Georgia State University Law Review

Volume 14
Issue 4 *July 1998*

Article 7

7-1-1998

Another Case of Freedom vs. Safety: Stretching the First Amendment to Protect the Publication of Murder Manuals-Bradenburg Need Not Apply?

Robert J. Coursey III

ANOTHER CASE OF FREEDOM VS. SAFETY: STRETCHING THE FIRST AMENDMENT TO PROTECT THE PUBLICATION OF MURDER MANUALS—*BRANDENBURG* NEED NOT APPLY?

INTRODUCTION

"Congress shall make no law . . . abridging the freedom of speech."[1] This seemingly clear-cut limitation of governmental power is not as limiting as its language implies. Perjury, solicitation to murder, and libel are among those forms of speech that are clearly abridged by law and yet regularly go constitutionally unchallenged.[2] Perhaps most of us are comfortable saying that those forms of speech have no societal value worth protecting. However, other forms of speech, such as virulent political mudslinging[3] or the display of profanity on one's clothing,[4] enjoy almost unlimited constitutional protection, even though many people certainly believe society would be better off without them.

The line between protected and unprotected speech is a fuzzy one, resulting in myriad First Amendment cases reaching the federal courts since World War I.[5] This Comment will focus on one of the latest First Amendment cases to reach the federal courts, *Rice v. Paladin Enterprises*,[6] which was decided on November 10, 1997 by the U.S. Court of Appeals for the Fourth Circuit.

The facts of the case are disturbing enough to make this a pivotal case of first impression for First Amendment jurisprudence and a "gut-check" for those who consider themselves defenders of free speech. Defendant, Paladin Enterprises (Paladin), is a publisher of mail-order books that focus mainly on "how to" manuals dealing with murder.[7] James

1. U.S. CONST. amend. I.

2. *See* Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUPREME CT. REV. 123, 153 (1996); *cf.* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960).

3. *See* McIntyre v. Ohio Elec. Comm., 514 U.S. 334 (1995).

4. *See* Cohen v. California, 403 U.S. 15 (1971).

5. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1008 (5th ed. 1995).

6. 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998).

7. *See* Alan Dershowitz, *Murder by the Book*, BUFFALO NEWS, Aug. 6, 1996, at 3B.

Perry, who evidently desired to enter the contract-killer business, ordered two of Paladin's books—*Hit Man: A Technical Manual for Independent Contractors* (*Hit Man*) and *How to Make a Disposable Silencer, Volume 2* (*Silencers*).[8] About one year later, after being hired by Lawrence Horn, Perry murdered Horn's former wife, his eight-year-old paraplegic son, and his son's private nurse, so that Horn could inherit his wife's sizeable fortune.[9] In a Joint Statement of Facts offered by the plaintiffs (the families of the victims) and Paladin for the purposes of deciding Paladin's motion for summary judgment in the district court, the parties acknowledge that "Perry followed a number of instructions outlined in *Hit Man* and *Silencers* . . . in planning, executing and attempting to get away with the murders . . . ."[10]

The plaintiffs brought wrongful death and survival actions against Paladin on four legal theories: (1) aiding and abetting, (2) civil conspiracy, (3) negligence, and (4) strict liability.[11] Paladin, in its motion for summary judgment, claimed that the First Amendment guaranteed its right to publish these books and protected it from civil liability.[12] The United States District Court for the District of Maryland accepted this argument and granted Paladin's motion for summary judgment,[13] but the decision was reversed and remanded by the court of appeals.[14]

This Comment will trace the development of First Amendment law since World War I, when the field suddenly became active.[15] Part I will focus on various tests the Supreme Court has developed in determining whether potentially harmful speech is protected. Part II will present viewpoints from two commentators on these tests. A review of the district court's decision granting Paladin's motion for summary judgment in *Rice v. Paladin Enterprises* will follow in Part III, followed in turn by a review of the Fourth Circuit's decision to reverse the district court in Part

---

Titles include *The Ancient Art of Strangulation*, *How to Dispose of a Dead Body*, and *21 Techniques of Silent Killing*. *See id.*

8. *See Rice*, 128 F.3d at 241 n.2.

9. *See id.* at 241 & n.2.

10. Joint Statement of Facts at 4, Rice v. Paladin, No. AW-95-311 (S.D. Md. filed 1996).

11. *See* Rice v. Paladin Enter., 940 F. Supp. 836, 838 (D. Md. 1996).

12. *See id.*

13. *See id.* at 839.

14. *See* Rice v. Paladin Enter., 128 F.3d 233, 267 (4th Cir. 1997).

15. *See* NOWAK & ROTUNDA, *supra* note 5.

IV. Finally, Part V will analyze both courts' decisions in light of the preceding case law and commentary.

I. DEVELOPMENT OF FIRST AMENDMENT LAW SINCE WORLD WAR I: CRIMINAL SANCTIONS FOR DANGEROUS SPEECH

A. Schenck v. United States

The first modern-day First Amendment case decided by the Supreme Court was *Schenck v. United States*.[16] This 1919 case, set against the backdrop of World War I, produced the foundation test for whether potentially dangerous speech should be protected.[17] The defendant in *Schenck* circulated a document discouraging United States military draftees from complying with their draft orders and was charged with violation of the Espionage Act of 1917.[18] The Court paraphrased the defendant's publication as suggesting that the draft was "despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few."[19] Actual language from the distributed document included, "[d]o not submit to intimidation . . . [a]ssert [y]our [r]ights . . . assert your opposition to the draft . . . [and i]f you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain."[20] The document also denied that the government had the power to send Americans to fight in foreign wars.[21] The defendant conceded that his words could have had the effect of discouraging draftees from fulfilling their duty, but claimed that the First Amendment protected this speech nevertheless.[22] Justice Holmes, writing for a unanimous court, stated: "[t]he 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 evils that Congress has a right to prevent."[23] The Court found

16. 249 U.S. 47 (1919).
17. *See id.* at 52.
18. *See id.* at 48, 51.
19. *Id.* at 51.
20. *Id.*
21. *See id.*
22. *See id.*
23. *Id.* at 52.

