FIRST AMENDMENT SPEECH PROTECTIONS IN A POST-*DOBBS* WORLD: PROVIDING INSTRUCTION ON INSTRUCTIONAL SPEECH

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In its June 2022 opinion, Dobbs v. Jackson Women's Health Organization, *the U.S. Supreme Court overruled* Roe v. Wade *and* Planned Parenthood of Southeastern Pennsylvania v. Casey, *thus revoking the constitutional right to abortion. As states continue to pass laws outlawing abortion to varying degrees, not only has* Dobbs *led to uncertainty for medical professionals and those who might want to seek an abortion, but it has also prompted questions for internet users across the world. May an organization or an individual post instructions on the internet regarding how to obtain an abortion if a resident of a state in which abortion is now illegal might see it? May the state constitutionally prosecute such speech, or does the First Amendment protect "instructional abortion speech" from prosecution?*

This Note explores the application of First Amendment protections and exceptions to internet speech that instructs others how to obtain an abortion, including in states where abortion is now illegal. This Note examines whether instructional abortion speech falls into any of three categories of speech—speech that incites, speech that aids and abets, and speech that facilitates crime—and whether such categorization would leave instructional abortion speech protected or unprotected. In light of the First Amendment's goal of preventing the government from regulating lawful speech and the differing stages of legality of abortion across the country, this Note argues that the First Amendment should protect instructional abortion speech and proposes a mode of analysis for courts to use when evaluating the constitutionality of such speech.

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INTRODUCTION

A pregnant woman in Oklahoma wants to get an abortion, but, after *Dobbs v. Jackson Women's Health Organization*[1] overturned *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] it became illegal to do so in Oklahoma.[4] A friend in Illinois offers to help her Oklahoman friend travel to a clinic in Illinois, where abortion is legal,[5] to get the procedure she desires. Another friend in New York, where abortion is also legal,[6] hears about the Oklahoman's situation and sends her friend an email explaining how she can order abortion pills from another state or country and take them in her home.[7] Another individual in California, where abortion is also legal,[8] puts up a webpage on the internet instructing women across the country on abortion options, including in-person clinics and mailed abortion pills. Can Oklahoma prosecute any of these individuals for communicating about abortion options across state lines? Does the First Amendment offer these individuals protection against potential prosecution?

After *Dobbs*, many states have already either entirely or partially outlawed abortion or are likely to do so.[9] Antiabortion activists, however, have gone a step further by circulating model bills for state legislatures that would criminalize facilitating abortions, such as by giving instructions over the internet on how to obtain an abortion or perform one on oneself.[10] Legislators in South Carolina, for example, introduced legislation that would criminalize maintaining a website directed at South Carolina residents that

1. 142 S. Ct. 2228 (2022).

2. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

3. 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

4. *See After* Roe *Fell, Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/2N9K-4PZJ] (last visited Feb. 6, 2023).

5. *See id.*

6. *See id.*

7. *See Consultation*, AIDACCESS (Sept. 14, 2021, 5:59 PM), https://aidaccess.org/en/i-need-an-abortion [https://perma.cc/8BWQ-2WSQ].

8. *See After* Roe *Fell, Abortion Laws by State*, *supra* note 4.

9. *See id.* Some states are not only making it illegal to get an abortion within their borders, but are also seeking to sanction those who travel outside the state to obtain an abortion. *See* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023) (manuscript at 3), https://ssrn.com/abstract=4032931 [https://perma.cc/TU7G-ZHJS]. However, this Note will not analyze laws that seek to regulate out-of-state abortions.

10. *See* Matt Perault, *After* Dobbs, *Democrats and Republicans Switch Places on Speech Policy*, LAWFARE (July 28, 2022, 8:01 AM), https://www.lawfareblog.com/after-dobbs-democrats-and-republicans-switch-places-speech-policy [https://perma.cc/BCJ8-PPLQ].

provides information on how to obtain an abortion.[11] In Missouri, one state legislator has introduced amendments to a proposed antiabortion bill that would similarly criminalize facilitating abortions by instructing a Missouri citizen on how to get an abortion within the state.[12] Yet the Missouri legislator who introduced the amendments has claimed that the provisions would not apply to speech protected by the First Amendment.[13] This invites the question: which speech about abortion *is* protected by the First Amendment?

In 1975, the U.S. Supreme Court in *Bigelow v. Virginia*[14] held that Virginia may not prevent a New York citizen from advertising, in Virginia, an activity or service that is legal in New York, including abortion and abortion clinics, even if the activity or service is illegal in Virginia.[15] But what if the citizen in the state where abortion is legal disseminates information to a woman in a state where abortion is illegal about how to obtain an abortion in the state where it is *illegal*? This is the post-*Dobbs* question that this Note addresses.

Specifically, in the wake of *Dobbs*, this Note addresses what protections, if any, the First Amendment offers to those who try to help others obtain an abortion through speech. Readers may have two conflicting instincts when thinking about the answer to this question. On one hand, readers may think that the right to free speech would and should cover speech that instructs another on how to get an abortion. On the other hand, readers may think one cannot and should not help another commit a crime without penalty. This Note seeks to navigate those competing views.

However, the scope of this Note is limited. Although someone could provide instructions from a state that criminalizes abortion to another person in that same state, this Note will not address that intrastate speech. Instead, this Note will focus on speech that is posted on the internet from a state where abortion is legal, instructing people across the world, including those in states where abortion is illegal, on how to obtain an abortion.[16] For the purposes of this Note, such speech will be referred to as "instructional abortion speech." This Note will address proposed criminal laws and penalties for instructional abortion speech as opposed to civil liability.[17]

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11. *See id.*

12. *See* Sarah Fentem, *Missouri Lawmaker Wants to Make It a Crime to Help People Get Abortions Out of State*, ST. LOUIS PUB. RADIO (Mar. 11, 2022, 6:21 PM), https://news.stlpublicradio.org/health-science-environment/2022-03-11/missouri-lawmaker-wants-to-make-it-a-crime-to-help-people-get-abortions-out-of-state [https://perma.cc/V4M3-DHNU].

13. *See id.*

14. 421 U.S. 809 (1975).

15. *Id.* at 829.

16. This Note also focuses on instructions on how to terminate a pregnancy with medication, commonly known as a medication abortion.

17. Some states have passed laws, like the Texas Heartbeat Act, that create a civil cause of action for citizens against any person who aids and abets an abortion. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–171.212 (West 2021).

Part I provides necessary background on *Dobbs*, the First Amendment, and the extent to which states may regulate certain types of speech. Part II canvasses the debate over whether the First Amendment protects instructional abortion speech or whether the speech fits into a First Amendment exception. Part III will resolve the debate explored in Part II, argue that instructional abortion speech should be protected, and suggest how courts should analyze this question, drawing on core First Amendment and other constitutional principles.

I. THE INTERSECTION OF THE FIRST AMENDMENT, *DOBBS*, AND POTENTIAL CRIMINAL PROSECUTION

This part details background information regarding the *Dobbs* decision, the First Amendment, and potential avenues that states may follow to prosecute instructional abortion speech. Part I.A reviews *Dobbs* and its effects, as well as some of the constitutional principles underlying the decision. Part I.B introduces the First Amendment and the extent to which states may regulate speech. Part I.C briefly considers whether and to what extent a state may regulate out-of-state activity, and whether a state like Oklahoma may prosecute a citizen of another state in an Oklahoma court. Finally, Part I.D introduces the various categories of speech into which instructional abortion speech could fall, including speech that incites, speech that aids and abets, and speech that facilitates crime.

A. Dobbs*, Federalism, and Interstate Conflict*

This section reviews the *Dobbs* holding to provide context for this Note. This section then outlines structural constitutional principles underlying the Court's decision that are relevant in the wake of *Dobbs*, including federalism and the right to travel. These constitutional principles may inform solutions to the problems surrounding instructional abortion speech addressed in this Note and suggest that such speech should be protected.

On June 24, 2022, the *Dobbs* Court upheld the Mississippi Gestational Age Act,[18] which bans abortions after the fifteenth week of pregnancy.[19] In doing so, the Court overruled *Roe* and *Casey*,[20] holding that there is no constitutional right to abortion.[21] The Court stated that the Fourteenth Amendment's Due Process Clause, which *Roe* pointed to as the basis for the right to abortion,[22] cannot guarantee rights unless they are rooted in the

18. MISS. CODE ANN. § 41-41-191 (2022).

19. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

20. *Casey* modified *Roe*'s holding by rejecting the trimester framework but reaffirmed the constitutional right to abortion and the right to obtain one without undue interference from the state before fetal viability, which was about twenty-four weeks when *Casey* was decided. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 873 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

21. *See Dobbs*, 142 S. Ct. at 2242.

22. *See* Roe v. Wade, 410 U.S. 113, 164 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *Casey*, 505 U.S. at 846.

nation's history and tradition.[23] The Court found that the right to abortion was not so rooted, and thus could not stand.[24] Thus, the *Dobbs* Court returned the authority to regulate abortion to the people through their elected representatives.[25] As a result, states may now pass laws that completely ban abortion, regulate abortion after a certain stage of pregnancy, protect the right to abortion in certain cases (such as when the life of the mother is at risk), or protect the right to abortion completely.[26]

Certain constitutional principles underlie the decision in *Dobbs*, including federalism. The U.S. Constitution reserves certain powers for the states and certain powers for the federal government, thus creating a mode of governance known as federalism, with two independent layers of government.[27] Under this system, the states possess powers that the Constitution does not give exclusively to the federal government,[28] including police powers to protect the public welfare.[29] However, when state laws clash with federal laws, the Supremacy Clause dictates that federal law must be followed.[30]

Additionally, states must give full faith and credit to the public acts, records, and judicial proceedings of every other state[31] because the states are equally sovereign.[32] States, therefore, have mutual obligations to one another.[33] For instance, states must give the citizens of each state the privileges and immunities of citizens in the several states.[34] However, a state is ultimately free to implement public policy through the enactment and enforcement of its own laws, which may be different than the laws of other states.[35] Accordingly, post-*Dobbs*, states may enact and enforce their own abortion laws.[36]

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23. *See Dobbs*, 142 S. Ct. at 2242.

24. *See id.* at 2242–43. The Court noted that at the time the Fourteenth Amendment was adopted, three-quarters of the states criminalized abortion. *Id.*

25. *See id.* at 2284.

26. HEALTH, EDUC., LAB. & PENSIONS COMM., U.S. SENATE, IMPACTS OF A POST-*ROE* AMERICA: THE STATE OF ABORTION POLICY AFTER DOBBS 7–8 (2022), https://www.help.senate.gov/imo/media/doc/8.01.2022%20Final%20Post-Dobbs%20Report.pdf [https://perma.cc/8HAJ-29HA]. However, we do not know if courts will uphold complete bans on abortion without any exceptions. *See* Masood Farivar, *3 Months After Court Ruling, Uncertainty Persists over Abortion Legal Status*, VOA NEWS (Sept. 23, 2022, 6:46 PM), https://www.voanews.com/a/months-after-court-ruling-uncertainty-persists-over-abortion-legal-status-/6760979.html [https://perma.cc/8YVX-VY8G] (outlining some of the challenges to abortion laws that are pending in state courts).

27. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 214 (5th ed. 2015).

28. U.S. CONST. amend. X.

29. *See* Gonzales v. Oregon, 546 U.S. 243, 270 (2006); CHEMERINSKY, *supra* note 27, at 215.

30. *See* U.S. CONST. art. VI, cl. 2.

31. *See id.* art. IV, § 1.

32. *See* CHEMERINSKY, *supra* note 27, at 263.

33. *See* 3 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 34:4 (3d ed. 2011).

34. *See* U.S. CONST. art. IV, § 2, cl. 1.

35. *See* RICH, *supra* note 33, § 34:64.

36. *See* HEALTH, EDUC., LAB. & PENSIONS COMM., *supra* note 26.

What are the benefits, generally, of having a federalist, decentralized government? In *Gregory v. Ashcroft*,[37] Justice Sandra Day O'Connor explained that a federalist system provides for a government that is "more sensitive to the diverse needs of a heterogenous society."[38] By making states compete for a "mobile citizenry," state governments will be more responsive to its citizens.[39] Furthermore, federalism allows for increased "innovation and experimentation in government."[40] Indeed, giving state governments the power to create and enact laws that are different from one another allows for each state to become a laboratory of democracy.[41] In theory, citizens who disagree with the policies of one state may "vote with their feet" and move to another state.[42]

This notion, that citizens of one state can move to another state where they find the laws more favorable, is bolstered by the constitutional right to travel. The Supreme Court has held that the right to travel, protected by the Fourteenth Amendment's Privileges and Immunities Clause, ensures a citizen's right to travel to states other than the state in which they reside, "to be treated as a welcome visitor" while in that second state, and to be treated like other citizens of that second state if they elect to establish permanent residency there.[43]

After *Dobbs*, pregnant women[44] residing in a state where abortion is illegal may travel to a state where abortion is legal to obtain an abortion. Although the majority did not address this issue in *Dobbs*, Justice Kavanaugh, in his concurrence, expressed the view that interstate travel for purposes of obtaining an abortion would be protected by the constitutional right to travel.[45] Assuming at least four of his colleagues on the Court agree, some interstate abortion activities are seemingly constitutional. But what about interstate speech?

