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Taming Terrorists but Not "Natural Born Killers"

S. Elizabeth Malloy
University of Cincinnati College of Law, betsy.malloy@uc.edu

TAMING TERRORISTS BUT NOT "NATURAL BORN KILLERS"

by S. Elizabeth Wilborn Malloy[1]

It may seem surprising, but there are many publications available for purchase which provide explicit instructions on how to perform acts which can only be described as criminal, and from which no social good comes.[2] Not surprisingly, some of the individuals who have read these publications put the ideas contained in the material into action. The victims have decided that civil lawsuits against the publishers of this material would help deter its publication and the subsequent harm it causes. In response, the publishers have argued that the First Amendment protects them from such lawsuits. Should this material receive such a high level of First Amendment protection that the publisher is immune from these civil lawsuits?

Consider, for example, a book providing detailed instructions on how to construct, place and detonate an explosive device to wreak maximum havoc in a public place. A publisher that prints and distributes such a book, is at best grossly indifferent to the prospect that such publications will result in harm to others. Under the common law of torts, you might expect that the victims of such an act could recover damages from the publisher, either for an intentional tort or negligence.[3] The First Amendment, however, has been used to block the

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1. Associate Professor, University of Cincinnati College of Law; J.D., 1991 Duke Law School; B.A., 1988, College of William and Mary. Many thanks to the staff of the *Northern Kentucky Law Review* for their help with this article.

2. Many such "how to" manuals are now easily available to the public. For an illustrative listing of some of the available books describing how to engage in criminal activity, see Amitai Etzioni, *Is Information on How to Make a Bomb More Harmful than Porn?*, CHICAGO TRIBUNE, 31 (August 24, 1995) (listing numerous books available through mail order, including the following: *Be Your Own Undertaker: How to Dispose of a Dead Body; Deadly Brew: Advanced Improvised Explosives; The Ancient Art of Strangulation; The Poor Man's Sniper Rifle; 21 Techniques of Silent Killing; The Home and Recreational Use of High Explosives; Kill Without Joy: The Complete How-to-Kill Book; Guerrilla's Arsenal: Advanced Techniques for Making Explosives and Time-Delay Bombs; Ultimate Sniper; The Big Book of Mischief; Silent But Deadly: More Homemade Silencers from Hayduke the Master; How to Build Practical Firearm Suppressors: An Illustrated Step-by-Step Guide;* and *The Terrorist Handbook).*

3. *See* W. PAGE KEETON. ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 (discussing the elements of neglience). For example, if a negligent physical act causes injury, the tort-feasor, absent a defense, is usually liable. *Id.* at 165. If, however, that same injury is the result of some form of speech, the First Amendment may insulate the tort-feasor from liability. *See, e.g.*, Cardozo v. True, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977) (plaintiff injured as a result of cookbook's

imposition of tort liability in such cases.[4] Because a victim's ability to recover remains doubtful under current law, a would-be publisher of such material faces very little deterrent to publishing and disseminating it.

As a matter of basic economics, it is not logical that the victim of a horrible crime shoulder the social costs of a book providing instruction to the perpetrator of that crime. In the absence of the First Amendment, establishing liability would be relatively easy. Tort law would allow victims to recover for the social harms associated with the criminal activity.

The critical question is why *should* the First Amendment preclude the application of traditional tort principles in this type of situation? What redeeming purpose do these publications serve that outweighs the need for a government to protect citizens? Such information is far removed from the good faith criticism of public officials that lies at the heart of *New York Times v. Sullivan*[5] and its progeny. It makes sense to protect the press from government censorship or undue influence. Protecting criticism of public officials and public figures serves core concerns of the First Amendment. Protecting those who advocate or teach criminal behavior does not.[6]

Because plaintiffs can recover damages for certain speech activities – i.e., fraud, solicitation, and defamation – it is surprising that courts have not acted to regulate speech that advocates or facilitates harm to others.[7] If the First Amendment permits liability for the nonphysical harm of defamation, then the

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inadequate warnings regarding poisonous ingredients used in recipe), *cert. denied*, 353 So. 2d 674 (Fla. 1977). The First Amendment applies because common law tort liability is a form of state action. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (declaring that "[t]he test is not the form in which state power has been applied, but, whatever the form, whether such power has in fact been exercised."). Although this article argues that the First Amendment should not bar liability for harm advocacy speech, it does not suggest that it is completely inapplicable. *Cf.* W. Tarver Rountree, *Constitutional Law*, 33 MERCER L. REV. 51, 63 (1981); Donald Wallis, *"Negligent Publishing": Implications for University Publishers*, 9 J.C. & U.L. REV. 209, 225 (1982).

4. *See infra* notes 11-119 and accompanying text.

5. *See* New York Times v. Sullivan, 376 U.S. 254 (1964).

6. Note also that imposing liability for speech that advocates harm is entirely viewpoint neutral: the aims or objectives of the publisher are irrelevant to the question of imposing liability for the social harm resulting from the speech.

7. For a full discussion of the impact of the *Sullivan* case, see BRUCE W. SANFORD, DON'T SHOOT THE MESSENGER: HOW OUR GROWING HATRED OF THE MEDIA THREATENS FREE SPEECH FOR ALL OF US 176-79 (1999).

First Amendment should also certainly permit liability in tort when publications facilitate physical injury or death.

Nevertheless, courts confronted with cases involving instructional speech that advocates or facilitates criminal behavior have concluded that such speech enjoys strong First Amendment protection.[8] Free speech undoubtedly imposes social costs on the community.[9] The fact that someone engages in speech activity or expressive conduct does not automatically insulate them from liability for the social harms caused by their speech activity or expressive conduct. The question is more subtle: sometimes the costs are taxed against the speaker, and other times they are not.

This squarely presents the question of whether and when the government may assign the social costs of speech activities against speakers. Someone falsely shouting "fire" in a crowded theater can be made to pay, whereas the street minister who distributes leaflets which are later dropped on the street creating aesthetic blight, cannot. Between these two points lies a continuum.

This Article will explore the possibility of shifting or sharing the liability stemming from criminal activities to those who provide detailed directions on how to commit those acts, when the publication in question has no other redeeming value. This Article concludes that in some limited circumstances, the First Amendment should not preclude the imposition of civil liability for those who write and distribute speech that both advocates and facilitates harm to others.[10]

Part I of this Article reviews the First Amendment and discusses the *Brandenburg* test and its potential application to situations involving speech advocating socially harmful activity. Part II argues that this approach is poorly suited for dealing with the problems inherent in such harm-promoting speech. By accommodating only considerations that arise from the imminence of the harm, and not the nature of the speech itself, the courts have not permitted individuals to recover in tort for harm proximately caused by such speech and

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8. *See infra* notes 11-119 and accompanying text.

9. For an excellent discussion of the need to re-think whether victims of speech-related harms should be required to "pay the price" of free speech, see Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1325 (1992) (arguing that once we uncouple the freedom of speech from the compensation (literally or figuratively) of the victim, we will see).

10. For a discussion of some of these concepts, *see* S. Elizabeth Wilborn Malloy, Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, WM & MARY L. REV. (2000).

intended by the speaker to cause such harm. Part III suggests that the recognition of this new category of speech would permit courts to better address the conflict between society's need to protect its citizens from violence and the First Amendment value of free expression and democratic deliberation.

I. THE FIRST AMENDMENT AND MEDIA VIOLENCE

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[11] In turn, the Fourteenth Amendment's due process clause incorporates a free speech guarantee identical to the First Amendment's guarantee.[12] The text, although important, does not on its face resolve specific free speech questions: the precise scope of "the freedom of speech" is something that reviewing courts must resolve on a case-by-case basis.[13]

The contemporary First Amendment speech categories do not adequately address the social costs associated with speech intended to facilitate anti-social behavior. When addressing the damage from speech that advocates harm, the federal courts routinely have applied the *Brandenburg* test, a test designed to protect political speech and the abstract advocacy of violence or revolution.[14] *Brandenburg* holds that speech cannot be the basis for civil or criminal sanctions unless it both advocates lawless conduct and poses a grave risk of actually inciting imminent harm.[15] Because instructional books, songs, and movies do

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11. U.S. CONST. amend. I. The First Amendment is made applicable to the states through the Fourteenth Amendment. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

12. *See* Near v. Minnesota, 283 U.S. 697, 707 (1931); Gitlow v. New York, 268 U.S. 652, 666 (1925). The Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life, liberty or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see also* Toni Massaro, *Reviving Hugo Black? The Court's "Jot for Jot" Account of Substantive Due Process*, 73 N.Y.U.L. REV. 1086 (1998).

13. *See* WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 21-49 (1984).

14. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

15. *Id.* at 447. In *Brandenburg*, the Court offered extremely broad protection to political dissent and required that the government meet three different criteria to regulate such speech. First, the

not usually by their nature prompt individuals to immediate action, such materials generally will not meet *Brandenburg's* imminent harm requirement. This test demands that the harmful speech cause an individual to act on impulse, without rational thought.[16] That is to say, *Brandenburg* addresses speech activity designed to persuade someone to immediately engage in an unlawful act, not speech designed to facilitate the commission of an unlawful act by a person who has already decided to act.

Applying *Brandenburg*, courts generally have held speech advocating harm to be constitutionally protected expression, thereby denying any effective remedy to injured plaintiffs. To address speech that does not produce imminent harm but nevertheless advocates harm in a fashion that directly facilitates the realization of the harm (perhaps at some later time), courts should develop a new category of speech that more appropriately weighs society's interest in protecting its citizens from socially harmful activities against the First Amendment's protection of free expression. As explained more thoroughly below, *Brandenburg*, properly understood, does not address speech that attempts to facilitate or assist lawless action, but rather governs abstract exhortations to lawless action which might incite a sufficiently susceptible person to action.[17]

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speaker must promote not just any lawless action, but "imminent" lawless action. *Id.* at 447. Second, the imminent lawless action must be highly "likely" to occur. *Id.* Third, the speaker must intend to produce imminent lawless action. *Id.* (stating that the speech must be "directed to inciting or producting imminent lawless action").

16. *Brandenburg*, 395 U.S. at 447-48 ("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"); Noto v. United States, 367 U.S. 290, 297-98 (1961) ("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.").

17. *See id.* at 447; *see, e.g.*, Herceg v. Hustler Magazine, 814 F.2d 1017 (5th Cir. 1987) (holding that a magazine article on "auto-erotic asphyxiation" did not incite adolescent to perform act that led to death by hanging since the article included several warnings, and imposition of civil liability would violate First Amendment); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1071 (Mass. 1989) (holding that a film depicting gang life did not constitute unprotected incitement because, "[a]lthough . . . rife with violent scenes, it [did] not at any point exhort, urge, entreat, solicit, or . . . encourage unlawful or violent activity"); McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 1001 (Cal. Ct. App. 1988) (stating that "there is nothing in . . . [the] songs which could be characterized as a command to an immediate suicidal act").

Thus, *Brandenburg* speaks only to the specific subject of speech advocating harm, and not to the entire category of media violence.[18]

A. The Brandenburg *Clear and Present Danger/Imminence Test*

The Supreme Court announced the current general test for advocacy of lawless action in *Brandenburg v. Ohio*.[19] Clarence Brandenburg was a leader of the Ku Klux Klan ("KKK") who had invited the local press to attend a KKK rally.[20] At the rally, he gave a somewhat incoherent speech in which he proclaimed that the KKK was "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."[21] As a result of his speech, the defendant was arrested for advocating criminal activity in violation of Ohio law.[22]

In reversing the defendant's conviction, the Supreme Court revised the "clear and present danger" test.[23] The Court recognized that the then predominant

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18. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969).

19. *Brandenburg*, 395 U.S. at 447.

20. *See id.* at 444-45.

21. *Id.* at 446.

22. *Id.* at 445. The statute at issue in that case prohibited:

> "[A]dvocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform . . . and voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Id. (quoting OHIO REV. CODE ANN. § 2923.13 (repealed 1974)).

23. *Brandenburg*, 395 U.S. at 447. The clear and present danger test was first articulated in Schenck v. United States, 249 U.S. 47, 52 (1919) (stating that "[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."). *See* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (stating that speech cannot be restricted under clear and present danger test unless it "would produce or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent."), *overruled in part by*, Brandenburg v. Ohio, 395 U.S. 444 (1969). The traditional clear and present danger test was relied upon to uphold government suppression of political speech on a number of occasions. *See, e.g.*, Frohwerk v. United States, 249 U.S. 204 (1919); Dennis v. United States, 341 U.S. 494 (1951) (upholding conviction of members of Communist Party, which advocated violent overthrow of federal government).

clear and present danger test allowed the government to suppress undesirable political views simply by invoking the speech's "tendency to lead to violence."[24] To ensure greater protection of political speech and less opportunity for government pretext, the *Brandenburg* Court focused on whether the speech at issue presented a temporally imminent danger, stating:

> [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.[25]

The Court emphasized that, "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."[26] Thus, under *Brandenburg*, advocacy of violence can be prohibited only when a speaker (1) advocates imminent illegal conduct; (2) intends to incite either the use of force or illegal conduct; and (3) is highly likely to incite such conduct.[27] Applying this test, the Court found that the words spoken by the Klansman amounted to mere abstract advocacy of lawlessness.[28] Accordingly, the Ohio statute that purported to punish such speech was itself unconstitutional.[29]

Since *Brandenburg*, the imminence requirement has become the central focus of the test.[30] For instance, in *Hess v. Indiana*,[31] the Court reversed the conviction of an anti-war demonstrator who yelled, "[w]e'll take the fucking

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24. *Brandenburg*, 395 U.S. at 447; *see also* Hess v. Indiana, 414 U.S. 105, 109 (1973). This concern relates back to cases applying the clear and present danger test in a relatively weak form. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951). Justice Douglas so feared a "bad tendencies" understanding of the clear and present danger test that he rejected the test entirely as being too unreliable in affording protection to core political speech. *See* Brandenburg, 395 U.S. at 453 (Douglas, J., concurring).

25. *Brandenburg*, 395 U.S. at 447.

26. *Id.* at 448.

27. *Id.*

28. *Id.* at 448-49.

29. *Id.* at 449.

30. *See* Hess v. Indiana, 414 U.S. 105 (1973); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

31. 414 U.S. 105 (1973).

street later (or again)."[32] The Court held that this language amounted at most to the "advocacy of illegal action at some indefinite future time."[33] Because the evidence showed that Hess's statement was an exclamation rather than being directed specifically at any group, and because no evidence existed that his statement was intended and likely to produce imminent disorder, the statement enjoyed constitutional protection.[34]

Similarly, in *NAACP v. Claiborne Hardware Company*,[35] the Supreme Court set aside an award of damages based on a NAACP boycott of white merchants.[36] In the course of the boycott, one NAACP official had proclaimed in a public speech that "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck."[37] The Court acknowledged that the speaker in question had used strong language, but concluded that the speech essentially was an impassioned plea for support of the boycott.[38] Nevertheless, if actual outbreaks of violence had followed, the Court suggested that a substantial question would exist regarding whether the speaker could be held liable for the resulting damages.[39] Because the only outbreaks of violence took place weeks or months later, the Court held that no liability could attach.[40] Advocates must be free to make spontaneous emotional appeals without carefully weighing their words, and such appeals constitute protected speech when they do not immediately incite lawless action.[41]

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32. *See Id. Hess* involved a statement made during a protest by one of the protesters that "We'll take the fucking street later." *Id.* at 106. The statement was made while the protesters were dispersing. *Id.* at 107. The speech clearly advocated an illegal action. *Id.* at 108. However, the Court held that although the statement advocated an illegal action, it advocated such an action at an undefined future date. *Id.* It was not an action to be taken in the near future, and thus did not meet the imminence requirement. *Id.* at 108-09.

33. *Id.* at 108.

34. *Id.* at 108-09.

35. 458 U.S. 886 (1982).

36. *Id.*

37. *Id.* at 902.

38. *Id.* at 928.

39. *Id.*

40. *Id.*

41. *Id.* In addition, the Court noted that the speaker tempered his impassioned rhetoric with the following remarks: "I am not going to lay out in the bushes and shoot no white folks. That's wrong. I am not gonna go out here and bomb none of them's home. That's not right. . . . Be courteous now. Don't mistreat nobody. Tell them in a nice forceful way, the curfew is going to be

One should note that *none* of these cases involve efforts to teach listeners how to commit specific illegal acts against particular persons or groups.[42] Neither the Klan, the anti-war protestor, nor the NAACP were conducting a seminar in how to make and successfully toss a Molotov cocktail.[43] When speech activity is hyperbolic and advocates some ambiguous lawless action at an indefinite time in the future, it presents very little real risk to the community.[44] The social cost of such speech activity is de minimis.[45]

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on until they do what we ask them." *Id.* at 939.

42. *See supra* notes 17-35 and accompanying text.

43. *Id.*

44. *See generally* Bradenburg v. Ohio, 395 U.S. 444; Hess v. Indiana, 414 U.S. 105; NAACP v. Claiborne Hardware Co, 458 U.S. 886.

