’t justify treating speech as “integral to illegal conduct” simply because the speech is illegal under the law that is being challenged. That should be obvious, since the whole point of modern First Amendment doctrine is to protect speech against many laws that make such speech illegal. Yet many lower courts have indeed cited *Giboney* for the proposition that speech loses its protection just because it is made illegal—for instance, when

³⁰ See *infra* text accompanying note 72.

³¹ See *infra* Part I.B.1.

³² See *infra* Part I.C.1.

³³ See *infra* Part I.C.2.

some courts have upheld laws restricting professionals' (such as psychotherapists') speech to their clients.³⁴

Giboney has thus become, at times, a tool for avoiding serious First Amendment analysis—a way to uphold speech restrictions as supposedly fitting within an established exception, without a real explanation of how the upheld restrictions differ from other restrictions that would be struck down. To avoid such misuse of *Giboney*, we need to understand the limitations on the *Giboney* doctrine.

8. Relatedly, *Giboney* can't justify treating speech as "integral to illegal conduct" even when the speech violates a law that equally forbids both conduct and speech (usually a law that bars conduct that produces, is intended to produce, or is likely to produce a certain result).³⁵ The Court has recently made clear, in *Holder v. Humanitarian Law Project*,³⁶ that even generally applicable laws are subject to strict scrutiny when they apply to speech because of the harm assertedly caused by its content.³⁷ Moreover, when *Giboney* was decided, the Court had already so held in several other leading cases—and continued to do so in many leading cases between *Giboney* and *Holder*.³⁸

I am not a fan of the "speech integral to illegal conduct" exception,³⁹ but it seems to be here to stay. The question is what it does—and should—cover.

I

WHAT "SPEECH INTEGRAL TO [ILLEGAL] CONDUCT" MEANS: THE SUPREME COURT CASES

Let us begin by canvassing what the "speech integral to illegal conduct" exception covers, according to the Supreme Court precedents. I'll begin by surveying the precedents, and then offer a summary of the rule and its function in Parts I.G and I.H.

³⁴ See *infra* Part III.B.

³⁵ See *infra* Part II.A.

³⁶ 561 U.S. 1 (2010).

³⁷ See *infra* Part II.A.1.

³⁸ See *infra* Parts II.A.2–5.

³⁹ See Volokh, *supra* note 17, at 1314–26.

A. Speech That Tends to Cause Illegal Conduct by Soliciting Its Commission

1. *Lack of Constitutional Protection*

a. *The 1910s Cases: Gompers, Fox, Frohwerk, Abrams*

Ever since the Court began to seriously consider protecting free speech, it has had to ask: what happens when speech tends to bring about crime—for instance, when it solicits crime?

The Court’s “clear and present danger” test, for all its flaws, was an attempt to distinguish protected advocacy from unprotected criminal solicitation. Justice Holmes expressly relied on the solicitation analogy in *Frohwerk v. United States*: “We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.”⁴⁰

Holmes stood by this even when he shifted to a generally more speech-protective approach in *Abrams v. United States*:⁴¹ “I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder,” he wrote, “the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils.”⁴² And Justice Brandeis’s opinion in *Whitney v. California*, which Justice Holmes joined, likewise acknowledged that advocacy of illegal conduct may be punished when it constitutes “incitement” that “would be immediately acted on,”⁴³ or an “attempt” or “conspiracy.”⁴⁴

⁴⁰ 249 U.S. 204, 206 (1919); see also GREENAWALT, *supra* note 16, at 126–29. Even Zechariah Chafee, who disagreed with the *Frohwerk* decision, seemed to likewise think that criminal solicitation was punishable. See Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 948 (1919) (apparently endorsing “ordinary standards of criminal solicitation and attempt”).

⁴¹ 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

⁴² *Id.* at 627 (Holmes, J., dissenting).

⁴³ 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). Indeed, Justice Brandeis ultimately concurred in the judgment in *Whitney* because he concluded that there was enough evidence of “a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member.” *Id.* at 379.

⁴⁴ *Id.* at 378.

Likewise, Justice Holmes reasoned in *Schenck v. United States*—immediately following the “falsely shouting fire in a theatre and causing a panic” line—that free speech “does not even protect a man from an injunction against uttering words that may have all the effect of force,” citing *Gompers v. Buck Stove & Range Co.* (1911).⁴⁵ And *Gompers*, an opinion that Justice Holmes had joined, likewise involved speech that, in the Court’s view, solicited illegal conduct: speech that called on union members to engage in what was seen as unlawful restraint of trade by boycotting a company.⁴⁶

Another early Justice Holmes free speech opinion, *Fox v. Washington* (1915),⁴⁷ was likewise framed as being about solicitation. *Fox* upheld a conviction for violating a ban on speech that “encourages a] . . . breach of law.”⁴⁸ Jay Fox was an anarchist, a trade unionist, and, most relevant here, a nudist. He was involved in a community called Home, where, among other things, many people walked around naked, in violation of Washington public nudity laws. When some people complained, he published an article in the newspaper he edited (*The Agitator*) condemning the complainants, defending a boycott of the complainants, and more generally defending Home’s nudist practices.⁴⁹

The Court upheld Fox’s conviction. The statute, Holmes reasoned, should not be read as banning speech that simply “tend[s] to produce unfavorable opinions of a particular statute” but rather as limited to speech urging criminal violation of the law.⁵⁰ Individual “encouragements . . . directed to a particular person’s conduct” would have been criminal under the common law, Holmes argued.⁵¹ The statute, he concluded, simply extended this common-law prohibition to “publication[s]” distributed “to a wider and less selected audience.”⁵²

Fox’s speech, like the speech in *Gompers*, *Schenck*, and *Frohwerk* may well be protected today. But at the time it was seen as closely related to the illegal conduct it urged (a form of

⁴⁵ 249 U.S. 47, 52 (1919) (citing *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 439 (1911)).

⁴⁶ 221 U.S. at 438–39.

⁴⁷ 236 U.S. 273 (1915).

⁴⁸ *Id.* at 276–77.

⁴⁹ For more on *Fox* and Justice Holmes’s approach in the case, see THE FUNDAMENTAL HOLMES: A FREE SPEECH CHRONICLE AND READER 187–90 (Ronald K. L. Collins ed., 2010).

⁵⁰ *Fox*, 236 U.S. at 277.

⁵¹ *Id.*

⁵² *Id.* at 277–78.

“verbal act[],” the *Gompers* Court called it⁵³), likely because it was understood to solicit a specific criminal act at a specific place or time—or, in *Gompers* or in the *Frohwerk* “counselling of a murder,” with a specific victim.

The line between punishable solicitation and protected condemnation of a law (perhaps including even protected advocacy of violating the law) has moved over the last century. But the Court’s cases, from *Gompers*, *Fox*, *Schenck*, and *Frohwerk* through Justice Holmes’s dissent in *Abrams*, the 1960s civil rights cases,⁵⁴ *Brandenburg v. Ohio*,⁵⁵ and the recent *United States v. Williams*⁵⁶ criminal solicitation decision, have been attempts to draw this line.

b. *Giboney as a Solicitation Case*

On its facts, then, *Giboney v. Empire Storage & Ice Co.*⁵⁷ was an easy case for the Court. Indeed, it was unanimous, and got the votes of First Amendment maximalists (such as its author, Justice Black, as well as Justice Douglas) and strong union supporters.

Giboney arose in a time when many people didn’t have refrigerators, or didn’t have freezers in their refrigerators. If you wanted ice, you would buy ice from an ice peddler, who would buy the ice from a wholesale ice distributor. The Ice and Coal Drivers and Handlers union wanted to unionize the ice peddlers, but many peddlers refused to join.⁵⁸

To pressure the nonunion peddlers, the union picketed Empire Ice & Storage, the peddlers’ supplier, demanding that it agree to stop supplying them.⁵⁹ Unionized truckers abided by the picket line, and refused to deliver goods to Empire. Empire’s business fell 85%.⁶⁰

What the union demanded that Empire do, though, would have been a crime under Missouri law, which forbade, among other things, “any . . . combination . . . or understanding . . . in

⁵³ *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 439 (1911).

⁵⁴ As late as 1965, Justice Goldberg’s majority opinion in *Cox v. Louisiana* described *Giboney* as supporting the proposition that “[a] man may be punished for encouraging the commission of a crime.” 379 U.S. 559, 563 (1965) (citing *Fox* and *Giboney*).

⁵⁵ 395 U.S. 444 (1969).

⁵⁶ 553 U.S. 285, 297 (2008); see also *Brown v. Hartlage*, 456 U.S. 45, 55 (1982) (likewise stating that solicitation, as “an invitation to engage in an illegal exchange for private profit,” may be prohibited).

⁵⁷ 336 U.S. 490 (1949).

⁵⁸ *Id.* at 492.

⁵⁹ *Id.*

⁶⁰ *Id.* at 493.

restraint of trade or competition in the . . . sale of any product.”⁶¹ Empire therefore sued, and won: the “sole, unlawful immediate objective” of the picketing “was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers,” the Court concluded, citing *Fox v. Washington*⁶² in the same paragraph.⁶³ Because of this, “appellants were doing more than exercising a right of free speech or press. They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade.”⁶⁴

To be sure, the union’s speech did more than just solicit crime: it tried to economically pressure the employer into committing the crime. But if ordinary solicitation of a specific crime by a specific entity (the employer) against specific victims (the nonunion peddlers)—“please commit this crime”—is punishable, then coercive solicitation, “commit this crime or we’ll ruin your business,” must be at least as punishable.

In the following years, *Giboney* was repeatedly applied to solicitation of a related crime: picketing aimed at pressuring an employer to force employees to join a union, when state law forbade such employer action.⁶⁵ And more generally, *Giboney* has been cited for the proposition that picketing can be restricted when it is “directed at an illegal end,”⁶⁶ in the sense of soliciting a crime.

61 *Id.* at 491 n.1.

62 236 U.S. 273 (1915).

63 *Giboney*, 336 U.S. at 502.

64 *Id.* at 503 (citation omitted).

65 See *Int’l Bhd. of Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957); *United Ass’n of Journeymen Plumbers & Steamfitters v. Graham*, 345 U.S. 192, 193 (1953); *Bldg. Serv. Emps. Int’l Union v. Gazzam*, 339 U.S. 532, 533, 541 (1950); see also *Int’l Bhd. of Teamsters v. Hanke*, 339 U.S. 470, 481 (1950) (Minton, J., dissenting) (characterizing *Giboney* as involving picketing aimed at pressuring the picketed company to violate the law); *Hughes v. Superior Court*, 339 U.S. 460, 469 (1950) (Reed, J., concurring) (likewise).

66 *Amalgamated Food Emps. Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 314 (1968), *overruled by* *Hudgens v. NLRB*, 424 U.S. 507 (1976); see also *California v. LaRue*, 409 U.S. 109, 117–18 (1972) (“States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal” (citations omitted)); *NAACP v. Button*, 371 U.S. 415, 454 (1963) (Harlan, J., dissenting) (stating that the government may prohibit “picketing for an unlawful objective”); *Dennis v. United States*, 341 U.S. 494, 571 (1951) (Jackson, J., concurring in the judgment) (citing the *Frohwerk* “counselling of a murder” line as expressing the “same doctrine” approved of by *Giboney*).

c. *Expressly Recognizing a Solicitation Exception:*
United States v. Williams

This link between the “speech integral to criminal conduct” doctrine and solicitation of crime thus dates back to the 1900s. But the Court has also reaffirmed it just in the last decade: in 2008, the Court cited *Giboney* in *United States v. Williams*,⁶⁷ which officially recognized a criminal solicitation exception to the First Amendment (there, in the context of an offer to distribute illegal child pornography).

“Offers to engage in illegal transactions are categorically excluded from First Amendment protection,” the Court held, citing *Giboney* as authority.⁶⁸ And offers, as the Court noted, are a form of solicitation—“offers to provide” contraband solicit listeners to commit unlawful receipt of contraband, while “requests to obtain contraband,” which the Court viewed as similarly punishable, solicit listeners to commit unlawful distribution of contraband.⁶⁹

2. *Limitations on the Exception*

But while the Court has held that some advocacy of crime is punishable, there must be limits on any advocacy-of-crime exception. Some recognized this as early as the 1870s: Francis Wharton’s criminal law treatise, for instance, reasoned that too broad a view of solicitation would “greatly infringe[]” the “necessary freedom of speech and of the press.”⁷⁰ The Holmes and Brandeis dissents, of course, also acknowledged this. And since the 1960s, the Court has gone far in upholding the right to advocate crime generally.⁷¹

“Counselling of a murder,” in the sense of urging someone to kill a specific person, likely remains punishable solicitation, as *Williams* suggests. But counseling murder in the sense of urging killing in the abstract (whether of capitalists, police of-

⁶⁷ 553 U.S. 285, 297 (2008).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 2 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 850 (7th ed. 1874).

⁷¹ See *Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see also Greenawalt, *supra* note 16, at 111–26 (discussing solicitation in more detail). I greatly respect Greenawalt’s work in this area, but I think his focus on “situation-altering utterances” is unsound, for reasons discussed in Volokh, *supra* note 17, at 1326–36.

ficers, thieves, or whoever else) is now constitutionally protected.⁷²

Indeed, as noted above, *Fox v. Washington* would likely no longer be good law. Today, the Washington statute, even if read as limited to speech “encouraging [a] . . . breach of the [law],”⁷³ would be unconstitutionally overbroad under *Brandenburg v. Ohio*. Setting aside fairly specific solicitations, aimed at particular victims or particular criminal actions, speech that advocates crime can only be punished if it is intended to and likely to cause imminent criminal conduct.⁷⁴

And this illustrates an important principle, to which we will return repeatedly below: the decision that some speech is sufficiently related to criminal conduct—and is thus potentially constitutionally unprotected—can only be the start of the analysis. The decision may justify restricting *some* speech that, for instance, urges criminal conduct. It may justify an exception even to a Justice who generally thinks the First Amendment should provide absolute protection (Justice Black in *Giboney*) or to Justices who think First Amendment exceptions should be limited to traditionally recognized categories (such as the majority in *Williams*, most of whom endorsed the tradition-based view two years later in *Stevens*⁷⁵). But the Court still has to decide *which* such speech is punishable, and may decide that the exception should reach only a narrow range of such speech.

During much of the 1900s, the Court was struggling with this very question. Justice Holmes in *Abrams* seemed to draw the line at purpose—speech said with the purpose of promoting violation of the law would be punishable (at least so long as the danger was “clear and imminent”). Speech said with a good motive would be unpunishable, even if the effect of the speech might be to lead some listeners to commit crimes.⁷⁶

In the 1950s, the test appeared to become that “advocacy of abstract doctrine,” even of criminal conduct, was constitu-

⁷² Under *Brandenburg*, 395 U.S. at 447, and *Hess*, 414 U.S. at 108–09, such speech is unprotected only if it is intended to and likely to promote *imminent* illegal conduct, as opposed to conduct at some unspecified time in the future.

⁷³ *Fox v. Washington*, 236 U.S. 273, 275 (1915).

⁷⁴ See *supra* note 72.

⁷⁵ The *Williams* majority consisted of Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Thomas, Breyer, and Alito. *United States v. Williams*, 553 U.S. 285, 287 (2008). All those Justices were still on the Court when *Stevens* was decided, and all but Alito were in the *Stevens* majority. *United States v. Stevens*, 559 U.S. 460, 463 (2010).

⁷⁶ See *Abrams v. United States*, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting).

tionally protected (again, even if it could cause such conduct), but "advocacy directed at promoting unlawful action" was unprotected.⁷⁷ Indeed, the Court in *Yates v. United States* recharacterized the precedents from *Fox* and *Schenck* onwards as reflecting that line.⁷⁸ *Brandenburg* and *Hess v. Indiana* redrew the line at speech intended to and likely to cause imminent lawless conduct.⁷⁹ *United States v. Williams*, however, acknowledged that some speech may be punished as solicitation when it refers to a specific enough crime, likely even when the contemplated crime is set for a specified future, non-imminent time.⁸⁰

This line-drawing was at times focused on whether speech was so temporally or spatially close to the proposed crime that it is "integral" to it.⁸¹ But ultimately, the limits on the incitement doctrine likely flowed from the recognition (to which we will return below) that suppressing advocacy of crime may have two effects, not just one.

First, such suppression may, as intended, prevent communication to those listeners who will be persuaded to commit crime. But second, such suppression may also prevent communication to other listeners who will use the speech as a basis for lawful action. Even Justice Frankfurter, who took a fairly narrow view of speech protections, acknowledged this:

[S]peech is seldom restricted to a single purpose, and its effects may be manifold [C]oupled with . . . advocacy [of the overthrow of the Government by force] is criticism of defects in our society. . . . It is a commonplace that there may

⁷⁷ *Yates v. United States*, 354 U.S. 298, 318 (1957).

⁷⁸ *Id.* ("The distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action is one that has been consistently recognized in the opinions of this Court, beginning with *Fox v. Washington* and *Schenck v. United States*." (citations omitted)).

⁷⁹ See *Hess v. Indiana*, 414 U.S. 105, 108 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969).

⁸⁰ 553 U.S. 285 (2008).

