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Comments: Rice v. Paladin: The Fourth Circuit's Unnecessary Limiting of a Publisher's Freedom of Speech

Elise M. Balkin
University of Baltimore School of Law

RICE v. PALADIN: THE FOURTH CIRCUIT'S UNNECESSARY LIMITING OF A PUBLISHER'S FREEDOM OF SPEECH

I. INTRODUCTION

On April 20, 1999, Eric Harris and Dylan Klebold entered Columbine High School in Littleton, Colorado and killed twelve fellow students and a teacher; wounded several others; then turned their guns on themselves, committing suicide.[1] These two had an arsenal of weapons, including at least one hundred homemade bombs,[2] seventy-six of which they planted in the high school.[3] Thirty of the seventy-six bombs detonated.[4]

Harris and Klebold obtained instructions to make many of these explosives from the Internet.[5] One of the perpetrators, Eric Harris, published pipe-bomb assembly instructions on his personal Web page, which also featured links to other, similar websites.[6]

Publications providing instructions on how to perform criminal acts have been available to Americans for many years.[7] A 1997 Department of Justice (DOJ) report revealed that publications providing bomb-making instructions are "readily available to any member of the public interested in reading them and copying their con-

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1. *See* Angie Cannon et al., *Why?*, U.S. NEWS & WORLD REPORT, May 3, 1999, at 16-17.
2. *See id.*
3. *See* Gary Massaro et al., *Report Sheds Light on Tragedy Swat Team Found Saunders Alive, But Paramedics Arrived Too Late,* DENVER ROCKY MTN. NEWS, May 15, 2000, at 4A. The teenagers left the remaining thirteen bombs in their cars parked outside of the school. *See id.*
4. *See id.*
5. *See* Kevin McCoy, *Internet Targeted in Probe,* N.Y. DAILY NEWS, Apr. 22, 1999, at 34.
6. *See id.* "Harris . . . apparently bragged about the ease of building pipe bombs in a file on his America Online Web site . . . ." *Id.* "The site included instructions on attaching shrapnel to a bomb, as well as the type and amount of explosive powder needed." *Id.*
7. *See also* REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS (Paladin Press) (1983) (killing for hire); J. FLORES, HOW TO MAKE A DISPOSABLE SILENCER, (VOL. II): A COMPLETE ILLUSTRATED GUIDE (Paladin Press) (1983) (crafting a disposable silencer); WILLIAM L. PIERCE, THE TURNER DIARIES (Barricade Books) (1978) (creating a bomb).

tents."[8] With a few strokes on a computer keyboard, one can have such a publication almost instantaneously.[9] In the 1997 report, the DOJ stated:

> It is readily apparent from our cursory examination that anyone interested in manufacturing a bomb, dangerous weapon or weapon of mass destruction can easily obtain de-

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8. U.S. DEPT. 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 OF THE UNITED STATES CONSTITUTION, April, 1997, at 5, *available at* <http://www.derechos.org/human-rights/speech/bomb.html#pubavail> [hereinafter BOMB MAKING]. A member of the DOJ Committee found titles to over 110 different bomb-making texts listed on a website, such as "HOW TO MAKE A CO2 BOMB," "JUG BOMB," "CHERRY BOMB," "MAIL GRENADE," "CALCIUM CARBIDE BOMB," and "CHEMICAL FIRE BOTTLE." These titles could be readily printed or copied. *See id.* at 7. *See also,* Gerald Mizejewski, *21 Pipe Bombs Found in Boy's Toy Box Detonation Prompted Search of Apartment,* Sept. 6, 2000 WASH. TIMES (D.C.) at C1, *available at* 2000 WL 4164186 (quoting A.T.F. Agent Mike Campbell: "With the advent of the Internet and published books [about bombs], the instructions are readily available . . . [and] not difficult devices to construct and make work"); Amitai Etzioni, *Is Information on How to Make a Bomb More Harmful than Porn?,* CHICAGO TRIBUNE, Aug. 24, 1995 at 31 (discussing numerous how-to crime books available by mail order including: BE YOUR OWN UNDERTAKER: HOW TO DISPOSE OF A DEAD BODY, DEADLY BREW: ADVANCED IMPROVISED EXPLOSIVES, THE ANCIENT ART OF STRANGULATION, THE POOR MAN'S SNIPER RIFLE, 21 TECHNIQUES OF SILENT KILLING, THE HOME AND RECREATIONAL USE OF HIGH EXPLOSIVES, KILL WITHOUT JOY: THE COMPLETE HOW-TO-KILL BOOK, GUERRILLA'S ARSENAL: ADVANCED TECHNIQUES FOR MAKING EXPLOSIVES AND TIME-DELAY BOMBS, ULTIMATE SNIPER, THE BIG BOOK OF MISCHIEF, SILENT BUT DEADLY: MORE HOMEMADE SILENCERS FROM HAYDUKE THE MASTER, HOW TO BUILD PRACTICAL FIREARM SUPPRESSORS: AN ILLUSTRATED STEP-BY-STEP GUIDE, and THE TERRORIST HANDBOOK); WILLIAM L. PIERCE, THE TURNER DIARIES (Barricade Books 1978). *The Turner Diaries,* written by the leader of the National Alliance, a white supremacist group in West Virginia, and another "how to" book published by Paladin was found in Timothy McVeigh's possession when he was arrested for the April 19, 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. *See* Doreen Carvajal, *Group Tries to Halt Selling of Racist Novel,* N.Y. TIMES, Apr. 20, 1996, § 1, at 8.

9. *See* Carvajal, *supra* note 8, § 1, at 8; *see also* http://www.totse.com/files/FA031/draino.htm (visited Sept. 26, 2000) (draino bomb); http://www.totse.com/files/FA031/pipebomb.htm (visited Sept. 26, 2000) (pipe bomb); http://members.aol.com/eukaryote/SciHumor/bomb.html (visited Sept. 26, 2000) (atomic bomb); *see* Cheryl White, *My Son Built a Bomb,* LADIES HOME J., Mar. 1, 1997, at 36 (discussing a son's injuries resulting from attempting to detonate a bomb built from information obtained from the Internet).

> tailed instructions for fabricating and using such a device. Available sources include not only publications from the so-called underground press but also manuals written for legitimate purposes, such as military, agricultural, industrial and engineering purposes. Such information is also readily available to anyone with access to a home computer equipped with a modem.[10]

There is little doubt that, had Harris and Klebold not taken their own lives, they would, at a minimum, have been incarcerated for life; however, some believe that the publishers of these how-to materials are partially responsible for the teenagers' actions.[11] Would this tragedy been avoided had these instructions not been available?

The events at Columbine High School provoke consideration of whether, by publishing information on how to commit a crime, the publisher becomes criminally responsible for assisting a reader who uses that information to commit a crime. However, to impose criminal responsibility without proper consideration to the protections afforded by the United States Constitution eviscerates both the protections necessary to maintain a free society, and the personal responsibility of the actual offenders. Some believe this information is not protected by the First Amendment because publishers are assisting in criminal conduct.[12] Others believe such a publication is

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10. *Id.* at 9.
11. Lonn Weissblum, Comment, *Incitement to Violence on the World Wide Web: Can Publishers Seek First Amendment Refuge?*, 6 MICH. TELECOMM. & TECH. L. REV. 35, 57-58 (2000).
12. *See* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 102 (1994) ("Nowadays the First Amendment is the First Refuge of Scoundrels" (quoting S. Johnson & S. Fish)); S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1168 (2000) ("The contemporary First Amendment speech categories do not address adequately the social costs associated with speech intended to facilitate antisocial behavior."); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 7 (1986) ("[T]he suggestion that the first amendment ties our hands in dealing with . . . revolutionaries . . . is an unintended intimation of that most frightening of constitutional conceptions: the Constitution as a suicide pact."). *Accord* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-52 (1985) (arguing that context is an important element of contemporary First Amendment analysis); Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1424, 1438 (1995) (positing that consideration of context is essential to

protected by the First Amendment and should be scrutinized to determine whether there is a direct government interest advanced in suppressing the publication, and whether that interest is legitimate, substantial, or compelling enough to justify its suppression.[13]

The First Amendment of the Constitution affords United States residents the rights to speak and print free of government prohibition.[14] Although the right to free speech in the United States is well-established, this freedom risks encroachment based on the notion that harmful ideas and words result in harmful acts.[15]

In the landmark case of *Brandenburg v. Ohio*,[16] the Supreme Court developed a test to separate political speech and abstract advocacy, both protected by the First Amendment, from speech advocating illegal conduct, which is unprotected by the First Amendment.[17] Many cases involving media publications that reportedly incite illegal and harmful acts have been scrutinized under the *Brandenburg* doctrine.[18] Although this test does not always provide defendants with the most desirable outcome, the application of the test, alone, signifies the First Amendment protection and recognition of publication as a form of speech.