that publishing anti-draft literature during the war created a "clear and present danger" to the nation, and was therefore not protected by the First Amendment.[24]

B. Dennis v. United States

In *Dennis v. United States*,[25] the Supreme Court elaborated on the clear and present danger test. The defendants were convicted of violating the Smith Act,[26] which made it " 'unlawful for any person . . . to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence . . .' "[27] or to " 'print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter' " furthering this goal.[28] The defendants were charged specifically with violating section 3 of the Smith Act, making it " 'unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of . . . this title.' "[29]

The Court began its analysis by clarifying that it is permissible under the First Amendment to balance the right of free speech against other societal values.[30] The Court then reviewed several cases involving convictions under the Espionage Act[31] and extracted the following rule:

> [W]here an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a 'clear and present danger' of attempting or accomplishing the prohibited crime, e.g., interference with enlistment.[32]

---

24. *Id.*
25. 341 U.S. 494 (1951).
26. *See id.* at 495.
27. *Id.* at 496 (quoting The Smith Act, 18 U.S.C. §§ 10, 11 (1946)).
28. *Id.*
29. *Id.* at 497.
30. *See id.* at 503.
31. *See id.* at 504 (citing Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1920); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919)).
32. *Id.* at 505.

Next, the Court referred to two cases in which the statute in question did not specify the offense in "nonspeech or nonpress terms" as in the previous cases.[33] In *Gitlow v. New York*[34] and *Whitney v. California*,[35] the majority decisions did not apply the clear and present danger test because of deference to the legislature's finding that certain speech is inherently unlawful, and therefore found that the Court's only duty was to determine whether the statute was reasonable.[36] The *Dennis* Court noted, however, that Justices Holmes and Brandeis had dissented in those opinions, insisting that "wherever speech was the evidence of the violation, it was necessary to show that the speech created the 'clear and present danger' of the substantive evil which the legislature had the right to prevent."[37] In reviewing First Amendment law up until that time, the Court noted that even though *Whitney* and *Gitlow* had not been overtly overruled, the trend of subsequent opinions had nevertheless been to adopt the views of the Holmes-Brandeis dissenting opinions.[38]

In applying the clear and present danger test to *Dennis*, the Court adopted the lower court's formulation of the rule, as set forth by Chief Judge Learned Hand: "[i]n each case (courts) must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[39] The Court, in upholding the conviction, reasoned that here, the gravity of the evil—the overthrow of the government—was a "substantial enough interest for the Government to limit speech."[40] As to the "improbability" factor in Hand's formula, the Court stated that:

> [A]n attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it

33. *Id.* at 505-06.
34. 268 U.S. 652 (1925).
35. 274 U.S. 357 (1927).
36. *See Dennis*, 341 U.S. at 506.
37. *Id.* (quoting Gitlow v. New York, 268 U.S. 652 (1925)).
38. *See id.* at 507.
39. *Id.* at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d. Cir. 1950)).
40. *Id.* at 509.

> impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt.[41]

Thus, the Court applied the clear and present danger test specifically to the "attempt" of the governmental overthrow, rather than to the overthrow itself.[42]

C. Brandenburg v. Ohio

The 1969 case of *Brandenburg v. Ohio*[43] modified the test for whether the government could proscribe speech.[44] The defendant, a leader of a Ku Klux Klan (KKK) group, was convicted for violating the Ohio Criminal Syndicalism Act,[45] after a KKK meeting that he led was filmed by a local news station at his invitation.[46] The statute made it a crime to " 'advocat[e] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.' "[47] In a four-page opinion, the Court reversed the defendant's conviction, officially overruled *Whitney v. California*,[48] and set forth a new test for determining whether criminal advocacy should be protected:[49]

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[50]

---

41. *Id.*

42. *Id.* at 517. But see Justice Black's dissenting opinion, in which he stated his belief that section 3 of the Smith Act was unconstitutional on its face and as applied in the instant case. *See id.* at 579-80 (Black, J., dissenting). Justice Black stated:

> I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.' Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress. The Amendment as so construed is not likely to protect any but those 'safe' or orthodox views which rarely need its protection.

Id. at 580.

43. 395 U.S. 444 (1969) (per curiam).

44. *See id.* at 448.

45. *See id.* at 444-45 (citing OHIO REV. CODE ANN. § 2923.13 (Anderson 1969)).

46. *See id.*

47. *Id.* (quoting OHIO REV. CODE ANN. § 2923.13 (Anderson 1969)).

48. 274 U.S. 357 (1927). The Court noted that "*Whitney* has been thoroughly discredited by later decisions." *Brandenburg*, 395 U.S. at 447.

49. *See Brandenburg*, 395 U.S. at 447-49.

50. *Id.* at 447.

The defendant's speech included the language: "[t]he Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[51]

The Court found that such language did not rise to the level of "incitement to imminent lawless action."[52] Further, the Court scrutinized Ohio's Criminal Syndicalism Act itself to see if its reach exceeded constitutional limits.[53] The Court stated, " 'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' "[54] This difference was critical to the Court, which found that a statute must draw such a distinction in order to pass First Amendment scrutiny.[55] Thus, Ohio's Criminal Syndicalism Act was deemed unconstitutional.[56] On its face and as applied, the act unconstitutionally abridged free speech by punishing words that were "mere advocacy," as opposed to an "incitement to imminent lawless action."[57]

In a concurring opinion, Justice Douglas expressed an even broader view of free speech.[58] In Douglas' view, there was no appropriate use of the clear and present danger test in First Amendment law.[59] Douglas' belief was that the distinction between mere advocacy and incitement to imminent lawless action, which developed from the clear and present danger test, was in itself constitutionally suspect.[60] He suggested that for the government to make such a distinction was to punish a person for the difference between having "a deep and abiding belief and casual or uncertain belief."[61] Douglas also added, because "[o]ne's beliefs have long been thought to be sanctuaries which government could not invade, . . . all matters of belief are beyond

---

51. *Id.* at 446.
52. *Id.* at 449.
53. *See id.* at 448.
54. *Id.* (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).
55. *See id.*
56. *See id.*
57. *Id.* at 448-49.
58. *See id.* at 454 (Douglas, J., concurring).
59. *See id.*
60. *See id.*
61. *Id.* at 456.

