MEDIA VIOLENCE, PROXIMATE CAUSE & THE FIRST AMENDMENT

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MEDIA VIOLENCE TORT CASES: PROBLEMS OF CAUSATION AND THE FIRST AMENDMENT

Symposium Introduction by David J. Franklyn

We live in a violent age. The most recent rash of school shootings are but one example of the extent to which our culture has become accustomed to senseless — and to some extent random — violent acts. We find ourselves asking: who beyond the individual perpetrator is responsible for these acts? Victims of violent crimes, and families of victims, increasingly point the finger at members of the media — book publishers, television executives, movie producers and the like — and seek to place legal responsibility and liability squarely on their shoulders.

When this sort of claim is made, our traditional tort system is put under great pressure. On November 20, 1999, the Northern Kentucky Law Review held a symposium to address the issue of whether media-producing entities should be subject to tort liability for violent acts committed by media consumers. Several notable experts in the field participated in the symposium, including Rodney A. Smolla, Bruce W. Sanford, Richard M. Goehler, Elizabeth Wilborn Malloy, L. Lin Wood and Jill Meyer-Vollman. This special edition of the Northern Kentucky Law Review includes articles by each of these speakers (occasionally co-authored with other writers) and by two student authors, Robin R. McCraw, and J. Robert Linneman.

In their articles and essays, the authors discuss the potential tort liability of media defendants for violent acts committed by media consumers in the context of several litigated cases, including: (1) a Kentucky case in which victims of a

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school killing spree by a teenager allegedly obsessed with a video game sue the manufacturer of the game;8 (2) a Michigan case in which the family of a gay man murdered by a fellow guest on the “Jenny Jones” television program sue Ms. Jones' production company for allegedly inciting the violent acts of the guest;9 (3) a Louisiana case in which the victims of a convenience store shooting sue producers of the film Natural Born Killers, alleging the spree occurred in part because the murderer viewed the violent film;10 (4) an Oregon case wherein abortion protesters were ordered to pay $109 million in damages to the relatives of murdered doctors for putting the names and addresses of four doctors on two “wanted”-style posters and on a web site;11 and (5) a suit by murder victims against the publishers of a “hit man” instructional manual for allegedly inciting the murder.12

In all of these cases, courts have grappled with the age-old question of cause — legal cause. That is, to what extent can it fairly be said that a particular act of violence was caused by the media defendant on trial? Causation questions are never easy, and they are not easy here. But traditionally we have confined tort liability to actors whose conduct has caused the plaintiff's harm in some close or especially connected way. This sort of close connection is not always evident in cases alleging media influence. Our symposium writers discuss the causation issue in some detail, including the extent to which foreseeability or some other standard should delineate the scope of a media defendant's legal duty to protect the public from harm caused by third parties.

The symposium participants also address freedom of speech and freedom of press issues. As several symposium participants point out, even if a particular producer or publisher can be said to have proximately caused a plaintiff's harm, courts must still grapple with the question of whether the media defendant's activities were protected speech under the First Amendment. Our symposium writers take us through the relevant analyses, offering different approaches as to how First Amendment issues should be resolved in media violence cases. In this

11. Id. at 7.
connection, several symposium authors discuss whether the traditional Brandenburg test should apply in media violence cases at all, or whether courts should fashion a new test, one which specifically applies for such cases.

We hope you find this special symposium edition informative and stimulating. Thank you for your continued support of the Northern Kentucky Law Review.

David J. Franklyn

SHOULD THE BRANDENBURG V. OHIO INCITEMENT TEST APPLY IN MEDIA VIOLENCE TORT CASES?
by Rodney A. Smolla

I. INTRODUCTION

A. Five Hypothetical Cases

Imagine that you are a newly-installed justice of a state supreme court. An array of cases come before you in your first term posing, in a variety of contexts, questions concerning the extent to which tort liability may be imposed to compensate victims for injuries or death allegedly caused by presentation of violent material in the media. Here are the cases:

I. The manufacturers of a violent video game are sued for wrongful death by the families of victims of school children murdered in a killing spree at a high school. The plaintiffs allege that the teen-aged boy who committed the killings had become fixated on the video game, and perpetrated the crime under its influence. The suit alleges that the manufacturers of the video game acted callously and recklessly in marketing the violent game to children, knowing that some children would be particularly susceptible to the influences of the game and would be impelled to commit acts of violence as a result of it.

II. The producers of a television show with a “surprise” format, in which guests typically are confronted on the air by persons in their lives who reveal a secret that is shocking or embarrassing, are sued for a murder allegedly precipitated by one of the show’s programs. The producers are sued for wrongful death by the family of a person murdered in the aftermath of a program in which the victim, a gay man, revealed on the air that he had a secret crush on the murderer, who claimed to be heterosexual. Several days after the secret crush was revealed during the taping of the program, the person who was the object of the secret admirer’s desires, apparently chagrined or outraged at the revelation, sought out the secret admirer and murdered him. The suit claims that the television producers created this dangerous situation fraught with high risks of psychological or physical injury and should be responsible for the tragic consequences that ensued.

III. The producers of a movie thriller depicting criminals who engage in a rampage of robbery and murder are sued by the victims of real criminals

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who, after watching the movie scores of times, allegedly went out and engaged in a robbing and shooting spree emulating the actions of the characters in the film. The plaintiffs claim that the producers intended their film to cause persons to want to engage in such violent criminal behavior, and knew that some viewers, after watching the film, would probably commit such violent atrocities.

IV. Individuals and organizations responsible for posting web pages on the internet that allegedly threaten abortion providers are sued by doctors who perform abortion services. The suit claims that the defendants, through the use of old-west “wanted” style posters, have placed on the internet the doctors’ names, business locations, residential addresses, social security numbers, vehicle license plates, phone numbers, and other identifying information, for the purpose of inciting and assisting acts of violence against those abortion providers.

V. The publisher of a manual containing explicit instructions on how to go into the business of murder-for-hire is sued for wrongful death by the families of murder victims killed by a paid assassin who allegedly purchased the murder manual and followed its instructions to murder three people. The plaintiffs allege that the publishers of the manual knew and intended that the manual would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder-for-hire.

As a state supreme court justice, you must address the perplexing tort and First Amendment issues posed by these cases. You discern in your state, and across the nation, a growing sense of dismay over our increasingly violent culture. You know that many people blame the ubiquitous depiction of violence in the media for the violence in the nation, and you realize that these suits are emblematic of a growing public conviction that the media should be held legally responsible for acts of violence that appear to have been caused, at least to some degree, by speech portraying, advocating, or assisting in violence. While there are some precedents to guide you, the decisional law contains many gaps and uncertainties. You are searching for a coherent jurisprudence. What questions must you face, and how would you begin to organize your thoughts in facing them?

Each of these hypothetical cases have analogs in recent legal disputes, and when your law clerk brings them to your attention, you will quite naturally look to those disputes for whatever illumination or insight they might provide.

B. Five Real-World Analogs

Plaintiffs in Paducah, Kentucky have sued the manufacturers of a video game as a result of a school killing spree by a teenager who allegedly was
obsessed by the game. As of this writing, the litigation is in its early stages and no reported decisions have resulted.

On May 7, 1999, a Michigan jury awarded $25 million to the family of a gay man murdered by a fellow guest on the “Jenny Jones” television program. The popular nationally-syndicated talk program typically features confrontational situations, often in which guests are ambushed with embarrassing personal revelations, such as extramarital affairs. The lawsuit arose from a Jenny Jones program that was taped in March, 1995, but never aired, except as part of news accounts of the ensuing trials. The show on “secret admirers” featured Scott Amedure, a 32-year-old gay man, who revealed a crush on Jonathan Schmitz, who later said he was heterosexual. Three days after the taping, Schmitz, apparently embarrassed by the revelation, drove to Amedure’s home in Oakland County, outside Detroit, and killed him with a shotgun blast. Amedure's family later sued Warner Bros. and the show’s producer, Telepictures Productions, both owned by Time Warner Inc. The family sought $71.5 million in damages, arguing that the producers were partly to blame for Amedure's death. After seven hours of deliberation, the jury agreed the show was negligent and ordered the companies to pay $5 million for pain and suffering, $20 million for the loss of Amedure’s companionship to his family and $6,500 for funeral expenses. Jones, who was not a defendant, testified for three days during the trial. She told jurors that her program was “a very lighthearted talk show. . . . I think the audience relates to it. I think most everybody at some point have [sic] had

3. Id.
5. Id.
6. Id.
7. Id.
8. Id.
10. Id.
11. Id.
12. Id.
crushes in our lives. Some people choose to reveal the crush on TV. 13 Attorneys for the program pointed out that Schmitz agreed to come on the show, even after being told in advance that his secret admirer could be a man or a woman. 14 They said the producers couldn't have known that Schmitz had a history of mental problems, was an alcoholic and had a thyroid condition -- all of which might have caused him to react violently to Amedure's revelation. 15 But Amedure family lawyer Geoffrey Fieger argued that Jones and Warner were motivated only by ratings and cared nothing about the guests' welfare, rebutting the argument that Schmitz might have killed Amedure because the two had had a sexual encounter. 16 The defendants announced that the decision would be appealed to the United States Court of Appeals for the Sixth Circuit. 17

In Byers v. Edmondson, the Louisiana Court of Appeals held that the victims of a convenience store shooting could sue the producers of the film Natural Born Killers, including Time Warner Entertainment and Oliver Stone, on the grounds that the perpetrators of the shooting had gone on a crime and shooting spree after seeing the film. 18 The suit alleged that the producers of Natural Born Killers, labeled collectively in the complaint as "the Hollywood defendants," were liable to the victims for distributing a film "which they knew or should have known would cause and inspire people" to acts of violence by, among other things, "glorifying" such violence and "treating individuals who commit such violence as celebrities and heroes." 19

13. Id.
14. Id.
16. Id.
17. Id.
19. Byers, 712 So. 2d at 684. Paragraph 1 of plaintiffs' third supplemental and amending petition for damages provided:

All of the Hollywood defendants are liable, more particularly, but not exclusively:
A) for producing and distributing a film (and marketing same on videotape) which they knew, intended, were substantially certain, or should have known would cause or incite persons such as defendants, Sarah Edmondson, and Benjamin Darrus (via subliminal suggestion or glorification of violent acts) to begin, shortly after repeatedly viewing same, crime sprees such as that which led to the shooting of Patsy Ann Byers;
B) for negligently and/or recklessly failing to take steps to minimize violent content of the video or to minimize glorification of senselessly violent acts and those who perpetrate such conduct;
The defendants filed a "peremptory exception," equivalent to a motion to dismiss for failure to state a cause of action, arguing that the defendants owed no duty to ensure that none of the viewers of the movie would decide to imitate actions depicted in the fictional film, and that their actions in producing and distributing the film were protected by both the First Amendment and the free speech provisions of the Louisiana Constitution. The Louisiana court focused on the allegations in the complaint that the defendants "knew, should have known or intended" that the film would incite acts of violence, holding that the factual allegations which had to be accepted as true were that Edmondson and Darrus viewed *Natural Born Killers* and began a crime spree shortly thereafter; that Byers was shot while Edmondson and Darrus were on this crime spree; that the defendants produced, directed and marketed *Natural Born Killers* without warning viewers of the potential deleterious effects that repeated viewing of the film could have on teenage viewers; that the defendants were negligent in producing a film that they knew, should have known, or intended would incite people such as Edmondson and Darrus to commit violent acts such as the one committed against Byers; that the film glorified the type of violence committed by Edmondson and Darrus against Byers through its treatment of individuals in the film who committed such acts as celebrities and heroes; and that the defendants failed to take steps to minimize the violent content of the film or the glorification of senselessly violent acts in the film. The court in *Byers* appeared to reject the submission that the plaintiffs could pursue an action

C) by intentionally, recklessly, or negligently including in the video subliminal images which either directly advocated violent activity or which would cause viewers to repeatedly view the video and thereby become more susceptible to its advocacy of violent activity;

D) for negligently and/or recklessly failing to warn viewers of the potential deleterious effects upon teenage viewers caused by repeated viewing of the film/video and of the presence of subliminal messages therein; and

E) as well as for other such intentional, reckless, or negligent acts will [sic] be learned during discovery and shown at trial of this matter. *Id.* at 684-85.

Byers asserted that Edmondson and Darrus (1) repeatedly viewed the movie on videotape, sometimes under the influence of mind-altering drugs; (2) desired to emulate the protagonists of the video by obtaining a gun and ammunition; and (3) began their own reenactment of the "Mickey and Mallory" story from the film, resulting in the murder of a Mississippi cotton gin owner and brutal attempted murder of Patsy Byers. *Byers*, 712 So. 2d at 685.

20. *Byers*, 712 So. 2d at 685.

21. *Id.* at 687.
sounding in negligence against the defendants, on the reasoning that the defendants owed no duty to members of the public to protect them against the violent acts of others in the absence of some "special relationship" between the defendants and the plaintiffs, something that clearly did not exist.\(^{22}\) The complaint, however, also contained an allegation of intent.\(^{23}\) Accepting this allegation as true, as it was required to do in a peremptory challenge to the pleadings, the court ruled that the suit could proceed.\(^{24}\) The plaintiffs' claim, the court observed, was that the defendants had produced and released a film containing violent imagery which was intended to cause its viewers to imitate the violent imagery.\(^{25}\) If the intentional action allegations could be proven at trial, the court reasoned, the imposition of a duty would be warranted.\(^{26}\)

In reaching this conclusion the court in Byers placed special reliance on two prior cases, *Weirum v. RKO General, Inc.*,\(^{27}\) and *Rice v. Paladin Enterprises, Inc.*\(^{28}\) In *Weirum*, the Supreme Court of California held that a radio station catering primarily to teenagers could be held liable for wrongful death damages arising from an accident caused when two youths who listened to a promotional broadcast engaged in a street race in order to be the first to reach the site at which the station had announced prize money would be given away.\(^{29}\) The court held that the radio station owed a duty of care to the non-listener killed in the accident. The court rejected, with virtually no analysis, the station's proffered First Amendment defense stating cryptically that "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."\(^{30}\)

In *Rice*, discussed at length later in this article,\(^{31}\) the United States Court of Appeals for the Fourth Circuit held that a viable cause of action in tort for aiding and abetting murder existed against the publisher of a murder manual entitled *Hit Man: A Technical Manual for Independent Contractors*, which was allegedly
used by a professional hit man as the blueprint for three murders.32

The procedural posture of Edmondson is worth emphasizing. In choosing to
attack the pleadings on their face rather than launch an evidentiary attack on the
allegations to negate the claims of intent, the defendants were forced to accept
the well-pleaded allegations of the plaintiffs as true. This appeared to be a
strategic decision by the defendants to try to cut off at the knees any suit arising
from an entertainment production such as the movie Natural Born Killers. It
was this defense — that even if the movie producers had intended the film to
incite violence the producers were immune — that the Louisiana court
rejected.33 Thus, however implausible it may be that the defendants in fact
intended that the violent behavior in the film Natural Born Killers would be
emulated, that was the factual assumption with which they were stuck for
purposes of their attempt to have the case dismissed.

In February, 1999, a federal jury in Portland, Oregon ordered a coalition of
abortion protesters to pay $109 million in damages for putting the names and
addresses of four doctors on two “wanted”-style posters and a web site called
“The Nuremberg Files.”34 The jury determined that the posters and the web site,
although not explicitly threatening, constituted illegal threats of violence under
federal clinic-protection and anti-racketeering statutes.35 The jury also had
before it two posters with a “Deadly Dozen” list, released during a 1995 news
conference, which included names and addresses of doctors under the heading
“guilty” of “crimes against humanity.”36 A flier resembling an Old West
“wanted” poster showed the name, photograph and both home and work
addresses of a Missouri abortion provider.37 None of the actual plaintiffs in the
case were victims of violence as a result of being listed on the posters or the web

34. See Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life
Activists, 945 F. Supp. 1355 (D. Or. 1996); Planned Parenthood of Columbia/Willamette, Inc. v.
American Coalition of Life Activists, 23 F. Supp. 2d 1182 (D. Or. 1998); Planned Parenthood of
Columbia/Willamette, Inc. v. American Coalition of Life Activists, 41 F. Supp. 2d 1130 (D. Or.
1999).
35. See Ashbel S. Green, Jury Finds Anti-Abortion Web Site Threat to Doctors, PORTLAND
OREGONIAN, Wednesday, February 3, 1999.
36. Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists,
37. Id.
The plaintiffs' theory was that the posters and web sites constituted threats against them. There was evidence presented that three doctors had been killed in recent years after they appeared on "wanted"-style posters. Thus, the plaintiffs argued that when the defendants issued similar posters the effect was threatening.

Of all these recent legal events, perhaps the most significant is *Rice v. Paladin Enterprises, Inc.*, because it is the only dispute to date that has resulted in a full-blown appellate decision analyzing, in detail, the First Amendment questions that surround attempts to hold the media liable for material that has allegedly caused violence. In *Rice*, the United States Court of Appeals for the Fourth Circuit reversed a district court decision that had granted summary judgment for the publisher, remanding the case for trial. On the eve of the trial the case was settled for $5 million and an agreement by the publisher to withdraw the murder manual from the market.

II. THE BRANDENBURG DEFENSE

In all of the hypothetical cases posed above, and in the myriad variations on them that are now either pending or likely to be brought in courts across the country, difficult questions on issues such as causation, proximity, and fault must be faced, questions that require analysis both under tort and First Amendment principles. This article does not attempt to explore and resolve all of these complex issues, but rather focuses on one critical threshold problem involving the application of the landmark First Amendment decision in *Brandenburg v. Ohio* to these fact patterns. *Brandenburg* is widely understood as establishing the prevailing First Amendment test to be applied in cases involving incitement to violence. In all of these disputes, the defendants can
be counted on to interpose Brandenburg as the centerpiece of the defense, arguing that if Brandenburg is conscientiously and properly applied, no liability against the media can be imposed in any of these fact patterns. If this Brandenburg argument is sound, then all of these suits should be non-starters. For plaintiffs to have any chance in these cases, they must proffer a convincing way around the ostensible barriers posed by Brandenburg, either by demonstrating that the Brandenburg doctrine simply should not apply at all in the tort liability contexts posed by these disputes, or by constructing a plausible interpretation of Brandenburg that would permit the causes of action to remain viable even if Brandenburg is applied.

Brandenburg arose out of a Ku Klux Klan rally conducted on a farm in Hamilton County, Ohio, outside Cincinnati. A local Cincinnati television station reporter had been invited to witness the rally, and he and a cameraman filmed the event, portions of which were later broadcast on the Cincinnati station and a national network. The film footage is filled with vile, incendiary racist bile. Klan members pronounced that “the nigger should be returned to Africa, the Jew to Israel,” and “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 revengence taken.”

The state of Ohio prosecuted Brandenburg, the leader of the Klan group, under an Ohio “criminal syndicalism” law making it illegal to advocate “the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform,” or to assemble “with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” Brandenburg was convicted, fined $1,000 and sentenced to one to ten years imprisonment.

The Supreme Court held the Ohio law unconstitutional. No one was present at the Klan rally except the Klan members themselves, the television

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49. Id.
50. Id. at 446-47.
51. Id. at 444-45.
52. Id. at 445.
53. Id. at 449.
reporter, and his cameraman. Nothing in the record indicated that the racist messages of the Klansman at the rally posed any immediate physical threat to anyone. In these circumstances, the Court said the Klan was guilty only of the “abstract teaching” of the “moral propriety” of racist violence. According to the Court:

[T]he constitutional guarantees of free speech and free press do not permit a State 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.

The Court’s statement of the governing First Amendment principles thus appeared to contain three constituent elements: (1) intent (embodied in the requirement that such speech to be “directed to inciting or producing” lawless action); (2) imminence (embodied in the phrase “imminent lawless action”); and (3) likelihood (embodied in the phrase “and is likely to incite or produce such action”).

If Brandenburg is mechanically applied to the five fact patterns described above, it would appear to be extremely difficult to impose liability on the defendants. If Brandenburg’s requirement that the speech be “directed to” the incitement of imminent lawless action imposes a standard of subjective intent, in at least three of the five scenarios, no such subjective intent appears at all plausible. The manufacturers of the violent video game, the producers of the surprise television show, and the makers of the violent movie are all almost surely innocent of an intent that their productions will incite violence. Although they may be subjectively aware that such incitement is possible, it is highly unlikely that their motivation was to incite such violence. In two of the five cases, however, intent is less clear. In the abortion “wanted poster” scenario, it is possible that the subjective intent of those responsible for the web page was to incite violence. Similarly, in the murder manual case, the publisher may have had multiple intents, one of which may have been to encourage and assist murder.

The “likelihood” prong of Brandenburg appears to mean simply that it is more probable than not that violence will ensue as a result of the defendants’ action. If the focus is on any one reader or viewer, likelihood appears remote. It is obvious that most video game players will not be moved to violence by

54. Brandenburg, 395 U.S. at 446-47.
55. Id.
56. Id. at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).
57. Id. at 447.
repeated playing of video games, or that most readers of a murder manual will not in fact be moved by it to commit murder. If the question, however, is put more broadly, so the inquiry is whether it is likely that *some* viewers or readers will be moved to violence, the balance would seem to tip sharply toward plaintiffs. Imminence is clearly the most formidable obstacle posed by *Brandenburg*. If “imminent” is understood as meaning “immediate,” then in all of these cases the plaintiffs would seem to have a difficult time prevailing.

III. SHOULD THE *BRANDENBURG* STANDARD APPLY?

A. Overview

It is not at all certain that existing First Amendment theory and doctrine require a mechanical application of *Brandenburg* to these fact patterns. Very serious arguments can be made that *Brandenburg* was never designed to encompass the full range of cases suggested by the five hypotheticals. *Brandenburg* arose out of the “clear and present danger” strain of First Amendment doctrine and should be interpreted and applied in light of the history and purpose of the clear and present danger tradition. The literal application of *Brandenburg* to many of the tort liability patterns suggested by the hypotheticals is almost incoherent, for it wrenches the standard too far from the context in which it was created.

A closer look at the history and purpose of the *Brandenburg* test yields, in my view, the following conclusions:

I. *Brandenburg*’s intent standard is critical, and should be applied in all tort liability cases involving violence in which the speech at issue is directed to adults. A standard less demanding than intent, however, may be appropriate in cases in which the speech at issue is directed primarily at children.

II. The likelihood standard should be applied in all cases, but it should be tempered by the understanding that probability of harm should not be confused with the frequency of harm.

III. The imminence standard should not apply in cases in which “incitement” is not the gravamen of the alleged wrong. In the murder manual situation, for example, it is “assistance” through the provision of detailed instruction that lays at the heart of the plaintiff’s claim. Proof of detailed instruction in techniques of violence, when coupled with intent, should be a doctrinal substitute for imminence.
B. Brandenburg’s Place in the Broader Expanse of First Amendment Law

The Brandenburg case is an important First Amendment landmark, but it is not the only First Amendment landmark and does not restate the legal doctrine applied in all First Amendment contexts. To the contrary, modern First Amendment law is a complex maze of doctrinal formulas employing specific standards that have been tailored to particular topics of speech, modes of legal liability, and social contexts. There are innumerable other First Amendment contexts in which the Brandenburg standard just does not apply, contexts in which the Supreme Court has fashioned special standards suited for the balance of interests at hand. Because free speech issues arise in an extraordinarily wide range of circumstances and settings, the Supreme Court has not attempted to jam all free speech analysis into the “incitement” standard of Brandenburg, but rather has employed Brandenburg-style analysis only in cases dealing with Brandenburg-like settings.

Brandenburg is the capstone of the evolution in this century of the “clear and present danger” test, which originated with Justice Holmes in Schenck v. United States, and is best understood as the defining endpoint of this vein of First Amendment law. This strain of the First Amendment tradition has historically dealt with the unique problems posed by attempts to curb violent political discourse as it is manifest in protest demonstrations, rallies, leafleting, picketing, boycotts, and similar collective political and social activity. The


59. 249 U.S. 47, 52 (1919).

60. See, e.g., Thomas Emerson, First Amendment Doctrine and the Burger Court, 68 CAL. L. REV. 422, 436 (referring to “the Brandenburg version of the clear and present danger test”); Frank Strong, Fifty Years of “Clear and Present Danger:” From Schenck to Brandenburg — and Beyond, 1969 SUP. CT. REV. 41 (1969).

principal purpose of *Brandenburg* is to draw a line between abstract advocacy of violence in the advancement of political and social causes, on the one hand, and actual incitement on the other. The long train of rulings that have formed the center of the clear and present danger tradition out of which *Brandenburg* arose have involved cases that always dealt, in one way or another, with the advocacy of violence, incitement, symbolic speech, or graphic protest speech pertaining to political or social issues.62

A careful reading of the *Brandenburg* opinion reveals that this problem, and this problem alone, was the entire focus of the Court’s attention. The very passage in which the Court’s now-famous test was articulated opened with a discussion of precisely this context, with the Court candidly admitting that it had sustained a criminal syndicalism law much like Ohio’s in the 1972 case arising from California, *Whitney v. California*.63 Thus, the Court in *Brandenburg* observed that the Ohio syndicalism statute, enacted in 1919, was identical or quite similar to laws adopted by some twenty other American jurisdictions during the same historical period.64 *Whitney* had sustained such laws, the Court in *Brandenburg* forthrightly conceded, “on the ground that, without more, ‘advocating’ violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it.”65 But *Whitney*, the Court proclaimed, had been “thoroughly discredited by later decisions.”66 It was in this context that the Court issued its famous pronouncement that:

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63. 274 U.S. 357 (1927).

64. *Brandenburg*, 395 U.S. at 447 (citing E. DOWELL, A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES 21 (1939)).

65. Id. (citing Whitney v. California, 274 U.S. 357 (1927)).

66. Id. (citing Dennis v. United States, 341 U.S. 494 (1951)).
These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State 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.67

This quotation — this one sentence upon which so much First Amendment litigation is focused — is limited by its own language to situations in which government seeks to “forbid or proscribe advocacy of the use of force or of law violation.”68 Moreover, it is patently obvious from the discussion of criminal syndicalism, advocacy of the use of force, and Whitney that preceded the passage, that such advocacy was the sole context within which Brandenburg was decided. And finally, as the Court went on to apply this restatement of the test to the facts before it, it was obvious once again that the context of violent protest was the nucleus of the Court’s analysis. “[W]e are here confronted,” the Court observed, “with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.”69 The Court in Brandenburg properly understood the Klan’s actions in the case as evil, but not inciting. As reprehensible as the racist and anti-Semitic bile of the Klan was in Brandenburg, the fact is that the Klan members’ speech posed no palpable danger to anyone. Indeed, no one other than the news crew was even present. The Court wanted to make it clear that the mere act of assembling and blowing off so much violent hate-filled steam was protected by the Constitution.70

If Brandenburg was a great decision, it was not an unlimited one, creating some universal doctrine to be applied in all contexts. A legal standard designed to preserve the right of dissenters to advocate in the abstract the desirability of violence as a method of social and political change simply bears no strong contextual relationship to disputes involving violent video games, surprise television, violent movies, Internet “wanted” posters or murder instruction manuals. This is not to say that none of the First Amendment values that animated Brandenburg are implicated by such tort suits — for surely in some fashion they are — but it is to say that a doctrinal standard formulated to vindicate those values in one specific context is not necessarily appropriate when those values surface in tension with other social interests in other contexts.

67. Id. (emphasis added).
68. Id.
69. Id. at 449.
70. Id. at 446-49.
IV. THE UTILITY AND NON-UTILITY OF THE ELEMENTS OF BRANDENBURG IN MEDIA VIOLENCE CASES

Rather than treat Brandenburg as a set piece that imposes demanding requirements of intent, imminence, and likelihood in all cases, it may be more sensible to look at Brandenburg in its component pieces and assess the function and suitability of each component in the specific tort context in which it is being applied.

A. Intent, Advocacy, and Imitation

The intent requirement of Brandenburg is the most important of the three elements in the standard, a requirement that must be applied in all cases, at least when the speech at issue is not speech directed to children. Several of the hypothetical cases posed in this article involve imitative or "copycat" behavior, in which material presented for artistic, entertainment, or educational purposes depicts activity that is dangerous or violent. A person exposed to the depiction, often a child, engages in behavior emulating the dangerous activity, resulting in injury or death. Courts have consistently rejected liability in such cases.71

71. See, e.g., Way v. Boy Scouts of Am., 856 S.W.2d 230 (Tex. App. 5th Dist. 1993) (motion for summary judgment granted dismissing plaintiff's claims against the publisher of a firearm advertisement in a magazine which advertisement allegedly caused a fatal firearm injury to plaintiff's son); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) (motion for summary judgment granted dismissing plaintiff's claim that the producer of a gang violence film was liable for the murder of plaintiff's son who had viewed the film); Bill v. Superior Court, 187 Cal. Rptr. 625 (Cal. 1982) (motion for summary judgment granted dismissing plaintiff's claim that the producer of a gang violence film was liable for the shooting of plaintiff's daughter by a third party shortly after both saw the film); McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (1988) (rejecting claim brought by parents of teenager who shot and killed himself while listening to a record by the musician Ozzy Osbourne in suit against the performer and his record company); Zamora v. Columbia Broad. Sys., 480 F. Supp. 199 (S.D. Fla. 1979) (rejecting argument that television violence caused minor to become addicted and desensitized to violent behavior, resulting in the minor killing an 83 year-old woman); Walt Disney Prods. v. Shannon, 276 S.E.2d 580 (Ga. 1981) (rejecting attempt to impose liability when eleven year-old was injured while attempting to reproduce sound effect from Mickey Mouse Club on television); DeFilippo v. National Broad. Co., 446 A.2d 1036 (R.I. 1982) (rejecting claim arising from stunt on the Tonight Show in which Johnny Carson was "hung" by a professional stuntman and not injured, when thirteen year-old boy, emulating the stunt, hung himself); Sakon v. Pepsico, Inc., 553 So. 2d 163 (Fla. 1989) (rejecting liability arising from advertisement for Mountain Dew showing kids riding up a ramp
judicial decisions in these cases have focused on a wide variety of tort law and First Amendment rationales. In some decisions, courts have applied Brandenburg. In others, Brandenburg has not even been mentioned. What is important is that in none of these cases can it be credibly maintained that the defendants advocated that persons engage in the violent behavior, or incited that behavior, or were in any other sense engaged in speech "directed to inciting or producing" such behavior.

One of the most interesting and illuminating decisions in this line of cases is Herceg v. Hustler Magazine, Inc.\(^7\)\(^2\) The case was a wrongful death action brought by the mother of a fourteen year-old boy who emulated the practice of autoerotic asphyxia, as depicted in an article in Hustler Magazine entitled "Orgasm of Death."\(^7\)\(^3\) Autoerotic asphyxia entails masturbation while "hanging" oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm.\(^7\)\(^4\) The article described how the act is performed and the physical pleasure those who engage in it seek to achieve.\(^7\)\(^5\) An editor's statement warned: "Hustler emphasizes the often-fatal dangers of the practice of ‘auto-erotic asphyxia,’ and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose."\(^7\)\(^6\)

The plaintiffs in Herceg conceptualized their case as an incitement suit, and presented it in those terms, attempting to fit the case within the Brandenburg formulation.\(^7\)\(^7\) The court in Herceg appeared greatly disturbed by the plaintiff's whole conception of the case, expressing considerable dismay at the fact that the court below and the parties chose to characterize the suit in "incitement" terms (even seeming to hint that the plaintiffs might have had a plausible suit had they packaged it in some other way), reasoning that the judgment could not be "affirmed even if it is conceivable that, had the case been tried on some other ground, the jury might have reached the same verdict."\(^7\)\(^8\) The court further

\(^{72}\) 814 F.2d 1017 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988).
\(^{73}\) Id. at 1020.
\(^{74}\) Id.
\(^{75}\) Id.
\(^{76}\) Id. at 1018.
\(^{77}\) Id. at 1020.
\(^{78}\) Hustler, 814 F.2d at 1020-21.
noted that while it was doubtful that cases fitting the fact pattern before it could ever constitute "incitement" as that term had evolved under the First Amendment, it would review the case under the traditional doctrinal tests for incitement, "for that was the theory under which the case was tried and submitted." In a very perceptive discussion, the court in Herceg explored the proposition that the Brandenburg standard is simply not fitted for application outside the incitement context in which it arose:

But the parties' and, apparently, the district court's effort to apply the Brandenburg analysis to the type of "incitement" with which Hustler was charged appears inappropriate. Incitement cases usually concern a state effort to punish the arousal of a crowd to commit a criminal action. The root of incitement theory appears to have been grounded in concern over crowd behavior. As John Stuart Mill stated in his dissertation, On Liberty, "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." In Noto v. United States, the Supreme Court expressed similar views about incitement: "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 steering it to such action . . ." Whether written material might ever be found to create culpable incitement unprotected by the first amendment is, however, a question that we do not now reach.

If the Herceg court's intuition that Brandenburg ought not be applied to the kind of media tort liability suit before it was sound, then what standard ought to have applied? A natural place to look for guidance is the one area of First Amendment law in which the intersection of First Amendment and tort doctrine is most well-developed, the line of cases emanating from New York Times Co. v. Sullivan, in which the Supreme Court first began to "constitutionalize" certain aspects of the law of torts. In New York Times, the Court held that in order for a

79. Id. at 1021. In the concluding section of its opinion the Court in Herceg also noted that "[t]his case, however, was not tried on a negligence theory. There are, therefore, no jury findings on the issue of negligence, and this court may not infer what those findings would have been had the issue been presented. The trial was conducted on an incitement theory. . . . The defense prepared its defense accordingly. Had a negligence claim remained, Hustler may have settled out of court or pursued alternative defense strategies." Id. at 1025.
80. Hustler, 814 F.2d at 1023 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).
public official to prevail in a libel suit arising from allegedly defamatory statements on issues germane to the public officials performance in or fitness for office, the plaintiff must prove that the defendant published the material with knowledge of falsity or reckless disregard for truth or falsity. The New York Times standard thus permits liability to be predicated on something less than conscious “intent” to injure reputation through publication of a falsehood, allowing liability for mere “reckless disregard” of the risk. If something less than conscious intent will suffice to support liability to vindicate damage to reputation, then certainly no greater standard of fault ought to be imposed when the purpose is to compensate plaintiffs for physical injury or death, at least in cases in which the speech itself does not appear to contain any serious elements of public discourse or it is devoid of any content that might seriously be advanced as newsworthy, political, artistic, educational, religious, or scientific. For example, plaintiffs might very well mount a convincing case that a showing of fault less than conscious intent would satisfy constitutional requirements.

Indeed, in certain contexts this line of argument might be pushed quite aggressively, with potentially astounding consequences. The Supreme Court held in Gertz v. Robert Welch, Inc. that the “knowing or reckless disregard” standard of New York Times did not apply when the libel suit was brought by a “private figure” plaintiff, rather than a public figure or official. Under Gertz, private figure libel suits may be based on a mere showing of ordinary negligence. More importantly, the Supreme Court in Dun and Bradstreet, Inc., v. Greenmoss Builders, Inc., held out the possibility that in suits in which the speech at issue did not involve matters of public concern, no heightened First Amendment protection applied at all. Justice Powell’s plurality opinion in Dun and Bradstreet summarized the history of the Supreme Court’s First Amendment jurisprudence since New York Times with the conclusion that “[w]e have long recognized that not all speech is of equal First Amendment importance.” Speech “on matters of public concern,” he noted, “is at the heart of First Amendment protection,” an Amendment that “was fashioned to assure unfettered interchange of ideas for the bringing about of political and

82. Id. at 255.
84. Id. at 347.
86. Id. at 758.
87. Id. at 759 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (citations omitted)).
social change.”88

Media defendants will predictably protest the entire invocation of the *New York Times v. Sullivan* line of cases, arguing that the analogy to them is not apt. By hypothesis, the speech upon which a libel case is predicated is a “false” statement. Media violence cases do not involve such factual “falsehoods,” the argument goes, and thus any attempt to import the matrix of fault rules that have evolved from *New York Times* is flawed. From the media defense perspective, the best case supporting the argument is yet another *Hustler Magazine* suit, *Hustler Magazine v. Falwell*, in which Reverend Jerry Falwell attempted an end-run around the First Amendment protections of *New York Times* in seeking recovery for the emotional distress caused by a vicious political satire.89 The Supreme Court refused to permit recovery, concluding that “public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice.’”90 The reasoning of the Court’s ruling was that public figures and public officials who enter the arena of political debate must accept, as part of that venture, “‘vehement, caustic, and sometimes unpleasantly sharp attacks.’”91 Indeed, the centerpiece of Chief Justice Rehnquist’s opinion for the Court in *Hustler* was his historical discussion of the vital role that vituperative caricature and satire have played in American political culture.92 Jerry Falwell, a quintessential American public figure, simply could not enter the arena of debate on issues of politics, morality, and religion and, at the same time, seek to immunize himself from the slings and arrows of outrageous fortune; he could sue for libel or for intentional or reckless falsehoods arising from public attacks, but he could not sue merely because his feelings were hurt.93 The subtext of the parody run by *Hustler Magazine* was that Falwell was a pompous hypocrite — an expression of opinion not capable of proof or disproof in a court of law.94 Accordingly, the Supreme Court properly held that Falwell’s cause of

88. *Id.* at 759 (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (citations omitted)).
90. *Id.* at 56.
91. *Id.* at 51 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
92. *Id.* at 54. (“From the viewpoint of history it is clear that our political discourse would have been considerably poorer without them.”).
93. *Id.* at 54.
action for intentional infliction of emotional distress could not stand.95

The attempt to entirely disavow the applicability of New York Times and its progeny to media violence cases on the relatively glib and thin grounds that such cases do not involve “falsehood” is not, however, self-evidently persuasive. Media violence cases involve physical injury and death, social interests far more compelling than recompense for the emotional distress felt by a public figure victimized by satire or parody. The Hustler v. Falwell case does not attempt to redress injury for matters unrelated to a public figure’s standing in the community or emotional equanimity. Rather, the case is related to some social harm entirely disconnected from that context and would be forced within the knowing or reckless falsehood standard of New York Times, where truth or falsity plays no role whatsoever in cause of the harm or the plaintiff’s claim for relief.96 Looping back on matters of the “public concern” standard, plaintiffs in media violence cases might vigorously contend that when the speech at issue appears to have little serious claim to partaking in “public discourse” of any kind, yet does appear to have caused violence, there is a cogent argument for treating such speech as not being on matters of public concern, and not deserving any especially heightened First Amendment protection.

One can imagine contexts in which this might be propitiously pushed. In the violent video game case, for example, plaintiffs might quite seriously argue that a violent video game is simply not speech on matters of public concern, at least

95. Hustler, 485 U.S. at 55.

96. In a wide variety of contexts, liability is imposed through harm caused by speech when the truth or falsity of the speech is simply not an issue. See, e.g., Zacchini v. Scripps-Howard Co., 433 U.S. 562, 575-79 (1977) (holding that First Amendment did not protect defendants from liability under the common-law tort of “appropriation” or “right of publicity” when news media filmed plaintiff’s “human cannonball” act at a county fair and broadcast the act without the plaintiff’s permission, holding that it was enough that defendants knew that the plaintiff objected to the broadcast and went forward anyway); Cohen v. Cowles Media Co., 501 U.S. 663, 667-72 (1991) (holding that the First Amendment does not bar application of ordinary principles of state contract and promissory estoppel law in suit against newspaper for breaching promise of confidentiality and printing a source’s name); Goldstein v. California, 412 U.S. 546, 571 (1973) (upholding California’s “record piracy” law, noting that “[n]o restraint has been placed on the use of an idea or concept”); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985) (upholding copyright infringement action against The Nation magazine for printing excerpts from President Gerald Ford’s memoirs, holding that the First Amendment did not shield the magazine from the normal principles of copyright liability); Snepp v. United States, 444 U.S. 507, 511-16 (1980) (upholding constructive trust on defendants’ book royalties for book published in violation of pre-clearance agreement with CIA).
not speech that fits at all comfortably within Justice Powell’s description of speech protected by a First Amendment “fashioned to assure unfettered interchange of ideas for the bringing about of political and social change.”

