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RESTRICTING CRIMINOGENIC INFORMATION:
Toward a Balanced Approach to Limiting the First Amendment in Favor of Crime Control

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Abstract

Although the First Amendment is an important bulwark against tyranny, the dissemination of information that provides "how-to" guidance to would-be criminals does not protect freedom and serves no legitimate purpose. While there are a number of types of speech like obscenity which are already without First Amendment protection, the Supreme Court needs to go further and announce an explicit exclusion for criminogenic information, defined here to mean information detailing "how-to" "successfully" commit a crime. With the proliferation of this type of information via the internet, it is more important than ever that law enforcement be empowered to suppress its dissemination and punish its creation and possession at the earliest opportunity in order to protect the public from the harm such material can wreak.

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Introduction

In 2011, many Americans sat glued to their T.V. screens, watching in increasing horror as the details of Caylee Anthony's murder spilled out in graphic detail. Her mother, Casey Anthony, was accused of the crime and, to the surprise of many, Casey was ultimately acquitted. Among the State's evidence was expert testimony that 84 internet searches for neck breaking and instructions for how to make chloroform had been made using the family computer, during a time when the other adults in the home, Casey's parents, were at work (Baker, 2011; McAuley, 2011; Molloy, 2011). Other evidence suggests chloroform played a role in little Caylee's death (Baker, 2011).

These events raise questions about whether we, as a society, should permit the dissemination of criminogenic information, defined here to mean information designed to facilitate the commission of criminal offenses by providing "how-to" advice to would-be criminals. Should those who disseminate information about how to poison or harm others be held accountable for making such dangerous information available? Should they be accountable if someone else uses the information to harm someone else? Is it really necessary to allow the dissemination of this type of information in order to protect our fundamental right to free expression or does such information merely imperil the lives of the innocent without really adding anything of social value? If limitations are appropriate, how should society draw the line and determine what may be sanctioned and what must be protected when it comes to the creation, dissemination and possession of criminogenic information? This paper explores these questions by examining publications, print and electronic, that disseminate this information and the availability of this kind of material in our society. , We then consider the current First Amendment jurisprudence as articulated by the U.S. Supreme Court as well as lower court' efforts to grapple with the problem. We conclude with an evaluation of the extent to which existing law needs to be modified to address emerging threats of the internet age.

Methods

In this paper we draw upon three illustrative and particularly noteworthy examples of publications that explicitly disseminate what may be called criminogenic information: *The Anarchist Cookbook*, (Powell, 2002) *Silent Death*, (Festor, 1997), *Hit Man: A Technical Manual for Independent (*Hitman, 2011) as well as upon other works by Uncle Festor that are available on-line. Each of these works is widely known and readily available, as we discuss below. We did a textual analysis of these works, using a qualitative approach. This approach has been used in other studies of media (see, e.g., Messner and Montez de Oca, 2005). We examined the manifest content of each, focusing on major themes that related to the legal and social questions posed above. We then reviewed legal cases that centered on First Amendment rights and limits on free speech, with particular attention paid to the question of whether legal exemptions to the First Amendment apply to contents found in sources such as those discussed herein.

Sources and Availability of Criminogenic Information

Criminogenic information i.e. information which expressly provides "how-to" advice to would be criminals is readily available. Our first example, The *Anarchist Cookbook*, which has been around in various incarnations since the early 1970s, provides a wealth of information about committing various crimes. There are chapters on growing pot and fabricating acid, natural lethal and nonlethal weapons as well as instructions on how to make nitroglycerin, blasting gelatin and dynamite (Powell, 2002). The technical information given is detailed and specific (Powell, 2002). The book contains over 100 drawings to supplement the "how-to" information contained in the text (Powell, 2002). A quote from the author on the back of the books says, "read this book but keep in mind that the topics written about here are illegal and constitute a threat. Also, more importantly, almost all of the recipes are dangerous . . . This book is not for children or morons." (Powell, 2002). Despite this caution, the book is readily available for purchase by children and morons as well as the criminally-inclined. Indeed, there is even a kindle edition for less than $10 available through Amazon.com.

