Rice v. Paladin Enterprises, Inc.: Does the First Amendment Protect Instruction Manuals on How to Commit Murder

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Casenotes

RICE V. PALADIN ENTERPRISES, INC.: DOES THE FIRST AMENDMENT PROTECT INSTRUCTION MANUALS ON HOW TO COMMIT MURDER?

I. INTRODUCTION

Since Timothy McVeigh’s conviction for the April 1995 bombing of the Arthur P. Murrah federal building in Oklahoma City, there has been increasing concern about the ease with which individuals gain access to instructions on how to commit crimes. McVeigh used an instruction manual to build the fertilizer bomb that destroyed the federal building in Oklahoma City. However, the instruction manuals available on the market today are not limited to bomb building. There are books providing information on strangulation, how to become a sniper, how to build a silencer and how to be a hit man. Regulating these types of instruction manuals could have serious implications for publishers, especially if liability can be imposed for selling them. Despite the potentially


2. Some of the titles of available how-to books include: Be Your Own Undertaker: How to Dispose of a Dead Body; Deadly Brew: Advanced Improvised Explosives; The Ancient Art of Strangulation; The Poor Man’s Sniper Rifle; 21 Techniques of Silent Killing; The Home and Recreational Use of High Explosives; Kill Without joy; The Complete How-to-Kill Book; Guerrilla’s Arsenal: Advanced Techniques for Making Explosives and Time-Delay Bombs; Ultimate Sniper; The Big Book of Mischief; How to Make a Silencer for a .22; How to Make a Silencer for a .45; Silent But Deadly: More Homemade Silencers from Hayduke the Master; How to Build Practical Firearm Suppressors: An Illustrated Step-by-Step Guide; and The Terrorist Handbook. See Theresa J. Pulley Radwan, How Imminent is Imminent?: The Imminent Danger Test Applied to Murder Manuals, 8 SETON HALL Const. L.J. 47, 73 n.102 (1997).

3. There are also implications for the Internet, however, they exceed the scope of this casenote. Generally, the rapid expansion of the Internet presents a medium with the potential to almost instantaneously disseminate volatile information to an unknown number of persons, demanding increasing government vigilance. See Teens Charged After Pipe Bombs Found, THE HARRISBURG PATRIOT, Oct. 1,
harmful nature of the books, regulation of such speech raises serious constitutional issues.


In March 1993, James Perry, hired to murder two women and a child, committed the crimes by following the directions provided in these two books. After Perry's conviction for these crimes, the victims' families brought a wrongful death suit against Paladin, the publisher of the instruction manual, and Peter Lund, the president of the company, for aiding and abetting the murder by publishing

1997, at B3. For example, two Pittsburgh teens were charged with manufacture, possession and transportation of an explosive device for building seven pipe bombs and putting them near the tracks of a commuter railroad. See id. They said they learned how to build the bombs from a library book and information posted on the Internet. See id. Police in Atlanta suspect that vandals learned how to make bottle bombs from the Internet, underground circulated materials and chemistry sets. See Michael Weiss, Bottle Bombs Appear Over the Weekend, THE ATLANTA JOURNAL - THE ATLANTA CONSTITUTION, Jan. 22, 1998, at J6. A Miami elementary school teacher was arrested for operating a gun shop, and building silencers and pipe bombs according to how-to books. See Weapons Factory Found in Home, THE TAMPA TRIBUNE, July 5, 1997, at 6.

See Equal Time: Case Against Suspected Unabomber Ted Kaczynski; Terrorists Within the United States; and a New Generation of Extremists Ready to Build Their Own Chemical and Biological Bombs (CNBC television broadcast, Nov. 12, 1997) (transcript available on LEXIS). "Bubonic plague, sarin gas, anthrax are just some of the concoctions you can learn to make off the Internet or from a copy of "The Terrorist's Handbook."" Id. If an individual knows what he is doing, he can create something deadly just by pulling the directions off the Internet. See id. This new kind of terrorism emerged a few years ago when a cult of New Age extremists named Aum Supreme Truth released nerve gas into a Tokyo subway Monday morning rush hour. See id.


5. See id. Other how-to books have constituted grounds for suits against publishers. In 1985, an individual filed suit, due to injuries resulting from following a how-to diet book. See Alm v. Van Nostrand Reinhold Co., Inc., 480 N.E.2d 1263 (Ill. App. Ct. 1985) (refusing to impose liability on publisher under negligent misrepresentation theory of liability).


7. See id. at 838.

the manuals. The defendants raised a First Amendment defense, arguing that they were not subject to liability for the deaths resulting from the use of Hit Man.

Whether Hit Man deserved First Amendment protection depended on the characterization of the language used in the book because of the well-established First Amendment principles that "advocacy and abstract teaching" of an idea is protected whereas speech that is "an incitement to imminent, lawless action" is not protected. If the instruction manual constituted abstract discussion or advocacy of the principles of how to commit murder, then the First Amendment would shield Paladin from liability. If, on the other hand, the book exceeded advocacy and served as a call to violence, then the First Amendment would not protect Hit Man, and Paladin would be subject to civil liability in the wrongful death action. The issue was whether the First Amendment guarantee to

9. See Rice I, 128 F.3d at 238.
10. See id.
12. See United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985) (holding that defendant's lectures promoting filing fraudulent tax returns not protected by First Amendment); United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985) (holding that First Amendment does not protect actions that go beyond advocacy); Welch v. United States, 750 F.2d 1101, 1108 (1st Cir. 1985) (holding that filing frivolous deductions on tax return to protest war not protected by First Amendment as advocacy); United States v. Ness, 652 F.2d 890, 892 (9th Cir. 1981) (holding that "[t]ax violations are not a protected form of political dissent"); Hudson v. United States, 766 F.2d 1288, 1292 (9th Cir. 1985) (denying First Amendment protection to taxpayer who filed frivolous return); Wall v. United States, 756 F.2d 52, 55 (8th Cir. 1985) (finding no First Amendment defense for claiming "war tax deduction" which rendered defendant's tax return incorrect); United States v. But-
Section II of this Note describes the factual basis for the civil suit brought against Paladin for aiding and abetting the murder of three individuals by James Perry. Section III explores the applicable law. Sections IV and V examine the Maryland District Court's holding that the First Amendment protected the murder manual, and analyze the Fourth Circuit's rationale for reversing the decision and holding that the First Amendment was not a defense. Section VI explores the possible impact of the decision on the availability of this type of instructional material and the likelihood that publishers will refrain from publishing these types of books.

II. FACTS

On the night of March 3, 1993, James Perry carried out the gruesome murder of Mildred Horn, her eight-year-old quadriplegic son, Trevor, and Trevor's nurse, Janice Saunders. Perry shot Mildred Horn and Janice Saunders through the eyes and strangled Trevor Horn. Perry did not even know his victims. He was simply fulfilling his contract as a hit man, hired by Mildred Horn's ex-husband.

13. See Rice I, 128 F.3d at 241 n.2. Defendants conceded for the purposes of the motion for summary judgment:

[D]efendants engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes; and in publishing, marketing, advertising and distributing Hit Man and Silencers, defendants intended and had knowledge that their publications would be used, upon receipt by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications.

Id.

14. See infra notes 18-43 and accompanying text.
15. See infra notes 44-174 and accompanying text.
16. See infra notes 175-270 and accompanying text.
17. See infra notes 271-76 and accompanying text.
19. See id.
band, Lawrence Horn, to murder his family.20 Lawrence Horn had his family killed because he was the beneficiary of a two million-dollar trust fund that was created for his disabled son, Trevor.21

Perry's guide in planning and committing the murders was Hit Man, which contains 130 pages of detailed instructions on how to commit murder and get away with it.22 In a chapter by chapter presentation, Hit Man details, among other things, how to solicit a client, commit a murder and dispose of the murder weapon and the victim's body.23 It is undisputed that Perry used the book to murder his victims.24 The murders paralleled the process detailed in Hit Man. For example, for a guaranteed quick death the book specifically instructs to aim for the head, "preferably the eye sockets," and fire at least three shots.25 Both Mildred Horn and Janice Saunders were shot two or three times through the eyes.26 James Perry followed several other instructions for covering up the murder, including: picking up the empty cartridges at the murder scene, disassembling his weapon, altering it so that the police would be unable to match the bullets removed from the victims' bodies and making the crime scene look like a burglary.27 After James

20. See id. The joint statement of facts reveals that Lawrence Horn and James Perry conspired to have Mildred Horn and Trevor Horn killed prior to March 3, 1993. See id. at 241 n.2.

21. See id. at 239. The trust money came from a settlement for medical malpractice that resulted in Trevor's life-long paralysis. See id. Under the terms of the trust instrument, in case of both Trevor's and Mildred's deaths, Lawrence would be the beneficiary. See id.

22. See Rice I, 128 F.3d at 239-41. Perry was convicted of these three murders. See Perry v. State, 686 A.2d 274 (Md. 1996).

23. See Rice I, 128 F.3d at 239. The book enumerates preparatory steps such as: how to request "expense money" from the employer before committing the crime, how much to charge, how to "steal an out-of-state tag" to put on a rental car, how to choose a weapon, and how to drill the serial numbers off of a gun. Id. (quoting Perry, 686 A.2d at 277). It also provided instructions on how to "design a silencer from material available at any hardware store." Id.

The titles for chapters one through nine are as follows: "The Beginning — Mental and Physical Preparation;" "Equipment — Selection and Purpose;" "The Disposable Silencer — The Poor Man's Access to a Rich Man's Toy;" "More Than One Way to Kill a Rabbit — The Direct Hit is Not Your Only Alternative;" "Opportunity Knocks — Finding Employment, What to Charge, What to Avoid;" "Getting the Job Done Right — Why the Described Hit Went Down the Way it Did;" "Danger: Ego, Women and Partners — Controlling Your Situation;" "Legally Illegal." Id. at 257-61.

24. See id. at 241 n.2. The joint statement of facts states that Perry followed the instructions outlined in Hit Man and Silencers. See id.

25. Id. at 240.

26. See id.

27. See id. at 240-41. Hit Man also recommends trying to make the scene look like a burglary by "messing the place up a bit and taking anything of value that you can carry concealed." Id. at 241. The police report noted that a Gucci watch and
Perry was convicted of the triple murder, the victims’ next of kin brought a wrongful death suit against Paladin for aiding and abetting the murders by providing the necessary information for committing the crime.\textsuperscript{28}

An analysis of the nature of the language used in \textit{Hit Man} is critical to determine what role the book played in the murders. \textit{Hit Man} provided the information that enabled James Perry to carry out the crimes, but it did more than recite preparatory steps. The book employed language describing the act of murder with arrogance and indifference and glorified the art of killing by stating, “when you’ve read all the suggested material, you [will have] honed your mind, body and reflexes into a precision piece of professional machinery.”\textsuperscript{29} There was an element of encouragement present throughout the book, especially at points when readers and potential customers of Mildred Horn’s credit cards were missing and that the place appeared “disturbed.” See \textit{id.} The book also includes information on how to cover up the crime scene by arson and what types of non-traceable substances to use to start the fire; how to dispose of a corpse by cutting off the head and placing a stick of dynamite in the mouth to prevent identification of the victim by dental records; and how to sink or bury a corpse. See \textit{id.} at 236-38.

28. For purposes of summary judgment and reserving the right to contest these statements in later proceedings, the defendants stipulated to these facts: [D]efendant engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes; and in publishing, marketing, advertising and distributing \textit{Hit Man} and \textit{Silencers}, defendants intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications. . . . [D]efendants’ marketing strategy was and is intended to maximize sale of its publications to the public, including sales to (i) authors who desire information for the purpose of writing books about crime and criminals, (ii) law enforcement officers and agencies who desire information concerning the means and methods of committing crimes, (iii) persons who enjoy reading accounts of crimes and the means of committing them for purposes of entertainment, (iv) persons who fantasize about committing crimes but do not thereafter commit them, and (v) criminologists and others who study criminal methods and mentality. . . .

\textit{Rice I}, 128 F.3d at 241 n.2.

29. \textit{id.} The quote continues: “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.” \textit{Id.} Another relevant excerpt from \textit{Hit Man} reads as follows:

I’m sure your emotions have run full scale over the past few days or weeks. There was a fleeting moment just before you pulled the trigger when you wondered if lightning would strike you then and there. And afterwards, a short burst of panic as you looked quickly around you to make sure no witnesses were lurking. But other than that, you felt absolutely nothing. And you are shocked by that nothingness. You had expected this moment to be a spectacular point in your life. . . . The first few seconds of nothingness give you an almost uncontrollable urge to
tional hitmen may lose their commitment to carry out the act. This language was crucial to determining whether the book was protected by the First Amendment.

There were two possible grounds for imposing liability on a publisher of a murder manual. First, the Supreme Court has created at least five categories of speech that receive limited or no First Amendment protection. Second, some circuit courts have held that speech which is indivisible from the crime itself, and tantamount to aiding and abetting a crime, is denied First Amendment protection.

The Maryland District Court and the Fourth Circuit applied the recognized exceptions to First Amendment protection differently. The district court used a categorical approach that excluded the powerful prose is also exemplified by this passage:

When someone starts to brag, in confidence, about something he’s done, the intimacy of the moment, the shared confessions, may inspire you to do a little bragging of your own... Start now in learning to control your ego. That means, above all, keeping your mouth shut! You are a man. Without a doubt, you have proved it. You have come face to face with death and emerged the victor through your cunning and expertise. You have dealt as a professional. You don’t need any second or third opinion to verify your manhood.

Id. at 239.