45. Of course, the effects of hate speech can be very real to members of targeted communities. *See, e.g.*, MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 20 (1993). The First Amendment's free speech guarantee has generally afforded speakers immunity from liability for psychological harm, even when a speaker deliberately sets out to bring about such harm. *See* Hustler v. Falwell, 485 U.S. 46, 56 (1988); Collin v. Smith, 578 F.2d 1197, 1206, 1210 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *cf.* Beauharnais v. Illinois, 343 U.S. 250, 265-67 (1952) (holding that protection of liberty as defined by the due process clause does not prevent punishment of criminal libel directed at certain groups). For democratic deliberation to occur, some measure of psychological harm to members of the community must be accepted as a necessary consequence of the project of self-governance. Whether the Supreme Court has struck an appropriate balance on the question of how much psychological harm must be tolerated is a matter that legal scholars are hotly contesting. *See, e.g.*, RICHARD DELGADO AND JEAN STEFANCIC, MUST WE DEFEND NAZIS: HATE SPEECH, PORNOGRAPHY AND THE NEW FIRST AMENDMENT 10-11 (1997); CATHERINE MACKINNON, ONLY WORDS (1993) (arguing that pornography or "graphic sexually explicit materials," should not fall within the protective bounds of the First Amendent); Steven G. Gey, *Postmodern Censorship Revisited: A Reply to Richard Delgado*, 146 U. PA. L. REV. 1077 (1998) (arguing against the creation of a "hate speech" category of unprotected speech). Moreover, Europe and Canada have struck radically different balances. *See* Frances H. Foster, *Translating Freedom for Post-1997 Hong Kong*, 76 WASH. U. L. Q. 113 (1998). For present purposes, this article assumes that the First Amendment precludes relief for harms of the sort described in *Beauharnais* and *Falwell*. These harms, while real, are not the result of Harm Advocacy and therefore lie beyond the scope of this article.

B. *The Implications of* Brandenburg *for Media Violence*

The *Brandenburg* test quite appropriately makes it difficult for the government to restrict or suppress political speech.[46] It does not, however, establish an absolute bar to government regulation of speech activity.[47] Rather, it creates a strong presumption that the First Amendment protects the mere advocacy of lawlessness.[48] Although the *Brandenburg* test clearly recognizes the government's compelling interest in safeguarding the safety of citizens, it generally rejects the government's invocation of this interest when the speech in question involves dissident political views.[49] Thus, the requirement that the alleged lawlessness take place or be likely to take place almost immediately after the delivery of the speech ensures that the danger is in fact not speculative and that the government's interest in preventing the violence is not pretextual.

Conversely, if speech aims to facilitate a particular lawless act against a discrete victim or group of victims, the government's claim of concern sounds far more plausible on its face. Suppressing unpopular political minorities is one thing, preventing the bombing of federal buildings or abortion clinics is quite another. In the context of abstract political speech by unpopular political minorities, *Brandenburg*'s imminence test makes a great deal of sense. Purely speculative harms are not sufficient grounds for censorship. But when the nature of the speech itself creates a palpable danger, the government's concerns sound less in censorship and more in the viewpoint neutral cadence of the public safety.[50] Indeed, landmark Supreme Court cases suggest that *Brandenburg*

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46. *Brandenburg*, 395 U.S. 444.

47. *Id.*

48. *Id.*

49. *See generally* STEVEN H. SHIFFRIN, DISSENT, INJUSTICE AND MEANINGS OF AMERICA (1999) (arguing that dissent is the core of the First Amendment). 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.

50. *See generally* United States v. New York Times, 403 U.S. 713, 718 (1971) (per curiam) (Black, J. concurring) (language on publishing troop transport information is not protected by the First Amendment and may indeed be subject to a prior restraint). *See also* United States v. Progressive, Inc., 467 F. Supp. 990, 999-1000 (W.D. Wis. 1979) (granting temporary injunction against Progressive Magazine to prohibit publication of an article containing material on how the H-bomb worked); Morland v. Sprecher, 443 U.S. 709 (1979). For a further discussion of the *Progressive* case, see Erwin Knoll, *National Security: The Ultimate Threat to the First*

should not be stretched to confer blanket protection on speech that advocates harm to others.[51]

II. TORT LIABILITY, THE FIRST AMENDMENT AND THE FEDERAL COURTS

In *New York Times Company v. Sullivan*,[52] the Supreme Court severely limited the right of individuals to sue publishers in the event a publication is defamatory.[53] A would-be public figure or public officer plaintiff must show "actual malice," that is knowledge of falsity or reckless indifference to truth or falsity, in order to recover damages from a media defendant.[54] Although the Court also recognized that the imposition of tort liability based on a defendant's speech constitutes state action,[55] and that the imposition of liability may have a

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Amendment, 66 MINN. L. REV. 161 (1981); L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55 (1990).

51. *See* United States v. New York Times Co., 403 U.S. 713 (1971) (per curiam). In *United States v. New York Times Company*, also known as the "Pentagon Papers Case," a clear majority of the justices made clear that the First Amendment did not privilege the publication of military secrets, at least when publication of the information would put service people in immediate harm. Concurring opinions in the Pentagon Papers Case point the way toward the recognition of Harm Advocacy as an unprotected subject of speech activity. Justice Brennan reaffirmed explicitly that "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Id.* at 726 (Brennan, J., concurring) (quoting Near v. Minnesota, 283 U.S. 697, 716 (1931)). For a discussion of the media's view of the *New York Times* case, *see* BRUCE W. SANFORD, DON'T SHOOT THE MESSENGER 154-156 (1999); Cass Sunstein, *Is Violent Speech a Right?*, THE AMERICAN PROSPECT 35 (1995) (arguing that "narrow restrictions on speech that expressly adovcate illegal, murderous violence in messages to mass audiences probably should not be taken to offend the First Amendment").

52. 376 U.S. 254 (1964).

53. *See Sullivan*, 376 U.S. at 265 ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."). In *Sullivan*, the Supreme Court held that "[w]hat a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel," because the fear of civil liberty might be "markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.* at 277.

54. *Sullivan*, 376 U.S. at 279-80.

55. *Id.* at 266-68; *see, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (noting the

chilling effect on the exercise of free speech,[56] the Court permitted recovery because of society's interest in protecting individuals' reputation from harm, even when individuals voluntarily place themselves in the public spotlight.

In *Sullivan*, the Supreme Court effectively constitutionalized state tort law to prohibit the imposition of civil liability for good faith criticism of public officials.[57] In subsequent cases, however, the Supreme Court has made clear that false speech, as such, does not enjoy any special First Amendment protection in its own right.[58] Careful consideration of *Sullivan* and its progeny[59] demonstrates that the free speech clause of the First Amendment displaces

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"well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because of their enforcement against the press has incidental effects on its ability to gather and report the news.").

56. *See Sullivan*, 376 U.S. at 300 (Goldberg, J., concurring). To achieve protection of free speech, the Court imposed on public officials a heavy burden of proving actual malice to make it difficult to reach, much less persuade, a jury. *Id.* If such public officials could be persuaded not to sue, the media would be spared the cost of defending questionable claims, and the corresponding pressure to tone down or even disregard provocative stories that might spawn litigation. Some commentators believe that the *New York Tmes* standard is not sufficiently protective of the press and have suggested that such libel cases be barred or made even more difficult to pursue. *See* Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "the Central Meaning of the First Amendment*, 83 COLUM. L. REV. 603 (1983) (urging absolute immunity should apply at least for published criticism of the official conduct of public officials); William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press – An Extended Comment on "the Anderson Solution"*, 25 WM. & MARY L. REV. 793 (1984) (supporting limitations on damage awards in libel cases); David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 435-36 (1975) (discussing why *New York Times* standard failed to achieve goal of reducing defense costs); BRUCE W. SANFORD, DON'T SHOOT THE MESSENGER 176-179 (1999) (discussing some of the harms that have resulted from the *New York Times* holding for the media).

57. *See generally Sullivan*, 376 U.S. at 254. The court did not decide whether tort liability, in general, is the kind of abridgement of speech that requires First Amendment scrutiny. *See* Davis A. Anderson, *Torts, Speech and Contracts*, 75 TEX. L. REV. 1499, 1505 (1997).

58. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) ("There is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

59. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (holding that a public figure must show actual malice); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (holding that when the subject of a libelous statement is a private figure, the defendant must at least be at fault in order for liability to be imposed).

traditional common law tort principles only when necessary to protect democratic deliberation.[60] Because Harm Advocacy does not advance the process of democratic deliberation, it should be deemed outside the scope of the *Sullivan* rule.

Based on the *Sullivan* holding that tort remedies are available to plaintiffs harmed by certain types of speech, numerous plaintiffs have tried to hold publishers liable for their works which incite violence or lawlessness.[61] Few have prevailed.[62] One major reason is that a majority of the lower federal courts

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60. *See Sullivan*, 376 U.S. at 270 (asserting a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks on government and public officials.").