The contours of the “public concern” concept are not well-developed in current First Amendment law. The concept has come into play primarily in two areas, the libel / privacy cases that have evolved from *New York Times*, and the government employment cases typified by such decisions as *Connick v. Meyers*. Certainly the “public concern” standard must be expansive; in an open society it must encompass a broad range of cultural discourse, including politics, science, religion, art, literature, education, and entertainment. And no doubt, discussions of crime and violence will frequently qualify as matters of public concern. But if the phrase is understood as a meaningful doctrinal limitation, then the term must have *some* content, and at least in some media liability cases, plaintiffs might well have a credible argument that the speech at issue falls outside the definition. In a provocative dissent in *Herceg*, Judge Edith Jones made exactly this type of argument, claiming that the *Hustler* article did not qualify for heightened First Amendment protection.

This style of argument would be lent particular force if it could be demonstrated that the speech at issue was directed at children. In a number of different contexts, the Supreme Court has shown a willingness to apply more relaxed doctrinal standards less protective of free speech interests when children are involved. While it is certainly true that the mere possibility that children


100. Judge Jones thus stated:

> No sensitive first amendment genius is required to see that, as the Court concluded in *Dun & Bradstreet*, ‘‘[t]here is simply no credible argument that this type of [speech] requires special protection to insure that ‘debate on public issues [will] be uninhibited, robust, and wide-open.’’’ 472 U.S. at 762 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). To place *Hustler* effectively on a par with *Dun & Bradstreet*’s “private speech” or with commercial speech, for purposes of permitting tort lawsuits against it hardly portends the end of participatory democracy, as some might contend.

*Herceg*, 814 F.2d at 1028-29 (Jones, J., concurring and dissenting).

101. *See, e.g.*, ACLU v. Reno, 521 U.S. 844 (1997) (provisions of the Communications Decency Act prohibiting transmission of obscene or indecent communications by means of
might be exposed to speech intended for adults does not justify regulation of that speech merely to prevent harm to children, there are relatively few cases in which the speech is actually targeted at children, and in those cases, it is at least arguable that lower First Amendment standards would apply. At the very least, it can be said that cases targeted at children would present a different and more difficult case, one in which the force of the plaintiffs' arguments would be at their apex.

B. Imminence, Bad Tendency, and Assistance

The imminence requirement is by far the most imposing component of Brandenburg. In deciding whether imminence should be required in media violence liability cases, it is sensible to consider why the imminence requirement emerged as an important element in the clear and present danger line of cases. In early developments of the clear and present danger test, imminence was, at least arguably, nominally an element of the standard. But in actual application, it was not a requirement of imminence that was imposed, but a far more lax notion of proximity labeled "bad tendency." The case in which Justice Holmes coined the phrase "clear and present danger" is illustrative. Schenck v. United States involved the prosecution of Charles T. Schenck, the general secretary of the Philadelphia Socialist Party. In August 1917, Schenck and others mailed leaflets to men listed in newspapers as having passed their draft board examinations. Over 15,000 leaflets were published, arguing in passionate terms that conscription was despotism and a monstrous wrong against telecommunications device to persons under age eighteen were facially overbroad in violation of the First Amendment; in order to deny minors access to potentially harmful speech, provisions effectively suppressed speech that adults have a constitutional right to receive and to address to one another, with no demonstration less restrictive alternatives would be at least as effective in achieving legitimate purpose that statute was enacted to serve.


104. 249 U.S. 47 (1919).

humanity, engineered by Wall Street's chosen few. The leaflets urged readers to "not submit to intimidation." The war effort, they maintained, was a cunning capitalist conspiracy, and our citizens should not be sent to foreign shores to shoot the people of other lands.

In the process of affirming Schenck's conviction, Holmes announced the clear and present danger test that would exert a powerful hold on American First Amendment jurisprudence for the rest of the century. In its first application, the test was interpreted in a manner that rendered it a vehicle for censorship. Holmes appeared to conflate intent with effect. The leaflets would not have been distributed unless the distributors intended for them to be effective, he argued, and in the context of a nation at war, it was impossible to say that the leaflets might not have a deleterious effect. Thus, the mere "bad tendency" of the leaflets, in some indefinite future sense, appeared to be enough to justify the

107. Id. at 51. The leaflets quoted verbatim the first section of the Thirteenth Amendment, which declares that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Id. A person violated the Constitution, the leaflets argued, by refusing to recognize "your right to assert your opposition to the draft," and went on to maintain: "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." Id. Another passage in the leaflets proclaimed that "[a] conscript is little better than a convict," and "[h]e is deprived of his liberty and his right to think and act as a free man." Id.
110. That the clear and present danger test was used, in its early manifestations, to censor speech rather than protect it demonstrates that no legal formulation will in any self-executing sense protect freedom of speech. Rather, the level of protection freedom of speech will receive depends on how the verbal formulation is applied in practice. See Paul Freund, On Understanding the Supreme Court 27-28 (1949); David Rabban, The Emergence of Modern First Amendment Doctrine, 50 U. Chi. L. Rev. 1205 (1984).
111. Schenck v. United States, 249 U.S. 47, 51 (1919). "Of course," Holmes argued simply, "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 it out." Id.
convictions, notwithstanding the rhetoric that the danger must be “clear” and “present.”

“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” This test, Holmes elaborated, is always “a question of proximity and degree.” There was no doubt that Congress had the power, Holmes reasoned, to outlaw the actual obstruction of the draft. There was also no doubt, he maintained, that Congress could punish the “words that produced that effect.” Could Congress penalize words when it was not demonstrated that they had actually resulted in obstruction of the draft? Holmes thought the answer was yes — as long as the words were intended to have that effect, and also had a “tendency” to produce the effect, they could be penalized: “[i]f the act, (speaking, or circulating a paper) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.”

After Schenck, the clear and present danger test went through decades of evolution. Holmes continued his willingness to send protestors to jail for the mere bad tendencies of their speech in Frohwerk v. United States and Debs v. United States, before undergoing something in the nature of a legal conversion experience in Abrams v. United States. In Abrams, Holmes wrote his stirring dissent, perhaps the most celebrated opinion of his distinguished career, writing with haunting eloquence:

But when men have realized that time has upset many fighting faiths, they may

112. The defendants argued that even if this were the intended effect, the leaflets were protected by the First Amendment. Id. Holmes admitted that “in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights.” Id. at 52. But these were not ordinary times, Holmes maintained, and “the character of every act depends upon the circumstances in which it is done . . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.” Id.

113. Schenck, 249 U.S. at 52.

114. Id.

115. Id.

116. Id.

117. Id.


119. 249 U.S. 204 (1919).

120. 249 U.S. 211 (1919).

121. 250 U.S. 616 (1919).
come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. 122

This was a dramatic departure from “bad tendency,” written in terms of immediacy and emergency, or as Brandenburg would eventually put it, imminence. But it took a long time to get from Abrams to Brandenburg, and in an important weigh station in between, Dennis v. United States,123 the notion of temporal proximity seemed, for awhile, to drop out of the picture altogether. Dennis involved the convictions of eleven members of the American Communist Party for violating the Smith Act, a federal statute making it unlawful “to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence . . . .”124 The convictions were first appealed to the United States Court of Appeals for the Second Circuit in New York, and were affirmed by the Chief Judge of that court, Learned Hand.125 In his opinion affirming the convictions, Hand took the clear and present danger test, and purported to explain its meaning in new words. In each case, Hand maintained, courts must “ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”126 Justice Vinson, writing the plurality opinion in Dennis for the Supreme Court, found the Hand reformulation of clear and present danger

122. Id. at 630 (Holmes, J., dissenting); see also David Rabban, The Emergence of Modern First Amendment Doctrine, 50 U. Chi. L. Rev. 1205 (1984) (providing thoughts on what caused this metamorphosis in Holmes).
123. 341 U.S. 494 (1951).
125. United States v. Dennis, 183 F.2d 201 (2d Cir. 1950).
126. Id. at 212.
appealing and adopted it as his own, writing that "[a]s articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words."127 Justice Vinson then used the Hand test to affirm the convictions of the Communist leaders, explaining that the phrase "clear and present danger" simply "cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited."128

Proximity in time does not appear to be an integral part of the Dennis test, although it may become an element in the assessment of probability. What the Hand test in Dennis endorsed was a First Amendment variant of conventional tort-law risk analysis, in which judges and juries are to discount the "gravity of the evil" by its "improbability."129 If something like the Dennis test were adopted as the governing formula in media violence cases, plaintiffs would be in a strong position to argue that, given the high "gravity" of the evil — violence resulting in injury or death — liability might be imposed even when the probability is relatively low, and even when there is no immediacy in time.130

Cases after Dennis, however, appear to have put immediacy in time back into the clear and present danger tradition, at least in the context of political discourse and protest. The Court in Yates v. United States131 reversed Smith Act convictions against communist party officials in an opinion by Justice Harlan, somewhat narrowing the scope of Dennis in the process.132 Justice Harlan concluded that Dennis did not obliterate "the traditional dividing line between

127. Dennis, 341 U.S. at 510.
128. Id. at 509. Justice Frankfurter concurred, applying a balancing test to affirm the convictions. Id. at 544-45 (Frankfurter, J., concurring).
130. Id. Judge Hand's formula for assessing when it was permissible to impose liability for speech was no different than his formula for assessing when it was permissible to impose liability for all other forms of human activity. In a famous decision written during this same time period, United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), Hand was faced with the question of whether the owners of a ship were guilty of negligence. He expressed his analysis algebraically, stating that a party should be deemed negligent if the burden (B) of preventing the accident is less than the loss (L) multiplied by the probability (P) of its occurrence, or whether "B < PL." In Dennis, Hand merely took his Carroll Towing formula and refitted it for the First Amendment.
advocacy of abstract doctrine and advocacy of action."  

Dennis must be understood, Justice Harlan admonished, as holding that the preparation of a group for violence or revolution was not protected by the First Amendment in circumstances in which such violence or revolution was being "presently" advocated to be undertaken as soon as future circumstances permit:

_"Dennis was . . . not concerned with a conspiracy to engage at some future time in seditious advocacy, but rather with a conspiracy to advocate presently the taking of forcible action in the future. It was action, not advocacy, that was to be postponed until "circumstances" would "permit.""

Despite this narrowing of Dennis, the Court, again through Justice Harlan, upheld prosecutions against Communists in *Scales v. United States*. The lower court in *Scales* had found that the Communist Party members advocated violent overthrow of the government "as speedily as circumstances would permit." Justice Harlan held that this finding satisfied the requirements of Dennis and Yates, because the Smith Act as narrowly interpreted:

>[I]s found to reach only "active" members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action.

Thus, while *Yates* had been carefully written to draw a line between protected "advocacy" and unprotected calls to "action," *Scales* made it clear that present calls for future illegal action were enough to satisfy the requirement of "immediate" danger under the First Amendment:

*Dennis* and *Yates* have definitely laid at rest any doubt that present advocacy of future action for violent overthrow satisfies statutory and constitutional requirements equally with advocacy of immediate action to that end.

The distinction drawn in this fine line between "mere advocacy" in *Yates* and "present" calls to "future action" in *Scales* was applied by the Supreme
Court in *Noto v. United States*,\(^{139}\) decided the same day as *Scales*.\(^{140}\) In *Noto* the Court, once again through Justice Harlan, reversed the conviction of a Communist Party worker in upstate New York, holding that the defendant was merely a member of the Communist Party, and that there was little evidence of participation in the sort of advocacy of action required by *Scales*.\(^{141}\) In an important passage, however, the Court in *Noto* expressed the view that the First Amendment would permit convictions based on conduct it described as “preparing a group for violent action and steeling it to such action.”\(^{142}\)

These were the key cases leading up to *Brandenburg* and its requirement of imminence. All of these cases dealt with situations quite distinct from media violence suits based on violent video games, explicit movies, surprise television, or murder manuals. The same can be said of the Supreme Court’s subsequent elaborations on *Brandenburg*. In *Hess v. Indiana*, for example, the defendant was convicted of violating Indiana’s disorderly conduct statute in an anti-Vietnam War demonstration on the campus of Indiana University.\(^{143}\) Between 100 and 150 demonstrators had moved onto a public street, blocking traffic.\(^{144}\) After refusing to obey the sheriff’s command to clear the street, the demonstrators were moved to the curbs by the sheriff and his deputies.\(^{145}\) As the sheriff passed by, Hess said, “[w]e’ll take the fucking street later.”\(^{146}\) The sheriff immediately arrested Hess for disorderly conduct and he was convicted.\(^{147}\) The Supreme Court reversed the conviction, holding that Hess could not be convicted merely for having used the word “fuck,” since that word, standing alone, did not satisfy the legal definition of obscenity.\(^{148}\) Nor could Hess’s statement be seen as a direct verbal challenge to fight the sheriff or his


\(^{140}\) Like *Yates* and *Scales*, the prosecution in *Noto* was under the so-called “Membership Clause” of the Smith Act, 18 U.S.C. § 2385, which states, in part: “whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof . . . .” (emphasis added).


\(^{142}\) *Id.* at 297-98.


\(^{144}\) *Id.* at 106.

\(^{145}\) *Id.*

\(^{146}\) *Id.* at 107.

\(^{147}\) *Id.* at 105.

\(^{148}\) *Id.* at 107.
deputies — witnesses testified that he was facing the crowd, not the street, when
he made the statement and that his words did not appear to be addressed to any
particular person or group. 149 Turning to the Brandenburg standard, the Court
held that Hess was not guilty of any incitement to imminent lawless action. 150
The words “[w]e’ll take the fucking street later,” the Court maintained, could be
taken as a counsel for “present moderation” or as advocacy of illegal action “at
some indefinite future time,” neither of which were enough to constitute a
present threat of imminent disorder. 151

The Court interpreted Brandenburg again in NAACP v. Claiborne Hardware
Co. 152 The case grew out of a boycott of white-owned stores organized by a
local branch of the NAACP to protest racial inequality. 153 Charles Evers, one of
the NAACP leaders, stated that “boycott violators would be ‘disciplined’ by
their own people and warned that the Sheriff could not sleep with boycott
violators at night.” 154 Evers was further quoted as saying: “[i]f we catch any of
you going in any of them racist stores, we’re gonna break your damn neck.” 155
The Supreme Court held that the boycott was politically motivated and protected
by the First Amendment. 156 Although some of the statements of Evers and
other boycott leaders might have sounded like exhortations to violence, the
Supreme Court held that they were the sort of mere advocacy that did not satisfy
the rigorous requirements of the Brandenburg standard, admonishing that
“[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in
purely dulcet phrases.” 157

The immediacy requirement plays a vital role in the context of public
demonstrations and protest, in which there is a grave concern that police may
engage in censorship of ideas in situations in which there may certainly be some
risk of violence at some indefinite future time, but there is no immediate
physical emergency. 158 If a group of protesters is planning to set off a bomb in

149. Hess, 414 U.S. at 107-08.
150. Id. at 109.
151. Id. at 108-09.
153. Id. at 889.
154. Id. at 902.
155. Id.
156. Id. at 911-12.
157. Id. at 928.
158. McCalden v. California Library Ass’n, 955 F.2d 1214, 1229 (9th Cir. 1992) (Kozinski, J.,
dissenting from the order rejecting the suggestion for rehearing en banc) (“Public demonstrations
the plaza of a public building as part of a mass demonstration, and their advance communications involve the planning of that physical violence, law enforcement officials alerted to that planning would certainly be justified in moving in and arresting the protesters for conspiracy to destroy property and endanger lives. If the same group of protesters, however, meet to plan a mass rally that does not include any planned acts of violence, but that does include a great deal of fiery and emotional rhetoric, even rhetoric that could tend to cause the crowd to surge out of control and endanger property or lives, the Brandenburg test would not be satisfied. In such cases it would violate the Constitution for law enforcement officials to arrest the protest rally planners or seek to enjoin the rally. Officials are perfectly free to flood the plaza with police and undercover agents, but they must refrain from penalizing the speech until a genuine clear and present danger actually ripens, live, on the scene.159

This dynamic is now well-understood in our First Amendment tradition. While there may be close calls, in the context of protest and political discourse the distinction between abstract advocacy of violence and present calls to future violence, and the requirement of imminence, are all at least coherent and understandable, if not always easy to apply. The dynamic breaks down, however, when we move away from this context.

This breakdown was vividly illustrated by the Hit Man murder manual litigation, Rice v. Paladin Enterprises, Inc., in which the United States Court of Appeals for the Fourth Circuit held that a viable cause of action in tort for aiding and abetting murder existed against the publisher of a murder manual entitled Hit Man: A Technical Manual for Independent Contractors, which was used by a professional hit man as the blueprint for three murders.160 The publisher had

often carry with them the risk of violence. A large group of individuals, united by a common cause and motivated by strong emotions, can get out of control, causing property damage or injury. This is a risk we endure as part of life in a free society; it is not a sufficient reason—and I hope it will never become one—to stifle concerted public expression.

159. Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1014 (7th Cir. 1984) (en banc) (Posner, J.) (“If... a new sect of religious fanatics announced that unless Chicagoans renounce their sinful ways it may become necessary to poison the city’s water supply, or a newly organized group of white supremacists vowed to take revenge on Chicago for electing a black mayor, these statements, made by groups with no “track record” of violent acts, might well be privileged. Or suppose the leaders of a newly formed organization of Puerto Rican separatist[s] went around Chicago making speeches to the effect that, if the United States does not grant Puerto Rico independence soon, it will be necessary to begin terrorist activities on the mainland United States. These speeches could not, in all probability, be made the basis of a prosecution.”).

stipulated for the purposes of a motion for summary judgment that it marketed the manual to attract and assist criminals, and that it knew and intended that the manual would be used, upon receipt, by real murderers to plan and execute killings.161 These stipulations, of course, went a long way toward establishing culpability in aiding and abetting murder.162 The murder manual was originally published in 1983, but the murders at issue did not take place until 1993.163 The alleged murderer apparently purchased the murder manual in 1992, several months before the killings.164 The Court of Appeals held that in these circumstances the First Amendment did not preclude the imposition of liability, and reversed a grant of summary judgment and remanded for trial.165 In the course of that ruling, the court engaged in an extended discussion of Brandenburg and whether it could or should be applied to the fact pattern presented, engaging in a close examination of the alleged role that the murder manual played in the killings.166 On the night of March 3, 1993, readied by the instructions in Hit Man and steeled by its “seductive adjurations,” the “hit man,” James Perry, brutally murdered Mildred Horn, her eight-year-old quadriplegic

161. Id. at 241 n.2. The publishers stipulated:

4. Defendants concede, for purposes of this motion, and for no other purposes, that:
   a. defendants engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes; and
   b. in publishing, marketing, advertising and distributing Hit Man and Silencers, defendants intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications.

* * *

7. Defendants concede, for the purpose of this motion and for no other purposes, that in publishing, distributing and selling Hit Man and Silencers to Perry, defendants assisted him in the subsequent perpetration of the murders which are the subject of this litigation.

Id. at 241 n.2.


164. Id.


166. Id. at 243-44.
son Trevor, and Trevor’s nurse, Janice Saunders, by shooting Mildred Horn and Saunders through the eyes and by strangling Trevor Horn. Perry was a contract killer, a “hit man,” hired by Mildred Horn’s ex-husband, Lawrence Horn, to murder Horn's family so that Horn would receive the $2 million that his eight-year-old son had received in settlement for medical malpractice injuries that had left him paralyzed. At the time of the murders, this money was held in trust for Trevor and the trust money was to be transferred to Lawrence in the event of Mildred’s and Trevor’s deaths. The Court stated that:

In soliciting, preparing for, and committing these murders, Perry meticulously followed countless of Hit Man’s 130 pages of detailed factual instructions on how to murder and to become a professional killer. Perry, for example, followed many of the book’s instructions on soliciting a client and arranging for a contract murder in his solicitation of and negotiation with Lawrence Horn. Cautioning against the placement of advertisements in military or gun magazines, as this might prompt “a personal visit from the FBI,” Hit Man instructs that “as a beginner” one should solicit business “through a personal acquaintance whom you trust.” James Perry sold his services as a killer to Lawrence Horn through Thomas Turner, a friend of Perry’s and Lawrence Horn’s cousin. Hit Man contains instructions to request expense money from the employer prior to committing the crime, advising the contract killer to get “all expense money up front.” The manual explains that this amount should range from five hundred to five thousand dollars, “depending on the type of job and the job location,” and that the advance payment should be received as cash. Prior to commission of the murders, Lawrence Horn paid James Perry three thousand five hundred dollars through a series of wire transfers using phony names. Hit Man instructs that the victim’s home is the “initial choice” as a location and “an ideal place to make a hit,” depending on its “layout” and “position.” James Perry murdered the Horns at their place of residence.

167. Id. at 239.
168. Id.
169. Id.
170. Id.
171. Rice, 128 F.3d at 239 (quoting REX FERAL, HIT MAN at 87 (1983)).
172. Id. (citing Perry v. State, 686 A.2d 274, 278 (1996), cert. denied, 117 S. Ct. 1318 (1997)).
173. Id. (quoting REX FERAL, HIT MAN at 92 (1983)).
174. Id. (quoting REX FERAL, HIT MAN at 92 (1983)).
175. Id. at 240 (citing Perry, 686 A.2d at 280).
176. Id. (quoting REX FERAL, HIT MAN at 81-82 (1983)).
Hit Man instructs the reader to rent a car when performing the job. The book tells the reader to “steal an out-of-state tag” and use it to “replace the rental tag” on the car, stating that “[s]tolen tags only show up on the police computer of the state in which they are stolen.” James Perry stole out-of-state tags and put them on his rented car prior to driving to the Mildred Horn’s home.

Hit Man further instructs its readers to establish a base at a motel close to the “jobsite” before the hit. On the night Perry killed Mildred and Trevor Horn and Janice Saunders, he took a room at a Days Inn motel that was a short drive from the Horns’ residence. Hit Man teaches that a contract killer should “use a made-up [license] tag number” when registering at the motel. James Perry provided a false tag number when he checked in at the Days Inn that evening. Hit Man says that a “beginner” should use an AR-7 rifle to commit the crime. James Perry shot Mildred Horn and Janice Saunders with an AR-7 rifle.

Hit Man tells its readers where to find the serial numbers on an AR-7 rifle, and instructs them that they should completely drill out these numbers so that the weapon cannot be traced by law enforcement officials. Hit Man instructs in explicit detail, including photographs and diagrams, how to construct, “without [the] need of special engineering ability or machine shop tools,” a homemade, “whisper-quiet” silencer from material readily available. James Perry built such a silencer and used it on the AR-7 rifle with which he murdered Mildred and Trevor Horn and Janice Saunders.

James Perry also followed many of Hit Man’s instructions on how to commit the actual murders. The manual instructs its readers to kill their “mark”
at close range, so that the killer will “know beyond any doubt that the desired result has been achieved.” 191 The book cautions, however, that the victim should not be shot at point blank range, because “the victim’s blood [will] splatter [the killer] or [his] clothing.” 192 Additionally, the book recommends that the reader shoot the victim from a distance of three to six feet. 193 James Perry shot two of his victims from a distance of three feet. 194 Hit Man instructs its readers to shoot the victim through the eyes if possible, stating that “[a]t least three shots should be fired to insure quick and sure death. . . . [A]im for the head -- preferably the eye sockets if you are a sharpshooter.” 195 James Perry shot Mildred Horn and Janice Saunders the specified number of times through the eyes. 196

Similarly, James Perry also followed many of Hit Man’s instructions in concealing his murders. Hit Man instructs the reader to “[p]ick up those empty cartridges that were ejected when you fired your gun.” 197 Although Perry fired a number of times, no cartridges were found. 198 Hit Man tells its readers to disguise the crime as burglary by “mess[ing] the place up a bit and tak[ing] anything of value that you can carry concealed.” 199 After the murders, James Perry stole a Gucci watch, as well as some credit cards. 200 According to the police report, a few areas of the Horns’ residence appeared disturbed or slightly tossed, and a rug and cocktail table in the living room had been moved. 201 Hit Man instructs that the murderer should break down the weapon in order to make it easier to conceal. 202 James Perry disassembled his weapon after the murders, in accordance with these instructions. 203 Hit Man instructs its readers in how to use specified tools to alter the rifle. 204 The book explains that the alterations will prevent the police from matching the slugs recovered from the victims’
bodies to the rifle.\textsuperscript{205} James Perry altered his rifle the way the book instructed.\textsuperscript{206} Hit Man also instructs killers to dispose of the weapon by scattering its disassembled pieces after he leaves the crime scene.\textsuperscript{207} After the murders, Perry disposed of the pieces of his disassembled AR-7 rifle along Route 28 in Montgomery County.\textsuperscript{208}

Throughout the Hit Man litigation, both sides expended considerable energy over the motivations of the publisher.\textsuperscript{209} On one level, of course, the publisher's motivation was at once mundane and obvious: to sell as many books as possible and make as much money as possible. The plaintiffs readily conceded this point, stipulating that in order to increase revenues, the murder manual was marketed and sold to many readers who were not planning to use it to kill people.\textsuperscript{210} The plaintiffs argued, however, that one of the publisher's motivations was to market and sell the book to criminals and would-be criminals like James Perry who would indeed use it to commit murder, and that this was enough to defeat any First Amendment defense.\textsuperscript{211} The Court of Appeals agreed, observing that "every court that has addressed the issue, including this court, has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word."\textsuperscript{212}

\begin{itemize}
\item \textsuperscript{205} Id. (citing REX FERAL, HIT MAN at 25 (1983)).
\item \textsuperscript{206} Id. (citing Perry, 686 A.2d at 280).
\item \textsuperscript{207} Id. (citing REX FERAL, HIT MAN at 105 (1983)).
\item \textsuperscript{208} Id. (citing Perry, 686 A.2d at 280).
\item \textsuperscript{209} See RODNEY A. SMOLLA, DELIBERATE INTENT: A LAWYER TELLS THE TRUE STORY OF MURDER BY THE BOOK 112-28 (1999).
\item \textsuperscript{210} Rice, 128 F.3d at 241 n.2. The stipulations of the parties included a paragraph that read: a. Defendants' marketing strategy was and is intended to maximize sales of its publications to the public, including sales to (i) authors who desire information for the purpose of writing books about crime and criminals, (ii) law enforcement officers and agencies who desire information concerning the means and methods of committing crimes, (iii) persons who enjoy reading accounts of crimes and the means of committing them for purposes of entertainment, (iv) persons who fantasize about committing crimes but do not thereafter commit them, and (v) criminologists and others who study criminal methods and mentality.
\item \textsuperscript{211} Id.
\item \textsuperscript{212} Rice, 128 F.3d at 244. The accuracy of the Court of Appeals' reading of the law of other circuits was reinforced by a report issued by the Department of Justice on the eve of oral argument
\end{itemize}
The plaintiffs in the *Hit Man* suit drew heavily on lower court decisions decided in the criminal law context in which courts had refused to treat the First Amendment as a bar to conviction in cases in which speech was closely intertwined with crime. As then-Judge Kennedy, writing for the Ninth

below. See DEP’T OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION (April 1997) ("But the tax-avoidance aiding and abetting cases are not subject to *Brandenburg* because culpability in such cases is premised, not on defendants’ 'advocacy' of criminal conduct, but on defendants’ successful efforts to assist others by detailing to them the means of accomplishing crimes.").

213. See, e.g., United States v. Barnett, 667 F.2d 835, 843 (9th Cir. 1982) (holding that the First Amendment does not provide publishers a defense as a matter of law to charges of aiding and abetting a crime through the publication and distribution of instructions on how to make illegal drugs, rejecting as a "specious syllogism" with "no support in the law" the publisher’s argument that there could be no probable cause to believe that a crime had been committed because its actions were shielded by the First Amendment, stating that "[t]o the extent . . . that Barnett appears to contend that he is immune from search or prosecution because he uses the printed word in encouraging and counseling others in the commission of a crime, we hold expressly that the first amendment does not provide a defense as a matter of law to such conduct."); United States v. Buttorff, 572 F.2d 619, 623-24 (8th Cir. 1978) (sustaining convictions for aiding and abetting the filing of false or fraudulent tax returns against defendants who spoke at large public meetings where they offered detailed instructions on how to illegally avoid paying taxes and frustrate the administration of the Internal Revenue Service, stating: "Although the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. This speech is not entitled to first amendment protection and, as discussed above, was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms."); United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990) (holding *Brandenburg* inapplicable to a conviction for conspiring to transport and aiding and abetting the interstate transportation of wagering paraphernalia, where defendants disseminated a computer program that assisted others to record and analyze bets on sporting events, on grounds that the program was "too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection."); United States v. Rowlee, 899 F.2d 1275, 1279 (2d Cir. 1990), cert. denied, 498 U.S. 828 (1990) (rejecting First Amendment defense to aiding and abetting convictions in case involving "step-by-step instructions on how to prevent employers from withholding both state and federal income taxes," noting that the consensus of every federal Court of Appeals was that liability for a false or
fraudulent tax return cannot be avoided by invoking the First Amendment and stating "we think it would have made for a simpler and cleaner case if the district court had not referred to the First Amendment at all" because "to the extent that the concept of 'imminent lawless action' has any role to play in this non-syndicalism case" that concept was already incorporated in the criminal statute); National Org. for Women v. Operation Rescue, 37 F.3d 646, 656 (D.C. Cir. 1994) ("That 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality."); United States v. Moss, 604 F.2d 569 (8th Cir. 1979), cert. denied, 444 U.S. 1071 (1980) (holding that the First Amendment did not protect defendant's speech which challenged the constitutionality of federal income tax laws and described how to avoid the federal withholding tax); United States v. Fleschner, 98 F.3d 155, 158-59 (4th Cir. 1996), cert. denied, 521 U.S. 1106 (1997) (holding that defendants who instructed and advised meeting attendees to file unlawful tax returns were not entitled to a First Amendment jury instruction on the charge of conspiracy to defraud the United States of income tax revenue because "[t]he defendants' words and acts were not remote from the commission of the criminal acts."); United States v. Kelley, 769 F.2d 215 (4th Cir. 1985) (same); United States v. Daly, 756 F.2d 1076, 1081-82 (5th Cir. 1985) (sustaining conviction for conspiracy to defraud the United States based on dissemination of information to members of church on how to file tax returns in a manner calculated to hamper Internal Revenue Service investigation, noting that the defendant "claims that his advocacy of a tax scheme, whether legal or illegal, is protected by the First Amendment, because it did not incite imminent lawless action. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). This claim is preposterous."); United States v. Featherston, 461 F.2d 1119, 1122 (5th Cir.), cert. denied, 409 U.S. 991 (1972) (rejecting First Amendment challenge to federal statute criminalizing the teaching or demonstration of the making of any explosive device, 18 U.S.C. § 232(l), after construing statute to require "intent or knowledge that the information disseminated would be used in the furtherance of a civil disorder."); National Mobilization Comm. to End the War in Viet Nam v. Foran, 411 F.2d 934, 937 (7th Cir. 1969) (similarly rejecting First Amendment challenge to 18 U.S.C. § 232(l), stating that the requirement of intent "narrows the scope of the enactment by exempting innocent or inadvertent conduct from its proscription."); Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir. 1992), cert. denied, 506 U.S. 1071 (1993) (sustaining a wrongful death cause of action against Soldier of Fortune Magazine arising from a "gun for hire" advertisement); Weirum v. RKO Gen., Inc., 539 P.2d 36, 40 (Cal. 1975) (sustaining an action for wrongful death when the decedent's automobile was negligently forced off a highway by a listener to the defendant's radio station, which was conducting a contest rewarding the first contestant to locate a disc jockey traveling throughout the listening area, rejecting the station's asserted First Amendment defense, holding that "[d]efendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because
Circuit in *United States v. Freeman*\(^\text{214}\) explained, "[i]n those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone."\(^\text{215}\)

If the principle were otherwise, government would be paralyzed, for a large part of criminal and tortious activity is executed through the use of language, and "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."\(^\text{216}\)

The Court in *Rice* rejected the argument that the imposition of liability in the murder manual scenario was inconsistent with the long line of rulings rejecting liability in the "copycat" scenario, cases in which the publisher or broadcaster clearly did not *intend* that others follow or act upon their depictions:

In the 'copycat' context, it will presumably *never* be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime; rather, the information for the dissemination of which liability is sought to be imposed will actually have been *misused* vis-a-vis the use intended, not, as here, used precisely as intended. . . . And, perhaps most importantly, there will almost never be evidence proffered from which a jury even *could* reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity.\(^\text{217}\)

The *Rice* Court's treatment of *Brandenburg* was especially intriguing. The plaintiffs had argued that *Brandenburg* does not insulate a defendant from

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\(^\text{214}\) 761 F.2d 549 (9th Cir. 1985), cert. denied, 476 U.S. 1120 (1986).

\(^\text{215}\) Id. at 552.

\(^\text{216}\) Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949); see also KENT GREENAWALT, SPEECH, CRIME AND THE USES OF LANGUAGE 85 (1989) ("The reasons of ordinary penal policy for covering communicative efforts to carry out ordinary crimes are obvious, and the criminal law sensibly draws no distinction between communicative and other acts. Although assertions of fact generally fall within a principle of freedom of speech, what these sorts of factual statements contribute to the general understanding of listeners is minimal, and the justifications for free speech that apply to speakers do not reach communications that are simply means to get a crime successfully committed."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 837 (2d ed. 1988) ("And the law need not treat differently the crime of one man who sells a bomb to terrorists and that of another who publishes an instructional manual for terrorists on how to build their own bombs out of old Volkswagen parts.").

liability when the defendant's speech goes beyond the bounds of abstract advocacy and into the realm of providing specific instruction that aids and abets another in the commission of a criminal offense.\footnote{Id. at 255-56.} The court in \textit{Rice} accepted this submission, accepting as valid the distinction between mere "abstract teaching" and more concrete preparation and instruction to aid and abet crime.\footnote{Id.} \textit{Brandenburg} itself had appeared to recognize this distinction, emphasizing that "the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."\footnote{\textit{Brandenburg}, 395 U.S. at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).}

The opinion in \textit{Rice} recognized that \textit{Hit Man} could not embrace any plausible claim to being mere "abstract teaching" of the "moral propriety" of murder.\footnote{\textit{Rice}, 128 F.3d at 249.} Rather, the \textit{Hit Man} manual was precisely what it claimed to be, a "technical manual" published "for" the "independent contractor."\footnote{Id. at 249.} It was steeped in detailed step-by-step instruction, including engineering specifications, photographs, diagrams, charts, sample maps, checklists, formulas, suggested prices, information on selection of weapons, methods for altering weapons and ammunition, killing techniques, travel arrangements, instructions on appropriate garb, money-laundering methods — all the protocols, particulars and minutia of contract murder from A to Z, punctuated page-by-page with exhortation and encouragement intended to prepare and steel the criminal for action.\footnote{Id. at 264.}

The plaintiffs argued that the murder manual, in its combination of encouragement and detail, went far beyond \textit{Brandenburg}.\footnote{\textit{Rice}, 128 F.3d at 264.} Imagine that in \textit{Brandenburg} itself, the record had demonstrated that the leaders of the Ku Klux Klan rally did more than burn crosses and spout racist venom, but actually distributed material such as maps, diagrams, chemical formulas for bombs,
travel arrangements, instruction on weapons selection, and specific killing techniques, thus crossing the line from mere abstract advocacy to specific training and preparation. And imagine that following those instructions, Klan members went out and committed murder, using the techniques distributed at the rally. And imagine that the Klan leaders stipulated that in distributing their material, they knew and intended that the information would be used to kill. And imagine that the Klan leaders were convicted not under a broadly-worded “criminal syndicalism” law, but for intentionally aiding and abetting murder. In those circumstances, it is inconceivable that the Supreme Court would have reversed the convictions as beyond the pale of the First Amendment. To the contrary, the Court would surely have cited holdings such as *Noto v. United States*, labeling such conduct as “preparing a group for violent action and steeling it to such action.”

The Fourth Circuit Court of Appeals properly recognized the great purpose of the standard articulated in *Brandenburg*, eloquently explaining that the “right to advocate lawlessness is, almost paradoxically, one of the ultimate safeguards of liberty.” The point of *Brandenburg* is to place even advocacy of violence, revolution, and murder within the ambit of the free speech principle. As the Court of Appeals stated:

> Even in a society of laws, one of the most indispensable freedoms is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted. Without the freedom to criticize that which constrains, there is no freedom at all.

What the Court of Appeals also recognized, however, is that the *Brandenburg* standard was never designed to insulate from liability the communication of detailed information intended to facilitate crime. There was no abstract advocacy in the detailed how-to instructions contained in *Hit Man*. Unlike the many decisions of the Supreme Court that comprise the *Brandenburg* line of precedent — all of which involved political or social discourse of some kind — *Hit Man* was nothing more than detailed factual information on how to go into business as a paid assassin and carry out
executions, coupled with constant psychological indoctrination calculated to place the assassin in an efficient and cold-blooded state of mind. *Hit Man* was not political manifesto, not revolutionary diatribe, not propaganda, advocacy, or protest, not an outpouring of conscience or credo. It was *instruction and encouragement*, pure and simple, in the dark arts of mercenary murder.

This distinction between teaching theory and teaching technique was emphasized by no less a First Amendment stalwart than Justice William O. Douglas, in his dissenting opinion in *Dennis*.

If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale.”

The Court of Appeals in *Rice*, therefore, appeared to accept the argument of the plaintiffs (and the argument advanced in this article), that the *Brandenburg* requirement of imminence need not be satisfied in those instances in which the speaker provides substantial detailed assistance in the commission of a crime with the intent that the information will be used to commit the crime, holding:

Paladin’s astonishing stipulations, coupled with the extraordinary comprehensiveness, detail, and clarity of *Hit Man*’s instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction, the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book’s evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law. In at least these circumstances, we are confident that the First Amendment does not erect the absolute bar to the imposition of civil liability for which Paladin Press and *amici* contend.