B. The First Amendment: State Regulation of Speech Generally

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech,"[46] and the Fourteenth Amendment makes the First Amendment applicable to the states.[47] However, "the right of free

37. 501 U.S. 452 (1991).
38. *Id.* at 458.
39. *Id.*
40. *Id.*
41. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
42. *See* David Schleicher, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 HASTINGS L.J. 1043, 1047 (2014).
43. *See* Saenz v. Roe, 526 U.S. 489, 500 (1999).
44. I use the term "pregnant women" rather than "pregnant people" throughout this Note. Although it does not describe all of the people impacted by *Dobbs*, the term is meant to highlight the attack on women specifically, as they make up the majority of the group affected by the kind of activism that is the subject of this Note.
45. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).
46. U.S. CONST. amend. I.
47. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019).

speech is not absolute,"[48] and legislatures may pass laws regulating some speech to a certain degree.[49] Whether a law unconstitutionally restricts speech depends on whether it is content-based or content-neutral; the Court applies strict scrutiny to laws restricting expression "because of its message, its ideas, its subject matter, . . . its content,"[50] or the harms that flow from it,[51] but applies only intermediate scrutiny to content-neutral laws.[52] Strict scrutiny requires the government to show it has a compelling governmental interest for the regulation in question, and that the regulation is the least speech-restrictive way to further its interests.[53] Thus, content-based regulations are presumed unconstitutional.[54]

Nevertheless, a court will uphold a content-based speech regulation if the law or regulation passes strict scrutiny or falls into a First Amendment category exception.[55] Certain categories of speech are considered First Amendment exceptions because they are recognized by the Supreme Court as unprotected.[56] These categories include true threats,[57] incitement,[58] libel,[59] obscenity,[60] child pornography,[61] and fighting words.[62] The Supreme Court has determined that these categories of speech have little to no social value and thus may be regulated if the law in question passes one of the category tests the Court has established.[63] In Part II, this Note will apply some category exceptions to instructional abortion speech.

C. Whether States May Regulate and Prosecute Out-of-State Activity

This section briefly explores whether a state may prosecute an out-of-state speaker for instructional abortion speech in that state's courts, and whether states have the power to regulate out-of-state activity—including speech that instructs others on how to obtain an abortion—in the first place. In other words, to return to the hypothetical presented at the beginning of this Note, this section explores, as a matter of jurisdiction, whether Oklahoma may pass

48. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).
49. *See id.* at 571–72.
50. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).
51. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1284 (2005).
52. *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647–48 (1981).
53. *See* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000).
54. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
55. *See* Volokh, *supra* note 51, at 1287.
56. *See* Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1092 (9th Cir. 2002) (en banc) (Kozinski, J., dissenting).
57. *See* Watts v. United States, 394 U.S. 705, 707 (1969).
58. For a definition and full discussion of incitement, see *infra* Part I.D.1.
59. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).
60. *See* Miller v. California, 413 U.S. 15, 36 (1973).
61. *See* New York v. Ferber, 458 U.S. 747, 764 (1982).
62. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
63. *See* DAVID L. HUDSON, JR., LEGAL ALMANAC: THE FIRST AMENDMENT: FREEDOM OF SPEECH § 2.5 (2012).

a criminal law seeking to prevent a California citizen from posting a webpage giving instructions to women in Oklahoma and across the world. This section also asks, if Oklahoma may pass such laws, whether Oklahoma may then prosecute that California citizen in an Oklahoma court.

In civil cases, the concept of personal jurisdiction and the question of whether a state may apply its laws to out-of-state conduct are separate.[64] However, in criminal cases, on which this Note focuses, the concept of territorial jurisdiction encompasses both whether a state's courts have the authority to try a case and whether the law of the state applies to those interstate activities.[65] A state will not apply another state's laws in a criminal proceeding in its own state courts.[66] Therefore, a criminal defendant may be tried in a state's court only if that state may apply its laws to the defendant's conduct.[67]

When may a state apply its laws to a defendant's conduct or speech? A state generally may not prosecute people for crimes committed wholly outside its borders.[68] In internet speech cases, courts have suggested that due to the geographic boundarylessness of the internet, a state may not regulate internet activity without violating the dormant commerce clause,[69] which prevents states from regulating extraterritorial commerce.[70] Accordingly, the court in *Publius v. Boyer-Vine*[71] held that a California statute was likely to violate the dormant commerce clause because it required a resident of another state to remove his post in an online forum when the post violated California law.[72]

Similarly, in *Backpage.com, LLC v. McKenna*,[73] one webpage owner sued the state of Washington for enacting a law prohibiting certain ads from being

64. *See* Shaffer v. Heitner, 433 U.S. 186, 224–25 (1977) (Brennan, J., concurring in part and dissenting in part) (noting that personal jurisdiction and choice of law are different, though often similar, inquiries).

65. *See* People v. Betts, 103 P.3d 883, 891 (Cal. 2005).

66. *See id.* at 886.

67. *See id.*

68. *See* Planned Parenthood of Kan. v. Nixon, 220 S.W.3d 732, 742 (Mo. 2007) (holding that it was beyond Missouri's authority to regulate conduct occurring "wholly outside of Missouri").

69. *See* Am. Booksellers Found. v. Dean, 342 F.3d 96, 103 (2d Cir. 2003); Publius v. Boyer-Vine, 237 F. Supp. 3d 997, 1024–25 (E.D. Cal. 2017); *see also* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 526 (2016) (arguing that the dormant commerce clause prohibits extraterritorial application of a state's laws). *But see* Mark D. Rosen, *"Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS U. L.J. 713, 714–15 (2007) (arguing that states have the power to apply their criminal laws outside state borders).

70. The dormant commerce clause is not an express provision in the Constitution but rather "is the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce." CHEMERINSKY, *supra* note 27, at 353, 374.

71. 237 F. Supp. 3d 997 (E.D. Cal. 2017).

72. *See id.* at 1025. The court noted that the statute was problematic because it did not require that websites bar only California users' access, thus suggesting that states may regulate internet activity if a state-specific requirement was put in place. *See id.*

73. 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

published online in Washington.[74] The webpage was posted outside of Washington, and thus the webpage owner argued that the law, as applied, violated the dormant commerce clause because it regulated conduct outside of Washington.[75] In awarding the webpage owner a preliminary injunction, the U.S. District Court for the Western District of Washington seemed inclined to agree, referring to the statute as one that regulated conduct occurring wholly outside the state of Washington.[76]

Nevertheless, there are two key ways through which a state could prosecute someone for out-of-state conduct or speech.[77] First, under the "effects doctrine,"[78] states may exercise jurisdiction over criminal conduct that occurs outside the state if the conduct was intended to cause and results in harm in the prosecuting state.[79] Considering that many state legislatures are attempting to grant unborn children legal protection through personhood status,[80] scholars point out that states could plausibly argue that conduct that aids abortion results in harm within the state by killing these persons.[81] However, the success of such arguments would likely turn on whether the fetal personhood laws hold up in court.[82]

Additionally, despite the boundarylessness of the internet, states could potentially use the effects doctrine to criminalize internet speech. In *Goodwin v. United States*,[83] the defendant, a forty-five-year-old resident of Texas, planned through online communications for a seventeen-year-old North Dakota resident to travel to Texas to engage in sexual acts with him.[84] A North Dakota statute authorized the state to prosecute anyone who, while out of state, solicits sexual contact with a person in the state believed to be a minor at the time of solicitation.[85] The statute therefore aligns with the effects doctrine in that it granted North Dakota authority over the defendant's speech because it affected the North Dakota resident. Thus, North Dakota's criminal laws applied to the Texas resident, who could therefore be brought into a North Dakota court for prosecution.[86]

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74. *Id.* at 1268–69.

75. *Id.* at 1285.

76. *Id.* The statute likely would have been permissible as applied to conduct within Washington, however, as it would not have burdened interstate commerce. *See id.*

77. *See* Cohen et al., *supra* note 9 (manuscript at 24) (exploring the jurisdictional issues that are likely to arise post-*Dobbs* and analyzing whether—and through which laws—a state may obtain jurisdiction over an out-of-state actor for conduct relating to abortion aid).

78. *See id.*

79. *See* Strassheim v. Daily, 221 U.S. 280, 285 (1911).

80. *See* Madeleine Carlisle, *Fetal Personhood Laws Are a New Frontier in the Battle over Reproductive Rights*, TIME (June 28, 2022, 4:40 PM), https://time.com/6191886/fetal-personhood-laws-roe-abortion/ [https://perma.cc/7NZ6-5J9J] (noting that at least six states have introduced laws to establish fetal personhood).

81. *See* Cohen et al., *supra* note 9 (manuscript at 24–25).

82. *See* Carlisle, *supra* note 80 (explaining that fetal personhood laws are being litigated, including one antiabortion law in Arizona that the American Civil Liberties Union has claimed violates the right to due process).

83. 869 F.3d 636 (8th Cir. 2017).

84. *See id.* at 637.

85. *See id.* at 638.

86. *See id.* at 639–40.

Second, some states have statutes that provide for jurisdiction over conduct taking place outside the state's borders.[87] For example, Pennsylvania law specifies that it has jurisdiction over out-of-state actors if their conduct "bears a reasonable relation to a legitimate interest of [Pennsylvania,] and the actor knows or should know that his conduct is likely to affect that interest."[88] States may have a legitimate interest in ensuring that their citizens follow their laws.[89] Thus, if an out-of-state individual's conduct may be considered to be aiding and abetting a crime, a state, through a statute like Pennsylvania's, may be able to obtain jurisdiction over that individual.

Under these two theories, a state could criminalize out-of-state conduct or speech, and thus prosecute an out-of-state speaker in that state's courts. This Note assumes that, for the purpose of analyzing possible First Amendment protections, states may regulate abortion-related speech and prosecute out-of-state speakers in its courts, even when the instructional abortion speech is not intended to reach only citizens of the regulating state.[90]

D. How States Might Try to Classify Instructional Abortion Speech

If someone were to be prosecuted for their instructional abortion speech, they could raise the First Amendment as a defense. A state, in turn, could respond by arguing that the First Amendment does not protect the speech for which the individual is being prosecuted, as it falls into a recognized exception to the First Amendment or into a category of speech that a state could argue *should* be recognized as an exception. States might argue that instructional abortion speech falls into one of these three categories: speech that incites, speech that aids and abets, and speech that facilitates crime (crime-facilitating speech). This section will introduce and define these three types of speech.

1. Speech That Incites

Incitement is broadly defined as speech that encourages another to commit a crime,[91] and the Supreme Court has recognized incitement as a category of

87. *See* Cohen et al., *supra* note 9 (manuscript at 25).

88. 18 PA. STAT. AND CONS. STAT. ANN. § 102 (West 2022).

89. Professor Donald H. Regan argues that states have an interest in controlling their citizens' conduct wherever they are. *See* Donald H. Regan, *Siamese Essays: (I)* CTS Corp. v. Dynamics Corp. of Am. *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1908 (1987). Professor Regan also suggests that this is true in the abortion context too, and thus, in his opinion, a state would be free as a constitutional matter to forbid its citizens from obtaining an abortion elsewhere. *See id.* at 1912–13.

90. This Note does *not* take the position, however, that the First Amendment should leave speech that is widely available, and thus is not directed only at members of the regulating state, unprotected. *See infra* Part III.B.1.

91. *See* Nwanguma v. Trump, 903 F.3d 604, 608 (6th Cir. 2018) (defining incitement in criminal law as persuading others to commit a crime); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1102 (2005) (explaining that incitement is speech that persuades or inspires listeners to commit bad acts).

unprotected speech.[92] The Court articulated the modern approach for determining when speech constitutes incitement, and thus should not be protected, in *Brandenburg v. Ohio*.[93] In *Brandenburg*, a leader of the Ku Klux Klan challenged his conviction under an Ohio statute for seemingly urging violence against political leaders.[94] The defendant told a crowd of followers that there would have to be some "revengeance taken" if political leaders continued to "suppress the white, Caucasian race."[95] The Supreme Court overturned the defendant's conviction because it found that the statute was unconstitutional for punishing mere advocacy.[96] The Court held that although the First Amendment protects some advocacy of violence and illegal action, it does not protect speech that is intended to incite imminent lawless action and is likely to incite such action.[97]

Thus, according to *Brandenburg*, a state may not bar speech that advocates illegal action at some unknown, indefinite future time, as it is not considered incitement.[98] As a result, for a state to succeed in arguing that speech should be stripped of its First Amendment protection under the incitement standard from *Brandenburg*, courts require the state to show that the speaker (1) intended to incite (2) imminent lawless action and (3) that the words were objectively likely to cause such lawless action.[99]

These elements have proven difficult to meet.[100] Thus, *Brandenburg* favors protecting speech over restricting it.[101] *Brandenburg* calls for such a high bar because it seeks to ensure that political speech remains protected.[102] Accordingly, the *Brandenburg* test is typically applied—with the state sometimes winning and sometimes losing—in the context of inciting crowds to violence over political disagreements.[103]

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92. *See* Bible Believers v. Wayne County, 805 F.3d 228, 243–44 (6th Cir. 2015) (explaining that "there are a limited number of categorical exclusions from the comprehensive protection offered by the Free Speech Clause," including incitement).

93. 395 U.S. 444 (1969).

94. *Id.* at 444–46.

95. *Id.* at 446.

96. *Id.* at 448–49.

97. *Id.* at 447.

98. *See* McCoy v. Stewart, 282 F.3d 626, 631 (9th Cir. 2002); United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985) (noting that First Amendment immunity extends to speech that criticizes existing laws unless it urges listeners to violate said laws).

