Brigaded With Action: Undirected Advocacy and the First Amendment

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I. INTRODUCTION: TWO SCENARIOS

When Oliver Stone released his 1994 film, *Natural Born Killers*[1], he probably never imagined that the result would be a lawsuit seeking to hold him liable as an accessory to a real life series of crimes modeled on those committed by the fictitious Mickey and Mallory. The film, a scaldingly angry satire of media glamorization of violence, itself employed graphic violence in depicting the titular characters' "reel-life" killing spree. In directing the film, Stone used several cinematic tools including distancing techniques, the depiction of the patent stupidity of Mickey and Mallory's conduct and the sheer sleaziness of their associates to reinforce his points that Mickey and Mallory were not admirable, and that their violence was indicative of their spiritual emptiness and their sickness. To further emphasize this point, Stone introduced the character of a Native American wise man, who explains it in words of one syllable to his grandson. Although he is the only wholly admirable character in the film, the Wise Man pays with his life for having offered Mickey and Mallory shelter—a gratuitous act of cruelty which is too much even for Mallory, and precipitates her one fight with Mickey. To miss the anti-violence message of *Natural Born Killers,* one would have to be spectacularly obtuse, focused solely on the most literal, narrow possible reading of the text, and wholly impervious to nuance, irony

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[1] NATURAL BORN KILLERS (Warner Brothers, Inc. 1994).

and techniques of subversion. Nonetheless, when Sarah Edmonson and Benjamin Darrus shot Patsy Ann Byers during a convenience store holdup, the resultant civil suit[2] named as defendants Stone, Warner Home Video, Inc.,[3] Warner Brothers, Inc.,[4] corporate parent Time Warner Entertainment, L.P., and other affiliated corporations.[5] The case brought against Stone and Time Warner alleged several theories of recovery,[6] including a claim that Stone and Time Warner "*intended to incite viewers of the film to begin, shortly after viewing the film, crime sprees such as the one that led to the shooting of Patsy Byers.*"[7] The trial court held that Byers did not state a cause of action.[8] The Louisiana Court of Appeal accepted the complaint's allegation as true for the sake of reviewing the trial court's dismissal of the action, and found that the petition did indeed state a cause of action.[9] The court stated that if plaintiffs could prove their allegations, the First Amendment would not be a bar to recovery.[10]

The facts in *Byers* resemble those in a dramatic Fourth Circuit

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[2] The suit was filed before Ms. Byers's death in her name by her husband and their three children.

[3] Warner Home Video is the company that released the video rented by Edmonson and Darrus.

[4] Warner Brothers is the company that made the film.

[5] Byers v. Edmonson, 712 So. 2d 681, 681-84 (La. Ct. App. 1998).

[6] *Id.* at 685. The causes of action included:

> A) for producing and distributing a film (and marketing same on videotape) which they knew, intended, were substantially certain, or should have known would cause or incite persons such as defendants, Sarah Edmonson, and Benjamin Darrus (via subliminal suggestion or glorification of violent acts) to begin, shortly after repeatedly viewing the same, crime sprees as that which led to the shooting of Patsy Ann Byers;
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> B) for negligently and/or recklessly failing to take steps to minimize violent content of the video or to minimize glorification of senselessly violent acts and those who perpetrate such conduct;
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> C) by intentionally, recklessly, or negligently including in the video subliminal images which either directly advocated violent activity or which would cause viewers to repeatedly view the video and thereby become more susceptible to its advocacy of violent activity;
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> D) for negligently and/or recklessly failing to warn viewers of the potential deleterious effects upon teenage viewers caused by repeated viewing of the film/video and of the presence of subliminal messages therein; and
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> E) as well as for other such intentional, reckless, or negligent acts will [sic] be learned during discovery and shown at trial of this matter.

Id.

[7] *Id.* at 690 (emphasis added).

[8] *Id.* at 685.

[9] *Id.* at 689.

[10] *Id.* at 691-92.

case, *Rice v. Paladin Enterprises, Inc.*[11] In *Rice,* the defendant was Paladin Enterprises, Inc., a small publishing house catering to super-macho fantasies with an edge of lawlessness. In 1983, Paladin published a slender volume titled *Hit Man: A Technical Guide for Independent Contractors* ("*Hit Man*").[12] The book provided explicit and detailed advice and instructions on how to establish a career as a contract killer.[13] A decade later, James Perry, at the behest of Motown producer Lawrence Horn, killed Horn's ex-wife Mildred, and Trevor, their severely brain-damaged son.[14] Perry also killed Trevor's nurse, Janice Saunders, seemingly to eliminate her as a witness.[15] Perry had been hired by Lawrence Horn to do the job, so that Horn could inherit the proceeds of a settlement on a malpractice claim stemming from the injury causing Trevor's brain damage.[16] In killing the Horns and Saunders, Perry followed many of the suggestions contained in *Hit Man.*[17] The victims' survivors sued Paladin on the theory that it had been guilty of aiding and abetting in the murders.[18] Paladin moved for summary judgment on the theory that the First Amendment served to protect it from liability.[19] It even stipulated, for the purpose of the motion, that it had intended some unknown number of its readers to act upon the suggestions conveyed in the book.[20]

The Fourth Circuit decision in *Rice* was the principle authority upon which the Louisiana Court of Appeal relied in *Byers.*[21] Both decisions found that a representation of violent and unlawful conduct as desirable or beneficial can subject the purveyor of the message to accomplice liability for the acts of those who act upon the representations.[22] Both courts required that in order for the purveyor of images or text to be liable, it must intend that someone, although not necessarily the criminal/tortfeasor in question, act upon the

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[11] 128 F.3d 233 (4th Cir. 1997).

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

[13] *Id.* at ix.

[14] *Rice,* 128 F.3d at 239.

[15] *Id.*

[16] *Id*

[17] *Id.*

[18] *Id.* at 241.

[19] *Id.*

[20] *Rice,* 128 F.3d at 241.

[21] *Byers,* 712 So. 2d at 690-91.

[22] *See Rice,* 128 F.3d at 267; *Byers,* 712 So. 2d at 690.

representations.[23] The courts also suggested that there should be some sort of relationship between the exposure to the image or text and the commission of criminal or tortious act, but it is unclear whether either court would require any kind of temporal imminence or immediacy.[24]

The cases, *Rice* in particular, have occasioned a blizzard of commentary in the mainstream press and legal scholarship.[25] Much of the commentary has applauded the decisions, although a significant number of commentators deplore them.[26] Much of the positive commentary has been from self-styled "friends of the First Amendment," and indeed, two of the counsel involved in *Rice*, Rodney A. Smolla,[27] lead counsel for the plaintiffs, and Professor David Crump,[28] who filed a brief *amicus curiae*, plainly consider themselves guardians of the First Amendment.

Establishing the outer boundaries of free expression cannot be a simple task, and for as long as the jurisprudence has been evolving, the courts and scholars have grappled with the fluctuating parameters of the line. Indeed, some Supreme Court Justices and scholars have argued that bright-line approaches are doomed to fail, and instead suggest a pragmatic weighing of the estimated value of speech to society against the speech's foreseeable potential for harm.[29] But the appeal of bright lines in First Amendment

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[23] *See Rice*, 128 F.3d at 248-51; *Byers*, 712 So. 2d at 691.

[24] *See Rice*, 128 F.3d at 253-54 (declining to impose any kind of time frame as a predicate for liability and holding that intent was a sufficient basis for liability); *see also Byers*, 712 So. 2d at 691. In *Byers*, the court held that the plaintiff's petition alleged sufficient facts to establish an incitement to imminent lawless action exception to First Amendment protection. *Id.* Accordingly, the court ruled that the cause of action was not barred by the First Amendment. *Id.*

[25] *See, e.g., Symposium Issue*, 27 N. KY. L. REV. 1 (2000).

[26] *See* discussion *infra* beginning on page 49.

[27] *See supra* note 25. See also RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY (1992) [hereinafter SMOLLA, FREE SPEECH] and RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL (1988) for examples of outstanding works of scholarship. Professor Smolla has written numerous books celebrating the First Amendment, several of which may attain classic status in the free speech jurisprudence.

[28] Professor Crump so values his First Amendment credentials that he included his status as a "Recipient of the 'Friend of the First Amendment' Award" from Sigma Delta Chi as part of his *amicus* brief. *Rice*, 128 F.3d at 233. Additionally, it is inserted in his author's biographical footnote in his article titled *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1 (1994). Crump's article provided much of the intellectual ballast for the court's approach in *Rice*.

[29] *See, e.g.*, Dennis v. United States, 341 U.S. 494, 517, 542-45 (1951) (Frankfurter, J., concurring) (agreeing with Court's ruling to uphold convictions of Communist

jurisprudence is not easy to deny. The uncompromising language of the Amendment, its function as a bulwark against repression in times of crisis, and the ease with which such repression is rationalized in the face of seeming urgency are all factors that militate against subtle, multi-variable equations, which can be susceptible to manipulation by judges who desire to reach the politically "right"—that is, expedient—result. These multi-variable tests are inherently prone to manipulation when judges yield to the hydraulic pressure to conform, thus potentially reducing freedom of speech to a mere empty promise.[30]

In striving to draw bright lines to protect freedom of speech, the Supreme Court has adopted various strategies, some more convincing than others. Perhaps the most viable, however, is the notion of the "verbal act" or "speech brigaded with action," a concept that has persisted in the free speech jurisprudence since its beginning.[31] The verbal act approach to free speech claims avoids many of the

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Party leaders for "criminal syndicalism" and advocating multiple variable, case-by-case balancing test approach to free speech claims); Beauharnais v. Illinois, 343 U.S. 250 (1952) (opinion by Frankfurter, J.) (upholding criminal prohibition against "group libel" under balancing approach); *see also* Winters v. United States, 333 U.S. 507, 527-30 (1948) (Frankfurter, J., dissenting) (urging application of rational basis review to free speech claims). Works by present day advocates of a holistic, *ad hoc* balancing approach to speech claims include Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778 (2000); Tracy Higgins, *Giving Women the Benefit of Equality: A Response to Wirenius*, 20 FORDHAM. URB. L J. 78 (1992). For a representative selection of viewpoints to this effect, see DAVID S. ALLEN & ROBERT JENSEN, FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION (1995).

[30] *See, e.g.*, Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (upholding a rule compelling children to recite the Pledge of Allegiance against claims by the Jehovah's Witnesses that such compulsion required them to violate their understanding of the Biblical admonition against worshipping idols), *overruled by* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *Dennis*, 341 U.S. at 499 (upholding laws essentially banning the American Communist Party by applying the "clear and present danger" test). This application was radically different from the intent of its creator, Justice Oliver Wendell Holmes). *See generally* JOHN F. WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES: VERBAL ACTS AND FREEDOM OF SPEECH 56-60 (2000) [hereinafter WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES].

[31] *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) (upholding labor injunction against boycott on theory that the First Amendment does not afford protection to words used in such circumstances where they "become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged"); *see also* Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting) (recasting the verbal act concept as "speech brigaded with action"). *See generally* WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 122-81 (discussing "verbal act" concept as embodying basic First Amendment standard and sketching past and possible applications of concept to First Amendment claims).

difficulties posed by other interpretative approaches to the First Amendment, and is accurately captured in *Brandenburg v. Ohio*,[32] the leading case on the line between advocacy that is protected and advocacy that is proscribed in the depiction of unlawful conduct. In *Brandenburg*, the Supreme Court reaffirmed the principle that:

> [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 or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto v. United States*, "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 for such action."[33]

Justice Douglas contended, with cogent logic, that the Court in *Brandenburg* had gone even further than the old clear and present danger test, and that it should avowedly adopt the verbal act formulation.[34] As he put it, the "line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts."[35] Taking the infamous example of "the case of one who falsely shouts fire in a crowded theatre," as clearly regulable speech, Justice Douglas described it as a "classic case of speech brigaded with action."[36] Douglas, addressing the "fire" example, explained that the misleading cry and the resultant dangerous chaos were "indeed

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[32] 395 U.S. 444 (1969).

[33] *Id.* at 447-48 (citation omitted). The Court noted that to the extent the criminal syndicalism statute, under which the Ku Klux Klansmen led by Frank Brandenburg had been charged, impacted the right to free assembly, as distinct from that of free speech, the analysis was the same; such statutes "must observe the established distinctions between mere advocacy and incitement to imminent lawless action '[because] . . . [t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.'" *Id.* at 449 n.4 (quoting DeJonge v. Oregon, 299 U.S. 353, 364 (1937)). *See also* United States v. Cruikshank, 92 U.S. 542, 552 (1876); Hague v. CIO, 307 U.S. 496, 513, 519 (1939); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).

[34] *Brandenburg*, 395 U.S. at 456 (Douglas, J., concurring).

[35] *Id.*

[36] *Id.* (Douglas, J., concurring) (citing Speiser v. Randall, 357 U.S. 513, 536-37 (1958)). The "fire" hypothetical was first employed by Justice Oliver Wendell Holmes in *Schenck v. United States*, 249 U.S. 47, 52 (1919). Holmes employed the hypothetical as a means for cautiously delineating the outer limits of protected speech. *Id.* He then backed into a more controversial, but still (to him) self-evident class of plainly unprotected speech, the "uttering [of] words that have all the effect of force." *Id.* at 52 (citing *Gompers*, 221 U.S. at 419). *See also* WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 27-36.

inseparable and a prosecution can be launched for the overt acts actually caused."[37]

The Court's high level of solicitude regarding violent rabble-rousing might seem strange, but in fact it is at the core of First Amendment jurisprudence. The regulation of speech based on its message, even where that message consists of advocacy of unlawful conduct, raises problems which the regulation of other forms of "low value" speech does not. As a matter of history, the regulation of such advocacy, particularly when it is tied to a political message, has consistently implicated the fundamental values of freedom of speech.[38] The historical primacy given to speech encouraging law violation makes logical sense as well, as it encompasses political speech calling for revolutionary change. Thus, the centrality of violent rhetoric and hyperbole to the American traditions of civil disobedience, struggles for liberation, and revolution, position such speech at the core of the First Amendment's protections.[39]

Each of the courts and the scholars who have urged a finding of liability in cases of seductive depictions of unlawful conduct has had to attempt to justify itself in terms of the line drawn by the Supreme Court in *Brandenburg*, or to redraw a different line that supplements the *Brandenburg* line. Some scholars have blinked at the question, seeking instead to carve out a new category of "low value" speech. These scholars ignore the fact that the increasing permeability of the First Amendment to such *ipse dixit* approaches dilutes the doctrine and renders it meaningless. More candidly and productively, the basic approach of the Fourth Circuit in *Rice* seeks to situate the advocacy of homicide–for-hire somewhere between the poles of

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[37] *Brandenburg*, 395 U.S. at 456-57. For confirmation that the Court in *Brandenburg* adopted Justice Douglas's position, see *Hess v. Indiana*, 414 U.S. 105, 107-08 (1973); *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389, 1403 (2002).

[38] The first three decisions to accord any level of substantive protection to speech, as opposed to merely prohibiting punishment prior to publication, each involved subversive advocacy. In the factual circumstances present in these decisions, the Court found that subversive advocacy presented a "clear and present danger" of resultant lawless action which the government was entitled to prevent, and thus upheld convictions under the federal Espionage Act. *See Schenck*, 249 U.S. at 47; Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); *see also* WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 29-36.

[39] Many scholars have celebrated the critically important role of dissent in the American tradition and have explicitly tied the protection of dissent to the centrality of the First Amendment to American political views. *See, e.g.*, WILLIAM O. DOUGLAS, POINTS OF REBELLION (1970). For a more recent dissent-based view of the First Amendment, although one far less speech-protective than that of Justice Douglas, see STEVEN H. SHIFFRIN, DISSENT, INJUSTICE AND THE MEANINGS OF AMERICA (1999) and STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990).

speech and criminal or tortious conduct. The case demonstrates the persistent difficulty in defining the boundary between speech and conduct.

This article will examine that boundary, employing both *Rice* and *Byers* as illustrative examples. I will argue that the imposition of liability for speech like that involved in *Rice* impermissibly blurs this distinction between speech and conduct. I will further argue that the Supreme Court's distinction between speech and verbal acts is proper as a matter of both policy and Constitutional interpretation. Finally, I will try to clarify this distinction in a more precise manner than has been accomplished previously.

This exploration into the hinterland of free speech jurisprudence leads us through an under-conceptualized, uncertain body of legal opinions. The ambiguity of the reasoning in these cases includes a morass of poorly explained case results and of broad dicta. This has left scholars seeking to deduce organizing principles from broad generalities.[40] In seeking to bring some clarity to the discussion, the first step is to explore the nature of advocacy. The various forms of speech that courts and legislators have sought to subject to regulation have been treated as essentially fungible. However, even if the distinctions do not lead to different results, they may help to clarify what rationales are applicable to the distinct variants of advocacy. Each form of advocacy can be measured against the traditional notions of criminal jurisprudence that have been used as justification for subjecting the authors to liability. Additionally, an examination of the role of the speech that supposedly triggered the crimes or tortious acts may help explain the extent to which free speech rationales are either undermined by or consistent with a determination of liability. From there, a study of the policy-based arguments deployed in favor of regulation, and a reflection upon their resultant political corollaries, will shed light on the nature of moral agency and of the relationship between the individual and the state embodied in the First Amendment.