the reach of subpoenas or the probings of investigators."[62] Justice Douglas preferred a simple, straightforward test for determining free-speech issues: "[t]he line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts."[63]

II. MODERN COMMENTARY ON POTENTIALLY DANGEROUS SPEECH

A. *Legal Justifications for Protecting the Advocacy of Unlawful Conduct Through the Clear and Present Danger Test*

Commentators have struggled to pinpoint the justification for why the advocacy of unlawful conduct should warrant constitutional protection given its inherent potential for harm to society.[64] The test used most often in determining whether speech is to be protected, the clear and present danger test, traces its development back to *Schenck v. United States*,[65] and has been interpreted through a host of subsequent cases as noted in Part I of this Comment.[66] Notwithstanding its continued invocation by the courts, the test is more often than not subject to negative commentary.[67]

Professor Redish, in his article entitled *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, attempts to refute such negative commentary by suggesting that, with a bit of "reformulation" of the test, it is still the most viable method that courts have in determining what level of protection to apply to potentially harmful speech.[68] Redish first sets forth several competing theories for why advocacy of unlawful conduct should be given any protection.[69]

---

62. *Id.*

63. *Id.*

64. *See* Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159 (1982).

65. 249 U.S. 47 (1919).

66. *See* Redish, *supra* note 64, at 1166-71.

67. *See id.* at 1160.

68. *Id.* at 1160-61.

69. *See id.* at 1162-64. These include the "marketplace of ideas" theory, suggesting that "false speech" will "serve to accentuate the superiority of speech that contains truth;" the "safety valve" theory, suggesting that free speech "helps to achieve a stable society by providing the cathartic opportunity to those who are displeased with society;" and the "facilitation of the political process" theory, suggesting that "the

Rejecting these popular theories, Redish suggests that the most compelling reason for protecting unlawful advocacy is "the value inherent in allowing individuals to think and discuss freely . . . [and] to explore all possibilities to think through the comparative advantages and disadvantages of various options."[70] With this theory as his basis, Redish then explores the development of the clear and present danger test to examine how well it protects this goal.[71]

Redish points out that after the Court's unanimous decision in *Schenck* the clear and present danger test became the minority opinion for several years.[72] During this period, in *Whitney v. California*,[73] the test underwent its first transformation.[74] In a concurring opinion, Justice Brandeis (with Justice Holmes joining) set forth a more protective view of constitutional analysis for unlawful advocacy questions.[75] He stated that such speech cannot be restricted "unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent."[76] Substitution of the word "imminent" for the word "present," Redish asserts, illustrates that Brandeis and Holmes "inten[ded] to impose strict requirements concerning both the likelihood and timing of harm that would flow from any particular speech" and to make certain that "only an emergency could justify repression."[77]

The next major development of the clear and present danger test came in *Dennis v. United States*, when the test was "so dramatically altered . . . that it effectively implemented a new analysis."[78] As noted in Part I of this Comment, the Court in *Dennis* applied the lower court's formulation, written by Judge Learned Hand, that "[courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such an invasion of

---

political process may benefit from learning the nature of [citizens'] grievances." *Id.* at 1161-63.

70. *Id.* at 1164.

71. *See id.* at 1170.

72. *See id.*

73. 274 U.S. 357 (1927).

74. *See* Redish, *supra* note 64, at 1170 (citing Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)).

75. *See id.*

76. *Whitney*, 274 U.S. at 373.

77. Redish, *supra* note 64, at 1170.

78. *Id.* at 1171 (citing Dennis v. United States, 341 U.S. 494 (1951)).

free speech as is necessary to avoid the danger."[79] Redish explains the application of this new test as significant because:

> The clear and present danger test featured two independent conditions: first, the threat that a substantive evil might follow from some speech, and second, the real imminence of that threat. Only the conjunction of the two conditions could justify curtailment of free speech. The Hand test, by contrast, made the variables dependent so that probability and gravity of harm would work in inverse correlation: the graver the evil threatened by the speech, the less probable need be its occurrence before government is justified in suppressing the speech. The clear and present danger test did not allow either condition to mitigate or exacerbate the effect of the other, so that even if a threatened evil were great, a lack of true imminence would invalidate governmental suppression of its advocates. The Hand test, in contrast, derives results by setting up and appraising such interaction: threat of a great evil, even of a non-imminent one, would justify suppression of speech.[80]

Redish describes the Court's decision to uphold the convictions in *Dennis* as "extraordinary" in light of "the majority's adoption of the Hand sliding-scale test . . . where the charge was not conspiracy to overthrow but merely conspiracy to advocate overthrow, and where no showing of imminence was made."[81]

Redish next examines the latest development of the clear and present danger test, *Brandenburg v. Ohio*.[82] Although the Court in *Brandenburg* did not mention the clear and present danger test by name, Redish explains, "it appeared to incorporate its meaning" by finding that the state cannot restrict " 'advocacy of the use of force or 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.' "[83]

This view, seemingly more protective of speech than *Dennis*, leaves important questions unanswered.[84] Redish asks:

---

79. *Id.* at 1171-72 (quoting *Dennis*, 341 U.S. 494).
80. *Id.* at 1172.
81. *Id.* at 1173.
82. 395 U.S. 444 (1969) (per curiam).
83. Redish, *supra* note 64, at 1174-75 (quoting Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam)).
84. *See id.* at 1175-76.

> [I]f the Court intended to be rigorous in requiring some 'imminence,' did it also intend to use this highly speech-protective test in cases that did not involve advocacy of 'ideological' crimes? It is difficult to imagine that the Court intended to protect solicitations to ordinary murder, but the fact remains that the Court used no language that tended to limit the requirement of imminence.[85]

A second question Redish perceives as unanswered by *Brandenburg* is whether the use of the disjunctive phrase "directed to inciting *or producing* imminent lawless action" meant the Court "intended to make possible convictions for indirect ('producing') as well as direct ('inciting') advocacy."[86] These questions will prove to be important in the analysis of *Rice v. Paladin Enterprises*,[87] the subject case of this Comment.

