COMMENT

INCITEMENT TO VIOLENCE ON THE WORLD WIDE WEB: CAN WEB PUBLISHERS SEEK FIRST AMENDMENT REFUGE?

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INTRODUCTION

On April 20, 1999, Eric Harris and Dylan Klebold entered Columbine High School in Littleton, Colorado armed with a semiautomatic

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pistol, carbine, two sawed-off shotguns, and dozens of homemade bombs.[1] Before killing themselves, the two teenagers utilized this arsenal to kill twelve of their fellow students and to wound many others.[2] Harris and Klebold planted at least 30 pipe bombs and other explosives throughout the school, including a bomb made of a twenty-pound propane tank that police believe was intended to destroy the school.[3] The teenagers used the World Wide Web (Web) to obtain the instructions for making many of these bombs.[4] Moreover, Harris' personal Web site contained bomb-building instructions.[5]

While the tragedy in Littleton added to the trend of violent acts committed by juveniles, it also illustrated the notion that the Internet has become not only a source of potentially violent information, but also a means of inciting violence with potential First Amendment implications.[6] For example, three days after the Littleton tragedy, four 14-year-old students in Texas were arrested for allegedly planning to blow up their school.[7] Police who searched the homes of the students found gunpowder, and bomb-building instructions downloaded from the Web.[8]

When considering the availability of such violence-related materials on the Web within the context of the First Amendment, some constitutional lawyers believe that *Brandenburg v. Ohio*[9] and its progeny allow such conduct.[10] Other constitutional lawyers, however, believe that the issue is more complex because of the increased risk of harm stemming from the vast number of people who can easily access the Web.[11]

A great deal of online activity including, but not limited to, the information that provoked Harris and Klebold's rampage involves conduct that can be classified as speech.[12] According to the United States

1. *See* Angie Cannon et al., *Why?*, U.S. NEWS & WORLD REPORT, May 3, 1999, at 16, 17.

2. *See id.*

3. *See id.*

4. *See* Eric Pooley, *Portrait of a Deadly Bond*, TIME, May 10, 1999, at 26, 26.

5. *See id*.

6. *See* Steven Levy, *Loitering on the Dark Side*, NEWSWEEK, May 3, 1999, at 39, 39. Levy notes that "cyberspace offers unlimited opportunity to network with otherwise unreachable creepy people."

7. *See* Tammerlin Drummond, *Battling the Columbine Copycats*, TIME, May 10, 1999, at 29, 29.

8. *See id.*

9. 395 U.S. 444 (1969); *see also* discussion *infra* Part II.

10. *See* Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 366 (1996); *see also* discussion *infra* Part II.

11. *See* Sunstein, *supra* note 10, at 366, 370.

12. *See* SOFTWARE PUBLISHERS ASSOCIATION, ONLINE LAW: THE SPA'S LEGAL GUIDE TO DOING BUSINESS ON THE INTERNET 305 (Thomas J. Smedinghoff ed., 1996). Examples of these activities are e-mail communications and online publishing.

Supreme Court, the First Amendment does not protect speech if it creates a "clear and present danger" of imminent lawless action.[13] That is, this action must be imminent, and there must be both intent to produce, and a likelihood of producing, imminent disorder.[14] For example, in *Rice v. Paladin Enterprises, Inc.*, the Fourth Circuit explained that criminal culpability can be based on the speaker's successful efforts to assist others by providing them with detailed instructions on how to commit a crime.[15] The mere advocacy of violence, however, is not regarded as incitement to imminent lawless action and does receive First Amendment protection.[16]

Despite its facilitation of a new worldwide exchange of ideas, information, and content, the Web has been condemned "for enabling massive dissemination of pornography and other forms of content offensive to the morals of our society."[17] This condemnation has led to an intense debate about whether it is necessary to place controls upon information distributed over the Web.[18] The Internet is a network of internationally connected computers and the Web is one of its many mediums.[19] Thanks to its extraordinary growth over the past few years, the Internet allows millions of people to communicate with each other and to access large amounts of information from locations throughout the world.[20] Users gain access to the Internet, and therefore the Web, through colleges and universities, the workplace, coffee shops, and commercial online services.[21] Once on the Internet, users have the ability to use electronic mail, mailing lists, chat rooms, and the World Wide Web—all of which can be used to transmit textual material.[22]

The purpose of this comment is to analyze the potential First Amendment implications of the appearance of bomb-making instructions on the Web in the United States. Moreover, this comment will ultimately consider the notion that "because *Brandenburg* allows consideration of all the unique characteristics of the Web, there is no reason

13. *See id.*; *see also* Schenck v. United States, 249 U.S. 47, 52 (1919).

14. *See* Hess v. Indiana, 414 U.S. 105, 109 (1973).

15. 128 F.3d 233, 246 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); *see* discussion *infra* Part V.

16. *See* SOFTWARE PUBLISHERS ASSOCIATION, *supra* note 12, at 308 (citing Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969)).

17. *Id.*

18. *See id.*

19. *See* Reno v. ACLU, 521 U.S. 844, 849 (1997).

20. *See id.* at 850.

21. *See id.* at 850–51.

22. *See id.* at 851.

to formulate new jurisprudence merely because of new technology."[23] Part II examines the seminal cases in the area of speech action, including *Schenck v. United States*,[24] *Hess v. Indiana*,[25] and *Brandenburg v. Ohio*,[26] and the adulations and criticisms that resulted from these cases. Part III discusses the civil cases that applied *Brandenburg* to various forms of media.[27] Part IV discusses criminal aiding and abetting cases in which the defendants sought First Amendment protection for instructions they disseminated to others on how to commit illegal acts. Part V focuses upon *Rice v. Paladin Enterprises, Inc.*,[28] which illustrates the civil and criminal approaches to incitement detailed in Parts III and IV and applied to the Web in Part VI. Part VI analyzes the problem of bomb-making instructions that appear on the Web within both civil and criminal contexts. Part VII explores some alternatives and implications of the problem by discussing ideas presented by constitutional scholars and court opinions. The conclusion of this comment is that in a potential civil case for tort damages, and in a potential criminal case for aiding and abetting, the current law is easily applied, and thus, there is no need for change in the existing incitement laws to better handle cases dealing with the characteristics of the Web.

I. THE SEMINAL CASES: FROM *SCHENCK* TO *BRANDENBURG* AND *HESS*

Beginning with *Schenck v. United States* in 1919, the United States Supreme Court encountered the First Amendment implications of speech which was followed by some form activity caused by the listeners of those words.[29] Over time, the Court developed a detailed standard that went beyond the "clear and present danger" formulation set forth in

23. Adam R. Kegley, Note, *Regulation of the Internet: The Application of Established Constitutional Law to Dangerous Electronic Communication*, 85 KY. L.J. 997, 1019 (1997). In his analysis, Kegley relied on the district court opinion from *Rice v. Paladin Enterprises, Inc.* Shortly after publication, the Fourth Circuit reversed the case. Thus, *Rice* is examined again in this comment in Part V.

