Loyola of Los Angeles Entertainment Law Review

Volume 19
Number 2 *Symposium—The Right of Privacy versus the Right to Know: The War Continues*

Article 8

1-1-1999

Hit Man: The Fourth Circuit's Mistake in Rice v. Paladin Enters., Inc.

Gregory Akselrud

NOTES & COMMENTS

HIT MAN: THE FOURTH CIRCUIT'S MISTAKE IN *RICE V. PALADIN ENTERS., INC.*

> *"If there is a bedrock principle of the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."*[1]

I. INTRODUCTION

In the early hours of March 3, 1993, James Edward Perry broke into the Maryland home of Mildred Horn.[2] Once inside, he killed Mrs. Horn, her eight year-old quadriplegic son Trevor, and Trevor's nurse, Janice Saunders.[3] Perry acted as a contract killer, a "hit man," hired by Mildred Horn's ex-husband Lawrence Horn, to murder the family so that Lawrence would inherit the $1.7 million medical malpractice settlement for injuries that left Trevor paralyzed for life.[4] Perry is currently on death row in Maryland and Lawrence Horn is serving life in prison without parole.[5]

In an unprecedented decision, the Fourth Circuit United States Court of Appeals in *Rice v. Paladin Enterprises, Inc.*,[6] permitted the victims' families to sue Paladin Press, the publisher of the book entitled *Hit Man: A Technical Guide for Independent Contractors*,[7] for aiding and abetting the crime.[8] The Fourth Circuit found that Perry plotted out the slayings by following the book's detailed instructions on how to commit murder and how to avoid being caught.[9] Reversing a prior summary judgment in the publisher's favor, the court held that the information in the book could fall

---

1. Texas v. Johnson, 491 U.S. 397, 414 (1989). Justice William J. Brennan, Jr. delivered the opinion of the Court. *Id.* at 398.

2. John Gibeaut, *Deadly Advice Targeted: Decision Allows Suit Against Publisher of Murder Manual*, A.B.A. J., July 1998, at 24.

3. *Id.*

4. *Id.*

5. *Id.*

6. Rice v. Paladin Enters., Inc., 128 F.3d 233, 239 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998).

7. REX FERAL, HIT MAN: A TECHNICAL GUIDE FOR INDEPENDENT CONTRACTORS (1983).

8. *Rice*, 128 F.3d at 233.

9. Gibeaut, *supra* note 2, at 24.

outside First Amendment protection.[10] Although it attempted to fashion a narrow decision,[11] the Fourth Circuit dealt a striking blow to First Amendment privileges and created the possibility of extending liability to those who disseminate precarious information to the public.

In April 1998, the United States Supreme Court refused to disturb the Fourth Circuit's decision.[12] The Court's refusal to hear the case suggests that the publisher and its president, Peter C. Lund, could stand civilly liable in the wrongful death action.[13] By denying certiorari, the Court also failed to resolve the circuit split on whether the First Amendment protects those who publish detailed instructions for illegal or dangerous activities from civil liability.[14]

This Note argues that the Fourth Circuit's decision in *Rice* ignored important Supreme Court standards and abandoned the fundamental principles underlying First Amendment protection. In the landmark case of *Brandenburg v. Ohio*,[15] the Court found that the First Amendment protected the abstract advocacy of lawlessness except when that advocacy was intended and likely to incite imminent lawless action.[16] This Note argues that although the Fourth Circuit recognized this standard, it refused to apply the test. Urged by the Attorney General and Department of Justice, the court instead relied on a small number of criminal cases[17] and previously failed federal legislation[18] to support its conclusion.[19]

Part II outlines several theories addressing the benefits of free speech and enumerates the areas of unprotected speech. This Part also considers the standard most applicable to *Hit Man*. Part III analyzes the appellate decision in light of the lower court's ruling. Part IV critiques the Fourth Cir-

---

10. *Rice*, 128 F.3d at 233.

11. *Id.* at 266–67. "A decision that Paladin may be liable under the circumstances of this case is not even tantamount to a holding that all publishers . . . may be liable . . . ." *Id.*

12. Paladin Enters., Inc. v. Rice, 118 S. Ct. 1515 (1998).

13. Gibeaut, *supra* note 2, at 24.

14. *Id.*; *see, e.g.*, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (holding that publisher of an article describing how to perform autoerotic asphyxia could not be held civilly liable for inciting the death of a teenager); *see also* discussion *infra* Part IV.D.

15. 395 U.S. 444 (1969) (per curiam).

16. *Id.* at 447.

17. *Rice*, 128 F.3d at 245 (citing United States v. Rowlee, 899 F.2d 1275 (2d Cir. 1990)); United States v. Freeman, 761 F.2d 549, 552–53 (9th Cir. 1985); United States v. Kelley, 769 F.2d 215 (4th Cir. 1985); United States v. Barnett, 667 F.2d 835 (9th Cir. 1982); United States v. Moss, 604 F.2d 569 (8th Cir. 1979); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978)).

18. *See* Prohibition on Dissemination of Information Relating to Explosive Materials for a Criminal Purpose, S. 735, 104th Cong. § 842 (1996) (proposing an amendment to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter *AEDPA*]).

19. *Rice*, 128 F.3d at 244–47; *see* discussion *infra* Part III.C.1–2.

cuit's analysis and considers its arguments in light of other appellate and United States Supreme Court decisions. Ultimately, this Part concludes that the Fourth Circuit's reasoning was flawed. Part V examines the threat this decision poses to First Amendment rights. In particular, Part V outlines the pressures this decision imposes on publishers, filmmakers, and the media. Finally, Part VI concludes that courts should preserve the individual's ability to deliberate and debate the values of speech, and that First Amendment protection cannot be eliminated from publications that create even a potential hazard.

II. THE FIRST AMENDMENT

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."[20] It is made applicable to the states through the Fourteenth Amendment.[21] Therefore, neither a state nor the federal government may limit an individual's freedom of speech, absent a compelling reason.[22]

A. Balancing the Free Flow of Information

Numerous theories illustrate the values of free expression and the importance of preserving speech. Most prominent, the "marketplace of ideas" theory rests on the notion that promoting the free and open exchange of ideas leads to the ascertainment of truth and the downfall of false thoughts.[23] Tolerance and safety-valve theorists aim to increase social stability by furthering society's commitment to the endurance of reprehensible views or by giving people an opportunity to express themselves in lieu of

---

20. U.S. CONST. amend. I.

21. U.S. CONST. amend. XIV, § 1. "[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." *Id.; see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980).

22. *See* Simon & Schuster, Inc. v. New York Crime Victims Bd., 502 U.S. 105, 118 (1991); *see* 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).

23. *See, e.g.*, Red Lion Broad. Co. v. Federal Communications Commission, 395 U.S. 367, 390 (1969). "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Id.*; *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). "The best test of truth is the power of the thought to get accepted in the competition of the market." *Id.*

committing harmful acts.[24] Some scholars stress that free speech promotes public deliberation and a well-informed electorate, both of which are essential to democratic self-governance.[25] Finally, libertarian theorists view people as independent and rational decision makers with the right to control their own thoughts and beliefs without government interference.[26]

These theories guard against the dangerous proposition that while government purports to be concerned with offensiveness or hostile audience reaction, it is in fact reacting to the persuasiveness of the speech that it seeks to suppress.[27] The First Amendment ultimately prevents the government from stifling dissident views by alleging that such speech will cause harm or violence.[28]

By the same notion, courts have often found that the values afforded to the freedom of expression and its constitutional protection are not based on naive beliefs that speech can do no harm.[29] Rather, like marketplace theorists, courts are confident that the benefits gained from the free and open exchange of ideas outweigh the costs endured by receiving harmful or reproachable thoughts.[30] The Supreme Court itself has found that false ideas do not exist in our society.[31] "However pernicious an opinion may seem, [the Court has] depend[ed] for its correction . . . on the competition of other ideas."[32] Thus, because all of society benefits from the open ex-

---

24. DANIEL A. FARBER, THE FIRST AMENDMENT 71 (1998).

25. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); *See also* 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." *Id.*

26. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 n.12 (1978) ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion . . . ."); Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control [people]'s minds."); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring) ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties."), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam)).

27. Avital T. Zer-Ilan, Case Note, *The First Amendment and Murder Manuals*, 108 YALE L.J. 2697, 2698–99 (1997) (citing David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 338 (1991)); *see* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 134 (1993) ("Government is rightly distrusted when it is regulating speech that might harm its own interests; and when the speech at issue is political, its own interests are almost always at stake.").

28. Zer-Ilan, *supra* note 27, at 2698–99; *see* Strauss, *supra* note 27, at 337 (stating that "tyrants suppress speech because they fear it will be persuasive").

29. Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1019 (5th Cir. 1987).

30. *Id.*

31. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

32. *Id.* at 339–40.

change of ideas, it is worth protecting some forms of harmful or reprehensible speech, including so-called false ideas.[33] The possibility that a harmful thought could lead to danger or violence is not immaterial in determining the state's power to penalize that thought for harm that ensues.[34] However, First Amendment protection cannot be eliminated simply because that thought creates a potential hazard.[35]

B. Unprotected Speech

Nevertheless, the First Amendment does not guarantee an absolute right for anyone to express their views at any time, place, or in any manner they choose.[36] For example, certain types of speech generally protected by the First Amendment may be subject to government regulation.[37] Freedom of speech is not absolute.[38] In fact, "[i]f the state interest is compelling and the means of regulation [are] narrowly tailored to accomplish a proper state purpose, regulation of expression is not forbidden by the [F]irst [A]mendment."[39]

The Supreme Court has recognized that some types of speech are excluded from or entitled only to narrow constitutional protection.[40] Freedom

---

33. *Id.* at 340–41.

34. *Herceg*, 814 F.2d at 1020.

35. *Id.*; *Whitney*, 274 U.S. at 376 (Brandeis & Holmes, JJ., concurring) ("Fear of serious injury cannot alone justify suppression of free speech[.]").

36. Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981).

37. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) (upholding a ban on "fusion" ballots that allowed minor parties to list another party's nominee as their own); Burdick v. Takushi, 504 U.S. 428 (1992) (upholding a Hawaiian statute that prohibited write-in votes in general elections); Frisby v. Schultz, 487 U.S. 474 (1988) (upholding a municipality ban on all picketing in front of a particular residence); United States Postal Serv. v. Greenburgh Civic Assns., 453 U.S. 114 (1981) (upholding a federal statute that prohibited deposits of unstamped materials in home mailboxes because mailboxes do not constitute public forums); Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding a ban on all amplification devices operated in public places that emitted loud and raucous noises).

38. Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961).