30. See id.

31. See Rice, 940 F. Supp. at 841. In general, these categories of speech include obscenity, fighting words, libel, commercial speech and speech which is likely to incite imminent, lawless action. See id. (citations omitted). For a more detailed discussion, see infra note 45 and accompanying text.

32. See United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985) (holding that of the exception, however, defendant’s participation in preparation of fraudulent tax return was sufficient to affirm conviction of aiding and abetting); United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985) (holding that First Amendment does not protect actions that exceed advocacy); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978) (upholding defendants’ conviction for aiding and abetting clients who filed false tax returns); United States v. Moss, 604 F.2d 569, 571 (8th Cir. 1979) (holding that speech motivating filing of fraudulent tax forms was sufficient to constitute aiding and abetting); United States v. Barnett, 667 F.2d 835, 835 (9th Cir. 1982) (holding that publication of instructions on how to make illegal drugs was not protected by First Amendment); United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990) (holding that computer program, the sole purpose of which was illegal betting, was not protected by First Amendment); National Org. for Women v. Operation Rescue, 37 F.3d 646, 656 (D.C. Cir. 1994) (holding that fact “[t]hat ‘aiding and abetting’ of an illegal act may be carried out through speech is no bar to its illegality”); United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970) (holding that “speech is not protected by the First Amendment when it is the very vehicle of the crime itself”).

33. Compare Rice, 940 F. Supp. 836 with Rice I, 128 F.3d 233. The Supreme Court has created at least five categories of speech that receive limited or no First Amendment protection. See Rice, 940 F. Supp. at 841. In general, these categories of speech include obscenity, fighting words, libel, commercial speech and speech...
amined the facts of the case to determine that only the "incitement to imminent, lawless action" exception to the First Amendment protection might apply in this case. Since the district court concluded that Hit Man did not satisfy the criteria, the First Amendment was a defense which shielded Paladin from liability.

Specifically, the district court concluded that the language in Hit Man did not incite imminent, lawless conduct, but merely advocated and taught abstract ideas about how to commit murder. Abstract advocacy of ideas, however gruesome, is protected so long as it does encourage commission of a violent or criminal act. The district court, thus, granted defendants' motion for summary judgment on the First Amendment defense. The Fourth Circuit, however, held that the speech in Hit Man did not advocate abstract ideas. It found that the book encouraged the reader to take illegal action by following the instructions of the manual. The court stated that the First Amendment was not intended to apply to "abstract advocacy [of] speech so explicit in its palpable entreaties to violent crime." The Fourth Circuit reversed the summary judgment granted by the district court, that is likely to incite imminent, lawless action. See id. (citations omitted). For a more detailed discussion, see infra note 45 and accompanying text.

34. Brandenburg, 395 U.S. at 447. For a further discussion of the Brandenburg exception, see infra notes 46-72 and accompanying text.

35. See Rice, 940 F. Supp. at 849. The district court held that the First Amendment was an absolute defense to liability because Hit Man "did not fall within the parameters of any of the recognized exceptions to the general First Amendment principles of freedom of speech." Id. Specifically, the court held that the criteria for removing First Amendment protection under Brandenburg were not met. See id. at 848. For a discussion of Brandenburg, see infra notes 46-72 and accompanying text.

The Maryland District Court initially held that there was no cause of action for civil aiding and abetting murder in Maryland. See id. at 842. The district court subsequently stated, in an amended opinion, that Maryland did recognize aiding and abetting tort liability, but it had never been applied in this context. See id. at 842 n.2.

36. See id. at 848. "The Court finds that the book merely teaches what must be done to implement a professional hit. The book does not cross that line between permissible advocacy and impermissible incitement to crime or violence." Id. at 847 (citing Young v. American Mini Theaters, Inc., 427 U.S. 50, 66 (1976)).

37. See Rice, 940 F. Supp. at 849.

38. See Rice, 940 F. Supp. at 849.

39. See Rice I, 128 F.3d at 262-63. The court held that "ideas simply are neither the focus nor the burden of the book," and that the book "directly and unmistakably urges concrete violations of the laws against murder for hire and coldly instructs on the commission of these crimes." Id.

40. Id. at 263.
denied Paladin's First Amendment defense and remanded the case for trial.\textsuperscript{41}

Although the Fourth Circuit considered the exceptions to First Amendment protection, it ultimately denied First Amendment protection on the grounds that publishing \textit{Hit Man} and marketing it to an audience with criminal tendencies constituted conduct that aided and abetted the commission of a crime.\textsuperscript{42} Although speech that aids and abets a crime is not a recognized exception to First Amendment protection as established by the Supreme Court, several circuit courts have adopted this approach for imposing civil liability on the party who uttered the speech.\textsuperscript{43}

III. BACKGROUND

The First Amendment states: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”\textsuperscript{44} Despite the literal language of the First Amendment, the protection of speech by the First Amendment is not absolute. Over the years the Supreme Court has created at least five categories of speech that receive limited or no First Amendment protection.\textsuperscript{45} One relevant

\textsuperscript{41.} See id. at 267.
\textsuperscript{42.} See id. at 265. The court held that “plaintiffs [had] stated, sufficient to withstand summary judgment, a civil cause of action against Paladin Enterprises for aiding and abetting the murders . . . , and that this cause of action [was] not barred by the First Amendment . . . .” \textit{Id.} (emphasis added).
\textsuperscript{43.} See United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985) (holding that of the exception, however, defendant's participation in preparation of fraudulent tax return was sufficient to affirm conviction of aiding and abetting); United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985) (holding that First Amendment does not protect actions that exceed advocacy); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978) (upholding defendants' conviction for aiding and abetting clients who filed false tax returns); United States v. Moss, 604 F.2d 569, 571 (8th Cir. 1979) (holding that speech motivating filing of fraudulent tax forms was sufficient to constitute aiding and abetting); United States v. Barnett, 667 F.2d 835, 835 (9th Cir. 1982) (holding that publication of instructions on how to make illegal drugs was not protected by First Amendment); United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990) (holding that computer program, the sole purpose of which was illegal betting, was not protected by First Amendment); National Org. for Women v. Operation Rescue, 37 F.3d 646, 656 (D.C. Cir. 1994) (holding that fact “[t]hat 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality”); United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970) (holding that “speech is not protected by the First Amendment when it is the very vehicle of the crime itself”).
\textsuperscript{44.} U.S. CONST. amend. I.
\textsuperscript{45.} See \textit{Rice}, 940 F. Supp. at 840. The first, obscenity, is defined as speech which “depict[s] or describe[s], in a patently offensive way, sexual conduct. . . .” is obscenity. \textit{Miller v. California}, 413 U.S. 15, 24 (1973). The second exception, fighting words, is characterized as words which “by their very utterance inflict injury or tend to incite an immediate breach of the peace.” \textit{Chaplinsky v. New Hampshire}, 315 U.S. 568, 572 (1942). The third, libel, is speech that tends to
category of unprotected speech is the exception created by the Supreme Court in Brandenburg v. Ohio, permitting a content-based restriction on speech if it is an "incitement to imminent, lawless action and is likely to incite or produce such action." Brandenburg established the rule of law that speech advocating or teaching the use of violence is protected by the First Amendment, but that speech aimed toward "preparing a group for violent action and steeling it to such action" is not protected.

The Brandenburg exception to First Amendment protection was developed in the late 1960s to address the political speech of a member of the Ku Klux Klan. The speech was uttered at a rally and advocated violent retaliation against governmental oppression of the white race. An existing Ohio state statute made it a crime to "advocat[e] the duty, necessity or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform [and] to teach or advocate the doctrines of criminal syndicalism." The Supreme Court reversed the conviction, holding that a State may only prohibit advocacy of the use of force where it is directed to inciting imminent, lawless action and is likely to incite or produce such action. This decision expressly overruled an earlier case, Whitney v. California, which punished pure advocacy and assembly to advocate lawless action, without requiring that the lawless action be imminent.


The district court in Rice analyzed each of the five categories, and determined that the only category applicable to the instant facts was incitement to imminent, lawless activity. See Rice, 940 F. Supp. at 841 (citing Brandenburg, 395 U.S. at 447).

47. Id. at 447.
48. Id. at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).
49. See id. at 446.
50. See id. at 495. Part of the language which was the basis of the conviction under the Ohio Criminal Syndicalism statute was as follows: "We'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' taken." Id.
51. See Brandenburg, 395 U.S. at 444-45.
52. 274 U.S. 357 (1927).
53. See Brandenburg, 395 U.S. at 447. The defendant in Whitney was charged with a violation of the California Criminal Syndicalism Act. See Whitney, 274 U.S. at 359. The defendant was a member of the Communist Labor Party ("Party") and had actively participated in a political convention with the purpose of promoting the Party's ideals. See id. at 364-65. The Party's purpose was to organize the work-
The *Brandenburg* exception clearly distinguished First Amendment protection of speech advocating dangerous or illegal ideas, from speech intended to encourage illegal action. If an idea is presented in an abstract manner, and there is little likelihood that it will incite illegal action, the First Amendment protects the speech.\(^{54}\) If the speech is likely to result in illegal action or if the speaker participates in preparation, however, the speech is not protected.\(^{55}\)

For the *Brandenburg* exception to apply, the speech must be 1) intended to incite unlawful action, 2) the unlawful action must be imminent and 3) likely to occur.\(^{56}\) The speech in *Brandenburg* advocated measures to be taken at a later time if the government were to suppress the white race. The speech was not intended to be an incitement to take action within a short period of time and thus failed to meet the *Brandenburg* criteria. Under the three criteria, therefore, the speech was protected by the First Amendment.\(^{57}\)

*Brandenburg* draws an important distinction between speech teaching violent means of action and speech resulting in violent action.\(^{58}\) Abstract advocacy or teaching of general principles or ideas, however reprehensible, is permitted so long as it does not instigate or command violent action.\(^{59}\) If the language is deemed capable of "inciting imminent, lawless activity," was intended to do so and was likely to produce that effect, then the First Amendment does not provide protection.\(^{60}\)
A. Protection of Advocacy under \textit{Brandenburg}

Historically, the First Amendment protects political and social speech that may suggest violent action. Speech suggesting overthrowing of the government, or recommending opposition to federal taxation of wages will be protected as long as it does not incite imminent lawlessness.\textsuperscript{61}

\textit{Noto v. United States,}\textsuperscript{62} decided eight years before \textit{Brandenburg}, foreshadowed the \textit{Brandenburg} exception by stating that “the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”\textsuperscript{63} \textit{Noto} involved members of the Young Communist League planning to introduce communism in the United States through conferences and lectures on Leninist principles.\textsuperscript{64} The Supreme Court held that this type of advocacy,

\begin{itemize}
\item \textsuperscript{61} See, e.g., \textit{Brandenburg}, 395 U.S. at 444 (holding that First Amendment protected advocacy of use of force that did not qualify as “incitement to imminent, lawless action”); \textit{Noto v. United States}, 367 U.S. 290, 290 (1961) (refusing to impose liability for advocating Communism); \textit{Yates v. United States}, 354 U.S. 298, 298 (1957) (reversing conviction for conspiring to advocate overthrow of United States government for want of intentional incitement); \textit{Hess v. Indiana}, 414 U.S. 105, 105 (1973) (holding that First Amendment protected “we’ll take the fucking street later”); \textit{Watts v. United States} 394 U.S. 705, 705 (1969) (holding that “[i]f they ever make me carry a rifle the first man I want in my sights is L.B.J.” protected under First Amendment as offensive, but not prosecutable means of taking opposition to President of United States); \textit{NAACP v. Claiborne Hardware Co.,} 458 U.S. 886, 902 (1982) (holding that statement that “if we catch any of you going in any of them racist stores, we’re gonna break your damn neck” is protected); \textit{United States v. Dahlstrom}, 713 F.2d 1423, 1423 (9th Cir. 1983) (holding that First Amendment protected seminars instructing how to establish tax shelters of questionable legality). \textit{But see} \textit{Scales v. United States}, 367 U.S. 203, 203 (1961) (holding that active membership in group advocating overthrow of government was sufficient ground for removing First Amendment protection of speech); \textit{Gitlow v. New York}, 268 U.S. 652, 652 (1925) (holding that Socialist Manifesto advocating destruction of government was not protected by First Amendment); \textit{Dennis v. United States}, 341 U.S. 494, 494 (1951) (holding that advocating overthrow of government was not protected).
\item \textsuperscript{62} 367 U.S. 290 (1961).
\item \textsuperscript{63} \textit{Id. at 297-98. \textit{See also} \textit{Yates v. United States}, 354 U.S. 298, 298 (1957) (holding that evidence was insufficient to uphold conviction of conspiracy to advocate violent overthrow of government by members of Communist Party). \textit{But see} \textit{Scales v. United States,} 367 U.S. 203, 203 (1961) (holding that active membership in group advocating overthrow of government sufficient ground for removing First Amendment protection of speech); \textit{Gitlow v. New York}, 268 U.S. 652, 652 (1925) (holding that Socialist Manifesto advocating destruction of government was not protected by First Amendment); \textit{Dennis v. United States}, 341 U.S. 494, 494 (1951) (holding that advocating overthrow of government was not protected).
\item \textsuperscript{64} \textit{See} \textit{Noto,} 367 U.S. at 294-96. The plan was to have Communist Party members penetrate the United Auto Workers Union and to exercise control once they assumed positions of power. \textit{See id. at 294.}
\end{itemize}
even though spoken in the hope that it will inspire future violent action, "was not sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching." To deny First Amendment protection of this type of speech, provocation and urging to action must be inherent in the language. The threat of danger was not sufficiently imminent to justify imposing liability in Noto.

