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NOTES

MURDER IN THE ABSTRACT: THE FIRST AMENDMENT AND THE MISAPPROPRIATION OF *BRANDENBURG*

When Paladin Enterprises published Hit Man, a manual about murder for hire, it knew and intended that the book would be used for such a purpose. When James Perry used the information contained in Hit Man to murder three innocent persons, he started a legal debate about the scope of First Amendment protections for books that instruct how to commit criminal acts. Many scholars and commentators indicated that Brandenburg v. Ohio contains the applicable constitutional standard; however, in litigation against Paladin, the survivors of the decedents challenged the conventional wisdom.

This Note examines the Brandenburg test for its applicability to published materials that function as instruction manuals to perpetrate crimes. Because Brandenburg is inextricably linked with the crowd context, it is inapplicable to the published materials that function not as advocacy, but as instruction. Because Hit Man was used exactly as Paladin had intended, Paladin should be held liable in tort for the wrongful deaths of Perry's three victims.

* * *

INTRODUCTION

With the filing of *Rice v. Paladin Enterprises*¹ in 1996, publisher liability for criminal acts committed by third parties as a result of publications has become the focus of intense legal debate. At the center of that debate is the First Amendment guarantee of freedom of speech²—and the rights thus bestowed upon publishers through the traditional and long-standing interpretation of that Amendment, an interpretation founded in the heritage and development of the clear-and-present danger inquiry as refined by *Brandenburg v. Ohio*.³ In the developing and voluminous commentary by

¹ 940 F. Supp. 836 (D. Md. 1996), *rev'd*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 1998 U.S. LEXIS 2548 (U.S. Apr. 20, 1998).

² "Congress shall make no law . . . abridging the freedom of speech, or of the press" U.S. CONST. amend. I.

³ 395 U.S. 444 (1969). "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting imminent lawless action

legal scholars and commentators alike, evaluation of the speech contained in the books at issue in *Rice* has appeared to proceed on a presumption that the *Brandenburg* test is the appropriate rubric. The analysis, however, may actually be hindered by such an approach. This Note explores various related questions regarding whether a legal test originally developed to respond to conduct inextricably tied to the crowd context and to efforts to steel a group to violent action can be properly applied to language contained in an instructional manual that teaches the "art" of conducting oneself as a professional hit man.

Believed to be the first case of its kind,⁴ *Rice* focuses on the issue of whether the publishers of an instructional manual on how to commit murder for hire may be held liable in tort to the families of the three victims killed by a professional hit man who followed the manual's instructions to perpetrate the murders.⁵

and is likely to incite or produce such action." *Id.* at 447.

Justice Oliver Wendell Holmes believed that "under the rigorous clear-and-present danger test society must tolerate even speech that we 'loathe' and believe 'fraught with death,' unless an immediate check is required to prevent imminent danger." RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 116 (1992) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

⁴ The Court of Appeals for the Fourth Circuit called the case "unique in the law." *Rice*, 128 F.3d at 267.

⁵ On or about January 24, 1992, James E. Perry, a self-proclaimed street preacher in Detroit, responded to defendant Paladin Enterprises's catalogue advertisement of a book by author Rex Feral (a pseudonym for "King of the Wild Animals"), entitled *Hit Man: A Technical Manual for Independent Contractors*, and a book by J. Flores, entitled *How to Make a Disposable Silencer, Volume II: A Complete Illustrated Guide*. See *Rice*, 940 F. Supp. at 838. Prior to March 3, 1992, Lawrence Horn hired Perry to murder his ex-wife Mildred Horn, their eight-year-old quadriplegic son Trevor, and Trevor's private-duty nurse, Janice Saunders. See *id.* at 839. Horn stood to inherit \$1.7 million in damages awarded in a medical malpractice judgment entered for Trevor Horn, who was left a quadriplegic as the result of a hospital accident some years before. See Stuart Taylor Jr., *Closing Argument: Let 'Hit Man' Take a Tort Hit*, TEX. LAW., Aug. 19, 1996, at 22, available in LEXIS, News Library, TXLAWR File. Lawrence Horn was a down-and-out former Motown music technician living in Los Angeles. See David Montgomery, *Murder Manual Lawsuit Tests First Amendment*, WASH. POST, July 22, 1996, at B1.

On March 3, 1993, James Perry traveled from Detroit to Montgomery County, Maryland, where he murdered Mildred Horn, Trevor Horn, and Janice Saunders, in the Horn residence. See *Rice*, 940 F. Supp. at 839. At his trial, Perry testified that when he committed the murders he followed instructions appearing in *Hit Man* and *Silencers* in planning, executing, and attempting to get away with the murders. See *id.* Among the instructions Perry was found to have followed was a passage in which the author wrote:

You will need to know beyond any doubt that the desired result has been achieved. . . . You will not want to be at point blank range to avoid having the victim's blood splatter you or your clothing. At least three shots should be fired

I. THE PLAINTIFFS' SUIT AND THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Brought by the survivors of the three decedents, *Rice* is a civil action against the defendant publisher Paladin Enterprises for aiding and abetting murder.⁶ The plaintiffs additionally seek damages in survival and wrongful death actions based on civil conspiracy, strict liability, and negligence.⁷

In April 1996, defendant Paladin moved for summary judgment,⁸ claiming entitlement to judgment as a matter of law based on First Amendment protection for *Hit Man* and *Silencers* under the United States Constitution's guarantee of freedom of speech.⁹ To be entitled to judgment as a matter of law, a party seeking summary judgment must demonstrate that no issue of material fact exists.¹⁰ Solely for the purposes of the motion, therefore, the defendant made several factual concessions.

Paladin conceded that in publishing, marketing, and advertising *Hit Man* and *Silencers*, it "intended and had knowledge that their [sic] 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."¹¹ Paladin also agreed that "in publishing, distributing and

to insure quick and sure death . . . aim for the head—preferably the eye sockets if you are a sharpshooter.

Id. (quoting REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS 24 (1983)).

Horn was convicted in Montgomery County Circuit Court in Maryland and sentenced to life without the possibility of parole for hiring Perry. *See id.* at 838 n.1. Perry was convicted and sentenced to death for the murders. *See Perry v. State*, 686 A.2d 274 (Md. 1996), *cert. denied*, 117 S. Ct. 1318 (1997).

⁶ *See Rice*, 940 F. Supp. at 838.

⁷ *See id.*

⁸ Judge Alexander Williams of the United States District Court for the District of Maryland, Southern Division, granted summary judgment in an Amended Memorandum Opinion and an Amended Order dated September 6, 1996. *See id.* at 838, 849.

⁹ *See* U.S. CONST. amend. I. The First Amendment applies to the states by virtue of the Fourteenth Amendment. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 599 n.2 (1980) (Stewart, J., concurring).

¹⁰ *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

¹¹ *Rice*, 940 F. Supp. at 840. At least two commentators have suggested the reason for such a concession. Patrick Brogan asserted:

It is not such a foolish admission as it appears. If there had been a dispute over the facts, the case might have gone immediately to a jury which would have read the book and might have been less persuaded than constitutional scholars of the absolute inviolability of the First Amendment.

Patrick Brogan, *Free Speech Covers Guides to Murder, US Publishers Argue*, HERALD (Glasgow), July 24, 1996, at 13, available in LEXIS, News Library, GHERLD File. David Montgomery explained:

That concession is breathtaking and possibly damaging to Paladin, outside legal

selling *Hit Man* and *Silencers* to Perry, they [sic] assisted him in the subsequent perpetration of the murders which are the subject of this litigation.”¹² Finally, Paladin did not dispute that Perry followed numerous, detailed instructions on “planning, executing and attempting to get away with the murders.”¹³

A. *Parties’ Stipulations for Purposes of Summary Judgment*

All parties to the suit agreed that Paladin and its president, Peder Lund, “had no specific knowledge that either Perry or Horn planned to commit a crime; that Perry and Horn had entered into a conspiracy for the purpose of committing a crime; nor that Perry had been retained by Horn to murder Mildred Horn, Trevor Horn, or Janice Saunders.”¹⁴ In addition, defendant Paladin asserted that its marketing strategy was intended

to maximize sales to the public, including authors who desire information for the purpose of writing books about crime and criminals, law enforcement officers and agencies who desire information concerning the means and methods of committing crimes, persons who enjoy reading accounts of crimes and the means of committing them for purposes of entertainment, persons who fantasize about committing crimes but do not thereafter commit them, and criminologists and others who study criminal methods and mentality.¹⁵

specialists said. [Floyd] Abrams gasped when he heard the wording . . . and said the issues in the case are so extreme that “it sounds like a law school exam that the professor gives his or her students to test the boundaries of the First Amendment.”