II. THE NATURE OF ADVOCACY AND OF "VERBAL ACTS"

Before addressing the parameters of this First Amendment

[40] For an ambitious, comprehensive synthesis of these concepts, see KENT GREENAWALT, SPEECH, CRIME AND THE USES OF LANGUAGE (1989); and THOMAS EMERSON, THE SYSTEM OF FREE EXPRESSION 401-65 (1970). My own effort to explore the ramifications of the verbal act concept and its boundaries in other factual contexts is contained in WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 122-81.

doctrine, both as it stands currently and as various scholars would have it, some refinement of the notion of advocacy is needed. At its broadest, advocacy can be defined as speech in favor of a given cause or a statement or argument on behalf of a given result. One may advocate on behalf of a client to prevail in a lawsuit, for a political party to win in election, to persuade someone to pursue a given course of conduct, or to obtain a favorable result in any other situation. Styles of advocacy can range from the decorous to the threatening, and the conduct at which the advocacy is aimed can likewise range from the legal or innocuous to the reprehensible or proscribed. Almost every speech or writing relating to public affairs falls within this definition of advocacy. The courts have frequently recognized that different levels of advocacy exist, and have endeavored to distinguish between the variants based on elements, including the intensity with which the speaker exhorts, and the specificity of the desired result.

In the frequently examined context of speech urging overthrow of the government, the Supreme Court has sought to distinguish, in the first instance, between protected "advocacy" and unprotected "incitement," and in the second, between protected "discussion" and unprotected "advocacy."[41] For the present discussion, the distinction between advocacy and incitement can wait. The term "incitement" implies a legal conclusion about the unprotected status of the speech in question, and thus is a result of analysis and not an aid to it. As a threshold matter, it is better to first distinguish between the several types of advocacy without making assumptions as to their constitutional status.

A. Three Forms of Advocacy

The first type of advocacy may be called "directed advocacy," which involves speech urging a particular action be taken in a specific situation. Such advocacy is "directed" in that the speaker knows the specific factual context of the occasion calling for action and is thus in a position to assess both the likelihood that her advice

[41] *See* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 127-29 (1988) (discussing the distinction between "direct incitement" and protected speech in *Masses Publ'g Co. v. Patten*, 244 F. 535, 540 (D.N.Y. 1917), *rev'd*, 246 F.24 (2d Cir. 1917)); *id.* at 154-56 (discussing *Gitlow v. United States*, 268 U.S. 652 (1925), and the duel between Justices Sanford and Holmes over whether incitement could be meaningfully distinguished from advocacy of ideas in general); *id.* at 215-17 (distinguishing between "discussion" and "advocacy" as used by Justice Harlan in *United States v. Yates*, 354 U.S. 298 (1957), and noting his own preference for the term "incitement" to capture the circumstances involved).

will be implemented, and the likely consequences of her advice being followed. This renders the advocate's connection to any resultant conduct more intimate, less abstract and bloodless. The advocate in a sense is giving her imprimatur to the performance of the deed and is authorizing the specific result. The listener, who is not indulging in philosophic speculation, applies the advocate's general principles to a context that arises independently. Thus, the listener internalizes the advocate's message, independently accepts the message's validity, and decides to implement these principles in the concrete terms of the real world. This process involves three separate intellectual actions: evaluation, acceptance and implementation, whereby the listener desires a fact-specific result in a given set of circumstances. In directed advocacy, the advocate participates in each of these three actions and approves of the performance of the action advocated. Thus, the listener is far less independent in her decision-making process and the speaker far more involved. Frequently, direct advocacy creates instances where the time between the speech and the resultant act is short. This further links the act with the advocate because the listener has less time to perform the three mental operations and is less able to closely consider the speaker's reasoning.

The second type of advocacy may be termed "undirected advocacy," in which the speaker addresses a hypothetical set of facts or a general course of conduct. When a speaker uses undirected advocacy, she does not have as large a role in two of the three mental operations: application and implementation of the speech to a factual context. In fact, the real life context of time and place are missing entirely, which renders the applicability of the advice or advocacy less tangible. The listener may perceive distinctions between the hypothetical and reality, and may conduct a separate balancing of factors not addressed by the speech. Alternatively, the listener may simply remove the fact situation from the principle advocated altogether.

The third and most subtle form of advocacy would be "indirect advocacy," which is limited to the depiction of a course of conduct or a belief-system in a sympathetic, approving manner, but without explicit exhortation. By using this type of advocacy, the author or speaker may be teaching by example, or by presenting the conduct or beliefs in question in a favorable light.

Narrative commentary can provide further spin and the opportunities to co-mingle undirected and indirect advocacy. For

example, in the novel *Atlas Shrugged,*[42] author Ayn Rand uses the actions of the leading character, John Galt, to evoke the reader's admiration and emulation. This is an example of indirect advocacy—the portrayal of action in a manner that seeks to teach a lesson to the reader or audience. In contrast, the long—wearisomely long, to this reader—speech given by Galt is an example of undirected advocacy, in that it is designed to persuade the reader to rationally accept the theory Rand calls "Objectivist Ethics."[43] Such an effort is undirected because it seeks to convince the audience to adopt a conclusion, but does so with no real life context for the reader to apply the conclusion. And, of course, direct advocacy would feature an employment of Rand's principles to a specific context – for example, the argument that criminal enforcement of securities laws against Enron would be in the long run contrary to public policy.

More subtle examples of the intermingling of indirect and undirected advocacy can be found in less overtly didactic novels such as Anthony Trollope's *The Last Chronicle of Barset,* where the opinions of the elderly Mr. Harding regarding the proper place of money in the priorities of a young couple have extra weight because of the moral stature Trollope has accorded Harding.[44] Trollope also is famous for giving his own opinions in chatty little asides to the reader. To give a more contemporary example, the insights of the recurring character Dunstan Ramsay in the novels of Robertson Davies are generally to be equated with Davies's own views.[45] Even less overtly, in Robert Bolt's 1962 play, Thomas More is held up as *A Man For All Seasons,*[46] and as one to be admired and emulated.

Indirect advocacy can be further veiled thorough the use of irony and satire. For instance, in *The Adventures of Huckleberry Finn,* Huck Finn's decisions both not to betray Jim based upon his

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[42] AYN RAND, ATLAS SHRUGGED (1957).

[43] In addition to ATLAS SHRUGGED, Rand explicates her belief in the philosophy set out by the fictional Galt, whom she describes as "its best representative," in AYN RAND, THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM 13-35 (1964).

[44] ANTHONY TROLLOPE, THE LAST CHRONICLE OF BARSET 509-10 (1867). For Trollope's final estimation of Mr. Harding, see *id.* at 864.

[45] Dunstan Ramsay, the protagonist of ROBERTSON DAVIES, FIFTH BUSINESS (1970), appears not only in its sequels, THE MANTICORE (1972) and WORLD OF WONDERS (1975), but in several of Davies's otherwise unrelated novels. *See* ROBERTSON DAVIES, WHAT'S BRED IN THE BONE 157-59 (1985) (Ramsay sets Francis Cornish, the protagonist, on his artistic path); THE LYRE OF ORPHEUS 319 (1988) (Cornish repays Ramsay by including him in a great painting of the Wedding at Cana); THE CUNNING MAN 73-83 (1994) (Ramsay participates in a debate with an aspirant to the priesthood against the moral and philosophical outlook of public schools).

[46] ROBERT BOLT, A MAN FOR ALL SEASONS (1962).

recognition of Jim's moral worth, and to reject the racist standards of the slaveholding South, are all the more potent because for Huck it represents a sin—and Huck nonetheless concludes, "Alright then, I'll go to hell."[47] Undirected advocacy can also afford the luxury of sarcasm and irony. Jonathan Swift's *A Modest Proposal*[48] masquerades as a tract urging people to eat the children of the poor, but of course advocates very different reforms—the "other expedients" rejected by the persona adopted by the author. The irony is laid on with a trowel, but the point is made. In the context of direct advocacy, such tools can seldom be used because time is generally of the essence and action must be taken before the state of affairs changes and the evanescent opportunity is lost. Thus, direct advocacy tends to adopt a more simple, rhetorical strategy as a function of the need to compel immediate, or at least swift, action.

B. Liability for Advocacy: The Supreme Court's Exegesis

The distinction between these three forms of advocacy is relevant because the underlying First Amendment values that sometimes permit the imposition of liability on people who advocate harmful conduct through speech apply predominantly—indeed, exclusively—to direct advocacy. The imposition of liability for even the most direct advocacy, however, strongly undermines the values associated with the First Amendment, and particularly undermines the verbal act concept that lies at the heart of First Amendment jurisprudence.

The *Brandenburg* rubric and Justice Douglas's cognate "speech brigaded with action" formulation provide the most philosophically coherent account of the First Amendment principles relating to the Government's prevention of speech and punishment of speakers.[49] Indeed, disregarding the categories of "lesser value" speech, this account resonates on the whole with the Supreme Court's own understanding of the First Amendment.[50] The Court has yet to jettison the verbal act concept, despite the increasing number of speech categories considered to be "lesser value" and the Court's increasing reliance on balancing tests, which, as a general matter,

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[47] MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN 207 (Penguin Books) (1983).

[48] JONATHAN SWIFT, A MODEST PROPOSAL (1729).

[49] Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting).

[50] For examples of cases applying verbal act logic to symbolic speech, see *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. O'Brien*, 391 U.S. 367 (1968). Such logic has been successfully applied to a variety of contexts. *See* WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 135-56.

threaten the existence of a coherent jurisprudence. In applying the verbal act concept, the Supreme Court has long recognized that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech elements can justify incidental limitations on First Amendment freedoms."[51]

Distinguishing between protected speech and unprotected conduct in the form of speech brigaded with action is frequently difficult.[52] However, "if the evidence shows that the speeches crossed the line into criminal solicitation, procurement of criminal activity or conspiracy to violate the laws, the prosecution [of such speech] is permissible."[53] In *Rahman*, the Second Circuit described such unprotected words as "ones that instruct, solicit, or persuade others to commit crimes of violence," and found that they might appropriately be prosecuted under statutes of "general applicability."[54]

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[51] O'Brien, 391 U.S. at 376; *see also* Citicorp v. Interbank Card Ass'n., 478 F. Supp. 756, 762 (S.D.N.Y. 1979) (where "conduct properly proscribed is coupled with conduct protected by the First Amendment, the latter does not cure the former"); United States v. Viehaus, 168 F.3d 392, 395-96 (10th Cir. 1999) (distinguishing between protected political speech and unprotected threat component of telephone call threatening bombings); Michael Anthony Jewelers v. Peacock, 795 F. Supp. 639, 648-49 (S.D.N.Y. 1992) (discussing limitations on freedom of speech of the Noerr-Pennington Doctrine. *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) (stating that speech within a class of speech may be regulated for the "very reason the entire class of speech at issue is proscribable," but not based upon disapproval of the viewpoint expressed); Watts v. United States, 394 U.S. 705 (1969) (distinguishing between protected political hyperbole in the form of ostensibly threatening statements and unprotected verbal act of "true threat"); United States v. Dinwiddie, 76 F.3d 914 (8th Cir. 1996) (distinguishing between "true threats" and First Amendment protected speech in the context of threats against abortion clinic staff); United States v. Kelner, 534 F.2d 1020, 1026 (2d Cir. 1976) ("Threats punishable consistently with the First Amendment were only those which according to their language and context conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected 'vehement, caustic . . . unpleasantly sharp attacks on government and public officials.'" (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964))); United States v. Baker, 890 F. Supp. 1375 (E.D. Mich. 1995), *aff'd*, 104 F.3d 1492 (6th Cir. 1997) (stating that email messages containing sexual violence against women and girls were not an immediate threat and were therefore protected by the First Amendment).

[52] *See generally* GREENAWALT, *supra* note 40 (endeavoring to chart the permutations of Supreme Court decisions in seeking to draw this line, but unable to discern a bright-line, or even a series of bright-line distinctions to facilitate analysis).

[53] United States v. Rahman, 189 F.3d 88, 117 (2d Cir. 1999) (upholding conviction of Muslim cleric for his role in terrorist conspiracy against First Amendment speech and free exercise challenges).

[54] *Id.* (citing Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (rejecting Free Exercise challenge to anti-drug regulation impacting upon religiously-inspired use of peyote); *see also* City of Boerne v. Flores, 521 U.S. 507, 533-34 (1997)).

The applicability of this verbal act analysis has never been limited to the advocacy of violence[55] and did not originate in the subversive advocacy context of *Brandenburg*. In fact, the formulation antedates the 1919 Espionage Act cases in which such speech was first given any substantive level of protection.[56] Well before *Brandenburg*, the Supreme Court declared, through Justice Hugo Black, that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[57]

C. Of Conspiracies and Attractive Nuisances: Grappling with the Limits

The decision in *Rice* would be tempting to write off, as Professor Smolla has suggested, as a unique instance where liability attached only because of Paladin's spectacularly arrogant confession of intent

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[55] *See* IDK, Inc. v. County of Clark, 836 F.2d 1185, 1194 (9th Cir. 1988). The court cited as "examples illustrat[ing] that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity:" *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (the exchange of information about securities); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (corporate proxy statements); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (the exchange of price and production information among competitors); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (employers' threats of retaliation for the labor activities of employees); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61-62 (1973) (damage to neighborhood property values by adult movie theatres).

[56] *Compare Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911) (upholding contempt citation for labor demonstrators violating an injunction on theory that boycott was a "verbal act" and as such, subject to regulation), *with* Schenck v. United States, 249 U.S. 47 (1919) (upholding convictions under the 1919 Espionage Act based on written speech). The Court in *Schenck*, however, first enunciated the "clear and present danger" test and the first extension of substantive immunity to some speech, as opposed to previous decisions holding that the First Amendment was in essence only a protection against prior restraint. *Schenck*, 249 U.S. at 51 (citing Patterson v. Colorado, 205 U.S. 454 (1907)).

[57] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (upholding as constitutional an injunction barring labor picketing deemed to be coercive); *see* New York v. Ferber, 458 U.S. 747, 761-62 (1982) (upholding a New York law prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16); *see also* Sanitation and Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 999 (2d Cir. 1997) ("When a trade organization becomes so closely brigaded with illegal activity as to become inseparable from it, the government is justified in withholding benefits based on association with such an organization."); United States v. Rowlee, 899 F.2d 1275, 1278 (2d Cir. 1990) (advisor's counseling tax fraud in advancing agenda of anti-tax society). The *Rowlee* court stated that "[s]peech is not protected by the First Amendment when it is the very vehicle of crime itself." *Id.* (quoting United States v. Varani, 435 F.2d 758, 762 (6th Cir. 1970)); *IDK, Inc.*, 836 F.2d at 1194 (escort service asserting associational rights).

to assist in the fruition of crime.[58] Such a limited view of the case would nonetheless require the artificial harmonization of two countervailing streams of cases in which the courts have struggled with the breadth of the verbal act concept.

In the first set of decisions, various circuit courts have seemingly applied the verbal act doctrine when considering instructional materials that provide assistance in the commission of unlawful activity. The courts have found a sufficient linkage between these instructions and resultant acts so as to establish liability under several theories, ranging from attempt, to accessory liability, to conspiracy. These cases were resolved on several different grounds but, as the Second Circuit has rightly perceived, some could have been resolved on verbal act grounds. In *Rowlee*,[59] the Second Circuit upheld the conviction of a tax protestor who conducted "tax seminars" under the aegis of an anti-taxation organization known as the "New York Patriot's Society for Individual Liberty Association."[60] At the seminars, class members were instructed and assisted in the preparation of false and evasive tax returns, and were taught how to set up frivolous but purportedly effective defenses against an audit.[61] At trial, the defendant was convicted of conspiracy. The Second Circuit noted that the conspiracy was partly proven through the verbal acts of the defendant and that in addition, "[a]ppellants were convicted of the act of conspiracy. . . . Their act was not protected by the First Amendment merely because, in part, it may have involved the use of language."[62] Such logic, the Court held, rendered appropriate the finding of aiding and assisting liability.[63] The Second Circuit conceded that the theories upon which aiders and assistants in tax evasion could be convicted were not consistent from circuit to circuit, but noted that the "consensus of this and every other circuit is that liability for a false or fraudulent tax return cannot be evaded by evoking the First Amendment."[64]

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[58] *See* RODNEY SMOLLA, DELIBERATE INTENT: A LAWYER TELLS THE TRUE STORY OF MURDER BY THE BOOK 266-77 (1999) [hereinafter SMOLLA, DELIBERATE INTENT].

[59] 899 F.2d at 1275.

[60] *Id.* at 1276-77.

[61] *Id.*

[62] *Id.* at 1278 (quoting *Ferber*, 458 U.S. at 747; United States v. O'Brien, 361 U.S. 367 (1968)).

[63] *Id.* at 1278-79.

[64] *Id.* at 1279. The Court went on to canvass the rationales employed by the various circuits to justify the conclusion that "the preparation of tax returns does not implicate the First Amendment at all." *Id.* (citing, *inter alia*, United States v. Kelley, 864 F.2d 569 (7th Cir. 1989) (holding that under a balancing test of the individual rights weighed against the need of the government to collect revenue, the

In explaining its conclusion, the *Rowlee* court found that the District Court had over-complicated the analysis by discussing the First Amendment and the temporal imminence requirement of *Brandenburg*. The Court found that "to the extent that the concept of 'imminence lawless action' has any role to play in this non-syndicalism case, it is incorporated sub silentio in the tax evasion statute itself."[65] The court concluded that if the defendants did not violate the statute, "the restrictions imposed by that statute did not violate their First Amendment rights," and that, "if they did violate [the statute], they were not protected by the First Amendment."[66] The court further explained that "[i]nsofar as Rowlee commented generally on the tax laws during his seminars without aiding, assisting, procuring, counseling, or advising the preparation or presentation of the alleged false or fraudulent tax documents, he did not violate [the statute]. Accordingly, as to those comments, the question of First Amendment protection was redundant and irrelevant."[67] The Court stated that the converse applied to actual participation and assistance in the preparation of specific documents.[68] Thus, the Second Circuit concluded, the trial court's charge on the First Amendment "simply required the jury to consider a duplicative and unnecessary issue and would better have been omitted."[69]

Most intriguingly, the Second Circuit found these arguments equally effective with respect to the mail fraud charges. The court squarely rejected that the application of the "'incitement to imminent lawless action' required by *Brandenburg* can be applied in any reasonable manner to violations of the mail fraud statute."[70] As the Court described it:

> Mail fraud cases often involve long-term, slowly-developing wrongs, not "imminent lawless action." Imminence of mailing likewise is not essential to a mail fraud violation. Indeed, the

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government interest prevails); Hudson v. United States, 766 F.2d 1288 (9th Cir. 1985); Kahn v. United States, 753 F.2d 1208, 1217 (3d Cir. 1985)). Regarding the rationale employed by the District Court in *Rowlee* that the seminar could be divided into protected advocacy and unprotected "counsel[ing] and participat[ion] in the actual preparation of returns so as to become part of the crime itself, the court held that a First Amendment defense rested on words alone." *Rowlee*, 899 F.2d at 1280 (citing, *inter alia*, United States v. Freeman, 761 F.2d 549 (9th Cir. 1985)).

