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Christopher E. Campbell

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MURDER MEDIA—DOES MEDIA INCITE VIOLENCE AND
LOSE FIRST AMENDMENT PROTECTION?

CHRISTOPHER E. CAMPBELL*

INTRODUCTION

Should we allow First Amendment protection to a publisher who “intended and had knowledge that [its] publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications?” Should First Amendment protection preclude liability where movie producers “intended to incite viewers of the film [Natural Born Killers] to begin, shortly after viewing the film, crime sprees such as the one that led to the shooting of Patsy Byers?” Although the defendants in these lawsuits stipulated to these facts in their motions for summary judgment, they fully expected to win their motions. Both motions were denied, however, by courts that ruled that the First Amendment did not protect these defendants from potential liability. Both courts ruled that a jury could find that the defendants’ actions fell under the incitement to imminent lawless activity exception to the First Amendment guarantee of free speech.

Despite the lack of any causal link between violent media and antisocial behavior, we are more and more willing to hold publishers and producers responsible for the violent actions of their readers or viewers. We seem to ignore “the independent intervening cause that

* J.D., Chicago-Kent College of Law, Illinois Institute of Technology, 1999; M.B.A. and B.A., University of Illinois. The author is a law clerk for the Honorable Ann Claire Williams, United States Court of Appeals for the Seventh Circuit. After November 2000, the author will be associated with Latham & Watkins in Chicago, Illinois. The author thanks Professor Steven J. Heyman for his encouragement, insight, and valuable criticisms and Eric R. Moran for his careful editing and constructive comments. The views in this Note are strictly those of the author, who can be reached at ccampbel@21stcentury.net.

3. In both cases, the trial courts ruled in favor of the defendants but were later overruled by appellate courts.
4. See discussion infra Part III.A.
breaks the chain of circumstances leading from a book to action: the mind and judgment of the reader." Should our society be comfortable with an increased censorship of ideas just because some sociopaths read the same books and watch the same movies as we do?

This Note will review these cases and how they fit into First Amendment jurisprudence on incitement. Next, this Note will review First Amendment theories and how they approach incitement analysis. The Note will also analyze the correlation between media and violence and how this analysis should fit into First Amendment jurisprudence. Finally, this Note will argue that these defendants should have been given First Amendment protections and their cases dismissed.

I. BACKGROUND

A. The Hit Man Manual

In 1983, Paladin Enterprises published Hit Man: A Technical Manual for Independent Contractors. Since then, the publisher has sold over 13,000 copies. Paladin markets the book with the following description:

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. For academic study only.

Hit Man includes chapters on mental and physical preparation; equipment selection; the disposable silencer; homework and surveillance; finding employment—what to charge and what to avoid; and getting the job done right. Paladin argues that the primary readers of this book are readers of true crime stories, mystery writers,

6. Although written under the pseudonym of Rex Feral, the author of Hit Man is reportedly a woman. See ROD SMOLLA, DELIBERATE INTENT 230, 235 (1999). Professor Smolla is a First Amendment attorney who, even though a vigorous advocate of free speech, agreed to represent the plaintiffs in their suit against Paladin Press. See id. at x. Deliberate Intent is his story of that lawsuit. See id. at xi.
7. See Rice, 940 F. Supp. at 838.
8. Id.
9. See id. at 847 n.4.
and law enforcement personnel. The book also contains the following disclaimer:

IT IS AGAINST THE LAW TO manufacture a silencer without an appropriate license from the federal government. There are state and local laws prohibiting the possession of weapons and their accessories in many areas. Severe penalties are prescribed for violations of these laws. Neither the author nor the publisher assumes responsibility for the use or misuse of information contained in this book. For informational purposes only!

In January 1992, James Perry purchased *Hit Man* and another publication, *How to Make a Disposable Silencer, Vol. II*, from Paladin. Later that year, Perry contracted with Lawrence Horn to have Perry murder Horn's ex-wife and Horn's eight-year-old son Trevor. Trevor was paralyzed for life from a previous injury. As a result of his injuries, Trevor had been awarded $2 million, which was held in trust. Horn wanted his son killed so that he could collect his son's trust benefits. In March 1993, Perry murdered Horn's wife and son along with his son's private nurse. The district court found that "Perry followed a number of instructions outlined in *Hit Man* and *Silencers* in planning, executing, and attempting to get away with the murders." But the court also found that Paladin "had no specific knowledge that either Perry or Horn planned to commit a crime; that Perry and Horn had entered into a conspiracy for the purpose of committing a crime; nor that Perry had been retained by Horn to murder [Perry's wife, his son, and his son's nurse]."

In committing the murders, Perry followed a number of instructions that were outlined in *Hit Man*. He used the recommended rifle, disassembled it, and removed the serial number all as suggested in the book. He followed the book's instructions for

12. See id. at 839.
13. See id.
15. See id.
16. See id.
17. See Rice, 940 F. Supp. at 839.
18. Id.
19. Id.
20. The prosecution argued that *Hit Man* "largely relieved James Perry of the need to do much independent thinking in planning the murder. Every step required for the murders was right there in front of him in the book, all laid out." SMOLLA, supra note 6, at 66.
manufacturing a homemade silencer. The book suggested that victims should be shot at point-blank range with three shots through the eyes; Perry shot two of his victims from three feet away and shot each of them three times in the eyes. Additionally, Perry followed references in Hit Man for soliciting clients, for using fake license plate numbers on rented cars, for murdering his victims in their home, for making the murders look like part of a burglary, and for discarding the evidence after the crime. Ironically, Perry was caught because he did not follow the book’s advice on keeping his identity a secret; he checked into a motel the day of the murders using his real name and address. Perry was convicted of murder and sentenced to death. Horn was convicted of hiring Perry to commit the murders and was sentenced to life without the possibility of parole.

The relatives and representatives of the murder victims filed a wrongful death action against Paladin alleging that it aided and abetted Perry in committing the murders by publishing killing instructions in Hit Man. Paladin filed a motion for summary judgment with the district court arguing that the First Amendment gives it the right to publish this book. For the purposes of this motion, Paladin conceded that it “assisted [Perry] in the subsequent perpetration of the murders.”

The district court granted Paladin’s motion for summary judgment. Although Paladin conceded that it intended Hit Man to be purchased and used by criminals, Paladin did not intend imminent lawless action. Furthermore, the court did not find that the book

22. See id.
23. See id.
24. See id. at 840.
27. See id. at 838.
28. See id.
29. Id. at 839. Paladin also stipulated that it 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 [and that] in publishing, marketing, advertising and distributing Hit Man and Silencers, defendants intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications.
30. See Rice, 940 F. Supp. at 849.
31. See id. at 847.
“constitute[d] incitement or ‘a call to action.’” The court concluded that our democracy and Constitution does not restrict free speech just because an emotionally troubled person may be adversely affected.

The constitutional protection accorded to the freedom of speech and of the press is not based on the naïve belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.

The appellate court disagreed. It ruled that a jury could find that Paladin aided and abetted the murders by providing Perry with detailed instructions on how to prepare, commit, and cover up the murders. Moreover, a jury could find that Hit Man had no other purpose but to facilitate murder. Consequently, the circuit court reversed the district court’s summary judgment decision and remanded the case for trial.

Even though Perry committed the murders a year after purchasing Hit Man, and ten years after the book was published, the Fourth Circuit ruled that Paladin’s actions in publishing the book amounted to aiding and abetting because “culpability in such cases is premised, not on defendants’ ‘advocacy’ of criminal conduct, but on defendants’ successful efforts to assist others by detailing to them the means of accomplishing the crimes.” Furthermore, the court found that Hit Man is more than mere abstract advocacy.

