

# Time to Reflect:

## When Should “Dangerous” Speech Lose its First Amendment Shield?

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**Editor’s Note:** This article was the winning entry in last year’s American Judges Association law student writing competition. Although it does not affect the author’s analysis, readers may be interested to know that the underlying lawsuit discussed in the article – Rice v. Paladin Enterprises, Inc. – was settled in May 1999 on the eve of trial for several million dollars. See Jean Hellwege, *Hit Man Case Settles*, Trial 114 (July 1999). The publisher, Paladin Press, issued a news release claiming that “it had no say in the insurance company’s decision” to settle, but that, for financial reasons, it “had to go along.” Paladin Press News Release, May 24, 1999 (visited August 8, 1999) <<http://www.paladin-press.com/settlement.html>>. Although Paladin asserted that it withdrew the Hit Man book at issue because the author had requested it more than a year before the settlement, *id.*, it was reported that one of the terms of the settlement was that the remaining 700 copies of the book be turned over to the plaintiffs. Hellwege, *supra* at 116. One writer has suggested that the Paladin settlement was “spurred in part” by the \$25 million jury verdict rendered May 7, 1999 against Warner Brothers, the producer of “The Jenny Jones Show,” an award that resulted from a lawsuit by the family of a gay man who was shot to death after a prearranged, surprise announcement during a show taping that he had a crush on another male guest. Stuart Taylor, Jr., “Ride-Alongs” Bring Bad News, New York Law Journal, June 1, 1999, at 2.

**C**ourting danger, surrounded by political intrigue and always in the thick of the action, the gunrunner can shape the course of history. But how can the aspiring gunrunner keep from getting shot with his own merchandise or winding up in jail while plying his trade? To find out, a person need only send twenty dollars (plus shipping and handling) to the Paladin Press. In a few weeks she will receive Ragnar Benson’s book, *Gunrunning for Fun and Profit*, and learn “how to make connections, where to buy and sell weapons, . . . how to get paid and much more.” The Paladin Press also offers: *Drug Smuggling; How to Kill*; and *Be Your*

*Own Undertaker; How To Dispose Of A Dead Body*.<sup>1</sup>

Welcome to the world of forbidden information. The Paladin Press publishes hundreds of volumes discussing self-defense, weapons, martial arts, and various ways of “beating the system.” Paladin’s books consistently trumpet the benefits of self-reliance and express disdain for government’s restrictions on individual liberty and, until recently, enjoyed the freedom to do so.<sup>2</sup>

However, just as cold war Russians were not allowed to view textbooks on Western economics or *Playboy* magazine, and present-day Chinese are punished for the distribution of economic information that “slanders or jeopardizes the national interests of China,”<sup>3</sup> some book publishers face the very real possibility of effectively being censored. The censor is not in China or Russia — but is instead here, in the United States.

This article will demonstrate that the First Amendment protects publishers like the Paladin Press. Properly applied, the Supreme Court’s interpretation of the First Amendment in *Brandenburg v. Ohio*<sup>4</sup> allows the law to punish violent mobs, yet prevents the targeting of unpopular ideas. This article also will demonstrate that when courts stray from *Brandenburg*’s principles, as the Fourth Circuit did in a case involving the Paladin Press, the result can be censorship. The Fourth Circuit’s decision will muzzle not just the Paladin Press, but also more important communications.

Part I of this article explores the historical application of the First Amendment and shows that despite the Amendment’s guarantee that “no law” shall abridge the freedom of speech, some types of speech have always been punishable. Part I also lists the very narrow (and necessarily so) categories of “punishable speech” and exposes the dangers of broadly allowing speech to be punished.

Part II introduces the seminal case of *Brandenburg v. Ohio*, which establishes a four-prong test for finding certain types of speech as “inciting,” and thus punishable. This part explores how other courts have built on the *Brandenburg* test and gives examples about how the *Brandenburg* test protects the ability

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### Footnotes

1. Paladin Press, Vol. 28, No. 1, Paladin Press, Publishers of the Action Library at 62, 74 (1998).
2. See Petition for Writ of Certiorari at 3, *Rice v. Paladin Enterprises,*

Inc., No. 97-1325, *cert. denied*, 523 U.S. 1074 (1998).

3. See Francis X. Clines, *Soviet Students Study The Art Of The Deal*, N.Y. TIMES, Nov. 11, 1990, at 4; *Russian Bare Sets First Appearance in Playboy’s Local-Language Edition*, WALL ST. J., Feb. 15, 1996, at A11; *What’s News*, WALL ST. J., Jan. 1, 1996, at A1.
4. 395 U.S. 444 (1969).

of the mass media to express unpopular ideas while simultaneously protecting citizens from rabble-rousers and angry mobs.

Part III introduces the recent “*Hit Man* case,” in which the Fourth Circuit allowed *Hit Man* book publisher Paladin Press to be liable for the actions of one of its 13,000 readers. Both the trial court’s decision in favor of and the appellate court’s decision against the publisher are analyzed and compared with present-day First Amendment and *Brandenburg* law.

In conclusion, Part IV reveals the errors in the appellate court’s decision to punish the book publisher and argues that the decision’s rationale poses a danger to the free expression of ideas.

## I.

Despite the First Amendment’s language that “Congress shall make no law . . . abridging the freedom of speech, or of the press,”<sup>5</sup> the nation’s founders did not believe that all speech should be protected. Thomas Jefferson would have preferred the free speech portion of the First Amendment to read, “The people shall not be deprived or abridged of their right to speak or write or otherwise publish anything but false facts affecting injuriously the life, property, or reputation of others or affecting the peace of the confederacy with foreign nations.”<sup>6</sup>

Courts agree. The First Amendment does not protect all utterances. In this country’s first 150 years, speech having the potential to “encourage vice, compel the virtuous to retire, destroy confidence, and confound the innocent with the guilty” could be checked.<sup>7</sup> Obscenity, libel, and incitement were commonly lumped together since all were types of speech having a tendency to lead people to do ill.<sup>8</sup>

In today’s jurisprudence, the categories of speech excluded from First Amendment protection are more narrow and distinct. Various Supreme Court cases have held the First Amendment to “not protect obscene materials, child pornography, fighting words, incitement to imminent lawless activity, and purposefully-made or recklessly-made false statements of fact such as libel, defamation, or fraud.”<sup>9</sup> In other words, speech is protected unless it falls into one of these categories.