[65] *Rowlee*, 899 F.2d at 1280.

[66] *Id.* at 1280.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

> scheme to defraud need not even contemplate use of the mails as an essential element. "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." Thus, in tax fraud cases, the mailing required by the statute may not take place until the Government sends out refund checks, a procedure that some tax payers look upon as "long-term" indeed.[71]

Thus, in terms of assessing liability, the Circuit suggested that the requirement of temporal imminence contained within *Brandenburg* is specific to the factual scenario involved there: the context of "syndicalism," or the advocacy of political change through lawless, especially violent, action.

Like the Second Circuit in *Rowlee*, the Fourth Circuit in *Rice* concluded that the imminence prong of *Brandenburg* "generally poses little obstacle to the punishment of speech that constitutes criminal aiding and abetting, because 'culpability in such cases is premised, not on defendants' "advocacy" of criminal conduct but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes.'"[72] The Fourth Circuit concluded that the "question of whether criminal conduct is 'imminent' is relevant for constitutional purposes only where, as in *Brandenburg*, the government attempts to restrict advocacy, as such."[73]

The second series of cases, seemingly more analogous to *Byers* than to *Rice*, involves "copycat" behavior. In a series of lower court decisions, a general consensus has evolved that representations or discussions of risky conduct do not subject publishers to liability for imitative behavior.In perhaps the most pointed case in this genre, *Herceg v. Hustler Magazine*,[74] an adolescent died after following a description of the practice of "autoerotic asphyxiation" contained in an article in *Hustler* magazine.[75] Both the text of the article and a prefatory disclaimer warned that the practice was "neither healthy nor harmless" and stated that "it is a serious—and often-fatal—

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[71] *Rowlee*, 899 F.2d at 1280-81 (citations omitted).

[72] *Rice*, 128 F.3d at 246 (quoting U.S. DEPARTMENT OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION 37 (Apr. 1997) [hereinafter DEPARTMENT OF JUSTICE REPORT]).

[73] *Id.* (quoting DEPARTMENT OF JUSTICE REPORT, *supra* note 72).

[74] 814 F.2d 1017 (5th Cir. 1987).

[75] *Id.* at 1018 (the article was charmingly entitled "Orgasm of Death").

mistake to believe that asphyxia can be controlled."[76] The article also described the "thrill" and the "high" those who engage in the practice seek to achieve.[77] The disclaimers in the two-page article were not enough to eliminate the allure of the "intense physical pleasure" obtained by successful practitioners of this "dangerous, self-destructive and deadly" practice in the mind of one 14-year-old boy, who imitated the practice, lost consciousness, and died of strangulation—just as the article warned might happen.[78] The mother of the hapless boy sued, as did one of his closest friends who found him hanging dead in the closet with the article opened at his feet.[79]

The district court dismissed all the claims except those based on the theory that the article served to incite the youth's experiment, and that the magazine should be held accountable because the result was foreseeable.[80] After a jury trial, damages were awarded to both plaintiffs.[81] The district court found that the "crucial element to lowering the First Amendment shield is the imminence of the threatened evil" when evaluating whether an article or book may be deemed an "incitement."[82] Moreover, finding that "[t]he root of incitement theory appears to have been grounded in concern over crowd behavior," the court intimated doubts, but did not deem impossible, that "written material might ever be found to create culpable incitement unprotected by the First Amendment."[83] On appeal, the Fifth Circuit Court of Appeals reversed, finding that the First Amendment operated to shield the article.[84]

Perhaps part of the analytical difficulty here is that many of the acts described fall within the class of criminal activities known as "inchoate crimes."[85] In criminal law, these crimes are not easily defined. Glanville Williams, however, in his masterful survey of the common law, divides inchoate crimes into three related offenses: incitement, attempt and conspiracy.[86] The concept of incitement

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[76] *Id.*

[77] *Id.* at 1018-19.

[78] *Id.* at 1019.

[79] *Id.*

[80] *Herceg*, 814 F.2d at 1019.

[81] *Id.*; *see* Herceg v. Hustler Magazine, 565 F. Supp. 802 (S.D. Tex. 1983) (the district court's reasoning is set out in its opinion on the motion to dismiss).

[82] *Herceg*, 814 F.2d at 1022.

[83] *Id.* at 1023.

[84] *Id.*

[85] *See* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 466 (1953).

[86] *Id.*

incorporates the rubric of liability applied in *Rice*, because the difference between an accessory before the fact and an inciter "is that in incitement the crime has not (or has not necessarily) been committed, whereas a party cannot be an accessory in crime unless the crime has been committed. An accessory before the fact is party to consummated mischief; an inciter is guilty only of an inchoate crime."[87]

The Supreme Court has, without much analysis of the effect of the First Amendment, accepted that such doctrines are unaffected by its sweep. With respect to the Second and Fourth Circuits' circumscribed view of the applicability of the *Brandenburg* temporal imminence requirement, the Supreme Court has addressed the nature of agreements and solicitations of participation in specific unlawful acts:

> Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or the underlying conduct, the constitutional immunities that the First Amendment extends to speech. Finally, while a solicitation to enter into an agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may properly be prohibited.[88]

In the instance of conspiracy, the archetype of such inchoate offenses, it is the formation of the agreement itself that is the offense—the creation of an association with the goal of committing the criminal act.[89] Many lower courts have opined that using speech as a means to effect ends prohibited by otherwise valid laws does not cause these laws' application to become unconstitutional. However, such application may lead to a blurring of the line between speech and conduct. In *Jews for Jesus, Inc. v. Jewish Community Relations Council, Inc.*, the Second Circuit applied anti-discrimination law to

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[87] *Id.* at 469.

[88] Brown v. Hartlage, 456 U.S. 45, 55 (1982) (upholding state statute prohibiting the sale and purchase of votes (citing Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496 (1982); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563-64 (1980); Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973))).

[89] Williams, *supra* note 85, at 512.

impose liability based upon boycotts "with the objective of coercing the [boycott target] to deny plaintiffs accommodations for reasons prohibited by the anti-discrimination statute."[90] The Second Circuit opined that "if discrimination engaged in by 'primary' actors using words can be constitutionally outlawed," so too can discrimination engaged in by third parties who use speech or other expressive conduct to coerce a 'primary' actor to violate an anti-discrimination statute."[91]

Similarly, in *United States v. Kufrovich*, the United States District Court for the District of Connecticut rejected a First Amendment challenge to federal statutes that prohibited the use of any means of interstate commerce "to persuade a minor to engage in sexual activity for which anyone may be prosecuted," or "travel in interstate commerce to engage in a sexual act with a minor."[92] The court, following *Rowlee*, found such persuasion unprotected because it was a component of the interrupted act of child molestation, rather than mere speech.[93] This result may be influenced by the fact that it, and others like it, target expression that is directed at minors—those who, in the eyes of the law, are not deemed fully accountable for their own behavior, and are considered to be especially vulnerable to such blandishments. The result may alternatively be justified by interpreting the communication in question as an attempted act of child molestation in that it is a "substantial step" towards the efficacy of the deed, or as bringing the illegal action "dangerously close to fruition," in violation of the penal law.[94]

The results in these cases may have turned on the coercive nature of the boycott in *Jews for Jesus*, or in the presumptively less fully developed moral agency of minors as compared to adults in

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[90] 968 F.2d 286, 296-97 (2d Cir. 1992).

[91] *Id.* at 295-97.

[92] 997 F. Supp. 246, 254 (D. Conn. 1997).

[93] *Id.* at 254; *see* People v. Foley, 731 N.E.2d 123 (N.Y. 2000) (upholding a state statute criminalizing Internet communications of a sexually explicit nature, which were deemed "designed to lure children into harmful conduct." Such communications were defined as those consisting of an "invitation or an enticement" or an effort to "solicit" or "procure," as opposed to "pure speech"); *see also* United States v. Wilson, 154 F.3d 658, 666-67 (7th Cir. 1998) (stating that those who conspire to violate the law can be held liable, despite First Amendment concerns).

[94] *Compare* People v. Hernandez, 711 N.E.2d 972, 978 (N.Y. 1999) (noting that the phrase "substantial step" in the definition of criminal attempt has been "supplanted" and is a "disfavored phrase"), *and* People v. Slater, 705 N.Y.S.2d 777, 778 (N.Y. Gen. Term 2000), *with* United States v. Porter, No. 99-1235, 2000 U.S. App. LEXIS 1865 (2d Cir. Feb. 1, 2000). (2d Cir. 2000) (stating that Federal law definition of criminal attempt involves committing an act constituting a "substantial step" toward the commission of the actual crime).

Kufrovich. But if they were not decided on these points, then the "verbal act" concept could swell up to obliterate the very protection it distinguishes. If efforts to persuade others in a non-coercive way are deemed to fall on the "conduct" side of the dividing line, then the law of attempt, or the law of incitement, is on a collision course with the protection of speech advocating illegal conduct that stands at the heart of the First Amendment doctrine.

In *Rice* and in *Byers*, the criminal and tort law concepts which have been generally seen as unexceptional boundary lines demarcating protected speech from unprotected conduct were applied in a manner that upset expectations and highlighted the lack of a clear boundary between the two. A look at the rationales undergirding these decisions is helpful to an effort to distinguish them.

III. FOR THE WRONG REASON: THE DISTRICT COURT OPINION IN *RICE*

The district court in *Rice* focused on the practical impact of *Hit Man's* concrete suggestions on the crime committed by Perry on Horn's behalf.[95] Indeed, the district court's brief factual summary consists largely of a correlation of *Hit Man's* "how-to" suggestions and the methods adopted by Perry in committing the murders:

> "What other basic equipment will the beginner need as essential tools of his trade?" An AR-7 rifle.
>
> James Perry used an AR-7 rifle to commit the murders of Mildred Horn and Janice Saunders.
>
> "The AR-7 rifle is recommended because it is both inexpensive and accurate. The barrel breaks down for storage inside the stock with the clip. It is lightweight and easy to carry or conceal when disassembled."
>
> After the murders, James Perry disassembled the AR-7 rifle as instructed by the Defendants.
>
> "The AR-7 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."
>
> James Perry drilled out the serial number of the AR-7 rifle exactly as instructed by the Defendants.
>
> "The directions and photographs that follow show in explicit detail how to construct a silencer for a Ruger 10/22 rifle. The same directions can be followed successfully to construct a

[95] Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 839-40 (D. Md. 1996).

> silencer for any weapon, with only the size of the drill rod used for alignment changed to fit the inside dimension of the barrel.
>
> James Perry used a homemade silencer which he used to silently kill Mildred Horn and Janice Saunders.
>
> "Close kills are by far preferred to shots fired over a long distance. You will need to know beyond any doubt that the desired result has been achieved. When using a small caliber weapon like the 22, it is best to shoot from a distance of three to six feet. You will not want to be at point blank range to avoid having the victim's blood splatter you or your clothing. At least three shots should be fired to ensure quick and sure death . . . aim for the head—preferably the eye sockets if you are a sharpshooter."
>
> James Perry shot Mildred Horn and Janice Saunders from a distance of three feet. He shot them each three times in the eyes.
>
> "Use a rat tail file, alter the gun barrel, the shell chamber, the loading ramp, the firing pin and the ejector pin. Each of these items leaves its own definite mark and impression on the shell casing, which if any shells happened to be left behind, can be matched up to the gun under a microscope in a police laboratory. . . . Of primary importance now too, is changing the rifling of the murder weapon. This should be done even before you leave the crime scene. That way, even if you get picked up or stopped with the weapon in your possession, its ballistics will not match the bullets you left behind in the mark."
>
> James Perry filed down the parts of the AR-7 Rifle.[96]

The district court adduced further instances of the extent to which Perry had employed techniques suggested by *Hit Man* including:

> how to solicit for and obtain prospective clients in need of murder for hire services; requesting up-front money for expenses; how to register at a motel in the vicinity of the crime, paying with cash and using a fake license tag number; . . . reminding to clean up and carry away the ejected shells; breaking down the gun and discarding the pieces along the roadside after the murders; and using a rental car, a stolen tag on the rental car and the discarding of the tag after the murders.[97]

The district court also found that "Paladin engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to

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[96] *Id.* (citations omitted).

[97] *Id.* at 840.

commit crimes."[98] Reciting the stipulations of the parties, the Court concluded that "[i]n publishing, marketing, advertising and distributing *Hit Man*... Paladin intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications."[99] The district court, however, concluded its factual recitation by stating that:

> [a]ll parties agree that Paladin's marketing strategy is 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.[100]

The district court proceeded to analyze whether the plaintiffs had stated a cause of action. Acknowledging that the imposition of tort liability against a publisher constituted state action sufficient to implicate the First Amendment, Judge Williams concluded that "if the court finds that *Hit Man* is protected by the First Amendment, the Plaintiffs [sic] are barred from maintaining tort claims against Paladin."[101] Judge Williams found the task of "balancing society's interest in compensating injured parties against the freedom of speech guaranteed by the First Amendment" to be "both novel and awesome" in the factual circumstances of this case.[102] Judge Williams then set out his template for First Amendment analysis:

> The First Amendment bars the imposition of civil liability on Paladin unless Hit Man falls within one of the well-defined and narrowly limited classes of speech that are unprotected by the First Amendment. Those classes of speech which receive limited or no First Amendment protection include: (1) obscenity (2) fighting words (3) libel (4) commercial speech, and (5) words likely to incite imminent lawless action.[103]

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[98] *Id.*

[99] *Rice,* 940 F. Supp. at 840.

[100] *Id.*

[101] *Id.* In support of its conclusion, the court cited *N.Y. Times v. Sullivan,* 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has . . . been exercised.").

[102] *Rice,* F. Supp. at 840.

[103] *Id.* at 840-41 (citations omitted).

The district court proceeded to examine whether the speech at issue fit into any of these categories of speech receiving "limited or no First Amendment protection."[104] Before examining the district court's reasoning, however, a discussion of some underlying principles may shed some light on this examination. Judge Williams' reasoning reflects an understanding of First Amendment jurisprudence, which is growing in the academic commentary, but which is antithetical to any kind of free speech protection not dependent upon the subjective whim of the judiciary. Judge Williams assumed in his opinion that the only type of speech subject to government regulation was speech deemed to be low value, and that the categories of low value speech, among others, included speech likely to incite imminent lawless action. In fact, this is not the case.

The categorization analysis is, as a general matter, applied only to discrete classes of speech that the Supreme Court has deemed to be of such minimal social value that "the prevention and punishment of which have never been thought to raise any Constitutional problem."[105] Those classes, as Justice Murphy stated in *Chaplinsky v. New Hampshire*, were subject to proscription because "such utterances are no essential part of any exposition of ideas, and are of such slight social value . . . as a step to truth . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[106] The Supreme Court in recent years has pointed to nothing but tradition in justifying these exceptions carved out of the Amendment's scope, but has reasserted that "a limited categorical approach has remained an important part of our First Amendment jurisprudence."[107] The rule protecting speech advocating lawless behavior, by contrast, is the descendant of the "clear and present danger" test, and is the basic test applied to speech concededly at the core of the First Amendment's protective scope.[108]

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[104] *Id.* at 841.

[105] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[106] *Id.* at 572.

[107] R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992).

[108] *See* WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 17-71 (describing evolution of standard); *id.* at 122-56 (applying "verbal act" formulation as touchstone of First Amendment jurisprudence). Even among scholars who are not hostile to the "multi-tier" theory, as the *Chaplinsky* analysis has come to be known, the centrality of the *Brandenburg* verbal act analysis is widely conceded. *See, e.g.*, HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 119-24 (1988) (iIn a chapter titled, "Subversive Advocacy: The Core Issue and the *Brandenburg* Answer," Kalven describes the issue as "the ultimate battleground for free speech theory"); SMOLLA, FREE SPEECH, *supra* note 27, at 50-51 (describing the *Brandenburg* version of the "clear and present danger" principle as the "rigorous causation rule" upon which

Judge Williams' error in deeming categorization to be the universal approach to speech cases is attributable to two sources, but is still potentially dangerous. First, in *Chaplinsky,* the Court, in a manner calculated to cause confusion, explained the classes of speech subject to regulation as: "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[109] However, this language modifies the original list of categories, and is offered, in context, as an explanation of why these so-called narrow and well-defined categories may be proscribed without creating a First Amendment concern. The category to which the "incitement" language refers is "fighting words," generally understood to refer to face-to-face-insults that would provoke a reasonable person to violence.[110]

Moreover, the *Chaplinsky* decision was rendered in 1942, 27 years before *Brandenburg,* at a time when the status of politically inflammatory speech was still governed by the loose "bad tendency" test, or by a watered-down version of the clear and present danger test, which allowed the Court to employ a holistic balancing test to decide whether it felt the harm posed by speech was outweighed by the value of the speech.[111] Indeed, this variation of the clear and present danger test, modeled on a formulation created to measure liability for a shipowner for damages caused when a ship broke free of its moorings, analogized constitutionally protected speech to a garden variety tort claim.[112]

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the "integrity" of the three main principles of government regulation of speech is dependent).

