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# Providing the Recipe for Destruction: Protected or Unprotected Speech

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# Providing the Recipe for Destruction: Protected or Unprotected Speech?

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*The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matters when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity . . . .*[1]

## I. INTRODUCTION

If a person wishes to find information on how to make explosives out of fertilizer, household cleaning products,[2] or even tennis balls or light bulbs,[3] one need only turn on the computer and connect to the Internet.[4] Some proponents of free speech claim that such information is protected by the First Amendment.[5] However, books and web sites containing this information may go too far in providing "detailed illegal instruction."[6]

The argument that such web sites and manuals are protected by the First Amendment is primarily based on the decision by the Supreme Court in

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1. Norwood v. Soldier of Fortune Magazine, Inc., 651 F. Supp. 1397, 1402 (W.D. Ark. 1987) (quoting Sir William Blackstone, 34 W. BLACKSTONE COMMENTARIES, at 1326).

2. Ian A. Kass, *Regulating Bomb Recipes on the Internet: Does First Amendment Law Permit the Government to React to the Most Egregious Harms?*, 5 S. CAL. INTERDISC. L.J. 83, 83 (1996).

3. *Dragon's Lair* (visited Oct. 23, 1999) <http://members.tripod.com/~Sky_Z/DRAGON.HTM>.

4. *See* Kass, *supra* note 2, at 83 (explaining that these recipes for building explosives can be found on computer bulletin boards, web sites, chat rooms, and news groups).

5. *See, e.g.*, Robert G. Pimm, *Publishers Beware: Hit Man Targets Brandenburg*, 16 ENT. & SPORTS LAW. 16 (Summer 1998) (discussing Rice v. Paladin Enterprises, 128 F.3d 233, 262 (4th Cir. 1997)). The author explains that

> [t]he Fourth Circuit was adamant that Hit Man contained none of the advocacy required in Brandenburg and, therefore, must be an incitement. But, as the district court noted, nothing in the book says 'go out and commit murder now!' Rather, the book explains how to be a hit man if that is what one wants to become. The book advocates an antisocial lifestyle and career, not imminent lawless action. In *Brandenburg*, a law punishing advocacy of Ku Klux Klan doctrine and assembly of Ku Klux Klan members to advocate their beliefs was held unconstitutional. Like the Ku Klux Klan in *Brandenburg*, the Fourth Circuit's detailed quotations from *Hit Man* show an author advocating and teaching killing as a way of life, extolling avowed spiritual virtues, claims of freedom, perverse power and improved masculinity.

*Id.* at 19.

6. ROD SMOLLA, DELIBERATE INTENT 115 (1999).

*Brandenburg v. Ohio*.[7] In that case, a Ku Klux Klan leader made the statement, "'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.'"[8] The Court held that "the 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."[9] Some commentators argue that *Brandenburg* is the right standard to use when determining whether instructions on how to break the law are protected by the First Amendment.[10]

Conversely, as Justice Douglas explained in his dissenting opinion in *Dennis v. United States*,[11] "[t]he freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale. . . ."[12] In *Dennis*, the Supreme Court affirmed the convictions of high-ranking officials of the American Communist Party for violating the Smith Act.[13] The Smith Act made it a federal crime to "knowingly and wilfully advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence."[14] Justice Douglas, dissenting, stated: "[i]f this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts."[15] This Comment proposes that a book or web site providing instructions on how to build explosives is of a character about which Justice Douglas would have no doubt.

Forty-six years after the *Dennis* decision, the United States Court of Appeals for the Fourth Circuit decided *Rice v. Paladin Enterprises, Inc.*[16] In that case, Paladin Enterprises published a book that provided instructions on how to become a successful hit man and gory details on how to perform as a hit man.[17] The court

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7. 395 U.S. 444 (1969).

8. *Id.* at 446.

9. *Id.* at 447.

10. *See* 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?*, 14 GA. ST. U. L. REV. 875, 897 (1998) (explaining that the district court in *Rice v. Paladin Enterprises* "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.'").

11. 341 U.S. 494 (1951).

12. *Id.* at 581 (Douglas, J., dissenting).

13. *Id.* at 517.

14. *Id.* at 497; *see* Smith Act, §§ 2, 3, 54 Stat. 671, 18 U.S.C. §§ 10, 11 (1946 ed.) (*see* present 18 U.S.C. § 2385).

15. *Dennis*, 341 U.S. at 581 (Douglas, J., dissenting).

16. 128 F.3d 233 (4th Cir. 1997).

17. *Id.* at 235-39.

agreed with plaintiffs' counsel's claim that the test set out in *Brandenburg v. Ohio*[18] was never intended to cover situations in which speech goes beyond the bounds of abstract advocacy and into the realm of providing specific instruction that aids and abets another in the commission of a criminal offense.[19] The Court determined there was a sharp distinction between mere abstract teaching and more concrete preparation and instruction to aid and abet crime.[20] Under *Rice*, books and web sites explaining how to build explosives are aiding and abetting people in committing crimes.

Part II of this Comment examines the actual content of some of the books and web sites that provide instruction to aid and abet crime and the social concerns raised by that information.[21] Part III discusses First Amendment case law leading to *Brandenburg*.[22] Part IV examines *Rice v. Paladin* and the case law relied upon by the plaintiff's counsel.[23] Part V considers the underlying justifications for protection of speech by the First Amendment.[24] Part VI discusses the mens rea requirement in accessory liability cases.[25] Part VII analyzes the potential application of the *Rice* decision to other instructional manuals and internet sites, and Part VIII concludes that instruction to aid and abet crime should not be protected by the First Amendment.[26]

## II. CONTENT OF MANUALS AND WEB SITES PROVIDING DETAILED ILLEGAL INSTRUCTION

There are many manuals and web sites available to the public that provide detailed illegal instructions.[27] Some teach readers how to make explosives, ranging from small pipe bombs to atomic bombs.[28] Some detail how to kill with different weapons or provide the reader with various techniques to employ in order to avoid being caught.[29] Others explain how to produce different kinds of narcotics or other illegal substances.[30] Although some providers of this material claim their readers are sophisticated enough that they will not use the information to do any harm,[31] these

18. 395 U.S. 444 (1969).
19. *Rice*, 128 F.3d at 262.
20. *Id.*
21. *Infra* Part II.
22. *Infra* Part III.
23. *Infra* Part IV.
24. *Infra* Part V.
25. *Infra* Part VI.
26. *Infra* Part VII and Part VIII.
27. *See infra* Part II.A.-B (providing examples of these manuals and web sites and their effects on society).
28. *Infra* Part II.A.-B.
29. *Infra* Part II.A.-B.
30. *Infra* Part II.A.-B.
31. *See* Kurt Saxon, *Welcome to Kurt Saxon's Self-Sufficiency Pages* (visited Dec. 27, 1999) <http://kurtsaxon.com/littleton.htm> (discussing the tragedy at Columbine High School in Littleton, Colorado and asserting that if Dylan Klebold and Eric Harris had read his book, *The Poor Man's James Bond*, they would not have used the

manuals and web sites have actually aided and abetted many people in committing crimes.[32]

### A. *Manuals*

Books and pamphlets providing detailed illegal instruction have existed for some time.[33] *The Anarchist's Cookbook* was first published in 1971[34] and has been "celebrated as [the] Bible" of the Trench Coat Mafia.[35] Dylan Klebold and Eric Harris, members of the Trench Coat Mafia, planted several bombs in Columbine High School before shooting thirteen people and then committing suicide.[36] Examples of material found in *The Anarchist's Cookbook* include step-by-step instructions on how to kill someone with a knife,[37] how to grow marijuana, and how to make the explosive nitroglycerin.[38] For example, a section of the book containing a recipe for how to build a nail grenade provides "materials required, construction procedure, and even an alternate use: 'An effective directional anti-personnel mine can be made by placing nails on only one side of the explosive block.'"[39]

James Gluck threatened a Colorado judge that he could decimate the Jefferson County Administration Building with a "bullet" containing the deadly chemical ricin.[40] An FBI agent explained that a lab maintained by Gluck included ingredients for making ricin, as well as a copy of *The Anarchist's Cookbook*.[41]

Henry Lee Dreyer slit his mother's throat as well as the throat of her male companion, while Dreyer's friend shouted encouragements and hit the companion

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information provided to do such harm, even though the book would have provided them with information that would have allowed them to do much more damage than actually occurred). Unfortunately, this web page had been taken down at the time of publication of this paper and no hard copy is available.

