

# Case Notes

## Speaking in Code

*Bernstein v. United States Department of State*, 922 F. Supp. 1426 (N.D. Cal. 1996); *Bernstein v. United States Department of State*, 945 F. Supp. 1279 (N.D. Cal. 1996).

For centuries, generals have spoken in code to disguise their communications.<sup>1</sup> Today, computer programmers utilize code as well. Encryption computer programs are written in source code, the text of a computer program written in a high-level computer language.<sup>2</sup> While no one has challenged the right of military leaders to use code, there is a constitutional question as to whether computer programmers have a First Amendment right to speak in cryptographic computer source code. Recently, District Judge Marilyn Hall Patel held in *Bernstein v. United States Department of State*<sup>3</sup> that cryptographic computer source code is “pure speech” and thus entitled to the full protection of the First Amendment.<sup>4</sup>

Much effort has been spent on the administrative regulations concerning the export of encryption technology. Yet very little has been written on whether computer source code is “pure speech” subject to the full protection of the First Amendment, “expressive conduct” to be regulated by the standard

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1. Cryptography is the art and science of keeping messages secure, while encryption is the “process of disguising a message in such a way as to hide its substance.” BRUCE SCHNEIER, *APPLIED CRYPTOGRAPHY* 1 (1994).

2. See Charles H. Davidson, *Object Program*, in *ENCYCLOPEDIA OF COMPUTER SCIENCE* 962 (Anthony Ralston & Edwin D. Reilly eds., 3d ed. 1993); see also *Bernstein v. United States Dep’t of State*, 922 F. Supp. 1426, 1429 n.3 (N.D. Cal. 1996) (“High-level [computer] languages are closer to natural language than low-level languages which direct the functioning of the computer.”) (citation omitted).

3. 922 F. Supp. 1426 (denying government’s motion to dismiss and holding that cryptographic computer source code is speech protected by First Amendment and constitutional challenges to statute and regulations are justiciable); *Bernstein v. United States Dep’t of State*, 945 F. Supp. 1279 (N.D. Cal. 1996) (holding on cross-motions for summary judgment that: (1) licensing requirements for speech relating to computer encryption software are unconstitutional prior restraints; (2) definitions of certain terms in International Traffic in Arms Regulation (ITAR) are not vague; (3) exemptions from term “technical data” for academic items are impermissibly vague; (4) term “export” is not vague; and (5) neither ITAR scheme as whole nor definition of export are overbroad).

4. See *Bernstein*, 922 F. Supp. at 1436; see also *Bernstein*, 945 F. Supp. at 1287

set forth in *United States v. O'Brien*<sup>5</sup> or simply “pure conduct,” and therefore outside the protection of the First Amendment. In *Bernstein*, Judge Patel found that “even if Snuffle source code, which is easily compiled into object code for the computer to read and easily used for encryption is essentially functional, that does not remove it from the realm of speech.”<sup>6</sup> This Case Note will argue that *Bernstein* improperly categorized cryptographic computer source code as speech, when it is simply pure conduct not entitled to any First Amendment protection.<sup>7</sup>

*Bernstein* arose out of a dispute between Daniel Bernstein and the State Department over the export of Bernstein’s encryption system, “Snuffle 5.0.”<sup>8</sup> Snuffle 5.0 is the source code for an encryption system written in “C,” a high-level computer programming language.<sup>9</sup> When source code is converted into object code—a binary system consisting of a series of 0’s and 1’s—a computer can encrypt and decrypt information.<sup>10</sup> Nearly unbreakable encoding technology, such as Snuffle 5.0, is becoming more available and affordable, and law enforcement agencies such as the Federal Bureau of Investigation are finding it much more difficult to employ old methods of surveillance. Such methods, including wiretapping, are increasingly obsolete in a digital

5. 391 U.S. 367 (1968). *O'Brien* held that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377.

6. *Bernstein*, 922 F. Supp. at 1435.