[109] *Chaplinsky*, 315 U.S. at 571.

[110] *See R.A.V.*, 505 U.S. at 397, 401 (White, J., concurring) ("Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are directed against individuals to provoke violence or to inflict injury.").

[111] For the development of the *Brandenburg* test, see WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 17-71. See also Frank Strong, *Fifty Years of Clear and Present Danger,* 1969 SUP. CT. REV. 41 (1970), for a discussion on the status of the "clear and present danger" test between 1930 and 1950. *See also* Dennis v. United States, 341 U.S. 494, 505, 507-10 (1951) (reaffirming the "clear and present danger" formula as the standard for evaluating content-based restrictions on speech, but watering it down to a holistic balancing test as suggested by Judge Learned Hand at the circuit level (quoting United States v. Dennis, 183 F.2d at 212 (2d Cir. 1950), *aff'd,* 341 U.S 494 (1951))). See also WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 56-62 for further discussion of *Dennis.*

[112] *Compare Dennis*, 183 F.2d at 212 (balancing test for free speech claims in which "gravity of the evil, discounted by its improbability" is weighed to determine if "invasion of free speech" inherent in finding liability is justified), *with* United States v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947) (balancing test for common law tort claims, the so-called "Learned Hand formula," in which the probability that vessel will break away and the magnitude of damage likely to result are measured against

Another factor that could have led Judge Williams to conflate the *Chaplinsky* categorization approach with the mainstream test is that other courts had done so previously. In *Simon & Schuster Inc. v. Crime Board*,[113] Justice Kennedy wrote an opinion deploring the Court's application of the "compelling state interest" standard from equal protection law to the First Amendment context on the ground that such an application could lead to wider interpretation of content-based restriction:

> There are a few legal categories in which content-based regulation has been permitted or at least contemplated. These include obscenity, defamation, incitement, or situations presenting some grave and imminent danger the government has the power to prevent. These are, however, historic and traditional categories long familiar to the bar, although with respect to the last category it is most difficult for the government to prevail. While it cannot be said with certainty that the foregoing types of expression are or will remain the only ones that are without First Amendment protection, as evidenced by the proscription of some visual depictions of sexual conduct by children, the use of these traditional legal categories is preferable to the sort of ad hoc balancing that the Court henceforth must perform in every case if the analysis here used becomes our standard test.[114]

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the burden of preventing the ship's breaking away to determine if owner was negligent, and thus should be liable).

At the risk of riding a well-worn hobby horse, I reiterate that a comparison of these two cases establishes that Judge Hand's formulation in *Dennis*, mirroring his *Carroll Towing* approach, is unworkable because it gave an unprotected tortious act the same standard of protection as core First Amendment speech. This formula effectively erased the First Amendment from the Constitution, or at best, reduced it to a codification of common law practice. This is in itself ahistorical, as Judge Hand's analysis of tort liability was an innovation from common law and of the state practice. *See* WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 36-42; *see also* John F. Wirenius, *Helping Hand: The Life and Legacy of Learned Hand*, 25 SETON HALL L. REV. 505, 516-21 (1994).

[113] 502 U.S. 105 (Kennedy, J., concurring) (1991).

[114] *Id.* at 127 (citations omitted). A similarly flawed analysis was applied by the court in *Herceg v Hustler Magazine*, 814 F.2d 1017 (5th Cir. 1987). As in the case of the District Court opinion in *Rice*, employment of this *Chaplinsky* analysis did not result in a finding that regulation was appropriate. *Herceg*, 814 F.2d at 1020. In each case this was a result of delimiting the classes of speech that can be regulated to those which the Supreme Court has explicitly established.

Leaving aside the question of conflation of the *Brandenburg* scenario with a *Chaplinsky* category, Justice Kennedy has remained vigilant to the harmful nature of the application of the terms evolved in Equal Protection analysis to the First Amendment context, which suggests "that content-based limits on speech can be upheld if confined in a narrow way to serve a compelling state interest." This is contrary to the First Amendment's complete disabling of the government as censor—with the exception of the *Chaplinsky* categories. Burson v. Freeman, 504

Judge Williams, therefore, had reason to believe that the First Amendment status of speech turned on whether it had social value. However, the discussion did not end on this point. After examining *Hit Man* with respect to the *Chaplinsky* categories, Judge Williams found that the book did not fall within any of the *Chaplinsky* categories and was therefore entitled to protection, thus defeating the plaintiffs' claim for compensation.[115] Easily dismissed were the obscenity, fighting words and libel classes of lesser value speech.[116] The Court then turned to commercial speech, a category of speech deemed to be intermediate, and thus afforded a lesser quantum of protection.[117] On the ground that "commercial speech is speech

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U.S. 191, 211-14 (1992) (Kennedy, J., concurring).

[115] *Rice*, 940 F.Supp at 849.

[116] Judge Williams rejected application of the obscenity doctrine to *Hit Man* on the incontrovertible ground that "it does not depic[t] or describ[e], in a patently offensive way, sexual conduct." *Id.* (quoting Miller v. California, 413 U.S. 15, 25 (1973)). The fighting words category was rejected on the basis that "the words in the book do not, by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* (quoting *Chaplinsky*, 315 U.S. at 572). *Hit Man* "is clearly not libelous since it does not tend to injure the reputation of any particular individual." *Id.* (quoting N.Y. Times. v. Sullivan, 376 U.S. 254, 267 (1964)).

[117] *See* 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996). The exact level of protection that commercial speech receives is somewhat unclear, as is perhaps not surprising for a doctrine created out of whole cloth by the judiciary. The notion that commercial speech was subject to a different standard of protection than other speech originated as an exclusion under *Chaplinsky*. Valentine v. Chrestensen, 316 U.S. 52, 55 (1942). Since *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, 447 U.S. 557 (1980), a balancing test has been applied to even truthful advertising where the state could "assert a substantial interest to be served by restrictions on commercial speech," if those restrictions are directly limited to the substantial interest, and are the most limited means of achieving that goal. For example, In *Posadas de Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328, 340-45 (1986), this test was applied with a level of deference to the legislature as to suggest that the protection afforded commercial speech could be described as "illusory." WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 105. Cases subsequent to *Posadas* have been substantially more protective of speech, and a plurality of the Court in *44 Liquormart* rejected the "greater-includes-the-lesser" approach of *Posadas*, which argued that the ability to ban the transaction proposed justified regulation of the advertisement. *44 Liquormart*, 517 U.S. at 509-10 (Stevens, J., plurality opinion); WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 105, n.169 (discussing these cases). Justice O'Connor's concurring opinion did not go so far as to declare *Posadas* wrongly decided, but did opine that "the closer look we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson*, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored." *44 Liquormart*, 517 U.S. at 531-32. While redressing some of the imbalance of the *Posadas* approach, Justice O'Connor's approach retains the subjectivity and *ad hoc* nature of the *Central Hudson* test. For today at least, the Justices agree that so great a deference to the legislative will as was invoked in *Posadas* was excessive. *See* Greater New Orleans Broad. Ass'n. v. United States, 527 U.S. 173, 182 (1999) (reaffirming disavowal of logic underlying *Posadas*).

which does no more than propose a commercial transaction," Judge Williams found this category to be inapplicable.[118] He stated that although "*Hit Man* is published for profit, the book itself cannot be considered an effort to achieve the type of commercial result that an advertisement is designed to achieve."[119] This conclusion is well in accord with mainstream First Amendment jurisprudence, which holds that the mere fact that a work is written for profit does not render it commercial speech, and therefore subject to a lesser level of protection.[120] Accordingly, Judge Williams determined that the "only category of unprotected speech under which *Hit Man* could conceivably be placed is incitement to imminent, lawless activity under *Brandenburg*."[121]

Before examining the viability of any conceivable regulation of *Hit Man* under *Brandenburg*, Judge Williams looked to the various theories of recovery propounded by the plaintiffs. The first theory was that *Hit Man* constituted an act of aiding and abetting, and could be punished as such.[122] Judge Williams' answer to this claim was perhaps the weakest section of his opinion. He asserted that, in "the absence of any reported decision suggesting that Maryland extends the tort of aiding and abetting to the circumstances of this case," such extension would violate the rule that "a federal court sitting in diversity cannot create new causes of action."[123] It is a weak and

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[118] *Rice*, 940 F. Supp. at 844 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973); citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976)).

[119] *Id.*

[120] *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952). However, while the classic definition of commercial speech limits this intermediate class of speech to "speech which does no more than propose a commercial transaction," the Supreme Court has referred to this as the "core notion" of commercial speech, and has stated that under certain circumstances, speech which combines elements of commercial and noncommercial speech may be regulated as commercial speech. Bolger v. Youngs Drug Prods., 463 U.S. 60, 66 n.11 (1983) (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 62); Bad Frog Brewery v. N.Y. State Liquor Auth., 134 F.3d 87, 97 (2d Cir. 1998). This rule has led some courts to consider speech that seems rather far from the notion of advertising to be susceptible to interpretation as commercial speech. For example, in *In re Orthopedic Bone Screw Prods.*, 193 F.3d 781, 793-94 (3d Cir. 1999), the court refused to hold as a matter of law that seminars on the use of orthopedic bone screws were not commercial speech, on the ground that the information regarding medical treatment provided may be "inextricably intertwined" with endorsement of the products made by the seminars' sponsors, the companies manufacturing the screws. Nonetheless, *Hit Man* seems far enough from any notion of commercial speech that Judge Williams was correct to dismiss this theory.

[121] *Rice*, 940 F. Supp. at 841.

[122] *Id.*

[123] *Id.* at 842 (citing Guy v. Travenol Labs., Inc., 812 F.2d 911 (4th Cir. 1987); Tarr

unconvincing argument that the application of an established cause of action to a new set of factual circumstances constitutes a "new cause of action" or a "new theory" such that a federal court sitting in diversity must decline to rule upon the viability of a cause of action, or, worse, must dismiss an otherwise meritorious cause of action because it requires the federal court to apply settled legal principles to new constellations of facts. Such is the inherent nature of case-by-case adjudication.

The district court glossed over the tax seminar cases and the PCP instruction manual cases relied upon by the plaintiffs. The court noted that in the tax seminar case, "the defendants' speech went beyond mere advocacy to incitement of lawless activity" under *Brandenburg*, and that the PCP instruction manual case was a criminal case and not one in which the imposition of civil liability for a criminal act was involved.[124] These distinctions were not fully developed by Judge Williams' opinion, but the latter is not especially convincing. In fact, the issue of whether Maryland law permitted the imposition of civil liability for an aider and abettor of a criminal act was convincingly addressed by the plaintiffs, and the court of appeals rightly rejected this holding on the part of the district court. Likewise, the applicability of the First Amendment analysis developed in the criminal context to the civil claims brought by the plaintiffs was conceded by Judge Williams at the very outset of his discussion of the First Amendment.[125]

The district court was on more solid ground in rejecting the plaintiff's effort to analogize the case to *New York Times v. Sullivan.* The plaintiff argued that if the lesser interest in reputation could support liability on the part of a defendant acting with knowledge or recklessness, "then of course the First Amendment must permit parallel liability in tort when publications cause physical injury and

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v. Manchester Ins. Corp., 544 F.2d 14, 15 (1st Cir. 1976); Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949)). Judge Williams also flatly declined to "create another category of unprotected speech, i.e. speech that aids and abets murder." *Id.* In so declining, Judge Williams displayed an appropriate sensitivity to his role as a district judge and to First Amendment values.

[124] *Id.* at 842-43 (discussing United States v. Barnett, 667 F.2d 835 (9th Cir. 1982) (upholding criminal conviction on aiding and abetting theory based on publication of manual instructing how to manufacture PCP) and United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978), *cert. denied,* 437 U.S. 906 (1978) (upholding criminal conviction based on aiding and abetting persons filing fraudulent tax returns)).

[125] *Id.* at 840 ("The imposition of tort liability constitutes state action, so the First Amendment is applicable in this case. 'The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised'") (quoting N.Y. Times, Co. v. Sullivan, 376 U.S. 254, 265 (1964)).

death."[126] The Court rejected this argument as lacking precedential support, and distinguished *Times* on the basis that the speech involved in that case "tend[ed] to injure the reputation of a particular individual."[127] Judge Williams likewise declined to follow *Weirum v. RKO General, Inc.*,[128] a California case. In *Weirum*, a disc jockey, who offered a cash reward for the first person to find him, "actively and repeatedly encouraged listeners to speed to announced locations" during the course of his broadcast.[129] The California court imposed liability "on the broadcaster for urging listeners to act in an inherently dangerous manner."[130] Judge Williams concluded that, regardless of the merits of the decision, there was immediate, real-time urging involved in *Weirum*, and "no such urging occurred in this case."[131]

Having cleared away all of this jurisprudential underbrush, Judge Williams moved on to the key question: whether the speech contained in *Hit Man*, was protected by the First Amendment under the standard articulated in *Brandenburg*.[132] Judge Williams concluded that the speech was protected, likening the case to many reported decisions relating to "copycat" crimes where courts had generally found no cause of action.[133] Judge Williams rejected plaintiff's efforts to distinguish the "copycat" cases from *Hit Man* on the grounds that Paladin intended the book to be used for the purpose of killing. Judge Williams shakily relied on Paladin's "clarification" of its stipulation regarding intent and, more plausibly, on the ground of immediacy:[134]

> [T]here is no evidence that Defendants intended imminent lawless activity. Secondly, the Court has read the book and concludes that, although morally repugnant, it does not constitute incitement or "a call to action."
>
> Nothing in the book says "go out and commit murder now!"

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[126] *Id.* at 843 (citing *N.Y. Times*, 376 U.S. at 279).

[127] *Rice*, 940 F. Supp at 841.

[128] 539 P.2d 36 (Cal. 1975).

[129] *Rice*, 940 F. Supp. at 844 (describing *Weirum*, 539 P.2d at 36).

[130] *Id.*

[131] *Id.*

[132] *Id.* at 845-46 (Judge Williams rejected plaintiffs' effort to argue that the *Brandenburg* standard applied only to speech which advocated illegal conduct in the context of urging or advocating political reform or change.).

[133] *Id.* at 846.

[134] At oral argument, Paladin maintained it had "intended" such use only to the extent that it knew that a cross-section of readers would buy the work, and would use it for all of their varied purposes. *Id.* at 846.

> 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.... The Court finds that the book merely teaches what must be done to implement a professional hit. The book does not cross that line between permissible advocacy and impermissible incitation to crime or violence. The book does not purport to order or command anyone to any concrete action at any specific time, much less immediately.[135]

Judge Williams also found that *Hit Man* did not have a tendency to incite violence, noting 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 the book has been in circulation."[136] The Court also pointed to Paladin's disclaimer that the book was "[f]or information purposes only," a disclaimer reiterated within the book itself.[137] Additionally, the nature of the book—the time it would take to read and its "advocacy of illegal action at some indefinite future time"—were deemed to exclude the book from the category of "incitement to imminent lawless action."[138] In short, Judge Williams concluded that, while "the books have been proven to contain information which, when it makes its way into the wrong hands, can be fatal, First Amendment protection is not eliminated simply because publication of an idea creates a potential hazard."[139]

IV. "STEELING TO ACTION": *RICE* ON APPEAL

On appeal, the Fourth Circuit reversed. The opinion for the Court was authored by Judge Michael Luttig, who opened with a long excerpt from *Hit Man*.[140] Much of the opening part of the opinion consists of selections from *Hit Man's* "recipes" for murder—the sort of "how to" materials that were not quoted verbatim by Judge Williams, but that the district court acknowledged and linked to the murders.[141] The material excerpted by the court of appeals had a different tone:

To	Those	Who	Think,
To	Those	Who	Do,
To	Those	Who	Succeed.

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[135] *Rice*, 940 F. Supp. at 847 (citations omitted).
[136] *Id.* at 848.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] Rice v. Paladin Enters., 128 F.3d 233, 235-39 (4th Cir. 1997).
[141] *Id.* at 236.

Success is nothing more than taking advantage of an opportunity.

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.

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 of living by their reflexes, of doing whatever is necessary without regard to moral or legal restrictions. But few have the courage or knowledge to make that dream a reality. . . .

[After you killed your first victim,] you felt **absolutely nothing**. And you are shocked by the nothingness. You had expected this moment to be a spectacular point in your life. You had wondered if you would feel compassion for the victim, immediate guilt, or even experience direct intervention by the hand of God. But you weren't even feeling sickened by the sight of the body. . . .

The people around you have suddenly become so aggravatingly ordinary. You start to view them as an irritating herd of pathetic sheep, doing as they are told, doing what is expected, following someone, anyone, blindly. You can't believe how dumb your friends have become, and your respect diminishes for people you once held in awe.

You too have become different. You recognize that you made some mistakes, but you know what they were, and they will never plague you again. Next time (and you know there will be a next time), there will be no hesitation, no fear.

Your experience in facing death head-on has taught you about life. You have the power and ability to stand alone. **You no longer need a reason to kill . . . .**

You are a man. Without a doubt, you have proved it. You have

> come face to face with death and emerged the victor through your cunning and expertise. You have dealt death as a professional. You don't need any second or third opinions to verify your manhood.[142]

A. Port of Departure

After recounting the murders, and setting out at some length the parallels between them and the instructions contained within *Hit Man*,[143] the court admitted:

> that such a right to advocate lawlessness is, almost paradoxically, one of the ultimate safeguards of liberty. Even in a society of laws, one of the most indispensable freedoms is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted.[144]

As Judge Luttig further stated, "[w]ithout the freedom to criticize that which constrains, there is no freedom at all."[145] Yet, he continued, "speech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes."[146] Judge Luttig spends the rest of the opinion seeking to justify the court's conclusion that *Hit Man* falls within the latter, and not the former, principle.