In order to have truly free speech — to have discourse on

public issues that is “uninhibited, robust, and wide-open, and that . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”<sup>10</sup> — these unprotected categories are *necessarily* narrow. When, in this country’s past, courts and legislatures did not narrowly define speech restrictions, the government exercised its ability to punish speech. The results of this ability are hardly surprising.

James Thompson Callender did not approve of John Adams’s performance as President. “The reign of Mr. Adams,” wrote Callender, “has been one continued tempest of malignant passions . . . Mr. Adams has laboured, and with melancholy success, to break up the bonds of social affection, and under the ruins of confidence and friendship, to extinguish the only gleam of happiness that glimmers through the dark and despicable farce of life.”<sup>11</sup> Alleging a violation of the Sedition Act of 1798, the District Attorney issued an indictment against Callender for “publish[ing] libel . . . with intent to bring [the President] into contempt and disrepute, and to excite the hatred of the good people of the United States towards him.”<sup>12</sup> After two hours of deliberation the jury returned a verdict of guilty, and the court sentenced Callender to nine months in jail and assessed a \$200 fine.<sup>13</sup>

The late nineteenth century also received its share of state censorship. Social purists, perceiving a threat to the goal of a morally cohesive community, persuaded Congress to enact the Comstock Act, which forbade “obscene, lewd, or lascivious book[s]. . . or any article or thing designed or intended for the prevention of conception.”<sup>14</sup> The statute created the position of a special agent of the post office to enforce its provisions. The Postmaster General appointed Anthony Comstock — who had tirelessly lobbied for the law known by his name — to this position two days after the enactment of the law, which he held until death in 1915. Comstock seemed to have executed his duties well; in 1913 he claimed that his efforts had led to the destruction of 160 tons of obscene literature, and he boasted a conviction rate of 75 percent.<sup>15</sup>

After Dr. Edward Bond Foote sold his book, *Medical Common Sense*, to one of Comstock’s agents, the government convicted and heavily fined the doctor. The government prosecuted Dr. Foote, said Comstock, “not for sending a medical

5. U.S. Const. amend. I.

6. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON at 367, (Julian P. Boyd, ed., 1955).

7. See *People v. Croswell*, 3 Johns.Cas. 337, 353 (N.Y. 1804) (stating argument of Alexander Hamilton).

8. See e.g., 4 W. BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 151-52 (T. Cooley 2d rev. ed. 1872) (justifying the post-publication punishment of speech with “bad sentiments, destructive to the ends of society”); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 38 (1997) (discussing the common law origins of the “bad tendency” test).

9. *Herceg v. Hustler Magazine, Inc.*, 815 F.2d 1017, 1020 (5th Cir.1987) (footnotes and citations omitted).

10. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

11. *United States v. Callender*, 25 F.Cas. 239, 239 (C.C.D.Va. 1800).

12. *Id.* at 245 (citing 1 Stat. 596-97 (1798)).

13. See *id.* at 258.

14. See Rabban, *supra* note 8, at 28. See also An Act For The Suppression Of Trade In, And Circulation Of, Obscene Literature and Articles of Immoral Use, ch. 258, § 2, 17 Stat. 599 (1873) (enactment repealed, provisions contained in Revised Title: 18 U.S.C. § 1461 (1998)). In interpreting versions of this law, courts have found “incitement to murder” by applying the same test used to find “obscenity.” See *Magon v. United States*, 248 F.2d 202-03 (9th Cir. 1918).

15. See Rabban, *supra* note 8, at 30.

work, but [for] advertisements of an infamous article — an *incentive to crime* to young girls and women.”<sup>16</sup> Note that dirty pictures or lewd displays of sexual activity did not pique Comstock’s interest in *Medical Common Sense*. Specifically, Comstock objected to the book’s *information* about a contraceptive device. “The object of the statute,” the court held, “is. . . to prevent the mails of the United States from being the effectual aid of persons engaged in a nefarious business [and from] distribut[ing] their obscene wares. [The statute] exclude[s] from the mails every form of notice whereby the prohibited information is conveyed.”<sup>17</sup> The Comstock Act had effectively made particular portions of medical knowledge illegal.

Charles T. Schenck, unlike Dr. Foote, did not seek to give “incentive to crime to young girls and women,” but instead targeted men who had been accepted for military service in the First World War.<sup>18</sup> Schenck mailed over 15,000 leaflets to draftees, imploring them to “not submit to intimidation” and to “assert your opposition to the draft.”<sup>19</sup> The Espionage Act of 1917 forbade any attempt to obstruct the draft, and the government prosecuted and convicted Schenck under this Act.<sup>20</sup> Justice Holmes, writing for the Court, saw the import of the leaflets. “Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of [the draft] out.”<sup>21</sup>

In dismissing Schenck’s First Amendment defense, Holmes coined what is perhaps the most famous phrase in the free speech debate. “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not protect a man from an injunction against uttering words that may have all the effect of force.”<sup>22</sup> Holmes justified the conviction by analogizing Schenck’s leafletting to a “clear and present danger.”<sup>23</sup> “It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured. . . .”<sup>24</sup>

While the Court articulated a seemingly strict standard for

restricting speech — “clear and present danger,” “proximity and degree,” and “words that may have all the effect of force” — it did not apply its articulation to the facts in the case. At no point did the court link these standards to the distribution of propaganda to scattered and distant draftees. Indeed, the Court effectively admitted that Schenck’s leaflets had no adverse effect on the draft at all.<sup>25</sup>

The Sedition Act, the Comstock Act, and the Espionage Act seem untenable today; citizens regularly write scurrilous statements about the President, promote birth control, and protest wars<sup>26</sup> — all without being prosecuted for “inciting” crime. If today’s courts properly followed the landmark Supreme Court case *Brandenburg v. Ohio*,<sup>27</sup> one could look back on these instances and dismiss them as outdated jurisprudence created by the reigning emotion of the day.