7. The only other case to consider the First Amendment implications of cryptographic computer source code is *Karn v. United States Department of State*, 925 F. Supp. 1 (D.D.C. 1996). In deciding the summary judgment motion, the court assumed that the protection of the First Amendment extended to the source code and the comments on the plaintiff’s diskette. *See id.* at 9 (footnotes omitted). However, lending credence to the argument that cryptographic computer source code *alone* is not speech protected by the First Amendment, Judge Charles Richey stated that “[t]he Court makes no ruling as to whether source codes, without the comments, fall within the protection of the First Amendment. *Source codes are merely a means of commanding a computer to perform a function.*” *Id.* at 10 n.19 (emphasis added). The D.C. Circuit remanded the case in light of an Executive Order transferring regulatory authority over nonmilitary cryptographic computer source code to the Commerce Department. *See Karn v. United States Dep’t of State*, No. 96-5121, 1997 WL 71750, at \*1 (D.C. Cir. Jan. 21, 1997).

Finding that cryptographic computer source code by itself is not protected by the First Amendment does not mean that all matters related to source code and encryption programs are without a constitutional shield. This Case Note will not examine the more complex question of whether other potentially regulated matters are protected by the First Amendment. Some of these potentially regulated matters are: (1) the encrypted message itself; (2) the algorithm; (3) specific instructions for programming a computer to encrypt and decrypt using this algorithm; (4) general descriptions of how to use the algorithm; and (5) scientific writings concerning the encryption system as a whole. Some of the matters above are clearly protected by the First Amendment as “pure speech.” Others may fall into a category I term “byte speech,” composed of language or expression unique to digital communications. Byte speech would include forms of protected First Amendment expression ranging from “pure speech” to “symbolic speech.” A discussion of the extent of such protection, however, is outside the scope of this Case Note.

8. *See Bernstein*, 922 F. Supp. at 1429. Snuffle 5.0 consists of “Snuffle.c,” the encryption component, and “Unsnuffle.c,” its decryption counterpart. *See id.*

9. *See id.*

10. *See id.*

communication age.

Bernstein submitted Snuffle 5.0—in C language source files—and his academic paper describing the Snuffle system to the Office of Defense Trade Controls (ODTC) to ascertain whether his work needed to be licensed for commercial export.<sup>11</sup> ODTC determined that “Snuffle 5.0 was a defense article under Category XIII of ITAR [International Traffic in Arms Regulations] and subject to licensing by the Department of State prior to export.”<sup>12</sup> Thereafter, Bernstein sought declaratory and injunctive relief against enforcement of the ITAR and the Arms Export Control Act (AECA), which regulates the import and export of defense articles.<sup>13</sup> Bernstein argued that “the First Amendment . . . includes the right to speak confidentially, and thus, encryption is deserving of protection because it facilitates private communications.”<sup>14</sup> Although the court’s holding in *Bernstein* was not this broad, Judge Patel did hold that source code was speech.<sup>15</sup> Judge Patel had previously held that “[l]anguage is by definition speech, and the regulation of any language is the regulation of speech’ . . . . This court can find no meaningful difference between computer language, particularly high-level languages . . . and German or French.”<sup>16</sup>

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11. The Arms Export Control Act (AECA), 22 U.S.C. §§ 2778–96 (1994 & Supp 1996), authorizes the President to regulate the import and export of “defense articles” by designating such items on the United States Munitions List (USML). *See* 22 U.S.C. § 2778(a)(1) (1994). Once placed on the USML, and unless otherwise exempted, a defense article requires a license before it can be imported or exported. *See id.* § 2778(b)(2). Types of items covered by the USML are listed at 22 C.F.R. § 121.1. Category XIII, Auxiliary Military Equipment, includes “[c]ryptographic (including key management) systems, equipment, assemblies, modules, integrated circuits, components or software with the capability of maintaining secrecy or confidentiality of information systems.” *Id.* § 121.1 Category XIII(b)(1).

The International Traffic in Arms Regulations (ITAR), 22 C.F.R. §§ 120–30 (1996), authorizes the Secretary of State pursuant to an executive order to enforce the AECA. The ITAR is administered within the State Department by the Office of Defense Trade Controls, Bureau of Politico-Military Affairs. The ITAR prescribes a “commodity jurisdiction procedure” by which the ODTC determines if an article is covered by the USML when doubt exists. *See id.* § 120.4(a).