After discussing the cases exploring this distinction, Judge Luttig placed the case within the tort doctrine of aiding and abetting, because "*every* court that has addressed the issue, including this court, has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting crime, even when such aiding and abetting takes the form of the spoken or written word."[147] After examining cases in which aiding and abetting theory was applied to speech, the court moved on to conclude that the imminence requirement of *Brandenburg*:

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[142] *Id.* at 235-39.

[143] *Id.* at 239-43.

[144] *Id.* at 243.

[145] *Id.*

[146] *Rice*, 128 F.3d at 243 (citing Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991)) ("[G]enerally applicable laws do not offend against the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

[147] *Rice*, 128 F.3d at 244.

> generally poses little obstacle to the punishment of speech that constitutes criminal aiding and abetting, because "culpability in such cases is premised, not on defendants' 'advocacy' of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes."[148]

Judge Luttig then[149] moved on to apply the Maryland aiding and abetting law and, after considering certain factors including Paladin's stipulations of fact, found that the suggestions in *Hit Man* qualified it as aiding and abetting.[150] The court then examined whether, and in what manner, the *Brandenburg* standard should be applied to *Hit Man.*

B. Freedom to Speak Vaguely?

Judge Luttig's opinion proceeds on two separate but intertwined analytical tracks, of varying import for First Amendment jurisprudence. The first is the court's conclusion that *Hit Man* constitutes "aiding" of murder, as defined by the lower courts to fall within the speech act doctrine, because it provided such detailed technical information that it lost its protected status as purely informational speech. The second is the applicability of *Brandenburg* to *Hit Man* and the court's conclusion that its rule is limited to "abstract advocacy." The court said that *Hit Man* is not "abstract," and instead falls within a class of non-protected speech that the court styles "steeling to action" or, less floridly, "incitement." Both of these tracks present difficult questions as to the nature of speech and verbal acts, but the former is by far the less controversial.

The notion that the provision of raw data, absent editorial analysis or any other "message," presents a series of First Amendment concerns different than those encapsulated by mainstream First Amendment jurisprudence, is not inherently implausible. One can imagine a First Amendment analysis following Judge Luttig's lead, in which a showing that a party intentionally provided data and that it

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[148] *Id.* at 246 (citation and quotation marks omitted).

[149] In fact, the opinion then raises in capsule form two notions discussed at greater length subsequently in the opinion. First, the court examined and rejected the notion that the First Amendment "superimpose[s] upon the speech-act doctrine a heightened intent requirement in order that preeminent values underlying that constitutional provision not be imperiled." *Id.* at 247. Second, the court suggests that the First Amendment "might well (and presumably would) interpose the same or similar limitations upon the imposition of civil liability for abstract advocacy, without more, that it interposes upon the imposition of criminal liability for such advocacy." *Id.* at 248-49.

[150] *Id.* at 250-55.

intended a reader to act upon it would be deemed tortious. If such an analysis came to being, a reviewing court could further ensure First Amendment protections by applying the "viewpoint neutrality" requirement of public forum doctrine,[151] or by treating the speech, somewhat paradoxically, under the four-point test applied to the regulation of expressive conduct, which originated that requirement.[152] It is even possible that that such an approach could be squared with *Brandenburg*.

However, Judge Luttig's second track is far more problematic. In narrowing the scope of the rule in *Brandenburg* to the protection of only "abstract advocacy," Judge Luttig seized upon language in that short opinion reciting the Court's prior holdings in *Noto v. United States*[153] and *Scales v. United States*.[154] Judge Luttig, on the strength of this historical summary, claimed that the *Brandenburg* Court required reviewing courts to draw a distinction between "'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force or violence' on one hand, and the 'prepar[ation] [of] a group for violent action and steeling it to such action' on the other."[155] Only the former, the judge noted, would be protected speech, whereas the latter falls on the side of unprotected verbal acts.[156]

Judge Luttig's reading of *Brandenburg* is highly problematic, for three reasons. First, it assumes a consistency between the *Noto, Scales*, and *United States v. Yates*[157] cases cited by the Supreme Court in *Brandenburg*, which the actual ruling in *Brandenburg* strongly negates. Thus, as an instance of precedent-reading Judge Luttig ignores the fact that the Court overruled *Yates, Scales* and *Noto sub silentio*. While the Court did reference earlier language in *Noto* concerning "abstract advocacy," it did not reaffirm the distinctions set out in that case between abstract advocacy and advocacy of non-imminent violence subject to proscription and punishment.[158] Rather, the rule set out in

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[151] *See, e.g.*, Legal Servs. Corp. v. Velasquez, 531 U.S. 533 (2001) (collecting cases describing viewpoint neutrality doctrine). *See generally* Rosenberger v. Rector and Visitors Univ. of Va. 515 U.S. 819 (1995).

[152] *See* United States v. O'Brien, 391 U.S. 367 (1968); Texas v. Johnson, 491 U.S. 397 (1989).

[153] 367 U.S. 290 (1961).

[154] 367 U.S. 203 (1961)

[155] *Rice*, 128 F.3d at 264.

[156] *Id.*

[157] 354 U.S. 298 (1957).

[158] For a discussion on the development from *Dennis* through *Yates, Scales* and *Noto* (each of which seek to draw distinctions between harmful and protected advocacy of non-imminent violence) and the decision in *Brandenburg*, explicitly requiring

Brandenburg states clearly that "[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 or producing imminent lawless action and is likely to incite or produce such action."[159]

Second, by reinvigorating those earlier decisions, Judge Luttig replaced the bright-line rule of *Brandenburg* with an interlocking set of distinctions so illogical as to inspire the comment that "this is the sort of logic that leads to cotillions on the heads of pins,"[160] undermining the predictive value of the constitutional standard set out in *Brandenburg*. Finally, the distinction between "abstract advocacy" and "steeling to action" as drawn by Judge Luttig not only is unsupported by the verbal act logic he invokes to justify it, but undercuts any meaningful notion of freedom of speech.

C. A Limiting Interpretation: Judge Luttig's Legerdemain

As a matter of precedent, Judge Luttig acknowledged that the rule set forth in *Brandenburg* is at tension with the language quoted in that opinion from *Noto*.[161] Judge Luttig assumed that either this proposition must be reconciled with the prior decisions, because they were not explicitly overruled, or that the *Brandenburg* Court was affording some level of protection to "preparation and steeling." Judge Luttig added that if the latter was true, then the Court may have been implicitly limiting its holding to "the context of *advocacy*—speech that is part and parcel of political or social discourse—which was the only type of speech at issue in *Brandenburg*, *Noto*, and the cases relied upon by the Court."[162] Judge Luttig sought to justify his interpretation of *Brandenburg* by stating that *Brandenburg* was limited to the context of political speech. As support, Judge Luttig cited to a plurality opinion by Justice Stevens in *44 Liquormart* "describing *Brandenburg* as setting forth 'test for suppressing political speech.'"[163]

However, this reliance on *44 Liquormart's* casual dictum is in fact strikingly misleading. Far from suggesting that the *Brandenburg* test could be pigeonholed into a small category related to political speech

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temporal imminence connecting any advocacy to resultant harm for the imposition of liability, see WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 56-70.

[159] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[160] WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 64 (characterizing Justice Harlan's efforts to distinguish between harmless and harmful advocacy for purposes of determining constitutionally protected status).

[161] *Rice*, 128 F.3d at 264.

[162] *Id.* at 264.

[163] *Id.* at 264 (quoting 44 Liquormart v. Rhode Island, 517 U.S. 484, 498 (1996)).

in the narrowest sense, the *44 Liquormart* Court's reference to *Brandenburg* reinforces the contention that, in cases where a tier of so-called lesser value speech is not involved, the *Brandenburg* rule states the norm:

> Our early cases uniformly struck down several broadly based bans on truthful, nonmisleading commercial speech, each of which served ends unrelated to consumer protection. Indeed, one of those cases expressly likened the rationale that *Virginia Pharmacy Bd.* employed to the one that Justice Brandeis adopted in his concurrence in *Whitney v. California.* There, Justice Brandeis wrote, in explaining his objection to a prohibition of *political* speech, that "the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."[164]

Judge Luttig's out-of-context quotation of a snippet of Justice Stevens's characterization of *Brandenburg* in *44 Liquormart* completely obscures Justice Stevens's point that, while the *Brandenburg* rule does not apply of its own weight to regulations of commercial speech intended to protect consumers from fraud, it does so apply to truthful commercial speech involving transactions that are legal. The intermediate level of protection applied to commercial speech, traditionally deemed outside the scope of the First Amendment, and only latterly brought within its scope, distinguished it from "other forms of protected speech."[165]

The decisions cited by Justice Stevens in *44 Liquormart* undermine even further Judge Luttig's characterization of *Brandenburg* as an isolated class of speech subject to a *sui generis* level of protection that can be disregarded in other contexts. In each of these cases, the lesser protection afforded commercial speech (which is considered a *sui generis* area of speech, one of the traditional categories of "lesser-value" speech) was construed in accordance with the values underlying the *Brandenburg* test, in order to minimize the scope of suppression.[166] In *Linmark Associates v. Township of*

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[164] *44 Liquormart*, 517 U.S. at 497-98 (emphasis in original) (citing Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Whitney v. California, 274 U.S. 357 (1927)).

[165] *Id.* at 498 ("At the same time, our early cases recognized that the State may regulate some types of commercial speech more freely than other forms of protected speech.").

[166] Even in the context of categories of speech held to be entitled to no constitutional protection, as opposed to the intermediate level of scrutiny afforded to regulations of commercial speech, the Court has required that such regulations be limited to that factor which brings the speech outside of the First Amendment's scope and otherwise has applied the rationale of *Brandenburg*. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

Willingboro, the Court followed Justice Brandeis' counterspeech rationale, quoted by Justice Stevens in *44 Liquormart*.[167] That rationale is the basis for the imminence requirement in *Brandenburg*.[168] In *Carey v. Population Services International*,[169] Justice Brennan's opinion for the Court affirmed a lower court decision striking down a ban of advertising of contraceptives as unconstitutional.[170] The Court rejected the argument that such advertisements did not fall within the *Brandenburg* rubric of unprotected incitement.[171] Far from rejecting the applicability of the *Brandenburg* test, the Court explicitly found that it had not been established that the advertisements "directly incited illicit sexual activity among the young," as opposed to providing truthful information concerning legally available products, and thus did "not justify the total suppression of advertising concerning contraceptives."[172] Thus, Judge Luttig's effort to distinguish *Brandenburg* into an intellectual and political ghetto not only fails, but is contradicted by the very sources upon which it relies.

D. "Every Idea Is An Incitement"

Beyond the question of precedent, Judge Luttig's effort to distinguish between "abstract advocacy" and "steeling" was persuasively rejected by Justice Holmes in his dissenting opinion in *Gitlow v. New York*:[173]

> It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of

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[167] Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 97 (1977) (following Justice Brandeis' opinion in *Whitney*).

[168] *See* WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 68-70; *see also Brandenburg*, 395 U.S. at 448-49 (explicitly rejecting and overruling *Whitney* and distinguishing "mere advocacy, as opposed to abstract advocacy, from "incitement to imminent lawless action").

[169] 431 U.S. 678 (1977).

[170] *Id.* at 701.

[171] *Id.* at 681.

[172] *Id.* at 701-02.

[173] 268 U.S. 652 (1925).

> free speech is that they should be given their chance and have their way.[174]

Justice Douglas made the same point in *Brandenburg* itself, stating that "[t]he quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience."[175] Likewise, the Court, through Justice Jackson in *West Virginia State Board of Education v. Barnette*,[176] has eloquently indicated the centrality of the freedom of belief, even as to matters which are fundamental, declaring:

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here [Jehovah's Witnesses contesting a policy mandating their children to recite the Pledge of Allegiance], the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[177]

Judge Luttig's efforts to revive the *Noto* notion of "steeling to action" would also work a fundamental change of First Amendment doctrine, and would punish the speech in *Rice* for reasons that are contrary to the best-established rationales of freedom of speech. Judge Luttig himself admits that the "right to advocate lawlessness is, almost paradoxically, one of the ultimate safeguards of liberty."[178] Behind this familiar doctrine can be found Justice Jackson's wise words in *Barnette*. Yet Judge Luttig draws his notion of what constitutes "steeling" from Rex Feral's efforts to persuade the reader that the career of contract killer is useful or valid, and to glorify it:

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[174] *Id.* at 673 (Holmes, J., dissenting). *See also* Dennis v. United States, 341 U.S. 494, 507 (1951) (As even Chief Justice Vinson noted in *Dennis*, 341 U.S. at 507, "there is little doubt that subsequent opinions [to *Gitlow* and *Whitney*] have inclined toward the Holmes-Brandeis rationale.")

[175] *Brandenburg*, 395 U.S. at 457 (Douglas, J., concurring).

[176] 319 U.S. 624 (1943).

[177] *Id.* at 641-42 (1943). *See also* Scales v. United States, 367 U.S. 203, 262-63 (1961) (Douglas, J., dissenting) (applying *Barnette* doctrine).

[178] Rice v. Paladin Enters., 128 F.3d 233, 243 (4th Cir. 1997).

> As Hit Man instructs, it also steels its readers to the particular violence it explicates, instilling in them the resolve necessary to carry out the crimes it details, explains and glorifies. Language such as that which is reprinted in the prologue to this opinion, and similar language uncanny in its directness and power, pervades the entire work . . . . Speaking directly to the reader in the second person, like a parent to a child, Hit Man addresses itself to every potential obstacle to murder, removing each, seriatim, until nothing appears to the reader to stand between him and his execution of the ultimate criminal act. To those who are reluctant because of the value of human life, Hit Man admonishes that "life is robust and precious and valuable" and that "everything you have been taught about life and its value was a fallacy, a dirty rotten lie."[179]

Similarly, Judge Luttig detailed specific passages aimed to assuage the concerns of those who, afraid of guilt or ghosts, "fear their cold-bloodedness," and even "those who fear only that they will be caught . . . "[180] And, of course, in setting out and relying on the passages used as an epigraph to the opinion, Judge Luttig assailed the author's claim that the career of a contract killer was one of value and social utility.[181] In short, the Fourth Circuit imposed liability on Paladin in large part because it found that *Hit Man* persuasively advocated a vision of the personal and social good, although the means of presentation did nothing to undermine the reader's ability to evaluate and weigh the options presented in the text.

This rationale should be deeply troubling to anyone who cares about freedom of speech. It is especially disturbing that Professor Smolla, who is generally conscious of the value of free speech, could advocate such a ruling. Additionally, it is difficult to understand how any federal judge could so rule, in light of eighty years of jurisprudence in which the Supreme Court has repeatedly acknowledged that "[t]he First Amendment demands a tolerance of 'verbal tumult, discord and offensive utterance,' as 'necessary side effects of the process of open debate.'"[182] Supporters of the *Rice* decision also ignore the fact that "[u]nder the First Amendment there is no such thing as a false idea, the fitting remedy for evil

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[179] *Id.* at 261.

[180] *Id.* at 261-62.

[181] *See* part III supra.

[182] Waters v. Churchill, 511 U.S. 661, 672 (1994) (O'Connor, J., plurality opinion) (quoting Cohen v. California, 403 U.S. 15, 24-25 (1971)); *see also* Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949) (free speech prevents against "standardization of ideas either by legislature, courts or dominant political or community groups").

counsels is good ones."[183] In their defenses of *Rice* and its results,[184] neither Judge Luttig not Professor Smolla delineates between the very amorphous "steeling" concept of *Noto* and the concept of protected advocacy of unlawful behavior that would survive the *Rice* court's relegation of *Brandenburg* to a jurisprudential pigeonhole. The very expansive and inherently vague contours of the definition of steeling employed by the *Rice* court would nullify these well-established foundation stones of First Amendment theory, in the absence of some limiting principle not evident on its face. Seemingly, civil or criminal liability could be imposed in any case in which (1) the advocacy of unlawful conduct took place; (2) the speaker or writer intended that the advocacy be taken seriously (or should have known it was likely to be so taken—watch out, Jonathan Swift!); and, (3) someone in fact acted and implemented, or at least endeavored to implement, the suggestions.[185]

Of course, this tension between the reasoning in *Rice* and First Amendment precedent does not itself establish that the result in *Rice* fails to comport with the First Amendment any more than the flawed reading of the cases by Judge Williams renders the result in the district court incorrect. Rather, the conflict between the concept of a "steeling" theory of liability and the fundamental principles of First Amendment jurisprudence must be resolved beyond determining whether such a theory is consistent with precedent. To resolve the conflict, it is necessary to look at the speech involved in *Rice* in the context of verbal act jurisprudence and to draw independent conclusions.

V. VERBAL ACTS APPLIED: THE LIMITS OF SPEECH BRIGADED WITH ACTION.

At the risk of re-stating the obvious, the defenders of the Fourth Circuit's opinion in *Rice*, including Professor Smolla, have embraced a form of First Amendment jurisprudence that accords a wide range of discretion to the government in determining whether speech is protected "advocacy" or unprotected "steeling to action." By allowing

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[183] *Waters*, 511 U.S. at 672 (internal quotation marks and citations omitted) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) and Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

[184] *See* SMOLLA, DELIBERATE INTENT, *supra* note 58.