B. Constitutional Protection for the Media from Tort Liability

Professor Andrew B. Sims, in his article, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach*,[88] classifies cases in which plaintiffs have sued publishers in tort into four categories:[89]

> (1) where the injuries purportedly arose from media speech offering instructions for, thereby implicitly inviting participation in, an activity that was inherently dangerous; or which became dangerous because the instructions were erroneous (hereinafter the 'Instruction Cases'); (2) where the injuries purportedly arose as a consequence of obviously dangerous, reckless, and perhaps even unlawful, conduct in which the defendants actively encouraged or exhorted the speech recipient to engage (the 'Exhortation Cases'); (3) where the injuries purportedly arose from violence or from dangerous activity inspired by, but not actively encouraged by, the defendants' speech (the 'Inspiration Cases'); and (4) where violence against third-parties was supposedly facilitated by information provided by media defendants (the 'Facilitation Cases').[90]

---

85. *Id.* at 1176.
86. *Id.* (quoting *Brandenburg* 395 U.S. at 447) (emphasis added)).
87. 128 F.3d 233 (4th Cir. 1997).
88. 34 ARIZ. L. REV. 231 (1992).
89. *See id.* at 235.
90. *Id.*

Under Sims' classification scheme, *Rice v. Paladin Enterprises* would fall under the "facilitation" group.[91] However, Sims points out, the courts have analyzed each group by using the same three categories of First Amendment law: (1) *Brandenburg*'s version of the clear and present danger test; (2) invasion of privacy; and (3) limitations on recovery for defamation suits based on the public/ private concern distinction from *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[92] For purposes of this Comment, the second category, invasion of privacy, is not applicable and will not be discussed further.

Sims points out that most courts have applied the *Brandenburg* clear and present danger test to decide negligence suits under First Amendment law.[93] However, a literal reading of this test would result in perhaps too much protection of the media[94] because it is rare that a media defendant actually "advocates" any unlawful or dangerous conduct.[95] Besides this semantic difficulty, Sims suggests that there are several conceptual reasons why the *Brandenburg* test may be overprotective of the media in certain cases.[96]

First, the clear and present danger test, which culminated in *Brandenburg* has, since its inception, been almost solely used in cases involving prosecutions for "advocat[ing] crimes while voicing highly unpopular political views."[97] It was not until *Brandenburg* that the test became truly speech-protective.[98] Until then, almost every conviction under the clear and present danger test was upheld.[99]

---

91. Although the book in question, *Hit Man*, is basically an instruction manual on how to be successful in the contract killer business, Sims' "instruction cases" classification is reserved for cases in which injuries are suffered by the person receiving the information, as opposed to "facilitation cases," in which injuries are inflicted on a "third-party" by the person receiving the information. *Id.* at 235-36, 249.

92. *See id.* at 255-56 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985)).

93. *See id.* at 256.

94. *See id.* at 256-57.

95. *Id.* at 257.

96. *See id.*

97. *Id.* at 257-58. Sims cites several cases involving prosecutions of alleged communist activities, political overthrows, and impeding the national war effort. *See id.* at 258 n.211.

98. *See id.* at 258.

99. *See id.*

Another conceptual problem in applying the clear and present danger test to media defendants in physical injury cases is that *Brandenburg* may have been narrowly formulated for the facts of the case, that is, the specific words the speaker used at the KKK rally.[100] There the Court could have based its reversal of the conviction on a finding that the incitement was either not intended or not likely to bring about imminent unlawful conduct.[101] Both of the above conceptual problems suggest that because most media physical injury cases do not involve political issues, a test that has almost exclusively focused on political issues may be an inappropriate standard to use when it is arguably the political nature of the speech itself that calls for the increased protection.[102]

A final conceptual difficulty Sims discusses is the nature of the limitation on speech, which the government is attempting to impose in typical clear and present danger type cases as opposed to media physical injury cases.[103] As Sims points out:

> The *Brandenburg* test is, again, a limitation on the power of governments to impose prior restraints or subsequent punishment upon those who advocate unlawful actions. It is irrelevant whether the listeners responded and whether the unlawful actions or any injuries or damages consequential thereto, actually occurred. In the media physical injury cases, by comparison, the speech recipient or a third-party victim has already sustained injuries alleged to be the proximate result of the speech, and seeks compensation by way of damages under state tort law.[104]

Sims suggests that the high level of protection that *Brandenburg* grants may be appropriate when no unlawful or dangerous activities actually occur, yet may be overly protective in media physical injury cases.[105]

This problem of overprotection could be alleviated with a broader interpretation of the language of *Brandenburg*.[106] Sims's first suggestion is that *Brandenburg* could be interpreted

---

100. *See id.* at 259.
101. *See id.*
102. *See id.* at 260.
103. *See id.*
104. *Id.*
105. *See id.*
106. *See id.*

to apply to "the advocacy of actions that were 'dangerous' even if not technically 'unlawful,' as long as it was within the legislative power to criminalize the action."[107]

Next, Sims notes that by taking a cue from courts that have relaxed the imminency requirement in prosecutions for criminal solicitation, the same could be done for the imminency required in the *Brandenburg* test.[108] This suggestion figures prominently in the subject case of this Comment, when the murders took place approximately one year after the media defendant supplied the information used by the murderer.[109] However, although some tampering with the meaning of the language used in the *Brandenburg* test might make it more suitable for media physical injury cases, such tampering could result in a test that in reality is no longer the *Brandenburg* test at all.[110]

III. THE DISTRICT COURT OF MARYLAND'S GRANT OF SUMMARY JUDGMENT FOR DEFENDANT PALADIN ENTERPRISES AND THE FOURTH CIRCUIT'S DECISION TO REVERSE

A. *The District Court*

The district court viewed *Rice v. Paladin Enterprises* as purely a matter of First Amendment law.[111] The court recognized that the plaintiffs would have no recourse against Paladin if it found that *Hit Man* was protected by the First Amendment.[112] The court also recognized that this case's facts made "the [c]ourt's task . . . both novel and awesome," forcing it to "balance society's interest in compensating injured parties against the freedom of speech guaranteed by the First Amendment."[113]

---

107. *Id.* (citing Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 698-99; Redish, *supra* note 64, at 1179 n.91).