39. *Herceg*, 814 F.2d at 1020. This is the general strict scrutiny standard adopted by the Supreme Court when examining content-based regulations on constitutionally protected speech. *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 118 (1991); Texas v. Johnson, 491 U.S. at 412 (using "the most exacting scrutiny") (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987); Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

40. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); *see* R.A.V. v. St. Paul, 505 U.S. 377, 382–83 (1992); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 504 (1984). Traditionally, these areas received no constitutional protection. However, as a result of *R.A.V.*, it can fairly be understood that even these areas may receive narrow protection under certain circumstances. *See R.A.V.*, 505 U.S. at 383–86.

of speech does not protect obscene materials,[41] child pornography,[42] fighting words,[43] libel,[44] commercial speech,[45] or words intended and likely to incite imminent lawless action.[46] These areas are recognized as having little social value.[47] Therefore, the social interests in order and morality clearly outweigh any First Amendment protections these types of speech may receive.[48] For the purposes of this Note, it is necessary to examine only the standard for proscribing speech intended and likely to incite imminent lawless action.[49]

C. Speech That Incites Imminent Lawless Action

In *Brandenburg v. Ohio*,[50] the United States Supreme Court held that abstract advocacy of lawlessness is protected speech under the First Amendment.[51] The case involved a Ku Klux Klan leader convicted under the Ohio criminal syndicalism statute for advocating violence as a means for political change.[52] The Supreme Court reversed the conviction and held that the Constitution protects advocacy of the use of force or of the violation of laws except where that advocacy was "*directed to inciting or producing imminent lawless action* and [wa]s *likely to incite or produce such action*."[53] The Court went on to note that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and vio-

41. *See* Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

42. *See* New York v. Ferber, 458 U.S. 747 (1982).

43. *See Chaplinsky*, 315 U.S. at 572.

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

45. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

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

47. *Chaplinsky*, 315 U.S. at 572; *see R.A.V.*, 505 U.S. at 382–83; *Bose Corp.*, 466 U.S. at 504–05.

48. *Chaplinsky*, 315 U.S. at 572; *see R.A.V.*, 505 U.S. at 382–83; *Bose Corp.*, 466 U.S. at 504–05.

49. The district court in *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836 (D. Md. 1996), considered why the other forms of proscribed speech do not apply to the case in *Rice*. *See Rice*, 940 F. Supp. at 841.

50. 395 U.S. 444 (1969) (per curiam).

51. *Id.*

52. *Id.* The leader stated "[w]e're not a revengent [sic] 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 [sic] taken." *Id.* at 446. Other comments noted by the court included, "[t]his is what we are going to do to the n____rs," "[s]end the Jews back to Israel," and "[w]e intend to do our part." *Id.* at 446 n.1 (letters omitted).

53. *Id.* at 447 (emphasis added).

lence, [wa]s not the same as preparing a group for violent action and steeling it to such action."[54]

In its opinion, the Court made a distinction between protected speech that merely advocates violation of the law and unprotected speech that actually incites imminent lawless activity.[55] It reasoned that a statute failing to distinguish between the two would violate the freedoms guaranteed by the First and Fourteenth Amendments.[56] The Court found that the words spoken by the Klansman amounted to mere advocacy, and that the statute punishing such speech was unconstitutional.[57]

Subsequent Supreme Court decisions have revisited the *Brandenburg* standard. In *Hess v. Indiana*,[58] the Court held that provocative remarks uttered by a demonstrator could not be punished solely on the basis that these remarks had a tendency to incite violence.[59] It found that there was no evidence that "[the] words [used] were intended to produce, and likely to produce, *imminent* disorder . . . ."[60]

The *Hess* Court determined that the crucial element in lowering the First Amendment shield was the imminence of the threatened evil.[61] The Court was faced with the question of whether an anti-war demonstrator could be punished under Indiana's disorderly conduct statute for loudly shouting, "[w]e'll take the f_____ street later,"[62] as police attempted to move the crowd of demonstrators off the street so vehicles could pass.[63] The Court reasoned that because Hess's statement was not specifically directed to any group of people, his words did not advocate any immediate action.[64] Moreover, because there was no evidence from the language that his words were intended and likely to produce imminent disorder, these words could not be punished on the ground that they had a "tendency to lead to violence."[65]

Eleven years later, in *National Association for the Advancement of Colored People v. Claiborne Hardware Co.*,[66] the Court again demon-

54. *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).
55. *Id.* at 447–48.
56. *Brandenburg*, 395 U.S. at 448.
57. *Id.* at 448–49.
58. 414 U.S. 105 (1973) (per curiam).
59. *Id.*
60. *Id.* at 109 (emphasis in original).
61. *Id.*
62. *Id.* at 107 (letters omitted).
63. *Id.* at 106–07.
64. *Hess*, 414 U.S. at 108–09.
65. *Id.*
66. 458 U.S. 886 (1982).

strated that the *Brandenburg* test would be rigorously applied.[67] This case involved efforts by African-American citizens in a Mississippi county to boycott white merchants until certain demands for racial equality were satisfied.[68] Speaking in favor of the boycott, defendant Charles Evers[69] stated that African-Americans who violated the boycott would be "discipline[d]" by their own people.[70]

The Supreme Court reversed a lower court verdict against Evers and others for the lost earnings of the white merchants.[71] The Court concluded that his speech did not constitute imminent incitement, and was therefore protected by the First Amendment.[72] Although he used "strong language," the Court reasoned that "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause."[73] Consequently, Evers's language did not qualify as incitement of imminent violence.[74] In reaching its conclusion, the Court also considered the fact that the boycotts did not occur immediately after Evers's speech, but rather transpired weeks or months later.[75] The Court thus implied that when speech is followed by immediate violent or otherwise illegal acts, the requisite intent and likeliness to incite are more likely to be found, than when no such acts immediately follow.[76]

It is important to recognize that *Brandenburg* and its progeny[77] developed a two-part standard for examining the advocacy of unlawful conduct. First, a court must consider whether the speech was directed to incite or produce imminent lawless action[78] as opposed to mere abstract advocacy, not directed at producing any type of immediate activity. Second, a court

---

67. *Id.*

68. *Id.*

69. Evers was one of the NAACP leaders at the time. *See id.* at 898.

70. *Id.* at 903, 927.

71. *Id.* at 934.

72. *Claiborne*, 458 U.S. at 928.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*; *see* FARBER, *supra* note 24, at 70.

77. The Warren Court actually foreshadowed its ruling in *Brandenburg* in two prior cases. *See* Bond v. Floyd, 385 U.S. 116, 117 (1966) (holding that defendant could not be penalized for his statements because they did not constitute a call for unlawful draft resistance, but were merely general, abstract declarations of opposition to war); Watts v. United States, 394 U.S. 705, 708 (1969) (holding that the defendant speaker did not intend to make a "true threat" against the President, but rather aimed at stating his political opposition to the President's ideals in a "very crude, offensive" way). The *Hess* and *Claiborne* cases are important, however, because they demonstrate how the post-Warren era Supreme Court followed the *Brandenburg* standard.

78. FARBER, *supra* note 24, at 69.

must consider likelihood by determining whether the lawless activity is likely to occur as an immediate result of the speech.[79] Therefore, the test as a whole forbids protection of any speech that is directed to inciting or producing imminent lawless action and is likely to produce such action.

The *Brandenburg* test has most often been applied to cases involving political speech.[80] Although such speech is considered to be at "the core of the First Amendment,"[81] the Supreme Court has generally not differentiated between categories of protected speech for the purposes of determining constitutional protection.[82] The test, therefore, is not inherently limited to political speech cases.[83]

---

79. *Id.*

80. *See, e.g., Claiborne*, 458 U.S. at 926–28; Carey v. Brown, 447 U.S. 455 (1980) (indicating that expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values).

81. *Claiborne*, 458 U.S. at 926–27.

82. Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1024 (5th Cir. 1987). Such an endeavor by the Court "would not only be hopelessly complicated but would raise substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality." *Id.*

83. *See, e.g., Herceg*, 14 F.2d at 1017 (reversing a jury award of damages in a wrongful death action against a magazine publisher for adolescent's death allegedly caused by article that described practice of autoerotic asphyxia); Zamora v. Colombia Broad. Sys., Inc., 480 F. Supp. 199 (S.D. Fla. 1979) (dismissing suit brought by a fifteen year-old boy against television networks for violent programming that allegedly caused him to commit criminal acts); McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Ct. App. 1988) (dismissing suit against Ozzy Ozbourne record that included song "Suicide Solution" which allegedly exhorted suicide); Bill v. Superior Court, 187 Cal. Rptr. 625 (Ct. App. 1982) (dismissing the plaintiff's claim that a producer of a gang violence film was liable for the shooting of plaintiff's daughter by a third party shortly after boy saw the film); Olivia N. v. NBC, Inc., 178 Cal. Rptr. 888 (Ct. App. 1981) (finding no cause of action when girl raped by teenaged girls imitating similar incident depicted on television drama); Walt Disney Prods., Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981) (dismissing plaintiff's claim that the broadcast of a television program caused plaintiff's son to be injured when the son imitated an experiment performed on the television program); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) (dismissing wrongful death action by father of boy slain by person who had just seen the film *The Warriors*, which depicted scenes of gang violence, despite the fact that the perpetrator uttered a line from the film while committing the homicide); DeFilippo v. National Broad. Co., 446 A.2d 1036, 1040 (R.I. 1982) (dismissing wrongful death suit against NBC brought by parents of a deceased minor after their son hung himself while imitating a hanging stunt he observed on the *Johnny Carson Show*); Way v. Boy Scouts of Am., 856 S.W.2d 230 (Tex. Ct. App. 1993) (dismissing plaintiff's claims against a publisher of a firearm advertisement in a magazine advertisement that allegedly caused a fatal firearm injury to plaintiff's son).

III. *RICE V. PALADIN ENTERS., INC.*

A. Background

As described above, James Edward Perry murdered Mildred Horn, her eight-year-old quadriplegic son, Trevor, and Trevor's nurse, Janice Saunders on the night of March 3, 1993.[84] A copy of *Hit Man* was found in Perry's apartment.[85] In the civil wrongful death action against *Hit Man* publisher Paladin Enterprises, the relatives and representatives of the three victims alleged that Paladin aided and abetted Perry in committing the murders through its publication of *Hit Man's* killing instructions.[86]

Perry's actions and *Hit Man's* text are strikingly similar. *Hit Man* instructs readers that the victim's personal residence is the "initial choice" location for a murder and an ideal place to make a hit, depending on its layout and position.[87] Perry murdered his victims at the Horn's residence.[88] The book further instructs its readers to use a rental car to reach the victim's location, and to "steal an out-of-state tag"[89] to "replace the rental tag"[90] on the car, explaining that "[s]tolen tags only show up on the police computer of the state in which they are stolen."[91] Similarly, Perry stole out-of-state tags and affixed them to a rental car before driving it to the Horn's residence on the night of the murders.[92]

With respect to weapons, *Hit Man* instructs a "beginner" to use an AR-7 rifle to kill their victims.[93] The book informs readers where to find the gun's serial numbers and instructs them to completely drill out these numbers prior to using the weapon so that it cannot be traced.[94] Perry used an AR-7 rifle and drilled out its serial numbers exactly as the book instructed.[95] Finally, *Hit Man* instructs in explicit detail how to construct a

---

84. *Rice*, 128 F.3d at 239.