A jury could reasonably find . . . that Paladin aided and abetted the murders at issue through the quintessential speech act of providing step-by-step instructions for murder . . . so comprehensive and detailed that it is as if the instructor were literally present with the would-be murderer not only in the preparation and planning, but in the actual commission of, and follow-up to, the murder.

Although “[n]o one stood next to Perry when he committed the murders, telling him to do them or forcing him to take the action,” the court’s ruling means that “[w]ords, printed words, no less, published a decade before a murder can be held, in part, to blame for

32. Id.
33. See id. at 848.
34. Id. at 849 (quoting Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1019 (5th Cir. 1987)).
36. See id.
37. See id.
38. Id. at 246 (internal quotations and citations omitted).
39. Id. at 249.
Thus, the appellate court concluded that no jury could reasonably find that the book has any other value but to provide instructions and training for committing murder for hire.

The appellate court found Hit Man so powerfully written that the book apparently had the power to encourage persons to commit murder where they would otherwise have the will not to. Thus, the Fourth Circuit apparently became the first court to find a book responsible for committing murder. The court noted that the book reassures those contemplating the crime that they may proceed with their plans without fear of either personal failure or punishment. And 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. The book is so effectively written that its protagonist seems to be present at the planning, commission, and cover-up of the murders the book inspires. The book is arrestingly effective in the accomplishment of its objectives of counseling others to murder and assisting them in its commission and cover-up.

The book's "powerful prose" does not qualify, however, as "rhetorical threats of politically or socially motivated violence" that have traditionally been protected by the First Amendment. The court apparently reached this conclusion because "ideas simply are neither the focus nor the burden of the book."

Although the appellate court attempted to find neutral reasons for reversing the district court, the opinion appears to be a visceral reaction to the gruesome murders and the stark similarities with Hit Man. Would the court's decision have been the same, however, if these explicit murder instructions had been part of a John le Carré or Tom Clancy novel? Or are readers of these novelists able to resist

41. See Rice, 128 F.3d at 249.
42. The court comments on the book's "powerful prose" that "encourages its readers in their specific acts of murder." Id. at 252.
44. Rice, 128 F.3d at 252.
45. Id. at 262.
46. Id.
47. Both the appellate court opinion and Smolla's book on the case, see supra note 6,
their "powerful prose" while Paladin readers are not?

Furthermore, the appellate court apparently ignores the plaintiffs' acknowledgement that Paladin markets its books to maximize sales to all of the public. Perry was not the only person to purchase *Hit Man*. The other 13,000 readers include authors writing about crime and criminals, law enforcement personnel attempting to gather information about criminals, persons who read true crime accounts for entertainment, persons who fantasize about committing crimes but do not, and criminologists who study criminals and their methods.\(^{48}\)

In 1998, the Supreme Court declined to review the Fourth Circuit's ruling.\(^ {49}\) In May 1999, on the eve of trial, Paladin and the plaintiffs settled.\(^ {50}\) According to Paladin, it was prepared to go to trial but its insurance company, which was providing most of the financial support, elected to settle.\(^ {51}\) Although details were not officially released, Paladin reportedly paid the plaintiffs "several million dollars" and "agreed to contribute money to two charities chosen by the plaintiffs and to turn over to them the remaining 700 copies of *Hit Man*."\(^ {52}\) Paladin also ceased publication of *Hit Man*.\(^ {53}\)

contain extensive quotations from *Hit Man*. Now that *Hit Man* is no longer being published, see infra text accompanying note 53, should we hold Smolla or the appellate court liable if a criminal follows the advice now quoted in these texts?


\(^ {49}\) See Paladin Enters., Inc. v. Rice, 523 U.S. 1074, 1074 (1998). In its brief opposing certiorari, the plaintiffs argued that *Hit Man* was "a technical manual published for the independent contractor . . . , punctuated page by page with exhortation and encouragement intended to prepare and steel the criminal for action." SMOLLA, supra note 6, at 225.

\(^ {50}\) See Jean Hellwege, Hit Man Case Settles, TRIAL, July 1, 1999, at 114.

\(^ {51}\) See Paladin Press *Hit Man Case Settled* (last modified Dec. 12, 1999) <http://www.paladin-press.com/settlement.html>. Paladin may have also been concerned that it could not find a sympathetic jury "in the wake of the Columbine High School shootings." Boulder Publisher Ends "Hit" Manual Suit; Suit Costs Paladin Millions to Settle, DENV. POST, May 22, 1999, at B1. It may also have been influenced by a recent jury verdict that held a television talk show liable for the speech of one of its guests. See Grant, supra note 43 (reporting on the $25 million verdict against *The Jenny Jones Show* for negligently allowing a gay guest, Scott Amedure, to reveal his affection for another male guest, Jonathan Schmitz, which lead to Schmitz murdering Amedure).

Paladin's insurance company originally refused coverage because the plaintiffs' lawsuit alleged that Paladin had engaged in the intentional act of aiding and abetting murder. See SMOLLA, supra note 6, at 122-23. Only after Paladin sued did its insurance company agree to provide coverage. See id. at 123.

\(^ {52}\) Hellwege, supra note 50, at 114; Boulder Publisher Ends "Hit" Manual Suit, supra note 51, at B1.

\(^ {53}\) See Paladin Press *Hit Man Case Settled*, supra note 51; see also SMOLLA, supra note 6, at 272.
B. Natural Born Killers

On March 8, 1995, Sarah Edmondson shot and seriously wounded Patsy Byers during an armed robbery of a convenience store. Benjamin Darrus accompanied Edmondson and encouraged her in the armed robbery and shooting. Prior to shooting Byers and murdering a Mississippi cotton gin owner, Edmondson and Darrus repeatedly viewed the movie \textit{Natural Born Killers} on videotape, sometimes under the influence of drugs.

Byers’s family and her estate filed a suit for damages sustained by Byers and her family as a result of the shooting and included the producers of the videotape as defendants. Byers alleged that the producers knew or should have known that \textit{Natural Born Killers} “would cause and inspire people such as Edmondson and Darrus to commit crimes such as the shooting of Byers.” The trial court dismissed the claim finding no cause of action.

On appeal, the appellate court reversed and remanded, finding that the First Amendment does not bar this cause of action.

The appellate court ruled that the facts as alleged by the plaintiffs fit into the incitement to imminent lawless action exception to the First Amendment guarantee of free speech. The Louisiana appellate court cited the Fourth Circuit’s opinion in \textit{Rice} in reaching its conclusion that the First Amendment does not bar actions where the plaintiff has alleged that the defendant intended to assist and facilitate criminal acts.

55. See id.
56. See id. at 684-85.
57. See id. at 685.
58. Id. at 684.
59. See id. at 685.
60. See id. at 692.
61. See id. at 689.
62. See id. at 691. Professor Smolla, the First Amendment scholar who represented the plaintiffs in \textit{Rice}, acknowledged that

The \textit{Natural Born Killers} case was a defeat for the First Amendment, and thus a victory for Paladin, enabling it to crow “I told you so.” This was precisely what Paladin and its numerous amici in our suit had warned against. We’d claimed they were all Chicken Littles shouting that the sky was falling. But now they can assert that the sky is indeed beginning to fall.

SMOLLA, supra note 6, at 265.