108. *Id.* at 261 n.228 (citing People v. Rubin, 96 Cal. App. 3d 968, 978, 158 Cal. Rptr. 488, 492-93 (1979), *cert denied*, 449 U.S. 821 (1980) ("[A]n offer of $500 to anyone 'who kills, maims, or seriously injures a member of the American Nazi Party,' made at a press conference in connection with a protest of a Nazi march planned for five weeks hence, could constitute solicitation to murder and was not protected by the First Amendment; 'imminent' under *Brandenburg* . . . .")).

109. *See* Rice v. Paladin Enter., 128 F.3d 233, 241 n.2 (4th Cir. 1997).

110. *See* Sims, *supra* note 88, at 262.

111. *See* Rice v. Paladin Enter., 940 F. Supp. 836, 840-41 (D. Md. 1996).

112. *See id.*

113. *Id.* at 840.

The district court listed the five categories of speech that receive limited First Amendment protection.[114] These are "(1) obscenity; (2) fighting words; (3) libel; (4) commercial speech and; (5) words likely to incite imminent lawless action."[115]

The court summarily dismissed the first three of the above five categories as inapplicable to the instant case.[116] The fourth, commercial speech, was given almost as short a treatment.[117] The court, finding that *Hit Man* could not be considered commercial speech, relied on the definition that "commercial speech is speech which does 'no more than propose a commercial transaction.' "[118] Although *Hit Man* was sold in a commercial transaction, the purpose of the book, as opposed to an advertisement describing the book, was not to encourage anybody to enter into a commercial transaction with Paladin.[119]

After concluding that *Hit Man* clearly did not fall into any of the previous four categories of speech that receive diminished First Amendment protection, the court stated that the only way *Hit Man* would not be protected was if it fell within *Brandenburg*'s incitement to imminent, lawless activity category.[120] The district court then addressed the plaintiff's *Brandenburg* arguments.[121]

---

114. *See id.* at 841.
115. *Id.* (citations omitted).
116. *See id.*
117. *See id.*
118. *Id.* (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).
119. *See id.*
120. *See id.*
121. *See id.* Plaintiffs actually advanced several arguments besides their *Brandenburg* ones. Their first argument, that "the First Amendment does not protect speech aiding and abetting murder," was given some consideration by the court. *Id.* at 841-43. Ultimately however, the court decided that due to the fact that Maryland had not yet extended the tort of aiding and abetting to circumstances similar to those of this case, it could not, as "[a] federal court sitting in diversity . . . create [a] new cause[] of action." *Id.* at 842. In fact, as the court of appeals pointed out, the district court's original opinion incorrectly stated that Maryland did not even *recognize* the tort of aiding and abetting *at all*, and thereby rejected plaintiff's first argument on this ground. *See* Rice v. Paladin Enter., 128 F.3d 233, 250 (4th Cir. 1997). It was only in its amended opinion, issued a week later, that the district court, after being informed by both parties that Maryland indeed did recognize such a tort, was forced to address the issue head-on. *See id.* The court of appeals' dissatisfaction with the lower court's handling of the issue is evident:

> [T]he district court was obliged to amend its memorandum opinion to acknowledge the overwhelming authority that Maryland does, in fact, recognize such a cause of action. However, rather than address then the

> numerous precedents holding that the First Amendment offers little protection against claims of aiding and abetting criminal conduct, which in its initial opinion the court had agreed were similar to the instant case, the district court thereafter merely added to its original memorandum opinion [a] single conclusory footnote sentence . . . that, "[a]lthough Maryland appears to recognize aider and abetter tort liability, it had never been applied to support liability in this context." . . . As evidence of the haste with which the revised analysis was undertaken, the amended opinion elsewhere still includes a statement of the district court's initial conclusion that Maryland does not provide a civil cause of action for aiding and abetting.

Id. at 250-51 & n.5. The court of appeals suggested that:

> Whatever doubts the district court may have harbored about its interpretation of Maryland aiding and abetting law were almost certainly eased because it concluded alternatively (albeit in dicta) that *Hit Man* is entitled to the protections of *Brandenburg* in any event because it is a mere instructional manual for, and not an incitement to, murder.

Id. at 250.

Analyzing the motion for summary judgment as applied to the claim of civil aiding and abetting, the court of appeals concluded that plaintiffs had stated a cause of action under Maryland law and had established genuine issues of material fact regarding the cause of action, and thus were entitled to proceed to trial. *See id.* at 252.

The plaintiffs next argued that the rule from *New York Times v. Sullivan*, 376 U.S. 254 (1964), that "a public official must show actual malice or that a statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false," was applicable in this case. *Rice*, 940 F. Supp. at 843. Plaintiff's reasoned that:

> [I]f the First Amendment permits defendants guilty of knowing or reckless misconduct to be held liable in tort for millions of dollars in damages when their publications cause injury to reputation and its attendant emotional harm as in the *New York Times* case, then of course the First Amendment must permit parallel liability in tort when publications cause physical injury and death.

Id.

In order to make the *New York Times* rule better fit their case, plaintiffs suggested a slight reworking of the rule. *See id.* at 844. Their suggestion was that the rule as applied in this case should be that if plaintiffs could show that Paladin acted with "knowing or reckless disregard for human life," then the First Amendment would not bar liability. *Id.* The court did not accept plaintiffs invitation to rework the rule in this way. *See id.* The court stated its view that the *New York Times* rule was created in a case involving speech that could injure a particular person's reputation and, thus, did not apply to this case. *See id.* The court of appeals did not address this issue at all in its opinion. *See Rice*, 128 F.3d 233.