32. *Infra* Part II.A-B.

33. *See* Howard Berkowitz, *Hate on the Internet: Statement of the Anti-Defamation League on Hate on the Internet Before the Senate Committee on the Judiciary*, 1999 WL 27594383 (Sept. 14, 1999) ("William Powell's legendary Anarchist's Cookbook, first published in 1971, has inspired many Web pages.").

34. *Id.*

35. Steve Dunleavy, *Blind Could See It Coming*, N.Y. POST, Apr. 22, 1999, at 7.

36. *Id.*

37. Angela Lau, *Teen Bragged of Killings, Hearing Told*, SAN DIEGO UNION-TRIB., June 17, 1998, at B1.

38. *An Arsenal Online: The Internet Has Put the Tools of the Terrorist at the Disposal of Any Misfit with an Appetite for Violence* [hereinafter *An Arsenal Online*] THE GUARDIAN, Apr. 27, 1999, 1999 WL 16877351; *see Books and Videos Page 2: Books About Investigation, Missing Persons, Sabotage* [hereinafter *Books and Videos*] (visited Dec. 27, 1999) <http://www.uspystore.com/htmls/books02.htm> (describing *The Anarchist Cookbook* for possible purchasers as follows:

> The author considers this a survival guide and gives detailed advice concerning electronics, sabotage and surveillance, with data on everything from bugs to scramblers. Explicit info on the uses and effects of drugs, ranging from pot to heroin; natural, non-lethal, and lethal weapons, from cattle prods to submachine guns; explosives and booby traps from TNT to whistle traps. More than 100 drawings supplement the recipes in THE ANARCHIST COOKBOOK! . . . [$29.95]).

39. *An Arsenal Online*, *supra* note 38.

40. Peggy Lowe, *Toxin Suspect Denied Monitor Judge: Rejects House Arrest for Man Indicted in Jeffco Terrorist Threats*, DENVER POST, Nov. 9, 1999, at B2.

41. *Id.*

with a baseball bat.[42] Dreyer "consulted 'an anarchist's cookbook' on how to kill with a knife."[43]

*The Poor Man's James Bond* provides information on the value of "various exotic poisons" and instructions on how to set electrical fires,[44] as well as "how to start fires by remote-control electronics."[45] The book also gives instruction on how to turn semi-automatic weapons into automatic weapons.[46] The book has been described as "an underground guide to manufacturing explosives."[47]

In late 1999, two men, members of the San Joaquin County militia plotted to blow up two very large propane tanks located in a suburb of Sacramento, California.[48] The tanks held enough propane to destroy everything within a five mile range in the event of an explosion.[49] An FBI agent stated, "[t]hey planned to lead an armed overthrow of the U.S. government in the chaos and civil unrest they believed would follow Y2K. . . ."[50] The FBI learned that one of the men was photocopying *The Poor Man's James Bond* and "was especially interested in the section on timers."[51] The two men were arrested, and, upon entering the home of one of the men, agents found "a pound of red phosphorus; 100 pounds of fertilizer; a can of gunpowder; fuses, blasting caps, detonation cord and other bomb-making supplies; and a small armory, including parts for M-1 carbines, AK47 and Uzi assault rifles and hand grenades."[52]

John T. Veysey III has been charged with burning down his own house and agents are still investigating his peculiar story.[53] Federal prosecutors believe Veysey burned down four houses in order to collect the insurance money from policies covering his wife and his home.[54] His first wife died a few weeks after Veysey

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42. Lau, *supra* note 37.

43. *Id.*

44. Mike Robinson, *'Near-genius' May Have Killed Wife for Insurance: Agents Investigating Possible Scams that Former Cary Resident Concocted for Cash*, PEORIA J. STAR, July 19, 1999, at B5.

45. Matt O'Connor, *Arson Suspect Had a New Scheme, ATF Agent Tells Court*, CHI. TRIB., June 3, 1999, at 6.

46. Keiko Morris, *Boy Charged in Bomb Threat: Note Said School Would Be Blown Up*, SEATTLE TIMES, Apr. 29, 1999, at B1.

47. Lance Williams, *FBI Says Arrests Broke Up Y2K Plot: Militia Group Sought to Ignite Holocaust, Indictment Contends*, S.F. EXAMINER, Dec. 26, 1999, at A1; *see Books and Videos*, *supra* note 38 (describing *The Poor Man's James Bond* for possible purchasers as follows:

> This classic work on improvised mayhem has practical paramilitary info as used by various radical groups, Includes homemade poisons, explosives and improvised firearms. Also, reprints of the following books: Arson by Electronics; Fireworks and Explosives Like Grandpa Used to make; Pyrotechny; and Explosives, Matches, and Fireworks. An informative book by one of Americas most infamous authors! Not available In Canada, No exceptions! . . . [$29.95]).

48. Williams, *supra* note 47.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Robinson, *supra* note 44.

54. *Id.*

reportedly stated "'that he could kill a person by injecting them with something that would make it look like a heart attack—and not leave a trace at the autopsy. . . .'"[55] Interestingly enough, the coroner determined that she had died of a heart defect, but her family was suspicious, since she had been in good health and there was no history of heart conditions in her family.[56] Veysey's second wife survived a fire that burned down their house, because firefighters were able to carry her out.[57] When she awoke, the last thing she could remember was Veysey giving her a glass of water.[58] When investigators searched through the rubble they found *The Poor Man's James Bond* in Veysey's room "which describes the relative merits of various exotic poisons and explains how to set electrical fires."[59]

In Snohomish County, Washington, a fourteen-year-old boy was arrested when authorities traced a letter to him that threatened to bomb his middle-school.[60] He wrote with letters cut from a magazine and stated, "'I'm going to blow this plase [sic] up.'"[61] In the boy's bedroom, police found the magazines used to make the letter, as well as two empty propane bottles, a gallon can of Coleman lantern fuel and a copy of *The Poor Man's James Bond.*[62]

Ray L. Bowman and William A. Kirkpatrick were the focus of a nationwide investigation into twenty-eight bank robberies dubbed the "Trench Coat Robberies" because the robbers often wore trench coats.[63] Kirkpatrick was arrested and investigators discovered $1.8 million in cash and four guns in his car.[64] The police and FBI then searched Bowman's house and safe-deposit box and found an additional $1 million in cash.[65] Incidentally, some of the money found in Bowman's home was linked to a robbery in Tacoma.[66]

Bowman also had two storage lockers and seven safe-deposit boxes in which the police and federal agents found fifty more guns, "lock-picking equipment, armor-piercing bullets, a police frequency directory, two trench coats, four submachine gun manuals, five wigs, several Missouri Highway Patrol patches and two notes with the name 'Billy,' Kirkpatrick's name, on them."[67] One of the storage units contained copies of *The Anarchist's Cookbook* and *The Poor Man's James Bond* as well as

