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Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights

Report on the Availability of Bombmaking Information (1997)[1]

The Antiterrorism and Effective Death Penalty Act of 1996 required that the attorney general conduct a study concerning the extent to which instructions on how to make bombs were readily available to the public and whether such information had been used by domestic or international terrorists. The law was passed in the wake of the car bombings of the federal office building in Oklahoma City in 1995 and the World Trade Center in 1993. The attorney general was instructed to report to Congress the results of the study. The attorney general assigned the job to an interdepartmental committee, and the Department of Justice provided a report to Congress in April 1997. The DOJ concluded that such materials were widespread and readily accessible (including at the Library of Congress) were frequently used in the planning of crimes, that many existing federal laws imposed some limits on the dissemination of such materials, and that a bill introduced by Senator Diane Feinstein criminalizing the act of teaching or demonstrating the making of explosive devices if known that such information will be used to commit a crime would likely pass constitutional muster. Feinstein's proposal had passed the Senate as an amendment to the antiterrorism bill but was replaced in conference committee with the provision requiring a DOJ study of the issue. Feinstein's proposal was adopted into law in 1999.

How is conspiracy to commit a crime distinguished from advocacy? What is "mere advocacy"? What intent can be inferred from the publication of instructions on building a bomb? Is the publication of a PDF with unadorned instructions on building a bomb on a website advocating Jihad against the United States protected by the First Amendment? Is the publication of such a PDF on a website that does not itself advocate Jihad but includes links to other websites that do protected by the First Amendment?

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Before identifying what further steps Congress can take to address this problem, it is necessary to discuss whether and to what extent the First Amendment limits the government's power to impose criminal culpability on persons publishing or disseminating bombmaking information. In this regard, it should be noted that in *Rice v. Paladin Enterprises, Inc.* (D. Md. 1996), a district court recently held that the First Amendment substantially protects the right of persons to publish such information, regardless of the publishers' intent.

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[T]here is little in the way of judicial analysis directly addressing the First Amendment questions that a statute like the Feinstein Amendment would raise. However, the courts have substantially addressed the scope of the Free Speech Clause in three related factual contexts that serve to put the constitutional question in perspective: (i) where the government seeks to restrict the advocacy of unlawful action; (ii) where the government (or a private party using tort law) seeks to restrict or punish the general disclosure or publication of lawfully obtained information; and (iii) where the government

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[1] Excerpt taken from Report on the United States Department of Justice, *Availability of Bombmaking Information, the Extent to Which its Dissemination is Controlled by Federal Law, and the Extent to Which Such Dissemination May be Subject to Regulation Consistent with the First Amendment to the United States Constitution* (April 1997).

punishes conveyance of information as part of a "speech act," such as speech that aids and abets another person's commission of a crime.

1. *Advocacy of Unlawful Action*. In the landmark case of *Brandenburg v. Ohio* (1969), the Supreme Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless actions and is likely to incite or produce that action." This test, in other words, requires both an *intent* and a *likelihood* that the expression in question . . . will incite or produce *imminent* unlawful action.

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. . . It is doubtful that general publication of written materials advocating illegality can ever be proscribed under the *Brandenburg* test. Many of the bombmaking manuals . . . could plausibly be said to advocate . . . the illegal use of explosives and other weapons. Insofar as publication of such manuals were [sic] criminalized on account of those manuals' *advocacy* of unlawful conduct, such a prohibition almost certainly could not pass constitutional muster.

2. *Disclosure or Publication of Lawfully Obtained Information*. The *Brandenburg* test, by its terms, applies to advocacy of unlawful conduct. But the government's principal concern with respect to bombmaking manuals is not their advocacy, but the instructional information they contain. That information is (at least for the most part) a matter of public record. . . . And, presumably, most if not all of the writers and publishers of such publications do not obtain the information unlawfully, or from classified sources. The First Amendment imposes significant constraints on the ability of the government to restrict publication of such information.

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[E]ven where it is foreseeable that widely disseminated information will be used unlawfully, or in a negligent and dangerous manner, courts uniformly have found that the Constitution prohibits imposing culpability or civil liability for distributing or publishing that information. For example, a number of courts have held that the First Amendment prohibits imposing tort liability on publishers, producers and broadcasters for the foreseeable consequences of their speech where viewers or readers mimicked unlawful or dangerous conduct that had been depicted or described, even if the standards for tortious negligence or recklessness were otherwise satisfied. *Herceg v. Hustler Magazine* (5th Cir. 1987). . . . Similarly, a number of courts have held that the First Amendment bars recovery for allegedly foreseeable injuries suffered by persons who were following "how-to" instructions. . . .

