HOW IMMINENT IS IMMINENT?: THE IMMINENT DANGER TEST APPLIED TO MURDER MANUALS

Theresa J. Pulley Radwan[*]

I. INTRODUCTION

"We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."[1]

The doctrine of free speech is one of the most cherished freedoms provided for in the United States Constitution.[2] It is the doctrine credited with allowing a truly free and democratic society to flourish for more than two centuries.[3] It is a doctrine which evolved out of society's need for open discussion of political ideas,[4] but has since become a means to discuss much more than politics.[5]

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[*]B.A., University of Dayton, 1992; J.D., College of William and Mary, Marshall-Wythe School of Law, 1995. Associate, Thompson Hine & Flory LLP, Cleveland, Ohio.

[1]*See* Frohwerk v. United States, 249 U.S. 204, 206 (1919) (discussing violation of the Espionage Act by newspaper publication).

[2]*See* U.S. CONST. amend. I.

[3]LEE C. BOLLINGER, IMAGES OF A FREE PRESS 1, 5 (1991).

[4]*See* Krueger v. Austad, 545 N.W.2d 205, 215 (S.D. 1996) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)).

[5]Although most messages are protected by the First Amendment, some messages are considered to be more valuable and more worthy of protection. *See* Berger v. Battaglia, 779 F.2d 992, 999 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1985) (noting that entertainment is less worthy of protection than political speech).

One of the risks that society takes in allowing free speech is the risk that some speech that causes harm will enter the marketplace of ideas, an idea that creates an evil which society would rather prevent.[6] When such speech is at issue, a determination must be made regarding whether its value is worth the danger that it presents to society.[7] One significant example of the danger speech can provide is in the relatively new series of "how-to" murder manuals available on the market, which contain explicit instructions to would-be criminals, as well as non-criminal readers, on how to commit a crime. The most controversial of these manuals are those detailing how to commit the crime of murder.[8]

This article will first consider the history and development of the doctrine of free speech, specifically focusing on the exception to the doctrine for speech likely to cause imminent lawless action. This article will then analyze the imminent danger exception with regard to a recent case involving a murder executed in conformity with two such murder manuals. Finally, this article will conclude that although publishers lack the requisite intent to be held criminally liable for the crimes themselves, they should nonetheless be held accountable for such publications.

II. THE DOCTRINE OF FREEDOM OF SPEECH

A. THE FIRST AND FOURTEENTH AMENDMENTS

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[9] The First Amendment is made applicable to the states through the Fourteenth Amendment.[10] Therefore, neither the state nor federal government

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[6]*See* F.C.C. v. Pacifica Found., 438 U.S. 726 (1978); Tinker v. Des Moines, 393 U.S. 503 (1969)

[7]*See* Whitney v. California, 274 U.S. 357, 371 (1927) ("[A] State in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public welfare.").

[8]For examples of manuals involving crimes other than murder, see *infra*, note 102.

[9]U.S. CONST. amend. I.

[10]*See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980). The Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall abridge

is permitted to limit a citizen's freedom of speech, absent some justification for doing so.

The First and Fourteenth Amendments are couched in absolute terms, but the structure of our world is such that some types of speech are not worthy of First Amendment protection.[11] Despite the existence of some absolutists,[12] most constitutional theorists agree that the government must be permitted to limit some forms of speech.[13] "[T]he First Amendment does not guarantee an absolute right to anyone to express their views any place, at any time, and in any way they want."[14] Indeed, even the founding fathers of the nation, in writing the Constitution, probably envisioned some limits to the right of free expression.[15]

This is not to say that the statements are not speech,[16] but rather that they are not *protected* speech.[17] Determining whether or not speech is protected involves a risk-benefit analysis in which society, through its courts, determines what risks we must take to enjoy the benefit of free speech, and conversely, what risks are not worth taking.[18]

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the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

[11]*See infra* notes 35-39 and cases cited therein.

[12]For example, Justice Hugo Black was an absolutist, and felt that the First Amendment should be interpreted literally to prevent any government infringement on a citizen's freedom of speech. *See* Donald L. Beschle, *An Absolutism That Works: Reviving the Original "Clear and Present Danger" Test*, 1983 S. ILL. U. L.J. 127, 129-31 (1983).

[13]*See id.* at 129.

[14]Olivieri v. Ward, 801 F.2d 602, 605 (2d Cir. 1986) (citing Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981)).

[15]*See* Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1165 n. 25 (1982) ("There can be little doubt that whatever the framers intended, it was not absolute protection.").

[16]"It is not true that 'fighting words' have at most a 'de minimis' expressive content, . . ., or that their content is in all respects 'worthless and undeserving of constitutional protection,' . . . [w]e have not said that they constitute 'no part of the expression of ideas,' but only that they constitute 'no essential part of any exposition of ideas.'" R.A.V. v. City of St. Paul, 505 U.S. 377, 385 (1992) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[17]*See id.*

[18]*See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1019 (5th Cir. 1987), *cert.*

The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.[19] Therefore, even some "harmful" speech is worth protecting, simply because society reaps a benefit from the free flow of ideas, including bad ideas.[20] When the risks imposed by speech exceed the benefits gained from free speech, however, such speech may be prohibited.[21]

B. CONTENT-BASED REGULATION OF SPEECH

Regulation of speech may be either content-neutral or content-based.[22] Content-neutral regulation of speech means that the speech is not regulated because of *what* the speaker is saying, but because of *how* the speaker is saying it.[23] A popular example is a prohibition of speech above a set decibel level.[24] Such a law is not designed to prevent a certain message from reaching the audience; the speaker is free to find another, legal means for disseminating his or her message.[25] When a regulation of speech is truly content-neutral, the First Amendment merely requires that the regulation be reasonable.[26]

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denied, 485 U.S. 959 (1988) (holding that magazine was not liable for death of boy who tried to practice autoerotic asphyxia after reading article in magazine).

[19]*See id.* at 1019.

[20]*See* Redish, *supra* note 15, at 1164.

[21]*See id.* at 1200.

[22]*See* Doucette v. City of Santa Monica, 955 F. Supp. 1192, 1203 (C.D. Cal. 1997).

[23]*See id.*

[24]For a case rejecting a city-wide ban on all public demonstrations, regardless of content, see *Collins v. Jordan*, 102 F.3d 406 (9th Cir. 1996) (concerning curfews set in San Francisco and Los Angeles following the verdict in the Rodney King case, to avoid rioting).