85. *Id.* A second book was found in Perry's apartment , also published by Paladin entitled *How To Make A Disposable Silencer*, VOL. II. *Id.* at 241. However, both the district court and court of appeals focused on *Hit Man*. *Id.* at 233. This Note will focus only on *Hit Man* and its text.

86. *Id.* at 241.

87. FERAL, *supra* note 7, at 81–82.

88. Perry v. State, 686 A.2d 274, 277 (Md. 1996).

89. FERAL, *supra* note 7, at 98.

90. *Id.*

91. *Id.*

92. *Perry*, 686 A.2d at 276.

93. FERAL, *supra* note 7, at 21.

94. *Id.* at 23.

95. *Perry*, 686 A.2d at 280.

homemade, "whisper-quiet" silencer from material available in any hardware store.[96] Again, Perry constructed a similar silencer and used it to commit the murders.[97] In addition, *Hit Man* contains numerous instructions on killing, concealing the murder, making bombs, and disposing of bodies.[98]

On summary judgment, the parties agreed that the sole issue for the court to decide was whether the First Amendment was a complete defense,

---

96. FERAL, *supra* note 7, at 39–51.

97. *Rice*, 128 F.3d at 240; *see id.* at 239–41 (providing a full comparison of the books instructions and Perry's actions).

98. The similarities between Perry's acts and *Hit Man's* text are strikingly similar. The focus of this Note, however, is on the book's text and the notion that such text should be protected under the First Amendment. It is therefore important to consider a sample of the book's passages to understand the Fourth Circuit's reasoning:

> It is my opinion that the professional hit man fills a need in society and is, at times, the only alternative for "personal" justice. Moreover, if my advice and the proven methods in this book are followed, certainly no one will ever know . . . .
>
> [And when] [y]ou've read all the suggested material, you [will have] honed your mind, body and reflexes into a precision piece of professional machinery. You [will have] assembled the necessary tools and learned to use them efficiently. Your knowledge of dealing death [will have] increased to the point where you have a choice of methods. Finally, you [will be] confident and competent enough to accept employment . . . .
>
> The kill is the easiest part of the job. People kill one another every day. It takes no great effort to pull a trigger or plunge a knife. It is being able to do so in a manner that will not link yourself or your employer to the crime that makes you a professional . . . .
>
> [If you decide to kill your victim with a knife,] [t]he knife . . . should have a six-inch blade with a serrated edge for making efficient, quiet kills . . . . The knife should have a double-edged blade. This double-edge, combined with the serrated section and six-inch length, will insure a deep, ragged tear, and the wound will be difficult, if not impossible, to close without prompt medical attention . . . . Make your thrusts to a vital organ and twist the knife before you withdraw it . . . . [S]tab deeply into the side of the victim's neck and push the knife forward in a forceful movement . . .
>
> [If you plan to kill your victim with a gun,] . . . [use] a small caliber weapon like the 22, it is best to shoot from a distance of three to six feet. You will not want to be at point-blank range to avoid having the victim's blood splatter you or your clothing. At least three shots should be fired to ensure quick and sure death.
>
> [In order to dispose of a corpse,] you can simply cut off the head after burying the body. Take the head to some deserted location, place a stick of dynamite in the mouth, and blow the telltale dentition to smithereens....! If you choose to sink the corpse, you must first make several deep stabs into the body's lungs (from just under the rib cage) and belly. This is necessary because gases released during decomposition will bloat these organs, causing the body to rise to the surface of the water.
>
> [After you killed your victim,] you felt *absolutely nothing*. And you are shocked by the nothingness . . . Your experience in facing death head-on has taught you about life. You have the power and ability to stand alone. *You no longer need a reason to kill.*

Rice, 128 F.3d at 236–39. These passages, among others, were selected by the Fourth Circuit as representative of the type of content contained within *Hit Man's* 130 pages of text. *See id.*

as a matter of law, to the civil action set forth in the plaintiffs' complaint.[99] The district court granted summary judgment to the publisher.[100] On appeal, the Fourth Circuit reversed and remanded.[101]

B. Overview of the District Court Opinion

The district court determined that *Hit Man* was protected by the First Amendment unless it failed the *Brandenburg* standard.[102] The court found *Brandenburg* applicable to this case for two reasons.[103] First, similar to *Brandenburg*, this case involved speech advocating lawless activity—specifically, how to commit a murder.[104] Second, although the plaintiffs argued that *Brandenburg* could not apply because it had been applied most often to cases involving political speech,[105] the court felt the standard was "not inherently limited to political speech cases."[106] The court therefore proceeded to consider *Hit Man* in light of the *Brandenburg* test.[107]

Paladin conceded for purposes of summary judgment that it intended for the book to be purchased and actually used by criminals. According to the court, however, the publisher did not demonstrate the requisite intent required under the first prong of the *Brandenburg* test.[108] The court determined that in order to have the requisite intent, Paladin must have aimed for Perry to go out and commit the triple murder immediately.[109] Further, although the court found that the book was morally repugnant, it felt that

---

99. *Rice*, 128 F.3d at 241.

100. *Id.* at 242.

101. *Id.* at 243.

102. *Rice*, 940 F. Supp. at 844. That is, it was to remain protected unless the court found that the publisher intended to incite imminent lawless action and that the book's text was likely to produce such action.

103. *Id.* at 845–47.

104. *Id.* at 845.

105. *Id.*

106. *Id.* at 846. The court cited numerous cases in support of this contention. *See supra* note 83. The majority of cases cited by the court were what are termed "copycat" cases in which the media defendants were sued because information they had disseminated somehow caused or enabled someone to injure themselves or another. These cases are somewhat different from the present case because most were not considered to have a "how-to" format like the subject book. *But see* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (reversing jury's award of damages in a wrongful death action against a magazine publisher for adolescent's death allegedly caused by how-to article describing the practice of autoerotic asphyxia). The court determined these cases to be applicable, however, and considered *Brandenburg* a proper standard.

107. *Id.* at 846–50.

108. *Rice*, 940 F. Supp. at 847; *see* discussion *supra* Part II.C.

109. *Id.* at 847. Perry, however, committed the murders one year after receiving *Hit Man*. *Id.*

the book's message did not constitute incitement or "a call to action."[110] The court reasoned that *Hit Man* did not promote committing immediate unlawful activity, but rather focused on providing information on how to become an effective hit man.[111] For the court, this was abstract advocacy, not direct incitement.[112] It thus concluded that *Hit Man's* text constituted mere abstract teaching, and that it did not purport to order any concrete action at any specific time.[113]

Under *Brandenburg's* second prong, the district court found that no imminent lawless action was likely to occur as a result of reading *Hit Man*. Crucial to the court's decision were *Hit Man's* two separate warnings.[114] First, the back cover states that the book's contents are "*[f]or informational purposes only!*"[115] Next, a cautionary statement immediately preceding the table of contents explains that the actions described in the book are illegal, that they hail severe penalties, and that the publisher assumes no responsibility for the misuse of the information.[116]

The court also noted the fact that out of 13,000 copies sold in over ten years of publication, only one person actually used the information.[117] Moreover, the court added that the context of the information in *Hit Man* was equally significant.[118] It stated that the book took time to read and "[a]t worst[,] . . . amount[ed] to nothing more than advocacy of illegal action at some indefinite future time."[119] Under these circumstances, the court found it difficult to conclude that *Hit Man* constituted incitement to imminent lawless activity or that it was likely to incite such activity.[120]

The district court concluded that while the book was proven to contain information that was dangerous when placed in the wrong hands, First

---

110. *Id.* (quoting Zamora v. Columbia Broad. Sys. 480 F. Supp. 199, 204 (S.D. Fla. 1979) (citing Yates v. United States, 354 U.S. 298, 322 (1957)).

111. *Id.* at 847.

112. *Id.* at 848.

113. *Id.*

114. *See Rice*, 940 F. Supp. at 848.

115. FERAL, *supra* note 7, at back cover (emphasis added).

116. FERAL, *supra* note 7, at vi.

> 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!**

Id. (emphasis in original).

117. *Rice*, 940 F. Supp. at 848.

118. *Id.*

119. *Id.*

120. *Id.*

Amendment protection was not eliminated simply because the publication created a potential hazard.[121] It stated that a free and democratic society should not "restrict artistic creativity in order to avoid the dissemination of ideas . . . [that] may adversely affect emotionally troubled individuals."[122] The district court, therefore, granted summary judgment on behalf of Paladin and dismissed the case.[123]

C. *The Fourth Circuit Opinion*

The Fourth Circuit United States Court of Appeals reversed the lower court's ruling and created the possibility that Paladin may be held civilly liable. The appellate court found Paladin's stipulations that it intended *Hit Man* to be used by criminals and would-be criminals to commit murder-for-hire very influential.[124] The court then examined the book itself and found that *Hit Man* exhibited much more than mere abstract advocacy, and instead rose to the level of "specific intent" to aid and abet in the murders involved.[125]

The court thus concluded that *Brandenburg* did not apply to the *Rice* case. It reasoned that the standard was limited to protecting abstract advocacy of lawlessness and the open criticism of government and its institutions.[126] Thus, *Brandenburg* could not apply to "the teaching of the technical methods of criminal activity—in this case, the technical methods of murder."[127] It further found *Hit Man* to have little resemblance to the abstract criticisms jealously protected by *Brandenburg*.[128] Instead, the *Rice* court felt the book's instructions failed to compare with historically protected rhetorical threats of politically or socially motivated violence.[129] The court, therefore, based its overall conclusion to remand in four different areas.

---

121. *Id.* (citing *Herceg*, 814 F.2d at 1020).

122. *Id.* (citing Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1072 (Mass. 1989) (citing McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Ct. App. 1988))).

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

124. *Rice*, 128 F.3d at 241.

125. *Id.* at 255–56.

126. *Id.* at 250.

127. *Id.*

128. *Id.* at 262.