3. *"Speech Acts," such as Aiding and Abetting*. On the other hand, the constitutional analysis is radically different where the publication or expression of information is "brigaded with action," in the form of what are commonly called "speech acts." If the speech in question is an integral part of a transaction involving conduct the government otherwise is empowered to prohibit, such "speech acts" typically may be proscribed without much, if any, concern about the First Amendment, since it is merely incidental that such "conduct" takes the form of speech. . . .

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In a number of cases, persons have been convicted of aiding and abetting violations of the tax laws by providing explicit instructions to a discrete group of listeners on techniques for avoiding disclosure of tax liability. Defendants in such cases often have invoked the First Amendment; but that constitutional guarantee has rarely, if ever, been a bar to accomplice culpability. The courts correctly have rejected defendants' reliance on *Brandenburg*; and, in particular, have refused to accept defendants' arguments that the "imminence" requirements of the *Brandenburg* test apply to such aiding and abetting cases. If a defendant has aided and abetted a crime through the dissemination of information -- rather than simply by urging or "advocating" that the crime be committed -- then the government should not need to demonstrate that the speech was intended or likely to "incite" *imminent* unlawful conduct. The reasons the strict requirements of the *Brandenburg* test must be applied to cases of advocacy are that (i) abstract advocacy of unlawful conduct usually is closely aligned with (or sometimes part of) political and

ideological speech entitled to the strongest constitutional solicitude; and (ii) the danger the speech will in fact lead to unlawful behavior often is remote and speculative. These concerns are rarely, if ever, implicated, in cases involving conduct constituting intentional and material aid to the criminal conduct of particular persons. It follows that the question of whether criminal conduct is "imminent" is relevant for constitutional purposes only where, as in *Brandenburg* itself, the government attempts to restrict advocacy, as such. But the tax-avoidance aiding and abetting cases are not subject to *Brandenburg* because culpability in such cases is premised, not on defendants' "advocacy" of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes.

If it were otherwise -- that is, if the *Brandenburg* test applied to crimes implemented through the use of informative speech -- there would, for example, be no way for the government to prohibit the aiding and abetting of a crime that is intended to occur weeks or months after its planning. But in fact, if someone in October teaches another person how to cheat on their tax forms to be filed the following April, the person doing the teaching nonetheless can be culpable of aiding and abetting tax fraud. . . .

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As the Court made plain in *Noto v. United States* (1961) and in related cases, the latter category of conduct -- "preparing a group for violent action and steeling it to such action" -- is not entitled to First Amendment protection, even though advocacy ("the mere abstract teaching . . . of the moral propriety") of such violence is protected. . . .

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. . . . In light of the foregoing discussion, two things about the constitutionality of this "intent" prohibition [in the Feinstein Amendment] are clear:

First, the First Amendment almost certainly would require that the "intent" scienter provision in such a statute be construed to mean an actual, conscious purpose to bring about the specified result. . . .

Second, a prosecution relying upon an "intent" requirement plainly would be constitutional where the teacher intends that a *particular* student – or discrete group of students – use the information for criminal conduct. . . .

The more difficult question is whether criminal culpability can attach to *general publication* of explosives information, when the writer, publisher or seller of the information has the purpose of generally assisting unknown and unidentified readers in the commission of crimes. . . .

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[We believe] the government may punish publication of dangerous instructional information where that publication is motivated by a desire to facilitate the unlawful use of explosives. At the very least, publication with such an improper intent should not be constitutionally protected where it is foreseeable that the publication will be used for criminal purposes; and the *Brandenburg* requirement that the facilitated crime be "imminent" should be of little, if any, relevance. . . .

Having said that, we should note that where there is no concerted action between the publisher and any particular recipient of the information, there might be a significant problem in proving that the person publishing the information has done so with an impermissible purpose. . . .

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[T]he First Amendment traditionally has been understood to prohibit the use of the criminal or tort law to punish the dissemination of lawfully obtained factual information absent an impermissible purpose for such dissemination; and this is so even where such publication has a "propensity" to be misused by someone in a criminal or tortious manner. . . .

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