Even though the publishers of *Hit Man* did not have *specific criminal intent*, in the sense of knowledge that James Perry would use the book *Hit Man* to commit a particular set of murders, the publishers of *Hit Man* knew and intended that some of its readers would use the book to kill. This was enough to defeat
any First Amendment defense. The defendants in Hit Man objected that many other publications also contained detailed information on criminal activity — including many novels, movies, scientific journals, or journalistic accounts of real crime. But the plaintiffs claimed, and the Rice court found convincing, the counter-argument that none of those other examples contained the unique combination of detailed instruction, psychological exhortation, and intent to assist crime. As the court explained: "[t]he unique text of Hit Man alone, boldly proselytizing and glamorizing the crime of murder and the 'profession' of murder as it dispassionately instructs on its commission, is more than sufficient to create a triable issue of fact as to Paladin's intent in publishing and selling the manual." The plaintiffs in Rice thus successfully advanced the argument that Brandenburg need not be applied in the murder manual scenario. The plaintiffs also argued, however, that Brandenburg was not a barrier to a jury trial, even if it applied. On this issue, plaintiffs claimed that "imminence" need not be calculated in terms of proximity to the ultimate murders, but rather proximity to the "lawless action" that preceded them, which included the process of planning and conspiracy. The defendants had stipulated, after all, that the publishers knew and intended that the manual would be used "upon receipt" by criminals and would-be criminals to plan crimes. The Rice court appeared to endorse this fall-back argument, agreeing that even on its terms, the Brandenburg formulation did not warrant granting Paladin judgment as a matter of law, reasoning that the stipulations were sufficient to avoid summary judgment under

234. This analysis appeared to be endorsed by the United States Department of Justice. See DEP'T OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION 30 & n. 47 (April 1997) (citations omitted) ("Therefore, insofar as criminal culpability for dissemination of such information depends upon the distributors' intent -- for example, upon whether a disseminator of bombmaking manuals had the conscious purpose of helping others to use the information to engage in unlawful conduct -- the substance of the advocacy in such manuals could be used as material evidence of such intent.").
235. Rice, 128 F.3d at 265.
236. Id. at 249.
237. Id. at 254.
238. Id. at 252.
239. Id. at 249.
240. Id. at 241 n.2.
Properly construed, the *Rice* court’s most important holding was that the imminence element of *Brandenburg* need not be satisfied in a case presenting the unique facts posed by the publication of a detailed murder instruction manual. That ruling can be understood in a variety of ways. *Hit Man* contained very little of what might plausibly be described as political advocacy, dissent, or discourse. To the extent that the core purpose of *Brandenburg* is to protect such expression, no such expression existed to protect. Alternatively, *Rice* can be understood as treating the detailed instruction, written with intent to assist in crime, as itself a form of “lawless action,” a deliberate *en masse* aiding and abetting of crime, that in effect satisfied *Brandenburg*’s imminence standard *instantly*, for the very providing of such detailed instruction with such intent to aid and abet was *itself* lawless action. More generally, however, *Rice* may be most centrally grounded in what might be called a “detail for imminence trade,” a judgment that materials intended to provide detailed training instruction for planning and executing crimes deserve no First Amendment protection even though there may be a gap in time between the provision of the assistance and the perpetration of the crime, because the detailed training provides a causal nexus to lawless action that serves as a substitute for the nexus normally required in time. One of the theories behind the imminence requirement is that when time passes, other competing ideas have a chance to work their influence on the audience. We should count on the marketplace of ideas in situations in which there is time for the marketplace to operate. The marketplace metaphor, however, simply does not resonate at all in the context of a detailed criminal instruction manual, which by its very nature and express terms is encouraging the criminal to carefully and meticulously plan the future crime. A manual that says “Go out and blow up the building now!” is actually *less* lethal than a manual that says “Carefully plot and prepare and train and go out and blow up the building in three months.”

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242. See, e.g., Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting) (“The best test of truth is the power of the thought to get itself accepted in the competition of the market.”); Gitlow v. New York, 268 U.S. 652 (1925) (Holmes, J., dissenting) (“If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”).
V. CONCLUSION

If these ruminations are at all sound, as a justice on the state supreme court you should now have some better-informed intuitions about the pressure-points posed by the five cases pending before you.

In the suit brought against the manufacturers of a violent video game, it seems highly improbable that the plaintiffs could ever demonstrate either an intent to encourage or assist in the commission of violent behavior, let alone demonstrate that such behavior would follow imminently upon playing the game. Even if, for the reasons advanced in this article and accepted in Rice, you might be willing to forego the imminence requirement when there is evidence of an intent to provide detailed instruction for the commission of crime, this fact pattern does not appear to provide either evidence of intent or detail. The plaintiff’s only hope of success in this case, therefore, would be to convince you to adopt an entirely different analysis because these video games were allegedly marketed toward children. Only if you are convinced that much more lax standards of fault, causation, or proximity should be applied in the context of violent material targeted for consumption by children would you be likely to permit this suit to proceed.

The “surprise television” case appears very far removed from anything remotely resembling Brandenburg, and you may find yourself very much tempted by the plaintiff’s arguments that this case actually fails to even trigger any significant First Amendment protection, but is rather much more like the negligent car-chase encouraged by the radio station in Weirum v. RKO General, Inc.243

On the other hand, ultimately the claim of liability is predicated on what was revealed during the taping of the show, a claim clearly based on the content of speech, and it is almost certain that no case can be made that the defendants intended for that revelation to cause any violent consequences to ensue, or that the revelation provided any detailed instruction or assistance in crime. If you accept the parameters of liability discussed within this article, you would not be inclined to allow this cause of action.

The producers of the movie thriller will presumably be able to decisively

243. Weirum v. RKO Gen., Inc., 539 P.2d 36 (Cal. 1975) (sustaining an action for wrongful death when the decedent’s automobile was negligently forced off a highway by a listener to the defendant’s radio station, which was conducting a contest rewarding the first contestant to locate a disc jockey traveling throughout the listening area); see also supra, notes 29-30, and accompanying text.
and resoundingly negate the plaintiffs’ self-serving allegations that the movie was distributed with the intent that the behavior in it be emulated. Assuming that this is how the case in fact unfolds, if you accept the limitations argued in this article you would not be willing to support liability. The movie scenario appears to present the pure and classic example of nothing more than copycat behavior. *Rice* does not take issue with those cases, but rather appears to endorse and distinguish them. Thus, even if you find *Rice* persuasive, in the absence of credible and convincing evidence of intent, the defendants should prevail.

The abortion web page case implicates very difficult conflicts. On the one hand, this case clearly does involve a political discourse and protest in its classic sense. Thus the claim by defendants that they are entitled to the full protection of *Brandenburg* are forceful, for these abortion protestors, like the Ku Klux Klan members in *Brandenburg*, cannot be penalized for mere abstract advocacy. What makes the abortion web page case difficult, however, is the injection of an element not present in *Brandenburg*, the detailed provision of material on the doctors’ names, business locations, residential addresses, social security numbers, vehicle license plates, phone numbers, and other identifying information. This evidence adds some highly perplexing aspects to the case. First, it may well take it beyond the realm of abstract advocacy, and into the realm of detailed information provided to assist in violent crime. Second, it is highly probative of an intent by the defendants either to assist in crime or to threaten abortion providers, itself a crime. In this fact pattern, the details of the record are likely to be critical. You are likely to find yourself closely examining the facts to determine whether or not a case can be made that these defendants subjectively intended this material as a threat or as a vehicle for aiding and abetting crime, and whether, objectively, the material was so understood or used.244

The murder manual case will be the easiest for you, if you accept the premises of *Rice* and the arguments advanced in this article. In *Rice*, the Court

244. In the actual *Hit Man*, case, the suit ended with a settlement and no jury determination was ever made regarding the plaintiffs’ allegations. The stipulations entered into for the purposes of summary judgment were no longer in effect for purposes of the jury trial. The plaintiffs, however, were of the view that they had overwhelming evidence that the publisher in fact did know and intend that its murder manual would be used by some readers to engage in contract murder, and that the *Hit Man* manual was in fact so used by James Perry to commit the murders in the case. See RODNEY A. SMOLLA, DELIBERATE INTENT: A LAWYER TELLS THE TRUE STORY OF MURDER BY THE BOOK (1999).
of Appeals had the benefit of stipulations conceding intent and substantial assistance. In your hypothetical case, however, the defendants may have attempted to prove that they had no such intent, or that the murder manual provided no such assistance. The result will turn, then, on whether you believe the plaintiffs were actually able to prove what they alleged.
SHOT BY THE MESSENGER:
RETHINKING MEDIA LIABILITY FOR VIOLENCE INDUCED
BY EXTREMELY VIOLENT PUBLICATIONS AND BROADCASTS
by L. Lin Wood¹ and Corey Fleming Hirokawa²

The kill is the easiest part of the job. . . . It takes no great effort to pull a trigger or plunge a knife.

[If you decide to kill your victim with a knife,] [t]he knife . . . should have a six-inch blade with a serrated edge for making efficient, quiet kills.

An ice pick can . . . be driven into the victim’s brain, through the ear, after he has been subdued. The wound hardly bleeds at all, and death is sometimes attributed to natural causes.

[If you plan to kill your victim with a gun,] it is best to shoot from a distance of three to six feet. You will not want to be at pointblank range to avoid having the victim’s blood spatter you or your clothing.

Although several shots fired in succession offer quick and relatively humane death to the victim, there are instances when other methods of extermination are called for. The employer may want you to gather certain information from the mark before you do away with him. At other times, the assignment may call for torture or disfigurement as a “lesson” for the survivors.³

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be

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².  J.D., Emory University School of Law, Atlanta, Georgia (2000); B.A., Dartmouth College, Hanover, New Hampshire (1995).
derived from them is clearly outweighed by the social interest in order and morality.\textsuperscript{4}

\textbf{INTRODUCTION}

The recent rash of school shootings and the prominence of gun violence in American society, combined with the increasingly violent content of some movies, music, television, and publications, has lead to increasing efforts in recent years to hold the media liable for the fruits of violent media images. In recent years, lawsuits have been filed against producers of movies,\textsuperscript{5} music,\textsuperscript{6} television,\textsuperscript{7} print media,\textsuperscript{8} and even news outlets\textsuperscript{9} attempting to hold the

\begin{itemize}
\item \textsuperscript{4} Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
\item \textsuperscript{5} See, e.g., Lewis v. Columbia Pictures Indus., 23 Med. L. Rptr. 1052 (Cal. Ct. App. 1994) (unpublished) (alleging that the production company’s trailers for the film \textit{Boyz 'n the Hood} were likely to incite violence at showings of the film); Bill v. Superior Court, 137 Cal. App. 3d 1002 (Cal. Ct. App. 1982) (alleging that the producers should have known the film \textit{Boulevard Nights} was likely to attract violent viewers, and that the producers did not adequately protect or warn the public); Yakubowicz v. Paramount Pictures, 536 N.E.2d 1067 (Mass. 1989) (plaintiff’s decedent was killed during a confrontation which allegedly mimicked a scene of gang violence from the film \textit{The Warriors}). More recently, at least two lawsuits have been filed against the producers and director of \textit{Natural Born Killers}, each alleging that the plaintiffs were injured during “copycat” crimes in which the perpetrators re-enacted violent scenes from the movie. \textit{See} Sandra Davidson, \textit{Blood Money: When Media Expose Others to Risk of Bodily Harm}, 19 Hastings Comm. & Ent. L.J. 225, 238-39 (1997).
\item \textsuperscript{6} See, e.g, Davidson v. Time Warner, Inc., 25 Med. L. Rptr. 1705 (S.D. Tex. 1997) (plaintiff’s husband shot and killed by gang member who was listening to Tupac Shakur’s album \textit{2Pacalypse Now} at the time of the shooting); McCollum v. Columbia Broad. Sys., 202 Cal. App. 2d 989 (Cal. Ct. App. 1982) (plaintiffs’ son committed suicide while listening to an Ozzy Osbourne album).
\item \textsuperscript{7} See, e.g., Zamora v. Columbia Broad. Sys., 480 F. Supp. 199 (S.D. Fla. 1979) (plaintiff, a teenage boy allegedly influenced by near-constant exposure to television violence, shot and killed an 83-year-old neighbor); Olivia N. v. National Broad. Co., 126 Cal. App. 3d 488 (Cal. Ct. App. 1981) (plaintiff was artificially raped with a soda bottle by a group of teenagers allegedly re-enacting a scene from a movie shown on NBC).
\item \textsuperscript{8} See, e.g., Rice v. Paladin Enters., Inc., 128 F.3d 233 (4th Cir. 1997) (plaintiff’s decedent murdered by “hit man” allegedly following instructions spelled out in the book \textit{Hit Man}); Braun v. Soldier of Fortune Magazine, 968 F.2d 1110 (11th Cir. 1992) (plaintiff’s decedent killed by a contract killer allegedly hired through an advertisement placed in \textit{Soldier of Fortune}).
\item \textsuperscript{9} See John Crigler, \textit{Suing the Messenger}, 14 Comm. L. 15 (1996) (describing law suit against a
producers liable for injuries inflicted during crimes that were allegedly inspired or induced by violent media images. Despite an increasing public concern over violence in the media, courts have been reluctant to allow plaintiffs to recover in cases alleging injury due to media violence, both because plaintiffs often cannot show the causation and foreseeability of injury required to prevail in a negligence action and because courts hold that the defendants' publications are generally protected by the First Amendment. To date, only two appellate decisions in media violence cases have been favorable to plaintiffs. Although the courts that have analyzed media violence cases most likely have been correct in dismissing some of the cases because the plaintiffs could not show that their injuries were sufficiently foreseeable or that the defendants' actions were the proximate cause of their injuries, this article will argue that, to the extent courts have based their decisions to dismiss on First Amendment immunity, these decisions reflect a fundamental misunderstanding of the way the First Amendment should apply to private actions for damages.

Prior to the Supreme Court's 1964 decision in *New York Times v. Sullivan*, the First Amendment was thought not to prohibit or limit state tort laws that allowed private actions for damages related to injuries caused by negligent publications. However, in *New York Times*, the Court held that states could not impose liability on media outlets in defamation cases brought by public officials on a standard of mere negligence; rather, because of the chilling effect the threat of lawsuits could have on the media, a showing of intent or reckless indifference to truth was required. The *New York Times* holding was limited to suits brought by public officials, although the standard was later extended to suits brought by "public figures." In 1974, the Court in *Gertz v. Robert Welch*,

Los Angeles-area radio station alleging that the station's news broadcasts during the riots following the Rodney King verdict created an unreasonably dangerous situation in which plaintiff was injured).

14. *Id.* at 279-80.
15. *Id.*
16. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967). In *Butts*, the Court defined a "public figure" as someone who "by his purposeful activity... thrust[s]... his personality into the 'vortex'
Inc. explicitly declined to extend the *New York Times* standard to suits brought by private citizens, holding that, while public figures and officials may have given up some measure of their interest in privacy by entering the public sphere, and this reduced privacy interest justified the *New York Times* holding, where private citizens are concerned, the privacy interest bears greater weight when balanced against the potential for chilling speech, so states are generally free to use a simple negligence standard to measure media liability. Despite the limitations the Court placed on the *New York Times* rationale in *Gertz*, most lower courts analyzing the impact of the First Amendment on media violence cases have cited *New York Times* for the proposition that media outlets cannot be held liable in negligence, without a showing of some sort of intent or recklessness, and have ignored the *Gertz* holding. In this Article, we will argue that *Gertz*, not *New York Times*, supplies the correct standard for application of the First Amendment to media violence cases, and that following the *Gertz* standard, the First Amendment generally should not determine the outcome of most media violence cases.

This article will begin by considering the way the First Amendment has typically been applied in media violence cases. In Part II, the article will explain why the current dominant view of the limitations the First Amendment places on private suits for damages is too restrictive and will present an alternative view that better synthesizes the application of the Supreme Court's holdings in *New York Times* and *Gertz* to the media violence context. Finally, Part III will offer a new framework for analyzing media violence cases under traditional tort principles, largely free of First Amendment considerations, and will demonstrate that, while this framework is unlikely to result in liability for the vast majority of publishers and publications, it will allow the costs of injuries caused by extremely violent publications to be borne by the producers of publications rather than by their victims.

18. *id.* at 347.
I. The Current (Overly Restrictive) First Amendment Approach: No Liability for Speech Fully Protected by the First Amendment

To date, only two appellate decisions in media violence cases have been favorable to plaintiffs. In both of those cases, the court found either that the speech being challenged was outside the protection of the First Amendment (or subject to lesser First Amendment protections than most speech), that the publisher acted with an intent to cause harm, or both. In contrast, courts rejecting the claims of media violence plaintiffs routinely conclude that if the speech involved in the publication is fully protected by the First Amendment, so that it could not be regulated or prohibited by the state, and the media defendant did not intend to cause harm with the publication, the media defendant is immune from liability under the First Amendment. Before investigating the First Amendment analysis that these courts generally have employed, it is worthwhile to review the facts of the successful and unsuccessful cases.

A. The Hit Man Case: A How-To Book on Murder Leads to Publisher Liability

One of the most well-known lawsuits against a publisher for violence induced by an extremely violent publication is the case of *Rice v. Paladin Enterprises, Inc.*, in which the estates of three murder victims sued Paladin Press on the grounds that the murderer used Paladin’s book, *Hit Man: A Technical Manual for Independent Contractors*, in carrying out the murders. *Hit Man* described in graphic detail how to find and complete contract murder jobs. The facts of the *Hit Man* case are striking: the murderer, James Perry, apparently was hired by Lawrence Horn to murder Horn’s ex-wife, their paraplegic son, and the son’s nurse. Perry admittedly followed the instructions


21. *See* *Paladin*, 128 F.3d at 243-47; *Braun*, 968 F.3d at 1117.

22. *See* *Paladin*, 128 F.3d at 252-55.


24. 128 F.3d 233 (4th Cir. 1997).

25. *Id*. Portions of *Hit Man* are quoted *supra* at text accompanying note 3.

26. *Id*.

27. *Id.* at 239.
in *Hit Man* not only in soliciting Horn's business, but also in meticulous detail in carrying out the murders themselves. The plaintiffs argued that Paladin was liable under a theory of civil aiding and abetting, and Paladin stipulated that it would be liable under that theory unless its publication was protected from civil liability by the First Amendment. The Fourth Circuit Court of Appeals rejected Paladin's First Amendment argument on the grounds that because the state could constitutionally have imposed criminal penalties on Paladin for its role in aiding and abetting the murders, the state was free to impose civil liability as well. In holding that the publication of *Hit Man* was tantamount to the types of criminal solicitation and incitement of lawlessness that are unprotected by the First Amendment, the court concluded that "it is evident from even a casual examination of the book that the prose of Hit Man is at the other end of the continuum from the ideation at the core of the advocacy protected by the First Amendment."

**B. The Soldier of Fortune Case: Magazine Liable for Advertisement Offering "Gun for Hire"**

The only other media violence case in which an appellate court has found for a plaintiff also involved a contract murder. In *Braun v. Soldier of Fortune*, the plaintiffs' father was murdered by a contract killer. They sued *Soldier of

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28. *Id.* at 239-41.
29. The elements of a civil aiding and abetting claim are generally the same as for a criminal aiding and abetting charge, although the plaintiff must meet only the lower burden of proof for civil cases. *See id.* at 251. Therefore, in order to prove civil aiding and abetting, a plaintiff must show that the defendant has "undertake[n] conduct that aids another in commission of [an] unlawful act" and that the defendant "consciously desire[d] or intend[ed] that his or her conduct [would] yield such assistance." 74 AM. JUR. 2d Torts § 66 (1974 & supp. 1999) (citing *Coopman v. State Farm Fire & Cas. Co.*, 508 N.W.2d 610 (Wis. Ct. App. 1993)).
30. Although Paladin's stipulation took any consideration of liability under traditional tort principles out of the case and focused the court's attention exclusively on the First Amendment considerations, the Court of Appeals explicitly found that there was sufficient evidence of intent in the record that a reasonable jury could have held Paladin liable absent the stipulation. *Paladin*, 128 F.3d at 252-53.
31. *Id.* at 250.
32. *Id.* at 256.
33. 968 F.2d 1110 (11th Cir. 1992).
34. *Id.* at 1112.
Fortune magazine, alleging that their father's business partner, who hired the killer, was put in touch with the killer through a classified advertisement the killer had run in the magazine.\(^{35}\) The advertisement read: "GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete [sic] and very private. Body guard, courier, and other special skills. All jobs considered."\(^{36}\) The court held that the advertisement, as a form of commercial speech, was entitled to lesser First Amendment protection than other types of speech,\(^{37}\) and that the ad "on its face would have alerted a reasonably prudent publisher to the clearly identifiable unreasonable risk of harm to the public that the advertisement posed."\(^{38}\) Therefore, in the court's view, the publisher could be held liable for damage caused by the advertisement.\(^{39}\)

C. Unsuccessful Cases

Paladin and Braun both involved situations in which the courts found the media defendants' speech was not protected, or not fully protected, by the First Amendment, either because it evinced an intent to aid and abet a crime, or because it was commercial speech. In contrast, in almost every other media violence case to date, the courts have found that the defendants' publications are fully protected by the First Amendment, and accordingly, have held that the defendants are immune from liability. These cases range from cases of "copycat" crimes in which criminals have re-enacted fictional violent crimes contained in movies, television, or songs,\(^{40}\) to cases in which plaintiffs have argued that the extremely violent nature of a certain movie, song, or other

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35. Id.
36. Id.
38. Id. at 1115.
39. Id.
publication so affected someone that he or she was driven to violence, to other cases against Soldier of Fortune involving slightly more ambiguous classified advertisements. Although these cases vary in the extent to which the plaintiffs would have been able to prove that their injuries were a reasonably foreseeable consequence of the defendants' publications, at least some of the cases present compelling facts under a strict tort-law analysis. Nevertheless, the courts have uniformly held that if the publication is fully protected by the First Amendment, civil liability cannot be imposed.

D. The Courts' First Amendment Analysis

When confronted with cases seeking to hold media outlets liable for injuries allegedly caused by negligently violent publications, most courts have derived their understanding of the protection of the First Amendment from two Supreme Court holdings. First, beginning with the proposition that the media violence cases usually involve publications that have somehow incited or induced violence, the courts look at the Supreme Court's analysis of the protection afforded speech that advocates lawlessness. The courts have generally cited Brandenburg v. Ohio for the proposition that "the constitutional guarantees of free speech and free press do not permit a state 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."

After determining that the Brandenburg test supplies the appropriate test for whether states could criminalize the speech involved in media violence cases,
the courts then generally read *New York Times v. Sullivan* to hold that states may not impose civil liability for negligence for the consequences of speech that could not be directly prohibited by the state. Combining these two sources, the courts generally arrive at a rule stating that media defendants can be held liable for the violent consequences of their publications only if the publication amounted to "incitement of imminent lawless action" under the *Brandenburg* standard. As the illustrations above show, this standard has proven extraordinarily difficult for plaintiffs to meet.

II. BEYOND *BRANDENBURG*: RETHINKING THE APPLICATION OF THE FIRST AMENDMENT TO CASES OF MEDIA-INSPIRED VIOLENCE

When media violence cases are analyzed under a rule that protects defendants from liability unless they have violated *Brandenburg* 's "incitement of imminent lawlessness" standard, the result is that defendants almost always win; plaintiffs can rarely show that defendants actually intended to incite violence, especially with fictional publications. However, a close reading of *Brandenburg* and *New York Times*, as well as of other Supreme Court decisions such as *Gertz*, reveals that the restrictive application of the First Amendment to media violence cases is not compelled by these holdings. In fact, careful analysis of these Supreme Court cases shows that the First Amendment should

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49. See, e.g., *Olivia N.*, 126 Cal. App. 3d at 494; *Yakubowicz*, 536 N.E.2d at 1071. In this article, we argue that this reading of *New York Times* is overbroad and that *New York Times* in fact limits damage awards against media defendants only in a narrow set of cases. See infra Part II.B.
51. See *supra* Part I.C.
52. In occasional cases, plaintiffs have been successful in showing that the defendant's violent publication fell outside the scope of First Amendment protection for some reason other than that it constituted incitement under *Brandenburg*. For example, in *Braun*, the court found that the *Soldier of Fortune* advertisement was entitled to only limited protection because it was "commercial speech." *Braun v. Soldier of Fortune Magazine*, 968 F.2d 1101, 1117 (11th Cir. 1992). However, it is unlikely that plaintiffs will be able to establish that many violent publications fall into the "commercial speech" category. *See Lewis v. Columbia Pictures, Inc.*, 23 Med. L. Rep. 1052, 1054 (Cal. Ct. App. 1994) (plaintiff argued that trailers for movie *Boyz 'n the Hood* were commercial speech; court held that "promotional speech may be noncommercial if it advertises an activity itself protected by the First Amendment.")
place no more restraints on media liability for violence than the considerable requirements of sufficient evidence of causation and foreseeability that are already imposed by the common law of torts.

A. Understanding Brandenburg: Extraordinary Protection for Politically Unpopular Speech

As an initial matter, it is worth noting that Brandenburg and the line of cases that produced it deal with state sanctions against politically unpopular speech. Although the Court generally has been hesitant to state that certain categories of “political” speech may enjoy more First Amendment protection than artistic, literary, or entertainment speech, one can at least argue that the Brandenburg standard was developed with the specific context of politically unpopular speech in mind, and that the stringent protections of the Brandenburg test may not be necessary or appropriate when applied to speech that is less politically charged. As the Paladin court put it, “the prose of Hit Man is at the other end of the continuum from the ideation at the core of the advocacy protected by the First Amendment.”

This argument can be bolstered by citation to the holding of Brandenburg itself where the Court stated: “the mere abstract teaching of the moral propriety

53. Prior to Brandenburg, the Court had decided a series of cases dealing with when speech amounted to a “clear and present danger” that could constitutionally be suppressed or sanctioned. See, e.g., Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Schenck v. United States, 249 U.S. 47 (1919). Andrew Sims has suggested that the extremely speech-protective decision in Brandenburg was motivated in part by the Warren Court’s belief that the prior clear and present danger cases had left local governments with too much power to squelch politically unpopular speech. Andrew B. Sims, Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach, 34 ARIZ. L. REV. 231, 258-59 (1992).

54. Brandenburg itself dealt with the prosecution of a Ku Klux Klan leader for statements made at a rally. 395 U.S. at 445-46.

55. See, e.g., Miller v. California, 413 U.S. 15, 22-23 (1972) (“[I]n the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.”).


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.\textsuperscript{58} The Court's language in this frequently-quoted passage suggests that the Court was specifically concerned with speech that advocated violence as a matter of moral necessity in response to the speaker's perception of the political situation. The holding arguably does not reach speech that advocates or glamorizes violence for its own sake, absent the impetus of political or moral conviction. Therefore, it is at least arguable that the \textit{Brandenburg} holding should not reach most cases of media-inspired violence at all.\textsuperscript{59}

\textbf{B. Distinguishing Between State Suppression of Speech and Private Damages Actions: Gertz and the Limits of the New York Times Holding}

Even if \textit{Brandenburg} would prohibit the states from imposing prior restraints or criminal sanctions on most of the publications involved in media violence cases, however, plaintiffs can still make a strong argument that \textit{Brandenburg} is not controlling in the civil damages context. As discussed above, most courts cite \textit{New York Times v. Sullivan}'s holding that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel"\textsuperscript{60} to justify applying \textit{Brandenburg} to the media violence cases. Reliance on this broad statement in \textit{New York Times} ignores the Court's later holding in \textit{Gertz}. In \textit{Gertz}, the Court limited the \textit{New York Times} standard to defamation cases brought by public officials and public figures, and held that, in defamation cases brought by private persons, as long as states did not impose liability without fault, they were free to craft their own rules holding speakers liable for injuries caused by negligent publications.\textsuperscript{61}

In \textit{Gertz}, the Court recognized that "some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in

\textsuperscript{58} \textit{Brandenburg}, 395 U.S. at 448 (emphasis added).

\textsuperscript{59} This argument could be countered by arguing that, in today's anti-gun, anti-gang-violence culture, certain ultra-violent publications are a form of "politically unpopular speech." "Gangsta" rap may be an example -- to the extent proponents argue that the rap has a political message as well as entertainment value, it may be precisely the kind of unpopular, minority-viewpoint speech \textit{Brandenburg} addressed.

\textsuperscript{60} \textit{376 U.S. at 277}.

redressing wrongful injury," and further noted that the New York Times standard “administers an extremely powerful antidote to the inducement of media self-censorship,” but that it “exact a correspondingly high price from . . . victims.” The Court went on to explain that, in the context of defamation actions brought by public officials or public figures, the “high price” of refusing recovery to “many deserving plaintiffs” was acceptable because public officials and public figures, by entering public life, had chosen to give up some of their rights to state protection from defamation. However, the Court held that the New York Times rule exacted too high a price from private individuals who had become victims of defamation, because a private individual “had relinquished no part of his interest in . . . protection . . ., and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.” Therefore, the Court in Gertz explicitly limited the New York Times rationale to situations in which plaintiffs had somehow given up some of their rights to the protection of state tort law.

When media violence cases are considered in light of both New York Times and Gertz, it is clear that the New York Times standard is too high a price to impose on the victims of media-induced violence. Like private persons subjected to defamation, victims of media-induced violence have done nothing to lower the level of protection and compensation for bodily harm they can expect from the state tort laws. If anything, the protection of individuals from violent attacks is an even more compelling state interest than is the protection of private individuals from defamation.

62. *Id.* at 342.
63. *Id.*
64. *Id.*
65. *Id.* at 342-43.
66. *Id.* at 345.
67. As the Court stated,

We think [New York Times and Butts] are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe the New York Times rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. . . . [T]he state interest in compensation for injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

*Id.* at 343.
68. In fact, the Court in Gertz equates the protection of private persons from defamation with
The Court's opinion in *Gertz* establishes that in areas in which First Amendment concerns bump up against such compelling state interests, the proper accommodation of the competing interests is found in the *Gertz* standard: as long as states do not impose liability without fault, they are free to apply their traditional laws of negligence to cases of media-induced violence. Further, as will be demonstrated below, the stringent requirements of causation and foreseeability that the tort law of most states would place on media violence plaintiffs more than adequately protects against assignment of liability without fault.

C. Tort Principles and the Appropriate Allocations of the Costs of Free Speech

Even aside from the *Gertz* holding, powerful arguments can be made that the *New York Times/Brandenburg* analysis of liability for media-induced violence is an inappropriately high barrier to liability in this context. As Andrew Sims has noted:

The Brandenburg test is . . . a limitation on the power of governments to impose prior restraints or subsequent punishment upon those who advocate unlawful actions. It is irrelevant whether the listeners responded and whether the unlawful actions, or any injuries or damages consequential thereto, actually occurred. In the media physical injury cases, by comparison, the speech recipient or a third-party victim has already sustained injuries alleged to be the proximate result of the speech, and seeks compensation by way of damages under state tort law. This conceptual difference might explain in part why the Brandenburg test is as speech-protective as it is, and why it is arguably too speech-protective to be applied to the media physical injury cases.  

"the protection of life itself":

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose. . . . The protection of private personality, *like the protection of life itself*, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basis of our constitutional system.

*Id.* at 341.

69. See *infra* Part III.

The fact that the media violence cases deal with situations in which plaintiffs have actually been injured, whereas *Brandenburg* and similar cases deal with situations in which the government acts to suppress or punish speech regardless of its actual consequences, marks an important distinction between criminal sanctions and civil suits for damages. From this perspective, the question of assessing liability for physical injuries caused by negligent or reckless speech is not so much one of protecting speakers from chilling effects, but one of where the unavoidable costs of free speech should be assigned.

In his 1992 article *Uncoupling Free Speech*, Frederick Schauer argues persuasively that the costs of injuries caused by free speech are more appropriately assigned to the speakers than to their victims. As Schauer explains, the current restrictive view of the limitations the First Amendment places on recovery by victims of media violence is "based on the assumption that, because a price must be paid for free speech, it must be the victims of harmful speech who are to pay it." However, Schauer challenges that assumption, noting that "[i]t ought to be troubling whenever the cost of a general societal benefit must be borne exclusively or disproportionately by a small subset of the beneficiaries," and arguing that, especially since media outlets generally benefit more from guarantees of free speech than do other members of society, the costs associated with free speech — in this case, the injuries caused by negligent or reckless speech — are more appropriately borne by the publishers and disseminators of the violent speech than by the victims of the ensuing violence.

When media violence cases are viewed as efforts to allocate the costs of free speech rather than as attempts to suppress certain types of speech, it becomes clear that tort law, not First Amendment law, is the most appropriate framework for analyzing these cases. Traditional tort principles in most states have developed mechanisms for allocating the costs of activities that cause harm, and

72. *Id.* at 1322.
73. *Id.*
74. *Id.* at 1333.
75. *Id.* at 1326-38. Although Schauer believes this outcome would be correct even if it resulted in some incidental chilling of speech, he also argues that, contrary to media protests, assigning liability for media-induced violence to publishers would not result in a chilling of speech, both because most publishers as a matter of journalistic ethics would not be dissuaded from publishing what they felt was important by the threat of a lawsuit, *id.* at 1329-30, and because most publishers would probably be able to insure against the risk of such lawsuits, *id.* at 1339.
as will be discussed below, these principles adequately protect media defendants from being forced to bear costs not caused by their own negligence. Adding an additional First Amendment shield for media defendants to the analysis tilts the scales too much in favor of the defendants, and allows defendants to shift the costs of their negligent speech onto their victims. Therefore, this normative approach to the appropriate allocation of the costs of speech reinforces the outcome of the Gertz analysis: as long as media defendants do not face liability without fault, state tort law should govern media liability for media-induced violence.76

III. APPLYING THE NEW FRAMEWORK: ANALYSIS OF MEDIA VIOLENCE CASES UNDER TRADITIONAL TORT PRINCIPLES

If courts adopt the rationale discussed above for analyzing the First Amendment aspects of media violence cases, plaintiffs in these cases will nonetheless face high hurdles in establishing the causation and foreseeability of injury necessary to merit recovery under most states’ negligence law. As long as states continue to require strong evidence, first, that the media defendant’s publication was a cause in fact of the plaintiff’s injury, and second, that the media defendant should have foreseen the violent results of the publication at the time it was published, defendants will be held liable for violent responses to their publications only in extraordinary and egregious cases. Three elements of the common law of torts in particular have created barriers to recovery for plaintiffs in the reported media violence cases.

A. Causation in Fact

The first step in proving a negligence case against a media defendant is proving that the publication was in fact a contributing cause of the plaintiff’s injuries. In the successful media violence cases, the plaintiffs have produced strong evidence that the defendant’s publication directly contributed to the plaintiff’s injuries. For example, in Braun, the evidence clearly showed that the decedent’s business partner met the contract killer he hired to kill the decedent only because he answered the killer’s advertisement in Soldier of Fortune.77 Similarly, in Paladin, the plaintiff presented copious evidence that the methods used by the contract killer in the case matched instructions given in Hit Man in

76. See supra Part II.B.
Evidence of causation in fact is also available in many of the cases that fail on other grounds. For example, many copycat cases include detailed evidence linking the crime that injured the plaintiff with the crime scene in the movie or other publication.\footnote{78} However, in other cases, plaintiffs have attempted to hold media defendants liable with no stronger evidence of causation than that the person who committed the violent acts had been exposed to the defendant’s publication shortly before committing the crimes. For example, in Zamora v. Columbia Broad Sys.,\footnote{79} the plaintiffs argued that their teenage son, who attacked and killed an 83-year-old neighbor, was unduly influenced by the persistent violence he saw on television, and that the three major television networks had breached a duty to protect the boy from the violent images.\footnote{81} The plaintiffs could not point to any specific show or shows that caused their son’s mental instability; rather, they argued that the net effect of the violence produced by all three networks created the problem.\footnote{82} In dismissing the case, the court noted that, along with other problems, the plaintiffs had failed to show that any action by the television networks had in fact caused their son’s mental illness.\footnote{83}

Similar problems with causation arise in cases in which plaintiffs allege that listening to particular music led a perpetrator to violence. For example, in a case brought by the parents of a teenager who committed suicide while listening to an Ozzy Osbourne album, the court noted that while the evidence showed that the decedent had been listening to one Ozzy Osbourne album, Speak of the Devil, at the time of his death, his parents’ case relied heavily on citations to lyrics from two other albums he had listened to at some point earlier in the evening, and there was little evidence linking those albums to the suicide.\footnote{84} Similarly, in a case alleging that a car thief was induced to shoot and kill a police officer

\footnote{78} Rice v. Paladin Enters., Inc., 128 F.3d 233, 239-41 (4th Cir. 1997). As discussed above, the defendant in the Paladin case also stipulated that the attacker had followed the instructions in Hit Man. See supra note 28 and accompanying text.
\footnote{80} 480 F. Supp. 199 (S.D. Fla. 1979).
\footnote{81} Id. at 200.
\footnote{82} Id. at 202, 206.
\footnote{83} Id.
because the thief was listening to Tupac Shakur’s album 2Pacalypse Now at the time the officer pulled him over, the court expressed skepticism that the thief’s decision to shoot the officer was motivated by anything other than a desire to escape. These cases aptly demonstrate the importance of strong evidence linking a specific publication or recording directly to the crime that caused the plaintiff’s injuries.

B. Foreseeability

Recognizing that “nearly all human acts carry some recognizable but remote possibility of harm” and that tort law does not create liability for all harms, no matter how remote or unlikely, courts analyzing media liability for violence induced by their publications often focus on whether the defendant should have foreseen that its publication was likely to cause the type of harm the plaintiff alleges.

The contrast between the facts in Braun and those in Eimann v. Soldier of Fortune, in which the Fifth Circuit held that there was no liability for a facially ambiguous Soldier of Fortune advertisement, is instructive. The Braun advertisement contained the phrases “gun for hire,” “professional mercenary,” and “all jobs considered.” The court held that a jury could reasonably conclude that these phrases, on their face, created a “clearly identifiable unreasonable risk of harm from violent criminal activity.” In contrast, the advertisement at issue in Eimann stated only that “ex-Marines” were available for “high-risk assignments.” Noting that “the range of foreseeable misuses of advertised products and services is as limitless as the forms and functions of the products themselves,” the Eimann court concluded that “without a more specific indication of illegal intent than [the advertisement] provided, we conclude that Soldier of Fortune did not violate the required standard of conduct by publishing an ad that later played a role in criminal activity.”

87. 880 F.2d 830 (5th Cir. 1989).
89. Id. at 1114.
90. Id. at 831.
91. Id. at 838.
92. Id.
The courts have raised concerns about foreseeability in a variety of other contexts. For example, in the Tupac Shakur case, the Southern District of Texas noted that:

[P]laying a musical recording (even tasteless, violent music like 2Pacalypse Now) is fundamentally different from placing a classified advertisement seeking employment as a mercenary. The probability that a listener of 2Pacalypse Now would act on Shakur’s message is substantially less than the chance that a person responding to a Soldier of Fortune advertisement would hire a “hit man” for illegal activity. 93

Similarly, the California Court of Appeals’ opinion in the Ozzy Osbourne case illustrates the courts’ reluctance to find that violent acts are foreseeable consequences of the production and distribution of recorded music:

Osbourne’s music and lyrics had been recorded and produced years before. There was not a “real time” urging of listeners to act in a particular manner. There was no dynamic interaction with, or live importuning of, particular listeners. . . . [the decedent’s] tragic self-destruction, while listening to Osbourne’s music, was not a reasonably foreseeable risk or consequence of defendants’ remote artistic activities. 94

These cases, taken together, suggest that only publications that absolutely clearly condone recipients of their message engaging in violence, and perhaps only those that go so far as to exhort violence, will run the risk of liability. 95

95. In a few cases, courts have suggested an alternative method of proving foreseeability, although no plaintiff has yet prevailed on this theory. In both Eimann and Davidson, the courts suggested that they would be more receptive to a finding of foreseeability if the plaintiffs could have shown that the defendants were aware, at the time they made their publication available to the plaintiffs, that the publication, or others similar to it, had actually caused at least several instances of violent reactions in readers or listeners. Eimann, 880 F.2d at 835; Davidson v. Time Warner Inc., 25 Media L. Rptr. 1705 (S.D. Tex. 1997) (“The Davidsons present no evidence that 2Pacalypse Now has been the source of ‘music-inspired crime’; after more than 400,000 sales of 2Pacalypse Now, the case at bar is the only one alleging violence after listening to Shakur’s virulent music. Thus, the probability of harm is very low.”). Therefore, plaintiffs may be able to increase their chances of proving foreseeability if they are able to show that the publication they are attacking had, at some time before the publisher made it available to the person who injured the plaintiff, been linked with other violent incidents.
C. Independent Criminal Actors

Even if it can be established that the media defendant's film, music, or publication was a contributing factor to the plaintiff's injuries, courts will often hold that the defendant's publication cannot be considered a proximate cause of the injuries because the injuries are a result of the independent criminal acts of third parties, and as a general principle of tort law, defendants are not liable for injuries caused by independent criminal acts. The link between this element of the case and the foreseeability element is a close one, and courts often analyze the two together. However the court structures its analysis, the tendency of courts to dismiss cases on this ground is a serious hurdle for most plaintiffs.