24. 249 U.S. 47 (1919).

25. 414 U.S. 105 (1973).

26. 395 U.S. 444 (1969).

27. *See* Davidson v. Time Warner, Inc., No. CIV.A.V-94-006, 1997 WL 405907 at *1 (S.D. Tex. March 31, 1997); Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989); Byers v. Edmondson, 712 So. 2d 681 (La. Ct. App. 1998).

28. 128 F.3d 233, 246 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

29. *Schenck*, 249 U.S. at 51.

Schenck.[30] This line of cases culminated with the tests set forth in *Brandenburg v. Ohio*[31] and *Hess v. Indiana*[32] in 1973.

In *Schenck v. United States*, the United States Supreme Court established the "clear and present danger" test as a means of determining whether speech was protected by the First Amendment.[33] The defendant in *Schenck* appealed his conviction for conspiracy to violate the Espionage Act,[34] claiming that the pamphlets he published for distribution to members and prospective members of the military had First Amendment protection.[35] Speaking for the majority, Justice Oliver Wendell Holmes explained that the character of an act depends on the circumstances under which it is performed.[36] For Justice Holmes, "[t]he question in every case is whether the words used 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 that Congress has a right to prevent."[37] While these words provided a test for incitement under the First Amendment, the "clear and present danger" test led to more confusion in the next few decades.

In the years following *Schenck*, the Supreme Court struggled to define a standard to represent the "clear and present danger" test. In *Whitney v. California*, the Court upheld a California Syndicalism statute on the grounds that freedom of speech does not equate to an absolute right to speak.[38] Thus, according to the Court, states could punish individuals who uttered words that would incite crimes, disturb the peace, or threaten the government.[39] However, in 1951, the Court strayed from *Whitney* with its holding in *Dennis v. United States*.[40] In *Dennis*, while not expressly overruling *Whitney*, the Court agreed with the notion of Judge Learned Hand that one "must ask whether the gravity of the 'evil,'

30. *See id.* at 52.

31. *Brandenburg*, 395 U.S. at 447.

32. *Hess*, 414 U.S. at 108–09.

33. *Schenck*, 249 U.S. at 52.

34. *See id.* at 48–49. The charges against Schenck were that he conspired to violate the Espionage Act "by causing and attempting to cause insubordination . . . in the military and naval forces of the United States, when the United States was at war with the German Empire . . . [and] the defendant wilfully conspired to have printed and circulated to men who had been called and accepted for military service . . . a document set forth and alleged to be calculated to cause such insubordination and obstruction."

35. *See id.* at 49–50.

36. *See id.* at 51.

37. *Id.*

38. 274 U.S. 357, 371 (1927).

39. *See id.*

40. 341 U.S. 494, 510 (1951).

discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[41]

Brandenburg v. Ohio,[42] which expressly overruled *Whitney*, is regarded as the seminal case in the area of the First Amendment and incitement to violence.[43] The appellant in *Brandenburg* was convicted under the Ohio Criminal Syndicalism statute for advocating "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform and for voluntarily assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[44] In two separate speeches to the group, the appellant in *Brandenburg* made white supremacist statements and commented on his beliefs about Jews and African-Americans.[45] The issue was whether the statute was constitutional under the First and the Fourteenth Amendments.[46] The Supreme Court explained that previous decisions demonstrated that a state may prohibit advocacy only in cases where that advocacy is intended to produce "imminent lawless action and is likely to incite or produce such action."[47] In concluding that the statute was unconstitutional, the *Brandenburg* Court reasoned that the statute punished mere advocacy as opposed to incitement to imminent lawless action.[48]

Later in 1973, the United States Supreme Court clarified the *Brandenburg* standard through its reasoning in *Hess v. Indiana*.[49] *Hess* involved an appeal of an Indiana conviction for disorderly conduct.[50] During a demonstration in which the crowd failed to respond to requests from the sheriff to clear the street, the appellant said to the sheriff:

41. *Id.* (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).

42. 395 U.S. 444, 449 (1969).

43. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 243 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

44. *Brandenburg*, 395 U.S. at 444–45 (citing OHIO REV. CODE ANN. § 2923.13).

45. *Id.* at 445–47.

46. *See id.* at 445.

47. *Id.* at 447. The court noted that the 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." *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).

48. *Id.* at 448–49.

49. 414 U.S. 105 (1973).

50. *See id.* at 105. The disorderly conduct statute read as follows: "Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct." *Id.* at 106 n.1 (citing IND. CODE § 35-27-2-1).

"We'll take the fucking street . . . ."[51] The Court cited the rule from *Brandenburg* and reasoned that the statement was protected by the First Amendment because (1) "[it] was not directed to any person or group of persons" and (2) "there was no evidence or rational inference from the import of the language that [the] words were intended to produce, and likely to produce, imminent disorder."[52] This application of the *Brandenburg* standard as utilized in *Hess* raises the question presented in this comment as to whether this test protects speech on the Web that would incite violence.

As will be discussed in Part III, although its application to the Web is not clear, the *Brandenburg* test appears to protect most speech on the airwaves.[53] Advocates of applying *Brandenburg* to the Web believe that its simple rule can satisfactorily resolve all cases because the production of imminent action is highly unlikely.[54]

II. APPLYING *BRANDENBURG* TO FORMS OF MEDIA IN CIVIL CASES

Publishers of music, films, and television shows have successfully defended lawsuits[55] because their materials, despite the fact that they contained or depicted violence and the fact that *Brandenburg* provides a cause of action under such circumstances,[56] merited First Amendment protection.[57] For the most part, the common theme in these cases is that the publishers did not intend for the viewers or listeners to commit acts of violence.[58] Although individuals may copy or may be influenced by the speech involved, the publisher of such materials is normally protected by the First Amendment under the *Brandenburg* standard.

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51. *Id.* at 106–07.

52. *Id.* at 108–09.

53. *See* Sunstein, *supra* note 10, at 370; *see also* discussion *infra* Part III.

54. *See* Sunstein, *supra* note 10, at 370; Kegley, *supra* note 23, at 1019.

55. One exception is United States v. Progressive, Inc., 467 F. Supp. 990, 1000 (W.D. Wis. 1979). In *Progressive*, the government sought an injunction against the publishers of a magazine which sought to publish data in an article about the making of the hydrogen bomb. The United States District Court for the Western District of Wisconsin concluded that the circumstances fell "within the extremely narrow recognized area, involving national security, in which a prior restraint on publication is appropriate." Therefore, an injunction did not infringe upon the publisher's rights.