⁸¹ See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting) ("Speech is closely brigaded with action when it triggers a fight, *Chaplinsky v. New Hampshire*, as shouting 'fire' in a crowded theater triggers a riot." (citation omitted)); *Brandenburg*, 395 U.S. at 456–57 (Douglas, J., concurring) (characterizing "falsely shout[ing] fire in a crowded theatre" as punishable "speech . . . brigaded with action" because the speech and the action are "inseparable and a prosecution can be launched for the overt acts actually caused"); *Int'l Bhd. of Teamsters v. Vogt, Inc.*, 354 U.S. 284, 296–97 (1957) (Douglas, J., dissenting) (arguing that the speech in that case did not "form[] an essential part of a course of conduct which the State can regulate or prohibit," in part because there was insufficient "proximity of picketing to conduct which the State could control or prevent").

be a grain of truth in the most uncouth doctrine, however false and repellent the balance may be.⁸²

Moreover, as Justice Frankfurter likewise recognized,

Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed. No matter how clear we may be that the defendants now before us are preparing to overthrow our Government at the propitious moment, it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the convictions before us we can hardly escape restriction on the interchange of ideas.⁸³

Justice Frankfurter generally believed that it was up to legislatures to weigh the crime-prevention benefits of restrictions on speech that advocates crime against the burdens that these restrictions impose on debate among the law-abiding.⁸⁴ But the Court eventually rejected that position, most clearly in *Brandenburg* (which built on Justices Holmes's and Brandeis's rejecting that position in *Gitlow*⁸⁵ and *Whitney*⁸⁶). Even speech that advocates crime, the Court concluded, is generally protected, unless it intentionally advocates likely imminent crime; broader restrictions, even limited to intentional advocacy of crime, the Court concluded, are too restrictive of legitimate debate.⁸⁷

In this respect, the "speech integral to criminal conduct" exception is similar to other exceptions, such as obscenity and libel. The historical pedigree of those exceptions may have helped lead to their continuing existence.⁸⁸ But the Court has worked hard to clarify and narrow the historical scope of the exceptions, so as to minimize the risk that they would suppress constitutionally valuable speech.⁸⁹ The same has been true

⁸² *Dennis v. United States*, 341 U.S. 494, 549 (1951) (Frankfurter, J., concurring in the judgment).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Gitlow v. New York*, 268 U.S. 652 (1925) (Holmes, J., dissenting).

⁸⁶ *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J. concurring).

⁸⁷ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁸⁸ *See, e.g., Roth v. United States*, 354 U.S. 476, 482–84 (1957) (relying on history to determine that "unconditional phrasing of the First Amendment was not intended to protect every utterance").

⁸⁹ *See, e.g., Miller v. California*, 413 U.S. 15, 23–24 (1973) (setting forth an obscenity test that, for all its flaws, was much more speech-protective than obscenity law had historically been before the 1950s).

with regard to advocacy of crime. We will see that it has also been true with regard to the other exceptions recognized under the rubric of “speech integral to [illegal] conduct.”

B. Speech That Tends to Cause Illegal Conduct by Provoking Retaliation

1. *Lack of Constitutional Protection*

Justice Black’s opinion in *Giboney* also suggests that another traditionally recognized exception, fighting words, fits within the *Giboney* principle. “[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language,” the opinion says—and cites as support not just *Fox v. Washington* but also *Chaplinsky v. New Hampshire*, the leading fighting words case.⁹⁰ A later opinion, *Cox v. Louisiana*, likewise cites *Chaplinsky* alongside *Giboney* as an example of a situation where “conduct mixed with speech may be regulated or prohibited.”⁹¹

And this is unsurprising. The fighting words exception is structurally similar to the solicitation exception. Both involve speech that tends to cause crime. Both, though justified as involving a “course of conduct,” can actually lead to criminal liability even for standalone statements. In both, the concern is that the speech will cause criminal conduct by someone else. Moreover, *Chaplinsky* itself characterized the fighting words statute as “punishing verbal acts”⁹²—a similar formulation to *Giboney*’s “illegal” “course of conduct . . . carried out by means of language.”⁹³

Indeed, Justice Black consistently accepted the fighting words exception, despite his absolutist rhetoric. Near the start of his time on the Court, he joined the *Chaplinsky* opinion. Near the end of his life, he joined Justice Blackmun’s dissent in *Cohen v. California*, which cited *Chaplinsky* favorably.⁹⁴ In between, he joined opinions that would have entirely rejected the

⁹⁰ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Fox v. Washington*, 236 U.S. 273 (1915)).

⁹¹ 379 U.S. 559, 563 (1965) (citing *Giboney*, 336 U.S. 490 (1949); *Chaplinsky*, 315 U.S. 568 (1942)).

⁹² 315 U.S. at 574.

⁹³ *Giboney*, 336 U.S. at 502.

⁹⁴ 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting).

obscenity exception,⁹⁵ the libel exception (at least as to matters of public concern),⁹⁶ and the incitement exception.⁹⁷

But he never expressed any doubt about the fighting words exception. The citation of *Chaplinsky* in *Giboney* suggests that he viewed fighting words as likewise "integral to criminal conduct."⁹⁸

2. *Limitations on the Exception*

At the same time, the fighting words exception, like the solicitation exception, is sharply limited. Not all speech that tends to cause crime, whether because it advocates criminal conduct or because it provokes retaliatory criminal conduct, is constitutionally unprotected. The Court has made clear that much potentially retaliation-provoking speech is protected, in *Terminiello v. Chicago*,⁹⁹ *Edwards v. South Carolina*,¹⁰⁰ *Gregory v. City of Chicago*,¹⁰¹ and *Cohen v. California*.¹⁰² And though Justice Black dissented in *Cohen*, he voted to protect such speech in *Terminiello*, *Edwards*, *Gregory*, and *Feiner v. New York*.¹⁰³

The connection between the speech and conduct, in Justice Black's view (and the Court's view), simply opened the door to carving out a limited exception under which sufficiently low-value speech could be restricted. The connection didn't itself justify restricting all speech for which the connection could be shown.

The chief reason for this, as with advocacy of illegal conduct, is that speech can both risk causing unlawful attacks on the speaker by some listeners *and* enlighten or inform other listeners. And, as with solicitation, this becomes especially clear as the audience grows beyond just one addressee.

It seems unlikely that the marshal whom Chaplinsky was insulting would have been much informed or persuaded by the insults. But when Terminiello gave his speech and Cohen wore his jacket, they were communicating to many potentially willing, persuadable listeners as well as to some who were likely

⁹⁵ *Roth v. United States*, 354 U.S. 476, 508 (1957) (Douglas, J., dissenting).

⁹⁶ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring).

⁹⁷ *Brandenburg v. Ohio*, 395 U.S. 444, 449-50 (1969) (Black, J., concurring).

⁹⁸ *See supra* note 72.

⁹⁹ 337 U.S. 1 (1949).

¹⁰⁰ 372 U.S. 229 (1963).

¹⁰¹ 394 U.S. 111 (1969).

¹⁰² 403 U.S. 15 (1971).

¹⁰³ 340 U.S. 315 (1951).

only to be offended and angered. That helps explain why speech that is not “directed to the person of the hearer”¹⁰⁴ is generally excluded from the fighting words doctrine (even when such speech might potentially cause a violent reaction among some hearers).

C. Speech That Tends to Cause Crimes by Creating an Incentive to Commit Crime

1. *Lack of Constitutional Protection*

New York v. Ferber, the case that recognized a child pornography exception, relied in part on *Giboney*:

The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. “It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.” *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949).¹⁰⁵

And while this was only one of the rationales the Court gave in *Ferber*, it has recently become the Court’s principal explanation for the constitutionality of bans on distributing child pornography.

In *United States v. Stevens*, the Court concluded that the First Amendment exceptions should be limited to the historically recognized ones, such as for libel, obscenity, and the like.¹⁰⁶ Yet the Court had recognized child pornography as a First Amendment exception,¹⁰⁷ even though this exception lacks a longstanding historical pedigree. The Court’s explanation in *Stevens* was that the child pornography exception constitutes just an instance of the broader *Giboney* exception:

Ferber presented a special case: The market for child pornography was “intrinsically related” to the underlying abuse, and was therefore “an integral part of the production of such materials, an activity illegal throughout the Nation.” As we noted, “[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a

¹⁰⁴ *Cohen*, 403 U.S. at 20 (internal quotation marks omitted) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)).

¹⁰⁵ 458 U.S. 747, 761–62 (1982) (footnotes omitted).

¹⁰⁶ 559 U.S. 460, 471–72 (2010).

¹⁰⁷ See, e.g., *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984) (listing libel, fighting words, incitement, obscenity, and child pornography as parallel First Amendment exceptions).

valid criminal statute.” *Id.*, at 761-762 (quoting *Giboney*). Ferber thus grounded its analysis in a previously recognized, long-established category of unprotected speech¹⁰⁸

This connection between the child pornography exception and the *Giboney* doctrine could be criticized. Among other things, the distribution (and, even more so, possession¹⁰⁹) of child pornography is often quite far removed from the underlying criminal abuse of the child in time and in place. The distributors and possessors often have no direct connection to the initial abusers. Calling the distribution and possession “an integral part of the production” strains the term “integral” in some measure. And unlike solicitation, aiding and abetting, threats, and the like, speech that is the fruit of a crime has not itself long been seen as criminally punishable.¹¹⁰

Nonetheless, the connection may be sufficient, precisely because the existence of the market for child pornography does indeed help cause the production of further child pornography (and thus the abuse of children involved in this production). Like solicitation and fighting words, the distribution of child pornography is strongly causally linked to a particular crime, a crime that does not itself consist of otherwise protected speech.¹¹¹

2. *Limitations on the Exception*

The incentive-to-commit-crime cases also resemble the solicitation cases in another way: the connection to crime doesn’t suffice to strip all such speech of protection, but just opens the door to recognizing a First Amendment exception.

This was made particularly clear in *Bartnicki v. Vopper*, which, like *Ferber*, involved a causal link between a punishable crime and speech.¹¹² In *Bartnicki*, federal law banned interception of cellular telephone conversations, a ban that is broadly assumed to be constitutional.¹¹³ The same law also banned

¹⁰⁸ 559 U.S. 460, 471 (2010) (citations omitted in part).

¹⁰⁹ *Osborne v. Ohio*, 495 U.S. 103, 110 (1990), held that private possession of child pornography was also criminally punishable, and cited *Giboney* (via *Ferber*) in the process.

¹¹⁰ *Cf. Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.*, 502 U.S. 105, 115-18 (1991) (holding that speech describing a crime is constitutionally protected).

¹¹¹ *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 236 (2002) (distinguishing actual child pornography from simulated child pornography on the grounds that actual child pornography in *Ferber* “had what the Court in effect held was a proximate link to the crime from which it came”).

¹¹² 532 U.S. 514 (2001).

¹¹³ *Id.* at 520-21.

the publication of any such intercepted conversations, even by downstream recipients who weren’t involved in the interception.¹¹⁴

In this respect, as the dissent pointed out, the distribution ban was much like the ban on distributing child pornography. The intercepted material, like child pornography, was the fruit of an underlying crime. Allowing its distribution, like allowing distribution of child pornography, created an incentive to commit the crime.¹¹⁵

Yet the majority held that the publication ban was unconstitutional, at least as to speech on matters of public concern. “Although there are some rare occasions in which a law suppressing one party’s speech may be justified by an interest in deterring criminal conduct by another, *see, e.g., New York v. Ferber*, this is not such a case.”¹¹⁶ “In cases relying on such a [*Ferber*] rationale,” the Court reasoned, “the speech at issue is considered of minimal value”;¹¹⁷ and indeed, *Ferber* relied at least as much on the low value of the speech as on the connection to crime. Likewise, *Landmark Communications, Inc. v. Virginia* concluded that even if leaks of confidential judicial conduct proceedings are punishable, the publication by downstream recipients of such links is protected.¹¹⁸

Not all speech that advocates crime is constitutionally unprotected; the relevant exceptions are the solicitation exception and the incitement exception, both of which are much narrower than the category of all advocacy of crime. Likewise, not all speech that is the fruit of crime is constitutionally unprotected—the relevant exception, at least so far, seems to be just the child pornography exception.

Moreover, the constitutional distinction is not based on a judgment about how close or how distant the forbidden speech (distribution of information illegally recorded by third parties or distribution of child pornography illegally created by third parties) is from the criminal conduct (the illegal recording or the illegal underage sexual conduct). In both *Ferber* and *Bartnicki*,

¹¹⁴ *Id.* at 520.

¹¹⁵ *Id.* at 551–52 (Rehnquist, C.J., dissenting).

¹¹⁶ *Id.* at 530 (citation omitted in part).

¹¹⁷ *Id.* at 530 n.13.

¹¹⁸ 435 U.S. 829, 837–38 (1978). The *Pentagon Papers* case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), also in practice freed newspapers to publish even illegally leaked speech; but it technically settled only the freedom from injunctions against such publications, and didn’t resolve whether the government might be able to criminally punish newspapers that published such material. *See id.* at 733 (White, J., concurring in the judgment).

the defendants' speech was equally distant from the third parties' criminal conduct.¹¹⁹

Rather, the rationale for the distinction stems from the noncriminal value of the speech. In the child pornography cases, as *Ferber* and *Bartnicki* noted, distributing and possessing child pornography helped cause crime and also had very little First Amendment value. But in cases such as *Bartnicki* and *Landmark Communications*, publishing illegally intercepted or leaked material helped cause future illegal conduct (by creating an incentive for it to take place) but also helped inform the public about important matters.¹²⁰

Thus, the Court's conclusion in *United States v. Stevens* that "[w]hen we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis"¹²¹ is indeed limited to the process of *identifying* First Amendment exceptions in the first place. The Court was unwilling to come up with an "animal-cruelty-depicting speech" exception in *Stevens*, or a "violence-depicting speech" exception in *Brown v. Entertainment Merchants Association*.¹²² But once an existing exception is in play, the value of speech is often relevant to defining the scope of the exception.

We see that in the Court's libel case law.¹²³ We see it in the obscenity test.¹²⁴ And we see it in the decisions under the "integral part of unlawful conduct" exception. Whether speech that is connected to unlawful conduct can be punished turns on how valuable the speech is.

Much advocacy of crime is protected because of its potential value to noncriminal listeners, despite its tendency to cause crime by some other listeners.¹²⁵ Much offensive speech to the public is protected because of its potential value to willing listeners, despite its tendency to cause some offended listeners to criminally attack the speaker.¹²⁶ And much

¹¹⁹ See *Bartnicki v. Vopper*, 532 U.S. 514, 519 (2001); *New York v. Ferber*, 458 U.S. 747, 752 (1982).

¹²⁰ See *Bartnicki*, 532 U.S. at 534; *Landmark Commc'ns v. Virginia*, 435 U.S. 829, 839 (1978).

¹²¹ 559 U.S. 460, 471 (2010).

¹²² 131 S. Ct. 2729, 2734 (2011).

¹²³ See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755-57 (1985) (plurality opinion) (distinguishing speech on matters of public concern from speech on matters of private concern for libel law purposes).

¹²⁴ See *Miller v. California*, 413 U.S. 15, 24 (1973) (limiting obscenity law to speech that lacks "serious literary, artistic, political, or scientific value").

¹²⁵ See Volokh, *supra* note 17, at 1290.

¹²⁶ See *id.* at 1304.

publication of illegally created, intercepted, or leaked material is protected because of its potential value to listeners, despite its tendency to stimulate such illegality in the future.

D. Threats of Illegal Conduct

1. *Lack of Constitutional Protection*

Giboney is also connected to the First Amendment exception for true threats. When the *Giboney* opinion said that speech “used as an essential and inseparable part of a grave offense against an important public law” may be restricted,¹²⁷ two of the cases it cited in support were about the lack of protection for threats.¹²⁸ And *Giboney* has in turn been cited as support for the proposition that threats are constitutionally unprotected.¹²⁹

The Court first considered the threats exception in cases involving speech about unionization. Companies are generally barred from firing employees for voting for a union, and unions are generally barred from retaliating against employees for their speech.¹³⁰ The Court therefore concluded that speech that threatens unlawful retaliation is itself unlawful. The Court so held as to employer speech, reasoning that “conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to [unlawful] coercion”:¹³¹

The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power. In determining whether the Company actually interfered with, restrained, and coerced its employees, the Board has a right to look at what the Company has said, as well as what it has done.¹³²

Shortly afterwards, the Court held that the same principle applied to union speech threatening members with illegal retalia-

¹²⁷ 336 U.S. 490, 502 (1949).

¹²⁸ See *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945); *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539, 549 (1943) (noting that the employer’s speech was punishable because it was threatening); *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 478–80 (1941) (discussing the threats in more detail in an earlier proceeding).

¹²⁹ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (citing one of the labor threat cases, *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), as an example of the *Giboney* doctrine).

¹³⁰ See, e.g., 29 U.S.C. §§ 157, 158(a)(1), 158(a)(3), 158(b)(1)(A), 158(b)(2) (2012).

¹³¹ *Va. Elec. & Power Co.*, 314 U.S. at 477.

¹³² *Id.* at 478.

tion.¹³³ And the Court also suggested the same with regard to union threats of illegal conduct more broadly.¹³⁴

To be sure, most of the Court's threats cases since then have framed the threats exception as a separate exception, not as a special instance of *Giboney*. But one of the later employer threats cases, *NLRB v. Gissel Packing Co.* (1969),¹³⁵ was characterized by a 1978 Court decision as an example of the *Giboney* principle.¹³⁶ And one of the Court's recent citations to *Giboney*—*Rumsfeld v. FAIR* (2006)¹³⁷—likewise fits within the “threat of illegal conduct” rubric.

Rumsfeld v. FAIR offered this example as an illustration of the *Giboney* principle:

Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading “White Applicants Only” hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.¹³⁸

And “White Applicants Only” is a threat of tortious conduct (illegal discrimination). Someone who isn't white and sees the sign will know that, if he takes the time and effort to apply for the job, he will get nothing except a humiliating rejection. As a result, he won't apply for the job.

An analogy might be the tort law that bars anyone from ousting a tenant from land that he has leased, at least unless the tenant violates the terms of the lease. If a landlord (or anyone else) locks a tenant out of the property that the tenant has leased, he is committing a tort.¹³⁹ If a landlord instead tells the tenant, “If you come onto the property, you'll find that you are locked out,” he is committing the same tort, even if the tenant doesn't bother coming to the property and checking

¹³³ *Thomas*, 323 U.S. at 537–38 (citing *Va. Elec. & Power Co.*).