In recent years, most courts have ruled that "how-to" publications, similar to the bomb-making materials Harris and Klebold accessed, are not entitled to First Amendment scrutiny, failing to recognize them as a protected form of speech.[19] Most of these cases

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proper application of the First Amendment properly); *see also* DEPARTMENT OF JUSTICE, BOMB MAKING 26 (1997) *available at* <http://www.usdog.gov/criminal/cybercrime/bombmakinginfo.html> ("[W]here it is foreseeable that the publication will be used for criminal purposes . . . the Brandenburg requirement that the facilitated crime be imminent should be of little, if any, relevance.").

13. Ann K. Wooster, Annotation, *Protection of Commercial Speech Under First Amendment-Supreme Court Cases*, 164 A.L.R. FED. 1, § 14-16 (2000).

14. *See infra* note 26 and accompanying text for the language of the First Amendment.

15. *See* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322 (1992) ("[E]xisting understandings of the First Amendment presuppose that legal toleration of speech-related harm is the currency with which we as a society pay for First Amendment protection."); *see also infra* Part V.

16. 395 U.S. 444.

17. *See Brandenburg*, 395 U.S. at 447; *infra* Part II.E for a thorough discussion of *Brandenburg v. Ohio*.

18. *See infra* notes 118-27 and accompanying text, Part III.

19. *Compare* Rice v. Paladin Enters., Inc., 128 F.3d 233 (4th Cir. 1997) (holding First Amendment does not apply to book providing explicit instructions to commit murder); 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 car-

preclude using the First Amendment as a defense to those who provide instructions on how to accomplish a crime, holding that, although information relaying illegal instructions is a form of speech, it is not protected by the First Amendment because it assists in committing a crime.[20]

Recently, in *Rice v. Paladin Enters., Inc.*[21] the United States Court of Appeals for the Fourth Circuit held that the First Amendment posed no bar to imposing civil liability against the publisher, after the defendant, James Perry, was contracted to murder three individuals after reading murder for hire how-to books.[22] The court refused to recognize the content of the books as a protected form of speech, afforded the publisher no First Amendment protection, and found that the publisher may be civilly liable for aiding and abetting the murders by publishing the books.[23]

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ried out through speech is no bar to its illegality."); United States v. Rowlee, 899 F.2d 1275 (2d Cir. 1990) (finding no First Amendment issue for defendant instructor who sold tax forms to justify fraudulent claims and provided tax advice for all of the members on how to evade taxes); United States v. Mendelsohn, 896 F.2d 1183, 1185 (9th Cir. 1990) (precluding First Amendment defense where speech in computer software instructions is closely intertwined with a criminal act); United States v. Barnett, 667 F.2d 835 (9th Cir. 1982) (convicting defendant for aiding and abetting individuals in manufacture of phencyclidine (PCP) after defendant provided instructions in *High Times* magazine); 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.") *with* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (ruling for defendant after applying the *Brandenburg* test where young boy followed instructions for auto-erotic asphyxia and consequently suffocated despite publisher's explicit and numerous warnings).

20. *See Rice,* 128 F.3d at 248 ("[T]he First Amendment poses no bar to the imposition of civil (or criminal) liability for speech acts which the plaintiff (or the prosecution) can establish were undertaken with specific, if not criminal, intent.") (citations omitted); *Rowlee,* 899 F.2d at 1278, 1280 ("Having undertaken to charge on the First Amendment, the district court correctly instructed the jury that, if the defendants [conspired to defraud the IRS] . . . the First Amendment afforded no defense.").
21. 128 F.3d 233 (4th Cir. 1997).
22. *See id.* at 242. The books were HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS (Paladin Press) (1983) (hereinafter "HIT MAN") and HOW TO MAKE A DISPOSABLE SILENCER, (VOL. II): A COMPLETE ILLUSTRATED GUIDE (hereinafter "DISPOSABLE SILENCER"). *See id.* at 238 (HIT MAN), 241 (DISPOSABLE SILENCER).
23. *See id.* at 267. The Fourth Circuit's holding was reinforced when the Supreme Court denied certiorari to hear the case. *See* Rice v. Paladin Enters., Inc., 523 U.S. 1074 (1998). See also *infra* Part IV for a complete discussion of Rice v. Paladin Enters., Inc.

Although the outcome may have be the same, the *Brandenburg* doctrine should have been applied to the *Rice* case.[24] By refusing to provide the publisher of *Hit Man: A Technical Manual for Independent Contractors* with First Amendment protection, publishers must now be concerned with the possible effect and liability of the content of texts submitted for publication.[25]

II. THE FIRST AMENDMENT

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."[26] This right is firmly entrenched into our system of government.[27] Some consider it the most valuable freedom, as Justice Holmes illustrated:

> [W]hen men have realized that time has upset many a fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the 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

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24. See *infra* Part II.E, IV & V exploring the *Brandenburg* doctrine, its rationale, application and purpose; the speech act doctrine, its rationale for this First Amendment exception; and why the doctrine should be applied to cases such as *Rice*.

25. See *infra* Part V discussing *Rice v. Paladin* and its implications for the future.

26. U.S. CONST. amend. I.

27. Since the early days of the American Revolution, individual parties and the courts have shaped First Amendment legal analysis. For example, Thomas "Jefferson once remarked that he did not care whether his neighbor said that there are twenty gods or no God, because 'it neither picks my pocket nor breaks my leg.'" Leonard Levy, *Liberty and the First Amendment: 1790-1800*, 68 AM. HIST. REV. 22, 22 (1962). Likewise;

> In 1789 William Cushing, the Chief Justice of Massachusetts, wrote a long letter to John Adams discussing the press clause in the Massachusetts Constitution. Cushing asserted the importance of a free press to good government and stressed the crucial role the American press played in resisting British authority and supporting the Revolution. He claimed that the clause covered subsequent as well as previous restraints, and . . . advocated truth as a defense against prosecutions for seditious libel. Adams, who had drafted this clause, essentially agreed with Cushing.

David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 812 (1985).

> market, and the truth is the only ground upon which their wishes can safely be carried out.[28]

This "market place of ideas" philosophy is founded upon the notions that all ideas are worth advocating in the market place of free speech, and that faith in the idea is truly tested within this market place.[29]

The boundaries of this marketplace continue to be defined through judicial determinations.[30] Such boundaries occurred with the Supreme Court's recognition of the government's interest in protecting people. The Court established five categories of speech that are not afforded First Amendment protection, namely: (1) obscenity,[31] (2) fighting words,[32] (3) libel,[33] (4) commercial speech,[34] and (5) words likely to incite imminent lawless action.[35]

A. *Obscenity*

The Supreme Court excluded the first category of unprotected speech, obscenity, in *Miller v. California*.[36] In *Miller*, the defendant was criminally charged under California law for conducting a mass

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28. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
29. *See* Edward J. Bloustein, *Criminal Attempts and the "Clear and Present Danger" Theory of the First Amendment*, 74 CORNELL L. REV. 1118, 1139-44 (1990); Christopher T. Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669, 669-72 (1986).
30. *Compare* Rice v. Paladin Enters., Inc., 940 F. Supp. 836 (D. Md. 1996) *with* Rice v. Paladin Enters., Inc., 128 F.3d 233 (4th Cir. 1997).
31. *See generally* Miller v. California, 413 U.S. 15, 24 (1973).
32. *See generally* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
33. *See generally* New York Times Co. v. Sullivan, 376 U.S. 254, 267 (1964).
34. *See generally* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).
35. *See generally* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). This Comment focuses on the fifth category—words that incite imminent lawless action, also known as the speech act. However, to appreciate this exception it is important to understand the first four unprotected areas of speech.
36. 413 U.S. 15, 36-37 (1973) (reaffirming Roth v. United States, 354 U.S. 476, 484-85 (1957)); *see also* Ward v. Illinois, 431 U.S. 767, 771-77 (1977) (finding an Illinois statute conforms with the test set fourth for obscenity and affirming defendant's conviction for selling sadomasochistic publications); Pendleton v. California, 423 U.S. 1068, 1068 (1976) (Brennan, J., dissenting) (urging the Court to analyze the allegedly obscene material under the second and third prongs of *Miller* before convicting the defendant); J-R Distribs., Inc. v. Washington, 418 U.S. 949, 949-53 (1974) (striking back at Justice Brennan's thirteen dissents to the Supreme Court's decisions to deny certiorari and balancing the right of consenting adults to obtain obscenity with the right of the states to prohibit the distribution of obscenity).