Paladin’s attorneys assumed the worst set of facts imaginable for today’s hearing so that the other side could not argue that facts were in dispute that a jury must decide. It’s part of their strategy to kill the lawsuit before it reaches a jury. If [Judge] Williams does order a trial, then Paladin’s stipulation will be voided, and the two sides will argue over the true intent of “Hit Man.”

Montgomery, *supra* note 5, at B1.

¹² *Rice*, 940 F. Supp. at 839.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 840; *see also* Montgomery, *supra* note 5, at B1 (“Paladin’s attorneys offer contradictory interpretations of the book. On the one hand, they contend that it is obviously tongue-in-cheek satire not meant to be taken seriously. But they also say it provides useful information to crime writers, criminologists and others with legitimate purposes.”).

Though the plaintiffs “stipulated that selling books to these users was *part* of [Paladin’s] marketing strategy,”¹⁶ they did not stipulate that Paladin actually marketed *Hit Man* and *Silencers* to these “general users.”¹⁷

II. *HIT MAN*: A FACIAL DESCRIPTION

The back cover of *Hit Man* reads:

Rex Feral kills for hire. Daring. Unafraid. Professional. Now he dares to tell his professional secrets.

Feral is a hit man. Some consider him a criminal. Others think him a hero. In truth, he is a lethal weapon aimed at the enemy of the one who pays him. He is the last recourse in these times when laws are so twisted that justice goes unserved. He is a man who controls his destiny through his private code of ethics, who feels no twinge of guilt at doing his job. He is a professional killer.

Learn how a pro makes a living at this craft without landing behind bars. Find out how he gets hit assignments, creates a false working identity, makes a disposable silencer, leaves the scene without a trace of evidence, watches his mark unobserved, and more. An expert assassin and bodyguard, Feral reveals the details of how to get in, do the job, and get out—without getting caught. For informational purposes only!

A Paladin Press Book.¹⁸

Below this description on the back cover is an artist’s depiction of a bottle of poison, gloves, handcuffs, a serrated hunting knife, and a pistol with a silencer attached.¹⁹

Along with the title and the author’s pseudonym Rex Feral,²⁰ the front cover of *Hit Man* shows an artist’s depiction of a character reminiscent of

¹⁶ Plaintiffs’ Opposition to Defendant Paladin Enterprises, Inc.’s Motion for Summary Judgment at 35, *Rice* (AW-95-3811) [hereinafter Plaintiffs’ Opposition] (emphasis added).

¹⁷ *Id.* at 35 n.19.

¹⁸ REX FERAL, *HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS* back cover (1983).

¹⁹ *See id.*

²⁰ Paladin has disclosed that the author of the book is actually a woman, but has not disclosed her identity. *See Brogan, supra* note 11, at 13.

Dick Tracy superimposed on a chalk outline of an apparent murder victim.²¹

The page preceding the table of contents displays the following:

WARNING

IT IS AGAINST THE LAW TO manufacture a silencer without an appropriate license from the federal government. There are state and local laws prohibiting the possession of weapons and their accessories in many areas. Severe penalties are prescribed for violations of these laws. Neither the author nor the publisher assumes responsibility for the use or misuse of information contained in this book. **For informational purposes only!**²²

The inside front cover contains fine print documentation of copyright and ordering information, reservation of rights to the publisher, and the following disclaimer: "Neither the author nor the publisher assumes any responsibility for the use or misuse of information contained in this book."²³ The facing page presents the book's dedication, which reads: "To Those Who Think,/To Those Who Dare,/To Those Who Do,/To Those Who Succeed./Success is nothing more than taking advantage of an opportunity./Anonymous."²⁴

In the preface to *Hit Man*, the author describes "his" disdain for men who dream of killing, but who cannot actually bring themselves to commit such an act.²⁵ In addition, Feral outlines what the reader should gain from the book and admonishes the reader regarding the requisite care with which the book should be read.²⁶ The book contains detailed, meticulous instruc-

²¹ See FERAL, *supra* note 18, at front cover.

²² *Id.* at page facing Table of Contents.

²³ *Id.* at inside front cover.

²⁴ *Id.* at second unnumbered page.

²⁵ See *id.*, at ix-x.

²⁶

A WOMAN RECENTLY ASKED HOW I could, in good conscience, write an instruction book on murder.

"How can you live with yourself if someone uses what you write to go out and take a human life?" she whined.

I am afraid she was quite offended by my answer.

It is my opinion that the professional hit man fills a need in society and is, at times, the only alternative for "personal" justice. Moreover, if my advice and the proven methods in this book are followed, certainly no one will ever know.

....

There are many, many instances when atrocities are committed that the law will not or cannot pursue. And other times when the law does its part but the

tions regarding every aspect involved in the perpetration of a murder for hire. The book sets out charts, diagrams, checklists, photographs, and engineering specifications.²⁷ It discusses, among other things, soliciting the appropriate clientele,²⁸ obtaining the recommended rifle and weaponry,²⁹ drilling out the weapon's serial number,³⁰ constructing a disposable silencer for the rifle,³¹ and using a rat-tail file to alter the gun barrel in order to foil ballistics tests following the commission of the crime.³² Instructions are presented in a straightforward, matter-of-fact fashion.

American legal system is so poor that *real* justice is not served. In those cases, as in cases of personal revenge and retribution, a man must step outside the law and take matters into his own hands.

Since most men are capable of carrying out their threats and wishes only in their heads, it becomes necessary for a man of action to step in and do what is required: a special man for whom life holds no real meaning and death holds no fear . . . a man who faces death as a challenge and feels the victory each time he walks away the winner.

....

It seems that almost every man harbors a fantasy of living the life of Mack Bolan or some other fictional hero who kills for fun and profit. They dream . . . [b]ut few have the courage or knowledge to make that dream a reality.

....

You might be like my friends—interested but unsure, standing on the sidelines afraid to play the game because you don't know the rules. Within the pages of this book you will learn one of the most successful methods of operation used by an independent contractor. You will follow the procedures of a man who works alone, without backing organized crime or on a personal vendetta. Step by step you will be taken from research to equipment selection to job preparation to successful job completion. You will learn where to find employment, how much to charge, and what you can, and *cannot*, do with the money you earn.

But deny your urge to skip about, looking for the "good" parts. Start where any amateur who is serious about turning professional will start—at the beginning.

Id. at ix-xi.

²⁷ See *id.* at 21-22 (presenting a checklist of weapons, ammunitions, and accessories), 31 (providing a template for lock picks), 42-50 (displaying step-by-step instructions on the assembly of a homemade disposable silencer, including 19 photographs), 73-80 (depicting a sample information form suggested for use in obtaining a physical description and other relevant information about the intended victim, or "mark").

²⁸ See *id.* at 87-94. Chapter 6 is titled "Opportunity Knocks: Finding Employment, What to Charge, Who to Avoid." *Id.* at 87.

²⁹ See *id.* at 21-36. Chapter 2 is titled "Equipment: Selection and Purpose." *Id.* at 21.

³⁰ "The AR-7 rifle has a serial number stamped on the case, just above the clip port. This number should be completely drilled out. The hole left will be unsightly but will not interfere with the working mechanism of the gun or the clip feed." *Id.* at 23.

³¹ See *id.* at 37-52. Chapter 3 is titled "The Disposable Silencer: A Poor Man's Access to a Rich Man's Toy." *Id.* at 37.

³² See *id.* at 25.

In oral argument on the summary judgment motion, Paladin highlighted several factors belying the plaintiffs' assertion that the book was meant to be taken seriously.³³ Among the factors cited were the cartoon-like cover illustration, the sometimes ridiculously pompous and egotistical tone of the author, and apparent inconsistencies in certain of the author's instructions when considered with others.³⁴ Paladin also told the district court that the prosecutor in the case against Perry marveled that Perry had taken such a book seriously.³⁵ In addition, Paladin stressed the fact that Perry did not follow each and every instruction contained in the book.³⁶ Indeed, if he were to have done so, Paladin asserted, Perry would have eluded authorities.³⁷

³³ See David Montgomery, *Judge Doubts Publisher Is Liable in Md. Triple Murder*, WASH. POST, July 23, 1996, at D3; see also Memorandum of Points and Authorities in Support of Defendant Paladin Enterprises, Inc.'s Motion for Summary Judgment at 32, *Rice* (AW-95-3811) [hereinafter Memorandum] (noting the "unavoidable signals" that *Hit Man* is "fiction").