56. *See* Byers v. Edmondson, 712 So. 2d 681 (La. Ct. App. 1998).

57. *See* Davidson v. Time Warner, Inc., No. CIV.A.V-94-006, 1997 WL 405907, at *1 (S.D. Tex. March 31, 1997); Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991); Walt Disney Prods., Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981); *Byers*, 712 So. 2d at 692.

58. *See Waller*, 763 F. Supp. at 1144; *Davidson*, 1997 WL 405907 at *1; Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989); *Walt Disney Prods.*, 276 S.E.2d at 583; *Byers*, 712 So. 2d at 692.

Music is one form of media that, because of its wide audience, merits First Amendment protection. In *Waller v. Osbourne*, the plaintiffs filed suit against musician Ozzy Osbourne contending that their son committed suicide as a result of repeatedly listening to a music tape which allegedly contained audible and perceptible lyrics that directed the listener to commit suicide.[59] In concluding that the music was entitled to First Amendment protection,[60] the United States District Court for the Middle District of Georgia explained that music classified as obscene or defamatory, representing fighting words, or inciting imminent lawless activity "is either entitled to diminished first amendment constitutional protection or none at all."[61] The court referred to both *Brandenburg* and *Hess* and reasoned that there was no indication that the music was directed toward a specific person or group of persons.[62] Also, no evidence established that the music was intended to cause its listeners to commit suicide.[63] Finally, the court emphasized that "an abstract discussion of the moral propriety or even moral necessity for a resort to suicide is not the same as indicating to someone that he should commit suicide and encouraging him to take such action."[64]

More recently, in *Davidson v. Time Warner, Inc.*, the United States District Court for the Southern District of Texas applied *Brandenburg* to violence against another individual and held, like *Waller*, that the music involved was entitled to First Amendment protection.[65] The parents of a man who shot and killed a police officer filed an action alleging that the rap music was not protected by the First Amendment and thus, the defendants, including musician Tupac Shakur, were liable as the producers of the music that was the proximate cause of the officer's death.[66]

In determining that the music was protected by the First Amendment, the court concluded that even if there was intent to incite the listener of the lyrics to commit a lawless act, the violent conduct by the

59. *Waller*, 763 F. Supp. 1144, 1145–46. The lyrics were as follows: "Ah know people / You really know where it's at / You got it / Why try, why try / Get the gun and try it / Shoot, shoot, shoot." *Id.* at 1146 n.2.

60. *See also* McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 194–96 (Cal. Ct. App. 1988) (concluding, on nearly identical facts as *Waller*, that imposition of civil damages would violate the First Amendment).

61. *Waller*, 763 F. Supp. at 1150.

62. *See id.* at 1151.

63. *See id.*

64. *Id.*

65. *Davidson*, 1997 WL 405907 at *1, *20–21.

66. *See id.* at *1. One song at issue contained the following lyrics: "I got a nine millimeter Glock pistol / I'm ready to get with you at the trip of the whistle / So make your move and act like you wanna flip / I fired 13 shots and popped another clip / My brain locks, my Glock's like a f—kin mop / The more I shot, the more mothaf—ka's dropped / And even cops got shot when they rolled up." *Id.* at *1 n.4 (censorship of expletives provided by the court).

assailant was not an imminent and likely result of listening to those lyrics.[67] The court explained that to restrain the music, it had to find that "the recording (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent illegal conduct."[68] The court noted that the plaintiffs were the first to claim that the music incited imminent lawless action and, moreover, that courts dealing with similar issues often refused to find that a musical recording or broadcast incited certain behaviors only because certain acts occurred after the speech.[69] Finally, the court disagreed with the plaintiffs' claim that the music was directed at a violent black "gangsta" subculture.[70] The fact that this group was so large was not sufficient to fulfill the directed requirement from *Hess*.[71]

The appearance of messages which, according to some plaintiffs, would lead to imminent lawless action is not only reserved to the words found in music lyrics. This notion also applies to major motion pictures that have come under scrutiny in the courts. In *Yakubowicz v. Paramount Pictures Corp.*, the plaintiff alleged that a man whose acts stemmed from watching Paramount's film, "The Warriors," immediately prior to the attack, murdered his sixteen-year-old son.[72] The plaintiff claimed "that Paramount produced, distributed, and advertised 'The Warriors' in such a way as to induce film viewers to commit violence in imitation of the violence in the film."[73] In concluding that the film was not "incitement" for the purposes of the First Amendment, the Massachusetts Supreme Court emphasized that the film was fictional and, although there was violence depicted, it did not "exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of the viewers."[74] Similar to the reasoning used by the *Waller* and *Davidson* courts, the *Yakubowicz* court agreed that there was no

67. *See id.* at *20.

68. *Id.* at *21 (citing Hess v. Indiana, 414 U.S. 105, 108 (1973)).

69. *See id.* at *20 (citing Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991)); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989); McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 194–96 (Cal. Ct. App. 1988).

70. *See Davidson*, 1997 WL 405907 at *21.

71. *See id.* (explaining that the group was "necessarily too large to remove First Amendment protection from the album: to hold otherwise would remove constitutional protection from speech directed to marginalized groups").

72. *Yakubowicz*, 536 N.E.2d at 1068 (Mass. 1989). Yakubowicz claimed that Paramount "knew of violence and threats of violence perpetrated by members of 'gangs' attending showings of the film in Boston and in California, and that [his son's] death was causally related to [Paramount's] exhibition of the film to Michael Barrett (the assailant)."

73. *Id.*

74. *Id.* at 1071.

likelihood of producing imminent lawless action and the movie did not tell someone to perform any action at any certain time.[75]

In addition to movies, television programs have also been scrutinized for a possible tendency to incite violent acts. One interesting example is *Walt Disney Productions, Inc. v. Shannon*, where the plaintiff was injured after imitating a demonstration shown on a Mickey Mouse Club television program featuring sound effects.[76] In the scene, one of the participants demonstrated how to reproduce the sound of a tire coming off an automobile by putting a BB pellet in a filled balloon and rotating it within the balloon.[77] The child was injured when he repeated the demonstration by using a large piece of lead in a thin balloon.[78]

Rather than utilizing *Brandenburg* to decide the case, the Supreme Court of Georgia believed that the *Schenck* "clear and present danger" doctrine was more appropriate because there were no allegations that the plaintiff was incited to perform a *lawless* act.[79] The court analogized this case to the "pied piper" cases in which children were attracted to doing something which caused a foreseeable risk of injury.[80] In a "pied piper" case, there must be an "express or implied invitation" for the child to do something dangerous to himself and the defendant must be responsible for providing the means that caused the injury.[81] The court concluded that there was the likelihood that the child was invited by Disney to do something injurious to himself.[82] There was also no doubt, however, that Disney was not responsible for providing the instrumentality that caused the injury.[83] Although there was a foreseeable risk of injury to any person who might perform the demonstration for himself, there was no clear and present danger of injury.[84]