[25]It is possible for a content-neutral law to be applied in such a way that only certain messages are prohibited. This, in effect, creates a content-based regulation, which may present a constitutional problem. *See* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 675 (1991). For the purposes of this article, the author has assumed that content-neutral regulations are intended to be and are enforced as content-neutral regulations.

[26]*See* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (holding that content-neutral regulation on noise level at concert is reasonable time, place, or manner restriction

Content-based regulation of speech, then, is speech which is prohibited or limited as a result of what the speaker has to say.[27] Content-based regulation of speech is presumed to be invalid, because speech is protected even if it contains an unpopular message.[28] However, the Court in *Chaplinsky v. New Hampshire* stated:

> [t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that 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.[29]

In other words, the content of some speech may be regulated because the benefit that society receives therefrom is outweighed by the risks that society must face if such speech is disseminated freely.[30]

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on speech).

[27]*See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-3, at 794-95 (2d ed. 1988).

[28]*See* R.A.V. v. Saint Paul, 505 U.S. 377, 383 (1992); Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 115 (1991); *see also* Cole v. Richardson, 405 U.S. 676, 688-89 (1972) ("The First Amendment . . . leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.") (quoting Yates v. United States, 354 U.S. 298, 344 (1957)); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging."); Collin v. Smith, 578 F.2d 1197, 1206, 1210 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) ("[A]bove all else the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (quoting Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972)).

[29]315 U.S. 568, 571-72 (1942) (citation omitted).

[30]Even opponents of the clear and present danger test, discussed *infra*, concede that some weighing of values is necessary to determine when speech may be prohibited. *See* Redish, *supra* note 15, at 1199. Professor Redish quotes Professor Paul Freund as stating:

> No matter how rapidly we utter the phrase "clear and present danger," or how

Content-based speech may be further broken down into a distinction between the prohibition of a general category of speech or the prohibition of a specific message. When a specific message is prohibited, the restriction is not only content-based, but viewpoint-based.[31] This distinction can be demonstrated as follows: Suppose that a city passes an ordinance prohibiting all speeches on the city hall steps from 7:00 in the morning until 7:00 at night. Such a prohibition is content-neutral. If the city instead prohibited all speech relating to abortion on the city hall steps, the regulation would be content-based. However, if the city went one step further and prohibited all speeches on the city hall steps which oppose abortion, the regulation would be viewpoint-based because it prohibits not only a category of speech, but a particular point of view.[32] Viewpoint-based regulation of speech is the most difficult to justify. Content-based regulation of speech is also suspect, and the courts are reluctant to permit such regulation without a sufficient showing of the necessity for doing so.[33]

The courts have carved out five areas of speech which pose a sufficient risk to society such that regulation by the government of speech based on content will be permitted. These exceptions are for fighting words,[34] obscenity,[35]

> closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle.

Id. (citing PAUL FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1949)).

[31]*See* Madsen v. Women's Health Ctr., 512 U.S. 753, 762-64 (1994) (regarding picketing of residences of abortion clinic personnel).

[32]Another example of content-neutral speech is a ban on amplifiers on subway platforms, even though the ban incidentally affected some musicians more than others. *See* Carew-Reid v. Metropolitan Transp. Auth., 903 F.2d 914 (2d Cir. 1990).

[33]*See* Widmar v. Vincent, 454 U.S. 263, 270 (1981); Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York, 447 U.S. 530, 536 (1980); Medlin v. Palmer, 874 F.2d 1085, 1089 (5th Cir. 1989); Turner Adver. Co. v. National Serv. Corp., 742 F.2d 859, 862 (5th Cir. 1984).

[34]*See Chaplinsky*, 315 U.S. at 572. Fighting words are those words which by their very utterance will provoke a reasonable person. *See id.*

[35]*See* Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957). The obscenity exception is probably best known for its definition, the often-quoted statement by Justice Stewart that "I know it when I see it . . . ." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

defamation,[36] commercial speech,[37] and speech which is likely to incite imminent lawless action.[38] It is the last of these exceptions which may apply to speech that creates a danger to society or its members through physical harm to individuals or the overall weakening of society.

C. EVOLUTION OF THE IMMINENT DANGER TEST

1. Decisions under Justice Holmes

The "Imminent Danger Test" evolved out of a test developed by Justice Oliver Wendell Holmes in 1919. The standard, first enunciated as the "Clear and Present Danger" test, was first stated in *Schenck v. United States*.[39] The defendant, Schenck, was arrested during World War I for the illegal distribution of approximately 15,000 leaflets that encouraged young men to dodge the draft.[40] Schenck was clearly arrested for the content of his speech. Arguably, he was arrested for the viewpoint expressed by his speech: to avoid the draft.[41] Schenck argued that because he was arrested for what he was saying, his arrest was a violation of the First Amendment's prohibition against restricting speech.[42] The Court disagreed.[43] Justice Holmes, writing for the majority,

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[36]*See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Beauharnais v. Illinois, 343 U.S. 250 (1951). Causes of action for defamation include slander, libel, and various invasion of privacy torts. *See, e.g.*, RODNEY A. SMOLLA, LAW OF DEFAMATION (1996).

[37]*See* Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978). Unlike the speech prohibited by the other exceptions, speech made for commercial purposes is not inherently "bad." *See id.* at 455. However, such speech is not automatically protected. *See id.* at 456. In *Ohralik*, for example, an attorney was prohibited from soliciting business from an accident victim, even though he sought to aid the victim and even though the challenged conduct was speech. *See id.* at 467-68.

[38]*See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[39]249 U.S. 47 (1919).

[40]*See id.* at 49.

[41]It could be argued that no one would have complained if Schenck had encouraged young men to follow the draft or to enlist willingly in the military.

[42]*See Brandenburg*, 249 U.S. at 49.

[43]*See id.* at 53.

stated that some speech is of "such a nature as to create a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent."[44] Justice Holmes reasoned that Schenck's distribution of these leaflets during wartime created a danger that young men would dodge the draft, and clearly Congress had both a right and an obligation to prevent draft-dodging.[45] Thus, the Court found that the speech could be regulated.[46] The *Schenck* decision created the new standard that in order to prohibit speech for its dangerous tendencies, it must create: (1) a clear and present danger and (2) a danger that Congress has the duty to prevent.[47]

Later that year, Justice Holmes had an opportunity to expand upon the clear and present danger test in *Debs v. United States*.[48] Like *Schenck*, *Debs* involved speech designed to obstruct the draft.[49] Again, the Court determined that such speech is not protected.[50] Most notably, Justice Holmes clarified the requirements of the clear and present danger required to prohibit speech, stating that the evil to be prevented, dodging the draft, must be the natural and reasonable result of the speech.[51] Justice Holmes also hinted that a specific intent to bring about the result is also necessary.[52] Therefore, after *Debs* the clear and present danger test required: (1) a clear and present danger, (2) that was intended by the speaker, and (3) that Congress had the right or duty to prevent.[53]

Out of wartime protests came yet another case involving the clear and present danger test, *Abrams v. United States*.[54] The defendant, Jacob Abrams, was

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[44]*Id.* at 52.