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55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. Morris, *supra* note 46.
61. *Id.*
62. *Id.*
63. Tom Jackman, et al., *The 'Trench Coat Robberies': The Suspects Cash and Guns Just Latest Run-Ins with the Law*, KAN. CITY STAR, Jan. 11, 1998, at A1.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*

other manuals on "explosives, disguises, false identification, assassination techniques and other topics."[68] Bowman was also arrested.[69]

### B. Web Sites

There are many recipes providing detailed illegal instruction available online.[70] Some white supremacist sites have posted bomb-making instructions.[71] For example, one web site, entitled *Death 2 ZOG*, which is covered with Nazi and World Church of the Creator[72] symbols, urges readers to "[k]ill the jew [sic] pig before it's too late" and supports "black on black violence."[73] Copies of bomb-making manuals such as *Jolly Roger Cookbook*, *The Big Book of Mischief*, and *The Anarchist's Cookbook* can be downloaded from the site.[74]

Many web sites providing versions of the *Terrorist's Handbook* include a disclaimer that warns "don't try anything you find in this document!!! Many of the instructions doesn't [sic] even work."[75] The instructions from *Terrorist's Handbook* include "how to construct 'High Order Explosive' such as 'Ammonium Nitrate,' 'Dynamite,' and 'TNT' as well as 'Molotov Cocktails,' 'Phone Bombs,' and other destructive devices."[76] The *Terrorist's Handbook* even acknowledges that for a person to construct "a truly useful explosive," the chemicals would have to be stolen from a lab.[77]

The Bureau of Alcohol, Tobacco, and Firearms reported that "[f]ederal agents investigating at least 30 bombings and four attempted bombings between 1985 and June 1996 recovered bomb-making literature that the suspects had obtained from the

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68. *Id.*

69. *Id.*

70. *See* Berkowitz, *supra* note 33 (stating "[n]umerous pages devoted to terror manuals are currently present on the Web, and explosives enthusiasts regularly post information at USENET newsgroups").

71. *Id.*

72. World Church of the Creator is a non-profit organization promoting the religion of Creativity. *World Church of the Creator: RAHOWA* (visited March 31, 2000) <http://www.creator.org/about.html>. It is a religion "established for the Survival, Expansion, and Advancement of our White Race exclusively." *Id.* The World Church of the Creator asserts that the white race is more threatened today than it has ever been. *Id.* The purported reason for this is that "[w]e [members of the white race] have subsidized those not of our own kind at our expense, causing their numbers to soar, while at the same time, White people have scaled back the size of their families, either out of selfishness or because of low-paying salaries and exorbitant taxes." *Id.* The symbol of the World Church of the Creator is a red flag with a white triangle on one end and a white circle in the middle that contains a capital W, a crown, and a halo. *Id.* The W stands for "White Race," the crown represents the "Aristocratic position [of the World Church of the Creator] in Nature's scheme of things" intended to denote that they are the "Elite." *Id.* The halo signifies that the members of the World Church of the Creator regard their race as "being unique and sacred above all other values." *Id.* The "blood-red" color of the flag represents the "struggle for the survival, expansion and advancement of the White Race." *Id.* The "pure white" triangle illustrates "the emergence of a Whiter and Brighter World out of the struggle." *Id.*

73. *Id.*

74. *Id.*

75. Berkowitz, *supra* note 33.

76. *Id.*

77. *Id.*

Internet."[78] For example, two teenage boys were arrested after they made a pipe bomb using instructions obtained from the Internet.[79] Three high school students who detonated a bomb at a church told police they acquired material on how to make the device from a web site focusing on *The Anarchist's Cookbook.*[80]

*Overthrow.com* is a web site dedicated to "Militant Anti-Government Anarchism."[81] This site claims to have "one of the few remaining copies of the banned book 'Hit Man'" and it is available for viewing simply by clicking on the title.[82] *The Terrorist Handbook* is also available to download.[83] The site even provides a button that says, "Dumb Lawyers Click Here," leading to a list of questions and answers providing reasons why the makers of the web site are not violating any laws and are not inciting violence.[84]

The main feature of the web site is a list of drugs and bombs for which the site provides recipes.[85] For example, the site provides a recipe for making Mercury Fulminate and explains that: "Mercury fulminate is perhaps the oldest known initiating compound. It can be detonated by either heat or shock. Even the action of dropping a crystal of fulminate causes it to explode. A person making this material would us [sic] the following procedure."[86] A recipe for a pipe bomb provided by the site even contains a diagram to aid the reader in construction.[87] The site recommends other titles such as *The Anarchist's Cookbook*, *Ragnar's Big Book of Homemade Weapons*, and *Pipe and Fire Bomb Designs.*[88]

Another web site, titled *THC's Pyromania* simply provides links for viewing instructional manuals such as *The Anarchist's Cookbook, Terrorist Handbook*, and *The Big Book of Mischief.*[89] The web site entitled *Dragon's Lair* provides instructions ranging from "how to fraud credit cards" or hot wire a car to how to construct an atomic bomb.[90]

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78. *Id.*
79. *Id.*
80. *Id.*
81. *Overthrow.com* (visited Oct. 9, 1999) <http://www.overthrow.com/home.html>.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Malignant Chemistry* (visited Sept. 10, 1999) <http://www.overthrow.com/drugznbombz.html>.
86. *Mercury Fulminate* (visited Oct. 9, 1999) <http://www/overthrow.com/merefulm.html>.
87. *Pipe Bombs* (visited Sept. 10, 1999) <http://www.overthrow.com/pipebomshtml>.
88. *Id.*
89. *See THCs Pyromania* (visited Oct. 23, 1999) <http://freehosting9.at.web1000.com./498ab35bl/th/thc-pyromaniac-web1000/> (providing other titles, including *Jolly Rogers Cookbook, Anarchists Home Companion, The Avengers Handbook, 403 Different Files on Anarchy,* and *Hacking Phreaking and Cracking).*
90. *Dragon's Lair* (visited Oct. 23, 1999) <http://members.tripod.com/~Sky_Z/DRAGON.HTM>.

## III. FIRST AMENDMENT CASE LAW

The First Amendment states, "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."[91] The First Amendment is applied to the states through the Fourteenth Amendment.[92] Thus, the right of a citizen to speak freely should not be limited by a state or the federal government unless there is justification for doing so.[93]

The United States Supreme Court has determined that some types of speech are not worthy of First Amendment protection.[94] Indeed, the Court determined that: "the freedom of speech and of press which is secured by the Constitution, does not confer an absolute right to speak . . . ."[95] Courts have acknowledged certain categories of speech which may be regulated due to the sufficient risk created by that speech.[96] The categories recognized as excluded from first Amendment protection are for fighting words,[97] obscenity,[98] defamation,[99] commercial speech,[100] and speech which is likely to incite imminent lawless action.[101] The test applied to speech which is likely to incite imminent lawless action is claimed to be the appropriate test to be applied to speech providing detailed illegal instruction.[102]

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91. U.S. CONST. amend. I.

92. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . .").

93. Theresa J. Pulley Radwan, *How Imminent is Imminent?: The Imminent Danger Test Applied to Murder Manuals*, 8 SETON HALL CONST. L.J. 47, 49 (1997).

94. *Id.*

95. Gitlow v. New York, 268 U.S. 652, 666 (1925).

96. Radwan, *supra* note 93, at 52.

97. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (describing fighting words as those which by their very utterance will provoke a reasonable person).

98. *See* Miller v. California, 413 U.S. 15, 24 (1973)

> ([T]he basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value).

99. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

100. Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 455-56 (1978).

101. Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969).

102. *See supra* note 10 and accompanying text.

