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The Advocacy of "Constitutional" Conduct

MARSHALL C. DERKS*

INTRODUCTION

The U.S. Supreme Court has long spoken of First Amendment freedoms in glowing, expansive terms. The rhetoric surrounding freedom of speech has suggested that the words of the Amendment are of paramount importance to the success of the American experiment. In practice, the elegant, sweeping language does not accurately reflect the Court's actual approach to the constitutional guarantee. Recent decisions of the Supreme Court suggest that the boundaries of permissible behavior under freedom of speech, having been stretched too far, are now being tightened.

Many recent freedom of expression claims have been defeated in the Supreme Court. Rust v. Sullivan allowed the advocacy of completely legal conduct to be squelched entirely because of the situs of the communication and executive "disapproval" of the conduct advocated. The Court determined that regulations promulgated by the Department of Health, Education and Welfare that tied Title X funding to a "gag" order on speech intimate to a doctor/patient relationship were appropriate. This determination came despite the underlying legality of the conduct (abortion) that the doctors and other clinicians were likely to advocate.

Justice Scalia went even further in his rationale of curtailment in Barnes v. Glen Theatre. Without holding that the expressive conduct of totally nude dancing was obscene (and thus completely unprotected by the First Amendment), he was willing to allow the government to regulate the expression merely on the rational basis of the state's interest, despite the fact that the

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3. Rust, 111 S. Ct. at 1769.
4. Id. at 1771.
5. 111 S. Ct. 2456.
7. Barnes, 111 S. Ct. at 2468 (Scalia, J., concurring).
conduct involved was "protected" by the First Amendment. He said in concurrence that "the State's 'right to maintain a decent society' provide[s] a 'legitimate' basis for regulation" of expressive conduct. Justice Scalia stated that when expression other than speech was regulated, the only First Amendment analysis necessary was the "threshold inquiry of whether the purpose of the law is to suppress communication." 

Additionally, the ordinarily sacrosanct area of political speech has encountered an atmosphere hostile to free speech. In *Burson v. Freeman*, the Supreme Court upheld a restriction on campaigning near polling places, despite its recognition of the importance of political speech and the "quintessential" nature of the public forum. While the majority balanced away this ordinarily highly favored category of speech, Justice Scalia, in concurrence, would have allowed the statute to stand merely by surviving a rational basis inquiry. "Ordinary" speech is in even more unfriendly territory than "favored" speech. *Renton v Playtime Theaters, Inc.*, allowed the state to infringe upon protected expression nearly to the point of oblivion because of the secondary effects of the speech. Even in the generally speech-protective flag-burning cases, powerful dissents criticized the majority's willingness to protect what conservative Justices considered radical expression. Justice Stevens, usually considered a moderate, was willing to uphold a restriction on flag burning on the ground that "the prohibition [would] not entail any interference with the speaker's freedom to express his or her ideas by other means."

All of this suggests that the Supreme Court is in no mood to hear of extensions of First Amendment protections to speech that is not currently

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8. *Id.* (quoting *Pans Adult Theatre I v. Slaton*, 413 U.S. 49, 59-60 (1973)).
9. *Id.* at 2467.
10. 112 S. Ct. 1846 (1992) (rejecting a political candidate's claim that a Tennessee statute proscribing campaigning within 100 feet of a polling place violated her First Amendment rights).
11. *Id.* at 1850.
12. *Id.* at 1856-58.
13. *Id.* at 1859-61.
15. *Id.* at 52. The "secondary effects" of speech are those that are associated with the speech even if they are not specifically encouraged by the speech. In this case, which involved an adult movie theatre, the government was concerned with such secondary effects as prostitution, violence against women, and illegal drug use.
17. See *Johnson*, 491 U.S. at 402-06 (Rehnquist, C.J., dissenting) (describing flag burning as "evil and profoundly offensive"); see also *Eichmann*, 496 U.S. at 323 (Stevens, J., dissenting).
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safeguarded. This stifling atmosphere is unfortunate, and it is misguided. As our society matures, it should be willing to provide more protection for speech and expressive conduct, not less. The populace is better educated and better prepared to process information on its own than ever before in the nation's history. This public assimilation of information should be allowed to occur without governmental interference. The applications and protections of the First Amendment that have evolved from the Court's "doctrine" may not have been crucial to, or even contemplated by, the Framers, but these applications and protections have become more important in the latter stages of the twentieth century. Those principles—in a maturing, information-based society—require an expansion of the freedom of expression, not the contraction that recent decisions exhibit.

This Note argues for such an expansion—one that the Court is not likely to recognize in the near future, if ever. The protection it proposes follows simply from the purposes of the First Amendment, the maturation of our society, how we change our laws, the political environment, and the assertions of commentators and legal philosophers who have studied the importance and logical boundaries of a system of freedom of expression. This Note contends that certain types of advocacy of criminal conduct that are not currently protected by the First Amendment should be. Specifically, this Note makes the argument that the advocacy of conduct that the government has made criminal through an arguably ultra vires exertion of power should be protected. In other words, if there is a colorable argument that a certain course of conduct has been unconstitutionally proscribed by the government, then the First Amendment should protect an advocate in his or her counseling/incitement of others to that action, regardless of the illegality.

To develop this argument fully, this Note initially considers the First Amendment and the advocacy of criminal conduct, examining the reasons why such advocacy is not protected. The Note then turns to the development and support of a "new" exception from the generally unprotected category of advocacy of criminal conduct. An analysis of the countervailing governmental interests follows, and those factors are weighed against the rationale for the creation of the exception. Finally, the Note applies the exception, testing situations and exploring the boundaries of the hypothetical exception to the unprotected advocacy of criminal conduct.

I. THE FIRST AMENDMENT AND ADVOCACY OF CRIMINAL CONDUCT

Although the Supreme Court really only began to struggle with the First Amendment in this century, many twists and turns in the histories of both the country and First Amendment methodology have made the subject a source of copious commentary. Despite the difficulty in characterizing any First Amendment “doctrine,” Steven Shiffrin attempts to summarize by asserting that “the Court would have to admit that it employs an elaborate general balancing technique to determine whether speech shall enjoy first amendment protection.” Typically, the First Amendment value of the speech at issue is balanced against the government’s asserted interest in regulating the speech. For some types of speech, the Court has already definitively applied the balancing test. In doing so, the Court has found the following types of speech to be unprotected by the First Amendment: advocacy of violent overthrow of the government, "fighting words," obscenity, advocacy of criminal conduct, and, at least arguably, group libel. It is the unprotected category of advocacy of criminal conduct with which this Note is primarily concerned.

20. It is hard to describe satisfactorily a First Amendment “doctrine” because of the difficulty that the Supreme Court has had in coming to terms with the guarantee. The decisions have roamed from the enormously unprotective “bad tendency” test, Patterson v. Colorado, 205 U.S. 454 (1907); Fox v. Washington, 236 U.S. 273 (1915), through the speech restrictive Espionage Act cases, Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Abrams v. United States, 250 U.S. 616 (1919), to the Brandeis/Holmes “clear and present danger” test and myriad applications and non-applications thereof, Whitney v. California, 274 U.S. 357 (1927), overruled by Brandenburg v. Ohio, 395 U.S. 444 (1969); Gitlow v. New York, 268 U.S. 652 (1925). The Court to some extent seems unsure of how properly to apply the Amendment to preserve the enigmatic concept of freedom of expression.


22. Gitlow, 268 U.S. 652. This category arguably collapses into the advocacy of criminal conduct generally. An interesting quirk in the development of the First Amendment is that the law has now essentially made criminal the type of advocacy that won independence for the United States in the first place. Whether or not the Framers intended to characterize their own actions as criminal is a fascinating question that is beyond the scope of this Note. Presumably the situation of the American colonists could be differentiated by their political disempowerment. England’s King George III and Parliament did not grant the colonists any other method for political change, and thus violence and advocacy thereof were justified. The argument intensifies if one considers that portions of current society are probably less politically empowered than the colonists of the late eighteenth century.