In March 1999, the United States Supreme Court, in denying \textit{certiorari}, implicitly refused to entertain defendants’ argument that \textit{Natural Born Killers} is constitutionally protected speech. See Time Warner Entertainment Co. v. Byers, 526 U.S. 1005 (1999); see also Grant, supra note 43 (reporting that defendants, in their unsuccessful \textit{certiorari} petition, argued that the Louisiana
C. The Supreme Court on Incitement

In 1919, Justice Oliver Wendell Homes, Jr., wrote for a unanimous court in Schenck v. United States:

The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. With this opinion the Court ruled that mere intent or preparation is not enough to void First Amendment protection for speech. The speech must come dangerously close to an illegal act to be proscribable; it must be akin to "attempt" in an attempted murder.

Although Schenck's clear-and-present-danger test came to be strictly interpreted by the Court, at the time "this standard was satisfied whenever, in the legislature's judgment, speech had a tendency to cause social harm." Holmes himself took a stricter approach to incitement when he dissented in Abrams v. United States in 1919. Holmes argued that only imminent danger justified limiting the freedom of speech. Furthermore, Holmes suggested that the value of free speech was in pursuit of truth. He believed that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Nevertheless, Holmes would not grant First Amendment protections for a "persuasion to murder." The Court would later adopt the Holmes approach in Whitney v. California.

In 1969, the Court, in Brandenburg v. Ohio, developed a two-part test for determining when a state can proscribe the advocacy of force. First, the advocacy must be "directed to inciting or producing imminent lawless action." Second, the advocacy must be "likely to
incite or produce such action.” The Court further emphasized that abstract advocacy of force or violence is protected by the First Amendment while preparing and directing a group for imminent violent action would not be.

In *Brandenburg*, the appellant was convicted under Ohio’s Criminal Syndicalism Statute for advocating revenge “if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race.” The Court found that this was not incitement to imminent lawless action. Furthermore, the Court ruled that the statute violated the First and Fourteenth Amendments and thus, was unconstitutional.

The Criminal Syndicalism Statute was directed at speech that advocated violence as a means of accomplishing industrial or political reform. Thus, some would argue that *Brandenburg* is only protecting political speech. Consequently, *Hit Man* and *Natural Born Killers* would not receive protection under the *Brandenburg* test. Furthermore, if the *Brandenburg* Court could find that *Hit Man* is more than “mere advocacy”—perhaps how-to manuals would receive less protection than abstract political advocacy.

Justice Brandeis, in a concurring opinion in *Whitney*, further clarified when incitement to imminent lawless action would not be protected by the First Amendment. Suppression of free speech requires more than a reasonable expectation that harm will follow from the speech; the expected harm must also be imminent. “The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiring, must be borne in mind.” Furthermore, a clear and present danger is not present unless the expected harm is so imminent that full discourse is not possible. “If there is time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education,

72. *Id.*
73. *See id.*
74. *Id.* at 446.
75. *See id.* at 448-49.
76. *See id.* at 449.
77. By denying certiorari in the *Rice* case, is the Court implicitly ruling that a book can incite imminent lawless action? *See* Franklyn S. Haiman, *Setting Limits on Free Speech*, AM. PROSPECT, Jan. 3, 2000, at 61, 61 (reviewing ROD SMOLLA, DELIBERATE INTENT (1999)). The Court has not yet explicitly ruled on a case where it found that a defendant has crossed the *Brandenberg* line. *See id.*
79. *Id.*
80. *See id.*
the remedy to be applied is *more speech, not enforced silence.*" \(^{81}\)

II. FIRST AMENDMENT THEORY AND INCITEMENT

A. The Search for Truth

The marketplace of ideas or "the search for truth" theory of the First Amendment exempts incitement from constitutional protection only when the speech is likely to produce imminent lawless action.\(^ {82}\) For example, John Stuart Mill draws a distinction between ideas circulated through the press and the same ideas delivered orally to an excited group of people.\(^ {83}\) The former should generally be protected by the freedom of speech, while the latter would not.\(^ {84}\)

Incitement under this theory is punished because it is equivalent to acts that produce an immediate injury or are highly probable to cause an imminent breach of the peace.\(^ {85}\) "The harm is done as soon as [the words] are communicated, or is liable to follow almost immediately."\(^ {86}\) Words that have a potential for only future harm should not be regulated.\(^ {87}\)

Under the marketplace theory, free speech is valued because it aids in a society's search for the "truth."\(^ {88}\) Thus, some words are not protected by the First Amendment because their harm is immediate, and they do not offer society the opportunity to counter them with more speech.\(^ {89}\) For example, some would argue that lewd comments, obscenity, fighting words, and profanity should not be protected by free speech because society does not have the opportunity to argue against them.\(^ {90}\) The critical issue for marketplace theorists is under what circumstances speech creates a likelihood for imminent lawless action.

Underlying the search-for-truth approach to First Amendment

\(^{81}\) Id. (emphasis added).
\(^{82}\) See discussion supra Part I.C.
\(^{84}\) See id. ("[E]ven opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act.").
\(^{85}\) See Zechariah Chafee, Jr., *Free Speech in the United States* 149-50 (1948).
\(^{86}\) Id.
\(^{87}\) See id.
\(^{88}\) See id.
\(^{89}\) See id.
\(^{90}\) See id. at 150.
protections is the value of the speech being protected. As discussed above, *Brandenburg* addressed political speech. Holmes’s marketplace-of-ideas analysis focused on the essential role that ideas play in a democratic society. Thus, not all speech may enjoy the same level of protection under the search-for-truth theory.

The Court and commentators concentrate their discussions of incitement with oral or written pleadings to specific target audiences. Consequently, it is difficult to see how the traditional view of incitement under the marketplace theory applies to either *Hit Man* or *Natural Born Killers*. The plaintiffs under this theory must prove not only that the speaker (author or producer) intended immediate lawless action to occur but also that the speech (book or movie) had a high probability of causing such a lawless action. Furthermore, *Hit Man* and *Natural Born Killers* would be without speech value only if full discourse was not available to counter the messages contained within them. If the marketplace theory only applies to ideas and political speech, however, *Hit Man* and *Natural Born Killers* will have less (or no) First Amendment protection.

**B. Democratic Self-Government**

Many supporters of free speech value it because of its relationship with democracy and self-government. Early proponents of this were Cato, Jefferson, and Madison. They believed that humans were born with natural rights that included the right to self-government. Free speech was indispensable to insure that government satisfied its social contract with the governed. Furthermore, free speech keeps potential tyrants at bay.

These views were later echoed by Justice Brandeis in *Whitney v. California* when he said: the “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . . [T]he greatest menace to freedom is an inert people.” He asserted that the government’s role was to insure

91. See G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 412 (1993) (finding that “Holmes eventually came to believe that there was an important social interest in protecting speech as a means of informing public opinion in a democracy”).

92. See generally Heyman, *supra* note 64, at 1282-96 (discussing the natural rights origins of the First Amendment).

93. See id.

94. See id.

95. See id.

96. See id.

97. 274 U.S. 357, 375 (1972) (Brandeis, J., concurring).
a robust discussion by the citizens regarding public issues. Free speech avoids majority tyrannies. Consequently, free speech should be suppressed only when there is "reasonable ground to fear that serious evil will result if free speech is practiced."

Alexander Meiklejohn is the leading modern proponent of free speech's value to democratic self-government. Like Cato and Madison, he argued that free speech is necessary for self-government. Self-government makes citizens wiser by infusing the public discussion with new and fresh ideas. Furthermore, self-government is part of what makes us human: "men are not recognizable as men unless, in any given situation, they are using their minds to give direction to their behavior." Free speech is indispensable to self-government because the best government will only prevail through constant criticism and analysis of current values and political organizations. Moreover, as Lee Bollinger argues, free speech combats the general human inclination to be intolerant, especially toward minority participants in the political process.