[185] For the imposition of civil liability, resultant damages would need to be shown; no such requirement attaches as a prerequisite for criminal liability. Of course, the State cannot impose liability of either kind to speech that is constitutionally protected. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

the imposition of liability on Paladin for actions based on the methods set out in *Hit Man*, the Fourth Circuit has left open to question the status of any advocacy of unlawful conduct. Indeed, as more than one commentator has suggested, the Fourth Circuit has revived the long-discredited "bad tendency" test, under which any speech may be punished upon a showing that it has a tendency to lead to some level of harm. Beyond the poor argument for the viability of this approach as a matter of precedent, discussed above, its consonance with the First Amendment is independently subject to question.

In discussing these matters, one should not lose sight of the general structure of First Amendment jurisprudence. As it was summarized in *Terminiello v. Chicago*,[186] "freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a substantive evil that rises far above public inconvenience, annoyance, or unrest."[187] Despite the jettisoning of the "clear and present danger" language in *Brandenburg*, the rule of the *Terminiello* case is still good law, and the dominant paradigm of First Amendment jurisprudence is that speech is protected unless it fits within that rule, or falls within the so-called low-value categories enumerated by the Court in *Chaplinsky*.[188] While these categories have been supplemented by additional categories that have been given an intermediate level of protection, including commercial speech or broadcast speech, the Court has consistently accepted that the default setting of First Amendment jurisprudence is the line of cases culminating in *Brandenburg*. Justice Scalia summarized the present status of the First Amendment in *R.A.V. v. City of St. Paul*:

> The First Amendment generally prevents government from proscribing speech, or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted

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[186] 337 U.S. 1 (1949).

[187] *Id.* at 4 (internal citation omitted) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Bridges v. California, 314 U.S. 252, 262 (1941); Craig v. Harney, 331 U.S. 367, 373 (1949)).

[188] *Compare* WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 59, n.192, 72-112 *with* Rodney A. Smolla, *Should the Brandenburg v. Ohio Incitement Test Apply in Media Violence Tort Cases*, 27 N. KY. L. REV. 1, 14 (2000) [hereinafter Smolla, *Media Violence Tort Cases*] (arguing that *Brandenburg* should be conceptualized as a decision limited to political advocacy). Although Smolla does not provide the misleading citation support that Judge Luttig deploys, his arguments are, in the last analysis, equally flawed.

> restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations. Our decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation and for obscenity, but a limited categorical approach has remained an important part of our First Amendment jurisprudence.[189]

Thus, there are two paths open to those who would argue that a proposed substantive regulation is consistent with the First Amendment: to fit it within an extant or proposed *Chaplinsky* category, or to fit it in the *Brandenburg* framework, or some variant thereof. Both approaches, we have seen, were employed in *Rice.*

Arguments in favor of this sort of regulation, however, do not end with these rules relating to substantive proscriptions. Another approach involves the presentation of the regulation as non-substantive. For an example of an attempt at this argument, one can look to *Reno v. American Civil Liberties Union*,[190] where the Justice Department sought to justify the proposed limitations on purportedly "indecent" speech on the Internet contained within the Communications Decency Act as "a sort of 'cyberzoning' on the Internet."[191] This effort was unsuccessful because, as the Court stated, "the CDA applies broadly to the entire universe of cyberspace. And the purpose of the CDA is to protect children from the primary effects of 'indecent' and 'patently offensive' speech . . . ."[192] Thus, the effort to characterize the CDA's restrictions as analogous to "time, manner and place" restrictions was deemed to be a flawed analogy: the result would have been a total ban in effect, not a limitation on when speech may take place.[193]

Moreover, the "time, manner and place" approach, cannot be employed by those advocating the assignment of tort liability on the basis of a reader's response to the advocacy. Such regulations are required to be content-neutral and, as the Court has repeatedly stressed, "[l]isteners' reaction to speech is not a content-neutral basis

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[189] 505 U.S. 377, 382-83 (1991).

[190] 521 U.S. 844 (1997).

[191] *Id.* at 868.

[192] *Id.* at 867-68.

[193] *Id.*; *see also* WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 219-20.

for regulation."[194] Since the very basis of tort liability is just this—the listener's reaction—the application of tort liability to a speaker cannot be judged as a content-neutral regulation. Therefore, the only remaining arguments in favor of tort liability for an advocate are content related. An examination of such content-related restrictions delineates the very narrow circumstances in which such liability does not constitute censorship.

A. Verbal Acts and Inchoate Crimes.

Of the two prongs of the *Brandenburg* test, the imminence requirement is the prong most clearly inapplicable to the portrayal of violence as desirable. In defending the result in *Rice*, Professor Smolla makes two arguments that are calculated to overcome this barrier. First, Smolla claims that the imminence requirement can be met by

> treating the detailed instruction, written with intent to assist in crime, as itself a form of "lawless action," a deliberate *en mass* aiding and abetting of crime, that in effect satisfie[s] *Brandenburg's* imminence standard *instantly*, for the very providing of such detailed instruction with such intent to aid and abet [is] *itself* lawless action.[195]

This theory requires a rather curtailed reading of the First Amendment. If any advocate who speaks with the hope that her words are effective could be held liable for consequences that occur without her knowledge, then the right to advocate lawless conduct is reserved to those who in fact do not believe in the desirability of their speech. Such a neutering of the First Amendment would reject the above-quoted insight of Justice Holmes, that every idea is an incitement.[196]

Indeed, Smolla does not state that the provision of the information itself should be alone a ground for liability. Rather, he states, it is this provision plus the intent that the reader act upon it that is dispositive. This theory, however, ignores the message of Justice Douglas' dissent in *Dennis v. United States* that a cause of action is dangerous when it subjects one to liability for a creed and:

> requires the element of intent that those who teach the creed

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[194] Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992); *see also* Boos v. Barry, 485 U.S. 312, 321 (1988) (stating that "[r]egulations that focus on the direct impact of speech on its audience" are not properly held to the standard for content-neutral restrictions); *Reno*, 521 U.S. at 868.

[195] *See* Smolla, *Media Violence Tort Cases*, *supra* note 188, at 43 (emphasis added).

[196] *See supra* note 174 and accompanying text.

> believe in it. The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on *what is said* but on the *intent* with which it is said. Once we start down that road we enter territory dangerous to the liberties of every citizen.
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> There was a time in England when the concept of constructive treason flourished. Men were punished not for raising a hand against the king but for thinking murderous thoughts about him. The Framers of the Constitution were alive to that abuse and took steps to see that the practice would not flourish here. Treason was defined to require overt acts—the evolution of a plot against the country into an actual project. The present case is not one of treason. But the analogy is close when the illegality is made to turn on intent, not on the nature of the act. We then start probing men's minds for motive and purpose; they become entangled in the law not for what they did but *for what they thought*; they get convicted not for what they said but for the purpose with which they said it.
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> Intent, of course, often makes the difference in the law. An act otherwise excusable or carrying minor penalties may grow to an abhorrent thing if the evil intent is present. We deal here, however, not with ordinary acts but with speech, to which the Constitution has given a special sanction.[197]

Justice Douglas' argument that intent alone fails to raise speech to the level of conduct is further buttressed by the two classic limiting concepts of the inchoate crime of conspiracy: the existence of an agreement and the performance of an overt act. As Justice Douglas expressed it in another dissent, this time in *Scales v. United States*, "Conspiracy rests not in intention alone but in an agreement with one or more others to promote an unlawful project."[198]

Similarly, the inchoate crime of aiding and abetting may include a "counseling" element, but also traditionally includes an element of specificity, which neither Smolla nor the court in *Rice* even mention. To employ an older articulation:

> "Counseling" to come up to the definition, must be special. Mere general counsel, for instance, that all property should be regarded as held in common, will not constitute the party offering it accessory before the fact to larceny; "free love" publications will not constitute their authors technical parties to sexual offenses which these publications may have stimulated. Several youthful highway robbers have said that they were led into crime by

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[197] 341 U.S. 494, 583 (1951) (Douglas, J., dissenting) (emphasis in original).

[198] 367 U.S. 203, 262-63 (1961) (Douglas, J., dissenting).

> reading Jack Sheppard; but the author of Jack Sheppard was not an accessory before the fact to the robberies to which he thus added an impulse. Under the head of "counsel" may be included advice and instruction as to the modes of committing particular offenses, *e.g.*, pocket picking. General instruction, it is true, could not be "counseling" in the sense before us; though it is otherwise with special instructions as to the management of a particular case. Persuading and tempting to a particular crime fall under this head.[199]

In prose almost explicitly directed at the case of media depictions of violence or other crime, Glanville Williams writes:

> It seems that the crime instigated must have an element of particularity. D exhorts E to commence a life of crime and recommends burglary as affording a good opening. It is hard to believe that D thus becomes accessory to every burglary thereafter committed by E. The more satisfactory view appears to be that D is guilty of the inchoate crime of incitement, but does not become a party to the various burglaries.[200]

The required element of specificity in terms of the crime to be committed does not mandate knowledge of the minutiae of the criminal act executed.[201] On the contrary, as Williams goes on to describe, the supplier of information or equipment used to perform illegal acts must know that a specific crime is envisioned by the purchaser, and must intend that it take place in order to be held liable.[202] Williams approvingly cites the language of a British judge in a 1928 case:

> A crime must be a specific intentional act, and I know of no case saying that a man can be an aider and abettor if he knows nothing of the act or the date or the person against whom the criminal offence is committed. It will not do to say: "You gave the means of doing it."[203]

The stress on this requirement of particularity, or specificity, is not to suggest that the state law doctrines of criminal or of tort liability define the appropriate limits of the protections of the First Amendment or that Professor Smolla or Judge Luttig have misread the law of accessorial liability (which in any event differs subtly in the civil from the criminal context). Rather, the point is to stress that the legal doctrines that allow for such liability draw a distinction between

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[199] 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 265 n.3 (11th ed. 1912).

[200] WILLIAMS, *supra* note 85, at 190.

[201] *Id.*

[202] *Id.* at 190-203.

[203] *Id.*at 198 (quoting Bowker v. Premier Drug Co., 1 K.B. 217, 230-31 (1927).

advocate and accessory. This distinction, like that between principal and agent, or that of conspirators acting in concert, carries with it recognition of two facts relating to human conduct. The first is that it is easier, and far less significant, to extol a course of conduct that is totally lacking a context ("kill the capitalists!") than it is to connect that sentiment to a specific object ("kill Kenneth Lay!"). Even then, the context in which the words are spoken may greatly influence their significance, and the blameworthiness of the speaker. For First Amendment purposes, the specificity and finality of a resolution do not exist in terms of general theorizing, or even in the advocacy of the act, absent a context for its application. This is precisely the difference between verbiage and a verbal act.

A verbal act, surely, must be the equivalent of a physical act in that it has consequences on its own. A conspiracy, for example, involves at least two people in an agreement to perform an act—a specific criminal or tortious act. With conspiracies, resolutions are formed. Just as a legal contract carries with it the legal consequences of enforcement, an unlawful contract, or conspiracy, carries with it the legal consequence of punishment. The meeting of the minds is identical in these mirror images. Similarly, in aiding and abetting cases, the provider of the aid knows that she has left the comfortable world of armchair strategy and entered the real world of action. Real consequences to real people necessarily attend her actions. The speaker has affiliated herself with the action's completion and ratified it as her own.

In *Rice*, there was no knowledge on the part of the publisher or author that any crimes would take place. Therefore, the verbal act formulation that allows for the distinction between advocacy of unlawful conduct, and its constitutional protection, and aiding and abetting through words does not apply. The *Rice* court, in blurring this distinction "makes speech do service for deeds."[204] By so doing, the nature of the verbal act concept was expanded beyond all rational limit. Rather than tethering what might otherwise collapse into a bald restriction of speech to a flow of real-world conduct, the *Rice* court used the verbal act concept as a catch-all method to avoid the dictates of the First Amendment.

B. Incitement and Imminence

In *Rice*, the imminence requirement was avoided by the finding

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[204] Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting); *see also Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389, 1403 (2002).

of an analogous requirement, that the materials provide sufficiently detailed coaching. As Professor Smolla puts it:

> *Rice* may be most centrally grounded in what might be called a "detail for imminence trade," a judgment that materials intended to provide detailed training instruction for planning and executing crimes deserve no First Amendment protection even though there may be a gap in time between the provision of the assistance and the perpetration of the crime because the detailed training provides a causal nexus to lawless action that serves as a substitute for the nexus normally required in time.[205]

This "detail for imminence trade" begs a very significant question, however, involving the nature of the causal nexus constructed by the imminence requirement. Professor Smolla states a rather bare-bones version of it:

> One of the theories behind the imminence requirement is that when time passes, other competing ideas have a chance to work their influence on the audience. We should count on the marketplace of ideas in situations in which there is time for the marketplace to operate. The marketplace metaphor, however, simply does not resonate at all in the context of a detailed criminal instruction manual, *which by its very nature and express terms is encouraging the criminal to carefully and meticulously plan the future crime.* A manual that says "Go out and blow up the building now!" is actually *less* lethal than a manual that says "Carefully plot and prepare and train and go out and blow up the building in three months."[206]

Smolla endeavors to render the marketplace of ideas metaphor inapposite, and thus, he suggests that the imminence requirement can be eliminated. This is splendid rhetorical strategy, but rests upon an unprovable notion of causation, and impoverishes the roots of the requirement; it is not a persuasive effort.

First, Professor Smolla assumes that the amassing of detail concerning technique somehow acts to render the imminence requirement irrelevant. He contends that Rex Feral has gone from being a participant in the marketplace of ideas, to a principal of crime because of the amount of data he has provided. Such an argument seeks to convince through inflamation. In fact, the provision of detail by no means coerces the reader to act and can, in fact, repulse. The relatively bloodless and tidy murders in the writings of Agatha Christie are far less appalling than the painful and

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[205] Smolla, *Media Violence Tort Cases, supra* note 188, at 43 (emphasis in original).

[206] *Id.* (emphasis added).

far more graphic murders in the works of P.D. James, or even more so, those of Thomas Harris. The idea that the reader is passive clay in the hands of an author may be flattering to the authorial ego, but is simply contrary to experience. For example, the voluminous literature rejecting allegedly seductive works that contain readers' stringent criticisms makes the point clear. Andrea Dworkin's scathing descriptions of pornography show that she has been able to reach an independent evaluation of it, different from that which an author would desire.[207]

Smolla identifies nothing inherently coercive about reading a book. The reader remains free to close the volume, annotate it, or to take a break from it in order to think through the moral and philosophical ramifications. As a reader, I do all these and have even been known in extreme cases to discard books. Whereas a face-to-face presentation or a training seminar can be coercive in that one faces group disapprobation if one leaves, a book read in the privacy of one's own home is at the mercy of the reader. Moreover, a reader's reaction to a book is an interaction between an author and a pre-existing self who experiences the text. Common human experience supports such a dynamic—what readers bring to the text plays a role in their interpretation of and reaction to a text. One need not follow the deconstructionists to acknowledge that an author may provoke hostility as well as acceptance, depending on the pre-existing value structure, beliefs and biases of any individual reader.[208]

What Smolla seems to have overlooked is the underlying reasoning of the imminence requirement that has been expressed by Justices from Holmes and Douglas to Brennan and Stevens: a faith

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[207] *See* ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1980).

[208] Author Rex Stout and his fictional detective Nero Wolfe are legendary for truly passionate negative assessments by readers of works not to their taste. *See e.g.*, REX STOUT, GAMBIT 2 (1962) (Wolfe is first described by Our Narrator, his assistant Archie Goodwin, "on a chair too small for him, tearing sheets out of a book and burning them. The book is the third edition, of WEBSTER'S NEW INTERNATIONAL DICTIONARY, published by the G. & C. Merriam Company of Springfield, Massachusetts. He considers it subversive because it threatens the integrity of the English language."); REX STOUT, DEATH OF A DOXY 58 (1966) (Wolfe suffers a similar reaction to Sir Thomas More's depiction of King Richard III: "the young princes had been dead for five centuries, and Wolfe had once spent a week investigating that case, after which he removed More's, UTOPIA from his bookshelves because More had framed Richard III."), citing THOMAS MORE, UTOPIA (1516).

Stout playfully attributed many of his own views to Wolfe. According to the president of the Richard III Society, Stout was an honorary member and on one occasion placed an "In Memoriam" advertisement in the *New York Times* on the anniversary of the Battle of Bosworth, mourning Richard as a "great king and true friend of the rights of man." JEREMY POTTER, GOOD KING RICHARD? 261 (1983).

that the people can be trusted to choose between right and wrong, and between good or bad ideas. Justice Douglas, in his dissenting opinion in *Roth v. United States* best articulated this faith, "I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field."[209]

In part, the meaning of free speech involves just such a leap of faith. John Stuart Mill asserted in *On Liberty* that truth could not be put to flight by falsehood in an open contest.[210] Holmes declared, from his skeptic's heart, that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[211] The literature surrounding the First Amendment, and the various rationales proffered in support of it, presuppose this ability on the part of the citizenry to gauge the desirability of representations offered to them by artists, scholars, advocates of all forms of alternative lifestyles, ranging from the Christian Brothers to the Church of Satan.[212] In a very real sense, the First Amendment codifies this leap of faith, so radically different from the faith of Hitler and Goebbels in "the Big Lie."

In that sense, the idea bruited by Smolla that the reader can be taken outside the "marketplace of ideas" model because the time for other ideas to bring themselves to bear is somehow cancelled out by detailed instruction is simply without foundation. The rationale for imminence provided by Brandeis in *Whitney v. California*[213] resonates in addressing the moral choice of the auditor, and the opportunity for him or her to internalize the argument of the speaker and to decide whether or not to act upon those ideas. Only when the peculiarities of group dynamics act to eliminate the time for reflection can the imminence requirement be omitted from the analysis. Smolla has simply not carried his burden by any fair measure.

The Supreme Court has, rightly, long rejected the approach of *Rice*. In terms of causation, the Court has repeatedly refused to find that the persuasive effect of speech on illegal conduct serves as a content-neutral ground for regulation. The court has found that any resultant violence is not a "secondary effect" of the speech. In the

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[209] Roth v. United States, 354 U.S. 476, 514 (1957).