Plaintiffs who have successfully avoided dismissal on this ground have generally made what amounts to a heightened foreseeability argument: because the defendant should easily have foreseen that his publication would lead to unlawful conduct, the commission of the very crimes that could have been foreseen should not relieve the defendant of liability. As the Braun court explained:

Georgia law recognizes that, "generally, the intervening criminal act of a third party, without which the injury would not have occurred, will be treated as the proximate cause of the injury, superseding any negligence of the defendant. . . ." If, however, "the criminal act was a reasonably foreseeable consequence of the defendant's conduct, the causal connection between that conduct and the injury is not broken."97

Following this rationale, it appears that plaintiffs can best avoid a dismissal

96. See, e.g., Davidson v. Time Warner Inc., 25 Media L. Rptr. 1705 (S.D. Tex. 1997) ("Considering the murder of Officer Davidson was an irrational and illegal act, Defendants are not bound to foresee and plan against such conduct."); Lewis v. Columbia Pictures Indus., 23 Media L. Rptr. 1052, 1056 (Cal. Ct. App. 1994) ("Even if the gang members were attracted to the movie theater by the advertisement, Columbia cannot be held liable for the resulting injuries, which had an independent intervening cause."); McCollum, 202 Cal. App. 3d at 1005 (Decedent's "suicide, an admittedly irrational response to Osbourne's music, was not something which any of the defendants intended, planned, or had any reason to anticipate.").

97. Braun v. Soldier of Fortune, 968 F.2d 1110, 1122 (11th Cir. 1992) (quoting Rosinek v. Cox Enters., Inc., 305 S.E.2d 393, 394-95 (Ga. App. 1983)). See also Bill v. Superior Court, 137 Cal. App. 3d 1002, 1010 (Cal. Ct. App. 1982) ("If the likelihood that a third person may react in a particular manner is a hazard which makes the actor negligent, such reaction whether innocent or negligent does not prevent the actor from being liable for the harm caused thereby.").
on the grounds that their injuries result from independent criminal acts by stressing the close causal connection between the criminal act and the publication and the high likelihood that that type of crime would be committed in response to the publication.

CONCLUSION

As illustrated above, traditional tort principles of causation and foreseeability will protect media defendants from liability in all cases except those in which plaintiffs can clearly establish that the media took an unreasonable risk in publishing an extremely violent work and that the work actually caused injury to another person. As the facts of the media violence cases discussed in this article illustrate, such cases are likely to be rare, but they do exist. When such cases do arise, traditional tort principles, essentially free of First Amendment constraints, supply the appropriate mode of determining liability. Application of traditional tort principles to these cases adequately protects defendants from "liability without fault,"98 and at the same time protects "deserving plaintiffs"99 from being forced to bear the costs of the defendants' free speech.100 Allowing defendants to use the First Amendment as an additional shield against liability, in contrast, unfairly allows these defendants to escape liability for the consequences of their negligence.

This view of the appropriate balance between the competing interests of free speech and of compensation for victims of negligence was recognized by the Supreme Court in Gertz v. Robert Welch, Inc. That case established that state tort law generally governs the assessment of liability for defamation of a private individual, and that the First Amendment generally does not constrain these cases.101 When media violence cases are analyzed in light of Gertz, it is clear that the appropriate standards for determining liability in these cases, like those in private individuals' defamation suits, are to be derived from state tort law, not from the Supreme Court's First Amendment jurisprudence.

In closing, a final note about Gertz is appropriate. When the Gertz decision was announced twenty-five years ago, many in the media predicted that the new standard would have a dire chilling effect on news outlets and other media.102

99. Id. at 342.
100. See supra Part II.C.; see also Schauer, supra note 71.
101. See Gertz, 418 U.S. at 323.
102. See, e.g., Bruce J. Borrus, Comment, Defamation and the First Amendment: Protecting
However, even under the Gertz standard, successful defamation suits against media defendants are rare, and few if any media outlets seem to have been seriously chilled in their efforts to gather and report the news. In the media violence context, media groups similarly issue dire warnings that any liability for media-induced violence, no matter how egregious the case, will lead to a flood of lawsuits and have an impermissible chilling effect on all media. However, as illustrated above, this chilling effect is likely to be more hype than reality: even if media violence cases are analyzed under traditional tort principles without reference to the First Amendment, only in the clearest cases of media-induced violence will plaintiffs be likely to prevail. Especially in light of the Gertz experience, it appears that the dire warnings from media groups are best explained by one of Schauer's hypotheses: “publishers are... no different than the rest of us in preferring that others pay for what we would pay for if we had to.”

Speech on Public Issues, 56 WASH. L. REV. 75 (1980).
104. In Paladin, for example, the court noted that a “spate of media amici, including many of the major networks, newspapers, and publishers, contend[ed] that any decision recognizing even a potential cause of action against Paladin [would] have far-reaching chilling effects on the rights of free speech and press.” Rice v. Paladin Enters., Inc., 128 F.3d 233, 265 (4th Cir. 1997). The court quoted the following sample from the brief filed by the amici: “Allowing this lawsuit to survive will disturb decades of First Amendment jurisprudence and jeopardize free speech from the periphery to the core. No expression - music, video, books, even newspaper articles - would be safe from civil liability.” Id.
105. See supra Part III.
106. Schauer, supra note 71, at 1330.
HIT MAN’S MISS HIT
by Bruce W. Sanford and Bruce D. Brown

I. INTRODUCTION

The brochure for this symposium announced the thunder. The featured topics included the “potential liability of the media for knowingly producing displays of violence that are possibly linked to certain forms of violent behavior by young people, the relation between media and school shootings, and the interplay of the First Amendment in this controversial area.”

The emphases here are mine, and they make my first and foremost point. The problem with the way we approach today the noun-noun combination of media violence is that, by and large, we have adopted all the wrong predicates. Liability; knowingly producing; linked; violent behavior; the relation between media and school shootings; controversial area; these are the words that frame the dialogue for this conference. To be sure, there is a dose of qualifiers in the description – potential, possibly, certain forms – but the foundation has been laid: media violence is a scourge that causes life to imitate art, so let’s do something about it.

Judge Michael Luttig’s opinion in the Hit Man case, a decision that is perhaps the principal reason why conferences such as this one are organized today, contained a more exaggerated example of faulty predicates at work. He began his opinion with a self-selected 2500-word excerpt from the allegedly offending book, taking care, he tells us in a footnote, to “minimize the danger to the public from the repetition” of these passages. Before the statement of facts, before the assessment of the legal merits, Luttig rolls out the manual’s “advice” on topics ranging from using serrated blades, to dealing with bloated corpses, to building silencers.

Never mind that the quoted portions were completely stripped from their context, that the judge was maneuvering his audience into outrage, that such a lengthy excerpt would typically be found in an appendix at the end of a judicial opinion. This “criminal partnership,” as the judge characterized the relationship between Hit Man and its readers, was bared before us in its most sensational and gory detail, justifying the results and censorious punishment the

4. Id. at 239 n. 1.
5. Rice, 128 F.3d at 252.
Fourth Circuit was about to deal out. Being closely involved in the *Hit Man* litigation—we wrote an amicus brief on behalf of a coalition of news organizations and free speech advocates asking the Fourth Circuit to affirm the District Court’s dismissal of the action—I knew as soon as I read that long windup that judicial outrage over the content of *Hit Man* was going to take the day.

In the libel arena, our law tolerates, and even encourages some falsehoods in order to provide the breathing space for aggressive coverage of public affairs. Any similar tolerance in the area of “media violence” is evaporating. Reaction against language or imagery that shocks and offends us is driving a trend of holding media companies liable for crimes allegedly tied to violent content. With all the finesse of Rudy Giuliani railing against the Brooklyn Museum, the purveyors of these new ideologies of media accountability seek to purge the *Hit Mans* and *Natural Born Killers* from their neighborhoods. Where they’ll find themselves, in the end, is *Pleasantville*—a city of bland, government-controlled language.

This movement appears to be gaining momentum despite the fact that artistic and literary works are clearly in a different camp from tobacco, which science has “causally” linked to addiction and disease; and handguns, which leave blood on the floor in a way that no book, movie, or album ever will. Indeed, the social science research “linking” media violence to violent behavior is pitifully underwhelming. Taken together, they add up to no more significant a discovery than the correlation between those who enjoy snow and those who ski—and it should certainly not form the justification for tort liability or government regulation.

But today’s media conglomerates do not fare well in the politics of violence. There is a deep vein of disdain for marketplace pandering to the public’s insatiable appetite for low-brow news and entertainment. This hostility is evident in our courtrooms and in the realm of public opinion, where media companies are routinely demonized. In his *Hit Man* opinion, Judge Luttig chastised the industry for “shamelessly seek[ing] refuge in the sanctuary of the First Amendment.” The hostility is unfolding, too, in our universities and law schools, where the rhetoric of “responsibility” has replaced the rhetoric of “rights” on issues surrounding the First Amendment. Plaintiffs need no talent to tap into these populist themes. When school shootings and other random acts of terror occasionally invade our communities, the media looks like a pretty good target, for lawmakers and litigants alike, even though, statistically, violence in

schools has dramatically declined from just 20 years ago. Overlooked also are
the words of Judge Frank Easterbrook: "[While] much speech is dangerous . . .
[u]nless the remedy is closely confined, it could be more dangerous to speech
than all the libel judgments in history." 7

I, too, was put off by much of what I read in Hit Man. But though the words
we read and the movies we watch can horrify us, they cannot act. The
publication of Hit Man in 1983 no more led to three murders in Maryland a
decade later than the Sorrows of Young Werther was responsible for the suicides
of young men in eighteenth century Germany, or Catcher in the Rye for the act
of a crazed fan who ended John Lennon's life outside his New York apartment
building twenty years ago. "There is no such thing," wrote Oscar Wilde, "as a
moral or immoral book. Books are well written, or badly written. That is all." 8

II. THE LEGAL CONTEXT

Tort actions seeking to impose liability on the media for "copycat" crimes
are not a totally recent phenomenon. During the 1970s and 1980s, the courts
saw a number of efforts to link fictional dramatized violence of one kind or
another – in film, music, etc. – to real-life crimes. One by one, they rejected
these claims. NBC prevailed, for example, when a nine year-old girl sued for
damages after being assaulted in a manner reminiscent of a violent attack in a
film the network broadcast. 9 The cult movie The Warriors, with its numerous
depictions of gang warfare, was the subject of an unsuccessful lawsuit against
Paramount Pictures. 10 CBS won a lawsuit premised on the theory that its
programming had so desensitized a fifteen year old to violence that it was
partially responsible for his murdering an elderly neighbor. 11 A family who lost
a son to suicide blamed Ozzy Osbourne's crude rock lyrics for the boy's
decision to take his own life, but did not get past a motion to dismiss. 12 The list
is extensive.

The Hit Man ruling departs from this tradition. On one level, it is tempting
to dismiss the Fourth Circuit decision and the subsequent settlement of the case

as resulting from an unlucky confluence of events. The regrettable "stipulations" that the publisher entered into at the trial court for the purposes of expediting the proceedings backfired at the Fourth Circuit, taking on a life of their own and handing the court some of its most potent ammunition. In the Hit Man case, Paladin drew a jurist whose father had been victimized by violent crime – murdered in a car-jacking. Finally, were it not for the Columbine High School shootings that occurred a few weeks before the trial was slated to open, the final word on Hit Man may have been far different from the stinging contempt of Luttig's ruling. The shootings, and the national shock that followed, made settlement all the more appealing for Paladin, which is based in Colorado.

But the Hit Man decision cannot be explained away by its rather idiosyncratic circumstances. The fact is, the legal atmosphere was hospitable to the plaintiffs' arguments for a number of reasons. First, the growth of the victim's rights movement has placed increased attention and public sympathy on those who are harmed by violent crime. Victim's rights groups are now an active – and successful – force in litigation in this country. While they have played their most high profile role in criminal matters, such as the Oklahoma City bombing trials, they have also focused their attention on promoting the interests of victims in other areas of the legal system. Some tension has developed between these groups and the press, particularly regarding the way that reporters interact with crime victims. No surprise, then, that two different victim's rights organizations – the National Victim Center and the Victims Rights Political Action Committee – ended up filing amicus briefs at the Fourth Circuit in the Hit Man case, asking the court to let the suit against Paladin proceed. A third organization, the National Center for Victims of Crime, has been tracking the legal assault against media violence on its Internet site. These new "voices" represent a constituency whose influence is on the rise.

Secondly, the national mood is predisposed to think of children not as "speakers" with their own affirmative First Amendment rights but as "listeners" who must be protected from speech. A generation ago, during the Vietnam War, courts deployed the First Amendment to encourage and permit children to engage in their own expressive activities. To be sure, there has always been concern about the need to "protect" them as well, but paternalistic impulses

were balanced with the realistic recognition that adolescents will be curious, adventurous, impatient with boundaries – and we wouldn’t want them to be any other way. Today, shielding children from sex and violence (on the Internet, in front of the television, at the library) is as fashionable as Prohibition in the 1920s (and about as effective). Again, we are confronted with false predicates – and their dangerous consequences. Once you conceptualize children almost exclusively as listeners, not as speakers, protection becomes the dominant theme, and speech such as Hit Man becomes a hazardous commodity, a poisonous substance to be contained and controlled.

At the same time, First Amendment law is experiencing a general stagnation. This topic, addressed at length elsewhere, bears a brief mention here. The Supreme Court has been mostly dormant on speech freedoms over the last decade, a silence that was particularly noticeable last year when the Court held that media “ride-alongs” into private houses violate the Fourth Amendment rights of homeowners. The First Amendment merited barely a passing mention, though the implications for newsgathering were tremendous. While libel doctrines have remained relatively constant during this period, weak spots have developed in other free speech areas. The news media, for example, has had to contend with a whole new generation of “newsgathering” torts filed by plaintiffs looking for a way to “get around” the protections of libel law. There is little doubt that the overall drag on First Amendment law made the time more ripe for the Hit Man ruling.

Another contribution to the climate that made the Hit Man decision possible is the passion for “criminalization” and “blame” that characterizes our legal culture today. All original sin is now legally accountable. Ask Mike Espy, who endured a four-year, $17 million Independent Counsel investigation over allegations that he accepted less than $40,000 in improper gifts – charges of

17. Wilson v. Layne, 119 S. Ct. 1692 (1999) (finding that police violated homeowners’ rights when they permitted the media to accompany them on a search, but that the officers in this case were entitled to qualified immunity because the law was not clearly established when the search occurred); see also Hanlon v. Berger, 119 S. Ct. 1706 (1999) (holding that allegations of filming by broadcasters of execution of search warrant implicated Fourth Amendment rights of plaintiff).
which he was ultimately acquitted.\textsuperscript{19} A Washington, D.C. zip code may make one particularly sensitive to this issue, but I do believe that the endless search for malfeasance in so many sectors of our public life has inevitably trickled down to the world of private litigation. In this era of wrongdoing, media companies make good adversaries.

Finally, the tobacco and gun control sagas have taught us that when lawmakers fail to make public policy in the legislative arena, plaintiffs’ lawyers will step into the void and try to drive the agenda through mass tort litigation. Media companies thus do share something with cigarette makers and firearms manufacturers – they are all equal targets in the eyes of a plaintiffs’ bar that views their “products” as socially harmful. (Paladin’s pretrial focus group polling revealed that some members of the public did compare publishers to tobacco companies in this regard.\textsuperscript{20}) The tort system should be used to compensate people for injury to reputation, not to direct social policy in the First Amendment area. While it is for good reason that legislative efforts to regulate “violent” content have not succeeded, the fact that they have failed leaves the media industry perhaps more vulnerable to attack on the tort flank.

\textbf{III. THE SOCIAL SCIENCE PICTURE}

Two of the more interesting legislative stumbles in recent years are dissected in \textit{American Booksellers Assoc., Inc. v. Hudnut}\textsuperscript{21} and \textit{Eclipse Enterprises, Inc. v. Gulotta}.\textsuperscript{22} Not only do they show why regulation of “violent” or “harmful” content fails to pass constitutional muster, they also illustrate the inconclusive state of the social science research conducted in the media violence field. Additionally, and perhaps most importantly, they demonstrate the harms to free speech interests that develop when we adopt the wrong predicates in looking for ways to cope with expression that some segment of society finds offensive.

In \textit{Hudnut}, the Seventh Circuit invalidated an anti-pornography ordinance enacted by Indianapolis. The ordinance was significant because it went beyond regulation of distribution – it created a cause of action, against a publisher, for any individual injured by a viewer or reader of that publisher’s pornographic


\textsuperscript{20} Seth Berlin et al., \textit{The Road to Trial in the Hit Man Case}, \textit{LDRC Libel Letter}, Aug. 1999, at 36.

\textsuperscript{21} 771 F.2d 323 (7th Cir. 1985).

\textsuperscript{22} 134 F.3d 63 (2d Cir. 1997).
material.\textsuperscript{23} Indianapolis justified this provision "on the ground that pornography affects thoughts."\textsuperscript{24} As further explained by the Seventh Circuit, the city's views were as follows:

Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea: pornography is the injury.\textsuperscript{25}

In striking down the ordinance as violative of the First Amendment's guarantee against viewpoint discrimination in governmental regulation, Judge Easterbrook did not close his eyes to the obvious role that speech plays in contributing to human behavior and attitudes. As he acknowledges, "racial bigotry, anti-semitism, violence on television, reporters' biases - these and many more influence the culture and shape of our socialization."\textsuperscript{26} But where does that get you? "If the fact that speech plays a role in a process of conditioning were enough to permit government regulation, that would be the end of freedom of speech."\textsuperscript{27} Judge Easterbrook concludes that the Indianapolis law created a regime of "thought control."\textsuperscript{28}

If there are "unhappy effects" that flow at least in part from particular forms of speech, they all "depend on mental intermediation."\textsuperscript{29} The speech is not the act. The court illustrates its point: "Depictions may effect slavery, war, or sexual roles, but a book about slavery is not itself slavery, or a book about death by poison a murder."\textsuperscript{30} Easterbrook also observes that the social science studies offered in support of the ordinance "conflict," and that "[n]ational commissions here, in the United Kingdom, and in Canada have found that it is not possible to demonstrate a direct link between obscenity and rape or exhibitionism."\textsuperscript{31} The

\begin{footnotes}
\item[23.] Hudnut, 771 F.2d at 325.
\item[24.] Id. at 328.
\item[25.] Id. (footnotes omitted).
\item[26.] Id. at 330.
\item[27.] Id.
\item[28.] Id. at 328.
\item[29.] Hudnut, 771 F.2d at 339.
\item[30.] Id. at 330.
\item[31.] Id. at 329 n.2 (emphasis added).
\end{footnotes}
court ultimately trusts the *Brandenburg* standard\(^{32}\) to circumscribe the bounds of legitimate recovery for assaults caused by speech.\(^{33}\)

While the *Hudnut* court merely referenced the inconclusive nature of the empirical work in the obscenity area, the decision in *Gulotta* more directly turned on the flimsiness of the social science theories offered in defense of the speech regulation at issue in that case. *Gulotta* arose out of Nassau County, New York's effort to ban the distribution of certain kinds of "trading cards" to minors. The regulation singled out cards that depicted "a heinous crime" or a "heinous criminal" and were deemed to be "harmful" to children.\(^{34}\) The statute was challenged by a publisher whose trading cards contained pictures of famous criminals as well as "scorecards" of their crimes. Among the cards put out by plaintiff Eclipse Enterprises were those depicting American support for Third World dictators, illustrating scenes from well-known criminal trials, and recounting the stories of the blood-and-guts gangsters who thrived during Prohibition.

The county's action presents a classic example of faulty predicates run amok. One local official testified that he and other members of the Board of Supervisors believed that the crime trading cards, on the basis of "surmise" alone, contained no social value and contributed to juvenile crime.\(^{35}\) He also admitted that the board knew of no research studies associating the cards with subsequent criminal behavior, let alone actual incidents of violence linked to exposure to such materials. So we can guess what happened: some parents found a handful of the offending cards in their child's backpack (Pol Pot? Pretty Boy Floyd? Leopold and Loeb?), didn't like what they saw, told their local supervisors, and they all banded together to cleanse their communities of this evil influence. This is precisely how the wrong predicates (it's "bad" speech, so let's do something about it) create dangerous conditions for First Amendment freedoms.

Fortunately, the Second Circuit didn't buy it. The court unanimously ruled that the Nassau ordinance was a content-based law that could not survive strict

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33. *Hudnut*, 771 F.2d at 333-34.
34. *Eclipse Enter., Inc. v. Gulotta*, 134 F.3d 63, 64 (2d Cir. 1997).
35. *Id.* at 66. The legislative history of the law included a statement that "[t]he dissemination of materials devoted to the depiction of heinous crimes and heinous criminals is a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the citizens of Nassau County." *Id.* at 69 (Griesa, J., concurring).
In my mind, the most important element of the ruling was the circuit’s evaluation of the expert testimony put on by Eclipse. One expert spoke to the fact that “TV violence studies do not provide strong evidence that TV violence causes criminal behavior or aggression and that TV is a far more powerful medium than trading cards.” Another stated that “the environmental risk factors he had identified as contributing to adolescent criminal behavior included child abuse, drugs, alcohol, and gang membership” – not exposure to violence in the media. Two others testified that “they knew of no study or case where crime cards had been linked to juvenile crimes.” The Second Circuit’s decision in *Gulotta* followed the Fourth Circuit’s ruling in *Hit Man* by less than a month, and the two cases make an interesting juxtaposition.

Eclipse’s expert testimony worked very well in the context of a statutory challenge, but how would it play with a jury? In the *Hit Man* case, Paladin had recruited experts in popular media and behavioral psychology to testify that the book was not causally connected to the Maryland triple murder. Unfortunately, science has its limits when perceptions are engrained; in a recent survey, over 60% of Americans said that they believed that the depiction of violence in popular entertainment is one of the major causes of violence among young people. As much as we don’t want legislatures passing on the social value of artistic or literary expression, we should equally fear putting juries into the position of deciding these questions.

### IV. THE QUAGMIRE OF INTENT

Just as the task of evaluating the worthiness of artistic works is endlessly elusive, attempts to plumb the “intent” of publishers is a waste of time. It’s like trying to capture the shifting shades of gray in Seattle on a rainy day. No commercial publisher ever “intends” anything when publishing a book except to

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36. *Id.* at 68.
37. *Id.* at 65. Professor Craig Smith of Cal-State, Long Beach, who chairs the university’s journalism department and directs its Center for First Amendment Studies, has authored a helpful article summarizing the inconclusive and in some cases sloppy research in this area. See Craig Smith, *Violence in Programming: Is it Protected Speech* <http://www.csulb.edu/-research/Cent/Amend/violence.html>.
38. *Id.*
39. *Id.*
make a profit. Cookbook publishers, for example, do not “intend” that readers will prepare every (or any) recipe in the book. Certainly a publishing house might be said to hope that its releases will be informative, inspiring, or entertaining, but as for hard “intentions,” one cannot realistically ascribe specific motives with the kind of clarity required by the law. This is a semantic point, to be sure, but a metaphysical one as well. The Supreme Court has warned of the perils of delving into “legislative intent” in assessing the constitutionality of legislation, yet parsing “creative intent” appears to be precisely the road we are heading down in the post-

In the *Hit Man* decision, for example, Judge Luttig held that examining the “marketing strategy” for a book was a legitimate means of determining intent. The court declared that it would have been a reasonable “inference” that Paladin intended to “attract and assist criminals” in the commission of violent crimes based on its catalogue advertisement for the book. Paladin’s “promotion” of murder also revealed the publisher’s purpose, according to the court: “The unique text of *Hit Man* alone, boldly proselytizing and glamorizing the crime of murder and the ‘profession’ of murder . . . is more than sufficient to create a triable issue of fact as to Paladin’s intent in publishing and selling the manual.” What Judge Luttig calls “glamorizing” and “proselytizing,” some might call “caricaturing” at times, but for this and other suggestions the amici group that we represented was called “reckless.” Had *Hit Man* contained a toll-free number for assistance in carrying out a murder – or any of the indicia found in the *Soldier of Fortune* case – it might have crossed the *Brandenburg* line into impermissible incitement. *Hit Man* “the book” contained none of these elements, of course, but *Hit Man* “the stipulations” conceded intent, and this “fiction” became “truer” than the actual “fact” of the publication itself.

Arming a judge or a jury with a divining rod is not the way to detect the “true” intent of an author or film director. But having determined that judges and juries are competent to handle this task, the *Hit Man* court then tries to assure us that it really isn’t making mischief for news and entertainment folk because litigants will not be able to hamstring the industry with nuisance cases. Says the court:

> In the ‘copycat’ context, it will presumably *never* be the case that the

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43. Id. at 254.
44. Id.
broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime; rather, the information for the dissemination of which liability is sought to be imposed will actually have been misused vis-a-vis the use intended. . . . And, perhaps most importantly, there will almost never be evidence proffered from which a jury even could reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity."}

Putting aside my disagreement with Judge Luttig that we can sniff out the "intended use" of artistic works, his reassurances (however carefully they are hedged) are little solace to a company such as Time Warner that has been defending for almost five years a "copycat" claim stemming from the Oliver Stone film *Natural Born Killers*. While the complaint was filed before the Fourth Circuit's *Hit Man* decision, the case only received a breath of life when the Louisiana Court of Appeals, following the lead of the *Hit Man* ruling, and quoting from it extensively, reversed a trial court's dismissal and sent the case on to discovery. According to the Court, the plaintiffs "alleged the very intent on the part of the [Time Warner] defendants referred to by the [Hit Man] court . . . [and] at this stage of the proceeding . . . [the] cause of action is not barred by the First Amendment." Allege intent and that'll be enough, it seems, to launch you into discovery.

Not a nuisance case? Even Professor Smolla concedes that the *Natural Born Killers* case is frivolous, yet he criticizes the Time Warner lawyers for attempting to dispose of the claim on a motion to dismiss. He advocates a summary judgment strategy from the outset. But taking such a road is an expensive proposition, and it can't possibly be true that every Hollywood studio and New York publishing house is now expected to set aside millions of dollars for full-blown discovery in these cases because that's just another cost of being in the "violence business." With Time Warner having now filed for summary judgment in the *Natural Born Killers* case, and with other ongoing lawsuits in this area (the film *The Basketball Diaries* is also the subject of current litigation), we should soon have some additional indication of just how bad the picture has become in the wake of the *Hit Man* ruling. Advocates of putting *Hit

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46. *Rice*, 128 F.3d at 265.
48. *Id.* at 691-92.
Man behind bars, Judge Luttig among them, assured the free speech community that the case would be a “one in a million” exercise. But with the atmosphere as it is today, and a new wave of litigation underway, “one in a million” may be coming along with more frequency in the coming years.

V. CONCLUSION

While some passages in Hit Man are slightly goofy or so “purplish” as to be comic, others are shocking and graphic. Many are crude. Indeed, one can understand how the trial judge in the case arrived at his personal opinion that much of the publication is “reprehensible” and “devoid of any significant redeeming social value.”51 Even Professor Smolla’s visceral reaction against the text is comprehensible. In the pages of Deliberate Intent, his account of the Hit Man litigation, he writes that he could envision the book “send[ing] off menacing vapors” and “stinking [of] the rot of cold-blooded murder,” so disturbing did he find it.52 Professor Smolla seems to be engaging in a nice bit of fantasy here, which raises the question: Is this response in a reader the intended effect of the publisher or was it the product of the imagination of the individual reading the book?

Professor Smolla and I have reached our conclusions after having read Hit Man, and this is a privilege that all of us should enjoy. I wish I could say to the curious, “read it for yourself.” But future students of the First Amendment will probably be limited to characterizations of Hit Man contained in judicial opinions and law review articles such as this one. Paladin, you see, took the book out of circulation as part of the litigation settlement; the censors have won this round. A copy still sits in my office, but that’s one of the few places you’ll find Hit Man today, unless you count its image on the front cover of Professor Smolla’s book, Deliberate Intent. Professor Smolla now has Hit Man almost all to himself.

52. RODNEY A. SMOLLA, DELIBERATE INTENT 62 (1999).
TAMING TERRORISTS
BUT NOT "NATURAL BORN KILLERS"
by S. Elizabeth Wilborn Malloy

It may seem surprising, but there are many publications available for purchase which provide explicit instructions on how to perform acts which can only be described as criminal, and from which no social good comes. Not surprisingly, some of the individuals who have read these publications put the ideas contained in the material into action. The victims have decided that civil lawsuits against the publishers of this material would help deter its publication and the subsequent harm it causes. In response, the publishers have argued that the First Amendment protects them from such lawsuits. Should this material receive such a high level of First Amendment protection that the publisher is immune from these civil lawsuits?

Consider, for example, a book providing detailed instructions on how to construct, place and detonate an explosive device to wreak maximum havoc in a public place. A publisher that prints and distributes such a book, is at best grossly indifferent to the prospect that such publications will result in harm to others. Under the common law of torts, you might expect that the victims of such an act could recover damages from the publisher, either for an intentional tort or negligence. The First Amendment, however, has been used to block the

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1. Associate Professor, University of Cincinnati College of Law; J.D., 1991 Duke Law School; B.A., 1988, College of William and Mary. Many thanks to the staff of the Northern Kentucky Law Review for their help with this article.

2. Many such "how to" manuals are now easily available to the public. For an illustrative listing of some of the available books describing how to engage in criminal activity, see Amitai Etzioni, Is Information on How to Make a Bomb More Harmful than Porn?, CHICAGO TRIBUNE, 31 (August 24, 1995) (listing numerous books available through mail order, including the following: Be Your Own Undertaker: How to Dispose of a Dead Body; Deadly Brew: Advanced Improvised Explosives; The Ancient Art of Strangulation; The Poor Man's Sniper Rifle; 21 Techniques of Silent Killing; The Home and Recreational Use of High Explosives; Kill Without Joy: The Complete How-to-Kill Book; Guerrilla's Arsenal: Advanced Techniques for Making Explosives and Time-Delay Bombs; Ultimate Sniper; The Big Book of Mischief; Silent But Deadly: More Homemade Silencers from Hayduke the Master; How to Build Practical Firearm Suppressors: An Illustrated Step-by-Step Guide; and The Terrorist Handbook).

3. See W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 (discussing the elements of negligence). For example, if a negligent physical act causes injury, the tort-feasor, absent a defense, is usually liable. Id. at 165. If, however, that same injury is the result of some form of speech, the First Amendment may insulate the tort-feasor from liability. See, e.g., Cardozo v. True, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977) (plaintiff injured as a result of cookbook's
imposition of tort liability in such cases. Because a victim’s ability to recover remains doubtful under current law, a would-be publisher of such material faces very little deterrent to publishing and disseminating it.

As a matter of basic economics, it is not logical that the victim of a horrible crime shoulder the social costs of a book providing instruction to the perpetrator of that crime. In the absence of the First Amendment, establishing liability would be relatively easy. Tort law would allow victims to recover for the social harms associated with the criminal activity.

The critical question is why should the First Amendment preclude the application of traditional tort principles in this type of situation? What redeeming purpose do these publications serve that outweighs the need for a government to protect citizens? Such information is far removed from the good faith criticism of public officials that lies at the heart of New York Times v. Sullivan and its progeny. It makes sense to protect the press from government censorship or undue influence. Protecting criticism of public officials and public figures serves core concerns of the First Amendment. Protecting those who advocate or teach criminal behavior does not.

Because plaintiffs can recover damages for certain speech activities—i.e., fraud, solicitation, and defamation—it is surprising that courts have not acted to regulate speech that advocates or facilitates harm to others. If the First Amendment permits liability for the nonphysical harm of defamation, then the inadequate warnings regarding poisonous ingredients used in recipe), cert. denied, 353 So. 2d 674 (Fla. 1977). The First Amendment applies because common law tort liability is a form of state action. See New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (declaring that “[t]he test is not the form in which state power has been applied, but, whatever the form, whether such power has in fact been exercised.”). Although this article argues that the First Amendment should not bar liability for harm advocacy speech, it does not suggest that it is completely inapplicable. Cf. W. Tarver Rountree, Constitutional Law, 33 Mercer L. Rev. 51, 63 (1981); Donald Wallis, “Negligent Publishing”: Implications for University Publishers, 9 J.C. & U.L. Rev. 209, 225 (1982).

4. See infra notes 11-119 and accompanying text.
6. Note also that imposing liability for speech that advocates harm is entirely viewpoint neutral: the aims or objectives of the publisher are irrelevant to the question of imposing liability for the social harm resulting from the speech.
7. For a full discussion of the impact of the Sullivan case, see Bruce W. Sanford, Don’t Shoot the Messenger: How Our Growing Hatred of the Media Threatens Free Speech for All of Us 176-79 (1999).
First Amendment should also certainly permit liability in tort when publications facilitate physical injury or death.

Nevertheless, courts confronted with cases involving instructional speech that advocates or facilitates criminal behavior have concluded that such speech enjoys strong First Amendment protection. 8 Free speech undoubtedly imposes social costs on the community. 9 The fact that someone engages in speech activity or expressive conduct does not automatically insulate them from liability for the social harms caused by their speech activity or expressive conduct. The question is more subtle: sometimes the costs are taxed against the speaker, and other times they are not.

This squarely presents the question of whether and when the government may assign the social costs of speech activities against speakers. Someone falsely shouting “fire” in a crowded theater can be made to pay, whereas the street minister who distributes leaflets which are later dropped on the street creating aesthetic blight, cannot. Between these two points lies a continuum.

This Article will explore the possibility of shifting or sharing the liability stemming from criminal activities to those who provide detailed directions on how to commit those acts, when the publication in question has no other redeeming value. This Article concludes that in some limited circumstances, the First Amendment should not preclude the imposition of civil liability for those who write and distribute speech that both advocates and facilitates harm to others. 10

Part I of this Article reviews the First Amendment and discusses the Brandenburg test and its potential application to situations involving speech advocating socially harmful activity. Part II argues that this approach is poorly suited for dealing with the problems inherent in such harm-promoting speech. By accommodating only considerations that arise from the imminence of the harm, and not the nature of the speech itself, the courts have not permitted individuals to recover in tort for harm proximately caused by such speech and

8. See infra notes 11-119 and accompanying text.
9. For an excellent discussion of the need to re-think whether victims of speech-related harms should be required to “pay the price” of free speech, see Frederick Schauer, Uncoupling Free Speech, 92 COLUM. L. REV. 1321, 1325 (1992) (arguing that once we uncouple the freedom of speech from the compensation (literally or figuratively) of the victim, we will see).
10. For a discussion of some of these concepts, see S. Elizabeth Wilborn Malloy, Ronald J. Krotoszynski, Jr., Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg, WM & MARY L. REV. (2000).
intended by the speaker to cause such harm. Part III suggests that the recognition of this new category of speech would permit courts to better address the conflict between society’s need to protect its citizens from violence and the First Amendment value of free expression and democratic deliberation.

I. THE FIRST AMENDMENT AND MEDIA VIOLENCE

The First Amendment states that “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.”\(^ {11}\) In turn, the Fourteenth Amendment’s due process clause incorporates a free speech guarantee identical to the First Amendment’s guarantee.\(^ {12}\) The text, although important, does not on its face resolve specific free speech questions: the precise scope of “the freedom of speech” is something that reviewing courts must resolve on a case-by-case basis.\(^ {13}\)

The contemporary First Amendment speech categories do not adequately address the social costs associated with speech intended to facilitate anti-social behavior. When addressing the damage from speech that advocates harm, the federal courts routinely have applied the *Brandenburg* test, a test designed to protect political speech and the abstract advocacy of violence or revolution.\(^ {14}\) *Brandenburg* holds that speech cannot be the basis for civil or criminal sanctions unless it both advocates lawless conduct and poses a grave risk of actually inciting imminent harm.\(^ {15}\) Because instructional books, songs, and movies do

\(^{11}\) U.S. CONST. amend. I. The First Amendment is made applicable to the states through the Fourteenth Amendment. See Duncan v. Louisiana, 391 U.S. 145 (1968).

\(^{12}\) See Near v. Minnesota, 283 U.S. 697, 707 (1931); Gitlow v. New York, 268 U.S. 652, 666 (1925). The Fourteenth Amendment states that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life, liberty or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1; see also Toni Massaro, *Reviving Hugo Black? The Court’s “Jot for Jot” Account of Substantive Due Process*, 73 N.Y.U.L. REV. 1086 (1998).


\(^{15}\) Id. at 447. In *Brandenburg*, the Court offered extremely broad protection to political dissent and required that the government meet three different criteria to regulate such speech. First, the
not usually by their nature prompt individuals to immediate action, such materials generally will not meet *Brandenburg*’s imminent harm requirement. This test demands that the harmful speech cause an individual to act on impulse, without rational thought. That is to say, *Brandenburg* addresses speech activity designed to persuade someone to immediately engage in an unlawful act, not speech designed to facilitate the commission of an unlawful act by a person who has already decided to act.

Applying *Brandenburg*, courts generally have held speech advocating harm to be constitutionally protected expression, thereby denying any effective remedy to injured plaintiffs. To address speech that does not produce imminent harm but nevertheless advocates harm in a fashion that directly facilitates the realization of the harm (perhaps at some later time), courts should develop a new category of speech that more appropriately weighs society’s interest in protecting its citizens from socially harmful activities against the First Amendment’s protection of free expression. As explained more thoroughly below, *Brandenburg*, properly understood, does not address speech that attempts to facilitate or assist lawless action, but rather governs abstract exhortations to lawless action which might incite a sufficiently susceptible person to action.

speaker must promote not just any lawless action, but “imminent” lawless action. *(id. at 447)*. Second, the imminent lawless action must be highly “likely” to occur. *(Id.)* Third, the speaker must intend to produce imminent lawless action. *(Id.)* *(stating that the speech must be “directed to inciting or producing imminent lawless action”).

16. *Brandenburg*, 395 U.S. at 447-48 (“constitutional guarantees of free speech and free press do not permit a State 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”); *Noto v. United States*, 367 U.S. 290, 297-98 (1961) (“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.”).

17. See *id. at 447*; see, e.g., *Herceg v. Hustler Magazine*, 814 F.2d 1017 (5th Cir. 1987) (holding that a magazine article on “auto-erotic asphyxiation” did not incite adolescent to perform act that led to death by hanging since the article included several warnings, and imposition of civil liability would violate First Amendment); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989) (holding that a film depicting gang life did not constitute unprotected incitement because, “[a]lthough . . . rife with violent scenes, it [did] not at any point exhort, urge, entreat, solicit, or . . . encourage unlawful or violent activity”); *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989, 1001 (Cal. Ct. App. 1988) (stating that “there is nothing in . . . [the] songs which could be characterized as a command to an immediate suicidal act”).
Thus, *Brandenburg* speaks only to the specific subject of speech advocating harm, and not to the entire category of media violence.18

**A. The Brandenburg Clear and Present Danger/Imminence Test**

The Supreme Court announced the current general test for advocacy of lawless action in *Brandenburg v. Ohio*.19 Clarence Brandenburg was a leader of the Ku Klux Klan ("KKK") who had invited the local press to attend a KKK rally.20 At the rally, he gave a somewhat incoherent speech in which he proclaimed that the KKK was "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."21 As a result of his speech, the defendant was arrested for advocating criminal activity in violation of Ohio law.22

In reversing the defendant's conviction, the Supreme Court revised the "clear and present danger" test.23 The Court recognized that the then predominant

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20. See id. at 444-45.
21. Id. at 446.
22. Id. at 445. The statute at issue in that case prohibited:

"[A]dvocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform . . . and voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." Id. (quoting OHIO REV. CODE ANN. § 2923.13 (repealed 1974)).