III. AIDING AND ABETTING IN THE CRIMINAL CONTEXT

While publishers of various forms of media received First Amendment protection for their speech, those who guided others to commit lawless acts have been unable to hide behind the First Amendment. On many occasions, courts have encountered criminal cases in which the

75. *Id.* (citing McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 194–96 (Cal. Ct. App. 1988)).
76. 276 S.E.2d 580, 581 (Ga. 1981).
77. *See id.*
78. *See id.*
79. *See id.* at 582 n.2.
80. *See id.* at 583.
81. *Id.*
82. *See id.*
83. *See id.*
84. *See id.*

defendants were convicted of aiding and abetting crimes through the use or provision of instructions.[85]

In *United States v. Buttorff*, the defendants appealed their convictions for aiding and abetting individuals who filed false income tax forms.[86] The defendants spoke at four public gatherings in which they discussed the unconstitutionality of income taxes and conducted question and answer sessions regarding tax issues.[87] Based on the suggestions of the defendants, fifteen people claimed false allowances and made false certifications of taxable income on their income tax returns.[88] In determining that the defendants' activities did not merit First Amendment protection, the Eighth Circuit distinguished the case from *Brandenburg* because "[a]lthough the speeches here [did] not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform."[89] Moreover, the court explained that the government successfully demonstrated that there was affirmative participation by the defendants in encouraging their listeners to evade income taxes.[90]

Another instance requiring consideration of First Amendment protection for aiding and abetting tax evasion, in which the defendants experienced a similar fate as in *Buttorff*, took place in *United States v. Rowlee* in 1990.[91] The defendant in *Rowlee* was a member of The New York Patriots Society for Individual Association (the Society), an organization whose activities involved the promotion of tax evasion and frustration of the IRS.[92] The defendant served as an instructor for courses in which the "students were taught that wages were not income and hence not subject to income taxation, that the filing of income tax returns was voluntary, that Title 26 of the United States Code never was enacted into law, and that money not tied to a gold standard had no

85. *See* United States v. Rowlee, 899 F.2d 1275 (2d Cir. 1990), *cert. denied*, 498 U.S. 828 (1990); United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990); United States v. Barnett, 667 F.2d 835 (9th Cir. 1982); United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978), *cert. denied*, 437 U.S. 906 (1978).

86. *Buttorff*, 572 F.2d at 621.

87. *See id.* at 622.

88. *See id.* at 622–23. The defendants instructed the attendees "to divide their yearly salary by 750 to determine the number of claimed allowances necessary to stop withholding."

89. *Id.* at 624.

90. *See id.* at 623. "Each was associated with the tax evasion movement; each opposed the graduated income tax and wanted to bring about its demise; and each, by speaking to large groups of persons, sought to advance his ideas and encourage others to evade income taxes."

91. United States v. Rowlee, 899 F.2d 1275 (2d Cir. 1990), *cert. denied*, 498 U.S. 828 (1990).

92. *See id.* at 1276. The Society published advertisements in newspapers which told the readers that, among other things, the payment of income taxes was voluntary. *See id.* at 1276–77.

value."[93] At Society meetings, the defendant sold tax forms to justify fraudulent claims and provided tax advice for all of the members.[94] Relying on *Brandenburg*, the defendant contended that his words warranted First Amendment protection.[95] The Second Circuit, however, held that the First Amendment provided no defense because the combination of speech and nonspeech elements in the same conduct created a sufficiently important governmental interest in regulating the nonspeech element.[96]

Affirmative participation by defendants is not limited to tax evasion and has also occurred in the making of illegal drugs. In *United States v. Barnett*, the defendant sold printed instructions through the mail for manufacturing the drug PCP and other illegal drugs.[97] As in *Buttorff*, the defendant claimed First Amendment protection for his printed instructions for the manufacture of the PCP.[98] Calling the defendant's argument "specious," the Ninth Circuit explained that the First Amendment did not provide a defense to a criminal charge simply because the provider of the information used words to carry out his illegal purpose.[99] The court held that it was not necessary for the government to show that there was a personal meeting between the defendant and the drug manufacturer to prove the offense of aiding and abetting.[100] Thus, the First Amendment was not a defense because the defendant provided "essential information" for the purposes of assisting the drug manufacturer in committing a crime.[101]

The unwillingness of the courts to adopt the First Amendment as a protection to aiding and abetting crimes extended to the world of computer software in *United States v. Mendelsohn*.[102] There, the makers of computer software containing a bookmaking program claimed the protection of the First Amendment.[103] The bookmaking program provided a computerized method for recording and analyzing bets on sporting events.[104] In concluding that the computer program did not merit First

93. *Id.* at 1277.
94. *See id.*
95. *See id.* at 1277–78.
96. *See id.* at 1278.
97. 667 F.2d 835, 838 (9th Cir. 1982). These documents included "Synthesis of PCP/Angel Dust," "Synthetic Routes to Amphetamines," and "A Feasible Synthesis of Methaqualone Hydrochloride."
98. *See id.* at 837.
99. *See id.* at 842.
100. *See id.* at 843.
101. *See id.*
102. 896 F.2d 1183 (9th Cir. 1990).
103. *See id.* at 1185.
104. *See id*. at 1184.

Amendment protection, the Ninth Circuit discussed the need for evidence demonstrating that the speech involved was merely a form of information that was distant from an immediate connection to the commission of a criminal act.[105] While computer programs receive First Amendment protection under other circumstances, the court believed the program was so intimately connected with the execution of a criminal act that there was no entitlement to First Amendment protection.[106] The court would not permit a First Amendment defense where the words involved were more than mere advocacy, but instead functioned as part of the crime itself.[107]

IV. *RICE v. PALADIN ENTERPRISES, INC.*: NO FIRST AMENDMENT PROTECTION FOR INSTRUCTIONS

Compared to the media cases mentioned in Part III, *Rice v. Paladin Enterprises, Inc.* is different in that *Hit Man: A Technical Manual for Independent Contractors* ("*Hit Man*"), the book at issue in the case, presented instructions to the reader as opposed to only providing a form of entertainment to a reader or viewer.[108] *Rice* is especially important because, while the form of media involved is print media, the contents of *Hit Man* are similar to a website containing detailed instructions on how to build a bomb.

A. *The Facts of Rice*

In *Rice*, the relatives and representatives of three murder victims filed suit against Paladin Enterprises, the publisher of *Hit Man*.[109] *Hit Man* contained 130 pages of detailed instructions on how to commit a murder and how to become someone who kills others for a profession.[110] Among the instructions was information on soliciting clients, requesting expense money, setting up a "base" for coordinating "jobsite" activities, constructing weapons, committing the murder itself, and concealing the

105. *See id.* at 1185.