12. *Bernstein*, 922 F. Supp. at 1430. After the first ODTC determination, Bernstein submitted a second request asking for a separate determination for each of five items: *The Snuffle Encryption System* (an academic paper), *Snuffle.c*, *Unsnuffle.c*, a description in English of how to use Snuffle 5.0, and instructions in English for programming a computer to use Snuffle 5.0. *See id.* After the plaintiff initiated this action, the ODTC concluded that only *Snuffle.c* and *Unsnuffle.c* were defense articles. *See id.*

13. *See id.* at 1428. In response to allegations by critics that these federal regulations serve only to handicap American companies, because domestic companies are forced to limit the encryption capabilities of their products if they hope to export them for sale overseas, President Clinton issued Executive Order 13,026, 1996 WL 666563 (Nov. 15, 1996), which recognizes that foreign products with comparable or greater encryption capabilities than American products currently exist. *See id.* (establishing that “the Secretary of Commerce (‘Secretary’) may, in his discretion, consider the foreign availability of comparable encryption products in determining whether to issue a license in a particular case or to remove controls on particular products”). Under the new guidelines, companies would be able to sell more sophisticated encryption technology, provided that they devise and submit a plan to the Commerce Department “outlining how they would ensure that law enforcement officers would be able to ‘recover,’ or unscramble, encrypted information.” Elizabeth Corcoran, *U.S. to Ease Encryption Restrictions; Privacy Advocates Wary of Proposal for Software Exports*, WASH. POST, Oct. 1, 1996, at A1.

14. *Bernstein v. United States Dep’t of State*, 945 F. Supp. 1279, 1287 (N.D. Cal. 1996).

15. *See id.*

16. *Bernstein*, 922 F. Supp. at 1435 (quoting *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 935 (9th Cir. 1995) (en banc), *vacated as moot*, 117 S. Ct. 1055 (1997)).

The First Amendment prohibits governmental bodies from enacting laws abridging the freedom of speech. The category of speech receiving the most protection is "pure speech." "Pure speech" includes ideas expressed verbally and ideas communicated through the written word.<sup>17</sup> For example, the Court of Appeals for the Ninth Circuit recently stated that the decision to "speak in a language other than English [implicates] pure speech concerns . . . . Speech in any language is still speech, and the decision to speak in another language is a decision involving speech alone."<sup>18</sup> However, for expression to be termed pure speech, the form of its expression must be relatively pure. For example, courts have held that picketing is "not an instance of 'pure speech' because it usually involves conduct of some sort and may not include verbal utterances at all."<sup>19</sup>

Examining the relevant case law, it is clear that the Snuffle source code is not "pure speech" protected by the First Amendment. Indeed, computer source code differs from natural language in two significant respects. First, it is not possible to employ source code without the use of special equipment. Without a computer, source code is simply an array of symbols, letters, and numbers. With the addition of a computer, the source code allows the computer to monitor and control application programs running on the computer, to read other programs, and to manage data.<sup>20</sup> While it is true that all forms of expression—except those that are live, oral, and unmodified by amplification or other means—sometimes employ equipment (even if that equipment is as simple as a pen or pencil), source code cannot function without a computer. English, French, German, and other natural languages can stand apart from equipment such as a pen or pencil, but computer source code cannot.

Second, it is not possible to create communications, thoughts, or ideas in cryptographic computer source code. Instead, it is only possible to use source code to translate these events into and out of an encrypted message. It is the ability to create thoughts or ideas in a language that gives rise to culture.<sup>21</sup> While some may argue that computer source code is no different from languages such as Braille or American Sign Language (ASL), which are

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17. See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word.").

18. *Yniguez*, 69 F.3d at 936.

19. *Schultz v. Frisby*, 807 F.2d 1339, 1343 (7th Cir. 1986), *vacated and reh'g granted*, 818 F.2d 1284 (7th Cir.), *aff'd en banc by an equally divided court*, 822 F.2d 642 (7th Cir. 1987), *rev'd on other grounds and remanded*, 487 U.S. 474, *vacated prior judgment and rev'd and remanded*, 857 F.2d 1175 (7th Cir. 1988), *aff'd*, 877 F.2d 6 (7th Cir. 1989).

20. See Todd Shuster, *Originality in Computer Programs and Expert Systems*, 5 *TRANSNAT'L LAW* 1, 12 (1992).

21. See Michele Belluzzi, Comment, *Cultural Protection as a Rationale for Legislation*, 14 *DICK. J. INT'L L.* 127, 129 (1995) ("It is only through language that individuals discover their true personality and develop ideas, skills, and customs necessary to function in society.").

translating mechanisms, there is an extraordinary difference between these languages and computer source code. Braille and ASL serve to support a culture for the deaf and the hearing-impaired.<sup>22</sup> No such claim can be made on behalf of computer source code.