23. *Brandenburg*, 395 U.S. at 447. The clear and present danger test was first articulated in *Schenck v. United States*, 249 U.S. 47, 52 (1919) (stating that "[t]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."). *See Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (stating that speech cannot be restricted under clear and present danger test unless it "would produce or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent.")., overruled in part by, *Brandenburg* v. Ohio, 395 U.S. 444 (1969). The traditional clear and present danger test was relied upon to uphold government suppression of political speech on a number of occasions. *See, e.g.*, *Frohwerk v. United States*, 249 U.S. 204 (1919); *Dennis v. United States*, 341 U.S. 494 (1951) (upholding conviction of members of Communist Party, which advocated violent overthrow of federal government).
clear and present danger test allowed the government to suppress undesirable political views simply by invoking the speech's "tendency to lead to violence." To ensure greater protection of political speech and less opportunity for government pretext, the Brandenburg Court focused on whether the speech at issue presented a temporally imminent danger, stating:

[T]he constitutional guarantees of free speech and free press do not permit a State 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.

The Court emphasized 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." Thus, under Brandenburg, advocacy of violence can be prohibited only when a speaker (1) advocates imminent illegal conduct; (2) intends to incite either the use of force or illegal conduct; and (3) is highly likely to incite such conduct. Applying this test, the Court found that the words spoken by the Klansman amounted to mere abstract advocacy of lawlessness. Accordingly, the Ohio statute that purported to punish such speech was itself unconstitutional. Since Brandenburg, the imminence requirement has become the central focus of the test. For instance, in Hess v. Indiana, the Court reversed the conviction of an anti-war demonstrator who yelled, "[w]e'll take the fucking

24. Brandenburg, 395 U.S. at 447; see also Hess v. Indiana, 414 U.S. 105, 109 (1973). This concern relates back to cases applying the clear and present danger test in a relatively weak form. See, e.g., Dennis v. United States, 341 U.S. 494 (1951). Justice Douglas so feared a "bad tendencies" understanding of the clear and present danger test that he rejected the test entirely as being too unreliable in affording protection to core political speech. See Brandenburg, 395 U.S. at 453 (Douglas, J., concurring).


26. Id. at 448.

27. Id.

28. Id. at 448-49.

29. Id. at 449.


street later (or again)." 32 The Court held that this language amounted at most to the "advocacy of illegal action at some indefinite future time." 33 Because the evidence showed that Hess’s statement was an exclamation rather than being directed specifically at any group, and because no evidence existed that his statement was intended and likely to produce imminent disorder, the statement enjoyed constitutional protection. 34

Similarly, in NAACP v. Claiborne Hardware Company, 35 the Supreme Court set aside an award of damages based on a NAACP boycott of white merchants. 36 In the course of the boycott, one NAACP official had proclaimed in a public speech that "[i]f we catch any of you going in any of them racist stores, we’re gonna break your damn neck." 37 The Court acknowledged that the speaker in question had used strong language, but concluded that the speech essentially was an impassioned plea for support of the boycott. 38 Nevertheless, if actual outbreaks of violence had followed, the Court suggested that a substantial question would exist regarding whether the speaker could be held liable for the resulting damages. 39 Because the only outbreaks of violence took place weeks or months later, the Court held that no liability could attach. 40

Advocates must be free to make spontaneous emotional appeals without carefully weighing their words, and such appeals constitute protected speech when they do not immediately incite lawless action. 41

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32. See Id. Hess involved a statement made during a protest by one of the protesters that "We'll take the fucking street later." Id. at 106. The statement was made while the protesters were dispersing. Id. at 107. The speech clearly advocated an illegal action. Id. at 108. However, the Court held that although the statement advocated an illegal action, it advocated such an action at an undefined future date. Id. It was not an action to be taken in the near future, and thus did not meet the imminence requirement. Id. at 108-09.

33. Id. at 108.

34. Id. at 108-09.


36. Id.

37. Id. at 902.

38. Id. at 928.

39. Id.

40. Id.

41. Id. In addition, the Court noted that the speaker tempered his impassioned rhetoric with the following remarks: "I am not going to lay out in the bushes and shoot no white folks. That's wrong. I am not gonna go out here and bomb none of them's home. That's not right. . . . Be courteous now. Don't mistreat nobody. Tell them in a nice forceful way, the curfew is going to be
One should note that *none* of these cases involve efforts to teach listeners how to commit specific illegal acts against particular persons or groups.\textsuperscript{42} Neither the Klan, the anti-war protestor, nor the NAACP were conducting a seminar in how to make and successfully toss a Molotov cocktail.\textsuperscript{43} When speech activity is hyperbolic and advocates some ambiguous lawless action at an indefinite time in the future, it presents very little real risk to the community.\textsuperscript{44} The social cost of such speech activity is de minimis.\textsuperscript{45}

\textsuperscript{42} See supra notes 17-35 and accompanying text.


\textsuperscript{45} Of course, the effects of hate speech can be very real to members of targeted communities. See, e.g., MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 20 (1993). The First Amendment's free speech guarantee has generally afforded speakers immunity from liability for psychological harm, even when a speaker deliberately sets out to bring about such harm. See Hustler v. Falwell, 485 U.S. 46, 56 (1988); Collin v. Smith, 578 F.2d 1197, 1206, 1210 (7th Cir.), cert. denied, 439 U.S. 916 (1978); cf. Beauharnais v. Illinois, 343 U.S. 250, 265-67 (1952) (holding that protection of liberty as defined by the due process clause does not prevent punishment of criminal libel directed at certain groups). For democratic deliberation to occur, some measure of psychological harm to members of the community must be accepted as a necessary consequence of the project of self-governance. Whether the Supreme Court has struck an appropriate balance on the question of how much psychological harm must be tolerated is a matter that legal scholars are hotly contesting. See, e.g., RICHARD DELGADO AND JEAN STEFANCIC, MUST WE DEFEND NAZIS: HATE SPEECH, PORNOGRAPHY AND THE NEW FIRST AMENDMENT 10-11 (1997); CATHERINE MACKINNON, ONLY WORDS (1993) (arguing that pornography or "graphic sexually explicit materials," should not fall within the protective bounds of the First Amendment); Steven G. Gey, *Postmodern Censorship Revisited: A Reply to Richard Delgado*, 146 U. PA. L. REV. 1077 (1998) (arguing against the creation of a "hate speech" category of unprotected speech). Moreover, Europe and Canada have struck radically different balances. See Frances H. Foster, *Translating Freedom for Post-1997 Hong Kong*, 76 WASH. U. L. Q. 113 (1998). For present purposes, this article assumes that the First Amendment precludes relief for harms of the sort described in Beauharnais and Falwell. These harms, while real, are not the result of Harm Advocacy and therefore lie beyond the scope of this article.
B. The Implications of Brandenburg for Media Violence

The Brandenburg test quite appropriately makes it difficult for the government to restrict or suppress political speech.\textsuperscript{46} It does not, however, establish an absolute bar to government regulation of speech activity.\textsuperscript{47} Rather, it creates a strong presumption that the First Amendment protects the mere advocacy of lawlessness.\textsuperscript{48} Although the Brandenburg test clearly recognizes the government's compelling interest in safeguarding the safety of citizens, it generally rejects the government's invocation of this interest when the speech in question involves dissident political views.\textsuperscript{49} Thus, the requirement that the alleged lawlessness take place or be likely to take place almost immediately after the delivery of the speech ensures that the danger is in fact not speculative and that the government's interest in preventing the violence is not pretextual.

Conversely, if speech aims to facilitate a particular lawless act against a discrete victim or group of victims, the government's claim of concern sounds far more plausible on its face. Suppressing unpopular political minorities is one thing, preventing the bombing of federal buildings or abortion clinics is quite another. In the context of abstract political speech by unpopular political minorities, Brandenburg's imminence test makes a great deal of sense. Purely speculative harms are not sufficient grounds for censorship. But when the nature of the speech itself creates a palpable danger, the government's concerns sound less in censorship and more in the viewpoint neutral cadence of the public safety.\textsuperscript{50} Indeed, landmark Supreme Court cases suggest that Brandenburg

\textsuperscript{46} Brandenburg, 395 U.S. 444.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} See generally STEVEN H. SHIFFRIN, DISSERT, INJUSTICE AND MEANINGS OF AMERICA (1999) (arguing that dissent is the core of the First Amendment). Another possible explanation is that incitement to imminent lawlessness, like fighting words, induces listeners to react impulsively. Under this theory, regulating such speech would therefore not implicate the listeners' autonomy.
\textsuperscript{50} See generally United States v. New York Times, 403 U.S. 713, 718 (1971) (per curiam) (Black, J. concurring) (language on publishing troop transport information is not protected by the First Amendment and may indeed be subject to a prior restraint). See also United States v. Progressive, Inc., 467 F. Supp. 990, 999-1000 (W.D. Wis. 1979) (granting temporary injunction against Progressive Magazine to prohibit publication of an article containing material on how the H-bomb worked); Morland v. Sprecher, 443 U.S. 709 (1979). For a further discussion of the Progressive case, see Erwin Knoll, National Security: The Ultimate Threat to the First
should not be stretched to confer blanket protection on speech that advocates harm to others.\textsuperscript{51}

II. TORT LIABILITY, THE FIRST AMENDMENT AND THE FEDERAL COURTS

In \textit{New York Times Company v. Sullivan,}\textsuperscript{52} the Supreme Court severely limited the right of individuals to sue publishers in the event a publication is defamatory.\textsuperscript{53} A would-be public figure or public officer plaintiff must show “actual malice,” that is knowledge of falsity or reckless indifference to truth or falsity, in order to recover damages from a media defendant.\textsuperscript{54} Although the Court also recognized that the imposition of tort liability based on a defendant’s speech constitutes state action,\textsuperscript{55} and that the imposition of liability may have a

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\item \textit{Amendment,} 66 MINN. L. REV. 161 (1981);
\item \textit{See} United States v. New York Times Co., 403 U.S. 713 (1971) (per curiam). In \textit{United States v. New York Times Company,} also known as the “Pentagon Papers Case,” a clear majority of the justices made clear that the First Amendment did not privilege the publication of military secrets, at least when publication of the information would put service people in immediate harm. Concurring opinions in the Pentagon Papers Case point the way toward the recognition of Harm Advocacy as an unprotected subject of speech activity. Justice Brennan reaffirmed explicitly that “[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.” \textit{Id.} at 726 (Brennan, J., concurring) (quoting \textit{Near v. Minnesota}, 283 U.S. 697, 716 (1931)). For a discussion of the media’s view of the \textit{New York Times} case, see \textit{Bruce W. Sanford, Don’t Shoot the Messenger} 154-156 (1999); Cass Sunstein, \textit{Is Violent Speech a Right?}, \textit{The American Prospect} 35 (1995) (arguing that “narrow restrictions on speech that expressly advocate illegal, murderous violence in messages to mass audiences probably should not be taken to offend the First Amendment”).
\item 376 U.S. 254 (1964).
\item \textit{See Sullivan,} 376 U.S. at 265 (“The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.”). In \textit{Sullivan,} the Supreme Court held that “[w]hat a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel,” because the fear of civil liberty might be “markedly more inhibiting than the fear of prosecution under a criminal statute.” \textit{Id.} at 277.
\item \textit{Sullivan,} 376 U.S. at 279-80.
\item \textit{Id.} at 266-68; \textit{see, e.g.,} Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (noting the
chilling effect on the exercise of free speech, the Court permitted recovery because of society’s interest in protecting individuals’ reputation from harm, even when individuals voluntarily place themselves in the public spotlight.

In *Sullivan*, the Supreme Court effectively constitutionalized state tort law to prohibit the imposition of civil liability for good faith criticism of public officials. In subsequent cases, however, the Supreme Court has made clear that false speech, as such, does not enjoy any special First Amendment protection in its own right. Careful consideration of *Sullivan* and its progeny demonstrates that the free speech clause of the First Amendment displaces

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56. See *Sullivan*, 376 U.S. at 300 (Goldberg, J., concurring). To achieve protection of free speech, the Court imposed on public officials a heavy burden of proving actual malice to make it difficult to reach, much less persuade, a jury. *Id.* If such public officials could be persuaded not to sue, the media would be spared the cost of defending questionable claims, and the corresponding pressure to tone down or even disregard provocative stories that might spawn litigation. Some commentators believe that the *New York Times* standard is not sufficiently protective of the press and have suggested that such libel cases be barred or made even more difficult to pursue. See Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to “the Central Meaning of the First Amendment*, 83 COLUM. L. REV. 603 (1983) (urging absolute immunity should apply at least for published criticism of the official conduct of public officials); William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press – An Extended Comment on “the Anderson Solution”,* 25 WM. & MARY L. REV. 793 (1984) (supporting limitations on damage awards in libel cases); David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 435-36 (1975) (discussing why *New York Times* standard failed to achieve goal of reducing defense costs); Bruce W. Sanford, *Don’t Shoot the Messenger* 176-179 (1999) (discussing some of the harms that have resulted from the *New York Times* holding for the media).


58. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (“There is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”).

59. See Curtis Pub’l’g Co. v. Butts, 388 U.S. 130, 155 (1967) (holding that a public figure must show actual malice); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (holding that when the subject of a libelous statement is a private figure, the defendant must at least be at fault in order for liability to be imposed).
traditional common law tort principles only when necessary to protect democratic deliberation. Because Harm Advocacy does not advance the process of democratic deliberation, it should be deemed outside the scope of the Sullivan rule.

Based on the Sullivan holding that tort remedies are available to plaintiffs harmed by certain types of speech, numerous plaintiffs have tried to hold publishers liable for their works which incite violence or lawlessness. Few have prevailed. One major reason is that a majority of the lower federal courts

60. See Sullivan, 376 U.S. at 270 (asserting a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks on government and public officials.").


have applied the *Brandenburg* test when determining whether a publisher or author who advocates criminal acts should be liable for resulting harm.\^{63}\ See infra notes 56-61 and accompanying text. Applying the *Brandenburg* test, courts have refused to hold publishers liable because the incitement was not explicit, warnings were included, or no "clear and present danger" of imminent injury existed.\^{64}\ Although the *Brandenburg* test properly protects political speech advocating the overthrow of the government or other abstract promotion of lawlessness, it has proven to be overprotective of non-political speech that directly facilitates physical harm against others.\^{65}\ The Supreme Court has not addressed the standard applicable to non-political speech that advocates harm to others.\^{66}\ Nevertheless, two relatively recent United States Circuit Court of Appeals cases have established two very different approaches to claims that such speech enjoys broad First Amendment protection.\^{67}\ 1. *Rice v. Paladin Enterprises, Inc.*

*Rice v. Paladin Enterprises, Inc.*\^{68}\ is one of the few cases holding that the First Amendment does not pose a bar to a finding of civil liability against a publisher.\^{69}\ The *Rice* case arose out of the brutal murders committed by James Perry, a contract killer.\^{70} In preparation for these murders, Perry closely

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\^{63}\ See infra notes 56-61 and accompanying text.  
\^{64}\ See id.  
\^{65}\ See supra note 50.  
\^{66}\ See supra notes 50-51.  
\^{67}\ See *Rice*, 128 F.3d 233; *Herceg v. Hustler Magazine*, Inc., 814 F.2d 1017 (5th Cir. 1987).  
\^{69}\ *Id.* For an interesting discussion to some of the background to the *Rice* case, see RODNEY A. SMOLLA, DELIBERATE INTENT (1999).  
\^{70}\ *Rice*, 128 F.3d at 239. Lawrence Horn had hired James Perry to kill his ex-wife and his eight-year old quadriplegic son, in order to inherit over $1 million awarded to his son in a lawsuit for the accident, which caused the son's paralysis. *Id.* James Perry murdered Mildred Horn, her
followed the directions contained in *Hit Man: A Technical Manual for Independent Contractors*\(^{71}\) and *How to Make a Disposable Silencer, Vol II*,\(^ {72}\) publications of Paladin Enterprises, Inc. ("Paladin"). On discovering the pivotal role that these books played in the execution of this crime, the victims' families sued Paladin\(^ {73}\) for tortious aiding and abetting and civil conspiracy.\(^ {74}\)

Applying the standard set forth in *Brandenburg v. Ohio*,\(^ {75}\) the district court

71. REX FERAL, *HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS* (Paladin Press 1983). For example, Perry meticulously followed the books' directions and advice about how to solicit for prospective clients in need of murder-for-hire services, how to handle and use an AR-7 rifle and drill out the serial number, how to construct a silencer and shoot at an optimal distance to "insure quick and sure death," how to disassemble the weapon and change its rifling to prevent its ballistics from matching the bullets left behind in the victims, how to make the crime scene look like a burglary, how to dispose of the weapon and any stolen goods in pieces along the roadway, and how to use a rental car to get away from the crime scene undetected. *See Rice*, 940 F. Supp. 836, 839-40 (D. Md. 1996). If Perry had followed the *Hit-Man* instructions a little more closely, he may not have ended up in his current predicament. Despite the precautions Perry took to avoid detection, police placed him in Rockville the day of the murders because he checked into a motel near the scene—using his real name and address. *Perry*, 686 A.2d at 277. The author of the book is actually a woman who has remained unidentified. *See 60 Minutes* (CBS Television Broadcast, Mar. 2, 1997) (interviewing Peter Lund).


73. The families sued Paladin Press and its president, Peter Lund. *Rice*, 940 F. Supp. at 838. Many amici curiae briefs were filed in support of the defendant, including ones from media corporations, the ACLU, the Association of American Publishers, the Newspaper Association of America, and the Society of Professional Journalists. *Id.*

74. *Rice*, 940 F. Supp. at 838. The plaintiffs also sought damages based on theories of negligence and strict liability. *Id.* The complaint alleged that Paladin aided and abetted Perry in the commission of these murders through the publication of its books with their explicit instructions on how to commit and cover-up a contract murder. *Id.* Neither the District Court nor the Fourth Circuit addressed these arguments. *See Rice*, 128 F.3d at 233; *Rice*, 940 F. Supp. at 836.

75. *Brandenburg*, 395 U.S. 444 (1969). The *Rice* court found that three elements must be met under the *Brandenburg* test to prohibit Paladin's publication of the manuals. *See Rice*, 940 F. Supp. at 845-46. First, the manuals must advocate imminent lawless action. *Id.* at 845. Second,
granted Paladin’s motion for summary judgment, holding that the First Amendment barred recovery of damages. The district court found that the Paladin publications did not meet Brandenburg’s stringent imminence requirement, as the murders occurred at least a year after Perry purchased the manuals. In addition, the district court found that the books, although “reprehensible and devoid of any significant redeeming social value,” did not constitute incitement or a call to action, and that Paladin did not intend for Perry to commit murder. In granting Paladin’s motion for summary judgment, the court concluded that “[i]t is simply not acceptable to a free and democratic society to limit and restrict creativity in order to avoid dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals.”

The United States Court of Appeals for the Fourth Circuit reversed and remanded. In an opinion written by Judge Michael Luttig, the panel agreed

the books must have been intended to produce imminent lawless action. Id. Third, and last, the books must have been likely to produce imminent lawless action. Id. Finding that none of these requirements had been met, the court concluded that Paladin's speech could not be regulated or prohibited by state tort law. Id. at 847.

76. Rice, 940 F. Supp. at 849.
78. Id. at 847.
79. See Rice, 940 F. Supp. at 848-49 (“Nothing in the book says ‘go out and commit murder now!’”).
80. See Id. at 847. However, Paladin stipulated that its intent and its marketing strategy was intended to attract and assist criminals and would-be criminals who desired information and instructions on how to commit crimes. Id. The court, however, found it highly relevant that Paladin’s catalogues and its books included prominent warnings such as “For Academic Use Only” and a warning stating that certain laws made illegal the possession of certain guns and accessories as well as stating that it is illegal to manufacture a silencer without a government license. Id. at 838-39 (“WARNING: IT IS AGAINST THE LAW TO manufacture a silencer without an appropriate license from the federal government. There are state and local laws prohibiting the possession of weapons and their accessories in many areas. Severe penalties are prescribed for violations of these laws. Neither the author nor the publisher assumes responsibility for the use or misuse of information contained in this book. For informational purposes only.”).
81. Id. at 848 (stating specifically that the court declined to create a new category of unprotected speech).
82. Rice, 128 F.3d at 267 (4th Cir. 1997) (“Paladin's astonishing stipulations, coupled with the extraordinary comprehensiveness, detail, and clarity of Hit Man's instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power
that the *Brandenburg* standard applied, but held that the First Amendment was not a bar to finding Paladin civilly liable as an aider and abetter of Perry's triple contract murder.\textsuperscript{83} The court held that the district court had misread *Brandenburg*\textsuperscript{84} by failing to recognize that speech which "is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated. . . ."\textsuperscript{85} The Fourth Circuit emphasized that Paladin's speech, because it was so detailed and methodical in its explanations and instructions on how to plan, commit, and cover-up the crime of murder, was not abstract speech and therefore received no First Amendment protection.\textsuperscript{86}

Throughout the opinion, the court repeatedly cited the "unprecedented" stipulations by Paladin that it knew criminals would use its publication.\textsuperscript{87} In the

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\item and effectiveness of its peculiar form of instruction, the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law. In at least these circumstances, we are confident that the First Amendment does not erect the absolute bar to the imposition of civil liability. . . ."), cert. denied, 118 S. Ct. 1515 (1998).
\item \textsuperscript{83.} \textit{Id.} at 265.
\item \textsuperscript{84.} \textit{Id.} at 264. ("We cannot fault the district court for its confusion over the opinion in that case. The short per curiam opinion in Brandenburg is, by any measure, elliptical.").
\item \textsuperscript{85.} \textit{Id.} In support of this, the court looked to two Supreme Court decisions. In \textit{Giboney v. Empire Storage & Ice Co.}, the Supreme Court rejected "a First Amendment challenge to an injunction forbidding unionized distributors from picketing to force an illegal business arrangement." \textit{Id.} at 243 (citing \textit{Giboney v. Empire Storage & Ice Co.}, 336 U.S. 490). The court next cited \textit{Brown v. Hartlage} as a recent example of the Supreme Court's decision not to allow a First Amendment defense when the activity sought to be protected involved illegal activity. \textit{Id.} at 243, 244 (citing \textit{Brown v. Hartlage}, 456 U.S. 45, 55 (1982)).
\item \textsuperscript{86.} \textit{Id.} at 256 (\textit{Hit Man} is, pure and simple, a step-by-step murder manual, a training book for assassins). The court further stated that the "speech act of providing step-by-step instructions for murder . . . so comprehensive and detailed that it is as if the instructor were literally present with the would-be murderer not only in preparation and planning, but actual commission of, and follow-up to, the murder [has] . . . not even a hint that the aid was provided in the form of speech that might constitute abstract advocacy." \textit{Id.} at 255.
\item \textsuperscript{87.} \textit{Id.} at 252-54 (reviewing Paladin's stipulations that it intended and had knowledge that \textit{Hit Man} would be used by criminals to commit murder and that it had engaged in a marketing strategy to attract and assist these individuals in the pursuit of this information). Based on these stipulations, the court held that a reasonable jury could find that Paladin possessed the requisite
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court’s opinion, these stipulations proved a level of intent readily satisfying the requirements of Maryland’s civil aiding and abetting statute and the First Amendment. 88

Applying a narrow line of criminal cases holding that the First Amendment does not shield the defendants just because they used speech to commit crimes, the Fourth Circuit concluded that the First Amendment posed no bar to civil liability as well. 89 The court reviewed several cases involving tax protesters who not only urged violations of the Internal Revenue Code, but also helped people complete false returns. 90 It also noted a Ninth Circuit case in which the federal government successfully prosecuted the publisher of drug-manufacturing instructions for aiding and abetting, citing with approval the Ninth Circuit’s holding that the First Amendment “does not provide publishers a defense as a matter of law to charges of aiding and abetting a crime...” 91 Although Judge

88. Id. The Fourth Circuit found that their only instructional communicative “value” was the illegitimate one of training persons how to murder and to engage in the business of murder for hire. Id.

89. Rice, 128 F.3d at 245; see, e.g., United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982) (holding that the First Amendment does not provide publishers a defense as a matter of law to charges of aiding and abetting a crime through the publication and distribution of instructions on how to make illegal drugs); United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990) (holding Brandenburg inapplicable to a conviction for conspiring to transport and aiding and abetting the interstate transportation of wagering paraphernalia, where defendants disseminated a computer program that assisted others to record and analyze bets on sporting events; program was “too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection.”); United States v. Buttorff, 572 F.2d 619, 623-24 (8th Cir. 1978) (holding that tax evasion speeches were not subject to Brandenburg because, although they did not “incite the type of imminent lawless activity referred to in criminal syndicalism cases,” they did “go beyond mere advocacy of tax reform.”), cert. denied, 437 U.S. 906 (1978). But see United States v. Freeman, 761 F.2d 549, 551-52 (9th Cir. 1985) (holding general statements regarding the unfairness of tax laws, as opposed to teaching of how to avoid tax laws, may constitute protected speech), cert. denied, 476 U.S. 1120 (1986).

90. Rice, 128 F.3d at 245, 246 (citing United States v. Kelly, 769 F.2d 215, 217 (4th Cir. 1985) (holding that the First Amendment offered no protection to speech which was not abstract in its criticism of tax law, but instead urged people to file false tax returns, with the expectation that this advice would be heeded)).

91. Id. at 244 (citing United States v. Barnett, 667 F.2d 835 (9th Cir. 1982)). In Barnett, the Ninth Circuit held that the First Amendment did not provide publishers a defense as a matter of
Luttig acknowledged that considerably less authority exists on the subject of whether the government may subject such speech to civil penalty or make it subject to private causes of action, the court assumed that it could do so because the government could criminally prosecute the same speech without running afoul of the First Amendment.

law to charges of aiding and abetting a crime through the publication of instructions of how to make illegal drugs. Barnett, 667 F.2d at 842. The defendant was the publisher of an instruction manual on how to manufacture the illegal drug known as PCP. Id. Another person obtained the defendant's instruction manual and was caught in the act of manufacturing the illegal drugs. Id. at 838. The defendant was prosecuted for aiding and abetting the manufacture of PCP. Id. The defendant argued that evidence seized at the crime scene should be suppressed because the defendant had a First Amendment right to print the manual. Id. The Court stated "[t]o the extent, however, that Barnett appears to contend that he is immune from search or prosecution because he uses the printed word in encouraging and counseling others in the commission of a crime, we hold expressly that the First Amendment does not provide a defense as a matter of law to such conduct." Id. at 843.


93. Rice, 128 F.3d at 247. The court then identified two possible qualifications to this conclusion. Id. at 247. The first involved a "heightened intent requirement" to prevent the punishment or abolishment of innocent and lawfully useful speech. Id. The court determined that this exception does not apply when "those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment." Id. at 248. The second qualification was that the First Amendment imposed similar limitations on the imposition of civil liability for abstract advocacy as it would for the imposition of criminal punishment for the same type of speech. Id. at 248-49. Because the court firmly believed that Paladin's speech was "so comprehensive and detailed" in its narration and instruction on murder, the speech, under no circumstances could be considered abstract advocacy, and therefore this qualification was inapplicable. Id. at 249.
The Fourth Circuit’s analysis seems largely correct on the facts at bar: the First Amendment should not protect an intentional effort to facilitate a crime. For whatever reasons, Paladin’s officers stipulated that this was their intent in publishing the two books at issue.

The court’s attempt to fit Brandenburg to these facts is somewhat less convincing. Brandenburg’s imminence requirement mandates difficult, almost theological intellectual acrobatics in order to reach instructional speech that advocates harm to others. It would make more sense to simply find Brandenburg inapplicable to the kind of speech activity at issue in Rice.

2. Byers v. Edmondson

Less than six months after the Fourth Circuit’s decision in Rice v. Paladin, a Louisiana Court of Appeals relied on the Rice rationale in refusing to block a civil lawsuit that sought to hold liable the producers and distributors of the film Natural Born Killers for the damages suffered by Patsy Byers. The Byers case demonstrates the manner in which the Rice holding may be interpreted to reduce the First Amendment’s protection for a wide variety of violent speech, not just murder manuals.

In March 1995, Sarah Edmondson and her boyfriend, Benjamin Darrus, after repeated viewings of the movie Natural Born Killers, decided to act out various portions of that movie. The two young people shot and killed a cotton gin owner, and later shot Patsy Byers during their armed robbery of a convenience store. Byers, who was partially paralyzed by her wounds, brought a $20 million suit against Edmondson and Darrus, and against those responsible for

94. See supra notes 55-62 and accompanying text.
95. Rice, 128 F.3d at 252.
96. Id. at 243-65.
98. See id. at 683. Mrs. Byers died of cancer in November 1997. Her family continues to pursue her lawsuit.
99. Sarah Edmondson is currently serving a 35-year sentence for the attempted murder and
the film, including the director, Oliver Stone.\textsuperscript{100}

Byers contended the producers and distributors of \textit{Natural Born Killers} knew, intended and were substantially certain that the film would cause the type of incitement to violence that Edmondson and Darrus carried out against her.\textsuperscript{101} Additionally, Byers alleged that the media defendants negligently and/or recklessly failed to minimize the film's violent content and glorification of senseless violence.\textsuperscript{102} She also asserted that the media defendants negligently and/or recklessly failed to warn viewers of the "potential deleterious effects" upon teenage viewers caused by repeated viewing of \textit{Natural Born Killers}.\textsuperscript{103}

\footnotesize{\textsuperscript{100}See id. at 684 (the suit included Warner Brothers, Inc., Warner Home Videos, and Time Warner Entertainment). Patsy Byers alleged that Edmondson and Darrus, after watching the movie \textit{Natural Born Killers}, desired to emulate the protagonists in the movie, and thus, Oliver Stone and the other media defendants are responsible for the harm she suffered. See id. Byers' allegations are not particularly novel. See infra note 62 (listing cases brought against media defendants on a "copy cat" theory of liability). In fact, other courts that have considered "copy cat" cases (in which plaintiffs blame the actions of their attackers on the media content that their attackers watched) have consistently rejected them. See id.; see also Marc A. Franklin and David A. Anderson, Cases and Materials on Mass Media Law 437-39 (1995) (describing examples of what the authors call "how-to-do-it" cases involving physical harm allegedly caused by information contained in media messages).

\textsuperscript{101}See id. at 684-85 (enumerating the allegations against the media defendants). The Byers complaint states, "Defendants are liable ... for producing a film ... which they intended ... would cause or incite persons such as defendants Sarah Edmondson and Benjamin Darrus (via subliminal suggestion or glorification of violent acts) to begin shortly after repeatedly viewing same, a crime spree such as that which lead to the shooting of Patsy Ann Byers." \textit{id.} at 684.

\textsuperscript{102}See id. at 685.

\textsuperscript{103}See id. The dispute surrounding the viability of Byers' suit provides insight into the conflicting views that even those within the entertainment and publishing industry have regarding civil liability for their works. One of Edmondson's and Darrus' other victims was William Savage, a good friend of John Grisham, the author of many successful legal thrillers. Mr. Grisham urged the Louisiana court to hold the producers of \textit{Natural Born Killers} liable under a products liability theory. See Ben Elton, \textit{When Artists Must Take the Rap}, \textit{Sunday Times - London}, July 28, 1996, at B1. Oliver Stone, producer of \textit{Natural Born Killers}, responded by asking whether Grisham...}
In response, the media defendants filed a peremptory exception raising the objection of no cause of action. Specifically, the media defendants contended that they owed no duty to the plaintiff to ensure that viewers of *Natural Born Killers* would not imitate actions depicted in the fictional work. Additionally, the media defendants argued that the imposition of liability on the filmmakers would violate the First Amendment’s free speech guarantee.

The trial court dismissed Byers’ claims against the media defendants.

The Louisiana Court of Appeals for the First Circuit reversed. The court found that the media defendants may have owed a duty to Byers and that the First Amendment did not bar her suit. In addressing the duty question, the court found that if Byers could prove that the media defendants intended that viewers imitate the criminal conduct of the main characters in *Natural Born Killers*, then the risk of harm would be “imminently foreseeable,” justifying the imposition of a duty upon the defendants to refrain from creating such a film. The court specifically limited Byers’ claims against the media would “be happy to assume liability” if someone committed a revenge murder after reading Grisham’s novel *A Time to Kill*. See Sandra Davidson, *Blood Money: When Media Expose Others to Risk of Bodily Harm*, 19 HASTINGS COMM/ENT. L. J. 225, 239-40 (1997) (reviewing the dispute between those who seek to hold the media liable for the harms it may have caused through violent programs, and those who believe that the media is never the cause of the harm when individuals decide to “copy cat” what they see or hear).

104. See id. at 684 (the peremptory exception raising the objection of no cause of action is similar to a motion to dismiss).

105. See id.

106. The Byers’ lawsuit is not the first attempt to bring claims against the producers and distributors of *Natural Born Killers*. A Georgia court dismissed another lawsuit, which contained similar allegations as those in *Byers*, on the grounds that the film could not meet the immediacy requirement of *Brandenburg*. See S. Michael Kernan, *Should Motion Picture Studios and Filmmakers Face Tort Liability for the Acts of Individuals Who Watch Their Films?*, 21 HASTINGS COMM/ENT. L. J. 695, 708 (1999) (discussing the Miller v. Warner Bros., Inc. case in detail).

107. See id. at 685. The trial court granted the defendant’s motion to dismiss, “finding that the law simply does not recognize a cause of action such as that contained in and asserted by Byers’ petition.” Id. At this time, the Rice v. Paladin opinion had not yet been issued.

108. See id. at 691.

109. Id. at 689.

110. Id. at 688 (holding that “[i]f the intentional action allegations contained the petition can be proven at trial, the imposition of a duty would be warranted.”).

111. Id. In making this determination, the court principally relied on *Weirum v. RKO Gen., Inc.*
defendants to those involving intentional torts, stating that because "mere foreseeability or knowledge" that the film might be used for criminal purposes would not support liability, Byers had to prove that the media defendants intended for viewers to imitate the violent acts.\textsuperscript{112} The court then distinguished several cases that refused to hold the media liable in similar "copy cat" situations by stating that those cases were decided on summary judgment motions, and therefore were inapplicable to this case where the dismissal was based on the allegations of the complaint.\textsuperscript{113}

After finding that the media defendants may have owed a duty to Byers, the court next addressed the First Amendment arguments. Again, accepting Byers' allegations as true, the court found that if Byers could prove that the media defendants intended for viewers to imitate the violent acts in the film, then the film would fall under \textit{Brandenburg}'s incitement exception, and would not be protected by the First Amendment.\textsuperscript{114} Citing at length the Fourth Circuit's \textit{Rice v. Paladin} decision,\textsuperscript{115} the court found that the plaintiff's allegations that Oliver Stone and his production company had intended to incite imminent lawless action were sufficient to state a cause of action not barred by the First Amendment.\textsuperscript{116}

The \textit{Byers} case further demonstrates the potential problems with the \textit{Rice v. Paladin} decision.\textsuperscript{117} By manipulating \textit{Brandenburg}'s imminence requirement to apply to a murder manual situation, the \textit{Rice} court opened the door for other courts to apply \textit{Brandenburg} in a similar, loose fashion. Unfortunately for the media industry, the \textit{Byers} opinion could apply more widely than \textit{Rice}, not just to permit lawsuits against those who produce and distribute violent instructional

\textsuperscript{539} P.2d 36 (Cal. 1975), a case holding a radio station liable for harms caused by its listeners whom the radio station had deliberately urged to speed in order to receive a prize.

\textsuperscript{112} \textit{Id.} at 690-92.

\textsuperscript{113} \textit{Id.} at 688-89.

\textsuperscript{114} \textit{Id.} at 689.

\textsuperscript{115} See \textit{Rice v. Paladin Enters., Inc.}, 128 F.3d 233 (4\textsuperscript{th} Cir. 1997), \textit{cert. denied}, 118 S. Ct. 1515 (1988). For a more detailed discussion of this case, see text and accompanying notes 68-96.

\textsuperscript{116} \textit{Id.} at 690.

\textsuperscript{117} The \textit{Byers} court could have avoided applying \textit{Rice v. Paladin} because the two cases are so very different. In \textit{Byers}, the movie, \textit{Natural Born Killers}, was intended to entertain movie audiences, unlike the murder manual at issue in \textit{Rice}, which was intended to train people how to commit anti-social acts.
manuals and videos, but to ultra-violent movies, and potentially to mystery novel writers and others who produce works that may discuss anti-social or harmful concerns.

Many commentators argue that both Rice and Byers are incorrect, but fail to provide a standard for courts to apply when dealing with speech that instructs and encourages harm to others. Such speech does not deserve the level of

118. The Byers court does not guarantee that a plaintiff will be successful in bringing such “copy cat” cases against media defendants, but may encourage other plaintiffs to file suit. See James v. Meow Media, Inc., 2000 WL 359735 (W.D. Ky. 2000) (dismissing a $130 million lawsuit brought by the families of the three children whom Michael Carneal murdered at Heath High School in Paducah, Kentucky, against the makers and distributors of the film The Basketball Diaries, alleging that Carneal was inspired, encouraged, or substantially assisted by that movie in gunning down his classmates). The plaintiffs argued that their claims should not be dismissed because they were similar to those asserted in Byers. Id. at *5. The James court rejected this argument, finding that the Byers court permitted only the plaintiffs’ intentional tort claims to proceed. Because the James plaintiffs had alleged only negligence on the part of the media defendants, the court dismissed their claims. Id. at *5.

119. See, e.g., RICHARD BACHMAN, RAGE (1977) (writing under the pen name “Richard Bachman,” Stephen King tells the story of a disturbed student who goes to class and shoots his teacher and fellow classmates. The book was later made into the movie The Basketball Diaries). Rage has been cited as a potential causal factor in several incidents of school violence. In 1996, officials found a copy of the book in a student’s bedroom after he had killed four people at his junior high school. See Alex Fryre, School Violence Pervades Films, Books, and Music, SEATTLE TIMES, Apr. 25, 1999, at A1 (discussing several violent school events that allegedly were copied from books and music depicting teenage angst).

120. See Keith C. Hauprich, A Triple Homicide, A Book Publisher, and the First Amendment: How Will Rice v. Paladin Enterprises Inc. Impact the Entertainment and Media Industries?, 7 UCLA ENT. L. REV. 33 (1999) (arguing that if future courts liberally construe Rice, as the Byers court did, “a Pandora’s Box of liability for defendants in the entertainment industry may be opened” and warning of potential censorship in the future but not recognizing the need to protect the public); See S. Michael Kernan, supra note 106 (critiquing the Byers opinion for not analyzing the speech element of the film and for failing to provide a clear test for liability but not suggesting a method for courts to use when evaluating speech that advocates harm to others); Jeffery Haag, If Words Could Kill: Rethinking Tort Liability in Texas for Media Speech that Incites Dangerous or Illegal Activity, 30 TEX. TECH. L. REV. 1421 (1999) (arguing that Texas courts should continue to follow the Brandenburg standard and not permit tort liability for the publication of works that promote harm to others but failing to realize the courts’ manipulations of Brandenburg could actually cause more restrictions on speech rather than less); Clay Calvert and Robert D. Richards,
First Amendment protection offered by *Brandenburg*. Extending *Brandenburg* to encompass such speech provides more protection than such speech merits under the First Amendment. If a publisher knowingly seeks to facilitate conduct which the legislature may constitutionally proscribe, the speech at issue should itself be proscribable. This is not because the power of prohibiting conduct also encompasses the lesser power of proscribing speech. Rather, it is because speech that facilitates criminal conduct is itself proscribable — just as conspiracies and solicitations may be criminalized and punished, speech akin to a conspiracy or solicitation can be punished. Moreover, the proscription is not the product of antipathy toward the speaker’s ideological motivation, but rather a prudent preventive measure to protect the public from harm.

III. THE DANGERS AND THE INADEQUACY OF THE *BRANDENBURG* TEST AS APPLIED TO MEDIA VIOLENCE

Recent events have underscored the need to develop a new approach to speech that advocates harm to others. Investigators in the Oklahoma City bombing prosecution discovered that one of the bombers, Timothy McVeigh, had a “how-to” book by Paladin, as well as The Turner Diaries in his possession. Earlier this year, a federal jury found that the operators of a website threatening physical harm to many abortion providers and listing their names and addresses were liable under the Free Access to Clinic Entrances

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*New Millennium, Same Old Speech: Technology Changes, the First Amendment Issues Don’t*, 79 B.U.L. REV. 959 (1999) (arguing that new technologies may encourage people to censor speech but failing to suggest ways to protect the public from speech that advocates harms to others, is widely disseminated, and easily accessible by others).