[45]*See id.*

[46]*See id.*

[47]*See id.* at 52.

[48]249 U.S. 211 (1919).

[49]*See id.* at 212.

[50]*See id.* at 216.

[51]*See id.* at 216.

[52]*See id.*

[53]*See* Beschle, *supra* note 12, at 133.

[54]250 U.S. 616 (1919).

charged with a violation of the Espionage Act for protesting American intervention in a Russian revolutionary battle.[55] Using the clear and present danger test, the Court found that Abrams' protest could be prohibited.[56] Justice Holmes dissented though, stating that Abram's protest was not likely to cause any dissension among soldiers nor hamper the war effort.[57] The majority in *Abrams* seemingly abandoned Justice Holmes' requirement in *Debs* that the evil to be prevented be a "natural" result of the speech.[58] In *Abrams* and subsequent decisions, the Court began to slowly chip away at the requirements of the original clear and present danger test.[59]

Justice Holmes again dissented in *Gitlow v. New York*.[60] *Gitlow* involved the distribution of material calling for the overthrow of the government.[61] Justice Holmes disagreed with the Court's determination that the materials constituted a clear and present danger to the government.[62] The majority opinion stated that when Congress determines certain speech is dangerous, the Court could not hold otherwise.[63] Essentially, the Court removed the requirement that Congress have a right to prevent the substantive evil brought about by the speech in question and allowed Congress to determine what constitutes a clear and present danger.[64] The Court, therefore, relinquished its check on

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[55]*See id.* at 617.

[56]*See id.*

[57]*See id.* at 624.

[58]As Justice Holmes noted in his dissent, "[n]o argument seems to me necessary to show that these pronouncements in no way attack the form of government of the United States, or that they do not support either of the first two counts." *Id.* at 626 (Holmes, J., dissenting). Although the feared harm, toppling the government, was unlikely to occur as a result of Abram's statement, the Court determined that Abrams could be liable for his speech. *See id.* at 624.

[59]*See e.g.*, Fisk v. Kansas, 274 U.S. 380 (1927); Gitlow v. New York, 268 U.S. 652 (1925).

[60]268 U.S. 652 (1925).

[61]*See id.* at 655.

[62]*See id.* at 673.

[63]*See id.* at 670-71. Justice Frankfurter follows a similar ideology, stating that judicial review should be limited because great deference should be given to the recommendations and decisions of Congress. *See* Redish, *supra* note 15, at 1197-98.

[64]*See Gitlow*, 268 U.S. at 669.

Congress, insofar as its ability to ensure that Congress only prohibited truly dangerous speech.[65] The Court in *Abrams* took away the requirement that the danger be "present."[66] The *Gitlow* Court then removed the requirement that the danger be "clear."[67] Therefore, the clear and present danger test, as set forth by Justice Holmes in *Schenck*, was effectively abolished.

2. Aftermath of the Holmes Era

In the aftermath of the Holmes decisions, the clear and present danger test evolved into a balancing test, weighing the gravity of the danger to be prevented against the likelihood that if the speech was permitted, the feared danger would occur.[68] One decision utilizing this balancing test was *Dennis v. United States*,[69] in which members of the communist party were convicted for violations of the Smith Act for organizing a group advocating violent overthrow of the government.[70] Using the balancing test, the *Dennis* Court upheld

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[65]*See id.* at 670. The *Gitlow* Court stated:

> [T]he question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils upon which great reliance is placed in the defendant's arguments, [but that such question] has no application to [cases] like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.

Id. (citing Schenck v. United States, 249 U.S. 47, 51 (1919); *see also* Beschle, *supra* note 12, at 137. Prior to *Gitlow*, the Court looked to whether the feared harm was likely to occur and whether the harm was sufficient to allow the speech to be prohibited.

[66]*See* Abrams v. United States, 250 U.S. 616 (1919).

[67]*See Gitlow*, 268 U.S. at 670.

[68]This balancing formula of gravity of the evil versus probability of the evil occurring was made popular by Judge Learned Hand in *United States v. Dennis*, 183 F.2d 201, 215 (2d Cir. 1950), *aff'd* 341 U.S. 494 (1951). *See* Redish, *supra* note 15, at 1172 n.62. The distinction between the clear and present danger test and the balancing test is that, under the clear and present danger test, in order to suppress speech, the danger must be great *and* be likely to occur. *See id.* Under the balancing test, if the danger is great, the likelihood of occurrence need only be minimal to justify suppression of speech. *See id.* Likewise, if the likelihood of the harm occurring is sufficiently large, speech may be suppressed even if the harm to occur is not great. *See id.* at 1172.

[69]341 U.S. 494 (1951).

[70]*See id.* at 497-98; *see also* 18 U.S.C. § 2385 (1946).

the convictions of the party members.[71] Given the gravity of the harm advocated, overthrow of the government, and the likelihood of Dennis' speech inciting the listener to act, the Court held that the speech could be prohibited.[72]

The balancing test has also been used to reverse convictions, as in *Lovell v. City of Griffin*[73] and *Schneider v. Irvington*.[74] The Court in *Lovell* and *Schneider* reversed convictions for the distribution of leaflets in violation of a city ordinance.[75] The Court reasoned in both cases that the evil to be prevented in each case, littering, could be handled by other means such as laws against littering.[76] The danger to the city from litter, the Court opined, could not outweigh the defendants' rights to speak.[77] Thus, even though the harm feared was almost certain to occur, the harm itself was so minor that it did not justify an infringement of speech.[78]

Even when the harm is greater than littering, however, the courts have managed to use the balancing test to reverse convictions. In *Hartzel v. United States*,[79] for example, the Court overturned a conviction for the distribution of

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[71]*See Dennis*, 341 U.S. at 516. The Court in *Dennis* considered "whether the gravity of the 'evil,' discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid the danger." *Id.* at 510 (quoting Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950)).