99. *See* John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 441 (2002); *see also* Glen v. Hongisto, 438 F. Supp. 10, 18 (N.D. Cal. 1977) (construing *Brandenburg* to require imminence, likelihood of illegal action, and intent).

100. *See Hongisto*, 438 F. Supp. at 18 (describing *Brandenburg* as a stringent standard).

101. *See* Cronan, *supra* note 99, at 438–39 (explaining that *Brandenburg* elevated speech protections).

102. *See* Zachary Leibowitz, Note, *Terror on Your Timeline: Criminalizing Terrorist Incitement on Social Media Through Doctrinal Shift*, 86 FORDHAM L. REV. 795, 805 (2017) (explaining that *Brandenburg*'s strict standard is meant to keep speech unrestricted and promote political discussion).

103. *See, e.g.*, Hess v. Indiana, 414 U.S. 105, 106–08 (1973); Nwanguma v. Trump, 903 F.3d 604, 606 (6th Cir. 2018) (considering claim that President Donald Trump incited those in the crowd at a campaign rally to violence); *see also* Herceg v. Hustler Mag., Inc., 814 F.2d 1017, 1023 (5th Cir. 1987) (remarking that *Brandenburg* typically applies to situations of

2. Speech That Aids and Abets

Aiding and abetting is defined in the Model Penal Code as assisting or attempting to assist another in planning or committing an offense "with the purpose of promoting or facilitating the commission of the offense."[104] Although the Supreme Court has never explicitly addressed the First Amendment status of aiding and abetting speech,[105] many federal courts have, holding that speech that aids and abets is largely unprotected.[106]

The First Amendment does not protect speech that fits into the definition of aiding and abetting merely because it takes the form of words.[107] First Amendment speech protections do not operate as a bar to all criminal activity that involves speech because, if they did, "the government would be powerless to protect the public from countless of even the most pernicious criminal acts and civil wrongs."[108]

Accordingly, the principle that the First Amendment is not a defense to aiding and abetting a crime merely because it takes the form of speech has been applied to various crimes.[109] For instance, in *Rice v. Paladin Enterprises, Inc.*,[110] the U.S. Court of Appeals for the Fourth Circuit held that a publisher could be civilly liable for publishing a manual giving detailed instructions on how to commit murder-for-hire.[111] In *Rice*, relatives of victims of murders-for-hire sued the publisher of the novel *Hit Man*, alleging that the publisher, Paladin Enterprises, aided and abetted the murderers in the commission of the crimes.[112] *Hit Man* instructs its readers in detail on numerous ways to commit and conceal murder.[113] The defendant raised a First Amendment defense, claiming that it barred the imposition of liability.[114] The *Rice* court, however, stated that neither criminal nor civil aiding and abetting enjoys First Amendment protection.[115] The *Rice* court

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inciting crowds to violence because courts are concerned with crowd behavior). *But see* People v. Rubin, 158 Cal. Rptr. 488, 490–91 (Ct. App. 1979) (noting there is as much potential for civil disruption and incitement in other settings that reach large audiences besides the traditional "mob in the town square" *Brandenburg* setting).

104. *See* MODEL PENAL CODE § 2.06(3)(a)(ii) (AM. L. INST., Official Draft and Revised Comments 1985).

105. *See* Volokh, *supra* note 51, at 1284.

106. *See* United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985) (finding First Amendment defenses frivolous against aiding and abetting charge for urging listeners to file false tax returns while knowing his advice would be followed); United States v. Garland, No. 20-CR-173, 2021 WL 2072123, at *17 (D. Wyo. May 24, 2021) (stating the First Amendment does not bar liability for aiding and abetting just because the aiding and abetting takes the form of speech).

107. *See Garland*, 2021 WL 2072123, at *17.

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

109. *See, e.g.*, United States v. Freeman, 761 F.2d 549, 552–53 (9th Cir. 1985) (sustaining convictions of aiding and abetting tax fraud after defendant counseled tax evasion at seminars and referring to conduct as part of the ultimate crime itself).

110. 128 F.3d 233 (4th Cir. 1997).

111. *See id.* at 265.

112. *See id.* at 241.

113. *See id.* at 239–41.

114. *See id.* at 242.

115. *See id.* at 242–43.

subsequently found that Paladin's speech constituted aiding and abetting, and thus, the First Amendment offered no protection.[116] Other courts have similarly treated aiding and abetting as unprotected speech.[117]

Professor Eugene Volokh, however, seemingly disagrees with *Rice*, noting that generally the government may not punish speakers due to fear that informative facts will cause harm.[118] Professor Volokh cites various civil cases in support of the proposition that even speech that results in harm may be protected.[119] Nevertheless, the Fourth Circuit in *Rice* dismissed a version of this argument, finding such cases to be inapplicable.[120]

Therefore, despite arguments to the contrary, under the current case law, speech that aids and abets illegal activity is outside the reach of First Amendment protection.

3. Speech That Facilitates Crime

Crime-facilitating speech is not a category of speech recognized by courts.[121] Rather, it is a concept that Professor Volokh introduced, and it can be defined as speech that provides knowledge on how to commit a crime or lower the risk of being caught.[122] According to Professor Volokh, crime-facilitating speech differs from speech that incites because it does not advocate for or encourage someone to commit a crime,[123] but rather provides people who already have the desire and motivation to commit a crime with instructions on how to do so.[124] Crime-facilitating speech therefore may encompass speech that aids and abets but encompasses more than that as well, including speech that lacks the intent necessary for aiding and abetting.[125] For instance, a chemistry textbook may be considered crime-facilitating because it provides its readers with the knowledge

116. *See id.* at 243.

117. *See, e.g.*, Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 329 (D. Mass. 2013) ("It is well-established that speech that constitutes criminal aiding and abetting is not protected by the First Amendment.").

118. *See* Volokh, *supra* note 51, at 1304.

119. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910–12 (1982) (finding that even when speech causes tortious interference with business relations, the speech is protected); E.R.R. Presidents Conf. v. Noerr Motor Freight Inc., 365 U.S. 127, 142–44 (1961) (finding speech used to restrain trade, in violation of antitrust laws, is protected).

120. *See Rice*, 128 F.3d at 262 (finding plaintiffs' argument that *NAACP v. Claiborne Hardware Co.* was not applicable to be an "apt observation").

121. *See* Stewart v. McCoy, 537 U.S. 993, 993 (2002) (statement of Justice Stevens respecting denial of petition for writ of certiorari) (noting the Supreme Court has not yet addressed the scope of First Amendment protection for instructional speech); Volokh, *supra* note 91, at 1128 (explaining the absence of Supreme Court cases dealing with crime-facilitating speech exactly). *But see* Obriecht v. Splinter, No. 18-cv-877, 2019 WL 1779226, at *5–6 (W.D. Wis. Apr. 23, 2019) (discussing expressive conduct that defense counsel referred to as crime-facilitating and finding plaintiff had plausible claim for relief for such expression under First Amendment).

122. *See* Volokh, *supra* note 91, at 1107.

123. *See id.*

124. *See* Leslie Kendrick, Note, *A Test for Criminally Instructional Speech*, 91 VA. L. REV. 1973, 1988–89 (2005).

125. *See* Volokh, *supra* note 91, at 1218.

necessary to manufacture a bomb, but it would not qualify as aiding and abetting because the textbook authors likely did not intend for the book to be used in furtherance of that purpose.[126]

Professor Volokh argues that crime-facilitating speech deserves its own test, separate from the standard in *Brandenburg* and the test for aiding and abetting.[127] Professor Volokh proposes first that restrictions on crime-facilitating speech should be treated as content-based and thus subject to strict scrutiny.[128] However, he then proposes a First Amendment exception allowing legislatures to regulate the speech if any of the following factors are met: (1) the speaker directs their speech to a few listeners the speaker knows will use the speech with criminal purpose, (2) the speech has almost no noncriminal value, or (3) the speech is extraordinarily harmful, as a threat to national security would be.[129]

Some courts appear to have adopted Professor Volokh's test.[130] The Fourth Circuit, for example, found that posting unredacted social security numbers online was protected, as the speech had noncriminal value.[131] Another court similarly found that defendants were entitled to minimal First Amendment protection because some of their criminal conduct had noncriminal value.[132] Therefore, a state or speaker could argue that a court should adopt Professor Volokh's test when evaluating instructional abortion speech by arguing that other courts have previously looked favorably on the test.[133]

II. EXPLORING WHETHER THE FIRST AMENDMENT PROTECTS INSTRUCTIONAL ABORTION SPEECH

This part explores whether states can refute the argument that the First Amendment protects instructional abortion speech by utilizing the three types of speech introduced in Part I. Part II.A will apply the case law on incitement to instructional abortion speech and explore whether and in what contexts such speech would be considered incitement and thus be unprotected speech. Part II.B will do the same for aiding and abetting.

126. *See id.* at 1221 (explaining how a ban on knowingly crime-facilitating speech would encompass textbooks, while a ban on intentionally crime-facilitating speech would not).

127. *See id.* at 1106.

128. *See id.* at 1137 n.174.

129. *See* Thomas Healy, Brandenburg *in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 704 n.318 (2009).

130. *See* Ostergren v. Cuccinelli, 615 F.3d 263, 271 (4th Cir. 2010); London-Sire Recs., Inc. v. Doe 1, 542 F. Supp. 2d 153, 163 (D. Mass. 2008).

131. *See Ostergren*, 615 F.3d at 271–72 (rejecting Virginia's argument and finding that posting social security numbers had noncriminal value because they were used to draw attention to Virginia's failure to safeguard its citizens' private information).

132. *See London-Sire Recs., Inc.*, 542 F. Supp. 2d at 163 (finding that downloading music and making it available to others could be entitled to First Amendment protection because it expresses one's identity, but finding that the part of the conduct that constitutes copyright infringement is not protected).

133. *See* United States v. White, 638 F. Supp. 2d 935, 958 n.18 (N.D. Ill. 2009) (referring to Professor Volokh's analysis of the constitutionality of crime-facilitating speech as "cogent"), *rev'd and remanded*, 610 F.3d 956 (7th Cir. 2010).

Finally, Part II.C will explore whether instructional abortion speech would be protected under Professor Volokh's test if it is considered crime-facilitating speech.

A. Applying Incitement to Instructional Abortion Speech

For speech to be considered incitement, as explained in *Brandenburg*, advocacy must be intended to incite or produce imminent lawless action and must be likely to incite or produce such action.[134] If the speech does not meet *Brandenburg*'s standard, the speech will not be considered incitement and thus will be protected, unless it falls into another recognized category of unprotected speech or the state's regulation otherwise satisfies strict scrutiny.[135] The *Brandenburg* standard can be broken down into three elements: (1) intent,[136] (2) imminence, and (3) likelihood.[137]

It is unclear from *Brandenburg* what "imminent" means.[138] Although some believe that "imminent" means a matter of hours or days,[139] others suggest it could include action that occurs up to five weeks after the inciting speech.[140] However, most courts require some level of immediacy for the speech to be considered incitement, even when that speech appears to present a danger to the public.[141] If there is time for "more speech" to ward off harm from speech urging lawless action, free speech doctrine prefers such public dialogue.[142] Only when the harm is truly imminent—and there is no time for "more speech"—will a court allow criminal liability for speech urging lawless action.[143]

For internet postings and publications, the definition of imminence is murky. When speech is published on the internet, can the required immediacy ever be proven? If an online post is read long after it has been posted—the equivalent to the words being spoken—how can that

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

135. *See In re* White, No. 07-CV-342, 2013 WL 5295652, at *62 (E.D. Va. Sept. 13, 2013) (holding that White's statements were not excluded from First Amendment protection because they did not constitute incitement under *Brandenburg*); Volokh, *supra* note 51, at 1287.

136. For a more complete discussion of speakers' intent, see *infra* Part II.B.

137. *See* Glen v. Hongisto, 438 F. Supp. 10, 18 (N.D. Cal. 1977).

138. *See* Bradley J. Pew, Comment, *How to Incite Crime with Words: Clarifying* Brandenburg*'s Incitement Test with Speech Act Theory*, 2015 BYU L. REV. 1087, 1087–88 (explaining the confusion among lower courts as to the meaning of imminence).

139. *See* L.A. Powe, Jr., Brandenburg*: Then and Now*, 44 TEX. TECH L. REV. 69, 78 (2011).

140. *See* Healy, *supra* note 129, at 715.

141. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982). The speech at issue in *Claiborne* included a statement to a crowd that "if we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902. The Court held that the speech did not "transcend the bounds of protected speech set forth in *Brandenburg*" because the only possible violence that resulted from the speech occurred weeks or months later. *Id.* at 928.

142. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (explaining why imminence was necessary for the clear and present danger test), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969). *Brandenburg*, however, is consistent with Justice Louis D. Brandeis's concurrence in *Whitney*. *Compare Whitney*, 274 U.S. at 377 (Brandeis, J., concurring), *with* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

143. *See Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

communication be said to be likely to produce imminent lawless action?[144] *Brandenburg* was decided before the internet existed, and, therefore, the Supreme Court could not have considered the meaning of imminence in the context of internet speech.[145] The issue still has not been squarely addressed.[146] The ambiguity of the imminence element with regard to the internet may cause a divide over whether to treat instructional abortion speech as unprotected incitement or to treat it as protected speech that is not incitement. This section primarily explores that divide.