Plaintiff's last argument, that the court should follow decisions in two cases involving suits against *Soldier of Fortune Magazine*, was quickly rejected by the district court. *See Rice*, 940 F. Supp. at 848. In those cases, the defendant magazine was unsuccessful in warding off damage claims with the First Amendment defense. *See id.* (citing Braun v. Soldier of Fortune Magazine, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993); Norwood v. Soldier of Fortune Magazine, 651 F. Supp. 1397 (W.D. Ark. 1987)). However, the district court here found those cases "inapposite because they involve[d] commercial speech," which is entitled to less First

Plaintiffs first contended that the *Brandenburg* standard should not even apply to this case, because it is a standard "used in cases dealing with speech on issues of social or political concern, usually in the context of demonstrations and rallies, in which authorities are concerned that matters are about to erupt into violence."[122] The district court, however, maintained that *Brandenburg* was applicable for two reasons: first, because this case was about "speech which advocate[d] or [taught] lawless, activity, in this case murder," and second, because the court did not agree that *Brandenburg* was "inherently limited to political speech cases."[123] In support, the district court cited several "copycat" cases in which media defendants were sued because information they had disseminated somehow caused or enabled someone to injure themselves or another.[124] In these cases, the district court believed, *Brandenburg* was appropriately applied.[125]

In performing the *Brandenburg* analysis, the district court relied heavily on two copycat cases, *Zamora v. C.B.S. Inc.*[126] and *Yakubowicz v. Paramount Pictures Corp.*,[127] both of which involved allegations by plaintiffs that violence portrayed on TV or film was the cause of injury or death.[128] In both cases, plaintiffs argued that after watching particularly violent programs, a viewer imitated the violence portrayed and this resulted in harm.[129] The district court acknowledged that "the programs involved in these cases were not considered to have a 'how-to' format like the subject book [*Hit Man*]."[130] Interestingly,

---

Amendment protection. *Id.* at 848 (citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

122. *Rice*, 940 F. Supp. at 845.

123. *Id.* at 845-46.

124. *Id.* at 846 (citing Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); Zamora v. C.B.S. Inc., 480 F. Supp. 199 (S.D. Fla. 1979); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989); McCollum v. C.B.S. Inc., 202 Cal. App. 3d 989 (Ct. App. 1988); De Filippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982); Olivia N. v. N.B.C., Inc., 126 Cal. App. 3d 488 (Ct. App. 1981), *cert. denied*, 458 U.S. 1108 (1982)).

125. *See id.*

126. 480 F. Supp. 199 (S.D. Fla. 1979).

127. 536 N.E.2d 1067 (Mass. 1989).

128. *See Rice*, 940 F. Supp. at 846.

129. *See id.*

130. *Id.*

however, the district court "s[aw] no difference" between the two types of cases.[131]

Quoting *Yakubowicz*, the district court added: " '[a]lthough the film is rife with violent scenes, it does not at any point exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers.' "[132] Evidently the *Yakubowicz* court considered this to be the reason why "incitement" was lacking in that case.[133] However, although the district court stated that *Yakubowicz* was thereby applicable to *Rice v. Paladin*, its own language earlier in the opinion seems contradictory.[134] As previously mentioned, the district court stated that *Brandenburg* should apply in this case because the case "involves speech which *advocates* or *teaches* lawless activity."[135] Therefore it is unclear how the district court could make use of the result in *Yakubowicz* to help decide the present case. This is especially true when one takes into account that the *advocacy* of unlawful or dangerous conduct does not by itself merit lower protection under *Brandenburg*,[136] but only when the "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[137]

The plaintiffs argued that such cases were inapplicable because the media defendants "did not intend that others follow or act upon their depictions."[138] To bolster their argument, plaintiffs pointed out that defendants "conceded that they intended that their publications would be used by criminals to plan and execute murder as instructed in the manual."[139] The district court rejected this argument because:

> Defendants clarif[ied] their concession by explaining that when they published, advertised and distributed both *Hit Man* and *Silencers*, they knew, and in that sense "intended," that the books would be purchased by all of the categories of

131. *Id.*
132. *Id.* (quoting Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1071 (Mass. 1989)).
133. *See id.*
134. *See id.*
135. *Id.* at 845 (emphasis added).
136. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasis added).
137. *Id.*
138. *Rice*, 940 F. Supp. at 846.
139. *Id.*

> readers previously described and used by them for the broad range of purposes previously described.[140]

The district court did not elaborate on why this "clarification" of the defendant's concession should have the effect of neutralizing their stated intent (or at least one of them) that criminals would use the book as an aid in committing murder.

The district court attempted to clarify the issue of intent when it recognized that even if the defendants intended their book to be used as an aid in committing crimes, unless the defendant intended that crime would be an imminent result of the book, the *Brandenburg* intent was not met.[141] As the district court stated: "Defendants must have intended that [the murderer] would go out and murder Mildred Horn, Trevor Horn, and Janice Saunders immediately."[142] The district court found that this level of intent was not met.[143]

The district court next addressed the issue of whether *Hit Man* was likely to incite or produce imminent lawless action under *Brandenburg*.[144] The court noted that 13,000 copies of *Hit Man* had been sold nationwide and this was the only known case of someone using the information to actually commit a murder.[145] This and the fact that Paladin put disclaimers both on the advertisement for the book and on the book itself, saying " '[f]or academic study only' " and " '[f]or information purposes only!,' " respectively, was enough for the district court to find that the book was not likely to incite the violence that it did in this one case.[146]

The district court also found that the context of the speech contained in *Hit Man*—the very fact that it was in book form, and therefore would take time to read—made it unlikely that it could be considered as intended to produce any imminent lawless activity at all.[147] The district court found that such information was, "[a]t worst . . . nothing more than advocacy of illegal action at some indefinite future time."[148]

---

140. *Id.*
141. *See id.* at 847.
142. *Id.*
143. *See id.*
144. *See id.*
145. *See id.* at 848.
146. *Id.*
147. *See id.*
148. *Id.*

The district court therefore found that the publishing of *Hit Man* did not meet the *Brandenburg* test and thus the state could not restrict its publication.[149] But some of the district court's wording gives some cause to wonder if the court applied the rule correctly. The court stated, "applying the standard in *Brandenburg*, and considering the content and the context of the speech in *Hit Man*, . . . the book does not constitute incitement to imminent lawless action."[150] The question, however, is not whether the book *did* incite imminent lawless activity, but whether it was "directed to inciting" such action, and was "likely" to incite such action.[151] The district court looked at the result of the speech, whereas the *Brandenburg* court looked at the speech at the time it was made, regardless of whether lawless or dangerous activity resulted or not.