[72]*See id.* at 509-11, 516. The essence of a balancing test is that if one factor increases, the other factor may decrease without affecting the result. In other words, the greater the likelihood of the harm occurring, the less dangerous the result needs to be for the speech to be prohibited. On the flip side, if the likelihood of the harm occurring is slim, the resulting danger, should it occur, would need to be of great danger for the speech to be prohibited. Under this type of analysis, there could conceivably be some type of danger which is so egregious that the government would have a duty to prevent the harm even if it is practically impossible for it to ever occur. The gravity of the harm would be such that likelihood is no longer even a factor. *See* Redish, *supra* note 15, at 1172.

[73]303 U.S. 444 (1938).

[74]308 U.S. 147 (1939).

[75]*See Schneider*, 308 U.S. at 165; *Lovell*, 303 U.S. at 452-53.

[76]*See Schneider*, 308 U.S. at 162.

[77]*See id.* at 163-65. Note that the ordinance preventing distribution of leaflets was a content-neutral restriction, unlike other clear and present danger cases. For more on analysis of content-neutral regulation of speech, see Williams, *supra* note 25.

[78]*See Schneider*, 303 U.S. at 162.

[79]322 U.S. 680 (1944).

leaflets. Hartzel had distributed leaflets during World War II advocating withdrawal of the United States from the Allied forces, and was convicted pursuant laws relating to treason, rather than laws prohibiting littering.[80] Hartzel's conviction was reversed on the grounds that he lacked the specific intent to cause insubordination.[81] The *Hartzel* decision is reminiscent of the clear and present danger test as formulated by Justice Holmes, rather than the Learned Hand balancing formula, in that it requires intent as well as both a grave danger and a likelihood of occurrence.[82] Likewise, in *United States v. Wagner*,[83] the court held that the distribution of leaflets opposing the sale of a residence to mentally disabled persons was protected speech because the danger to be prevented, the dissemination of socially unacceptable ideas, was not sufficient to limit one's right to speak.[84]

3. Brandenburg v. Ohio

The most significant development in the clear and present danger test came in 1968 with the Court's decision in *Brandenburg v. Ohio*.[85] The defendant in *Brandenburg* was a leader of the Ku Klux Klan.[86] He invited the local press to a KKK meeting, and a videotape of the meeting was aired on television.[87] As a result of this video, the defendant was arrested for advocating criminal activity in violation of Ohio law.[88] In upholding the defendant's conviction, the Court

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[80]*See id.* at 681. Hartzel was convicted of violating the Espionage Act of 1917.

[81]*See id.* at 687. The Court, citing *Abrams*, *Schenck*, and the Espionage Act, noted that two elements were required to convict Hartzel: specific intent to cause insubordination and a clear and present danger that the speech would cause the feared result. *See id.* at 686-87. The Court went on to note that nothing in the pamphlets could be construed to specifically intend to cause the insubordination because there was no direct mention of such insubordination. The attack of the government could merely lead to an inference that insubordination is the answer. *See id.*

[82]*See id.* at 686-87.

[83]1995 U.S. Dist. LEXIS 20665 (N.D. Tex. 1995).

[84]*See id.*

[85]395 U.S. 444 (1969).

[86]*See id.*

[87]*See id.* at 445.

[88]*See id.*

did not utilize the traditional "clear and present danger" test. Rather, the Court spoke in terms of imminent danger which could result from the speech:

> [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.[89]

The Court's imminent danger test mimicked Justice Holmes' clear and present danger test by requiring an intent to create a proscribable danger and the likelihood that the danger will come to fruition.[90] However, the term "imminent" danger, rather than "clear and present" danger, indicated the need for a more pressing problem—a danger which will come to pass in the near future. It is the requirement of immanence which has become the central focus of the imminent danger test since *Brandenburg*.[91]

4. The Requirement of Imminent Danger

One such example of the importance of immanence in proscribing speech came in *Hess v. Indiana*.[92] *Hess* involved a statement made during a protest by one of the protesters that "We'll take the fucking street later."[93] The statement was made while the protesters were dispersing.[94] The speech clearly advocated an illegal action.[95] However, the Court held that while the statement advocated an illegal action, it advocated such an action at an undefined future date.[96] It was not an action to be taken in the near future, and thus did not

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[89]*Id.* at 447.

[90]*See id.* at 449 (Douglas, J., concurring); Schenck v. United States, 249 U.S. 47, 52 (1919).

[91]*See Brandenburg*, 395 U.S. at 449 n.4.

[92]414 U.S. 105 (1973).

[93]*Id.* at 106.

[94]*See id.* at 107.

[95]*See id.* at 108.

[96]*See id.*

meet the imminence requirement.[97] The Court failed to define how imminent the action must be to meet the test, or whether if a future date (a distant future date) to take action had been set, the result would have been different. The court's decision could be interpreted to require advocacy of immediate action, such as "Let's storm the fucking street right now!" Conversely, it could be interpreted to require advocacy of planning for future action at a specific time, such as "Let's storm the fucking street tomorrow!" The differences are monumental.

III. RICE V. PALADIN ENTERPRISES, INC.

In 1996, the United States District Court for the District of Maryland heard what could become a landmark case in the field of the imminent danger test: *Rice v. Paladin Enterprises, Inc.*[98] *Rice* involved a triple-murder in Silver Springs, Maryland.[99] The murderer used two murder manuals to aid him in committing the murders.[100] The families of the victims sued the publisher of the manuals, Paladin Enterprises, Inc., for aiding and abetting the murders through the publication of these manuals.[101] The families noted specific refer-

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[97]*See id.* at 108-09.

[98]940 F. Supp. 836 (D. Md. 1996), *rev'd* 1997 U.S. App. LEXIS 30889 (4th Cir. 1997). As this article was going to press, the United States Court of Appeals for the Fourth Circuit issued an opinion in *Rice*. The Fourth Circuit reversed and remanded the case to the District Court of Maryland. The Court of Appeals held that the First Amendment did not bar the lower court from finding that Paladin acted to aid and abet in murder. The court cited a number of instances in which speech could be limited by law, including, *inter alia*, extortion, conspiracy, threatening the life of the President, and harassment. *See id.* at *29. In the civil context, the court held that Paladin could be found to have the requisite intent for liability for three reasons: the purpose of the book was to assist in committing murders, the book clearly promotes murder, and the book was marketed to potential murderers. *See id.* at *61-64. For all of these reasons, the court concluded that "this book constitutes the archetypal example of speech which, because it methodically and comprehensively prepares and steels its audience to specific criminal conduct through exhaustively detailed instructions on the planning, commission, and concealment of criminal conduct, finds no preserve in the First Amendment." *Id.* at *70. The decision does not change the premise of this article--given the clarity and detail of HIT MAN, it may be one of the few instances in which the speech goes one step beyond speech and enters the realm of incitement to illegal activity.