106. *See id.* at 1186. The court alluded to cases in which computer programs were classified as literary works and works of authorship. *See id.* at 1185 (citing Apple Computer v. Formula Int'l, Inc., 725 F.2d 521 (9th Cir. 1984)).

107. *See id.* (citing United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985)).

108. 128 F.3d 233, 242 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). "In soliciting, preparing for, and committing [the] murders, [the assailant] meticulously followed countless of *Hit Man*'s 130 pages of detailed factual instructions on how to murder and to become a professional killer."

109. *See id.* at 241.

110. *See id.* at 239.

crime.[111] According to the Fourth Circuit, *Hit Man* instructed and encouraged its readers to commit the acts of violence it discussed and "instill[ed] in them the resolve necessary to carry out the crimes it detail[ed], explain[ed], and glorifi[ed]."[112]

On March 3, 1993 James Perry took these instructions to heart and murdered a woman, her quadriplegic son, and the son's nurse.[113] The woman's ex-husband hired Perry to murder the family so that he could receive a two million-dollar settlement the son received as a result of the accident in which he became paralyzed.[114] Throughout the process, Perry followed many of the book's instructions regarding the solicitation and negotiation of a contract murder.[115]

B. *The District Court: Brandenburg Protects Hit Man*

In granting Paladin's motion for summary judgment, the United States District Court for the District of Maryland believed that the issue was whether *Hit Man* was protected by the First Amendment and *Brandenburg*.[116] To determine whether First Amendment protection applied, the court addressed whether *Hit Man* merely advocated and taught murder, or whether it incited and encouraged murder.[117] According to the court, this meant "examin[ing] not only the content of the speech in this case, but also the context in which it was disseminated."[118] The court saw no difference between *Rice* and cases such as *Yakubowicz* in which violent movies were alleged to have caused injury or death.[119] "Although the programs involved in these cases were not considered to have a 'how-to' format like [*Hit Man*], they were considered depictions of violence alleged to have been imitated."[120]

In determining that *Brandenburg* protected *Hit Man*, the court focused upon the intent related to the depictions of violence.[121] Concluding that Paladin did not intend for Perry to commit the murders, the court emphasized that the book was merely abstract teaching rather than in-

111. *See id.* at 239–41. "*Hit Man* specifically instructs its audience of killers to shoot the victim through the eyes if possible: At least three shots should be fired to insure quick and sure death . . . . [A]im for the head—preferably the eye sockets if you are a sharpshooter."

112. *Id.* at 261. The court also provides a chapter-by-chapter synopsis of *Hit Man*, explaining the contents of the book in detail. *See id.* at 257–62.

113. *See id.* at 239.

114. *See id.*

115. *See id.* at 239–40.

116. *See* Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 842 (D. Md. 1996).

117. *See id.* at 845.

118. *Id.*

119. *See id.* at 846.

120. *Id.*

121. *See id.* at 847.

citement.[122] Basically, it did not rise to the level of impermissible incitement to crime or violence.[123] The book did not tell a person to commit a concrete act at any certain time.[124] The court also emphasized that in the ten years in which *Hit Man* was in circulation, only one person acted upon the information in the book.[125] Finally, the court explained that the disclaimers inserted by Paladin into the text of the book only reinforced the notion that *Hit Man* had no tendency to incite violence.[126] Thus, the court concluded that the book did not "constitute incitement to imminent lawless action."[127]

Although the district court found that *Hit Man* was protected by the First Amendment, it acknowledged the possible impact of technology in today's society: "Moreover, the Court suspects that there are a myriad of other complex issues now emerging and which have been spawned by recent electronic technologies, including the internet and related modes of communication."[128] Despite this idea, however, the court did not want to create a new category of speech that was not entitled to First Amendment protection—"speech that arguably aids and abets murder."[129] It emphasized the history of this country of "permitting the free, open and competitive dissemination of information and ideas."[130]

C. *The Fourth Circuit: Hit Man is Not Protected*

While the district court held that the First Amendment protected Paladin's publication of *Hit Man*, the Fourth Circuit held that the First Amendment did not prevent finding that Paladin aided and abetted Perry.[131] The court noted that the concept of speech acts "has long been invoked to sustain convictions for aiding and abetting the commission of criminal offenses."[132] Relying on *Barnett*, the court explained that the idea of the First Amendment not protecting the aiding and abetting of another in the commission of a criminal offense was commonly

122. *See id.* "Nothing in the book says 'go out and commit murder now!' Instead, the book seems to say, in so many words, 'if you want to be a hit man this is what you need to do.' "

123. *See id.*

124. *See id.*

125. *See id.* at 848.

126. *See id.* The advertisement in Paladin's catalog said, "for academic study only" and the book's disclaimer said, "[for] information purposes only."

127. *Id.*

128. *Id.* at 848–49.

129. *Id.* at 849.

130. *Id.*

131. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 243 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

132. *Id.* at 244.

accepted.[133] Additionally, the court mentioned that the Department of Justice had advised Congress that *Brandenburg* could not prevent the punishment of speech that involved aiding and abetting.[134]

More importantly, the Fourth Circuit believed that *Hit Man* resembled a classic example of speech which "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."[135] Unlike the lower court, the Fourth Circuit believed that *Rice* was different from cases in which the speech involved was protected by the First Amendment.[136] While cases such as *Yakubowicz* involved threats of socially motivated violence, *Rice* involved specific instructions on how to commit a crime.[137] Moreover, the speech in *Brandenburg* and *Hess* did not even compare with the detailed form of speech in *Rice*, which was designed to appeal to the psyche of the reader.[138]

The Fourth Circuit responded to the district court by saying that the district court misperceived the nature of the speech that the Supreme Court held in *Brandenburg* is protected under the First Amendment.[139] In fact, the Supreme Court has never applied *Brandenburg*, or any of its progeny, to protect someone from liability when that person provided detailed instructions used to assist another person in the commission of a crime.[140] According to the Fourth Circuit, *Brandenburg* protected the abstract teaching of principles, which does not necessarily include "mere teaching."[141] In *Rice*, the words of *Hit Man* functioned as the preparation of a group of people for violent action and the encouragement of that action.[142] Thus, the court concluded that someone could incite imminent

133. *Id.* at 245–46. In *Barnett*, the Ninth Circuit held that the First Amendment is not a defense for publishers against charges of aiding and abetting a crime through the publication and distribution of instructions on how to make illegal drugs. *Barnett*, 667 F.2d 835, 843 (9th Cir. 1982); *see also* discussion *infra* Part IV.