mailing of unsolicited brochures advertising adult books around the state.[37] These brochures depicted men and women engaged in sexually explicit activities.[38] Two individuals, offended by the brochures, brought the mailing to the police.[39] The appellant, Marvin Miller, argued that the California statute under which he was charged was overbroad and encroached on his freedom of expression.[40]

The Court struck a balance between the appellant's freedom of expression and the State's interest in protecting its residents from offensive, unsolicited materials[41] by creating parameters within which members of the community were to determine whether the brochure was obscene.[42] The Court enumerated the following guidelines:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[43]

If the material under consideration met these criteria, then it was obscene and lacked First Amendment protection.[44] The policy behind this exception to free speech was to protect children and unconsenting adults from exposure to vulgar material.[45]

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37. *See id.* at 16, 18.
38. *See id.* at 18.
39. *See id.*
40. *See id.* at 25.
41. *Compare id.* at 23-24 (discussing appellant's right to free expression) *with id.* at 18-19 (discussing the state's interests in regulating obscene material).
42. *See Miller*, 413 U.S. at 24. The Court remanded the case to be determined, consistent with the standard enumerated in its opinion. *See id.* at 37.
43. *Id.* at 24. For additional commentary about the Supreme Court's definition of obscenity and of community standards, see, e.g., Joseph T. Clark, *The "Community Standard" in the Trial of Obscenity Cases–A Mandate for Empirical Evidence in Search of the Truth*, 20 OHIO N.U. L. REV. 13, 14-16 (1993); Anne Salzman, *On the Offensive: Protecting Visual Art With Sexual Content Under the First Amendment and the "Less Valuable Speech" Label* 55 U. PITT. L. REV. 1215, 1229-43 (1994); Merle H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment* 66 TENN. L. REV. 597, 615-36 (1999).
44. *See Miller*, 413 U.S. at 23-24.
45. *Id.* at 27.

B. Fighting Words

The second category of unprotected speech, "fighting words," was created in *Chaplisky v. New Hampshire*.[46] The Supreme Court defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[47] This seminal case arose after a Jehovah's Witness standing near the entrance to a city hall building in Rochester, New York yelled: " '[y]ou are a God damned rackateer' and 'a damned facist and the whole government of Rochester are Fascists or agents of Fascists' " to an unnamed religious individual.[48]

The Court held that those words were not protected by the First Amendment given their propensity to incite others to react violently.[49] Elaborating, the Court explained that the effect of the words was not based on what the hearer thinks, but what "men of common intelligence would understand would be words likely to cause an average addressee to fight . . . ."[50] Because the appellant breached the peace and shouted fighting words, the First Amendment did not protect his speech, and the Court upheld his conviction.[51]

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46. 315 U.S. 568 (1942). The Court justified restraining orders for picketers outside abortion clinics because the picketer's speech constituted fighting words. *See* Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 374-85 (1997); Williams v. Planned Parenthood Shasta-Diablo, Inc., 520 U.S. 1133, 1135-39 (1997) (Scalia, J., dissenting).
47. *Chaplinsky*, 315 U.S. at 572. *See generally* Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?* 22 HARV. J.L. & PUB. POL'Y 959 (1999) (relating religious speech to speech that incites people to become enraged, and balancing religious speech as fighting words with the right to freedom of religion); J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295 (1999) (discussing the similarities between sexual harassment and fighting words).
48. *Chaplinsky*, 315 U.S. at 569.
49. *See id.*
50. *Id.* at 573.
51. *See id.* at 574. In affirming the conviction, the Court stated:

> Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations "damned racketeer" and "damned facist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

Id.

C. Libel

Libel, a publication made with actual malice[52] that is "injurious to the reputation of another,"[53] is the third category of unprotected speech.[54] In *New York Times v. Sullivan*,[55] the respondent, L.B. Sullivan, an elected commissioner in Montgomery, Alabama, sued the *New York Times* for printing libelous statements about him in a full-page advertisement.[56] Although never identified by name, Sullivan alleged that any reader would know he was being mocked in the advertisement given its contents and his position in the community.[57]

The New York Times sought refuge in the security of the First Amendment.[58] Addressing this argument, the Court stated: "libel can claim no talismanic immunity from constitutional limitations. It must be measured with standards that satisfy the First Amendment."[59] Considering the case in this light, the Court found that the nature of the advertisement—an "expression of grievance and protest on one of the major public issues of our time"[60]—"would seem to clearly qualify for the constitutional protection."[61] First Amendment protection did not depend on whether the statements made were true,[62] nor defamatory;[63] however, those statements made with actual malice—"knowledge that [the statements were] false or with reckless disregard of whether [they were] false or not"[64]—were not protected.[65] The Court found that although negligent, the newspaper did not act with actual malice; therefore, publication of the advertisement was protected.[66]

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52. *See Sullivan*, 376 U.S. at 279-80.
53. BLACK'S LAW DICTIONARY 915 (6th ed. 1990).
54. *See* New York Times v. Sullivan, 376 U.S. 254 (1964). For an overview and recent analysis of libel, see Robert D. Sack, *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy Under the First Amendment,"* 100 COLUM. L. REV. 294 (2000).
55. 376 U.S. 254 (1964).
56. *See id.* at 256.
57. *See id.* at 258.
58. *See Sullivan*, 376 U.S. at 269.
59. *See id.*
60. *See id.*
61. *See id.*
62. *See id.* at 271.
63. *See id.* at 273.
64. *See Sullivan*, 376 U.S. at 280.
65. *See id.*
66. *See id*; *see also* Milkovich v. Lorain Journal, 497 U.S. 1, 21-23 (1990) ("[W]here a statement of 'opinion' on a matter of public concern reasonably implies

D. Commercial Speech

The fourth category, commercial speech, speech that advertises a business purpose,[67] is afforded limited protection by the First Amendment because it is coercive and holds a "subordinate position in the scale of First Amendment values . . . ."[68] As such, the Supreme Court determined that the level of judicial scrutiny was lower in order to protect the public from it.[69] In *Ohralik v. Ohio State Bar Ass'n*,[70] the Supreme Court discussed the interplay between free

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false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth."); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 665-66 (1989) (explaining that where a public figure brings suit, the public figure must show actual malice under the *New York Times* standard for libel); Hustler Magazine v. Falwell, 485 U.S. 46, 48-57 (1988) (holding that a nationally known minister could not win a suit for libel against a magazine that parodied the minister without showing actual malice on the part of the magazine); Gertz v. Welch, 418 U.S. 323, 345-46 (1974) (determining actual malice includes consideration of the status of the individual being defamed as a public or private figure, resulting in imposition of liability on a newspaper publisher who printed false information that private individual was a communist); Hepps v. Philadelphia Newspapers, Inc., 485 A.2d 374, 387 (Pa. 1984) (establishing the burden on the appellant to prove the truth of defamatory statements does not violate the First Amendment). The New York Times' victory is also attributed to the overbreadth doctrine under which the Court declared the Alabama statute at issue in the case unconstitutional. *See Sullivan*, 376 U.S. at 291-92.

67. BLACK'S LAW DICTIONARY 271 (6th ed. 1990).

68. *See* Ohralik v. Ohio, 436 U.S. 447, 456-57 (1978) ("Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."). For a more complete discussion regarding commercial speech, see Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999).