Our second example is *Silent Death* (Festor, 1997). Uncle Festor, the nom de plume for a prolific but apparently troubled soul, has authored and array of books providing "how-to" advice for a variety of criminal endeavours from drug manufacture to murder. In the preface, Uncle Festor proudly proclaims that "this book is a celebration of that ancient and fine art, the art of poisoning." (Festor, 1997, p.i).[2] The book goes on to note that "the advances of medical and chemical technology in recent times has made successful poisoning more difficult . . . the successful poisoner must . . . return to his cultural roots, the knowledge of the shaman, if he is to avoid detection." (Festor, 1997, p. i). The author promises that "we will explore the methods used by artists skilled in the craft to avoid detection." (Festor, 1997, p. ii). Uncle Festor refers to nerve gas as "the poor man's atom bomb" and comments "I'm sure you'll be surprised how easy to make and use these little gems are." (Festor, 1997, p. ii). "I would especially recommend phosgene, arsine and phosphine . . . because they don't have much odor at lethal concentrations, and their effects are delayed so that an entire group can be taken out if so desired." (Festor, 1997, p. 2). Uncle Festor also emphasizes the advantages of using plant poisons to help perpetrators avoid a paper trail of suspicious purchases. Finally, he provides detailed information about carbon monoxide poisoning and other readily available means of murder.

Social media has, of course, exacerbated the problem by making access to the information contained in such tomes nearly ubiquitous. Uncle Festor's web page provides access to many of his publications, including *Advanced Techniques of Clandestine Drug Laboratories*, a book designed to help would-be drug traffickers manufacture and distribute illegal drugs (Festor, 2011). Of his *Secrets of Methamphetamine Manufacture*, 8th edition, Uncle Festor boasts:

> I wrote the original edition of this book in 1985 while doing time for making meth. Eight editions later it is still the most comprehensive and reliable source for all the info and detailed explanation of techniques related to making meth. The closely related compounds MDA and MDMA (X or Ecstacy) and other psychedelic amphetamines are

[2]This book was given to me by a friend who is Director of Toxicology at a major teaching hospital. It was given to her by the family of a poisoning victim she was trying to save. The family had found the text among the victim's girlfriend's possessions. While the girlfriend "successfully" poisoned the victim, it did not go undetected. She confirms that much of the technical information contained in *Silent Death* is dangerously correct.

also covered, with detailed instructions for their manufacture from commonly available essential oils (Festor, 2011).

A recent search of the worldwide web for The Anarchist Cookbook returned more than 60,000 hits. The Anarchist Cookbook version 2000 is available in its entirety from a number of websites (Anarchist, 2011). Like its literary forerunner, the web version of the *Anarchist Cookbook* contains advice about how to commit crimes of violence and theft. As is the case with conventional cookbooks, this one instructs readers as to exactly what materials they need and gives step by step instructions for turning items as prosaic as light bulbs and film canisters into deadly explosives. There is even a chapter entitled "*How-to Kill Someone*."

A third example is the infamous, *Hit Man: A Technical Manual for Independent Contractors* first published by Paladin Press and subject of a well-known lawsuit, *Rice v Paladin* discussed below, is now available on line through a variety of sources (Hitman, 2011). This online version of *Hit Man*, like its original literary counterpart, provides advice on how an average person can successfully start a hit man business for fun and profit. It contains detailed instructions on making disposable silencers and offers suggested modus operendi for completing different types of hits. It also suggests tips for finding clients and obtaining jobs.

Commenting on the *Hit Man*'s effect on him, the attorney for the plaintiff colourfully and perhaps hyperbolically said:

> I was depressed at the absolute incarnate *evil* of the thing, the brazen, cold-blooded, calculating, meticulous instruction, and repeated encouragement in the black arts of assassination...I didn't even want to *touch* the damn book. I couldn't leave it on the night table--I had to take it back to my office in the house and lock it in my brief-case. It didn't even seem like it was a book at all, really. It was more like someone had sent me a loaded pistol, or a vial of poison. The physical *thing* had a stench of evil to it (BeVier, 2004, p. 50 quoting Rod Smolla, *Deliberate Intent*, New York: Crown Publishers, 1999, p. 38-39).