1. The State's Argument: The Speech Would Be Incitement

For internet speech, the imminence element is difficult to meet if someone might read internet speech weeks, months, or years after it is posted.[147] As a result, some scholars support measuring imminence from when the reader of internet speech encounters it rather than from when the speaker posts it.[148] If courts adopt this approach, instructional abortion speech on the internet is more likely to meet the imminence prong.[149] Speech may remain on the internet for an indefinite amount of time, and illegal activity may not occur immediately after the speech was posted.[150] Measuring from the time viewers read the internet speech accounts for this problem and captures the conduct that the incitement category of speech is meant to prevent.[151] Thus, a state may benefit from arguing for this approach.[152]

Moving to the likelihood element of the *Brandenburg* standard, there does not need to be a showing of concrete imminent harm for speech to be

144. *See* Pew, *supra* note 138, at 1088 n.8.

145. *See id.*

146. *See id.*

147. *See id.*

148. *See* Cronan, *supra* note 99, at 456 (suggesting courts should analyze internet speech from when the post was read, rather than when it was put up); Pew, *supra* note 138, at 1088 n.8.

149. *See* Cronan, *supra* note 99, at 456, 466 ("[I]t is possible to construct a standard that addresses the dangers of Internet incitement while remaining faithful to *Brandenburg*'s steadfast commitment to free speech.").

150. *See* Jennifer Spencer, Note, *No Service: Free Speech, the Communications Act, and BART's Cell Phone Network Shutdown*, 27 BERKELEY TECH. L.J. 767, 789 (2012).

151. *See* Lauren E. Beausoleil, Note, *Free, Hateful, and Posted: Rethinking First Amendment Protection of Hate Speech in a Social Media World*, 60 B.C. L. REV. 2101, 2134 (2019).

152. Additionally, the Fourth Circuit has disregarded the imminence element when analyzing speech under *Brandenburg* by failing to mention it. *See* United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985). Some courts therefore may be responsive to calls to abolish the imminence element for internet speech. *See* Tiffany Komasara, Comment, *Planting the Seeds of Hatred: Why Imminence Should No Longer Be Required to Impose Liability on Internet Communications*, 29 CAP. U. L. REV. 835, 848–49 (2001) (suggesting imminence requirement is not necessary for internet speech when seeking to impose *civil* liability on publisher). Without the imminence element, the state's argument that speech is incitement gets much stronger, as there is one less hurdle to clear. *See* Cronan, *supra* note 99, at 428 (stating that when imminence element is applied to internet speech, "almost no Internet communication, regardless of the likelihood and seriousness of incitement, can be condemned under *Brandenburg*").

considered incitement.[153] The test under *Brandenburg* is an objective one, evaluating the likelihood of imminent harm *at the time of the speech*.[154] *United States v. Coronado*[155] demonstrates how *Brandenburg*'s likelihood element functions. In *Coronado*, during a lecture, the defendant demonstrated to attendees how he made an incendiary device to destroy facilities where researchers were conducting animal testing.[156] As a result, the defendant was charged with violating federal statute 18 U.S.C. § 842(p)(2)(A), which prohibits the distribution of information relating to explosives and destructive devices.[157] The defendant challenged the statute as overbroad, arguing that it criminalized mere advocacy in violation of *Brandenburg*.[158] In support of his argument, the defendant argued that his own speech had not and was not likely to produce any lawless action and thus could not be incitement.[159] The U.S. District Court for the Southern District of California, however, rejected the defendant's argument that the statute was overbroad and that his speech should be protected under *Brandenburg*, with the court instead highlighting that the government does not have to wait for the fruition of illegal conduct before it may act.[160] Thus, the state does not have to show that illegal conduct has occurred for the speech to be considered incitement.

Additionally, there are ways to determine objective likelihood other than by showing that the listener committed the crime. Judge John P. Cronan suggests identifying the most probable audience of the internet posting to gain insight into the likelihood that it will incite others to commit a crime.[161] For example, incitement is more likely when the target audience, or the audience that the post is more likely to reach, is more aggressive or more impressionable.[162] Instructional abortion speech postings are likely to reach an audience that includes pregnant women who are looking to obtain an abortion—a factor that a court could consider in determining likelihood.[163]

A court might also look at the increased traffic to the internet posting at issue following *Dobbs* to determine the most likely audience and otherwise analyze the objective likelihood element. Data from the Planned Parenthood

153. *See* United States v. Coronado, 461 F. Supp. 2d 1209, 1215 (S.D. Cal. 2006).
154. *See In re* White, No. 07-CV-342, 2013 WL 5295652, at *61 (E.D. Va. Sept. 13, 2013).
155. 461 F. Supp. 2d 1209 (S.D. Cal. 2006).
156. *Id.* at 1210–11.
157. *Id.* at 1210.
158. *Id.* at 1212–13.
159. *Id.* at 1215.
160. *Id.*
161. *See* Cronan, *supra* note 99, at 460–61.
162. *See id.* at 461.
163. *See Abortion Providers Discuss State of Abortion Access One Month Post Fall of* Roe v. Wade, PLANNED PARENTHOOD (July 27, 2022), https://www.plannedparenthood.org/about-us/newsroom/press-releases/abortion-providers-discuss-state-of-abortion-access-one-month-post-fall-of-roe-v-wade [https://perma.cc/V52S-8STG] (explaining increase in website traffic and number of appointments booked in states where abortion is not protected in the immediate aftermath of *Dobbs*). *But see* Bigelow v. Virginia, 421 U.S. 809, 822 (1975) (stating advertisement of abortion services that are legal in New York could reach diverse audience and not only readers who want to utilize the advertised services).

website indeed seems to suggest that in the wake of *Dobbs*, these kinds of websites are attracting more readers and that these readers later take action. For example, Planned Parenthood released a report stating that the "number of emergency contraception appointments scheduled increased by 48%,"[164] and "Planned Parenthood's sexual health education chatbot . . . experienced twice the normal number of questions about birth control."[165] Finally, the report notes that the number of people from South Carolina that Planned Parenthood provided abortion care to in their North Carolina and Virginia centers more than doubled during the first two weeks of July 2022.[166] If there is similar data available for the specific posting at issue, a court may find that that post is objectively likely to produce imminent lawless action.

Lastly, a court might consider instructional abortion speech to be incitement even though the context surrounding the speech is different from traditional incitement cases. A state could argue that because courts have previously found instructional speech to be incitement outside the angry mob context,[167] they should do the same here. For instance, in *United States v. Buttorff*,[168] the U.S. Court of Appeals for the Eighth Circuit considered whether speech was incitement or mere advocacy in a tax evasion case.[169] In *Buttorff*, the defendants held a series of public and private meetings at which they gave speeches about the unconstitutionality of income tax.[170] Individuals who attended these meetings, at defendants' recommendation and advice, later filed income tax forms that claimed allowances to which they were not entitled or falsely certified that they received no taxable income.[171] As a result, federal prosecutors charged the defendants with aiding and abetting these tax crimes.[172] The *Buttorff* court found that the speech incited others to action that violated federal law and thus was not entitled to First Amendment protection.[173] Therefore, *Buttorff* suggests that speech does not have to encourage others to commit violent acts or political overthrow to be considered incitement.[174] Rather, the speech can simply incite others to break the law,[175] in which case instructional abortion speech could potentially qualify as incitement.

164. *Abortion Providers Discuss State of Abortion Access One Month Post Fall of* Roe v. Wade, *supra* note 163.
165. *Id.*
166. *Id.*
167. *See* United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978); United States v. Schiff, 269 F. Supp. 2d 1262, 1280 (D. Nev. 2003) (declaring instructional speech aimed at helping individuals stop paying taxes through live and recorded seminars, materials, and personal assistance to be incitement), *aff'd*, 379 F.3d 621 (9th Cir. 2004).
168. 572 F.2d 619 (8th Cir. 1978).
169. *Id.* at 624.
170. *Id.* at 622.
171. *Id.*
172. *Id.*
173. *Id.* at 624.
174. *See id.*
175. *See id.*

2. The Speaker's Argument: The Speech Would Not Be Incitement

On the other hand, courts' treatment of imminence with regard to publications may shed light on how courts might treat internet postings, as print publications and internet postings share similar qualities.[176] In *Citizen Publishing Co. v. Miller*,[177] the Arizona Supreme Court, sitting en banc, considered whether a letter to the editor stating that "we" should execute five Muslims at random whenever an assassination or other atrocity occurred was incitement.[178] The court held that the speech was *not* incitement because there was no evidence that violence that might result from the speech was imminent.[179] In explaining that the letter was not likely to incite imminent lawless action, the court noted that the statements were made in a letter to the editor rather than to an angry mob,[180] suggesting that the court may not have believed that a publication could satisfy the level of imminence contemplated by *Brandenburg*. The *Miller* court noted that this publication could not satisfy *Brandenburg* because publishing the speech in the newspaper in this case resulted in more letters to the editor critiquing the original publication.[181] In other words, the original speech produced "more speech," which could prevent lawless action or remedy any evil that might come from the original speech—precisely the justification for *Brandenburg*'s imminence element.[182] Because there was time for responsive speech, the original letter could not have satisfied the imminence element.[183] Similarly, internet speech may produce "more speech" and therefore may not satisfy the imminence element either.

Additionally, lower courts have considered the connection between imminence and internet speech specifically. The U.S. District Court for the Eastern District of Virginia found that publishing statements on the internet does not, by itself, suggest that the actions the speaker recommended are likely to be imminently carried out by those who see the posting,[184] even though the internet's ability to transmit content instantly makes imminent action possible.[185] Other courts have similarly held that internet postings failed to meet *Brandenburg*'s imminence requirement.[186] Finally, internet

176. *See* Firth v. State, 775 N.E.2d 463, 465 (N.Y. 2002) ("Communications accessible over a public Web site resemble those contained in traditional mass media, only on a far grander scale.").

177. 115 P.3d 107 (Ariz. 2005) (en banc).

178. *Id.* at 109–10.

179. *Id.* at 113.

180. *Id.*

181. *Id.*

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

183. *Id.*

184. *See In re* White, No. 07-CV-342, 2013 WL 5295652, at *62 (E.D. Va. Sept. 13, 2013).

185. *See* Pew, *supra* note 138, at 1088 n.8.

186. *See* Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1092 n.5 (9th Cir. 2002) (en banc) (Kozinski, J., dissenting); United States v. Carmichael, 326 F. Supp. 2d 1267, 1287 (M.D. Ala. 2004).

postings continue to be used as examples of speech that would fail to meet the imminence prong in other sources, such as treatises.[187]

Furthermore, internet postings might fail to meet the *Brandenburg* standard if there has not been any harmful action yet.[188] Here, the imminence element and the likelihood element intersect. Even though *Brandenburg* does not require lawless action to occur, the timing of the prosecution of internet speech may still make a difference to its chance of success[189]: if lawless action has not yet occurred by the time of prosecution, the elements of likelihood and imminence are more difficult to prove.[190] Indeed, at least one court held that speech did not meet the imminence element of *Brandenburg*, and thus could not be incitement, because there was no proof that the defendant's internet postings had previously inspired any action.[191] Similarly, in *Miller*, discussed above, the court found that the letter to the editor did not advocate imminent lawless action in part because no act of violence had ensued from the publication.[192]

Therefore, returning to the hypothetical presented in the introduction of this Note, if Oklahoma attempts to prosecute a California citizen for instructional abortion speech based on a statute specifically targeting such speech or a general incitement to illegal action law, without proof that it caused an Oklahoma citizen to obtain an abortion, the state is more likely to fail when using *Brandenburg* as a justification.

As for the intent element, in cases that allege incitement, it is sometimes difficult for the prosecution to prove intent.[193] The U.S. Court of Appeals for the Sixth Circuit, for instance, has found intent to be lacking when the speaker subsequently disavowed and discouraged violence[194] or when the speaker took other measures to prevent violence from ensuing.[195] By contrast, it may be difficult to prove intent for instructional abortion speech—not because the speaker has discouraged the lawless action in subsequent speech, but rather because the speech has noncriminal uses as well,[196] and noncriminal uses may disprove criminal intent.[197]

187. *See* HUDSON, *supra* note 63, § 3.2 (explaining that a post on the internet calling on readers to defend their nationality and race against others would likely be protected by the First Amendment for failing to incite *imminent* lawless action).

188. *See Carmichael*, 326 F. Supp. 2d at 1288 (finding that the First Amendment should protect speech when there is no evidence of any unlawful act or evidence linking an act to the speaker).

189. *See* Leibowitz, *supra* note 102, at 805.

190. *See id.* at 805–06.

191. *See In re* White, No. 07-CV-342, 2013 WL 5295652, at *62 (E.D. Va. Sept. 13, 2013).

192. Citizen Publ'g Co. v. Miller, 115 P.3d 107, 113 (Ariz. 2005) (en banc).

193. *See, e.g.*, Bible Believers v. Wayne County, 805 F.3d 228, 244 (6th Cir. 2015); Nwanguma v. Trump, 903 F.3d 604, 612 (6th Cir. 2018).

194. *See Nwanguma*, 903 F.3d at 612 (citing Bible Believers v. Wayne County, 805 F.3d 228, 244 (6th Cir. 2015)).

195. *See Bible Believers*, 805 F.3d at 244.

196. *See infra* Parts II.B.2, II.C.2.

197. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 255 (4th Cir. 1997) (explaining a court or jury may infer criminal intent when speech has no genuine uses aside from its lawless uses).