## II.

Clarence Brandenburg telephoned a Cincinnati television station reporter and invited him to a Ku Klux Klan rally to be held on a farm. Klansmen assisted the reporters and cameramen in filming the events. One film showed twelve hooded figures, some with guns, gathered around a large burning cross. Phrases such as “dirty nigger,” “bury the nigger,” and “send the Jews back to Israel” could be heard on the film. Another film featured Klan leader Brandenburg, decked out in his Klan regalia, making a speech.<sup>28</sup>

This is an organizers’ meeting. We have had quite a few members here today which are — we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio *Dispatch*, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken.

We are marching on Congress July the Fourth, four hundred thousand strong. From there we are

16. ANTHONY COMSTOCK, *FRAUDS EXPOSED* 427 (revised ed. 1969) (emphasis added).

17. *United States v. Foote*, 25 F.Cas. 1140, 1141 (S.D.N.Y. 1876). The court refused to recite the alleged obscenity in both the indictment and opinion in order to “prevent[] the proceedings from being the vehicle of spreading obscenity before the public.” *Id.*

18. See *Schenck v. United States*, 249 U.S. 47, 50-51 (1919).

19. *Id.*

20. *Id.* at 48-49.

21. *Id.* at 51.

22. *Id.* at 5.

23. *Id.*

24. *Id.*

25. See *id.* (“It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability . . . might be enforced . . . [But] we perceive no ground for saying that success alone

warrants making the act a crime. Indeed that case might be said to dispose of the present contention if the precedent covers all media conclusively.” (citations omitted)).

26. See, e.g., Mike R. Staup, Letter to the Editor, *Scandal-ridden Clinton*, DAYTON DLY. NEWS, Feb. 20, 1998, at 19A (stating that Clinton is “a disingenuous, immoral, prevaricator”); Gary Rotstein, *Teen Birth Rates Fall; Health Officials Say the Nation Is Realizing the Successes of Programs Focusing on Education, Abstinence, and Contraception*, PITT. POST-GAZETTE, May 1, 1998, at A1 (discussing organizations that advise women about methods of birth control); Debra Lynn Vial, *Teaneck Marchers Say Bombing Iraq Will Hurt Innocents*, THE (NORTHERN N.J.) RECORD, Feb. 22, 1998, at A3 (reporting on activists engaging in rallies, protests, hunger strikes, and distributing anti-war leaflets).

27. 395 U.S. 444 (1969).

28. See *id.* at 445-46.

dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.<sup>29</sup>

After the rally, the television station broadcast portions of these films on the local station and on the national network.<sup>30</sup>

The State of Ohio prosecuted Brandenburg under the Ohio criminal syndicalism statute for “advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.”<sup>31</sup> The trial court sentenced Brandenburg to one to ten years of imprisonment and fined him \$1000.<sup>32</sup> The Ohio Court of Appeals and the Ohio Supreme Court dismissed Brandenburg’s appeal. The United States Supreme Court agreed to hear the case and reversed the conviction.<sup>33</sup>

The *Brandenburg* decision was a break from the Court’s earlier “incitement” jurisprudence. Previous Supreme Court cases upheld the notion that advocating illegality “involves such danger to the security of the State that the State may outlaw it.”<sup>34</sup> In fact, Holmes relied on this type of reasoning in *Schenck*, as did the courts enforcing the Sedition Act and the Comstock Act.<sup>35</sup> *Brandenburg*, however, articulates a different rule: The First Amendment will not allow the government “to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>36</sup> The Court repeated the principle that “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”<sup>37</sup>

Justice Douglas’s concurrence (joined by Justice Black) sheds light on *Brandenburg*’s new incitement principle. The concurring opinion disparages the Espionage Act cases that applied the malleable “clear and present danger” test. That test, Douglas wrote, could easily be “manipulated to crush what Brandeis called ‘[t]he fundamental right of free men to strive for better conditions through new legislation and new institutions’ by argument and discourse.”<sup>38</sup> Douglas observed

that “[t]he only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result.”<sup>39</sup>

Douglas would prosecute speech only where the “speech is brigaded with action,” such as the classic example of shouting fire in a crowded theater.<sup>40</sup> There should be no line drawn between advocacy of abstract ideas and advocacy of action.<sup>41</sup> In short, Douglas’s views emphasize the requirement that punishable speech must be enmeshed with the action.

A close look at *Brandenburg* reveals four prongs to the very narrow restriction it places on finding “inciting” speech. First, to be punishable, speech must be *directed to* producing or inciting lawless action.<sup>42</sup> Second, the lawless action the speech is directed to must be *imminent*.<sup>43</sup> Third, the lawless action must be *likely to result* from the speech.<sup>44</sup> Fourth, the speech in question must steel the group to action, or, as Douglas phrased it, the *speech and lawless action must be inseparable*.<sup>45</sup> The *Brandenburg* test is the same in both civil liability and criminal cases.<sup>46</sup> Courts interpreting *Brandenburg* have fleshed out these four prongs.

The “directed to” portion of the *Brandenburg* test requires particular people to be targeted and a particular action to be called for as well. In *Hess v. Indiana*,<sup>47</sup> the events leading to Hess’s conviction began with an anti-war demonstration on the campus of Indiana University.<sup>48</sup> During the demonstration approximately 100 to 150 demonstrators moved onto a public street and blocked traffic.<sup>49</sup> After the protestors ignored the sheriff’s instructions to clear the street, the sheriff and his deputies began walking up the street to move the protestors onto the curb.<sup>50</sup> As the sheriff walked by Hess (who stood on the curb, not the street),<sup>51</sup> Hess said loudly, “We’ll take the fucking street later.”<sup>52</sup> The sheriff arrested Hess and charged him with disorderly conduct.<sup>53</sup>

The Indiana Supreme Court upheld the conviction<sup>54</sup> since Hess, by his statement, “intended to incite further lawless action on the part of the crowd in the vicinity of [Hess] and was likely to produce such action.”<sup>55</sup> The United States Supreme Court reversed.<sup>56</sup> Hess neither directed his statement “to any person or group of persons,”<sup>57</sup> nor did he direct

29. *Id.* at 446.