Is cryptographic computer source code "symbolic speech" protected by the First Amendment? In *Spence v. Washington*,<sup>23</sup> the Supreme Court set forth a two-part test for determining whether conduct is "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[]." <sup>24</sup> The Court held that for an activity to be deemed expressive conduct, "[a]n intent to convey a particularized message [must have been] present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."<sup>25</sup> However, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,<sup>26</sup> the Court stated that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll."<sup>27</sup> As a result, courts have looked to another portion of *Spence* that examines "the nature of [the] activity, combined with the factual context and environment in which it was undertaken"<sup>28</sup> to determine whether the activity has enough communicative elements to receive protection under the First Amendment.<sup>29</sup>

Applying this test to cryptographic computer source code is difficult, but not impossible. In cases where government regulations of expressive conduct have been struck down, the communicative intent of the actor was clear and "closely akin to pure speech."<sup>30</sup> Examining the nature of the source code, the factual context, and the environment in which it is undertaken, makes clear that source code is not sufficiently imbued with elements of communication to fall within the scope of the First Amendment. In *Tinker v. Des Moines Independent*

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22. Although encrypted speech may be analogous to Braille, source code itself is as much speech as a printing press designed to print Braille.

23. 418 U.S. 405 (1974) (per curiam).

24. *Id.* at 409. The Supreme Court has recognized the expressive nature of many activities. See *Texas v. Johnson*, 491 U.S. 397 (1989) (recognizing expressive nature of desecrating American flag to protest renomination of Ronald Reagan for President); *Schacht v. United States*, 398 U.S. 58 (1970) (recognizing expressive nature of wearing American military uniforms in dramatic presentation criticizing Vietnam War); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (recognizing expressive nature of students' wearing of black armbands to protest Vietnam War); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (recognizing expressive nature of sit-in by African Americans in segregated library).

25. *Spence*, 418 U.S. at 410-11.

26. 115 S. Ct. 2338 (1995).

27. *Id.* at 2345 (citation omitted).

28. *Spence*, 418 U.S. at 409-10.

29. See *id.*

30. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505-06 (1969)

*Community School District*,<sup>31</sup> *Spence*, and *Texas v. Johnson*,<sup>32</sup> the expressive nature of the particular activities was relatively clear. In *Tinker*, the donning of a black armband in a school “conveyed an unmistakable message about a contemporaneous issue of intense public concern—the Vietnam hostilities.”<sup>33</sup> In *Spence*, the upside-down display of an American flag with a peace sign taped on it “was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy.”<sup>34</sup> In *Johnson*, the American flag was desecrated while President Ronald Reagan was nearby being renominated for the Presidency, and the “overtly political nature of this conduct was both intentional and overwhelmingly apparent.”<sup>35</sup>

In the case of source code, the expressive nature of the conduct is far from intentional and overwhelmingly apparent. If source code, by itself, intends to communicate a right to speak confidentially, then its current form of numbers, letters, and symbols is not likely to aid in that endeavor. Neither is it likely that an average viewer would discern any element of communication in source code espousing a desire for confidential communications. Perhaps the only factual context and environment in which a viewer would be able to understand the expressive nature of encryption is the dark recesses of a computer laboratory. Yet this is not the factual scenario in *Bernstein*, for Daniel Bernstein sought permission for the general export of his source code. It is doubtful that a general audience will comprehend the expressive nature of cryptographic computer source code.

There is no First Amendment right to speak in cryptographic computer source code. Computer source code is neither “pure speech” nor expressive conduct. Instead, it is “pure conduct” that is not sufficiently imbued with elements of communication to receive First Amendment protection. On viewing cryptographic computer source code, an average viewer would be hard pressed to ascertain an intent to convey a message or belief, or discern any form of a readily recognizable message. Yet although computer source code is not protected under the First Amendment, other forms of digital communications may be protected. For instance, courts may conclude that the encrypted message itself or ready-to-use software deserves such protection. Source code, however, merits no such protection.

—John P. Collins, Jr.

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31. *Id.*

32. 491 U.S. 397 (1989).