The classic case of *Brandenburg v. Ohio* provides the test regarding the categorization of speech advocating criminal conduct as subject to governmental curtailment.27 Clarence Brandenberg, a Ku Klux Klan leader, was convicted under Ohio's Criminal Syndicalism Statute as a result of statements he made that were captured on video shot by a television reporter who was invited to a Klan rally.28 A per curiam opinion for the Court spelled out the "principle that the constitutional guarantees of free speech do not permit a State to forbid or proscribe advocacy of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."29

The Court further refined the standard two years later in *Hess v. Indiana*30 to include the element of objective encouragement of law violation.31 In other words, the speech must be relatively effective in its advocacy. Once speech crosses the Brandenburg line and is directed towards and likely to produce imminent lawless action, it is no longer protected by the First Amendment. The government may restrict or abridge such advocacy with relative impudence.

In theory, the content of speech may be regulated once the government has satisfactorily considered such factors as the nature of the state's interest, the extent of the abridgement, the effectiveness of the abridgement, and the impact on the free speech values that are considered in Part II of this Note.32 In the case of advocacy of imminent criminal conduct, the Court has already performed its balance through the holdings of Brandenburg-Hess. In such cases, governmental interests automatically outweigh the interests of free speech.

In responding to the advocacy of imminent criminal conduct, the government's interests are several. First, in many cases the government may not have other means to prevent the lawless conduct that will likely result.33 Second, because of the imminent nature of the advocated conduct, the government can no longer rely on the marketplace of ideas to dissuade actors.

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27. *Brandenburg*, 395 U.S. at 447. The courts have retreated in the application of this ordinarily speech-protective test, allowing more speech-restrictive results. See United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990) (relaxing significantly the application of *Brandenburg*).
29. *Id.* at 447 (emphasis added).
31. *Id.* at 108-09; see also John E. Nowak et al., *Constitutional Law* 864 (3d ed. 1986).
33. Nowak et al., *supra* note 31, at 863.
finally, in many situations the government may prosecute the advocate because damage to persons and property has already occurred and cannot otherwise be discouraged in the future.\textsuperscript{35}

To this point, few have been persuasive in articulating the First Amendment value of any type of advocacy of criminal conduct. In fact, the Model Penal Code states that the solicitation of crimes has nothing to do with the freedom of speech.\textsuperscript{36} Of the classic First Amendment rationales,\textsuperscript{37} traditionally only personal autonomy, the most radical of justifications for the First Amendment, has been used to argue for the protection of the advocacy of crime. The personal autonomy/self-determination model would allow almost any expression on the theory that the act of expression is the operative event. With this broad coverage, the advocacy of criminal conduct would certainly be protected under the model. Because of its perceived overinclusiveness, this position has not enjoyed wide acceptance. The consideration of personal autonomy as a justification for expression bears little weight as a First Amendment interest in the balancing process for the advocacy of criminal conduct. This Note seeks to add to the First Amendment interest side of the scale by carefully considering the other three justifications for the freedom of expression and showing that they, too, favor protecting the advocacy of criminal conduct under certain circumstances.

\textsuperscript{34} \textit{Id.} In fact, Nowak, Rotunda, and Young seem to emphasize the unthinking nature of the "lawless action." This Note defends advocacy of "lawless action" that is grounded in careful thought and consideration. See infra notes 89-90 and accompanying text.

\textsuperscript{35} NOWAK ET AL., supra note 31, at 863.

\textsuperscript{36} MODEL PENAL CODE § 5.02 cmt. 3(b) (Official Draft and Revised Comments 1985). One semantic matter that might cause confusion is the fact that "solicitation" and "advocacy" are often used interchangeably. In the Model Penal Code, "solicitation" seems to encompass "advocacy." The courts have grappled with the distinction and the D.C. Circuit has proposed a definition:

Advocacy is the act of "pleading for, supporting or recommending; active espousal" and, as an act of public expression, is not readily disassociated from the arena of ideas and causes, whether political or academic. Solicitation, on the other hand, implies no ideological motivation but rather is an act of enticing or importuning on a personal basis for personal benefit or gain. District of Columbia v. Garcia, 335 A.2d 217, 224 (D.C. Cir. 1975) (footnote omitted) (quoting Gitlow v. New York, 268 U.S. 652, 665 (1925)). This Note primarily concerns itself with advocacy as opposed to solicitation by this definition.

\textsuperscript{37} The four primary categories of justifications for protecting freedom of expression in a democracy are the marketplace model, the political process model, the safety valve model, and the personal autonomy model. For further discussion of the rationales behind the First Amendment, see, for example, KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 9-39 (1989); C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. REV. 964 (1978); Vincent Blasi, The Checking Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 521; see also infra notes 56-127 and accompanying text.
II. ADVOCACY OF "CONSTITUTIONAL" CONDUCT

What is perhaps most striking about the early First Amendment cases, aside from their enormously restrictive view of the freedom of speech, is that they affirmed the punishment of advocates who spoke out and encouraged action regarding freedoms they felt the Constitution guaranteed them. In Schenck v. United States, the Court balanced away the defendant's freedom of speech with respect to peaceful and open draft resistance. The defendant merely urged American males to "assert their rights" and to resist what he believed was a violation of the Constitution.

Schenck is one of the earliest and most significant considerations of the First Amendment, especially concerning its relation to the advocacy of criminal conduct. The criminal conduct advocated by Schenck was of the most egregious type, namely, disloyalty during time of war. In upholding Schenck's conviction, Justice Holmes articulated the test that would cause fifty years of debate on the bench. To wit: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent." The primary debate has been about the "clear and present danger" language of the test. This Note, however, focuses on the final clause of the test: "the substantive evil

38. 249 U.S. 47 (1919).
39. Id. at 51-52.
40. Id. at 51.
41. Id. Similarly, the famous Masses case, decided by the ever-influential Learned Hand, found punishment proper for a person who asserted that it was a citizen's "duty and interest to resist the law." Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917). Schenck's speech was ultimately political, and thus of the utmost importance.

The line between non-ideological and ideological solicitation is roughly the line between telling somebody simply that some act will benefit him and telling him that it is his duty or his right or will be of broad benefit or is warranted within some overall philosophical understanding of human life and social change.

GREENAWALT, supra note 37, at 271-72. Greenawalt's distinction is strongly reminiscent of the advocacy that the Supreme Court chose not to protect in Schenck. See Schenck, 249 U.S. at 51.

42. Schenck was arrested for a violation of the Espionage Act of 1917 because he encouraged others to resist the draft during the First World War. Schenck, 249 U.S. at 48-49.
43. The debate apparently ended with Brandenburg v. Ohio, 395 U.S. 444 (1969), in which the Court (in a per curiam opinion) set out the "incitement to imminent lawless action" standard. Id. at 447. See also FRANKLYN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 245-83 (1981), for a thorough discussion of the history of the incitement doctrine.
44. Schenck, 249 U.S. at 52.
that Congress has a right to prevent.""\(^{46}\) Presumably, if the "clear and present danger" test is taken not as a two-part test,\(^{47}\) but as a three-part test, the analysis of whether Congress has a right to prevent the "substantive evil,"\(^{48}\) the First Amendment analysis of the advocacy of certain kinds of criminal conduct would yield a significantly different outcome. If Congress is without the right to prevent the "evil," the speech advocating the "evil" is entitled to the protection of the First Amendment. In other words, the advocacy of conduct made criminal by the government in an ultra vires exercise of power should be protected speech.