Finally, a court might reject a state's incitement argument because *Brandenburg* protects political speech,[198] and a court may find that instructional abortion speech is a form of political speech. Political speech is speech that, for one thing, concerns governmental policy.[199] A court may find that instructional abortion speech concerns governmental policy in that it advocates the violation of law to correct a governmental policy by testing its legitimacy in court.[200] Because many of the laws surrounding abortion are newly passed in the wake of *Dobbs*, many have yet to be tested in court, and thus, instructional abortion speech may be a way to lead to those tests.[201] Accordingly, if a court finds that instructional abortion speech is political speech, it may be appropriate to apply *Brandenburg*.[202] A speaker would then only need to argue that their speech is abstract advocacy for a court to afford strong protections to instructional abortion speech under *Brandenburg*.[203]

B. Applying Aiding and Abetting to Instructional Abortion Speech

The Fourth Circuit in *Rice v. Paladin Enterprises, Inc.* held that a publisher could be civilly liable for publishing a manual giving detailed instructions on how to commit murder-for-hire because it constituted aiding and abetting.[204] The manual instructed its readers on various ways to murder someone, conceal the body, and ask for proper compensation.[205]

Similarly, in the abortion context, one could imagine someone posting a webpage that gives instructions on how to obtain abortion pills. At first glance, following the holding of *Rice*, such a webpage would not receive any First Amendment protection because instructing another on how to commit a crime would be considered aiding and abetting.[206] However, instructional abortion speech may not fit within *Rice* so neatly.

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198. *See* Leibowitz, *supra* note 102, at 805.

199. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27–28 (1971); Mills v. Alabama, 384 U.S. 214, 218–19 (1966) (stating political speech includes discussions of "structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes").

200. Although some commentators reject the idea that advocating law violation is political speech, others assert that civil disobedience, which may include violating the law and advocating for violation of the law, is political speech deserving of protection. *See* Marshall C. Derks, Note, *The Advocacy of "Constitutional" Conduct*, 68 IND. L.J. 1385, 1407 (1993).

201. *See* Farivar, *supra* note 26 (outlining some of the challenges to abortion laws in state courts and explaining that legal challenges to abortion laws could continue for years).

202. *See* Eric J. Segall, *The Internet as a Game Changer: Reevaluating the True Threats Doctrine*, 44 TEX. TECH L. REV. 183, 191 (2011) (noting it would be problematic to apply *Brandenburg* to speech that is not "core political speech or political advocacy"); *see also Rice*, 128 F.3d at 264 (commenting that *Brandenburg* is only meant to apply to speech that is "part and parcel of political and social discourse").

203. *See* McCoy v. Stewart, 282 F.3d 626, 631 (9th Cir. 2002) (explaining a court may not bar advocacy of illegal action at some unknown future time); *supra* Part I.D.1.

204. 128 F.3d at 265.

205. *Id.* at 239–40.

206. *See supra* Part I.D.2.

When exploring whether instructional abortion speech would be considered aiding and abetting and thus unprotected by the First Amendment, four factors from *Rice* seem to be of particular importance: (1) imminence, (2) causation, (3) audience, and (4) intent. The intent element, in particular, may be determinative. This section will lay out the state's potential argument that instructional abortion speech constitutes aiding and abetting, and the speaker's potential argument that instructional abortion speech does not.

1. The State's Argument: The Speech Is Aiding and Abetting

Starting with the imminence element, in *United States v. Mendelsohn*,[207] defendants were charged with aiding and abetting the interstate transportation of wagering paraphernalia for mailing a computer program used for illegal sports betting.[208] Defendants also instructed the buyer on how to use the illegal program.[209] Defendants argued a First Amendment defense, but the court found that First Amendment immunity would not apply to the defendants' speech unless the informational speech was "removed from immediate connection to the commission of a specific criminal act."[210] Therefore, *Mendelsohn* suggests a temporal element to aiding and abetting.

As previously discussed, a court may find that internet speech can spark imminent lawless action and therefore could be immediately connected to the commission of a crime.[211] This is particularly true for states that have criminalized the mailing of abortion pills,[212] or consider ordering abortion pills to be an attempt to commit a crime, which is itself a criminal offense.[213] There is a stronger temporal connection between the speech and commission of a crime in these scenarios because mailing or ordering the abortion pills would naturally occur closer in time to when the speaker posted the instructional abortion speech.[214]

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207. 896 F.2d 1183 (9th Cir. 1990).

208. *Id.* at 1184.

209. *Id.*

210. *Id.* at 1185.

211. *See supra* Part II.A.1.

212. Despite state efforts to criminalize delivering abortion pills by mail to women within their borders, the U.S. House of Representatives recently passed a resolution to reaffirm the U.S. Food and Drug Administration's power to preempt state law on this issue and the U.S. Attorney General's authority to take action against states that attempt to restrict a patient's access and use of abortion pills. *See* Press Release, Diana DeGette, Rep., U.S. House of Representatives, House Approves Measure Reaffirming FDA Power to Block States from Banning Abortion Pills (Dec. 22, 2022), https://degette.house.gov/media-center/press-releases/house-approves-measure-reaffirming-fda-power-block-states-banning [https://perma.cc/PDN5-LHDN].

213. *See, e.g.*, RICHARD A. GREENBERG, MARTIN MARCUS, LYNN W.L. FAHEY, RICHARD DE SIMONE & STEVEN Y. YUROWITZ, NEW YORK CRIMINAL LAW § 4:12 (4th ed. 2016).

214. *See Can't Get to a Health Center?*, PLANNED PARENTHOOD KEYSTONE, https://www.plannedparenthood.org/planned-parenthood-keystone/services/remote-services/dtp-mab [https://perma.cc/FZ3U-XP7W] (last visited Feb. 6, 2023) (explaining it can take up to two weeks to obtain abortion pills after starting the process by meeting with a doctor); *Frequently Asked Questions*, ABORTION ON DEMAND, https://abortionondemand.org/faq/ [https://perma.cc/9P8S-DDXF] (last visited Feb. 6, 2023).

The next factor, causation, may sway in the state's favor, depending on the crime charged and when the prosecution is brought. In cases in which the state seeks to punish speech, culpability depends not on advocacy of criminal conduct but on a defendant's *successful* efforts to assist others by detailing the means to commit the crime.[215] Indeed, the Ninth Circuit found that informing another as to how to commit a crime is not aiding and abetting unless the person who was informed or otherwise assisted actually commits that crime.[216] As a result, if the prosecution against the speaker is brought after a pregnant woman obtains an abortion, or has attempted to obtain one,[217] then the court is more likely to consider the speech to be unprotected.[218] However, although the constitutionality of speech that instructs and results in crime has been determined, the constitutionality of instructional speech that is likely to lead to the commission of a crime but has yet to do so remains unsettled.[219]

Nevertheless, the state has other arguments that would allow the prosecution to be brought earlier. As mentioned previously, some states are criminalizing mailing abortion pills, and thus, the instructional speech could be considered aiding and abetting that crime.[220] Furthermore, when a pregnant woman has not yet obtained or attempted to obtain an abortion, instructional speech may be considered an attempt to aid and abet.[221] However, although the Model Penal Code includes attempting to aid and abet in accomplice liability,[222] some state statutes do not.[223] Therefore, in states that have not adopted this provision of the Model Penal Code[224] and thus do not include attempting to aid and abet in their accomplice liability statutes, a state may not be able to bring the prosecution before a listener acts.

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215. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 246 (4th Cir. 1997).

216. *See* United States v. Barnett, 667 F.2d 835, 841–42 (9th Cir. 1982).

217. An individual can aid and abet an attempted crime. *See, e.g.*, People v. Perez, 113 P.3d 100, 104 (Cal. 2005).

218. For a discussion on how the timing of a prosecution can affect the strength of the state's case, see *supra* Part II.A.2.

219. *See* Kendrick, *supra* note 124, at 1979.

220. *See* Press Release, Diana DeGette, *supra* note 212.

221. *See* United States v. Partida, 385 F.3d 546, 555 (5th Cir. 2004) (explaining a person can be guilty of an attempt to aid and abet a crime so long as they engage in conduct designed to aid the principal, even if the principal has not committed or attempted to commit the crime).

222. *See* MODEL PENAL CODE § 2.06(3)(a)(ii) (AM. L. INST., Official Draft and Revised Comments 1985) (stating that one is an accomplice if they attempt to aid another in the commission of an offense with the purpose of promoting or facilitating it); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 401–02 (9th ed. 2022) (explaining that under the Model Penal Code one who attempts to aid and abet may be guilty of criminal attempt even when a crime has not been committed by another if "(1) the purpose of her conduct was to aid another in the commission of the offense; and (2) such assistance *would* have made her an accomplice in the commission of the crime under the Code's complicity statute").

223. At common law, a defendant could not be guilty of attempting to aid and abet. *See* DRESSLER, *supra* note 222, at 401.

224. The Model Penal Code has not been adopted fully in any state. *See id.* at 31.

As for audience, to constitute aiding and abetting, the speech does not have to be targeted at one specific person.[225] Rather, the speaker can be held liable for speech that aids and abets even if it is disseminated to a larger, unknown audience.[226] In an instructional abortion speech case, the speech would be disseminated to a larger, unknown audience,[227] but a court could determine the likely audience.[228] Additionally, the nature of the speech itself may show the court that the targeted audience is specific.[229] For instance, a court could likely determine for whom the speech was intended based on its timing as well as its content.[230]

Lastly, for speech to be unprotected as criminal aiding and abetting, the speaker must have the requisite mens rea.[231] In *Rice*, intent was stipulated to, but the court stated that a reasonable jury could find the requisite intent without a stipulation based on four factors[232]: the manual's declared purpose,[233] the book's level of detail,[234] the defendant's marketing strategy,[235] and its lack of other genuine, lawful uses.[236]

For instructional abortion speech, based on these factors, the way in which instructional speech is framed could make a difference in whether intent is found and thus whether the speech may be protected. However, as to the declared purpose, disclaimers stating that the posting of any such speech

225. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 248 (4th Cir. 1997); United States v. Barnett, 667 F.2d 835, 843 (9th Cir. 1982). Although a speaker does not have to target a specific person, there must be at least a focused interaction to support liability for aiding and abetting. *See* Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 378 (2003).

226. *See Rice*, 128 F.3d at 248.

227. *See* Cronan, *supra* note 99, at 452 (explaining that it is difficult to identify a website's audience because the creator will not know exactly who will view it, as anyone with internet access can read the posting).

228. *See id.* at 460–61; *supra* Part II.A.1.

229. *See Rice*, 128 F.3d at 248.

230. *See* Bloomington-Normal Seating Co. v. NLRB, 357 F.3d 692, 696 (7th Cir. 2004) (explaining that the court may evaluate the legality of the speech only by putting it into context and looking at factors including the timing of the speech).

231. *See* MODEL PENAL CODE § 2.06(3)(a) (AM. L. INST., Official Draft and Revised Comments 1985) (stating that one aids and abets when they act "with the purpose of promoting or facilitating the commission of the offense"); *see also* Hicks v. United States, 150 U.S. 442, 449 (1893) (explaining that intent for one's conduct to further another's criminal conduct is required for aiding and abetting).

232. The U.S. District Court for the District of Oregon also adopted these factors to analyze intent in the absence of a stipulation. *See* Wilson v. Paladin Enters., Inc., 186 F. Supp. 2d 1140, 1144 (D. Or. 2001). Similarly, when determining that defendants' speech constituted aiding and abetting tax evasion, the U.S. District Court for the District of Nevada considered the speakers' stated purpose and whether the scheme was targeted toward individuals who would file false income tax returns. *See* United States v. Schiff, 269 F. Supp. 2d 1262, 1284 (D. Nev. 2003), *aff'd*, 379 F.3d 621 (9th Cir. 2004).

233. *Rice*, 128 F.3d at 253.

234. *Id.* at 253–54.

235. *Id.* at 254–55.

236. *Id.* at 255.

should not be used unlawfully may not prevent a court from finding criminal intent.[237]

Additionally, as for the marketing strategy, a speaker may not be able to avoid a court finding the requisite intent even when a webpage purports to be available to all persons in America.[238] In *Rice*, the court found that the publisher did not market the manual to all customers because it was only advertised in a magazine to which consumers had to subscribe.[239] By contrast, with internet postings, anyone may be able to find most material online without subscribing.[240] Thus, a court may or may not distinguish a speaker's marketing strategy for instructional abortion speech posted online from the marketing strategy in *Rice* and find that intent is lacking when content is posted on the universally accessible internet.

Combating the idea that instructional abortion speech does not have any lawful uses might be difficult for the state as well when such speech is available to and directed at women in states where abortion is *legal*.[241] However, to overcome this obstacle, states could write bills targeting instructional abortion speech or other aiding and abetting abortion laws that include "knowingly" as the requisite mens rea rather than "intentionally."[242] Doing so would make the state's case easier, as it would lower the burden for proving mens rea.[243]

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237. The *Rice* court found that a reasonable jury could find intent, despite the defendant's disclaimer in the book that it was to be used for academic purposes only, because there were indications the disclaimer was sarcastic. *See id.* at 254. However, if the disclaimer is not sarcastic, a court may reach a different conclusion.

238. *See id.* at 254–55.