¹³⁴ See *Bridges v. California*, 314 U.S. 252, 277 (1941) (suggesting that threatening an illegal strike in the event a court held a particular way might be constitutionally unprotected, though threatening a legal strike was constitutionally protected).

¹³⁵ 395 U.S. 575 (1969).

¹³⁶ See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

¹³⁷ 547 U.S. 47 (2006).

¹³⁸ *Id.* at 62.

¹³⁹ See, e.g., *Willcutt v. Stout*, 670 S.W.2d 158, 162 (Mo. Ct. App. 1984); RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 6.1, illus. 6 (AM. LAW INST. 1977).

whether his key still works.¹⁴⁰ (Say this is a vacation home and the tenant is out of town, so trying to go on the property and finding himself locked out will be expensive.)

Threatening the tenant with unlawful exclusion from the property is unprotected speech, because it is a threat of tortious conduct. The same is true for threatening potential applicants with unlawful exclusion from consideration for a job.

2. *Limitations on the Exception*

The Court has not squarely dealt with the threats exception in much detail. Indeed, the Court hasn’t even resolved whether statements are punishable only (a) if the speaker intends to put a person in fear, or whether it is enough that (b) a reasonable speaker would realize that the statement would put a person in fear.¹⁴¹ The Court has said that, to be punishable, a threat of illegal conduct must be a “true threat,” rather than obvious hyperbole or humor, but that is more just a reminder that threats must indeed be threatening.

Lower courts, however, have begun to deal with how specific and concrete a threat must be to be punishable. Some courts, for instance, have required that the threat be “so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution.”¹⁴² “One day we’ll revolt”—or even “one day there’ll be a revolution and the capitalists will be the first ones up against the wall”—likely would be constitutionally protected. So would “no justice, no peace,” even when the “no peace” threatens unspecified violence in the future, as a means of pressuring listeners into going along with the speaker’s demands. At the same time, despite the “immedia[cy]” and “imminen[ce]” requirement, presumably a threat to do something

¹⁴⁰ See, e.g., RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 6.1, illus. 16 (noting that landlord’s making property unavailable to tenant, when the tenant knows of this, equals wrongful eviction of tenant).

¹⁴¹ In *Elonis v. United States*, 135 S. Ct. 2001 (2015), the Supreme Court initially agreed to consider the matter but ultimately decided the case on purely statutory grounds. The federal threats statute, the Court held, required a minimum *mens rea* of either recklessness or knowledge (the Court didn’t decide which it was), not mere negligence. *Id.* at 2012–13. *Elonis*’s conviction, which was based on jury instructions that only required negligence, thus had to be reversed without the need to decide what the First Amendment required. The circuit split on the constitutional *mens rea* question—what is the minimum *mens rea* that the First Amendment requires for a threat conviction?—thus remains unresolved.

¹⁴² *New York ex rel. Spitzer v. Operation Rescue Nat’l*, 273 F.3d 184, 196 (2d Cir. 2001) (quoting *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976)); see also *State v. Krijger*, 97 A.3d 946, 960 n.11 (Conn. 2014) (endorsing this test); *State v. Chung*, 862 P.2d 1063 (Haw. 1993) (likewise).

specific at some time in the future (e.g., “if you vote to form a union, we’ll fire you,” even when the vote won’t be for some months) would still be punishable.

Likewise, *NAACP v. Claiborne Hardware Co.* suggests that at least some statements made as part of a political movement remain constitutionally protected even if they may appear to be threats and are said against a backdrop of violence. In *Claiborne*, the NAACP organized a black boycott of white-owned stores and publicized the names of blacks who weren’t following the boycott, to pressure people into going along with the boycott.¹⁴³ Some of the people whose names were so publicized were beaten, had their property vandalized, or had shots fired into their homes.¹⁴⁴

Charles Evers, an NAACP leader, gave two speeches in which he “stated that boycott violators would be ‘disciplined’ by their own people and warned that the Sheriff could not sleep with boycott violators at night.”¹⁴⁵ And it seems likely that black citizens who didn’t want to go along with the boycott might have understandably felt threatened with violence; indeed, such a reaction might have been intended:

While many of the comments in Evers’ speeches might have contemplated “discipline” in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night implicitly conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended.¹⁴⁶

But the Court held that the speech didn’t qualify as punishable incitement to violence (surely correct under *Brandenburg*), and then concluded without much further analysis that it was constitutionally protected, notwithstanding its potentially threatening message.¹⁴⁷ The holding of *Claiborne* with regard to threats is thus unclear, and has led to some confusion among lower court judges.¹⁴⁸

143 *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 903–04 (1982).

144 *Id.* at 904.

145 *Id.* at 902.

146 *Id.* at 927.

147 *See id.* at 928–29.

148 *See, e.g., Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc) (splitting 6 to 5 on

E. Agreements to Commit Crime—and Other Agreements

1. *Lack of Constitutional Protection*

Agreements to commit a crime or tort, such as traditional conspiracy, would fit neatly within the *Giboney* principle, alongside solicitation, provocation, or threats of illegal conduct, or the use of the fruits of illegal conduct.¹⁴⁹

Giboney, however, has often been cited to support the constitutionality of laws that ban agreements to do something, even when that something itself would *not* have been independently criminal or tortious. Antitrust law is a classic example.¹⁵⁰ An agreement to set high prices violates antitrust law, even though simply setting a high price on one’s own is perfectly legal. Prostitution is another example: agreeing to have sex in exchange for valuable consideration is prostitution, even though giving (and accepting) a gift following sex is legal.

And though agreements are often labeled “conduct” rather than speech, they are indeed communication. An agreement is essentially a communication that the speaker intends to do something under certain circumstances, and intends to be morally or legally bound to do it, generally coupled with a communication from the other party that the other party agrees to the proposed deal.

The communication can be nonverbal, with the proverbial wink and a nod that the parties understand because of their shared knowledge and expectations. But one way or another, agreement stems from *communicated* intentions. Nor can one say that the communication is just evidence of the agreement.¹⁵¹ Before the communication happens, all we have are

whether speech by antiabortion activists qualified as sufficiently threatening to be constitutionally unprotected, notwithstanding *Claiborne*).

¹⁴⁹ See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); see also *Brown v. Hartlage*, 456 U.S. 45, 55 (1982) (“Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech.”); GREENAWALT, *supra* note 16, at 79–88.

¹⁵⁰ See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011) (citing *Giboney* for the proposition that antitrust law is constitutionally permissible); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (likewise); *Nat’l Soc’y of Prof. Eng’rs v. United States*, 435 U.S. 679, 697 (1978) (likewise).

¹⁵¹ Speech can be used as evidence of some other crime, or of a motive that makes certain other conduct criminal. See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993); *Haupt v. United States*, 330 U.S. 631, 641–42 (1947). The torts and crimes discussed in this Article, though, involve speech itself being made illegal.

desires and intentions in the prospective parties' heads. It is the communication that itself creates the agreement.

Still, agreements have long been seen as a regulable communication: "the very plot is an act in itself."¹⁵² That's true of agreements that are seen as criminal or tortious. And it's true of other agreements that create various legal obligations; many normal contracts qualify. A statute might, for instance, require various disclosure obligations for certain kinds of agreements, and impose civil penalties (such as lack of enforceability) when those obligations aren't complied with. That is a constitutionally valid regulation of the agreement, even though the burden on speech—you can't say "I promise to X" unless you also say something else—is quite deliberate.

Here, I think the better explanation is simply this: (a) Agreements are a longstanding category of speech that has been historically excluded from constitutional protection. (b) Such exclusion is broadly seen as necessary because many kinds of agreements have substantial tangible consequences, whether economic or physical. (c) Restricting such agreements does little to interfere with self-government or discussion of issues, whether political, religious, scientific, social, artistic, or even personal. We can say that the restriction on speech is just incidental to the restriction on the "conduct" of agreement, but that obscures more than it reveals, given that the agreement is itself mutual communication of future intentions.

2. *Limitations on the Exception*

The conspiracy exception, too, has to be limited by First Amendment considerations.¹⁵³ *Whitney v. California*, for instance, involved a law that essentially banned conspiracies to "advocate, teach or aid and abet" criminal "means of accomplishing a change in industrial ownership or control, or effecting any political change."¹⁵⁴ Though the law could be violated simply by a conspiracy to advocate or teach such behavior, the

¹⁵² *Mulcahy v. Queen* (1868) 3 LRE & I. App. 306 (HL) 317 (appeal taken from Ir.), *quoted in* *Loewe v. Lawlor*, 208 U.S. 274, 299 (1908) (as to unlawful business conspiracies to restrain trade); *Aikens v. Wisconsin*, 195 U.S. 194, 205 (1904) (as to unlawful union conspiracies to strike); *Commonwealth v. Walters*, 266 S.W. 1066, 1068 (Ky. 1924) (as to unlawful conspiracies to commit crime); *State v. Carbone*, 91 A.2d 571, 574 (N.J. 1952) (joined by William Brennan, J.) (same); 2 WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 12.2(a) (2d ed. 2003) (quoting this as a common-law rule).

¹⁵³ See generally Martin H. Redish & Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, 76 ALB. L. REV. 697, 698–700 (2013).

¹⁵⁴ 274 U.S. 357, 359–60 (1927).

purpose to advocate or teach would itself be a purpose to bring the behavior about.

In principle, conspiracies to advocate and teach could thus often be classified as ordinary conspiracies to bring about the crime. And the Court defended the law in part based on the argument that “[t]he essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy.”¹⁵⁵

The same was so in *Dennis v. United States*, where Justice Jackson’s concurrence expressly relied on *Giboney*. “The defense of freedom of speech or press,” Justice Jackson reasoned,

has often been raised in conspiracy cases, because, whether committed by Communists, by businessmen, or by common criminals, it usually consists of words written or spoken, evidenced by letters, conversations, speeches or documents. Communication is the essence of every conspiracy, for only by it can common purpose and concert of action be brought about or be proved.¹⁵⁶

The *Giboney* reasoning, Justice Jackson argued, rejected protection for union conspiracies to commit crimes;¹⁵⁷ it likewise rejected such protection for Communist conspiracies.¹⁵⁸

Yet the Court has overruled *Whitney*,¹⁵⁹ and limited *Dennis* to “advocacy . . . directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action”¹⁶⁰ (a vastly narrower range of speech than the speech alleged in *Dennis* itself). Agreements to speak, even when the speech is aimed at eventually producing crime—such as sabotage or revolution—are thus not within today’s conspiracy exception.

¹⁵⁵ *Id.* at 371–72. Justice Brandeis concurred on the grounds that there was evidence that the defendant had been involved in a conspiracy to commit “present serious crimes,” and not just a conspiracy “to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future.” *Id.* at 379 (Brandeis, J., concurring in the judgment). But a mere conspiracy to advocate, in his view, would be constitutionally protected. *Id.*

¹⁵⁶ 341 U.S. 494, 575 (1951) (Jackson, J., concurring in the judgment).

¹⁵⁷ *Id.* at 575–56 (quoting *Giboney* at length).

¹⁵⁸ *See id.*

¹⁵⁹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹⁶⁰ *Id.* at 447 & n.2.

F. Speech That Violates the Law for Reasons Unrelated to Its Communicative Impact

At times, *Giboney* has also been cited for the proposition that a law may be applied to speech for reasons that are independent of what the speech communicates. *Sorrell v. IMS Health Inc.*, for instance, suggested that when “an ordinance against outdoor fires” is applied to “burning a flag,” that application is valid for reasons related to the *Giboney* rationale.¹⁶¹ And *Rumsfeld v. FAIR* cited *Giboney* in holding that a law requiring universities to treat military recruiters on par with other recruiters could constitutionally be applied to the universities’ sending out announcements about where the recruiters were going to be.¹⁶² The equal treatment provision applied to equal distribution of speech as well as, for instance, equal provision of space.

Both of these cases involved speech that was affected “incidental[ly],” simply in the sense that it applied to speech without regard to the supposed harms that flowed from its communicative content.¹⁶³ That explains how an ordinance against outdoor fires can be applied against flag burning.¹⁶⁴ Indeed, the language of “incidental” restrictions on speech was used in *United States v. O’Brien*, the precedent that would normally be applied to restrictions on outdoor fires.¹⁶⁵ And this fits well with *Giboney*’s statement that the First Amendment generally does not protect “speech or writing used as an integral part of conduct in violation of a valid criminal statute.”¹⁶⁶ Indeed, *California v. LaRue* seems to treat *Giboney* and *O’Brien* as closely related.¹⁶⁷

¹⁶¹ 131 S. Ct. 2653, 2665 (2011) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992)).

¹⁶² 547 U.S. 47, 61–62 (2006).

¹⁶³ See *Sorrell*, 131 S. Ct. at 2655; *Rumsfeld*, 547 U.S. at 70.

¹⁶⁴ See, e.g., *City of Columbus v. Meyer*, 786 N.E.2d 521, 529 (Ohio Ct. App. 2003) (upholding a conviction in such a case); *Bohmfolk v. City of San Antonio*, No. SA-09-CV-0497 OG (NN), 2010 WL 2303387, at *3–4 (W.D. Tex. June 4, 2010) (concluding that an arrest in such a case didn’t violate the First Amendment).

¹⁶⁵ 391 U.S. 367, 376–77 (1968).

¹⁶⁶ 336 U.S. 490, 498 (1949).

¹⁶⁷ 409 U.S. 109, 117 (1972); see also *Eisenstadt v. Baird*, 405 U.S. 438, 466–67 (1972) (Burger, C.J., dissenting) (arguing that distribution of contraceptives, though coupled with certain kinds of speech, is outside First Amendment protection (citing *O’Brien*, 391 U.S. at 376; *Giboney*, 336 U.S. at 502)); *Street v. New York*, 394 U.S. 576, 615–16 (1969) (Fortas, J., dissenting) (arguing that flag burning, though done with the purpose of protest, is outside First Amendment protection (citing *O’Brien* and *Giboney*)).

G. Summary: The Other Crime Requirement

We can thus arrive at a general summary of the “speech integral to [illegal] conduct” doctrine, as it has been understood by post-*Giboney* cases:

1. When speech may cause other unlawful (criminal or tortious) conduct, or threatens that the speaker will engage in such illegal conduct,
2. courts are entitled to develop rules defining some such speech as restrictable,
3. much as the Court has done for advocacy of crime (under the rubric of the incitement and solicitation doctrines), for fighting words, for threats, and for child pornography, all of which have at times been viewed as special cases of the “speech integral to [unlawful] conduct” doctrine.
4. The word “integral” is thus the Court’s way of suggesting that the speech is substantially enough connected to *some other* crime for the speech to be potentially punishable—though this connection to crime is only a necessary condition for triggering the exception, not a sufficient one.
5. The illegal conduct can consist either of physical non-speech behavior or of agreement, which is treated as analogous to physical conduct.
6. It is not enough that the speech itself *be labeled* illegal conduct, e.g., “contempt of court,” “breach of the peace,” “sedition,” or “use of illegally gathered information.” Rather, it must help cause or threaten *other* illegal conduct (including an illegal agreement), which may make restricting the speech a justifiable means of preventing that other conduct.

The most helpful way of thinking about *Giboney*, then, is as a case that discusses when new exceptions to free speech protection may be recognized—even by absolutists (such as Justice Black), or by those who think that only historical exceptions to free speech protection may be recognized (such as Chief Justice Roberts, Justice Scalia, and the other Justices who signed on to *Stevens*). Indeed, the continuing treatment of fighting words, incitement, solicitation, and child pornography as separate exceptions supports that view.

But some modern cases, such as *Stevens*, treat *Giboney* as creating an overarching exception for “speech integral to [illegal] conduct.”¹⁶⁸ That too is plausible, but it is necessary to recognize that the boundaries of the exception differ sharply

¹⁶⁸ See *United States v. Stevens*, 599 U.S. 460, 468 (2010).

depending on the way the speech is linked to the conduct. *Giboney* cited both *Fox v. Washington* and *Chaplinsky v. New Hampshire*, after all, to support its conclusion—but the advocacy/solicitation exception that ultimately flowed from *Fox* has very different boundaries from the fighting words exception that flowed from *Chaplinsky*. The boundaries for the *Ferber* speech-that-creates-incentive-for-illegal-conduct doctrine (the most recent direct application of *Giboney*) are different still.

I would have favored a different approach to dealing with such matters, but the summary I offer above is what the cases dictate. That the doctrine applies to speech integral to tortious conduct flows directly from *Rumsfeld v. FAIR*, which gave as an example speech that threatens civilly actionable (but not criminal) discrimination, and *Virginia Electric & Power Co. v. NLRB*, which likewise involved a threat of civilly actionable retaliation.¹⁶⁹ That the tendency of speech to cause or threaten illegal conduct may indeed strip it of protection stems not just from *Giboney* but also from *Chaplinsky*, *Ferber*, *FAIR*, and the other cases I cited.

Moreover, though some subdoctrines within the “speech integral to [illegal] conduct” exception require that the speech be close in time or space to the conduct—consider incitement and fighting words—others do not. For instance, the distribution of child pornography can be punished even if it happens many years after the criminal creation of the material, and even if the tendency of the distribution to cause future criminal creation (by creating a market for the created material) likewise operates over time and across space.¹⁷⁰ Similarly, solicitation can be a crime even if it solicits a crime at some time in the future (e.g., solicits the commission of a carefully planned murder rather than a spontaneous one).¹⁷¹

That such a causal connection is not sufficient to justify restricting speech, and is only the first step in developing the boundaries of any new exception (or subexception), stems from *Brandenburg*, *Bartnicki*, *Gooding v. Wilson*,¹⁷² and the various

¹⁶⁹ See *Rumsfeld v. FAIR*, 547 U.S. 47, 62 (2006); *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 533–34, 546 (1943).