69. *See Ohralik*, 436 U.S. at 457; *see also* Greater New Orleans Broad. Ass'n v. United States, 119 S. Ct. 1923, 1930-36 (1999) (determining whether a Federal Communications Commission regulation advances a government interest and can preclude certain commercial speech); Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 468-504 (discussing "whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve" and holding that the advertising program does not violate the First Amendment); Florida Bar v. Went for It, Inc., 515 U.S. 618, 623-35 (1995) (distinguishing between free speech and commercial speech, and holding that attorney advertising is not afforded unlimited freedom of speech).

70. 436 U.S. 447 (1978).

speech and the ability of the States to regulate commercial activity.[71] *Ohralik* originated after an attorney made repeated, in-person solicitations, attempting to represent two women injured in an automobile accident.[72] The appeal resulted from a state bar association determination that the attorney violated the rules of professional conduct, and subsequent discipline.[73] The attorney claimed that his activity was protected under the First Amendment.[74] Rejecting this argument, the Court held that the attorney's in-person solicitation was unprotected commercial speech that could be regulated by the State.[75] In its rationale, the Court stressed the need for a prophylactic regulation that would protect the public from unscrupulous professional conduct and distinguished a public advertisement from in-person solicitation.[76] The former, which is not coercive and leaves time for the recipient to act on his or her own, was protected under the First Amendment.[77] However, because the latter exerted pressure on an individual to make a decision without the proper information and an opportunity to weigh the circumstances, it was not protected.[78]

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71. *See id.* at 455-56.
72. *See id.* at 449-51.
73. *See id.* at 454.
74. *See id.* The First Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980); Whitney v. California, 274 U.S. 357, 361 (1927); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).
75. *See Ohralik*, 436 U.S. at 454.
76. *See id.* at 457, 468. Direct, in-person solicitation is also prohibited by the Maryland Rules of Professional Conduct, adopted in the Maryland Rules of Civil Procedure. *See* MD. RULE 16-812 (2000) (Incorporating Rule 7.3 of the Maryland Rules of Professional Conduct, which permits direct contact with prospective clients only when the prospective client: (1) is a close friend, relative, etc.; (2) under the auspice of a bona fide charitable legal organization; or (3) under the auspice of a bona fide political or similar organization whose mission includes recommending legal services related to the purpose of the organization); *see also* American Bar Ass'n, ANN. MOD. RULES PROF. COND., Rule 7.3 (1999) (prohibiting direct solicitation of prospective clients).
77. *See id.* at 457.
78. *See id.* The Court looked at "the immediacy of [the] particular communication and the imminence of harm [as] factors that made certain communications less protected than others." *Id.* at 457 n.13. (*comparing* Cohen v. California, 403 U.S. 15 (1971) *with* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Brandenburg v. Ohio, 395 U.S. 444 (1969) (laying the foundation for speech acts); Schenck v. United States, 249 U.S. 47 (1919) (finding the defendant guilty of violating the Espionage Act when he mailed leaflets to

In 1980, the Supreme Court, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[79] addressed commercial speech protection again, enumerating a four-part test.[80] In *Central Hudson*, the New York Public Service Commission, the regulatory arm of government for utilities in New York, classified advertising as either promotional or informative, then banned promotional advertising.[81] The plaintiffs brought suit alleging the regulation was unconstitutional because it violated their choice to advertise freely under the First Amendment.[82] However, the Court categorized the speech as commercial, which is not afforded absolute protection.[83]

The Court found that to regulate commercial speech, the government must "assert a substantial interest to be achieved by restrictions on commercial speech."[84] In addition, the government must demonstrate that the regulation was directly related to its purpose, and the regulation must be drawn narrowly.[85] To achieve these objectives, the Court enumerated a four-part test for commercial speech.[86]

First, the Court asked how valuable the need to advertise was to the company.[87] In *Central Hudson*, the corporation monopolized the market; therefore, although advertising was always important, this factor weighed low in the analysis.[88] Second, the Court looked at the state's interest.[89] Here, it concluded energy conservation was always important and was a valid state interest.[90] Third, the Court focused "on the relationship between the State's interests and the advertising ban."[91] The Court concluded this prong was weak because

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men, telling them to dodge the draft)).

79. 447 U.S. 557 (1980).

80. *Greater New Orleans Broadcasting Ass'n v. United States*, 119 S. Ct. 1923, 1930 (1999), discusses the four parts of the *Central Hudson* test. It explains that the four parts are interrelated and "not entirely discrete." *Id.*

81. *See Central Hudson*, 447 U.S. at 558-59.

82. *See id.*

83. *See id.* at 561.

84. *Id.* at 564.

85. *See id.* at 564-65. The Court is clear that the interest cannot be indirect; it must be a direct government interest. *See id.*

86. *See id.* at 566-71.

87. *See Central Hudson*, 447 U.S. at 566-68.

88. *See id.* at 567-68.

89. *See id.* at 568-69.

90. *See id.*

91. *Id.* at 569.

the link was speculative.[92] The final prong was "whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest in energy conservation."[93] Here, the Commission's regulation failed because, although the State had an important interest, it was not sufficient to justify suppressing all advertising.[94]

These cases are the cornerstone for First Amendment analysis of commercial speech. *Orahlik* redefined the interplay between protected speech and regulated, unprotected speech.[95] *Central Hudson* provided the framework to analyze commercial speech.[96]

E. Words Likely to Incite Imminent Lawless Action

The cases guiding the protection of the First Amendment:

> [H]ave fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[97]

There is a fine line between mere advocacy protected by the First Amendment, and advocacy directed at inciting imminent lawless action, which is devoid of First Amendment protection. In order to understand the current standard for distinguishing between the two types of advocacy, it is important to understand the seminal case of this area of speech, *Brandenburg v. Ohio*.[98]

In *Brandenburg*, the Supreme Court declared Ohio's Criminal Syndicalism Act unconstitutional.[99] This statute punished people who advocated violent political and industrial reform.[100] In that

92. *See id.*
93. *See Central Hudson*, 447 U.S. at 569-70.
94. *Id.*
95. *See supra* notes 70-78 and accompanying text.
96. See *supra* notes 84-94 and accompanying text for a discussion of the test enumerated in *Central Hudson*.
97. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
98. 395 U.S. 444 (1969).
99. *See id.* at 448.
100. *See id.* The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform;" or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to

case, a newspaper journalist filmed two meetings of the Klu Klux Klan (KKK), during which the appellant stated that continued "suppression" of the Caucasian race would lead the Klan to commit acts of "revengeance" against the President, Congress, and the Supreme Court.[101] Both films revealed KKK members yelling noxious statements about people of Jewish and African-American heritage, stating that the KKK should deport Jews to Israel and the African-Americans to Africa.[102] These films were used by the State to convict the appellant of violating Ohio's Criminal Syndicalism Act.[103]

The Supreme Court held the Act unconstitutional because it violated the First Amendment.[104] In its analysis, the Court revisited *Whitney v. California*,[105] where it upheld a California statute similar to the Ohio Act because "'advocating' violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it."[106] However, in *Brandenburg*, the Court articulated a new principle that "constitutional guarantees of free speech and free press do *not* permit a State to forbid or proscribe advocacy 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.*"[107] The Court stressed, "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."[108] Significantly, the Court distinguished the right to assemble and teach from the unprotected act of causing imminent danger to the safety

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exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism;" or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." *Id.*

101. *See id.* at 446.

102. *See id.* at 446-47.

103. *See id.* at 445.

104. *See id.* at 448. The Court stated:

> Accordingly, we are 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. Such a statute falls within the condemnation of the First and Fourteenth Amendments.

Id. at 449.

105. 274 U.S. 357 (1927).

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

107. *Id.* (emphasis added). The Court indicated that this principle was the result of a past decision that had discredited *Whitney*. *See id.* (citing Dennis v. U.S. 341 U.S. 494, 507 (1951)). The *Brandenburg* Court overruled *Whitney*. *See id.* at 449.