Under the Schenck-Brandenburg-Hess framework, a great deal of advocacy of criminal conduct is without the protection of the First Amendment. According to the drafters of the Model Penal Code, a person may be guilty of a crime if he or she orders another to commit a crime, requests another to commit a crime, uses provocative or insulting language to cause angered listeners to commit crimes, or engages in speech likely to lead those who are persuaded by its message to commit crimes.\(^{49}\) The drafters of the Code made no attempt to differentiate among the types of crime advocated. The political crime is as equally reprehensible as the mundane "garden-variety" incitement under the Model Penal Code.\(^{50}\)

It is not the mere semantics of an eighty-year-old case that justifies this argument for the expansion of the freedom of speech. The general idea of the relative moral accountability of the speaker, while not squarely within the scope of this Note, also justifies this expansion of First Amendment protection. The final responsibility for action is generally thought to rest with the actor, not the advocate.\(^{51}\) This is especially true when the action advocated is the type of civil disobedience contemplated in this Note. The actors—those incited to civil disobedience—understand, and in fact desire,

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46. Schenck, 249 U.S. at 52 (emphasis added). Justice Holmes restated the test in dissent in Abrams, choosing the language "immediate interference with the lawful purposes of the law that an immediate check is required" Abrams, 250 U.S. at 630 (Holmes, J., dissenting) (emphasis added).


48. Or in the words of the Abrams dissent, whether the governmental action in question is a "lawful law." Abrams, 250 U.S. at 630 (Holmes, J., dissenting).

49. GREENAWALT, supra note 37, at 6. It is interesting to note that the original Brandenburg opinion protects advocacy of the use of violence, so long as it is not imminent. Brandenburg, 395 U.S. at 446-47. As will be discussed later, the protection for advocacy this Note proposes would not ordinarily include the encouragement of violence. Violence would seldom be the type of criminal action that would effectively challenge a governmental action. See infra note 173 and accompanying text.

50. See GREENAWALT, supra note 37, at 6.

51. Id. at 112.
that they will be arrested and prosecuted. The final choice, and thus the final responsibility, is theirs, not the speaker's.

Further, there are other kinds of speech that present the clear and present danger of a substantive evil with which the government is legitimately concerned, but that are within the protection of the First Amendment. The advocacy of "constitutional" conduct should enjoy similar protection as a highly valuable form of expression.

Moreover, this type of advocacy falls well within the traditional rationales for First Amendment protection. First, the type of advocacy discussed here is an unrecognized part of our political process in the late twentieth century. Much of our political change is effectuated in the courts through constitutional challenges to congressional and state enactments. The advocacy of "test cases" through the encouragement of criminal acts should be allowed to provide the public with better and more rationally informed access to this forum.

Because of this reality of political change, any injury to the "state"

52. Shiffrin, supra note 21, at 944. Shiffrin contends that "although Gertz [v. Robert Welch, Inc., 418 U.S. 323 (1974),] does not use the words 'clear and present danger,' it clearly recognizes that the false defamatory speech presents a clear and present danger of a substantive evil " Shiffrin, supra note 21, at 944. Defamation may be similar enough to the targeted criminal action considered in this Note to justify comparison. In most cases where the advocacy of targeted criminal action would be protected, the primary damage would be to the pride and policies of the government. The targeted crimes would be high profile. The perpetrators would want to be apprehended. There would seldom be specific victims of the crimes. Defamation, on the other hand, is arguably more damaging than this advocacy of targeted crime. When the defamatory speech is protected, there is a distinct and real victim. The damage to this victim is arguably not recompensed even when the law allows an action against the speaker.

53. This Note does not purport to favor or disfavor this manner of judicial review (some would call it activism). It merely recognizes its existence and, in recognizing it, argues that it should be reasonably available to the populace as another tool for political change.

54. Of whom does one speak when one refers to the "state"? If it is merely the established government, then the injury may be serious; its actions and decisions are being challenged. If, however, we consider the state in a broader sense and include the citizens whose grant of power is arguably being abused, then there is little danger of serious injury. The potential for relative good is great when the "state" is defined in this manner.
law, they are less likely to resort to more violent methods of change. Finally, as mentioned above, the advocacy would serve the First Amendment interest in personal autonomy. This is not startling, as nearly any expression can be said to serve this interest. What is interesting, however, is that this rationale can be tied directly into the political process reasoning of the First Amendment.

A. The Political Process

The political process rationale may be the most important of the justifications for the First Amendment doctrine. It is widely accepted, if unproved, that a better informed citizenry will yield a better government and make better political and social decisions. This is a modification or refinement of the more inclusive marketplace of ideas model. The political process model restricts the broader marketplace to one concerned primarily with the search for political "truth."

Both the political process and the marketplace models rely primarily on the idea that it is through wide-open expression that "the voter[s] derive[] the knowledge [and] the capacity for judgment which a ballot should express." The political process model probably enjoys some measure of added credibility over the more liberal marketplace model because it is directly related to the political culture of what was the new American state. Typically, arguments founded in the political process model find greater acceptance by strict constitutional constructionists. Even the Supreme Court is willing to concede that the First Amendment may be most efficacious when it is most unnerving to the established government. "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Whatever the unsettling effect of free speech, it is clear that it is a crucial element of the citizens' ability to govern themselves in a free society.

1. The Politics of Speech

The political process arguments regarding the role of speech in a liberal democracy have probably been the "most influential in the development

55. Greenawalt, supra note 37, at 28.
56. See infra notes 98-110 and accompanying text.
of twentieth-century free speech law.” It follows, then, that if the advocacy of certain criminal conduct furthers the interests of the political process, that advocacy is significantly legitimized.

Thomas Emerson contends that the essential function of the First Amendment is to enable the political process to reach the best social decisions. The broad scope of Emerson’s justification would certainly include contesting the “illegality” of an encouraged course of action. The legitimacy of the legislative/governmental edict must be considered by an independent forum. If the advocacy of criminal conduct serves this portion of the political process, it should fall within the protection of the First Amendment.

Alexander Meiklejohn furnishes examples of the interplay of speech and government. Speech allows “participation in government” by the people, so long as it is related to “public’ issues.” In turn, the listening public is able to grasp truths significant for political life. When citizens are informed about the issues important to governance, the relations between political officials and the citizenry significantly improves. These general communicative activities should be protected by the courts when they are “utilized for the governing of the nation.” Meiklejohn contends that First Amendment protection is not so much a freedom to speak as it is a protection of the freedom of those activities of thought and communication by which we “govern.” The advocacy of “constitutional” conduct would be a method by which the people could govern. Ideas about the constitutionality of governmental edicts could be brought to the fore and tested, allowing citizens access to a real method of governance.

2. Speech as a Power Retained by the People

Since the methods by which we govern concern what power is reserved to the people, it follows that “[t]he check on government must come from the power of public opinion, which in turn rests on the power of the populace to withdraw the minimal cooperation required and ultimately to make a

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60. ERIC M. BARENDE, FREEDOM OF SPEECH 23 (1985).
62. Meiklejohn, supra note 57, at 257.
63. Id. at 259.
64. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 3 (Galaxy Books 1965) (1948).
65. Meiklejohn, supra note 57, at 256.
66. Id. at 255.
67. The Constitution is a grant of power from the people to a central government. The Bill of Rights, on the other hand, explicitly reserves certain rights to the people.
Meiklejohn expands this concept to show that the First Amendment is more concerned with a public power, a governmental responsibility to the people, than it is with a private right. 69

Speech advocating criminal conduct could serve as an urgent and important reminder to an unrepresentative or illegally motivated legislature that their power is granted from and ultimately rests with the people. It is interesting to note that while most of the significant freedom of speech cases of the first half of this century involved advocacy of doctrine that required the violent overthrow of the government, 70 the cases of the 'sixties and 'seventies "presented questions of power to unleash latent social forces [and] to discredit persons and institutions" 71 The advocating speech was no longer so much concerned with discarding the entire governmental framework as it was with ensuring that delegated power is properly exercised.