61. *See, e.g.*, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (reversing jury's award of damages in a wrongful death action against a magazine publisher for adolescent's death allegedly caused by article which described practice of autoerotic asphyxia); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) (motion for summary judgment granted in wrongful death action by father of boy slain by person who had just seen the film *The Warriors*, which depicted scenes of gang violence, dismissed despite the fact that the perpetrator uttered a line from the film while committing the homicide); McCollum v. CBS, Inc., 202 Cal. App. 3d 989 (Cal. Ct. App. 1988) (granting motion to dismiss in wrongful death suit against Ozzy Ozbourne record that included song *Suicide Solution*, which exhorted suicide); DeFilippo v. National Broad. Co., 446 A.2d 1036, 1038, 1042 (R.I. 1982) (motion for summary judgment granted in wrongful death suit brought by parents of a deceased minor against NBC after their son hanged himself while imitating a hanging stunt he observed on the Johnny Carson Show); Disney Productions v. Shannon, 276 S.E.2d 580 (Ga. 1981) (motion for summary judgment granted in suit by parents of child partially blinded during an attempt to perform balloon trick demonstrated on a Disney television program); Niemi v. National Broad. Co., Inc., 126 Cal. App. 3d 488 (Cal. Ct. App. 1981), *cert. denied*, 458 U.S. 1108 (1982) (judgment of non-suit granted at trial when plaintiff admitted that the film, *Born Innocent*, did not incite the unlawful behavior which injured the plaintiff); Zamora v. CBS, Inc., 480 F. Supp. 199 (S.D. Fla. 1979) (granting motion to dismiss in suit involving fifteen-year-old against television networks for violent programming that allegedly caused him to commit criminal acts).

62. *See, e.g.*, Rice v. Paladin Enters., Inc., 128 F.3d 233 (4th Cir. 1997) (permitting wrongful death suit against publisher of *How to Hire a Hit Man* under *Brandenburg's* incitement standard); Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir.1992), *cert. denied*, 506 U.S. 1071, 1072 (1993) (applying commercial speech doctrine to advertisement in *Soldier of Fortune* magazine offering "gun for hire; all jobs considered" and permitting wrongful death suit to

have applied the *Brandenburg* test when determining whether a publisher or author who advocates criminal acts should be liable for resulting harm.[63] Applying the *Brandenburg* test, courts have refused to hold publishers liable because the incitement was not explicit, warnings were included, or no "clear and present danger" of imminent injury existed.[64] Although the *Brandenburg* test properly protects political speech advocating the overthrow of the government or other abstract promotion of lawlessness, it has proven to be overprotective of non-political speech that directly facilitates physical harm against others.[65]

The Supreme Court has not addressed the standard applicable to non-political speech that advocates harm to others.[66] Nevertheless, two relatively recent United States Circuit Court of Appeals cases have established two very different approaches to claims that such speech enjoys broad First Amendment protection.[67]

1. *Rice v. Paladin Enterprises, Inc.*

Rice v. Paladin Enterprises, Inc.[68] is one of the few cases holding that the First Amendment does not pose a bar to a finding of civil liability against a publisher.[69] The *Rice* case arose out of the brutal murders committed by James Perry, a contract killer.[70] In preparation for these murders, Perry closely

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proceed); Norwood v. Soldier of Fortune Magazine, Inc., 651 F. Supp. 1397 (W.D. Ark. 1987) (permitting action against publisher of "gun for hire" advertisement); Weirum v. RKO Gen., Inc. 539 P.2d 36 (Cal. 1975) (permitting wrongful death suit against radio station where a promotional contest repeatedly urged and encouraged driving in dangerous manner to intercept another DJ driving around in a marked car to collect a cash prize).

63. *See infra* notes 56-61 and accompanying text.

64. *See id.*

65. *See supra* note 50.

66. *See supra* notes 50-51.

67. *See Rice*, 128 F.3d 233; Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987).

68. Rice v. Paladin Enters., Inc., 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998).

69. *Id.* For an interesting discussion to some of the background to the *Rice* case, *see* RODNEY A. SMOLLA, DELIBERATE INTENT (1999).

70. *Rice*, 128 F.3d at 239. Lawrence Horn had hired James Perry to kill his ex-wife and his eight-year old quadriplegic son, in order to inherit over $1 million awarded to his son in a lawsuit for the accident, which caused the son's paralysis. *Id.* James Perry murdered Mildred Horn, her

followed the directions contained in *Hit Man: A Technical Manual for Independent Contractors*[71] and *How to Make a Disposable Silencer, Vol II*, [72] publications of Paladin Enterprises, Inc. ("Paladin"). On discovering the pivotal role that these books played in the execution of this crime, the victims' families sued Paladin[73] for tortious aiding and abetting and civil conspiracy.[74]

Applying the standard set forth in *Brandenburg v. Ohio*,[75] the district court

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son Trevor, and Trevor's private nurse by shooting the two women through the eyes and strangling the helpless boy. *Perry v. Maryland*, 686 A.2d 274, 277 (Md. 1996). Perry received the death sentence. *Id.* at 295.

71. REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS (Paladin Press 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 and use 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, how to dispose of the weapon and any stolen goods in pieces along the roadway, and how to use a rental car to get away from the crime scene undetected. *See Rice*, 940 F. Supp. 836, 839-40 (D. Md. 1996). If Perry had followed the *Hit-Man* instructions a little more closely, he may not have ended up in his current predicament. Despite the precautions Perry took to avoid detection, police placed him in Rockville the day of the murders because he checked into a motel near the scene - using his real name and address. *Perry*, 686 A.2d at 277. The author of the book is actually a woman who has remained unidentified. *See 60 Minutes* (CBS Television Broadcast, Mar. 2, 1997) (interviewing Peter Lund).

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

73. The families sued Paladin Press and its president, Peter Lund. *Rice*, 940 F. Supp. at 838. Many amici curiae briefs were filed in support of the defendant, including ones from media corporations, the ACLU, the Association of American Publishers, the Newspaper Association of America, and the Society of Professional Journalists. *Id.*

74. *Rice*, 940 F. Supp. at 838. The plaintiffs also sought damages based on theories of negligence and strict liability. *Id.* The complaint alleged that Paladin aided and abetted Perry in the commission of these murders through the publication of its books with their explicit instructions on how to commit and cover-up a contract murder. *Id.* Neither the District Court nor the Fourth Circuit addressed these arguments. *See Rice*, 128 F.3d at 233; *Rice*, 940 F. Supp. at 836.

75. *Brandenburg*, 395 U.S. 444 (1969). The *Rice* court found that three elements must be met under the *Brandenburg* test to prohibit Paladin's publication of the manuals. *See Rice*, 940 F. Supp. at 845-46. First, the manuals must advocate imminent lawless action. *Id.* at 845. Second,

granted Paladin's motion for summary judgment, holding that the First Amendment barred recovery of damages.[76] The district court found that the Paladin publications did not meet *Brandenburg's* stringent imminence requirement, as the murders occurred at least a year after Perry purchased the manuals.[77] In addition, the district court found that the books, although "reprehensible and devoid of any significant redeeming social value,"[78] did not constitute incitement or a call to action,[79] and that Paladin did not intend for Perry to commit murder.[80] In granting Paladin's motion for summary judgment, the court concluded that "[i]t is simply not acceptable to a free and democratic society to limit and restrict creativity in order to avoid dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals."[81]

The United States Court of Appeals for the Fourth Circuit reversed and remanded.[82] In an opinion written by Judge Michael Luttig, the panel agreed

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the books must have been intended to produce imminent lawless action. *Id.* Third, and last, the books must have been likely to produce imminent lawless action. *Id.* Finding that none of these requirements had been met, the court concluded that Paladin's speech could not be regulated or prohibited by state tort law. *Id.* at 847.

76. *Rice*, 940 F. Supp. at 849.

77. *See Rice*, 940 F. Supp. 836, 849 (D. Md. 1996).

78. *Id.* at 847.

79. *See Rice*, 940 F. Supp. at 848-49 ("Nothing in the book says 'go out and commit murder now!'").

80. *See Id.* at 847. However, Paladin stipulated that its intent and its marketing strategy was intended to attract and assist criminals and would-be criminals who desired information and instructions on how to commit crimes. *Id.* The court, however, found it highly relevant that Paladin's catalogues and its books included prominent warnings such as "For Academic Use Only" and a warning stating that certain laws made illegal the possession of certain guns and accessories as well as stating that it is illegal to manufacture a silencer without a government license. *Id.* at 838-39 ("WARNING: IT IS AGAINST THE LAW TO manufacture a silencer without an appropriate license from the federal government. There are state and local laws prohibiting the possession of weapons and their accessories in many areas. Severe penalties are prescribed for violations of these laws. Neither the author nor the publisher assumes responsibility for the use or misuse of information contained in this book. For informational purposes only.").

81. *Id.* at 848 (stating specifically that the court declined to create a new category of unprotected speech).