108. *Id.* at 448. (quoting Noto v. U.S., 367 U.S. 290, 297-98 (1961)).

of citizens.[109] Any statute that did not distinguish advocacy from incitement of imminent lawless action intruded upon First and Fourteenth Amendment freedoms.[110]

Applying the law to the facts before it, the Court held the Ohio statute unconstitutional because it punished mere advocacy.[111] The appellant advocated what he believed to be the importance of lawless action, which the statute forbade.[112] The First Amendment protected the appellant's speech because he advocated his belief of the importance of acts of "revenge" and the deportation of Jews and African-Americans.[113] However, the Court's rationale indicated that, had the appellant made a speech that was *directed to incite* acts of "revenge" and the deportation of Jews and African-Americans, *and the effect* of his speech would have made the occurrence of such acts *likely*, then his speech would not have been protected by the First Amendment.[114]

The *Brandenburg* two-prong test, whereby speech, first, "is directed to inciting or producing imminent lawless action[, and second, that it is] . . . likely to incite or produce such action,"[115] promulgated a clear test to determine the line between protected and unprotected "dangerous" speech under the First Amendment.[116] The test distinguished speech that incites imminent lawless action, which was unprotected, from mere advocacy, which retained the protection of the First Amendment.[117]

Following *Brandenburg*, various courts have assessed what information must be provided in order for advocacy to be protected as free speech.[118] The Supreme Court applied the *Brandenburg* test in *NAACP v. Claiborne Hardware Co.*[119] In *Claiborne*, the NAACP boycotted several white merchants who disregarded the NAACP's de-

109. *See id.* at 448-49.
110. *See Brandenburg*, 395 U.S. at 448.
111. *See id.* at 449.
112. *See id.* at 448.
113. *See id.*
114. *See id.* at 447, 449.
115. *See id.* at 447.
116. *See Brandenburg*, 395 U.S. at 447.
117. *See id.*; *see also supra* notes 107-08 and accompanying text.
118. *See infra* notes 119-27 and accompanying text.
119. 458 U.S. 886 (1982). *But see* O. Lee Reed, *The State is Strong but I am Weak: Why the "Imminent Lawless Action" Standard Should Not Apply to Speech that Threatens Individuals with Violence*, 38 AM. BUS. L.J. 177, 199-203 (2000). "At best the doctrinal connection between *Claibourne* and *Brandenburg* is tenuous and unfortunate." *See id.* at 200.

mands for racial equality and integration.[120] Charles Evers, a NAACP official and boycott organizer, in a public speech, said that blacks would be watched and anyone who did not act in accordance with the boycott "would be answerable to him."[121] In another speech, Evers said that "boycott violators would be disciplined by their own people,"[122] and in a third speech said, "[i]f we catch any of you going into any of them racist stores, we're gonna break your damn neck."[123]

The Court found that Evers speech passed the *Brandenburg* test, and was therefore protected.[124] Justice Stevens wrote that, "[i]n the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended."[125] Evers address was basically "an impassioned plea" for blacks to unify and support each other and to "realize the political and economic power available to them."[126] The Court acknowledged that Evers used strong language, and added that a question of Evers' liability would have been raised if his speech had been followed by acts of violence.[127]

III. CRIMINAL LIABILITY IMPOSED FOR SPEECH INSTIGATING VIOLATIONS OF PENAL LAWS

Unlike in *NAACP v. Claiborne Hardware Co.*, several courts have imposed criminal liability for speech-related conduct.

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120. *See Claibourne*, 458 U.S. at 889.
121. *See id.* at 900 n.28, 926.
122. *See id.* at 902.
123. *See id.*
124. *See id.* at 928.
125. *See id.* at 927.
126. *See Claibourne*, 458 U.S. at 928. "An advocate must be free to stimulate his audience with spontaneous appeals for unity and action in a common cause." *See id.*
127. *See id.* The Court added that with the exception of one incident, acts of violence happened within weeks or months of one of Evers' speeches. *See id.* The Court also pointed out: "If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence." *Id.* at 929; *see also* Reed, *supra* note 119, at 202 ("The opinion emphasized the necessary evidentiary connection between incitement and violence within a reasonable time . . . .").

A. Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists

In *Planned Parenthood of Columbia/Williamette, Inc. v. American Coalition of Life Activists*,[128] the plaintiffs ("Providers") sued members of the anti-abortion group, American Coalition of Life Activists ("ACLA"), alleging ACLA issued material comprising threats to their safety.[129] The appellate court enjoined the defendant from publishing and exhibiting materials, including a poster entitled "The Deadly Dozen," which listed the names and addresses of doctors who performed abortions and was exhibited at anti-abortion rallies.[130] The appellate court found that the speech act of publishing and exhibiting this poster at abortion rallies created a true threat to bodily harm of the plaintiffs.[131] In addition, the ACLA had various "WANTED" posters and papers collectively referred to as the "Nuremburg File," which contained names and addresses of doctors who performed abortions.[132] The Nuremburg File was also posted on the Internet.[133]

On March 10, 1993, Dr. David Gunn was shot and killed outside the Pensacola, Florida office where he performed abortion procedures.[134] On August 21, 1993, Dr. George Patterson was also shot and killed outside the clinic where he performed abortions.[135] Prior to their murders, the names and addresses of both Drs. Gunn and Patterson were listed on an ACLA "WANTED" poster.[136] On July 29, 1994, Dr. John Byard Britton, the doctor who replaced Dr. Gunn, was shot and killed outside his office, along with his escort.[137]

After extensive findings of fact, the court briefly addressed the defendant's contention that the posters and the Nuremburg Files were protected speech, "totally reject[ing]" this defense.[138] Relying

128. 41 F. Supp. 2d 1130 (D. Or. 1999), vacated by 2001 WL 293260 (9th Cir. March 28, 2001).

129. *See id.* at 1133. The plaintiffs were seeking injunctive relief against and damages from ACLA, as well as other relief. *See id.*

130. *See id.* at 1134.

131. *See id.*

132. *See id.* at 1133-34.

133. *See Planned Parenthood*, 41 F. Supp. 2d at 1134.

134. *See id.*

135. *See id.*

136. *See id.*

137. *See id.* at 1135.

138. *See id.* at 1154-55.

on the Freedom of Access to Clinic Entrances Act ("FACE"),[139] the court held that the defendant's freedom of speech was fallible.[140] FACE expressly gave courts the authority to provide injunctive relief when a plaintiff faced unlawful threats.[141] Given these threats, the court held that each day the above-mentioned material was open for public consumption, the plaintiffs' were in physical danger.[142] While the court acknowledged that a heightened scrutiny was applicable because potentially protected speech was involved, it held that this heightened scrutiny was clearly satisfied and that the publication of such sensitive information was not protected speech.[143]

B. United States v. Rowlee

In *United States v. Rowlee*,[144] the defendants were convicted of conspiracy to defraud the Internal Revenue Service (IRS), and aiding and assisting others in the filing of false tax documents.[145] The United States Court of Appeals for the Second Circuit held that First Amendment protection did not extend to participation in a conspiracy to defraud the IRS, and that the trial court correctly instructed the jury that the First Amendment afforded no defense where the defendants urged preparation and presentation of fraudulent documents, when they knew their advice would be heeded.[146]

In 1990, the defendant formed the New York Patriot Society for Individual Liberty and Association (the "Society"), and worked as the Executive Director.[147] The Society dealt exclusively with promoting tax evasion, and advertised its services in the newspaper.[148] Based on these advertisements, Mr. Rowlee formed classes where he instructed members on how to unlawfully evade the Internal Revenue Code.[149] After completing his course, the defendant sold packets to students who had elected to become members of his club

139. 18 U.S.C. § 248 (2000).
140. *See Planned Parenthood*, 41 F. Supp. 2d at 1154.
141. *See id.*
142. *See id.*
143. *See id.* at 1155.
144. 899 F.2d 1275 (2d Cir. 1990), *cert. denied*, 498 U.S. 828 (1990) (finding no First Amendment protection for defendant instructor who sold tax forms to justify fraudulent claims and provided tax advice for all of the members on how to evade taxes).
145. *See id.* at 1276.
146. *See id.* at 1276-77.
147. *See id.*
148. *See id.* at 1276.
149. *See Rowlee*, 899 F.2d at 1277.

that contained W-4 forms and instructions to complete the form and evade taxes.[150] Additionally, the defendant acted as a tax advisor for almost one hundred of his students, aiding them in filing false W-4 statements.[151]

The defendant asserted that the First Amendment protected his speech, relying on the fact that he had not incited imminent lawless action.[152] The trial court disagreed and refused to instruct the jury, as the defendant requested, that the First Amendment provided a defense for his conduct.[153] The Second Circuit affirmed this ruling in holding that it has rarely been suggested that free speech extends to violations of a criminal statute.[154] Furthermore, the Second Circuit elaborated that, even if the defendant's First Amendment rights had been somehow abridged, the government's interest in maintaining the IRS far outweighed the defendant's rights.[155]