³⁴ See Reply Memorandum of Points and Authorities in Support of Defendant Paladin Enterprises, Inc.'s Motion for Summary Judgment at 10, *Rice* (AW-95-3811) [hereinafter Reply Memorandum].

[D]espite plaintiffs' tireless efforts to dismiss *Hit Man* as a "murder manual," . . . the book itself is simply not that. From its cartoon-like cover, to the transparent and exaggerated pseudonym of its author, to its mystery novel-like tales of his "adventures," to the obvious absurdity of much of the "instruction" it purports to relate, . . . [t]he book contains not a single word that can reasonably be said to direct or encourage anyone to engage in "imminent lawless" conduct and, in fact, includes an express warning to the contrary.

Id. But see *Rice*, 128 F.3d at 254 ("[W]e are of the view that the book so overtly promotes murder in concrete, nonabstract terms that we regard as disturbingly disingenuous . . . Paladin's cavalier suggestion that the book is essentially a comic book whose 'fantastical' promotion of murder no one could take seriously . . .").

³⁵ See Memorandum, *supra* note 33, at 8 (citing Transcript, Sept. 13, 1995, at 5, *State v. Perry* (Mont. County Cir. Ct.) (Crim. No. 72050)). It should be noted that the prosecutor in the criminal case against Perry relied upon the fact that Perry used such a book as evidence of the calculative element of Perry's crimes. See Transcript, Sept. 23, 1995, at 125-26, 157, *State v. Perry* (Mont. County Cir. Ct.) (Crim. No. 72050). 72050); Transcript, Oct. 3, 1995, at 25-35, *State v. Perry* (Mont. County Cir. Ct.) (Crim. No. 72050). 72050).

³⁶ See Memorandum, *supra* note 33, at 10.

³⁷ See Thomas Kelly, Counsel for Defendant Paladin Enterprises, Oral Argument (July 22, 1996) (transcript available in United States District Court, District of Maryland, Southern Division). "Moreover, if my advice and the proven methods in this book are followed, certainly no one will ever know." FERAL, *supra* note 18, at ix.

III. THE DEBATE

At the heart of the legal debate is the difficulty many scholars have in distinguishing between the book *Hit Man* and certain movies, fictional literature, and music containing some of the same kinds of information, which, when it falls into the wrong hands, becomes a danger to innocent individuals.³⁸ Indeed, a number of cases have involved so-called copycat or imitative crimes in which an individual or group emulated crimes or dangerous activity represented in books, movies, songs, and magazines.³⁹ In such cases, courts have examined the speech at issue under the "incitement to imminent lawless activity" analysis established by the United States Supreme Court in *Brandenburg v. Ohio*,⁴⁰ and have determined that the speech did

³⁸ Bruce Sanford has written that *Rice* threatens "a destabilizing effect on First Amendment law" because of the absence of a "principled distinction between constitutional protection for the type of information found in [*Hit Man*] and protection for identical or similar information found in a vast array of fiction, nonfiction, music, electronic communication, and video programming." Brief of Amici Curiae in Support of Affirmance at 22, 2, *Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997) (No. 96-2412) [hereinafter Support Brief].

³⁹ See, e.g., *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988) (reversing a jury's award of damages in a wrongful death action against a magazine publisher for an adolescent's death allegedly caused by an article that described the practice of auto-erotic asphyxia); *Zamora v. CBS*, 480 F. Supp. 199 (S.D. Fla. 1979) (discussing a fifteen-year old's unsuccessful suit against television networks for violent programming to which he allegedly became addicted and that allegedly caused him to kill an elderly woman); *McCollum v. CBS*, 249 Cal. Rptr. 187 (Ct. App. 1988) (holding that the Ozzy Osbourne song "Suicide Solution," propounding the acceptable nature of suicide, merited protected-speech status); *Olivia N. v. NBC*, 178 Cal. Rptr. 888 (Ct. App. 1981), cert. denied, 458 U.S. 1108 (1982) (dismissing an action brought by a minor girl raped with a bottle by other juveniles imitating a similar incident depicted in a television drama for failure to state a valid cause of action); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989) (dismissing the wrongful death action by the father of a boy killed by a person who had just seen the film *The Warriors*, which depicted scenes of gang violence); *DeFilippo v. NBC*, 446 A.2d 1036 (R.I. 1982) (discussing a wrongful death action brought against NBC by parents of a deceased boy after he hanged himself while imitating a stunt demonstrated on *The Tonight Show* hosted by Johnny Carson).

⁴⁰ 395 U.S. 444 (1969). *Brandenburg* involved a Ku Klux Klan rally that took place on a farm outside of Cincinnati. A reporter from a local television station had been invited to film the rally. Portions of the film were later broadcast, showing Klan members denouncing Blacks, Jews, and the national government. On the film, Klan leader Brandenburg stated that "if our President, our Congress, and our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." *Id.* at 446. The Court struck down the State's conviction of Brandenburg, holding that "the constitutional guarantees of free speech and free press

not constitute "incitement."⁴¹ Critics like media litigator Bruce Sanford warn of the extensive litigation that would result from a decision that would leave *Hit Man* unprotected by the First Amendment, in view of the many works of artistic expression containing graphic information similar to that set forth in *Hit Man*.⁴² Others have articulated support for a narrowly defined interpretation of "intent," one which might facilitate a solution to the *Hit Man* problem without chilling artistic expression.⁴³

The *Brandenburg* standard as applied by the Supreme Court contains three elements: intent, imminence, and likelihood.⁴⁴ These three elements prove useful in analyzing the claims at issue in the case against Paladin.

A. *Brandenburg Intent*

The first element, intent, was the subject of vigorous debate at the summary judgment stage of *Rice*.⁴⁵ Defendant Paladin asserted that it did not intend to incite violence through the publication and marketing of *Hit Man*, while at the same time conceding—for purposes of summary judgment only—that "[i]n publishing, marketing, advertising and distributing *Hit Man* and *Silencers*, [it] intended and had knowledge that their [sic] 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."⁴⁶ Paladin reconciled this apparent self-contradiction by asserting that "'subjective intent' is [not] at all relevant to the *Brandenburg* test."⁴⁷ Paladin further stated, "The 'directed to' prong of the *Brandenburg* test is an objective standard, which looks only to the words themselves and

do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

⁴¹ See cases cited *supra* note 39.

⁴² See Support Brief, *supra* note 38, at 22.

⁴³ See Taylor, *supra* note 5, at 22:

[W]hile no reputable publisher "intends" to facilitate murder—in the sense of publishing with that purpose—many arguably have depicted violent crimes or fantasies with "reckless disregard" for the possibility that they might inspire copycat crimes. Unless the courts define "intent" more narrowly in this context than in many others . . . a flood of litigation could indeed ensue.

⁴⁴ See *Brandenburg*, 395 U.S. at 447.

⁴⁵ See *Rice*, 940 F. Supp. at 844-48.

⁴⁶ *Id.* at 840. Interestingly, the Fourth Circuit Court of Appeals disregarded Paladin's "intent" distinction entirely, focusing on Paladin's stipulation as interpreted via the common meaning of the word, see *Rice*, 128 F.3d at 252-53, except to note that "of course, the district court was without authority to allow Paladin to alter the parties' stipulation unilaterally" *Id.* at 253.

⁴⁷ Reply Memorandum, *supra* note 34, at 2.

the context in which they were disseminated.”⁴⁸ In response to the plaintiffs’ assertion that no other publisher would “stipulate to knowledge and intent,”⁴⁹ Paladin stated: “[T]here can be no question that even authors of fiction *know* that their readership includes criminals who will employ, to the extent they find them useful, technically accurate descriptions of assassination methods contained in such works.”⁵⁰

This argument convinced the district court,⁵¹ but is it the law?⁵² Paladin appears to have argued that subjective intent was not a part of the First Amendment analysis, maintaining that the question of whether it published with subjective intent—versus the “knowledge” brand of intent to which it asserted it stipulated—is irrelevant to the outcome of *Rice*, because it cannot be held liable unless the words in *Hit Man* somehow can be viewed objectively as embodying intent. Paladin’s definition of *Brandenburg* intent seems to be intent that can be objectively distinguished within the speech at issue. This intent cannot be identified in the language of *Hit Man*, Paladin maintained.⁵³

⁴⁸ *Id.* at 11. On this point, Paladin referenced *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973), stating that “intent to incite imminent lawless action must be gleaned from ‘the import of the language.’” *Id.* In addition, Paladin referenced *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 929 (1982), stating that the “court must focus upon the defendants’ ‘speeches themselves.’” *Id.*

⁴⁹ Plaintiffs’ Opposition, *supra* note 16, at 37.