33. *Spence*, 418 U.S. at 410.

34. *Id.*

35. *Johnson*, 491 U.S. at 406.

# The First Amendment and Murder Manuals

*Rice v. Paladin Enterprises, Inc.*, 940 F. Supp. 836 (D. Md. 1996).

## I

On March 3, 1993, James Perry brutally murdered Mildred Horn, her quadriplegic son, and his nurse. Perry closely followed twenty-two instructions on how to plan and execute such murders, provided in graphic and explicit detail by two books he purchased from Paladin Enterprises: *How to Make a Disposable Silencer, Vol. II*<sup>1</sup> and *Hit Man: A Technical Manual for Independent Contractors*.<sup>2</sup> Following Perry's conviction and death sentence for the triple murder, the families of the victims sued Paladin for tortious aiding and abetting and negligence.<sup>3</sup> For purposes of summary judgment, Paladin stipulated that it had intentionally marketed its books to ex-convicts and would-be criminals, knowing full well that many would rely on the detailed step-by-step instructions therein to commit heinous murders.<sup>4</sup> Although the district court found the books to be "reprehensible and devoid of any significant redeeming social value,"<sup>5</sup> it nevertheless held that, under *Brandenburg v. Ohio*,<sup>6</sup> the First Amendment barred recovery of damages.<sup>7</sup>

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1. 2 HOW TO MAKE A DISPOSABLE SILENCER (Paladin Enters. 1983).

2. REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS (Paladin Enters. 1983). For example, Perry meticulously followed the books' directions and advice about how to solicit for prospective clients in need of murder-for-hire services, how to handle an AR-7 rifle and drill out the serial number, how to construct a silencer and shoot at an optimal distance to "insure quick and sure death," how to disassemble the weapon and change its rifling to prevent its ballistics from matching the bullets left behind in the victims, how to make the crime scene look like a burglary, and how to use a rental car to get away from the crime scene undetected. See *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 839-40 (D Md. 1996).

3. *Rice*, 940 F. Supp. at 838. The plaintiffs also sought damages based on theories of civil conspiracy and strict liability. *Id.*

4. See *id.* at 840. The parties acknowledged that Paladin's target audience also included authors who write books about crime and criminals, law enforcement officers and agencies, persons who read about methods for committing crimes for entertainment, persons who fantasize about committing crimes but do not commit them, and criminologists and others who study criminal methods and psychology. See *id.*

5. *Id.* at 849.

6. 395 U.S. 444 (1969).

7. See *Rice*, 940 F. Supp. at 848-49. The district court also held that Maryland tort law does not extend far enough to support a claim of aider and abettor tort liability in this context. See *id.* at 842. Since the Maryland Supreme Court has expressly recognized that "[a] person may be held liable as a principal . . . if he, by any means (words, signs, or motions) encouraged, incited, aided or abetted the act of the direct perpetrator of the tort," *Alleco, Inc. v. Weinberg Found., Inc.*, 665 A.2d 1038, 1049 (Md. 1995) (quoting *Duke v. Feldman*, 226 A.2d 345, 347 (Md. 1967)) (emphasis added), it is not altogether clear why the district court declined to apply this precedent in *Rice*. Furthermore, if the district court was correct in declining to apply aider and abettor tort liability, it is unclear why the court ever reached the First

The question posed by this case is significant in light of recent state<sup>8</sup> and federal<sup>9</sup> legislation designed to curb the distribution, especially via the Internet, of instructional information about bomb-making and the construction of other dangerous weapons. I argue in this Case Note that government regulation of speech that provides these kinds of detailed, step-by-step instructions about how to commit violent felonies should be considered presumptively constitutional.

## II

Scholars and jurists have relied on a number of theories to explain the value of free speech. The marketplace of ideas theory rests on the notion that free speech leads to the ascertainment of truth and that the best way to convince people of the falsehood of ideas is not by suppressing speech, but by encouraging more of it.<sup>10</sup> The Meiklejohnian theory of free speech places more emphasis on free speech as a means to public deliberation and a well-informed electorate, essential to democratic self-governance.<sup>11</sup> The libertarian model values free speech as an end in and of itself, viewing people as autonomous and rational decisionmakers, with a right to control their own thoughts and beliefs without government interference or manipulation.<sup>12</sup> Essentially, all of these theories are “designed to guard against the danger that

Amendment issues. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring) (advocating that laws be construed to avoid constitutional questions).