Current First Amendment Jurisprudence

The First Amendment to the U.S. Constitution says:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

While the First Amendment is written in absolute terms, it has never been construed as a total prohibition against regulation or punishment of speech or expressive conduct. Clearly, joking about a bomb while waiting in line to board an airplane, falsely yelling fire in a crowded theatre or libelling or defaming another person are all subject to criminal or civil sanctions. Indeed, there are a number of types of speech which the U.S. Supreme Court has expressly determined are not worthy of any First amendment protection at all. The three existing exemptions most relevant to

a discussion of criminogenic information as herein defined are the exemption pertaining to advocating illegal conduct, fighting words and speech that is evidence of criminal conduct such as fraudulent speech and speech inherent in establishing a criminal conspiracy or solicitation.

1. Cases decided under the advocating criminal conduct exemption to the First Amendment often involve speech by unpopular political groups like communists or socialists who advocate violence to fundamentally change the social order. The Supreme Court is understandably concerned about permitting the punishment of political speech, even political speech from the extreme and potentially violent fringe, for fear that once government has the power to punish any kind of political speech, the core value of the First Amendment, the protection of free and open political discourse, is imperilled. As a consequence, the Court has tended over time to further restrict the government's ability to sanction speech advocating for illegal and violent conduct in this context.[3]For example, in *Debs v U.S.*, 249 U.S. 211 (1919), the U.S. Supreme Court affirmed Deb's conviction under the Espionage Act for giving a speech which advocated for socialism and expressed opposition to war because the probable effect of such speech was to prevent recruitment for World War I, even though Mr. Debs had not explicitly advocated for any particular illegal acts. Similarly, in *Whitney v California*, 274 U.S. 357 (1927), the U.S. Supreme Court upheld a woman's conviction for criminal syndicalism which punished membership in any organization which advocated the use of violence to bring about economic or political change based upon her participation in the Communist Labor Party of California. By contrast, in *Hess v Indiana*, 414 U.S. 105 (1973), the disorderly conduct conviction of an anti-war demonstrator who explicitly told the police he and his cohorts would retake the street they had been illegally blocking was reversed on the grounds that the speech amounted to nothing more than advocacy of illegal action at some indefinite future time and was thus insufficiently immediate.

To understand the contours of the modern advocating criminal conduct exemption, it is necessary to examine *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *Brandenburg* involved a Klansman who spoke at a rally spewing the type of race-based hate speech one expects from people associated with the Ku Klux Klan. He made some vague and non-specific statements advocating for violence. Some of these statements could be construed as calls to murder African Americans. For example he said "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." *Brandenburg v. Ohio*, 395 U.S. at 446. He also said, "This is what we are going to do to the niggers" and "Bury the niggers". *Brandenburg v. Ohio*, 395 U.S. at 446.

Brandenburg was convicted under the Ohio Criminal Syndicalism Statute which punished people "who 'advocate or teach the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial or political reform'; or who publish or circulate or display any book or paper containing such advocacy; or who justify the commission of violent acts 'with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism'; or who

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'voluntarily assemble' with a group formed 'to teach or advocate the doctrines of criminal syndicalism.'" *Brandenburg v. Ohio*, 395 U.S. at 448. The *Brandenburg* Court overruled *Whitney* and held that a statute which punished mere advocacy of illegal conduct, as distinct from incitement to imminent lawless action, could not be sustained under the First and Fourteenth Amendments.

Thus, according to *Brandenburg*, in order to punish a speaker, the government must show that the speech or expression is likely to incite imminent lawless action. General or abstract declarations in support of illegal conduct are constitutionally protected and cannot be punished. See *Bond v Floyd*, 385 U.S. 116 (1966). Threats meant as hyperbole or to illustrate the firmness of one's political opposition are also protected by the First Amendment. See *Watts v U.S.*, 394 U.S. 705 (1969). Even speech that appears to call for an immediate violent response may be insufficient to establish intent to incite if unlawful acts do not actually result from the speech. See *NAACP v Claiborne Hardware Co*., 458 U.S. 886 (1982). These standards, while perhaps appropriate for dealing with political speech that utilizes calls for violence or lawlessness in support of a political agenda, are not appropriate or useful when it comes to dealing with speech designed to provide "how-to" information to would-be criminals.

For one thing, "how-to" authors rarely expressly advocate for violence. Indeed, authors and publishers in this realm appear to be aware of the law and often offer facile statements like "this books is sold for informational purposes only. Neither the author nor the publisher will be held accountable for the use or misuse of the information contained in this book."(Uncle Festor, 1997, copyright page). "Neither the author nor the publisher assumes any responsibility for the use or misuse of the information contained in this book." (Powell, 2002, copy right page). And, "this book is for entertainment purposes only." (Powell, 2002; copy right page).