B. *The Fourth Circuit Court of Appeals*

The court of appeals, after reversing the lower court's finding that Maryland would not impose civil liability for aiding and abetting murder on these facts,[152] went on to examine whether a *Brandenburg* analysis was called for to determine whether such civil liability was foreclosed by First Amendment protection.[153] The court of appeals rejected the district court's copycat case analogy, in part at least because it found that "the district court was without authority to allow Paladin to alter the parties' stipulation unilaterally."[154] Moreover, after considering Paladin's stipulation that it "intended *Hit Man* to be used by criminals and would-be criminals to commit murder for hire in accordance with the book's instructions," and examining, chapter by chapter, in detail, the book itself, the court of appeals found that *Hit Man* exhibited much more than mere advocacy, instead rising to the level of "specific intent" to aid and abet the contract killings here involved.[155] The court stated:

149. *See id.*
150. *Id.*
151. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
152. *See* Rice v. Paladin Enter., 128 F.3d 233, 250 (4th Cir. 1997); *see also supra* note 121.
153. *Rice*, 128 F.3d at 255-65.
154. *Id.* at 253.
155. *Id.* at 255-56.

> [O]ne finds in *Hit Man* little, if anything, even remotely characterizable as the abstract criticism that Brandenburg jealously protects. *Hit Man*'s detailed, concrete instructions and adjurations to murder stand in stark contrast to the vague, rhetorical threats of politically or socially motivated violence that have historically been considered part and parcel of the impassioned criticism of laws, policies, and government indispensable in a free society and rightly protected under *Brandenburg*.[156]

Addressing the district court's finding that *Hit Man*'s "disclaimers" signaled that Paladin did not actually intend that its books be taken literally, the court of appeals disagreed with this interpretation of Paladin's motives, finding that these disclaimers were included not to dissuade, but "to titillate" readers.[157] The court of appeals stated:

> There is nothing even arguably tentative or recondite in the book's promotion of, and instruction in, murder. To the contrary, the book directly and unmistakably urges concrete violations of the laws against murder and murder for hire and coldly instructs on the commission of these crimes. The Supreme Court has never protected as abstract advocacy speech so explicit in its palpable entreaties to violent crime.[158]

The court of appeals thus deemed *Brandenburg* inapplicable,[159] an argument the plaintiffs made unsuccessfully in the lower court.[160] The court of appeals understood the lower court's decision as resting on the incorrect premise that *Brandenburg* differentiated the advocacy or teaching of lawlessness from incitement or encouragement of lawlessness.[161] The court of appeals noted that "[t]he district court thus framed the issue before it as 'whether *Hit Man* merely advocates or teaches murder or whether it incites or encourages murder.' "[162] Explaining why it thought this formulation of the issue was flawed, the court of appeals maintained that

---

156. *Id.* at 262.
157. *Id.* at 263, n.10.
158. *Id.* at 263.
159. *See id.* at 262-63.
160. *See* Rice v. Paladin Enter., 940 F. Supp. 836, 845 (D. Md. 1996).
161. *See Rice*, 128 F.3d at 263.
162. *Id.*

Brandenburg's protection was not so broad.[163] As the court stated:

> The Court in *Brandenburg* . . . did not hold that "mere teaching" is protected; the Court never even used this phrase. And it certainly did not hold, as the district court apparently believed, that all teaching is protected. Rather, however inartfully it may have done so, the Court fairly clearly held only that the "mere abstract teaching" of principles . . . and "mere advocacy" . . . are protected.[164]

The court of appeals interpreted "advocacy" to mean "speech that is part and parcel of political and social discourse—which was the only type of speech at issue in *Brandenburg* . . . ."[165] It refused to read *Brandenburg* as applying to non-advocacy speech, due to its belief that this would "revolutionize the criminal law . . . by subjecting prosecutions to the demands of *Brandenburg*'s 'imminence' and 'likelihood' requirements whenever the predicate conduct takes, in whole or in part, the form of speech."[166] This interpretation, together with the court of appeals' earlier finding that *Hit Man* was more than "mere advocacy," foreclosed the necessity of applying *Brandenburg* to the speech in *Hit Man*.[167] Thus, withholding *Brandenburg*'s protections from Paladin's book, the court of appeals saw no barrier to the plaintiffs maintaining their civil suit against the publisher.[168]

IV. ANALYSIS OF THE TWO COURTS' DECISIONS

The district court in *Rice v. Paladin Enterprises* found that the only applicable standard by which to measure *Hit Man* was the test from *Brandenburg*.[169] The plaintiffs in the case, however, suggested that *Brandenburg* was ill-suited to a case such as this because here the speech in question was not of a political nature.[170] The plaintiffs' argument finds support both in First

163. *See id.*
164. *Id.* (citations omitted).
165. *Id.* at 264.
166. *Id.* at 265.
167. *See id.*
168. *See id.* at 267.
169. Rice v. Paladin Enter., 940 F. Supp 836, 841 (D. Md. 1996).
170. *See id.* at 845.

Amendment commentary,[171] and more importantly, in the Court of Appeals for the Fourth Circuit.

The district court claimed that *Brandenburg* was the right standard for two reasons: first, because this case "involve[d] speech which advocate[d] or [taught] lawless activity," and second, because "[*Brandenburg*] is not inherently limited to political speech cases."[172] These reasons are not wholly convincing. The first is little more than question begging, and moreover, insufficient according to the court of appeals to trigger

---

171. Redish, *supra* note 64, at 1175-76; Sims, *supra* note 88, at 260. Sims' concern was that the *Brandenburg* test's ultra-protective nature was formed with governmental attempts to silence controversial political views in mind. *See* Sims, *supra* note 88, at 257-58. In a case with no political overtones whatsoever (such as *Rice v. Paladin*), the *Brandenburg* test may be overly protective, leaving the injured parties with no legal recourse for damages caused. *See id.*

Plaintiffs not only questioned whether *Brandenburg* should be applied in this case, they also offered the district court an alternative standard—that of New York Times v. Sullivan, 376 U.S. 254 (1964). *See Rice*, 940 F. Supp. at 841. The district court rejected this proposition because *New York Times* involved an injury to reputation—defamation, whereas the present case involved actual physical injury. *See id.* at 844. This reason oversimplifies plaintiff's argument.