Meiklejohn and other self-government advocates of First Amendment protections are criticized because their free speech philosophy protects only political speech. Thus, under a narrow view of political speech, commercial speech, art, and literature would not be protected by the First Amendment. Meiklejohn countered this criticism by arguing that art and literature are needed to promote the human values necessary for self-government.

Cass Sunstein takes a two-tier approach to the First Amendment. High-value speech should be afforded more protection than low-value speech. Government need only have a reasonable basis for regulating low-value speech. Although political speech is high value, to qualify for protection it must be both intended and received

98. See id.

99. See id.

100. Id. (emphasis added).

101. See ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1960).

102. See id. at 13.

103. Id.

104. See LEE C. BOLLINGER, THE TOLERANT SOCIETY 107 (1986). Although Bollinger does not argue a self-government theory of free speech, tolerance toward minority rights would seem to be a prerequisite for a successful democracy. Thus, tolerance to minority viewpoints supports self-government First Amendment theory as well.


107. See id. at 155 (high-value speech is subject to strict scrutiny review).
as input regarding public policy concerns. Low-value speech is far from political speech, has a noncognitive appeal, and does not communicate a message. Under this definition, art is generally high value but pornography is low value. Violent speech may also be considered low value.

Sunstein argues that the First Amendment would not be offended by narrow restrictions on language that "expressly advocates illegal, murderous violence in messages to mass audiences." For example, instructions on how to make the type of bomb that was used in the Oklahoma City bombing were posted on the Internet; Sunstein believes that these types of instructions are not a "point of view," have no democratic value, and can be restricted without offending the First Amendment.

While Sunstein bases his argument on the differences between low-value and high-value speech, he supports his restrictions on low-value speech with his belief of a direct causal link between violent messages and violent acts. He writes: "It is likely, perhaps inevitable, that hateful and violent messages carried over the airwaves and the Internet will someday, somewhere, be responsible for acts of violence." But he does not provide evidence of such a link. Would we really have less violence if this speech was censored?

*Hit Man* and *Natural Born Killers* apparently would not be afforded First Amendment protection under the narrow political speech and democratic self-government approaches. On the other hand, plausible arguments could be made that both the book and the movie are making political statements. Some would suggest that the writer, the director, and the producer of *Natural Born Killers* were arguing that society should hold the political system and the news media responsible for creating the monsters that go on killing sprees. Others might argue that, by encouraging the public to take justice into their own hands, *Hit Man* is an indictment against our criminal justice system. Finally, an argument can be made that both are art or literature and, therefore, deserve First Amendment protection

108. See id. at 130.
109. See id.
111. See Sunstein, supra note 110, at 604.
113. See id.
114. Id.
because of the intrinsic value art in general makes to the human values that are needed for self-government.

These arguments are more plausible for *Natural Born Killers*; it certainly fits into our traditional view of art and literature. It is a fictional story that does not explicitly encourage lawless behavior. Furthermore, its story concerns crime, the criminal justice system, and the contemporary media, all of which are of political importance.

Arguing that *Hit Man* should be afforded protection under democratic self-government theories of the First Amendment, however, does not work. *Hit Man* is not espousing contract killings because of a political belief but, instead, is helping would-be assassins get away with murder. Moreover, as a how-to book on contract killing, it does not fit into Meiklejohn’s political speech theory. Although Meiklejohn made an exception for art and literature that are needed to promote self-government values, he would not find any self-government value in this literature.

**C. Self-Fulfillment and Self-Realization**

A number of diverse philosophies can be described as self-fulfillment or self-realization approaches to free speech theory. C. Edwin Baker argues that the First Amendment protects free speech because individual liberty and equality are essential human values. Consequently, democratic governments must support and protect these values. "[D]emocracy acts illegitimately when its rules or other actions are inconsistent with respect for people’s equality and liberty." Thus, in order to obtain noncoerced agreement among the

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115. See Rice, 128 F.3d. at 235. “It is my opinion that a professional hit man fills a need in society and is, at time, the only alternative for ‘personal’ justice. Moreover, if my advice and the proven methods of this book are followed, certainly no one will ever know.” *Id.* at 236 (quoting from *Hit Man* and its author’s reasons for writing an “instruction book on murder”).

116. This is apparently the reason that Rod Smolla, a self-described champion of the First Amendment, “experienced a personal metamorphosis” and agreed to represent the plaintiffs in a civil suit against Paladin Press. See SMOLLA, supra note 6, at x-xi. Smolla believes “that the American social compact embraces a wonderful and emancipating and robust conception of freedom of speech, a conception so bold and liberty-loving that even expression espousing revolution, violence, and murder must be tolerated, as long as those views are advanced as mere abstract teaching.” *Id.* at 270. However, Smolla argues, “*Hit Man* can stake no plausible claim to the nourishment of the human spirit. The training and incitement of killers does not advance the rule of law or contribute to the deliberative processes of democracy.” *Id.* at 271.


118. See id.

citizens and between the citizens and their government, citizens must
be free to decide who they are and free to express their opinions.\textsuperscript{120} “To be noncoerced moral agents capable of entering into noncoerced
agreements about how to be and how to contribute to social life
requires that people be free: free to praise, associate, initiate,
advocate; to condemn, reject, criticize; and to create, play, display,
solve, comprehend, interpret.”\textsuperscript{121} Consequently, free speech means:
“(i) self-expressive or substantially valued or voluntarily interactive
behavior (ii) that operates nonviolently and without coercively
intruding into other entities’ realm of decisionmaking authority.”\textsuperscript{122}

Baker criticizes the marketplace theory for focusing on listeners.
Moreover, he argues that the marketplace theory is faulty because
truth is not objective, people are not rational, people are influenced
by things other than speech, and marketplace failures are likely.\textsuperscript{123}
David Strauss argues that the “more speech” argument of the
marketplace theorists does not make sense; it is not always possible
for more speech to persuade people not to do bad acts.\textsuperscript{124} On the
other hand, the self-realization model
holds that the free speech clause protects not a marketplace, but
rather an arena of individual liberty from certain types of
government restrictions. Speech or other self-expressive conduct is
protected not as a means to achieve a collective good but because
of its value to the individual. The [self-realization] theory justifies
protection of expression because of the way the protected conduct
fosters individuals’ self-realization and self-determination without
improperly interfering with the legitimate conduct of others.\textsuperscript{125}

The self-realization theorists also criticize the self-government
approach to free speech. The value of free speech is not just political.
For example, David Richards finds that free speech is based on a
deeper moral tenet of the value in human life of having autonomous
decision-making power.\textsuperscript{126} These moral foundations lead to the
conclusion that free speech should not be infringed merely because of
popular majority wishes.\textsuperscript{127}

\textsuperscript{120} See Baker, supra note 119, at 1019.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 986.
\textsuperscript{123} See Baker, supra note 117, at 12-17; see also David A. Strauss, Persuasion, Autonomy,
\textsuperscript{124} See Strauss, supra note 123, at 347-53.
\textsuperscript{125} Baker, supra note 117, at 5.
\textsuperscript{126} See David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of
\textsuperscript{127} See id. “Notwithstanding the detestation of and outrage felt by the majority toward
certain contents of communication, the equal liberty principle absolutely forbids the prohibition
Baker generally takes an absolutist approach to free speech. Even minor suppressions of speech to achieve legitimate ends are not justified.128 “[A]s long as speech represents the freely chosen expression of the speaker, depends for its power on the free acceptance of the listener, and is not used in the context of a violent or coercive activity, freedom of speech represents a charter of liberty for noncoercive action.”129 Speech is coercive, and thus subject to regulation if the speaker attempts to undermine the listener’s autonomy and integrity.130 For examples, self-realization theory does not protect speech that occurs while committing a crime, speech that the speaker does not choose as his or her own (e.g., commercial), or speech intended to distort the listener’s autonomy (e.g., fraud, perjury, blackmail, espionage, or treason).131 Also, according to David Strauss, left unprotected is speech that elicits action before the listener has had an opportunity to rationally think about the speech and its potential counterarguments.132 This argument is similar to the marketplace of ideas approach that does not protect speech when society does not have an opportunity to offer counterarguments.133

Martin Redish believes that the listener gains as much self-fulfillment through free expression as the speaker.134 Thus, the government has no business determining “value” for either the speaker or the listener.