The lack of affirmative urging to violence is probably sufficient to prevent the establishment of the requisite incitement under existing law. In addition, given the fact that distribution and dissemination is diffuse and often occurs in private as the consumer sits at his/her computer pursuing websites or in his/her living room reading a recently acquired criminal instruction manual, it is very difficult for the Government to establish the imminence of the lawlessness as well.

The fighting words exemption is also insufficient to deal with the problems of "how-to" manuals. "Fighting words" are words that are so vicious and offensive that they are likely to provoke a violent response in the average listener. Quite often cases construing the meaning of the fighting words exemption deal with situations where *the speaker* is imperilled by the likely violent response of his/her listeners

In cases where listeners have sought out "how-to" criminal information such a response is unlikely, thereby making the fighting words exemption inapplicable. The remoteness of a reader from the author of a book or web page further limits the extent to which fighting words can be applied in this context. In any event, the fighting words exemption has been significantly limited by the Court in recent decades and its continued vitality is subject to some debate. Even an ordinance banning cross-burning will not survive First Amendment scrutiny on the basis of the fighting words exemption (see, e.g., Greene, 1993).Speech which is evidence of a crime is also not protected by the First Amendment and such statements can be used against the accused

to secure a conviction without running afoul of the First Amendment. For example, it is settled law that false and deceptive speech may be used as evidence to establish a fraud charge. See, *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600 (2003). Similarly speech which is inherent in other types of criminal activity may also be sanctioned. For example, the plotting of co-conspirators can be used to support a conviction for conspiracy and the verbal attempts of an actor to get another person to commit a crime can be punished as solicitation in many jurisdictions. Others have analyzed this type of exemption by making a speech as conduct argument and construing this as punishing conduct rather than speech (see, Volokh, 2005). Regardless of the vocabulary of the analysis used,this exemption is of little utility in controlling the creation and dissemination of criminogenic "how-to" information because of the lack of direct contact between the creator and the end user.

Rice v Paladin: and the Dissemination of Criminogenic Information

Perhaps the most notorious lower court case dealing with the dissemination of criminogenic information is *Rice v Paladin*, the so-called murder manual case. Lawrence Horn, desirous of inheriting the trust fund set up to care for his quadriplegic son, Trevor, hired James Perry to murder his ex-wife Mildred, their son Trevor and the son's nurse, Janice Saunders. See, *Rice v Paladin*, 940 F. Supp. 836 (S.D.MD. 1996). Perry purchased two books published by Paladin to aid him in committing the murders *Hit Man: A Technical Manual for Independent Contractors* ("*Hit Man*") and "how-to" *Make a Disposable Silencer, Vol. II* ("*Silencers*"). Perry meticulously followed many of the detailed instructions contained in these volumes in planning and executing the murders. See, *Rice v Paladin*, 940 F. Supp. 836 (S.D.MD. 1996); *Rice v Paladin*, 128 F.3d 233, 241 (4th Cir 1997); Fagan, 2000.

The victims' surviving family members brought a wrongful death civil suit against Paladin. Paladin sought summary judgment, arguing that they had a First Amendment right to publish the books. Paladin stipulated for purposes of the motion for summary judgment "that in publishing, distributing and selling *Hit Man* and *Silencers* to Perry, they assisted him in the subsequent perpetration of the murders which are the subject of this litigation." *Rice v Paladin*, 940 F. Supp. at 839. Furthermore, it was also conceded that "Paladin 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. In publishing, marketing, advertising and distributing *Hit Man* and *Silencers*, Paladin 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."[4]

Despite these remarkable stipulations, the District Court agreed with Paladin and granted summary judgment on the theory that Paladin's speech in *Hit man* was protected by the First Amendment. Noting that the only possible First Amendment exception applicable to *Hit Man* was incitement to imminent lawless action articulated in *Brandenburg*, the District Court concluded that Paladin simply advocated for or taught lawless action and did not actually incite imminent lawless action and thus its speech was protected. The Court also rejected the notion that Paladin's technical "how-to" assistance with planning and carrying out the crimes provided