The notion of power was also important to more classical political philosophers. John Locke reminded us that the general citizenry has a right to overthrow rulers who abuse the public trust. 72 "[T]he role of the ordinary citizen is not so much to contribute on a continuing basis to the formation of public policy as to retain a veto power to be employed when the decisions of officials pass certain bounds." 73 As a more contemporary commentator, Meiklejohn also explains the First Amendment in terms of allocation of power. 74 In his view, the "intent" of the protection is "to deny to all subordinate agencies authority to abridge the freedom of the electoral power of the people." 75

Shy of exercising the right to overthrow the abusive government, a mechanism has developed by which the citizenry can challenge the laws of elected officials who have exceeded their constitutional grant of power. As long as judicial review remains a part of the way our laws and government

68. Blasi, supra note 37, at 539.
69. MEIKLJOHN, supra note 64, at 106.
70. Examples include the communist and socialist doctrines, which were predicated on a workers' revolt, espoused by Whitney, Debs, and their contemporaries. See Whitney v. California, 274 U.S. 357 (1927), overruled by Brandenburg v. Ohio, 395 U.S. 444 (1969); Gitlow v. New York, 268 U.S. 652 (1925); Debs v. United States, 249 U.S. 211 (1919).
72. Blasi, supra note 37, at 542 n.84 (citing JOHN LOCKE, AN ESSAY CONCERNING THE TRUE, ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT ch 13-19 (1932)).
73. Id. at 542 (citation omitted) (citing LOCKE, supra note 72; JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269-83 (1942)).
74. Meiklejohn, supra note 57, at 254.
75. Id.
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change, and thus a part of the way we govern, people must be able to advocate, without fear of reprisal, the types of behavior that will directly change those laws. This relationship between speech and crime is one of the methods by which we govern ourselves. It allows the people to contest the decisions of the delegates we have chosen to represent us. In some very important ways, the advocacy of some criminal action is analogous to the right to vote.

3. Speech and Civil Disobedience as Politics

Once the advocacy of criminal action or "narrowly tailored" civil disobedience is recognized as a legitimate exertion of the people's power, the importance to the governance of the country of both the advocacy and the disobedience becomes more apparent. While the concept is still rather radical, scholars contend that civil disobedience may actually create greater respect for the law and order of the society, rather than degrading stability as its critics fear. For instance, Fred Berger writes that the legal system itself is often the source of disorder in the society. If this is true, "[c]ivil disobedience may contribute to greater order and a more stable legal system by helping to remove [the chaotic legal system's] causes of disorder. Thus, civil disobedience is sometimes justifiable in terms of its contribution to law and order." Berger further contends that so long as disobedience is motivated by one's "conscience," it is beneficial within the framework of a society legitimately concerned about law and order. In explaining the political "conscience," Berger elucidates,

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76. Examples are access to the political process and involvement in setting the policy agenda.
78. This is language borrowed from the typical equal protection analysis. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). Here it means that the civil disobedience is a violation of the law that the protester is challenging.
80. Id. at 78. Perhaps one need look no further than the civil disobedience/riots in Los Angeles in May, 1992, to find an example of disorder brought on, at least in part, by the legal system.
81. Id. at 73.
82. Id. at 74-75. Berger proposes guidelines as to when civil disobedience would be appropriate. He envisions six such situations: (1) when public officials refuse to enforce laws, (2) when no other remedies for the unlawful actions of public officials exist, (3) when redress is needed against administrative and non-elected officials, (4) when the government is allowing chaotic behavior by, or granting special powers to, private individuals, (5) when the disobedience is required to disrupt the current unlawful order, and (6) when groups are politically excluded by these and other factors. Id. at 78-82. The six factors might often be the result of ultra vires, unconstitutional action by the government. Advocacy of appropriately targeted crimes in response would be protected by this exception from the unprotected category of the advocacy of criminal conduct.
[w]hen the behavior of individuals violates a statute, but also is done for the moral and political values furthered by constitutional rights, the final determination of the legality of that activity depends less on the existence of that particular statute and more on the understanding of the values that activity exemplifies or furthers.83

Greenawalt proposes that "some lawbreaking is engaged in in order to contribute to the justice of society, and when people encourage peaceable civil disobedience with submission to punishment, they are rarely trying to subvert the legal order."84 Blasi concurs. "[A] society must . . . preserve a climate in which citizens can seriously consider the option to engage in civil disobedience as a means of combating abuses of official power."85 The climate must include unfettered advocacy of targeted civil disobedience. If citizens are to consider seriously the option, advocates who provide information regarding disobedience are surely performing a civic service close to the heart of the First Amendment.

Blasi goes further in linking the concept of judicial review to the important notion of civil disobedience. He states: "Since recourse to the courts is one way that victims of official misconduct may put a halt to improper government practices, a proponent of the checking value should look favorably on the contention that the First Amendment protects communication designed to 'stir up' litigation."86 The disobedience may be crucial to the retained power of the "citizen-critic."87 If their disobedience is crucial, so then is the advocacy of that disobedience.

Most of the above arguments speak to "ordinary" civil disobedience such as trespass and the like. The disobedience whose advocacy is envisioned by this Note would be directly focused at the challenged legislation and would be likely to be more directly effective in its challenge to governmental power. Still, the similarities between "traditional" civil disobedience and the disobedience discussed here are several. In both instances, the crimes are likely to be open and ideologically motivated, and the violators, if not the advocates, are willing to be prosecuted. The criminal action is as much to call attention to the governmental misconduct and create sympathy for those

83. Id. at 66.
84. GREENAWALT, supra note 37, at 114.
85. Blasi, supra note 37, at 648. It is, however, a climate that the United States is on the verge of losing. See supra notes 2-18 and accompanying text.
86. Blasi, supra note 37, at 647 (discussing primarily solicitation to litigation (noting, for example, NAACP v. Button, 371 U.S. 415 (1963))).
affected than for any other purpose. Prosecution serves to attract more attention to the "cause."

The crimes discussed in this Note, however, are crucially different from "ordinary" civil disobedience. They are significantly more ideologically focused in that they are specific to the alleged governmental wrong. The activists do not break the law just to break the law. They break the law to challenge the legitimacy of the law and to increase the likelihood of change of that particular law. Without prosecution, a test case will not be created and the law will not be changed. "Ordinary" civil disobedience does not serve this function. No anti-abortion protester is carried off to jail in the hope that trespassing laws will be changed. On the other hand, a pro-choice advocate might convince a pregnant woman to violate a law prohibiting or restricting abortions by terminating her pregnancy. If that woman is then prosecuted for her actions, judicial review of the law might lead to the change of restrictive abortion legislation.

The danger of "unthinking lawless action" is rather small in the case of this advocacy of targeted criminal conduct.\textsuperscript{88} "[I]f a crime is to be committed openly and violators are typically punished, the arguments presented to a listener are likely to be strongly ideological, and the listener is likely to reflect carefully before going ahead."\textsuperscript{89} While the crime is intended to be imminent and the advocacy effective, and thus the speaker left unprotected by the \textit{Brandenburg-Hess} scheme, the crime is also directed solely at the governmental "misconduct" that it seeks to correct. The criminal act is therefore a thoughtful exercise of the citizen's retained political power.

The otherwise legitimate governmental interests in avoiding lawlessness and anarchy are not as persuasive when the civil disobedience is highly targeted. It is disobedience of a specific nature, directed solely at a single governmental action. It is not merely a violation of a trespass or an impediment-of-access statute used to call attention to some other general governmental policy. Because of the action's specificity, the disobedience is even more directly political than any "traditional" notion of civil disobedience.\textsuperscript{90} Advocacy that

\textsuperscript{88} See Nowak \textit{et al.}, supra note 31, at 864.
\textsuperscript{89} Greenawalt, \textit{supra} note 37, at 269.
\textsuperscript{90} Thus, most of the advocacy of the highly publicized civil disobedience of "Operation Rescue," NOW v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990), \textit{rev'd in part and vacated in part}, 113 S. Ct. 753 (1993), would not be protected by this proposed category of protected speech. The Operation encourages its participants to block access to, or at least trespass upon, the grounds of abortion clinics. This violation of law does not in any way challenge the government's legalization of the abortion procedure and would not be embraced by this exception. It is, in other words, not sufficiently targeted to challenge the governmental action. However, there are other instances in which the advocacy of "Operation Rescue" is squarely within the boundaries of the exemption from the ordinarily unprotected
urges people to engage in such targeted disobedience is of a particularly political nature because it is at this level that the citizens to whom the advocacy is directed can make their political decisions. The people can determine whether they agree and will participate, or whether they disagree and will ignore the advocate.