8. The Georgia Code, for example, makes it a felony for any person to

[t]each, train, or demonstrate to any other person the use, application, or making of any illegal firearm, dangerous weapon, or incendiary device capable of causing injury or death to persons either directly or through a writing or over or through a computer or computer network if the person teaching, training, or demonstrating knows, has reason to know, or intends that such teaching, training, or demonstrating will be unlawfully employed for use in or in furtherance of a civil disorder, riot or insurrection.

GA. STAT. tit. 16, ch. 11, § 151(b)(1) (amended 1995). This statute would cover the speech in *Rice*, but may be overbroad. The phrase “civil disorder, riot or insurrection” may or may not involve danger to the lives and safety of other people. For example, the term “civil disorder” could encompass peaceable assemblies like sit-ins or strikes. Moreover, the phrase “to teach, train, or demonstrate” encompasses a wide variety of speech that may extend far beyond the kind of step-by-step, manual-like instructional speech found in *Rice*.

9. The Department of Defense Authorization Act, already passed by the Senate, would prohibit the distribution of information relating to the manufacture of explosive materials for a criminal purpose. See S. 1762, 106th Cong. § 1088(a)(1) (1997).

10. See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get accepted in the competition of the market.”).

11. See, e.g., *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

12. See, e.g., *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) (“The individual’s interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion.”); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed that the final end of the state was to make men free to develop their faculties.”).



the government is only pretending to be concerned about noise, litter, offensiveness, or a hostile audience reaction but in fact is reacting to the feared persuasiveness of the speech that it seeks to suppress."<sup>13</sup> The First Amendment prevents the government from stifling dissident political views by resorting to pretextual allegations that such speech will cause harm or violence.<sup>14</sup>

*Brandenburg v. Ohio* provides a paradigmatic example of the use of such pretext by the government. In that case, a Ku Klux Klan leader was prosecuted for making a reference to possible future lawlessness in a speech before a number of Klan members. The Court recognized that the then-predominant clear and present danger test<sup>15</sup> allowed the government to suppress undesirable political views simply by invoking the speech's "tendency to lead to violence."<sup>16</sup> In order to ensure greater protection of political speech and less opportunity for government pretext, the *Brandenburg* Court abandoned the manipulable "danger" test and replaced it with a new rule: The state cannot proscribe speech that it alleges could or will lead to lawlessness unless such speech was "directed to inciting or producing imminent lawless action and [was] likely to incite or produce such action."<sup>17</sup>

The *Brandenburg* test was obviously intended to make it more difficult for the government to restrict or suppress political speech. It did not, however, establish an absolute bar to government regulation. Rather, it created a strong presumption that the First Amendment protects the mere advocacy of lawlessness. It implicitly assumes that government fears of erupting violence, even if not pretextual, are usually exaggerated, and that the balance of interests therefore favors protecting individuals' self-expression.

This presumption, however, is inverted when the advocacy in question is directed to producing imminent violence and is likely to produce such violence.<sup>18</sup> The question, of course, is: why? Why is state regulation of

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13. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 338 (1991); see also CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 134 (1993) ("Government is rightly distrusted when it is regulating speech that might harm its own interests; and when the speech at issue is political, its own interests are almost always at stake.").

14. See Strauss, *supra* note 13, at 337 ("[T]yrants suppress speech because they fear it will be persuasive.").

15. The clear and present danger test was first articulated in *Schenck v. United States*, 249 U.S. 47 (1919), and was subsequently relied upon to uphold government suppression of political speech on a number of occasions, see, e.g., *Dennis v. United States*, 341 U.S. 494 (1951) (upholding conviction of members of Communist Party, which advocated violent overthrow of federal government); *Whitney v. California*, 274 U.S. 357 (upholding conviction of member of state Communist Labor Party, which advocated criminal syndicalism); *Debs v. United States*, 249 U.S. 211 (1919) (upholding conviction of Socialist Party presidential candidate for antiwar speech).

16. *Hess v. Indiana*, 414 U.S. 105, 109 (1973).