30. *See id.* at 445.

31. *Id.* at 444-45 (alteration in original) (quoting Ohio Rev. Code Ann. § 2923.13 (repealed 1971)).

32. *See id.* at 455.

33. *See id.* at 445.

34. *Id.* at 447 (citing *Whitney v. California*, 274 U.S. 357 (1927)).

35. *See supra*, Part I.

36. *See Brandenburg* at 447.

37. *Id.* at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

38. *Id.* at 452 (Douglas, J. concurring).

39. *Id.* (quoting *Gitlow v. People of the State of New York*, 268 U.S. 652, 673 (1925) (Holmes, J. dissenting)).

40. *See id.* at 456 (Douglas, J., concurring).

41. *See id.* at 457 (Douglas, J. concurring).

42. *See id.* at 447.

43. *See id.*

44. *See id.*

45. *See id.* at 456-57 (Douglas, J. concurring).

46. *See Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1019 (1987) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) and *Hess v. Indiana*, 414 U.S. 105, 107-08 (1973)).

47. 414 U.S. 105 (1973).

48. *See id.* at 106.

49. *See id.*

50. *See id.*

51. *See id.*

52. *Id.* at 107.

53. *See id.* at 105.

54. *See id.* at 106.

55. *Id.* at 108.

56. *See id.* at 109.

57. *Id.* at 108.

it to any specific action,<sup>58</sup> and thus his statement could not be incitement.<sup>59</sup> Hess's utterance had not met all the requirements of *Brandenburg*.

The second prong, imminence, has a temporal quality. An action is imminent only if it is "about to occur."<sup>60</sup> The Hess court, in addition to finding no "directed to" component in his statement, also found no "imminence" component. "At worst, [Hess's statement] amounted to nothing more than advocacy of illegal action at some indefinite future time."<sup>61</sup> Since Hess did not advocate immediate action, he could not have been "inciting."

Another Supreme Court case affirms this rationale even when illegal action does take place. In *NAACP v. Claiborne Hardware Company*,<sup>62</sup> Charles Evers had delivered several emotionally charged speeches to the black citizens of Mississippi in 1966.<sup>63</sup> Evers urged his listeners to unify, to support and respect one another, and to exercise their political and economic power to boycott white store owners.<sup>64</sup> Evers used strong, emotional language in his pleas.<sup>65</sup> The speeches propelled several of the listeners to action.<sup>66</sup> In two cases, boycotters fired shots into a house; in a third, a person hurled a brick through a windshield; in a fourth, a young boycott participant purposely trampled a woman's flower garden.<sup>67</sup>

Evers could not be punished for the results of his speech, the Court held, because too much time had lapsed from Evers's importuning to the acts themselves. "[T]he acts of violence . . . occurred weeks or months after the . . . speech."<sup>68</sup> Other courts have whittled down the requisite time delay further. A wait of just one day between the utterance and the act will remove the "imminent" or "immediate" quality of the speech, and thus afford it First Amendment protection. "Immediately" means within a period which does not give time for reflection. . . [which] this court assumes. . . to mean at maximum a twenty-four hour period."<sup>69</sup>

The third prong of *Brandenburg* — that the speech must be "likely to result" in lawless action — is one of the more revolutionary portions of the decision. *United States v. Schenck* (the anti-war leaflet case) would have failed on this prong since Schenck's pamphleteering had no real effect.<sup>70</sup>

On the other hand, some tax protestors have gained no relief from this third prong. The Fourth Circuit affirmed Marc

Kelley's criminal conviction of conspiring to defraud the federal government for urging his audience to "file false [federal income tax] returns with every expectation that the advice would be heeded."<sup>71</sup> Had his audience ignored his advice, Kelley likely would not have been convicted.

Apart from its "likelihood" analysis, the *Kelley* court's application of the *Brandenburg* prongs is disingenuous. The court admits that Kelley "did not take his pen in his hand to complete the forms,"<sup>72</sup> but instead only advised and instructed his listeners to commit illegal acts.<sup>73</sup> Kelley's crime, then, arises only from his speech. According to the *Kelley* court, "the First Amendment envelops critical, but abstract, discussions of existing laws, but lends no protection to speech which urges the listeners to commit violations of current law."<sup>74</sup> Inexplicably, *Kelley* cites this holding to *Brandenburg v. Ohio*. Of course, *Brandenburg* says no such thing. *Brandenburg* held the Ohio criminal syndicalism statute to be unconstitutional because it punished advocacy of "the necessity, or propriety of crime, violence, or unlawful methods of terrorism."<sup>75</sup> *Brandenburg* not only allowed the advocacy of illegality, it overruled cases that conflicted with this principle.<sup>76</sup> Indeed, the Supreme Court had, in deciding *NAACP v. Claiborne* just three years prior to *Kelley*, reaffirmed this principle. "[M]ere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment."<sup>77</sup> *Kelley* cites *Brandenburg* as authority for the very proposition that *Brandenburg* itself overruled and with which *NAACP v. Claiborne* conflicts. As this article discusses, the *Kelley* case is not an isolated instance of the Fourth Circuit's disregard for *Brandenburg v. Ohio*.<sup>78</sup>

The fourth and final prong of *Brandenburg* requires that the inciting speech steel a group to action, or be inseparable from the action.<sup>79</sup> *Herceg v. Hustler Magazine, Inc.*,<sup>80</sup> relying on John Stuart Mill, explains this prong well. "An opinion that corn-dealers are starvers of the poor, or that private property is robbery ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer."<sup>81</sup>

The verb "steel" seemingly has a malleable definition. "To steel" is "to make hard, strong, or obdurate; to strengthen."<sup>82</sup> Does "steel," then, merely mean encourage, or does it require

58. See *id.* at 109.

59. See *id.* at 108.

60. AMERICAN HERITAGE COLLEGE DICTIONARY 679 (3d ed. 1997).

61. See Hess, 414 U.S. at 108.

62. 458 U.S. 886 (1982).