4. The Checking Value of the First Amendment

The role of “citizen-critic” is essential to the checking power retained in the populace of a democracy. The First Amendment serves to facilitate that “checking” function by ensuring “that free speech can serve in checking the abuse of power by public officials.” The theory is that the threat of exposure through the free speech of the electorate deters abuses of power by the government. Appropriately targeted civil disobedience would not only expose abuses of power, it would also provide an avenue for change. “Under the checking value, [the] determination [of when an official’s action amounts to misconduct] must be made by each citizen in deciding when the actions of the government so transcend the bounds of decency that active opposition becomes a civic duty.” Such active opposition certainly includes civil disobedience and the advocacy of targeted civil disobedience.

Thus, there are several grounds for justifying the advocacy of unconstitutionally proscribed behavior that easily fall within the bounds of the political process model. Advocacy is a means of achieving Emerson’s working political process. The exercise of free speech to advocate targeted civil disobedience is a way for the populace to participate actively in the government. As such, it is in reality a part of our democratic system of government and therefore would be protected in Meiklejohn’s conception of the First Amendment guarantee. This targeted advocacy is an exertion of the people’s retained power, exercised once the citizenry feels the government has violated their trust. If civil disobedience is legitimate, advocacy of “constitutional” speech. Specifically, if the members of the organization encourage violation of judicial injunctions that are arguably beyond the power of a judge to issue, the speech should be protected.

91. Blasi, supra note 37, at 527. “The central premise of the checking value is that the abuse of official power is an especially serious evil.” Id. at 538.
92. Id. at 527.
93. Id.
94. Id. at 543. Blasi also recognizes that “[b]ehavior [of government officials] adjudicated to be unconstitutional could also be misconduct.” Id.
95. See supra note 61 and accompanying text.
96. See supra note 64 and accompanying text.
97. And there are good arguments that it is legitimate. See supra notes 79-85 and accompanying text.
conduct must also be legitimate since the latter disobedience is more narrowly targeted and more likely to be directly effective than "ordinary" civil disobedience. Finally, the advocacy of targeted civil disobedience is a politically legitimate exercise of the people's First Amendment checking power.

B. The Marketplace Model

John Stuart Mill probably advanced the most influential articulation of the marketplace of ideas model. The model relies on the concept that society should encourage free, unfettered discussion to allow "truth" to be triumphant over false ideas. It is within the context of the marketplace model that the Court has typically attacked the legitimacy of the advocacy of criminal conduct. The Court has ruled that the tolerance of such advocacy is a bad idea, and if the marketplace is responsive to such speech, the marketplace is simply wrong. This frosty attitude toward advocacy raises the hackles of free speech defenders, especially adherents to the marketplace of ideas model. Shiffrin contends that "there is marketplace value in knowing that some members of the body politic are so concerned about particular governmental practices that violence [or other crime] is considered as an alternative, and there is marketplace value in knowing the premises which lead them to such conclusions."

Although the Supreme Court fondly writes of "uninhibited, robust, and wide open" debate of public issues, excluding advocacy of targeted civil disobedience impoverishes the marketplace by diminishing the available information and eliminating many points of view from among which the "truth" will prevail. In a marketplace limited in this manner, the "true" idea may not be included in the discussion. In theory, with its exclusion, the truth would not prevail because the market never achieves the appropriate balance of "pros" and "cons." The Court has recognized this balancing nature of the marketplace and thus the informative value in many types of speech—even in faulty, if sincere, advocacy "Honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech." If this is so, the

100. See Shiffrin, supra note 21, at 949.
101. Id.
102. Id.
104. Garrison v. Louisanna, 379 U.S. 64, 75 (1964). The Supreme Court's allegiance to this principle may be less than solid. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974), the Court pronounced
advocacy of targeted disobedience should also be counted among the utterances that will further the "truth"-seeking purpose of free speech.

The temporal imminence required in the Brandenburg test is important in this context for two reasons. When incitement to criminal action is imminent, there is no opportunity for discussion or effective rebuttal. What is apparent from the Court's treatment of incitement is that it believes the marketplace of ideas is not reliable in these volatile situations. The earliest commentators believed that the discussion of ideas "alone can render them harmless and remove the excuse for illegality by giving hope of their realisation [sic] by lawful means." If the marketplace of ideas model were applied in the Court's current restrictive approach described above, it would certainly proscribe the advocacy of imminent civil disobedience. However, the limited marketplace analysis should not apply here. Its application would ignore the fact that the "discussion" does not end when the advocacy ends. The debate, and the citizens' exercise of power, has merely moved to a different and more powerful forum, namely, the courts. It is here that the matter can truly be resolved. The advocate, the actors, and the state need rely on the general marketplace no longer. With the targeted civil disobedience and the pending prosecution, the courts are now in a position to determine the "truth" whether or not the government has been empowered by the people to proscribe the course of behavior advocated and pursued. The judiciary would not have been in this position without the advocacy and the targeted disobedience.

Additionally, any new information or statement of fact can and should affect legal liability. "In this relation between assertions of fact and normative context, the source of information is fortuitous, and information is given by someone not in order to affect legal or moral liability but to provide the basis for a sensible decision." In the context of the marketplace, the advocate desires to convince the actors that there is at least an argument that the

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the complete lack of "constitutional value" in false statements of fact, just one page after stating that the First Amendment does not discriminate between truth and falsity. "Under the First Amendment there is no such thing as a false idea." Id. at 339. Apparently the Court reserves to itself the power to distinguish between a fact and an idea.

105. NOWAK ET AL., supra note 31, at 863.
107. See supra notes 100-04 and accompanying text.
108. Whether the courts are beyond the marketplace, or are a special part of it specifically designed to settle legal and constitutional questions in an organized and stylized manner, is beyond the scope of this Note.
109. See GREENAWALT, supra note 37, at 62.
110. Id. (emphasis omitted).
governmental action is illegal and that the sensible decision is to violate the law or edict and force the government’s hand in defending the legitimacy of its action.

C. The Safety Valve Model

The safety valve theory is based on the belief that if people are allowed to “blow off steam” through expressive behavior, they are less likely to explode in socially destructive ways.\textsuperscript{111} This model is premised on the idea that it is better to let even the most radical advocates speak than to suppress their speech and risk their frustration and eventual resort to violence. Indeed, “Pound asserts that [the] individual will fight if [the] speech [is] repressed.”\textsuperscript{112} The model relies on the cathartic value of the speech and asserts that unnecessary governmental repression is likely to foster political instability.\textsuperscript{113}

Clearly, suppressing advocacy of unlawful conduct is a means for the government to suppress what it considers to be unpopular social ideas.\textsuperscript{114} This is a dangerous weapon for a government to wield. If the state can choose which issues will be legitimate topics of discussion, it has the ability to manufacture public opinion to a great extent. To avoid this invidious suppression, the government should be held to the “least restrictive alternative.”\textsuperscript{115} In other words, the government must not restrict more speech than is absolutely required. If any speech is to be suppressed, the “substantive evil” it poses should be serious.\textsuperscript{116}

The evil implicated in the advocacy of “constitutional” conduct is not likely to be serious. Much of the advocacy of targeted civil disobedience that would be protected in the category this Note proposes could be characterized as the commission of “open crimes.”\textsuperscript{117} The actors, in order to be successful,

\textsuperscript{113} Shiffrin, \textit{supra} note 21, at 949.
\textsuperscript{114} Redish, \textit{supra} note 47, at 1159.
\textsuperscript{115} Greenawalt, \textit{supra} note 37, at 269.
\textsuperscript{116} There is an argument that no speech whatsoever should be suppressed merely because of its “evil” content. The position maintains that the evil likely to result from any speech would “probably be less, and its correction by public sentiment more speedy, than if the terrors of the law were brought to bear to prevent the discussion.” THOMAS M. COOLEY, A \textit{TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION} *429.
\textsuperscript{117} See \textit{infra} text accompanying note 160.
would want to be apprehended and prosecuted to provide the case that would test the legitimacy of the government's action. Any "evil" that would result from such advocacy would likely be minimal and the potential for good in correcting an "evil" action by the government would likely be strong.