129. *Id.*

1. The Criminal Cases

First, the court analogized the few existing criminal cases that failed to protect certain forms of speech against charges of criminal aiding and abetting.[130] In *United States v. Barnett*,[131] the Ninth Circuit held that the First Amendment did not provide publishers with a defense, as a matter of law, to charges of aiding and abetting a crime by publication and distribution of instructions detailing the production of illegal drugs.[132]

The *Rice* court found *Barnett* to firmly hold that instructions aiding and abetting others in the commission of a criminal offense lay unprotected by the First Amendment. It further concluded that the Ninth Circuit's position was uniformly accepted, applied to the aiding and abetting of numerous other crimes, and thus could apply here.[133]

2. Failed Federal Legislation and Department of Justice Report

Second, the court relied on previously failed federal legislation[134] and a Department of Justice Report[135] to guide its ruling.[136] In the wake of the Oklahoma City bombing in 1995, Senator Dianne Feinstein backed a proposal criminalizing the teaching and dissemination of the manufacture of explosive materials if the distributor intended, knew, or reasonably should have known that such information would likely be used in furtherance of certain specified criminal offenses.[137] Although Feinstein called it a "common-sense" amendment, critics in the House of Representatives re-

---

130. *Rice*, 128 F.3d at 244–46.

131. 667 F.2d 835 (9th Cir. 1982).

132. *Id.* at 843. "To the extent . . . 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.* (emphasis in original).

133. *Rice*, 128 F.3d at 245 (citing United States v. Rowlee, 899 F.2d 1275 (2d Cir. 1990); United States v. Freeman, 761 F.2d 549, 552–53 (9th Cir. 1985); United States v. Kelley, 769 F.2d 215 (4th Cir. 1985); United States v. Moss, 604 F.2d 569 (8th Cir. 1979); United States v. Buttorff, 572 F.2d 619, 623–24 (8th Cir. 1978)).

134. Prohibition on Dissemination of Information Relating to Explosive Materials for a Criminal Purpose, S. 735, 104th Cong. § 842 (1996) (proposing an amendment to *AEDPA*, Pub. L. No. 104132, 110 Stat. 1214 (1996)).

135. 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* (April 1997) [hereinafter *DOJ Report*].

136. *Rice*, 128 F.3d at 246 n.3.

137. Prohibition on Dissemination of Information Relating to Explosive Materials for a Criminal Purpose, S. 735, 104th Cong. § 842 (1996) (proposing an amendment to AEDPA, Pub. L. No. 104132, 110 Stat. 1214 (1996)).

moved the provision from anti-terrorism legislation on free speech grounds.[138]

The court also relied on a Department of Justice Report resulting from the Antiterrorism and Effective Death Penalty Act.[139] In the report, Congress required the Attorney General to conduct a study concerning the extent to which there is public access to certain harmful or dangerous instructional materials.[140] The Attorney General's report, in turn, found that "[t]he First Amendment would impose substantial constraints on any attempt to proscribe indiscriminately the dissemination of bombmaking information."[141] While recognizing substantial governmental constraints in proscribing published materials, the *Rice* court found the report significant in allowing the government to punish any speech that was deemed an "integral part of [a] [criminal] transaction."[142]

3. Intent

Third, the appellate court considered two qualifications where, in the civil context, the First Amendment requires a heightened analysis so that "preeminent values underlying that constitutional provision not be imperiled."[143] The first of these was intent.[144] The *Rice* court reasoned that the

---

138. David G. Savage, *Did Hired Killer Go by the Book?*, L.A. TIMES, May 7, 1997, at A17.

139. *AEDPA*, *supra* note 18, at 1297.

140. *Rice*, 128 F.3d at 246 n.3. The study focused on materials instructing "how to make bombs, destructive devices, or weapons of mass destruction," the application of then existing federal laws to such materials, and the extent to which the First Amendment protects such materials and their private and commercial distribution. *Id.*

141. *Id.* (quoting *DOJ Report*, *see supra* note 135, at 2.) The report stated:

> The government generally may not, except in rare circumstances, punish persons either for advocating lawless action or for disseminating truthful information—including information that would be dangerous if used—that such persons have obtained lawfully. However, the constitutional analysis is quite different where the government punishes speech that is an integral part of a transaction involving conduct the government otherwise is empowered to prohibit; such "speech acts"—for instance, many cases of inchoate crimes such as aiding and abetting and conspiracy—may be proscribed without much, if any, concern about the First Amendment, because it is merely incidental that such "conduct" takes the form of speech.

Id. (emphasis omitted).

142. *Id.*

143. *Rice*, 128 F.3d at 247.

144. *Id.* (citing New York Times v. Sullivan 376, U.S. 254 (1964)); United States v. Aguilar, 515 U.S. 593, 605 (1995) (rejecting the defendant's First Amendment construction in part because the statute imposed restrictions only on those who disclosed wiretap information in order to obstruct, impede, or prevent a wiretap interception); Haig v. Agee, 453 U.S. 280, 308–09 (1981) (stating "[the defendant's] disclosures, among other things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel. They are clearly not protected by the Constitution."); United States v. Featherston, 461 F.2d 1119, 1122 (5th Cir. 1972) (rejecting First Amendment challenge to federal statute after construing statute to require

First Amendment, in the civil liability context, requires that an actor possess specific intent to commit a crime.[145] Liability on the basis of mere foreseeability or knowledge that information could be misused for an impermissible purpose is insufficient.[146] Such a limitation addresses the legitimate concern of publishers and other mass media who fear exposure to suit under less restrictive intent standards.[147] At the same time, the appellate court determined that this limitation does not relieve those who intentionally assist and encourage crime.[148]

In a consolidated statement of facts, Paladin stipulated that it engaged in a marketing strategy to attract and assist criminals and would-be criminals.[149] It further stated that in publishing and distributing *Hit Man*, it intended that their publications "would be used by criminals . . . and would-be criminals to plan and execute the crime of murder for hire."[150] Finally, for the sole purpose of summary judgment, Paladin conceded that by publishing, distributing and selling *Hit Man* to Perry, it assisted him in the subsequent perpetration of the murders.[151]

In addition to these stipulations, the *Rice* court considered four other grounds upon which a reasonable jury could find intent.[152] First, the court pointed out that the declared purpose of *Hit Man* is to serve as a murder manual.[153] Second, the court found that the book's extensive promotion of murder was "highly probative of the publisher's intent."[154] Third, the court proclaimed that examining the "publisher's marketing strategy would more than support a finding of the requisite intent."[155] Finally, the court found a jury could reasonably conclude that Paladin specifically intended to assist Perry and similar murderers by holding that *Hit Man's* only genuine use

---

"intent or knowledge that . . . information disseminated would be used in the furtherance of a civil disorder."). The second qualification recognized by the *Rice* court was abstract advocacy. *Rice*, 128 F.3d at 248; *see* discussion *infra* Part III.C.4.

145. *Rice*, 128 F.3d at 247. Specific intent refers to having the purpose of creating a certain outcome or act.

146. *Id.*

147. *Id.*

148. *Id.* at 248.

149. *Id.* at 241.

150. *Id.*

151. *Rice*, 128 F.3d at 241. Anxious to avoid probing discovery motions and then a trial, Paladin's legal team agreed to accept these stipulations, solely for purposes of summary judgment, in exchange for a quick ruling on whether the First Amendment shielded the publisher from liability. *See* Savage, *supra* note 138, at A17. Had these stipulations not existed, Paladin arguably could have had a much stronger case.

152. *Rice*, 128 F.3d at 253–55.

153. *Id.* at 253.

154. *Id.*

155. *Id.* at 254.

was the unlawful facilitation of such murders.[156] Thus, accepting Paladin's stipulations and itself analyzing the book's text, the *Rice* court concluded that the publisher possessed the specific intent to assist in the murders.

4. Abstract Advocacy

Finally, under the second qualification, the court closely examined *Hit Man's* language and concluded that the book could not profess abstract advocacy. The court stated that the First Amendment circumscribes the power of the state to create and enforce a cause of action that permits the imposition of civil liability, for speech that constitutes pure abstract advocacy.[157] Thus, if certain speech is not directed at inciting or producing imminent lawless action, a publisher cannot be liable.[158] The court admitted that the instances where such advocacy would actually give rise to civil liability under state statutes are rare, but do exist.[159]

The court contended that a jury could reasonably find that Paladin aided and abetted in the murders through the "quintessential speech act of providing step-by-step instructions for murder . . . so comprehensive and detailed . . . as if the instructor were literally present with the would-be murderer . . . ."[160] The appellate court further argued that such speech bares no resemblance to the "theoretical advocacy,"[161] the advocacy of "principles divorced from action,"[162] or "the mere abstract teaching [of] the moral propriety or even moral necessity for a resort to force and violence,"[163] that had always been protected by the Supreme Court.[164] The court was satisfied that a reasonable jury could find the instructions had virtually no instructional value.[165] Furthermore, it held that such a jury could find that the book's only "communicative value [wa]s the indisputably illegitimate one of training people how to murder and to engage in the business of murder for hire."[166]

---

156. *Id.* at 255.

157. *Id.* at 249.

158. *Rice*, 128 F.3d at 249.

159. *Id. But see* Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919). These cases predicated criminal prosecution upon subversive advocacy.

160. *Rice*, 128 F.3d at 249.

161. *Id.* (quoting Scales v. United States, 367 U.S. 203, 235 (1961)).

162. *Id.* (quoting Yates v. United States, 354 U.S. 298, 320 (1957)).

163. *Id.* (quoting Brandenburg v. Ohio, 395 U.S. 444, 448 (1969)).

164. *Id.*

165. *Id.*

166. *Rice*, 128 F.3d at 249.

The appellate court then embarked on a seven page abstract advocacy discussion criticizing *Hit Man's* language.[167] While the court considered certain notions of the *Brandenburg* standard, such as intent and abstract advocacy, the court of appeals ignored the test and found that the First Amendment does not shield Paladin from civil liability.[168]

IV. WHERE THE FOURTH CIRCUIT FAILED

A. The Proper Standard

The First Amendment bars the imposition of civil liability on Paladin unless *Hit Man* falls within one of the well-defined and narrowly limited classes of speech that remain unprotected.[169] A court, therefore, must first recognize where, in the spectrum of First Amendment protections, *Hit Man* would best be categorized. If the book's text does not fit within one of the six forms of speech usually unprotected,[170] the book receives full First Amendment protection.[171] If a court determines, however, that the actions of the publisher and the book's text are similar to one of the unprotected areas, the court must examine these actions and the text under the appropriate test.[172]

---

167. *Id.* at 255–63.