C. United States v. Varani

In *United States v. Varani*,[156] the defendant filed a blank income tax return.[157] He was contacted by a collection officer for the IRS, Mr. Samuel Ginsburg, attempting to collect on Varani's delinquent accounts.[158] In 1967, the defendant paid his 1965 taxes, however, after noticing that that the defendant also filed a blank income tax return for 1966, Mr. Ginsburg contacted the defendant again and asked him to refile and pay his 1966 income taxes.[159] Varani became belligerent with the collections officer, refused to file the 1966 return, and threatened to shoot Mr. Ginsburg and any member of the IRS if they attempted to seize his property.[160] Despite this threat, Mr. Ginsburg again contacted the defendant and arranged a meeting to discuss the situation.[161] Upon arriving, the defendant again threatened Mr. Ginsburg, this time promising to blow his head

150. *See id.*
151. *See id.*
152. *See id.*
153. *See id.* at 1277-78.
154. *See id.* at 1278 (citing New York v. Ferber, 458 U.S. 747, 761-62 (1982) (citations omitted)).
155. *See Rowlee*, 899 F.2d at 1279 (citations omitted).
156. 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.").
157. *See id.* at 758.
158. *See id.* at 759.
159. *See id.*
160. *See id.*
161. *See id.*

off.[162] Following this meeting, the defendant wrote a long, rambling, and violent letter to Mr. Ginsburg in which he again stated that he would shoot Mr. Ginsburg if anyone attempted to seize his property.[163] As a result, the defendant was criminally charged with threatening an officer of the IRS, a violation of federal law.[164]

At trial, the defendant claimed he could not be held criminally liable for his threats because of his First Amendment right to free speech.[165] The court analyzed this defense under *United States v. Schenck*[166] and the "clear and present danger test."[167] The court held that, despite the logic of the defendant's contention, speech was not protected when it was the crime itself, and accordingly, the court found the defendant guilty.[168]

IV. THE *RICE v. PALADIN ENTERPRISES, INC.* ROLLER COASTER UNNECESSARILY LIMITS FREE SPEECH

Rice v. Paladin Enterprises, Inc.[169] resulted after the gruesome murder of three victims in Silver Spring, Maryland by James Perry.[170] Perry committed these murders by following instructions provided in books entitled *Hit Man: A Technical Manual for Independent Contractors* ("*Hit Man*"), and *How to Make a Silencer* ("*Silencers*"), both published by Paladin Enterprises ("Paladin").[171] Family members of the victims brought a wrongful death action against Paladin on the theory that, by publishing books instructing how to murder for hire, Paladin aided and abetted Perry.[172] Paladin defended this action based on its First Amendment right to publish the books.[173]

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162. *See Varani*, 435 F.2d at 759.
163. *See id.* at 760.
164. *See* 26 U.S.C. 7212(a) (1964).
165. *See Varani*, 435 F.2d at 761.
166. 249 U.S. 47 (1919).
167. *See Varani*, 435 F.2d at 761.
168. *See id.* at 762.
169. Rice v. Paladin Enters., 940 F. Supp. 836 (D. Md. 1996), *rev'd*, Rice v. Paladin Enters., 128 F.3d 233 (4th Cir. 1997).
170. *See Rice*, 128 F.3d at 242; *Rice*, 940 F. Supp. at 838.
171. *See Rice*, 128 F.3d at 241 n.2; *Rice*, 940 F. Supp. at 838. As their titles suggest, these books chronicle how to carry out a murder for hire, and how to create a tool to silence the noise that emanates from a bullet exiting a gun. *See Rice*, 940 F. Supp. at 838.
172. *See Rice*, 128 F.3d at 241; *Rice*, 940 F. Supp. at 838.
173. *See Rice*, 128 F.3d at 241; *Rice*, 940 F. Supp. at 838.

A. Initial Analysis of Rice: *the* Brandenburg *Application Results in Publisher Protection*

The Federal District Court of Maryland identified the five areas of speech that receive limited or no First Amendment protection,[174] and determined that *Hit Man* could be categorized as speech inciting imminent, lawless activity under *Brandenburg*, affording limited First Amendment protection.[175] First, the form of speech involved advocating or instructing lawless activity.[176] Second, the *Brandenburg* standard applies to speech in all contexts, not just political speech.[177]

Under the *Brandenburg* test, to justify restricting speech "because it was an incitement to lawless action, the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent conduct."[178] In the present case, Paladin conceded that their books were intended to produce criminal activity.[179] However, to impose liability on Paladin, the speech must be unprotected and the publisher must have intended imminent lawless activity to result, necessitating Paladin to intend for Perry to murder the victims immediately upon reading the book.[180] This did not occur.[181]

The families of the victims argued that, even if *Brandenburg* does apply, they should still prevail,[182] arguing that "the three components of the *Brandenburg* test have been met: 1) intent, 2) imminence, and 3) likelihood."[183] The court rejected this argument for

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174. *See Rice*, 940 F. Supp. at 841. *See supra* Part II (enumerating the areas of speech afforded limited First Amendment protection).

175. *See Rice*, 940 F. Supp. at 841, 844-45. *Brandenburg v. Ohio* prohibits the government from forbidding "advocacy of the use of force or of law violation" unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 841. See *supra* notes 97-117 and accompanying text for a discussion of the free speech test enunciated in *Brandenburg*.

176. *See Rice*, 940 F. Supp. at 841.

177. *See id.* The court analogized the facts *sub judice* to cases in which the *Brandenburg* doctrine was applied whereby physical injury or death resulted allegedly from viewing violent movies and television shows. *See id.*

178. *Id.* at 846.

179. *See id.* at 847.

180. *See id.*

181. *See Rice*, 940 F. Supp. at 847. The parties stipulated that Perry committed the murders one year after receiving the books. *See id.*

182. *See id.*

183. *Id.*

several reasons: first, the intent to which Paladin conceded is irrelevant to the analysis; second, as stated previously, there was no evidence that Paladin intended immediate, lawless activity; third, although repugnant, the book "does not constitute incitement or 'a call to action.'"[184]

Elaborating, the court described the book as advocating, or teaching in an abstract manner, rather than inciting.[185] It found that the book did not cross the line between permissibly advocating violence and impermissibly inciting a crime.[186] The book did not purport to command anyone to any action immediately, nor did it tend to incite violence.[187] Finally, the court found that the books did not constitute incitement to imminent, lawless activity because the content in *Hit Man* and *Silencers* was voluminous; the "deadly information . . . presumably take[s] time to read."[188]

In its holding, the court stated that "First Amendment protection is not eliminated simply because the publication of an idea creates a potential hazard."[189] In a free society, it is unacceptable "to limit and restrict creativity in order to avoid dissemination of ideas in artistic speech which may adversely affect emotionally and troubled individuals."[190] Concluding that Paladin was permitted to raise the First Amendment as a defense in this action, the court granted its summary judgment motion.[191]

B. The Fourth Circuit Reverses, Expanding States' Rights and Limiting First Amendment Protection

The facts and issue considered on appeal by the United States Court of Appeals for the Fourth Circuit were identical to those considered by the district court: whether the "First Amendment absolutely bars the imposition of liability upon a publisher for assisting

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

185. *See Rice*, 940 F. Supp. at 847.

186. *See id.*

187. *See id.* at 847-48. Over 13,000 copies of the book had been sold, and one person actually used the information over the ten years that the book has been printed. *See id.* at 848. In addition, the disclaimers in the advertisement and on the book itself stating that the book was for informational purposes only did not "indicate a tendency to incite violence." *Id.*

188. *See id.* at 848.

189. *Id.* (citing Herceg v. Hustler Magazine, 824 F.2d 1017, 1020 (5th Cir. 1987)).