### A. Schenck v. United States

*Schenck v. United States*[103] created the fundamental test for determining whether possibly dangerous speech is protected.[104] Charles T. Schenck was the general secretary of the Socialist party and was in charge of the Socialist headquarters that mailed the documents in question.[105] A book containing the minutes of the Executive Committee was found at the headquarters and included a resolution that fifteen thousand leaflets would be printed on the blank side of an existing leaflet.[106] Schenck was in charge of the printing.[107] The existing leaflet contained the first part of the Thirteenth Amendment and stated that the idea set forth in that amendment was violated by the Conscription Act.[108] There was also a statement that conscription was "despotism" and a "wrong against humanity."[109] The second side of the leaflet began with the statement, "Assert Your Rights" and contended that the denial of the right of a person to assert his opposition to the draft violated the Constitution.[110] The leaflet claimed that sending citizens to foreign countries to kill people deserved condemnation.[111] Schenck was found guilty and convicted of violating the Espionage Act;[112] he appealed on the ground that the First Amendment protected the speech contained in the leaflet.[113]

In an opinion written by Justice Holmes, the Court reasoned that "in many places and in ordinary times" the speech might have been protected, "[b]ut the character of every act depends upon the circumstances in which it is done."[114] The Court, setting forth the rule that would come to be known as the "clear and present danger" test, held 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."[115]

The Court noted that if the act, the tendency of that act, and the intent of the actor are the same, there would be no ground for maintaining that only success would justify making the act a crime.[116] The Court reasoned that the defendants

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103. 249 U.S. 47 (1919).
104. *Id.* at 52; Coursey, *supra* note 10, at 877.
105. *Schenck*, 249 U.S. at 49.
106. *Id.*
107. *Id.*
108. *Id.* at 50.
109. *Id.* at 51.
110. *Id.*
111. *Id.*
112. *Id.* at 48; *see* ESPIONAGE ACT, ch. 30, tit. I, 40 Stat. 217 (1917) (codified as amended at 18 U.S.C. § 2388 (1976)).
113. *Schenck*, 249 U.S. at 49.
114. *Id.* at 52.
115. *Id.*
116. *Id.*

would not have sent the document unless it was intended to have some effect.[117] Thus, the intent could be inferred from the act itself.[118] The Court also reasoned that the only perceivable effect the document could have been expected to have on those people subject to the draft was to influence them to obstruct the draft.[119] Therefore, the result of obstructing the draft did not have to actually occur; it was only necessary to find that it was foreseeable that a harmful result could occur.[120] The Court held that printing literature containing anti-draft material during the war created a "clear and present danger" to the nation and was not protected by the First Amendment.[121]

### *B.* Abrams v. United States

In *Abrams v. United States*,[122] the majority applied the clear and present danger test and determined that the test was met so as to justify conviction of the defendant.[123] Jacob Abrams and four others were convicted of conspiring to violate the Espionage Act.[124] The defendants admitted they had gotten together to print and distribute the circulars and five thousand had been printed and distributed.[125] Abrams rented rooms for a meeting place, purchased the printing outfit, and "installed [the printing press] in a basement room where the work was done. . . ."[126]

One of the circulars labeled President Wilson a "hypocrite and a coward" for sending troops into Russia and then attacked the government in general.[127] The circular claimed that capitalism is the only enemy and workers of the world should "'put down'" the enemy.[128] The court interpreted these statements to be a call to the workers of the United States to "put down[,] by force[,] the Government of the United States. . . ."[129]

Another circular, printed in Yiddish, spoke to people who had little belief in the honesty of the United States government and commanded those people to throw away all confidence.[130] The Court reasoned that the purpose of these statements was to persuade people "to cease to render assistance" in the war.[131] The Court then

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117. *Id.* at 51.
118. *Id.*
119. *Id.*
120. *Id.* at 52.
121. *Id.*
122. 250 U.S. 616 (1919).
123. *Id.* at 623-24.
124. *Id.* at 615-17.
125. *Id.* at 618.
126. *Id.*
127. *Id.* at 619.
128. *Id.* at 620.
129. *Id.*
130. *Id.*
131. *Id.* at 620-21.

stated that "[m]en must be held to have intended, and to be accountable for, the effects which their acts were likely to produce."[132]

Another circular stated that a great disturbance should be created so that the "autocrats" of America would be compelled to keep their armies at home and concluded by stating, "[i]f they will use arms against the Russian people to enforce their standard of order, *so will we use arms*. . . ."[133] The Court determined that the obvious purpose of the propaganda was to "excite . . . disaffection, sedition, riots, and, as they hoped, revolution, in [the United States] for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe."[134] The Court further determined that the language of the circulars was intended to provoke resistance to the United States in the war and that the defendants urged a strike of workers in ammunition factories in order to curtail production.[135]

Justice Holmes, dissenting, reasoned that "[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."[136] Holmes revised the *Schenck* clear and present danger test, however, stating that "speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils . . ." could constitutionally be punished.[137] Holmes reasoned that the simple publishing of a "silly" leaflet by an undisclosed person was not likely to present any immediate danger that the opinions stated "would hinder the success of the government arms or have any appreciable tendency to do so."[138] He noted, however, that publishing those opinions with the specific intent to obstruct might denote a greater danger.[139]

### C. Gitlow v. New York

In *Gitlow v. New York*,[140] the majority did not apply the clear and present danger test created in *Schenck* and found that the Court's only responsibility was to decide whether the statute was reasonable.[141] Benjamin Gitlow was tried and convicted for the statutory crime of criminal anarchy.[142] The first count of the indictment charged that Gitlow "advocated, advised and taught the duty, necessity and propriety of overthrowing and overturning organized government by force, violence and

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132. *Id.*
133. *Id.* at 623.
134. *Id.*
135. *Id.* at 624.
136. *Id.* at 628 (Holmes, J., dissenting).
137. *Id.* at 627.
138. *Id.* at 628.
139. *Id.*
140. 268 U.S. 652 (1925).
141. Coursey, *supra* note 10, at 879.
142. *Gitlow*, 268 U.S. at 654.

unlawful means" through a writing titled "The Left Wing Manifesto."[143] Gitlow was "a member of the Left Wing Section of the Socialist Party" and a member of the National Council of that section.[144] Gitlow was also on the board of managers of a paper titled "The Revolutionary Age" and arranged for the printing of the paper and delivered the first issue containing the Manifesto.[145] Gitlow also went to various parts of New York state "to speak to branches of the Socialist Party about the principles of the Left Wing."[146] In doing so, he urged that revolutionary Socialism must use mass industrial revolts to destroy the parliamentary state.[147]

The Court determined that the Manifesto did not simply provide an abstract statement or prediction that industrial turbulence and revolutionary mass strikes would erupts spontaneously.[148] Rather, the Court concluded that the Manifesto advocated and urged mass action to incite industrial disturbances and ultimately overthrow and destroy organized parliamentary government.[149] The Court ruled that the jury was warranted in finding that the Manifesto advocated not simply the abstract teaching of overthrowing organized government by force, violence and unlawful means, but the action to accomplish the result.[150]

The Court considered two further situations: first, situations where the legislative body has determined that certain utterances involve such danger of substantive evil that they may be punished; and second, situations where the statute "prohibits certain acts involving the danger of substantive evil without any reference to language itself" and the statute is being applied to language used by the defendant.[151] In the first situation, the regulation of speech will survive if the statute is constitutional and the use of the language comes within its prohibition.[152] In the second situation, First Amendment freedom of speech analysis requires a determination of whether the specific language in question involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection.[153] The Court held that the clear and present danger rule in *Schenck* was intended to apply only to the second type of situation and has no application to cases involving the first type of situation.[154]

In dissent, Justice Holmes reasoned that the clear and present danger test should be applied.[155] Holmes determined that, under the test as reformed in *Abrams*, there