The Supreme Court decision in Hess v. Indiana exemplified protection of threatening speech under the First Amendment. Hess was involved in an antiwar demonstration on the Indiana University campus and was heard saying, "[w]e'll take the fucking street later" in a crowd of demonstrators. The Court held that this statement was not an incitement to violence, and that it was, at most, advocacy of lawlessness at an indefinite future time. To forfeit First Amendment protection, political speech must be uttered with the intent to produce imminent disorder and violence. Since the imminence requirement was not satisfied, the speech was protected.

Conduct that does not exceed simple advocacy of illegal action is protected under Brandenburg if there is no intent to commit a crime. This rationale has been applied to speech advocating other forms of criminal conduct, such as holding meetings in order to instruct others how to file fraudulent tax forms. So long as the

65. Id. at 298. The advocacy was too removed from any evidence of action. It could not, therefore, be considered a call to action. See id. at 297.
66. See id. at 299-300. See also Yates v. United States, 354 U.S. 298 (1957). In Yates, the court reversed a conviction for conspiring to advocate and teach the overthrow of the United States government by force. See id. at 331. The conviction was reversed because there was insufficient evidence of preparation and intentional incitement of action to be taken in the near future. See id. at 329-30, 332.
68. See id. at 107.
69. See id. at 108.
70. See id. at 108-09. See also Watts v. United States, 394 U.S. 705, 706 (1969) ("[i]f they ever make me carry a rifle the first man I want in my sights is L.B.J." protected under First Amendment as offensive, but not prosecutable means of taking opposition to President of United States); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 902 (1982) (ruling that "if we catch any of you going in any of them racist stores, we're gonna break your damn neck," is protected speech).
71. See Hess, 414 U.S. at 108.
73. See United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985) (holding defendant's participation in preparation of fraudulent tax return sufficient to affirm conviction of aiding and abetting); United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985) (holding that First Amendment did not protect lectures on tax evasion that went beyond advocacy); Welch v. United States, 750 F.2d 1101, 1108 (1st Cir. 1985) (holding that frivolous deductions on tax return to protest war not
speech teaches an abstract principle or idea, it will be protected as advocacy and the speaker will not be prosecuted as inciting lawlessness.74

For example, in United States v. Dahlstrom75 the Ninth Circuit held that the First Amendment protected a defendant who formed an organization whose sole purpose was to promote a tax shelter program he created.76 Members paid a fee in return for information on how to establish tax shelters of questionable legality.77 The speech was not proven to be an illegal method of creating tax shelters and there was no evidence that the defendant specifically intended to violate the law, or that he helped to prepare the fraudulent tax returns.78 Since the defendant did not intend to commit a crime, or to induce members of the organization to do so, the speech was protected as advocacy.79

These cases illustrate that, absent intent to commit a crime, speech advocating criminal conduct is protected under the First Amendment.80 It is for this reason that the characterization of Hit

protected by First Amendment); United States v. Ness, 652 F.2d 890, 892 (9th Cir. 1981) (holding that "[t]ax violations are not a protected form of political dissent"); Hudson v. United States, 766 F.2d 1288, 1292 (9th Cir. 1985) (denying First Amendment protection to taxpayer who filed frivolous return); Wall v. United States, 756 F.2d 52, 53 (8th Cir. 1985) (holding that First Amendment is not defense for claiming "war tax deduction" which rendered defendant's tax return incorrect); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978) (holding that First Amendment is not defense for defendants' conduct of recommending filing false tax forms); United States v. Fleschner, 98 F.3d 155, 158-59 (4th Cir. 1996) (holding that First Amendment is not defense in case of meetings promoting tax evasion practices that exceeded advocating opposition to income tax laws); United States v. Moss, 604 F.2d 569, 571 (8th Cir. 1979) (holding that speech motivating filing fraudulent tax forms sufficient to constitute aiding and abetting). For a further discussion of tax evasion cases in which the court held that the First Amendment was not a defense, see infra notes 83-97 and accompanying text.

75. 713 F.2d 1423 (9th Cir. 1983).
76. See id. at 1425.
77. See id. at 1425-27. The government had not presented any evidence which clearly established the illegality of the defendant's tax shelters. See id. at 1427.
78. See id. at 1425, 1428-29. The defendant occasionally assisted by traveling to the foreign country in which the foreign trust organization was to be created to file the requisite documents. See id. at 1425. He also made an exception to assist the individual who, unknown to him, was acting in conjunction with the government to convict the defendant. See id. at 1428.
79. See id. at 1428-29.
80. But c.f. Weirum v. RKO General, Inc., 539 P.2d 36 (Cal. 1975) (imposing liability on radio station for negligently inducing reckless behavior of contestants in radio promotion). To win the money being awarded, the contestants were required to locate a disc jockey's automobile whose location was announced on the radio. See id. While chasing the automobile to the next stop, two contestants forced another car into a highway divider, killing the occupant. See id.
Man as advocacy or incitement played a crucial role in determining whether Paladin was protected by the First Amendment.81

B. Prosecution of Preparation

The Brandenburg exception was later applied to prosecute speech accompanied by participation in subsequent illegal conduct.82 Once the speaker crosses the fine line separating abstract discussion from participation and preparation, the First Amendment no longer protects the speech.83 The tax evasion cases are the most well developed area of law in which speech was sufficient to hold a defendant liable for aiding and abetting. Unlike the usual criminal aiding and abetting case, these are unique in that they provide one of the few instances in which the First Amendment did not protect speech. In these cases, the individual not only provided instructions for filing fraudulent tax forms, but also encouraged or actually prepared the forms.84 If the speaker provided general information about filing fraudulent tax returns without the belief that those instructions would be followed, however, the First Amendment would have provided protection.85

The Fourth Circuit in United States v. Fleschner86 upheld the defendants' conviction for holding meetings with the sole purpose to

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In the district court, the plaintiffs in Rice relied on Weirum to support the proposition that liability can be imposed for the physical injuries caused by speech which urged persons to act in an inherently dangerous manner. See Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 844 (1996). However, Weirum is distinguishable from Rice because liability was based on a negligence theory, not on whether it was an incitement to imminent, lawless action under Brandenburg. See Weirum, 539 P.2d at 41.

81. For a discussion of the court's characterizations of the language in Hit Man, see infra notes 227-32 and accompanying text.

82. See United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985) (holding that First Amendment does not protect actions that exceed advocacy); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978) (holding that First Amendment defense does not apply to defendants recommending filing false tax forms); United States v. Fleschner, 98 F.3d 155, 158-59 (4th Cir. 1996) (holding that liability should be imposed for meetings promoting tax evasion practices that went beyond advocacy of opposition to income tax laws); United States v. Rowlee, 899 F.2d 1275, 1279-80 (2d Cir. 1990) (holding that the First Amendment does not protect actions that constitute more than advocacy of tax non-compliance); United States v. Moss, 604 F.2d 569, 571 (8th Cir. 1979) (holding that speech motivating filing fraudulent tax forms was sufficient to constitute aiding and abetting).


84. See id. at 552 (holding that defendant's participation in preparation of fraudulent tax return was sufficient to convict on aiding and abetting charge).

85. See United States v. Freeman, 761 F.2d 549, 551 (9th Cir. 1985) (stating that mere advocacy of tax non-compliance protected by First Amendment, not instruction intended to result in violating law).

86. 98 F.3d 155 (4th Cir. 1996).
encourage an audience to file false tax returns. The court rejected a First Amendment defense because the defendants, with knowledge that the attendees were following their instructions, solicited the unlawful acts. The lectures were intended to produce the lawless action of filing the false returns, and the defendants knew this was likely to occur. Therefore, the defendants' conduct met the criteria for denying First Amendment protection under the Brandenburg exception.

In United States v. Freeman, the Ninth Circuit held that speech that actively incited criminal action, coupled with participation in the criminal activity, precluded a First Amendment defense. The defendant in Freeman unsuccessfully argued that his seminars on tax evasion were an abstract advocacy of tax non-compliance and that he should be protected by the First Amendment. The prosecution presented evidence that Freeman used speech intended to incite criminal activity and that he knew that the audience was likely
to follow his instructions.\textsuperscript{94} The tax seminars, however, would have been protected if they had been a discussion of the general principles of tax non-compliance rather than an active demonstration of how to falsely report wages and make fraudulent deductions.\textsuperscript{95} \textit{Freeman} reinforces the distinction between abstract advocacy, which is afforded protection under the First Amendment, and speech intended to encourage illegal conduct, which falls within the \textit{Brandenburg} exception and is, thus, not afforded protection under the First Amendment.

Courts have used different rationales to deny First Amendment protection for the preparation of tax returns.\textsuperscript{96} Some courts have held that the First Amendment does not apply at all.\textsuperscript{97} Other courts have held that the government's interest in protecting the integrity of the revenue system outweighs the defendant's First Amendment rights.\textsuperscript{98} A third approach has been to deny First Amendment protection on the ground that the preparation and counseling are so intimately associated with the crime that it becomes part of the crime itself.\textsuperscript{99} In the last instance, circuit courts have held defendants liable for aiding and abetting the filing of false tax returns through speech.\textsuperscript{100} Nevertheless, denial of First

\begin{itemize}
\item \textsuperscript{94} See id. See also United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978) (upholding conviction of defendant for aiding and abetting tax fraud by recommending that employees file fraudulent withholding statements).
\item \textsuperscript{95} See \textit{Freeman}, 761 F.2d at 551.
\item \textsuperscript{96} See United States v. Rowlee, 899 F.2d 1275, 1279 (2d Cir. 1990) (discussing different rationales for denying First Amendment protection to filing false tax returns).
\item \textsuperscript{97} See United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985) (holding that First Amendment does not protect actions which exceed advocacy); Welch v. United States, 750 F.2d 1101, 1108 (1st Cir. 1985) (filing frivolous deductions on tax return as "war protest" not afforded First Amendment protection); United States v. Ness, 652 F.2d 890, 892 (9th Cir. 1981) (holding that "[t]ax violations are not a protected form of political dissent").
\item \textsuperscript{98} See \textit{Rowlee}, 899 F.2d at 1279; Hudson v. United States, 766 F.2d 1288, 1292 (9th Cir. 1985) (holding that public interest in efficient tax system outweighed First Amendment protection of defendant's conduct); Wall v. United States, 756 F.2d 52, 53 (8th Cir. 1985) (holding that government interest in revenue collection was sufficiently compelling to outweigh defendant's objection on religious grounds).
\item \textsuperscript{99} See \textit{Rowlee}, 899 F.2d at 1280.
\item \textsuperscript{100} See, e.g., \textit{Freeman}, 761 F.2d at 552 (holding that defendant's participation in preparation of fraudulent tax return was sufficient to affirm conviction of aiding and abetting); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978) (upholding defendants' conviction for aiding and abetting filing false tax returns). This theory for denying First Amendment protection has been applied in contexts other than the preparation of tax returns. See United States v. Barnett, 667 F.2d 835 (9th Cir. 1982) (holding that First Amendment did not protect publication of instructions on how to make illegal drugs); United States v. Mendelsohn, 896 F.2d
\end{itemize}
Amendment protection for aiding and abetting a crime is an approach that the Supreme Court has yet to explicitly approve.

C. Aiding and Abetting Using Speech

Several circuit courts do not apply the Brandenburg standard to speech that instructs someone on how to commit a crime.\(^{101}\) First Amendment protection is denied on the ground that the speech aids and abets the commission of a crime.\(^{102}\) Traditionally, aiding and abetting has been a criminal law concept that imposes liability on an individual who "advises, counsels, procures, or encourages another to commit a crime."\(^{103}\) This can be accomplished through advice or encouragement in the form of words, acts or signs.\(^{104}\) The accomplice’s requisite mental state remains uncertain.\(^{105}\) Generally, an individual is liable as an accomplice if he intentionally

\(^{101}\) See supra notes 82-100 and accompanying text for examples of the application of the concept of aiding and abetting using speech. See also National Org. for Women v. Operation Rescue, 37 F.3d 646, 655-56 (D.C. Cir. 1994) (outlining aiding and abetting by speech).

\(^{102}\) 21 AM. JUR. 2D Criminal Law § 167 (1963). Maryland defines aiding and abetting in a civil context as a tort for which a defendant can be held liable if he or she "by any means (words, signs, or motions) encourage[s], incite[s] or abet[s] the act of the direct perpetrator of the tort." Rice I, 128 F.3d at 251 (quoting Alleco Inc. v. Harry & Jeanette Weinberg Foundation, 665 A.2d 1038, 1049 (Md. 1995)) (emphasis in original).

A person is an aider and abettor if he or she actively assists in planning and preparing for the perpetration of a crime and assumes a station with the knowledge of the perpetrators where he or she may be able to assist either in the commission of the crime or in the escape immediately following in the perpetration of the crime. An aider and abettor need not know that the activity constitutes a crime.

21 AM. JUR. 2D Criminal Law § 167 (1963). The modern approach expressed in the Model Penal Code defines a person as an accomplice if: "with the purpose of promoting or facilitating the commission of the offense, he solicits the other person to commit it, or aids or agrees or attempts to aid the other person in planning or committing it . . . ." WAYNE F. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 575 (2d ed. 1986).

\(^{104}\) See supra note 103 at 576. Mere presence at the scene of the crime, or approval of the conduct alone, is not sufficient to make someone an accomplice. See id. at 577. Actual “aid” by an accomplice includes activities such as providing guns, money, supplies or instrumentalities to be used in committing the crime or standing by with a getaway car. See id. at 578. “It is quite enough if the aid merely renders it easier for the principal actor to accomplish the end intended by him and the aider and abettor, though . . . the end would have been attained without it.” Id.