[4] *Rice v Paladin*, 940 F. Supp. at 840.

via *Hit Man* was sufficient to constitute aiding and abetting under existing law. On appeal, the Fourth Circuit considered "whether the First Amendment is a complete defense, as a matter of law, to the civil action set forth in the plaintiffs' Complaint."[5] Expressing surprise at Paladin's stipulations, the Court of Appeals emphasized that Paladin "'intended and had knowledge' that *Hit Man* actually 'would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire.'"[6] The Appellate Court also remarked that the publisher had "even stipulated that, through publishing and selling *Hit Man*, it assisted Perry in particular in the perpetration of the very murders for which the victims' families now attempt to hold Paladin civilly liable."[7] Looking at these facts, the Fourth Circuit disagreed with the District Court's legal determination and found that

> long-established case law provides that speech -- even speech by the press -- that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment, and because we are convinced that such case law is both correct and equally applicable to speech that constitutes civil aiding and abetting of criminal conduct (at least where, as here, the defendant has the specific purpose of assisting and encouraging commission of such conduct and the alleged assistance and encouragement takes a form other than abstract advocacy), we hold, as urged by the Attorney General and the Department of Justice, that the First Amendment does not pose a bar to a finding that Paladin is civilly liable as an aider and abetter of Perry's triple contract murder. We also hold that the plaintiffs have stated against Paladin a civil aiding and abetting claim under Maryland law sufficient to withstand Paladin's motion for summary judgment. For these reasons . . . the district court's grant of summary judgment in Paladin's favor is reversed and the case is remanded for trial. *Rice v Paladin*, 128 F.3d at 242-243.

The U.S. Supreme Court subsequently denied certiorari in *Paladin v Rice*, 523 U.S. 1074 (1998).

Lower Court Decisions

The lack of clear and applicable guidance from the Supreme Court on the proper handling of criminogenic "how-to" manuals has impeded the ability of the government to control and sanction the creation, dissemination and possession of such material. Without such guidance, lower courts have been at a loss as to how to proceed. The confusion and uncertainty are apparent in a review of additional lower court decisions.

Lower courts faced with similar challenges in the criminal realm have also, of necessity, fallen back on an aiding and abetting theory in order to hold those who disseminate criminal instruction manuals accountable. For example, Gary Barnett was charged with aiding and abetting the manufacture of PCP for selling instructions for the fabrication of this substance to Don Hensley. The nexus between Mr. Barnett's actions and Mr. Hensley's crimes was unusually

[5] *Rice v Paladin*, 128 F.3d 233, 241 (4th Cir 1997).
[6] *Rice v Paladin*, 128 F.3d 233, 241 (4th Cir 1997).
[7] *Rice v Paladin*, 128 F.3d 233, 241 (4th Cir 1997).

tight. Mr. Hensley was actually arrested while he was reading a document was entitled "Synthesis of PCP-Preparation of Angel Dust" which he had purchased from Barnett through his front organization, United News Service. At the time of his arrest, Hensley was seated within a few feet of an operational phencyclidine (PCP) factory, which was located in his yard. See, *U.S. v Barnett*, 667 F.2d 835 (9th Cir. 1982). In the course of its investigation, the DEA obtained a search warrant for Barnett's apartment to search for instructions for preparing various illegal drugs, mailing lists and other documents relevant to Barnett's business. The search successfully uncovered the items sought. Barnett sought to have the proceeds of the search suppressed. The District court obliged but on appeal the 9th Circuit reversed.

The Court of appeals found that "The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes, including that of aiding and abetting, frequently involve the use of speech as part of the criminal transaction. The use of a printed message to a bank teller requesting money coupled with a threat of violence, the placing of a false representation in a written contract, the forging of a check, and the false statement to a government official, are all familiar acts which constitute crimes despite the use of speech as an instrumentality for the commission thereof." *U.S. v Barnett*, 667 F.2d at 842. Based on this reasoning, the Court of Appeals determined that Barnett's home was properly searched and that the evidence obtained did not have to be excluded on First Amendment grounds.