⁵⁰ Reply Memorandum, *supra* note 34, at 15. On this point, Paladin’s examples included Tom Clancy’s novel *Without Remorse*, Dave Fisher’s “Joey” series, and Stephen King’s novel *Rage*. *See id.*

⁵¹ The district court wrote:

Defendants conceded that they intended that their publications would be used by criminals to plan and execute murder as instructed in the manual. However, Defendants clarify their concession by explaining that when they published, advertised and distributed both *Hit Man* and *Silencers*, they knew, and in that sense “intended,” that the books would be purchased by all of the categories of readers previously described and used by them for the broad range of purposes previously described.

Rice, 940 F. Supp. at 846 (citation omitted) (emphasis added).

⁵²

In the First Amendment realm, as indeed throughout the law of crimes and torts, subjective intent is often the *very essence* of the case, the fact on which responsibility hangs or falls. The Supreme Court has thus repeatedly emphasized the often outcome-determinative role of intent in First Amendment cases.

Plaintiffs’ Opposition, *supra* note 16, at 20 (citing *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), as “holding that defendants’ subjective intent was sufficient to overcome asserted First Amendment defense in bias-crime prosecution,” and *Herbert v. Lando*, 441 U.S. 153 (1979), as “emphasizing the role of subjective intent in libel cases governed by the First Amendment.”)

⁵³ *See* Montgomery, *supra* note 5, at B1.

This objective-intent argument cannot withstand close scrutiny. Consider the words of Judge Kennedy in *United States v. Freeman*,⁵⁴ a case about solicitation to commit tax fraud. Kennedy noted 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."⁵⁵ The court thus applied a two-part analysis that included the subjective intent of the actor plus the objective meaning of the words—not the meaning of the words under a variety of undeniably subjective interpretations.

Paladin itself advanced a number of interpretations for the speech contained in *Hit Man*. Among these were that the book contains "unavoidable signals [that it is] fiction,"⁵⁶ that it is "[u]nlike fictional works . . . [in that it] reveals, in stark relief, the reality and violence of the act of killing, . . . and otherwise counsels sober reflection on the topic,"⁵⁷ that it is "not meant to be taken seriously,"⁵⁸ and that there is value to society in the book because it is a valuable learning tool for law enforcement personnel and "criminologists and others who study criminal methods and mentality."⁵⁹ Though these assertions in combination are problematic and self-contradictory, it becomes unnecessary to evaluate any of them under the *Freeman* analysis, for the objective meaning of the words on their face, in combination with the actor's intent, are the sole determining factors. This is altogether different from Paladin's assertion that the court must determine whether intent objectively may be gleaned from the speech. *Freeman* again raises the question of whether the *Brandenburg* test, a First Amendment analysis, even applies to this case. A finding of intent on the part of Paladin, combined with a consideration of the objective meaning of the speech in *Hit Man*, a relatively simple task in itself, would seem to indicate that *Rice* is not a First Amendment case at all.

The district court's endorsement of an interpretation of *Brandenburg* that requires a finding of objectively apparent intent is unsettling. The district court appears to have closed its eyes to the implications of such an endorse-

⁵⁴ 761 F.2d 549 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986); *see also infra* note 78.

⁵⁵ *Freeman*, 761 F.2d at 552 (emphasis added). Indeed, the Fourth Circuit relied on *Freeman* in rejecting Paladin's claim to First Amendment protection. *See Rice*, 128 F.3d at 245.

⁵⁶ Memorandum, *supra* note 33, at 32.

⁵⁷ *Id.*

⁵⁸ The Associated Press, *Suit Follows Murder by the Book: Publisher of How-To Hit Man Manual Is Blamed in 3 Killings*, N.Y. NEWSDAY, July 23, 1996, at A18, available in LEXIS, News Library, NEWSDY File. "Paladin's president, Peder C. Lund, said in an April 19[1996], affidavit that the book was not meant to be taken seriously." *Id.*

⁵⁹ *Rice*, 940 F. Supp. at 840; *see also* Reply Memorandum, *supra* note 34, at 1 (citing Joint Statement of Facts ¶¶ 5, 8).

ment. In effect, the court said that although Paladin intended that its manual would be used upon receipt by criminals and would-be criminals to plan and carry out the crime of murder for hire, Paladin did not intend it in the "right," or culpable, sense.⁶⁰ This proposition—that there are different "brands" of intent, of which the *Brandenburg* "brand" is just one—is quite confusing, and it is difficult to find legal authority for it. Indeed, the court cited none.

The court then proceeded to effectively neutralize the relevance of having recognized the proposition in the first place. With no further explanation of the basis for proposing different brands of intent, the court moved directly into a discussion of the idea that Paladin had not conceded to the requisite intent because *Brandenburg* mandates that intent must be to incite *imminent* lawless action.⁶¹ Under the district court's analysis, then, the element of intent in *Rice* is inextricably linked to the element of imminence. The court wrote: "While the Defendants have conceded that they intended for their books to be purchased and actually used by criminals, they have not conceded to the requisite intent. Under *Brandenburg*, the Defendants must have intended imminent lawless action."⁶² "Paladin knew, and in that sense 'intended,' that the books would be"⁶³ put to use by criminals and would-be criminals upon receipt.⁶⁴ If "upon receipt" were not to qualify as imminent, it would seem that, under the district court's analysis, Paladin might just as well have openly intended (in the objective definition of the word⁶⁵)

⁶⁰ *Rice*, 940 F. Supp. at 847.

While the Defendants have conceded that they intended for their books to be purchased and actually used by criminals, they have not conceded to the requisite intent. Under *Brandenburg*, the Defendants must have intended imminent lawless action [N]othing in *Hit Man* and *Silencers* could be characterized as a command to immediately murder the three victims.

Id.

⁶¹ See *id.* at 847-48.

⁶² *Id.* at 847.

In other words, Defendants must have intended that James Perry would go out and murder Mildred Horn, Trevor Horn, and Janice Saunders *immediately*. That did not happen in this case since the parties have stipulated to the fact that James Perry committed these atrocious murders a year after receiving the books. Just as in *McCullum*, nothing in *Hit Man* . . . could be characterized as a command to immediately murder the three victims.

Id. (citations omitted).

⁶³ Reply Memorandum, *supra* note 34, at 14.

⁶⁴ See *Rice*, 940 F. Supp. at 840. "In publishing, marketing, advertising and distributing *Hit Man* and *Silencers*, Paladin intended and had knowledge that their [sic] 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.*

⁶⁵ "Intend" is defined as "to have in mind as something to be done or brought about . . . to design or mean for a particular purpose, use, recipient, etc. . . . to have a

that its book be used by criminals, for it would appear that the imminence prong of *Brandenburg* simply cannot be met on the facts of *Rice*.

That the district court felt the need to attempt a distinction between Paladin's "intent" and *Brandenburg*'s "intent" suggests that *Brandenburg* may not apply to *Rice* at all. If Paladin were to have "kn[own], and in that sense 'intended,'" ⁶⁶ then this distinction would appear to approach the foreseeability analysis that is characteristic of the negligence approach found in tort law, rather than the somewhat cursory *Brandenburg* analysis in which the district court engaged.

B. *The Riddle of Brandenburg Imminence in Rice*

The district court reasoned that the only unprotected class of speech under which *Hit Man* might conceivably fall is speech likely to incite imminent lawless action—the *Brandenburg* analysis.⁶⁷ Thus, the court considered the distinction drawn in *Brandenburg* between incitement and mere advocacy,⁶⁸ as well as whether the speech in *Hit Man* constitutes incitement or advocacy.

The inquiry into whether speech constitutes incitement or advocacy explores two aspects of the speech: "the content of the speech . . . [and] the context in which it [i]s disseminated."⁶⁹ The district court's analysis of this issue resulted in the conclusion that *Hit Man* did not constitute incitement in the *Brandenburg* sense because Paladin did not intend that Perry murder the three victims immediately.⁷⁰ The court found that *Hit Man* simply advocated murder for hire by explaining how it may be effectuated.⁷¹ The court

purpose or design." RANDOM HOUSE COMPACT UNABRIDGED DICTIONARY 991 (Special 2d ed. 1996).

⁶⁶ See *supra* text accompanying note 63.

⁶⁷ See *Rice*, 940 F. Supp. at 844.

⁶⁸ See *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (holding that advocacy is protected, but incitement is not protected).

⁶⁹ *Rice*, 940 F. Supp. at 845. "[T]he line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976).

[T]he question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect."