\(^{105}\) See supra note 103 at 579-80. The issue revolves around whether the mental state should be based on the accomplice’s intent to assist, his
encourages or assists, and intends the recipient of the encouragement to commit the crime. In some circuits, speech that is invisible from the resulting crime is sufficient basis for a conviction of aiding and abetting. To date, the Supreme Court has never explicitly adopted this approach.

The Ninth Circuit in Freeman, in addition to applying the Brandenburg exception, held that "the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself." Freeman's direct participation in the preparation of fraudulent tax returns was sufficient to affirm a conviction of aiding and abetting.

In another case involving tax fraud, United States v. Buttorff, the Eighth Circuit held that suggesting methods to withhold money from the government was sufficient to constitute aiding and abetting the filing of fraudulent tax returns. The defendants encouraged the audience to use the information provided. Despite less involvement than in Freeman, the court affirmed the conviction.

knowledge of what the principal's intent is or on his knowledge of the laws that are being broken. See id.

106. See id. 107. See United States v. Freeman, 761 F.2d 549, at 552 (9th Cir. 1985). See also United States v. Buttorff, 572 F.2d 619, 619 (8th Cir. 1978) (holding that First Amendment protection of speech did not extend to speech that "went beyond mere advocacy of tax reform"); United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985) (holding that First Amendment does not protect speech urging filing of false tax returns with expectation that encouragement will lead to lawlessness); United States v. Rowlee, 899 F.2d 1275, 1275 (2d Cir. 1990) (holding that First Amendment protection does not apply to actions that constitute more than advocating tax non-compliance); United States v. Moss, 604 F.2d 569, 569 (8th Cir. 1979) (holding that speech motivating filing of fraudulent tax forms sufficient to constitute aiding and abetting); United States v. Fleschner, 98 F.3d 155, 158-59 (4th Cir. 1996) (holding that no First Amendment protection for speech intended to incite criminal act of filing false tax forms); National Org. for Women v. Operation Rescue, 37 F.3d 646, 656 (D.C. Cir. 1994) (holding, "[t]hat 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality"); United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970) (holding that "speech is not protected by the First Amendment when it is the very vehicle of the crime itself").

108. Freeman, 761 F.2d at 552 (citing United States v. Barnett, 667 F.2d 835, 842-43 (9th Cir. 1982); Buttorff, 572 F.2d at 624. Even if the sole basis for the conviction were words, the false filing of tax returns was so proximately associated with the speech that it is not protected by the First Amendment. See id. at 552 (citing United States v. Holecek, 739 F.2d 331, 335 (8th Cir. 1984)).

109. See id. at 552-53.

110. 572 F.2d at 619.

111. See id. at 624. See also Moss, 604 F.2d at 569; Freeman, 761 F.2d at 549; Kelley, 769 F.2d at 215.

112. See Buttorff, 572 F.2d at 623.
Although the speech did not incite the type of imminent lawless action described in *Brandenburg*, it did "go beyond mere advocacy of tax reform." Therefore, it was not protected speech.

Written words that are indivisible from subsequent lawless activity are not protected by the First Amendment. Simply because illegal conduct takes the form of written words does not guarantee protection under the First Amendment. This standard also applies to computer programs with the sole purpose of facilitating illegal betting.

Although computer programs are not typically considered speech, the Ninth Circuit in *United States v. Mendelsohn* affirmed the defendants' aiding and abetting conviction, holding that the speech and subsequent illegal conduct were inseparable. The speech at issue was an illegal computer program, the sole application of which, was to enable a bookmaker to "record, calculate, analyze and quickly erase illegal bets." When a work is closely

113. *See id.* at 622-23. The defendants in *Buttorff* only participated in the preparation of one person's tax form. *See id.* at 623. In *Freeman*, the defendant participated directly in the preparation of one individual's tax returns for two consecutive years, prepared drafts and reviewed the forms to be sure that his instructions were followed. *See Freeman*, 761 F.2d at 552. Despite less involvement on the part of the defendants in *Buttorff*, the court affirmed the conviction for aiding and abetting, because the conduct went beyond mere advocacy. *See Buttorff*, 572 F.2d at 624.

114. *Id.*

115. *See United States v. Barnett*, 667 F.2d 835, 835 (9th Cir. 1982) (holding that publication describing steps for making illegal drugs is not protected by First Amendment); *Freeman*, 761 F.2d at 549 (holding that First Amendment does not protect speech closely associated with crime); *Buttorff*, 572 F.2d at 619 (holding that First Amendment does not protect speech intimately associated with crime of tax fraud); *United States v. Mendelsohn*, 896 F.2d 1183, 1183 (9th Cir. 1990) (holding that First Amendment does not protect computer program designed solely for illegal betting); *Kelley*, 769 F.2d at 215 (holding that First Amendment does not protect speech encouraging crime); *National Org. for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994) (holding "[t]hat 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality"); *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970) (holding that "speech is not protected by the First Amendment when it is the very vehicle of the crime itself").

116. *See Kelley*, 769 F.2d at 217 (holding that "[t]he cloak of the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges the listeners to commit violations of current law"). *See also National Org.*, 37 F.3d at 656 (holding "[t]hat 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality"); *Varani*, 435 F.2d at 762 (holding that "speech is not protected by the First Amendment when it is the very vehicle of the crime itself").

117. 896 F.2d 1183 (9th Cir. 1990).

118. *Id.* at 1185. The fact that computer programs are considered literary works and works of authorship under copyright laws, does not guarantee First Amendment protection. *See id.*
associated "in time and substance to the ultimate criminal conduct," and is "not directed to ideas or consequences other than the commission of the criminal act," a First Amendment defense is not available.\textsuperscript{119}

\textit{United States v. Barnett}\textsuperscript{120} further illustrates speech that aided and abetted the commission of a crime. In \textit{Barnett}, the Ninth Circuit held that the First Amendment was not a defense to aiding and abetting by publishing directions for making illegal drugs.\textsuperscript{121} The court rejected Barnett's argument that he was immune from prosecution because he used a publication to encourage and carry out his illegal purpose instead of directly participating in the commission of the crime.\textsuperscript{122} In excluding the speech from First Amendment protection, the court did not apply the \textit{Brandenburg} exception. Instead, the basis for imposing liability was aiding and abetting the production of illegal drugs by providing instructions for violating the law.\textsuperscript{123}

These cases demonstrate that in some circuits, speech that does not resemble the advocacy protected by \textit{Brandenburg} can be punished as aiding and abetting the commission of crime. The use of speech does not automatically ensure that the protective shield of the First Amendment will apply. Only speech that can be charac-

\textsuperscript{119.} \textit{Id}. There was no evidence that the defendants thought that the recipient of the computer disk intended to use the computer program for anything other than illegal betting. \textit{See id}. at 1185. The court distinguished \textit{Dahlstrom}, a case in which counseling on how to create tax shelters was protected by the First Amendment, on the ground that the defendants in \textit{Mendelsohn} were not providing legitimate information on legal loopholes. \textit{See id}. The defendants created a computer program that lacked a legitimate purpose. \textit{See id}. at 1185-86. Based on the content of the computer program, the court held that it did not warrant First Amendment protection. \textit{See id}. For a discussion of \textit{Dahlstrom}, see supra notes 75-79 and accompanying text.

\textsuperscript{120.} 667 F.2d 835 (9th Cir. 1982).

\textsuperscript{121.} \textit{See id}. at 844. The defendant distributed, through the federal mail system, materials such as "Synthesis of PCP/Angel Dust," "Synthetic Routes to Amphetamines," "A Feasible Synthesis of Methaqualine Hydrochloride" and "Chemicals used in Drug Synthesis." \textit{Id}. at 839. Based on the detection and seizure of these materials after Barnett had placed them in the mail, a search warrant was issued. \textit{See id}. The defendant was unsuccessful in his attempt to suppress the evidence seized pursuant to the search warrant. \textit{See id}. at 844. The case was remanded to determine whether he was guilty of aiding and abetting for supplying instructional information. \textit{See id}.

\textsuperscript{122.} \textit{See id}. at 842-43. Parallels were drawn between \textit{Rice} and \textit{Barnett}. In both cases, the defendants published instructional material on how to commit crimes; the information was mailed to unknown persons who then responded in a criminal fashion; and the perpetrators of the crimes in both cases relied on the instructions when carrying out the crime. \textit{See Rice v. Paladin Enters., Inc.}, 940 F. Supp. 836, 843 (D.Md. 1996).

\textsuperscript{123.} \textit{See id}. at 841-42.
terized as abstract advocacy will be protected. In some circuits, once speech goes beyond advocacy, it can be punished as aiding and abetting without fear of violating the First Amendment.

D. Distinction of “Copy Cat” Cases

Application of the Brandenburg exception to violent TV shows and movies has consistently resulted in a failure to impose liability on producers because they lack intent to induce imminent, lawless action.124 Intent to have the audience duplicate the violence depicted is required to impose liability.125 Absent the requisite intent, the perpetrators of the criminal acts are only copying an expression of a violent idea, and Brandenburg protects the actions.126 The district court, in holding that Hit Man was protected, stated that Rice was analogous to these cases in that the requisite intent was missing.

In Herceg v. Hustler Magazine, Inc.,127 a fourteen-year-old boy, Troy Herceg, read an article in Hustler describing auto-erotic as-

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124. See Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1017 (5th Cir. 1987) (holding that magazine was not liable for printing article on auto-erotic asphyxia which youth followed resulting in his death); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1067 (Mass. 1989) (holding that producer of violent movie was not liable for copycat deaths); Zamora v. Columbia Broadcasting System, 480 F. Supp. 199, 199 (S.D. Fla. 1979) (holding that producer of violent TV shows was not liable for murder committed by child).


126. See Brandenburg, 395 U.S. at 447. The district court stated that Rice was similar to the cases in which violent movies and television shows resulted in physical harm and, sometimes, death. See Rice, 940 F. Supp. at 846. In those cases the court analyzed the speech under the Brandenburg exception, and concluded that the incitement element was not met. Therefore, the speech was protected. Likewise, the district court held that since there was no incitement element in Hit Man, the speech was protected. For a further discussion of the district court opinion, see infra, notes 186-213 and accompanying text.

127. 814 F.2d 1017 (5th Cir. 1987). The suit was brought by Troy Herceg’s mother and a friend, who sued to recover for emotional distress as a result of Troy’s death and for exemplary damages. See id. at 1019. The friend discovered Troy hanging dead in his closet with the magazine open to the page with the article “Orgasm of Death” the day after the fateful event. See id. The article detailed the practice of masturbation while cutting off the blood supply to the brain so as to enhance orgasm. See id. at 1018. Jurors believed expert testimony that Troy’s death was not the result of a psychological disorder and that his death occurred from performing the acts described in the article. See id. at 1021.

The plaintiffs alleged that the Hustler article was “directed to inciting or producing [Troy’s death]” and was likely to do so. See id. at 1019. To hold the publisher of the magazine liable, the plaintiffs needed to prove that the defendant’s actions satisfied the Brandenburg standard. In this case, that meant that they needed to prove that “auto-erotic asphyxiation is a lawless act, Hustler advocated this act, Hustler’s publication went beyond ‘mere advocacy’ and amounted to incitement,” and the incitement was directed to imminent action. Id. at 1022.
phyxia and decided to try it.\textsuperscript{128} The article described the practice in detail; yet, the court held that the amount of detail did not support a finding of "incitement."\textsuperscript{129} Therefore, the court held that no liability could attach to the publisher of the magazine.\textsuperscript{130}

Similarly, crimes allegedly resulting from violent television programs, movies and rap songs have not lead to the imposition of liability on their producers. \textit{Zamora v. Columbia Broadcasting System}\textsuperscript{131} involved the murder of a neighbor by a child who watched so much violent television he allegedly became desensitized to violence.\textsuperscript{132} The plaintiff argued that the brutality of the television shows "incited" the child to imitate the activity.\textsuperscript{133} The complaint failed, however, to identify any particular program of "inflammatory nature" which prompted the child to commit the murder.\textsuperscript{134} As a result, the First Amendment protected the speech at issue and the plaintiff was barred from recovering against the television show producer.\textsuperscript{135}

Inspired by violent films such as "The Warriors," produced by Paramount Pictures Corporation, impressionable adolescents sometimes duplicate violent scenes that they have just witnessed.\textsuperscript{136} Despite reports that other teens were killed near movie theaters showing "The Warriors," the court in \textit{Yakubowicz v. Paramount Pic-}

\begin{itemize}
  \item \textsuperscript{128} See id. at 1019. Throughout the article, emphasis was placed on disclaimers and strong statements that the activity was not recommended and that it was "dangerous, self-destructive and deadly." \textit{Id.} at 1018-19.
  \item \textsuperscript{129} See id. at 1023.
  \item \textsuperscript{130} See id. at 1022-23, 1025. The \textit{Hercog} court defined incitement to mean "encouragement of conduct that might harm the public such as the violation of law or the use of force." \textit{Id.} at 1022.
  \item \textsuperscript{131} 480 F. Supp. 199 (S.D. Fla. 1979).
  \item \textsuperscript{132} See id. at 200. Ronny was only fifteen years old when the suit was filed. See id.
  \item \textsuperscript{133} See id.
  \item \textsuperscript{134} See id. at 204.
  \item \textsuperscript{135} See id. at 206. The court refused to allow the plaintiff to recover damages for "unspecified violence" and a child's unlawful act. See id.
\end{itemize}
tures Corporation found that the movie did not "exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers." Relying on Brandenburg, the court concluded that the language and context of the speech in the movie did not constitute incitement or a call to violent action, and therefore, should be protected by the First Amendment.