63. See *id.* at 900.

64. See *id.* at 928.

65. See *id.*

66. See *id.* at 900-01.

67. See *id.* at 904.

68. *Id.* at 928.

69. See *National Organization for Women, Inc. v. Scheidler*, 897 F. Supp. 1047, 1087 (N.D. Ill. 1995).

70. See *supra* note 25 and accompanying text.

71. See *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir.1985).

72. *Id.*

73. See *id.*

74. *Id.* (emphasis added).

75. *Brandenburg v. Ohio*, 395 U.S. at 449 n.3.

76. See *id.* at 449 (overruling *Whitney v. California*, 274 U.S. 357 (1927)).

77. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 927.

78. See *infra* text accompanying notes 137-41.

79. See *Brandenburg*, 395 U.S. at 456-57 (Douglas, J., concurring).

80. 814 F.2d 107 (5th Cir. 1987).

81. *Id.* at 1023 (quoting John Stuart Mill).

82. AMERICAN HERITAGE COLLEGE DICTIONARY 1329 (3rd ed. 1997).

Justice Douglas's "speech brigaded with action?"<sup>83</sup> Historically, "steel" has been used to indicate the creation of a strong resolve or firm conviction.<sup>84</sup> This belies the interpretation of "steel" to be mere encouragement. The *Brandenburg* "steel to action" requirement needs to be defined in the context of "imminent" lawless action. When considering that punishable incitement must be "imminent" — that is, "about to occur" — and simultaneously must be "steeling to action" — that is, creating a strong resolve to act — one realizes that "steeling to action" is best read as Justice Douglas's "speech brigaded with action."

A close reading of *NAACP v. Claiborne* reveals that the Supreme Court later adopted this view. In that case, the Court would have come to a different conclusion had the boycotters committed their violence concurrently with the Evers's speech. "Words that create an immediate panic are not entitled to constitutional protection . . . If [Evers's] language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of the unlawful conduct."<sup>85</sup> The Court noted that "[i]n this case, however. . . the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech."<sup>86</sup> Since Evers's speech is separable from the action, it is protected by the First Amendment.

Courts frequently overlap *Brandenburg's* four prongs when deciding lawsuits involving the media. One such suit arose from the August 1981 issue of *Hustler* magazine, which contained, among other things, an article entitled "Orgasm of Death."<sup>87</sup> The article discussed the practice of masturbating while simultaneously "hanging" oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm ("autoerotic asphyxiation").<sup>88</sup> The article found its way into the hands of Troy, a fourteen-year-old adolescent.<sup>89</sup> Troy apparently attempted autoerotic asphyxiation, but wound up killing himself. A friend found him hanging by the neck, naked and dead, with the "Orgasm of Death" article at his feet.<sup>90</sup> Even though Troy's mother won a jury verdict against the publisher,<sup>91</sup> the appellate court threw it out.<sup>92</sup> Citing *Brandenburg*, the court noted that the article failed to

direct a specific action; had not specifically targeted Troy; and did not imminently cause his death.<sup>93</sup> The court noted that it did not need to reach the abstract question of "[w]hether written material might ever be found to create culpable incitement."<sup>94</sup>

Television shows receive the same protection under *Brandenburg*. In *Zamora v. Columbia Broadcasting System*,<sup>95</sup> the (incarcerated) plaintiff claimed that television violence had incited the crime that led to his imprisonment.<sup>96</sup> Since no particular offending television program could be identified, the court dismissed the suit.<sup>97</sup> In addition, the court noted that CBS did not direct its programs at one particular viewer, and that no crowd had been incited.<sup>98</sup>

Similarly, the Ozzy Osbourne song "Suicide Solution" found First Amendment protection.<sup>99</sup> The parents of a teenager who had committed suicide while listening to the tune brought suit, alleging that the song had driven their child to take his own life.<sup>100</sup> Since its lyrics did not "command anyone to do any concrete action at any specific time" and Osbourne's performance was "physically and temporally remote from the listener who only subsequently hears such performance by means of an electronic recording,"<sup>101</sup> the court dismissed the lawsuit.<sup>102</sup>

These decisions demonstrate how extraordinarily valuable the *Brandenburg* test is since, properly applied, no mass media production will be punished for some third party's response to its message. *Brandenburg's* restrictions are so narrow that it is difficult to imagine how newspapers, television programs, radio shows, or other expressions could ever legally "incite" the population.<sup>103</sup> Thus, proper application of *Brandenburg* promotes freedom of the press and prevents the sort of censorship that occurred under the Sedition Act, the Comstock Act, and the Espionage Act, while simultaneously punishing shouters of "Fire!" in a crowded theater.

### III.

Some courts are straying from *Brandenburg*, and are thus paving the way to media censorship à la Anthony Comstock. The latest legal deviation begins in Maryland, with paid assas-

83. *Brandenburg*, 395 U.S. at 456 (Douglas, J., concurring).

84. See OXFORD ENGLISH DICTIONARY 896 (28th ed. 1989).

85. *Claiborne*, 458 U.S. at 928.

86. *Id.*

87. See *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987).

88. See *id.* at 1018-19.

89. See *id.* at 1019.

90. See *id.*

91. See *id.*

92. See *id.* at 1025.

93. See *id.* at 1023.

94. See *id.*

95. 480 F. Supp. 199 (S.D. Fla. 1979).

96. See *id.* at 200.

97. See *id.* at 204, 207.

98. See *id.* at 204.

99. *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 3d 187 (Cal. App. 1988).