¹⁷⁰ See, e.g., 18 U.S.C. § 2251(e) (2012) (criminalizing the distribution of child pornography); *id.* § 2252(a)(3) (criminalizing the distribution alone of child pornography, as opposed to requiring creation *and* distribution for prosecution); *New York v. Ferber*, 458 U.S. 747, 760 n.10 (1982) (noting the long-lasting negative effects of child pornography as a rationale for the prescribed punishment).

¹⁷¹ See, e.g., *Westbrook v. State*, 29 S.W.3d 103, 125 (Tex. Crim. App. 2000).

¹⁷² See *Bartnicki v. Vopper*, 532 U.S. 514, 529–34 (2001); *Gooding v. Wilson*, 405 U.S. 518, 527–28 (1972); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

other cases discussed above. And the inapplicability of the doctrine to cases where speech itself violates a ban on conduct (because of its communicative conduct), as opposed to tending to cause or threaten other conduct, stems from *Holder v. Humanitarian Law Project*, *Cohen v. California*, *Terminiello v. City of Chicago*, *Bridges v. California*, *Cantwell v. Connecticut*, and the other cases discussed below in Part II.A.

H. Summary: The Function of the “Speech Integral to [Illegal] Conduct” Doctrine

We have seen, then, what the “speech integral to criminal conduct” doctrine has meant in First Amendment law; Part II will discuss what it hasn’t meant, or has stopped meaning. But let me offer here some thoughts about one function this doctrine has had, and some speculation about why we have seen a return to this doctrine since 2006.

Giboney, as I’ve noted above, was an opinion by Justice Black, who long described himself as a First Amendment absolutist.¹⁷³ Justice Douglas sometimes likewise argued that the First Amendment was an absolute, especially starting after *Dennis v. United States*.¹⁷⁴

Yet even Justices Black and Douglas weren’t willing to offer constitutional protection to all speech. As noted above, they had no objection to bans on “fighting words,”¹⁷⁵ threats of illegal conduct,¹⁷⁶ or solicitation of illegal conduct.¹⁷⁷ Presumably, they would have said the same as to classic aiding and abetting, in which one criminal advises on the details of how to commit a crime.¹⁷⁸ Justice Douglas expressed regret about his agreeing in *Valentine v. Chrestensen*¹⁷⁹ that commercial adver-

¹⁷³ *Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting, joined by Black, J.); *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting); *Carlson v. Landon*, 342 U.S. 524, 554 (1952) (Black, J., dissenting); *Rochin v. California*, 342 U.S. 165, 211 (1952) (Black, J., dissenting).

¹⁷⁴ See *Beauharnais*, 343 U.S. at 275 (Black, J., dissenting, joined by Douglas, J.); *Roth*, 354 U.S. at 514 (Douglas, J., dissenting).

¹⁷⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942).

¹⁷⁶ *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 478–80 (1941).

¹⁷⁷ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 491 (1949).

¹⁷⁸ See, e.g., *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting) (taking the view that the First Amendment wouldn’t protect “teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like” as a means of helping people commit those crimes).

¹⁷⁹ See *Valentine v. Chrestensen*, 316 U.S. 52, 55 (1942).

tising was categorically unprotected,¹⁸⁰ but never about his agreeing in *Chaplinsky* that fighting words were unprotected. Justices Black and Douglas fought the libel, obscenity, and incitement exceptions,¹⁸¹ but not the other exceptions I mentioned.

The doctrine that “speech integral to criminal conduct”—or, as Justice Douglas liked to put it, “[speech] brigaded with illegal action”¹⁸²—is constitutionally unprotected thus had an important function in Justice Black’s and Justice Douglas’s jurisprudence: it provided room for restrictions on speech even within a purportedly “absolutist” framework. Indeed, in *Ko-nigsberg v. State Bar*, Justice Black expressly used *Giboney* and its predecessor, *NLRB v. Virginia Electric & Power Co.*,¹⁸³ this way:

The Court suggests that a “literal reading of the First Amendment” would be totally unreasonable because it would invalidate many widely accepted laws. I do not know to what extent this is true. I do not believe, for example, that it would invalidate laws resting upon the premise that where speech is an integral part of unlawful conduct that is going on at the time, the speech can be used to illustrate, emphasize and establish the unlawful conduct. [Footnote: *Roth v. United States*, 354 U.S. 476, 514 (dissenting opinion). See also *La-bor Board v. Virginia Electric & Power Co.*, 314 U.S. 469; *Giboney v. Empire Storage Co.*, 336 U.S. 490.]¹⁸⁴

And there is a principled vision of the First Amendment and of democracy that one can draw from Justice Black’s position, whether one agrees with it or not:¹⁸⁵ what one might call the “rule of law” model of free speech.

In that vision, a democratic legal system has broad authority to prohibit physical and economic conduct: murder, public nudity, retaliatory dismissal of employees who vote for a union, refusal to deal with nonunion customers, and the like. The Free Speech Clause denies the legal system the general authority to restrict speech, even through democratically chosen laws. In a democratic rule of law system, you can advocate for

180 *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Rels.*, 413 U.S. 376, 398 (1973) (Douglas, J., dissenting); *Cammarano v. United States*, 358 U.S. 498, 513–14 (1959) (Douglas, J., concurring).

181 See *supra* notes 95–97.

182 See *Roth v. United States*, 354 U.S. 476, 514 (1957) (“Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it.”).

183 See *supra* Part I.D.

184 366 U.S. 36, 64 & n.18 (1961) (Black, J., dissenting).

185 I myself am open to some applications of it but skeptical about others.

whatever law you want, and you can use speech to create social and economic pressure. But the legal system may prohibit you from causing illegal conduct, even causing it through speech, or using your capacity for illegal conduct to coerce others. Law-abiding citizens ought not use violence or other illegal nonspeech conduct, whether directly or indirectly, to bring about the changes they seek.

Justice Black never articulated this position directly. But his acceptance of speech restrictions in the solicitation, threats, and fighting words cases, and rejection of speech restrictions in most other cases, seems best explicable by this sort of “rule of law” approach.

Since *United States v. Stevens*, the Court has taken the view—whether rightly or wrongly—that the list of First Amendment exceptions is essentially limited to historically recognized exceptions, such as the ones for obscenity, libel, and the like.¹⁸⁶ It has thus found itself facing much the same question that Justices Black and Douglas were facing: How to make room for other speech restrictions that also jeopardize the rule of law (by tending to cause illegal conduct), when those restrictions—for instance, the child pornography restriction—do not have a solid historical provenance? The *Giboney* umbrella seems to be the Court’s answer to that question.

II

HOW THE “SPEECH INTEGRAL TO [ILLEGAL] CONDUCT” EXCEPTION OUGHT NOT BE DEFINED: THE SUPREME COURT CASES

Part I tried to summarize what the holding and applications of *Giboney* can mean, consistently both with the precedents that cite it and with other First Amendment precedents. The language of *Giboney* itself can indeed be read more broadly, as authorizing considerably more speech restrictions. But such broad interpretations of *Giboney* are not consistent with First Amendment precedents, either those decided since *Giboney* or those decided before and at the same time.

A. Upholding Laws That Can Be Violated Through the Communicative Impact of Speech, as Well as Through Conduct?

One of the most-quoted passages in *Giboney* is, “[i]t rarely has been suggested that the constitutional freedom for speech

¹⁸⁶ 559 U.S. 460, 471–72 (2010).

and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”¹⁸⁷ And there is a possible broad reading of this passage:

- (a) when a valid criminal statute bans any conduct (speech or not)
- (b) that causes (or intends to cause or is likely to cause) a particular harm,
- (c) speech that likewise causes that same harm and therefore triggers the statute may be punished,
- (d) even when the harm flows from what the speech communicates.

Thus, if there is a “valid criminal statute” banning any conduct that causes restraint of trade, speech that violates this statute would be punishable, too. There would be no need to conclude that the speech constitutes punishable solicitation of some other crime (or threat, conspiracy, or aiding and abetting). So long as the speech fits the elements of this facially speech-neutral crime, the speech is not constitutionally immunized.

This doctrine, though, was rejected by the Court in *Holder v. Humanitarian Law Project*.¹⁸⁸ It has been implicitly rejected in other post-*Giboney* cases. And it is inconsistent with two leading precedents decided shortly before *Giboney*.

1. *Holder v. Humanitarian Law Project: Speech That Helps Terrorists*

Holder dealt with a statute banning “material support” to foreign terrorist organizations, conduct “which most often does not take the form of speech at all”¹⁸⁹ and which was defined based on the tendency of the conduct to aid harm-causing agents. The law could apply to speech, such as “training on the use of international law or advice on petitioning the United Nations,” but also to the provision of money, goods, or soldiers.¹⁹⁰ The government argued that, as a result, the law was just a speech-neutral conduct restriction that only incidentally burdened speech—even when the speech triggered the law precisely because its content (such as training or advice) provided material support.¹⁹¹

187 336 U.S. 490, 498 (1949).

188 561 U.S. 1 (2010).

189 *Id.* at 26.

190 *Id.* at 27.

191 *Id.* at 27–28.

Not so, the Court concluded, citing *Cohen v. California* (as the “most prominent[.]” of “a number of our precedents”¹⁹²). Both *Holder* and *Cohen*, the Court pointed out, “involved a generally applicable regulation of conduct” (in *Cohen*, this was breach of the peace).¹⁹³ “But when *Cohen* was convicted for wearing a jacket bearing an epithet, we did not apply *O’Brien*,” the test applicable to conduct restrictions that incidentally burden speech.¹⁹⁴

“Instead, we recognized that the generally applicable law was directed at *Cohen* because of what his speech communicated—he violated the breach of the peace statute because of the offensive content of his particular message. We accordingly applied more rigorous scrutiny and reversed his conviction.”¹⁹⁵ Likewise, the Court held, strict scrutiny should be applied to the material support ban in those situations where the speech constitutes material support “because of what [the] speech communicated.”¹⁹⁶

This makes sense: it’s the only way to explain *Cohen* and the other similar cases discussed below. And it shows that the denial of protection “to speech or writing used as an integral part of conduct in violation of a valid criminal statute” can’t mean that a facially valid speech-neutral conduct restriction could be freely applied to speech based on what the speech says.¹⁹⁷

The *Holder* Court did mention *Giboney* in passing. The government had briefly argued that plaintiffs were unprotected because their speech “coordinated with foreign terrorist organizations” was similar to “speech effecting a crime, like the words that constitute a conspiracy.”¹⁹⁸ The Court cited *Giboney* as a “*See, e.g.*,” following this statement, but then declined to “consider any such argument because the Government does not develop it.”¹⁹⁹ The Court thus had no occasion to determine whether the *Giboney*-based conspiracy exception (see Part I.E) could justify the material support ban. But it was pretty clear that the Court, despite being aware of *Giboney*, was rejecting

¹⁹² *Id.* at 27.

¹⁹³ *Id.* at 28.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* (emphasis added).

¹⁹⁶ *Id.*

¹⁹⁷ *Holder* of course did uphold the speech restriction, but only after evaluating it as a content-based speech restriction and upholding it under strict scrutiny, based on (1) the restriction’s narrowness and (2) its being justified by a compelling government interest in preventing terrorism. *Id.* at 25–26, 28, 39.

¹⁹⁸ *Id.* at 27 n.5.

¹⁹⁹ *Id.*

the view that speech can be punished whenever it violates a generally applicable conduct restriction.

2. *Giboney-era and Post-Giboney Cases: Breach of the Peace*

Indeed, before and immediately around *Giboney*, the Court had dealt with general conduct restrictions that were triggered by what speech communicated. In such situations, the Court treated the laws as speech restrictions and struck them down when the speech didn't fit within a historically recognized exception to protection.

One notable example was breach of the peace. In *Cantwell v. Connecticut*, the Court acknowledged the general constitutionality of breach-of-the-peace law, which has historically applied to a wide range of constitutionally unprotected conduct.²⁰⁰ But when the law was applied to offensive speech because of “the effect of [the speaker’s] communication upon his hearers,”²⁰¹ it violated the First Amendment.

*Terminiello v. City of Chicago*²⁰²—argued two months before *Giboney* was decided and decided a month after *Giboney*—is another example. Like *Cantwell*, *Terminiello* used the First Amendment to set aside a conviction under a breach-of-the-peace ordinance. The breach of the peace in that case stemmed from Terminiello’s giving a racist speech that angered a crowd gathered outside the meeting hall in which Terminiello was speaking.

Terminiello held that the ordinance wasn’t generally valid, but only because, as applied to speech, the ordinance reached beyond “fighting words.” Barring all conduct that tends to cause a breach of the peace, including speech that has the same effect, thus violates the First Amendment. The very fact that the ordinance did not provide “immunity to speech or writing”—at least outside the *Chaplinsky* exception—made it into something other than “a valid criminal statute.”

In the decades that followed, the Court repeatedly held generally applicable breach-of-the-peace laws invalid when they were applied to speech based on “the effect of [the speaker’s] communication on his hearers.” This happened in

²⁰⁰ See 310 U.S. 296, 308 (1940). In that instance, the law was a statute, not a common law rule, but shortly after *Giboney* the Court made clear that the *Giboney* principle applies to common law rules as well as statutes. *Hughes v. Superior Court*, 339 U.S. 460 (1950).

²⁰¹ *Cantwell*, 310 U.S. at 309.

²⁰² 337 U.S. 1 (1949).

Edwards v. South Carolina,²⁰³ in *Hess v. Indiana*,²⁰⁴ and most famously in *Cohen*.²⁰⁵ (The latter two cases both involved as-applied challenges to valid laws.)

3. *Giboney-era and Post-Giboney Cases: Contempt of Court*

Like breach-of-the-peace law, contempt-of-court law prohibits a wide range of conduct, speech or otherwise. In the 1940s, that conduct was defined as anything that “ha[s] a ‘reasonable tendency’ to interfere with the orderly administration of justice in pending actions before judicial tribunals.”²⁰⁶ But by the time *Giboney* was decided, the Court had already held that facially valid contempt-of-court rules might be unconstitutional as applied to out-of-court speech criticizing a judge’s decision.

The first such case—written by Justice Black, the author of *Giboney*—was *Bridges v. California*, which set aside a conviction for common-law contempt of court.²⁰⁷ *Giboney* cited *Bridges* favorably as an example of “the essential importance to our society of a vigilant protection of freedom of speech and press.”²⁰⁸ Two more pre-*Giboney* cases, *Craig v. Harney*²⁰⁹ and *Pennekamp v. Florida*,²¹⁰ likewise used the First Amendment to set aside convictions for statutory contempt of court. The pattern continued after *Giboney*, in *Wood v. Georgia*.²¹¹

4. *Post-Giboney Cases: Antitrust Law and Interference with Business Relations*

Indeed, since *Giboney*, the Court has made clear that even antitrust law—the very sort of law involved in *Giboney*—is limited by the First Amendment. Antitrust law, as *Giboney* noted, is generally applicable and is generally used to punish conduct, not speech. But when organizations help restrain trade by lobbying legislatures and the public for anticompetitive regulations, *Eastern Railroad Presidents Conference v. Noerr Motor*

²⁰³ 372 U.S. 229, 234–37 (1963).

²⁰⁴ 414 U.S. 105, 105 n.1, 107–09 (1973).

²⁰⁵ 403 U.S. 15 (1971).

²⁰⁶ *Bridges v. Superior Court*, 94 P.2d 983, 995–96 (Cal. 1939), *rev’d sub nom. Bridges v. California*, 314 U.S. 252 (1941).

²⁰⁷ 314 U.S. at 258, 278.

²⁰⁸ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501 (1949).

²⁰⁹ 331 U.S. 367, 368, 378 (1947).

²¹⁰ 328 U.S. 331, 333, 349–50 (1946).

²¹¹ 370 U.S. 375, 395 (1962).

Freight, Inc. (1962)²¹² and *United Mine Workers of America v. Pennington* (1965)²¹³ make clear that the speech may not be punished.

Noerr and *Pennington* reached these speech-protective results by interpreting the Sherman Act as not applying to anticompetitive lobbying or public advocacy. But the Court was clearly influenced by a desire to avoid a First Amendment violation. In the words of *Noerr*, failing to read a public advocacy exception into the Sherman Act “would raise important constitutional questions.”²¹⁴

The same is true of the related tort of interference with business relations. That too is a facially valid tort, which covers a wide range of conduct and constitutionally unprotected speech (such as threats or defamation). But in *NAACP v. Claiborne Hardware*, the Court held that the First Amendment barred applying the tort to speech that interfered with business relations by urging a political boycott.²¹⁵

5. *Post-Giboney Cases: Intentional Infliction of Emotional Distress*

Intentional infliction of emotional distress is likewise a facially valid tort, which permissibly covers conduct and constitutionally unprotected speech. Yet *Hustler v. Falwell*²¹⁶ and *Snyder v. Phelps*²¹⁷ set aside intentional infliction of emotional distress verdicts when those verdicts were based on constitutionally protected speech that caused distress because of its message.

The Court has left open the possibility that speech that is not “of public concern” and that outrageously inflicts severe emotional distress may be actionable.²¹⁸ But this was *not*

²¹² 365 U.S. 127, 144–45 (1961).

²¹³ 381 U.S. 657, 659–61 (1965).

²¹⁴ 365 U.S. at 137–38; *see also* *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 424 (1990) (noting the *Noerr* Court’s interpretation of the Sherman Act “in the light of the First Amendment[]”); David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POLY 293, 363–66 (1994) (arguing that *Noerr-Pennington* immunity makes sense only as a First Amendment exception to antitrust law, and not as a faithful interpretation of antitrust law standing alone). These cases involved civil lawsuits, but surely speech should be at least as protected against criminal punishments as it is against civil suits.