122. For example, under a speech theory that permits liability for the advocacy of harm to others, it does not make any difference whether the publisher of a manual on how to build bombs is a white supremacist group, a pro-life organization, or a radical feminist group. All would be responsible for actions taken as a result of their publication if the requisite intent, causation and procedural burdens can be satisfied.

ACT. 24 Moreover, the Anti-Defamation League and the Southern Poverty Law Center have noted a marked increase in hate groups on the internet calling for violent revolution against the government and advocating physical violence against the members of various minority groups.125

In response to the threat from hate groups and the easily accessible material

124. See Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 41 F. Supp. 2d 1130, 1153-54 (D. Oregon 1999) (granting under FACE an injunction prohibiting the publication of defendant's website and posters with the intent to threaten the abortion providers and declaring that the court "totally reject[s] the defendants' attempt to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the plaintiffs from providing abortion services."). Planned Parenthood and four doctors who perform abortions brought suit against fourteen individuals and two organizations alleging that they had threatened abortion providers through a series of posters and a web site, "the Nuremberg files." Id. at 1130-34. One of the posters lists by name a "Deadly Dozen" of doctors and highlights an indictment from the Nuremberg Trials declaring the Nazis who forced abortions on East European and Jewish women were war criminals. Id. at 1131-32. On the website, the anti-abortion organization had a wanted list of 200 doctors and abortion supporters, providing their addresses, photos, license plate numbers and in at least one case, the names of their children and the schools they attend. Id. Doctors who have been killed by alleged pro-lifers were crossed off the wanted list. Id. Those who merely were wounded were shaded in gray. Id. On Feb. 2, a federal jury awarded Planned Parenthood, and the other plaintiffs $107 million in damages. Id. For an overview of the verdict and the surrounding controversy, see James C. Goodale, Can Planned Parenthood Silence the Pro Life Website? 4/2/99 N.Y.L.J. 3 (discussing the potential harm to the media resulting from the verdict in the Nuremberg Files case); Roxanne Guillory, Abortion Rights Supporters Challenge Opponents' Dangerous, Deadly Tactics, NATIONAL NOW TIMES, April 1, 1999 (presenting the arguments for restricting the anti-abortion speech against the abortion providers).

125. See Raymond W. Smith, Civility Without Censorship: The Ethics of the Internet - Cyberhate, 65 VITAL SPEECHES OF THE DAY 196 (Jan. 1999) (chairman of Bell Atlantic stating that civil rights groups need to think of ways to meet the increasing threat from cyberhate on the internet); Mark Potok, Hate Groups on the Rise; Internet Major Factor, Research Finds, JET, March 2, 1999, at 19 (stating that "The Internet is allowing the White supremacy movement to reach places it has never reached before -- middle and upper-middle-class, college-bound teens."); Explosion of Hate, ANTI-DEFAMATION LEAGUE (1988) (reporting on growth of hate groups in the United States and their increasing use of the internet to attract followers); We love the Net, but we hate you, NEW MEDIA AGE, July 1, 1999, at 17 (discussing recent report by the Anti-Defamation League which states that hate groups are steeping up their use of the internet to target young recruits).
providing directions on how to commit various violent acts, some politicians and commentators have called for government censorship of such speech. The Department of Justice, concerned about the proliferation of bomb-making instructions on the internet, filed a brief in support of the Rice family in the *Paladin* case, arguing that *Brandenburg* should not apply to protect this speech, and that even if it does, "imminent," as used in *Brandenburg*, does not really mean "imminent." Moreover, Congressman Henry Hyde, chairman of the House Judiciary Committee, proposed "The Child Safety and Violence Prevention Act" that recommended banning "obscenely violent materials" to minors. More recently, the school shootings have lead many to question the

126. *DEPARTMENT OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION* (1997) ("[W]here it is foreseeable that the publication will be used for criminal purposes, the *Brandenburg* requirement that the facilitated crime be "imminent" should be of little, if any, relevance"). The Department’s position is somewhat bewildering; if "imminent" does not have a strong temporal connotation, one is hard pressed to make sense of the *Brandenburg* opinion - or, for that matter, subsequent opinions such as *Hess* and *Claiborne*. *Id.* One commonly cited dictionary defines "imminent" as meaning "likely to happen without delay," "impending," and "threatening." *WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE* 726 (College Edition 1957). The Department’s position - not unlike the *Rice* opinion itself - ignores the core meaning of "imminent" in order to find the *Brandenburg* test satisfied. The problem with this approach is that watering down or eliminating the imminence requirement opens the door to a "bad tendency" interpretation of the clear and present danger test – an approach that sanctions relatively broad censorship of unpopular political minorities. *See generally Dennis v. United States, 341 U.S. 494 (1951).*

127. *See The Child Safety and Youth Violence Prevention Act of 1999, H.R. 1501* (prohibiting the sale of "extremely sexual or violent material that is not protected by the First Amendment" to minors and imposing felony investigations and possible jail terms on retailers of such material if they sold, loaned, or exhibited sexually explicit or violent material to minors); *see also*, Eric Pianin, Juliet Eilperin, *House GOP Split Bill on Violence: Tactic May Weaken Gun Curbs, Allow Focus on Hollywood*, *WASHINGTON POST*, June 15, 1999, at A1 (discussing Hyde Amendment to Juvenile Crime Bill that proposed tough new restrictions on the entertainment industry as a method to control new wave of violence among school-aged children and prevent their access to sexual and violent materials); Bill Holland, *House Defeats Cultural Legislation*, *BILLBOARD*, June 26, 1999 (noting the defeat of Senator Hyde’s proposal and discussing the other statutes still pending to regulate violence on the internet, television and movies); Robert MacMillan, *Sen. Hatch Joins
role of the media in encouraging youth violence.\textsuperscript{128}

The federal courts' current application of the \textit{Brandenburg} test to speech that advocates harm does not strike the proper balance when the speech at issue advocates lawless behavior in a manner that does not necessarily cause any imminent danger.\textsuperscript{129} For example, in \textit{Rice}, the Fourth Circuit had to engage in severe manipulations of the \textit{Brandenburg} test to establish liability for books that clearly are far removed from the type of speech at issue in \textit{Brandenburg}. The \textit{Rice} court does not even try, and possibly could not, explain how a book purchased and read more than one year prior to the date when a reader followed its instructions could be viewed as inciting "imminent" lawless action.\textsuperscript{130}

\textit{Anti-Online Violence Crusade}, NEWBYTES, May 5, 1999 (discussing proposals by Senator Hatch to implement more safeguards to protect children from damaging thoughts and images in popular media, particularly those children receive over the internet). For a further discussion of the similarity between obscenity and violence, see KEVIN SAUNDERS, \textit{VIOLENCE AS OBSCENITY} (1999) (arguing that violence is at least as obscene as sex and therefore should face similar prohibitions). A recent article in the \textit{Ladies Home Journal} shows just how easily bomb-making material is on the internet. \textit{See} Cheryl White, \textit{My Son Built a Bomb}, 114 \textit{LADIES HOME JOURNAL} 36 (March 1997) (discussing author's son's access to internet site concerning how to build a bomb and his resulting injuries after he attempted to build and detonate it).

\textsuperscript{128} \textit{See} Faye Fiore and James Gerstenzang, \textit{Clinton Opens Entertainment Violence Inquiry}, L.A. TIMES, June 2, 1999, at A1 (noting that President Clinton ordered a $1,000,000 federal inquiry into the entertainment industry's marketing of violent films to children); Faye Fiore & Melissa Healy, \textit{Clinton Urges Hollywood To Cut Violence}, L.A. TIMES, May 11, 1994, at A1 (noting Clinton's recent effort to have the Surgeon General prepare a report on youth violence, including the effects of the news media).

\textsuperscript{129} A "how to" guide might not motivate a person to commit a crime, unlike a fiery speech ("on to the Bastille!"). Properly understood, \textit{Brandenburg}'s imminence requirement relates to the probable persuasiveness of the speech. \textit{Harm Advocacy}, on the other hand, is not necessarily meant to persuade, it is meant to assist or facilitate. The temporal relationship between the distributor of \textit{Harm Advocacy} and harm occurring could be quite temporally attenuated. If courts continue to apply \textit{Brandenburg} to \textit{Harm Advocacy}, they will either have to fudge the imminence requirement or find the speech protected. The former presents an unacceptable risk to unpopular political speech that includes abstract calls to arms, the latter imposes unduly high costs on the victims of \textit{Harm Advocacy}.

\textsuperscript{130} The "imminence" required for the \textit{Brandenburg} test is speech that causes an "unthinking, immediate, lawless action." \textit{See} Brandenburg v. Ohio, 395 U.S. 444 (1969). Only in these situations is the government permitted to regulate incitement to illegal action because few other options are available to prevent the lawless action, as there is no time for reasoned debate. For a
Because the *Brandenburg* test was stretched in this manner, publishers and authors now fear that the federal courts have opened the floodgates of liability for works of fiction. Moreover, hyperbolic political speech also seems to be in danger of losing its protected status.

Clearly, such an application of the *Brandenburg* test undermines the protection the First Amendment should provide to abstract political speech; and could easily chill artistic and literary speech. Yet, the imposition of liability on the facts at issue in *Rice* seems appropriate because “society's interest in compensating injured parties [and] the freedom of speech guaranteed by the First Amendment” should not be incompatible goals.

Because instructional speech advocating harm is highly technical, it has little if any expressive value, and because it not only advocates, but also directly facilitates the commission of crimes and intentional torts, it has little, if any, political or socially redeeming value. As a category of speech, therefore, it is particularly dangerous and not particularly valuable. More importantly, like other categories of unprotected speech, this category is particularly likely to result in severe harms to innocent third parties. The state clearly has a very strong interest in safeguarding the lives of its citizens. In the general calculus


132. *See* Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1176-77 (1982) (“[I]f a speaker so intends, advocacy which does not 'directly' urge unlawful conduct may nevertheless be 'directed' to bringing about such conduct.”). *But see* Hess v. Indiana, 414 U.S. 105, 111 (1973) (stating that “[w]e'll take the fucking street later,” is not advocating imminent danger because the result will not occur for an indefinite period of time).

133. *See*, e.g., Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979) (noting that state may not punish publication of lawfully obtained truthful information “absent a need to further a state interest of the highest order.”); Branzburg v. Hayes, 408 U.S. 665, 700 (1972) (noting that government has compelling interest in securing safety of persons and property of citizens); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1028-29 (5th Cir. 1987) (Jones, J., dissenting) (“The interest in protecting life is recognized specifically for first amendment purposes and, analytically can be no less important than the interest in reputation . . . . [P]rotect[ing] society from loss of life
of competing interests, the government's interest in protecting the lives and limbs of its citizens outweighs whatever slight social value inherent in such speech. Additionally, the risk that the government will suppress unpopular viewpoints or cultural minorities is, at best, remote. To better balance society's interest in protecting its citizens from criminal activities, the federal courts should create a new First Amendment speech category. 134

IV. CONCLUSION

When speech poses a significant public danger, the value of that speech may outweigh the threat that speech poses to society. There is no doubt that the state has a strong interest in preventing speech that will cause a crime, particularly crimes involving serious bodily injury or death. Because of the value which society places on the freedom of speech, however, the tests developed to avoid government censorship of the speech activities of unpopular minorities properly place a high burden on the government to justify imposing liability for the consequences of speech activity. That said, a high burden in theory should not prove to be an insurmountable burden in practice. 135

134. See S. Elizabeth Wilborn Malloy, Ronald J. Krotoszynski, Jr., supra note 10, at 1165 (discussing the need for the creation of a new category of speech to better regulate speech that advocates harm to others while not diluting the protection for political advocacy under Brandenburg). See also Kent Greenawalt, Speech and Crime, AM. BAR. FDN. RESEARCH J. 647, 739 (1980) (suggesting that any “approach to criminal prohibitions that gives adequate protection to speech must be categorial.”). Professor Greenawalt suggests categorizing speech by the type of utterance: ordinary expressions of fact and value (high level of protection), utterances which are strongly situation altering (low-level of protection), and action-inducing encouragements (middle level of protection). Id. The level of protection afforded the speech varies with the type of utterance, whether it was said in public or private, and whether it is ideological or not. Id. at 739. As Professor Greenawalt recognizes, however, some purely factual utterances are worth regulating. Id. at 741 (discussing speech concerning how to make a bomb or the location of troops). See also David Crump, Camouflaged Incitement: Freedom of Speech, Communicative Torts, and Borderland of the Brandenburg Test, 29 GA. L. REV. 1, 46 (1994) (“It was precisely because Brandenburg used the ‘categorical’ or ‘unprotected utterance’ approach that it improved protection for the freedom of speech over the excessively loose balancing in cases such as Dennis.”).

135. See Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995) (“Finally, we wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’ The unhappy persistence of both the practice, and the lingering effects of racial discrimination against minority groups in this country is
Recent events conclusively demonstrate the need for government to impose some of the costs of harmful instructional speech on those who propagate it. The victims of those who use directions intended to facilitate harm should not be denied a meaningful remedy on the theory that the First Amendment privileges the instructions or advocacy of a de facto accomplice before the fact. When cases arise that meet reasonably speech-protective standards of liability, courts must be willing and able to impose liability.
EXPANSION OF TORT LAW AT THE EXPENSE OF THE FIRST AMENDMENT: HAS THE JONES COURT GONE TOO FAR? STAY TUNED TO FIND OUT.

by Richard M. Goehler and Jill Meyer Vollman

I. BACKGROUND

Jonathan Schmitz and Scott Amedure crossed inevitable paths when the two men were contacted by the Jenny Jones show and offered spots as guests on the show in 1995. At the initiation of a mutual friend, Schmitz agreed to come on the show for a feature on secret admirers. Schmitz, who had no idea that Amedure was his secret admirer, reportedly was excited about the possibility of a secret admirer, and had hopes of reuniting with a former fiancée. Unknown to Schmitz, however, the program featured only “Same Sex Crushes.” According to witnesses, Amedure was encouraged by producers of the Jenny Jones show to develop his sexual fantasies about Schmitz, and even relayed one such fantasy to the show’s audience during the broadcast of the show.

When Schmitz discovered on stage that Amedure was his secret admirer, he appeared to receive the surprise with relative ease, smiling and covering his face amiably. The two men even hugged. After introductions, however, Schmitz

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3. Id.

4. Id.


stated that he was decidedly heterosexual. During the show, Jenny Jones replayed the clip of Amedure describing his sexual fantasy involving Schmitz. Schmitz responded by putting his hands over his eyes, smiling and chuckling.

Yet three days later, the bashful, gentle nature that Schmitz had displayed on the show was replaced with a murderous rage when he discovered an explicit “come-on” note that Amedure left taped to his door. Schmitz, who had reportedly been drinking and smoking marijuana since he left the show two days earlier, purchased a shotgun the next morning and headed for Amedure’s home. After a brief exchange of words, Schmitz retrieved his shotgun and shot Amedure twice in the chest. A confession to a 911 operator revealed that Schmitz’s motive for the murder was embarrassment and humiliation brought on by the men’s appearance on the talk show.

The chain of events that took place quickly led to legal jousts in both the criminal and civil arenas. The first round took place in the criminal court between the State of Michigan and Schmitz. A temporary insanity defense earned Schmitz a conviction of second degree murder, which was ultimately overturned on appeal. On appeal, Schmitz was again found guilty of second-degree murder.

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12. A Trash TV Murder?, SEATTLE POST-INTELLIGENCER, March 17, 1995, at A14 (explaining that three days after the show, Schmitz found a note on his door containing “certain sexual connotations”).
13. Keith Bradsher, Talk Show Guest Guilty of Second-Degree Murder, N.Y. TIMES, November 13, 1996, at A14. According to one of the jurors in the case, there was testimony that “Mr. Schmitz was manic-depressive, and had stayed up all night before the killing while drinking and using marijuana.” Id.
14. Id. (“He shot Mr. Amedure twice in the chest with 12 gauge buckshot, and at such close range that paper wadding from one shotgun shell ended up in Mr. Amedure’s heart while a fragment of the other shell’s casing entered his left lung . . . .”). Id.
15. Suhr, supra note 7.
16. Irwin, supra note 5.
17. Rueters, Jury Selection Begins in Jenny Jones Lawsuit, N.Y. TIMES, March 30, 1999, at A19. The conviction was overturned due to the trial judge’s refusal to allow Schmitz’s attorney to remove a juror.
degree murder and sentenced to 25 to 50 years in prison. Schmitz’s attorney has filed another appeal for Schmitz.

On the civil side, the issues were more heated with the potential for far-reaching effects. The family of Scott Amedure brought a wrongful death action against the Jenny Jones show, Warner Brothers, Telepictures (collectively the “Jones Group”) and Schmitz. After a six week trial, a Michigan jury held the Jones Group responsible for $5 million for pain and suffering, $20 million for loss of consortium, and $6,500 for funeral expenses, for a total in excess of $25 million. Schmitz settled his portion of the wrongful death suit for $5,000.

II. THE CIVIL TRIAL

A. Plaintiffs’ Premise: Misrepresentation and Ambush

From the beginning of the case, *Graves v. Warner Bros.*, the opposing lawyers carved out two distinct approaches to the civil action: expanding a traditional tort theory versus the First Amendment right to free speech. The Amedure family, represented by attorney Geoffrey Fieger, focused on negligence, arguing that the Jones Group breached its duty to Scott Amedure, a guest on the show, by creating a dangerous situation and then failing to provide for his safety. In a report published by Lawyers Weekly, Ven Johnson, second chair to Geoffrey Fieger, argued “our position is that it wasn’t about the content but the manner in which they dealt with their invitee.” Plaintiffs argued that the show specifically sought shock value and, thus, violent harm was

25. *Id.*
foreseeable. Characterizing this shock value as an "ambush" of Jonathan Schmitz, the plaintiffs said that the producers of the show knew that Schmitz did not want to be told that his admirer was a man, and yet they persisted in placing Schmitz in this potentially volatile situation.

In the end, the trial court adopted a broad theory of misrepresentation based upon various sections of the Restatement of Torts. The gist of this broad theory was that if the show made any false or vague statements to Schmitz, then the show was liable for the resulting harm whether or not the harm was foreseeable. The court found it "only logical" to extend the Jones Group's duty further than the business premises because they "actively create a volatile personal situation into which they invited the injured party to – in essence – an ambush, thereby setting the parties upon a course of conduct ending in tragedy."

B. Defendants Claim First Amendment Protection

According to Marshall Shapo, Professor of Law at Northwestern University, "[a]ssigning blame is not the only complication in these cases: there is the 'majestic wild card' of the First Amendment." The defense agreed. Led by James P. Feeney, the defense argued that the content of the Jenny Jones show

27. Suhr, supra note 7. Elaine McArdle, writer for Lawyers Weekly, agrees with Fieger: "From the start, the case went to the heart of tort law, breaking new ground on the fundamental principles of 'foreseeability' and 'duty.'" McArdle, supra note 24, at B6. Vicki Abt, author of Coming After Oprah: Cultural Fallout in the Age of TV Talk Show and the plaintiffs' expert witness, concurred, taking the position that the case was not about free speech, but about responsibility. Jennifer Weiner, Decision Will Change Face of TV Talk Shows, CINCINNATI ENQUIRER, May 8, 1999, at A4 (quoting Vicki Abt).
29. Id.
33. Member of Feeney, Kellett, Wiener & Bush, Professional Corporation.
was protected by the First Amendment. Thus, they argued, the show could not be held liable for acts that did not cause imminent harm or death. Melvyn R. Durchslag, Professor of Constitutional Law at Case Western Reserve University School of Law, agrees. Although acknowledging that he did not follow the case closely until the verdict came out, Professor Durchslag stated:

[U]nless the plaintiffs could have demonstrated that the show knew or had reason to know that what the deceased said on the show would prompt the violent reaction it did, I can't figure out any reason why the judgment should stand. Moreover, even if they knew, the time between the speech and the violent act might be sufficient to immunize the show from the judgment.

The trial court, however, scoffed at the notion that the Jones show was protected by the First Amendment. Judge Gene Schnelz, in his denial of defendants' motion for summary judgment, said the case was analogous to one involving Michigan's dram shop statute; in other words, holding the Jenny Jones show liable for Amedure's death was like holding a tavern owner liable for injury to a third party that resulted from the tavern patrons having been served too much alcohol. Although the court later agreed that the dram shop parallel was inappropriate and dropped the analogy when the case went to trial, some lawyers opine that the analogy is on point.

35. *Id.*
36. Telephone Interview with Professor Melvyn R. Durchslag, Professor of Constitutional Law at Case Western Reserve University School of Law (July, 1999).
37. *Id.*
39. *Id.* (explaining that the judge compared the shooting to a tavern owner who can be held liable after serving liquor to someone who subsequently crashes his car, causing injury to someone). *Id.*
40. *Jury Holds TV Talk Show Liable for Wrongful Death*, supra note 20 (explaining that the judge dropped the analogy at trial).
41. Philip H. Corboy, of Corboy & DeMetrio in Chicago, stated, “[Schmitz] was dynamite, and with reasonable care, the *Jenny Jones* producers could have found that out. Instead, they let him out on the road, encouraged guests to mock and incite him and then pretended to be shocked when he exploded.” Philip H. Corboy, *Don't Neglect the Real Stakes of the Jenny Jones Verdict*, *ILLINOIS LEGAL TIMES*, June 1999, at 7. In contrast, Susan Estrich, Professor of Law at U.S.C. Law School, points out that applying the *Jones* logic could deem *Wall Street Journal* editors liable for the death of Vince Foster, based on the significant role that the article “Who is Vince Foster”
The Jones court also frequently invoked the traditional metaphor of a person shouting "fire!" in a crowded theater.\textsuperscript{42} Defense attorney Feeney said that the court used the right metaphor but reached the wrong conclusion in Jones.\textsuperscript{43} In Feeney's view, the intent to create imminent harm simply was not present in the Jones case.\textsuperscript{44} No statements were made during the show that were intended either to induce someone to act in a harmful manner or to create a threat of imminent harm, and the show had no reason to suspect any harmful reaction from Schmitz.\textsuperscript{45} During the show, Schmitz smiled and chuckled upon finding out that his secret admirer was Amedure and continued to smile and clap at times throughout the show.\textsuperscript{46} Although a witness for the plaintiffs testified that Schmitz was convinced his admirer was a woman, other witnesses testified that there was no way to detect that Schmitz was remotely affected by the revelation that his suitor was a man.\textsuperscript{47}

\textbf{C. Jury Instructions Focused On Duty}

The court instructed the jury that it could not find the Jones Group negligent based solely on the topic of the show; that, rather, they could find for the Jones Group if they determined that Schmitz proximately caused Amedure's death.\textsuperscript{48} The court also used a layered approach to the concept of duty, including the imposition of a duty to:

[T]ake reasonable measures to protect a plaintiff from criminal acts by a third person on or off the premises, so long as the acts were foreseeable.

\begin{flushleft}

\textsuperscript{43} \textit{Jury Holds TV Talk Show Liable for Wrongful Death}, supra note 20. A similar analysis was applied in a case in which a radio station conducted a contest encouraging listeners to race toward selected locations to be the first to arrive and receive a prize. The station was held liable for negligence for the death of a motorist run off the road by racing contestants. See Weirum v. RKO Gen., Inc., 539 P.2d 36 (Cal. 1975).

\textsuperscript{44} \textit{Id.} ("The court used the right metaphor, but drew the wrong conclusion.").

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{Jury Holds TV Talk Show Liable for Wrongful Death}, supra note 20 (explaining the judge's instructions regarding proximate cause).
\end{flushleft}
[D]isclose to another a fact that it knows may justifiably induce the other to act or refrain from acting.

[E]xercise reasonable care to disclose to the other party matters known to it that it knows to be necessary to prevent its partial or ambiguous statement of facts from being misleading.

[N]ot act in a manner that either intends to affect or realizes or should realize that is likely to affect the conduct of another or a third person in such a manner as to create an unreasonable risk of harm.

[A]ct in a manner such that it does not intentionally and unreasonably subject another to emotional distress which it should recognize as likely to result in illness or other bodily harm, even though it had no intention of inflicting such harm and irrespective of whether the act was directed against another or a third person.49

According to these instructions, says Greg Schuetz, second chair to Jim Feeney in defense of the Jones Group, the show would be deemed liable even if Jonathan Schmitz had robbed a bank three days later and blamed the show.50

III. ANALYSIS: WEAK LINKS IN THE CHAIN

There are a number of holes in the causal chain leading to Amedure’s murder, which are difficult to dismiss. First, Schmitz voluntarily appeared on the show even though he was faced with the possibility that his secret admirer might be a man.51 Second, Schmitz’s reaction during the show and later that evening gave the Jones Group no indication that Scott Amedure needed protection.52 Third, Schmitz admits that it was Amedure’s “come-on” note the evening before the crime that pushed him over the edge.53 And finally, there was evidence presented at the trial that Schmitz had been up all night drinking and smoking marijuana the night before the murder.54

49. Id. (outlining the instructions of the trial judge as to duty).
50. See McArdle, supra note 24, at B9.
51. Estrich, supra note 41.
52. Id. Amedure and Schmitz went out for drinks the night of the show with the friend who initiated their appearance on the show, and made arrangements to take the same flight home together. Id.
53. Id.
54. Bradsher, supra note 13, at A14.
In Professor Estrich's view, these events were enough to break the causal chain, if one existed.\footnote{Estrich, supra note 41.} Saul Levmore, Professor of Law at the University of Chicago, attributes the Jones case to a trend towards "multiple causal doctrine."\footnote{Can Media Kill?, THE ECONOMIST, May 15, 1999, at 26.} This doctrine uses the law to divide blame among several parties so that, for example, while a rapist is not excused for committing the crime, the park owner may face civil liability as well for not providing adequate lighting in the park where the rape took place.\footnote{Id.}

Schmitz's reaction during the show could be key in the appellate case. The Sixth Circuit has already used the appearance of guests on a show to discern the effect of the show on its participants.\footnote{Fronning v. Jones, 1996 U.S. App. LEXIS 5725, at *2 (6th Cir. Feb. 23, 1996).} In \textit{Fronning v. Jones},\footnote{1996 U.S. App. LEXIS 5725, at *1 (6th Cir. Feb. 23, 1996).} a pair of dancers sued the Jenny Jones show for using their photographs in a feature entitled "His Bachelor Party Ruined Our Marriage," alleging an invasion of privacy under the false light publicity doctrine.\footnote{Id. at *1-*3.} Jones and the show's guests discussed the need for pre-nuptial agreements while the images of two topless dancers, Nancy Diem and April Fronning, repeatedly flashed across the screen.\footnote{Id. at *2.} The dancers subsequently sued the show for portraying them as home wreckers.\footnote{Id. at *3.} The Sixth Circuit affirmed summary judgment against the dancers, finding that although the title of the show was suggestive of home wrecking, the married couple guests appeared good-humored and at ease with each other throughout the broadcast.\footnote{Id. at *8.} The court concluded that nothing in the show could be construed to imply that the dancers' performance actually ruined the guests' marriages.\footnote{Id. at *5.}

Likewise, the Jones defendants have a strong argument that nothing about the demeanor of Schmitz throughout the taping of the show suggested that he was upset, violent, or even angry with Scott Amedure or others.\footnote{Suhr, supra note 7.} How, then, could the Jones Group be expected – legally or otherwise – to protect Amedure from him?
IV. INCONSISTENT STANDARDS: SINGLING OUT THE TALK SHOW

A. The Music Cases

The Jones case is analogous to a string of cases involving charges that song lyrics were connected to violent crimes. Courts across the country almost unanimously have dismissed these cases before they reach trial, either for failure to state a claim or based on the First Amendment. In most cases, there has been a lack of a causal connection between the song lyrics and the actual violent act committed.

In 1997, the widow of a state trooper who was shot to death in Jackson County, Texas sued rap artist Tupac Shakur for events claimed to have been instigated by the lyrics of one of Shakur’s rap songs. During a traffic stop of Ronald Howard, Howard pulled out a nine-millimeter handgun and fatally shot Officer Davidson, later blaming the graphic lyrics for his actions.

The district judge in the wrongful death suit granted summary judgment in favor of the defendants, rejecting the idea that Shakur’s music incited the crime. The court applied the Brandenburg “incitement” test, which requires the medium to incite imminent lawless action. In applying the test, the court explained that, “[i]n this case, it is far more likely that Howard, a gang member driving a stolen automobile, feared his arrest and shot Officer Davidson; to avoid capture. Under the circumstances, the Court cannot conclude that 2Pacalypse Now was likely to cause imminent illegal conduct.” Significant also, in the court’s opinion, was the fact that Howard had been listening to the album, and others like it, for forty-five minutes before actually shooting Officer Davidson: according to the court, this was a clear indication that the “imminence”

67. Id.
68. Id.
70. Id. at *4. The song included lyrics which suggested that “even cops [get] shot when they [roll] up.” Id. at *5 n.4.
71. Id. at *66.
74. Id. at *66.
requirement of the Brandenburg test was not satisfied.\textsuperscript{75}

A similar result was reached in the case of \textit{McCollum v. CBS, Inc.}\textsuperscript{76} In that case, plaintiffs brought suit against CBS and others connected to the production and distribution of an Ozzy Osbourne album which the plaintiffs believed contributed to the suicide of their son.\textsuperscript{77} The plaintiffs, parents of the decedent, claimed that their son had repeatedly listened to Ozzy Osbourne albums that urged suicide and portrayed life as full of despair and hopelessness for hours prior to committing suicide.\textsuperscript{78} It was the parents' contention that various defendants cultivated the image of Osbourne as a "mad man" and encouraged his antisocial messages about life and death, and therefore knew or should have known that it was foreseeable that the music would influence the behavior of listeners.\textsuperscript{79}

The court disagreed, however, holding that the defendants could not be held liable for the death of the plaintiffs' son.\textsuperscript{80} Beginning with the recognition that, "entertainment, as well as political and ideological speech, is protected,"\textsuperscript{81} the court went on to apply the Brandenburg test to find that the music at issue did not incite suicidal behavior.\textsuperscript{82} According to the court, "there is nothing in any of Osbourne's songs which could be characterized as a command to immediate suicidal act."\textsuperscript{83} Rather, the court explained, "merely because art may evoke a mood of depression . . . does not mean that it constitutes a direct "incitement to imminent violence.""\textsuperscript{84}

\textbf{B. The Television and Movie Cases}

The courts have been similarly unwilling to impose liability in the face of First Amendment guarantees in the television and movie context.\textsuperscript{85} In the

\begin{itemize}
\item \textsuperscript{75} \textit{Id.} at *69.
\item \textsuperscript{76} 249 Cal. Rptr. 187 (Cal. Ct. App. 1988).
\item \textsuperscript{77} \textit{Id.} at 188-89.
\item \textsuperscript{78} \textit{Id.} at 189.
\item \textsuperscript{79} \textit{Id.} at 191.
\item \textsuperscript{80} \textit{Id.} at 195, 198.
\item \textsuperscript{81} \textit{Id.} at 195.
\item \textsuperscript{82} \textit{McCollum}, 249 Cal. Rptr. at 195.
\item \textsuperscript{83} \textit{Id.} at 193.
\item \textsuperscript{84} \textit{Id.} at 194.
\item \textsuperscript{85} \textit{See, e.g.,} Walt Disney Prods., Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981) (denying recovery
seminal case of *Olivia N. v. National Broadcasting Co., Inc.*, for example, the Court of Appeals of California affirmed a judgment of the trial court denying recovery to appellant, a nine year-old girl. In that case, a group of minors attacked and raped the appellant at a San Francisco beach after watching the movie "Born Innocent," a television movie aired by NBC in which a gang of adolescent women attack and rape another adolescent in a shower of a community home. The defendants in that case admitted that they had viewed and discussed the rape scene in "Born Innocent" before their attack on the appellant.

Although the appellant offered to show that NBC had knowledge of studies on child violence and should have known that susceptible persons might imitate the crime portrayed in the film, the court refused to impose liability in the face of First Amendment guarantees. Although the court initially recognized that "television broadcasting poses 'unique and special problems not present in the traditional free speech case," it nevertheless went on to uphold the broadcaster's right to air its program without fear of tort liability. According to the court, "[r]ealistically, television networks would become significantly more inhibited in the selection of controversial materials if liability were to be imposed on a simple negligence theory." The court failed to reach the *Brandenburg* issue, however, because the appellant conceded that the film did not advocate or encourage violent acts.

This same reasoning was applied in the case of *Bill v. The Superior Court of* in suit seeking damages arising out of minor's attempt to duplicate a magic trick shown on defendant's television show); *DeFilippo v. National Broad. Co., Inc.*, 446 A.2d 1036 (R.I. 1982) (denying recovery to parents of 13 year-old who accidentally hung himself while trying to imitate a stunt performed on the *Tonight Show*); *Zamora v. Columbia Broad. Sys.*, 480 F. Supp. 199 (S.D. Fla. 1979) (holding that the First Amendment barred a suit for damages for violation of an alleged duty to avoid airing violent shows).

87. *id*.
88. *See id.* at 891.
89. *id*.
90. *id.* at 893.
91. *id.* at 892 (quoting *Columbia Broad. v. Democratic Comm.*, 412 U.S. 94 (1973)).
92. *Olivia N.*, 178 Cal. Rptr. at 893.
93. *id.* at 892.
94. *id.* at 890.
the City and County of San Francisco, 95 a case dealing with First Amendment rights in the movie context. 96 In that case, a woman was shot as she exited a movie theater by a member of "the general public" who was prone to violence and was "attracted to [the theater] by the showing of [a] violent movie." 97 The plaintiff, the mother of the woman who was shot, argued that the petitioners knew or should have known that the violent movie would attract certain members of the public that were likely to inflict grave bodily injury upon others, and thus were liable under traditional tort principles. 98

Refusing to impose liability on the petitioners, the court in that case reasoned that, "exposure to liability in such situations would have a chilling effect upon the selection of subject matter for movies." 99 Although the plaintiff tried to argue that the First Amendment was not really implicated in that case, due to the fact that they were not alleging that the movie incited violence (only that it attracted members of the public who were predisposed to violence), 100 the court nevertheless viewed the case through the First Amendment lens and refused to encroach on the defendant's free speech rights. 101 Accordingly, First Amendment rights trumped tort liability in that instance as well.

If song lyrics and movies and television that describe and arguably encourage violence do not proximately cause the commission of violence, how, then, can a talk show, whose subject matter had nothing to do with violence, bare such blame? The logic of the jury appears tenuous at best. 102 Because courts have traditionally been unwilling to impose liability even in these situations, it is unlikely that a verdict connecting a talk show—whose content focused on secret crushes and in no way advocated violent behavior—to the subsequent murder of one of its guests will be affirmed on appeal. Such a holding would turn First Amendment law, which has heretofore refused to

96. Id.
97. Id. at 626.
98. Id.
99. Id. at 629.
100. Id. at 628.
102. A similar analogy may be applied in suits where authors are sued after their books and magazines reach the newsstands. See, e.g., Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (reversing the $182,000 jury verdict in favor of the mother and a friend of a 14-year-old boy who hanged himself after reading an article in Hustler on autoerotic asphyxia).
recognize liability on the part of defendants in like situations, on its head.

If, however, the Jones case is upheld, the small minority of cases that have disregarded free speech protection could grow roots. If the Jones case makes its way to the Supreme Court, the high court will have to revisit the issues posed in Olivia N. v. National Broadcasting Co., Inc.,\(^{103}\) where it denied certiorari in a ruling holding that First Amendment principles preclude negligence liability absent proof of incitement per the Supreme Court’s decision in \textit{Brandenburg}.\(^{104}\) Opening up this veritable can of worms may prove disastrous to established First Amendment jurisprudence.

\textbf{C. What About \textit{Brandenburg}?}

\textit{Brandenburg v. Ohio}\(^{105}\) could be the saving grace for the Jones Group and other media defendants. In \textit{Brandenburg}, the Supreme Court affirmed free speech protection for the advocacy of force or violence unless the advocacy is “directed to inciting or producing imminent lawless action,” and is likely to cause such action.\(^{106}\) Though the defendants requested such an instruction in the Jones trial, the court denied that request.\(^{107}\) Moreover, in arguing an earlier motion to dismiss, defense attorney Richard E. Rassel posited that talk shows have First Amendment protections like any news medium.\(^{108}\) Judge Schnelz simply dismissed the argument, replying, “this isn’t media—this is a television talk show.”\(^{109}\) When the Jones Group argued that allowing the lawsuit to proceed could have a chilling effect on talk shows, Judge Schnelz responded, “[i]f that happens so be it, but this court considers this a simple negligence case where people are being called to task for alleged actions which may have done harm to others. . . . No more, no less.”\(^{110}\) The trial court’s disregard of \textit{Brandenburg} will likely be a serious issue for the court of appeals, particularly because, as detailed above, this is the standard test that the First Amendment

\begin{footnotes}
\item[104.] \textit{id}.
\item[105.] 395 U.S. 444 (1969).
\item[106.] See \textit{id} at 448-49.
\item[107.] \textit{Jury Holds TV Talk Show Liable For Wrongful Death}, supra note 20.
\item[108.] Ron French, \textit{Judge Ready to Give \textquote{Jenny Jones} Trial Prime Time Slot}, \textit{The Detroit News}, Feb. 26, 1996.
\item[109.] \textit{id}.
\item[110.] \textit{Michigan Judge Allows Lawsuit over \textquote{Jenny Jones} Killing}, \textit{Liability Week}, Mar. 4, 1996; see also French, supra note 108.
\end{footnotes}
requires courts to apply in these types of cases.\textsuperscript{111}

Similarly, in the few cases in which courts were willing to impose tort liability in the face of First Amendment concerns, the \textit{Brandenburg} factors have proven dispositive. In the case of \textit{Weirum v. RKO General, Inc.},\textsuperscript{112} a case frequently cited by plaintiffs in support of the notion that tort liability can attach notwithstanding countervailing First Amendment interests, the California Supreme Court upheld a jury finding that a radio station was liable for the death of a motorist killed by teenagers participating in a contest sponsored by the radio station.\textsuperscript{113} In that case, the court emphasized the fact that the radio station’s broadcast was designed to encourage its youthful listeners to be the first to arrive at a particular location to claim prize money.\textsuperscript{114} Listeners were encouraged to speed and urged to drive recklessly in an effort to win the contest.\textsuperscript{115} Thus that case, and its holding, are inapplicable to the facts of the Jenny Jones case.