In a more recent criminal case, U.S. v Mustafa, Oussama Kassir was convicted of providing material support and resources to a terrorist organization by offering jihadist training.[8] (must be considered as foot note). In this case, the evidence showed that Kassir provided training in how to conduct violent jihad. Specifically, Kassir provided training in how to modify AK-47s to operate as propelled grenade launchers, how to make silencers, how to protect Islamic leaders from being shot, and how to slit throats. Kassir also represented to other people that he intended to train people in tracking, shooting and warfare and that he was in possession of money to fund jihadist activities. Kassir also maintained websites that hosted terrorist training manuals that were unavailable from other sources. Based on this evidence, the Second Circuit concluded that a rational fact finder could have found the crimes charged proved beyond a reasonable doubt.

The Second Circuit went on to note that in light of the Supreme Court's decision in *Holder v. Humanitarian Law Project*, it was proper to reject Kassir's void for vagueness challenge to 18 U.S.C. § 2339B because this statute clearly applied to his conduct. Knowingly providing jihad training and disseminating training manuals on the Internet for the benefit of Al Qaeda, and other terrorist organizations implicated the core meaning of the statute which proscribed knowingly providing training and expert advice or assistance to a foreign terrorist organization. Thus, the Court reasoned, even under the more stringent void for vagueness test applied to statutes which interfere with free speech, § 2339B was not unconstitutionally vague because a person of ordinary intelligence would know that training aspiring jihadists to use guns and knives and make poison, and creating and maintaining websites that host training manuals and propaganda for jihadist organizations as well as instructions for making explosive devices and other weapons clearly violated the proscription against knowingly providing training and expert advice or assistance to a foreign terrorist organization.

[8] *U.S. v Mustafa*, 406 Fed. Appx. 526 (2011)

The Court's heavy reliance on evidence of Kassir's actual personal involvement in training suggests that evidence of hosting the jihadist instruction manuals alone might not have been enough to establish a violation of § 2339B. Moreover, the courts are generally more receptive to restricting individual rights when national security is at stake thus it is unclear what application, if any, this decision might have for cases involving the dissemination of criminogenic information not associated with foreign terrorist organizations. In sum, while the *Mustafa* decision is legally sound it is probably not sufficient precedence for withdrawing First Amendment protection from speech providing "how-to" criminal information, even in the Second Circuit where it was decided. For such an important extension of First Amendment law, we must look to the U. S. Supreme Court. While permitting publishers and individuals to be held civilly or criminally liable on an aiding and abetting theory is preferable to according First Amendment protection to criminal instruction manuals, it is nonetheless insufficient to deal with the threat posed by such materials. Indeed, as the author of *Hit Man* himself notes "if my advice and the proven methods in this book are followed, certainly no one will ever know [about the crime]." *Rice v Paladin*, 128 F.3d at 236. Allowing these materials to circulate unimpeded until ***after*** it can be proved in court that someone was actually harmed as a result of someone else reading the criminogenic material needlessly exposes unknown numbers of people to physical harm while offering little, if anything, in the way of social value. Indeed, even the District Court Judge in Paladin conceded that "this Court, quite candidly, personally finds the book to be reprehensible and devoid of any significant redeeming social value." *Rice v Paladin*, 940 F. Supp. at 849.

Insufficiency of Free Speech Protection Rationales

The First Amendment does not require the protection of socially dangerous speech which does not provide an offsetting social benefit. As Fagen previously noted "the major rationales for protecting free speech are the (1) marketplace of ideas, (2) self-governance, (3) tolerance, (4) social stability and interest accommodation, and (5) self-realization theories" (Fagen 2000, p.620). None of these justifications underlying freedom of speech apply to criminal instruction manuals like *Hit Man* or *Silent Death (*Fagen 2000). Such manuals offer no ideas in furtherance of the search for truth, they do nothing to further political discourse or self-governance, nor do they promote legitimate tolerance, rather they force toleration of non-ideological instruction about the commission of crimes that society has decided are not to be tolerated, much less promoted (Fagen 2000, p. 622-23). By promoting crime they actually foster social instability and offer no political guidance about accommodating political interests (Fagen 2000, p. 623). While self -expression may have value for the individual, criminal instruction manuals can stake no plausible claim to the nourishment of the human spirit and their negative impact on the autonomy and self fulfillment of others more than outweighs any expressive benefits their authors may accrue (Fagen, 2000, p. 623-24).