²¹⁵ 458 U.S. 886, 912–13 (1982).

²¹⁶ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

²¹⁷ 562 U.S. 443 (2011).

²¹⁸ *Id.* at 451–52.

based on any general conclusion that a facially speech-neutral tort could be freely applied to speech as well as conduct.

B. Upholding Restrictions on Speech That “Subvert[s]” Government Policies?

There is another way of reading *Giboney*—as allowing the government to restrict speech that produces socially harmful behavior, whether that behavior is itself criminal or otherwise. The Court experimented with this reading in the 1950s, but ultimately retreated from such an approach (at least outside picketing, which the cases have long treated as special).

A year after *Giboney*, the Court decided *Hughes v. Superior Court*.²¹⁹ Picketers had been trying to pressure a grocery store chain to “hire Negro clerks in proportion to Negro customers,”²²⁰ and the California Supreme Court upheld an injunction against such picketing.²²¹ Justice Black, joined by Justice Minton, concluded the injunction was constitutional on the basis of *Giboney*, with no further elaboration.²²² The majority opinion, which Justice Black didn’t join, also cited *Giboney*, but for a broader proposition:

Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. See . . . *Giboney v. Empire Storage & Ice Co.*

The constitutional boundary line between the competing interests of society involved in the use of picketing cannot be established by general phrases The California Supreme Court suggested a distinction between picketing to promote discrimination, as here, and picketing against discrimination: “It may be assumed for the purposes of this decision, without deciding, that if such discrimination exists, picketing to protest it would not be for an unlawful objective.” We cannot construe the Due Process Clause as precluding California from securing respect for its policy against involuntary employment on racial lines by prohibiting systematic picketing that would subvert such policy. See *Giboney v. Empire Storage & Ice Co.*, *supra*.²²³

But neither the Court nor Justice Black discussed a major difference between *Giboney* and *Hughes*—in *Giboney*, the action that the picketers sought (Empire Ice’s refusal to deal with

²¹⁹ *Hughes v. Superior Court*, 339 U.S. 460 (1950).

²²⁰ *Id.* at 461.

²²¹ *Id.* at 462.

²²² *Id.* at 469 (Black, J., concurring in the judgment).

²²³ *Id.* at 465–66 (citations omitted in part).

nonunion peddlers) was illegal under state law, but in *Hughes*, racially discriminatory hiring was *not* illegal. California wouldn't outlaw race discrimination in employment until 1959,²²⁴ and the California Supreme Court decision didn't purport to outlaw such discrimination either.²²⁵ The U.S. Supreme Court was therefore taking the view that picketing could be banned even if it sought to pressure employers into acting *legally*, albeit (in the California Supreme Court's view) socially undesirably (because of the "policy against involuntary employment on racial lines").²²⁶

Likewise, in *Electrical Workers v. NLRB* (1951), the Court upheld a ban on "secondary boycotts," in which a union that had a dispute with an employer picketed a neutral party, which was doing business with the employer, trying to pressure the neutral into pressuring the employer to comply with the union's demands.²²⁷ Again, the conduct that the union was soliciting—the neutral's pressure on the employer—was not illegal, unlike the solicited conduct in *Giboney*, which was illegal.

Nonetheless, the Court relied on *Giboney*, listing it as one of several precedents that had "recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives."²²⁸ Suggesting that *Electrical Workers* involved an "unlawful objective[]" implied that using speech to pressure a neutral party to pressure the employer could be

²²⁴ CAL. LAB. CODE § 1412 (1959) (repealed 1980) (current version at CAL. GOV'T CODE ANN. § 12921 (West 2014)).

²²⁵ Justice Reed concurred in *Hughes*, having "read the opinion of the Supreme Court of California to hold that the pickets sought from Lucky Stores, Inc., discrimination in favor of persons of the Negro race, a discrimination unlawful under California law." 339 U.S. at 469 (Reed, J., concurring). But no other Justices endorsed this view, and the California Supreme Court decision doesn't support it. Justice Traynor's dissenting opinion below specifically pointed out that employers remained free to discriminate based on race. See *Hughes v. Superior Court*, 198 P.2d 885, 896 (Cal. 1948) (Traynor, J., dissenting, joined by Carter, J.); see also *Jones v. Am. President Lines, Ltd.*, 308 P.2d 393, 395 (Cal. Dist. Ct. App. 1957) (stating, several years after *Hughes*, that there was no recognized "right to private employment without discrimination on the basis of race"). The California Supreme Court held only that picketing to pressure employers into discriminating was unlawful, not that employer discrimination was itself unlawful. See Osmond K. Fraenkel, *Peaceful Picketing—Constitutionally Protected?*, 99 U. PA. L. REV. 1, 9 (1950) (recognizing this); Elliot L. Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 20 n.86 (1951) (same).

²²⁶ *Hughes*, 339 U.S. at 466.

²²⁷ *Int'l Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694, 700–01 (1951).

²²⁸ *Id.* at 705.

made unlawful—even though the solicited neutral party action would have itself been legal.²²⁹

If this principle were taken to its logical conclusion, it would essentially justify any restrictions on speech that urges behavior that legislatures or courts have declared harmful—or at least on speech that uses the threat of economic pressure to produce such behavior.²³⁰ This fits well with the general vision of Justice Frankfurter, who wrote *Hughes* and *Teamsters, Inc. v. Vogt* (1957),²³¹ a case that reaffirmed the secondary boycott principle of *Electrical Workers* (and that drew a sharp dissent from Justice Douglas, joined by Justice Black and Chief Justice Warren).²³²

But, like some other speech-restrictive doctrines from the 1950s that Justice Frankfurter promoted,²³³ these interpretations of *Giboney* have not had much generative force. Indeed, in *California v. LaRue* and *NAACP v. Claiborne Hardware Co.*, the Court recharacterized *Hughes* as involving “a boycott designed to secure aims that are themselves prohibited by a valid state law”²³⁴—as noted above, not a factually correct description of *Hughes*, but one that the Court imposed to cabin the force of *Hughes*.

Likewise, while restrictions on picketing to support secondary boycotts have been reaffirmed as recently as *NLRB v. Re-*

²²⁹ *Id.*

²³⁰ See, e.g., *Missouri v. Nat'l Org. for Women*, 620 F.2d 1301, 1324 n.15 (8th Cir. 1980) (Gibson, J., dissenting) (citing *Giboney* and arguing that advocacy of a boycott of Missouri businesses, aimed at getting Missouri to ratify Equal Rights Amendment, might be constitutionally punishable as an antitrust law violation); *Searle v. Johnson*, 646 P.2d 682, 685 (Utah 1982) (citing *Giboney* and holding that the state Humane Society's advocacy of a tourist boycott of a county, aimed at getting the county to improve its dog pound, could be constitutionally punishable as interference with a prospective business advantage). *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), discussed below, makes these positions untenable.

²³¹ *Int'l Bhd. of Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957).

²³² *Id.* at 295–97 (Douglas, J., dissenting).

²³³ See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding a law prohibiting group libel); *Dennis v. United States*, 341 U.S. 494, 552 (1951) (Frankfurter, J., concurring in the judgment) (concurring regarding the constitutionality of a law prohibiting conspiracy to advocate violent government overthrow); *Feiner v. New York*, 340 U.S. 268, 287–89 (1951) (Frankfurter, J., concurring in the result) (concurring regarding the constitutionality of arresting a political speaker because his speech seems likely to lead to a violent retaliation by offended listeners).

²³⁴ *Claiborne Hardware*, 458 U.S. at 915 n.49; *California v. LaRue*, 409 U.S. 109, 117–18 (1972) (characterizing the speech in *Hughes* as “expression that is directed to the accomplishment of an end that the State has declared to be illegal”).

tail Store Employees,²³⁵ two of the six Justices in the majority concurred in the judgment on narrow grounds, suggesting that similar restrictions outside the specific factual context of picketing and secondary boycotts might be unconstitutional.²³⁶ And in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, the Court strongly suggested that all these cases are limited to picketing and do not cover other speech, such as leafleting.²³⁷

Indeed, the Court's cases from before *Giboney* repeatedly stressed that there was something special about *picketing*, alone among media of communication, that justified extra speech restrictions. *Giboney* itself stated—quoting a 1942 concurrence by Justice Douglas, joined by Justices Black and Murphy—that

[p]icketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.²³⁸

Hughes quoted the same passage.²³⁹ And later non-picketing cases, such as *DeBartolo* and *Babbitt v. Farm Workers*, similarly stressed that picketing is less constitutionally protected because it “is qualitatively ‘different from other modes of communication.’”²⁴⁰

Indeed, *Giboney* seems to have been further limited to *labor* picketing, when *NAACP v. Claiborne Hardware Co.* distinguished the “economic regulation” involved in *Giboney* from

²³⁵ 447 U.S. 607 (1980).

²³⁶ *Id.* at 617–18 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 618–19 (Stevens, J., concurring in part and concurring in the judgment).

²³⁷ 485 U.S. 568, 580 (1988).

²³⁸ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 503 n.6 (1949) (quoting *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 776–77 (1942)).

²³⁹ *Hughes v. Superior Court*, 339 U.S. 460, 464–65 (1950).

²⁴⁰ *DeBartolo*, 485 U.S. at 580 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 311 n.17 (1979), which in turn quoted *Hughes*, 339 U.S. at 465); *Brandenburg v. Ohio*, 395 U.S. 444, 455 (1969) (noting that picketing is “free speech plus” that can be permissibly subjected to greater regulation than typical speech); *Amalgamated Food Emps. Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 333 (1968) (Black, J., dissenting) (same); *Cameron v. Johnson*, 390 U.S. 611, 617 (1968); *Cox v. Louisiana*, 379 U.S. 536, 555, 563 (1965) (same); *id.* at 578 (Black, J., concurring in one case and dissenting in another) (same); *NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 77 (1964) (Black, J., concurring) (same).

“peaceful political activity” involved in *Claiborne* itself.²⁴¹ The broad reading of *Giboney*—as authorizing restrictions on any speech that “subvert[s]” important government policies (even when the speech doesn’t seek to promote illegal conduct)²⁴²—has thus not survived outside the limited zone of labor picketing, and possibly just labor picketing to promote secondary boycotts.²⁴³

C. Upholding Restrictions on Speech That Involves Economic Coercion Through Threats of Lawful Retaliation?

Giboney could also have been understood as allowing regulation of speech that threatened social or economic retaliation, even when that retaliation would itself be lawful.

One of the footnotes seemed to point in that direction. It quoted *Thomas v. Collins* for the proposition that “[w]hen to . . . persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed.”²⁴⁴ And it quoted Justice Jackson’s *Thomas* concurrence for the proposition that once an employer or employee “uses the economic power which he has over other men and

²⁴¹ I’m not persuaded by this distinction. Labor picketing has famously long had a political dimension. Conversely, the politically boycott in *Claiborne Hardware* both used economic pressure as a tool and sought to accomplish economic goals—indeed, labor-related goals—such as the hiring of black employees by white-owned businesses. Nonetheless, this is the distinction the Court offered.

²⁴² *Hughes*, 339 U.S. at 466.

²⁴³ Likewise, though *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515–16 (1972), could be read as authorizing restrictions on First Amendment activity that undermines important public goals, later cases have rejected this reading. *California Motor Transport* suggested that some litigation campaigns—which would otherwise be protected by the First Amendment’s Petition Clause—could sometimes be punished as antitrust violations, if they had anticompetitive purposes and effects. *Id.* at 513. And the Court cited *Giboney* for that proposition, saying that “[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.” *Id.* at 514.

But *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), and *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), made clear that antitrust laws can be applied in this context only when the anticompetitive litigation was undertaken without “probable cause” as well as with an anticompetitive purpose. *BE&K Constr.*, 536 U.S. at 526; *Profl Real Estate Inv’rs*, 508 U.S. at 62. And litigation that lacks “probable cause” has long been recognized as outside the scope of the Petition Clause altogether, quite apart from *Giboney* or any similar doctrine. See, e.g., *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983). This, for instance, is why the tort of wrongful civil proceedings (also sometimes labeled “malicious prosecution”) is constitutional. See *id.* at 744, 747 n.14.

²⁴⁴ *Giboney*, 336 U.S. at 503 n.6 (quoting *Thomas v. Collins*, 323 U.S. 516, 537–38 (1945)).

their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment.”²⁴⁵

But this too has generally been rejected by more recent Supreme Court opinions, at least when the speech doesn't involve picketing (as opposed to leafletting) and doesn't involve labor speech. *Claiborne Hardware*, as noted above, held that speech promoting a boycott of white-owned businesses was constitutionally protected—even though the speech helped exert economic pressure on businesses and social pressure (likely including economic pressure) on blacks who might have preferred not to go along with the boycott. “Speech does not lose its protected character,” the Court wrote, “simply because it may embarrass others or coerce them into action.”²⁴⁶

Organization for a Better Austin v. Keefe likewise held that speech aimed at using economic pressure was fully protected.²⁴⁷ Keefe, a real estate agent, sought to enjoin the Organization for a Better Austin from leafletting against him (leafletting aimed at getting him to change his business practices). Keefe's argument cited *Giboney*, arguing that the “purpose [of the leafletting] was admittedly to pressure Keefe” into going along with the Organization's demands.²⁴⁸ But the Court disagreed, reasoning that “[t]he claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper.”²⁴⁹

²⁴⁵ *Id.* (quoting *Thomas*, 323 U.S. at 543–44 (Jackson, J., concurring)).

²⁴⁶ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982).

²⁴⁷ 402 U.S. 415, 419 (1971).

²⁴⁸ Brief for Respondent at 20, *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (No. 135).

²⁴⁹ *Keefe*, 402 U.S. at 419. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 428 n.12 (1990), cited *Giboney* for the proposition that “[a] nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association.” But *Superior Court Trial Lawyers* was a case about regulation of outright conspiracies in restraint of trade, which the Court has long seen as constitutionally permissible. See *supra* Part I.E. It was not a case about speech advocating or even facilitating such conspiracies.

D. Upholding Conduct Restrictions That “Incidental[ly] Burden[]” Speech?

In *Sorrell v. IMS Health Inc.*, a Vermont statute restricted pharmacies from selling information about which doctors prescribed which drugs. Drug companies wanted to use such information (which identified the prescribing doctors but not the patients) to more effectively market to doctors, but Vermont sought to prevent such marketing.²⁵⁰ The Court struck down this restriction, in an opinion chiefly remembered for its commercial speech analysis.²⁵¹

But the Court also touched on *Giboney*, in responding to the state’s argument that the law was “a mere commercial regulation” and thus not subjected to any “heightened . . . scrutiny” at all:

It is . . . true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why a ban on race-based hiring may require employers to remove “‘White Applicants Only’” signs, *Rumsfeld v. FAIR, Inc.*; why “an ordinance against outdoor fires” might forbid “burning a flag,” *R.A.V. v. City of St. Paul*; and why antitrust laws can prohibit “agreements in restraint of trade,” *Giboney v. Empire Storage & Ice Co.*

But § 4631(d) imposes more than an incidental burden on protected expression. Both on its face and in its practical operation, Vermont’s law imposes a burden based on the content of speech and the identity of the speaker. . . . Vermont’s law does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers.²⁵²

There are several things going on here, and it’s helpful to tease them apart. In one of the examples the Court gives, the fire ordinance is used to forbid flag burning for reasons unrelated to “the content of speech” (in this instance, the communicative impact of the symbolic act of flag burning).²⁵³ In another, the “agreements in restraint of trade” example, the agreements have historically been viewed as a form of conduct (see Part I.E.), even though it takes communication to create an agreement.²⁵⁴

²⁵⁰ *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011).

²⁵¹ *See id.* at 2664, 2672.

²⁵² *Id.* at 2664–65 (citations omitted).

²⁵³ *Id.*

²⁵⁴ *Id.*

But in the “White Applicants Only” example, the harm is indeed connected to the content of speech: as Part I.D noted, “White Applicants Only” is forbidden by the law precisely because it conveys a message that threatens illegal discrimination. That message is properly prohibitable, but it is not, strictly speaking, an “incidental” burden on speech in the sense of a burden unrelated to the communicative content of the speech (Compare *Holder v. Humanitarian Law Project*, which noted that the *O’Brien* test for restrictions that “incidentally burden[] . . . expression” was inapplicable when a “generally applicable law [is] directed at [a speaker] because of what his speech communicated.”²⁵⁵).

The better way to make sense of *Sorrell*, I think, is to note what the three items have in common: they all involve laws that are applied to behavior that is itself conduct—for instance, the physical burning of an object without regard to what the burning communicates, or an agreement that is viewed as a form of conduct²⁵⁶—or is treated as closely linked to such conduct, because it consists of speech that causes or threatens such conduct in a constitutionally unprotected way.

III

THE “SPEECH INTEGRAL TO [ILLEGAL] CONDUCT” EXCEPTION IN LOWER COURTS

Unsurprisingly, the “speech integral to [illegal] conduct” exception has been taken up by lower courts, following the Supreme Court’s lead. Let’s look closely at how this has been happening, sometimes soundly and sometimes not.

A. (Potentially) Sound Uses of *Giboney*: Speech Soliciting or Aiding Other Crimes

1. *Solicitation*

Many lower court decisions, both before *United States v. Williams*²⁵⁷ and after, have cited *Giboney* in cases factually much like *Giboney* itself: cases where the speaker is soliciting the commission of some other crime.²⁵⁸ Thus, for instance, a recent Minnesota decision upheld a ban on soliciting prostitu-

²⁵⁵ See 561 U.S. 1, 26, 28 (2010); *supra* Part II.A.1.

²⁵⁶ See *supra* Part I.E.

²⁵⁷ 553 U.S. 285, 297 (2008).