[210] JOHN STUART MILL, ON LIBERTY (1869).

[211] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[212] For a brief survey of this literature, see WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 316-31.

[213] 274 U.S. 357 (1927).

context of a "fighting words" ordinance, the Court noted in *R.A.V. v. City of St. Paul* that "[l]isteners' . . . reactions are not the type of 'secondary effects'" which may be regulated, and emphasized its prior statements that "[t]he emotive impact of speech on its audience is not a 'secondary effect.'"[214] As the Court explained in the opinion:

> The only reason why such expressive conduct would be especially correlated with violence is that it conveys a particularly odious message; because the chain of causation thus *necessarily* runs through the persuasive effect . . . of the conduct, [and thus] the St. Paul ordinance regulates on the basis of the primary effect of the speech—i.e., its persuasive (or repellent) force.[215]

Thus, only under the circumstances captured in *Brandenburg* may they be the grounds of an imposition of liability.

Holmes spoke vehemently about the protection of speech that we believe to be "fraught with death."[216] In contrast to this robust approach, Smolla's equation of speech's protected status with its innocuous nature suggests a decline in modern commitment to the First Amendment. Smolla erroneously assumes that the tying of any kind of serious danger to speech suffices to render the speech outside of the Amendment's scope. This is not and must never become the case, unless freedom of speech is to be reduced to a mere luxury item, protected only when the speech poses no threat to the settled order of things. Rather, it is those dangers captured by the verbal act formulation, which involve the author in a specific crime or wrongful act, that are properly chargeable to the author.

C. Techniques of Subversion and Steeling to Action

Similarly, Smolla's suggestion that a better-framed manual, one which suggests the reader should prepare over an extended period of time rather than attempt a criminal act on the spur of the moment, is somehow "more deadly" and therefore more susceptible to regulation, is overbroad. Should counsel fall outside the scope of the First Amendment because its pragmatic nature makes it more deadly? In this regard, Smolla is surprisingly able to score a telling point. He cites the opening lines of Justice Douglas' dissent in *Dennis v. United States*:

> If this was a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the

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[214] 505 U.S. 377, 394 (1992).

[215] *Id.* at 394 n.7 (internal quotation marks omitted) (emphasis in original); *see also* Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959).

[216] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

> assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare and the like, he wrote, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale. . . .[217]

It may not be quite fair to hold Justice Douglas to these opening words of his great dissent. After all, they were written in the midst of his evolution to the absolutist position he came to hold in reference to the First Amendment's protections—an evolution triggered by what he saw as the Supreme Court's acquiescence in government repression of dissident speech in the 1950s and 1960s.[218] As indicated previously, a "dangerous data" doctrine of limited scope could be engrafted onto the First Amendment without necessarily diminishing the Amendment's functions of preventing government abuses, fostering spirited debate and allowing for self-expression. Perhaps, after all, some data is too inherently dangerous, too prone to misuse. Certainly, the scope of such an exception would be difficult to define, and its contours could well be misused like other instances of balancing governmental need to control inherently dangerous data, such as national security cases.[219] Nonetheless, in the wake of the terrorist attacks on the World Trade Center and the Pentagon, the potential impetus for such an approach should be acknowledged, if not necessarily embraced.

However attractive this notion may be, it is not the basis of the decision in *Rice*, nor is it founded within the law. Judge Luttig's and Smolla's reliance upon the Supreme Court's decision in *Noto*, and its allowance of the suppression of speech guilty of "steeling to action," suggests that there is some intermediate category between abstract advocacy and the sort of incitement to imminent violence delineated in *Brandenburg*. This category, however, is inherently subjective and efforts to explain it, like previous efforts to define obscenity, tend to collapse into a string of pejorative synonyms:

> So that if all *Hit Man* did was preach, all that I would do is preach back. But *Hit Man* also teaches. The book not only preaches and teaches, it exhorts, cajoles, encourages, steels, incites. And in that combination, in that evil alchemy of nihilistic philosophy, calculating instruction, and black exhortation, *Hit Man* forfeited the protections of the U.S. Constitution. Freedom of speech is

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[217] SMOLLA, DELIBERATE INTENT, *supra* note 58, at 116 (quoting Dennis v. United States, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting)).

[218] *See, e.g.*, WILLIAM O. DOUGLAS, POINTS OF REBELLION 1-34 (1970); WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE 49-59 (1958).

[219] *See* WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 170-76.

> not freedom to kill. *Hit Man* causes murder. Perhaps not in a direct, literal and immediate sense.... But its blend of incitement, justification and training in the dark arts of murder does result in the real slaughter of real innocents.[220]

This summary of what Smolla considers steeling, similar to Judge Luttig's reliance on *Hit Man's* philosophy, makes clear exactly why Justice Douglas withdrew his notion of steeling expressed in *Dennis* by the time of his concurrence in *Brandenburg*. The question is one of vehemence in presentation and "belief—belief in the" ideas being advocated, surely an impermissible basis for liability.[221] Of course, Paladin's use of a first time novelist to write the book—a woman with no such background and experience as that postulated for the fictional Rex Feral—suggests that the author did not believe in the acts advocated, rather that the belief was faked. Nonetheless, the presentation of feigned passionate advocacy does not lend itself to a distinction that can be drawn with either safety or certitude.

While Smolla acknowledges (as does Judge Luttig) the importance of protecting "abstract advocacy" he does not distinguish this term from "steeling." Apparently, Smolla considers the distinction to be self-evident. However, as Justice Holmes made clear, no such clear distinction exists:

> It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.[222]

Unfortunately, eloquence may also be subject to civil liability—at least in the Fourth Circuit.

The fact that much violent speech and provocative rhetoric could fit the "steeling" rubric should illuminate that the "test" is emotive not logical. If the adjectives used in the context of *Hit Man* can be banned, speech seeking political and social changes on the part of oppressed groups using similar language also could be subject to a ban. This type of speech is plainly at the core of the First Amendment's protection by even the most restrictive definition. For example, Valerie Solanas's *S.C.U.M Manifesto* similarly urges, incites, advocates—choose your own term—the murder of men by women as

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[220] SMOLLA, DELIBERATE INTENT, *supra* note 58, at 270.

[221] Scales v. United States, 367 U.S. 203, 265 (1961) (Douglas, J., dissenting).

[222] *Gitlow*, 268 U.S. at 673.

a means of ending sexist oppression.[223] Solanas's rhetorical strategies are very similar to the passages adverted to by Smolla and Luttig as "steeling." She endeavors to erode inhibitions against violence, justifies resort to such violence, and provides suggestions as to how to execute said violence, along with other unlawful actions. In terms of intent, of course, Solanas's own attempted murder of Andy Warhol suggests that she intended her thoughts to be taken seriously.[224] Yet, such radical pronouncements are commonplace to radical political discourse, which both Smolla and Luttig acknowledge must be protected. It is hard to escape the conclusion that both Smolla and Luttig allowed their revulsion at Paladin's message to color their application of First Amendment doctrine to the *Hit Man* text.

D. The Tort-Criminal Distinction

One final effort to square the circle presented by the academics who wish to clear the way for regulation of materials such as *Hit Man* is to distinguish between tort formulations of liability and criminal liability. The argument is premised on the notion that civil liability for speech conflicts in lesser measure with the First Amendment than does criminal liability, with its punitive aspects. Several commentators have argued that such a notion should result in liability on the part of publishers or other speakers, essentially conceptualizing the award of damages as the cost of a speaker's exercise of her right to free speech in lieu of punitive consequences.[225] Such a notion is vulnerable on two grounds. First, as current doctrine makes clear, speech that cannot be criminally punished is equally immune to civil sanction. Second, the nature of causation applied in tort law cases that find a speaker liable based upon an actor's independent decision to follow his or her promptings violates the logic inherent in any concept of free expression.

As a matter of hornbook law, it has been clear since 1964 that, where a claim of First Amendment immunity challenges any state law, "it matters not that that law has been applied in a civil action. . . . The test is not the form in which state power has been applied but,

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[223] VALERIE SOLANAS, *S.C.U.M. MANIFESTO* (1967).

[224] *See* JOHN DE ST. JORRE, VENUS BOUND: THE EROTIC VOYAGE OF THE OLYMPIA PRESS AND ITS WRITERS 277-78 (1994) (quoting Solanas).

[225] *See* Frederick A. Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992); L. Lin Wood & Corey Fleming Hirokawa, *Shot By the Messenger: Rethinking Liability for Violence Induced by Extremely Violent Publications and Broadcasts*, 27 N. KY. L. REV. 47, 50 (2000). (applying Schauer's thesis in arguing that *Rice* was correctly decided).

whatever the form, whether such power has in fact been exercised."[226] This ruling, as the Court noted in *Sullivan*, merely applied principles long established in other realms of constitutional law to the First Amendment context.[227] Since then, the Court has zealously applied the principle even in the contexts of taxation or government subsidies of speech,[228] holding that neither granting of benefits or imposition of costs[229] may be "manipulated" to "drive certain ideas or viewpoints from the marketplace."[230]

Thus, to the extent that commentators such as Frederick Schauer urge the Court to "uncouple" free speech protection from tort liability, they are urging a new and radical deviation from the constitutional norm.[231] Indeed, Schauer himself explicitly states this and urges a paradigm shift, not a re-interpretation.[232] However, such a shift should not be undertaken either in the form Schauer proposes or in the simpler form at issue in *Rice*: the decision to impose liability upon the speaker.

Schauer suggests that either the speaker be held liable, or that a public compensation scheme, analogous to workers' compensation, should be imposed to compensate victims of speech torts or crimes where the First Amendment immunizes speech. He presents his theory as a "Law and Economics"-inspired means of reallocating social costs, and not as punitive. Relying in large part on Schauer's painstaking efforts to separate cost allocation issues from First Amendment protection, Wood and Hirokawa argue for imposition of cost upon the party who profits from the speech, in this case, Paladin.[233]

As a matter of precedent, the Court has declined to perform just the sort of cost-shifting that Schauer, Wood and Hirokawa would advocate. In *Forsyth County v. Nationalist Movement*,[234] the Supreme Court struck down as unconstitutional a local ordinance, which permitted the county clerk to vary a permit fee on the basis of the

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[226] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

[227] *Id.* (citing *Ex parte* Virginia, 100 U.S. 339, 346-47 (1879); Am. Fed'n. of Labor v. Swing, 312 U.S. 321 (1941)).

[228] Nat'l Endowment of the Arts v. Finley, 524 U.S. 569, 587 (1998)

[229] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victim's Bd., 502 U.S. 105, 116 (1991).

[230] Legal Services Corp. v. Velasquez, 531 U.S. 533, 552 (2001) (citing *Nat'l Endowment of the Arts*, 524 U.S. at 587.).

[231] Schauer, *supra* note 225 at 1331-32.

[232] *Id.* at 1321-22.

[233] Wood & Hirokawa, *supra* note 225, at 60-61.

[234] 505 U.S. 123 (1992).

anticipated cost of providing police protection to the speakers applying for the permit.[235] The Court explicitly rejected the state's argument that the recoupment of such cost represented a content-neutral regulation aimed at the "secondary effects" caused by the speech or the cost of providing extra police protection.[236] In so doing, the Court stated that "listeners' reaction to speech is not a content-neutral basis for regulation."[237] In the context of a hostile reaction to such speech, the Court held that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[238] The basic principle at stake in *Forsyth County*—that the state may not burden speech by requiring that a speaker must shoulder its costs—was long ago made in *Schneider v. Irvington.*[239] In *Schneider*, the Court struck down as unconstitutional a ban on public leafleting based on the burden of cleaning up the discarded leaflets. The court stated: "[a]ny burden imposed upon the City authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press."[240]

Schauer has frankly disagreed with this principle, while his successors have failed to address it. However, it points to a valuable truth that is relevant here: the protection of free speech is predicated on a series of value judgments standing for the proposition that the creation of a free society is worthwhile in itself and is even worth social costs. Justice Holmes pointed this out in the context of speech "fraught with death" and Justice Douglas celebrated speech causing controversy and turbulence. The Justices were not merely relying on the formalistic (though cogent) argument that a right ceases to be a right when its possessor may be taxed for its use. Rather, they are making a leap of faith based on the notion that enlightenment may come from the least anticipated sources and that free people, used to deciphering the babble of conflicting messages, have the best hope of steering the ship of state. Schauer and his adherents have disagreed with this principle, but have interposed no contrary theory of free speech and its role. Commendably exercised by speech that they see as wounding or leading to harmful conduct, they postulate no limiting principle that delineates the scope of free speech. At the

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[235] *Id.* at 126-27.
[236] *Id.* at 134.
[237] *Id.*
[238] *Id.*
[239] 308 U.S. 147 (1939).
[240] *Id.* at 162.

end of the day, they offer only a simulacrum of freedom: speak if you can pay for the privilege.

The First Amendment's leap of faith, by contrast, allows for one to find value in the least likely of places. Indeed, such has been the case. Justice Holmes, with his hatred of "proletarian dictatorship" (as he termed it)[241] would perhaps be shocked at the extent to which a "mixed economy" has evolved, employing policies drawn from socialist thought consciously drawn to "save capitalism from itself" by politicians such as Theodore and Franklin Roosevelt.[242] While the social utility of individual instances of speech are not an appropriate measure of the utility of free speech, violent rhetoric can nonetheless illuminate the depth of disaffection and alienation from the dominant culture that motivates dissidents, and can vindicate the values served by the First Amendment.[243] Thus, the often violent, intemperate speech of figures such as Malcom X and Louis Farrakhan has a value that enriches the debate.

But Judge Luttig's opinion seems to conclude that *Hit Man* is merely a recipe book for getting away with murder, and that it has no social value and cannot be said to advance discourse in any measurable way. This argument, however, is suspect. First, the book does advocate a point of view—that the "personal justice" provided by a hit man performs a valuable social service, and that a career as a hit man may be a valid and satisfying one for the reader.[244] Despite Luttig's and Smolla's anger at this view and its contradiction of the very foundations of the nation's founding principles, their use of the author's viewpoint as justification for censoring the book is deeply troubling in the face of the core principle of content neutrality. Notably, Smolla picks up unwittingly on the fact that the very attributes of the book that are being used to justify a finding of liability are those that militate most favorably for protection. He describes Judge Luttig as having found the book *Hit Man* "so profoundly fraught with death,"[245] a memorable phrase lifted from Justice Holmes, who urged that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe

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[241] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J. dissenting).

[242] *See, e.g.*, EDMUND MORRIS, THEODORE REX 72-74, *et seq.* (2001); NATHAN MILLER, THEODORE ROOSEVELT: A LIFE 335-56, 365-70 (1992); PETER COLLIER & DAVID HOROWITZ, THE ROOSEVELTS: AN AMERICAN SAGA 265-66 (1994); TED MORGAN, FDR 367-412 (1985).

[243] For a discussion of those values, see WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 316-22.

[244] SMOLLA, DELIBERATE INTENT, *supra* note 58, at 268-70.

[245] *Id.* at 216.

and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[246]

Moreover, the question of social value allows Professor Smolla to shift the burden of proving that speech should be outside of the Amendment's protection to one where a speaker must prove that the speech should fall within it. Requiring the speaker to justify the worthiness of his speech for inclusion is a very worrisome rhetorical move. Professor Smolla, however, explicitly lists two of the "wonderful and grandiloquent purposes that undergird the First Amendment" and asks "how does the murder manual *Hit Man* stack up when measured against them?"[247] Requiring the speaker to show that her speech serves these purposes imposes a content-based threshold requirement of utility that disserves the relationship between the citizen and the government by allowing the former's expression only at approval of the latter, and only to serve the purposes of the latter.

Moreover, *Hit Man* may even pass this test. Professor Smolla himself notes that the plaintiffs stipulated that:

> Paladin's "marketing strategy was and is intended to maximize sales of its publications to the public, including sales to (i) authors who desire information for the purpose of writing books about crime and criminals, (ii) law enforcement officials and agencies who desire information concerning the means and methods of committing crimes, (iii) persons who enjoy reading accounts of crimes and the means of committing them for purposes of entertainment, (iv) persons who fantasize about committing crimes but do not thereafter commit them, and (v) criminologists and others who study criminal methods and mentality."[248]

These functions all are indubitably of social value.

E. Byers v. Edmonson and Hidden Costs

While little has been said about *Byers*, the decision stands as an example of the perils of a rule such as that engrafted by the Fourth Circuit in *Rice*. The suit, filed in 1996, was dismissed on March 12, 2001, following half a decade of litigation. Thus, a cost was imposed

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[246] *Abrams*, 250 U.S. 616, 630 (1919).

[247] SMOLLA, DELIBERATE INTENT, *supra* note 58, at 271.

[248] *Id.* at 122.

upon the publishers regardless of their eventual legal victory.[249] This, in part, is inherent in the nature of pleading complaints under the Federal Rules of Civil Procedure and cognate "notice pleading" systems in effect in most states, including Louisiana. It is well-established that, where a defendant seeks to dismiss a complaint prior to discovery taking place, the court is "required to assume the truth of the detailed – but as yet untested - factual allegations of the complaint."[250] Thus, artful pleading—asserting each of the elements of a cause of action—can guarantee a plaintiff the opportunity to obtain discovery even where, as in *Byers*, the court openly expresses skepticism as to the plaintiff's ability to establish the elements thus pleaded.