134. *See Rice*, 128 F.3d at 246. *Brandenburg* posed "little obstacle to the punishment of speech that constitutes criminal aiding and abetting, because culpability in such cases is premised, not on defendants' 'advocacy' of criminal conduct, but on defendants' successful efforts to assist others by detailing them the means of accomplishing the crimes."

135. *Id.* at 255.

136. *See id.* at 256.

137. *See id.* at 262.

138. *See id.*

139. *See id.* at 263.

140. *See* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 10, at 10–63 (1998). Previous Supreme Court rulings dealing with the advocacy of violence, incitement, symbolic speech, and graphic protest have involved speech regarding political or social issues.

141. Rice v. Paladin Enters., Inc., 128 F.3d 233, 263 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

142. *See id.* at 264 (citing Brandenburg v. Ohio, 395 U.S. 444, 448 (1969)).

lawless action not only through a call to action but also through speech that, while advocating nothing, functioned as an instruction booklet for the commission of crimes.[143]

V. BOMB-MAKING INSTRUCTIONS ON THE WORLD WIDE WEB

In order to analyze the problem of bomb-making instructions on the Web without the benefit of prior cases on the topic, it is necessary to compare the similarities and differences between the use of the Web with the facts in the precedent media and criminal cases. First, the characteristics of the Web discussed by the Supreme Court in *Reno v. ACLU* provides the background reasoning utilized for the following analyses.[144] Second, a hypothetical situation in which a publisher of bomb-making instructions on the Web may be subject to civil liability is analyzed. Finally, a situation in which the same publisher may be subject to criminal charges for aiding and abetting a violent crime is examined. The application of the precedent cases to the Web shows the speech would likely be protected in the civil context and unprotected in the criminal context —results no different from the precedent cases applied to other forms of media.

A. *The Web According to the Supreme Court: Reno v. ACLU*

Before analyzing the problem of bomb-making instructions on the Web, it is necessary to set forth the characteristics of the Web. In *Reno v. ACLU*, the Supreme Court concluded that the Communications Decency Act (CDA), which intended to protect minors from indecent and offensive material on the Web, abridged the freedom of speech protected by the First Amendment.[145] Although the Court in *Reno* focused on indecent material, the Court's discussion of the nature and scope of the Web is certainly relevant to any analysis of a First Amendment problem regarding the Web.[146]

The Court in *Reno* noted that "these tools constitute a unique medium—known to its users as 'cyberspace'—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Web."[147] Of the various mediums on the Internet, the

143. *See id.*
144. 521 U.S. 844, 852 (1997).
145. *See id.* at 849.
146. *See id.*
147. *Id.*

most popular and prominent is the World Wide Web.[148] Users of the Web have the ability to search for and retrieve information from computers throughout the world.[149] Most pages on the Web contain "links" allowing the user to access a related site.[150] To access a given site on the Web, the user has two options. The first option is to type the address of the page which they wish to access, and the second option is to enter keywords or subject terms into one of the many "search engines" available on the Web.[151] According to the Court, "[t]he [Web] is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services."[152] Moreover, the Court noted that, for publishers, the Web functions as a means of addressing an audience of millions throughout the world.[153]

B. *Bomb-Making Instructions on the Web in the Civil Context*

If a civil action was filed by the victims of the attack on Columbine High School against the publishers of the Web sites from which Eric Harris and Dylan Klebold obtained their bomb-making information for the attack, would those publishers be protected by the First Amendment against civil liability for inciting Harris and Klebold to commit violent acts? The likely answer to that question is "yes" because both the directed and imminence requirements as explained in *Hess* would be difficult to satisfy.[154] A different result would likely "remove constitutional protection from speech directed to marginalized groups."[155]

The first element derived from *Hess*, that the speech must be "directed or intended toward the goal of producing imminent lawless conduct,"[156] is likely to fail because of the large audience capable of viewing a website.[157] It is important to note that the court in *Waller*, where the plaintiff contended that the musical lyrics encouraged the listener to commit suicide, implied that the directed requirement might be

148. *See id.* at 852.

149. *See id.*

150. *See id*.

151. *See id.* Examples of search engines include Yahoo, Hotbot, and AltaVista.

152. *Id.* at 853.

153. *See id.* These publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals.

154. Hess v. Indiana, 414 U.S. 105, 108 (1973).

155. Davidson v. Time Warner, Inc., No. CIV.A.V-94-006, 1997 WL 405907, at *21 (S.D. Tex. Mar. 31, 1997). The court referred to the plaintiffs' argument that the directed requirement was fulfilled by the fact that Time Warner directed the music to a violent group in general.

156. *Id.* at *20 (citing *Hess*, 414 U.S. at 108).

157. *See Reno*, 521 U.S. at 850.

met if the speech was directed toward a particular person or group of people.[158] Thus, the possibility exists that a web publisher could meet the directed requirement if the web community is thought of as a single target group or if the target group was comprised of militia group members. The reasoning from *Davidson*, however, limits this notion.[159] If the "violent black 'gangsta' subculture" in *Davidson* was too large of a target group to merit First Amendment protection, then a target group of users on the Web would be far too large for protection as well.[160] The *Reno* Court estimated that by 1999, there would be 200 million users on the Web[161] — a group that is probably too large for the directed requirement.

The second element derived from *Hess*, that the speech must be "likely to produce such imminent illegal conduct,"[162] is also likely to fail in the hypothetical for similar reasons as articulated above. The answer to the question would depend on whether the "instructiveness" of the bomb-making instructions rose to the level depicted by the book *Hit Man* in *Rice*.[163] The imminence aspect of the test would be difficult to fulfill in the context of the Web because from the time of posting of the information by the publisher to the time of the harm committed by the tortfeasor, additional steps would be necessary in order to follow through on the instructions.[164] It is unlikely that violent action would occur at the instant of or immediately following the reading of the instructions on the Web. The court in *Davidson* noted that until the plaintiffs' claim that the music caused violent conduct, there had been no other claims following more than 400,000 sales of the album.[165] Thus, given the number of users on the Web,[166] an argument can be made that a similar proportion of users making claims of incitement to violence would result in a similar conclusion as *Davidson*.[167]

158. Waller v. Osbourne, 763 F. Supp. 1144, 1150 (M.D. Ga. 1991).

159. *Davidson*, 1997 WL 405907, at *21.

160. *Id.*

161. *Reno*, 521 U.S. at 850. According to the Court, there were 9,400,000 computers hosting Internet sites to serve 40 million users in 1996.

162. *See Davidson*, 1997 WL 405907, at *20.

163. Rice v. Paladin Enters., Inc., 128 F.3d 233, 264–65 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). "[O]ne obviously can prepare, and even steel, another to violent action not only through the dissident 'call to violence,' but also through speech, such as instruction in the methods of terror or other crime, that does not even remotely resemble advocacy, in either form or purpose."