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

18. Although the *Brandenburg* test speaks only of "lawlessness," many cases use the terms lawlessness and violence interchangeably. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-28 (1982) (using the terms lawlessness and violence interchangeably); *Communist Party v. Whitcomb*, 414 U.S. 441, 448 (1974) (same); *Hess*, 414 U.S. at 109 (same); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 183-84 (1971) (Black, J., dissenting) (same); *Noto v. United States*, 367 U.S.

speech that incites imminent lawlessness presumptively valid? After all, restricting speech because of its communicative impact, even speech directed to inciting imminent lawlessness, still implicates certain core First Amendment values such as self-expression and listener autonomy.<sup>19</sup> Regulating such speech might also curtail public deliberation and limit the quantity of speech disseminated in the marketplace.

The answer lies in the Court's general suspicion of government motives. While the *Brandenburg* test clearly recognizes the government's compelling interest in safeguarding the safety of citizens, it generally suspects the government's invocation of this interest when the speech in question involves dissident political views.<sup>20</sup> Thus, the requirement that the alleged lawlessness take place or be likely to take place almost immediately after the delivery of the speech is an attempt to ensure that the danger is in fact not speculative and that the government's interest in preventing the violence is not pretextual.

### III

Although the *Rice* court was correct in holding that under the *Brandenburg* test, *Paladin* could not be held liable,<sup>21</sup> the First Amendment does not require such broad protection of instructional speech. Government regulation of the narrow category of speech at issue in *Rice*—technical, detailed, step-by-step, do-it-yourself manuals—ought to be considered presumptively constitutional. Like other “well-defined and narrowly limited classes of speech”<sup>22</sup> that are

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290, 297–98 (1961) (same).

19. People presumably still have an interest in making up their own minds to act without interference from a paternalistic government.

20. Another possible explanation is that incitement to imminent lawlessness, like fighting words, induces listeners to react impulsively. Under this theory, regulating such speech would therefore not implicate the listeners' autonomy. See Strauss, *supra* note 13, at 338–40, 366–68 (arguing that government regulation of speech that persuades rational decisionmakers to act violates individual autonomy and the First Amendment, but that regulation of speech that induces ill-considered actions is not a deprivation of autonomy). The problem with this theory is that the *Brandenburg* test does not hinge on the persuasiveness *vel non* of the speech. That is, it is irrelevant whether an audience is about to act lawlessly because it is reacting irrationally or because it is acting rationally and deliberately. As long as the speaker directs her speech to producing imminent lawlessness, and as long as such action is likely, the government's interest in protecting against such violence outweighs whatever social value the speech may have.

21. Applying *Brandenburg's* holding to the facts in *Rice*, the district court properly found that the *Paladin* publications did not meet the stringent imminence requirement, as the murders occurred at least a year after Perry purchased the manuals. See *Rice v. Paladin Enters.*, 940 F. Supp 836, 847 (D. Md. 1996). The district court also found that the publications did not incite readers to lawlessness. However, the speech did implicitly invite such action. For a reader without the knowledge or confidence to act on his resolve, a detailed roadmap not only provides information needed to commit the crime, but also functions to instruct, reassure, and encourage the actor to follow through on his intent. Despite the books' disclaimers that it is against the law to manufacture silencers and that the information provided is for informational purposes only, see *id.* at 839–40, the detailed photographs and step-by-step instructions about how to construct such weapons and how effectively to utilize them to commit murders suggest that these disclaimers were not meant to be heeded. Like other instruction manuals, the instructions were presumably set forth to aid readers interested in following and implementing them.

22. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

not accorded First Amendment protection, such as obscenity<sup>23</sup> and incitement to imminent lawless action,<sup>24</sup> this category of speech only minimally implicates the values at the heart of the First Amendment. More importantly, like other categories of unprotected speech, this category is particularly likely to result in severe harms to innocent third parties. In the general calculus of competing interests, the government's interest in protecting the lives and limbs of its citizens outweighs whatever slight social value inheres in such speech. Additionally, the risk that the government will regulate such speech in order to curtail undesirable political viewpoints is *de minimis*.