In sum, criminal instruction manuals are devoid of political or social value and should not be protected. Applying an aiding or abetting standard or relying on evidence of personal involvement in illegal activities beyond the dissemination of the criminogenic speech before sanctioning those who disseminate such material is unduly burdensome and needlessly hampers law enforcement. Even worse, such an approach necessitates waiting until harm actually accrues before acting. By definition, civil remedies are not available until after someone is harmed because it is the infliction of harm which creates the case in controversy and confers standing to

sue on the plaintiffs. Even in the criminal realm, it seems that harm must accrue prior to the authorities being able to punish someone as an aider and abettor. As noted by the *Barnett* court, "encouraging and counseling another by providing specific information as to how to commit a complex crime does not alone constitute aiding and abetting. If, however, the person so assisted or incited, commits the crime he was encouraged to perpetrate, his counsellor is guilty of aiding and abetting." *U.S. v Barnett,* 667 F.2d at 841-842.

Conclusion

The principle problem with the current approach to "how-to" criminal information is that the authorities have to wait until something bad happens. They must wait until they can prove someone was murdered or maimed before they can attempt to punish the creator or disseminator of such material as an accessory or aider and abettor. While this approach in preferable to shielding purveyors of such material under the First Amendment, as the District court did in the *Paladin* case, it is insufficient.

A better approach is to identify "how-to" criminal manuals as a species of expression which is unworthy of First Amendment protection. Such an approach would allow the authorities to seize such materials upon discovery as contraband and would allow those who create, disseminate and possess such materials to be swiftly and efficiently sanctioned, without waiting until someone is actually injured or an additional criminal offense involving the material can be proved. Rather than attempting to analyze such cases under a *Brandenburg* or similar standard, which requires the government to establish intent or immediate lawlessness, regulators should define "how-to" manuals as outside the purview of the First Amendment in the same way that obscenity is not accorded any First Amendment protection.

With obscenity, the government need not show any intent on the part of the maker or the consumer. See e.g., *Miller v California*, 413 U.S. 15 (1973). Nor does the government have to show that the obscenity was used in an illegal manner. Rather, the *Miller* Court crafted an objective test which allows certain materials to be banned outright. Specifically, the *Miller* Court held that material could be found to be obscene and banned if the average person, applying contemporary community standards would find that the work appealed to a prurient interest in sex, depicted sex in a patently offensive and proscribed manner and lacked serious literary, artistic or scientific value.

A similar approach should be followed with regard to "how-to" crime manuals. Borrowing from *Miller v California*, the following 2 part test to determine whether material constitutes criminogenic information is proposed:

1. Does the material primarily serve to inform its audience about methods for committing crimes and/or methods of avoiding detection of criminal activity?

2. If so, does the material lack serious literary, artistic, political or scientific value?

If the answers to both of these questions are yes, the material should be classified as criminogenic and stripped of First Amendment protection. As with other material which is exempt from First Amendment protection, the states or federal government should be free to criminalize the creation, dissemination or possession of such material. One of the principle

virtues of such an approach is that there is no need to wait until something horrible happens before the authorities can take action. The authorities can move to seize such material, suppress its dissemination and hold its creators and possessors criminally responsible upon discovery of the material. There is no need to wait for people to actually be injured or other crimes to be committed. Those crimes can be prevented. As with most problems, an ounce of prevention is worth a pound of cure.

The test proposed herein is sufficiently narrowly tailored to avoid sanctioning depictions of violence which are merely entertaining and not instructive because it requires an explicit finding that the material primarily serves to inform its audience about methods for committing crimes and/or methods of avoiding detection of criminal activity. Material which simply depicts violent activity for entertainment purposes and does not contain a substantial amount of technical "how-to" information would not meet these standards. As noted by others, "materials that explicitly teach audiences how to engage in violent acts pursue an agenda and raise legal issues that are different from those that merely portray or glamorize violence and thus "teach" it only implicitly or by example" (BeVier, 2004, p. 48). Thus, there would be no need to disturb decisions relieving game and movie makers of civil liability for tragedies like Columbine where the role of violent media was at most supportive and not instructive.[9]

[9] See, e.g., *Sanders v. Acclaim Entertainment, Inc.*, 188 F.Supp.2d 1264 (D. Colo. 2002); see also *Wilson v. Midway Games, Inc.*, 198 F. Supp.2d 167 (D. Conn. 2002)

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