168. The Fourth Circuit also based its opinion on Maryland's civil cause of action for aiding and abetting. *Id.* at 250. The district court erred in its initial ruling by failing to recognize a Maryland civil cause of action for aiding and abetting. *Id.* Once brought to the court's attention, however, the lower court simply amended its opinion by concluding alternatively that *Hit Man* was entitled to the protections of *Brandenburg*. *Id.* Recognizing Maryland's civil cause of action for aiding and abetting, the appellate court determined that Maryland courts would conclude that an aiding and abetting cause of action did lie in the circumstances of this case. *Id.* at 251. The court further concluded that the plaintiffs had, by way of stipulation and otherwise, established a genuine issue of material fact as to each element of that cause of action. *Id.* at 251–52. Specifically, that plaintiffs had more than met their burden of establishing a genuine issue of fact as to Paladin's intent, even assuming heightened standards set by the First Amendment. *Id.* at 252. The appellate court argued the lower court was never required to consider any element of intent required under Maryland's aiding and abetting law, or whether the First Amendment held a heightened requirement, because the district court failed to fully recognize the Maryland claim. *Id.* at 253.

169. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1941); *see* R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 382–83 (1992); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503–05 (1984).

170. *See Chaplinsky*, 315 U.S. at 571–72; *R.A.V.*, 505 U.S. at 382–83; *Bose Corp.*, 466 U.S. at 503–05; *see also supra* Part II.B.

171. Full First Amendment protection will be afforded unless a state or federal statute provides for a narrowly tailored regulation and a compelling government interest. *See* Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 118 (1991).

172. *See* National Ass'n for the Advancement of Colored People v. Claiborne Hardware Co.,

As noted by the district court, the only test appropriate for examining *Hit Man* is the *Brandenburg* standard—determining whether the book qualifies as speech intended and likely to incite imminent lawless action.[173] The book not only advocates lawless activity, but can also be seen as a political manifesto advocating the need of the "hit man" in society and providing the tools to learn this skill.[174] Therefore, in its consideration of whether Paladin was protected under the First Amendment, the *Rice* court was required to examine whether by publishing *Hit Man*, Paladin intended to incite imminent lawless action, and whether that imminent lawless action was likely to occur from the book's text.

This task was to be done by the court as a matter of law.[175] The Supreme Court in *Bose Corp. v. Consumers Union of United States, Inc.*,[176] noted that the jury's role in considering the limits of any unprotected category or "unprotected character of particular communications" has little significance.[177] Rather, the Court has relied on its own "judicial evaluation of special facts that have been deemed to have constitutional significance."[178] In such cases, the Court has conducted independent review of the record, finding that juries have neither narrowed any unprotected category, nor eliminated the danger of inhibiting the expression of protected ideas.[179] Most important, the Court has conducted such independent review in this context—deciding for itself whether advocacy is directed and likely to incite or produce imminent lawless action.[180] The *Rice* court, however, failed to do this.

---

458 U.S. 886, 916 n.50 (1982) (stating that "[I]n cases where [the First Amendment] line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made[,] to see . . . whether they are of a character which the principles of the First Amendment . . . protect") (citations omitted); *Bose Corp.*, 466 U.S. at 505. The court regularly conducted "independent review of the record both to be sure that the speech . . . actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.*

173. *Rice*, 940 F. Supp. at 844. The book advocates lawless activity. It is not obscenity, commercial speech, child pornography, libel, or fighting words. *Id.*

174. FERAL, *supra* note 7, at ix. "It is my opinion that the professional hit man fills a need in society . . . ." *Id.*

175. *See Bose Corp.*, 466 U.S. at 505 (explaining that the limits of the individual unprotected areas "as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance.").

176. 466 U.S. 485 (1984).

177. *Id.* at 505.

178. *Id.*

179. *Id.*; *see Claiborne*, 458 U.S. at 915–16 n.50 (quoting the proposition that the Court review for itself the statements in issue).

180. Hess v. Indiana, 414 U.S. 105, 108–09 (1973).

B. The Critique

1. The Criminal Cases

As mentioned, the *Rice* court first relied on the few existing criminal cases that denied First Amendment protection to those who were prosecuted for aiding and abetting.[181] As these cases illustrate, the federal circuits have refused to apply *Brandenburg* in the criminal context and have held publishers to a less speech-protective standard—considering whether publishers intended to assist in the commission of a crime.[182] Although it is beyond the scope of this Note, it is important to recognize that *Brandenburg* should apply to those criminal cases as well.[183] The publishers who were prosecuted were not involved in integrated criminal transactions and it was never clearly shown that the speech was either intended or likely to incite imminent lawlessness.

Regardless, the major distinction between those cases and *Rice* is that *Rice* is a civil suit.[184] Although some publishers have been held *criminally* liable for publishing speech that aims to aid and abet in a crime, courts have been reluctant to transfer this liability to a *civil* context.[185] The appellate court, however, concluded that these criminal cases apply to *Rice*.[186] In so doing, it considered other areas where criminal standards carried over into the civil arena.[187] This was a detrimental error, however, because civil

---

181. *Rice*, 128 F.3d at 244–46.

182. *See id.*

183. *Brandenburg* itself was decided pursuant to Ohio's *Criminal* Syndicalism statute. Brandenburg v. Ohio, 395 U.S. 444 (1969). It is therefore questionable why the federal circuits have avoided applying the standard in the criminal context, especially in these types of cases where the speech was not *directly* involved in any crime and was not intended to or likely to cause *imminent* lawlessness. By so doing, they have unavoidably created confusion as to where *Brandenburg* applies. In its strictest form, *Brandenburg* would inherently include these cases.

184. *Rice*, 128 F.3d at 233. There has been no criminal suit filed against Paladin. If there had been, there is a possibility that in a criminal context, Paladin could be found guilty because the standard seems much lower. *See id.* at 244–46; *see also* discussion *supra* Part III.C.1.

185. Gibeaut, *supra* note 2, at 25.

186. *Rice*, 128 F.3d at 246–47.

187. *Id.* (comparing Garrison v. Louisiana, 379 U.S. 64 (1964) (applying similar standards to criminal libel prosecutions and private defamation actions) with New York Times Co. v. Sullivan, 376 U.S. 254 (1964)); *see* Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (finding that the First Amendment did not bar liability for newspaper's publication of confidential source's name in a civil case); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (refusing to bar First Amendment liability from common law tort); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (rejecting First Amendment defense to copyright infringement action).

and criminal cases possess tremendous distinctions.[188] Indeed, the *Rice* court itself recognized that in the civil context, the First Amendment imposes heightened requirements that would otherwise not exist in criminal law.[189]

2. Misapplication of Failed Federal Legislation and Department of Justice Report

Further, urged by the Attorney General and Justice Department,[190] the court misapplied the Department's report by viewing Paladin not as an abstract advocate of lawless activity, but as an intricate part of some criminal scheme. As stated in the report, an individual lacks First Amendment protection where that individual uses the spoken or written word to conduct a crime.[191] In that situation, it is justified to punish speech not when it is directed and likely to incite imminent lawless activity, but rather simply when the government can show that that certain speech or text was integrated into a criminal act. However, according to the report, this analysis does not apply to a publisher who, especially on a market scale, advocates lawless action or disseminates truthful information, even if that information would be dangerous if used.[192] Such regulations would indiscriminately impose massive burdens on most law-abiding publishers.[193]

The court, therefore, rested on its own misapplication of the Justice Department's report and the failed efforts of Senator Feinstein not only to

---

188. The Constitution, statutes, and the common law all draw fundamental distinctions between criminal proceedings, that emphasize the adjudication of guilt or innocence with strict adversarial protections for the accused, and civil proceedings, that emphasize the rights and responsibilities of private parties. *See* Mary M. Cheh, Note, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991).

189. *Rice*, 128 F.3d at 247; *see* discussion *supra* Part III.C.3–4; *see also* discussion *infra* Part IV.B.3–4.

190. *Rice*, 128 F.3d at 246 n.3. "The decision we reach today, which, as noted, was urged upon us by Attorney General Reno and the Department of Justice, follows from the principle conclusion reached by the Attorney General and the Department . . ." *Id.* Although the Justice Department report provided a proper analysis, it opined concern with the lower court's decision. The report stated, "[W]e believe that the district court in *Rice v. Paladin* erred insofar as it concluded that *Brandenburg* bars liability for dissemination of [instructions on murder] *regardless* of the publisher's intent . . . ." *Id.* at 253 (citing *DOJ Report*, *supra* note 135, at 43, 44–45 n.71).

191. In other words, where someone writes a letter with instructions on how to make a bomb and, intending to help, then sends it to another who plans to use the instructions, there is no First Amendment protection.

192. *Rice*, 128 F.3d at 247.

193. *Id.* For example, publishers would be concerned with the inability to freely publish information, as well as with the costs of constant law suits and raised insurance rates because of such suits. Indeed, a small publisher would be put out of business with a suit like that in *Rice*.

justify its decision, but also to hold applicable the criminal cases discussed earlier. It misinterpreted the Department's report and Senator Feinstein's proposal because those documents referred strictly to criminal prosecution. They do not expressly, or even implicitly, intend to consider civil liability, nor can they apply in such a context. Although criminal law seemingly poses little barrier to the prosecution of different speech acts,[194] the *Rice* court noted that the First Amendment creates a heightened standard of analysis in the civil context.[195] This higher standard makes Senator Feinstein's failed amendment, the Justice Department report, and the criminal cases discussed earlier, inherently inapplicable to a civil case.

3. Intent

Although civil liability under the First Amendment does require a heightened intent standard, the *Rice* court erroneously ignored this test. The test for intent in the context of First Amendment civil liability is not whether Paladin intended to aid and abet murderers or would-be murderers in the commission of their crimes, but whether the publisher, through its release of *Hit Man*, intended to incite imminent lawless activity. In terms of these particular facts, the requisite intent required that Paladin intended for Perry to go out and commit these murders immediately after reading *Hit Man*.

With this in mind, the four examples of intent the *Rice* court considered appropriate to bring before a jury cannot apply.[196] If these examples indicate anything, they connote the type of speech protected by *Brandenburg*. They evidence the mere abstract teaching of the moral necessity for a resort to force or violence.[197] As noted by the district court, nowhere in the text of *Hit Man* does it say "go out and commit murder now!"[198] Rather, "the book seems to say, in so many words, 'if you want to be a hit man this is what you need to do.'"[199] Without directive, or commanding language, these four examples cannot indicate intent. They support only the notion that the book enlists the essence of speech protected by *Brandenburg*.

---

194. *Id.* at 245.

195. *Id.* at 247–49.