First, it is highly probable, if not certain, that detailed, graphic instructional speech will aid and abet some readers in effectively carrying out violent felonies. As with other do-it-yourself manuals, it is highly foreseeable that some readers will—yes—do it themselves and follow the instructions provided. Although it may not lead to *imminent* lawlessness, such speech poses a danger that is far from speculative in terms of either its nature or its likelihood. The state clearly has a very strong interest in safeguarding the lives of its citizens.<sup>25</sup>

Second, because step-by-step, instructional speech is highly clinical and technical, it has little if any expressive value, and because it advocates the commission of garden-variety felonies, it has little if any political or otherwise socially redeeming value. As a category of speech, therefore, it is particularly dangerous and not particularly valuable. Restricting such speech might still implicate certain values like speaker and listener autonomy, but the state's interest in protecting the lives of citizens outweighs whatever value inheres in permitting access to detailed information about criminal methods.<sup>26</sup>

Finally, instructional speech like the kind found in *Rice* is easily distinguishable from general advocacy, description, opinion, or political speech. For example, speech that provides instructions on how to blow up buildings or commit murder, torture, or rape falls well within this exception. As with the obscenity standard, which requires that there be an absence of serious literary,

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23. See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973) (reaffirming the unprotected status of obscenity).

24. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (permitting government regulation of speech directed to inciting imminent violence and likely to produce such violence).

25. See, e.g., *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (nouncing that state may not punish publication of lawfully obtained truthful information "absent a need to further a state interest of the highest order"); *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972) (noting that government has compelling interest in securing safety of persons and property of citizens); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1028–29 (5th Cir. 1987) (Jones, J., dissenting) ("The interest in protecting life is recognized specifically for first amendment purposes and, analytically can be no less important than the interest in reputation. . . . [P]rotect[ing] society from loss of life and limb, [is] a legitimate, indeed, compelling, state interest.").

26. See, e.g., KENT GREENWALT, *SPEECH, CRIMES, & THE USES OF LANGUAGE* 115 (1989) (arguing that "considerations of autonomy matter, and the autonomy of speaker and of audience are reasons to permit encouragements to crime, but they are reasons to be considered in relation to other reasons, not absolutely decisive counters in favor of liberty").

artistic, political, or scientific value,<sup>27</sup> inserting into such publications a few lines from Shakespeare or *The Federalist Papers* will not change the nature of the speech as a whole.<sup>28</sup> While other kinds of speech might also endanger the bodily integrity and safety of innocent people and possess little political or social value, such speech is often difficult to categorize, and its regulation is therefore much more susceptible to manipulation by the government or the courts. Judges and juries, however, can easily tell that the speech before them is instructional: It is either a manual, like the kind one uses to set up a VCR, or it is not. It either instructs how to commit violent felonies or it does not.<sup>29</sup>

The adoption of this exception would implicate none of the major concerns of *Brandenburg* and its progeny. On the one hand, there is little danger that the state's invocation of harm or lawlessness would be a pretext for quashing political dissent. As with the imminence standard in *Brandenburg*, this exception to otherwise protected speech ensures that the reason for restricting speech is to protect citizens from real harm, and not to suppress open and robust public debate. Moreover, the repercussions of instructional speech of the sort found in *Rice* are so foreseeable, and so severe, that the danger is quite real, even if not technically imminent. On the other hand, the speech itself has little, if any, socially redeeming value, politically, artistically, or otherwise. In cases like *Rice*, "society's interest in compensating injured parties [and] the freedom of speech guaranteed by the First Amendment,"<sup>30</sup> are not incompatible goals.

—Avital T. Zer-Ilan

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27. See, e.g., *Miller*, 413 U.S. at 24.

28. See *id.* at 25 n.7 ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . .") (quoting *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972)).

29. Of course, this test only establishes a presumption that instructional speech about how to commit violent felonies is unprotected. When instructional speech has significant political value, the presumption may be overcome. For example, the speech in *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), involving the publication of an article about building hydrogen bombs, might have warranted more First Amendment protection than was actually extended to it, since its principal purpose was to "alert the people of this country to the false illusion of security created by the government's futile efforts at secrecy." *Id.* at 994. This case, however, is distinguishable from *Rice* not just in terms of the political nature of the messages. Unlike *Rice*, *Progressive* was a prior-restraint case, and therefore required the government to prove the likelihood of direct, immediate, and irreparable injury to national security. See *id.* at 1000. Furthermore, the *Progressive* court found that the article in question did not "provide a 'do-it-yourself' guide for the hydrogen bomb." *Id.* at 993.

30. *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 840 (D. Md. 1996).