For if an individual wishes to buy a car because he believes it will make him look more masculine, or to vote for a candidate because the candidate looks good with his tie loosened and his jacket slung over his shoulder, who are we to tell him that these are improper acts...? Society has left the ultimate right to decide to the individual, and this would not be much of a right if we prescribed how it was to be used.135

Even if speech has the potential for harm, Baker does not generally support suppression.136 Speech is not generally physically

of such communications on the ground of such detestation and outrage alone.” Id. at 68.

128. See BAKER, supra note 117, at 162.
129. Id. at 69.
130. See id. at 59.
131. See id.
132. See Strauss, supra note 123, at 334-36.
133. See supra Part II.A.
134. See Redish, supra note 119, at 620 (arguing that Baker’s self-realization theory is deficient because he fails to realize that self-realization can be gained by receiving as well as expressing speech); see also Strauss, supra note 123, at 371 (arguing that “freedom of expression is designed to protect the autonomy of potential listeners”).
136. See BAKER, supra note 117, at 55-56.
violent or destructive. Harms from speech result from influencing the mind or emotions of the listener. But we generally hold the listener responsible for his or her actions unless the listener has been coerced to engage in the act. "The speaker’s harm-causing speech does not itself interfere with another person’s legitimate decision-making authority... [O]utlawing acts of the speaker in order to protect people from harms that result because the listener adopts certain perceptions or attitudes disrespects the responsibility and freedom of the listener." Baker would not allow free speech protections, however, when “speech plays merely the role of an instrument.”

Self-realization theory offers the strongest support for giving full First Amendment protections to Hit Man and Natural Born Killers. Both the book and the movie arguably “represent[] freely chosen expression of the speaker, depend[] for [their] power on the free acceptance of the listener, and [are] not used in the context of a violent or coercive activity.” Authors or producers have a right under the self-realization theory to express their views and opinions as long as they do not coerce others into following their viewpoints. Under this theory the speaker’s intent is not dispositive; even if the speaker intends the listener to perform an unlawful act, the speech cannot be restricted unless the listener is coerced.

Self-realization theory also focuses on the listener. The listener has the self-fulfillment right to read Hit Man or view Natural Born Killers. The listener, and not the speaker, is responsible for his or her violent actions unless coerced or forced to perform the acts. Consequently, the plaintiffs in these two cases must prove that the violent acts were directly caused by the defendants’ actions such that the criminals did not have the ability to control themselves.

137. See id.
138. See id.
139. See id.; Baker, supra note 119, at 981.
140. BAKER, supra note 117, at 56.
141. Baker, supra note 119, at 991.

If Pat enters a gun dealer’s shop and says: “Sell me a gun, I want to use it right away to kill Kelly,” or says, “I already have this loaded gun with which I want to kill Kelly, and I will give you five dollars if you will point Kelly out to me,” few free speech advocates will complain if the government treats the gun dealer’s assistance, whether providing a weapon or verbally providing an identification, as interchangeable.

Id.
142. BAKER, supra note 117, at 69.
143. Thus, most self-realization theorists would reject the Brandenburg incitement exception to First Amendment rights.
Thomas Emerson draws a distinction between expression and action. When expression can be equated with action, it can be regulated. "[T]he urging of immediate, specific acts of violence would, under circumstances where violence was possible and likely, fall within the category of 'action'". The expression becomes part of the action and can be regulated. Emerson finds a distinction between theoretical preparation for action and actual preparation in the conduct itself. The former is protected by the First Amendment, the latter is not.

Expression becomes action when it becomes a part of the conduct, even if the speaker did not directly engage in the criminal action. "[C]ommunication that is specifically concerned with a particular law, aimed at a particular person, and urges particular action, moves closer to action." For example, labor picket lines are not protected speech; they are acts. "A labor picket line is thus not so much a rational appeal to persuasion as a signal for the application of immediate and enormous economic leverage." Nonlabor picketing, however, is more loosely organized and is a "call to reason" and thus protected expression. But, solicitation to commit a crime should be proscribed "only when the communication is so close, direct, effective, and instantaneous in its impact that it is part of the action."

Franklyn Haiman disagrees with Emerson. Haiman believes that all speech is symbolic behavior; speech should never be thought of as action. Haiman distinguishes between speech that "is an integral part of illegal conduct" from "speech which incites to illegal conduct."

Speech that is part of illegal action can be regulated. For examples, speech that inevitably takes place during the execution of a
crime, or communication that takes place between coconspirators during the incipient stages of their activity do not get full First Amendment protection.\textsuperscript{156} Therefore, Haiman has no objection to the use of coconspirator's statements as evidence in a criminal trial. The symbolic activity that takes place during these activities is different than speech that incites others to illegal action.\textsuperscript{157} In the above examples, the parties have already decided to commit a crime.\textsuperscript{158}

Additionally, Haiman would hold a speaker responsible for results in those limited situations where humans can be "triggered" rather than "persuaded" to illegal conduct.\textsuperscript{159} Moreover, the speaker must \textit{know} that the "triggering" situation exists and deliberately takes advantage of it.\textsuperscript{160}

Do the [listeners] have the capacity to resist the communicator's inducements, or does the communication to which they are exposed set off an \textit{inevitable} chain reaction over which they have no control? If the former, then \ldots{} they, and not the communicators should be held responsible for any crimes they may commit. If the latter, we must ask if the communicators knew what they were doing and, if so, hold them accountable.\textsuperscript{161}

But human beings are not generally subject to this kind of influence.