82. *Rice*, 128 F.3d at 267 (4th Cir. 1997) ("Paladin's astonishing stipulations, coupled with the extraordinary comprehensiveness, detail, and clarity of *Hit Man* 's instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power

that the *Brandenburg* standard applied, but held that the First Amendment was not a bar to finding Paladin civilly liable as an aider and abetter of Perry's triple contract murder.[83] The court held that the district court had misread *Brandenburg*[84] by failing to recognize that speech which "is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated. . . ."[85] The Fourth Circuit emphasized that Paladin's speech, because it was so detailed and methodical in its explanations and instructions on how to plan, commit, and cover-up the crime of murder, was not abstract speech and therefore received no First Amendment protection.[86]

Throughout the opinion, the court repeatedly cited the "unprecedented" stipulations by Paladin that it knew criminals would use its publication.[87] In the

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and effectiveness of its peculiar form of instruction, the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law. In at least these circumstances, we are confident that the First Amendment does not erect the absolute bar to the imposition of civil liability. . . ."), *cert. denied*, 118 S. Ct. 1515 (1998).

83. *Id.* at 265.

84. *Id.* at 264. ("We cannot fault the district court for its confusion over the opinion in that case. The short per curiam opinion in Brandenburg is, by any measure, elliptical.").

85. *Id.* In support of this, the court looked to two Supreme Court decisions. In *Giboney v. Empire Storage & Ice Co.*, the Supreme Court rejected "a First Amendment challenge to an injunction forbidding unionized distributors from picketing to force an illegal business arrangement." *Id.* at 243 (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490). The court next cited *Brown v. Hartlage* as a recent example of the Supreme Court's decision not to allow a First Amendment defense when the activity sought to be protected involved illegal activity. *Id.* at 243, 244 (citing Brown v. Hartlage, 456 U.S. 45, 55 (1982)).

86. *Id.* at 256 (*Hit Man* is, pure and simple, a step-by-step murder manual, a training book for assassins). The court further stated that the "speech act of providing step-by-step instructions for murder . . . so comprehensive and detailed that it is as if the instructor were literally present with the would-be murderer not only in preparation and planning, but actual commission of, and follow-up to, the murder [has] . . . not even a hint that the aid was provided in the form of speech that might constitute abstract advocacy." *Id.* at 255.

87. *Id.* at 252-54 (reviewing Paladin's stipulations that it intended and had knowledge that *Hit Man* would be used by criminals to commit murder and that it had engaged in a marketing strategy to attract and assist these individuals in the pursuit of this information). Based on these stipulations, the court held that a reasonable jury could find that Paladin possessed the requisite

court's opinion, these stipulations proved a level of intent readily satisfying the requirements of Maryland's civil aiding and abetting statute and the First Amendment. [88]

Applying a narrow line of criminal cases holding that the First Amendment does not shield the defendants just because they used speech to commit crimes, the Fourth Circuit concluded that the First Amendment posed no bar to civil liability as well. [89] The court reviewed several cases involving tax protesters who not only urged violations of the Internal Revenue Code, but also helped people complete false returns.[90] It also noted a Ninth Circuit case in which the federal government successfully prosecuted the publisher of drug-manufacturing instructions for aiding and abetting, citing with approval the Ninth Circuit's holding that the First Amendment "does not provide publishers a defense as a matter of law to charges of aiding and abetting a crime. . . ."[91] Although Judge

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intent under Maryland law as well as the heightened First Amendment standard. *Id.* at 255.

88. *Id.* The Fourth Circuit found that their only instructional communicative "value" was the illegitimate one of training persons how to murder and to engage in the business of murder for hire. *Id.*

89. *Rice*, 128 F.3d at 245; *see, e.g.*, United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982) (holding that the First Amendment does not provide publishers a defense as a matter of law to charges of aiding and abetting a crime through the publication and distribution of instructions on how to make illegal drugs); United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990) (holding *Brandenburg* inapplicable to a conviction for conspiring to transport and aiding and abetting the interstate transportation of wagering paraphernalia, where defendants disseminated a computer program that assisted others to record and analyze bets on sporting events; program was "too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection."); United States v. Buttorff, 572 F.2d 619, 623-24 (8th Cir. 1978) (holding that tax evasion speeches were not subject to Brandenburg because, although they did not "incite the type of imminent lawless activity referred to in criminal syndicalism cases," they did "go beyond mere advocacy of tax reform."), *cert. denied*, 437 U.S. 906 (1978). *But see* United States v. Freeman, 761 F.2d 549, 551-52 (9th Cir. 1985) (holding general statements regarding the unfairness of tax laws, as opposed to teaching of how to avoid tax laws, may constitute protected speech), *cert. denied*, 476 U.S. 1120 (1986).

90. *Rice*, 128 F.3d at 245, 246 (citing United States v. Kelly, 769 F.2d 215, 217 (4th Cir. 1985) (holding that the First Amendment offered no protection to speech which was not abstract in its criticism of tax law, but instead urged people to file false tax returns, with the expectation that this advice would be heeded)).

91. *Id.* at 244 (citing United States v. Barnett, 667 F.2d 835 (9th Cir. 1982)). In *Barnett*, the Ninth Circuit held that the First Amendment did not provide publishers a defense as a matter of

Luttig acknowledged that considerably less authority exists on the subject of whether the government may subject such speech to civil penalty or make it subject to private causes of action,[92] the court assumed that it could do so because the government could criminally prosecute the same speech without running afoul of the First Amendment.[93]

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law to charges of aiding and abetting a crime through the publication of instructions of how to make illegal drugs. *Barnett*, 667 F.2d at 842. The defendant was the publisher of an instruction manual on how to manufacture the illegal drug known as PCP. *Id.* Another person obtained the defendant's instruction manual and was caught in the act of manufacturing the illegal drugs. *Id.* at 838. The defendant was prosecuted for aiding and abetting the manufacture of PCP. *Id.* The defendant argued that evidence seized at the crime scene should be suppressed because the defendant had a First Amendment right to print the manual. *Id.* The Court stated "[t]o the extent, however, that Barnett appears to contend that he is immune from search or prosecution because he uses the printed word in encouraging and counseling others in the commission of a crime, we hold expressly that the First Amendment does not provide a defense as a matter of law to such conduct." *Id.* at 843.

92. *Compare* Garrison v. Louisiana, 379 U.S. 64 (1964) (applying the same "actual malice" standard to both criminal libel prosecutions and private defamation actions) *with* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *Cf.* Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (finding in civil promissory estoppel case that First Amendment does not bar liability for newspaper's publication of confidential source's name); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (holding that the First Amendment does not bar liability for common law tort of unlawful appropriation of "right to publicity" where television station broadcast "human cannonball" act in its entirety without plaintiff's authorization); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (rejecting First Amendment defense to copyright infringement action against magazine for printing unauthorized presidential memoir excerpts).

93. *Rice*, 128 F.3d at 247. The court then identified two possible qualifications to this conclusion. *Id.* at 247. The first involved a "heightened intent requirement" to prevent the punishment or abolishment of innocent and lawfully useful speech. *Id.* The court determined that this exception does not apply when "those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment." *Id.* at 248. The second qualification was that the First Amendment imposed similar limitations on the imposition of civil liability for abstract advocacy as it would for the imposition of criminal punishment for the same type of speech. *Id.* at 248-49. Because the court firmly believed that Paladin's speech was "so comprehensive and detailed" in its narration and instruction on murder, the speech, under no circumstances could be considered abstract advocacy, and therefore this qualification was inapplicable. *Id.* at 249.

The Fourth Circuit's analysis seems largely correct on the facts at bar: the First Amendment should not protect an intentional effort to facilitate a crime.[94] For whatever reasons, Paladin's officers stipulated that this was their intent in publishing the two books at issue.[95]

The court's attempt to fit *Brandenburg* to these facts is somewhat less convincing.[96] *Brandenburg's* imminence requirement mandates difficult, almost theological intellectual acrobatics in order to reach instructional speech that advocates harm to others. It would make more sense to simply find *Brandenburg* inapplicable to the kind of speech activity at issue in *Rice*.

2. *Byers v. Edmondson*

Less than six months after the Fourth Circuit's decision in *Rice v. Paladin*, a Louisiana Court of Appeals relied on the *Rice* rationale in refusing to block a civil lawsuit that sought to hold liable the producers and distributors of the film *Natural Born Killers* for the damages suffered by Patsy Byers.[97] The *Byers* case demonstrates the manner in which the *Rice* holding may be interpreted to reduce the First Amendment's protection for a wide variety of violent speech, not just murder manuals.

In March 1995, Sarah Edmondson and her boyfriend, Benjamin Darrus, after repeated viewings of the movie *Natural Born Killers,* decided to act out various portions of that movie. The two young people shot and killed a cotton gin owner, and later shot Patsy Byers during their armed robbery of a convenience store.[98] Byers, who was partially paralyzed by her wounds, brought a $20 million suit against Edmondson and Darrus,[99] and against those responsible for

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94. *See supra* notes 55-62 and accompanying text.

95. *Rice*, 128 F.3d at 252.

96. *Id.* at 243-65.