Plaintiffs were unsuccessful in suits against producers of music that encourages suicide and violence against police officials, because plaintiffs were unable to prove that the music was intended to lead to the commission of the violent acts. In a 1997 case, a Texas district court held that violent lyrics in rap music advocating cop killing did not incite imminent, lawless action despite the fact that a police officer was murdered soon after the murderer listened to the music. First Amendment protection extends to rap music,

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138. Id. at 1071. In examining whether the movie was a call to violence, the court noted that a "tendency to lead to violence" is not sufficient grounds for removing First Amendment protection. See id. (citing Hess v. Indiana, 414 U.S. 105, 109 (1973)).

139. See id. at 1071-72 (affirming lower court's grant of summary judgment for defendants).


141. See Davidson, at *19-21, 1997 WL 405907. In April of 1992, the murderer, Howard, was stopped by Officer Davidson for a traffic violation. See id. at *1. Howard fatally shot the officer. See id. The murderer was listening to a tape entitled 2Pacalypse Now at the time of the shooting, a recording by Tupac Amaru Shakur. See id. To avoid the death penalty, the murderer argued that the lyrics in the song compelled him to shoot the officer. See id. The lyrics to the song "Crooked Ass Nigga" are as follows:

Now I could be a crooked nigga too
When I'm rollin with my crew
Watch what crooked niggas do
I got a nine millimeter Glock pistol
I'm ready to get with you at the trip of the whistle
So make your move and act like you wanna flip
I fired 13 shots and popped another clip
My brain locks, my Glock's like a f-kin mop,
The more I shot, the more mothaf-ka's dropped
And even cops got shot when they rolled up.

Id. at *1 n.4. The court determined that the murder of the officer was an attempt to elude arrest, not a random act of violence incited by Shakur's music. See id. at *13. The suit against the rap artist, Tupac Amaru Shakur, was dismissed for lack of personal jurisdiction. See id. at *9.
regardless of how dangerous the message may be, because it is a form of speech.\textsuperscript{142}

In \textit{Davidson v. Time Warner, Inc.},\textsuperscript{143} the First Amendment protected the "offensive" rap music of artist Tupac Shakur because, although Shakur may have intended to produce imminent, lawless conduct, the prosecution failed to prove that the perpetrator's violent conduct was an imminent and likely result of listening to the songs.\textsuperscript{144} The Supreme Court stated that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment."\textsuperscript{145} Provided that the speech does not command the listener to take violent action, it is protected.\textsuperscript{146}

While violent films and rap music may be reprehensible, they are punishable under the \textit{Brandenburg} exception only if they constitute an incitement to imminent, lawless action.\textsuperscript{147} As the court in \textit{Herceg} stated, "[F]irst amendment protection is not eliminated sim-

\begin{itemize}
  \item \textsuperscript{142} \textit{See id.} at *15 (citations omitted). \textit{See also} Betts v. McCaughtry, 829 F. Supp. 1400, 1406 (W.D. Wis. 1993) (extending First Amendment protection to rap music).
  \item \textsuperscript{144} \textit{See Davidson}, 1997 WL 405907, at *20-21. After three years and 400,000 sales of the album, the Davidsons were the first to argue that there is a causal link between listening to the music and committing violent crime. \textit{See id.} The court rejected any causal relationship. \textit{See id.}
  \item \textsuperscript{145} \textit{Id.} at *20 (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)). The court in \textit{Davidson} drew a distinction between speech uttered in person, such as at a concert, and recorded lyrics, suggesting that the former has the greater capacity for incitement. \textit{See id.} at *21. The court stated that "no rational person ... would ... mistake musical lyrics and poetry for literal commands or directives to immediate action." \textit{Id.} (quoting McCollum v. Columbia Broad. Sys. Inc., 202 Cal. App. 3d 989, 1002 (1988)). This suggests a sort of continuum of capacity for incitement ranging from spoken words to written words. \textit{See id.} at *21. Spoken words are most likely to incite because they carry the speaker's intonation, emphasis and emotion, which can be powerful inspirations to take action. \textit{See id.} Taped music is one step removed because, while still spoken, the audience understands that the message is not directed to them personally. \textit{See id.} The written word is further removed from its audience, and therefore is arguably the least capable of incitement. It contains no auditory element to stir the emotions, thereby making immediate violent action less likely. \textit{See id.}
  \item \textsuperscript{146} \textit{See} Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969).
  \item \textsuperscript{147} \textit{See id.} The court in \textit{Davidson} addressed the First Amendment role in protecting the free exchange of ideas:
    First Amendment protection is not weakened because the music takes an unpopular or even dangerous viewpoint. The constitutional protection accorded to the freedom of speech and of the press can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas. \textit{Davidson}, 1997 WL 405907, at *15 (quoting Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1019 (5th Cir. 1987)).
\end{itemize}
ply because publication of an idea creates a potential hazard."¹⁴⁸ Unlike cases in which the speech and the criminal act are intimately intertwined, cases involving mere expression of ideas lack a specific command to action. Therefore, they enjoy a greater range of First Amendment protection.¹⁴⁹

E. Commercial Speech Used to Solicit Criminal Conduct

The Rice plaintiffs drew an analogy to another group of cases, collectively known as the "Soldier of Fortune" cases, in which advertisements soliciting criminal activity, such as murder for hire, were published in Soldier of Fortune magazine.¹⁵⁰ In these cases, advertisements were placed in the magazine to solicit employment.¹⁵¹ Despite the allegedly legitimate purpose of the advertisements, the individuals were hired to commit murder.¹⁵² The court in these cases imposed liability on the publisher of Soldier of Fortune magazine on the ground that they reasonably could have foreseen that criminal conduct was the imminent and likely result of the publication.¹⁵³

In addition, since the advertisement was a solicitation for services, the court determined that it was commercial speech. Therefore, it was not entitled to the same level of First Amendment protection.¹⁵⁴ Precedent dictates that the First Amendment does

¹⁴⁸. Herceg, 814 F.2d at 1020.
¹⁴⁹. See Brandenburg, 395 U.S. at 447-49.
¹⁵⁰. See Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 848 (D.Md. 1996). The language of the advertisement was as follows: "GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete [sic] and very private. Bodyguard, courier, and other special skills. All jobs considered." Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1112 (11th Cir. 1992). The advertisement also included Mr. Savage's telephone number and other information. See id. Soldier of Fortune magazine had been contacted by law enforcement officials who were investigating two crimes linked to the personal advertisements run in the magazine. See id. at 1113.
¹⁵¹. See id. at 1112-13.
¹⁵². See id.
¹⁵⁴. See Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). Under Ohralik, commercial speech automatically receives a lesser degree of First Amendment protection. See id. Ohralik addressed the issue of whether personal solicitations by attorneys for professional employment were protected by the First Amendment. See id. at 455. The court stated that "in-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component." Id. at 457. Due to the commercial nature
not protect commercial speech that is directly related to illegal conduct.\textsuperscript{155}

More specifically, \textit{Braun v. Soldier of Fortune Magazine, Inc.},\textsuperscript{156} involved the publication of advertisements in \textit{Soldier of Fortune} magazine that promoted Michael Savage's expertise with handling guns.\textsuperscript{157} Savage stated that his intention was to solicit only legitimate jobs; however, in 1985, he agreed to meet with and discuss plans to murder Mr. Braun.\textsuperscript{158} Savage, Moore and Doutre went to Mr. Braun's house where they found him in his car with his son.\textsuperscript{159} Doutre fired shots into the car, wounding both passengers.\textsuperscript{160} Mr. Braun crawled out of the car and Doutre came over to where he was on the ground and fired two shots directly into the back of his head, killing him.\textsuperscript{161}

The Eleventh Circuit found that the advertisement's language, specifically its reference to all jobs requiring the use of a gun, provided sufficient notice of a substantial danger of harm to the public.\textsuperscript{162} Despite the reluctance to impose liability for fear that it may of the speech, it receives a lower level of First Amendment protection. \textit{See id.} \textit{Hit Man} was not considered commercial speech because it did not propose a commercial transaction or provide information to entice readers to buy goods or services. \textit{See Rice,} 940 F. Supp. at 848.

\textsuperscript{155} \textit{See Braun,} 968 F.2d at 1117 (citing Central Hudson Gas & Elec. Corp. \textit{v. Public Service Comm'n of New York,} 447 U.S. 557, 564 (1980)). Most cases involve a minor risk of chilling commercial speech because the need to disseminate the information is so closely associated with the entity's financial stability that the speech is not likely to be suppressed. \textit{See id.}

In \textit{Norwood,} an advertisement was placed in \textit{Soldier of Fortune} magazine describing the individual as: "GUN FOR HIRE. NAM sniper instructor. SWAT. Pistol, rifle, security specialist, bodyguard, courier plus. All jobs considered. Privacy guaranteed." \textit{Norwood v. Soldier of Fortune Magazine, Inc.,} 651 F. Supp. 1397, 1400 (W.D. Ark. 1987). The facts parallel those in \textit{Braun.} The individual was contracted to assassinate the plaintiff, Norwood, and several attempts were made. \textit{See id.} at 1398. At least one of these attempts resulted in personal injuries. \textit{See id.}

The court disagreed with the parties' characterization of the issue as a matter of regulating the defendant's speech. \textit{See id.} at 1400. The court stated that the plaintiff was not requesting the court to enjoin the defendant from publishing the advertisements, he was merely asking to be compensated for the resulting damages. \textit{See id.} Therefore, the cases cited by both parties on whether regulation was consistent with the First Amendment were not applicable. \textit{See id.}

\textsuperscript{156} 968 F.2d 1110 (11th Cir. 1992).
\textsuperscript{157} \textit{See id.} at 1112.
\textsuperscript{158} \textit{See id.} at 1121.
\textsuperscript{159} \textit{See id.}
\textsuperscript{160} \textit{See id.}
\textsuperscript{161} \textit{See Braun,} 986 F.2d at 1121.
\textsuperscript{162} \textit{See id.} The Eleventh Circuit agreed with the district court's finding that despite the use of terms that do not explicitly refer to criminal services, the publisher should have recognized that the advertisement offered criminal services. \textit{See id.}
chill future speech, the Eleventh Circuit held *Soldier of Fortune* magazine liable for “negligently publishing a commercial advertisement where the ad on its face, and without the need for investigation, makes it apparent that there is a substantial danger of harm to the public.” The court determined that the nature of the speech in the advertisement imposed “a legal duty to refrain from publishing it.”

The plaintiffs in *Rice* argued that Paladin, the publisher of *Hit Man*, reasonably could have foreseen that a reader would follow the instructions on how to commit murder. In addition they argued that, analogous to the “Soldier of Fortune” cases, the speech resulted in the commission of murder. However, the district court in *Rice* distinguished the “Soldier of Fortune” cases. It stated that unlike the advertisements, *Hit Man* was not a direct solicitation of services. Therefore, the book was not an analogous form of commercial speech for which First Amendment protection should be limited.

**F. Summary of Applicable Law**

The case law provides two possible theories for denying First Amendment protection of *Hit Man*. The first is the Supreme Court-created *Brandenburg* exception under which protection is denied for speech that is likely to “incite imminent, lawless action.” Courts have applied this standard in both civil and criminal suits. Not every case involving speech that results in criminal action, however, leads to liability. In *Herceg*, the First Amendment protected a magazine detailing how to perform deeply disturbing and danger-

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163. *Id.* at 1119. The speech must be of a nature that alerts the publisher to the inherent danger. *See id.* at 1119-20. The failure to impose a duty to investigate is significant because it reinforces the degree to which the danger must be obvious to a reasonable publisher and, thereby prevents the chilling of protected commercial speech. *See id.*

164. *Id.* at 1121. The court focused on the term “Gun for Hire,” the description of Savage as a “professional mercenary,” the confidentiality and privacy mentioned in the ad, and the fact that Savage would consider “all jobs.” *See id.* There was an intentional solicitation of a job that required the use of a gun. *See id.*


168. For a discussion of the civil suits involving violent movies, television shows and rap music, *see supra* notes 124-49 and accompanying text. For a discussion of criminal suits in which a defendant was held liable for aiding and abetting, *see supra* notes 101-123 and accompanying text.
ous sexual acts. In *Davidson*, protection extended to rap music glamorizing killing police officers. In each of these cases, the First Amendment protected the speech in each case because it did not incite imminent, lawless action.

The second approach, followed by the Fourth, Sixth, Eighth and Ninth Circuits, is to hold the speaker liable for speech that is so intimately associated with a crime that it constitutes aiding and abetting the commission of a crime. To prove aiding and abetting, a plaintiff must show that the defendant encouraged the perpetrator with the intent to bring about the ultimate crime. Examples of this type of unprotected speech include instructions on how to make illegal drugs, computer programs designed to facilitate illegal betting and speech encouraging filing false tax returns.

The court in *Rice* had to determine whether the First Amendment protected *Hit Man*, or whether it fell within one of the recognized exceptions to First Amendment protection. The court also had to determine whether to follow the aiding and abetting exception to First Amendment protection adopted by several circuit courts. A final consideration was whether the language in *Hit Man*, accompanied by the stipulated intent, was sufficient to support liability.
bility for aiding and abetting. The Supreme Court has yet to address these issues.