Unless deceived, coerced, or mentally deficient, human beings are \textit{not} inanimate objects who are "triggered" by others; they are \textit{not} piles of kindling waiting for a spark to ignite them. They should \textit{not} be relieved of responsibility for their own behavior by the buck being passed to someone else who may have planted an idea in their minds.\textsuperscript{162}

Haiman criticizes the Supreme Court's \textit{Brandenburg} formulation for determining when incitement avoids First Amendment protections. Per Haiman, the Court should require that the imminent lawless action be serious.\textsuperscript{163} Moreover, the incitement exception should be limited to those situations where there is no opportunity to avert the evil by more speech.\textsuperscript{164} Finally, Haiman criticizes the Court for not addressing Justice Holmes's concern that "every idea is an incitement."\textsuperscript{165}

\textsuperscript{156} \textit{See id.} at 246-47.
\textsuperscript{157} \textit{See id.}
\textsuperscript{158} \textit{See id.}
\textsuperscript{159} \textit{See id. at 277.}
\textsuperscript{160} \textit{See id.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id. at 277-78.}
\textsuperscript{163} \textit{See id. at 277.}
\textsuperscript{164} \textit{See id.}
\textsuperscript{165} \textit{See id.} "'Every idea is an incitement' capable of setting 'fire to reason,' depending
Even under the current *Brandenburg* standards, Haiman argues that how-to publications should be protected by the First Amendment. He believes a court must answer the following five questions before finding that a how-to publication loses its free speech protection. One, what is the intent of the author?\textsuperscript{166} Two, is there a threat of *imminent* criminal activity?\textsuperscript{167} Three, is criminal activity *likely* to occur?\textsuperscript{168} Four, does the reader have the capacity to decide *not* to follow the instructions?\textsuperscript{169} Five, is there any proof that the reader was "triggered" by the speaker?\textsuperscript{170}

Both Emerson and Haiman would give First Amendment protections to *Hit Man* and *Natural Born Killers*. Under Emerson’s analysis, the solicitation of crime in either the book or the movie is not "so close, direct, effective, and instantaneous in its impact that it is part of the action."\textsuperscript{171} Furthermore, neither the author of *Hit Man* nor the producer of *Natural Born Killers* engaged in any actual preparation for the crimes that transpired.

Haiman would not hold the author or the producer liable unless it can be shown that they were an actual part of the criminal activity or if their speech "triggered" the illegal acts. Mere persuasion would not be enough under Haiman’s First Amendment approach. Haiman would hold only the perpetrators responsible for their actions unless they were "triggered" and it can be shown that the speakers knew that they were "triggering" their listeners.\textsuperscript{172}

\textsuperscript{166} See id. at 278-79.  
\textsuperscript{167} See id.  
\textsuperscript{168} See id.  
\textsuperscript{169} See id.  
\textsuperscript{170} See id.  
\textsuperscript{171} EMERSON, supra note 144, at 404.  
\textsuperscript{172} In his review of Smolla’s book on the *Hit Man* case, Haiman said:  
The decisive question for Smolla in deciding to represent these plaintiffs was whether Paladin Press had deliberately intended that some reader of *Hit Man* would actually follow the manual. For that there was abundant evidence, both circumstantial and testimonial, to convince him the answer was yes. But for many other First Amendment scholars, myself included, there is a second question that must also be answered affirmatively before they embrace a restriction on such speech: whether any book or other mass medium of communication addressed to the public at large and not directed to a particular target at a particular time and place can ever fail to qualify for First Amendment protection. My inclination is to say no. The reason is that there is simply no way that is compatible with freedom of speech and press to ensure, for example, that some psychologically disturbed person, by reading Hitler’s *Mein Kampf*, necessarily available in any public library, will not be motivated to go out and kill Jews, or that some alienated teenager, viewing legitimate TV news coverage of the Columbine High School massacre, will not attempt to copycat that crime. Those who commit such crimes of violence should be severely punished, but not the
E. Rights-Based Approach

Steven Heyman suggests that the various philosophies underlying support for freedom of speech—"natural" freedom, democratic self-government, the marketplace of ideas, and self-realization—also support other fundamental rights. These other rights include "personal security, privacy, reputation, and citizenship." Heyman argues that a rights-based theory has its origins in the natural rights philosophies of Cato, Blackstone, Jefferson, and Madison. The natural rights theorists believed that free speech rights were tempered by the rights of others, both individually and as a society. Heyman's theory suggests that an act of expression is presumptively wrongful, and subject to legal regulation, when it (1) causes (2) an infringement of a fundamental right belonging to another, and (3) is done with a state of mind that should make the actor responsible for that result. Speech can cause injury to other rights either directly (as when A threatens B) or indirectly (as when A incites B to attack C). To ensure broad protection for free speech, causation should be limited to cases in which an act of expression has a concrete and substantial impact on other rights.

Conflicts between the freedom to speak and other fundamental rights are resolved through a three-part analysis. First, the rights in conflict are balanced to see which one has more value. Second, the conflict is analyzed to determine if there is any relationship between the rights. "For example, individuals cannot freely engage in speech unless they are safe against violence; a modicum of personal security is necessary for the enjoyment of other rights." Finally, which of the rights in conflict lends more support for our traditional views of liberty? For example, "if individuals were permitted to assault or threaten others, the result would be to greatly weaken the communicators of ideas or information that among a multitude of other possible causes may or may not have contributed, deliberately or otherwise, to the enactment of their deeds.

Haiman, supra note 77, at 61.
173. See generally Heyman, supra note 64.
174. Id. at 1280.
175. See id. at 1315.
176. See id.
177. Id.
178. See id. at 1355.
179. See id.
180. See id. at 1357-58.
181. Id. at 1358.
182. See id.
overall system of liberty. On the other hand, the system would also be undermined if speech could be restricted because of distant or speculative fears of violence.”

Under a rights-based approach, *Natural Born Killers* would receive free speech protections. It is a fictional story that, arguably, did not intend to cause anyone injury. Although some would argue that the movie caused a breach of the peace because of the violence that resulted—and, thus, impacted a personal security right—the balancing approach favors free speech protection. If fictional entertainment that explicitly does not intend injury is censored, the value of free speech would be permanently diminished.

*Hit Man*, on the other hand, would not receive First Amendment protection. A rights-based approach would find that there is little, if any, value to a how-to publication that explicitly advocates murder for hire. Whatever value is lost by censoring this book would be balanced by increased protections for individual safety and improved community relationships.

**F. Situation-Specific Approach**

Kent Greenawalt argues for a situation-specific approach to First Amendment protections. He differentiates between speech that encourages situation-specific acts and speech that does not. According to Greenawalt, only the latter should get full First Amendment protection. He divides speech into four situations: (1) private nonideological solicitation, (2) public ideological encouragement, (3) private ideological solicitation, and (4) public nonideological solicitation. “[P]rivate, nonideological solicitations to crime should enjoy much weaker constitutional protection than that accorded to public ideological solicitations.” Not much value exists for these communications and there is little opportunity for countervailing communication. Public ideological speech, however, should get *Brandenburg* protections—this speech should be subject to punishment only if imminent lawless action is reasonably likely.

183. *Id.*
185. *See id.* at 260.
186. *See id.*
187. *See id.* at 261.
188. *Id.*
189. *See id.*
190. *See id.* at 266.
The other two categories are more troublesome to address. Greenawalt would only punish private ideological solicitations to specific crimes if it presented a "significant danger of criminal harm." 191 Public noncommercial, nonideological solicitation would be granted Brandenburg protection. 192

Greenawalt would not give First Amendment protection to someone who makes factual disclosures with the intention that the disclosures will produce specific crimes. 193 If it is reasonably likely that the crime will be committed in the near future, the speech should not be protected by the First Amendment. 194 On the other hand, speech that supports, without encouraging, criminal action should only be punished if the crime is serious, imminent, and results from the speaker’s influence. 195

Greenawalt would also punish some speech that the speaker does not intend as harmful but where the speaker nevertheless disregards a substantial risk that harm will occur.