Because the plaintiffs pleaded the appropriate level of intent specified in *Rice*, they would withstand a motion to dismiss regardless of whether it could be borne out at trial. However, the pretrial process itself works a burden on speech that is by no means negligible. Before the District Court eventually dismissed the case, the plaintiffs were able to compel Stone to testify concerning his artistic intentions, and to obtain and examine internal memos and Time-Warner market research documents in their efforts to establish that "Stone and the company targeted young males and intended to 'push their buttons.'"[251] Despite the court's final ruling, Stone and Time-Warner were forced to cooperate in this pretrial discovery at their own expense, including attorneys fees, thus imposing a sizable cost on the allegedly "free" speech represented by the film. That cost will continue to rise, as the plaintiffs announced their intention to appeal.[252]

Smolla views the defeat at the motion to dismiss stage in *Byers* as an example of poor defense tactics. In *Deliberate Intent*, he describes an exchange with a student who cites the decision as proof that "other courts, in other cases, will take this principle you have ordained and use it as a license to censor and suppress speech."[253] Smolla, admitting that "The *Natural Born Killers* case was a defeat for the First Amendment, and thus a victory for Paladin, enabled them to crow 'I told you so.' This was precisely what Paladin and its

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[249] Stephanie A. Stanley, *Filmmaker Cleared in Shooting Trial: Natural Born Killers Protected, Judge Rules*, TIMES-PICAYUNE (New Orleans), March 13, 2001, at 1.

[250] Clinton v. Jones, 520 U.S. 681, 685 (1997).

[251] Stanley, *supra* note 249.

[252] *Id.*

[253] *Id.*

numerous amici in our suit had warned against."[254] Smolla, endeavoring to rebut his student's claim that he has "damaged the First Amendment," places the blame squarely where he feels it belongs - on the media:

> "I think the *Natural Born Killers* case is frivolous," I said. "The producers of *Natural Born Killers* deserve to win, and I'm sure they eventually will win. But the defendants in the suit took the wrong procedural step. They tried to get the case dismissed on the pleadings, which means they were stuck with the allegations that they knew and intended that the movie would be emulated. If they'd instead moved for summary judgment, on the grounds that there was absolutely no credible proof of any such intent, I'm sure they would have won. The difference between their movie and our murder manual is that it is utterly implausible that Oliver Stone or Warner Brothers intended to encourage or assist crime. But that's exactly what we believe Paladin and Lund knew they were doing and intended to do."[255]

Smolla's defense is less than compelling, as it rather disingenuously elides the fact that in order to get to summary judgment, a defendant must first go through discovery, and that process itself can wreak havoc on the media outlet in question. [256] Indeed, Smolla's silence on this point is especially telling in view of his own awareness of the risk of self-censorship caused by a desire to avoid punitive processes such as pretrial discovery and motion practice. In describing the costs of defending media tort suits, Smolla wrote in 1986, "[t]he time, energy and money consumed is enormous, and its tendency to reduce the aggressiveness and courage of the media in pursuing significant issues of social concern is very real."[257] When Smolla wrote *Suing the Press,* he focused on cases of libel and invasion of privacy—both torts resolved in civil litigation.[258]

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[254] *Id.*

[255] *Id.* at 265-66.

[256] Under federal law, as is also the case under Louisiana law applicable to *Byers,* summary judgment should only be granted if, after discovery, the "nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. The nonmoving party must have had the opportunity to discover information that is essential to his opposition to the motion for summary judgment. Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery." Hellstrom v. U.S. Dept. of Veterans Affairs, 201 F.3d 94, 97 (2d Cir. 2000) (internal quotations and citations omitted) (citing, *inter alia,* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

[257] RODNEY A. SMOLLA, SUING THE PRESS 79 (1986).

[258] *Id.*

However, Smolla's analysis applies just as powerfully to the variant of tort litigation championed by Smolla in *Rice*: "[I]f the plaintiff's primary motive is vindication through punishment of the media defendant, it is no longer necessary to win in order to win. If the suit can be prolonged sufficiently the mere ticking away of the defense lawyer's clock will be enough to extract the pound of flesh."[259]

Particularly when it comes to local outlets or smaller producers of content, the "threat of libel or invasion of privacy litigation may be severely crippling to the exercise of First Amendment rights. Such small outlets are not only financially unable to sustain the costs of litigation, but the physical process of mounting a defense may consume so much manpower that the publication or broadcast of news may literally have to stop."[260] Among the most serious contributors to that cost is pretrial discovery. As Smolla aptly pointed out in *Suing the Press*, pretrial discovery can serve as a "weapon for intimidation":

> In the *Herbert v. Lando* litigation, Barry Lando's deposition alone continued intermittently for a year, and consumed *over 3,000 pages of transcript.* This huge expenditure of money and effort, however, would come to be dwarfed by the discovery process in cases such as those later brought by Ariel Sharon and William Westmoreland. The discovery process in suits like Sharon's or Westmoreland's may cost many millions of dollars before they are completed. In *Westmoreland v. CBS* the attorneys for both sides examined over 300,000 documents, and interviewed hundreds of witnesses all over the globe.[261]

For Smolla in the year 2000 to blithely suggest that Stone and Warner Brothers should have waited to move for summary judgment at the close of discovery is for him to forget his own practicality and wisdom in 1986. Now as then, pretrial discovery can be a very expensive proposition—and attorney's fees have risen in the past 16 years. These hidden costs suggest that Smolla's efforts to distinguish the two cases is untenable on the practical front, if not as a matter of law. More likely, it is untenable on both levels. As Chief Justice John Marshall noted, "[T]he power to tax involves the power to destroy,"

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[259] *Id.* at 76.

[260] *Id.* at 78.

[261] *Id.* at 71 (emphasis in original) (footnote and citation omitted). Notably, Smolla does not conclude that the press should be categorically protected from these perils; indeed, he notes the success of plaintiffs in libel suits throughout the 1980s as proof that "America in recent years seems to have been growing increasingly convinced that freedom of speech does not deserve the level of preemeinence that the *New York Times* case suggested." *Id.* at 79.

and the imposition of significant costs on what is a legal right constitutes an abridgment of that right.[262] Such is the danger when factual issues, such as subjective intent, form a component of the constitutional status of speech.

VI. CONCLUSION

The application of verbal act logic, as delineated above, suggests that the jurisprudential leaps taken by the Courts in *Rice* and *Byers* are without warrant. Moreover, these decisions are hurtful both to the coherence of First Amendment jurisprudence and to the security of those who publish ideas that challenge the mainstream. If, as happened in *Byers*, an artistic work that satirizes the very "culture of violence" [263] and promoters of this violence become victims of these culture wars, perhaps the wisdom of the entire enterprise should be rethought, independently of the unconstitutionality of such a course of conduct. For instance, when Canada adopted the definition of pornography as a violation of the civil rights of women long urged by Andrea Dworkin, Dworkin's own works were among the first to fall subject to the ban.[264] The experience of *Natural Born Killers* is similar and a reminder of one of the key dangers of political censorship: censors have a tendency to devour their own young.[265] More fundamentally, reliance on the disapproval of the speech's message as an element of the proof of liability contradicts what has been repeatedly described as the "lodestar" of the First Amendment: the notion that "there is no such thing as a false idea."[266] When Professor Smolla speaks of the "blow" he has struck against the "culture of violence," he admits violating this core precept of free speech.

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[262] McCulloch v. Maryland, 17 U.S. 316, 431 (1819). For the application of this logic in a First Amendment context, see Forsyth County v. Nationalist Movement, 505 U.S. 123, 135-37 (1992) (forbidding the passing on of police costs attributable to public reaction to unpopular speaker's message to speaker by way of sliding-scale fee); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). The Court's decision in *Forsyth County* would seem, as described previously, to effectively undermine the arguments of Professor Schauer and his adherents that the "cost-shifting" approach of civil law does not conflict with the First Amendment.

[263] SMOLLA, DELIBERATE INTENT, *supra* note 58, at 272 ("We have struck a blow against the culture of violence.").

[264] NADINE STROSSEN, DEFENDING PORNOGRAPHY 237 (1995).

[265] *See, e.g.*, ALAN DERSHOWITZ, THE BEST DEFENSE 191 (1982) (recounting that twenty years ago, when he asked the Rev. Tom Michel, the leader of the Moral Majority in New England who welcomed Dworkin as a fellow anti-pornography crusader, whether his organization would seek to enforce such a ban against her writings, Rev. Michel replied, "We would surely ban such ungodly writings.").

[266] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

The Court has recently rejected just such arguments as made by Professor Smolla and Judge Luttig in reaffirming its commitment to the highest quantum of protection for indirect advocacy, and reasserting the centrality of the verbal act concept in First Amendment jurisprudence. In *Ashcroft v. Free Speech Coalition*,[267] the Court struck down as unconstitutional the Child Pornography Protection Act of 1996. In ruling that the statute violated the First Amendment, the Supreme Court rejected the Government's claim that "virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct.[268] As the Court explained:

> The mere tendency of speech to encourage lawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from government because speech is the beginning of thought.[269]

The *Ashcroft* opinion goes on to explain that to "preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct."[270] The Court deemed the promulgation of attractive images of sexuality involving minors did not constitute "more than a remote connection between speech that might encourage thoughts and impulses and any resulting child abuse," and concluded that "[w]ithout a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct."[271] While the Court did not provide a comprehensive, definitional account of precisely what linkage is required beyond this description, it distinguished the CPPA from the general bar on child pornography upheld in *Ferber v. New York* on the ground that "in contrast to the speech at issue in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates

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[267] 122 S.Ct. 1389 (2002).

[268] *Id.*, slip op. at 15.

[269] *Id.*, quoting *Stanley v. Georgia*, 394 U.S. 557, 566 (1969).

[270] *Id.*; *Kingsley International Pictures Corp.*, 360 U.S. 684, 689 (1959); *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001).

[271] *Id.*

no victims by its production.[272]

The Court's decision in *Ashcroft v. Free Speech Coalition* stands as a rebuke to the holding in *Byers* and at the very least, to the logic advanced in support of the Fourth Circuit's ruling in *Rice*. These holdings, still so new, may be already destined to be swept aside as "a derelict on the waters of the law."[273] More fundamentally, the decision in *Ashcroft* is a powerful reassertion of the primary rule of free speech: that, as a general proposition, speech may only be deemed to constitute part of an illegal action under very narrow factual circumstances in which a specific relationship between speaker and actor correlates the speakers' expression to the fact-specific crime in question.

The exploration of verbal act logic involves more than a rejection of the reasoning in a brace of bad decisions. The exploration of the outer limits of the First Amendment—unpacking what Justice Douglas meant in his terse phrase "speech brigaded with action"—is by no means easy. Both Judge Luttig and Professor Smolla's yielding to the temptation to censor what affronted them at the most visceral level, despite their own sincere beliefs in the importance of free speech, is evidence of this difficulty. However, the easy gibe that "hard cases make bad law"[274] does not sum up the lessons learned in these media advocacy cases. Rather, a few observations about verbal act logic are in order.

First, as suggested at the beginning of this Article, the presumption that speech is inviolate is a precondition to such verbal act analysis. It is only upon a showing that the speech is the

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[272] *Id.* The Court explained that it is this rationale that legitimizes the laws forbidding possession of child pornography, upheld in *Osborne v. Ohio*, 495 U.S. 103 (1990). Where materials that are simply obscene may be freely possessed in the home while their dissemination may be banned, *Stanley, supra*, mere possession of child pornography may be criminalized, the Court held in *Osborne* and reaffirmed in *Ashcroft*, on the theory that such materials are themselves the fruit of an unlawful act, known to be such by the possessor, and thus impute accessorial liability after the fact. This concept is supported by the common law maxim that no "one shall be permitted to profit from his own fraud, or to take advantage of his own wrong . . . The maxim [is] *volenti non fit injura*." *Riggs v. Palmer*, 115 N.Y. 506, 511-12, 514 (1889); *New York Mutual Life Insurance Co. v. Armstrong*, 117 U.S. 591 (1886); *Egelhoff v. Egelhoff*, 532 U.S. 141, 152 (2001) (describing *Riggs* principle as "well established in the law"). The application of this concept to First Amendment jurisdiction has been upheld, although it presents questions of the appropriate scope. *Simon & Schuster*, 502 U.S. 105 (1993) (striking as unconstitutional New York's Son of Sam statute forfeiting profits for memoirs by criminals, as targeting expressive conduct alone).

[273] *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting); *see also Rose v. Rose*, 481 U.S. 619, 638 (O'Connor, J., concurring) (1987).

[274] N. Sec. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

functional equivalent of a physical act that proscription and punishment are permitted. Second, some kind of specific connection to the illegal conduct that resulted from the speech is needed—the causal chain must be sufficiently tight that the line between protected persuasion and unprotected verbal act remains as sharp as possible. Thus, in *Brandenburg*, and Justice Brandeis' *Whitney* concurrence, the requirement of both the imminence of the resultant act and a specific context in which the act takes place creates a lack of opportunity for reasoned deliberation and the temporary ascendancy of the speaker over the audience. This is similar to an agency relationship that fairly imputes the listener's act to the speaker.

In fact, the relationship of the audience to the speaker is critical in distinguishing a verbal act from advocacy. A classroom professor who instructs her class from the writings of Valerie Solanas, and urges action on the abstract level is not the same as a speaker who is aware that prompt obedience is likely because of a different relationship context. For example, Professor James Moriarity, known as the "Napoleon of Crime," instructs his direct subordinate Colonel Sebastian Moran to kill Sherlock Holmes.[275] The power relationship between the two make it expected that Moriarity will be obeyed; violent action on the part of Moran at the behest of Moriarity is within the scope of their relationship as negotiated by them, and as practiced. Moran's act is attributable to Moriarity even if attempted after Moriarity's death.[276] Where the relationship is an explicit one, one agreed upon by the parties and acknowledged by them, the lack of imminence alone does not absolve the speaker. The equation is simply that a relationship plus a command equals causation. A relationship where a command takes place with both parties having reason to believe that the command will be obeyed, makes the speaker liable for the resultant act.

Another example may be helpful. Henry II, at dinner with his loyal barons, fatefully muses about his political conflict with the Archbishop of Canterbury, Thomas Becket, asking "will no one rid me of this turbulent priest?"[277] Four of his knights take the King's angry exclamation as an instruction, and butcher Becket in his own cathedral, while at the altar; Henry disavows any intent that they

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[275] *See* A. Conan Doyle, *The Adventure of the Empty House*, STRAND MAGAZINE, October, 1903.

[276] *Id.*

[277] W.L. WARREN, HENRY II 508 (1973).

should have so acted.[278] This case posits an interesting question regarding intent: what is meant by a command? If Henry was just letting off steam, and did not intend his knights to act upon his passionate language (an interpretation much in keeping with the King's well-known rages), Henry might persuasively claim that, despite the relationship, his knights did not reasonably take his remark as a command. That is, Henry might claim either that his statement was not intended to be a command, or simply that the knights unreasonably so interpreted it, regardless of the King's subjective intention at speaking. The latter theory plainly exonerates Henry; if the statement is misunderstood in an objectively unreasonable manner, then the relationship does not act to impute liability to the King. If, however, the King was in the habit of commanding his knights to execute political opponents, and habitually expressed his will so elliptically, the agency relationship might still bind the King, despite Henry's lack of specific intent on that occasion.[279]

In both of these paradigm cases, immediacy is not required to establish liability because the pre-existing relationship creates a context whereby the speaker knows that the command, if spoken, will be acted upon. Speaker and actor are in a power relationship that supports such a conclusion. The *Brandenburg* rule likewise captures an unspoken power dynamic: the audience may be swept up in the feeling created by the speaker, directed at that moment at a specific target. In short, a temporary ascendancy due to group feeling and manipulated emotion has created a power relationship such that the causal chain is established. Power, not reason, links speaker and actor.

Thus, direct advocacy, under certain circumstances, crosses the line to verbal act status. Thus too, indirect advocacy—Henry II's wishing for the death of the "turbulent priest" to those who feel it their duties to anticipate and fulfill his needs—can also cross this line, under the right set of circumstances. However, undirected advocacy—like *Hit Man* or the *S.C.U.M. Manifesto*—can only appeal to reason. No power dynamic between reader and speaker exists to attribute the causation of an act to the following of advocacy that is abstract—in that it is untethered to a specific factual context, not that it is bloodless. The mind of the reader remains free to evaluate, to weigh, to accept or to reject the arguments presented. The acts that

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[278] *Id.* at 508-11.

[279] FRANCIS WHARTON, A COMMENTARY ON THE LAWS OF AGENCY AND AGENTS §§ 459-60 (1876).

result, therefore, are not attributable to the speaker, but solely to the actor. The speaker may be the spreader of error and evil counsel, but she is not herself an actor. To hold otherwise is not only to blur the lines between speech and act—even verbal act—but to reject the central tenet of any notion of free speech: that individuals are capable of receiving and evaluating various messages, and choosing between them. Such a doctrine also undermines our polity's commitment to individual responsibility, and to moral autonomy that undergirds the system of both civil and criminal law.[280] While such doctrines do not of themselves spell the end of freedom, they do show a disturbing ambiguity toward it. Freedom of speech, Luttig and Smolla seem to say, except when there is a price to pay. Perhaps advocates, judges and academics cannot accept the notion that the speech they find truly heinous can with impunity be uttered, even when it is found persuasive. How different from Holmes, who acknowledged the risks of free speech, and acknowledged that the happy ending might not come—that freedom of speech, just like freedom in general, allows us to build both Milton's Pandemonium as well as Bunyan's Celestial City.[281] But only when there is freedom of choice between the highest and the lowest does choosing matter.

[280] *See* WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES, *supra* note 30, at 326-29; *see also* LON FULLER, THE MORALITY OF LAW (1964).

[281] *See* JOHN MILTON, PARADISE LOST (1667), Bk. I, ln. 756 *reprinted in* THE POETICAL WORKS OF JOHN MILTON (Oxford University Press, H.C. Beeching, ed.) (1938) at 199; JOHN BUNYAN, THE PILGRIM'S PROGRESS (1678).