If these issues come before the Supreme Court, the Court could reaffirm Brandenburg, holding that the correct approach is to categorically apply the recognized exceptions and grant First Amendment protection to all speech that does not fall within one of the exceptions. Alternatively, the Court could create another exception by affirming the approach of circuits that deny protection for speech that constitutes aiding and abetting. In creating a new exception, the Court might limit it to instruction manuals and not address the dissemination of information via the Internet. Until the Court grants certiorari to clarify these issues, however, lower courts may impose liability under either theory.

IV. NARRATIVE ANALYSIS

The issue before the court in Rice was whether the First Amendment protected Paladin from civil liability for aiding and abetting the commission of a crime by publishing Hit Man, a book that provided the necessary information for committing murder. The Fourth Circuit held that the First Amendment did not bar suit against the publisher of an instructional manual on how to commit murder. This decision reversed the Maryland District Court's summary judgment that the instructional manual was protected by the First Amendment.

The Fourth Circuit cited several key factors in denying Paladin First Amendment protection. First, Paladin's marketing scheme intentionally targeted a criminal audience. It knew that criminals would use the book to commit the crime described therein. Second, the Fourth Circuit held that the First Amendment does not protect speech with the sole purpose of providing instructions on how to commit murder. Third, the court noted that most courts

177. See Rice, 940 F. Supp. at 849.
178. See Rice I, 128 F.3d at 254.
179. See id. at 253-54.
180. See id. at 249. The court determined that a reasonable jury could find that there was no other redeeming value to the instructional manual. See id. The
do not extend First Amendment protection to criminal instruction manuals. Finally, the court ruled that the speech in *Hit Man* was "an integral part of the crime" and, therefore, that the speech in no way exemplified the type of abstract advocacy that deserved First Amendment protection.

Because of the content and context of *Hit Man*, the district court and the Fourth Circuit agreed that only the *Brandenburg* exception applied. Under *Brandenburg*, the district court concluded that the book "merely teaches what must be done to implement a professional hit," and that it did not "cross the line between permissible advocacy and impermissible incitement to crime or violence." The Fourth Circuit, however, denied First Amendment protection on the ground that *Hit Man* blatantly promoted murder in "concrete, non-abstract terms" and that the "only instructional communicative 'value' is the indisputably illegitimate one of training persons how to murder and to engage in the business of murder for hire." In each court's opinion, the characterization of the language in *Hit Man* determined whether Paladin could be subject to liability.

court examined the policy and reasoning underlying the First Amendment guarantee to protect free speech. *See id.* It reviewed the necessity of having a qualified intent requirement imposed on speech so as not to hinder future publication of "entirely innocent, lawfully useful speech." *Id.* at 247. While this is an important consideration, the First Amendment cannot shield from accountability those who intentionally encourage or incite criminal acts by publishing information. *See id.* at 248. The court concluded that the First Amendment is not a complete defense against civil liability for speech acts "undertaken with specific, if not criminal, intent." *Id.*

181. *See id.* at 245. The Fourth Circuit also held that *Rice* and *Barnett* are "indistinguishable in principle" and that both warrant the imposition of liability. *See id.* at 244.

182. *See id.* at 249. The court's interpretation of the nature of the language was that it undoubtedly encouraged James Perry to commit murder. *See id.* at 252. The court emphasized the book's persuasive, powerful prose that counsels and encourages the reader to follow the steps toward committing the crime. *See id.* When a reader may potentially lose his resolve, the book inspires him or her to go on. *See id.* For a description of this language, *see supra* note 29.

The Maryland District Court held, in an initial opinion, that there was no cause of action for civil aiding and abetting a murder in Maryland. *See Rice*, 940 F. Supp. at 842. The district court subsequently stated, in an amended opinion, that Maryland did recognize aiding and abetting tort liability, but that it had never been applied in this context. *See id.* at 842 n.2.

183. *See id.* at 844. Of the five categories of speech afforded limited or no First Amendment protection, the *Brandenburg* standard of "incitement to imminent, lawless activity," was the only one under which the action could have been maintained. *See id.* For a discussion of the other categories, *see supra* note 45.

184. *Id.* at 847.

A. District Court Opinion

The plaintiffs presented several theories for holding Paladin liable for the murders committed by James Perry. First, the plaintiffs argued that the First Amendment did not protect speech that aids and abets a crime.\(^\text{186}\) Second, the plaintiffs argued that the Brandenburg exception did not apply, and that, even if it did apply it would not bar liability in this case.\(^\text{187}\)

The district court decision began with an examination of the exceptions to First Amendment protection as created by the Supreme Court.\(^\text{188}\) The district court concluded that the Brandenburg exception for "incitement to imminent, lawless action" was the only category that applied.\(^\text{189}\) Although the holding in Brandenburg protected political speech, the district court noted that courts have applied the standard in cases not involving political speech, such as the "copy cat" cases.\(^\text{190}\)

In the "copy cat" cases, the courts did not impose liability because the defendants did not intend the resulting injury or deaths.\(^\text{191}\) In light of these rulings, the district court held that Hit Man failed to meet the intent element of the Brandenburg exception.\(^\text{192}\) Thus, for Paladin to be liable, the publisher must have intended James Perry to murder Trevor Horn, Mildred Horn and Janice Saunders immediately upon receipt of the book.\(^\text{193}\) Since the murder occurred over a year after Perry received the book, the court found no such intention.\(^\text{194}\)

In addition, the district court found that the book did not command immediate action and only provided an abstract discussion of

\(^{186}\) See Rice, 940 F. Supp. at 841.

\(^{187}\) See id. Another argument for imposing liability was that the "knowing and reckless disregard for human life" established in New York Times v. Sullivan, 376 U.S. 254 (1964), should apply. See id. Plaintiffs also argued that Hit Man solicited criminal conduct, analogous to the "Soldier of Fortune" cases in which the publishers were held liable. See id.

\(^{188}\) See id. at 841. For a discussion of the different categories of speech which are either unprotected or receive limited protection under the First Amendment, see supra note 45.

\(^{189}\) See Rice, 940 F. Supp. at 841.

\(^{190}\) See id. For a discussion of the "copy cat" cases, see supra notes 124-49.

\(^{191}\) See id.

\(^{192}\) See id. at 847. The elements of the Brandenburg exception are intent, imminence and likelihood of incitement. For a further discussion of this exception see supra notes 45-78 and accompanying text.

\(^{193}\) See id.

\(^{194}\) See Rice, 940 F.Supp. at 847. The court also took into consideration the fact that of the 13,000 copies of the book sold nationally over the past ten years, only one resulted in the commission of a crime. See id. at 848.
the steps required to carry out a professional hit.\textsuperscript{195} Thus, plaintiffs also failed to establish the incitement to lawless action requirement of \textit{Brandenburg}. The district court held, therefore, that the \textit{Brandenburg} exception did not apply and that the First Amendment shielded Paladin from liability.\textsuperscript{196}

As an alternative to the recognized exceptions, plaintiffs argued that the First Amendment did not protect speech that was tantamount to aiding and abetting a crime.\textsuperscript{197} Initially, the district court dismissed this argument because Maryland law did not provide a cause of action for civil aiding and abetting.\textsuperscript{198} In an amended opinion, however, the district court held that the cause of action did exist although it had never been applied to support liability in this context.\textsuperscript{199} After acknowledging that a cause of action existed, the district court found that the "Soldier of Fortune" and the tax evasion cases relied upon by plaintiffs to argue that Paladin aided and abetted murder by publishing \textit{Hit Man} were distinguishable.\textsuperscript{200}

In finding that the First Amendment protected \textit{Hit Man}, the district court first distinguished \textit{Barnett}, a case in which the defendant was convicted of aiding and abetting for publishing instructions on how to make illegal drugs.\textsuperscript{201} The sole distinction was that \textit{Barnett} involved criminal liability whereas \textit{Rice} involved civil liability.\textsuperscript{202} The court also rejected the plaintiffs' argument, based on \textit{Weirum}, that the "knowing and reckless disregard for human life" standard

\begin{itemize}
  \item \textsuperscript{195} See \textit{id.} at 847.
  \item \textsuperscript{196} See \textit{Rice}, 940 F. Supp. at 848-49. Despite the despicable nature of \textit{Hit Man}, the district court found that the book did not fall within the parameters of the recognized exceptions to First Amendment protection. See \textit{id.} at 849. The court "decline[d] Plaintiffs' invitation to create a new category of speech unprotected by the First Amendment -- speech that arguably aids and abets murder." \textit{id.}
  \item \textsuperscript{197} See \textit{id.} at 841-43.
  \item \textsuperscript{198} See \textit{id.}
  \item \textsuperscript{199} See \textit{id.} at 842 n.2. The Fourth Circuit held that Maryland did recognize a civil cause of action for aiding and abetting. See \textit{Rice I}, 128 F.3d at 250.
  \item \textsuperscript{200} See \textit{Rice}, 940 F. Supp. at 842-45, 848.
  \item \textsuperscript{201} See \textit{id.} at 842-43. See, e.g., United States v. Barnett, 667 F.2d 835, 835 (9th Cir. 1982) (holding that publisher of "how-to" manufacture PCP manual was criminally liable). Specifically, plaintiffs outlined the following parallels:
    \begin{enumerate}
      \item defendants in both cases published and advertised step-by-step instructions on how to commit crimes;
      \item defendants in both cases mailed an instruction manual to an unknown person who responded to the advertisement; and
      \item the perpetrators in both cases followed the step-by-step instructions to commit the crimes.
    \end{enumerate}

\textit{id.} at 843.
  \item \textsuperscript{202} See \textit{id.}
\end{itemize}
should apply to the case.203 The plaintiffs argued that the facts paralleled those in \textit{Weirum}, where the California Supreme Court held defendants liable for the physical injury caused by their repeated words of incitement.204 The court found no such incitement in \textit{Hit Man}.205

Finally, the district court distinguished \textit{Hit Man} from the Soldier of Fortune cases, in which courts imposed liability for aiding and abetting a crime on a publisher of advertisements for “hired guns.”206 The advertisements were commercial speech, and therefore, were subject to less First Amendment protection.207 Because \textit{Hit Man} did not solicit criminal activity like the advertisements in the Soldier of Fortune cases did, the court concluded that it was not commercial speech.208

In summary, the district court applied a categorical approach to determine whether \textit{Hit Man} was protected by the First Amendment.209 First, it examined the possible exceptions established in Supreme Court precedent. The district court held that \textit{Brandenburg}’s “incitement to imminent, lawless action” was the only applicable exception.210 Because it concluded that the language in \textit{Hit Man} was mere advocacy and that the murders were not a likely, imminent result of the language in the book, the district court held that the book did not deserve lesser First Amendment protection under \textit{Brandenburg}.211 Finally, the district court concluded that \textit{Hit Man} was not commercial speech because it did not solicit criminal

\begin{notes}
203. See Rice, 940 F. Supp. at 843-44. The district court also held that the \textit{New York Times v. Sullivan} holding did not apply to \textit{Rice} because that case involved speech that injured an individual’s reputation rather than speech resulting in physical injury. See id.

204. See Weirum v. RKO General, Inc., 539 P.2d 36, 36 (Cal. 1975). In that case the defendant, a radio station promoting a contest, was held liable for inducing inherently dangerous activity on the part of contestants by encouraging them to race to a particular location in order to win the prize money. See id. See supra, note 77 for a more complete discussion of the facts in \textit{Weirum}.

205. See Rice, 940 F. Supp. at 844.

206. See id. at 848. See supra notes 150-66 and accompanying text for a more complete discussion of the “Soldier of Fortune” cases.

207. See Rice, 940 F. Supp. at 841-49.

208. See id. at 848.

209. See infra notes 210-13 and accompanying text.

210. See Rice, 940 F. Supp. at 848.

211. See id. After concluding that there were no other recognized exceptions that applied to the facts, the district court dismissed the plaintiffs’ other arguments. See id. at 841-49. The court rejected the negligence standard for imposing liability. It also rejected the aiding and abetting theory of liability and distinguished the commercial solicitation cases. See id. at 848. Finding no other ground for imposing liability, the district court granted the defendants’ motion for summary judgment.
\end{notes}
activity.\footnote{212} Thus, the district court afforded \textit{Hit Man} full First Amendment protection.\footnote{213}

B. Fourth Circuit Opinion

Like the district court, the Fourth Circuit began its analysis by considering the recognized exceptions to First Amendment protection. It concluded that only the \textit{Brandenburg} exception applied.\footnote{214} The Fourth Circuit recognized the dichotomy between advocacy, which was protected by the First Amendment, and incitement, which was not protected.\footnote{215} The Fourth Circuit held, however, that the First Amendment did not protect all forms of advocacy.\footnote{216} Rather, speech advocating lawlessness was protected only so long as, "in effect, [it was not] tantamount to legitimately proscribable non-expressive conduct."\footnote{217}

The Fourth Circuit held that a particular course of conduct was not shielded from prosecution simply because the conduct was carried out through the use of language.\footnote{218} The Fourth Circuit did not follow the same categorical approach as the district court, which deemed speech protected unless it could be pigeon-holed into a recognized exception.\footnote{219} Instead, in determining whether \textit{Hit Man} was a prosecutable form of speech, the Fourth Circuit examined the exceptions recognized in Supreme Court precedent as well as the overall purpose of the First Amendment.