The same is true of the holding in the case of \textit{Rice v. Paladin Enterprises, Inc.},\textsuperscript{116} a case dealing with the liability of a defendant for criminal acts of a third party who relied on a book published by the defendant in committing murder.\textsuperscript{117} In that case, Paladin Enterprises published a book entitled \textit{Hit Man: A Technical Manual for Independent Contractors}, a guide for would-be hit men that promised to teach the reader “how to get in, do the job and get out without getting caught.”\textsuperscript{118} Among other techniques, the book instructed on how to mentally and physically prepare for a murder, basic equipment needed, various techniques for torturing and killing, and methods of disposing of corpses after the murder.\textsuperscript{119} At issue in that case was the liability of the defendant after a man murdered three people by meticulously following the methods outlined in the \textit{Hit Man} manual.\textsuperscript{120}

Reversing the judgment of the District Court of Maryland, which held that

\begin{itemize}
  \item \textsuperscript{111} \textit{See supra} Part IV.A. \& B. (footnotes and accompanying text).
  \item \textsuperscript{112} 539 P.2d 36 (Cal. 1975).
  \item \textsuperscript{113} \textit{Id.} at 40-42.
  \item \textsuperscript{114} \textit{Id.} at 37-38.
  \item \textsuperscript{115} \textit{Id.} at 40.
  \item \textsuperscript{116} 128 F.3d 233 (4th Cir. 1997).
  \item \textsuperscript{117} \textit{Id.} at 239.
  \item \textsuperscript{118} \textit{See id.} at 238-41 (citing the marketing strategy for the book).
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} \textit{Id.} at 239. The murderer, James Perry, shot two adults at close range and strangled an eight-year-old boy on behalf of a client. \textit{Id.}
the First Amendment precluded liability under the circumstances, the Fourth Circuit Court of Appeals held that the First Amendment did not pose a bar to a finding of liability on the part of the publisher.\footnote{Id. at 242.} According to the court, "at every point where the would-be murderer might yield either to reason or to reservation, Hit Man emboldens the killer, confirming not only that he should proceed, but that he must proceed."\footnote{Rice, 128 F.2d at 252 (emphasis added).} Although the publisher in that case stipulated that it "intended and had knowledge" that Hit Man would be used by criminals to commit murder—thus obviating the need to engage in a full-scale \textit{Brandenburg} analysis—the court nevertheless went on to note the fact that the book actually "encourages its readers in their specific acts of murder."\footnote{Id.} Accordingly, while the analysis in the Hit Man decision has its own problems, the court held that the First Amendment was not a bar to the imposition of civil liability. Again, that is simply not the case with the Jenny Jones show.

Ultimately, the appeal may come down to the question of whether talk shows are akin to "news media" and whether that distinction even matters where the First Amendment is concerned. If that becomes a relevant distinction, courts inevitably will face the painstaking task of differentiating talk show speech from the rest of media speech. Indeed, because some talk shows move between bona fide news topics and controversial topics that are simply meant to shock, courts will have to slice and dice exceptions with new qualifiers, which will weaken the precious free speech privilege.\footnote{See Estrich, \textit{supra} note 41. For an illustration of the opposite point of view—that such verdicts pose no threat to the free speech privilege—see Turley, \textit{supra} note 2, at A29 ("From a constitutional perspective, the apocalyptic First Amendment predictions appear contrived.").}

**V. CONCLUSION**

In sum, if the appellate court upholds the Jones case, one cannot help but wonder where the blame will stop. Would the Washington Post have been liable for failing to publish the Unabomber's manifesto?\footnote{Unabomber's Manifesto, \textit{THE WASHINGTON POST}, Sep. 19, 1995 (separate pullout).} Theoretically, under the current Jones logic, a plaintiff could argue (1) the paper's knowledge of the Unabomber's threat created a duty to protect the public from a known danger, (2) the paper knew that imminent harm was foreseeable (although the paper would have no idea where or on whom the harm would befall), (3) the paper...
breached its duty by failing to submit to the Unabomber’s demands, and (4) this failure was the proximate cause of the plaintiff’s injury. As strange as the possibility seems, such scenarios may become commonplace if the Jones case is upheld on appeal. Indeed, in recent years there has been a trend toward high-profile lawsuits against media defendants implicating them in more and more of society’s ills. Simply put, the Jones verdict, and others like it, have the potential to undermine the ideals of the First Amendment and the bounty of case law supporting those ideals. The expansion of tort law simply cannot come at the cost of the First Amendment.

126. Executive Risk Says Media Face Perilous New Exposures, PR NEWswire, July 16, 1999 (explaining that media organizations are “running for cover before a recent spate of high-profile lawsuits.”).
RICE v. PALADIN: FREEDOM OF SPEECH TAKES A HIT WITH “DEEP POCKET” CENSORSHIP

by Robin R. McCraw

INTRODUCTION

The power of the written word has been extended to include the capacity to cause murder. In an unprecedented 1997 decision, the Fourth Circuit held that a mass-market book publisher can be held responsible for the crimes of a reader. The First Amendment did not protect Paladin Press from having to pay five million dollars to the survivors of three people who were murdered by a man who read the book Hit Man: A Technical Manual for Independent Contractors, despite the fact that the perpetrator knew he was subject to life imprisonment for his actions. Based on this persuasive authority, an appeals court in Louisiana has allowed Oliver Stone to be sued by a shooting victim who alleged that two criminals purposely imitated Stone’s movie “Natural Born Killers” when they shot her. This type of “censorship by monetary damages” can affect any publisher — even the Bible has been known to incite a fanatic to murder.

This paternalism in censoring “dangerous” reading or viewing material affects all United States citizens by denying us the right to read or see a publication that some “nut” may use as an excuse for criminal activity. When First Amendment freedoms depend on the personal views of a judge or a jury, the works of Alfred Hitchcock, Tom Clancy, and even Dr. Seuss may become the target of censorship because of the crimes depicted within.

3. Rice, 128 F.3d at 233.
6. See, e.g., FEDERAL BUREAU OF INVESTIGATION, PROJECT MEGIDDO 6, 10 (1999) (many groups are using biblical justification to commit violent crimes); Paul Leavitt, TV Show Helps FBI Capture Fugitive, USA TODAY, June 2, 1989, at 3A (a man killed his family because they had grown away from religion); MORRIS DEES, GATHERING STORM: AMERICA’S MILITIA THREAT 21 (1996) (“through . . . interpretations of the bible . . . [a certain religious group] gives its followers a sense of divine guidance and approval to engage in racial hatred, bigotry and murder.”); Colossians 3:5 (“Therefore put to death your members which are on the earth: fornication, uncleanness, passion, evil desire, and covetousness, which is idolatry.”); Ecclesiastes 3:3 (“A time to kill, and a time to heal.”).
A new standard is needed for determining the liability of a publisher of mass-market works. The Fourth Circuit and other courts have applied some or all of the tests for the six defined categories of unprotected speech, as well as derivations thereof, with remarkably differing results. If the courts are going to decide what mass-market works we can read or view, then the standard for censoring publications must be clearly defined and must be within the Supreme Court's guidelines for protecting expression under the First Amendment. Otherwise, the differences between the various tests will continue to allow for judicial subjectivity and inconsistent results.

I. RICE V. PALADIN: THE FACTS

On March 9, 1993, James Perry killed Mildred Horn, her eight-year-old son Trevor and Trevor's nurse, Janice Saunders. Perry was hired by Mildred Horn's ex-husband, Lawrence Horn, to murder Mildred and Trevor because Lawrence would receive one million dollars tax-free upon their deaths. Prior to committing the crime, Perry consulted a book published by Paladin Press [hereinafter "Paladin"] entitled *Hit Man: A Technical Manual for Independent Contractors* [hereinafter *Hit Man*].

After Perry and Horn were convicted of their crimes, the victims' families [hereinafter "Rice"] brought a civil wrongful death action against the publisher. The district court granted Paladin's motion for summary judgment, ruling that the First Amendment protects "speech that arguably aids and abets murder." Rice appealed on the sole issue of whether the First Amendment was a complete defense to a civil action of aiding and abetting a crime through publishing a mass-market book. For purposes of the appeal, Paladin stipulated that its marketing strategy was to maximize sales, including sales to:

(i) authors who desire information for the purpose of writing books about crime and criminals, (ii) law enforcement officers and agencies who desire information concerning the means and methods of committing crimes, (iii) persons who enjoy reading accounts of crimes and the means of committing

8. Id.
10. Id. at 838 n.1.
11. Id. at 836.
12. Id. at 849.
13. Rice, 128 F.3d at 241.
them for purposes of entertainment, (iv) persons who fantasize about committing crimes but do not thereafter commit them, and (v) criminologists and others who study criminal methods and mentality. 14

Paladin conceded that the marketing strategy also was directed towards "criminals and would-be criminals who desire information and instructions on how to commit crimes." 15 The publisher further stipulated that it "intended and had knowledge that [the book] would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire," 16 but that it had no specific knowledge of Perry or Horn's actions. 17

The Fourth Circuit cited sixteen instances where Perry followed Hit Man's instructions in committing the murders. 18 Based on this finding and on Paladin's stipulations, the court reversed the summary judgment and held that the First Amendment is not an absolute bar to a civil action for aiding and abetting violent conduct through the use of a published, mass-market book. 19

II. THE CATEGORIES OF UNPROTECTED SPEECH

A controversial book published for mass-market consumption is one medium of speech that the founders of the United States were determined to protect, without regard for content. 20 The First Amendment to the United States Constitution states that, "Congress shall make no law...abridging the freedom of speech." 21 However, over the last two hundred years the Supreme Court has formulated a rationale and an analysis for restricting six categories of speech content: obscene speech, commercial speech, speech that constitutes "fighting words," defamatory speech, speech that constitutes a crime ("speech-acts"), and political speech that incites imminent violence.

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14. Id. at 241 n.2 ¶ 5a.
15. Id. at 241 n.2 ¶ 4a. Paladin tried to clarify its "intent" stipulation as merely signifying the accepted tort definition of "reasonably foreseeable," but the court refused to consider the clarification, ruling that there was no authority to allow the stipulation to be altered. Id. at 253.
16. Id. at 241 n.2 ¶ 4b.
17. Id. at 241 n.9.
18. Rice, 128 F.3d at 239-41.
19. Id. at 267.
A. Obscene Speech

Obscenity is the only category of speech that can be restricted based on its content alone. The Supreme Court has formulated a three step test for analyzing speech not protected because its content is deemed “obscene.” The content, taken as a whole, must: (1) appeal to the prurient interest in sex, (2) portray sexual conduct in a patently offensive way, and (3) lack serious literary, artistic, political or scientific value. The second element, a “patently offensive” portrayal of sex, is a subjective element that is determined solely on a jury’s interpretation of “contemporary community standards.” The Court’s rationale for allowing obscenity to be restricted or banned through this subjective analysis is that historically, obscene speech was not considered to be protected by the First Amendment. Thus, the state interest in protecting “the quality of life and the total community environment . . . and, possibly, the public safety itself” legitimizes the restriction of speech that meets the obscenity test. The rationale for this content-based restriction may be specious, but the test is not vague. There are defined (albeit subjective) limits on the restriction of speech classified as obscene. The subjective analysis applied to obscenity has been applied by lower courts to “unpopular” speech such as that contained in Hit Man, but the Supreme Court has never upheld this rationale for censoring anything other than sexually-oriented speech.

B. Commercial Speech

The Supreme Court has defined commercial speech as speech which does “no more than propose a commercial transaction” and, alternatively, as speech which is “related solely to the economic interests of the speaker and its audience.” Most of the attempts by states to restrict commercial speech have

23. Id. at 24.
24. Id.
targeted advertising. Government can not completely restrict advertising containing “truthful information about entirely lawful activity.” The Supreme Court has struck down state laws banning the advertising of prices of prescription drugs and banning the advertising of prices of alcoholic beverages because the rationale behind the regulations was paternalistic (i.e. to protect consumers from themselves).

The four-part analysis the Court developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission* looks at the content of commercial speech first. If the communication is neither illegal nor misleading, then government power to restrict commercial speech is extremely limited. The balance of the test concerns externalities: the substantiality of the government interest, the relationship of the regulation to the purported interest, and the extensiveness of the regulation. In implementing this test, the Court held that New York’s attempt to restrict advertising which promoted the use of energy was constitutionally impermissible in the absence of a compelling state interest, such as an emergency fuel shortage. Unlike the obscenity test, this analysis allows for very little subjectivity in testing the content of restricted speech. Although the speech in *Hit Man* is directed to an economic interest of the speaker and audience, this is not the sole purpose of the book, and thus, the commercial speech analysis should not be applied in this case.

C. Speech That Constitutes “Fighting Words”

“Fighting words” are also subject to content-based restrictions, but the imposition of these restrictions is limited by the manner in which the communication is delivered. In other words, the speech must be face-to-face, or “directed to the person of the hearer.” The proscribable content of “fighting words” also has a narrow definition: words “which by their very utterance inflict...
injury or tend to incite an immediate breach of the peace."

In the seminal case, *Chaplinsky v. New Hampshire*, the defendant directed "fighting words" at a police officer, saying "[y]ou are a God damned racketeer [and a] damned Fascist." The Court’s rationale in restricting "fighting words" was that these words include "essentially a ‘nonspeech’ element of communication." This "nonspeech" characteristic, together with the requirement that the words be *spoken* face-to-face, creates a very limited content- and manner-based restriction on the freedom of speech. A mass-market book such as *Hit Man* is not spoken face to face and thus should not be restricted under this doctrine.

**D. Defamatory Speech**

Defamatory speech, like "fighting words," consists of speech by which the utterance alone inflicts injury, the injury here being the deleterious effect a false statement may have on the reputation of the subject. Defamation, obscenity, "fighting words" and unlawful or misleading commercial speech are the only categories of speech that the government may restrict based solely upon the content of the spoken word because such speech is considered by the Court as having "such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Unlike the other three categories, the content of defamatory speech is analyzed based on the speaker’s *intent*. In *New York Times v. Sullivan*, the court held that defamation actions by public officials can be maintained only if the official can prove that the speaker made a false statement with knowledge that the statement was false or was made with reckless disregard to its truth or falsity. This narrowly defined intent is called the "actual malice" standard. This high standard was meant to counter the effect of a rule "allowing the imposition of liability upon a jury’s evaluation of the speaker’s state of mind." When the defamatory speech does not involve a matter of public concern or when the defamatory speaker is a private individual, the standard is lower

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40. *id.* at 569.
42. *Chaplinsky*, 315 U.S. at 571-72.
44. *id.* at 279-80.
45. *id.*
46. *id.* at 300 (Goldberg, J., concurring).
because this type of speech is not public discourse and the constitutional interest in such speech is not as compelling.47

Although the test for restricting defamatory speech is based on both the content of the speech and the intent of the speaker, the actual malice standard protects critics on public matters from censorship by civil liability.48 The publication of Hit Man injured no one’s reputation, but the use of the defamation analysis of the speaker’s intent may be applicable as the Supreme Court has employed the “actual malice” standard to negate “outrageous” intent as an element of civil liability.49

E. Speech That Constitutes A Crime

“Where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone.”50 The constitutional freedom of speech does not immunize “speech or writing used as an integral part of conduct in violation of a valid criminal statute.”51 For example, fraud,52 threats,53 harassment,54 “misrepresentation, . . . perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like are also outside the scope of constitutional protection.”55 Other recognized exceptions include intolerable invasions of privacy,56 disruptions of the classroom57 and speech that poses a national security breach.58

This type of “lawbreaking” speech is characterized as a “speech-act” that can be punished no matter whether it is offered in a public forum or privately, a solicitation of a serious crime or an invasion of one person’s privacy. In People v. Rubin, the defendant held a press conference to protest a planned

50. United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985).
demonstration by the American Nazi Party.\textsuperscript{59} During the press conference, he held up cash as a reward to anyone who killed a Nazi.\textsuperscript{60} The court held that the defendant's advocacy of crime was not constitutionally protected speech.\textsuperscript{61}

The Supreme Court has also recognized that government may properly restrict speech to prohibit intrusion into the privacy of one's home with loud noises or unwelcome views and ideas.\textsuperscript{62} In view of the fact that some crimes involve the use of speech as part of the criminal transaction, "[t]he first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose."\textsuperscript{63} This doctrine may be applicable to the speech in \textit{Hit Man} in the abstract, but the degree of specificity required to make the book's speech capable of characterization as an "act," i.e. an integral part of Perry's conduct, is lacking.

\textbf{F. Political Speech That Incites Imminent Violence}

Following President McKinley's assassination by an anarchist in 1901, the United States government began to be concerned with radicals who advocated overthrowing the government by force.\textsuperscript{64} In 1919, Justice Holmes first articulated the "clear and present danger" doctrine in \textit{Schenck v. United States}.\textsuperscript{65} The defendant's conviction for speech that obstructed military recruiting was sustained by the Court.\textsuperscript{66} Holmes' famous example of a person shouting "fire" in a theater illustrated that words used in certain circumstances create a "clear and present danger" and thus are not protected by the First Amendment.\textsuperscript{67} The doctrine was refined in \textit{Whitney v. California} when Justice Brandeis recognized that the \textit{fear} of danger alone does not justify restriction of political speech.\textsuperscript{68} Justice Brandeis wrote that "[i]n order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be

\begin{footnotes}
\footnote{59}{158 Cal. Rptr. 488 (Ct. App. 1979).}
\footnote{60}{\textit{id}.}
\footnote{61}{\textit{id}. at 494.}
\footnote{63}{\textit{United States v. Barnett}, 667 F.2d 835, 842 (9th Cir. 1982).}
\footnote{64}{\textit{William Cohen \& Jonathan D. Varat, Constitutional Law}, 1198 (1997).}
\footnote{65}{249 U.S. 47 (1919).}
\footnote{66}{\textit{id}.}
\footnote{67}{\textit{id}. at 52.}
\footnote{68}{274 U.S. 357, 376 (1927) (Brandeis, J., concurring).}
\end{footnotes}
expected or was advocated, or that past conduct furnished reason to believe that such advocacy was then contemplated." 69

However, the clear and present danger test was muddied in a subsequent decision, Dennis v. United States, where several opinions were written, yet none had sufficient approval to be issued as the opinion of the Court. 70 In this case, the petitioners were convicted under the Smith Act of aiding and abetting the overthrow of the government. 71 The opinion receiving the greatest assent affirmed Judge Learned Hand's interpretation of the clear and present danger test in the court below. 72 Judge Hand used a balancing test: "[courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 73 This decision to employ a balancing test has continued to be cited as authority in First Amendment cases, despite development of a less subjective standard. 74 In 1957, the Court clarified the clear and present danger doctrine, stating that "those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something." 75

The current standard the Supreme Court uses to evaluate the restriction of "dangerous" political speech was formulated in Brandenburg v. Ohio. 76 A leader of the Ku Klux Klan made a speech that included the following statement: "[the Klan is] not a revengent organization, but . . . it's possible that there might have to be some revengeance taken." 77 In reversing his conviction, the Court held that "constitutional guarantees of free speech . . . do not permit a State 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." 78 While this test on its face seems to apply to any speech advocating commission of a crime, all of the Supreme Court's decisions utilizing this test have involved some form of political speech.

69. Id. at 375.
70. 341 U.S. 494 (1951).
71. Id. at 495.
72. Id. at 510.
73. Id. (quoting Dennis v. United States, 183 F.2d 201, 212 (1950)).
77. Id. at 446.
78. Id. at 447.
III. THE COURT’S REASONING IN RICE V. PALADIN

The Fourth Circuit held in Rice v. Paladin that the First Amendment does not bar a civil action against the publisher of a book that aids and abets a crime “[b]ecause long-established caselaw provides that speech — even speech by the press — that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment ....” 79

The court began with an analysis of Brandenburg v. Ohio,80 where the Supreme Court held that the First Amendment protects speech that constitutes “abstract advocacy” of lawlessness.81 The court found that the speech contained in Hit Man did not constitute “abstract advocacy,” but rather “speech brigaded with action” that is unprotected by the First Amendment under Brandenburg.82

The court likened the speech in Hit Man to speech which is an element of criminal conduct such as blackmail, threats, perjury, criminal solicitation, conspiracy, harassment and forgery.83 The court reasoned that Hit Man could not be classified as “abstract advocacy” under Brandenburg because here the “only instructional communicative ‘value’ is the indisputably illegitimate one of training persons how to murder and to engage in the business of murder for hire.”84 The court stated that even if Brandenburg is the appropriate standard, the court “could not conclude as a matter of law that Hit Man is not directed to inciting and likely to incite imminent lawlessness.”85

The Fourth Circuit reviewed three decisions of the Ninth Circuit, analogizing the decisions to the facts of Rice’s appeal.86 United States v. Barnett denied a First Amendment defense to a criminal charge of aiding and abetting through the publication of a document that contained printed instructions for manufacturing illegal drugs.87 The Ninth Circuit relied upon Barnett in United States v. Freeman to uphold a criminal conviction for aiding and abetting tax fraud through speech, holding that the defendant was not

79. Rice, 128 F.3d at 243.
82. Id. at 244 (citing Brandenburg, 395 U.S. at 456 (Douglas, J., concurring)).
83. Id.
84. Id. at 250.
85. Id. at 264 n.11.
86. Id. at 244-45.
87. 667 F.2d 835 (9th Cir. 1982).
entitled to a First Amendment defense. Likewise, United States v. Mendelsohn held that a sports wagering computer program was "too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection." Based on these three cases, the Fourth Circuit concluded that "instructions that aid and abet another in the commission of a criminal offense [are] unprotected by the First Amendment . . . ." The court then assumed that speech which can be proscribed by criminal penalties could also be subject to civil penalties, at least where the government interest is compelling.

The court then returned to Brandenburg and its requirement that proscribed speech be directed to incitement of "imminent lawless action." Relying on a Department of Justice report, the court concluded that Brandenburg's "imminence" requirement "poses little obstacle to the punishment of speech that constitutes criminal aiding and abetting . . . ." The Fourth Circuit stated that the lower court erred in concluding that the requirements of Brandenburg protected Paladin from civil liability because the speech in Hit Man does not constitute an incitement to murder, but is merely an instruction manual. The court construed Brandenburg as no safeguard to civil liability for speech that constitutes instruction in the technical methods of criminal activity.

The Fourth Circuit analyzed Paladin's intent under Maryland's civil and criminal laws. Maryland's civil intent standard for aiding and abetting requires that the conduct be the "natural consequence of [one's] original act," while the criminal standard requires a "purposive attitude." The court found that Paladin possessed the requisite intent for civil liability in: (1) the declared intent of the defendant to aid in the commission of the crime, (2) Paladin's knowledge that the speech would be used to aid in the commission of the crime, and (3) Paladin's active participation in the scheme to aid in the commission of the crime.
purpose of the book (to facilitate murder), (2) the book’s promotion of murder, (3) Paladin’s marketing strategy for Hit Man, and (4) the publisher’s specific intent to assist murders. Recognizing that First Amendment principles may require heightened intent, the court ruled that this specific intent would satisfy the First Amendment requirement. The application of the “speech-act” doctrine for a mass-market publication was held to a finding of specific intent. Additionally, the Fourth Circuit used the Miller obscenity standard as a rationale to allow a jury to impose content-based liability on Paladin because of an “absence of a lawful purpose.”

Dismissing the argument that its decision will subject all broadcasters and publishers to liability, the court stated that a media depiction with a “wholly legitimate purpose” will almost never support a reasonable inference of unlawful motive. The court also assumed that liability could not be imposed on other “lawful” instructional books based on “a finding of mere foreseeability or knowledge that the instructions might be misused for a criminal purpose” without a separate finding of intent.

The Fourth Circuit concluded that the plaintiffs stated a civil cause of action for aiding and abetting and that this cause of action against the publisher of a mass-market book was not barred by the First Amendment.

IV. ANALYSIS

Justice William O. Douglas voiced his disdain for the unconstitutional censorship of unpopular speech when he said, “I see no constitutional basis for fashioning a rule that makes a publisher, producer, bookseller, librarian, or movie house operator criminally responsible, when he fails to take affirmative steps to protect the consumer against literature, books, or movies offensive to those who temporarily occupy the seats of the mighty.” This writer agrees

98. Rice, 128 F.3d at 253-55.
99. Id. at 248 (citing DOJ REPORT at 42-43 (advising that a publication with an improper intent should not be constitutionally protected where it is foreseeable that it will be used for criminal purposes)).
100. Rice, 128 F.3d at 255.
101. Id.
102. Id. at 266.
103. Id. at 266.
104. Id. at 265.
and proposes that a new standard be developed for analyzing forms of mass-market expression which may be deemed “dangerous,” yet do not expressly intend to incite (or are not reasonably likely to incite) imminent violence.

A. Prior Persuasive Authority

A publisher's criminal and civil liability for speech has been analyzed under First Amendment protections using an amalgam of standards and tests. Although the Supreme Court has never applied Brandenburg to a case that did not involve political speech, lower courts have applied numerous tests, including Brandenburg's “intent to incite imminent violence” test, content-based obscenity standards, the “fighting words” “nonspeech’ element of communication” test, as well as the standard of “speech as an integral part of a crime” to determine whether a publisher’s liability is barred by the First Amendment.

The United States District Court Cases

In Zamora v. CBS, a fifteen-year-old brought a civil suit against a television network, claiming that certain violent programs “impermissibly stimulated, incited and instigated” him to kill an elderly woman. The United States District Court for the Southern District of Florida used the Brandenburg test of “intent to incite to imminent violence” to dismiss the suit on First Amendment grounds. The judge commented:

I suggest that the liability sought for by plaintiffs would place broadcasters in jeopardy for televising Hamlet, Julius Caesar, Grimm's Fairy Tales; more contemporary offerings such as All Quiet On the Western Front, and even The Holocaust, and indeed would render John Wayne a risk not acceptable to any but the boldest broadcasters.

The court also pointed out that “[r]eference to the ‘incitement’ cases . . . should not obscure the obvious.” This comment implies that Brandenburg was the appropriate test, but that the standard did not apply to television broadcasts depicting violence because the necessary intent would never be present.

The parents of another teenaged boy brought a wrongful death action against

107. Id. at 206-07.
108. Id. at 206.
109. Id.
music publishers in Waller v. Osbourne. The plaintiffs claimed that a song incited the boy to commit suicide. Using the Brandenburg standard, the court held that the music publishers "did not engage in culpable incitement." The court also pointed out that there was "no other plausible basis . . . upon which [the plaintiffs could] overcome the broad first amendment protection generally afforded speech . . . ."

In Video Software Dealers Association v. Webster, a Missouri statute restricted videotapes depicting violence. The court overturned the statute, holding that speech about violence was not outside the protection of the First Amendment. However, the court rejected the Brandenburg test in this circumstance, stating that Brandenburg did not apply to speech directed at young people. This decision illustrates the need for a new test for non-political, "dangerous" speech.

A similar Georgia statute directed toward juveniles also used the obscenity standard to restrict drug-related printed materials. The court ruled the obscenity test inapplicable and went on to consider two other exceptions to the First Amendment: the Brandenburg imminent incitement standard and the "speech-act" exception characterized as "direct solicitation of unlawful activity." Both exceptions were rejected as inapplicable to mass-market printed materials because "the First Amendment's expanse by necessity includes speech which is aberrant, unpopular, and even revolutionary."

Yet another standard was applied in Libertelli v. Hoffman-La Rouche, Inc., where the plaintiff sued the publisher of the Physicians Desk Reference for

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111. Id. at 1145.
112. Id. at 1151.
113. Id.
115. Id.
116. Id. at 1278.
negligence for failing to warn that valium is addictive.\textsuperscript{120} The court used the \textit{New York Times v. Sullivan} “actual malice” standard for libel to dismiss the claim, saying “a publisher is not liable for false reports of matters of public interest absent knowledge of falsity or reckless disregard of the truth.”\textsuperscript{121}

The balancing test formulated by Judge Hand in \textit{Dennis}\textsuperscript{122} was used by a district court in Illinois to strip First Amendment protection from a nonprofit organization that published material containing misstatements on contracting AIDS through blood products.\textsuperscript{123} The court held that “the interest of society in providing redress for the grave injuries alleged should be weighed against the danger of chilling the [defendant’s] communications.”\textsuperscript{124} The court found this balancing test to be “a constitutionally acceptable accommodation,” likening the action to one for medical malpractice where written or spoken expression is used to commit a tort.\textsuperscript{125}

A well-reasoned Texas opinion examined a publisher’s liability on every possible aspect of state law as well as four of the six recognized First Amendment exceptions to protected speech.\textsuperscript{126} A policeman’s widow brought a wrongful death action against a music publisher because the person who shot her husband claimed that listening to one of the publisher’s songs caused him to commit murder.\textsuperscript{127} The court examined state negligence and product liability law, granting summary judgment to the defendant on these theories, before turning to the First Amendment issues.\textsuperscript{128} The court ruled that the action likewise failed under the obscenity, defamation, “fighting words” and \textit{Brandenburg} tests.\textsuperscript{129} This exhaustive analysis once again demonstrates that a reproducible First Amendment standard is needed to evaluate the liability of a publisher of mass-market works.

\begin{thebibliography}{99}
\bibitem{1} No. 80 Civ. 5626, slip op. (S.D.N.Y. 1981).
\bibitem{2} Id.
\bibitem{3} 183 F.2d at 212.
\bibitem{4} \textit{In re Factor VIII or IX Concentrate Blood Prods. Litig.}, 25 F. Supp. 2d 837 (N.D. Ill. 1998).
\bibitem{5} Id. at 844-45.
\bibitem{6} Id. at 845-46.
\bibitem{8} Id. at *1.
\bibitem{9} Id. at *9-*15.
\bibitem{10} Id. at *15-*22.
\end{thebibliography}
The United States Courts of Appeals Cases

The Rice v. Paladin court cited United States v. Mendelsohn, where the defendants were convicted of criminally aiding and abetting the interstate transportation of wagering paraphernalia and lost on appeal.\(^{130}\) At issue was a computer program for bookmaking that the defendants demonstrated to an undercover policeman.\(^{131}\) The defendants subsequently offered to the policeman further assistance in illegal bookmaking.\(^{132}\) The Ninth Circuit rejected the Brandenburg test, holding that this speech was "too instrumental in and intertwined with the performance of criminal activity to retain First Amendment protection."\(^{133}\) This case can be distinguished from those of publishers who mass-market their materials because the defendants were personally involved in the crime, making the Brandenburg standard inapplicable.

The Rice court also cites United States v. Barnett, another Ninth Circuit criminal aiding and abetting case where the Brandenburg standard was discarded.\(^{134}\) The defendant, doing business as United News Service, advertised a catalog of drug manufacturing instructions in a magazine.\(^{135}\) Donald Hensley ordered the catalog and subsequently purchased instructions for manufacturing PCP from United News Service.\(^{136}\) Hensley was using Barnett’s instructions when he was arrested for manufacturing drugs.\(^{137}\) The Ninth Circuit reasoned that Barnett “provided essential information for the specific purpose of assisting [another] in the commission of a crime.”\(^{138}\) The defendant’s speech was compared to “[t]he use of a printed message to a bank teller requesting money coupled with a threat of violence, . . . a false representation in a written contract, the forging of a check, and the false statement to a government official . . . .”\(^{139}\)

As in Mendelsohn, this “speech-act” was placed in the unprotected category of

\(^{130}\) United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990).
\(^{131}\) Id. at 1184.
\(^{132}\) Id.
\(^{133}\) Id. at 1186.
\(^{134}\) United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982).
\(^{135}\) Id. at 840.
\(^{136}\) Id. at 838.
\(^{137}\) Id. at 840.
\(^{138}\) Id. at 843.
\(^{139}\) Id. at 842.
speech that constitutes a crime because of its specific illegal purpose, even though the defendant was a mass-marketing publisher with no knowledge of the crime.

Most mass-market speech however, has been held to the Brandenburg “intent toward imminent incitement” standard and has subsequently been absolved of both criminal and civil liability because of the lack of a specific illegal purpose. The plaintiffs’ decedent in Herceg v. Hustler Magazine, Inc. read an article on auto-erotic asphyxiation and tried the practice, killing himself in the process.140 Responding to the plaintiffs’ opposition to the use of the Brandenburg test, the Fifth Circuit stated, “[i]f the shield of the first amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as ‘bad,’ all free speech becomes threatened.”141 Taken with Mendelsohn and Barnett, this holding implies that Brandenburg is applicable to civil negligence actions, but not to criminal cases that involve personal assistance or a “specific illegal purpose.”

Mass-market publishing is held to a different standard if the speech at issue is classified as “commercial.” In Braun v. Soldier of Fortune Magazine, Inc. the plaintiffs alleged that the publishing company was liable for printing a classified advertisement titled “Gun For Hire” that promoted a professional mercenary’s services.142 The court syllogized First Amendment limitations on state defamation law with a risk-utility balancing test for negligence in commercial advertisements to conclude that there was no “constitutional infirmity” in holding the magazine civilly liable for the advertisement.143 Using the Dennis balancing test interpretation of the clear and present danger doctrine, the court adopted a “modified” negligence standard that involved not a duty to investigate, but liability for “a clearly identifiable unreasonable risk” of harm.144 Thus, advertisements, by definition mass-market, were determined to be subject to a different level of constitutional scrutiny because of their classification as “commercial speech.”145

141. Id. at 1024.
143. Id. at 1118.
144. Id. at 1119-20.
145. Id. at 1119.
The State Court Cases

With one exception in an instance where commercial speech was at issue, state courts have been remarkably uniform in the application of the Brandenburg "intent to incite to imminent action" standard to mass-market speech. The Supreme Court of California in Weirum v. RKO General, Inc. denied First Amendment protection to a promotional radio broadcast and imposed tort liability on the radio station.146 The suit arose from an accident caused when two youths raced in order to be the first to reach the site where prize money would be given away.147 The First Amendment defense was rejected because "[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."148 Not only was the speech in question "commercial," but it was also a "speech-act" because of the proximity and connection of the expression to the harm caused.

In state courts, mass-market speech that is not an advertisement has been protected not only by the Brandenburg test, but also by other less objective tests. The Supreme Court of Georgia in Walt Disney Productions v. Shannon cited Brandenburg in a footnote, but applied the more subjective clear and present danger test.149 In this case, the plaintiff imitated a television sound effect trick by putting a BB pellet inside a balloon, injuring himself when the balloon burst.150 The court held that the Brandenburg test was inapplicable in a "pied piper" situation where a child was involved, but found for the publisher because the defendant did not supply the child with the instrumentality causing the injury.151

Olivia N. v. National Broadcasting Company involved a child who was injured by a group of adolescents who mimicked a television depiction, but this imitation was a crime — sexual assault.152 In the resulting negligence action, the California Court of Appeals affirmed the defendant's motion for nonsuit when the plaintiff could not prove incitement under Brandenburg.153 The court ruled that the plaintiff could not attempt to prove negligence as a substitute for

147. Id. at 37.
148. Id. at 40.
150. Id. at 581.
151. Id. at 583.
153. Id. at 894.
the First Amendment’s required \textit{Brandenburg} standard.\textsuperscript{154}

In other state actions involving “pied piper” cases and children, the \textit{Brandenburg} test has prevailed as binding authority. A wrongful death action was brought against NBC television by the parents of a deceased boy after he hanged himself while imitating a stunt demonstrated on The Tonight Show.\textsuperscript{155} The Supreme Court of Rhode Island held that, as a matter of law, the broadcast could not be construed as incitement under \textit{Brandenburg}.\textsuperscript{156} The court’s rationale for applying \textit{Brandenburg} was that any other standard would lead to self-censorship by broadcasters that would violate the First Amendment.\textsuperscript{157}

When a juvenile was shot leaving a violent movie, she brought an action against the producers of the film, alleging that the defendants knew the movie would attract individuals who were likely to injure other movie patrons.\textsuperscript{158} The plaintiff conceded that the film did not constitute a \textit{Brandenburg} incitement, but the California Court of Appeals recognized the \textit{Brandenburg} standard, stating “[based on] the general First Amendment principle that when speech is of such a nature as to arouse violent reaction on the part of the lawless, the first obligation of government is to maintain the peace and enforce the law, and not to silence the speaker.”\textsuperscript{159} However, the court declined to decide the case on First Amendment grounds, holding that “there may well be circumstances in which the state could hold a party responsible for warning, or taking protective action, against the foreseeable reaction of persons to protected speech without violating the First Amendment.”\textsuperscript{160} Inexplicably, the court found that the lack of foreseeability in this case resulted in no duty owed by the film producers to the plaintiff under common law\textsuperscript{161} — the very premise upon which the \textit{Brandenburg} “intent to incite to imminent violence” standard is based, albeit under criminal law.

Six years later, another California court relied on \textit{Brandenburg} in dismissing an action against a music publisher for an Ozzy Osbourne song that allegedly encouraged a nineteen-year-old to commit suicide.\textsuperscript{162} The court held that “[i]t is not enough that [the plaintiffs’ decedent’s] suicide may have been the result of

\textsuperscript{154.} Id. at 893.
\textsuperscript{155.} DeFilippo v. NBC, 446 A.2d 1036 (R.I. 1982).
\textsuperscript{156.} Id. at 1041.
\textsuperscript{157.} Id. at 1042.
\textsuperscript{158.} Bill v. Superior Court, 187 Cal. Rptr. 625, 628 (Cal. Ct. App. 1982).
\textsuperscript{159.} Id. at 629.
\textsuperscript{160.} Id. at 629-30.
\textsuperscript{161.} Id. at 633.
an unreasonable reaction to the music; it must have been a specifically intended consequence.”

Likewise, the Supreme Judicial Court of Massachusetts relying on Brandenburg as binding authority, dismissed a wrongful death action by the father of a boy killed by a person who had just seen a depiction of gang violence in the film “The Warriors.” Although it recognized that the determination of “intent to incite” is essentially factual, the court held that the Brandenburg standard is a question of law for First Amendment purposes. This case stood as the most recent decision on liability for non-commercial, mass-market expression until Rice in 1997.

Rice provided persuasive authority to a Louisiana appeals court in ruling that proof of “intent to incite imminent lawless action” under Brandenburg is a question of fact for the jury, not a First Amendment question of law. In Byers v. Edmondson, a shooting victim brought a negligence and intentional tort action against the producers of the movie “Natural Born Killers,” alleging that the film incited two people to go on a crime spree similar to one depicted in the film. Quoting extensively from Rice, the court recognized that the proof of intent necessary for liability under Brandenburg in mass-market publishing “will be remote and even rare,” but declined to hold that the action was barred by the First Amendment.

Thus, Rice has created a dangerous precedent by turning what should be a question of law under the First Amendment into a question of fact to be decided by a jury of citizens. Such a determination will allow a jury to impose liability based on personal dislike of a publication’s content and perhaps fail to follow the Supreme Court's mandate of tolerance for “insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.”

163. Id. at 193 (citing Braxton v. Municipal Court, 514 P.2d 697, 703 (Cal. 1973)) (emphasis added). Under this standard, Paladin, too, would not have been found liable because an actual murder was not a specifically intended consequence of Hit Man, although it could have been foreseeable.

165. Id.
167. Id. at 683-84.
168. Id. at 691-92.
B. The Supreme Court

The Supreme Court rejected intent as an element of tort liability in *Hustler Magazine v. Falwell*. Reverend Jerry Falwell filed a civil action against the national magazine to recover damages for intentional infliction of emotional distress arising from the publication of a parody which portrayed Falwell as having engaged in a “drunken incestuous rendezvous with his mother in an outhouse.” The jury ruled in Falwell’s favor and the Fourth Circuit affirmed. The Supreme Court used the *New York Times* test for “actual malice” to overturn the judgment. The Court held:

“[O]utrageousness” in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression. An “outrageousness” standard thus runs afoot of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

The Court held the publisher’s “outrageous” intent to be inapplicable, reasoning that “many things done with motives that are less than admirable are protected by the First Amendment. . . . Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.”

C. Hit Man in Context: No Intent to Harm and No “Reasonably Foreseeable” Consequences

*Hit Man* differs from every case of publisher liability cited above, with the exception of the *Hustler* parody, because the book was a thinly-disguised farce. The author was a divorced mother of two who wrote the book in order to pay her property taxes. Originally, she submitted a novel, but Paladin Press wanted a

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171. *Id.* at 48.
172. *Id.* at 49.
173. *Id.* at 56.
174. *Id.* at 55 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982) (“Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”)).
175. *Hustler*, 485 U.S. at 53.
how-to book.\textsuperscript{177} Her absurd pseudonym, Rex Feral, is Latin for “wild and brutal king.”\textsuperscript{178} The court even cites her jibes at women: “[f]ortunately for the world, a woman usually makes only one man her target, and the nesting instinct quickly takes her off the street and ties her down to the little world of babies, laundry and housework she creates and protects for her own.”\textsuperscript{179} Despite what seems obvious to most observers, the Fourth Circuit rejected as disingenuous “Paladin’s cavalier suggestion that the book is essentially a comic book whose ‘fantastical’ promotion of murder no one could take seriously . . . .”\textsuperscript{180}

The “macho” passages of the book that frightened the Fourth Circuit are ludicrous, even to the average reader. Reader comments on \textit{Hit Man} posted by the cyber-bookseller \textit{Amazon.com} include:

“One chapter of the book advises you to make sure you wear gloves when snacking from the victim’s refrigerator. If you can’t tell by reading it that it is a joke, then you deserve what you get for acting on the information given.”