New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *Pennekamp v. Florida*, 328 U.S. 331, 334 (1946)) (citations omitted).

⁷⁰ See *Rice*, 940 F. Supp. at 847.

⁷¹ See *id.*

additionally noted that *Hit Man* did not constitute a "call to action."⁷² Considering the preface to *Hit Man*,⁷³ one is compelled to ask where this type of braggadocian dare might fall along the continuum leading from advocacy to incitement.

An examination of the word "imminent" is in order. At least one court has held that "imminent" does not mean "immediate" in all instances, but rather, that imminence is a relative term.⁷⁴ The position taken by the plaintiffs in *Rice* echoed this interpretation: "A training manual for murder published over a span of years and distributed to a broad range of readers commands a rolling conception of imminence; Defendants cannot hide behind temporal uncertainty of their own creation, in which the assassins they train and encourage may strike at any time."⁷⁵ Moreover, what result must be imminent? The plaintiffs asserted that it was *not* the deaths of the victims, but rather, "*the commencement of lawless action.*"⁷⁶ All parties have stipulated that Paladin intended that, *upon receipt*, criminals and would-be criminals would begin to use *Hit Man* and *Silencers* to plan and execute the

Nothing in the book says "go out and commit murder now!" Instead, the book seems to say, in so many words, "if you want to be a hit man this is what you need to do." This is advocacy, not incitement. Advocacy is defined as mere abstract teaching. . . . The Court finds that the book merely teaches what must be done to implement a professional hit.

Id. (citing *Brandenburg*, 395 U.S. at 448).

⁷² *Id.* (citing *Zamora v. CBS*, 480 F. Supp. 199, 204 (1979) (citing *Yates v. United States*, 354 U.S. 298, 322 (1957))).

⁷³

When the bragging and boasting starts, I just sit back and smile as one after the other talks of what he *would* do, and how he *would* be, if it weren't for family obligations, mortgages and corporate jobs.

You might be like my friends—interested but unsure Step by step you will be taken from research to equipment selection to job preparation to successful job completion

But deny your urge to skip about, looking for the "good" parts. Start where any amateur who is serious about turning professional will start—at the beginning.

FERAL, *supra* note 18, at x-xi.

⁷⁴ See *People v. Rubin*, 158 Cal. Rptr. 488, 492-93 (1979), *cert. denied*, 449 U.S. 821 (1980).

But time is a relative dimension and imminence a relative term, and the imminence of an event is related to its nature Murder, the most serious crime of all, carries the longest time span of any crime, as shown by the lack of any time limitation on its prosecution and a threat of murder can be imminent at a time when a threat of trespass is not.

Id. (citation omitted).

⁷⁵ Plaintiffs' Opposition, *supra* note 16, at 12.

⁷⁶ *Id.*

crime of murder for hire.⁷⁷ Is this the incitement of imminent lawless action according to *Brandenburg*? After all, conspiracy to commit murder, solicitation of murder, and attempted murder are all lawless activities advanced by *Hit Man*.⁷⁸ The question is whether Paladin incited these activities and whether they were imminent.

At common law, the crime of murder, as distinguished from manslaughter, contains the element of malice aforethought.⁷⁹ Furthermore, first degree murder—the crime that formed the basis for this suit—contains the element of premeditation.⁸⁰ *Hit Man* is about first-degree murder because murder

⁷⁷ See *Rice*, 940 F. Supp. at 840.

⁷⁸ Regarding solicitation to commit murder, consider Judge Kennedy's opinion in *United States v. Freeman*:

Though a statute proscribes certain speech, in this case counseling, the defendant does not have a First Amendment defense simply for the asking. Counseling is but a variant of the crime of solicitation, and 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.

761 F.2d 549, 552 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986) (citing *United States v. Barnett*, 667 F.2d 835, 842-43 (9th Cir. 1982); *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978)).

⁷⁹ See *McCord v. State*, 289 A.2d 7, 10 (Md. Ct. Spec. App.), *cert. denied*, 266 Md. 739 (1972).

⁸⁰ See MD. CODE ANN. CRIMES & PUNISHMENTS § 407 (1957).

A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

- (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
- (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
- (3) He is attempting or committing a forcible felony other than voluntary manslaughter.

JOSEPH G. COOK & PAUL MARCUS, CRIMINAL LAW 399-400 (3d ed. 1995).

Murder . . . is the killing of any person in the peace of the commonwealth, with *malice aforethought*, either express or implied by law. Malice . . . is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances, as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief.

Commonwealth v. Webster, 59 Mass. (1 Cush.) 295, 304 (1850).

Compare murder with manslaughter, "the unlawful killing of another *without malice*." *Id.* (emphasis added).

"A murder is not premeditated unless the thought of taking life was consciously conceived and the act or admission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intent to kill someone and

for hire is inextricably linked to premeditation; murder for hire does not happen by accident.

Because of this requisite element of calculation, it is quite possible that no individual or group is capable of being incited to the "imminent" act of premeditated murder, as opposed to the imminent act of murder or manslaughter. Under the district court's analysis, this would seem to be the case, for the district court unwittingly substituted "to murder" for "to kill,"⁸¹ by focusing, in computing the time lapse between Perry's receipt of the book and his entry into lawless activity, on when the three victims actually died.⁸² This is a longer period of time than could have been calculated, making Perry's actions consummate with the concept of a first-degree *murder*, rather than that of a sudden *killing*, such as manslaughter. The district court applied *Brandenburg* and effectively determined that murder for hire—premeditated murder—thus cannot be incited in an immediate fashion. Applying *Brandenburg* in this way, however, allows *Hit Man* to operate as its own defense; if premeditated murder could not be incited in an "imminent" fashion, then *Hit Man* by definition could not create liability.

In its *Brandenburg* analysis the district court curiously ignored the fact that *Hit Man* is about murder *for hire*, not the act of murder alone. If "imminence" were to be interpreted as "immediacy"—as in the district court's analysis⁸³—how are we to measure or evaluate the time it necessarily would take the hit man to transact the solicitation of and agreement with the individual seeking his services? In other words, what length of time is considered "immediate?"

Under the district court's application of *Brandenburg*, murder for hire—premeditated murder—cannot be incited in an immediate fashion. Because *Brandenburg* allows *Hit Man* to operate as its own defense in this way, one is left to wonder whether *Brandenburg* can even apply in this case, or whether another model for legal analysis should be sought. If courts were to insist on adhering to *Brandenburg*, then the only resolution of this

consideration of the act intended." COOK & MARCUS, *supra*, at 464.

⁸¹ "[N]othing in *Hit Man* . . . could be characterized as a command to *immediately murder* the three victims." Rice, 940 F. Supp. at 847 (emphasis added).

⁸² "Defendants must have intended that James Perry would go out and murder Mildred Horn, Trevor Horn, and Janice Saunders *immediately*. That did not happen in this case since the parties have stipulated to the fact that James Perry committed these atrocious murders a year after receiving the books." *Id.* (citation omitted).

The court inadvertently used the word "murder" here. Employed in this context, "murder" plainly means "kill" because *the court* focused on the death of the victims, as opposed to the Perry's actions; his acts of planning and premeditation (elements of murder) that took place long before the actual killings. Note again the distinction evident between the two words when "murder" is employed in its statutory sense—and the crucial import of the district court's disregard for the statutory elements of murder.

⁸³ See *id.*

apparent riddle would be that "imminent" simply cannot mean "immediate" in all cases, and most specifically, in this case. A question then exists regarding what to do with this portion of the district court's opinion. If "imminent" were not to mean "immediate," then its meaning would run along the lines of the plaintiffs' interpretation—based on existing law—and contrary to Paladin's interpretation, endorsed by the district court. Although the district court concluded, according to this interpretation, that *Brandenburg* bars imposition of civil liability in this case, it appears that it may not.

C. *Brandenburg Likelihood*

One final aspect remains for consideration under *Brandenburg*, and it is the aspect that ties the *Brandenburg* mandate together: likelihood.⁸⁴ Speech undeserving of First Amendment protection is that which "is directed to inciting or producing imminent lawless action *and is likely* to incite or produce such action."⁸⁵ According to the district court, *Hit Man* is unlikely to incite violence: "Nor does the book have a tendency to incite violence. The court noted that out of the 13,000 copies of *Hit Man* that have been sold nationally, one person actually used the information over the ten years that the book has been in circulation."⁸⁶ The district court further reasoned that *Hit Man*'s disclaimers did "not indicate a tendency to incite violence. To the contrary, such disclaimers may be interpreted as an attempt to dissuade readers from engaging in the activity it describes."⁸⁷

This is a remarkable stretch of logic. Whereas disclaimers attached to other known instructional materials relating to illegal or questionable activi-

⁸⁴ See *supra* text accompanying notes 40-44.