100. See *id.* at 189-91.

101. *Id.* at 194 n.10.

102. See *id.*

103. *But see Weirum v. RKO General, Inc.*, 539 P.2d 36 (1975). The *Weirum* case is an oddball in incitement jurisprudence. The case arose from a radio station's summer contest which involved broadcasting "repeated importuning" to local teens. The contest required the youth to race from one place to another in search of a cash prize. A car wreck resulted from the station's encouragements. Applying a tort negligence standard to the station's actions, the Court held the radio station liable for damages. At no point did the *Weirum* court cite *Brandenburg*. Other courts have refused to apply a negligence or reckless standard to media broadcasters. See, e.g., *DeFilippo v. National Broadcasting Co., Inc.*, 446 A.2d 1036, 1041 (R.I. 1982); *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199 (S.D. Fla. 1979).

sin James Perry. Perry, a contract killer hired by Lawrence Horn, murdered Horn's eight-year-old quadriplegic son Trevor, Horn's ex-wife, and Trevor's nurse. Perry shot the wife and nurse; Trevor suffocated after his breathing tube was detached. In soliciting, preparing for, and committing these murders, Perry meticulously followed the instructions contained in *Hit Man: A Technical Manual for Independent Contractors*, published by the Paladin Press.<sup>104</sup> The police solved the crimes and Perry was convicted, receiving three death sentences for the triple homicide and another life sentence for conspiracy to commit murder.<sup>105</sup>

The executors of the victims' estates brought suit against Paladin Press, alleging that *Hit Man* assisted in the murders.<sup>106</sup> The plaintiffs, relying on criminal "aiding and abetting" cases in tax and drug prosecutions, asked the trial court to apply the same principle to the *Hit Man* book. Since *Hit Man* assisted Perry, the plaintiffs argued, the publisher of *Hit Man* should be liable as an aider and abettor to Perry's actions.<sup>107</sup>

The trial court rightly rejected this argument and dismissed the case.<sup>108</sup> "Here, Defendants are not being charged with the crime of aiding and abetting. Rather, Plaintiffs are asking the Court to allow the Defendants to be subjected to civil liability for murder, based on a theory of civil aiding and abetting. . ." <sup>109</sup> Recognizing that the First Amendment allowed only a few narrow categories of unprotected speech (and that civil liability for "aiding and abetting" was not such a category),<sup>110</sup> the trial court analyzed the case under the *Brandenburg* incitement standard.<sup>111</sup> Citing the progeny of *Brandenburg* — *Herceg v. Hustler*, *NAACP v. Claiborne*, *Zamora v. CBS* — the trial court observed that "the instant case is very similar to these cases involving violent movies and television programs that were alleged to have caused physical injury or death."<sup>112</sup>

The trial court reasoned that, as in *Herceg*, *NAACP v. Claiborne*, and *Zamora*, *Hit Man's* publisher did not command Perry to *immediately* murder his victims.<sup>113</sup> The book did not say "go out and commit murder now," but instead said, effectively, "if you want to be a hit man, here is what you need to do."<sup>114</sup> The book has also proven to be unlikely to incite lawless action.<sup>115</sup> Only one person out of 13,000 purchasers — Perry — is known to have actually used the book to commit a murder.<sup>116</sup> Lastly, and the trial court did not reach this issue, it stands to reason that no book can satisfy the temporal requirement demanded by *Brandenburg* and subsequent cases. Perry had plenty of "time for reflection," as articulated by cases interpreting "imminent."<sup>117</sup>

The trial court's decision to give First Amendment protection to *Hit Man* did not break new ground. To be unprotected, speech must fall into one of the unprotected categories — obscenity, child pornography, fighting words, incitement, libel, slander, or fraud.<sup>118</sup> Time and again, "how-to" instructions have been found not to fall into these categories and have been granted First Amendment protection in civil cases.<sup>119</sup>

What is new law is the opinion issued by the Fourth Circuit Court of Appeals reversing the trial court's decision, thus removing *Hit Man* from First Amendment protection.<sup>120</sup> The Fourth Circuit discussed *Brandenburg* but did not hold it applicable in the case of *Hit Man*.<sup>121</sup> Instead, the Court relied on criminal cases punishing the aiding and abetting of crime. Specifically, the court likened the *Hit Man* case to *United States v. Barnett* and *United States v. Freeman*.<sup>122</sup>

In *Barnett*, the court upheld the defendant's conviction for aiding and abetting (18 U.S.C. § 2) since he had published and distributed instructions on how to make illegal drugs. "The fact that [Barnett's] counsel and encouragement is not

104. See *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 239 (4th Cir.1997), cert. denied 523 U.S.1074 (1998).

105. See *Perry v. State*, 686 A.2d 274, 276 (Md. 1996).

106. See *Rice v. Paladin Enterprises, Inc.*, 940 F. Supp. 836, 838 (D. Md. 1996).

107. See *id.* at 841.

108. See *id.* at 849.

109. *Id.* at 843.

110. See *id.*

111. See *id.* at 844.

112. *Id.* at 846.

113. See *id.* at 848.

114. *Id.* at 838.

115. See *id.* at 848.

116. See *id.*

117. See *supra* text accompanying notes 69-70.

118. See *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1020 (5th Cir. 1987).

119. See, e.g., *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1020 (5th Cir.1987) (holding that article on how to perform autoerotic asphyxiation was protected by First Amendment); *High Ol' Times, Inc. v. Busbee*, 456 F.Supp. 1035, 1038 (N.D. Ga. 1978) *aff'd*, 621 F.2d 141 (5th Cir.1980) (holding state statute proscribing distribution of materials on how to smuggle and

manufacture drugs was unconstitutional); *Smith v. Linn*, 563 A.2d 123 (1989), *aff'd*, 526 Pa. 447, 587 A.2d 309 (1991) (holding book on how to diet protected by First Amendment). Criminal convictions for providing detailed instructions have had different results. See *United States v. Buttorf*, 572 F.2d 619 (8th Cir.1978) (holding First Amendment did not protect criminal aiding and abetting tax evasion); *United States v. Barnett*, 667 F.2d 835 (9th Cir.1982) (holding First Amendment did not protect criminal aiding and abetting drug manufacturing).