\footnotesize
\begin{itemize}
\item \footnote{212} See id.
\item \footnote{213} See id.
\item \footnote{214} See Rice v. Paladin Enters., Inc., 128 F.3d 233, 243 (4th Cir. 1997).
\item \footnote{215} See id.
\item \footnote{216} See id. at 243-44. The Fourth Circuit in \textit{Rice} stated: Although agreements to engage in illegal conduct undoubtedly possesses some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech. \textit{Id.} at 243.
\item \footnote{217} \textit{Id.}
\item \footnote{218} See id.
\item [\textit{It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. \textit{Id.} (citing Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991)).}]
\item \footnote{219} See Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 849 (D.Md. 1996). The district court held that the \textit{Brandenburg} exception did not deny \textit{Hit Man} First Amendment protection and it was reluctant to heed Plaintiffs' suggestion to create another category of unprotected speech - that of imposing liability for speech aiding and abetting crime. \textit{See id.}}

\end{itemize}
The Fourth Circuit held that the sole purpose for *Hit Man* was to instruct readers how to commit murder. The book lacked any element of abstract advocacy which might warrant protection. The court deemed *Hit Man* indistinguishable from the crime of aiding and abetting murder, which is not protected by the First Amendment regardless of whether the crime was committed with acts or words. The relationship between the manual and the murders, coupled with Paladin's stipulation that it targeted a criminal audience, led the court to deny a First Amendment defense. Thus, the Fourth Circuit reversed the summary judgment granted by the district court for defendant and remanded the case for trial.

The Fourth Circuit first considered the holding in *Brandenburg*, which protects political speech protesting governmental constraints. The court noted that, although *Brandenburg* originally applied to protect political speech, the exception had since been applied in contexts in which political speech was not at issue.

The Fourth Circuit determined that since the holding in *Brandenburg* protected advocacy and *Hit Man* was deemed not to be advocacy, the book was not protected. The court concluded that the speech resembled neither the theoretical advocacy nor the teaching of abstract principles that were protected in *Brandenburg*. Therefore, the instruction manual was not protected by the First Amendment.

221. *See id.* at 242. The Fourth Circuit reviewed Paladin's stipulated facts and stated:

> [That Paladin] not only knew that its instructions might be used by murderers, but that it actually intended to provide assistance to murderers and would-be murderers which would be used by them "upon receipt," and that it in fact assisted Perry in particular . . .
> *Id.*

This is a much different characterization of Paladin's intended purpose than that proposed by the district court. The district court opinion portrayed Paladin as wanting to increase commercial sales of the book by selling to those who were interested in learning or writing about criminal conduct, such as law enforcement officers, authors and criminologists. *See Rice*, 940 F. Supp. at 840.

223. *See Rice I*, 128 F.3d at 265.
224. *See id.* at 243.

225. For a discussion of cases in which the *Brandenburg* exception was applied to non-political speech, *see supra* notes 82-154.
227. *See id.* at 249. The Fourth Circuit deemed *Hit Man* to be an "archetypal example of speech . . . which finds no preserve in the First Amendment," and placed it at "the other end of the continuum from the ideation at the core of the advocacy protected by the First Amendment." *Id.* at 256. The methodical and extremely detailed descriptions of how to prepare and commit murder did not deserve protection because it was so far removed from the type of impassioned
Turning to the imminence requirement, the court held that a determination of whether criminal conduct was "imminent" was relevant only where, as in Brandenburg, the government attempted to restrict advocacy. In Rice, the speech at issue was not considered advocacy and the government was not trying to restrict the publication of Hit Man. Therefore, the imminence requirement was not as strict.

Even if Hit Man were considered advocacy, the court noted that certain forms of advocacy are not protected regardless of the fact that they take the form of words. Specifically, speech which political critique which formed the essence of the speech protected by Brandenburg. See id. at 262. The court held that the instruction manual was "devoid of any political, social, entertainment, or other legitimate discourse," thereby, stripping it of any arguable purpose other than facilitating the commission of murder. See id. at 255.

The Fourth Circuit criticized the lower court for misunderstanding the extent to which Brandenburg protected "teaching." See id. at 250. According to the Fourth Circuit, the district court erred when it read Brandenburg as protecting "not just abstract advocacy of lawlessness ... but also the teaching of the technical methods of criminal activity." Id. The Fourth Circuit stated that the First Amendment protects speech that has the sole purpose of promoting criminal activity. See id. at 267. Cf. Noto, see supra notes 62-66 discussing First Amendment protection of Socialist manifestos describing means for overthrowing the United States government.

Brandenburg's 'imminence' requirement in particular, generally poses little obstacle to the punishment of speech that constitutes criminal aiding and abetting, because '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.

Id. (quoting 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" 37 (April 1997)) [hereinafter "DOJ Report"].

One could argue that by subjecting Paladin to potential liability for publishing Hit Man, this would have a chilling effect on the publication of other "how to" books ranging from how to commit murder to how to build bombs. See New York Times v. Sullivan, 376 U.S. 254, 278 (1964) ("Whether or not a newspaper can survive a succession of [ ] judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive"). Removal of First Amendment protection for publishing Hit Man may make publishers less likely to print this type of material for fear of third-party liability when readers commit crimes.

Finding that the language in Hit Man was not advocacy or political speech, the Fourth Circuit's analysis shifted from a consideration of whether the speech incited imminent, lawless action to whether it was so closely associated with the crime that it was the equivalent of conduct aiding and abetting murder. See id. The court concluded that, since the book contained no redeeming idea and only instructed someone how to commit murder, it could not be separated from the crime itself, and the First Amendment did not protect it. See id. at 255-56.
advocates violating a criminal statute and which has no expressive element and to which no legitimate social value can be attributed, will not be protected.\textsuperscript{231} Under this rubric, the Fourth Circuit held that \textit{Hit Man} was not protected by the First Amendment.\textsuperscript{232}

The Fourth Circuit considered other circuit court decisions in which the \textit{Brandenburg} exception was applied to impose criminal liability on a speaker for aiding and abetting.\textsuperscript{233} Since the Supreme Court has not yet imposed liability for aiding and abetting a crime through speech, the Fourth Circuit looked to its own precedent and cases in other documents. Specifically, the court followed binding Fourth Circuit precedent established in \textit{Feschner} and \textit{Kelley}, two tax evasion cases.\textsuperscript{234} In addition, the court examined decisions

\textsuperscript{231}. See id. The Fourth Circuit cited \textit{Giboney v. Empire Storage & Ice Co.}, 336 U.S. 490 (1949), in support of the proposition that First Amendment protection does not extend to speech "used as an integral part of conduct in violation of a valid criminal statute." See id. In that case the Supreme Court denied a First Amendment challenge to an injunction forbidding unionized distributors from picketing to force an illegal business arrangement. \textit{Id.} See also National Org. for Women \textit{v. Operation Rescue}, 37 F.3d 646, 656 (D.C. Cir. 1994) ("[T]hat 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality."); \textit{United States v. Varani}, 435 F.2d 758, 762 (6th Cir. 1970) ("[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself").

The Fourth Circuit stated that speech, such as detailed instruction on technical methods of murder, is a potential "call to violence." \textit{Rice I}, 128 F.3d at 256. For excerpts of this type of language, see \textit{supra} note 29 and accompanying text. For a comparison with the speech that was protected in \textit{Brandenburg}, see \textit{supra} note 49 and accompanying text. This language also served as the basis for the court's determination that a reasonable jury could conclude that Paladin assisted in the murder. \textit{See Rice I}, 128 F.3d at 252-53. Since the court considered this language a "call to violence," it would not receive First Amendment protection.

\textsuperscript{232}. See id. The Fourth Circuit was satisfied that a jury would find that the instructions provided in \textit{Hit Man} have almost no non-instructional, communicative value other than to train individuals to commit murder for hire. \textit{See id.} at 249.

\textsuperscript{233}. See \textit{United States v. Freeman}, 761 F.2d 549, 552 (9th Cir. 1985) (holding that defendant's participation in preparation of fraudulent tax return sufficient to affirm conviction of aiding and abetting); \textit{United States v. Kelley}, 769 F.2d 215, 217 (4th Cir. 1985) (holding that First Amendment does not protect actions that go beyond advocacy); \textit{United States v. Buttorff}, 572 F.2d 619, 624 (8th Cir. 1978) (upholding defendants' conviction for aiding and abetting filing false tax returns); \textit{United States v. Moss}, 604 F.2d 569, 571 (8th Cir. 1979) (ruling speech motivating filing fraudulent tax forms sufficient to constitute aiding and abetting); \textit{United States v. Barnett}, 667 F.2d 835, 835 (9th Cir. 1982) (ruling publication of instructions on how to make illegal drugs was not protected by First Amendment); \textit{United States v. Mendelsohn}, 896 F.2d 1183, 1183 (9th Cir. 1990) (holding that computer program with sole purpose of facilitating illegal betting was not protected by First Amendment); \textit{National Org.}, 37 F.3d at 656 ("That 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality"); \textit{Varani}, 435 F.2d at 762 ("[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself").

\textsuperscript{234}. See \textit{United States v. Fleschner}, 98 F.3d 155, 155 (4th Cir. 1996) (imposing liability for meetings promoting tax evasion practices that exceeded advocacy
from the Second, Sixth, Eighth and Ninth Circuits under principles of comity between federal courts. These circuit courts imposed liability on speakers who provided information for filing fraudulent tax returns, created computer programs to perform crimes and published instructions on how to make illegal drugs.

In its opinion, the Fourth Circuit drew parallels between speech by the defendants in *Fleschner* and *Kelly*, which instructed readers how to file fraudulent tax returns and *Hitman*, which instructed readers how to commit murder for hire. The tax evasion cases provide the circuit court decisions holding defendants liable for aiding and abetting a crime through speech. In the tax evasion cases, liability was imposed for aiding and abetting for several reasons: defendants had concrete discussions about non-compliance with tax laws, the language was intended to urge action on the part of the listeners, and the advice was followed by the filing of fraudulent tax forms. Similarly, *Hit Man* provided concrete techniques for committing murder, Paladin marketed *Hit Man* to a criminal audience with the intent that it be followed, and the advice was followed in the commission of murder. Therefore, Paladin

of opposition to income tax laws); United States v. Kelley, 864 F.2d 569 (4th Cir. 1989) (holding that First Amendment does not protect actions that exceed advocacy).

235. See *Freeman*, 761 F.2d at 552 (holding that defendant’s participation in preparation of fraudulent tax return sufficient to affirm conviction of aiding and abetting); *Buttorff*, 572 F.2d at 624 (holding that defendants’ conviction for aiding and abetting filing false tax returns); *Moss*, 604 F.2d at 571 (holding that speech motivating filing fraudulent tax forms sufficient to constitute aiding and abetting); *Barnett*, 667 F.2d at 835 (ruling publication of instructions on how to make illegal drugs not protected by First Amendment); *Mendelsohn*, 896 F.2d at 1183 (holding that computer program whose sole purpose was illegal betting was not protected by First Amendment); *National Org.*, 37 F.3d at 656 ("That ‘aiding and abetting’ of an illegal act may be carried out through speech is no bar to its illegality"); *Varani*, 435 F.2d at 762 ("[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself").

See 16 AM. JUR. 2D *Conflict of Laws* § 14 (1998). Any extraterritorial effect a state’s law may have is the result of a mutual respect for a similarly situated jurisdiction. See id. In order to properly employ the principles of comity, the jurisdiction applying the law should have "a significant interest . . . in the issue to be adjudicated." Id. The application of comity is not mandatory; it is merely persuasive authority. See id. § 17. The forum court has the discretion to apply the principles of comity, however, this decision is governed by well-established rules. See id.


237. See id. at 246.

238. See id. at 253. The Fourth Circuit emphasized the fact that Paladin directed *Hit Man* to a criminal audience interested in learning how to become a professional killer, instead of to the public at large. See id. at 254-55. To purchase *Hit Man*, a prospective reader had to complete a book catalogue request form printed in specialized magazines such as *Soldier of Fortune*. See id. at 255. After
might be held liable for aiding and abetting a murder under the logic of the Fourth Circuit’s tax evasion cases.239

The Fourth Circuit did not, however, reach the issue of Paladin’s liability for aiding and abetting. The only issue before the court was whether the First Amendment provided sufficient grounds for summary judgment. The court reversed the grant of summary judgment and remanded the case for trial.240

Another significant consideration in the Fourth Circuit’s decision that the First Amendment did not protect Paladin from liability was a 1996 Department of Justice Report (“DOJ Report”).241 The Attorney General conducted a study, to determine the extent to which the public can obtain information on how to make bombs, destructive devices or weapons of mass destruction.242 In addition, the report examined applicable federal law and the extent to which the First Amendment protects information and its distribution.243 The report concluded that the First Amendment prohibits an indiscriminant attempt to restrict the dissemination of truthful or theoretical information on bombmaking.244 The report also concluded, however, that when the information is an incidental element of

receiving the catalogue, the reader had to complete a second order form for the book. See id.

239. The district court also drew parallels between Rice and Barnett. See Rice v. Paladin Enters., Inc., 940 F.Supp. 836, 843 (D.Md. 1996). In both cases, the defendants published instructional material on how to commit crimes, the information was mailed to unknown persons who later committed the crimes, and the perpetrators of the crimes relied on the instructions to execute their crimes. See id. In Barnett, the court denied the defendant First Amendment protection. See id. By analogy to Barnett, the Fourth Circuit stated that Paladin should also be subject to liability. See Rice I, 128 F.3d at 244. For a further discussion of the facts in Barnett, see supra notes 120-23 and accompanying text.