⁸⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added).

⁸⁶ *Rice*, 940 F. Supp. at 848. More accurately, only one person was *caught* using the information. Though arguably not relevant to *Rice*, Paladin books frequently have been utilized by criminals. See, e.g., Juliet Dee, *When Classified Ads Lead to Murder: Hitmen, Soldier of Fortune, and the Question of Commercial Speech*, COMM. & L., Mar. 1996, at 54 ("Dr. Park Dietz, a forensic psychiatrist and consultant to the FBI, 'often encounters patients who have read Paladin books, including two serial killers responsible for 16 deaths.'") (quoting Erik Larson, *Libraries of Killers Often Include a Book or Two From Paladin*, WALL ST. J., Jan. 6, 1993, at A1, and Charlie Brennan, *Publisher Sued Over Hit-Man Book: Paladin Press, Based in Boulder, Sued by Kin of Contract-Killer Victims*, ROCKY MOUNTAIN NEWS (Denver), Jan. 31, 1996, at 5A, available in LEXIS, News Library, RMTNEW File); Christopher Goodwin, *Village Worthy Is Killing-Book King*, SUNDAY TIMES (London), Feb. 18, 1996, Home News Section, available in LEXIS, News Library, TTIMES File ("The lawsuit against Lund has brought his bizarre enterprise under scrutiny for the first time. An agent of the Bureau of Alcohol, Tobacco and Firearms said last week that Paladin books had been found in the possession of bombing suspects 'hundreds of times.'").

⁸⁷ *Rice*, 940 F. Supp. at 848.

ties have used such wording as "DON'T TRY ANYTHING YOU FIND IN THIS DOCUMENT!!!,"⁸⁸ or, "DO NOT ATTEMPT this method,"⁸⁹ the "disclaimers" contained in *Hit Man* conspicuously do *not* direct the reader to refrain from engaging in the activity of murder for hire.⁹⁰ At most, Paladin simply states that the activity advanced is illegal, and that the publisher assumes no responsibility for that illegal activity in the event that the reader-turned-hit man gets caught,⁹¹ as Perry did. Insofar as the argument has been made that *Hit Man's* "disclaimers" discredit a finding of likelihood—or intent, for that matter—the argument necessarily must be buttressed by conclusions drawn from reading the disclaimers in the best possible light, but not conclusions supported by the objective language of the disclaimers.

III. DOES *BRANDENBURG* APPLY TO *RICE*?

Although the district court found that *Brandenburg* applied to the fact pattern of *Rice*, the plaintiffs and others have maintained that it does not.⁹² In *Brandenburg*, the Court framed its opinion specifically in terms of violent crowd behavior and assembly: "[W]e are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action."⁹³ Other courts have recognized the importance of limiting *Brandenburg* to the context of crowd behavior,

⁸⁸ Dan Mihalopoulos, *The Web, Where Bomb-Makers Go To Learn: Despite Safety Concerns After Olympics Bombing, Instructions on Net Are Legal, Can't Be Stopped*, ST. LOUIS POST-DISPATCH, FIVE STAR LIFT EDITION, Aug. 4, 1996, at 4B, available in LEXIS, News Library, SLPD File.

⁸⁹ *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1018 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (reversing a jury's award of damages in a wrongful death action against a magazine publisher for an adolescent's death allegedly caused by an article that described the practice of auto-erotic asphyxia).

⁹⁰ See *supra* text accompanying notes 18, 22-23.

⁹¹ See *supra* text accompanying notes 18, 22-23.

⁹²

In any event, the *Brandenburg* line of cases is distinguishable. They focused mainly on revolutionary political rhetoric and mass protests. And the court's purpose was to draw a line between abstract advocacy of violence and actual face-to-face incitement, which tends to produce violent behavior either right away or not at all. Where something like a murder manual is involved, violent intent may foreseeably lead to violent results even absent "imminence" in the strict sense.

Taylor, *supra* note 5, at 22.

"Critics of the lawsuit are confusing public debate by raising the 'freedom of speech' mantra. Instead, the question for the court—and for the court of public opinion—should be whether this book was a critical instrument in causing the violence." Charles G. Brown, *Murder by the Book, and Its Consequences*, CHI. TRIB., Mar. 5, 1996, at N13.

⁹³ 395 U.S. at 449.

advocacy, and efforts to steel a group to violent action.⁹⁴ In fact, "[t]he long train of celebrated Supreme Court opinions dealing with such issues as advocacy of violence, incitement, symbolic speech, and graphic protest have *all* involved speech pertaining to political or social issues."⁹⁵ *Hit Man* contains no such political or social discourse.⁹⁶ The district court noted, "It is simply not acceptable to a free and democratic society to limit and restrict creativity in order to avoid dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals."⁹⁷

In a case that so many have described as a test of the First Amendment,⁹⁸ the legal profession might do well to recall the historical founda-

⁹⁴ See, e.g., *Herceg*, 814 F.2d at 1023.

But the parties' and, apparently, the district court's effort to apply the *Brandenburg* analysis to the type of "incitement" with which Hustler was charged appears inappropriate. Incitement cases usually concern a state effort to punish the arousal of a crowd to commit a criminal action. The root of incitement theory appears to have been grounded in concern over crowd behavior. As John Stuart Mill stated in his dissertation, *On Liberty*, "An opinion that corn-dealers are starvers of the poor, or that private property is robbery ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of the corn-dealer." In *Noto v. United States*, [367 U.S. 290, 297-98 (1961)], the Supreme Court expressed similar views about incitement: "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." Whether written material might ever be found to create culpable incitement unprotected by the [F]irst [A]mendment is, however, a question that we do not now reach.

Id. (citations omitted).

⁹⁵ Plaintiffs' Opposition, *supra* note 16, at 22 (citing *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning to protest Republican Party policies); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (civil rights boycott); *Hess v. Indiana*, 414 U.S. 105 (1973) (Vietnam protest); *Cohen v. California*, 403 U.S. 15 (1971) (vulgar anti-draft message); *Brandenburg v. Ohio*, 395 U.S. 705 (1969) (racist and anti-Semitic propaganda); *Bond v. Floyd*, 385 U.S. 116 (1966) (Vietnam protest); *Dennis v. United States*, 341 U.S. 494 (1951) (communist party materials); *Herndon v. Lowry*, 301 U.S. 242 (1937) (civil rights and communist party materials); *Whitney v. California*, 274 U.S. 357 (1927) (communist labor party convention); *Abrams v. United States*, 250 U.S. 616 (1919) (World War I protest); *Schenck v. United States*, 249 U.S. 47 (1919) (World War I protest)).

⁹⁶ "It is *instruction*, pure and simple, in the dark arts of mercenary murder." *Id.* at 23.

⁹⁷ *Rice*, 940 F. Supp. at 848 (citing *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1072 (Mass. 1989); *McCollum v. CBS*, 249 Cal. Rptr. 187 (Ct. App. 1988)).

⁹⁸ "Paladin is putting the First Amendment unnecessarily at risk in order to save the expense of a jury trial," said Arthur Spitzer, an attorney with the national office of the ACLU, based in Washington, D.C." Catherine M. Brennan, *'How-To' Murder Manual*

tion for that Amendment and its applicability—or inapplicability—to *Rice*:

The bedrock principle animating the First Amendment is that the government may not censor speech on the basis of viewpoint. In this case, however, Plaintiffs seek no censorship on the basis of viewpoint. Plaintiffs do not invite a jury to punish the Defendants because their speech is revolting, disgusting, or morally repugnant. This is not an offensive speech case; not an advocacy of unpopular ideas case. This is a case about tort liability for aiding and abetting murder. The gravamen of the Plaintiffs' cause of action is not a reader's intellectual or emotional disgust at the evil of the Defendants [sic] publication. This suit is not about taking sides in the marketplace of ideas; indeed, it is not about *ideas* at all. This suit is about recompense for physical injury and death, substantially caused by the dissemination of Defendants' instruction manual for murder, a manual that was used in this case precisely as the words in the book itself instructed that it should be used. Defendants are free to publish *Hit Man*. They are not free to escape compensation for the injury they knowingly and recklessly aided and abetted.⁹⁹

The district court concluded that, "although morally repugnant, [*Hit Man*] does not constitute incitement or 'a call to action.'"¹⁰⁰ The district court further concluded that *Brandenburg* is the appropriate legal test for *Hit Man* because the book "involves speech which advocates or teaches lawless activity, in this case murder."¹⁰¹

Advocacy was central to the holding of *Brandenburg*,¹⁰² and therefore

Case Tests First Amendment Limits: Paladin Press Gambles That 'Hit Man' Is Protected Even If It's Aimed at Would-Be Killers, But Free-Speech Backers Say That's a Risky Line, DAILY REC. (Baltimore), July 24, 1996, at 7, available in LEXIS, News Library, DLYREC File. "[I]t sounds like a law school exam that . . . tests the boundaries of the First Amendment," said Floyd Abrams. Montgomery, *supra* note 5, at B1.