196. The fact that *Hit Man* is an instruction book on murder, that it extensively promoted murder, the consideration of Paladin's marketing strategy, or considerations of *Hit Man's* legitimate use cannot suggest Paladin's intent to incite imminent lawless activity. *See* discussion *supra* Part III.C.3.

197. Noto v. United States, 367 U.S. 290, 297–98 (1961).

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

199. *Id.*

In addition, the court entirely dismissed Paladin's warnings as "titillating" efforts aimed at enticing readers.[200] The main warning, however, is explicit.[201] It explains that certain laws prohibit the conduct discussed within the book and that taking part in such conduct hails severe penalties.[202] This is a clear indication that Paladin did not really intend to incite imminent murderous acts.[203] Again, absent any language directing readers to perform imminent lawless activity, and considering the extensive initial warning, a jury could not conclude that Paladin intended to incite imminent lawless activity.[204] Moreover, any decision to remand to the jury was misplaced as the Supreme Court has consistently provided an independent review when considering the various unprotected areas of speech.[205]

Additionally, although Paladin's stipulations were admittedly damaging, they were not enough for the court to establish the requisite intent under *Brandenburg*. The *Brandenburg* standard considers imminence.[206] Even if Paladin conceded to some intention of inciting murder, it never conceded an intention to incite imminent murder. Although the difference seems unimportant, *Brandenburg* demands the imminence element.[207] As the Supreme Court analyzed in *Hess*, construing the stipulation in the least favorable terms to Paladin, its intention was at worst "advocacy of illegal

---

200. *Rice*, 128 F.3d at 263 n.10.

201. *See* FERAL, *supra* note 7, at vi.

202. *See id.*

203. However:

> A clever speaker might incite a crowd to violence without ever explicitly directing them to break the law; indeed, he might ironically direct them not to do so in terms leaving little doubt about his real intent . . . . [The] classic example is Mark Anthony's funeral oration, purportedly aiming to "bury Caesar not to praise him," but actually making a plea for revenge . . . ."

FARBER, *supra* note 24, at 70. Nevertheless, in the context of a book involving national scale publishers, the court should give deference to the actual warning. It would otherwise involve itself into a greater debate on how to decipher the meaning of words and sentence structure to analyze subjective intent.

204. Even if it were appropriate for a jury to so conclude, this would not immediately establish Paladin's liability, the jury would still have to consider whether this activity was likely to occur.

205. *See Bose Corp.*, 466 U.S. at 505; *see also* discussion *supra* Part IV.A.

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

207. It is arguable how soon a result has to occur to be considered imminent, i.e., one hour, one day, one month, etc. Imminent is defined as "near at hand; impending; on the point of happening; threatening; menacing; [and] perilous." BLACK'S LAW DICTIONARY 750 (6th ed. 1990). Examining the context of *Brandenburg*, *Hess*, and *Claiborne*, it is self-evident that imminent, as used by the Supreme Court, encompasses the dictionary definition without exception. Thus, in *Claiborne*, the fact that violent acts occurred weeks or months later did not satisfy the imminence requirement and displayed that violence was not likely to occur from the speech. *See* discussion *infra* Part IV.C.

action at some indefinite future time."[208] Because no rational inference from the stipulation can conclude that the publisher intended to produce imminent disorder, the book's text cannot be punished.[209]

The *Rice* court, however, completely ignored the imminence requirement, stating that it generally poses little obstacle to the punishment of speech that constitutes *criminal* aiding and abetting.[210] It based its reasoning on the fact that "'culpability in such cases is premised, not on defendants' advocacy of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes.'"[211]

Nonetheless, this reasoning again focuses on criminal liability guidelines inapplicable to the civil context. More importantly, the court probably failed to address imminence directly because in the context of reading a book, it unquestionably did not exist.[212] No reasonable individual could interpret the book's instructions as intending to incite imminent lawless activity. Indeed, *Hit Man* requires time to read and absorb its information. Its instructions are thorough and specific,[213] requiring study and patience. This characteristic entirely negates the notion that the book was intended to incite imminent murderous acts. Absent any concession to imminence, Paladin's stipulations alone fail to provide the requisite intent.

Furthermore, the *Rice* court entirely discounted the plaintiffs' concessions. The plaintiffs conceded that the marketing strategy employed by the publisher was, in fact, intended to maximize sales of its publications to the general public.[214] These concessions included sales of the book to authors who desire information for the purpose of writing books about crime and criminals, law enforcement agencies who desire information concerning the means and methods of committing crimes, persons who enjoy reading accounts of crimes and the means of committing them for purposes of entertainment, persons who fantasize about committing crimes but do not thereafter commit them, and criminologists and others who study criminal methods and mentality.[215] These stipulations, considered jointly with those

208. Hess v. Indiana, 414 U.S.105, 108 (1973).

209. *Id.* at 108–09.

210. *Rice*, 128 F.3d at 246.

211. *Id.* (quoting *DOJ Report*, *supra* note 135, at 37).

212. The context in which information is disseminated is important. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 66 (1976). "[T]he line between permissible advocacy and impermissible incitation [sic] to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say." *Id.*

213. *See supra* note 98.

214. *Rice*, 128 F.3d at 242 n.2.

215. *Id.*

of Paladin, lead to the conclusion that the marketing efforts and intentions of the publisher were to sell its book to everyone in the general public which, unfortunately, includes any murderers or would-be murderers. Yet, it is the intention of every publisher to have every possible person purchase its product.

Finally, although Paladin acknowledged that in publishing *Hit Man* it assisted in the perpetration of these particular murders, this concession has no relevance on what the *Rice* court termed specific intent. Perry not only committed the acts by his own volition, but also sought out the book at his own will. The fact that the book *actually* assisted him in committing the crime does not necessarily indicate that Paladin *intended* to assist him.

4. Abstract Advocacy

The *Rice* court's reasoning with respect to its abstract advocacy discussion was also flawed. The test in *Brandenburg* does not require speech to hold any "instructional communicative value," nor does it consider *any* type of value that speech contains. Other tests explicitly consider whether certain speech contains "serious literary, artistic, political, or scientific value."[216] However, *Brandenburg* specifically lacks this criteria. The standard blindly defends the theories of free speech overviewed in Part II.[217] With respect to abstract advocacy, therefore, the test requires only that the speech is not aimed at inciting imminent lawless activity.

Hit Man admittedly provides a comprehensive and detailed guide to murder. Nevertheless, as addressed by the district court, the book at no point constitutes a "call to action."[218] The author never directs the reader to commit murder, much less, immediately. Rather, the book simply outlines what is needed to commit the crime and to avoid being caught. *Hit Man* is "the mere abstract teaching . . . of the . . . moral necessity for a resort to force and violence" as noted in *Brandenburg*.[219] The book outlines the author's political belief that the professional hit man is needed in society.[220]

---

216. Miller v. California, 413 U.S. 15 (1973) (outlining one of the factors considered in testing obscene speech).

217. *See* discussion *supra* Part II.A. The theories include the "marketplace of ideas" theory, the Tolerance and safety-valve theory, Meiklejohnian theory, and the Libertarian theory.

218. Zamora v. Colombia Broad. Sys., 480 F. Supp. 199, 204 (1979) (citing Yates v. United States, 354 U.S. 298, 322 (1957)).

219. *Brandenburg*, 395 U.S. at 448 (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).

220. FERAL, *supra* note 7, at ix. "It is my opinion that the professional hit man fills a need in society . . . ." *Id.* However, as Part V will discuss, the book actually is true fiction and fictitious writing. It is therefore questionable whether anything in the book actually portrays the belief of the author.

It then provides instructions on how to attain this goal. At no time, however, does the book direct the reader to kill. Lacking such language, the book at its very essence is what the *Rice* court itself described as "theoretical advocacy"[221] or "principles divorced from action."[222] This fact, coupled with *Hit Man's* initial warning, provides significant evidence that Paladin aimed to simply publish an informational book. Though ignored by the court, the warning language states this outright.

C. Brandenburg's *Second Prong — Likelihood*

Although the court's main conclusion rested in the four areas described above, other issues deserve attention. The first covers *Brandenburg's* second prong — likelihood. As noted earlier, the standard requires that imminent lawless activity be likely to occur as a result of an actor's speech.[223] By failing to apply the *Brandenburg* test, the *Rice* court ignored this element. *Hit Man* was published in 1983.[224] Out of the 13,000 copies sold nationally through 1996, only Perry was known to have actually used the information.[225] This correlates to less than a one-ten-thousandth of a percent (.0001%) chance that the book actually incited imminent lawless activity and strongly suggests that such activity was not likely to occur from reading this book.

Furthermore, Perry committed the murders one year after receiving *Hit Man*. It seems difficult to conclude that a book, without the stresses of passion and persuasion found in direct speech, would be likely to incite imminent murderous acts, especially when the acts occurred one year later. Indeed, the Supreme Court in *NAACP v. Claiborne Hardware Co.*,[226] addressed a somewhat similar situation.[227] The Court noted that had any acts of violence directly followed the strong language, there would have been a substantial question about whether the speaker could be held responsible.[228] However, because the only acts of violence occurred weeks or months later, the Court found the defendant not liable.[229] Thus, *Claiborne* seemed

221. *Rice*, 128 F.3d at 249 (quoting Scales v. United States 367 U.S. 203, 235 (1961)).

222. *Id.* (quoting Yates v. United States, 354 U.S. 298, 320 (1957)).

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

224. FERAL, *supra* note 7.

225. *Rice*, 940 F. Supp. at 848.

226. 458 U.S. 886 (1982); *see* discussion *supra* Part II.C.

227. National Ass'n for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886 (1982).

228. *Id.* at 928; *see* discussion *supra* Part II.C.

229. *Claiborne*, 458 U.S. at 928.

to imply that violent acts materializing immediately as a result of speech could indicate the requisite likeliness to incite imminent lawless activity.[230]

Although the facts in *Claiborne* concerned political speech, its application to *Hit Man* is controlling. If direct speech was not found likely to incite imminent lawless activity when violent acts occurred after weeks or months, then neither could a book's text, especially when the acts required study and preparation, and occurred after one year.

D. Rice *Creates a Circuit Split*

Finally, the *Rice* court ignored a significant ten year precedent maintained by the Fifth Circuit case, *Herceg v. Hustler Magazine, Inc.*[231] Though the appellate courts are not required to follow precedent set by their sister circuits, *Rice's* failure to even consider or distinguish the case evidences the court's convoluted reasoning.