D. Autonomy or Personal Fulfillment Model

The last reason for including freedom of expression as a cornerstone of a free society is grounded on the concept of personal autonomy. Generally, constitutional guarantees provide legal autonomy from the government. In other words, the government cannot abridge the exercise of certain rights or invade certain sectors of a citizen's life, and this fact effectively creates a zone of complete individual independence safe from governmental intrusion. In First Amendment terms, the theory maintains that without the freedom of each individual to express herself, the populace cannot attain the personal maturity and enlightenment necessary to participate in a progressive democracy. This rationale would probably allow for the broadest interpretation of the freedom of expression because it is primarily the act of expression that is important. The focus of this theory is directed more to the benefit of the expression's value to society as a whole.

How great a role the personal realization of the citizenry's autonomy should play has ramifications for both the First Amendment autonomy theory and for the legitimacy of civil disobedience. The ordinary personal autonomy justification contends that any expression helps the individual grow and develop his or her system of values and decisional capabilities. Further, theorists recognize that the development of these decisional capabilities and other personal attributes is a vital characteristic of a liberal democracy. A government's activities in suppressing speech will have a profound effect on its citizens' perceptions of individual autonomy. "To regard himself as autonomous a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action." If the government proscribes speech that urges "illegal" courses of action, the person cannot see

120. Dienes, supra note 87, at 790.
himself as sovereign. The speaker must be allowed to advocate the “illegal” action to serve the autonomy model.

In the advocacy of “constitutional” conduct, the concerns shift more from the advocate (who is the typical concern in autonomy-based rationales) to the listener. “What is essential to the person’s remaining autonomous is that in any given case his mere recognition that a certain action is required by law does not settle the question of whether he will do it.” 122 Indeed, conceding to the state the right to prevent the advocacy of illegal conduct “is a concession that autonomous citizens could not make, since it gives the state the right to deprive citizens of the grounds for arriving at an independent judgment as to whether the law should be obeyed.” 123 The autonomy of the listener is the crucial element. “A[an advocate] merely changes the considerations which militate for or against a certain course of action; weighing these conflicting considerations is still up to you.” 124 Since the decision is left to the listener and not prejudged by the government, protecting the advocacy of “constitutional” conduct serves the autonomy interest.

Some commentators, 125 deciding that such speech is crucial for intellectual development, conclude that advocacy of criminal conduct might be allowed simply on grounds related to the autonomy model. 126 However, this conclusion ignores other legitimizing aspects of some advocacy of criminal conduct. The decision to protect advocacy of targeted civil disobedience can be justified by its purely political nature, its contribution to the marketplace, its safety valve function, and its furtherance of personal autonomy As Justice Brennan noted, “speech concerning public affairs is more than self-expression; it is the essence of self-government.” 127

III. Why a Categorical Rule?

Ordinarily, in considering First Amendment claims, courts face the “difficult task of deciding just how high a price our constitutional commitment to open, meaningful discussion requires us to pay in terms of such competing concerns as peace and quiet.” 128 Some commentators criticize the ad hoc balancing the Court often uses in its analysis of the advocacy of criminal

122. Id. at 216.
123. Id. at 218.
124. Id. at 216.
125. See infra notes 160-63 and accompanying text.
126. See Redish, supra note 47, at 1164-65.
conduct, but they find it preferable to a general prohibition of such advocacy. This Note favors neither balancing nor a general prohibition. Instead, it endorses a court-created exception from the category of unprotected advocacy of criminal conduct for the advocacy of targeted civil disobedience against governmental actions that may be unconstitutional.

Absent such an exception, even the most lucid of tests that the Court might adopt to protect such speech would only be the product of a balancing of factors. Such ad hoc balancing would frustrate and give little guidance to the potential speaker. Additionally, it might easily be abused by courts that are not willing to allow the advocate to espouse her views and her proposed course of action, which because of their illegality are, by definition, unpopular with the government. For these reasons, Ely proposes a categorical rule as the most protective judicial method for free speech. The controversial nature of the speech proposed to be protected here mandates a categorical rule for many of the same reasons.

In considering the advocacy of “constitutional” conduct, great harm should be required to justify a complete curtailment of speech. This Note has already explored the possibilities for harm in advocating “constitutional” conduct and shown that any harm is unlikely to be significant. Ordinarily, in a balancing situation, the courts will consider the seriousness of the problem at hand, the type of “evil” at issue, and the imminence of the “evil.”

Paramount to the argument for a categorical rule is consideration of the chilling effect. Even under the ad hoc approach, the advocate who encourages others to violate laws that she believes are unconstitutional will ordinarily have her conviction overturned if she proves to be right. Under that same ad hoc approach, if another advocate turns out to have been misguided in his interpretation of the Constitution, his conviction will be upheld without a clear exemption that removes him from the category of unprotected speech. Because of the uncertainty, speakers who are ultimately correct will be considered preferable to a general rule excluding law violation from first amendment protection.

129. Shiffrin, supra note 21, at 949. ("Particularized assessments of danger are considered preferable to a general rule excluding law violation from first amendment protection.").
130. Id. at 950. Shiffrin contends that even the “clear and present danger” test is the product of elaborate balancing. Id.
131. JOHN H. ELY, DEMOCRACY AND DISTRUST 110 (1980).
132. Redish, supra note 47, at 1179-82.
133. The chilling effect rests on the assumption that there is a certain amount of legal advocacy that will not be expressed if it is subject to regulation by an ad hoc balancing approach. The potential speaker knows that some of her speech is protected but is not sure of the extent of that protection. Because of this uncertainty, speakers will engage in self-censorship and valuable speech will be kept from the marketplace. See David A. Anderson, Libel and Press Self-Censorship, 53 TEX. L. REV. 422 (1975); Anthony Lewis, New York Times v. Sullivan Reconsidered: Time to Return to “The Central Meaning of the First Amendment,” 83 COLUM. L. REV. 602 (1983).
deterred from speaking, and no one will ever know that they were correct. If the advocacy of targeted civil disobedience is politically and socially desirable, then speakers should not be deterred or "chilled" because they might be incorrect. If the potential speaker knows that the speech is categorically protected, then he or she will not be deterred from making the argument for targeted civil disobedience once there is an arguable constitutional question.

Typically, courts and legislatures do not consider the potential chilling effect on this manner of speech as important enough to affect their decisions. "[T]he values of public order and protection of lives and property are considered to outweigh the freedom to express ideas of limited marketplace and cathartic value." This balance has been shown in this Note to be flawed in regard to the advocacy of "constitutional" conduct. It is precisely because of the chilling effect that the advocacy of targeted civil disobedience needs protection. Categorization is important because the advocate should have the confidence that even if he is wrong, he will be safe from prosecution.

IV ARGUMENTS AGAINST THE ADVOCACY OF "CONSTITUTIONAL" CONDUCT

Pre-World War I scholars envisioned no protection for the advocacy of illegal action. Edmund Freund relied on the common law to justify the punishment of speech related to criminal conduct even more so than his contemporaries, even though he believed that "agitation" without violence or injury to private rights was protected. Even the most libertarian of the early First Amendment scholars, Theodore Schroeder, was willing to punish the advocate once the speech resulted in some criminal act. Dean Harry Wellington believed that any constraint on the advocacy of illegal conduct would not significantly limit the ideas that might be put before citizens for their consideration. Learned Hand, as a district court judge, criticized any protection for advocacy of criminal conduct. "Words which have no

134. See supra notes 79-85 and accompanying text.
135. Shiffrin, supra note 21, at 949-50.
136. Rabban, supra note 112, at 572-75 (surveying the works of Cooley, Scholfeild, and Freund).
Pound was even less of an advocate of unbridled free speech than his contemporaries. Id. at 575.
137. FREUND, supra note 106, at 510.
139. Id. at 576.
141. Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917).
purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.\footnote{142}

Professor Bork agreed with these early scholars in his classic First Amendment analysis. Bork would provide protection only for explicitly political speech.\footnote{143} He contended that:

> advocacy of law violation does not qualify as political speech any more than advocacy of the forcible overthrow of government. Advocacy of law violation is a call to set aside the results that political speech has produced. The process of the “discovery and spread of political truth” is damaged or destroyed if the outcome is defeated by a minority that makes law enforcement, and hence the putting of political truth into practice, impossible or less effective. There should, therefore, be no constitutional protection for any speech advocating the violation of law.\footnote{144}

Bork defines political speech as speech concerning governmental behavior, policy, or personnel.\footnote{145} He balks, however, at recognizing the value of speech advocating the violation of law that is intended to expose or correct governmental behavior, policy, and personnel.