120. See *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997). It is interesting to note that while the Fourth Circuit quoted at length from *Hit Man*, the court "felt it necessary to omit portions of these few illustrative passages in order to minimize the danger to the public from their repetition herein." *Id.* at 239 n.1. This is eerily similar to the court that presided over the Comstock Act conviction in *United States v. Foote*, which wrote: "[I]t is neither necessary nor proper to pollute the record by a detailed description of obscene matter. . . to a certain extent, it prevents the proceedings from being a vehicle of spreading obscenity before the public." 25 F. Cas. at 1140.

121. See *Rice*, 128 F.2d at 243.

122. See *id.* at 244-45 (citing *United States v. Barnett*, 667 F.2d 835 (9th Cir.1982), and *United States v. Freeman*, 761 F.2d 549 (9th Cir.1985)).

acted upon for long periods of time does not break the actual connection between the commission of the crime and the advice to commit it.”<sup>123</sup> At no point did the *Barnett* case address *Brandenburg*.

The *Freeman* case (a tax evasion aiding and abetting case), argued the Fourth Circuit, stood for the proposition that the First Amendment protects only those comments directed at the unfairness of the tax laws generally, but not where Freeman’s speech “directly assisted in the preparation of . . . false tax returns.”<sup>124</sup> For additional support, the Fourth Circuit quoted, at length, its opinion in *United States v. Kelley* (another aiding and abetting tax evasion case), which interpreted *Brandenburg* to say that the advocacy of illegality was *not* protected.<sup>125</sup>

Having established that speech that serves to “aid and abet” was not protected, the Fourth Circuit then addressed the issue of Paladin Press’s *intent* to aid and abet. The Fourth Circuit focused on the parties’ stipulations and the observation that “*Hit Man* is not generally available or sold to the public from the bookshelves of local bookstores, but, rather, is obtainable as a practical matter only by catalogue.”<sup>126</sup> The opinion discussed the “requirements of this process” of ordering by catalogue and concluded that a jury could “find that *Hit Man* is not at all distributed to the general public and that, instead, it is available only to a limited, self-selected group of people interested in learning from and being trained by a self-described professional killer . . .”<sup>127</sup>

Finally, the Fourth Circuit observed that Maryland law allows action in tort against people who have aided and abetted a tortfeasor.<sup>128</sup> Having satisfied the elements of aiding and abetting and having found the requisite intent, the Fourth Circuit concluded that the *Hit Man* book did not warrant constitutional protection and thus, Paladin may be sued for the damage the book caused.<sup>129</sup>

The Fourth Circuit’s stance is not wholly unsympathetic. For the limited purpose of the court’s First Amendment decision, Paladin had stipulated that it knew that some of the 13,000 readers of *Hit Man* would, indeed, use the information to commit a murder.<sup>130</sup> That stipulation likely cost it the case, since it removed itself from the realm of violent movies and books and into the world of aiding and abetting criminal activity.<sup>131</sup>

Additionally, it is extremely difficult to imagine any socially beneficial use for *Hit Man*. It advocates (or, as the Fourth Circuit insisted, “instructs”) murder and mayhem. If the government has the right to prevent any action, certainly it must be allowed to stop contract killing. Because *Hit Man* embod-

ies “not so much as a hint of the theoretical advocacy of principles divorced from action that is the hallmark of protected speech,”<sup>132</sup> it hardly cries out for constitutional protection.

This kind of argument has many followers. One of the dissenting judges in *Herceg v. Hustler Magazine*,<sup>133</sup> the autoerotic asphyxiation case, Judge Edith Jones, equated the allegedly inciting “Orgasm of Death” article to be “exactly the opposite of[] the transmission of ideas,” and thus beyond the scope of First Amendment protection.<sup>134</sup> Obscenity is banned on the same rationale.<sup>135</sup> Judge Jones observed, “Despite the grand flourishes of rhetoric in many first amendment decisions concerning the sanctity of ‘dangerous’ ideas, no federal court has held that death is a legitimate price to pay for freedom of speech.”<sup>136</sup>

#### IV.

The Fourth Circuit’s argument, alluring as it may be, is flawed. First, the Fourth Circuit has misstated and misapplied the law. Second, the Fourth Circuit is establishing a speech policy that is reminiscent of the era when the government, via the Sedition Act, the Comstock Act and the Espionage Act, effectively silenced unpopular ideas. With respect to the rule of law and the robust exchange of ideas and information, there is a real loss if the Paladin Press is held responsible for its actions.

Recall that in interpreting *Brandenburg*, the Fourth Circuit’s opinion in the *Hit Man* case relied on the tax evasion case *United States v. Kelley*.<sup>137</sup> As this article has demonstrated, *Kelley* flatly contradicts both *Brandenburg v. Ohio* and *NAACP v. Claiborne*.<sup>138</sup> Contrary to the Fourth Circuit’s assertion, the Supreme Court actually does provide some protection for the advocacy of illegal activity.

The Fourth Circuit’s reliance on *Barnett* and *Freeman* also was ill-placed. First, at no point did *Barnett* consider the *Brandenburg* case. If it had, it would have noted that the documents sold by Barnett — “Synthesis of PCP/Angel Dust,” “Synthetic Routes to Amphetamines,” and “Chemicals Used in Drug Synthesis”<sup>139</sup> — perhaps could be construed as a part of a drug crime since they may have met the “likelihood” prong of *Brandenburg* — a prong that *Hit Man* cannot satisfy. In this manner, *Barnett* is distinguishable from *Hit Man*. On the other hand, *Barnett* may well be wrongly decided, since the defendant’s only criminal activity was supplying information. It is rather difficult to distinguish, in principle, between the advocacy of illegality in *Hess v. Indiana* (advocating disorderly conduct at some indefinite future time) and *Barnett*.