1. *Herceg v. Hustler Magazine, Inc.*

In its August 1981 issue, as part of a series about the pleasures and dangers of unusual and taboo sexual practices, *Hustler Magazine* printed "Orgasm of Death," an article discussing the practice of autoerotic asphyxia.[232] This technique "entails masturbation while 'hanging' oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm."[233] Though the article described the sexual "high[s]" and "thrill[s]" of those who engaged in this practice, it repeatedly warned readers that the practice was dangerous, self-destructive and deadly.[234] It stated that those who successfully performed the practice could achieve intense physical pleasure, but that the risks involved loss of consciousness and death by strangulation.[235] Indeed, the article itself stated that "the facts [were] presented . . . solely for an educational purpose."[236]

Tragically, a fourteen year-old adolescent read the article and strangled himself while attempting the practice.[237] The next morning, the boy's nude body was found hanging in his closet.[238] A copy of *Hustler Maga-*

230. FARBER, *supra* note 24, at 70.
231. 814 F.2d 1017 (5th Cir. 1987).
232. *Id.* at 1018.
233. *Id.*
234. *Id.* at 1018–19.
235. *Id.* at 1019.
236. *Id.* at 1018.
237. *Herceg*, 814 F.2d at 1019.
238. *Id.*

zine, opened to the page of the article, was found near his feet.[239] The decedent's mother and close friend sued Hustler to recover exemplary damages and damages of emotional and psychological harms that they suffered as a result of the adolescent's death.[240] In a jury trial considering only incitement, the plaintiffs prevailed.[241]

The Fifth Circuit, however, reversed and concluded that *Brandenburg* protected the magazine article under the First Amendment.[242] For the *Herceg* court, three main contentions guided its finding that the article could not incite imminent lawless activity. First, the fact that the article was extremely detailed failed to prove actual incitement.[243] For the court, simply considering the act of autoerotic asphyxia was enough to know how to accomplish its goal and could not indicate incitement to imminent lawless activity.[244]

Second, and probably most important, the *Herceg* court found that *Brandenburg* undermined the plaintiffs' incitement theory.[245] The court stated that incitement cases invoking the *Brandenburg* test usually concerned state efforts to punish the arousal of crowds to commit criminal action.[246] Although the court was unwilling to address whether the written word could ever be found to create culpable incitement unprotected by the First Amendment, it found that this article could not form such incitement.[247] Important to this issue were the numerous warnings on how the autoerotic practice produced a threat to life and the seriousness of the danger.[248] The warnings clearly stated that the article was not intended to incite this practice.

Finally, the court considered whether the article was actually protected by *Brandenburg* because it involved non-political speech.[249] In its conclusion, followed by the district court in *Rice*, the court conceded that *Brandenburg* did not inherently apply only to political speech.[250]

---

239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at 1023–25.
243. *Herceg*, 814 F.2d at 1023.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.* at 1023.
249. *Herceg*, 814 F.2d at 1023.
250. *Id.* at 1024.

2. The *Rice* Court's Failure to Consider *Herceg*

In light of *Herceg*, the *Rice* court's conclusion was clearly misguided. Similar to the *Hustler* article, *Hit Man* describes the perpetration of murder and other crimes in explicit detail.[251] However, as the court recognized in *Herceg*, detail is not enough.[252] Simply considering the act of murder, any reasonable person would know how to accomplish its goal. Violence portrayed on television and in movies probably gives average individuals more guidance than *Hit Man* itself. Further, as noted in *Herceg*, it is questionable whether any type of written material could actually incite a reader to kill.[253] Books and other written materials take time to read, examine, and study.[254] Similar to the *Hustler* article, *Hit Man* contained two warnings, both of which included similar words as the *Hustler* warnings—"For informational purposes only!"[255] Moreover, *Hit Man's* initial warning was very explicit.[256] Finally, as noted by the *Herceg* court, *Brandenburg* is not inherently limited to areas of political speech.[257]

Although the texts of both *Hit Man* and the article in *Herceg* are similar in style and form, the circumstances of both cases outline the flaws of the *Rice* opinion. The *Herceg* court considered an article in a magazine that could be found at every newsstand and still did not find liability. In contrast, *Hit Man* was available only by mail order at the time of the murders. Further, in *Herceg*, a dead boy's body hung above the open page of the article directing his death. These circumstances directly implied that the adolescent attempted to perform the act immediately after reading the article, yet the court would not conclude that this was incitement to imminent lawless activity.[258] The *Rice* court, however, reached a contrary conclusion.[259] Although Perry received *Hit Man* one year prior to committing the murders and did not have it in his direct possession, the court allowed the possibility for Paladin to be held liable.[260]

Admittedly, the case in *Rice* maintains some differences that may have influenced the court to ignore *Herceg*. Indeed, since the *Herceg* deci-

---

251. *See supra* note 98.

252. *Herceg*, 814 F.2d at 1023.

253. *Id.*

254. *See* discussion *supra* Part IV.B.3.

255. FERAL, *supra* note 7, at back cover, vi; *see* discussion *supra* Part III.B.

256. *See* FERAL, *supra* note 7, at vi.

257. Thus, even if the court failed to see *Hit Man* as the author's political manifesto addressing the need of the hit man in society, *Brandenburg* would still apply.

258. *Herceg*, 814 F.2d at 1021.

259. *Rice*, 128 F.3d at 233.

260. *Id.*

sion, society's ills have expanded. For instance, the tragedy in Oklahoma City and the expanding danger of internet publications have troubled Congress and the Department of Justice.[261] In particular, Paladin's stipulations of intent weighed heavily in the *Rice* decision.[262] These types of stipulations did not exist and were not at issue in *Herceg*. Moreover, murder is without question a lawless activity, while autoerotic asphyxia is questionably legal. Nevertheless, uniformity in the law should be a paramount goal for the federal appellate circuits in order to maintain uniform precedent and provide guidance for lower courts.[263] Therefore, the *Rice* court should have distinguished the *Herceg* case.

3. The State Courts

Additionally, many state supreme and appellate court decisions demonstrate that *Brandenburg* can apply to and protect publishers and other entertainment entities.[264] In *Yakubowicz v. Paramount Pictures Corp.*,[265] a father whose son was killed by a minor who had attended a showing of the film *The Warriors*,[266] brought a wrongful death action against Paramount Pictures, the distributor of the movie.[267] The Massachusetts Supreme Court, ruling for the defendants on summary judgment, stated that while the film was full of violent scenes, it did not "exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers. It [did] not create the likelihood of inciting or producing 'imminent lawless action' that would [have] strip[ped] [it] of First Amendment protection."[268]

A year earlier, in *McCollum v. CBS, Inc.*,[269] a California appellate court held that a musician could not be found liable for the words in his songs.[270] In *McCollum*, plaintiffs sued musician Ozzy Osbourne, and CBS

---

261. *See* Prohibition on Dissemination of Information Relating to Explosive Materials for a Criminal Purpose, S. 735, 104th Cong. § 842 (1996) (proposing an amendment to *AEDPA*, Pub. L. No. 104-132, 110 Stat. 1214 (1996)); *DOJ Report*, *supra* note 135.

262. *Rice*, 128 F.3d at 248, 252–53.

263. Admittedly, the federal appellate circuits do function autonomously. This is an important feature of our justice system because opposing decisions can fuel debate and create further deliberation, at least until the Supreme Court can address the issue. Nevertheless, as argued, uniformity in the law should be a paramount goal.

264. *See supra* note 83.

265. 536 N.E.2d 1067 (Mass. 1989).

266. THE WARRIORS (Paramount Pictures 1979).

267. *Yakubowicz*, 536 N.E.2d at 1067.

268. *Id.* at 1071.

269. 249 Cal. Rptr. 187 (Ct. App. 1988).

270. *Id.*

Records, Inc. when their son was allegedly inspired to commit suicide while listening to a song entitled "Suicide Solution."[271] While finding that there was no intent to produce imminent lawless action, the court reasoned that the songs did not contain the types of lyrics that could have been characterized as commands to immediate suicidal acts.[272] The lyrics, even in the most literal sense, did not purport to order or command anyone to any concrete action at any specific time.[273]

Although these cases did not involve any form of "how-to" format or informational setting similar to *Hit Man*, they were considered depictions of violence alleged to have been imitated similar to the subject book. This makes them inherently similar and their premises identical.[274] Although the *Rice* court was not required to consider these cases, their similarities deserved attention.[275]

V. THE SLIPPERY SLOPE

Joined by numerous entertainment and media conglomerates, including many of the major networks, newspapers, and publishers,[276] Paladin contended that any decision finding liability on behalf of the publisher would have far-reaching chilling effects on the rights of free speech and press.[277] This is the slippery slope argument—the idea that once one publisher is found liable for its work, other forms of speech or media become increasingly susceptible to regulation. Indeed, it is this pressure that has fueled the theories discussed in Part II.[278] As a result of this case, the

---

271. *Id.* at 191.

272. *Id.* at 193.

273. *Id.*

274. The plaintiffs in *Rice* argued that these types of cases were what are termed "copycat" or "imitative harm" cases, and thus did not apply, especially in light of Paladin's stipulations of intent. *Rice*, 940 F. Supp. at 846. Nevertheless, the district court found these cases applicable. *Id.* Their premise is identical. In the case of *Hit Man*, someone read the book and followed its words, while in these cases the victims watched and listened to the movie and song, respectively, and followed their actions. Furthermore, neither of the subject articles, that is the book, the movie, nor the song, directly advocated killing oneself or another.

275. The *Rice* court actually did address copycat type situations in general, but determined that broadcasters and other media would never be liable because it would be the rare case that the broadcaster or publisher actually intended to assist another in committing the crime. *Rice*, 128 F.3d at 265. However, as reasoned earlier, Paladin did not posses the requisite intent required under *Brandenburg*. Therefore, *Rice's* comparison to the copycat type cases is inherently similar.

276. Among the entities filing as *amici curiae* were: ABC, America Online, the National Association of Broadcasters, the *Baltimore Sun*, the *New York Times*, the *Washington Post*, the Association of American Publishers, the Magazine Publishers of America, and the Newspaper Association of America.

277. *Rice*, 128 F.3d at 265.

278. These theories include the "marketplace of ideas" theory, the Meiklejohnian theory, the

Fourth Circuit has triggered a slippery slope against all publishers, filmmakers, and other artists.

A. The Fiction

Prior to examining the widespread effects this case could potentially bring, and the one it has already brought, it is important to recognize that *Hit Man* is plain fiction. The author, Rex Feral,[279] was never a professional hit man.[280] In fact, Feral was a divorced mother of two when she wrote the book in 1983.[281] She never even owned a gun.[282] Therefore, the book, although narrated partly in the first person, is in essence, a hoax. This is significant because the Fourth Circuit's exhaustive analysis and ultimate decision creating the possibility of regulating this fictional book, written almost entirely in satire, has now tilted the liability scale against all publishers.[283]

B. The Actual Consequences of Rice

The slippery slope has already begun. In *Byers v. Edmondson*,[284] Louisiana's First Circuit Court of Appeal reversed a ruling that dismissed a suit against Time Warner and other affiliate entities responsible for the movie, *Natural Born Killers*.[285] This suit was filed by relatives of a woman shot in a convenience store robbery.[286] The plaintiffs contended the movie contained subliminal messages that influenced the couple who committed the crime.[287] Specifically citing *Rice*, the Louisiana appellate court sent the

---

Tolerance theory, and the Libertarian theory. *See* discussion *supra* Part II.A.