Plaintiffs were suggesting that due to the imperfections of applying either the *Brandenburg* test or a straightforward *New York Times* test to their case, perhaps a modification of *New York Times* would be the solution. *See id.* at 843-44. Hence, plaintiffs proposed that the *New York Times* standard—that "a public official must show actual malice or that a statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false," *New York Times*, 376 U.S, at 279—be adapted to this case by modifying it to require that a plaintiff show that a defendant acted with "knowing or reckless disregard for human life." *Rice*, 940 F. Supp. at 843.

The district court dismissed this argument for the simple reasons that plaintiffs could not show any authority for it. *See id.* A district court such as this would justifiably be hesitant to stretch the law as plaintiffs requested, especially in a case with constitutional dimensions.

If the *New York Times* standard were to be applied, it is likely that the *Gertz/Greenmoss* cases would also come into play, as Sims points out. *See* Sims, *supra* note 88, at 265-66 (referring to Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) and Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985)). The question that a court would then be required to answer is whether a book such as *Hit Man* could be considered a matter "of public concern." *Id.* at 267. The fact that defendants claim that the books in question are marketed to authors who write about crime, law enforcement personnel who want to learn about criminal methods, readers who merely enjoy reading about crime, people who fantasize about committing crimes without actually committing them, and criminologists who study criminal mentality, would, if true, tend to place *Hit Man* in the public concern category. Joint Statement of Facts at 3, Rice v. Paladin Enter., No. AW-95-311 (S.D. Md. filed 1996). If so, defendants would be immune from liability.

172. *Rice*, 940 F. Supp. at 845-46.

Brandenburg. The second only gives a reason why *Brandenburg could* be used in this case, not why it *must*.

Under *Brandenburg*, the result in the district court—no liability imposed on the publisher—was hardly surprising. This is due mainly to the finding by the district court of a lack of intent on the part of Paladin that its books actually be used to commit murder. Paladin's "clarified" stipulated intent was to maximize profits by selling as many copies of the book as possible.[173] This hardly qualifies as intentionally causing the murders. However, as the court of appeals indicated, Paladin's original stipulation, which the district court should not have allowed to be altered unilaterally, was that it intended *Hit Man* to be used by criminals to engage in the conduct described therein. Additionally, the district court may have over-simplified this issue when it found "no difference" between movies or television programs that depict violence that indirectly leads to injury[174] and *Hit Man*, a self-proclaimed instruction manual.

Similarly, the district court's treatment of the imminence issue may have been too simplistic for the facts of this case. If the court actually meant that *Brandenburg* could not be satisfied unless Perry, upon finishing reading *Hit Man*, put the book down and went to kill his victims immediately,[175] then perhaps the test is too protective of undeniably dangerous speech.

Because it found that *Brandenburg* was inapplicable to the present case, the court of appeals did not have to provide a full-blown analysis of the intent, imminence, and likelihood requirements that *Brandenburg* prescribes. But the court's opinion gives a good indication of how it would decide these issues if required to, albeit partially in dictum:

> Even if the district court were correct in its holding that *Hit Man* is speech somehow deserving of the protections of *Brandenburg*, we would yet be constrained to reverse the court's judgment. Given Paladin's remarkable stipulations that it knew that its murder manual would be used by murderers, would-be murderers, and other criminals "upon receipt" to assist them in the planning, commission, and cover up of their crimes, that the publisher intended that the

173. *See* Joint Statement of Facts at 3, Rice v. Paladin, No. AW-95-311 (S.D. Md. filed 1996).

174. *See Rice*, 940 F. Supp. at 846.

175. *See id.* at 847.

> manual would be so used, and that *Hit Man* actually assisted Perry's commission of the crime of murder, we could not conclude as a matter of law that *Hit Man* is not directed to inciting and likely to incite imminent lawlessness.[176]

Unlike the district court, the court of appeals would find imminence in the fact that "upon receipt" of *Hit Man*, readers would begin, at the very least, "planning" murder.[177] Undeniably, contract killings take time to plan and execute. In this case, the district court could have chosen to look to when the first actions leading to the murders occurred, perhaps when Perry used information from *Hit Man* to solicit clients. Other courts have relaxed the imminency requirement for criminal solicitation prosecutions.[178] Because criminal solicitation is in itself a crime, at the moment the solicitation is complete, a "lawless action" has taken place. As Professor Redish has pointed out, this possible oversight in the *Brandenburg* test could have recurrent ramifications for cases similar to this one.[179]

CONCLUSION

The decisions by the district court and court of appeals could hardly be more different. The district court applied *Brandenburg* and found that the test protected Paladin. The court of appeals found *Brandenburg* inapplicable and thereby found Paladin vulnerable to a civil suit. Reinforcing the difference between the courts is the court of appeals' dictum that even if it were to have applied *Brandenburg*, it would have allowed the case to go to trial rather than grant summary judgment as the district court did.

Plaintiffs and commentators both argued that *Brandenburg* was ill-suited to the facts of this or similar cases. Indeed, *Brandenburg* has almost exclusively been applied to speech that is in at least some way political. One can wonder, if Paladin added another chapter to its book, entitled "Why Contract Killing is Necessary for the Good of Society," whether the book would then cross into the promised land of *Brandenburg*'s protection. Yet, something seems odd if a book is entitled to less protection

176. Rice v. Paladin Enter., 128 F.3d 233, 264 n.11 (4th Cir. 1997).
177. *Id.*
178. *See* Sims, *supra* note 88, at 261.
179. *See* Redish, *supra* note 64, at 1175-76.

because it does not say "You *should* kill," but rather, "If *you choose* to kill, here's how we think you should do it."

Without the protection of *Brandenburg*, publishers like Paladin are subject to the criminal and civil laws of aiding and abetting. It is unlikely that many people will mourn the loss of *Hit Man* from their stock of potential reading material if Paladin decides that publishing the book is not in its economic best interest. But perhaps an inadequacy exists in the law if publishers who are merely out to profit by selling their wares to the largest possible audience can be punished for the sins of their criminally-bent readers.

Robert J. Coursey III