Bork's failure to find this protection stems from his “neutral values” theory of the derivation of constitutional rights. He contends that there are two proper methods for deriving constitutional rights. First, the rights of the citizen may originate from the specific text or history of the Constitution as a document. Second, the rights may flow from the governmental processes established by the Constitution.\footnote{146} Neither of these sources, according to Professor Bork, allows for the advocacy of law violation. Blasi contends, however, that the checking value of speech was most likely in the minds of the Framers.\footnote{147} This historical interest is well served by the advocacy of targeted civil disobedience. The incitement to “constitutional conduct” may also serve the processes that the government created by virtue of the Constitution. Specifically, the speech stimulates judicial review, which tests the legitimacy of legislation.

The argument exists, of course, that the government should be allowed to rectify any defects or improper exertions of power through the constitutional procedural system of checks and balances.\footnote{148} In other words, the judiciary

\begin{footnotes}
\item[142] Id. at 540.
\item[143] Bork, \textit{supra} note 58, at 20.
\item[144] Id. at 31.
\item[145] Id. at 27.
\item[146] Id. at 17.
\item[147] Blasi, \textit{supra} note 37, at 527.
\item[148] Id. at 539.
\end{footnotes}
is designed in part to check ultra vires assertions of power by the legislative or executive branches. However, this "function" of the judiciary is limited by the constitutional requirement of "case or controversy." 149 In United States jurisprudence, there is no opportunity for sua sponte review of legislation. The type of speech proposed for protection would stimulate the internal system of "checks and balances," providing the judiciary with cases in which to review the actions of the other two branches.

Social contract theory relies on the rights and duties of the individual and of the government in relation to each other. This theory comes into play when the government acts to forbid the advocacy of criminal conduct. Generally, the societal interest in suppressing this type of speech is to avert the harm assumed to be inherent in law violation.

Citizens have a duty to comply with the ground rules; if in their speech they urge the breaking of ground rules, they have forfeited any right to be free in that speech. In its more extreme form this position would apply to all encouragements of criminal actions; in its more moderate form it would only reach urgings of crimes that involve genuine challenges to prevailing political institutions. 150

Even the more "moderate" approach of the social contract theory would reach this advocacy of constitutional conduct. 151 Civil disobedience is narrowly targeted to challenge the policies and decisions of the "prevailing political institutions."

Basic contract law, as applied to social contract theory, would protect the advocacy. If the government has breached the social contract by abusing its grant of power, the citizen-advocate should no longer be bound by the terms of the agreement. Her speech, which would have been in violation of the social contract before the government's breach, is now crucial to the establishment of a new social contract, or is at least necessary to return to the terms of the old one.

Greenawalt recognizes the implicit inconsistency in proscribing speech based on the rationale that it is somehow outside the "ground rules." "The whole idea that in a liberal society a principle of freedom of speech should be tailored to the accepted ground rules is misconceived. . [M]any of the justifications for freedom of speech apply with considerable force to urgings of crime and to urgings of criminal revolutionary action." 152 Despite this language, even Greenawalt would not extend First Amendment protection to

150. GREENAWALT, supra note 37, at 114.
151. Id. at 113-14.
152. Id. at 114; see also supra notes 56-127 and accompanying text.
the type of advocacy this Note contemplates. Punishment of the speaker would be appropriate in his view if “the speaker urges the commission of a specific crime in the very near future and it is reasonably likely that the speech will contribute to the commission of that crime.”

Another theory, urged by Professor Thomas Emerson, would place any encouragement to criminal action outside the realm of free expression. He argues that speech that is directed at a particular law is more like action and thus more easily and legitimately regulated by the state. Some “criminal acts constitute a social harm serious enough so that urgings to commit them may properly be punished even if those urgings implicate considerations underlying free speech to some degree. So understood, this position represents a kind of ‘balancing’ approach.” Especially in the case of incitement, the balance is said to tip toward allowing governmental regulation of the speech. The incitement, so close in temporal proximity to the act, barely precedes the decision making on the part of the actor that is a part of the criminal act itself. However, in the case of targeted civil disobedience, as discussed above, the social “harm” is not serious enough to outweigh the heightened free speech considerations. Further, the line between the incitement and the criminal act is not so inconsequential that it can be totally discounted, especially in the face of important First Amendment considerations.

The most difficult question in relation to the advocacy of targeted civil disobedience is why the law should protect the advocate at all. If her speech is so closely linked to that civil disobedience, which has as one of its key tenets a willingness to be punished, why should the advocate receive more protection than the actor?

Despite the fact that one can argue for similar protection for the disobedience itself as powerful expressive conduct, protection of the “unlawful” action in this context destroys the political legitimacy of the advocacy. If actors were protected from prosecution under some notion of the disobedience as expressive conduct, then test cases would not be created and the courts would not be able to make determinations as to the legitimacy of the governmental actions in question. Without the creation of test cases, the advocacy of targeted civil disobedience is no longer intimately political and loses its strongest justification for protection.

153. Greenawalt, supra note 37, at 116-17. The language Greenawalt chooses is remarkably reminiscent of the “clear and present danger” test and thus no more speech protective.
155. Greenawalt, supra note 37, at 113.
Further, it is important to create protection for the advocate who may not be a member of the class that is affected by the "illegitimate" governmental action or in a position to engage in the civil disobedience. Moreover, there may be times when the advocate is unsuccessful in persuading her listeners to violate the law in civil disobedience. There is political, social, and marketplace value in speech even if it is unaccompanied by real civil disobedience. The chilling effect of potential punishment should not reach the speaker even if the actor is unpersuaded and does not violate the challenged law. Citizens may learn of the deeply held convictions of advocates who feel so strongly as to urge the commission of crime and the renouncement of the social contract. Protection of the ineffectual advocate whose speech may satisfy an "imminent incitement" test and be "likely to be effectual" but which does not actually move anyone to act is still important. The pure political aspect of the speech is diminished in that no test cases are actually created, but the speech retains other value nonetheless. Even if the speech has diminished political legitimacy, the safety valve, marketplace, and personal autonomy justifications apply with equal force. Since these three models will always provide support for the speech and since this advocacy will often have direct and potent political value, any chilling of this speech by allowing punishment of the advocate is insufferable under the First Amendment.

Finally, society has a general sense that the responsibilities are different between actors and advocates. The rationales surrounding a system of freedom of expression mandate special protection for advocates. They serve the public in a special role as informants and agents of change and, as such, occupy an important niche in our political system.

V. SIMILAR IDEAS

Other commentators have tentatively explored protection for advocacy that skates up to the edge of the criminal advocacy that this Note proposes. The classic argument to allow this type of speech is that the action against the actual perpetrators would be sufficient. Greenawalt contends, somewhat hesitantly, that:

[t]here may be a narrow class of public ideological encouragements to crime that should receive absolute protection. The class consists of

157. These advocates who cannot act might include the doctors or clinicians mentioned in the context of Rust v. Sullivan, 111 S. Ct. 1759 (1991). There might also be skilled advocates regarding the abortion issue who are not women capable of becoming pregnant.
158. See Shiffrin, supra note 21, at 949.
159. See GREENAWALT, supra note 37, at 269.
instances in which persons not in institutional positions of authority in relation to their audience encourage the commission of open crimes that do not threaten persons or property. By open crimes I mean crimes committed by actors who are identifiable and accessible to punishment.  

Blasi admits to a similar "embryonic and untutored" idea, stating, "I do believe that critics of government should have a right to 'incite' others to nonviolent, open civil disobedience." Redish proposes some protection for the advocacy of unlawful conduct as well. These commentators provide narrow exceptions in First Amendment doctrine based primarily on autonomy interests. 