²⁵⁸ See, e.g., *United States v. Clum*, 607 F. App’x 922, 928 (11th Cir. 2015); *State v. Pegouskie*, 113 P.3d 811, 820 (Haw. 2005); *State v. Whitmore*, 58 So. 3d 583 (La. Ct. App. 2011); *State v. Washington-Davis*, 867 N.W.2d 222, 232 (Minn. Ct. App. 2015); *State v. Tarbay*, 810 N.E.2d 979, 983 & n.19 (Ohio Ct. App. 2009);

tion, citing *Giboney* for the proposition that “the speech proscribed by the statute is outside the ambit of the First Amendment’s protection because it is speech integral to criminal conduct.”²⁵⁹

After *Williams*, it would probably have made more sense to cite *Williams* directly, since that case specifically discusses the solicitation exception. Nonetheless, as Part I.A notes, *Giboney* does fit these facts well.

2. *Attempts to Commit Crime or Preparation for Committing Crime*

a. *Lack of Constitutional Protection for Some Such Speech*

Even when a crime consists of something other than speech, the criminal may often use speech in the commission of the crime. Indeed, the attempt to commit the crime may consist entirely of speech.

Say, for instance, that Don wants to murder Vic (who isn’t expecting this). To do that, Don e-mails Vic and invites him to meet at a particular place.

In many jurisdictions, that would constitute the crime of attempted murder, even if Don does nothing beyond sending the e-mail (for instance, if he is caught before he has a chance to physically attack Vic). The Model Penal Code, for instance, defines attempt to include “purposely do[ing] . . . anything that . . . constitut[es] a substantial step in a course of conduct planned to culminate in his commission of the crime.”²⁶⁰ And one classic example of a “substantial step” is “seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission.”²⁶¹ Many states adopt this approach.²⁶²

Don’s attempt to commit murder would thus consist solely of speech said with a bad purpose (the plan to eventually physically attack Vic). The speech doesn’t easily fit within any of the familiar First Amendment exceptions: it’s not incitement of

State v. March, No. M2007-00701-CCA-R3-CD, 2010 WL 2219419, at *19 (Tenn. Ct. Crim. App. June 2, 2010).

²⁵⁹ *Washington-Davis*, 867 N.W.2d at 232.

²⁶⁰ MODEL PENAL CODE § 5.01(1)(c) (AM. LAW INST. 1985).

²⁶¹ *Id.* § 5.01(2)(b).

²⁶² See, e.g., CONN. GEN. STAT. ANN. § 53a-49 (West 2015); 18 PA. STAT. & CONS. STAT. ANN. § 901 (West 2015); see also 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 11.4 n.67 (2d ed. 2003) (citing twenty-three states as following this test).

crime,²⁶³ solicitation of crime, a threat, or a harmful and knowingly false statement of fact. Yet the speech is clearly criminally punishable.²⁶⁴

Giboney covers this, in its statement that “it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”²⁶⁵ Here, the course of conduct is the attempt to commit a nonspeech act (the planned physical attack on Vic). The course of conduct is carried out by means of speech.

Unsurprisingly, courts have cited *Giboney* in upholding prosecutions for attempt via speech in similar scenarios—for instance, when a person attempted to entice a child into sexual activity.²⁶⁶ Likewise, some other inchoate crimes consisting of speech or conduct intended to promote some further physical crime may in essence be forms of constitutionally unprotected attempt, though defined more specifically than in a general attempt statute.²⁶⁷ Thus, for instance, some courts have cited *Giboney* in upholding statutes specifically criminalizing luring a child to some place with the intent to commit an illegal sexual act.²⁶⁸

But this zone of unprotected speech is limited to speech that is preparatory to the actor’s (or the actor’s confederates’) commission of some other nonspeech act. For instance, a restriction on speech that angers listeners or creates a disturbance could not be upheld on the grounds that the speech brings about a criminally prohibited *result* (anger or disturbance). Indeed, that was the very restriction that the Court

²⁶³ While it helps bring about a crime, it doesn’t advocate it, and might contemplate a meeting that’s not imminent (e.g., is at a fixed time two weeks in the future).

²⁶⁴ Cf. *Aikens v. Wisconsin*, 195 U.S. 194, 206 (1904) (Holmes, J., writing for the Court) (“The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.”), cited in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 500 n.4 (1949).

²⁶⁵ *Giboney*, 336 U.S. at 502.

²⁶⁶ *United States v. Gagliardi*, 506 F.3d 140, 148 (2d Cir. 2007).

²⁶⁷ See, e.g., 720 ILL. COMP. STAT. ANN. § 5/10-5.1 (West 2015).

²⁶⁸ See, e.g., *People v. Williams*, 551 N.E.2d 631, 634 (Ill. 1990); *State v. Backlund*, 672 N.W.2d 431, 440 (N.D. 2003); *State v. Robins*, 646 N.W.2d 287, 319 (Wis. 2002); see also *People v. Foley*, 731 N.E.2d 123, 130 (N.Y. 2000) (upholding a conviction for sending sexually themed material to a minor in a way that “importunes, invites or induces” the minor to engage in illegal sexual conduct (quoting N.Y. PENAL LAW § 235.22(2) (McKinney 2015))).

held unconstitutional in *Terminiello v. City of Chicago*,²⁶⁹ which the Court was considering at the same time as *Giboney*. (Part II.A will discuss this in more detail.)

b. *Limits on the Exception*

Even when it comes to attempts to commit crime, and other preparations for crime, some speech remains constitutionally protected. Indeed, *Schenck v. United States*, *Frohwerk v. United States*, and *Debs v. United States* were in large measure attempt prosecutions: the defendants, the government argued, intended to bring about nonspeech conduct (noncompliance with the draft), and their speech was just a means of trying to bring about that conduct.²⁷⁰

Today, these cases would almost certainly come out the other way.²⁷¹ Under *Brandenburg v. Ohio*, such speech is protected even if it is intended to and likely to bring about illegal conduct, because the result that the speaker was attempting to bring about wasn't imminent.²⁷² Thus, attempting to bring about violation of the law by persuading listeners that the law is wrong is generally constitutionally protected, as Part I.A.2 discussed.

There may well be other First Amendment limits on attempt liability as well. The Court just hasn't seriously considered the exact boundaries of this exception (or of this application of the *Giboney* exception, if that is the right way of looking at *Giboney*).

But the important point is that courts need to consider where these limits are drawn. Simply labeling speech as “attempt” and thus as “integral to [illegal] conduct” doesn't resolve the matter.

²⁶⁹ 337 U.S. 1, 2–3, 6 (1949).

²⁷⁰ *Schenck v. United States*, 249 U.S. 47, 48–49 (1919); *Frohwerk v. United States*, 249 U.S. 204, 205 (1919); *Debs v. United States*, 249 U.S. 211, 212, 216–17 (1919).

²⁷¹ See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1048–51 (5th ed. 2015); Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 569 (2000); Michael Vitiello, *The Nuremberg Files: Testing the Outer Limits of the First Amendment*, 61 OHIO ST. L.J. 1175, 1218–19 (2000).

²⁷² 395 U.S. 444, 447 (1969).

3. *Aiding and Abetting/Crime-Facilitating Speech*

a. *Lack of Constitutional Protection for Some Such Speech*

Some speech, which I've labeled "crime-facilitating speech,"²⁷³ can give people information that helps them commit crimes or escape being caught. A speaker might advise a criminal friend about how best to disable an alarm system, grow drugs, or safely make or use a bomb. A speaker might tell a criminal about a witness to the crime whom the criminal will then kill or intimidate. A speaker might alert a criminal when the police are coming (even when there was no conspiratorial prearrangement to that effect).

As a criminal law matter, this speech would often be labeled "aiding and abetting." In some jurisdictions, it would have to be said with the purpose of helping the listener commit a crime; in others, the speech might be punishable aiding and abetting even it were just said knowing that it would help the listener commit the crime.²⁷⁴

And as a First Amendment matter, the speech is likely not constitutionally protected, precisely because it is so closely connected to criminal conduct.²⁷⁵ Indeed, the case for punishing such speech is similar to the case for punishing criminal solicitation. Solicitation may help cause crime by encouraging people to commit it. Aiding and abetting may help cause crime by informing them how to commit it (or how to avoid being caught)—and may in turn encourage people to commit it as well.

My preference would be for courts to recognize aiding and abetting as a particular First Amendment exception (alongside the incitement and solicitation exceptions), rather than relying on *Giboney*. But given the Court's recent acceptance of *Giboney*, it makes sense for the *Giboney* principle to be used as a justification for restricting such speech. Indeed, as Part I.G suggests, aiding and abetting fits well the first part of the *Giboney* framework: it helps cause some other nonspeech

²⁷³ Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1103 (2005).

²⁷⁴ *Id.* at 1174–80.

²⁷⁵ See *United States v. Bell*, 414 F.3d 474, 482 n.8 (3d Cir. 2005); *United States v. Sattar*, 395 F. Supp. 2d 79, 102 (S.D.N.Y. 2005); *State v. Coleman*, 231 P.3d 212, 217 (Wash. Ct. App. 2010). But see *McCoy v. Stewart*, 282 F.3d 626, 631–32 (9th Cir. 2002) (holding that one criminal's advice to another about how to better run his gang is constitutionally protected); see also *Stewart v. McCoy*, 537 U.S. 993, 994–95 (2002) (Stevens, J., respecting the denial of certiorari) (suggesting that perhaps such speech shouldn't be protected).

crime (in our hypothetical, burglary, drug manufacturing, or the making or use of bombs).²⁷⁶ The *Stevens* principle that speech is generally protected unless it fits within a traditionally recognized exception thus doesn't shield aiding and abetting speech, such as the examples I gave above.

b. *Limits on the Exception*

Yet the second part of the *Giboney* framework is also critical here: courts need to recognize that the tendency of speech to cause crime (here, by informing people how to commit crime) is only a necessary condition, not a sufficient condition, for restricting the speech. That is particularly true for speech that is published to a large audience, and that can both inform or persuade law-abiding readers and help some criminal readers commit crimes.

A chemistry or engineering textbook, for instance, can provide information on how to create or use explosives, make guns, or make drugs. A realistic novel can do the same. A critic of drug law can explain just how easy certain drugs are to make, as a means of persuading readers that banning those drugs is a fool's errand. A critic of ballistic identification systems or fingerprint recognition systems might criticize those systems by explaining just how easy they are to deceive, information that criminals can also find useful.²⁷⁷

A newspaper might publish the name of a witness to a crime, making it easier for criminals to retaliate against him. A leaflet or a Web site might give the names and possibly the addresses of boycott violators, abortion providers, strikebreakers, police officers, police informants, or registered sex offenders, thus facilitating (purposefully or not) attacks on such people.

When and whether such speech should be restrictable is an interesting and important question, which I've covered extensively elsewhere.²⁷⁸ As I mentioned above, some such speech—such as advice given specifically to a particular would-be criminal—should indeed be punishable. Other speech, such as publication of textbooks, novels, and newspaper sto-

²⁷⁶ See, e.g., *Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646, 655–56 (D.C. Cir. 1994) (citing *Giboney* as support for punishing speech that is essentially aiding and abetting); *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 50 Cal. Rptr. 3d 27, 36 (Ct. App. 2006) (same).

²⁷⁷ For cases and other incidents corresponding to the examples in this paragraph and the next one, see Volokh, *supra* note 273, at 1097–1102.

²⁷⁸ See, e.g., *id.*

ries, should generally not be punishable.²⁷⁹ Nor should it be enough to conclude that the book or newspaper article was published with the intent of promoting crime, for reasons I give in the cited article.²⁸⁰

That such speech might be labeled “aiding and abetting” cannot suffice to justify restricting it, just as labeling speech that advocates breaking the law “solicitation” or “incitement” doesn’t suffice to justify restricting it. Just as the Court has narrowly cabined restrictions on crime-advocating speech in cases such as *Brandenburg v. Ohio*, so courts need to come up with rules indicating which restrictions on crime-facilitating speech are permissible and which are forbidden. (I have elsewhere discussed at length how such rules might be defined.²⁸¹)

Giboney itself doesn’t explain how these lines should be drawn, just as it didn’t explain how the lines between punishable solicitation or incitement and protected advocacy should be drawn. Simply relying on *Giboney* as authority for the proposition that speech (especially speech said to the public at large) that “aids and abets” crime is unprotected just distracts from the proper analysis.

This is why, I think, the Fourth Circuit erred in *Rice v. Paladin Enterprises, Inc.*, the famous “murder manual” case.²⁸² In *Rice*, Paladin Enterprises had published “Hit Man: A Technical Manual for Independent Contractors,” which described how contract killers could commit and get away with murder.²⁸³ James Perry killed three people using some of the information he learned in the book.²⁸⁴ The victims’ relatives sued Paladin, on the theory that their publishing the book tortiously aided and abetted Perry.²⁸⁵

The Fourth Circuit concluded that Paladin could indeed be held liable, if plaintiffs could show that Paladin published the book with “the specific purpose of assisting and encouraging commission of such conduct.”²⁸⁶ The court’s major argument was based on *Giboney*, which the court summarized as supporting the view that “speech, which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct, may itself be legitimately proscribed, punished, or regulated inci-

279 See generally *id.*

280 See *id.* at 1179–95.

281 See *id.* at 1097–1102.

282 128 F.3d 233, 266 (4th Cir. 1997).

283 *Id.* at 239, 253.

284 *Id.* at 239.

285 *Id.* at 242.

286 *Id.* at 243.

dentally to the constitutional enforcement of generally applicable statutes.”²⁸⁷

Yet, as Part II.A noted, this position is not correct. Speech is often constitutionally protected even when it is “tantamount to legitimately proscribable”²⁸⁸ disturbance of the peace, contempt of court, intentional infliction of emotional distress, or interference with business relations (in the sense that it tends to bring about results made criminal or tortious by those legal rules). Likewise, that aiding and abetting law is “generally applicable” to conduct as well as speech doesn’t tell us whether this law may constitutionally be applied to speech precisely because of what it communicates.²⁸⁹

B. Unsound Uses of *Giboney*, and Some Sound Refusals to Use It

As Part II suggested, *Giboney* is easy to misread, especially if the reader isn’t paying close attention to other First Amendment precedents. In particular, an exception for “speech integral to [illegal] conduct” might sound like it covers speech that *is itself defined* to be illegal conduct. The same is true for the statement that “it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part . . . carried out by means of language.”²⁹⁰ A court might assume that, so long as a law bans “conduct” generally, it can be freely applied to speech as well, if the speech “carri[es] out” the forbidden “conduct.”²⁹¹

As Part II.A noted, that would be incorrect. The Court has regularly deemed it an abridgment of free speech to make a course of conduct illegal or tortious when the “conduct” consists of speech that supposedly causes harm because of what it communicates. Yet many courts have missed this point. Let me offer three categories of examples.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* The Justice Department report supporting the constitutionality of a federal law restricting the distribution of bombmaking information, U.S. DEPT OF JUSTICE, *supra* note 13, also relies on *Giboney*. I have criticized the Justice Department’s approach, which focuses on the author’s alleged purpose in distributing information that can help some readers commit crime. See Volokh, *supra* note 273, at 1179–94. But at least the Justice Department report recognizes that *Giboney* simply opens the door for an aiding-and-abetting exception to the First Amendment, and doesn’t itself define the scope of that exception.

²⁹⁰ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

²⁹¹ *Id.*

1. *Criminal Harassment*

Giboney often appears in court decisions that consider whether speech may be punished as criminal harassment. Criminal harassment statutes generally make it a crime to communicate with the intent to “abuse,” “annoy,” “harass,” “offend,” or “severe[ly] emotional[ly] distress” a particular person.²⁹² Historically, such statutes have been focused on unwanted speech *to* a particular person, conveyed just to that person (for instance, by a phone call, a letter, or an e-mail).²⁹³ But today, they are increasingly being used to restrict unwanted speech *about* the person, such as posts insulting the person on the poster’s weblog, Facebook page, Twitter feed, and the like.²⁹⁴

When such speech may be restricted is a difficult question, on which I’ve written at length.²⁹⁵ I have generally argued that unwanted one-to-one speech said to the person being insulted or annoyed can indeed be restricted, because it is likely only to offend or distress the target, and not to enlighten or inform anyone. But speech said about a person, to third parties who may be willing to hear it or to the public generally, must remain protected—unless it falls into an existing unprotected category, such as threats or false statements of fact—precisely because it may persuade or inform willing listeners.

Yet however one draws this line, *Giboney* is largely unhelpful here. Speech that is intended to annoy, offend, or distress does not help cause or threaten other crimes, the way solicitation or aiding or abetting does.²⁹⁶ It may itself be a way of committing the crime of harassment, alongside nonspeech

²⁹² Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking,”* 107 NW. U. L. REV. 731, 740, 768–69 (2013).

²⁹³ See *id.* at 732–38.

²⁹⁴ See *id.*

²⁹⁵ See generally *id.* at 751–93.

²⁹⁶ Criminal harassment statutes that are limited to threats, of course, would be constitutional under the threats exception. And statutes that ban false statements about the target that cause third parties to visit and possibly commit crimes against the target—*e.g.*, posting a message in an ex-girlfriend’s name that purports to invite people to go to her house for sex, *id.* at 752 & n.102—would be constitutional, too, as tailored to knowingly false statements that tend to cause physical harm to particular people. See *United States v. Alvarez*, 132 S. Ct. 2537, 2553–54 (2012) (Breyer, J., concurring in the judgment) (suggesting that knowing falsehoods that cause “specific harm to identifiable victims” are constitutionally unprotected); *id.* at 2545 (plurality opinion) (likewise suggesting that knowing falsehoods that produce “legally cognizable harm,” “such as an invasion of privacy,” are constitutionally punishable). I am speaking in the text about broader criminal harassment statutes that have no such limitation and instead apply to all speech intended to annoy, offend, or distress.

conduct that constitutes the crime; but, as Part II.A notes, that is not what the *Giboney* exception covers.