⁹⁹ Plaintiffs' Opposition, *supra* note 16, at 23 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)).

¹⁰⁰ *Rice*, 940 F. Supp. at 847 (quoting *Zamora v. CBS*, 480 F. Supp. 199, 204 (S.D. Fla. 1979)).

¹⁰¹ *Id.* at 845.

¹⁰² The criminal statute at issue proscribed "'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' . . . and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.'" *Brandenburg*, 395 U.S. at 444-45 (quoting OHIO REV. CODE ANN. § 2923.13 (Anderson 1969)). The Court held that

deserves particularly close analysis. First, the district court in *Rice* reasoned that *Hit Man* did "not cross that line between permissible advocacy and impermissible incitation to crime or violence."¹⁰³ To draw such a conclusion, the district court began with the presumption that *Hit Man* was permissible advocacy.¹⁰⁴ To the contrary, *Hit Man* is not advocacy at all—permissible or otherwise.

The district court stated, "Advocacy is defined as mere abstract teaching,"¹⁰⁵ and thus the court misunderstood the fundamental message of *Brandenburg*. The Court in *Brandenburg* quoted *Noto v. United States*¹⁰⁶ for the proposition that "'mere abstract teaching. . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.'"¹⁰⁷ The district court in *Rice* stated that *Hit Man* "merely teaches what must be done to implement a professional hit."¹⁰⁸ This, however, is not the "abstract teaching of the moral propriety or even moral necessity for a resort to force and violence."¹⁰⁹ Indeed, it emphatically is not the advocacy addressed and defined by the Court in *Brandenburg*.¹¹⁰ Again, the district court fumbled with basic legal vocabulary—this time with language clearly set forth in *Brandenburg*. In *Brandenburg*, the Court specifically defined the type of advocacy not to be proscribed, and that advocacy was not simply "mere abstract teaching,"¹¹¹ as the district court erroneously concluded.¹¹²

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

Id. at 447.

¹⁰³ *Rice*, 940 F. Supp. at 847 (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976)).

¹⁰⁴ "Nothing in the book says, 'go out and commit murder now!' Instead, the book seems to say, in so many words, 'if you want to be a hit man this is what you need to do.' This is advocacy, not incitement." *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ 367 U.S. 290 (1961).

¹⁰⁷ *Brandenburg*, 395 U.S. at 448 (quoting *Noto*, 367 U.S. at 297-98) (emphasis added).

¹⁰⁸ *Rice*, 940 F. Supp. at 847.

¹⁰⁹ *Brandenburg*, 395 U.S. at 448 (quoting *Noto*, 367 U.S. at 297-98).

¹¹⁰

Hit Man's detailed, concrete instructions and adjurations to murder stand in stark contrast to the vague, rhetorical threats of politically or socially motivated violence that have historically been considered part and parcel of the impassioned criticism of laws, policies, and government indispensable in a free society and rightly protected under *Brandenburg*.

Rice, 128 F.3d at 262.

¹¹¹ *Rice*, 940 F. Supp. at 847.

¹¹² Additionally, the district court failed to discuss what made *Hit Man* so "abstract"

Because *Brandenburg* advocacy is not "mere teaching," and *Hit Man* is mere teaching, *Hit Man* is not *Brandenburg* advocacy. It is for this reason that *Hit Man* cannot "cross the line" between permissible *Brandenburg* advocacy and impermissible incitation. *Hit Man* cannot cross this finish line because it cannot begin at the appropriate starting point.

IV. THE ISSUE OF RESPONSIBLE SPEECH

Concerns over holding the publisher of *Hit Man* liable for foreseeable harm to three innocent people spring from a fundamental concern that such a decision would implicate not only this publisher's free speech interest, but also that of a host of authors, movie makers, and other artists. In short, there is a concern that artistic expression will be reined in by state action banning any expression that the state may deem undesirable or unpopular. One may ask, however, whether holding the publisher of *Hit Man* liable in this instance would really endanger such rights in light of the historic purposes undergirding the First Amendment.¹¹³

Sir William Blackstone wrote:

The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matters when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity¹¹⁴

in its teaching. As the Fourth Circuit noted, "[a]ny argument that *Hit Man* is abstract advocacy entitling the book, and therefore Paladin, to heightened First Amendment protection under *Brandenburg* is, on its face, untenable." *Rice*, 128 F.3d at 255. "Indeed, one finds in *Hit Man* little, if anything, even remotely characterizable as the abstract criticism that *Brandenburg* jealously protects." *Id.* at 262.

¹¹³ Three dominant theories have emerged in the free speech tradition: (1) The Marketplace Theory: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); (2) The Free Expression and Human Dignity Theory: "The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression," *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring); (3) The Democratic Self-Governance Theory: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of government affairs," *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). SMOLLA, *supra* note 3, at 6-17.

¹¹⁴ *Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F. Supp. 1397, 1402 (W.D.

Although the plaintiffs in *Rice* did not seek a prior ban on the speech contained in *Hit Man*, some legal scholars have articulated support for such an idea.¹¹⁵ The plaintiffs, however, merely sought compensation in tort for the damage facilitated by the speech contained in *Hit Man*.

V. THE COPYCAT CASES

The concern over a potential chilling of artistic expression as the result of *Rice* is fundamentally flawed. This concern harkens back to the copycat,

Ark. 1987). Judge Franklin Waters noted:

It does no violence to the value of freedom of speech and press to impose a duty of reasonable care upon those who would exercise such freedoms; the states have a substantial interest in encouraging speakers to carefully seek the truth before they communicate, as well as in compensating persons actually harmed by false descriptions of their personal behavior. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself.

Id. at 1400 (quoting 16A AM. JUR. 2D *Constitutional Law* § 506, at 344 (1979)). *Norwood* held Soldier of Fortune Magazine, Inc., liable for printing a gun-for-hire advertisement that led to the attempted murder of the plaintiff.

¹¹⁵ For those who remain uncomfortable with holding liable a publisher of such a book as *Hit Man*, consider one legal scholar's theory:

An arch legal principle holds persons civilly liable for the criminal conduct of others in a variety of circumstances. Landlords are responsible for failing to undertake safety measures to protect tenants from crime that might reasonably be anticipated. Gun dealers are similarly liable for sale to customers who they had reason to believe would use the firearms in crime. Bar owners are open to liability for alcohol sales to intoxicants who subsequently commit highway mayhem in violation of DWI prohibitions.

The theory behind these liability rules is sound and simple: Citizens and businesses are obliged to act reasonably to avoid assisting or facilitating crimes that might be reasonably anticipated. The reasonableness standard may dictate either preventive action against crime or a refusal to deal with probable criminals in ways that might advance their malevolent designs. As applied to Paladin Press, the theory makes a persuasive case for liability.

... Paladin Press might reasonably have expected its manual to be purchased and followed by a contract murderer like James Perry. In such circumstances, like a gun dealer or bar owner, the law should saddle it with a duty to desist from publication. That is a reasonable demand that society may require in the hopes of reducing criminal conduct.

....
Drawing sensible lines is the hallmark of enlightened law. The First Amendment is no exception. Experience discredits the ideas that to ban *Hit Man: A Technical Manual for Independent Contractors*, is but a step away from banning the Lincoln-Douglas debates.

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

or imitative harm, cases discussed previously.¹¹⁶ One crucial distinction, however, exists between these cases and *Rice*—a distinction that is central to the principles advanced in *Rice*. In each of the copycat cases, material presented for artistic, entertainment, or educational purposes depicted activities that were dangerous or violent. None of the publishers or broadcasters involved in these cases expressed any intent that the activity depicted should be emulated. In fact, in the case most closely analogous to the fact pattern of *Rice*,¹¹⁷ the magazine article at issue contained an express editorial warning.¹¹⁸ Thus, “[t]he crucial distinction between the copycat cases and [*Rice*] is the distinction between *misuse* of someone else’s ideas or information, and *use exactly as intended*—in this case, use to commit murder.”¹¹⁹ The court in *Herceg v. Hustler Magazine, Inc.* stated, “[T]he explicit meaning of the words employed, attempts to dissuade its readers from conducting the dangerous activity it describes.”¹²⁰

The above discussion raises serious questions. For example, do disclaimers or warnings serve as the definitive indication of an author’s or publisher’s intent for use of a publication? The district court in *Rice* demonstrated a heavy reliance on the disclaimers contained in *Hit Man*—although the court’s analysis of these disclaimers and their relevance to the likelihood determination was arguably misguided, as previously discussed.¹²¹

¹¹⁶ See *supra* note 39 and accompanying text.