164. *See Reno*, 521 U.S. at 854.

165. *Davidson*, 1997 WL 405907, at *20.

166. *See Reno*, 521 U.S. at 854.

167. *See Davidson*, 1997 WL 405907, at *20.

Conversely, there may be an argument that bomb-making instructions on the Web may satisfy the second part of the test if the speech tends to "exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity."[168] In *Rice*, the court noted that *Hit Man* was a classic example of a book that encouraged, prepared, and steeled its audience to specific conduct through its detailed instructions.[169] Also, the imminence standard does not necessarily mean immediate—the imminence must be evaluated according to the setting and risk involved.[170] It is possible that, under these circumstances, a publisher of bomb-making information would be civilly liable for violent acts if the speech was presented in a way similar to that of *Hit Man*.

It is more likely, however, that *Rice* would have the opposite impact. The failure of the directed aspect is probable when there is a comparison between bomb-making instructions on the Web and *Rice*. In *Rice*, the Fourth Circuit explained that a jury could find that *Hit Man* was marketed to a limited group of people who were interested in committing murder.[171] The court based its conclusion upon the notion that *Hit Man* was only available to the public through a mail order catalogue as opposed to through a local bookstore.[172] It was necessary for the prospective reader to order the catalogue.[173] If anything, the Web is more like the local bookstore because of its similarity to a "vast library" as the Court in *Reno* discussed.[174] Although the web user must take steps to access a given site or to gain access to the Web as a whole,[175] the bomb-making information is available to all users as it would be to all customers in a local bookstore. The web publisher needs to only post his or her bomb-making instructions on a website in order for it to be recognized by a given search engine at the command of the person looking for the information. This process is similar to a person entering commands into a computerized library catalog in order to find the desired reading mate-

168. Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1071 (Mass. 1989) (expressing the notion that it is not acceptable in our society to limit and restrict creativity in order to avoid affecting emotionally troubled individuals).

169. Rice v. Paladin Enters., Inc., 128 F.3d 233, 256 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

170. *See* SMOLLA, *supra* note 140, at 10–41.

171. *See Rice*, 128 F.3d at 255.

172. *See id.* To receive a copy of *Hit Man*, the prospective reader has to go through a number of steps. First, the reader obtains a copy of Paladin's catalogue by completing a form contained in an advertisement from a magazine such as Soldier of Fortune. After receiving the catalogue, the reader must find the desired book and then mail an order form to complete the process.

173. *See id.*

174. *See* Reno v. ACLU, 521 U.S. 844, 852 (1997).

175. *See id.* at 850–51, 854.

rial. Thus, because the directed requirement from *Hess* is not likely to be satisfied, publishers of bomb-making information on the Web will likely receive First Amendment protection for their speech.

C. *Bomb-Making Instructions on the Web in the Criminal Context*

Although they would likely receive First Amendment protection in a civil action, would those web publishers be protected by the First Amendment against criminal charges of aiding and abetting Harris and Klebold? After a consideration of the wide audience that would view those publishers' materials and of the vast means of accessing the Web,[176] the likely answer to that question is "no."[177] According to *Rice*, every court that has addressed this issue 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."[178]

Like *Rice*, a case involving bomb-making instructions on the Web is analogous to *Barnett* because of the type of instructions involved and the type of personal contact involved.[179] In *Barnett*, although the defendant communicated with the manufacturer by mail, the defendant provided detailed, step-by-step instructions for manufacturing the drug PCP without physically meeting with the drug manufacturer.[180] Similarly, a publisher of information on the Web is not meeting with the viewer of the information although the two parties can communicate by electronic mail.[181] The *Barnett* court noted that it is not necessary to demonstrate an actual meeting in order to prove that someone aided and abetted another person.[182]

After resolving the question of contact between the parties, the issue of the impact of the information is also resolved by the precedent cases.[183] In *Buttorff*, the defendant sought First Amendment protection as a defense against charges of aiding and abetting tax evasion, and the Eighth Circuit explained that a defendant who merely discussed his tax evasion ideas in front of large audiences was responsible for aiding and

176. *See id.* at 851, 854.

177. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 244 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

178. *Id.*

179. *Id*. at 245; United States v. Barnett, 667 F.2d 835, 838 (9th Cir. 1982).

180. *Barnett*, 667 F.2d at 844.

181. *See Reno*, 521 U.S. at 852.

182. *Barnett*, 667 F.2d at 843.

183. *See* United States v. Buttorff, 572 F.2d 619, 623 (8th Cir. 1978), *cert. denied*, 437 U.S. 906 (1978).

abetting because the speech went beyond advocacy.[184] Also, the Ninth Circuit, in *Mendelsohn* (in response to aiding and abetting charges, defendants contended that their computer program was protected by the First Amendment), discussed that the computer software at issue was "too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection."[185] In order for a type of speech to be protected, such as a computer program, the speech must be informational in such a way that there is no relation to the commission of a criminal activity.[186] While a given website containing bomb-making instructions may contain a disclaimer about its content,[187] similar disclaimers such as the one in *Rice* proved "to be transparent sarcasm designed to intrigue and entice."[188] Thus, the presence of a disclaimer on a bomb-making website may not dissuade most courts from denying First Amendment protection.

Conversely, a case involving bomb-making instructions on the Web may differ from the precedent cases because of the lack of interaction between the information provider and the perpetrator.[189] First, the court in *Buttorff* (tax evasion case) discussed the need for affirmative participation by the person who encourages the perpetrator.[190] Unlike someone who attends speaking appearances or classes, a web user must go through "a series of affirmative steps more deliberate and directed" to access the desired information.[191] Thus, the affirmative participation is more on the side of the perpetrator than on the side of the person encouraging the perpetrator. Second, the *Mendelsohn* court noted that the computer software at issue played too great a role in the commission of the crimes.[192] That is, the program made "an integral and essential" contribution to the crime committed.[193] In the case of a website with bomb-making instructions, the information is freely available to the user but it is the user who uses the instructions to make the crime occur.[194]

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184. *See id.* at 623–24.

185. United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990).

186. *See id.* at 1185.

187. *See* Reno v. ACLU, 521 U.S. 844, 854 (1997).

188. Rice v. Paladin Enters., Inc., 128 F.3d 233, 254 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). The disclaimer said: "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. *For academic study only!*"

189. *See id.*

190. *See Buttorff*, 572 F.2d at 623.

191. *See Reno*, 521 U.S. at 854.

192. *Mendelsohn*, 896 F.2d at 1185.

193. *Id.* at 1186.

194. *See Reno*, 521 U.S. at 852.