Consider, for instance, the lead opinion in *State v. Thorne*, which rejected an overbreadth challenge to West Virginia's telephone harassment law.²⁹⁷ Thorne was an anti-apartheid activist who had a longstanding acrimonious relationship with Marshall University.²⁹⁸ After being suspended from the university, he called Marshall on a series of occasions:²⁹⁹

Each phone call started out in a civil manner. However, at some point each turned unpleasant. One of Mr. Thorne's favorite subjects was Dr. Robert Hayes, former President of Marshall University, who had just resigned.

He referred to Dr. Hayes as "the head hog," and stated that the "rest of the little piggies would get it." Dr. Nell Bailey, Dean of Student Affairs, testified that she was called "a bigot, a racist pig." Her secretary, Phyllis Caldwell, testified that the defendant "referred to Dr. Hayes, who has been barbecued, and for the drippings, they're going to fry the little piggies who have been left behind." Although these and other witnesses explained the text of only four calls, they testified to receiving numerous calls of a similar nature from Mr. Thorne.³⁰⁰

Now, some of these statements might have been seen as threatening, but Thorne wasn't prosecuted on a threat theory. Rather, he was prosecuted under a statute that barred making "repeated telephone calls," "with intent to harass or abuse another [person at the called number] by means of telephone."³⁰¹ Thorne contended the statute was unconstitutionally overbroad, but the court upheld the statute, arguing as follows:

Prohibiting harassment is not prohibiting speech, because harassment is not a [*sic*] protected speech. Harassment is not communication, although it may take the form of speech. The statute prohibits only telephone calls made with

²⁹⁷ 333 S.E.2d 817, 819–20 (W. Va. 1985) (lead opinion). The lead opinion has been treated as an opinion of the court, *State v. Berrill*, 474 S.E.2d 508, 512 n.5 (W. Va. 1996), and includes a syllabus by the Court which, in West Virginia, is viewed as an authoritative statement of the law, and which is typically characteristic of majority opinions that announce binding law. W. VA. CONST. art. VIII, § 4; *State v. McKinley*, 764 S.E.2d 303, 309 (W. Va. 2014); *Walker v. Doe*, 558 S.E.2d 290, 294 (W. Va. 2001), *overruled on other grounds by McKinley*. Nonetheless, the lead opinion in *Thorne* was only signed by two Justices, with two others dissenting and the fifth disqualified. 333 S.E.2d at 821 n.1 (Miller, C.J., dissenting).

²⁹⁸ *Thorne*, 333 S.E.2d at 818.

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 819 (paragraph break added).

³⁰¹ *Id.* at 819 & n.4 (plurality opinion) (quoting W. VA. CODE § 61-8-16(a)(4) (1984)).

the intent to harass. Phone calls made with the intent to communicate are not prohibited.

Harassment, in this case, thus is not protected merely because it is accomplished using a telephone. “[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Cox v. Louisiana*, 379 U.S. 559, 563 (1965), quoting *Giboney*, 336 U.S. 490, 502 (1949). Because the statute does not prohibit communicative speech, we find that its proscription is not overbroad.³⁰²

This is argument by assertion—by the kind of reliance on “epithet[s]” and “mere labels” that the Court has condemned.³⁰³ The West Virginia court begins with the view that “harassment,” which presumably means speech said with intent to harass or abuse the listener, is “not . . . protected speech,” and indeed not even “communication.”³⁰⁴ And it then turns to *Giboney*, via *Cox*, for the proposition that “a course of conduct” may be prohibited even if “carried out by means of language.”³⁰⁵

Yet surely statements made by phone are indeed “communication.” If they are “conduct,” they are only conduct in the sense that all speech is also conduct. As the dissent acknowledged, other cases had indeed similarly upheld harassment statutes “because the courts characterize the statutes as regulating harassing conduct and not the speech itself.”³⁰⁶ But, the dissent concluded, “[t]hese cases have a sophistry that I find

³⁰² *Id.* at 819–20 (paragraph break added) (alteration in original) (citations omitted in part); see also *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 580 (5th Cir. 2005) (taking much the same approach, and likewise relying on *Giboney*); *Pontrich v. O’Reilly*, No. 2004-CA-002580-MR, 2006 WL 1195897, at *2 (Ky. Ct. App. May 5, 2006) (likewise); *State v. Hemmingway*, 825 N.W.2d 303, 304, 308–10 (Wis. 2012) (likewise). For other cases that use the argument that harassing phone calls are “conduct, not speech,” see, e.g., *Gormley v. Director*, 632 F.2d 938, 941–42 (2d Cir. 1980); *McKillop v. State*, 857 P.2d 358, 363 (Alaska Ct. App. 1993); *State v. Musser*, 977 P.2d 131, 133 (Ariz. 1999) (en banc); *State v. Brown*, 85 P.3d 109, 113 (Ariz. Ct. App. 2004); *Baker v. State*, 494 P.2d 68, 70 (Ariz. Ct. App. 1972); *State v. Roesch*, Nos. CR94-87735, CR94-87736 & CR94-90639, 1995 WL 356776, at *5 (Conn. Super. Ct. June 6, 1995); *State v. Elder*, 382 So. 2d 687, 690 (Fla. 1980); *State v. Richards*, 896 P.2d 357, 362 (Idaho Ct. App. 1995); *People v. Taravella*, 350 N.W.2d 780, 783 (Mich. Ct. App. 1984); *State v. Lee*, 917 P.2d 159, 162 (Wash. Ct. App. 1996); *State v. Alexander*, 888 P.2d 175, 180 (Wash. Ct. App. 1995).

³⁰³ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268–69 (1964).

³⁰⁴ *Thorne*, 333 S.E.2d at 819.

³⁰⁵ *Id.* (quoting *Cox v. Louisiana*, 379 U.S. 559, 563 (1965)).

³⁰⁶ *Id.* at 823 (Miller, C.J., dissenting).

repugnant,” at least where “legitimate communication” is part of the call.³⁰⁷

Of course, some forms of telephone harassment are indeed intended to “abuse” or “harass” via the noncommunicative content of speech—for instance, calling someone in the middle of the night precisely so his phone will ring and he will wake up, without regard to what is said when he picks up the phone. Such behavior can indeed be restricted using content-neutral laws,³⁰⁸ just as loud speech in residential areas at night can be restricted using content-neutral laws.³⁰⁹ But when telephone harassment laws are applied to a telephone call precisely because it is the insulting words that are supposedly intended to harass or abuse, the law certainly is a speech restriction.

Properly crafted telephone harassment laws may well be constitutional. I’ve argued that unwanted speech said to a particular person when the speaker knows the speech is nearly certain to be unwanted should often be constitutionally unprotected.³¹⁰ But relabeling the speech “conduct,” and invoking *Giboney*, doesn’t contribute to the analysis—it doesn’t help explain why the speech should be unprotected, or define the boundaries of the lack of protection.

And this sort of relabeling of speech as conduct, for purposes of applying *Giboney*, continues to happen. In *Commonwealth v. Johnson*, for instance, the Massachusetts Supreme Judicial Court cited *Giboney* in concluding that a harassment statute could be applied to online speech about a person because “cyber harassment will consistently involve a hybrid of speech and conduct.”³¹¹ “There is content within the communications” involved in the case, the court admitted, “but the very act of using the Internet as a medium through which to communicate implicates conduct.”³¹²

Yet that’s a recipe for clandestinely denying full First Amendment protection to all speech in all media. If “the very act of using the Internet . . . implicates conduct” and thus triggers lower protection, then a newspaper article likewise “implicates conduct” in the sense that a printing press or a computer printer has to put ink on paper, and oral communication “implicates conduct” in the sense that larynxes vibrate and

307 *Id.* at 824.

308 *See, e.g.*, WASH. REV. CODE ANN. § 9.61.230(1)(b) (West 2010) (criminalizing, among other things, telephone calls made “at an extremely inconvenient hour”).

309 *See Kovacs v. Cooper*, 336 U.S. 77, 78 (1949).

310 Volokh, *supra* note 292, at 740–51.

311 *Commonwealth v. Johnson*, 21 N.E.3d 937, 947 n.11 (Mass. 2014).

312 *Id.*

mouths open and close. The speech in the Massachusetts case might have been legitimately held unprotected on some grounds—in that case, because it consisted of knowing falsehoods that intruded on a particular person.³¹³ But it can't be distinguished from protected speech on the grounds that all Internet communication is “conduct.”

Likewise, consider the 2014 decision in *United States v. Osinger*, which upheld a conviction under federal stalking law.³¹⁴ Christopher Osinger, angry at an ex-girlfriend's refusal to restart their romantic relationship, started posting nude pictures of the ex-girlfriend on Facebook and sending them to her coworkers.³¹⁵ As I've noted elsewhere, such speech likely is punishable under a narrow and specific revenge porn statute.³¹⁶

But the basis for punishing the speech cannot be, in the Ninth Circuit's words, that “[a]ny expressive aspects of Osinger's speech were not protected under the First Amendment because they were ‘integral to criminal conduct’ in intentionally harassing, intimidating or causing substantial emotional distress” to his ex-girlfriend.³¹⁷ Under this rationale, *any* repeated online speech—including public political ridicule of politicians, journalists, businesspeople, religious figures, and others—that intentionally causes substantial emotional distress would be constitutionally unprotected.

After all, the federal stalking ban is not at all limited to revenge porn; it bars any “course of conduct [using mail or interactive computer services] that causes substantial emotional distress to [a] person” with intent to “harass . . . [and] cause substantial emotional distress to [that] person.”³¹⁸ A modern version of the *Hustler v. Falwell* parody³¹⁹ posted online (and posted more than once, to satisfy the “course of conduct” requirement) might well be covered by the ban. So could

³¹³ See *supra* note 296.

³¹⁴ 753 F.3d 939 (9th Cir. 2014).

³¹⁵ See *id.* at 942.

³¹⁶ Eugene Volokh, *Florida “Revenge Porn” Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013, 7:51 PM), <http://volokh.com/2013/04/10/florida-revenge-porn-bill/> [<http://perma.cc/S7KH-TWC5>]; Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. (forthcoming 2016) (manuscript at 47, pt. IV.C.2) (on file with author).

³¹⁷ *Osinger*, 753 F.3d at 947 (citing *United States v. Meredith*, 685 F.3d 814, 819–20 (9th Cir. 2012)).

³¹⁸ 18 U.S.C. § 2261A(2) (2012).

³¹⁹ For a description of the parody, see *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988).

a vast range of other ridicule or denunciation, whether of public officials, political or religious leaders, or private citizens.

After all, many political attacks, especially if they are successful in revealing their target’s misdeeds, can inflict substantial emotional distress. The loss of a place of honor, or even the prospect of such a loss, is naturally extremely distressing. So is the sense that hundreds of thousands of people are being persuaded to view you with contempt.

And many of the most effective attacks come from people who have long been the target’s enemy, whether those people are politicians who have fought with the target, or journalists or activists who have long viewed the target as dishonest or evil. Those speakers may well be seen as speaking with the intent of substantially distressing the target (likely intertwined with other motivations). Under the terms of the federal statute, there is nothing to keep this statute from covering such “conduct” in the form of repeated public ridicule, release of damaging facts about the target, and the like.

Moreover, as a result, even people who might have a purely public-spirited motive might be deterred from speaking for fear that they will be criminally prosecuted by a prosecutor who suspects their motives to be bad. As the Court noted in rejecting criminal libel liability for true statements said with a supposed “bad motive,”

[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.³²⁰

And under a rule allowing criminal punishment “based on an intent merely to inflict harm, . . . ’it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded.’”³²¹

Indeed, a person was recently prosecuted for posting hundreds of Twitter messages ridiculing and insulting a Buddhist religious leader, though the district court dismissed the indictment on First Amendment grounds.³²² And similar state statutes have been used to prosecute people who say harsh things

³²⁰ *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

³²¹ *Id.* at 73–74 (quoting Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 893 (1949)).

³²² *United States v. Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011).

about political officials, writers, businesspeople, and others, or to enjoin people from saying such harsh things.³²³

Such prosecutions can't be constitutional. Yet if one accepts the *Osinger*, *Johnson*, and *Thorne* use of *Giboney* as a basis for holding such speech unprotected—relabeling the speech as “conduct”—then the prosecutions would indeed be permissible. Reliance on *Giboney* thus distracts courts from the right questions (such as whether revenge porn, or knowingly false and distressing statements about particular people, should be constitutionally unprotected).³²⁴

Fortunately, some courts have recognized the error of categorically upholding criminal harassment laws. I already cited above the two-Justice dissenting opinion in *Thorne v. Bailey*. Likewise, two recent decisions by New York's highest court struck down an overbroad criminal harassment law,³²⁵ one of them also upheld a much narrower ban on knowingly false online impersonation.³²⁶ A recent New Jersey appellate decision likewise made clear that criminal harassment law is limited by the First Amendment, at least when the speech is said about a person rather than to him.³²⁷

And a 2015 federal district court decision in a criminal harassment case expressly recognized that “it is important that [the court] avoid interpreting *Giboney*'s exception too broadly”: “Under the broadest interpretation [of *Giboney*], if the government criminalized any type of speech, then anyone engaging in

³²³ See Volokh, *supra* note 292, at 732–40 (discussing several such cases).

³²⁴ The Ninth Circuit in *Osinger* also reasoned that the speech was unprotected “for the additional reason that it involved sexually explicit publications concerning a private individual,” partly because “the public has no legitimate interest in the private sexual activities of [the victim] or in the embarrassing facts revealed about her life.” 753 F.3d at 948 (quoting *United States v. Petrovic*, 701 F.3d 849, 856 (8th Cir. 2012) (alteration in original)). This is the sort of rationale that I think would be sound—though as to a narrowly defined statute, not the broad section 2261A ban on any repeated speech (revenge porn or otherwise) that intentionally causes serious emotional distress. But the criticism in the text is addressed to the Ninth Circuit's independent *Giboney*-based rationale for sustaining the conviction.

³²⁵ *People v. Marquan M.*, 19 N.E.3d 480, 484–88 (N.Y. 2014); *People v. Golb*, 15 N.E.3d 805, 813–14 (N.Y. 2014). *Marquan M.* mentioned the exception for “statements integral to criminal conduct,” 19 N.E.3d at 485, but concluded that criminal harassment law wasn't limited to such statements; the court distinguished “statutes that criminalized conduct—repeated telephone harassment and stalking—without regard to the content of any communication,” and concluded that a law punishing speech “based on the communicative message that the accused intends to convey” using “the offensive words he wrote on Facebook” had to be evaluated under strict scrutiny, *id.* at 488 n.4.

³²⁶ *Golb*, 15 N.E.3d at 811–13.

³²⁷ *State v. Burkert*, No. A-5103-13T3, 2016 N.J. Super. LEXIS 42, at *15 (N.J. App. Div. Mar. 18, 2016).

that speech could be punished because the speech would automatically be integral to committing the offense. That interpretation would clearly be inconsistent with the First Amendment and [later cases].”³²⁸ That is sound advice, which other courts ought to heed.

2. Professional-Client Speech

Giboney has likewise been misused in some recent professional-client speech cases. When professional-client speech should be constitutionally protected is a longstanding mystery of First Amendment law.³²⁹ But, again, *Giboney* does not really help clear up this mystery.

When lawyers, doctors, psychotherapists, financial planners, and other professionals advise clients, they are speaking.³³⁰ Yet such speech has traditionally been subject to regulation, for instance, through licensing requirements,³³¹ malpractice liability for negligent advice,³³² and compelled disclosures.³³³ And some subjects that professionals might dis-

³²⁸ United States v. Matusiewicz, 84 F. Supp. 3d 363, 369 (D. Del. 2015).

³²⁹ See generally Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639 (2011); Robert Kry, *The “Watchman for Truth”: Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885 (2000); Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. FORUM 183 (2015); Warren Geoffrey Tucker, *It’s Not Called Conduct Therapy; Talk Therapy as a Protected Form of Speech Under the First Amendment*, 23 WM. & MARY BILL RTS. J. 885 (2015). This extends both to the rules applicable to regulations of professional-client speech and to the judgment about which speakers count as less protected “professional[s].” Compare, e.g., *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569–70 (4th Cir. 2013) (upholding restriction on fortune-tellers using a relatively low level of scrutiny, on the grounds that they are professional counselors), with *Nefedro v. Montgomery Cty.*, 996 A.2d 850, 862–63 (Md. 2010) (striking down such a restriction under strict scrutiny, and not invoking the professional-client speech doctrine); see also *Locke v. Shore*, 634 F.3d 1185, 1191–92 (11th Cir. 2011) (concluding that interior decorators’ aesthetic advice to clients is regulable professional-client speech).

³³⁰ I focus here on professionals who don’t engage in physical conduct (such as surgery), and don’t engage in communications that themselves create legally significant rights or obligations (such as filing court documents or writing prescriptions).

³³¹ See, e.g., N.D. Rules of Prof’l Conduct r. 5.5(d) (2012) (“A lawyer who is not admitted to practice in this jurisdiction shall not represent or hold out to the public that the lawyer is admitted to practice law in this jurisdiction.”); 63 PA. STAT. & CONS. STAT. ANN. § 422.10 (West 2010) (“No person other than a medical doctor shall [practice medicine and surgery] except as authorized or exempted in this act . . .”).

³³² See, e.g., Me. Rules of Prof’l Conduct r. 1.1 (2015) (requiring lawyers to provide “competent representation to . . . client[s]”).