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143. *Id.* at 655.
144. *Id.*
145. *Id.*
146. *Id.* at 656.
147. *Id.* at 658-59.
148. *Id.* at 665.
149. *Id.*
150. *Id.* at 666.
151. *Id.* at 670.
152. *Id.*
153. *Id.* at 671.
154. *Id.*
155. *Id.* at 672-73 (Holmes, J., dissenting).

was no present danger that the small minority who shared the defendant's views would attempt to overthrow the government by force.[156] He noted, however, that a different question would have been presented if the document was published as an attempt to provoke a rebellion against the government immediately, rather than at some time in the future.[157]

*D.* Whitney v. California

In *Whitney v. California*[158] the majority of the Court again "did not apply the clear and present danger test" and only examined the reasonableness of the statute.[159] Charlotte Anita Whitney was tried and convicted for violation of The Criminal Syndicalism Act of California.[160] Whitney was a member of the Communist Labor Party of America whose purpose was to "create a unified revolutionary working class movement in America to conquer the capitalist state [and] overthrow . . . capitalist rule."[161]

The Court noted "that a State, in the exercise of its police power, may punish those who abuse this freedom with utterances adverse "to the public welfare, tending to incite crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means."[162] The Court reasoned that the nature of the "offense" condemned "by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods" and "it partakes of the nature of a criminal conspiracy."[163] The Court held that the Syndicalism Act was not "repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association."[164]

Justice Brandeis, concurring, reiterated the clear and present danger test as reformed by Justice Holmes in *Abrams*.[165] Brandeis reasoned that he was "unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection. . . ."[166] However, he concurred because other evidence was present tending to demonstrate the existence of a conspiracy to commit immediate serious crimes, and to show that

156. *Id.* at 673 (Holmes, J., dissenting).
157. *Id.*
158. 274 U.S. 357 (1927).
159. Coursey, *supra* note 10, at 879.
160. *Whitney,* 274 U.S. at 359.
161. *Id.* at 363.
162. *Id.* at 371 (citing *Gitlow*, 268 U.S. at 666-68).
163. *Id.* at 371-72.
164. *Id.* at 371.
165. *Id.* at 373 (Brandeis, J., concurring).
166. *Id.* at 379 (Brandeis, J., concurring).

such conspiracy would be furthered by the activity of the Communist Labor Party of America, of which Whitney was a member.[167]

### E. Dennis v. United States

In *Dennis v. United States*[168] Chief Justice Vinson announced the judgment of the Court and, in an opinion joined by three other justices, expanded on the clear and present danger test.[169] Eugene Dennis was found guilty of violating the conspiracy provisions of The Smith Act.[170] The indictment charged Dennis "with willfully and knowingly conspiring to organize the Communist Party of the United States of America, a group of persons who teach and advocate the overthrow and destruction of the government of the United States by force and violence."[171] In addition, the indictment charged Dennis "with knowingly and willfully advocating and teaching the duty and necessity of overthrowing and destroying the government of the United States by force and violence."[172] Moreover, the indictment alleged that The Smith Act proscribes these acts and a conspiracy to take such action is a violation of the Act.[173]

Chief Justice Vinson determined that this case implicated the clear and present danger test, and that the Court must decide the meaning of the phrase.[174] He determined that if the government is aware that a group is aiming to overthrow the government and attempting to convince its members to strike on the command of its leaders, action by the government is required.[175] He rejected the idea that success or probability of success is the criterion.[176]

The Court adopted the test applied by Chief Justice Hand in the lower court: "In 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."[177] It also affirmed the trial court's finding that the requisite danger existed.[178] The Court reasoned that although the defendant's activities did not result in an attempt to overthrow the government by force and violence, that fact does not change the circumstance that a group was ready to make the attempt.[179] According to Vinson, this analysis eliminated the contention that a conspiracy to advocate, as

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167. *Id.*
168. 341 U.S. 494 (1951).
169. Coursey, *supra* note 10, at 878.
170. 341 U.S. at 495.
171. *Id.* at 497.
172. *Id.*
173. *Id.*
174. *Id.* at 509.
175. *Id.*
176. *Id.* at 510.
177. *Id.* (changes in original).
178. *Id.*
179. *Id.*

distinguished from the advocacy itself, cannot be constitutionally restrained because it consists only of preparation to commit violence.[180] The Court asserted that it is the existence of the conspiracy itself that creates the danger.[181] As a result, the Court determined that Dennis was properly and constitutionally convicted for violation of The Smith Act and affirmed the judgment of the lower court.[182]

### *F.* Brandenburg v. Ohio

*Brandenburg v. Ohio*[183] modified the test for determining whether possibly dangerous speech is protected.[184] Clarence Brandenburg was convicted of violating the Ohio Criminal Syndicalism statute for "'advocat[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 for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[185] At Brandenburg's invitation, a reporter and cameraman attended and filmed a Ku Klux Klan rally.[186] Portions of the films were later broadcast on the local station and on a national network.[187] Brandenburg made a speech in the first film stating, "'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.'"[188] In the second film, Brandenburg stated, "'Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.'"[189]

The Court reasoned that unless advocacy is directed toward inciting imminent lawless action and is likely to incite such action, a state cannot outlaw advocacy of the use of force or advocacy of violation of the law due to the protections afforded by the First Amendment.[190] The Court also noted that the simple abstract teaching of the "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."[191] Therefore, a statute failing to draw such a distinction intrudes on the freedoms guaranteed by the First Amendment and Fourteenth Amendment because it captures speech protected by the

180. *Id.* at 511.
181. *Id.*
182. *Id.* at 517.
183. 395 U.S. 444 (1969).
184. Coursey, *supra* note 10, at 880.
185. *Brandenburg*, 395 U.S. at 444-45 (quoting Ohio Rev. Code Ann. § 2923.13).
186. *Id.*
187. *Id.* at 446.
188. *Id.*
189. *Id.* at 447.
190. *Id.*
191. *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).

Constitution.[192] The Court ruled that Ohio's Criminal Syndicalism Act could not be upheld as constitutional under this test.[193]

## IV. RICE V. PALADIN ENTERPRISES, INC.

### A. *Facts of the Case*

In the incident underlying *Rice v. Paladin Enterprises*,[194] James Perry murdered Mildred Horn and her quadriplegic son, Trevor, as well as Trevor's nurse, Janice Saunders.[195] He shot the two women through the eyes and strangled Trevor.[196] Lawrence Horn, Mildred's ex-husband and Trevor's father, hired Perry to commit the crime so that Lawrence would receive the two million dollar award his son won in settlement for the injuries that rendered him a quadriplegic.[197] Perry was convicted of first degree murder and sentenced to death while Horn was convicted of first degree murder and given a life sentence without the possibility of parole.[198]

A copy of *Hit Man* was found in Perry's apartment after the murders.[199] *Hit Man* instructs its readers how to "solicit business, choose a weapon, make a silencer, perform the kill, dispose of the weapon, and much more—all in explicit detail."[200] Perry carefully followed *Hit Man's* teachings in preparation of becoming a hired killer.[201] The families of the victims sued Paladin Enterprises for tortious aiding and abetting the murders of all three victims.[202] For purposes of summary judgment, Paladin stipulated that it had intentionally marketed its books to ex-convicts and would be criminals, knowing that many would rely on the detailed step-by-step instructions to commit heinous murders.[203] The district court granted Paladin's motion for summary judgment, applying *Brandenburg's* test to decide whether *Hit Man* incited or merely advocated murder.[204] The Fourth Circuit reversed and remanded.[205]

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192. *Id.* at 448.
193. *Id.* at 448-49.
194. 128 F.3d 233 (4th Cir. 1997).
195. *Id.* at 239.
196. *Id.*
197. *Id.*
198. Isaac Molnar, Comment, *Resurrecting the Bad Tendency Test to Combat Instructional Speech: Militias Beware*, 59 OHIO ST. L.J. 1333, 1343 n.72 (1998).
199. Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 838 (D. Md. 1996), *rev'd*, 128 F.3d 233 (4th Cir. 1997).
200. *Rice*, 128 F.3d at 235-39.
201. *Id.* at 239-41.
202. *Rice*, 940 F. Supp. at 838.
203. *Id.* at 840.
204. *Id.* at 844.
205. *Rice*, 128 F.3d at 267.