Although there may be an argument for invoking the First Amendment as a bar to criminal aiding and abetting charges, the satisfaction of one of the "qualifications" brought forth by the court in *Rice* would render the argument insignificant.[195] The first qualification is that the First Amendment may dictate a heightened intent requirement to preserve the important values serving as the foundation of the First Amendment.[196] The *Rice* court, however, noted that the First Amendment would not necessarily protect a speaker who distributed his or her message to a wide audience.[197] The exact words of that court prove to be persuasive when considering the problem of bomb-making instructions on the Internet:

> Were the First Amendment to offer protection even in these circumstances, one could publish, by traditional means or *even on the internet*, the necessary plans and instructions for assassinating the President, for poisoning a city's water supply, for blowing up a skyscraper or public building, or for similar acts of terror and mass destruction, with the specific, indeed even the admitted, purpose of assisting such crimes—all with impunity.[198]

VI. SCHOLARLY VIEWS AND POTENTIAL SOLUTIONS

An analysis of existing laws with respect to the Web demonstrates that the new technology may not necessitate the creation of new jurisprudence.[199] Before settling on this conclusion, it is important to consider both the thoughts of constitutional scholars regarding the issue and the alternatives to forming new First Amendment jurisprudence in response to the new technology. In 1996, Cass Sunstein wrote what eventually became prophetic words: "It is likely, perhaps inevitable, that hateful and violent messages carried over the airwaves and the Web will someday be responsible for acts of violence."[200] Sunstein believes that, in general, tests such as *Brandenburg* make a great deal of sense and function to protect most speech on the Web.[201] On the other hand, Sunstein

195. *See Rice*, 128 F.3d at 247.

196. *See id.*

197. *Id.* at 248. The court cited to *Barnett*, *Mendelsohn*, and *Buttorff* in its discussion.

198. *Id.* (emphasis added).

199. *See* Kegley, *supra* note 23, at 1019.

200. Sunstein, *supra* note 10, at 367. According to Sunstein, the questions for constitutional lawyers are whether the probability merits the restriction of such speech, whether these restrictions would be acceptable under the First Amendment, and whether preexisting law bears on the current issue. *See id.* at 368.

201. *See id.* at 370.

warns that judges and attorneys should exercise a great degree of caution when dealing with these issues.[202]

With respect to bomb-making instructions, Sunstein believes that these materials do not deserve much constitutional protection and thus, regulating these materials would "not place the government in a position where it does not belong."[203] According to Sunstein, messages that are available to large numbers of people create a greater risk of harm because of the large amount of people exposed to the speech.[204] Therefore, the requirements for protection should be loosened.[205] "It would be a short step, not threatening legitimate public dissent, for the Federal Communications Commission to impose civil sanctions on those who expressly advocate illegal acts aimed at killing people."[206] On the other hand, there are also difficulties in distinguishing between the counsels of violence that should be protected and the counsels of violence that should not be protected.[207]

A counterargument to Sunstein is that what he advocates is a double standard which has no justification in the Constitution.[208] Specifically, nothing in the First Amendment says that ideas are protected only in situations where a large audience is not reached and where ideas are not likely to persuade someone to act.[209] According to Jonathan Wallace and Mark Mangan, "[s]ince the First Amendment is based on the faith that good speech will always win, it is unimaginable that any speech could be ruled illegal *because* of its success in reaching a mass market."[210] Others, such as University of Houston law professor David R. Dow, believe that the current law protects too little speech.[211] Dow proposes a

202. *See id.* at 371.

203. *Id.* at 372.

204. *See id.* at 370–71.

205. *See id.*

206. *Id.* at 371.

207. *See id.*

208. *See* JONATHAN WALLACE & MARK MANGAN, SEX, LAWS, AND CYBERSPACE 160 (1996). "Sunstein wants to have it both ways; bomb manuals are evil because they advocate violence, but may be banned because they offer only information, not advocacy."

209. *See id.*

210. *Id.*

211. *See* David R. Dow, *The Moral Failure of the Clear and Present Danger Test*, 6 WM. & MARY BILL OF RTS. J. 733, 735 (1998); *see also* Theresa J. Pulley Radwan, *How Imminent is Imminent?: The Imminent Danger Test Applied to Murder Manuals*, 8 SETON HALL CONST L.J. 47, 73 (1997). "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."

"nearly categorical prohibition" against the restriction of speech.[212] His idea is that speech merits First Amendment protection unless (1) the speaker's intent was to cause an unlawful injury; (2) the injury occurred as a proximate result of the speech; and (3) the speaker overwhelmed the will of the listener.[213] Dow envisions a standard in which criminal defendants, for example, cannot attribute their acts to another's speech.[214]

Curtis E. A. Karnow, a computer law expert, believes that the situation is more complicated than a success/lack of success problem because of the blurring of the distinction between the public market and the private market.[215] He considers the Internet as a whole a combination of constantly changing public and private interests in networks, cables, satellites, software, and data.[216] This melding of interests, according to Karnow, would lead to both a desire for more regulation and a greater basis for contesting those regulations on First Amendment grounds.[217] Karnow's concern is that judges who know little about technology will defer to the decisions of the various regulatory agencies.[218] Courts may then be more likely to utilize the strict reasoning from previous cases involving the television and radio industries rather than the "no holds barred" approach taken with the print media.[219] However, Karnow asserts that the First Amendment will nonetheless prevail because the Internet allows society to exchange information and debate ideas.[220] Speech on the Web will be "as privileged as speech on the street, because the Internet is a public thoroughfare; as privileged as the printing press, because on the Internet we are all broadcasters, reporters, and the public."[221]

CONCLUSION

As Cass Sunstein correctly predicted, and as Eric Harris and Dylan Klebold ultimately proved through their actions on April 20, 1999, the Web has become a source of information for those persons who wish to undertake acts of violence. People now have the ability to turn on their computers, and in only a few keystrokes and mouse clicks, access

212. Dow, *supra* note 211, at 735.
213. *See id.*
214. *See id.*
215. *See* CURTIS E.A. KARNOW, FUTURE CODES: ESSAYS IN ADVANCED COMPUTER TECHNOLOGY AND THE LAW 238 (1997).
216. *See id.*
217. *See id.*
218. *See id.*
219. *See id.*
220. *See id.*
221. *Id*. at 239.

information that they can eventually utilize to create death and destruction. The question is whether the publishers of the information from the Web can be punished, and if so, in what way? It is unlikely that web publishers will be able to utilize the First Amendment to seek refuge from criminal charges of aiding and abetting. However, unless courts apply the reasoning for punishing criminal aiding and abetting to the civil context as the Fourth Circuit did in *Rice*, it is likely that web publishers will reap the benefits of First Amendment protections given to their counterparts in other forms of media. The laws in existence today that are easily applied to the Web, coupled with the various methods for people to screen out dangerous Web content, illustrate that there is no need for changes in the existing laws.