239. *See id.*

240. Some sites require monthly subscriptions for full access, but not all are based on this model. *See* Mark Hill, *Paywalls, Newsletters, and the New Echo Chamber*, WIRED (Dec. 7, 2020, 8:00 AM), https://www.wired.com/story/paywalls-newsletters-and-the-new-echo-chamber/ [https://perma.cc/3F3J-B7MK]. Similarly, although one must follow some users on social media platforms to see what they post, some users have their profiles on a setting that allows the public to view their content without following them first. *See Differences Between Public and Private Accounts on Instagram*, META, https://help.instagram.com/517073653436611/Differences+between+public+and+private+accounts+on+Instagram/?helpref=related_articles&source_cms_id=502981923235522 [https://perma.cc/R73W-ZTFJ] (last visited Feb. 6, 2023).

241. *See* Jeremy W. Peters, *First Amendment Confrontation May Loom in Post-*Roe *Fight*, N.Y. TIMES, https://www.nytimes.com/2022/06/29/business/media/first-amendment-roe-abortion-rights.html [https://perma.cc/S7Z9-4CTY] (June 30, 2022) ("It is generally not illegal to promote an activity that isn't a crime.").

242. *See* Memorandum from James Bopp, Jr., Gen. Couns., Nat'l Right to Life Comm., Courtney Turner Milbank & Joseph D. Maughon to Nat'l Right to Life Comm. (June 15, 2022), https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf [https://perma.cc/R4MT-FBL2] (including "knowingly" as the mens rea in the proposed statute).

243. "Knowingly" is a lesser mens rea than purpose or intent. *See* MODEL PENAL CODE § 2.02(5) (AM. L. INST., Official Draft and Revised Comments 1985) (explaining that establishing that a person acted purposely also establishes that they acted knowingly, recklessly, and negligently).

2. The Speaker's Argument: The Speech Is Not Aiding and Abetting

A court may find that an individual's instructional abortion speech does not constitute aiding and abetting because the speaker lacks the requisite mens rea. However, a speaker may struggle to make this argument to the court because, for instance, the model bill circulated to the National Right to Life Committee includes "knowingly" as well as "intentionally" as the requisite mens rea.[244]

Nevertheless, despite the statutory language, intent may be required as a matter of First Amendment scrutiny according to the case law.[245] Although the aider and abettor does not have to intend to commit the underlying crime and must only have knowledge that the perpetrator intends to commit the act, in criminal cases, lower court decisions suggest that the aider and abettor *does* need to have intent to encourage that act.[246]

To determine whether the speaker has the requisite intent, a court could look to the first and fourth factors discussed in *Rice*: the purpose of the speech and lack of lawful uses of the speech.[247] The court in *Rice* concluded that the jury could find the requisite intent from the instructional manual's "singular character"[248]: it had the exclusive purpose of assisting murderers in the commission of their crimes and had only one genuine use, which was to facilitate murders.[249] However, neither factor is as clear in the abortion context as it was in *Rice* due to the different stages of legality of abortion across the country.[250] A speaker who puts up a webpage instructing women across America on how to obtain abortion pills from an international organization may have multiple purposes,[251] including helping women in

244. *See* Memorandum from James Bopp, Jr., Courtney Turner Milbank & Joseph D. Maughon to Nat'l Right to Life Comm., *supra* note 242.

245. The First Amendment provides a defense when a state seeks to criminalize speech on the basis that it *could* be used for an impermissible purpose, rather than that it will be or is *intended* to be used for that purpose. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 247 (4th Cir. 1997). Thus, even when a statute permits a lesser mens rea, a state may have to prove intent beyond a reasonable doubt to make out a prima facie case of aiding and abetting and refute a First Amendment defense. *See* Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief and Dev., 291 F.3d 1000, 1013, 1024–25 (7th Cir. 2002) (requiring intent in First Amendment association case in which statute used "knowingly").

246. *See, e.g.*, State v. Gamble, No. 01-0292, 2002 WL 1427703, at *3 (Iowa Ct. App. July 3, 2002).

247. *See Rice*, 128 F.3d at 253–55.

248. *Id.* at 254.

249. *Id.* at 254–55.

250. *See After* Roe *Fell, Abortion Laws by State*, *supra* note 4.

251. For example, the speaker might have the purpose of advertising an international organization that sends the pills to women in America. *See* David Leonhardt & Ian Prasad Philbrick, *The Next Abortion Fight: Mailing Pills*, N.Y. TIMES, https://www.nytimes.com/2022/07/25/briefing/abortion-pills-mail-roe-v-wade.html [https://perma.cc/PMS5-VGPE] (July 28, 2022) (describing international organization Aid Access's work in sending abortion pills through the mail to America). Advertisements of services that are legal in other states or countries should be constitutionally protected based on *Bigelow v. Virginia*. *See* 421 U.S. 809, 822–26 (1975).

states where abortion is legal in addition to where it is illegal.[252] In the same vein, instructional abortion speech that is universally accessible on the internet has noncriminal uses.[253]

Thus, whereas murder and murder-for-hire is illegal in all states, the fact that abortion is only illegal in some makes the issue of intent less obvious here than in *Rice* and leaves room for a court to conclude that instructional abortion speech is not aiding and abetting.[254]

C. Applying the Crime-Facilitating Test to Instructional Abortion Speech

Finally, the speaker or the state could try to persuade the court to adopt Professor Volokh's test for determining when crime-facilitating speech should be protected. This section lays out the state's and the speaker's potential arguments if a court adopted Professor Volokh's test. By way of review, Professor Volokh argues that there should be a First Amendment exception when the speaker engages in crime-facilitating speech that meets one of the following conditions: (1) it is "said to a few people who the speaker knows are likely to use it to commit a crime or to escape punishment," (2) it has "no noncriminal uses," or (3) it is extraordinarily harmful.[255]

1. The State's Argument: The Speech Should Not Be Protected

Under Professor Volokh's test, the state arguably has an easier burden than the speaker, as only one factor must be met for a court to deem the speech unprotected.[256] The first factor, whether the speaker directs their speech to a small group of people they know are likely to use it for criminal purposes, seems to be the most difficult avenue for the state. Due to the special qualities of the internet, it may be difficult for the state to prove an internet posting's

252. For example, Planned Parenthood's website allows a user to search by state for a nearby clinic, so it can therefore reach and assist women across the nation. *See* PLANNED PARENTHOOD, https://www.plannedparenthood.org/ [https://perma.cc/556W-F84M] (last visited Feb. 6, 2023).

253. A court might find that instructional abortion speech has medical value in all states. *See* Brief of Amici Curiae American College of Obstetricians and Gynecologists, American Medical Association, American Academy of Family Physicians, American Academy of Nursing, American Academy of Pediatrics, American Association of Public Health Physicians, et al. in Support of Respondents at 18, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4312120 (explaining abortion pills are a safe way to conduct a self-induced abortion). The speech may also have value to those who are merely curious about the science behind abortion. *See Bigelow*, 421 U.S. at 822 (stating abortion services advertisement can be of value to those with interest in the subject matter who do not plan to use the services). For further discussion on the noncriminal uses of instructional abortion speech, see *infra* Part II.C.2.

254. *See* Brenner, *supra* note 225, at 426 (noting it would be "problematic" to prosecute a speaker for an internet posting if the speaker posted the information in a state or nation where the posting of the information is legal).

255. *See* Volokh, *supra* note 91, at 1217 (emphasis omitted).

256. *See id.* ("[T]here should indeed be a First Amendment exception for speech that substantially facilitates crime, when *one* of these three conditions is satisfied . . . ." (emphasis added)).

intended audience.[257] Additionally, Professor Volokh's test contemplates dissemination to a small group of people, while internet postings can reach millions worldwide.[258]

However, when looking at the language of Professor Volokh's test, a speaker does not have to direct the speech *only* to people who they know would use it for a criminal purpose. Rather, knowledge that the instructional speech would reach that set of people is all that is required.[259] A court could determine the probable audience for instructional abortion speech.[260] For instance, instructional abortion speech postings are likely to reach an audience that includes pregnant women who are in need of an abortion.[261] Even if creators do not intend for their postings to reach women in states where abortion is illegal, creators should know that it is possible, if not likely,[262] which would be enough to satisfy the test's first factor.

Moving to Professor Volokh's second factor, just as some states value the life of the fetus over the life of the mother, as evidenced by their proposed abortion laws,[263] courts will likely differ in their views of the value of instructional abortion speech.[264] Some courts may not see any value in the speech at all, and thus decide that instructional abortion speech should not be protected under this prong of Professor Volokh's test.

Professor Volokh's third and final factor, whether the speech is extraordinarily harmful, may turn on value judgments as well. A state could plausibly argue that the speech is extraordinarily harmful, particularly because it is distributed via the internet. Professor Volokh argues that speech only meets this third factor when it can cause harms that reach thousands at

257. *See* Cronan, *supra* note 99, at 452 (explaining that it is difficult to identify a website's audience because the creator will not know exactly who will view it since anyone with internet access can read the posting).

258. *See id.* at 425–26.

259. *See* Volokh, *supra* note 91, at 1217.

260. *See supra* Part II.A.1.

261. *See supra* Part II.A.1.

262. *See* Brenner, *supra* note 225, at 425 (commenting that internet content is available around the world). Webpage creators can control who can access their websites as well, so it is likely that creators know who is able to access it. *Can I Block an Entire Region or Country from Seeing My Site?*, HOSTGATOR, https://www.hostgator.com/help/article/can-i-block-an-entire-region-or-country-from-seeing-my-site [https://perma.cc/3RCG-QQXJ] (last visited Feb. 6, 2023); *Controlling Who Can Access Your Site's Pages*, SQUARESPACE (Sept. 2, 2022), https://support.squarespace.com/hc/en-us/articles/360022365512 [https://perma.cc/7TM9-T2BJ].

263. *See* Mary Ziegler, *Why Exceptions for the Life of the Mother Have Disappeared*, ATLANTIC (July 25, 2022), https://www.theatlantic.com/ideas/archive/2022/07/abortion-ban-life-of-the-mother-exception/670582/ [https://perma.cc/S8QA-8KMG] (describing politicians' approval of and support for abortion bans without "life of the mother" exceptions); Brad Dress, *Idaho GOP Rejects Platform Change Allowing Abortion to Save Person's Life*, THE HILL (July 18, 2022, 10:27 AM), https://thehill.com/homenews/state-watch/3563905-idaho-gop-rejects-platform-change-allowing-abortion-to-save-womans-life/ [https://perma.cc/43LP-93MN] (noting that the Idaho Republican Party changed its platform to support criminalizing abortion in all cases, including when the life of the mother is at stake).

264. *See* Kendrick, *supra* note 124, at 2016 (highlighting the subjectivity of any assessment of social value).

once.[265] Although internet postings may not cause harm to thousands in the same way that a bomb would, the internet does enable more people to voice criminal or dangerous messages at once.[266] The internet has also expanded the ability of speakers who were previously limited to spreading their messages verbally or through the mail to reach millions at the same time with the click of a button.[267] Finally, speech is more dangerous when posted on the internet than when spoken in person because it can be permanent and thus continue to reach more people over time.[268] Therefore, millions may read instructional abortion speech on the internet and be driven to action—action that, in the eyes of some states, would harm persons.[269] Due to this possibility, a court may find that the speech is extraordinarily harmful and thus decide that the speech is not protected.

2. The Speaker's Argument: The Speech Should Be Protected

For the First Amendment to protect an individual's speech under the crime-facilitating test, none of Professor Volokh's three factors may be satisfied.[270] If a speaker sought to disprove the first and third factors,[271] the speaker would likely have to rely on a literal reading of the test, and to disprove the second factor, the speaker would have to overcome the hurdle of unfavorable value judgments.

As for the first factor—whether the speaker directs their speech to a small group of people they know are likely to use it for criminal purposes[272]—the speaker would have to argue that the court should apply the test exactly as written. Because internet speech has the ability to reach a mass audience more easily[273] and because the speaker may not know who that audience is comprised of,[274] instructional abortion speech on the internet cannot be said to meet this first factor.

However, it is unclear whether a court would modify the test for the internet. In another case, one court stayed true to the traditional interpretation

265. *See* Volokh, *supra* note 91, at 1212.
266. *See* Cronan, *supra* note 99, at 427.
267. *See id.* at 426.
268. *See* Segall, *supra* note 202, at 191.
269. A court might consider the speech extraordinarily harmful in that it could cause millions to break the state's laws, something that states have an interest in preventing. *See* Regan, *supra* note 89, at 1908 (commenting that states have an interest in regulating their citizens' conduct).
270. *See* Volokh, *supra* note 91, at 1217.
271. A speaker may not have to disprove these factors, however. Professor Volokh's crime-facilitating speech test may become an affirmative defense by statute. *See* Patterson v. New York, 432 U.S. 197, 206 (1977) (noting that a statute provided for an affirmative defense to the crime charged in the case, thereby showing statutes may provide for such defenses). In criminal cases, some jurisdictions place the burden of proving affirmative defenses on the defendant, but others put the burden of disproving it on the government. *See* DRESSLER, *supra* note 222, at 74.
272. *See* Volokh, *supra* note 91, at 1217.
273. *See* Cronan, *supra* note 99, at 426.
274. *See supra* note 257 and accompanying text.

of a speech test.[275] However, Professor Volokh's crime-facilitating test has not been widely adopted,[276] nor has crime-facilitating speech been formally recognized as a First Amendment exception.[277] Therefore a court, in adopting the test, may not apply it as written.