*B. Relevant Authority Relied Upon by Plaintiffs*

The plaintiffs in *Rice* offered *United States v. Barnett*[206] and *United States v. Buttorff*[207] for the proposition that a wrongdoer cannot avoid either civil or criminal liability by simply using speech to achieve the illegal objective.[208] In *Barnett*, the defendants were charged with aiding and abetting crime through publication and distribution of instructions on how to make illegal drugs.[209] The *Barnett* Court concluded that "[t]o the extent, however, that [the defendant] 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 [F]irst [A]mendment does not provide a defense as a matter of law to such conduct."[210]

*Rice* is very similar to *Barnett*. First, the defendants, Paladin and Barnett both "published and advertised step-by-step instructions on how to commit crimes."[211] Second, they both "mailed an instruction manual to an unknown person who responded to the advertisement."[212] Third, in both cases, the person who received the instructions followed them step-by step in order to commit the crimes.[213]

In *Buttorff*, the defendants were convicted for aiding and abetting several people in filing false or fraudulent income tax forms.[214] The defendants' involvement entailed simply discussing their views at seminars.[215] The people that received the information, however, testified that they had filed fraudulent tax forms based on the "recommendation, advice or suggestions" of the defendants.[216] The court quoted Judge Learned Hand in response to the defendants' argument that their speech was protected by the First Amendment:

> One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state. . . . To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do

206. 667 F.2d 835 (9th Cir. 1982).
207. 572 F.2d 619 (8th Cir. 1978).
208. *Rice*, 940 F. Supp. at 842.
209. *Barnett*, 667 F.2d at 837.
210. *Id.* at 843.
211. Lise Vansen, *Incitement by any Other Name: Dodging a First Amendment Misfire in Rice v. Paladin Enterprises, Inc.*, 25 HASTINGS CONST. L.Q. 605, 617 (citing Rice v. Paladin Enterprises, Inc., 940 F. Supp. 836, 843 (D. Md. 1996), *rev'd*, 128 F.3d 233 (4th Cir. 1997)).
212. *Id.*
213. *Id.*
214. *Buttorff*, 572 F.2d at 621-22.
215. *Id.* at 623.
216. *Id.* at 622.

> it. . . . If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.[217]

The court held that the defendants went beyond[218] mere advocacy of tax reform because they explained "how to avoid withholding" by "counseling the principals in the technique of evasion of income taxes."[219] The court then held that the speech "was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding [of] forms."[220]

Plaintiffs in *Rice* also relied on *Weirum v. RKO General, Inc.*.[221] Their purpose in offering *Weirum* was to show that the defendants could be held liable for injury caused by their words.[222] In *Weirum*, the defendant radio station was holding a contest whereby the first listener to locate one of the disc jockeys at various locations would be a winner.[223] One of the participants in the contest forced decedent's car off the road in the process of trying to get to one of the locations.[224] The court found the defendants liable, holding that "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."[225]

Another case relied on by the plaintiffs in *Rice* was *United States v. Mendelsohn*.[226] In that case, the defendants were convicted of aiding and abetting interstate transportation of wagering paraphernalia.[227] The defendants sent SOAP, a bookmaking program, on a computer disk to California.[228] The defendants were aware that customers were mostly using the program for illegal bookmaking; however, defendants also sold the program to bettors and attempted to sell it to game companies and sports bookmakers who were engaged in legal gambling operations.[229] The court affirmed the convictions of the defendants and reasoned that the defendants had provided computerized instructions for use in an illegal activity and were aware that the program was to be used as part of that illegal activity.[230] The court held that "[w]here speech becomes an integral part of the crime, a First

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217. *Id.* at 624 (quoting Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917)).
218. *Id.* at 624.
219. *Id.* at 628.
220. *Id.* at 624.
221. 15 Cal. 3d 40 (1975).
222. *Rice*, 940 F. Supp. at 844.
223. *Weirum*, 15 Cal. 3d at 43-45.
224. *Id.*
225. *Id.* at 478.
226. 896 F.2d 1183 (9th Cir. 1990).
227. *Id.* at 1184.
228. *Id.*
229. *Id.*
230. *Id.* at 1185.

Amendment defense is foreclosed even if the prosecution rests on words alone."[231] The court concluded that the program was "too instrumental in and intertwined with the performance of criminal activity to retain [F]irst [A]mendment protection."[232]

### C. *The District Court*

The district court applied *Brandenburg* to the speech included in *Hit Man*.[233] The court reasoned that *Brandenburg* distinguished between speech "which merely advocates law violation and speech which incites imminent lawless activity."[234] The court determined that the issue was "whether *Hit Man* merely advocates or teaches murder or whether it incites or encourages murder."[235] The court concluded that in order to hold Paladin liable under the *Brandenburg* test, plaintiffs had to show that Paladin intended Perry to commit the murders immediately.[236] The court held that Paladin lacked this requisite intent.[237] Further, plaintiffs also failed to show the necessary "call to action" and immediacy elements.[238] Therefore, Paladin and *Hit Man* were protected by the First Amendment.[239] The court granted summary judgment to Paladin.[240]

### D. *Fourth Circuit Court of Appeals*

The Fourth Circuit reversed the decision of the district court and remanded for trial.[241] The court concluded that "the speech-act doctrine has long been invoked to sustain convictions for aiding and abetting the commission of criminal offenses . . . that the First Amendment does not necessarily pose a bar to liability [when using speech] for aiding and abetting a crime."[242] The court reasoned that *Brandenburg* only applied to abstract discussion of current laws, and not to "speech which urges the listeners to commit violations of current law."[243] The court further reasoned that one "can prepare and even steel another to violent action not only through the dissident 'call to violence,' but also through speech, such as instruction . . . that does not . . . remotely resemble advocacy."[244]

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231. *Id.* (quoting U.S. v. Freeman, 761 F.2d at 552).
232. *Id.* at 1186.
233. *Rice*, 940 F. Supp. at 845.
234. *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444, 448 (1969)).
235. *Id.* (citing Brandenburg v. Ohio, 395 U.S. 444, 449 (1969)).
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* at 848.
240. *Id.*
241. *Rice*, 128 F.3d at 267.
242. *Id.* at 244.
243. *Id.* at 246.
244. *Id.* at 265.