Narrow as these definitions are, this Note proposes a narrower, but more solidly grounded, interpretation of protectable criminal advocacy. The type of advocacy envisioned requires that the criminal conduct be in direct violation of an arguably unconstitutional governmental enactment or action. Because of the narrow focus of the advocacy, it draws legitimacy not only from autonomy interests, as do the other proposals, but grounds itself rationally and effectively in the political, marketplace, and safety valve functions of the freedom of speech. Such advocacy is a direct response to legitimate public complaints of governmental usurpation of power. The advocacy is directed solely at the problem it seeks to cure. In order to warrant protection, it would need to specifically encourage the violation of the law to be tested, such as counseling women to get illegal abortions. These urgings to action would create the test cases that would allow meaningful access to, and participation in, the political process.

VI. THE APPLICATION

In what circumstances might the protected speech exception be utilized? To put the issue in a contemporary context, one might consider the issues surrounding reproductive rights. Suppose, for instance, Congress or a state legislature enacts a law making it illegal for a woman to cross state lines for the purpose of obtaining an abortion. There is certainly a colorable
argument that such an enactment would be unconstitutional. Many advocates and counselors, who might not actually be able to violate the law themselves, would nonetheless be able to encourage others to create the test cases necessary to challenge the legislation. It would be important to protect those potential advocates who serve the political process by promoting challenges to the law on interstate travel and abortion.

The Irish courts have considered governmental actions that are strikingly similar to the situation described above. Despite constitutional protections similar to our First Amendment, the Irish Supreme Court held that "no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn." This holding confirmed the lower court’s decision that “freedom of expression and the right to disseminate information cannot be invoked to interfere with such a fundamental right as the right to life of the unborn.”

Ireland continued to restrict legal access for Irish women to abortions in other European states by making illegal the mere dissemination of information regarding abortions in the United Kingdom. If the advocacy contemplated by this Note was protected, the speaker who is silenced in Ireland would be specifically protected in the United States.

To remain with the abortion issue for another example, the protection would apply to a doctor or other advocate who urged a woman to obtain an abortion in violation of a statutorily mandated waiting period. The law violation is almost by definition imminent since, unlike Hess, the advocate would be

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165. The constitutional debate would center around the advocates and counselors who encourage women to secure legal abortions in other states. An argument against the hypothetical legislation might be grounded in the right to travel, which is itself an unenumerated liberty interest.

166. IR. CONST. art. 40, § 6.

167. Attorney General ex rel. Society for the Protection of Unborn Children v. Open Door Counselling, 1988 I.R. 593, 625 (Ir. Sup. Ct. 1988). The case arose when the Society for the Protection of Unborn Children sought a “declaration that the activities of the defendants in counselling pregnant women... to travel abroad to obtain an abortion or to obtain further advice on abortion within that foreign jurisdiction... are unlawful.” Id. at 600. The Society further sought an order that prohibited the defendants from “counselling or assisting pregnant women within the jurisdiction... to obtain further advice.” Id. The action was grounded in a common-law misdemeanor known as “conspiracy to corrupt public morals.” Id. at 611. While such an archaic common-law crime might seem too farfetched for the courts to apply in the United States, one might well review the concurring opinion of Justice Scalia in Barnes v. Glen Theatre, 111 S. Ct. at 2461 (Scalia, J., concurring) (“Public indecency [has its] common-law roots [in] the offense of ‘gross and open indecency’”), or the majority opinion of Bowers v. Hardwick, 478 U.S. 186 (1986) (affirming the “common-law roots” of the offense of sodomy).


170. See supra notes 33-34 and accompanying text.
encouraging the "illegal" conduct within the set period of time. If the conduct were not imminent, it would not be a violation of the waiting period. This violation would create the opportunity to test the constitutional legitimacy of such waiting periods.

The protection might also apply to a promoter or other individual who encouraged, or even required, a band or other act to perform despite a warning from local law enforcement that such an act would be obscene or otherwise unlawful. The promoter would not be situated to violate the statute on his own; only the band or act could do so. The violation would be imminent and set for a specific time. Once the act went on, its performance and subsequent prosecution could be used to test state and local obscenity laws against the First Amendment.

Could the targeted "civil disobedience" ever be violent? To fall within the protection for advocacy of targeted civil disobedience, the conduct advocated must be intimately linked with the governmental "wrong" that the conduct is proposed to right. It is unlikely that any statute proscribing violence is even arguably unconstitutional. Some statutes and situations that represent the improper exercise of governmental power might lead to violence on the part of a frustrated citizenry, but those are not the situations that fall within the targeted advocacy's protection.

Other instances might include the advocacy of smoke-ins (tobacco or otherwise) or massive motorcycle rallies without helmets to protest safety legislation outlawing or restricting either activity. These are difficult constitutional questions. It is unclear as to whether there are liberty interests in the Constitution that would protect such activities, but the advocacy of

171. For example, it might apply to the promotion of offensive musical acts such as 2 Live Crew or GWAR. See Atlantic Beach Casino v. Morenzoni, 749 F Supp. 39 (D.R.I. 1990) (granting the holder of an entertainment license an injunction against town council preventing the council from revoking the licensee's license in the event the licensee allowed 2 Live Crew to perform); see also Andy Garrigue, The Sick, Stupid, Slimy World According to GWAR, STYLE WKLY., Aug. 11, 1992, at 12 (describing GWAR's challenge to a local Georgia obscenity statute).

172. See Garrigue, supra note 171, at 12.

173. A closer question arises as to when the violence might be legally justified in response to the violence of state actors. If the advocate convinces the people around him or the victim of the governmental abuse to respond with violence, he is inciting those actors in violation of the first two prongs of the Brandenburg test. If the incitement is in response to an impermissible use of force by the state actor, the advocate may be inciting the actors to a response that is legal and thus not a part of the "evils" that the government has a right to prevent. A person is entitled to respond to unjustified force with equal force. WILLIAM L. PROSSER & W. PAGE KEETON, THE LAW OF TORTS 124-28 (5th ed. 1984). This maxim of tort law should apply equally when the instigator is an actor under color of state law who has exceeded his grant of power. The advocate who encourages the victim to respond, or encourages others to intervene on the victim's behalf with "lawful" violence, should be protected. This narrow form of advocacy of violence should fall within the purview of the First Amendment.

174. Perhaps the question is made easier by the current Court's hostility to new liberty interests.
such disobedience should not be discouraged, and the speakers should be protected.\footnote{175}

\section*{Conclusion}

These applications of the proposed protection for advocacy of "constitutional" conduct show that such advocacy could serve the interests of a citizenry that wished to challenge the actions of its representative government. Considering the maturing nature of the United States populace, the amount of information, both traditional and nontraditional, to which we are exposed should be expanding. The current Supreme Court does not seem to agree, and the ambit of First Amendment protection is shrinking.\footnote{176} Arguments like the one explored by this Note are necessary to show the legal community the importance of the freedom of expression beyond what we consider traditional information. Nontraditional advocacy and borderline expression are crucial to a mature society, even if it is just to recognize that such speech disgusts and offends. If the value of the speech is merely to point out that there is vehement disagreement in the political marketplace, the speech has merit.

Similarly, the role of civil disobedience should be expanding. The First Amendment should protect the advocacy of imminent exercises of civil disobedience as a political tactic and a method to challenge legislation. The type of narrow protection that this Note proposes might be a proper starting place for the recognition of the legitimacy of this type of citizen participation in the task of government.

\footnote{175. The author recognizes that the advocacy of some of the classic examples of civil disobedience would not be reached by the proposed protection for advocacy of "constitutional" conduct. For instance, incitement to a 1960s lunch counter sit-in would be advocacy to a trespass violation and thus would not be protected. On the other hand, the advocate who encourages a store or hotel owner to violate a public accommodations law protecting minorities would be reached, provided the now-foreclosed arguments of freedom of association or free use of property were still colorable arguments.}

\footnote{176. See supra notes 4-20 and accompanying text.}