Thus, the crime of criminal facilitation may constitutionally be applied to the giving of such information with a belief that it will probably be used for a criminal purpose. But it should not be sufficient for punishing someone for criminal facilitation that he believes that at least one person in an audience of millions will use a fact for criminal purposes; for someone to be punished for facilitation of ordinary crimes, the main interest of a large part of the main audience must be in committing the crime. 196

Greenawalt would not, however, hold literary or artistic portrayals criminally or civilly liable for viewers who act out a scene unless a "great danger of a particular sort of communication [is] powerfully shown." 197

It is likely that Greenawalt would not protect Hit Man from liability. If it can be shown that the publishers of Hit Man either intended crimes to occur from reading the book or recklessly ignored the fact that crimes would occur, then Greenawalt would not afford it First Amendment protection. 198 Natural Born Killers, however, would

191. Id. at 270.
192. See id. at 270-71.
193. See id. at 272-73.
194. See id.
195. See id. at 274.
196. Id. at 282 (emphasis added).
197. Id. at 285.
198. Professor Greenawalt was asked whether he would give First Amendment protections to a "mad and malevolent" scientist who writes a how-to book on building bombs and sneaking them onto airplanes. See SMOLLA, supra note 6, at 104. "If a terrorist group bought the book,
be protected as a literary work that does not generate a substantial and unjustifiable risk of danger.

III. ANALYSIS

A. Causation?

Many commentators who urge that violent speech receive lesser First Amendment protections argue that violent speech's value to society is diminished because violent speech causes violent acts.199 Other commentators would restrict their otherwise liberal view of free speech when the listener is coerced200 or “triggered.”201 What proof exists that violent speech causes violent acts?

A number of studies suggest that there is a causal relationship between media violence and increased incidents of violence in society. Most studies have concentrated on the impact of television violence, films, and video games on children.202 Some scientists conclude from these studies that “television violence causes aggression.”203 Another author found four effects of media violence: (1) an increase in the willingness to be aggressive; (2) an increase in callousness and apathy as a bystander; (3) the desire to view additional violence; and (4) the belief that the world is more violent than in fact it is.204 But another author acknowledged that “all the psychological evidence can establish is a correlation between viewing televised violence and aggressiveness, and correlation is not the same as causation.”205

Other studies indicate that some children act aggressively toward objects after watching violence on television but they do not act

followed its instructions, and brought down a plane with it, could we indict and convict the mad scientist for aiding and abetting murder?” Id. Greenawalt replied that it would depend upon “what the mad scientist's intent was, and whether it could be proven in court.” Id. at 108.

199. Sunstein, for example, argues that violent speech to mass audiences is of low value and deserves only rational basis review for government restrictions. See discussion supra Part II.B.

200. Baker, for example, would allow First Amendment restrictions when the speaker attempts to undermine the listener's autonomy and integrity through coercive speech. See discussion supra Part II.C.

201. Haiman would hold the speaker liable for the listener's acts in those limited situations where the speaker set off an inevitable chain of events and the speaker knew that the “triggering” situation existed. See discussion supra Part II.D.


203. Id. at 43-44.


205. See SAUNDERS, supra note 202, at 41.
violently toward other people. A 1995 University of California study concluded "that television violence does not have a simple, direct stimulus-response effect on its audience." Moreover, a 1993 report by the American Psychological Society concluded that the "greatest predictor of future violent behavior is a previous history of violence."

The scientific consensus seems to be that "there are a multitude of factors which contribute to violent behavior, and they all interact with each other." Mass media violence has a stronger impact on those children already predisposed to violent behavior because of other factors. But, "[t]his does not mean that the mass media is a 'cause' of violence."

Is the First Amendment a convenient scapegoat for violence in our society? No direct causal relationship has been found between violent images and violent behavior. Other effects may be more important: parental attitudes, knowledge and experience with real violence, poverty, inadequate educational and job opportunities, and

207. Id.
208. Id.
210. See id.
211. Id.
domestic abuse. A British study concluded that violent crimes are caused by violent family background. This same study found no correlation between violent videos and criminal behavior. The study did find, however, that violent movies and television shows are preferred by persons from poor social backgrounds. Furthermore, Japanese television and movies are infamous for their violence, but Japanese society has one of the lowest violence rates in the world. Japan’s strong family structure and its social cohesion are credited with offsetting the negative impacts of media violence. Maybe our efforts should be focused on improving our social structure rather than censoring expression.

If we could control violent behavior by holding books or movies responsible, where would we stop? “The source of inspiration most frequently cited by criminals has been the Bible.” Serial killer Ted Bundy collected cheerleading magazines. John Hinkley saw Taxi Driver dozens of times before shooting President Reagan. We should not censor all of this expression just because a “small fraction of the population reacts inappropriately.”

215. See id.
216. See id.
217. See Freedom of Expression, supra note 206.
220. See Freedom of Expression, supra note 206.
221. See Kopel, supra note 218, at 17.
222. Id. at 20. In a letter supporting Kopel’s conclusions, Federal District Court Judge John L. Kane, Jr., wrote:

Based upon the reasoning used in Rice v. Paladin, a survivor of guerrilla warfare could sue Leon Uris for writing Trinity or Exodus because they extol the excitement and effectiveness of guerrilla tactics against an established government with consequent loss of innocent lives. If one could obtain jurisdiction on the authors or editors of the Bible, I can only hazard a guess as to how many miscreants would attempt to justify their criminal behavior through their fractured readings of the Good Book.

The missing ingredient from these ridiculous decisions is the independent intervening cause that breaks the chain of circumstances leading from a book to action: the mind and judgment of the reader. The wisdom of the ages insists that responsibility for that judgment or lack thereof rests with the reader. Aside from the other dangers of censorship and thought control about which Kopel writes so well, the very essence of a civilized society, based upon the requirement that individuals are responsible for their own acts, is being desiccated by this sort of mindless pandering.

Kane, supra note 5, at 8.
That a few audience members who read or watch such media content also commit violent acts does not mean that the book or movie in question caused the violence in question. ... That a book or movie may have given an individual ideas does not meant that those ideas controlled the individual. In contrast to a gun purchase, we should not need to run background checks on individuals before they purchase or rent media products. It would be distinctly Orwellian practice if the government required us to receive permission before we read a book or rented a movie.  

B. Does Violent Speech Have Any "Value"?

Many commentators argue that violent speech should not have full First Amendment protections because it does not have any value. Advocates for crime victims argue that "when the media intends for its work to be used in the commission of a crime, it should be held as accountable as the perpetrator who actually carried the crime to its completion." Others argue that graphically violent material, like sexually explicit material, should be outside First Amendment protections because it does not promote truth and has no redeeming value. Moreover, Kevin Saunders argues that "[m]aterial that portrays excessive violence may well defeat the tolerance-producing value that toleration of extreme speech is supposed to foster." But isn't value in these contexts being used as an euphemism for morality?

Free speech censorship has a religious origin. The thought of prohibiting certain expression originated in the English ecclesiastical courts. Thus, some speech is prohibited not because it is harmful to others but because the thought itself is immoral. The debate over free speech is between those who believe that citizens can and should decide their own moral viewpoints and those who believe that they have the moral obligation to protect citizens from themselves.

Justice Douglas may have put it best in his Roth v. United States

223. Calvert & Richards, supra note 40, at 983.
225. See SAUNDERS, supra note 202, at 145.
226. Id. at 155; see also BOLLINGER, supra note 104, at 107 (arguing that free speech's value is in combating the general human inclination to be intolerant).
228. See id.
229. See id.
230. See id.
Government should be concerned with antisocial conduct, not with utterances. Thus, if the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community. In other words, literature should not be suppressed merely because it offends the moral code of the censor. The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience.231

If we are going to make value (morality) judgments about certain kinds of speech, who is equipped to make that determination? It cannot be simply a vote by the majority for that would instill majority tyranny, something that our system of government strives to eliminate. As long as there is no direct causal relationship between the speech and the violent act, are we not better off giving full First Amendment protection to speech whether it "incites" or not? Is not the better value judgment to hold individuals responsible for their actions?