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

191. *See id.* at 849.

in the commission of criminal acts."[192] As in the district court proceeding, the publisher, Paladin Enterprises, stipulated to facts that establish civil liability as a matter of law for aiding and abetting James Perry, the defendant convicted of the murders in the underlying criminal case, unless it is afforded First Amendment protection.[193]

However, after a much more conservative analysis, the Fourth Circuit reversed the lower court, stating:

> [L]ong-established caselaw provides that speech—even speech by the press—that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment, and . . . we hold . . . that the First Amendment does not pose a bar to a finding that Paladin is civilly liable as an aider and abetter of Perry's triple contract murder.[194]

In reaching this conclusion, the court first recognized the holding of *Brandenburg v. Ohio*:[195] "abstract advocacy of lawlessness is protected speech under the First Amendment,"[196] and such a right is "one of the ultimate safeguards of liberty."[197]

The court then countered *Brandenburg's* application to the case *sub judice* by enumerating cases denying First Amendment protection to defendants criminally charged with aiding and abetting the violation of a criminal statute as a result of their speech act;[198] "it is equally well established that speech which . . . is tantamount to legitimately proscribable, nonexpressive conduct may itself be legiti-

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192. Rice v. Paladin Enters., 128 F.3d 233, 241 (4th Cir. 1997). All other issues of law and fact were reserved for subsequent proceedings. *See id.* See *supra* notes 169-73 and accompanying text for a general discussion of the facts of *Rice* at both the district and appellate court levels; see also *supra* notes 179-81, 184-88 and accompanying text for a discussion of the facts and issue of *Rice* in the district court proceeding.

193. *See id.* Paladin stipulated that: Perry followed the directions in the *Hit Man* and *Silencers* books, both how-to manuals to commit crimes published by Paladin Enterprises; in marketing *Hit Man*, Paladin intended to attract and assist criminals and aspiring criminals who desire information on how to commit crimes; it intended and had knowledge that *Hit Man* would be used upon receipt by criminals to plan and execute murder for hire; and that, by publishing and selling *Hit Man*, it assisted Perry in the murders. *See id.*

194. Rice v. Paladin Enters., 128 F.3d 233, 242 (4th Cir. 1997).

195. 395 U.S. 44 (1969).

196. *Rice*, 128 F.3d at 243.

197. *See id.*

198. *See id.* at 243-46.

mately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally acceptable statutes."[199] The court elaborated: "it rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."[200]

As further support, the Fourth Circuit enumerated court opinions considering whether the speech-act doctrine should be applied to sustain a conviction for aiding and abetting the underlying criminal offense, stating that every court considering the issue held that the First Amendment is not an absolute defense, per se, even when the aiding and abetting is in the form of speech.[201]

Further, the Fourth Circuit analogized the cases previously discussed, whereby no First Amendment protection was afforded to criminal defendants charged with aiding and abetting a crime as a result of a speech act, to the civil action before the court.[202] In doing so, it relied on a Congressional Report concerning the availability of bomb-making information prepared by the Department of Justice, stating:

> [T]he law is now well established that the First Amendment, and *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'

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199. *Id.* at 243 (quoting Cohen v. Media Co., 501 U.S. 663 (1991) ("noting 'well-established line of decisions holding that generally applicable law do not offend the First Amendment simply because their enforcement against the press has incidental effects of its ability to gather and report the news' ")).

200. *Id.* (quoting Gibony v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (additional citations omitted in original)).

201. *See id.* at 244-46. The court referred to the following cases: United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990) (failing to recognize *Brandenburg* as a defense to a conviction for conspiring to transport and aid and abet gambling equipment across state lines); United States v. Freeman, 761 F.2d 549, 552-53 (9th Cir. 1985) (sustaining convictions for criminal liability for counseling tax evasion); United States v. Barnett, 667 F.2d 835 (9th Cir. 1982) (disallowing First Amendment protection for publishing and distributing instructions on manufacturing illegal drugs charged with aiding and abetting under a criminal statute). *See id.* at 244-45. The court also enumerated several cases holding the First Amendment inapplicable to criminal charges of aiding and abetting violations of tax laws. *See id.* at 245-46.

202. Rice v. Paladin Enters., 128 F.3d 233, 245 (4th Cir. 1997).

> successful efforts to assist others by detailing to them the means of accomplishing the crimes."[203]

To make this connection, the court stated:

> [W]hile there is considerably less authority on the subject, we assume that those speech acts, which the government may criminally prosecute with little or no concern for the First Amendment, the government may likewise subject to civil penalty or make subject to private causes of action. Even if this is not universally so, we believe it must be true at least where the government's interest in preventing the particular conduct at issue is uncontrovertibly compelling.[204]

The court qualified this newly enunciated rule in two ways.[205] First, when a publisher only could foresee the possible misuse of information for impermissible purposes, then the First Amendment may "stand as a bar to the imposition of liability . . . ."[206] This qualification would strike a balance between protecting the chilling effect of innocent, lawfully useful speech and holding accountable those who would "intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment."[207]

The second qualification is that the First Amendment might limit a state's power to create and enforce a cause of action that would permit imposing civil liability for speech constituting pure abstract advocacy not satisfying the *Brandenburg* test.[208]

The court stated that, because states are authorized to regulate speech under a criminal statute, they are empowered to regulate

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203. *See id.* (quoting U.S. DEPT. 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 OF THE UNITED STATES CONSTITUTION, April, 1997, at 37, *available at* <http://www.derechos.org/human-rights/speech/bomb.html#pubavail>); *see also supra* notes 8-10 and accompanying text (discussing the Department of Justice Report).

204. *Rice*, 128 F.3d at 246-47.

205. *See id.* at 247. Both qualifications were inapplicable to the case at bar. *See id.*

206. *Id.*

207. *Id.* at 247-48.

208. *Id.* at 248-49. Speech that is "not 'directed to inciting or producing imminent lawless action . . . [nor] likely to incite or produce such action' " does not meet the *Brandenburg* test. *Id.* (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

speech under a civil claim for aiding and abetting a crime.[209] As a result, the court held that the First Amendment did not bar the plaintiffs' action and the facts of the case would support a finding that Paladin was civilly liable for aiding and abetting James Perry in the murders of Mildred Horn, Trevor Horn, and Janice Saunders.[210]

V. HAD *BRANDENBURG* BEEN CORRECTLY APPLIED BY THE *RICE* COURTS, NO FURTHER LIMITATIONS OF PUBLISHER'S FREEDOM OF SPEECH WAS NECESSARY

The federal district court correctly determined that *Brandenburg* applied to Paladin Press's publication of the murder for hire instruction manual, *Hit Man*.[211] However, the district court incorrectly applied the facts of *Rice* to *Brandenburg*,[212] resulting in an erroneous decision. Further complicating the case, the United States Court of Appeals for the Fourth Circuit reached the correct conclusion, but improperly analyzed *Rice v. Paladin Enterprises* under the *Brandenburg* test, and instead expanded States' ability to circumscribe speech.[213] Although the result was the same as it would have been had the district court correctly analyzed the facts of the case under *Brandenburg*,[214] the Fourth Circuit was overreaching and unsettled over thirty years of precedent.

A. The Correct Rule Misapplied: The District Court's Approach

For over thirty years, the *Brandenburg* test has been applied to determine whether free speech protected under the First Amendment should be limited because the nature of the speech is likely to cause imminent, lawless activity.[215] This test was applied by the Fed-

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209. *Rice*, 128 F.3d at 250.

210. *See id.* at 243, 250, 265.

211. See *supra* notes 175-79 and accompanying text for a discussion of the federal district court's analysis of the correct law under which to analyze *Rice v. Paladin Enterprises*.

212. See *supra* notes 180-91 and accompanying text for a discussion of the federal district court's analysis of the facts of *Rice v. Paladin Enterprises* under the *Brandenburg* test.

213. See *supra* notes 204, 209 and accompanying text for a discussion of the rationale and holding of the Fourth Circuit's review of *Rice v. Paladin Enterprises* on appeal.

214. *Compare supra* note 210 and accompanying text (stating the court of appeals holding in Rice v. Paladin) *with* Rice v. Paladin Enters., 128 F.3d 233, 250 (4th Cir. 1997) (discussing the case within the context of the rule announced in *Brandenburg*).