¹¹⁷ The case is *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). *Herceg* involved a wrongful death action brought by the mother of a teenaged boy who had attempted a practice called auto-erotic asphyxia, as described in a magazine article. “The practice entails masturbation while ‘hanging’ oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm.” *Id.* at 1018.

¹¹⁸ See *id.* “Hustler emphasizes the often-fatal dangers of the practice of ‘auto-erotic asphyxia,’ and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose.” *Id.* (quoting the magazine’s editorial warning).

¹¹⁹ Brief of Appellants at 40, *Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997) (No. 96-2412). Appellants continued:

In cases in which violent behavior is merely displayed or depicted for dramatic purposes, the publisher will always, by definition, have as its purpose a value related to public discourse, thus rendering the speech presumptively protected by the First Amendment, and simultaneously rendering any attempt to hold the publisher liable problematic. When the manifest intent of the publisher is to train and equip individuals for illegal activity, however, the harm that comes is not from imitative behavior . . . it is rather behavior that the publisher expects and intends some number of its readers to engage in.

Id. at 42.

¹²⁰ *Herceg*, 814 F.2d at 1024.

¹²¹ See *supra* Part II.C.

While a phrase such as "This book is not meant to be taken seriously," or "Do not attempt the illegal activity discussed in this book" could easily have been included in the text of *Hit Man*'s "disclaimers," no such language appears. Paladin stressed the existence of these disclaimers in its defense, but did not invite the court to examine the language of the disclaimers with a view toward likening them to the disclaimers included in other cases cited by it—most notably, the copycat cases. This is understandable, of course, in light of the fact that Paladin's disclaimers were not as similar as it would have liked for the court or the public to have believed. Nonetheless, even the district court appears not to have read the disclaimers closely enough to have noticed the curious dissimilarity to other case law, relevant to *Rice* precisely because of this distinction.¹²²

VI. *BRANDENBURG* INCITEMENT REVISITED

The district court wrote of *Hit Man*: "Nothing in the book says 'go out and commit murder now!' Instead, the book seems to say, in so many words, 'if you want to be a hit man this is what you need to do.' This is advocacy, not incitement. Advocacy is defined as mere abstract teaching."¹²³ The Court in *Noto v. United States*, a case relied upon by the Court in *Brandenburg*, wrote that "mere abstract teaching of . . . the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."¹²⁴

The distinction made by the Court in *Noto* is important for two reasons. First, the Court's *exclusion* of "preparing a group for violent action and steeling it to such action"¹²⁵ from the definition of abstract teaching, or "advocacy," contradicts the district court's definition of advocacy. The district court in *Rice* determined that the language in *Hit Man*, language that on its face prepares individuals for violent action and steels them to such action—exactly as Paladin had stipulated it intended the book to function—is "advocacy." This interpretation is in direct contradiction of the *Noto* definition of advocacy, and thus the *Brandenburg* definition as well. Perhaps if *Hit Man* were to have ended at the close of the preface, it could be viewed as mere abstract teaching of the moral propriety of a resort to violence, but it does not end there. The book proceeds to prepare the reader for violent action.¹²⁶ It is the difference between saying, "Yes, sometimes 'personal'

¹²² For disclaimers in their entirety, see *supra* text accompanying notes 18, 22-23.

¹²³ *Rice*, 940 F. Supp. at 847 (citing *Brandenburg*, 395 U.S. at 448).

¹²⁴ 367 U.S. 290, 297-98 (1961).

¹²⁵ *Id.*

¹²⁶ Even the preface reads, "Within the pages of this book *you will learn* one of the most successful methods of operation used by an independent contractor. *You will fol-*

justice¹²⁷ requires that we take the law into our own hands,” and saying, “Yes, sometimes ‘personal’ justice requires that we take the law into our own hands, and here is exactly how to do it.” *Hit Man* does not advocate the mere abstract idea of the moral necessity of a resort to violent action;¹²⁸ it instructs and prepares the reader to engage in that action. Contrary to the district court’s perfunctory reading of the Supreme Court’s interpretation of the term, *Hit Man* is not advocacy.

Second, and more importantly, the Court in *Brandenburg* relied on a consideration of mere abstract teaching “of the moral propriety or even moral necessity for a resort to force and violence,”¹²⁹ as distinguished from “preparing a group for violent action and steeling it to such action.”¹³⁰ This is an idea developed in the strict context of a group assembly, and the Court’s definition simply cannot be divorced from the context in which it was developed.

CONCLUSION

It has been said that the publication of *Hit Man* did not cause the murders of Mildred Horn, Trevor Horn, and Janice Saunders. It also has been said that *Hit Man* did not incite James Perry to murder, in part because Perry—and people like him—are predisposed to committing murder prior to obtaining *Hit Man*. The latter assertion seems only to reinforce the fact that Paladin not only “knew, and in that sense intended”¹³¹ that the book be used by criminals in effectuating the crime of murder for hire, but also that Paladin intended that the book be used by this intended audience to put an already existent plan into action. As for the assertion that the publication of *Hit Man* did not cause the murders of three people, consider the words of

low the procedures of a man who works alone [Y]ou will be taken from research to equipment selection to job preparation to successful job completion.” FERAL, *supra* note 18, at x (emphasis added).

¹²⁷ *Id.* at ix.

¹²⁸ “It’s not like people who prosecute flag burners or the Nazis or the Ku Klux Klan, who wish to bar information because they disagree with their message. . . . [T]here is no message [in *Hit Man*] other than informational training on the art of being a gun for hire. And that is not the kind of information that even triggers First Amendment protection.” Karen Bowers, *Death Sentences: A Gruesome Triple Murder Puts a Boulder Publisher and Its How-To-Kill Book in the Crosshairs*, DENV. WESTWORD, Mar. 21, 1996, Features, available in LEXIS, News Library, DNVWST File (quoting Rodney A. Smolla, professor of law and First Amendment scholar).

¹²⁹ *Noto*, 367 U.S. at 298.

¹³⁰ *Id.*

¹³¹ Reply Memorandum, *supra* note 34, at 14.

Justice Eagen, dissenting in the Pennsylvania case of *Commonwealth v. Root*:¹³²

"It is a rule of both reason and the law that whenever one's will contributes to impel a physical force, whether another's, his own, or a combined force, proceeding from whatever different sources, he is responsible for the result, the same as though his hand, unaided, had produced it."

But, says the majority opinion, these are principles of tort law and should not in these days be applied to the criminal law. But such has been the case since the time of Blackstone. These same principles have always been germane to both crimes and tort.

... It is the people of the Commonwealth who are harmed by the kind of conduct the defendant pursued. Their interests must be kept in mind.¹³³

The wisdom of translating the treatment of a type of speech aimed at a crowd into the context of a book aimed at individuals remains questionable, and no court thus far has resolved it. The difficulties inherent in forcing the speech in *Hit Man* into an analysis not framed to consider its special distinguishing characteristics must be recognized.¹³⁴ Indeed, "the publication of works that brazenly seek and foreseeably cause the slaughter of innocents" was a "danger that seemed remote at the time of *Brandenburg* but now seems very real."¹³⁵

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¹³² 170 A.2d 310 (Pa. 1961).

¹³³ *Id.* at 318 (Eagen, J. dissenting) (quoting 2 BISHOP, NEW CRIMINAL LAW § 424 (1913)) (citations omitted).

¹³⁴

Because free speech issues arise in an extraordinarily wide range of circumstances and settings, the Supreme Court has not attempted to jam all free speech analysis into the "incitement" standard of *Brandenburg*, but rather uses *Brandenburg*-style analysis only in cases dealing with *Brandenburg*-style settings—namely speech on issues of social or political concern, usually in the context of demonstrations and rallies, in which authorities are concerned that matters are about to erupt into violence. In the myriad of other areas outside of this context, the Supreme Court has developed specialized First Amendment doctrines suited to the context at hand—tests that do not mention or require "imminence" as used in *Brandenburg*. Plaintiffs' Opposition, *supra* note 16, at 24.

¹³⁵ Taylor, *supra* note 5, at 22.