The Fourth Circuit’s discussion of *Freeman* can be kindly

123. See *Barnett*, 667 F.2d at 841.

124. See *Rice*, 128 F.3d at 245 (interpreting *United States v. Freeman*, 761 F.2d 549 (9th Cir. 1985)).

125. See *Rice*, 128 F.3d at 246.

126. See *id.* at 254-55.

127. *Id.* at 255.

128. See *id.* at 251.

129. See *id.* at 267.

130. See *id.* at 241-42 n.2.

131. See *id.* at 266-67.

132. See *id.* at 267.

133. 814 F.2d 1017 (5th Cir. 1987).

134. *Id.* at 1026 (Jones, J., concurring and dissenting).

135. See *Miller v. California*, 413 U.S. 15 (1973).

136. *Herceg*, 814 F.2d at 1025-26. (Jones, J., concurring and dissenting).

137. See *supra* text accompanying note 125.

138. See *supra* text accompanying notes 72-78.

139. See *United States v. Barnett*, 667 F.2d 835, 839 (9th Cir. 1982).

described as misleading. *Freeman*, contrary to the intimations of the Fourth Circuit's opinion, actually reversed twelve of the fourteen counts against the defendant. The *Freeman* court threw out the twelve convictions since "the jury should have been charged that the expression was protected unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur."<sup>140</sup> The court then cited *Brandenburg v. Ohio*. *Freeman* focused on *Brandenburg*, and each of *Brandenburg's* prongs. The Fourth Circuit, though, ignored that portion of the *Freeman* opinion and instead relied on the two non-reversed convictions in which the defendant directly participated in the preparation of false tax returns. But in the *Hit Man* case, no one alleged that Paladin "directly participated" in Perry's murder; instead the plaintiffs contend that the book "assisted" Perry.<sup>141</sup>

It is regrettable that, to get the real meaning of *Brandenburg*, *Kelley*, *Barnett*, and *Freeman*, one has to read the cases directly and cannot rely on the Fourth Circuit's spin on the law. However, these are not the opinion's only instances of shading the law and facts. When analyzing the text of *Hit Man*, the opinion cites favorably several Espionage Act cases, including *Schenck v. United States*.<sup>142</sup> The Fourth Circuit failed to mention that these cases were predicated on the fact that the nation was at war.<sup>143</sup> Finally, the allegation that selling by catalog indicates Paladin's requisite intent since catalog sales create a "self-selected group of people" is absurd. In 1993, more than 8,000 catalog houses issued 12 billion books in the U.S. for total sales of \$55 billion.<sup>144</sup> That statistic, combined with the 13,000 owners of *Hit Man*, flies in the face of the Fourth Circuit's assertion of a "limited" group.<sup>145</sup>

Expanding the limited categories of non-protected speech is poor public policy. While *Herceg v. Hustler Magazine's* Judge Jones would like to see those categories broadened,<sup>146</sup> many more publications than just *Hit Man* and *Hustler* would fall prey to punishment. Among other publications giving "assistance" to murderers have been:

*Contract Killer* (the story of hit man Donald Frankos, which provides technical details of successful contract murders); *Mafia Enforcer* (same, with respect to hit man Cecil Kirby); *Perfect Crimes* (twelve chapters, each a blueprint for a nearly flawless crime); *The Squad* (purportedly a factual account of the methods employed by an illegal hit team within the FBI); and *Wiseguy* (the subject of the film *Goodfellas*) . . . The United States Military publishes instruc-

tional manuals that describe assassination techniques for use against civilians, books that have been broadly republished for informational purposes.<sup>147</sup>

*Herceg's* Judge Jones dismisses these kinds of "slippery slope" arguments. "[T]he 'slippery slope' argument that if *Hustler* is held liable here, *Ladies Home Journal* or the publisher of an article on hang-gliding will next be a casualty of philistine justice simply proves too much: This case is not a difficult one in which to vindicate Troy's loss of life."<sup>148</sup>

Judge Jones is not persuasive. Expanding the categories would take Ozzy Osbourne and possibly other songwriters to task for the suicides of teens they never met. The Comstock Era proves the slippery slope argument. Anthony Comstock banned not just obscenity, but also cumulative medical knowledge.<sup>149</sup>

Free government demands a free press. The arguments that sweeping First Amendment protections run counter to good order would not have passed muster with the founding fathers. As Jefferson wrote, "[W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."<sup>150</sup>

A proper application of *Brandenburg* will provide a remedy against angry mobs and violent ringleaders. It will also provide a safe haven for the press from censors and from those who, on their judgment alone, would determine what a person can or cannot safely publish. Courts should maintain First Amendment rights for not just worthy causes, such as the civil rights movement in *NAACP v. Claiborne*, but should also maintain those rights for disfavored parties like the Paladin Press. In order to avoid the less desirable consequences of the Sedition, Comstock and Espionage eras, a federal court ought to strictly apply the excellent test crafted by *Brandenburg v. Ohio*.



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

141. *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 243 (4th Cir. 1997).

142. See *id.* at 249 (citing *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919)).

143. See, e.g., *Schenck*, 249 U.S. at 52.

144. See Gregory A. Patterson, *Retailing: U.S. Catalogers Test International Waters*, WALL ST. J., April 19, 1994, at B1.

145. The Fourth Circuit neglected to mention that Paladin Press books do not necessarily have to be purchased by catalog. They

can also be purchased on the Internet at <http://www.paladinpress.com/>.

146. See *supra* text accompanying notes 134-36.

147. Petition for Writ of Certiorari at 7-8, *Rice v. Paladin Enterprises, Inc.*, No. 97-1325, cert. denied, 523 U.S. 1074 (1998).

148. See *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1026 (Jones, J., concurring and dissenting).

149. See *supra* text accompanying notes 14 - 17.

150. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787) in 11 THE PAPERS OF THOMAS JEFFERSON 49 (Julian P. Boyd, et al. eds., 1955).