97. *See* Byers v. Edmondson, 712 So. 2d 681 (La. Ct. App. 1998), *cert. denied,* Time Warner Entertainment Co. v. Byers, 119 S.Ct. 1143 (1999). Oliver Stone's 1994 movie, *Natural Born Killers*, tells the tale of two young lovers, Mickey and Mallory, who murder Mallory's parents and then continue on a three-month violent crime spree during which they murder 52 people, cause a prison riot, and become national celebrites. *See* NATURAL BORN KILLERS (Warner Bros. 1994). The movie has been blamed for a dozen or so "copy cat" murders in the United States and Europe. *See* Michael Shnayerson, *Natural Born Opponents*, VANITY FAIR, July 1996, at 98.

98. *See id.* at 683. Mrs. Byers died of cancer in November 1997. Her family continues to pursue her lawsuit.

99. Sarah Edmondson is currently serving a 35-year sentence for the attempted murder and

the film, including the director, Oliver Stone.[100]

Byers contended the producers and distributors of *Natural Born Killers* knew, intended and were substantially certain that the film would cause the type of incitement to violence that Edmondson and Darrus carried out against her.[101] Additionally, Byers alleged that the media defendants negligently and/or recklessly failed to minimize the film's violent content and glorification of senseless violence.[102] She also asserted that the media defendants negligently and/or recklessly failed to warn viewers of the "potential deleterious effects" upon teenage viewers caused by repeated viewing of *Natural Born Killers*.[103]

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armed robbery of Patsy Byers. Her boyfriend, Benjamin Darrus, is serving a life sentence for the murder of William Savage, a cotton gin manager, whom the couple gunned down in his office in Mississippi the day before shooting Mrs. Byers. At the time of these incidents, both Edmondson and Darrus were 18 years old.

100. *See id.* at 684 (the suit included Warner Brothers, Inc., Warner Home Videos, and Time Warner Entertainment). Patsy Byers alleged that Edmondson and Darrus, after watching the movie *Natural Born Killers*, desired to emulate the protagonists in the movie, and thus, Oliver Stone and the other media defendants are responsible for the harm she suffered. *See id.* Byers' allegations are not particularly novel. *See infra* note 62 (listing cases brought against media defendants on a "copy cat" theory of liability). In fact, other courts that have considered "copy cat" cases (in which plaintiffs blame the actions of their attackers on the media content that their attackers watched) have consistently rejected them. *See id.*; *see also* MARC A. FRANKLIN AND DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 437-39 (1995) (describing examples of what the authors call "how-to-do-it" cases involving physical harm allegedly caused by information contained in media messages).

101. *See id.* at 684-85 (enumerating the allegations against the media defendants). The Byers complaint states, "Defendants are liable ... for producing a film ... which they intended ... would cause or incite persons such as defendants Sarah Edmondson and Benjamin Darrus (via subliminal suggestion or glorification of violent acts) to begin shortly after repeatedly viewing same, a crime spree such as that which lead to the shooting of Patsy Ann Byers." *Id.* at 684.

102. *See id.* at 685.

103. *See id.* The dispute surrounding the viability of Byers' suit provides insight into the conflicting views that even those within the entertainment and publishing industry have regarding civil liability for their works. One of Edmondson's and Darrus' other victims was William Savage, a good friend of John Grisham, the author of many successful legal thrillers. Mr. Grisham urged the Louisiana court to hold the producers of *Natural Born Killers* liable under a products liability theory. *See* Ben Elton, *When Artists Must Take the Rap*, SUNDAY TIMES – LONDON, July 28, 1996, at B1. Oliver Stone, producer of *Natural Born Killers*, responded by asking whether Grisham

In response, the media defendants filed a peremptory exception raising the objection of no cause of action.[104] Specifically, the media defendants contended that they owed no duty to the plaintiff to ensure that viewers of *Natural Born Killers* would not imitate actions depicted in the fictional work.[105] Additionally, the media defendants argued that the imposition of liability on the filmmakers would violate the First Amendment's free speech guarantee.[106] The trial court dismissed Byers' claims against the media defendants.[107]

The Louisiana Court of Appeals for the First Circuit reversed.[108] The *Byers* court found that the media defendants may have owed a duty to Byers and that the First Amendment did not bar her suit.[109] In addressing the duty question, the court found that if Byers could prove that the media defendants intended that viewers imitate the criminal conduct of the main characters in *Natural Born Killers*, then the risk of harm would be "imminently foreseeable,"[110] justifying the imposition of a duty upon the defendants to refrain from creating such a film.[111] The court specifically limited Byers' claims against the media

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would "be happy to assume liability" if someone committed a revenge murder after reading Grisham's novel *A Time to Kill*. *See* Sandra Davidson, *Blood Money: When Media Expose Others to Risk of Bodily Harm*, 19 HASTINGS COMM/ENT. L. J. 225, 239-40 (1997) (reviewing the dispute between those who seek to hold the media liable for the harms it may have caused through violent programs, and those who believe that the media is never the cause of the harm when individuals decide to "copy cat" what they see or hear).

104. *See id.* at 684 (the peremptory exception raising the objection of no cause of action is similar to a motion to dismiss).

105. *See id.*

106. The Byers' lawsuit is not the first attempt to bring claims against the producers and distributors of *Natural Born Killers*. A Georgia court dismissed another lawsuit, which contained similar allegations as those in *Byers*, on the grounds that the film could not meet the immediacy requirement of *Brandenburg*. *See* S. Michael Kernan, *Should Motion Picture Studios and Filmmakers Face Tort Liability for the Acts of Individuals Who Watch Their Films?*, 21 HASTINGS COMM/ENT. L. J. 695, 708 (1999) (discussing the *Miller v. Warner Bros., Inc.* case in detail).

107. *See id.* at 685. The trial court granted the defendant's motion to dismiss, "finding that the law simply does not recognize a cause of action such as that contained in and asserted by Byers' petition." *Id.* At this time, the *Rice v. Paladin* opinion had not yet been issued.

108. *See id.* at 691.

109. *Id.* at 689.

110. *Id.* at 688 (holding that "[i]f the intentional action allegations contained the petition can be proven at trial, the imposition of a duty would be warranted.").

111. *Id.* In making this determination, the court principally relied on *Weirum v. RKO Gen., Inc.*,

defendants to those involving intentional torts, stating that because "mere foreseeability or knowledge" that the film might be used for criminal purposes would not support liability, Byers had to prove that the media defendants intended for viewers to imitate the violent acts.[112] The court then distinguished several cases that refused to hold the media liable in similar "copy cat" situations by stating that those cases were decided on summary judgment motions, and therefore were inapplicable to this case where the dismissal was based on the allegations of the complaint.[113]

After finding that the media defendants may have owed a duty to Byers, the court next addressed the First Amendment arguments. Again, accepting Byers' allegations as true, the court found that if Byers could prove that the media defendants intended for viewers to imitate the violent acts in the film, then the film would fall under *Brandenburg*'s incitement exception, and would not be protected by the First Amendment.[114] Citing at length the Fourth Circuit's *Rice v. Paladin* decision,[115] the court found that the plaintiff's allegations that Oliver Stone and his production company had intended to incite imminent lawless action were sufficient to state a cause of action not barred by the First Amendment.[116]

The *Byers* case further demonstrates the potential problems with the *Rice v. Paladin* decision.[117] By manipulating *Brandenburg*'s imminence requirement to apply to a murder manual situation, the *Rice* court opened the door for other courts to apply *Brandenburg* in a similar, loose fashion. Unfortunately for the media industry, the *Byers* opinion could apply more widely than *Rice*, not just to permit lawsuits against those who produce and distribute violent instructional

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539 P.2d 36 (Cal. 1975), a case holding a radio station liable for harms caused by its listeners whom the radio station had deliberately urged to speed in order to receive a prize.

112. *Id.* at 690-92.

113. *Id.* at 688-89.

114. *Id.* at 689.

115. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1988). For a more detailed discussion of this case, see text and accompanying notes 68-96.

116. *Id.* at 690.

117. The *Byers* court could have avoided applying *Rice v. Paladin* because the two cases are so very different. In *Byers*, the movie, *Natural Born Killers*, was intended to entertain movie audiences, unlike the murder manual at issue in *Rice*, which was intended to train people how to commit anti-social acts.

manuals and videos, but to ultra-violent movies,[118] and potentially to mystery novel writers and others who produce works that may discuss anti-social or harmful concerns.[119]

Many commentators argue that both *Rice* and *Byers* are incorrect, but fail to provide a standard for courts to apply when dealing with speech that instructs and encourages harm to others.[120] Such speech does not deserve the level of

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118. The *Byers* court does not guarantee that a plaintiff will be successful in bringing such "copy cat" cases against media defendants, but may encourage other plaintiffs to file suit. *See* James v. Meow Media, Inc., 2000 WL 359735 (W.D. Ky. 2000) (dismissing a $130 million lawsuit brought by the families of the three children whom Michael Carneal murdered at Heath High School in Paducah, Kentucky, against the makers and distributors of the film *The Basketball Diaries*, alleging that Carneal was inspired, encouraged, or substantially assisted by that movie in gunning down his classmates). The plaintiffs argued that their claims should not be dismissed because they were similar to those asserted in *Byers*. *Id.* at *5. The *James* court rejected this argument, finding that the *Byers* court permitted only the plaintiffs' intentional tort claims to proceed. Because the *James* plaintiffs had alleged only negligence on the part of the media defendants, the court dismissed their claims. *Id.* at *5.