³³³ See, e.g., Ala. Rules of Prof’l Conduct pmbll., Scope (“In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure.”).

cuss are sometimes specially targeted for regulation: for instance, a lawyer counseling a client about whether to file bankruptcy,³³⁴ a doctor talking to patients about what the doctor sees as the dangers of gun possession,³³⁵ or a psychotherapist teaching patients techniques that can supposedly help them suppress their attraction to members of the same sex.³³⁶

All these regulations would be clearly unconstitutional as to the speech of, say, journalists, book authors, or documentarians. The law can't require, for instance, a license to publish history books. The law can't hold financial reporters liable for supposedly negligent research and published recommendations. But it's generally understood that professionals' speech advising a specific client about the client's individual problems can be subject to greater restriction.³³⁷

Just what sorts of restrictions are permissible, though? The Supreme Court has never squarely answered this. Justice White's concurring opinion in *Lowe v. SEC*, however, suggested that *Giboney* should help guide the analysis:

The power of government to regulate the professions is not lost whenever the practice of a profession entails speech. The underlying principle was expressed by the Court in *Giboney* . . . : "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."³³⁸

And the Ninth Circuit, in upholding a ban on sexual orientation conversion therapy of minors, echoed this:

[As to] regulation of professional conduct, . . . the state's power is great, even though such regulation may have an incidental effect on speech. . . . "Just as offer and acceptance

³³⁴ See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 323–33 (2010) (upholding such a restriction, though reading it narrowly as limited to lawyers' advising clients to break the law).

³³⁵ See *Wollschlaeger v. Governor*, 797 F.3d 859, 869 (11th Cir. 2015) (upholding such a restriction).

³³⁶ See *King v. Governor*, 767 F.3d 216, 220 (3d Cir. 2014) (upholding such a restriction); *Pickup v. Brown*, 740 F.3d 1208, 1221–22 (9th Cir. 2013) (same).

³³⁷ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (lead opinion) (upholding a requirement that abortion providers convey certain information to patients before performing an abortion); *id.* at 967 (Rehnquist, C.J., dissenting) (likewise concluding that this requirement was constitutional, though without expressly discussing the First Amendment issue); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1046 (9th Cir. 2000) (upholding a licensing requirement for psychotherapists).

³³⁸ 472 U.S. 181, 228 (1985) (White, J., concurring in the judgment) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

are communications incidental to the regulable transaction called a contract, the professional’s speech is incidental to the conduct of the profession.” . . . [A]n application of the First Amendment [to restrictions on medical and mental health treatments that involve speech] would restrict unduly the states’ power to regulate licensed professions and would be inconsistent with the principle that “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Giboney*, 336 U.S. at 502.³³⁹

But that can’t be the right analysis. When a psychotherapist counsels a patient about how the patient can (supposedly) suppress his same-sex sexual attraction, the psychotherapist is not promoting or threatening any separate crime or tort. He is just conveying advice, or teaching a patient how to avoid some legal behavior and to engage in other legal behavior instead.

He may be doing this over an extended set of interactions (a “course of conduct” in that sense of the phrase), but that does not make the speech regulable. A constitutionally protected lecture does not become unprotected when it becomes a lecture series. Advocacy of a political boycott does not become unprotected just because it consists of a “course of conduct” that includes speaking, gathering names of people who aren’t complying with the boycott, and publicizing those names.³⁴⁰

In all these cases, including in the professional-client speech case, there is no “course of conduct” apart from a course of speech. We can call the speech “professional consultation” or “psychotherapy,” but speech is all that it is. Just as the proposed offering of advice to terrorist groups about their international legal options was treated as speech in *Holder v. Humanitarian Law Project*, so the proposed offering of advice to a patient should be treated as speech as well. Indeed, the Court’s analysis of the speech offering advice about law in *Holder* carries over quite closely:

³³⁹ *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2013) (emphasis omitted) (quoting *Lowe*, 472 U.S. at 232 (White, J., concurring in the judgment); *Giboney*, 336 U.S. at 502); see also *Nat’l Ass’n for the Advancement of Psychoanalysis*, 228 F.3d at 1053–54 (citing *Giboney* to support the proposition that licensing requirement for psychoanalysts is constitutional); *People v. Shell*, 148 P.3d 162, 173 (Colo. 2006) (same for lawyers); *Accountants’ Ass’n of La. v. State*, 533 So. 2d 1251, 1254–55 (La. Ct. App. 1988) (same for accountants).

³⁴⁰ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909–10 (1982).

The Government is wrong that the only thing actually at issue in this litigation is conduct [rather than speech] Plaintiffs want to speak to the [terrorist groups], and whether they may do so under [the statute] depends on what they say. . . .

The Government argues that [the statute] should nonetheless receive intermediate scrutiny because it *generally* functions as a regulation of conduct. . . . The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message. . . . “If [the law is related to expression], then we are outside of *O’Brien’s* test, and we must [apply] a more demanding standard.”³⁴¹

The same is true of the conversion therapy ban. As the Third Circuit pointed out in dealing with such a ban in *King v. Governor*,

Given that the Supreme Court had no difficulty characterizing legal counseling as “speech,” we see no reason here to reach the counter-intuitive conclusion that the verbal communications that occur during SOCE counseling are “conduct.” Defendants’ citation to *Giboney v. Empire Storage & Ice Co.* does not alter our conclusion. . . .

[The Court’s statement that “it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed”] has been the subject of much confusion. Yet whatever may be *Giboney’s* meaning or scope, *Humanitarian Law Project* makes clear that verbal or written communications, even those that function as vehicles for delivering professional services, are “speech” for purposes of the First Amendment.³⁴²

As the Third Circuit further explained, “the enterprise of labeling certain verbal or written communications ‘speech’ and others ‘conduct’ is unprincipled and susceptible to manipulation”:

For instance, consider a sophomore psychology major who tells a fellow student that he can reduce same-sex attractions by avoiding effeminate behaviors and developing a closer relationship with his father. Surely this advice is not

³⁴¹ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010) (citations omitted) (last alteration in original) (quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989)).

³⁴² 767 F.3d 216, 225–26 (3d Cir. 2014) (citation omitted) (quoting *Giboney*, 336 U.S. at 502 (citations omitted)).

“conduct” Yet it would be strange indeed to conclude that the same words, spoken with the same intent, somehow become “conduct” when the speaker is a licensed counselor. That the counselor is speaking as a licensed professional may affect the level of First Amendment protection her speech enjoys, but this fact does not transmogrify her words into “conduct.”

As another example, a law student who tries to convince her friend to change his political orientation is assuredly “speaking” for purposes of the First Amendment, even if she uses particular rhetorical “methods” in the process.³⁴³

“To classify some communications as ‘speech’ and others as ‘conduct’ is to engage in nothing more than a ‘labeling game.’”³⁴⁴

The Eleventh Circuit’s *Wollschlaeger v. Governor of Florida* decision likewise rejected the “regulation of conduct, not speech” argument as a basis for upholding a restriction on doctors’ speech to patients about guns:

[This] begs the question we must answer here. An inhibition of professionals’ freedom of speech does not violate the First Amendment “so long as” it is “merely the incidental effect of . . . an otherwise legitimate regulation.” The State’s [“conduct, not speech”] analysis proceeds at such a high level of generality that *all* laws regulating the practice of a profession would necessarily impose only incidental burdens on speech, and so would always pass muster under the First Amendment. This cannot be the case. . . .

Indeed, Justice White [in his *Lowe v. SEC* concurrence, on which the State relies,] recognized that “[a]t some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment.” . . . [S]ee also *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (explaining that when “the conduct triggering coverage under [a] statute consists of communicating a message . . . we must [apply] a more demanding standard” of scrutiny than that applied to regulations of

³⁴³ *Id.* at 228 (paragraph break added).

³⁴⁴ *Id.*; see also *Pickup v. Brown*, 740 F.3d 1208, 1218 (9th Cir. 2013) (O’Scannlain, J., dissenting from denial of rehearing en banc):

The Supreme Court’s implication in *Humanitarian Law Project* is clear: legislatures cannot nullify the First Amendment’s protections for speech by playing this labeling game. SB 1172 prohibits certain “practices,” just as the statute in *Humanitarian Law Project* prohibited “material support”; but with regard to those plaintiffs as well as the plaintiffs here, those laws targeted speech. Thus, the First Amendment still applies.

noncommunicative conduct (second modification in original)).³⁴⁵

Some restrictions on professional-client speech may well be constitutional—for instance, because clients are particularly likely to put their physical, psychological, or financial well-being at risk when relying on the expertise of the professionals. Indeed, the Third Circuit so held in *King* and upheld the restriction on conversion therapy of minors.³⁴⁶ Likewise, an Eleventh Circuit panel decision concluded that professional-client speech should nonetheless be treated as less protected (for reasons unconnected to *Giboney*), and upheld the restriction on gun-related questions involved in that case.³⁴⁷ Moreover, professional-client speech that, say, aids a client in committing a crime might well qualify under the *Giboney* exception, properly understood.³⁴⁸

But the explanation for any broad lack of protection for professional-client speech must come from something other than a “conduct, not speech” argument—just as the explanation for exceptions such as defamation comes from something other than labeling the speech “conduct.” As the Court said in *New York Times Co. v. Sullivan*,

In deciding the question [of constitutional limitations upon the power to award damages for libel of a public official], we are compelled by neither precedent nor policy to give any more weight to the epithet “libel” than we have to other “mere labels” of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this court, libel can claim no talismanic immunity from constitutional

³⁴⁵ 797 F.3d 859, 884–85 (11th Cir. 2015) (citations omitted) (quoting *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011)).

³⁴⁶ 767 F.3d at 246.

³⁴⁷ *Wollschlaeger*, 797 F.3d at 899–900. The opinion declined to treat the speech as conduct, which I think is quite right (though I disagree with the court’s substantive First Amendment analysis, see Eugene Volokh, *Court Upholds Florida Law Restricting Doctor-Patient Speech About Guns*, WASH. POST: VOLOKH CONSPIRACY (July 29, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/29/court-upholds-restriction-on-doctor-patient-speech-about-guns/> [<https://perma.cc/WZG4-UQ9G/>]). A later panel decision in the same case concluded that the speech restriction passed strict scrutiny even if no specially reduced protection for professional-client speech was applicable. No. 12-14009, 2015 WL 8639875 (11th Cir. Dec. 14, 2015). The case is now being reheard en banc. Order, *Wollschlaeger v. Governor of Fla.*, No. 12-14009 (11th Cir. Feb. 3, 2016).

³⁴⁸ See *supra* Part III.A.3.

limitations. It must be measured by standards that satisfy the First Amendment.³⁴⁹

The same is true of labels such as “the practice of a profession”—or, more generally, “conduct.”

3. *Blackmail*

Let me close with one more example: blackmail, in the sense of threats to reveal information about someone unless he does something the speaker wants. When and why blackmail should be criminally punishable is a famously difficult question.³⁵⁰ So is when and why blackmail should be stripped of First Amendment protection.³⁵¹

But whatever the answer might be, it can’t just be that there is a criminal law prohibiting blackmail. Consider, for instance, *Gerhart v. State*, a recent decision of the Oklahoma Court of Criminal Appeals.³⁵² Al Gerhart, a political activist, sent a state senator a letter saying,

Get that bill heard or I will make sure you regret not doing it. I will make you the laughing stock of the Senate if I don’t hear that this bill will be heard and passed. We will dig into your past, [your] family, your associates and once we start on you there will be no end to it.³⁵³

For this, Gerhart was prosecuted for blackmail: “[t]hreatening to expose any fact, report or information concerning any person which would in any way subject such person to the ridicule or contempt of society” “with intent . . . to compel another to do an act.”³⁵⁴

Whether this should qualify as blackmail, and thus lose constitutional protection, is an interesting question. Telling a real estate agent to “stop engaging in ‘panic peddling’ or we’ll publicize your behavior to your neighbors and fellow church members” is protected by the First Amendment.³⁵⁵ “The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the

³⁴⁹ 376 U.S. 254, 269 (1964) (citations omitted).

³⁵⁰ See, e.g., James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670, 670–71 (1984); Peter Westen, *Why the Paradox of Blackmail Is So Hard to Resolve*, 9 OHIO ST. J. CRIM. L. 585, 585 (2012).

³⁵¹ See, e.g., *Wurtz v. Risley*, 719 F.2d 1438, 1442–43 (9th Cir. 1983); *State v. Robertson*, 649 P.2d 569, 578 (Or. 1982); GREENAWALT, *supra* note 16, at 90–92.

³⁵² No. F–2014–726, 2015 WL 5853981 (Okla. Crim. App. Oct. 7, 2015). This court is Oklahoma’s highest court for criminal matters.

³⁵³ *Id.* at *1.

³⁵⁴ *Id.* at *3.

³⁵⁵ *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 417, 419–20 (1971).

First Amendment.”³⁵⁶ Likewise, telling black citizens “stop shopping at white-owned stores or we’ll publicize your behavior to your neighbors and fellow church members” is similarly constitutionally protected.³⁵⁷

On the other hand, “vote for this civil rights bill or I’ll disclose that you cheated on your wife” is likely unprotected. I know of no clear answer as to how the law would deal with a general threat to uncover some unspecified dirt in the future, as in *Gerhart*.

Yet wherever the line is to be drawn between constitutionally protected and unprotected political threats, that line can’t simply turn on whether the threat is covered by a criminal law banning blackmail. The *Gerhart* dissent, which would have upheld *Gerhart*’s conviction, reasoned that “[t]he majority admits that speech integral to criminal conduct is not protected by the First Amendment. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). *Gerhart*’s communication clearly meets the statutory requirement for blackmail.”³⁵⁸ Yet that can’t be the right analysis.

The majority’s approach in *Gerhart* was better, because it properly read *Giboney* as limited to speech that promotes some *other* crime, rather than just the speech crime that the speaker is accused of committing:

The State asserts the email is “speech integral to criminal conduct” and thus not constitutionally protected[, relying on *Giboney*]. . . .

The facts of the present case are distinguishable. Appellant’s email did not urge or compel the Senator to violate the law or commit an unlawful act, nor was it sent with the intent to compel the Senator to violate the law. The email was sent with the intent to convince the Senator to change his mind on a political issue.³⁵⁹

Instead, the majority looked to the scope of the “true threats” exception to the First Amendment, and decided that this particular speech didn’t fall within the scope of that exception. The majority might or might not have been right on that question. But considering the proper scope of the “true threats” exception is the right approach; simply assuming that the

³⁵⁶ *Id.* at 419.

³⁵⁷ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910–12 (1982).

³⁵⁸ *Gerhart*, 2015 WL 5853981, at *8 (Smith, P.J., dissenting) (citation omitted in part); see also *United States v. Petrovic*, 701 F.3d 849, 854–55 (8th Cir. 2012) (likewise unhelpfully citing *Giboney* in a blackmail case); *State v. Strong*, 272 P.3d 281, 286 (Wash. Ct. App. 2012) (likewise).

³⁵⁹ *Gerhart*, 2015 WL 5853981, at *2–3.

speech is unprotected because it violates the blackmail statute is not.

CONCLUSION

The best way of understanding the “speech integral to [illegal] conduct” exception, consistent with the other First Amendment precedents, is this:³⁶⁰

1. When certain nonspeech conduct is criminal or tortious—*e.g.*, murder, child sexual abuse, restraint of trade, employment discrimination—certain speech that tends to cause or threaten the commission of such conduct in certain ways can likewise be made criminal or tortious.³⁶¹

2. Several existing exceptions have historically been understood as special cases of this doctrine: the exceptions for solicitation, fighting words, child pornography, threats, and conspiracy. Likewise, this doctrine can help explain why speech may sometimes be punished on the grounds that it consists of an attempt to commit crime (or preparation for such crime), or that it aids and abets people in committing crime.

3. This doctrine lets courts effectively carve out First Amendment exceptions, including for relatively new laws, such as bans on child pornography—even though the Court concluded in *United States v. Stevens* that only historically supported First Amendment exceptions can be recognized. In this respect, the function of the *Giboney* exception today is similar to its function to Justice Black, who wrote *Giboney* itself. Justice Black often said that there are no First Amendment exceptions at all, but nonetheless recognized exceptions for threats, fighting words, and solicitation under the theory that they involve speech that is integral to illegal conduct.³⁶² Both then and now, the doctrine has been a safety valve that in effect limits the absolutism of seemingly absolutist First Amendment approaches.

4. But even when speech does tend to cause or threatens illegal conduct, the boundaries of any exception for that speech need to be defined by the courts with an eye towards making sure that the exception doesn’t unduly suppress protected speech (just as the Court has done for the incitement, fighting words, and child pornography exceptions).³⁶³ *Giboney* doesn’t itself define those boundaries.

³⁶⁰ See *supra* Part I.G.

³⁶¹ See *supra* Part I.

³⁶² See *supra* Part I.H.

³⁶³ See *supra* Parts I.A.2, I.B.2, I.C.2, I.D.2, III.A.2.b & III.A.3.b.

5. The “speech integral to [illegal] conduct” exception cannot be triggered just by speech itself being a violation of a law, even a law that bans conduct as well as speech.³⁶⁴ Laws banning speech that seriously distresses a particular person, for instance, or regulating professional-client speech, cannot be defended under this exception.³⁶⁵ Those laws regulate speech, and if such speech may sometimes be restricted, that has to be done under some other rationale.

I am not fond of *Giboney*, a broadly and imprecisely written decision that has often been misinterpreted.³⁶⁶ I wish that the Court hadn’t revived it, and had instead dealt with these questions in some other way.

But *Giboney* and the “speech integral to [illegal] conduct” exception seems to be here to stay. This summary, I hope, can help explain it and keep it “well-defined and narrowly limited,” as the Court has directed.³⁶⁷

³⁶⁴ See *supra* Part II.A.

³⁶⁵ See *supra* Part III.B.

³⁶⁶ See Volokh, *supra* note 17.

³⁶⁷ *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).