[99]*See id.* at 838.

[100]*See id.*

[101]*See id.* The Court rejected the plaintiff's argument that Paladin's publications constituted aiding and abetting of a crime first on the grounds that Maryland does not have an aiding and abetting statute that applies to such circumstances. *See id.* at 842. If the Court

ences in the manual which the murderer followed in committing the crimes. These references provided a great amount of detail -- similar to a blueprint for murder. It was this degree of specificity which led the family to conclude that the publication of the manual served to assist the murderer in the commission of his crimes.

A. THE MANUALS

There are numerous books available, primarily through mail order, which provide instruction on committing violent crimes.[102] The books involved in the

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had considered the cause of action, it would have been confronted with two cases which plaintiff brought to the Court's attention, both of which found the defendant liable for aiding and abetting in a crime through speech.

In *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982), defendant published a manual on how to make narcotics, and was convicted of aiding and abetting in the crime of manufacturing narcotics. The court rejected defendant's reliance on the First Amendment, stating that

> [t]o the extent, however, that [defendant] appears to contend that he is immune from search or *prosecution* because he uses the printed word in encouraging and counseling others in the commission of a crime, we hold expressly that the first amendment does not provide a defense as a matter of law to such conduct.

Id. at 843.

Likewise, in *United States v. Buttorff*, 572 F.2d 619 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978), the defendant's conviction for aiding and abetting was upheld. Defendant made a presentation regarding the filing of false tax returns.

> [T]he defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. This speech is not entitled to first amendment protection and, as discussed above, was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms.

Id. at 624.

[102]See Karen Bowers, *Death Sentences*, DENVER WESTWORD, March 21, 1996; Amitai Etzioni, *Is Information on How to Make a Bomb More Harmful than Porn?*, CHICAGO TRIBUNE, August 24, 1995, at 31 (listing numerous books available through mail order, including some of the following: BE YOUR OWN UNDERTAKER: HOW TO DISPOSE OF A DEAD BODY; DEADLY BREW: ADVANCED IMPROVISED EXPLOSIVES; THE ANCIENT ART OF STRANGULATION; THE POOR MAN'S SNIPER RIFLE; 21 TECHNIQUES OF SILENT KILLING; THE HOME AND RECREATIONAL USE OF HIGH EXPLOSIVES; KILL WITHOUT JOY: THE COMPLETE

Rice suit, which were found in the possession of the killer, included *Hit Man: A Technical Manual for Independent Contractors*[103] and *How to Make a Disposable Silencer, Vol. II.*[104] *Hit Man*, the book on which the *Rice* case focused, was first published in 1983 and had sold approximately 15,000 copies by the time of trial. The *Hit Man* book, allegedly written by a professional hit man, outlines steps to take in committing a murder-for-hire, from locating clients to committing the act, and hiding the bodies. The book is detail-specific. For example, it recommends a weapon (an AR-7 rifle), and explains how to barrel out the serial number of the weapon in order to prevent the gun from being traced. The book also describes how to make a silencer, how to dispose of the weapon after the crime, how to purchase a hotel room with fake identification and license numbers, where and how often to shoot victims, and how to file down the weapon after use to prevent detection. The book hinges on a fine line of explaining in excruciating detail how to commit the crime, without actually demanding that the reader do so. The reader must be predisposed to commit the crime of murder; the book simply explains how to go about the process.

B. THE FACTS OF THE CASE

In March of 1993, Lawrence Horn hired James Perry to kill his ex-wife and quadriplegic son, in order to inherit over $1 million awarded to his son in a lawsuit for the accident which caused the son's paralysis.[105] James Perry committed the murders of Horn's ex-wife, the son's nurse, and the son.[106] In committing the murders, Perry followed more than twenty instructions from the *Hit Man* manual, including the use of an AR-7 rifle[107] with its serial num-

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HOW-TO-KILL BOOK; GUERRILLA'S ARSENAL: ADVANCED TECHNIQUES FOR MAKING EXPLOSIVES AND TIME-DELAY BOMBS; ULTIMATE SNIPER; THE BIG BOOK OF MISCHIEF; HOW TO MAKE A SILENCER FOR A .22; HOW TO MAKE A SILENCER FOR A .45; SILENT BUT DEADLY: MORE HOMEMADE SILENCERS FROM HAYDUKE THE MASTER; HOW TO BUILD PRACTICAL FIREARM SUPPRESSORS: AN ILLUSTRATED STEP-BY-STEP GUIDE; AND THE TERRORIST HANDBOOK).

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

[104]Paladin Press, HOW TO MAKE A DISPOSABLE SILENCER, VOL. II (1983).

[105]*See Rice*, 940 F. Supp. at 839.

[106]*See id.* at 838.

[107]*Rice*, 940 F. Supp. at 839. "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

ber removed after the murders;[108] shooting the adult victims three times in the eyes from a short distance;[109] use of a silencer;[110] filing of the weapon to confuse detectives;[111] and disposing of the weapons and any stolen goods in pieces along the roadway.[112] When police arrested Perry and searched his apartment, they uncovered the *Hit Man* and *Silencer* manuals from which Perry took his cues.[113] Perry and Horn were tried and sentenced for their parts in the slayings.[114] The unusual aspect of these murders did not occur in the criminal trials of the perpetrators, but in the civil arena, where the publisher of these manuals was sued for aiding and abetting in the crime.

C. THE CIVIL SUIT AGAINST PALADIN ENTERPRISES, INC.

The *Rice* case was decided by the Federal District Court of Maryland, Southern Division, on September 6, 1996. In reviewing the case, Judge Williams correctly determined that the case fell under the *Brandenburg* stan-

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is lightweight and easy to carry or conceal when disassembled." *Id.* (quoting REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS 22 (1983)).

[108]*See id.* "The AR-7 has a serial number stamped on the case, just above the clip port. This number should be completely drilled out." *Id.* (quoting REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS 23 (1983)).

[109]*See id.* "When using a small caliber weapon like the .22, it is best to shoot from a distance of three to six feet. . . . At least three shots should be fired to insure quick and sure death . . . aim for the head—preferably the eye sockets if you are a sharpshooter." *Id.* (quoting REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS 24 (1983)).

[110]*See id.* "The directions and photographs that follow show in explicit detail how to construct a silencer for a Ruger 10/22 rile. The same directions can be followed successfully to contract a silencer for any weapon, with only the size of the drill rod used for alignment changed to fit the inside dimension of the barrel." *Id.* (quoting REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS 39 (1983)).

[111]*See id.* "Use a rat-tail file, alter the gun barrel, the shell chamber, the loading ramp, the firing pin and the ejector pin. Each one of these items leaves its own definite mark and impression on the shell casing." *Id.* (quoting REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS 25 (1983)).

[112]*See* Perry v. State, 1996 W.L. 727006 (Ct. App. Md. 1996).

[113]*See id.*

[114]*See id.*

dard.[115] The First and Fourteenth Amendments applied in *Rice* because the state's creation and enforcement of tort law, namely aiding and abetting a crime, were sufficient to constitute "government action" that regulated speech.[116]

The *Rice* court found that three elements must be met under the *Brandenburg* test to prohibit Paladin's publication of the manuals.[117] First, the manuals must advocate imminent lawless action.[118] Second, the books must have been intended to produce imminent lawless action.[119] Third, and last, the books must have been likely to produce imminent lawless action.[120] The court found that none of these requirements were met.[121] The books did not *advocate* an action, and even if they did, they did not advocate an *imminent* action.[122] Additionally, reasoned the court, Paladin did not intend the end result, and the result was not likely to occur simply because someone read the books.[123] Thus, the court concluded that Paladin's speech could not be regulated or prohibited by state tort law.[124]

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[115]*See Rice*, 940 F. Supp. at 841.

[116]*See id.* at 840.

[117]*See id.* at 845-46.

[118]*See id.* at 845. It is the requirement that the end result be illegal that distinguishes books like *Hit Man* from government manuals on wartime killing.

[119]*See id.*

[120]*See id.*

[121]*See id.*

[122]*See id.* at 847. Summarizing the United States Supreme Court in *Noto v. United States*, 367 U.S. 290, 297-98 (1961), the *Rice* court stated that "mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steering it to such action." *Rice*, 940 F. Supp. at 836. The *Rice* court continued: "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." *Id.*

[123]*See id.* at 846.

[124]*See id.* at 847.

1. ADVOCACY

The *Rice* court dismissed the notion that *Hit Man* and *Silencer* advocate the commission of a crime because they do not "prepar[e] a group for violent action and steer[] it to such action."[125] The books do not demand that the reader commit the crime, but rather explain how to do so if the reader wishes.[126] Although the court accepted such an argument without much difficulty, the distinction between advocacy and teaching in this type of situation is certainly much more complex than the Court acknowledged.[127] HIT MAN and SILENCER are written with such specificity that they do, in a sense, prepare and steer the reader for violent action. As the Fifth Circuit recognized in *Herceg v. Hustler Magazine, Inc.*,[128] "it is conceivable that, in some instances, the amount of detail contained in challenged speech may be relevant in determining whether incitement exists."[129] Although the book does not demand that the reader commit a crime, it hinges dangerously close to the border of doing so by specifically telling the reader how to do so. The books' instructions are akin to telling someone "I'm not telling you to steal that wallet, but if you wanted to, here's how to do it . . . . " except that it is telling 15,000 people how to commit the crime of murder. The speaker comes as close as possible to telling the listener to commit a crime without actually doing so. Regardless of whether these books advocate a crime in this situation, it is conceivable that some speech might advocate the commission of a crime without an explicit demand for the listener to do so.[130]

An example of the fine distinction between advocacy and teaching can be

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[125]*Id.*

[126]*See id.* at 843.

[127]As the court noted, it is important to look at both the content and context of the speech. *See id.* at 845 (citing NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976)).

[128]814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

[129]*Id.* at 1023. The court, however, rejected the argument that the amount of detail in the article describing erotic asphyxiation was sufficient to constitute incitement under the circumstances. *See id.*

[130]*But see* Masses Pub. Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917) (when a person "stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation").

found in *United States v. Fleschner*,[131] in which the defendants had conducted a series of meetings instructing their clients how to file a tax return with false exemptions and to use other methods to avoid payment of taxes.[132] The court rejected defendants' argument that they were protected by the First Amendment, holding that "[t]he cloak of the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges the listener to commit violations of current law."[133] Presumably, whether the defendants in *Fleschner* expressly told their clients to file false tax returns, or merely suggested means for doing so if they had the inclination, is irrelevant because in that instance, even teaching of the means for filing false returns essentially advocated an illegal act.[134] The *Rice* court's casual dismissal of the potential advocacy simply because the manuals lack an explicit statement encouraging readers to "Go out and kill someone!" ignores the potential for subtly steering someone to commit a crime.[135]

2. IMMANENCE

Black's Law Dictionary defines imminent as "[n]ear at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous. Something which is threatening to happen at once, something close at hand, something to happen upon the instant, close although not yet touching, and on the point of happening."[136] As noted previously, what constitutes an imminent danger is one of the most difficult determinations to be made under the *Brandenburg* test.[137] The *Rice* court con-

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[131]98 F.3d 155 (4th Cir. 1996).

[132]*See id.* at 157. Apparently, the classes were taught such that it may have been unclear to students whether the actions were legal. *See id.* at 159. This distinguishes the case from the facts in *Rice*, where the publisher expressly stated that murder is illegal. *See Rice*, 940 F. Supp. at 848.

[133]*Id.* at 158 (citing United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985)).

[134]*But see* United States v. Freeman, 761 F.2d 549, 551-52 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120 (1986) (general statements regarding the unfairness of tax laws, as opposed to teaching of how to avoid tax laws, may constitute protected speech).

[135]*See* Redish, *supra* note 15, at 1176-77 ("[I]f a speaker so intends, advocacy which does not 'directly' urge unlawful conduct may nevertheless be 'directed' to bringing about such conduct.").

[136]BLACK'S LAW DICTIONARY 750 (6th ed. 1990).

[137]*See supra* note 85 and accompanying text.

centrated on the fact that Perry committed the triple murder over one year after he purchased copies of *Hit Man* and *Silencer.*[138] However, this analysis by the court focuses on the wrong aspect of the case, namely the result. It is the speech which is at issue and whether the words in the book advocate an imminent action. Whether the book was a successful advocate should not play into this determination. Certainly the result should not hinge on whether Perry committed the murders one week or one year after purchasing the book.

The more important consideration should be whether the language of the book demands action in the near future. This analysis requires a determination of what is "imminent." According to the *Rice* court, one year is not imminent.[139] It seems that in some circumstances, however, one year could be imminent. It takes a substantial amount of time to read a book, find potential customers, purchase all of the supplies, make a silencer, barrel out the serial number, and plan the murders.[140] Though the actual act of the murder is not immediate, the planning may begin immediately. The planning of a murder in and of itself is a criminal act that the state has an obligation to prevent when possible. Thus, it is difficult to say with certainty that the language used, if indeed it is advocacy, is advocacy of an imminent danger.[141] Perhaps it would make more sense to call the book an imminent danger if instead of detailing how to plan the murder, it simply focused on the actual act of killing? However, advocating the planning behind the murder does not make it any less imminent than if the advocacy focused solely on the act itself. As such, the advocacy of planning should be no less a source of liability than the advocacy of the killing.[142]

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[138]*See* Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 847 (D. Md. 1996), *rev'd*, 1997 U.S. App. LEXIS 30889 (5th Cir. 1997).

[139]*See id.*

[140]*See, e.g.*, Dennis v. United States, 341 U.S. 494, 509-10 (1951) (imminence requires action "as speedily as circumstances would permit").

[141]*See supra* text accompanying notes 92-97.*But see* Hess v. Indiana, 414 U.S. 105, 111 (1973) (stating that "We'll take the fucking street later," is not advocating imminent danger because the result will not occur for an indefinite period of time).

[142]Another objection to the imminence requirement has been stated by Martin Redish:

> My theoretical objection to the Brandenburg-style "imminence" requirement is that it harks back to the "marketplace of ideas" rationale for protecting unlawful advocacy. For it assumed that so long as there is sufficient time for rebuttal and reasoned consideration, we can rest assured that "truth" will best "falsity." Only when danger is so "imminent" that there is not time for response and discussion

3. INTENT

One of the most startling admissions in the *Rice* case was Paladin's admission that *Hit Man* is marketed to potential murderers and is intended to teach murder.[143] Such an admission seems to open the door to a finding that Paladin, in publishing its manuals, intended that a crime be committed.[144] Even with this admission, the *Rice* court found that Paladin did not intend that its readers commit murder.[145] In other words, Paladin had no specific intent for Perry to use these books to kill his victims.[146] Furthermore, Paladin protected itself from charges of intending the result of murder by adding a disclaimer to the book reminding readers that murder is illegal and that the books are for educational purposes only.[147]

Degrees of intent, or *mens rea*, are perhaps most comprehensively considered in the context of criminal law, where they are divided into various categories, from purposeful through negligent.[148] The distinction between each

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> should suppression be upheld. As noted above, however, there is simply no basis for the conclusion that the opportunity for reasoned response will always defuse unlawful advocacy. Requiring imminence in every case in the belief that if it is not present the advocacy will never lead to harm is theoretically unjustifiable.

Redish, *supra* note 15, at 1181. The problem with this theory is that it leaves the door open for infringing upon too much speech. No constitutional scholar has ever denied that some protected speech may be harmful, but there exists an inherent benefit in the free exchange of ideas, including harmful ideas. Imminence is not only justified on the basis that harm which is not imminent may be diffused by open discussion. It also serves as a mark for what speech is most likely to cause harm, such that it is not worthy of constitutional protection. It enlarges the protection of speech by narrowing the field of proscribed speech.

[143]*See Rice*, 940 F. Supp. at 846 ("Defendants conceded that they intended that their publications would be used by criminals to plan and execute murder as instructed in the manual.").

[144]Arguably, these books are of interest to persons other than professional hit men, such as police officers or citizens interested in reading about murders. However, the fact that an instruction manual might be of interest to a broad population does not make it any less an instruction manual. It is still designed to teach how to commit a murder, and marketed to people likely to do so.

[145]*See Rice*, 940 F. Supp. at 846.

[146]*See id.*

[147]*See id.* at 838-39.

[148]*See* MODEL PENAL CODE § 2.02 (1955).

level is critical, for different crimes require a different level of intent. The most specific form of intent required is often referred to as "purposeful" intent.[149] An act is done purposely, as defined by the Model Penal Code, when "it is [the actor's] conscious object to engage in conduct of that nature or to cause such a result; and . . . he is aware of the existence of such circumstances or he believes or hopes that they exist."[150] The actor must specifically desire to cause the resulting harm and must hope that circumstances can be created such that the harm will ensue.[151] If the same standard of intent is applied to the *Rice* case, as it appears to have been, Paladin would not be found liable for the murders unless, in publishing a book like *Hit Man*, Paladin not only believed that the manuals would lead to murder, but actually desired such a result. Paladin might have believed that someone could and would commit murder using one of its manuals.[152] However, Paladin probably only intended to do what most businesses do: make a profit. Perhaps Paladin also intended to place more information in the marketplace. As the *Rice* court noted, however, it is a stretch to believe that Paladin's executives wanted more murders to take place.[153] Given this strict definition of intent, Paladin did not have the requisite intent in the publishing of *Hit Man* and *Silencer* that a crime would be committed.

Although it would be almost impossible for Paladin to be found liable for the murders of the Horn family under a purposeful standard, a different result could ensue if the culpability required was lowered one level to "knowingly". The model penal code defines knowing actions as those in which the actor "is aware that his conduct is of that nature or that such circumstances exist; and . . . he is aware that it is practically certain that his conduct will cause such a result."[154] Under this level of intent, the issue begins to blur with the analysis of the likelihood of harm that will result, a factual question.[155] If

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[149] *See* MODEL PENAL CODE § 2.02(2)(a) (1955).

[150] *Id.*

[151] *See id.*

[152] Paladin executives may have realized the effect that these manuals could have. It has been alleged that Paladin's president has stated that Paladin will not publish books on poisons and altitude-sensitive bombs, presumably because of the potential danger such books would cause. Stuart Taylor, Jr., *Closing Argument: Let "Hit Man" Take a Tort Hit*, TEXAS LAWYER, August 19, 1996, at 22.

[153] *Rice*, 940 F. Supp. at 847.

[154] MODEL PENAL CODE at § 2.02(2)(b).

[155] In other words, the greater the likelihood of harm, the more likely that the publisher

Paladin realized that by publishing these manuals it would be likely for murders to occur, it would have sufficient knowledge to be liable for the murders under a "knowingly" standard. As Paladin admitted, these books are designed to teach how to commit a crime. If Paladin published these books with the knowledge of the danger which they could cause, under a standard similar to the criminal-law concept of "knowing" intent, Paladin could be civilly liable for the deaths. Again, this hinges on the factual question of Paladin's knowledge of the potential harm.

The final two standards of intent, recklessness and negligence, are more lenient levels of culpability not involving an intent for the harm to occur or a knowledge that it is likely to occur.[156] Rather they involve awareness of a potential risk.[157] Under either of these standards, Paladin would be more likely to be liable for the events caused by its publications.

The problem herein lies with the intent requirement itself. Often in criminal law, a specific intent to commit a crime is not required.[158] The knowledge that one's actions may cause a crime is sufficient, at least for criminal negligence.[159] Certainly, the result is no less devastating simply because it was not intended. The speech at issue does not gain more societal value simply because the speaker did not intentionally create a problem.

Under the original clear and present danger test outlined in *Schenck*, intent

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knew of the results. Thus, the analysis is similar for both the factual issue (likelihood of harm) and the legal issue (knowledge). *See* United States v. Ecker, 543 F.2d 178, 190 n.42 (D.C. 1976), *cert. denied*, Ecker v. United States, 429 U.S. 1063 (1977).

[156]Specifically, the Model Penal Code states that a person acts recklessly when he "consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct . . . [and his conduct] involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." MODEL PENAL CODE § 2.02(2)(c) (1955). Negligence requires an awareness "of a substantial and unjustifiable risk that the material element exists or will result from his conduct." MODEL PENAL CODE § 2.02(2)(d) (1995). Note that, even under the lenient standard of negligence, there is a requirement that the means do not justify the end. An argument could be made by absolutists that no speech can be abridged, even if it leads to the result of a human being's death, because the value and necessity for an open market of ideas justifies any resulting harm.

[157]*See* MODEL PENAL CODE § 2.02 (1995).

[158]For example, specific intent to kill the victim is not necessary for the crimes of involuntary manslaughter or vehicular homicide. Rather, they require reckless behavior such that the offender should have known that the result could be.

[159]*See supra* note 156.

was not a factor.[160] However, under the imminent danger test as it currently stands, specific intent for the end result to occur is required.[161] Unless the standard is relaxed to include knowledge, Paladin probably did not "intend" to aid and abet the commission of murder by its publications. Given the incredible value society places on free speech, it would be difficult to accept a lenient standard, such as negligence or recklessness, in prohibiting speech. Indeed, the fear created by such low standards for liability could lead to the incidental suppression of valuable speech by people who are afraid of liability for their messages.[162] Thus, it is wise to require a standard of at least knowing, and perhaps purposefulness, in suppressing speech. Whichever standard is appropriate has yet to be fully defined by the courts, but it appears that the *Rice* court has accepted the equivalent of the "purposeful" standard of intent.[163]

4. LIKELIHOOD

Finally, the *Rice* court held that murder was not likely to occur as a result of the publications.[164] Although the Court noted that only once had a murder been accomplished with the aid of the books, it is impossible to know if other murders might have been accomplished with these types of manuals that have never been traced to such publications.[165] The courts should focus on the

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[160]*See* Schenck v. United States, 249 U.S. 47 (1919); *see also* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (stating that speech cannot be restricted under clear and present danger test unless it "would produce *or* is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent.") (emphasis added), *overruled in part* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[161]*See supra* text accompanying notes 39-67; Brandenburg v. Ohio, 395 U.S. 444 (1969).

[162]*See, e.g.*, Alexander v. United States, 509 U.S. 544, 554-58 (1993) (RICO provisions not overbroad and do not have a chilling effect); Redish, *supra* note 15, at 1165 (discussing possibility that people would censor innocent speech in order to avoid possible prosecution for advocacy of illegal act).

[163]*See* Rice v. Paladin Enters., Inc., 940 F. Supp. 836 (D. Md. 1996), *rev'd*, 1997 U.S. App. LEXIS 30889 (5th Cir. 1997).

[164]*See id.*

[165]*See id.* at 848. *See, e.g.*, Taylor, *supra* note 152 (noting that Timothy McVeigh studied William Pierce's THE TURNER DIARIES, which instructs readers how to build a bomb from fertilizer and destroy a federal building, before allegedly bombing the federal building in Oklahoma City, Oklahoma).

speech itself, rather than the results to date. The likelihood of the harm occurring is an analysis which is closely linked to imminence. As noted, the *Rice* court focused on the result, the murder, rather than the speech itself. Although only one murder could conclusively be linked to publication of the manuals, it is still likely that harm could occur. Nothing requires that the harm occur repeatedly for it to be "likely." An act may be likely to occur, yet only occur once. In looking at the specificity of the manuals, it is highly conceivable that an individual will refer to the manual to commit an unthinkable crime. This is a "likely" results, even if not a common one.

IV. CONCLUSION

It has been stated that:

> the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means . . . .[166]

When speech poses a significant public danger, the value of that speech may not be sufficient to overcome the danger. There is no doubt that the state has a strong interest in preventing speech which will cause a crime, particularly the crime of murder. Because of the value which society places on the freedom of speech, however, the tests developed to avoid the freedom of speech are properly strict. A state must overcome stringent hurdles in order to limit an individual's right to free expression. However, when cases do arise that meet these standards, courts must be willing and able to restrict the speech, regardless of the difficulties encountered in setting such limits.[167]

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[166]*Whitney*, 274 U.S. at 371.

[167]Consider, for example, the statement by the REPORT ON THE BROADCAST OF VIOLENT, INDECENT, AND OBSCENE MATERIAL, 51 F.C.C. 2d 418 (1975), which encourages less regulation by government on television due to the inherent complexity of such regulation in light of the First Amendment:

> Regulatory action to limit violent and sexually-oriented programming which is neither obscene nor indecent is less desirable than effective self-regulation, since

The case of murder manuals is particularly difficult because of the egregious nature of the harm which may ensue. Given the detail provided in these manuals, it is not entirely clear that they do not incite imminent lawless action. The question that remains is whether open and free speech is worth the risk of loss of life.

When a publisher distributes materials which are so specific in detailing how to commit a crime, it is difficult to imagine that the publisher did not intend or know that such a crime would indeed be committed. Under the laws as written, this intent is probably insufficient to subject the publishers to criminal liability for the crime. However, the publisher's knowledge of the potential consequences of their actions should be sufficient to subject them to liability for causes of action with a lower level of intent. When some level of "intent" is combined with the likelihood of occurrence and the gravity of the harm, there are plausible reasons for the courts to step in and moderate such speech.

> government-imposed limitations raise sensitive First Amendment problems. . . . Government rules could create the risk of improper governmental interference in sensitive, subjective decisions about programming could tend to freeze present standards and could also discourage creative developments in the medium.

Id. at 420-22.