The court determined that *Hit Man* constituted a "speech act" and therefore removed the First Amendment as a bar to liability.[245] In coming to that conclusion, the court relied on a number of criminal cases in which the First Amendment did not protect defendant's use of speech to commit crimes.[246] The court first relied on *United States v. Barnett*, in which the Ninth Circuit held that the First Amendment did "not provide publishers a defense as a matter of law to charges of aiding and abetting a crime through the publication of instructions of how to make illegal drugs."[247] The court also relied on *United States v. Freeman*, in which a defendant who assisted in preparing false tax returns during seminars protesting tax laws was held criminally liable for counseling tax evasion at the seminars.[248]

The Fourth Circuit noted that although a heightened intent may be needed in some circumstances, it was not necessary in this case since Paladin had stipulated to having an intent "that would satisfy any heightened standard that might be required by the First Amendment . . . [prior] to the imposition of liability for aiding and abetting through speech conduct."[249] The court further determined that regardless of Paladin's stipulations, a reasonable jury could find that Paladin aided and abetted Perry and acted with the heightened intent which the First Amendment may impose.[250] The court held that the First Amendment did not bar plaintiff's action and the facts of the case would support a finding that Paladin aided and abetted Perry in the murder of Mildred and Trevor Horn, as well as Janice Saunders.[251]

## V. UNDERLYING JUSTIFICATIONS FOR THE FIRST AMENDMENT PROTECTION

Some commentators express concern that holding the publisher of *Hit Man* liable for foreseeable harm to Perry's victims invokes this particular publisher's free speech interest as well as that of other authors or movie makers.[252] There is concern that the state could ban "any expression that the state may deem undesirable or unpopular."[253] In light of the underlying purposes of the First Amendment, however,

245. *Id.* at 267.
246. Pimm, *supra* note 5, at 18.
247. *Rice*, 128 F.3d at 244-45 (citing United States v. Barnett, 667 F.2d 835 (9th Cir. 1982)).
248. *Rice*, 128 F.3d at 245 (citing United States v. Freeman, 761 F.2d 540 (9th Cir. 1985)).
249. *Id.* at 248.
250. *Id.* at 252.
251. Molnar, *supra* note 198, at 1350.
252. Amy K. Dilworth, Note, *Murder in the Abstract: The First Amendment and the Misappropriation of Brandenburg*, 6 WM. & MARY BILL RTS. J. 565, 587 (1998).
253. *Id.*

it is not likely that holding the publisher of such information liable would really endanger such rights.[254]

### *A. Theories Illustrating the Significance of Free Speech*

Scholars have considered several theories to illustrate the significance of free speech.[255] The First Amendment protects a marketplace of ideas because it leads to discovery of the truth and that the way to persuade people that ideas are false is to promote speech rather than suppress it.[256] The Meiklejohnian theory advocates the protection of free speech based on the idea that free speech is a mechanism for "public deliberation and a well-informed electorate, essential to democratic self-governance."[257] The libertarian model represents the view that people are independent and reasonable decision makers and should have the right to have their own thoughts and beliefs without the government interfering or trying to change them.[258] The purpose of these theories is to protect the people from the possibility

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254. *Id.* at 588; *see id.* n.115 ("For those who remain uncomfortable with holding liable a publisher of such a book as Hit Man, consider one legal scholar's theory:

> An arch legal principle holds persons civilly liable for the criminal conduct of others in a variety of circumstances. Landlords are responsible for failing to undertake safety measures to protect tenants from crime that might reasonably be anticipated. Gun dealers are similarly liable for sale to customers who they had reason to believe would use he firearms in crime. Bar owners are open to liability for alcohol sales to intoxicants who subsequently commit highway mayhem in violation of DWI prohibitions.
>
> The theory behind these liability rules is sound and simple: Citizens and businesses are obliged to act reasonably to avoid assisting or facilitating crimes that might be reasonably anticipated. The reasonableness standard may dictate either preventive action against crime or a refusal to deal with probable criminals in ways that might advance their malevolent designs. As applied to Paladin Press, the theory makes a persuasive case for liability. . . .
>
> Paladin Press might reasonably have expected its manual to be purchased and followed by a contract murderer like James Perry. In such circumstances, like a gun dealer or bar owner, the law should saddle it with a duty to desist from publication. That is a reasonable demand that society may require in the hopes of reducing criminal conduct. . . .
>
> Drawing sensible lines is the hallmark of enlightened law. The First Amendment is no exception. Experience discredits the ideas that to ban Hit Man: A Technical Manual for Independent Contractors, is but a step away from banning the Lincoln-Douglas debates.

Bruce Fein, *Crime, Responsibility and Free Speech*, WASH. TIMES, Feb. 27, 1996, at A17.").

255. Avital T. Zer-Ilan, Casenote, *The First Amendment and Murder Manuals*, 106 YALE L.J. 2697, 2698 (1997).

256. *Id.*; *see, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (explaining that the best way to determine the truth is to see if the thought will be accepted in the marketplace); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (illustrating the concept that the function of the First Amendment is to maintain an "uninhibited marketplace of ideas in which truth will ultimately prevail").

257. Zer-Ilan, *supra* note 255, at 2698. *See, e.g.*, Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.").

258. Zer-Ilan, *supra* note 255, at 2698. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties."); First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 n.12 (1978) ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion.").

that the government is actually "reacting to the feared persuasiveness of the speech that it seeks to suppress" and is only "pretending to be concerned about noise, litter, offensiveness, or a hostile audience reaction."[259]

### B. *Reasoning of* Rice v. Paladin *Distinguishable From Reasoning of* Brandenburg v. Ohio

The *Brandenburg* Court based its opinion on the effect of the speech on violent crowd behavior and assembly in particular.[260] In fact, the importance of confining *Brandenburg* to situations involving crowd behavior, advocacy, and efforts to steel a group to violent action has been recognized by other courts.[261] The Supreme Court opinions concerning advocacy of violence, incitement, symbolic speech, and graphic protest have included speech relating to political or social issues.[262]

*Hit Man* does not contain political or social discourse such as that contained in *Brandenburg*.[263] The historical foundation for the First Amendment is that the government cannot suppress speech on the basis of one's point of view.[264] In *Rice*, the plaintiffs were not seeking to suppress speech on the basis of advocacy of unpopular ideas or because the defendants speech is "revolting, disgusting, or morally repugnant."[265] Rather, the plaintiffs based their lawsuit on compensation for physical injury and death which was substantially caused by the distribution of the instruction manual published by the defendants.[266] It was not a lawsuit about "taking sides in the marketplace of ideas."[267]

Advocacy was of prime importance to the Court in *Brandenburg*.[268] The statute involved prohibited "'advocat[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.'"[269] The Court held that the protections afforded by the First Amendment do not allow a state to prohibit advocacy of law violation or use of

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259. Zer-Ilan, *supra* note 255, at 2698-99 (quoting David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 338 (1991)).

260. *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) ("[W]e are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action").

261. Dilworth, *supra* note 252, at 583-84.

262. *Id.* at 584.

263. *Id.*

264. *Id.* at 585.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Brandenburg*, 395 U.S. at 444-45 (quoting Ohio Rev. Code Ann § 2923.13).

force unless such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[270]

The Court quoted *Noto v. United States,*[271] stating that "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."[272] As described by the district court in *Rice*, *Hit Man* "merely teaches what must be done to implement a professional hit."[273] The *Brandenburg* court unequivocally defined the kind of advocacy that cannot be prohibited and this definition did not include "mere abstract teaching."[274] "*Hit Man* is not *Brandenburg* advocacy" because it involves "mere teaching," as opposed to the advocacy protected by *Brandenburg*.[275]

## VI. MENS REA IN ACCESSORY LIABILITY CASES

The mens rea of accomplice liability is ordinarily explained in terms of intent.[276] There currently is debate concerning whether a person may be designated as an accomplice "if he *knows* that his assistance will aid in a crime, but he lacks the *purpose* that the crime be committed."[277] At common law, knowledge of the criminal intent of the person committing the crime was enough to hold the accomplice liable.[278] Today, many argue that the accomplice must himself have the intent required for the substantive crime.[279]

Two tests have been established in the federal courts to determine the required mental state for accomplice liability. The Second Circuit established the first test in

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270. *Id.* at 447.

271. 367 U.S. 290 (1961).

272. *Brandenburg*, 395 U.S. at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)); Dilworth, *supra* note 252, at 586.

273. *Rice*, 940 F. Supp. at 847.

274. Dilworth, *supra* note 252, at 586.

275. *Id.* at 587.