119. *See, e.g.*, RICHARD BACHMAN, RAGE (1977) (writing under the pen name "Richard Bachman," Stephen King tells the story of a disturbed student who goes to class and shoots his teacher and fellow classmates. The book was later made into the movie *The Basketball Diaries*). *Rage* has been cited as a potential causal factor in several incidents of school violence. In 1996, officials found a copy of the book in a student's bedroom after he had killed four people at his junior high school. *See* Alex Fryre, *School Violence Pervades Films, Books, and Music*, SEATTLE TIMES, Apr. 25, 1999, at A1 (discussing several violent school events that allegedly were copied from books and music depicting teenage angst).

120. *See* Keith C. Hauprich, A Triple Homicide, *A Book Publisher, and the First Amendment: How Will Rice v. Paladin Enterprises Inc. Impact the Entertainment and Media Industries?*, 7 UCLA ENT. L. REV. 33 (1999) (arguing that if future courts liberally construe *Rice*, as the *Byers* court did, "a Pandora's Box of liability for defendants in the entertainment industry may be opened" and warning of potential censorship in the future but not recognizing the need to protect the public); *See* S. Michael Kernan, *supra* note 106 (critiquing the *Byers* opinion for not analyzing the speech element of the film and for failing to provide a clear test for liability but not suggesting a method for courts to use when evaluating speech that advocates harm to others); Jeffery Haag, *If Words Could Kill: Rethinking Tort Liability in Texas for Media Speech that Incites Dangerous or Illegal Activity*, 30 TEX. TECH. L. REV. 1421 (1999) (arguing that Texas courts should continue to follow the *Brandenburg* standard and not permit tort liability for the publication of works that promote harm to others but failing to realize the courts' manipulations of *Brandenburg* could actually cause more restrictions on speech rather than less); Clay Calvert and Robert D. Richards,

First Amendment protection offered by *Brandenburg*. Extending *Brandenburg* to encompass such speech provides more protection than such speech merits under the First Amendment. If a publisher knowingly seeks to facilitate conduct which the legislature may constitutionally proscribe, the speech at issue should itself be proscribable. This is not because the power of prohibiting conduct also encompasses the lesser power of proscribing speech.[121] Rather, it is because speech that facilitates criminal conduct is itself proscribable — just as conspiracies and solicitations may be criminalized and punished, speech akin to a conspiracy or solicitation can be punished. Moreover, the proscription is not the product of antipathy toward the speaker's ideological motivation, but rather a prudent preventive measure to protect the public from harm.[122]

III. THE DANGERS AND THE INADEQUACY OF THE *BRANDENBURG* TEST AS APPLIED TO MEDIA VIOLENCE

Recent events have underscored the need to develop a new approach to speech that advocates harm to others. Investigators in the Oklahoma City bombing prosecution discovered that one of the bombers, Timothy McVeigh, had a "how-to" book by Paladin, as well as The Turner Diaries in his possession.[123] Earlier this year, a federal jury found that the operators of a web site threatening physical harm to many abortion providers and listing their names and addresses were liable under the Free Access to Clinic Entrances

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New Millennium, Same Old Speech: Technology Changes, the First Amendment Issues Don't, 79 B.U.L. REV. 959 (1999) (arguing that new technologies may encourage people to censor speech but failing to suggest ways to protect the public from speech that advocates harms to others, is widely disseminated, and easily accessible by others).

121. *Cf.* Posadas de Puerto Rico Assocs. V. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986). The Supreme Court has plainly rejected this aspect of Chief Justice Rehnquist's opinion in *Posados*. *See* Greater New Orleans Broadcasters' Ass'n, Inc. v. United States, 119 S. Ct. 1923 (1999); 44 LiquorMart Inc. v. Rhode Island, 517 U.S. 484 (1996).

122. For example, under a speech theory that permits liability for the advocacy of harm to others, it does not make any difference whether the publisher of a manual on how to build bombs is a white supremacist group, a pro-life organization, or a radical feminist group. All would be responsible for actions taken as a result of their publication if the requisite intent, causation and procedural burdens can be satisfied.

123. *See* James Bone, *Murder Manual Firm Pays Out*, THE TIMES OF LONDON, May 25, 1999 (discussing Timothy McVeigh's ownership of a Paladin Press bomb making book).

Act.[124] Moreover, the Anti-Defamation League and the Southern Poverty Law Center have noted a marked increase in hate groups on the internet calling for violent revolution against the government and advocating physical violence against the members of various minority groups.[125]

In response to the threat from hate groups and the easily accessible material

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124. *See* Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists, 41 F. Supp. 2d 1130, 1153-54 (D. Oregon 1999) (granting under FACE an injunction prohibiting the publication of defendant's website and posters with the intent to threaten the abortion providers and declaring that the court "totally reject[s] the defendants' attempt to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the plaintiffs from providing abortion services."). Planned Parenthood and four doctors who perform abortions brought suit against fourteen individuals and two organizations alleging that they had threatened abortion providers through a series of posters and a web site, "the Nuremberg files." *Id.* at 1130-34. One of the posters lists by name a "Deadly Dozen" of doctors and highlights an indictment from the Nuremberg Trials declaring the Nazis who forced abortions on East European and Jewish women were war criminals. *Id.* at 1131-32. On the website, the anti-abortion organization had a wanted list of 200 doctors and abortion supporters, providing their addresses, photos, license plate numbers and in at least one case, the names of their children and the schools they attend. *Id.* Doctors who have been killed by alleged pro-lifers were crossed off the wanted list. *Id.* Those who merely were wounded were shaded in gray. *Id.* On Feb. 2, a federal jury awarded Planned Parenthood, and the other plaintiffs $107 million in damages. *Id.* For an overview of the verdict and the surrounding controversy, *see* James C. Goodale, *Can Planned Parenthood Silence the Pro Life Website?* 4/2/99 N.Y.L.J. 3 (discussing the potential harm to the media resulting from the verdict in the Nuremberg Files case); Roxanne Guillory, *Abortion Rights Supporters Challenge Opponents' Dangerous, Deadly Tactics*, NATIONAL NOW TIMES, April 1, 1999 (presenting the arguments for restricting the anti-abortion speech against the abortion providers).

125. *See* Raymond W. Smith, *Civility Without Censorship: The Ethics of the Internet – Cyberhate*, 65 VITAL SPEECHES OF THE DAY 196 (Jan. 1999) (chairman of Bell Atlantic stating that civil rights groups need to think of ways to meet the increasing threat from cyberhate on the internet); Mark Potok, *Hate Groups on the Rise; Internet Major Factor, Research Finds*, JET, March 2, 1999, at 19 (stating that "The Internet is allowing the White supremacy movement to reach places it has never reached before — middle and upper middle-class, college-bound teens."); *Explosion of Hate*, ANTI-DEFAMATION LEAGUE (1988) (reporting on growth of hate groups in the United States and their increasing use of the internet to attract followers); *We love the Net, but we hate you*, NEW MEDIA AGE, July 1, 1999, at 17 (discussing recent report by the Anti-Defamation League which states that hate groups are steeping up their use of the internet to target young recruits).

providing directions on how to commit various violent acts, some politicians and commentators have called for government censorship of such speech. The Department of Justice, concerned about the proliferation of bomb-making instructions on the internet, filed a brief in support of the Rice family in the *Paladin* case, arguing that *Brandenburg* should not apply to protect this speech, and that even if it does, "imminent," as used in *Brandenburg*, does not really mean "imminent."[126] Moreover, Congressman Henry Hyde, chairman of the House Judiciary Committee, proposed "The Child Safety and Violence Prevention Act" that recommended banning "obscenely violent materials" to minors.[127] More recently, the school shootings have lead many to question the

126. DEPARTMENT OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION (1997) ("[W]here it is foreseeable that the publication will be used for criminal purposes, the *Brandenburg* requirement that the facilitated crime be "imminent" should be of little, if any, relevance"). The Department's position is somewhat bewildering; if "imminent" does not have a strong temporal connotation, one is hard pressed to make sense of the *Brandenburg* opinion - or, for that matter, subsequent opinions such as *Hess* and *Claiborne*. *Id.* One commonly cited dictionary defines "imminent" as meaning "likely to happen without delay," "impending," and "threatening." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 726 (College Edition 1957). The Deparment's position — not unlike the *Rice* opinion itself – ignores the core meaning of "imminent" in order to find the *Brandenburg* test satisfied. The problem with this approach is that watering down or eliminating the imminence requirement opens the door to a "bad tendency" interpretation of the clear and present danger test – an approach that sanctions relatively broad censorship of unpopular political minorities. *See generally* Dennis v. United States, 341 U.S. 494 (1951).