As for the second factor, a court might not classify instructional abortion speech as speech with no value, or as having only a criminal purpose, as the test demands. Speech that teaches drug users how to use certain illegal drugs has medical value.[278] Similarly, speech that teaches pregnant women how to have a safe abortion, even if it is illegal to have an abortion, could also be considered medically valuable.[279] This is particularly true in states that criminalize abortion even when the safety and health of the mother is at risk.[280] Additionally, instructional abortion speech may have additional medical value, as abortion may alleviate the stress and negative effect on mental health that pregnancy can have on some women.[281]

A court may also find that internet postings of instructional abortion speech have noncriminal value in states where such speech is accessible and abortion is legal to some degree.[282] Accordingly, a court may find speech that is not solely accessible or directed at women in states where abortion is

275. *See* Cronan, *supra* note 99, at 454 (commenting that the court did not change analysis of true threats doctrine for internet speech).

276. *See* United States v. White, 638 F. Supp. 2d 935, 958 n.18 (N.D. Ill. 2009) (declining to adopt Professor Volokh's crime-facilitating speech test despite noting his analysis is "cogent"), *rev'd and remanded*, 610 F.3d 956 (7th Cir. 2010).

277. *See* Obriecht v. Splinter, No. 18-cv-877, 2019 WL 1779226, at *5–6 (W.D. Wis. Apr. 23, 2019) (commenting that the Supreme Court has not yet addressed crime-facilitating speech, and the law is thus unclear on the issue).

278. *See* Volokh, *supra* note 91, at 1113.

279. *See* Brief of Amici Curiae American College of Obstetricians and Gynecologists, American Medical Association, American Academy of Family Physicians, American Academy of Nursing, American Academy of Pediatrics, American Association of Public Health Physicians, et al. in Support of Respondents, *supra* note 253, at 17–18 (explaining that some women where abortion is banned will attempt self-induced abortion through unsafe methods like intentional trauma to the abdomen and noting abortion pills are a safe way to conduct a self-induced abortion); Brief of *Amici Curiae* Catholics for Choice, National Council of Jewish Women, Religious Coalition for Reproductive Choice, Muslim Advocates, Presbyterians Affirming Reproductive Options, Jewish Women International, Auburn Theological Seminary, Muslims for Progressive Values, African American Ministers in Action, and 45 Other Faith-Based Organizations, in Support of Respondents at 24, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4311849 (noting poor women are more likely to attempt unsafe methods of self-induced abortion than travel out of state).

280. *See* Aria Bendix & Dana Varinsky, *The Biggest Health Risks Women Would Face If* Roe v. Wade *Is Overturned*, NBC NEWS (May 4, 2022, 4:33 AM), https://www.nbcnews.com/health/health-news/health-risks-overturning-roe-v-wade-abortion-rcna27109 [https://perma.cc/2U8Z-VVT4] (explaining rate of death from pregnancy-related complications is rising and those denied abortions face higher risk of pregnancy-related health issues).

281. *See* Brief of Social Science Experts as *Amici Curiae* in Support of Respondents at 27–28, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4311868 (noting women denied access to an abortion are more likely to have negative mental health symptoms, whereas access to abortion does not have a negative effect and instead provides a sense of relief).

282. *See supra* note 241 and accompanying text.

completely illegal should be protected because to criminalize that speech or to leave it unprotected would criminalize legally protected speech, which the Constitution does not permit.[283] For instance, in *Reno v. American Civil Liberties Union*,[284] the Supreme Court considered whether the Communications Decency Act of 1996,[285] which sought to protect minors from sexually explicit material on the internet, violated the First Amendment.[286] The Court held that the statute was overbroad and thus infringed on free-speech rights, as the statute unnecessarily suppressed constitutional speech addressed to adults in order to serve its governmental interest of protecting children from it.[287] The Court's decision in *Reno* suggests that when speech reaches an audience that is legally allowed to hear it, the speech has value and should thus be protected. Otherwise, statutes criminalizing such speech should be struck down as overbroad.[288]

Finally, as for Professor Volokh's third factor, a court might not classify instructional abortion speech as extraordinarily harmful. Professor Volokh explains that extraordinarily harmful speech is, in the context of his test, speech that threatens national security.[289] Professor Volokh framed his test this way due to his concern that courts would make value judgments in determining what constitutes extraordinarily harmful speech.[290] Without a narrow rule restricting this third factor to speech that threatens national security, different courts may have vastly different rules based on value judgments about which crimes are more severe or more harmful than others, creating uncertainty for prosecutors and speakers alike.[291] Thus, in the interest of avoiding unpredictable outcomes, a court may apply the test as Professor Volokh intended. If so, instructional abortion speech would not satisfy this last factor because it does not threaten national security.

III. PUTTING VALUE IN THE EVALUATION OF INSTRUCTIONAL ABORTION SPEECH

Under the current case law, instructional abortion speech may or may not qualify for First Amendment protection. Individuals across the United States may suffer from the uncertainty surrounding the potential treatment of instructional abortion speech. Those who speak may face criminal sanctions. Those who do not speak may refrain from doing so out of fear of prosecution. As a result, pregnant women who live in states where abortion is illegal and

283. *See* Ashcroft v. ACLU, 542 U.S. 656, 665 (2004); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561–66 (2001); Reno v. ACLU, 521 U.S. 844, 874 (1997).

284. 521 U.S. 844 (1997).

285. Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 15, 18, and 47 U.S.C.).

286. *Reno*, 521 U.S. at 849.

287. *See id.* at 874, 885.

288. The overbreadth doctrine permits an individual to "challenge a statute by showing that it substantially abridges the First Amendment rights of other parties . . . ." CHEMERINSKY, *supra* note 27, at 82.

289. *See* Volokh, *supra* note 91, at 1210–11.

290. *See id.* at 1207.

291. *See id.*

cannot travel outside their state's borders may be left feeling as though they do not have options other than to attempt an unsafe, self-induced abortion. It is thus urgent for Americans to receive an answer about what their right to free speech includes, and for women in states where abortion is illegal to know their rights—and options—as well.

Part III.A suggests an approach for courts to use when evaluating instructional abortion speech, building on the tests discussed in Part II as well as the First Amendment overbreadth principle. Part III.B asserts that the First Amendment should protect instructional abortion speech as political speech and discusses additional constitutional principles that support that conclusion.

A. Adding Objectivity to Value Judgments: A New Mode of Analysis for Courts

This section explains why a court should not use the existing standards discussed in Part II to determine what constitutional protections for instructional abortion speech apply. It argues instead that courts should protect instructional abortion speech by focusing on its value outside of unlawful uses.[292] Therefore, this section suggests that courts should adopt only the second prong of Professor Volokh's crime-facilitating speech test as the proper test.

First, if a court were to analyze instructional abortion speech under an incitement theory and apply *Brandenburg*, it would likely find in favor of the speaker because the state's argument—that instructional abortion speech published on the internet is incitement—seems weak. It is unlikely that a court would find that internet speech satisfies the imminence prong of *Brandenburg*. If imminence is based on when the speaker posted their speech on the internet, this speech likely would not meet the prevailing standard of imminence.[293] However, even if imminence were measured from when an individual reads the internet posting, it may not meet the strict imminence requirements imposed by *Brandenburg* and its progeny.[294] For instance, in many cases regarding internet postings generally, someone who reads an internet posting will "have to travel some distance to commit the lawless

292. Although beyond the scope of this Note, filtering and blocking technology offers another solution worth exploring. The Supreme Court in *Ashcroft v. ACLU* considered filtering and blocking technology as a solution to a statute's overbreadth and found that it could prevent chilling constitutional speech directed at adults while still serving the government's goal of preventing minors from seeing harmful internet speech. 542 U.S. 656, 667–68 (2004). Similarly, here, filtering and blocking may still accomplish states' goals of preventing abortions and preventing women from accessing instructional abortion speech, and it is less restrictive than criminal sanctions. *See id.* at 667. However, an exploration of this solution would require an analysis of whether filtering and blocking is feasible in this setting, and who would have the burden of implementing the technology. *See* Schrader v. Sunday, No. 21-CV-01559, 2022 WL 1542154, at *8 (M.D. Pa. May 16, 2022) (noting proposed solutions must be the least restrictive means *available*).

293. *See* Powe, *supra* note 139, at 78 (opining that imminence is likely a matter of hours, or, at most, a few days, based on *NAACP v. Claiborne Hardware Co.*).

294. *See* Cronan, *supra* note 99, at 455; Powe, *supra* note 139, at 78.

activity."[295] In the abortion context, a woman in Oklahoma who reads abortion instructions online and decides to have a medication abortion would have to order the medication and wait for it to arrive before carrying out the key offense.[296] Therefore, given the difficulty of satisfying *Brandenburg*'s imminence requirement, instructional abortion speech is likely to be considered mere advocacy and entitled to robust speech protection instead.[297]

Even though instructional abortion speech would likely be protected under *Brandenburg*, it is still not the best test to apply. If the charge against the speaker of instructional abortion speech is aiding and abetting—which the charge is likely to be in these cases—*Brandenburg* would not be the correct standard to apply[298] because incitement and aiding and abetting are different legal theories. Furthermore, even though some courts have applied *Brandenburg* in tax evasion cases,[299] courts may be hesitant to apply *Brandenburg* outside the "angry mob" context[300] that the Supreme Court contemplated in its key incitement cases.[301] Therefore, *Brandenburg* does not seem to provide the best way of analyzing the constitutionality of instructional abortion speech because it does not quite fit.

As for aiding and abetting, if a court were to consider whether instructional abortion speech constitutes aiding and abetting, and if intent is required to make out a prima facie case, then the state would likely fail. It would be difficult to prove that a speaker had the requisite intent if they post instructional abortion speech on the internet that is not targeted at citizens of one specific state but rather is universally accessible.[302] For instance, if someone put up a webpage instructing women across America on how to obtain abortion pills from an international organization, the purpose of posting the webpage could be to help women in Oklahoma, where abortion is illegal, to get an abortion, or it could be to help women in a state where

295. *See* Cronan, *supra* note 99, at 451.

296. Many organizations provide for overnight shipping, but there can be delays, and the overall process can even take a few weeks when there are extra requirements, like meeting with a doctor in person or via telehealth. *See Can't Get to a Health Center?*, *supra* note 214 ("The entire process from the first phone call to receiving your medications can take one to two weeks . . . ."); *Frequently Asked Questions*, *supra* note 214. Nonetheless, the state could argue that taking these preparatory steps would be lawless action as well because it could at least constitute an attempt. *Cf.* MODEL PENAL CODE § 5.01 (AM. L. INST., Official Draft and Revised Comments 1985) (requiring intent to commit crime and a substantial step in the course of criminal conduct, which may include possession or collection of materials to be used in commission of crime). Furthermore, some states have made it a crime to mail abortion pills into their states. *See* Ian Prasad Philbrick, *The End of* Roe, N.Y. TIMES (June 25, 2022), https://www.nytimes.com/2022/06/25/briefing/roe-v-wade-struck-down-explained.html [https://perma.cc/9U5Q-YTV4]; Part II.B.1.

297. *See supra* Parts I.D.1, II.B.2.

298. *See supra* Part II.B.

299. *See* United States v. Schiff, 269 F. Supp. 2d 1262, 1280 (D. Nev. 2003), *aff'd*, 379 F.3d 621 (9th Cir. 2004); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978).

300. *See supra* note 103.

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

302. *See supra* Part II.B.2.

abortion is legal.[303] The purpose could also be to advertise an international organization that sends the pills to women in America.[304] Under these circumstances, a court would likely find that the speaker lacks the requisite intent to further the underlying crime of abortion.

However, a court may not consider intent at all, depending on the language in the state's relevant aiding and abetting statute.[305] Even though intent is required for incitement as a matter of First Amendment law,[306] and has been required in other First Amendment cases,[307] a court might not require it if a statute defines aiding and abetting as requiring only knowledge.[308] Therefore, given the unpredictability of the test, a speaker, even without criminal intent, may not want to risk posting instructional abortion speech on a website for fear that they could be found guilty of aiding and abetting criminal conduct in states that only require knowledge.[309] In an effort to avoid chilling speech[310] that may be permissible in states that impose an intent requirement or that do not criminalize this speech at all, a court should not utilize this analysis.