276. *See, e.g.*, U.S. v. Scotti, 47 F.3d 1237, 1245-46 (2nd Cir. 1995) (explaining that a judicial construction of the federal aiding and abetting statute based on the common law of accomplice liability, can be read to limit Congress's ability to define the participation crime of § 894 (a)(1) to require only the *mens rea* of knowledge. The plain language of § 894(a)(1) indicates that Congress decided that extortion was a grave enough evil to warrant criminal liability on the basis of knowledge alone); U.S. v. Washington, 106 F.3d 983, 1004 (D.C. Cir. 1997) (quoting U.S. v. Raper, 676 F.2d 841, 49 (D.C. Cir. 1982)) ("The elements of aiding or abetting an offense are (1) the specific intent to facilitate the commission of a crime by another; (2) guilty knowledge on the part of the accused; (3) that an offense was being committed by someone; and (4) that the accused assisted or participated in the commission of the offense.")).

277. *Id.*

278. Candace Courteau, Note, *The Mental Element Required for Accomplice Liability*, 59 LA. L. REV. 325, 328 (1998).

279. *Id.*; *see* MODEL PENAL CODE § 2.06 commentary at 312 n.42 (1985) ("[I]f anything, the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent.").

*United States v. Peoni*.[280] The court concluded that accomplice liability requires a "purposive attitude" to promote criminal conduct.[281] The mind set of the accomplice is determined by direct evidence of a specific intent to aid in the accomplishment of the criminal undertaking or by substantial affiliation with the undertaking.[282] The accomplice must in some way associate himself with the venture, participate as if it is something that he wishes to bring about, and seek by his action to make it succeed.[283]

The second test originated in the Fourth Circuit in *Backun v. United States*.[284] The court reasoned that an average citizen has a moral obligation to prevent the commission of a crime and that complicity is established if the citizen provides aid with knowledge that the aid will assist commission of the crime.[285] Under this test, guilt as an accomplice is based on aiding and assisting those committing the actual crime and not on "having a stake" in the outcome of the crime.[286] The court in *Backun* concluded that "those who make a profit by furnishing to criminals, whether by sale or otherwise, the means to carry on their nefarious undertakings aid them just as truly as if they were actual partners with them, having a stake in the fruits of their enterprise."[287]

## VII. ANALYSIS

*Rice v. Paladin* has been criticized. According to Isaac Molnar, under *Rice*, "instructional manuals that teach criminal conduct . . . will receive no protection from civil or criminal liability if its tendency is to create illegal conduct—irrespective of the speaker's specific intent."[288] Molnar's assertion is in direct conflict with the statement by the Fourth Circuit in *Rice v. Paladin* that it was "confident that the First Amendment poses no bar to the imposition of civil (or criminal) liability for speech acts which the plaintiff (or the prosecution) can establish were undertaken with specific, if not criminal, intent."[289]

The court reasoned that the number and extent of parallels between the instructions in *Hit Man* and the murders committed by Perry could not be perceived as coincidence.[290] Therefore, the court concluded that not only had Paladin stipulated

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280. 100 F.2d 401 (2d Cir. 1938).

281. *Id.* at 402 (establishing that the requirement is that the accessory should participate in the crime "as in something that he wishes to bring about, that he *seek* by his action to make it succeed" (emphasis added)).

282. Louis Westerfield, *The Mens Rea Requirement of Accomplice Liability in American Criminal Law—Knowledge or Intent*, 51 MISS. L.J. 155, 159 (1980).

283. *Peoni*, 100 F.2d at 402.

284. 112 F.2d 635 (4th Cir. 1940).

285. *Id.* at 637.

286. *Id.*

287. *Id.*

288. Molnar, *supra* note 198, at 1362.

289. Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 248 (4th Cir. 1997).

290. *Id.* at 252.

to an intent "that would satisfy any heightened standard that might be required by the First Amendment prerequisite to the imposition of liability for aiding and abetting through speech conduct,"[291] but also that a "jury could otherwise find that Paladin acted with a kind and degree of intent" that would satisfy that very same heightened standard.[292]

Manuals and web sites that provide detailed illegal instruction would also be subject to the intent requirement set forth in *Rice v. Paladin*. While it would be possible to show that some of those responsible for the manuals and web sites did have the intent required to be liable for aiding and abetting, that would not be the case in all situations. For example, the web site entitled *Dragon's Lair* provides a list of instructions on how to perform various illegal acts.[293] Aside from the very detailed list and a generic disclaimer that the information provided is for educational purposes only, the web site is void of any indication that the person or persons responsible do or do not intend for readers to use this information to do harm.[294] On the other hand, the fact that the instructions are being provided for no stated purpose could itself be enough to lead to an inference that the provider intends for the instructions to be used by the reader to do harm.[295]

The web site entitled *Death 2 ZOG* presents a much different case. That site promotes killing Jewish people, advocates violence by African-American people against African-American people, and is covered with Nazi and World Church of the Creator symbols.[296] The site provides downloadable versions of books providing detailed instructions on how to commit crime.[297] In this case, the web site alone is likely providing enough information to create an inference that the person or persons responsible for the site intend for the readers to use the instructions to do harm.

## VIII. CONCLUSION

Detailed illegal instruction is being provided, through books and web sites, to many people who will use it to do harm or commit crimes.[298] Although proponents of free speech contend that the information is protected by the First Amendment,[299] the provision of detailed illegal instruction goes too far and ultimately aids and abets those who would use it to commit crime.

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291. *Id.* at 248.

292. *Id.*

293. *Dragon's Lair* (visited Oct. 23, 1999) <http://members.tripod.com/~Sky_Z/DRAGON.HTM>.

294. *Id.*

295. *See Rice*, 128 F.3d at 252 (reasoning that "the number and extent of parallels" between "the instructions in Hit Man" and the murders committed by Perry could not be perceived as "coincidence" and that this was enough for the jury to find intent even without the stipulations of Paladin).

296. Berkowitz, *supra* note 33.

297. *Id.*

298. *See supra* Part II (providing examples of situations where information obtained from books or web sites was used to do harm).

299. *See supra* note 5 and accompanying text.

Proponents of free speech rely on *Brandenburg*, arguing that the test set forth there is the correct standard to use in determining whether detailed illegal instructions are protected under the First Amendment.[300] However, the *Brandenburg* line of cases is distinguishable.[301] Those cases concentrated on situations involving "revolutionary political rhetoric and mass protests."[302] The Court drew a line between abstract advocacy of violence and actual incitement tending to produce violent behavior.[303] It is argued that when detailed illegal instruction is involved, violent intent may be anticipated to lead to violent result even absent imminence in the strict sense.[304] Thus, it has even been argued that the "freedom of speech mantra" should not even be raised because the proper question for the court should be whether the detailed illegal instruction was "'a critical instrument in causing the violence.'"[305]

Justice William O. Douglas is considered to be "among the few jurists who believe that the First Amendment is a virtual 'absolute,' that it permits no abridgement of freedom of speech of any kind."[306] In *Dennis v. United States*, Justice Douglas made some remarks in a dissenting opinion that were very promising for the plaintiffs' counsel in the case of *Rice v. Paladin*.[307] Justice Douglas argued "that the defendants had been convicted for doing no more than teaching Marxist-Leninist doctrines."[308] He declared, however, that "[t]he freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should go beyond the pale."[309] The manuals and web sites providing information on building explosives, making narcotics, and killing with different weapons are providing detailed instructions on how to break the law. Accordingly, these sources are in fact aiding and abetting crime and therefore should not be protected by the First Amendment.

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300. *See supra* note 10 and accompanying text.
301. Dilworth, *supra* note 252, at 583 n.92.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.* (quoting Charles G. Brown, Murder by Book and Its Consequences, CHI. TRIB. Mar. 5, 1996, at N13).
306. SMOLLA, *supra* note 6, at 116 (1999).
307. *Id.*
308. *Id.*
309. Dennis v. United States, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting).