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Incitement By Any Other Name: Dodging A First Amendment Misfire in *Rice v. Paladin Enterprises, Inc.*

By Lise Vansen*

I. Introduction

The First Amendment states that "Congress shall make no law... abridging the freedom of speech, or of the press."\(^1\) It protects speech that offends, impassions and angers.\(^2\) However, it does not create an absolute free speech right.\(^3\) Certain categories of speech, including obscenity,\(^4\) fighting words,\(^5\) libel,\(^6\) commercial speech,\(^7\) and words likely to incite "imminent lawless action,"\(^8\) "receive limited or no First Amendment protection."\(^9\) Such categories represent those restricted circumstances in which the Supreme Court has recognized a government need to accommodate the other fundamental values, such as the social interest in order and morality, that may at times compete with the First Amendment interest in exposition of ideas.\(^10\)

*Rice v. Paladin Enterprises, Inc.*,\(^11\) is a case that "tests the outer limits of [the] First Amendment,"\(^12\) and "has reinvigorated the dis-

1. U.S. Const. amend. I.
6. See id.
10. See Chaplinsky, 315 U.S. at 571-72.
pute” over whether the First Amendment protects from civil liability publishers of detailed instructions for violent and illegal activities. Rice balances the freedom of speech guarantee against “society’s interest in compensating injured parties.” It also uncovers the potential for misapplication of the current “incitement” standard for characterizing speech as unprotected because it is likely to incite “imminent lawless action.”

In Rice, the families of three murder victims brought wrongful death and survival actions against publishing company Paladin Enterprises for a triple murder committed by convicted killer—James Perry. Perry had purchased and read two of Paladin’s books before committing his triple murder, and the families claimed that by publishing the books, Hit Man: A Technical Manual for Independent Contractors and How to Make a Disposable Silencer, Vol. II (hereinafter “Hit Man Manuals”), Paladin aided and abetted Perry’s murders. The families also claimed damages on civil conspiracy, strict liability and negligence grounds. Paladin moved for summary judgment, arguing that it had a First Amendment right to publish the Hit Man Manuals and, therefore, could not be held liable for any civil damages. The district court granted the motion.

The district court recognized that Paladin had “engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes.” It also agreed with the plaintiffs that “a defendant does not enjoy absolute immunity from criminal or tort liability merely because

16. Id. at 841(applying Brandenburg test).
17. See id. at 838.
18. See id.
19. See id.
20. See id.
21. See id.
22. See id.
23. Id. at 840. Moreover, upon review, the Fourth Circuit called Paladin’s stipulations—that “it not only knew that its instructions might be used by murderers, but that it actually intended to provide assistance to murderers and would-be murderers...,” and that it in fact assisted Perry in particular in the commission of [three murders]”—extraordinary. 128 F.3d at 242.
he uses speech.”

It, nonetheless, maintained that the dispositive issue was “whether that speech is protected by the First Amendment.”

No matter how “loathsome,” the court found that the Hit Man Manuals “simply [did] not fall within the parameters of any of the recognized exceptions to the general First Amendment principles of freedom of speech.”

The plaintiffs, therefore, failed at the district court level to show that “maintenance of [their] suit for damages [did] not infringe upon the [defendant’s] First Amendment protection of speech.”

The Fourth Circuit, however, in a “groundbreaking” ruling, reversed the district court’s grant of summary judgment in Paladin’s favor, holding that the First Amendment does not bar “a finding that Paladin is civilly liable as an aider and abettor of Perry’s triple contract murder.”

Rice bears resemblance to a “line of cases” in which plaintiffs sue media defendants alleging that “media material led to physical harm.” In such cases, “images in the form of movies, advertisements, magazines, games, music, and television form the basis of tort actions.” These “media cases” fall, for the most part, into two general categories: (1) “imitative behavior cases,” in which the media serves as a blueprint for the actor who imitates specific depicted behavior, and (2) “media-influenced behavior cases,” in which exposure to the media directly influences the actor’s behavior.

Besides having to prove the elements of their tort actions, plaintiffs have to hurdle the barrier of the First Amendment, which “bars any tort cause of action based on constitutionally protected speech.” Plaintiffs’ causes of action will usually be “fatally flawed” if “the material sued upon is protected by the First Amendment.”

25. Id. (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982)).
26. Id. at 849.
27. Id.
29. Rice, 128 F.3d at 243.
31. Id. at 867.
32. Id. at 867-68.
33. Id. at 868; see also id. at 868-900 (analyzing such barriers in terms of pornographer liability).
34. Id. at 868-69. Furthermore, the odds will be stacked against plaintiffs in close cases. For when the “challenged speech does not fit easily within one of these [unpro-
Accordingly, in *Rice*, the First Amendment "bar[red] the imposition of civil liability on Paladin unless [the Hit Man Manuals fell] within one of the well-defined and narrowly limited classes of speech that are unprotected by the First Amendment."³⁵ For the district court in *Rice*, "the only category of unprotected speech under which [the Hit Man Manuals] could conceivably be placed" was incitement to imminent, lawless activity under the rule of *Brandenburg v. Ohio.*³⁶

Indeed, "most courts apply the [Brandenburg] incitement test to allegations that some form of speech caused an individual to suffer bodily injury."³⁷

In *Brandenburg*,³⁸ the Supreme Court "created the modern test for the protection of speech which has a 'tendency to lead to violence.'"³⁹ The *Brandenburg* test is typically "construed to require the fulfillment of three elements for speech to be deemed incitement: '(1) the speaker *subjectively intended* incitement; (2) in context, the words used were *likely to produce* imminent lawless action; and (3) the words used by the speaker *objectively encouraged* and urged incitement.'"⁴⁰ Earlier Supreme Court decisions looked for "fighting words" or advocacy creating a "clear and imminent" danger of lawlessness, but the current *Brandenburg* distinction is between "mere advocacy" and "incitement to imminent lawless action."⁴¹ Speech that "merely advocates law violation" is protected, while speech that "incites imminent lawless activity" is not.⁴²

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³⁶. *Id.* at 841. For purposes of its scope, this Comment accepts the *Rice* court's conclusion that the "speech which incites imminent lawless action" category is the only category of excepted speech into which the Hit Man Manuals could be placed.
⁴¹. *Day*, supra note 34, at 78-79.
Where the Brandenburg incitement test is met, the First Amendment cannot block suits seeking recovery for media induced physical injuries "based on material falling outside the scope of its protection."43 On the other hand, if plaintiffs cannot establish each of the three parts of the incitement test, the First Amendment essentially bars recovery.44

Unfortunately, in practice, the Brandenburg standard thus "provides an almost impenetrable barrier to plaintiffs seeking redress for injuries caused by media defendants."45 For plaintiffs attempting to recover for injuries caused by or in reliance on "printed media" in particular, the incitement theory "has proven untenable."46 Whether such plaintiffs rest their underlying claims on, for example, defamation, invasion of privacy, negligence, breach of warranty, strict liability, misrepresentation, or malpractice,47 "courts almost uniformly deny relief."48 Further, the Supreme Court has refrained from ruling on "the issue of liability for injuries caused by negligently dissemi-

43. Whitaker, supra note 30, at 872.
44. But note Weirum v. RKO General, Inc., 123 Cal. Rptr. 468 (1975), a case which resulted in liability with the court seemingly ignoring the First Amendment barrier and thereby indicating the importance of context in determining whether media defendants are held liable.
46. Day, supra note 34, at 103-04.
47. See Steve Reitenour, Liability for Injuries Caused by Printed Media, 14 J. PROD. LIAB. 71, 72-75 (1992); see, e.g., Liz Hodgson, Grisham Takes a Shot at Stone, S. CHINA MORNING POST, Aug. 19, 1996, at 12(after a friend was murdered by a couple who were obsessed by the film, Natural Born Killers, author John Grisham called for the film to be declared a defective product and its director, Oliver Stone, to be held liable for the deaths and injuries resulting from the couple's shooting spree).
48. Day, supra note 34, at 103.
nated printed media." Publishers have, therefore, been "relatively safe from civil liability," with courts fearful that extending tort law to publisher liability cases will "chill[ ] First Amendment speech" and create a "slippery slope."

Recognizing that "[l]egal scholars, judges, and legislators alike have filled volumes attempting to define the scope of First Amendment protections of free speech," this Comment urges a reworking of the Brandenburg incitement test in order to prevent unexamined rulings in favor of media defendants in violent crime instruction cases like *Rice*. The district court's superficial application of *Brandenburg* and hasty grant of Paladin's motion for summary judgment, in contrast to the Fourth Circuit's careful examination of the Hit Man Manuals' contents and thoroughly reasoned reversal, reveals the need for a more reality-based, contextual characterization of incitement under *Brandenburg*.

Parts II(A), II(B), and II(C) of this Comment discuss the facts of the *Rice* case and specifically criticize the district court's application of the *Brandenburg* incitement standard, especially in light of the Fourth Circuit's very different approach. Part III explores the usefulness and feasibility of a more detailed incitement test that can meaningfully account for the unique context of instruction manuals. Such analysis, as a whole, establishes the need for a more realistic and less rigid definition of "incitement" under *Brandenburg*, at least to the ex-


50. Timothy J. Tatro, Case Note, *Braun v. Soldier of Fortune: Tort Law Enters the Braun's Age as Constitutional Safeguards for Commercial Speech Buckle 'neath the Crunch of Third-Party Liability*, 30 SAN DIEGO L. REV. 957, 957 (1993)(criticizing an Eleventh Circuit decision holding magazine liable for negligently publishing a gun-for-hire ad that resulted in the death of plaintiff's father; addressing commercial speech jurisprudence; and analyzing the detrimental effects on First Amendment freedoms of sustaining such a negligence action against a publisher).

51. Day, *supra* note 34, at 103. There is also the argument that publishers are less responsible, for instance, than authors. However, in *Lewin v. McCreight*, 655 F. Supp. 282 (E.D. Mich. 1987), though the court recognized that publishers can be considered further removed from liability than authors, it nonetheless stated that "publishers may have greater responsibilities where the risk of harm is plain and severe such as a book entitled How To Make Your Own Parachute." *Lewin*, 655 F. Supp. at 284. Indeed, a publisher of instructions like those in the Hit Man Manuals, rather than the original author, could be considered *more* responsible for ultimate victims of the instructions.

52. Tatro, *supra* note 50, at 957.

53. *Judge Decrees How-to Book For Murderers*, S.F. CHRON., May 8, 1997, at A10 ("From start to finish, [the Hit Man Manual] is an incitement. It exhorts people to take the law into their own hands and to steel themselves to kill people.").
tent that violent crime instruction manuals are not carelessly discounted as incapable of “inciting imminent lawless action.”\textsuperscript{54}

II. The Hit Man Manual Case: \textit{Rice v. Paladin Enterprises, Inc.}

A. A Triple Murder

James Perry ordered and received his Hit Man Manuals in January of 1992 after responding to Paladin Enterprises’ catalogue advertisement.\textsuperscript{55} The advertisement included the following:

\textbf{HIT MAN}


Rex Feral kills for hire. Some consider him a criminal. Others think him a hero. In truth, he is a lethal weapon aimed at those he hunts. He is a last recourse in these times when laws are so twisted that justice goes unserved. He is a man who feels no twinge of guilt at doing his job. He is a professional killer.

Learn how a pro gets assignments, creates a false identity, makes a disposable silencer, leaves the scene without a trace, watches his mark unobserved and more. Feral reveals how to get in, do the job and get out without getting caught. \textit{For academic study only}.\textsuperscript{56}

Less than 5 weeks later, sometime before March 3, 1992, Perry and Lawrence Horn of Detroit, Michigan began planning the murder of Horn’s ex-wife and son.\textsuperscript{57} Only a year later, in Montgomery County, Maryland—having carefully prepared his killings as instructed by Paladin’s Hit Man Manuals—Perry murdered Mrs. Horn, Trevor Horn and Trevor’s nurse.\textsuperscript{58}

The district court found that Perry followed the Manuals’ detailed instructions on:

- 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; committing the murders at the victims’ home; how to make the crime scene look like a burglary; 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

\textsuperscript{54} Rice, 128 F.3d at 263-65 (correcting erroneous outcome of district court decision).
\textsuperscript{55} See Rice, 940 F. Supp. at 838-39.
\textsuperscript{56} Id. at 838.
\textsuperscript{57} See id. at 839.
\textsuperscript{58} See id.
stolen tag on the rental car and the discarding of the tag after the murders.\textsuperscript{59}

Perry also used an AR-7 rifle, recommended by the Hit Man Manuals for beginners in the trade because it is “‘inexpensive and accurate . . . [and] lightweight and easy to carry or conceal when disassembled.’”\textsuperscript{60} He used a homemade silencer, constructed according to the Manuals’ “explicit[ly] detail[ed]” directions.\textsuperscript{61} Perry then shot each of his victims three times in the eyes from a distance of three feet.\textsuperscript{62} The Hit Man Manuals, after all, had advised him that:

\begin{quote}
\begin{center}
[c]lose kills are by far preferred . . . . You will need to know beyond any doubt that the desired result has been achieved. When using a small caliber weapon . . . . , 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 insure quick and sure death . . . aim for the head—preferably the eye sockets if you are a sharpshooter.
\end{center}
\end{quote}

His murders accomplished, Perry disassembled the AR-7 rifle as the Hit Man Manuals instructed, drilled out its serial number, and altered the “gun barrel, the shell chamber, the loading ramp, and firing pin and the ejector pin” with a rat-tail file.\textsuperscript{64} By taking these precautions, according to the Manuals, even if Perry got “picked up or stopped with the weapon in [his] possession, its ballistics [would] not match the bullets [he] left behind in the mark.”\textsuperscript{65}

\section*{B. The District Court: The Publisher Is Not Liable}

Although the district court recognized that Perry had committed his murders by following the steps in Paladin's Manuals, it held that the murder victims’ families could not even state a claim sufficient to reach a jury.\textsuperscript{66} According to the Fourth Circuit, this conclusion by the district court “must be attributed ultimately” to its failure upon its

\begin{itemize}
\item \textsuperscript{59} Id. at 841. See also Rice, 128 F.3d at 239, 252 (Perry “in painstaking detail . . . meticulously followed countless of Hit Man's 130 pages of detailed factual instructions on how to murder and to become a professional killer”); Adam Cohen, Murder By The Book, TIME, Dec. 1, 1997, at 74 (“Prosecutors showed that he followed at least 20 of its specific instructions”).
\item \textsuperscript{60} Rice, 940 F. Supp. at 839 (quoting REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS 22 (1983)).
\item \textsuperscript{61} Id. (citing FERAL, supra note 60, at 39).
\item \textsuperscript{62} See id.
\item \textsuperscript{63} Id. (citing FERAL, supra note 60, at 24) (emphasis added).
\item \textsuperscript{64} Id. (citing FERAL, supra note 60, at 25).
\item \textsuperscript{65} Id. at 840 (citing FERAL, supra note 60, at 105).
\item \textsuperscript{66} See id. at 849.
\end{itemize}
initial ruling to realize that Maryland recognizes a civil cause of action for aiding and abetting. However, the dispositive issue before the district court was "whether that speech is protected by the First Amendment." Ultimately, the court found that, "considering the context and content of the speech in Hit Man[,] . . . the book does not constitute incitement to imminent lawless action."

In making this determination, however, the district court failed to closely analyze or define "incitement" under Brandenburg. The court's purported query was whether the Manuals (1) were directed or intended toward producing imminent lawless conduct and (2) were likely to produce such imminent conduct—the determination of which, according to the court, depended upon the content and dissemination context of the speech involved. However, the district court failed to undertake any careful examination of the unique content and context of the Hit Man Manuals. It disregarded the incitement discussions from other decisions, and found, under Brandenburg, First Amendment protection for the Hit Man Manuals.

C. The District Court: A Cursory Look at Context and Content

To establish the Hit Man Manuals' context and content, the district court first examined the timing of Perry's triple murder. It asserted that to have "incited or encouraged" murder, rather than to have merely "taught" it, the defendants "must have intended that James Perry would go out and murder Mildred Horn, Trevor Horn, and Janice Saunders immediately." The court found, however, that "James Perry committed these atrocious murders a year after receiving the books" and that nothing in the Hit Man Manuals "could be characterized as a command to immediately murder the three victims."

67. Rice, 128 F.3d at 250.
69. Id. at 848.
70. See id. at 846-47 (citing Hess v. Indiana, 414 U.S. 105, 108 (1973)).
71. See id. at 845. See also Young v. American Mini Theatres, Inc., 427 U.S. 50, 66 (1976) (determination depends upon "exactly what the speaker had to say" and "the setting in which the speech occurs"); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915-16 n.50 (1982) (determination depends upon "the statements in issue and the circumstances under which they were made").
72. See Rice, 940 F. Supp at 845.
73. See id. at 843.
74. See id. at 847.
75. Id.
76. Id.
The district court’s requirement that Perry have murdered his victims “immediately” is unsatisfactory. First, as the court itself noted, books “take time to read.” Second, the Hit Man Manuals outline the process for completing a successful murder from start to finish. They explain how to prepare both mentally and physically, acquire equipment, solicit business, make a plan, set up surveillance, etc. Within the short time of one year, Perry managed to read the book, follow the Manuals’ instructions, travel across the country, locate his victims, and murder three people.

The district court’s distinction between imminent and not-so-imminent lawless activity would suggest that long, complex crimes, involving numerous people in different parts of the country, cannot be deemed imminent lawless activity. Imminent lawless activity started when Perry began following the Manuals’ instructions for soliciting business and formulating the murder plan.

Next, the *Rice* court examined the chapter titles of the Hit Man Manuals, including:

- Chapter One: The Beginning—Mental and Physical Preparation
- Chapter Two: Equipment—Selection and Purpose
- Chapter Three: The Disposable Silencer—A Poor Man’s Access to a Rich Man’s Toy
- Chapter Five: Homework and Surveillance—Mapping a Plan and Checking It for Accuracy
- Chapter Six: Opportunity Knocks—Finding Employment, What to Charge, What to Avoid
- Chapter Nine: Legally Illegal—Enjoying the Fruits.

The court interpreted these titles to characterize the Manuals’ instructive, rather than inciting, nature. It further cited Paladin’s catalogue disclaimer, “for academic study only,” and the Manuals’ own dis-

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77. See, e.g., infra discussion regarding chapter titles.
78. See *Rice*, 940 F. Supp. at 847.
The conclusion, however, that instruction manuals are instructive rather than inciting in nature, simply begs the incitement question. Furthermore, the Manuals' disclaimers lend little to any incitement analysis, especially considering the "deadly information" which the Manuals contain. The phrases "for informational purposes only" and "for academic study only" do not remotely warn that, for example, "the instructions herein, unlike other instructions, are not to be followed" or even that "murder is a crime." Additionally, any "hit man," reading the Hit Man Manuals for pointers, would be using them for informational purposes, and therefore, would undoubtedly study the Hit Man Manuals in an academic manner, perhaps memorizing helpful tips, comparing Feral's techniques with his or her own, or noting the changing trends in hit man culture.

Finally, the district court in Rice found it significant that the "deadly information" used by Perry "is contained in books," which "take time to read," "are available to an unlimited number of people," and, thus, "at worst . . . amount to nothing more than advocacy of illegal action at some indefinite future time." The court noted, in particular, "that out of the 13,000 copies of [the Hit Man Manuals] that have been sold nationally, one person actually used the information over the ten years that the book has been in circulation." This, for the court, demonstrated that the Hit Man Manuals did not have "a tendency to incite violence."

The court's conclusion that the information "contained in books . . . at worst," advocates illegal action at some future time. This argument shows the court's failure to examine "incitement" under the Brandenburg standard when applied specifically to the context and content of violent crime instruction manuals. The availability of such information in book form, to an unlimited number of people, may be

81. Id. at 838-39.
82. Id.
83. Id.
84. Id.
85. Id.
86. Id.
especially "inciting." In turn, it points to the publisher's increased responsibility for third party criminal acts simply because the act of publication inevitably broadens the potential audience. Further, the district court's reliance upon the apparent fact that only one person in ten years had actually used the Hit Man is unpersuasive and illogical. The Hit Man Manuals explicitly explain how to be a successful murderer by providing detailed instructions for many steps of committing the crime, including, covering one's tracks and "enjoying the fruits." Perry may simply be the one person in ten years who got caught using his easy-to-follow, step-by-step guide to murder.

In sharp contrast to the district court's approach, the Fourth Circuit actually examined Hit Man itself. It "carefully and repeatedly read[ ] Hit Man in its entirety" before issuing its opinion. It then set forth lengthy excerpts from the Hit Man Manuals and a "chapter-by-chapter synopsis" rather than merely brush over chapter titles and warning. The Fourth Circuit considered not only the Hit Man Manuals' numerous and graphic details about how to commit murder, but the Hit Man Manuals' attitude, voice, and targeted audience as well.

The Fourth Circuit noted, for example, that Hit Man encourages its readers through "powerful prose in the second person and imperative voice," reassuring readers that "they may proceed with their plans without fear of either personal failure or punishment." It speaks "directly to the reader . . . like a parent to a child" and "addresses

87. *Rice*, 128 F.3d at 248. The Fourth Circuit made a similar point with respect to Paladin's admittedly intentional aid to would-be murderers: "where a speaker—individual or media—acts with the purpose of assisting in the commission of crime, we do not believe that the First Amendment insulates that speaker from responsibility for his actions simply because he may have disseminated his message to a wide audience." *Id.*

88. Compare *Radwan*, supra note 79, at 71-72 ("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. The courts should focus on the speech itself, rather than the results to date") (citations omitted).

89. *Rice*, 128 F.3d at 254.

90. *Id.* at 256-62.

91. See *id.* at 236 (excerpting from the Hit Man Manuals). The Manuals provide the following representative tip for would-be murderers:

[If you decide to kill your victim with a knife, . . . [m]ake your thrusts to a vital organ and twist the knife before you withdraw it. If you hit bone, you will have to file the blade to remove the marks left on the metal when it struck the victim's bone. . . . Using your six inch, serrated blade knife, stab deeply into the side of the victim's neck and push the knife forward in a forceful movement. This method will half decapitate the victim, cutting both his main arteries and wind pipe, ensuring immediate death.

92. *Id.* at 252.
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.”93 Indeed, “at every point where the would-be murderer might yield either to reason or to reservations, Hit Man emboldens the killer, confirming not only that he should proceed but that he must proceed, if he is to establish his manhood.”94

After a thorough review of Hit Man—of the actual speech at issue—the Fourth Circuit arrived at a conclusion directly contrary to the district court’s opinion. According to the Fourth Circuit, “there is not even a hint that the aid was provided [to Perry] in the form of speech that might constitute abstract advocacy.”95 Rather, Hit Man “overtly promotes murder in concrete, non-abstract terms,” and “[a]ny argument that Hit Man is abstract advocacy entitling the book, and therefore Paladin, to heightened First Amendment protection under Brandenburg is, on its face, untenable.”96

D. The District Court: A Cursory Look at Relevant Authority

Several circuit court decisions reveal the district court’s analysis as totally inadequate in finding insufficient incitement to pierce Paladin’s immunity. For example, the Rice plaintiffs offered United States v. Barnett97 and United States v. Buttorff98 “for the proposition that criminal or tort liability may not be avoided merely because the wrongdoer uses speech to accomplish his illicit purpose.”99 The district court, however, distinguished both cases with irrelevant reasons.

In Barnett, publishers were charged with aiding and abetting crime through publication and distribution of instructions for making illegal drugs.100 The Rice plaintiffs pointed to the factual parallels between Barnett and their case in that

1) defendants in both cases published and advertised step-by-step instructions on how to commit crimes; 2) defendants in both cases mailed an instruction manual to an unknown person who responded to the advertisement; and 3) perpetrators in both cases followed the step-by-step instructions to commit the crimes.101

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93. Id. at 261.
94. Id. at 252.
95. Id. at 249.
96. Id. at 254-55.
97. 667 F.2d 835 (9th Cir. 1982).
98. 572 F.2d 619 (8th Cir. 1978).
100. Barnett, 667 F.2d at 837.
The *Barnett* court had concluded that:

To the extent . . . that [the publisher] Barnett 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 [F]irst [A]mendment does not provide a defense as a matter of law to such conduct.\(^{102}\)

The district court in *Rice*, however, cursorily distinguished *Barnett* as "a criminal case where the defendant publisher was charged with criminal aiding and abetting pursuant to 18 U.S.C. section 2."\(^{103}\) It neither examined why Barnett's First Amendment defense failed nor why his PCP manufacturing manual was thus deemed unprotected speech under *Brandenburg*.

In *Buttorff*, the defendants were convicted "on various counts of aiding and abetting several persons in the filing of false or fraudulent income tax forms."\(^{104}\) The defendants' "only participation in the allegedly illegal activity . . . was to talk about [their] ideas before gatherings of disgruntled Americans."\(^{105}\) The aided individuals testified, nonetheless, that they had submitted the fraudulent tax forms "because of the defendants' recommendations, advice or suggestions."\(^{106}\) For instance, because the defendants had stated that "30 or 40 claimed allowances would be sufficient to stop withholding,"\(^{107}\) several individuals claimed between 28 and 40 allowances.\(^{108}\)

When the defendants contended that their First Amendment right of freedom of speech prohibited their convictions, the *Buttorff* court responded by quoting Judge Learned Hand:

> One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state. . . . To counsel or advise a man to act is to urge upon him either that it is his interest or his duty to do it. . . . If one 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.\(^{109}\)

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104. *Buttorff*, 572 F.2d at 621.
105. *Id.* at 623.
106. *Id.* at 622.
107. *Id.* at 623.
108. See *id*.
109. *Id.* at 624 (quoting *Masses Publ'g Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917)).
As for the Supreme Court's *Brandenburg* distinction between protected speech, which merely advocates law violation, and unprotected speech, which incites imminent lawless activity, the *Buttorff* court stated that:

> although the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the 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.\(^{110}\)

Thus, the defendants' speech was not entitled to First Amendment protection because it went beyond mere advocacy of tax reform. It explained how to avoid withholding by "counseling the principals in the technique of evasion of income taxes."\(^{111}\)

The *Buttorff* court further found that the defendants' speech "was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms."\(^{112}\) It affirmed the defendants' convictions, even absent any proof that the defendants had "profited from the filing of false tax returns by others, or had any knowledge of the fact that such returns had been in fact filed."\(^{113}\)

As with *Barnett*, the district court in *Rice* noted *Buttorff*'s factual similarities to the Hit Man Manuals case before it, but concluded simply that the plaintiffs had "cited no authority that would allow the Court to apply the holdings in these criminal cases to the facts of the instant case."\(^{114}\)

The Eighth and Ninth Circuit's analyses in *Buttorf* and *Barnett*,\(^ {115}\) respectively, formed the foundation for the *Rice* plaintiffs' argument: the First Amendment is not a defense to either tort or criminal liability where defendants' instructions were deemed speech which incited imminent lawless action.\(^ {116}\) The *Rice* district court thus completely

\(^{110}\) Id. (reasoning followed in United States v. Moss, 604 F.2d 569, 571 (8th Cir. 1979); United States v. Moss, 559 F. Supp. 37, 39 (D. Or. 1983)).

\(^{111}\) Id. at 628.

\(^{112}\) Id. at 624.

\(^{113}\) United States v. Barnett, 667 F.2d 835, 843 (9th Cir. 1982) (citing *Buttorff* to reject defendant's contention 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" and to hold that "the [F]irst [A]mendment does not provide a defense as a matter of law to such conduct").


\(^{115}\) See discussion Part II(C).

\(^{116}\) See *Rice*, 940 F. Supp. at 842-43.
failed to consider problematic contrary authority in reaching its own resolution of the *Brandenburg* incitement question.

The court likewise overlooked the significance of *Weirum v. RKO General Inc.*,\(^{117}\) which the plaintiffs relied on "for the proposition that defendants can be held liable for physical injury caused by their words."\(^{118}\) In *Weirum*, the plaintiff's decedent was killed when a listener of the defendant radio station negligently forced the decedent's car off the highway while responding to a station contest which rewarded the first listener to locate its peripatetic disc jockey.\(^ {119}\)

The *Weirum* court found for the plaintiff, stating that "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word rather than act."\(^ {120}\) The issue, for the *Weirum* court, was whether there is "civil accountability for foreseeable results of a broadcast which created an undue risk of harm to the decedent."\(^ {121}\)

The district court in *Rice* distinguished *Weirum* because the *Weirum* defendant's broadcasts had repeatedly encouraged listeners to act in an inherently dangerous manner.\(^ {122}\) According to the district court, "[n]o such urging occurred in [*Rice*]."\(^ {123}\)

By distinguishing *Weirum*, the district court in *Rice* disregarded its importance in attacking Paladin's First Amendment defense and to the issue of social accountability. It ignored the fact that the actions which the *Weirum* defendant "urged" were not even "lawless." Furthermore, it ignored the noticeably cursory nature of the *Weirum* court's reference to the First Amendment. Apparently, the *Weirum* court did not think it even had to analyze any First Amendment question before finding liability in a media negligence case.\(^ {124}\) In stark contrast, the First Amendment served as a virtual bar to recovery under the district court's reasoning in *Rice*.

Some courts have, in fact, taken the approach of deciding media negligence liability one way or the other without ever exploring the First Amendment issue.\(^ {125}\) Some courts pay, at most, "superficial

\(^{117}\) 123 Cal. Rptr. 468 (1975).

\(^{118}\) *Rice*, 940 F. Supp. at 844.

\(^{119}\) *See* *Weirum*, 123 Cal. Rptr. at 469-71.

\(^{120}\) *Id.* at 472.

\(^{121}\) *Id.*

\(^{122}\) *See* *Rice*, 940 F. Supp. at 844.

\(^{123}\) *Id.*

\(^{124}\) *See* *Weirum*, 123 Cal. Rptr. at 471-72.

homage to the First Amendment" when finding a media defendant liable for negligence. There is a perceived divide in which courts emphasizing negligence tend to find liability while courts emphasizing the First Amendment tend not to. Again, Weirum thus does provide support for the proposition for which plaintiff's offered it: that media defendants can be held liable for physical injury caused by words alone, perhaps even without the First Amendment presenting a significant factor for judicial consideration. The district court in Rice should not have neglected this proposition.

Unlike the district court, the Fourth Circuit gave serious consideration in its Rice decision and in several of its prior decisions to judicial language indicating that the First Amendment does not necessarily bar liability for aiding and abetting a crime through speech. For example, it cited to Buttorff, not only in Rice, but also in United States v. Fleschner and United States v. Kelley. As in Buttorff, the defendants in Fleschner and Kelley instructed groups of people in filing false income tax forms. The people heeded their advice and false forms were filed. Although the defendants were somewhat more involved in the ultimate fraudulent filings than were the defendants in Buttorff, the Fourth Circuit's incitement analysis

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Ark. 1987), and Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830 (5th Cir. 1989), cert. denied, 493 U.S. 1024 (1990)).

126. Id. at 74.
127. See id. at 74-77.
128. See Rice, 940 F. Supp. at 844.
129. In its Rice decision, the Fourth Circuit discussed both Buttorff, 128 F.3d at 245, and Barnett, 128 F.3d at 244-45, which it deemed "indistinguishable in principle" from the Rice case. The Fourth Circuit noted further that:

   every court that has addressed the issue . . . has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word.

128 F.3d at 244 (emphasis added).
130. 98 F.3d 155, 159 (4th Cir. 1996). The Fourth Circuit refers back to Fleschner in its Rice decision. See Rice 128 F.3d at 246.
131. 769 F.2d 215 (4th Cir. 1985). The Fourth Circuit refers back to Kelley in its Rice decision. See Rice, 128 F.3d at 245.
132. See Fleschner, 98 F.3d at 159.
133. See id. (citing Kelley, 769 F.2d at 217).
134. For example, in addition to instructions and advice on claiming unlawful exemptions, not filing tax returns and not paying tax on wages, evidence showed that the purpose of defendants' meetings in Fleschner "was to encourage people to unlawful actions by convincing them that it was legal to claim false exemptions, to hide income." Fleschner, 98 F.3d at 159. In Kelley, the defendant had organized a group called the Constitutional Tax Association and had solicited dues paying members. See Kelley, 769 F.2d at 216. Besides explaining how to avoid income tax withholdings and providing detailed instructions for preparation of W-4 and other forms, defendant provided forms for members' use and a
in *Fleschner* and *Kelley* indicates that *Buttorff* was not an aberration and that the district court in *Rice* rushed to its *Brandenburg* judgment.

In *Fleschner*, the defendants were convicted of conspiracy to defraud the United States of income tax revenue. The court concluded that the evidence did not support the defendants' First Amendment defense. Such a defense, according to the court, "is warranted if there is evidence that the speaker's purpose or words are mere abstract teaching of the moral propriety of opposition to the income tax law." Defendants' speech, however, was "not remote from the commission of the criminal acts." It did not consist of mere "theoretical discussion of noncompliance with law."

In *Kelley*, the Fourth Circuit rejected Kelley's contention that he did not assist, but only gave advice which his listeners "were free to accept or reject" and upheld his conviction for conspiring to defraud the federal government and for aiding and assisting in preparation of false tax forms. Such a contention, according to the court, "ignore[d] reality." Kelley's participation in completing the false tax forms was "as real" as if he took pen to hand and filled them out himself. "His was no abstract criticism of income tax laws." He did more than abstractly teach. He actively assisted in the crime.

"The claim of First Amendment protection of his speech [was therefore] frivolous."

Another example of language cited for support by the Fourth Circuit in *Rice*, which undercuts the district court's *Brandenburg* analysis is found in *United States v. Mendelsohn*. There, the defendants were convicted for aiding and abetting interstate transportation of wagering paraphernalia. They mailed a computer disk containing a book-
making program called SOAP from Nevada to California. They knew that most customers used SOAP for illegal bookmaking, but also sold it to bettors and tried to sell it to game companies and legal sports bookmakers. The defendants analogized SOAP to a computer instruction manual and argued that it was speech protected by the First Amendment. They proposed a jury instruction tracking the Brandenburg test. The Mendelsohn court, however, affirmed the defendants' convictions, noting that the defendants had "furnished computerized directions for functional use in an illegal activity" and "knew that SOAP was to be used as an integral part of a bookmaker's illegal activity." The court stated, "[w]here speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone." It deemed SOAP "too instrumental in and intertwined with the performance of criminal activity to retain First Amendment protection."

The Hit Man Manuals were likewise instrumental and intertwined with Perry's triple murder, thereby foreclosing a First Amendment Brandenburg defense under the Mendelsohn reasoning. The district court, however, once again did not account for such contrary authority or address this important aspect of context in its incitement discussion.

The district court's sparse analysis was a weak basis for its finding of insufficient incitement under Brandenburg not only in light of the language in the above decisions, but also in light of the fact that the United States Supreme Court Justices themselves differ in their characterizations of incitement. In Hess v. Indiana, for example, Justice Rehnquist, dissenting, wrote: "[s]urely the sentence, 'We'll take the fucking street later . .' is susceptible of characterization as an exhortation, particularly when uttered in a loud voice while facing a crowd." The Hess Court deemed this remark not punishable as incitement of illegal activity under Brandenburg. There was, according to the Court, no rational inference from the import of the

149. See id.
150. See id.
151. See id. at 1185.
152. See id.
153. Id.
154. Id. (citations omitted).
155. Id. at 1186.
156. 414 U.S. 105, 111 (1973)(emphasis added).
157. See id. at 108-09.
language that Hess's words were intended to produce and likely to produce imminent lawless action.\footnote{158}

Apparently, however, such inference existed in the mind of Justice Rehnquist, with whom Chief Justice Burger and Justice Blackmun joined in dissent.\footnote{159} Clearly, incitement is not easily characterized. Indeed, it is susceptible to differing characterizations depending upon which aspects of the challenged speech's context are taken into account. Rehnquist, for example, particularly focused upon the volume and direction of the words at issue, rather than upon the fact that they urged action at some "later" time.\footnote{160} Thus, differing emphases upon the many contextual aspects of speech can justify a finding of incitement or not.

Finally, the very language upon which the \textit{Brandenburg} Court relied to set forth its distinction between "speech which advocates" and "speech which incites" indicates that a broader understanding of "incitement," than that afforded by the district court in \textit{Rice}, was implicated. The \textit{Brandenburg} Court stated that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."\footnote{161} According to this distinguishing language, unprotected incitement consists of "preparing for" and "steeling to" imminent lawless action. Protected advocacy, by contrast, is "abstract" teaching. The Hit Man Manuals are designed to prepare the reader for committing and getting away with murder.\footnote{162} They do so with details which can hardly be described as "abstract"\footnote{163} and with tips and assurances intended to steel the reader

\footnote{158. See id. at 109.}
\footnote{159. See id. at 111.}
\footnote{160. Id. at 110-11.}
\footnote{162. Hit Man states: "[s]tep by step you will be taken from research to equipment selection to job preparation to successful job completion. You will learn where to find employment, how much to charge, and what you can, and cannot, do with the money you earn." \textit{Rice}, 128 F.3d at 236 (excerpting passages from Hit Man).}
\footnote{163. Hit Man describes various means of disposing of victims' corpses after successful hits, including the following: If you choose to sink the corpse, you must first make several deep stabs into the body's lungs (from just under the rib cage) and belly. This is necessary because gases released during decomposition will bloat these organs, causing the body to rise to the surface of the water. \textit{Id.} at 238 (excerpting passages from Hit Man).}
physically and mentally.\textsuperscript{164} Thus, not only did the district court in \textit{Rice} ignore its own and other Circuits' decisions, but it refused to honestly apply the teaching of \textit{Brandenburg} itself.

The Fourth Circuit again attributed the district court's failure to seriously consider the plaintiffs' offered authority to the district court's doubts about Maryland aiding and abetting law.\textsuperscript{165} However, the Fourth Circuit, in turn, noted that the district court's doubts were "almost certainly eased" by its alternative conclusion that the Hit Man Manuals are a mere instructional manual for murder and not incitement in any event.\textsuperscript{166} Thus, underlying the district court's failure to account for contrary authority was its \textit{Brandenburg} incitement determination. And underlying this determination was a superficial \textit{Brandenburg} incitement analysis which addressed only cursorily the content and context of the Hit Man Manuals. At bottom, if unexamined rulings in favor of media defendants are to be avoided, then the \textit{Brandenburg} standard must be reworked.

\section*{III. The Necessity for and Feasibility of a More Encompassing Brandenburg Standard}

\subsection*{A. Legal Scholars Suggest a Change}

Various legal scholars agree that a broader understanding of incitement was originally intended. Professor Lawrence Tribe of Harvard Law School has suggested that the \textit{Brandenburg} test combines the best of two prior views: the incitement test (set out by Judge Learned Hand) and the clear and present danger test (reflecting Justices Holmes and Brandeis' concern with likely harm).\textsuperscript{167} The clear and present danger test was essentially a balancing test in which courts weighed the free speech interest at issue against the seriousness of the

\textsuperscript{164} Hit Man recognizes for its reader that "[a]lmost every man harbors a fantasy of living the life of Mack Bolan or some other fictional hero who kills for fun and profit . . . . But few have the courage or knowledge to make that dream a reality." \textit{Rice}, 128 F.3d at 236 (excerpting passages from Hit Man). It explains 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." \textit{Id.} (excerpting passages from Hit Man).

Finally, after taking its reader through its detailed, step-by-step formula for murder, Hit Man congratulates the reader: "You are a man. Without a doubt, you have proved it. You have come face to face with death and emerged the victor through cunning and expertise. You have dealt death as a professional." \textit{Id.} at 239 (excerpting passages from Hit Man).

\textsuperscript{165} See \textit{id.} at 250.

\textsuperscript{166} \textit{Id.}

\textsuperscript{167} \textit{Lawrence Tribe, American Constitutional Law} 581, 616 (1978).
regulated danger, rather than its imminence or lawlessness.\textsuperscript{168} This focus on "seriousness," along with Hand's assertion that to "advise a man to act is to urge upon him either that it is his interest or duty to act to do it."\textsuperscript{169} could make for broad and highly contextual findings of "incitement." Indeed, the fact that "inciting" speech is already susceptible to characterizations which vary, depending upon the aspects of the speech's context that a court takes into account, indicates that such increasingly contextual findings would better reflect reality.

Professor David Crump of the University of Houston Law School advocates a more contextual, reality-based incitement analysis. He describes a phenomenon which he calls "camouflaged incitement," and writes that:

\begin{quote}
\textit{in spite of the deference that we grant to speech falling short of actual incitement to crime, and in spite of our recognition that there are prohibited utterances that cross the line, a borderland remains in which clever speakers can hide, with form, the substance of what they say.} \textsuperscript{170}
\end{quote}

This phenomenon of "difficult-to-recognize incitement," according to Crump, deserves more attention than it has received.\textsuperscript{171}

Among the forms of "camouflaged incitement" which Crump identifies are the "recipe cases" where published depictions are so specific that they go beyond mere description.\textsuperscript{172} Such cases supply "otherwise missing information needed to commit a crime;" couple "description with details that amount to instructions;" or provide "a detailed road map for violence."\textsuperscript{173} Another form of camouflaged incitement is found in cases involving "advocacy by attractive presentation."\textsuperscript{174} Such advocacy utilizes "'glowing' treatment of forbidden acts," often combined with "appeals to heroes or ideals."\textsuperscript{175} Given such rhetorical devices, it can be difficult to distinguish between "camouflaged incitement to crime" and "advocacy of ideas."\textsuperscript{176} Hence, more than a superficial analysis is required.

\begin{itemize}
\item \textsuperscript{168} See Diamond & Primm, \textit{supra} note 40, at 975.
\item \textsuperscript{169} See discussion \textit{supra} Part II(C).
\item \textsuperscript{170} Crump, \textit{supra} note 39, at 1-2 (examining how the law should protect both the freedom of speech and the safety of victims of camouflaged incitement, and concluding that the solution lies within the \textit{Brandenburg} test itself, \textit{id.} at 6).
\item \textsuperscript{171} \textit{id.} at 2 n.3.
\item \textsuperscript{172} \textit{id.} at 33-34.
\item \textsuperscript{173} \textit{id.} at 33-37.
\item \textsuperscript{174} \textit{id.} at 39.
\item \textsuperscript{175} \textit{id.} at 40.
\item \textsuperscript{176} \textit{id.} at 41.
\end{itemize}
Crump proposes a case-by-case approach which "considers multiple evidentiary factors" in order to "best distinguish[ ] incitement from protected expression" in "close[ ] situations."\(^{177}\) The "evidentiary factors"\(^{178}\) include: the express utterance; pattern of the utterance; the context, including medium, audience, surrounding communications; predictability and anticipated seriousness of unlawful results, and whether they occur; the extent of speaker's knowledge or reckless disregard of the likelihood of violent results; the availability of other means of expressing a similar message; the inclusion of disclaimers; and whether speech is on a matter of public concern.\(^{179}\) Crump makes this proposal because the \emph{Brandenburg} standard, under which speech is either unprotected incitement or protected expression, "begs the question in close cases" where the distinction is less than clear.\(^{180}\)

The district court's decision in \emph{Rice} was an excellent example of judicial question-begging: instruction manuals are instructive, therefore not inciting, and therefore not incitement under \emph{Brandenburg}. Crump's approach would at least force a detailed, multi-factored consideration of the context and content of the speech at issue—a consideration which the district court itself deemed the proper basis for a \emph{Brandenburg} incitement determination and which the Fourth Circuit subsequently undertook.\(^{181}\) Crump's approach would, he claims, "identify serious cases of camouflaged incitement to violence and murder, and yet ... protect ... freedom of speech as fully as the Supreme Court has protected it in contexts of less serious risk."\(^{182}\)

Professor John L. Diamond of Hastings College of the Law and James L. Primm of Latham & Watkins in Washington, D.C. also criticize judicial application of the \emph{Brandenburg} standard, calling for courts to take a more reality-based approach toward media defendants.\(^{183}\) According to Diamond and Primm, "[c]ourts have inappropriately denied liability by failing to differentiate among kinds of media liability cases and by failing to analyze them as they would other similar tort cases."\(^{184}\)

\(^{177}\) \textit{Id.} at 45.

\(^{178}\) \textit{Id.} at 52.

\(^{179}\) \textit{See id.} at 54-69.

\(^{180}\) \textit{Id.} at 45.

\(^{181}\) \textit{See Rice}, 128 F.3d at 233.

\(^{182}\) \textit{Id.} at 79-80.

\(^{183}\) \textit{See generally} Diamond & Primm, \textit{supra} note 40.

\(^{184}\) \textit{Id.} at 970.
Interestingly enough, this may have been precisely the district court's failure in *Rice*. The court compared the Perry murders to a variety of unsuccessful cases in which "violent movies or television programs... were alleged to have caused physical injury or death."\(^{185}\) The district court saw "no difference" between these cases and the case before it\(^ {186}\) and simply followed the respective findings of insufficient 'incitement' under *Brandenburg*.\(^ {187}\) The movies and programs at issue, however, did not have the how-to format of the Hit Man Manuals and "were considered depictions of violence alleged to have been imitated."\(^ {188}\) This significant contextual difference between the Hit Man Manuals and the imitated movies and programs thus went unexamined at the district court level in *Rice*.

Diamond and Primm further suggest that "some cases involving physical injuries caused by media defendants should be classified into traditional tort typologies," rather than subjected routinely to the *Brandenburg* incitement standard.\(^ {189}\) For example, in "erroneous instruction cases outside of the media context," courts have imposed manufacturer liability for errors in product instructions or in navigational chart instructions.\(^ {190}\) Likewise, non-media defendants are subject to liability for negligence when sponsoring or promoting activities.\(^ {191}\) Media instructions and media-sponsored activities, according to Diamond and Primm, can similarly and properly be "subjected to liability under negligence theory because there is an intent to elicit action."\(^ {192}\) On the other hand, "speech which stimulates individuals to act aggressively and bring harm to themselves and others is regulable only to the extent that it tends to incite or to the extent the speech otherwise falls out of the purview of the first amendment."\(^ {193}\)

Thus, Diamond and Primm's discussion indicates that the district court was wrong when it failed to see any difference between its violent crime instruction case and imitative violence cases, not only because it ignored contextual differences which could impact its incitement determination, but also because those same contextual dif-

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186. *Id.*
187. *See id.*
188. *Id.*
190. *Id.* at 976.
191. *See id.* at 984.
192. *Id.* at 996.
193. *Id.*
ferences might take an instruction case like *Rice* out of the First Amendment *Brandenburg* arena altogether.

**B. Incitement Determinations in the Unique Context of Instruction Manual Cases**

Indeed, violent crime instruction cases particularly exemplify the need for a contextual application of the *Brandenburg* standard because, whatever the outcome, it is simply not accurate to presume without careful analysis that so-called media speech is incapable of inciting imminent lawless activity. In *Rice*, the district court recognized the Hit Man Manual case as a “novel” one, suggesting that the context was important. The district court recognized that the question of whether there exists a “substantial connection or causal nexus” between publications like the Hit Man Manuals and “the ultimate acts of criminal defendants,” which are necessary to support civil liability against the publishing company, remains undetermined. It, nevertheless, applied a rigid, superficial, predisposed version of the *Brandenburg* incitement standard, which allowed the plaintiffs’ case to fall, albeit temporarily, before the barrier of the First Amendment, and never reached the issue of whether a causal nexus existed.

Where the families of murder victims seek justice, as in *Rice*, this issue of causal nexus is worthy of at least some judicial consideration. Violent media-entertainment can promote criminal violence through simple imitation alone. Fictional treatments of crime not only teach crime techniques to be imitated, but can “inspire and empower potential criminals” as well. Even media reports of actual crimes can promote violence through simple imitation. The “phenomenon of

195. *Id*.
196. *See id*.
197. *See Symposium, Massaging the Medium: Analyzing and Responding to Media Violence Without Harming the First Amendment*, 4-SPG KAN. J.L. & PUB. Pol’y 17, 17 (1995) (“Two surveys of young American male violent felons found that 22-34% had imitated crime techniques they watched on television programs.”).
198. *Id*. For example:

John Hinckley drew encouragement in his attempt to shoot President Reagan from the dozens of times he watched *Taxi Driver*, a movie about an assassin who stalks a presidential candidate and wins a young woman’s affection. The man who murdered twenty-two people in Luby’s Cafeteria in Killeen, Texas, in October 1991 was found with a ticket to the film *The Fisher King* in his pocket; the film depicts a mass murder in a restaurant. In January 1993 in Grayson, Kentucky, seventeen-year-old Scott Pennington fatally shot a teacher and a janitor and held a classroom of students hostage; he had recently written a book report on a Stephen King novel in which a student shoots a teacher and holds a class hostage.

*Id*.
copycat crimes that follow truthful and accurate—but titillating—newspaper accounts of an unusual murder" is widely recognized.\textsuperscript{199} In short, "[p]ure unadorned description or depiction, accompanied by no solicitation at all, can sometimes induce action."\textsuperscript{200} "Graphic and easily imitated depictions of violence" thus present a special danger of being imitated.\textsuperscript{201} Indeed, "[a]s studies regarding the social impact of graphic violence share more decisive results, the courts may come to recognize that publications which contain such violence deserve less First Amendment protection."\textsuperscript{202}

Certainly, a First Amendment standard must have the goal of protecting the public but also of allowing information to flow freely. An incitement test that would allow suppression of the evening news, for instance, would go too far. At this point, therefore, "[t]he danger of copycats, by itself, obviously does not justify suppression of descriptions of crime."\textsuperscript{203} To the contrary, certain depictions of violence can be viewed as serving the First Amendment’s core values, despite the "danger that they may furnish ideas to impressionable people."\textsuperscript{204} Accordingly, "description-copycat cases uniformly have resulted in holdings of no liability."\textsuperscript{205} Courts are unwilling to suppress accounts of actual events even if the information leads to harm.

Instruction, however, goes beyond simple imitation or depiction. It even goes beyond the type of depiction which Crump calls a "recipe" for violence, or "camouflaged incitement," because it is "amount[ing] to implicit advocacy of violence or injury, as clearly as express incitement might."\textsuperscript{206} Instructions not only serve as blueprints or recipes for action, but also imply that they should be followed, that they are safe to follow, legal to follow, and so on. Instructions are

\textsuperscript{199} Crump, \textit{supra} note 39, at 28. For example, car-jacking spread rapidly across the country after a car-jacking incident in Detroit was publicized. \textit{See} Symposium, \textit{supra} note 198, at 20. Similarly, a man in Los Angeles dropped concrete from an overpass, blinding a driver below, several days after local papers had widely publicized an incident in which a man dropped concrete from an overpass onto traffic below. \textit{See id.} at 20.

\textsuperscript{200} Crump, \textit{supra} note 39, at 26.

\textsuperscript{201} \textit{Id.} (citing as an example, \textit{Hous. Chron.}, June 12, 1987, at A21 (reporting that two teen-age cousins had set fire to a prize-winning dog after seeing, as the cousins described it, a movie in which an individual was setting dogs and cats on fire)).

\textsuperscript{202} Day, \textit{supra} note 34, at 103-04.

\textsuperscript{203} Crump, \textit{supra} note 39, at 28.

\textsuperscript{204} \textit{Id.} at 30.

\textsuperscript{205} \textit{Id.} at 28 n.148.

\textsuperscript{206} \textit{Id.} at 33.
thus much more facilitating, inspiring, empowering, and "steeling for action" than any sort of depiction.\footnote{207}

Instruction cases such as \textit{Rice}, therefore, receive inadequate analysis if their differences from simple imitation cases go completely unexplored. For Diamond and Primm, cases involving "media depictions which are imitated by the audience member without any manifestations of intent on the part of the media to elicit such imitations . . . clearly fall outside of directions and instructions cases."\footnote{208} The district court in \textit{Rice}, however, deemed such cases "no different" from the case before it, even though Paladin could not contend that James Perry literally \textit{misused} the Hit Man Manuals' information.\footnote{209} To the contrary, Paladin's marketing strategy was designed precisely for the purpose of attracting and assisting criminals like Perry.\footnote{210}

Steve Reitenour mentions an illustrative incident involving \textit{First Love: A Young People's Guide to Sexual Information}, written by Dr. Ruth Westheimer and Dr. Nathan Kravetz.\footnote{211} The incident serves to exhibit our common understanding of instructions as distinguished from depictions, and as something provided to be followed. According to Reitenour, Warner Books published and distributed 115,000 copies of \textit{First Love} in October of 1985.\footnote{212} Shortly after, a librarian in New Jersey pointed out that its "Natural Method" chapter stated that the safe times to engage in sexual relations are "the week before and

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\footnote{207. The facts of \textit{United States v. McDavid}, 37 M.J. 861 (1993), provide generalized support for the argument that instructions go beyond mere description and deserve unique analysis for the purposes of a \textit{Brandenburg} incitement test. In \textit{McDavid}, the accused was convicted of violating an Air Force regulation by possessing drug abuse paraphernalia and possession of LSD. See id. at 862. The United States Air Force Court of Military Review affirmed the conviction, holding that \textit{written instructions} for production of a controlled substance could constitute "drug paraphernalia" within the meaning of the cited violation. Id. at 863 (emphasis added).}

\footnote{208. Diamond & Primm, \textit{supra} note 40, at 991 (emphasis added). See example cases, such as \textit{Herceg} and \textit{Olivia N.}, \textit{supra} note 45.}

\footnote{209. \textit{Rice}, 940 F. Supp. at 846. The Fourth Circuit, however, distinguished imitative or copy-cat media cases from the Hit Man Manuals case before it: it will presumably \textit{never} be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime; rather, the information for the dissemination of which liability is sought to be imposed will actually have been \textit{misused} vis-a-vis the use intended, not, as here, used precisely as intended.}

\footnote{210. \textit{See Rice}, 940 F. Supp. at 840.}

\footnote{211. \textit{See Reitenour, \textit{supra} note 47.}}

\footnote{212. \textit{See id.} at 71.}
the week of ovulation.”213 The chapter should have stated that these are the unsafe times to engage in sexual relations.214 Warner Books recalled First Love in December of 1985, “presumably before the misinformation caused any ‘accidents.”215 The recall reveals Warner Books’ assumption that purchasers of First Love would follow its tips, explanations, and instructions, trusting them as proper, safe, and advantageous to follow. Given this rather unremarkable assumption by a publisher, based in common understanding, it is difficult to defend the district court in Rice, which was so quick to conclude that instruction manuals do not “incite.” For even though courts are generally reluctant to hold authors, publishers, or retailers liable for injuries caused by printed media, they invariably make a distinction between publications that expressly invite reliance and publications that are merely informational. Only publications that reasonably invite reliance are potentially actionable. These publications generally include “how-to” books, cookbooks, science textbooks, navigational charts, and “a limited [comparable] class of articles published in magazines or newspapers.”216

Thus, even absent powerful language or a second-person imperative style like that in Hit Man Manuals, there is a difference between instruction and depiction—and a corresponding difference between the concrete teaching of how-to and the abstract teaching of an idea, opinion, or credo. The district court in Rice took no notice of these differences and therefore did not consider the potentially empowering, facilitating, and ultimately inciting effect of a published step-by-step guide to murder. To ignore such differences, ignores “the flexibility of language, indeed of communication, and . . . that the context can determine the meaning.”217

Furthermore, to account for such differences and to make more studied ‘incitement’ judgments under Brandenburg need not chill the free flow of information. Steve Reitenour has suggested simple steps by which all members in the “media chain” —authors, publishers, and retailers—can currently reduce their chances, however small, of being found liable for injuries caused by printed media.218 These steps,

213. Id.
214. See id.
215. Id.
216. Id. at 73 (citations omitted).
217. Crump, supra note 39, at 18. See also Radwan, supra note 79 at 66 (“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 the crime.” (citations omitted)).
218. See Reitenour, supra note 47, at 92-93.
which include obtaining sufficient insurance coverage, providing clear
disclaimers of accuracy, and providing warnings if the information
could cause injury, 219 would enable potential defendants to “continue
providing their essential services of producing and disseminating in-
formation to consumers without fear of an increased likelihood of lia-
bility.” 220 They would serve this same protective function no matter
how detailed a court’s incitement determination.

IV. Conclusion

David Crump writes, “our courts should take the potential for
tragedy seriously; they should strive to make the best accommodation
possible between these competing values, rather than cavalierly writ-
ing off the victims of camouflaged incitement.” 221 For while freedom
of speech is obviously a fundamental value, there are important
“countervailing interests, including murder victims’ right to bodily se-
curity.” 222 Even the United States Supreme Court has specifically
“rejected the notion that the First Amendment interest in protected
speech requires that ‘publishers and broadcasters enjoy an uncondi-
tional and indefeasible immunity from [tort] liability.’ ” 223 Indeed,
“[d]espite the grand flourishes of rhetoric in many [F]irst
[A]mendment decisions concerning the sanctity of ‘dangerous’ ideas,
no federal court has held that death is a legitimate price to pay for
freedom of speech.” 224

The very existence of categories of speech, such as child pornog-
raphy, defamation, or fighting words, which are excepted from First
Amendment protection, represents an accommodation of competing
values. In the Supreme Court’s own time-tested words, certain classes
of speech 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

219. See id. Use of warnings should be encouraged in any event because they are inex-
ensive and helpful in preventing injuries or accidents.

220. Id. at 93.


222. Id. at 21.


224. Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1025-26 (5th Cir. 1987) (Jones, J.,
concurring in the judgment and dissenting in relevant part), cert. denied, 485 U.S. 959
(1988).
derived from them is clearly outweighed by the social interest in order and morality."

The district court in *Rice* "cavalierly" wrote off the victims of the Hit Man Manuals’ deadly information by employing an inadequate incitement analysis. It failed to even consider the extent to which context governs the meaning of language and the corresponding extent to which instructions could conceivably, uniquely constitute incitement under *Brandenburg*. According to the Fourth Circuit, the district court must have misunderstood the “inartful[ ]” *Brandenburg* decision as protecting abstract advocacy of lawlessness as well as “the teaching of the technical methods of criminal activity.” Whatever the explanation, at the heart of the district court’s unexamined ruling in favor of Paladin, is an incitement standard that needs reworking.

A more reality-based, contextual characterization of incitement, would force careful examination of the speech at issue, would potentially envelope violent crime instruction manuals like the Hit Man Manuals in *Rice*, and would better account for countervailing interests, including the “social interest in order” and the instruction manuals’ unique propensity to cause serious harm. Further, a contextual characterization could accomplish these goals without threatening the First Amendment’s capacity to “foster[ ] a free flow exchange of information in the open marketplace of ideas.” Such a characterization of incitement, although perhaps imperfect, would help prevent superficial judicial treatment like that undertaken by the district court in *Rice*.

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225. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). See also Diamond & Primm, *supra* note 40, at 970-71 (“Supreme Court decisions have acknowledged that some speech is inherently less worthy of protection than other speech.”).


228. Tatro, *supra* note 50, at 968(citation omitted).