279. This actually was an alias. *See* David Montgomery, *If Books Could Kill; This Publisher Offers Lessons in Murder. Now He's a Target Himself*, WASH. POST, July 26, 1998, at F5.

280. *Id.*

281. *Id.*

282. *Id.* Feral originally submitted a novel at the behest of Paladin's editors who wanted a how-to book. She collected her ideas from books, television, movies, newspapers, police officers, her karate instructor, and an attorney friend. *Id.*

283. *See Rice*, 128 F.3d at 233. It is important to recognize that entertainment mediums are entitled to the same constitutional protection as the exposition of ideas. *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1977). Further, works of fiction are constitutionally protected in the same manner as political treatises and topical news stories. *See* Cohen v. California, 403 U.S. 15, 25 (1971). This is not to say that fictional works cannot cause harm or do not deserve to be scrutinized under the law. It does imply, however, that because such works are protected under the Constitution, courts should give deference to publishers in favor of preserving speech.

284. 712 So. 2d 681 (La. Ct. App. 1998); NATURAL BORN KILLERS (Warner Bros. 1994).

285. *Byers*, 712 So. 2d at 681.

286. *Id.* at 683.

287. *Id.* at 684.

case back for further discovery.[288] Relying heavily on considerations of intent, the court remanded the case to discover whether Oliver Stone or Time Warner actually produced and distributed the movie with the intent to incite others to kill.[289]

Admittedly, the *Rice* court zealously attempted to avoid decisions like that in the *Byers* case. The court wrote, "[i]n the 'copycat' context, it will presumably *never* be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime."[290] Indeed, it is highly unlikely that Stone possessed any intent other than to satirically depict the relationship between television and violence, in addition to attracting many people to watch his film. However, it is the *Byers* decision that truly illustrates the damage created by the *Rice* appellate court.

Following the *Rice* decision alone, lawyers now possess a wealth of opportunity to tailor arguments, and present evidence on notions of intent or incitement, or based on the persuasiveness of legislative and executive branch arguments. Considering these elements, courts then become obligated to continue litigation. Although the court in *Byers* may ultimately conclude that the First Amendment prevents liability, the possibility now exists for it to determine otherwise. The First Amendment, however, should stand to shield these cases outright. As described above, the proper examination for the *Byers* court was to consider whether the movie, when published, was intended and likely to incite imminent lawless activity. According to the Supreme Court in *Bose Corp.*, this can be determined by the court in its own independent review.[291] Considering a movie marketed on an international scale and lacking any directive language telling the viewer to go out and kill immediately, the court's decision can be made outright.[292]

C. The Possibilities

> If the shield of the First Amendment can be eliminated by proving after publication that an article[, or a book, or a movie] discussing a dangerous idea . . . helped bring about a real injury simply because the idea can be identified as "bad," all free speech becomes threatened. An article discussing the nature and

288. *Id.* at 692.

289. *Id.*

290. *Rice*, 128 F.3d at 265 (emphasis in original).

291. Bose Corp. v. Consumer Union, 466 U.S. 484, 505 (1984).

292. Although it is impossible to say generally that a movie will never be intended and likely to incite imminent lawless activity, in the case of *Natural Born Killers*, this is clear as a matter of law.

danger of "crack" usage—or of hand-gliding—might lead to liability just as easily.[293]

Texts similar to *Hit Man* have received First Amendment protection for decades. The *Anarchist Cookbook* was one of the first books to overview and detail methods of dealing death.[294] It contained numerous passages on drugs, sabotage, lethal weapons, and explosives.[295] Although the book is noted for its inaccuracies,[296] sales have totaled over two million copies since its 1971 release.[297] *The Cookbook* has always been protected by the First Amendment.[298] Similarly protected, the Army's 1969 *Improvised Munitions Book*[299] retails in some gun stores.[300] It teaches "how to make grenade launchers, booby traps, and how to mix laundry soap, alcohol, and gasoline to produce a napalm-like firebomb."[301] The future of these works and many others, however, is now unclear.

The *Rice* decision inevitably creates the possibility of extending liability to other publishers, television and film producers, the media, and other artists. Consider *The Turner Diaries*,[302] the racist novel with bomb-making instructions, said to have inspired Timothy McVeigh in the Oklahoma City Bombing or *The Day of the Jackal*,[303] a novel about attempting to kill the president of France. These types of publications are now open to suit. Plaintiffs' lawyers can create arguments by examining their texts and urging courts to consider both intent and incitement theories.

Other areas are also susceptible to litigation. In France in 1993, a seventeen year-old boy died from an explosion caused by a home-made bomb which he made in imitation of a technique shown on *MacGyver*.[304] A year earlier, also in France, some boys accidentally set their school on

---

293. *Herceg*, 814 F.2d at 1024.

294. WILLIAM POWELL, THE ANARCHIST COOKBOOK (1971).

295. *Id.*

296. Ken Shirriff, *Anarchist Cookbook FAQ* (last modified Feb. 3, 1998) <http://burn.ucsd.edu/~mai/TEXT/aol_cookbook_faq.html> (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

297. ENT. WKLY., *alt.culture: The Anarchists' Cookbook* (visited Nov. 17, 1998) <http://pathfinder.com/altculture/aentries_ew/a/anarchists.html>> (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

298. *Id.*

299. IMPROVISED MUNITIONS BOOK (1969).

300. *See* Montgomery, *supra* note 279.

301. *Id.*

302. ANDREW MACDONALD, THE TURNER DIARIES (1980).

303. FREDERICK FORSYTH, THE DAY OF THE JACKAL (1971).

304. Marlise Simons, *Blaming TV for Son's Death, Frenchwoman Sues*, N.Y. TIMES, Aug. 30, 1993, at 30. Ironically, the series sanctimoniously promoted gun control. *Id.*

fire, again imitating the the acts seen on *MacGyver*.[305] Also in 1993, a five-year-old Ohio boy who was watching the *Beavis and Butthead* cartoon on MTV set a fire that killed his sister after watching *Beavis and Butthead* say it was fun to play with matches.[306]

Though these cases seem extreme, they possess inherent similarities with *Hit Man*. *MacGyver* presumably established its techniques in a step-by-step manner. The show presumably never directed its viewers to explicitly follow its methods on bomb making and probably never directed anyone to kill outright. Similarly, the *Beavis and Butthead* cartoon, though probably not depicted in a "how-to" format, described a dangerous activity while stating that it was "fun." Following *Rice*, courts involved in these types of litigation could field discovery issues on notions of intent, or provide in depth analysis on whether any of these shows actually consisted of abstract advocacy or constituted actual incitement. Although admittedly extreme, with the standard and manner set by the *Rice* court, litigation of the most extreme case is definitely possible. Prior to *Rice*, courts consistently barred these types of suits, usually on First Amendment grounds.[307] The end is now limitless.

The First Amendment, however, stands to protect such programs and texts. Regardless of whether these publications are loathsome or harmful, our society depends on the free and open exchange of ideas, even so-called bad ideas. These notions promote debate and create opportunities for further thought and deliberation. Moreover, no matter what the subject, our society provides everyone with the right to find out more about it if they so choose, even if that subject may be considered by some as dangerous or reprehensible. As Supreme Court Justice Thurgood Marshall once wrote, "[i]f the First Amendment means anything, it means that a State has no business telling [people], sitting alone in [their] . . . house, what books [they] may read or what films [they] may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control [people]'s minds."[308]

The Founding Fathers knew this well. They ratified the First Amendment at the outset of the Bill of Rights, marking its importance for all time as the first recognized right under the Constitution. "They believed that freedom to think as you will and to speak as you think [we]re means

305. *Id.*

306. *Cartoon on MTV Blamed for Fire*, N.Y. TIMES, Oct. 10, 1993, at 30.

307. *See supra* note 83.

308. Stanley v. Georgia, 394 U.S. 557, 565 (1969).

indispensable to the discovery and spread of . . . truth; [and] that without free speech[,] . . . discussion would be futile . . . ."[309]

Finally, it is important for our society to recognize who deserves punishment. Individuals, like James Edward Perry, break the law by their own volition. They imitate actions read in books, seen on television, and in the movies that the majority of the populous simply perceive as entertainment. Society, and most important, courts, should realize this. They should therefore aim their efforts against those individuals who break the law at their own will, not at the legitimate producers of information like publishers, filmmakers, and the media.

VI. CONCLUSION

In his speech during the first Inaugural Address, Thomas Jefferson stated, that "*error of opinion may be tolerated where reason is left free to combat it.*"[310] The *Rice* decision abandoned this fundamental principle. Aside from its critical errors in analysis and its ignorance of seminal Supreme Court standards, the court entirely dismissed the extensive history of permitting the free, open and competitive dissemination of information and ideas.

Rather than apply the prominent *Brandenburg* standard to consider whether Paladin intended to incite imminent lawless activity and whether the text of *Hit Man* was likely to incite such activity, the court succumbed to pressures from the Justice Department. In doing so, the court found guidance in Senator Feinstein's failed amendment and in its own misapplication of the Department of Justice report, holding applicable a narrow line of criminal cases that inherently cannot apply in the civil context.

In conclusion, the court failed to preserve an individual's ability to deliberate and debate the values of speech, and failed to realize that First Amendment protection cannot be eliminated from publications even if a potential hazard exists. Ultimately, the *Rice* decision tilted the slippery slope against the First Amendment and against all those who disseminate precarious information and entertainment to the public.

Gregory Akselrud[*]

309. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

310. *Id.* at 375 n.2 (citation omitted) (emphasis added).

* This Note is dedicated to my parents for their endless and unconditional love, support, and encouragement, and to my brother Alex for his important advice and guidance. I would like to thank the editors and staff of the *Loyola of Los Angeles Entertainment Law Journal* for their diligence and commitment in publishing this Note. In particular, I would like to thank Heather

Baughman, Elizabeth Evans, Jeff Conrad, Jane Lee, and Erika Paulsrude for their valuable comments. Finally, I would like to give special thanks to Lynn Hartel for her insightful comments and guidance in writing this Note, and Professor William Araiza for his comments in the early development of this Note.