Furthermore, some researchers conclude that violent media has a beneficial impact on many people. James Twitchell argues that violent entertainment is like dreams—it encourages the imaginary expression of repressed desires.232 Marie-Louise Von Franz suggests that violent children's stories, like Mother Goose nursery rhymes, help children overcome their fears.233 For these authors, violent entertainment plays a positive socialization role for adolescents.

C. Individual Rights and Responsibilities

A democratic society expects its citizens to participate in self-government. Thus, each citizen is expected to make independent evaluations based on a wealth of information that is available. Free speech theories are partially justified because of the need for citizens to be actively involved in their government and to protect themselves against tyrannical rulers. Consequently, political speech is given full First Amendment protection.

But why stop at pure political speech? If we expect our citizens

232. See JAMES B. TWITCHELL, PREPOSTEROUS VIOLENCE 223 (1989).
233. See MARY-LOUISE VON FRANZ, AN INTRODUCTION TO THE PSYCHOLOGY OF FAIRY TALES (1975).
to critically evaluate political information and make political decisions, why not expect, or want, the public to critically evaluate all information presented to them? We cannot expect the public to draw such a fine line between political and nonpolitical speech so that they make effective political decisions but rely on the government to decide if they are capable of making nonpolitical ones. The value of our society should be to challenge every citizen to make informed decisions about everything around them, not just on traditional political issues.

Furthermore, we should not let criminals off the hook. If we decide that speech is responsible for causing harmful acts, we are giving potential criminals an excuse for their behavior. One of the goals of our criminal justice system is to insure responsibility for our actions. We should not diminish that goal by suggesting that the criminal would not have acted violently had he or she not read that book or seen that movie. By suggesting that media causes violence, we are encouraging criminals to blame something besides themselves for their antisocial behavior.

Finally, free speech has become an easy target for our society’s ills.234 Did Hit Man create a criminal or did the criminal read Hit Man? Thousands of people bought and read the book; apparently, only one acted it out.235 Did Natural Born Killers cause Edmondson and Darrus to go on a crime spree or would they have done it anyway? Millions of people have seen this critically acclaimed movie without engaging in any antisocial behavior. Do we attack the First Amendment because we have not been successful at addressing the real causes of violence in our society: poverty, domestic abuse, and experience with real violence?

D. Where Should a Line Be Drawn?

Most free speech theories would protect Natural Born Killers. It is a fictional literary work that many will argue adds considerable value to our society. Consequently, the minuscule percentage of viewers that may react inappropriately is outweighed by the value of protecting free speech rights for the vast majority of viewers.

234. See Calvert & Richards, supra note 40, at 982 (concluding “that, as a society, we are still all too eager to blame the media and the messages they disseminate for the violent actions of individual human beings”).

235. But see SMOLLA, supra note 6, at 258-59 (reporting on anecdotal evidence that linked Hit Man to one or perhaps two other homicides).
Furthermore, although the violence perpetuated by Edmondson after viewing the movie is reprehensible, most First Amendment theories will differentiate between encouragement and imitation. In this case, unless it can be shown that the *Natural Born Killer*'s producers intended violence to occur, they should not be held liable. So that we do not chill protected expression, the *Byers* court should differentiate between inducement and incitement. Moreover, without clear evidence that the producers incited violence under the *Brandenburg* test, the judge should grant the defendant's summary judgment motion.

*Hit Man* is a tougher case. Many argue that a how-to book on contract killing has little value and should be afforded little, if any, free speech protection. These critics find a fundamental difference between ideas and technical information. Furthermore, they argue that direct causation should not be the determination of a speaker's liability. Liability can be found, according to this analysis, if the speech is a contributing factor. The analogy is drawn to criminal law with aiding and abetting or to tort law with proximate causation or vicarious liability.

While I would not hold the publishers of *Hit Man* liable in the *Rice* case, there are situations where I would. For example, the author (or publisher) of *Hit Man* should not get First Amendment protection if the speech at issue took place as a private consulting discussion. Furthermore, legislators should be able to restrict minors from gaining access to this material; thus, the publisher would not get First Amendment protection if it knowingly or recklessly sold a technical manual to a minor that contained instructions for committing a felony.

In other situations, however, the *Brandenburg* test should apply. Speech should be protected, even with technical manuals that contain instructions for committing a felony, unless it can be shown that the speaker intended a specific crime to be committed in the near future (or recklessly ignored a significant risk that a specific...

236. See E. Barrett Prettyman, Jr. & Lisa A. Hook, *The Control of Media-Related Imitative Violence*, 38 FED. COM. L.J. 317, 382 (1987) (stating that inducement is "a visual instruction as to how to perform the violent act" and incitement is "an entreaty to perform the act").

237. See generally GREENAWALT, *supra* note 184, at 262.

Whether the speaker has intended and conveyed a fixed and potentially influential determination that the crime be committed would be a mixed question of fact and constitutional law. A trial judge should not submit that issue to the jury unless the evidence against the defendant clearly supports such a finding....
and serious crime would be committed in the near future because of the information provided by the speaker). Furthermore, it must be reasonably likely that the crime would take place in the near future. "Near future," as explained by Greenawalt, is flexible enough so that it could be several months for the most serious crimes.

CONCLUSION

Although Edmondson engaged in reprehensible behavior, the producers of *Natural Born Killers* should not be held responsible unless it can be shown that they coerced or triggered the harmful acts. Before other books or movies fight the same battles, we need more studies to see if there is any causal link between violent media and antisocial behavior. Correlational studies are not sufficient. Society should not be reduced to the lowest common denominator just because some sociopaths read the same books or watch the same movies as the rest of society does.

Technical, how-to publications that contain instructions for committing a felony should be afforded slightly less First Amendment protection. Here, the *Brandenburg* incitement test should be used to determine if the author or publisher intended a specific crime to occur. In these situations, the *Brandenburg* standard of imminent lawless action should be extended to include the near future, which for serious crimes could be several months. Furthermore, the intent requirement for these kinds of technical manuals can include recklessly ignoring a significant risk that a specific and serious crime would be committed in the near future because of the information provided in the publication.

We encourage self-government and democratic values by making it difficult to use the incitement exception to First Amendment protection against books and movies. We encourage our citizens to make independent and critical evaluations of political issues; we

238. But Thomas Kelly, the attorney who represented Paladin, argues that even this standard would make many mainstream publications liable. See Martha Neil, *In This Case, He's a Crusader Against Reading*, CHI. DAILY L. BULL., Oct. 1, 1999, at 3.

Since the test of intent applied in the *Rice* case is whether a publisher knows his product could encourage criminal behavior and people often are influenced by what they read and see on television and at the movies, the precedent established "is going to draw in lots of publishers, not just those that publish in a how-to format."

*Id.*

239. *See id.* at 267 (stating that "near future" takes into account "the seriousness of the crime, opportunities for intervening speech, and the likelihood that the audience will have opportunity for critical reflection before the crime is committed").
should expect this evaluation on nonpolitical issues as well. Consequently, our citizens should be encouraged to take responsibility for their actions and to know that they alone will be held accountable for them.

Without these First Amendment protections for books and movies, artistic works will be chilled. Even if *Natural Born Killer*'s producer wins at trial, many other publishers and producers will not want to expend the same efforts and money to defend themselves in court. Consequently, future works may not be as robust and society suffers. Summary judgment should be granted by trial courts unless the plaintiff has clearly established a First Amendment exception; mere allegation of intent to incite lawless action should not be sufficient.