Finally, under Professor Volokh's full crime-facilitating speech test, it is harder to discern which party would prevail because courts have not widely adopted the test.[311] Even though, if a court adopted the test literally, the speaker *should* prevail in arguing the speech should be protected,[312] there is no guarantee that a court would decide that way.[313] Because the test was proposed in 2005, and the internet has developed exponentially since then, the test—and in particular, its first prong—is outdated. The proper way to analyze instructional abortion speech, therefore, is by foregoing the outdated first prong and using only one portion of Professor Volokh's test: the value prong.[314]

One commentator has pointed out the difficulty in relying on value as a way to assess the constitutionality of speech.[315] Reasonable people disagree

303. *See supra* note 252.
304. *See generally supra* note 251.
305. *See supra* note 242 and accompanying text.
306. *See supra* note 99 and accompanying text.
307. *See* Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief and Dev., 291 F.3d 1000, 1013, 1024–25 (7th Cir. 2002).
308. *But see* Rice v. Paladin Enters., Inc., 128 F.3d 233, 247 (4th Cir. 1997) ("[T]he First Amendment may, at least in certain circumstances, superimpose upon the speech-act doctrine a heightened intent requirement.").
309. *See* Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1698 (2015) (explaining that criminal liability results in a chilling effect that would cause individuals to refrain from engaging in permissible behaviors).
310. The First Amendment demands efforts to avoid chilling constitutionally protected speech. *See* HUDSON, *supra* note 63, § 2.7.
311. *See supra* notes 276–77 and accompanying text.
312. *See supra* notes 273–74 and accompanying text.
313. *See supra* Part II.C.2.
314. I refer to Professor Volokh's second factor in his crime-facilitating speech test as the "value prong." Professor Volokh states that this second factor covers speech that has virtually no noncriminal uses, but he explains that because it has no noncriminal uses, it lacks First Amendment value. *See* Volokh, *supra* note 91, at 1217.
315. *See* Kendrick, *supra* note 124, at 2015–16.

about the value of speech and the harm it poses.[316] On one hand, because it is subject to such varying views, perhaps value should not determine which kinds of speech deserve First Amendment protection.[317]

On the other hand, the value of speech lies at the heart of the First Amendment. The Supreme Court deemed certain categories of speech as exempted from First Amendment protection because the Court determined that those types of speech did not have any positive value, had only low positive value, or had high negative value or harm.[318] Additionally, the standards discussed in this Note depend on the value of speech. For instance, whether speech constitutes aiding and abetting partially depends on whether the speech has positive value.[319] *Rice* teaches that when speech lacks value outside unlawful uses, courts may infer the intent mens rea for aiding and abetting.[320]

Thus, Professor Volokh's test for crime-facilitating speech properly accounts for value.[321] At least two courts have supported this notion, in that they recognized the value of speech that might otherwise be considered crime-facilitating, and thus protected that speech to an extent.[322] Accordingly, when assessing the constitutionality of the speech, courts should hold that the First Amendment protects speech when it plausibly has objective value outside of its lawless uses. Objective value might mean medical or otherwise scientific value,[323] or it might mean simply that the speech is legal in other states. I refer to this proposed analysis as the "objective indicators of value test."

Analyzing instructional abortion speech based on these factors removes some of the subjectivity in value judgments with which commentators are concerned.[324] Perhaps most importantly, however, analyzing speech based on the objective indicators of value test provides courts, litigants, and people across the United States and the world with a sense of predictability, as it would put people on notice about what speech is protected and what is not in the United States. Without such notice, constitutionally protected speech would likely be chilled, which is problematic.

316. *See id.* at 2016.

317. *See id.* (arguing that whether speech is "low value" is too tenuous a "foundation on which to rest First Amendment freedoms").

318. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (exempting fighting words from First Amendment protection).

319. *See supra* Part II.B.

320. *See supra* note 236 and accompanying text.

321. *See supra* Parts I.D.3, II.C.

322. *See* Ostergren v. Cuccinelli, 615 F.3d 263, 271 (4th Cir. 2010); London-Sire Recs., Inc. v. Doe 1, 542 F. Supp. 2d 153, 163 (D. Mass. 2008).

323. Professor Volokh notes that most crime-facilitating speech will have some First Amendment value, especially when the information provided is scientific. *See* Volokh, *supra* note 91, at 1111–14.

324. *See* Kendrick, *supra* note 124, at 2015–16.

The First Amendment prohibits the government from banning unprotected speech if doing so would chill protected speech.[325] Due to the nature of the internet, instructional abortion speech can be made easily accessible to women throughout the nation, including in states where it is *legal* to obtain an abortion.[326] Pregnant women are also not necessarily the only people who would view or want to view instructional abortion speech, as those who are merely curious about the science behind abortion may find the speech valuable.[327] The speech would thus reach an audience that is constitutionally able to hear, see, and use it.[328] If a speaker did not know how their instructional abortion speech would be evaluated in court, and thus when it likely would be protected, then they may not post the speech at all for fear of a criminal conviction.[329] Therefore, constitutional speech would be chilled, and those who are constitutionally allowed to access the speech would be denied the right to access it.

This argument as to why a court should evaluate instructional abortion speech through objective indicators of value overlaps with a key argument as to why the First Amendment should protect instructional abortion speech generally. Criminalizing instructional abortion speech might deter people from posting it in the first place,[330] which would in turn restrict legal audience members from hearing it. Furthermore, at the extreme, if these statutes chilled enough speech, we might end up in a race to the bottom, in which website owners might take their sites down, leaving women in states where abortion is legal with less information about where to get medical treatment. Therefore, because it would chill protected speech, states should not be able to criminalize instructional abortion speech at all.

If courts adopt the objective indicators of value test, however, people are more likely to know what speech is protected and what is not, and therefore less constitutional speech will be chilled. For instance, by applying the objective indicators of value test, courts uniformly should hold that the First Amendment protects instructional abortion speech when it is widely available on the internet, and thus people across America would know they have the right to post such speech.

Courts should come to this conclusion using the objective indicators of value test because instructional abortion speech has objective value outside its unlawful uses. First, as previously discussed, instructional abortion speech may be accessible and lawful for women to use in states where abortion is legal—or legal up to a point.[331] Even in states where abortion is illegal at some point, instructional abortion speech may be viewed as "harm

325. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561–66 (2001) (holding regulation violated the First Amendment because it unduly impinged on speaker's ability to communicate with audience with whom speaker was constitutionally entitled to speak).

326. *See supra* notes 227, 240–41 and accompanying text.

327. *See supra* note 253.

328. *See supra* Part II.C.2.

329. *See supra* note 309.

330. *See id.*

331. *See supra* Parts II.B.2–C.2.

reduction" speech[332] that has medical value because it could prevent dangerous, self-induced abortions, reduce mental health struggles, and save the life of the mother.[333] Because of these lawful uses, instructional abortion speech has positive value and should be protected under the test.

B. Further Constitutional Principles, Inside and Outside of the First Amendment, That Suggest Courts Should Protect Instructional Abortion Speech

As explained, when hearing instructional abortion speech cases, courts should consider how protecting instructional abortion speech prevents undesirable outcomes that would be in tension with the First Amendment's goals.[334] Courts should also take certain other constitutional principles into account. This section explains how constitutional principles—including federalism, state sovereignty, and the right to travel—and further First Amendment principles—like political speech protections—support protecting instructional abortion speech in general.

1. State Sovereignty Prohibits Sanctioning Legally Contested Speech

In our system of governance, states are permitted and encouraged to create their own laws, even if they are different from other states, because states are free to act as laboratories of democracy.[335] Therefore, something may be illegal in one state but legal in another.[336] Yet, to impose criminal sanctions on a citizen of New York for speaking about something that is illegal in Oklahoma would unfairly impose Oklahoma's laws on the New York citizen. Not only that, but federalism allows Americans to vote with their feet and move to states with laws that they find preferable.[337] Imposing criminal sanctions on the New Yorker for actions that are legal in New York would deprive the New Yorker of their choice to live in and be guided by New York's laws.

This is not to say that the First Amendment and constitutional principles such as federalism should work to protect all speech that instructs another on how to commit a crime or that facilitates a crime. This Note recognizes that it is undesirable for some states to become safe harbors for those that have committed crimes.[338] States should have the power to regulate conduct that is widely understood to be harmful, such as child pornography,[339] even if the speech originates outside the state. Nevertheless, there should be a

332. *See* Volokh, *supra* note 91, at 1113.
333. *See supra* notes 279–81.
334. *See supra* Part III.A.
335. *See supra* notes 35, 41 and accompanying text.
336. *See supra* notes 35–36.
337. *See supra* note 42 and accompanying text.
338. *See* Brenner, *supra* note 225, at 276–77 (noting that for example the United States would not want to become a speech haven for neo-Nazis).
339. Accordingly, child pornography is a category of speech that is an exception to the First Amendment's free speech guarantees, allowing states to regulate it. *See* New York v. Ferber, 458 U.S. 747, 764 (1982).

distinction between speech that is largely considered to be harmful and speech that is morally and legally contested, such as the speech contemplated here.

Furthermore, the main justification for protecting instructional abortion speech that is widely available on the internet is to prevent chilling constitutional speech.[340] However, this justification may be lacking when the speech is not widely available but rather directed at a specific person or persons in a state where it would only be used for an unlawful purpose. Therefore, states should be able to regulate more targeted speech that causes another to violate a state's abortion laws, as opposed to speech that is more widely available.

2. The Right to Travel Reveals the Futile and Unequal Nature of Laws Prohibiting Instructional Abortion Speech

States that pass laws criminalizing instructional abortion speech do so to prevent their citizens from obtaining abortions.[341] However, Justice Kavanaugh suggested that the right to travel would likely prevent states from imposing criminal penalties on women who travel to another state to obtain an abortion.[342] Therefore, prohibiting instructional abortion speech will not serve states' goals of preventing abortions and protecting unborn life when women can legally obtain one elsewhere. The right to travel thus makes such laws futile with respect to women who are able to travel outside the state.

Considering the way in which the right to travel comes into play in the abortion context reveals not only the futility of laws prohibiting instructional abortion speech but also their inequity. Some women—and more likely women of limited economic means and women of color—are unable to travel to another state to obtain an abortion.[343] Laws criminalizing instructional abortion speech therefore unfairly affect women of color since women of color will be disproportionately denied the knowledge and the opportunity to obtain an abortion.[344] In other words, even though all people formally have the right to travel and thus to procure an abortion in a state where abortion is legal, in reality, the formal right to travel—and therefore the ability to obtain a legal abortion—is inaccessible to certain populations. Populations that are

340. *See supra* notes 325–28 and accompanying text.

341. *See* Memorandum from James Bopp, Jr., Courtney Turner Milbank & Joseph D. Maughon to Nat'l Right to Life Comm., *supra* note 242 (explaining that criminalizing aiding and abetting abortions is a key part of legislation aimed at protecting unborn life).

342. *See supra* text accompanying note 45.

343. *See* Brief of Amici Curiae American College of Obstetricians and Gynecologists, American Medical Association, American Academy of Family Physicians, American Academy of Nursing, American Academy of Pediatrics, American Association of Public Health Physicians, et al. in Support of Respondents, *supra* note 253, at 26 (explaining that obtaining out-of-state abortion care is more difficult or impossible for patients with limited economic means and people of color).

344. *See id.* (noting that abortion bans disproportionately affect women of color and exacerbate inequities in health care).

already disadvantaged will thus be further disadvantaged[345] and marginalized if the First Amendment does not protect instructional abortion speech—an outcome that is in tension with democratic ideals.[346]

3. Robust Political Speech Protection Requires Instructional Abortion Speech Protections

Brandenburg highlights the vigorous protections that courts afford political speech.[347] A state seeking to criminalize instructional abortion speech might argue that instructional abortion speech is regulable incitement.[348] However, if that were the case, a court would likely analyze instructional abortion speech under *Brandenburg*'s stringent standard, which favors protecting political speech.[349]

Instructional abortion speech is political speech.[350] Speakers who post instructional abortion speech likely know that women in states where abortion is illegal will see it[351] and might even intend for them to see it and use it. Perhaps speakers are motivated to post their speech by their belief that laws outlawing abortion are immoral and unconstitutional and want to protest such laws, or perhaps they believe that abortions are so medically valuable so as to justify their speech.[352] Whatever the motivation, instructional abortion speech is at least bound up in the political discussion surrounding the soundness of antiabortion laws.[353]

Additionally, instructional abortion speech might be considered political speech in that it is a form of civil disobedience.[354] Speakers likely know that by posting instructional abortion speech, they are helping someone break the law and that they may be breaking the law as well. Regardless of the consequences, however, these speakers post their instructional abortion speech. Speakers might post the instructional abortion speech in the face of legal consequences, knowing that they could be prosecuted for it but willing to accept that fate because it provides an opportunity to test the laws criminalizing their speech in court.[355] When speech aims to test the

345. The harm is compounded by the lack of adequate reproductive health care for women of color, resulting in higher rates of dangerous pregnancies and maternal mortality for these women. *See* Emma Knight, Note, *Quality of Life Improves with Access to Choose: Easing Abortion Restrictions Benefits Both Mother and Child, Especially for Families of Color*, 41 CHILD.'S LEGAL RTS. J. 188, 189 (2021).

346. *See* Sarah Song, *The Liberal Tightrope: Brettschneider on Free Speech*, 79 BROOK. L. REV. 1047, 1049 (2014) ("According to value democracy, citizens must be treated as having equal status in that the rights of all citizens must be equally respected." (quoting COREY BRETTSCHNEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY 31 (2012))).

347. *See supra* Part I.D.1.

348. *See supra* Part II.A.1.

349. *See supra* Part I.D.1.

350. *See supra* notes 199–201 and accompanying text.

351. *See supra* Part II.C.1; *supra* note 262.

352. *See supra* notes 279–81 and accompanying text.

353. *See* Bork, *supra* note 199, at 27–28.

354. *See supra* Part II.A.2; *supra* note 200.

355. *See supra* note 201 and accompanying text.

constitutionality of laws, it may be seen as political speech.[356] Therefore, if courts protect political speech through *Brandenburg*'s strict test, courts should protect instructional abortion speech.

CONCLUSION

The First Amendment protects speech unless it falls into an exception due to its lack of positive value or significant negative value.[357] Instructional abortion speech, however, differs from these exceptions because it has positive value.[358] Instructional abortion speech may be lawfully used in states where abortion is legal, and to hold that it is unprotected would likely chill lawful speech.[359] Therefore, if states attempt to prosecute instructional abortion speech, courts should recognize its value and hold that the First Amendment protects such speech.[360]

356. *See supra* notes 199–200 and accompanying text.
357. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
358. *See supra* Part III.A.
359. *See supra* Parts II.C.2, III.A.
360. *See supra* Part III.A.