127. *See* The Child Safety and Youth Violence Prevention Act of 1999, H.R. 1501 (prohibiting the sale of "extremely sexual or violent material that is not protected by the First Amendment" to minors and imposing felony investigations and possible jail terms on retailers of such material if they sold, loaned, or exhibited sexually explicitly or violent material to minors); *see also*, Eric Pianin, Juliet Eilperin, *House GOP Split Bill on Violence: Tactic May Weaken Gun Curbs, Allow Focus on Hollywood*, WASHINGTON POST, June 15, 1999, at A1 (discussing Hyde Amendment to Juvenile Crime Bill that proposed tough new restrictions on the entertainment industry as a method to control new wave of violence among school-aged children and prevent their access to sexual and violent materials); Bill Holland, *House Defeats Cultural Legislation*, BILLBOARD, June 26, 1999 (noting the defeat of Senator Hyde's proposal and discussing the other statutes still pending to regulate violence on the internet, television and movies); Robert MacMillan, *Sen. Hatch Joins*

role of the media in encouraging youth violence.[128]

The federal courts' current application of the *Brandenburg* test to speech that advocates harm does not strike the proper balance when the speech at issue advocates lawless behavior in a manner that does not necessarily cause any imminent danger.[129] For example, in *Rice*, the Fourth Circuit had to engage in severe manipulations of the *Brandenburg* test to establish liability for books that clearly are far removed from the type of speech at issue in *Brandenburg*. The *Rice* court does not even try, and possibly could not, explain how a book purchased and read more than one year prior to the date when a reader followed its instructions could be viewed as inciting "imminent" lawless action.[130]

Anti-Online Violence Crusade, NEWBYTES, May 5, 1999 (discussing proposals by Senator Hatch to implement more safeguards to protect children from damaging thoughts and images in popular media, particularly those children receive over the internet). For a further discussion of the similarity between obscenity and violence, see KEVIN SAUNDERS, VIOLENCE AS OBSCENITY (1999) (arguing that violence is at least as obscene as sex and therefore should face similar prohibitions). A recent article in the *Ladies Home Journal* shows just how easily bomb-making material is on the internet. *See* Cheryl White, *My Son Built a Bomb*, 114 LADIES HOME JOURNAL 36 (March 1997) (discussing author's son's access to internet site concerning how to build a bomb and his resulting injuries after he attempted to build and detonate it).

128. *See* Faye Fiore and James Gerstenzang, *Clinton Opens Entertainment Violence Inquiry*, L.A. TIMES, June 2, 1999, at A1 (noting that President Clinton ordered a $1,000,000 federal inquiry into the entertainment industry's marketing of violent films to children); Faye Fiore & Melissa Healy, *Clinton Urges Hollywood To Cut Violence*, L.A. TIMES, May 11, 1994, at A1 (noting Clinton's recent effort to have the Surgeon General prepare a report on youth violence, including the effects of the news media).

129. A "how to" guide might not motivate a person to commit a crime, unlike a fiery speech ("on to the Bastille!"). Properly understood, *Brandenburg's* imminence requirement relates to the probable persuasiveness of the speech. *Harm Advocacy*, on the other hand, is not necessarily meant to persuade, it is meant to assist or facilitate. The temporal relationship between the distributor of *Harm Advocacy* and harm occurring could be quite temporally attentuated. If courts continue to apply *Brandenburg* to *Harm Advocacy*, they will either have to fudge the imminence requirement or find the speech protected. The former presents an unacceptable risk to unpopular political speech that includes abstract calls to arms, the latter imposes unduly high costs on the victims of *Harm Advocacy*.

130. The "imminence" required for the *Brandenburg* test is speech that causes an "unthinking, immediate, lawless action." *See* Brandenburg v. Ohio, 395 U.S. 444 (1969). Only in these situations is the government permitted to regulate incitement to illegal action because few other options are available to prevent the lawless action, as there is no time for reasoned debate. For a

Because the *Brandenburg* test was stretched in this manner, publishers and authors now fear that the federal courts have opened the floodgates of liability for works of fiction. Moreover, hyperbolic political speech also seems to be in danger of losing its protected status.

Clearly, such an application of the *Brandenburg* test undermines the protection the First Amendment should provide to abstract political speech, and could easily chill artistic and literary speech. Yet, the imposition of liability on the facts at issue in *Rice* seems appropriate because "society's interest in compensating injured parties [and] the freedom of speech guaranteed by the First Amendment"[131] should not be incompatible goals.

Because instructional speech advocating harm is highly technical, it has little if any expressive value, and because it not only advocates, but also directly facilitates the commission of crimes and intentional torts, it has little, if any, political or socially redeeming value. As a category of speech, therefore, it is particularly dangerous and not particularly valuable. More importantly, like other categories of unprotected speech, this category is particularly likely to result in severe harms to innocent third parties.[132] The state clearly has a very strong interest in safeguarding the lives of its citizens.[133] In the general calculus

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further critique of the *Brandenburg* imminence requirement as applied to "how to" manuals, *see* KENT GREENAWALT, SPEECH, CRIMES, & THE USES OF LANGUAGE 115 (1989).

131. *See* Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 840 (D. Md. 1996). On May 21, 1999, the *Rice* case settled. Paladin's insurance company agreed to a multi-million dollar compensation payment to the families. Paladin also agreed to take *Hit Man* off the market. *See* SMOLLA, *supra* note 69 at 272.

132. *See* Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1176-77 (1982) ("[I]f a speaker so intends, advocacy which does not 'directly' urge unlawful conduct may nevertheless be 'directed' to bringing about such conduct."). *But see* Hess v. Indiana, 414 U.S. 105, 111 (1973) (stating that "[w]e'll take the fucking street later," is not advocating imminent danger because the result will not occur for an indefinite period of time).

133. *See, e.g.*, Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979) (noting 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

of competing interests, the government's interest in protecting the lives and limbs of its citizens outweighs whatever slight social value inherent in such speech. Additionally, the risk that the government will suppress unpopular viewpoints or cultural minorities is, at best, remote. To better balance society's interest in protecting its citizens from criminal activities, the federal courts should create a new First Amendment speech category.[134]

IV. CONCLUSION

When speech poses a significant public danger, the value of that speech may outweigh the threat that speech poses to society. There is no doubt that the state has a strong interest in preventing speech that will cause a crime, particularly crimes involving serious bodily injury or death. Because of the value which society places on the freedom of speech, however, the tests developed to avoid government censorship of the speech activities of unpopular minorities properly place a high burden on the government to justify imposing liability for the consequences of speech activity. That said, a high burden in theory should not prove to be an insurmountable burden in practice.[135]

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and limb, [is] a legitimate, indeed, compelling, state interest.").

134. *See* S. Elizabeth Wilborn Malloy, Ronald J. Krotoszynski, Jr., *supra* note 10, at 1165 (discussing the need for the creation of a new category of speech to better regulate speech that advocates harm to others while not diluting the protection for political advocacy under *Brandenburg*). *See also* Kent Greenawalt, *Speech and Crime*, AM. BAR. FDN. RESEARCH J. 647, 739 (1980) (suggesting that any "approach to criminal prohibitions that gives adequate protection to speech must be categorial."). Professor Greenawalt suggests categorizing speech by the type of utterance: ordinary expressions of fact and value (high level of protection), utterances which are strongly situation altering (low-level of protection), and action-inducing encouragements (middle level of protection). *Id.* The level of protection afforded the speech varies with the type of utterance, whether it was said in public or private, and whether it is ideological or not. *Id.* at 739. As Professor Greenawalt recognizes, however, some purely factual utterances are worth regulating. *Id.* at 741 (discussing speech concerning how to make a bomb or the location of troops). *See also* David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 46 (1994) ("It was precisely because *Brandenburg* used the 'categorical' or 'unprotected utterance' approach that it improved protection for the freedom of speech over the excessively loose balancing in cases such as *Dennis*.").

135. *See* Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995) ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' The unhappy persistence of both the practice, and the lingering effects of racial discrimination against minority groups in this country is

Recent events conclusively demonstrate the need for government to impose some of the costs of harmful instructional speech on those who propagate it. The victims of those who use directions intended to facilitate harm should not be denied a meaningful remedy on the theory that the First Amendment privileges the instructions or advocacy of a *de facto* accomplice before the fact. When cases arise that meet reasonably speech-protective standards of liability, courts must be willing and able to impose liability.

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an unfortunate reality, and government is not disqualified from acting in response to it."); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (noting that a plaintiff may still succeed even under the clear and convincing evidence standard).