215. See *supra* notes 97-117 and accompanying text for a discussion of *Brandenburg*

eral District Court for the District of Maryland in *Rice v. Paladin Enterprises* when it determined whether the defendant, invoking First Amendment protection for crimes resulting from its publication of a murder for hire manual, should be granted summary judgment.[216]

To determine whether the publisher should be afforded limited First Amendment protection, the district court reviewed each of the unprotected areas of speech[217] and, after negating the others, determined that "the only category of unprotected speech which *Hit Man* could conceivably be placed is incitement to imminent, lawless activity under *Brandenburg*."[218] When explaining this determination, the court stated that the *Brandenburg* standard was appropriate because it "involves speech which advocates or teaches lawless activity, in this case murder,"[219] and that the standard was not limited to political speech.[220] The court then analogized the facts of the present case to those in a series of "copy-cat" cases in which the *Brandenburg* standard was applied because they, like *Hit Man*, "considered depictions of violence alleged to have been imitated."[221]

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v. Ohio, 395 U.S. 444 (1969).

216. Rice v. Paladin Enters., 940 F. Supp. 836, 838 (D. Md. 1996). The plaintiffs brought wrongful death and survival actions against the defendant on the theory that, by publishing a book on how to murder for hire, the defendant aided and abetted the murderer in committing the crime. *See id.* See also *supra* notes 169-73, 175 and accompanying text for a discussion of the facts of *Rice v. Paladin Enterprises* and *supra* notes 179-81 and accompanying text for a discussion of the district court's application of the *Brandenburg* test.

217. For a discussion of the other areas of speech afforded limited or no protection see *supra* notes 31-35 and accompanying text (enumerating the types of unprotected speech), notes 36-45 and accompanying text (obscenity), notes 46-51 and accompanying text (fighting words), notes 52-66 and accompanying text (libel), notes 67-94 and accompanying text (commercial speech), and notes 97-127 and accompanying text.

218. *Rice*, 940 F. Supp. at 841. See also *supra* 175-88 and accompanying text for a discussion of how the district court applied *Brandenburg* to Rice v. Paladin Enters.

219. *Id.* at 845.

220. *Id.* at 846.

221. *Id.* at 846-47 (citing Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (reversing the jury's damage award against magazine publisher for wrongful death of adolescent who died from alleged autoerotic asphyxia after reading article describing the same); Zamora v. CBS, 480 F. Supp. 199 (S.D. Fla. 1979) (alleging commission of criminal acts as a result of violent programming); McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (1988) (suing record company for Ozzy Ozbourne record that included song "Suicide Solution"); Olivia N. v. NBC, Inc., 178 Cal. Rptr. 888 (1981) (raping of girl with bottle by teenaged girls imitating similar incident depicted on television drama, Born

Once determining the legal standard under which to review the case, the court then examined the facts of the case and determined that *Hit Man* did not constitute incitement to imminent lawless action, and therefore the publication did not fit into a category of speech with limited protection under the First Amendment.[222] The court reached this determination because, in order to show speech was an incitement to lawless action, the speech must be "directed or intended toward the goal of producing imminent lawless conduct and . . . was likely to produce such imminent conduct."[223] The court held that although the defendant conceded to intending for its books to be "purchased and actually used by criminals, [it has] not conceded to the requisite intent,"[224] imminent lawless action.[225]

The district court interprets imminent, lawless action as immediate.[226] However, the interpretation of "immediate" should depend on the facts of the case. Paladin intended to for its book to be used by criminals to carry out murders for hire.[227] However, given the extent of the speech and the intricacies of the crime encouraged, the definition of immediate must be expanded to contemplate the criminal's reading of the book, and preparation of the crime. "Nothing in this book says, 'go out and commit murder now!'"[228] However, that is not required under *Brandenburg*; the detailed instructions provided in *Hit Man* teach the preparation of the concrete action of the highest form of violence prohibited under *Brandenburg*.[229]

Innocent); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) (gang-killing of boy after perpetrators viewed the film The Warriors, which depicted scenes of gang violence); DeFilippo v. NBC, 446 A.2d 1036, 1040 (R.I. 1982) (imitating a hanging stunt seen on Johnny Carson, a minor child killed himself resulting in parents wrongful death action against NBC). "Copy cat" cases are those in which a violent act resulted from the perpetrator viewing or otherwise perceiving the act through a form of publication (such as a movie, song, book, or the like). *See Rice*, 940 F. Supp. at 846.

222. *See Rice*, 940 F. Supp. at 847-48.

223. *Id.* at 846 (citing McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 193 (1988) (citing Hess v. Indiana, 414 U.S. 105, 108 (1973))).

224. *Id.* at 847.

225. *Id.*

226. *See id.*

227. *See id.*

228. *See Rice*, 940 F. Supp. at 847.

229. *See* Rice v. Paladin Enters., 128 F.3d 233, 249 (1997) (citing Scales v. United States, 367 U.S. 203, 233, 235 (1961); Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)); Yates v. United States, 354 U.S. 298, 320 (1957)).

B. The Fourth Circuit Reaches the Correct Result, But Without the Rule

The United States Court of Appeals for the Fourth Circuit reached the appropriate result, holding that a trier of fact could find the requisite intent under *Brandenburg* to limit Paladin's First Amendment right to free speech.[230] However, it did not reach this conclusion under an analysis of the test created in *Brandenburg*.[231]

The *Brandenburg* test was carefully created by the Supreme Court to ensure that its limitation on speech was narrowly crafted.[232] By failing to use this test, the Fourth Circuit created another exception to free speech, and enlarged states' authority to regulate speech using civil remedies so long as the speech is associated with a criminal act that the state may prosecute.[233] This was unnecessary because the same conclusion could have been reached under the appropriate *Brandenburg* test.[234]

Given the sanctity associated with free speech and the First Amendment in the United States,[235] the Fourth Circuit's analysis was inappropriate. The probable outcome is increased liability, which would, effectively, result in prior restraint on publishers afraid to print material because of the likelihood of defending a civil suit.[236]

VI. CONCLUSION

Freedom of speech has been paramount to our country's iden-

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230. *See generally Rice*, 128 F.3d at 249 (stating the court's holding); *supra* notes 204, 209 and accompanying text for a discussion of the rationale and holding of the Fourth Circuit's review of *Rice v. Paladin Enters.* on appeal.

231. *See Rice*, 128 F.3d at 249.

232. See *supra* notes 97-116 and accompanying text for a discussion of *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

233. *Rice*, 128 F.3d at 246-47.

234. See *supra* Part V.A for a discussion of why the *Brandenburg* test was appropriate under the facts of *Rice v. Paldin Enterprises* and how the outcome under *Brandenburg* would afford Paladin limited First Amendment protection.

235. See *supra* notes 27-29 and accompanying text for a discussion of the high regard for freedom of speech in American society.

236. *See* Near v. State of Minnesota *ex rel.* Olson, 283 U.S. 697, 712 (1931) (explaining that a primary purpose of free press is to prevent previous restraints upon publication); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 n.3 (1942) (noting that free press extends beyond freedom from prior restraint). Prior restraints "are the most serious and least tolerable infringements on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). Additionally, "[i]f it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Id.* (citing A. Bickel, THE MORALITY OF CONSENT 61 (1975).

tity and formation.[237] Since the ratification of the First Amendment in the Bill of Rights, only a handful of limitations have been imposed on the right to free speech and free press.[238] However, this tradition was undercut by the Fourth Circuit in *Rice v. Paladin Enterprises.*[239] In *Rice,* the Fourth Circuit failed to apply the appropriate *Brandenburg* test, despite the likelihood that the outcome would have been identical.[240] By creating a new standard of review,[241] the court encroached upon a tradition to which writers, publishers and Americans are and have been entitled to for the past thirty years.[242] The potential liability imposed on Paladin Enterprises for printing its murder for hire manual[243] likely and inappropriately sends a wave of concern among publishers nationwide about potential liability resulting from the words they print.

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237. See *supra* notes 15, 26-29 and accompanying text discussing the importance of the free exchange of ideas on American history.
238. See *supra* notes 31-35 and accompanying text enumerating the limitations on the right to free speech.
239. See *supra* Part IV for a discussion of *Rice v. Paladin Enterprises.*
240. See *supra* Part IV.B for an analysis of the district and appellate court holdings in *Rice v. Paladin Enterprises.*
241. See *supra* notes 202-10 and accompanying text for the standard of review created by the United States Court of Appeals for the Fourth Circuit in *Rice v. Paladin Enterprises.*
242. See *supra* notes 97-116 and accompanying text for a discussion of *Brandenburg v. Ohio,* 395 U.S. 444 (1969).
243. See *supra* Part IV for a discussion of *Rice v. Paladin Enterprises.*