240. See Rice I, 128 F.3d at 265.

241. See id. at 247 n.3.

242. See id. The Antiterrorism and Effective Death Penalty Act of 1996 (the “AEDPA”) required the Attorney General to conduct the study. See id. The statutory mandate was the result of legislation introduced by Senators Feinstein and Biden intended to criminalize “the teaching or demonstration of the manufacture of explosive materials ‘if the person intends or knows that such explosive materials or information will likely be used for, or in furtherance of’ specified criminal offenses.” Id. The Senators introduced the legislation in response to the 1995 bombing of the Murrah Federal Building in Oklahoma City. See id.

243. See id.

244. See id. The DOJ Report concluded with respect to abstract advocacy: The First Amendment would impose substantial constraints on any attempt to proscribe indiscriminately the dissemination of bombmaking information. 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.

Id.
otherwise criminal conduct the First Amendment will not provide protection.245

The Fourth Circuit acknowledged that Attorney General Reno urged the court, with reference to the DOJ Report, to deny First Amendment protection for Hit Man.246 Consistent with the Attorney General’s recommendation, the Fourth Circuit held that the First Amendment did not protect Hit Man since the speech was incidental to the criminal conduct of aiding and abetting murder.247

V. CRITICAL ANALYSIS

The fundamental difference between the decisions of the district court and the Fourth Circuit lies in the application of the Brandenburg exception. The district court followed a conservative approach to denying First Amendment protection. The court reasoned that in order to deny First Amendment protection, the speech must fall within one of the exceptions established by Supreme Court precedent.248 Absent an applicable exception, the First Amendment provided absolute protection from liability.249

Consistent with this analysis, the district court applied the Brandenburg exception and held that the language in Hit Man was not an incitement to imminent lawlessness or a call to violence. The court characterized the book, rather, as providing information on how to commit murder for the purpose of informing authors and law enforcement agents.250

245. See Rice I, 128 F.3d at 247 n.3. Specifically, the report stated the following:
[T]he 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, since it is merely incidental that such “conduct” takes the form of speech.

Id. The DOJ Report advised Congress that “imminence,” one of the elements of the Brandenburg exception, posed only a minor hurdle to the punishment of speech considered aiding and abetting crime. See id. The fact that the murder occurred one year after James Perry received the book was a factor in the district court’s determination that the crime failed to satisfy the imminence requirement of Brandenburg. See Rice, 940 F. Supp. at 848.

246. See Rice I, 128 F.3d at 247 n.3.
247. See id. at 262-63.
248. See Rice, 940 F. Supp. at 848-49.
249. See id. at 849.
250. See id. at 840. The district court characterized Hit Man as an attempt to increase commercial sales of the book by selling to those who were interested in learning or writing about criminal conduct, such as law enforcement officers, authors and criminologists. See id.
While the district court's interpretation is plausible, it is subject to the criticism that the publisher could have accomplished the same purpose without the extensive detail and provocative, taunting language it included in *Hit Man*.\(^{251}\) The district court's benign interpretation of *Hit Man* permitted the court to grant a First Amendment defense and to avoid deciding whether to follow the aiding and abetting theory of liability established by several circuit courts.\(^{252}\)

Although the Fourth Circuit was binding on the District Court of Maryland, it did not apply the aiding and abetting theory of liability adopted by the Fourth Circuit in *Fleschner* and *Kelley*.\(^{253}\) The Fourth Circuit criticized the district court for failing to recognize and hold Paladin liable under this precedent.\(^{254}\) Despite the binding nature of Fourth Circuit precedent, however, the district court proceeded properly by following the categorical approach established by the Supreme Court, and not applying an exception which the Supreme Court has not yet accepted. Until the Supreme Court determines whether aiding and abetting is a permissible exception to First Amendment protection, the district court correctly refrained from creating new law.\(^{255}\) Given the Supreme Court's categorical approach, the district court correctly granted the defendants' motion for summary judgment.

The Fourth Circuit did not, however, follow the same structured application of the exceptions to First Amendment protection. Instead, this court characterized *Hit Man* as an instrument intended to steer a reader to specific criminal conduct.\(^{256}\) Under this characterization, the Fourth Circuit held that the First Amendment did not protect *Hit Man*.\(^{257}\) Although the court affirmed *Brandenburg*’s protection of advocacy, it determined that not every form of advo-

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251. See id. at 849.

252. See id. The court also declined plaintiffs’ suggestion to impose liability under a theory of aiding and abetting. See id.


255. See Rice, 940 F. Supp. at 849.

256. See *Rice I*, 128 F.3d at 255-56. The court stated that “it is evident from even a casual examination of the book that the prose of *Hit Man* is at the other end of the continuum from the ideation at the core of the advocacy protected by the First Amendment." *Id.* at 256.

257. See id. at 267.
The court stated that the First Amendment did not protect advocacy that was tantamount to aiding and abetting, regardless of the fact that speech was an element of the crime. Applying the aiding and abetting theory, the Fourth Circuit concluded that the government interest in regulating this type of speech for law enforcement purposes outweighed First Amendment considerations.

However significant the government interest, imposing liability under the aiding and abetting theory raises constitutional issues. Failure to clearly define the parameters and criteria for this new category may place too great a burden on free speech and may ultimately undermine First Amendment freedoms. The Fourth Circuit has not created a clear, sufficiently tailored test for determining when speech constitutes aiding and abetting. The Fourth Circuit did not establish any criteria to guide future applica-

258. See id. at 243. The Fourth Circuit did not deeply examine the Brandenburg exception because it concluded that Hit Man could, by no means, be characterized as advocacy. See id. at 243-44, 255-56. The Fourth Circuit did not consider whether Hit Man qualified as an "incitement to imminent, lawless action," and instead, began its analysis with whether the book aided and abetted murder. See id. at 243.

259. See id. at 243-44. To prohibit governmental regulation of illegal conduct that contains an element of speech would completely inhibit law enforcement. See id. (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)). See also National Org. for Women v. Operation Rescue, 37 F.3d 646, 656 (D.C. Cir. 1994) ("That 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality"); United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970) ("[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself").

Hit Man was not protected as advocacy under Brandenburg because it departed significantly from an abstract discussion of murder. See Rice I, 128 F.3d at 243-44. It could not even be classified as a reflection on nihilistic thought. See id. Publishing the book could not be treated, however, as involving the same degree of preparation and participation that was punished in the tax evasion cases. See id. Publishing Hit Man was different from attending meetings where the defendant lectured, provided tax forms and helped prepare the returns. See id. Although the book provided necessary information for committing murder, it did not urge compliance with suggestions. See id. In addition, it is doubtful that the written word can be as encouraging or compelling as the spoken word when trying to incite lawlessness. See id. For a discussion of the defendants' preparatory role in the tax evasion cases, see supra notes 81-99 and accompanying text.

260. See Rice I, 128 F.3d at 243-44. The Department of Justice strongly urged this conclusion. See id. at 247.

261. See id. at 244.

262. See id.

263. See id. In concluding that Hit Man is "at the other end of the continuum from the ideation at the core of the advocacy protected by the First Amendment," the Fourth Circuit passed moral judgment on the speech and deemed it unworthy of protection. Id. at 256. If this were a permissible ground for denying protection, then each court would be empowered to determine whether the speech at issue was devoid of redeeming social value. See id. The court could impose its own val-
tions of the aiding and abetting exception. The amorphous, factspecific standard empowers each court to determine whether the speech is "at the other end of the continuum from the ideation at the core of the advocacy protected by the First Amendment" and therefore, not protected. This allows a court to impose its own values and morals when deciding whether the speech at issue represents the ideals protected by the First Amendment. This may result in a lack of uniformity in the types of speech that will be proscribed.

Since Hit Man was denied protection under the aiding and abetting exception, publishers may wonder whether, for example, a novel written by a sympathetic killer who included extremely detailed journal entries about how he prepared and committed the murder would also be denied First Amendment protection. In other words, if Hit Man were re-written in a more literary context, instead of an instructional format and someone relied on it to commit murder, would the book still be denied protection because of its close association to the crime? Would a book written in the 1960s providing instructions on how to boycott segregation laws, an illegal action at the time, have been denied protection because its sole purpose was to describe how to commit a crime? To prevent possible liability for these books, like these, the aiding and abetting exception must be carefully and narrowly drawn. Clearly enumerating criteria for the exception will be difficult, however, since the basis for denying protection is a court's subjective determination about whether the book's purpose is to further criminal activity.

Because of the subjective nature of this exception, other courts could use the holding in Rice to deny protection to other how-to books, such as those providing bomb-building instructions. Despite the laudable attempt to restrict the dissemination of potentially harmful information, this mechanism for restricting speech cannot be reconciled with fundamental First Amendment principles. The risk is too great that the exception will suppress more speech than the court in Rice intended.

See id. at 256.

See Sandra Davidson, Blood Money: When Media Expose Others to Risk of Bodily Harm, 19 Hastings Comm. & Ent. L.J. 225 (1997). There have been several books like this one written. The Turner Diaries, relied on by Timothy McVeigh, is a fictional story of the destruction of a federal building in Washington, D.C. by using a truck filled with ammonium nitrate fertilizer.
As Justice Holmes stated in *Abrams v. United States*, it may be that in order to protect the sanctity of the “free market of ideas,” Americans may have to tolerate “ideas fraught with death.” Following this reasoning, the Department of Justice concluded that the First Amendment did not prohibit imposing liability for speech that aids and abets crime. The Oklahoma City bombing in 1995 was undoubtedly the impetus for the DOJ Report. Historically, however, the assessment of threats and the need for governmental regulation, much like the current DOJ report, have not always been accurate.

For example, in *Noto*, the Supreme Court deemed speech advocating Communist overthrow of the government to be a sufficient threat of violence to justify suppressing the speech. In hindsight, the suppression of these ideas does not seem justifiable. Likewise, with the contemporary prevalence of violence and the potential for the information to be disseminated on the Internet, *Hit Man* seems like an imminent threat to the safety of society. Fifty years from now, however, historians may look back and conclude that imposing liability for a “how-to commit murder” book was equally unjustifiable. The only proper way to control the perceived threat is to regulate the speech in accordance with the parameters established by the First Amendment. That would require a sufficiently narrow test.

If the Supreme Court reverses the Fourth Circuit’s holding, by finding that imposing liability on a publisher for aiding and abetting is unconstitutional, the Court should clarify several issues. First, the Court should clarify whether the *Brandenburg* exception to First Amendment protection applies beyond political speech. Second, if the *Brandenburg* exception does apply, the Court should reconsider the relevant terms, like incitement and imminence in the expanded context of non-political speech.

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266. 250 U.S. 616 (1919) (Holmes, J., dissenting).
267. *Id.* at 630.
[T]he ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

*Id.*

If, however, the Court affirms the Fourth Circuit's decision to deny a First Amendment defense, it will create a new category of unprotected speech. Thus, the court would take the first step toward diminishing the incentive to publish criminally instructive speech, and therefore realize the purpose underlying the legislative measures taken in response to the Oklahoma City bombing. 270

VI. IMPACT

Although the Fourth Circuit's narrow holding in *Rice* related specifically to a murder manual, the decision will have implications for other how-to books. 271 In addition, the holding in *Rice* may have implications for the Internet, a medium with the ability to disseminate the same type of potentially harmful information to millions of recipients in only a few seconds. *Hitman* may not, however, be sufficiently analogous to a bomb-making instruction manual.

There are several problems with proving that information posted on the Internet aided and abetted a crime. First, the information could be posted anonymously. Second, individuals outside the jurisdiction of the United States could post the information. 272 Finally, it will be difficult to prove that the author directed information to a particular individual with the intent that it be used to commit a crime. 273

270. The legislature has already begun to take steps with regard to information about how to build bombs. In the aftermath of the Oklahoma City bombing, Senators Feinstein and Biden proposed legislation, which would "criminalize the teaching or demonstration of the manufacture of explosive materials if they know that the materials will likely be used in furtherance of specified criminal offenses." *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 247 n.3. In June 1997, the Senate passed the proposed legislation to "prohibit the distribution of bomb-making instructions with the intention that the information be used for criminal purposes, or knowing that such person intends to use it to commit a crime." *Senate Passes Feinstein Amendment to Prohibit Dissemination Bombmaking Instructions*, GOVT PRESS RELEASES, June 19, 1997.

271. See Kegley, *supra* note 56, at 1005. The issue remains undecided whether publication of bomb-making instructions on the Internet qualifies as dangerous speech under the *Brandenburg* test because of the imminent danger of ensuing terrorism. See id.

272. See *Reno v. ACLU*, 521 U.S. 844, 850 (1997). Approximately 60% of the material on the Internet is posted by hosts located outside of the United States. See id. At the time of trial, 40 million people used the Internet and it is expected to increase to 200 million by 1999. See id.

273. The Communication Decency Act ("CDA") did not withstand a constitutional challenge to two provisions: section 223(a)(1)(B)(ii) which criminalized the knowing transmission of "obscene or indecent" messages to any recipient under 18 years of age; and section 223(d) which prohibits the knowing sending or displaying to a person under 18 of any message that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs. See id. at 859-61. The Supreme Court upheld section...
Cass Sunstein has considered "whether existing legal standards concerning violent speech should change with emerging technology." Sunstein argues that, although the Internet creates an immeasurable audience for information, bomb-making speech would be protected by the First Amendment. Since *Hit Man* was not protected by the First Amendment, the question remains open whether a court could find a website with instructions on building bombs or biological weapons equally devoid of value and tantamount to aiding and abetting crime. Thus, in the interest of protecting the free flow of ideas published in books and on the Internet from the encroachment of court imposed restrictions on speech, the Fourth Circuit's decision should be reversed.

Emma Dailey

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274. See Kegley, *supra* note 56, at 1014.
275. See *id.* at 1015-16.