“The book is too amateurish. . . . If you want to knock someone off, common sense will save you a few dollars instead [sic] of buying the book.”

- A reader from Texas, September 2, 1998.

“This “hit” is a miss . . . . It was obviously not written by a professional, but rather by one deeply engrossed in older cloak-and-dagger novels.”

- scottgperry@hotmail.com from Atlanta, GA, May 18, 1998.

“If you find anything new in this book, you are out of touch with present society!”

- job@welchlink.welch.jhu.edu from Finksburg, MD, U.S.A., March 21, 1998.

“Mr. Feral’s book is, in essence a ‘for Dummies’ or “Complete Idiot’s” guide to homicide. . . . Most likely if any of Mr. Feral’s readers do try to implement his


\textsuperscript{179} \textit{Rice}, 128 F.3d at 260.

\textsuperscript{180} \textit{Id.} at 254.
teachings, they will more often than not mess up just like the readers of dummies’ guides to computers, auto repair, investment and sex. . . . The chances of someone acquiring the skills of a professional assassin just from reading Mr. Feral’s book are about equal to the chances of someone gaining the ability to throw or hit a 90 mile-per-hour fastball from reading an instructional book on baseball.

- A reader, July 5, 1997.181

The “facelessness” of the author could make the farcical tone unclear to an undereducated reader, but the “reasonably believable” standard for libel should be used to assess the purported danger of the content as the Supreme Court did in Hustler.182

The Fourth Circuit might have ruled differently if the female author of Hit Man had been reading the content of the book aloud. A spoken message differs from a printed book because the tone and identity of the speaker are clearer. When talk show host and convicted felon G. Gordon Liddy broadcast murder instructions on his nationally syndicated radio program,183 no reasonable person took his words to be an “incitement to action” nor a “speech-act” because Liddy is known to be a right-wing ignoramus and is not credible except as entertainment.184 Liddy gave “instructions” on how to kill agents of the Bureau of Alcohol, Tobacco, and Firearms, proclaiming: “Head shots, head shots . . . Kill the sons of bitches. . . . Shoot twice to the belly and if that does not work, shoot to the groin area.”185 If an ATF agent was killed based on Liddy’s words, no one brought suit. However, the danger that a listener might interpret Liddy’s words as a call to action is even clearer and more imminent than the speech in Hit Man.

The Fourth Circuit’s application of the “speech-act” doctrine that found Hit Man to be speech “brigaded with action” was based on the subjective reasoning that the book’s “only instructional communicative ‘value’ is . . . indisputably

182. See Hustler, 485 U.S. at 57.
The court ignored the five varied groups of readers (as well as the general public) specified in the Joint Appendix to whom the communicative value was legitimate, stating that these readers were merely marketing targets. Thus, the court’s finding of the specific intent necessary to make Hit Man an integral part of criminal conduct was not based on intent, but was actually based on content that the court found offensive. This subjective reasoning is illustrated throughout the text of the Fourth Circuit’s opinion:

[S]teeled by these seductive adjurations from Hit Man . . . James Perry brutally murdered Mildred Horn . . .

This Court, quite candidly, personally finds Hit Man to be reprehensible and devoid of any significant redeeming social value.

If there is a publication that could be found to have no other use than to facilitate unlawful conduct, then this would be it, so devoid is the book of any political, social, entertainment, or other legitimate discourse.

[The book’s] ‘disclaimers’ and ‘warnings’ obviously were affixed in order to titillate.

The notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book’s evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law.

These statements could reasonably be applied to the third prong of the Miller obscenity test, but are evidence of a bias in fact-finding when applied to the

187. Id. at 255.
188. Id.
189. Id. at 249 (quoting Rice, 940 F. Supp. at 849).
190. Rice, 128 F.3d at 255.
191. Id. at 263 n.10.
192. Id. at 267.
193. The requirement that the speech lacks no serious literary, artistic, political or scientific value. Miller, 413 U.S. at 24.
“speech-act” doctrine of “communications that are simply means to get a crime successfully committed.”

The content of Hit Man is a compilation of public domain information that the author took “from books, television, movies, newspapers, police officers, [her] karate instructor, and a good friend who is an attorney.” Substitute the words “A Study of Independent Contractors” for the title phrase “A Technical Manual for Independent Contractors” and the alleged intent changes even though the content remains the same. Nevertheless, the court’s content-based analysis found that “it is evident from even a casual examination of the book that the prose of Hit Man is at the other end of the continuum from [speech] protected by the First Amendment.”

In applying the “speech-act” exception to the First Amendment, the Fourth Circuit not only liberally construed the publisher’s intent, but also liberally interpreted the standard of liability. The court recognized that “the First Amendment may . . . superimpose upon the speech-act doctrine a heightened intent requirement in order that preeminent values underlying that constitutional provision not be imperiled.” Admitting that more than mere foreseeability or knowledge is needed for liability, the court nevertheless found that Paladin had a “specific purpose” to aid and abet James Perry in the crime of murder. The court determined this to be a “specific purpose” despite the fact that both parties stipulated that Paladin had no specific knowledge of Perry or his criminal plan. Instead, the court focused on the stipulation that “in publishing, marketing, advertising and distributing Hit Man . . . defendants intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire.”

However, this remarkable stipulation on its face does not preclude First Amendment protection against tort liability. For example, Hustler Magazine intended that its parody of Reverend Falwell cause the plaintiff emotional distress, but the Supreme Court rejected motive as inapplicable to First


196. Rice, 128 F.3d at 256.

197. Id. at 247.

198. Id. at 243, 252.

199. Id. at 241 n.2 ¶ 9.

200. Id. at 241 n.2 ¶ 4b.
Amendment considerations.\textsuperscript{201}

Even if this stipulation could facially provide a specific illegal purpose, the court’s ruling ignored its context in two important areas. First, the intent stipulated was only one of several purposes in Paladin’s marketing and distribution scheme. Both parties additionally stipulated that “in publishing, marketing, advertising and distributing Hit Man... defendants intended and had knowledge that their publications would be purchased by members of the general public, including [authors, law enforcement officers, persons who enjoy reading accounts of crimes, persons who fantasize about committing crimes but do not commit them and criminologists].”\textsuperscript{202} This additional stipulation dilutes any inference of a “specific” purpose to aid and abet a crime.

The second way that the Fourth Circuit erred in interpreting the publisher’s intent was in disregarding the district court’s factual interpretation of the “intent and knowledge of criminal use” stipulation.\textsuperscript{203} The lower court accepted Paladin’s clarification of this stipulation that the acknowledged “intent” was offered within the generally accepted standard of tort liability.\textsuperscript{204} This standard requires only that the resulting conduct be reasonably foreseeable or a “natural consequence of [one’s] original act.”\textsuperscript{205} Although the Fourth Circuit acknowledged that the “speech-act” doctrine requires an intent beyond the “reasonably foreseeable” standard to preclude First Amendment protection, the court concluded that “a trier of fact could still conclude that Paladin acted with the requisite intent to support civil liability.”\textsuperscript{206} Although Rice was entitled to this inference in the context of summary judgement, the Fourth Circuit erred as a matter of First Amendment law in factually interpreting Paladin’s intent.

\begin{thebibliography}{99}
\bibitem{201} See \textit{Hustler}, 485 U.S. at 53; see also R.A.V. v. St. Paul, 505 U.S. 377, 380 (1992) (striking down an ordinance that criminalized speech that “one knows... arouses anger alarm or resentment in others.”).

\bibitem{202} \textit{Rice}, 128 F.3d at 241 n.2 \S 5b (emphasis added).

\bibitem{203} \textit{Id.} at 253. The Fourth Circuit stated that the district court could not allow Paladin to clarify its stipulation, even though the Joint Statement of Facts expressly provided that either of “[t]he parties may file affidavits or supplement but not alter the foregoing stipulation.” \textit{Id.} at 241 n.2 \S 11.

\bibitem{204} \textit{Rice}, 128 F.3d at 253.

\bibitem{205} \textit{Id.} at 251 (quoting \textit{Peoni}, 100 F.2d at 402).

\bibitem{206} \textit{Rice}, 128 F.3d at 253.
\end{thebibliography}
D. The Need For A New Standard

The fact that the Fourth Circuit left many First Amendment issues in the case up to "a trier of fact" sets a dangerous precedent that has already been rejected by the Supreme Court and illustrates the need for a new standard of First Amendment tort liability for mass-market publishers. Although Paladin settled the case before trial, the Fourth Circuit's definition of intent had an "inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views" that the Supreme Court has expressly ruled unconstitutional.207 Throughout the opinion, the Fourth Circuit declines to decide First Amendment issues as a matter of law, leaving the constitutional freedom of speech issues up to a jury:

[A] jury could readily find that the provided instructions have no, or virtually no, noninstructional communicative value . . . .208

The unique text of Hit Man alone . . . is more than sufficient to create a triable issue of fact as to Paladin's intent.209

[A] jury could readily find [the book's disclaimer] to be transparent sarcasm designed to intrigue and entice . . . .210

[A] jury could conclude that Paladin marketed Hit Man directly and even primarily to murderers and would-be criminals, and, from this permissible conclusion, in turn conclude that Paladin possessed the requisite intent necessary to support liability.211

[A] jury could reasonably conclude that Paladin specifically intended to assist Perry . . . by finding, . . . as would we, that Hit Man's only genuine use is the unlawful one of facilitating such murders.212

[A] jury would certainly not be unreasonable in dismissing (in fact, it arguably would be unreasonable in accepting) Paladin's contention that Hit Man has

207. Hustler, 485 U.S. at 55.
208. Rice, 128 F.3d at 249. This statement also implies that the applicable standard is the content-based obscenity test.
209. Id. at 254.
210. Id.
211. Id.
212. Id. at 255.
significant social value. . . . 213

[A] reasonable jury could simply refuse to accept Paladin's contention that this purely factual, instructional manual on murder has entertainment value to law-abiding citizens. 214

These subjective, content-based determinations only belong in the hands of a jury if the speech at issue is being restricted as obscenity. Otherwise, controversial books will be able to be censored based purely on a jury finding of content with no "communicative value" other than the subjective intent of the publisher.

The "speech-act" doctrine has never been applied to civil liability for a mass-market book. The doctrine has been described in criminal cases variously as speech "so close in time and purpose to a substantive evil as to become part of the ultimate crime itself," 215 speech "too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection," 216 and, by the Fourth Circuit itself, as speech "not remote from the commission of the criminal acts." 217 The speech in Hit Man does not meet this criminal standard, which has historically been based on the speaker's use of the speech, not the speaker's intent. 218 The "speech-act" doctrine requires a direct causal connection between the speaker and the illegal act. 219 Paladin sold 13,000 copies of Hit Man, 220 and, as one commentator has stated, to hold the publisher responsible for the acts of one irrational reader is "patently absurd." 221

213. Id. The use of the obscenity standard is also implied here.
214. Rice, 128 F.3d at 255. This is another example of the unsupported proposition that "value" is a necessary element of First Amendment protection for any speech other than obscenity.
215. Freeman, 761 F.2d at 552.
216. Mendelsohn, 896 F.2d at 1186.
218. See Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 498 (1949) (defining the "speech-act" exception to the First Amendment as "speech or writing used as an integral part of conduct in violation of a valid criminal statute.").
220. Rice, 128 F.3d at 241 n.2 ¶ 8.
Mass-marketing information on how to commit a crime does not constitute intent to aid and abet because the lack of direct contact "alters the degree to which the speaker knows the likely effect of his or her words." Additionally, the time it takes to read a book allows for a period of reflection that negates the intent and encouragement necessary to criminally aid and abet. As the Fourth Circuit recognized in Rice, the First Amendment requires a level of culpable intent that is higher than the criminal standard for the imposition of civil liability for speech related conduct and this mass-market book fails to meet this standard.

The Fourth Circuit's censorship in Rice will continue to chill speech unless a clearer standard of First Amendment protection for mass-market speech is formulated. A study of First Amendment history shows that the actual dangers created by speech are usually overestimated by prosecutors and judges. "To correct for the human tendency to confuse unsettling social commentary with palpable harm, decisions like Sullivan and Brandenburg drew the line between legitimate and illegitimate public discourse not where abstract theory might suggest, but where pragmatics, formed in the light of [First Amendment history], dictated." The censorship in Rice is a harbinger for a floodgate of liability actions directed against Internet speech. Internet speech may become subject to liability or even criminalized if a court finds it reasonable that one person will take action, regardless of the actual intent of the speaker. The actor who is "aided" by Internet speech will be even more "faceless" than James Perry was to Paladin, rendering the "speech-act" doctrine inapplicable.

224. Rice, 128 F.3d at 252.
226. Id.
Brandenburg's guidance on advocacy of illegal conduct through the medium of the Internet is unclear because the speech in that case was directed at a small group of people who had face-to-face contact with the speaker. In fact, it is unclear whether Brandenburg was ever meant to be applied to mass communication. This "intent to incite to imminent violence" standard was formulated as an absolutist test in response to the inherent unconstitutionality of the subjective balancing test used in Dennis. In the words of one commentator:

Hand's formulation [of risk/utility balancing] treats conduct protected by a constitutional provision in the same way as conduct not so protected, allowing criminal liability for speech under the identical circumstances as justify the imposition of civil liability for any form of action. . . . The upshot of this formulation is that speech is accorded no special treatment from any other act deemed criminal.

The evolution of Supreme Court decisions following Dennis affirms that the First Amendment requires that speech be accorded "special treatment," yet the Fourth Circuit returned to Judge Hand's unconstitutional standard in Rice under the thinly-veiled disguise of the "speech-act" doctrine, combined with a content-based analysis.

If Brandenburg's element of "intent to imminently incite unlawful action" and the "speech-act" doctrine are unconstitutionally chilling when applied to "dangerous" mass communications (e.g. the Internet), no recognized exception to the First Amendment is applicable. "Fighting words" necessitate face-to-face contact, the lack of communicative value specified in the Miller obscenity test would be unconstitutional if applied to any speech other than pornography, the commercial speech test is inapplicable by definition and of things to come, Perry's check bounced. Id.

230. Sunstein, supra note 228, at 370.
231. Id.
232. Brandenburg, 395 U.S. at 454 (Douglas, J. concurring); id. at 449-50 (Black, J. concurring).
237. Commercial speech is a communication which does "no more than propose a commercial
this type of speech causes no harm to anyone’s reputation.

**Previous Proposals For A New Standard Fall Short**

Professor David Crump of the University of Houston Law School\textsuperscript{238} proposes a “camouflaged incitement” test for analyzing the incitement prong of *Brandenburg* in “close cases.”\textsuperscript{239} Crump details eight evidentiary factors to be used in determining whether speech is an incitement:

(1) the express words or symbols uttered; (2) the pattern of the utterance, including any parts of it that the speaker and the audience could be expected to understand in a sense different from the ordinary; (3) the context, including the medium, the audience, and the surrounding communications; (4) the predictability and anticipated seriousness of unlawful results, and whether they actually occurred; (5) the extent of the speaker’s knowledge or reckless disregard of the likelihood of violent results; (6) the availability of alternative means of expressing a similar message, without encouragement of violence; (7) the inclusion of disclaimers; and (8) the existence or nonexistence of serious literary, artistic, political, or scientific value.\textsuperscript{240}

Although Crump recognizes that a case-by-case balancing analysis allows judges to manipulate the outcome of the case,\textsuperscript{241} he states that weighing these eight evidentiary factors “is a pragmatic necessity, because First Amendment law could not avoid arbitrariness if it failed to recognize that speech is intertwined with conduct, and that language is flexible.”\textsuperscript{242} Yet, this balancing analysis is precisely what the Supreme Court tried to avoid in cases of “dangerous” speech when the Court set down the categorical approach in *Brandenburg*.\textsuperscript{243} Any type of judicial analysis that creates a “guessing game[] for regulated parties create[s] an unacceptable risk [that the First Amendment transaction” as defined by the Supreme Court. Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 385 (1973).

\textsuperscript{238} Crump was one of the amici for the plaintiffs in Rice.


\textsuperscript{240} *Id.* at 54-69.

\textsuperscript{241} *Id.* at 46.

\textsuperscript{242} *Id.* at 70.

\textsuperscript{243} 395 U.S. at 454 (Douglas, J. concurring) (“I see no place in the regime of the First Amendment for any ‘clear and present danger’ test, whether strict and tight as some would make it, or free-wheeling as the Court in Dennis rephrased it.”).
The Department of Justice advocates another standard. Section 709(a) of the Antiterrorism and Effective Death Penalty Act of 1996 required the Department of Justice to conduct a study and prepare a report concerning the availability of information relating to the fabrication of bombs and other weapons of mass destruction. The report, submitted in April 1997, examines the constitutionality of restricting the publication of bombmaking information both under the *Brandenburg* standard and as a "speech-act" which constitutes a crime. The report states that *Brandenburg* should not be the standard applied to mass-market publishing of bombmaking information because "[i]f a defendant has aided and abetted a crime through the dissemination of information — rather than simply by urging or 'advocating' that the crime be committed — then the government should not need to demonstrate that the speech was intended or likely to 'incite' imminent unlawful conduct." However, the report also notes that the First Amendment protects dissemination of information that could be used by a criminal if the information is in the public domain.

The report's recommendation is that liability be imposed on publication of bombmaking manuals based on intent, i.e. "the specific purpose of facilitating criminal conduct, or ... knowledge that a particular recipient intends to make improper use of the material." Unfortunately, "specific purpose" is ambiguously defined in the report as not merely a "foreseeable" result or "natural consequence," but at the minimum a "material stake" in the outcome of the intended illegal activity." The area of liability encompassed between a "material stake" and a "foreseeable result" is too broad to be useful as a First Amendment standard. For example, Paladin did not have a "material stake" in James Perry's crimes, but murder could have been determined to be a "foreseeable result" of the publication of *Hit Man*. The determination that *Hit Man* had "the specific purpose of assisting and encouraging commission of..."
[criminal] conduct" could be decided arbitrarily under this standard.

E. A Proposal for a New Standard

The Department of Justice's proposal comes close to an appropriate test for mass communication liability. As stated above, the major flaw is that "specific purpose" must be defined with more clarity in order to protect First Amendment values. "Specific purpose" must indicate an exclusive intent, or speech such as Hit Man that contains legitimate expressive content will be chilled in direct contradiction to the tenets of the First Amendment. Additionally, this exclusive intent must objectively indicate a "specific purpose of facilitating criminal conduct." A subjective standard would allow liability to be imposed on any type of mass communication at the whim of a judge or jury based on their personal views. The Supreme Court explicitly warned against this type of subjectivity in Hustler.

Published mass-market communication should never be held liable under a "speech-act" analysis of speech that constitutes a crime because, although it may be used as an integral part of culpable conduct, the proximity and connection of the expression to the harm caused cannot be present when the user of the information has the time to contemplate his or her actions. The Supreme Court has subjected mass-market publishing to this type of liability only in the New York Times defamation case where "actual malice" was present. The Department of Justice standard of "the specific purpose of facilitating criminal conduct, or... knowledge that a particular recipient intends to make improper use of the material" is similar to the standard of knowledge or reckless disregard of falsity that the Supreme Court developed in New York Times. The knowledge element in both standards can clearly be made a basis for liability, even though a mass-market publisher's knowledge of a false statement in a defamation action is far more likely to occur than knowledge that a specific

253. DOJ REPORT, supra note 93, at 40.
255. See Waller, 763 F. Supp. at 1151; Herceg, 814 F.2d at 1021. But cf. Barnett, 667 F.2d at 843 (reasoning that a publisher of a mass-market pamphlet "provided essential information for the specific purpose of assisting [another] in the commission of a crime.").
257. DOJ REPORT, supra note 93, at 52.
258. 376 U.S. at 279-80.
person intends to use the publication for illegal purposes. "Reckless disregard" and "specific purpose," on the other hand, are poles apart. If a publisher could be held liable under a subjective standard such as "reckless disregard" for the possibility of facilitation of illegal conduct, First Amendment freedoms would be chilled—as the Supreme Court warned in *Hustler*.259

Can a mass-market publication containing public domain information, occurring in the form of a book, an internet page or a motion picture, ever be found to have an exclusive, objective intent (i.e. "specific purpose") to facilitate illegal conduct? The profit motives of book and movie publishers tend to negate this proposition. The time and expense necessary to publish a book or produce a motion picture would be a wasteful way to achieve this "specific purpose" when conversation or a sheet of instructions would do. An Internet page, which can be published inexpensively and usually involves one person's personal expression, could be found to have this exclusive, objective intent. This is precisely the type of expression that the Department of Justice report recommends be constitutionally subject to criminal liability.260 The constitutional culpability of public domain information published on the Internet is beyond the scope of this note. However, it is clear that a mass-market book or movie publisher will rarely, if ever, meet a standard of exclusive, objective intent. This is the appropriate First Amendment standard to be applied to mass-market publishing liability, because, in the words of Justice Brennan, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

V. CONCLUSION

The Fourth Circuit should have decided that *Hit Man* was protected under the First Amendment from civil liability as a matter of law. The book's expression of ideas that the court found to be offensive did not meet the Supreme Court's *Brandenburg* standard of intent, the "speech-act" standard of

260. See DOJ REPORT, supra note 93, at 51.
intent, nor the proposed Department of Justice standard of intent. Censoring mass-market publishing is an unconstitutional method of crime prevention when state and federal laws currently punish the crime. The type of paternalism exercised by the Fourth Circuit negates the personal responsibility of an individual at the expense of every American’s freedom of speech in order to monetarily compensate victims who are merely looking for a “deep pocket.”
DAVIDSON v. TIME WARNER: FREEDOM OF SPEECH...BUT WATCH WHAT YOU SAY! THE QUESTION OF CIVIL LIABILITY FOR NEGLIGENCE IN THE MASS MEDIA

by J. Robert Linneman

I. INTRODUCTION

In a society where the mass media is an integral part of the nation’s daily routine and information is the currency of life, a legal conundrum begins like this: an idea is given force in the mind of an artist, and is put on paper, on the screen or on a compact disc. The idea is compelling, the speaker is charismatic, the production is attractive, and there is a marketing infrastructure which makes it available to hundreds of thousands of people. At some point a viewer or listener experiences the vitality of the message and the energy of the performance, and reacts to it, transforming the idea into physical violence, harming an innocent. Can the creator of an idea and those who profit from it be held responsible for the consequences of the idea once it leaves their hands?

The prevalence of violence in film, television, music, games and other forms of entertainment has long been a concern of parents and educators.1 The influence of mass media on children and on society at large has been studied and debated.2 Many people believe that a connection exists between increasing levels of violence and the messages broadcast by the mass media.3

This situation presents a sticky problem for courts called upon to assign liability based on such a connection. Such cases have forced the courts into a new analysis of the First Amendment and the principles of tort law. The contention of the plaintiff is that the defendant caused the injury by inspiring the offender to act. The defense is that the message cannot have caused the act of the offender, and even if it did, the Constitution protects the right to publicize such a message.

The Supreme Court has never decided a civil case involving redress of an injury of a plaintiff resulting from the “speech” of another, so the lower courts have gone about deciding such cases largely without guidance. Existing First Amendment jurisprudence provides a framework, but the unique considerations

surrounding the "media violence claim" remain unresolved.

The power of the media in the twentieth century cannot be disputed. The critical inquiry for the courts is to determine the level of responsibility that comes with such power. This note will examine the recent district court decision in the case of Davidson v. Time Warner, Inc., which considered this question under a common law negligence cause of action.\(^4\) For the purposes of this note, the term "media violence claim" will be used to describe a civil action brought against a publisher, broadcaster or other commercial communicator for injuries inflicted intentionally by a third party who is alleged to have acted under the influence of the defendant's message.

The first section of this note will discuss the reasoning of the trial court in the Davidson case and examine its underpinnings to illustrate the most common approach to the media violence claim. The second section will survey the history of Supreme Court cases which have led to the current interpretation of the First Amendment, and will then discuss lower court decisions which have dealt with the new set of problems presented by a media violence claim. The third section will propose an analytical method for a media violence claim under the common law elements of negligence.

II. THE FACTS OF DAVIDSON V. TIME WARNER, INC.

This case arose from an incident which occurred during a routine traffic stop in Jackson County, Texas, on April 11, 1992.\(^5\) The material facts of the case are undisputed: Officer Bill Davidson, a Texas State Trooper, stopped the driver of a stolen Chevrolet Blazer for a violation unrelated to the theft.\(^6\) The driver, Ronald Howard, was armed with a 9mm Glock handgun.\(^7\) When Officer Davidson approached the vehicle, unaware that it was stolen, Mr. Howard shot at him without warning, hitting him in the neck and killing him.\(^8\) Mr. Howard confessed to the crime before a grand jury and was convicted and sentenced to death.\(^9\)

At the time of the shooting, Mr. Howard was listening to a cassette copy of 2Pacalypse Now, a recording of rap music performed by Tupac Amaru Shakur,

\(^{5.}\) Id. at *1.
\(^{7.}\) Id.
\(^{8.}\) Id.
\(^{9.}\) Id.
which is produced and distributed by Interscope Records and Atlantic Records.\footnote{10} At his criminal trial, Mr. Howard claimed that listening to \textit{2Pacalypse Now} caused him to shoot Officer Davidson.\footnote{11}

The plaintiffs in \textit{Davidson} were Linda, Trey and Kimberly Davidson, the family of Officer Davidson.\footnote{12} The defendants included the following: Tupac Shakur, the rap artist who performed on \textit{2Pacalypse Now}; Atlantic Records and Time Warner, the record company and its parent company; and Interscope Records, a partner to Atlantic Records in the production and distribution of \textit{2Pacalypse Now}.\footnote{13}

The plaintiffs first brought the action in state court and, following a non-suit, brought their case in the federal district court in the Southern District of Texas.\footnote{14} The plaintiffs brought claims under a negligence theory and a products liability theory and claimed that \textit{2Pacalypse Now} was not protected by the First Amendment because the work fit into four different categories of speech which may be permissibly regulated: obscenity, “fighting words,” incitement, and defamatory invasion of privacy.\footnote{15}

After extensive discovery, the defendants filed motions to dismiss which the court construed as motions for summary judgment due to the large volume of evidentiary matter submitted by both parties.\footnote{16} The defendants argued: (1) that the court could not exert personal jurisdiction over the defendants; (2) that the plaintiffs had not stated a cause of action under negligence or products liability theories; and (3) that \textit{2Pacalypse Now} receives full First Amendment protection and therefore no claim could proceed which would allow liability based on its content.\footnote{17} The court granted summary judgment to all defendants and held that: (1) the court could not exert personal jurisdiction over the defendants; (2) the plaintiffs had not stated a cause of action under a negligence or products liability theory; and (3) that \textit{2Pacalypse Now} was not stripped of its First Amendment

\begin{thebibliography}{99}
\item [10] Id.
\item [11] Id.
\item [13] Id. Defendant Tupac Shakur was killed in September 1996 in an unrelated incident of gun violence.
\item [14] Id. at *1.
\item [15] Id.
\item [16] Id. at *2.
\item [17] Id.
\end{thebibliography}
protection as it could not be deemed to fit under any of the four alleged classes of unprotected speech.\textsuperscript{18}

This note will address only the negligence and First Amendment issues considered by the Southern District of Texas.

III. \textsc{The Reasoning of the Davidson Court}

The district court in \textit{Davidson}, like many other courts faced with a case of some novelty which incorporates several discreet areas of the law, claimed to be deciding the case on state law grounds.\textsuperscript{19} Subsequent to the determination that no cause of action could lie, however, the court elected to discuss the constitutional issues which the defendants raised despite the lack of a necessity to do so.\textsuperscript{20} While ostensibly examining the case under Texas negligence law, the court relied on First Amendment principles to provide its rationale.\textsuperscript{21}

\textit{A. Negligence Liability}

The negligence claim was dismissed based on the court’s unwillingness to impose a legal duty on the defendants not to publish and perform rap music.\textsuperscript{22} The imposition of a legal duty in Texas is a question of law which is determined using a risk-utility balancing test.\textsuperscript{23} The test employed by the Texas courts is broad. It gives the court latitude to consider the risk, foreseeability, and likelihood of injury weighed against the value to society of the actor’s conduct, the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the actor.\textsuperscript{24} It is acknowledged that the imposition of duty is likewise dependent on contemporary attitudes on social, economic, and political questions which are pertinent to the issues presented in a particular

\textsuperscript{18.} Davidson, 1997 WL 405907, at *1.
\textsuperscript{19.} \textit{Id.} at *9.
\textsuperscript{20.} \textit{Id.} at *15.
\textsuperscript{21.} \textit{Id.} at *12 (citing First Amendment protection as the basis for finding of no duty under Texas negligence analysis).
\textsuperscript{22.} \textit{Id.} at *12. The court did so despite dicta indicating that the evidence was sufficient to create a jury question on the element of cause in fact, stating “a reasonable jury could find that the recording entreats others to act on Shakur’s violent message.” \textit{Id.}
\textsuperscript{23.} Venetoulias v. O’Brien, 909 S.W.2d 236, 241 (Tex. App. 1995) (citing Otis Eng’g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983)).
\textsuperscript{24.} Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994).
Foreseeability is the most important factor to be considered under this test. The court considered the foreseeability of violence that could be caused by "2Pacalypse Now" in light of the binding precedent set by *Eimann v. Soldier of Fortune Magazine*. In *Eimann*, the plaintiff sued a magazine publisher for damages after classified ads in a magazine were used to solicit a hit man who murdered the plaintiff's decedent. Relying on the holding in *Eimann*, the *Davidson* court concluded that no duty could be imposed on a publisher to refrain from publicizing ideas even though they may convey some impetus to do violence. The court's determination of foreseeability rested heavily on the presence (or absence in this case) of past occurrences of similar events. In *Eimann*, the plaintiff had presented evidence that the defendant had knowledge of police investigations and convictions in cases which were connected to the classified ads. The plaintiffs in the *Davidson* case, however, had failed to present similar evidence and the court inferred that the lack of such incidents illustrated the low degree of foreseeability.

The court reinforced this finding by analogizing the facts in the *Davidson* case to those in *Way v. Boy Scouts of America*. In *Way*, a boy was injured while experimenting with a rifle after reading an advertising supplement which promoted shooting. The court pointed out that in both cases, the environment in which the injury occurred was outside the control of the publisher.

25. *Id.* (citing TEXAS TORTS AND REMEDIES § 1.03[2], at 1-22 (J. Edgar & J. Sales eds. 1989)).
27. *Davidson*, 1997 WL 405907, at *12 (citing Eimann v. Soldier of Fortune Magazine, 880 F.2d 830 (5th Cir. 1989) (holding that the burden on a publisher of recognizing potentially harmful classified ads and the value of advertising to consumers outweighed the potential for serious harm presented by an ad offering illegal services), cert. denied, 493 U.S. 1024 (1990)).
30. *Id.*
33. 856 S.W.2d 230 (Tex. App. 1993).
34. *Way*, 856 S.W.2d at 232.
the publication had stressed the importance of adult supervision; the court noted that the boy was unsupervised when he was injured.\(^{36}\) The perpetrator in \textit{Davidson} was in the process of committing a felony (stealing a car) when the shooting occurred.\(^{37}\) The court held that a publisher could not be expected to anticipate such volatile circumstances, and therefore, the attack by Ronald Howard was not foreseeable.\(^{38}\) The court found that the shooting of Officer Davidson was not the spontaneous result of the influence of rap music, but rather was the intentional act of an adult criminal during the commission of an unrelated felony.\(^{39}\) The court cited \textit{Way} as support for the proposition that, in general, injuries caused by media-inspired conduct are not foreseeable.\(^{40}\)

The court's analysis of the duty question then turned to the other side of the risk-utility equation, the measurement of the burden of imposing such a duty on a defendant. Relying on \textit{Eimann}, the court concluded that the burden of liability upon a publisher would be intolerably high.\(^{41}\) The court cited fears that such liability would affect the willingness of publishers to market diverse types of music and place excessive limits on artistic expression.\(^{42}\) The court deemed this cost to be too high for society to bear.\(^{43}\) In its examination of duty, the court stressed that its analysis would be limited to state law issues,\(^{44}\) yet its discussion of the burden on the defendant relied on the First Amendment without naming any other issue which would affect this element of the test.\(^{45}\)

The court went on to distinguish the \textit{Davidson} case from the facts in \textit{Braun}

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36. \textit{Way}, 856 S.W.2d at 236.
37. \textit{Davidson}, 1997 WL 405907, at *13. The court apparently discounted the possibility of a causal connection between the influence of the music and the previous act of stealing the car.
38. \textit{Id}.
39. \textit{Davidson}, 1997 WL 405907, at *14. While the court came to this conclusion under an examination of foreseeability, it seems more plausible to reach that result in consideration of the actions of Ronald Howard as a superceding cause, as will be discussed herein.
40. \textit{Id}. Such a finding implicitly relies on First Amendment protection for publishing and broadcasting since the lack of a duty in \textit{Way} was based at least partially on a limited First Amendment protection for commercial speech. \textit{Way}, 256 S.W.2d at 236.
42. \textit{Id} at *12.
43. \textit{Id}.
44. \textit{Id} at *9.
45. \textit{Davidson}, 1997 WL 405907, at *11-*12. Indeed, the court explicitly invoked the First Amendment twice within the evaluation of the burden of imposition of a duty.
v. Soldier of Fortune Magazine. In Braun, the plaintiffs sued the defendant magazine for its role in solicitation of a hit man through a classified ad, and the court in that case allowed recovery. The Davidson court emphasized the distinction between the solicitation of a hit man through a classified ad in Braun, and the act of listening to a cassette of recorded music. The Davidson court noted that it was bound by the Fifth Circuit’s holding in Eimann, where no duty had been imposed when the publisher was alleged to have provided a conduit for criminal activity. The court deemed the more tenuous connection of 2Pacalypse Now to the violent act to be insufficient to allow imposition of a duty. Despite the court’s claim to be disposing of the issue based on common law negligence rules, it continued to make reference to Constitutional protection of speech within the risk-utility analysis.

The Davidson court concluded that placing a burden on a publisher to prevent the distribution of materials which could lead to violence would place unacceptable limitations on the types of content which would be publishable without risk of liability. Thus, the defendants never owed a duty to the plaintiffs.

B. First Amendment Issues

Despite the court’s purported unwillingness to anticipate a constitutional question, the court addressed the plaintiff’s contentions that 2Pacalypse Now is not protected by the First Amendment in a separate analysis. Although the court’s decision on the negligence claim was based on its interpretation of Texas law, the difficulty in determining factors such as foreseeability spurred the court to reinforce its findings with an evaluation of the First Amendment issues, which

46. 968 F.2d 1110 (11th Cir. 1992) (affirming a jury verdict against a magazine publisher where the defendant published a classified ad which was used to solicit a contract murder).
47. Id.
49. Id.
50. Id.
51. Id.
52. Id.
53. Id.
eventually led it to the same conclusion.\textsuperscript{55}

The plaintiffs attempted to lower the burden that they faced in the imposition of a duty by arguing that \textit{2Pacalypse Now} should not be accorded full protection under the First Amendment.\textsuperscript{56} They supported this claim by asserting that \textit{2Pacalypse Now} falls into four categories of speech which the Supreme Court has recognized as not constitutionally protected.\textsuperscript{57} Such an argument is particularly difficult to make in light of numerous cases which establish that music, and rap music specifically, is protected by the First Amendment.\textsuperscript{58}

\textbf{1. Obscenity}

The court applied the test enunciated by \textit{Miller v. California}\textsuperscript{59} in evaluating the status of \textit{2Pacalypse Now} as obscene speech.\textsuperscript{60} The proposition that any work of music can be obscene is questionable on its face based on the opinions of many courts,\textsuperscript{61} but the \textit{Davidson} court did not rely on such a broad rule in order to dismiss this claim.\textsuperscript{62} The court found that \textit{2Pacalypse Now} does not contain the type of graphic depictions of sexual acts which would meet the stringent requirements of \textit{Miller}, and that the recording could be said to have some creative social value as a musical work, even if the court found it distasteful.\textsuperscript{63}

The court further questioned whether a connection could be found between the injury claimed by the plaintiff and the purported obscenity of the work.\textsuperscript{64}

\textsuperscript{55} \textit{Id.}.
\textsuperscript{56} \textit{Id.} at *15.
\textsuperscript{57} \textit{Id.} at *16.
\textsuperscript{58} \textit{E.g.}, \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); \textit{Betts v. McCaughtry}, 827 F. Supp. 1400, 1406 (W.D. Wis. 1993) ("It is undisputed that rap music constitutes speech protected by the First Amendment."), aff'd, 19 F.3d 21 (7th Cir. 1994) (unpublished opinion).
\textsuperscript{59} \textit{413 U.S. 15, 24-25 (1969)} (per curiam).
\textsuperscript{60} \textit{Davidson}, 1997 WL 405907, at *17.
\textsuperscript{62} \textit{Davidson}, 1997 WL 405907, at *17.
\textsuperscript{63} \textit{Id.} Overall, \textit{2Pacalypse Now} contains ample profanity and offensive language, but sexual references are not nearly as plentiful. The most overt references to sex acts are present in narratives describing the lives of female victims of abuse. These references serve the literary purpose of creating sympathy for the victim, and do not appeal to the "prurient interest." 
\textsuperscript{64} \textit{Davidson}, 1997 WL 405907, at *17.
The court reasoned that if the work were to be stripped of its First Amendment protection, there must be a logical nexus between the grounds for denying constitutional protection and the injury allegedly caused by the unprotected work.\textsuperscript{65} The Davidsons asserted that \emph{2Pacalypse Now} caused an act of violence, but the court could find no such connection between obscenity and gun violence.\textsuperscript{66}

2. \textit{Defamation}

The court rejected the plaintiffs claim that \emph{2Pacalypse Now} should be deprived of First Amendment protection because it is defamatory toward Officer Davidson.\textsuperscript{67} While it is clear that defamatory or libelous speech is not constitutionally protected, the court found that \emph{2Pacalypse Now} did not meet the required standard for defamation.\textsuperscript{68} To be defamatory under Texas law, a statement must be false and must refer to an ascertainable person, which normally means the person must be named.\textsuperscript{69} Although \emph{2Pacalypse Now} contains numerous insults and criticisms of police in general, and of the San Francisco Police Department and the Marin County Police Department, at no point in the record is Officer Davidson specifically mentioned.\textsuperscript{70} Thus, the court held that \emph{2Pacalypse Now} could not be stripped of its First Amendment protection as a defamatory invasion of privacy.\textsuperscript{71}

3. \textit{"Fighting Words"}

The court held that \emph{2Pacalypse Now} could not be classified as \textquotedblleft fighting words\textquotedblright{} because the music did not use insulting speech which caused an instant violent reaction toward the speaker.\textsuperscript{72} The Supreme Court has held that it is permissible for states to regulate speech which rises to the level of \textquotedblleft fighting words,\textquotedblright{} speech which by its very utterance tends to incite a breach of the

\begin{itemize}
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Id.
\item \textsuperscript{69} Rogers v. Dallas Morning News, Inc., 889 S.W.2d 467, 472 (Tex. App. 1994).
\item \textsuperscript{70} Davidson, 1997 WL 405907, at *18.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Id.
\end{itemize}
Although the Davidson court recognized that the “fighting words” doctrine applies to a situation where a person insults another person in a way which causes an instinctive, uncontrollable reaction toward the speaker, the court held that this doctrine could not apply where the reaction occurs in response to a recording. The court further distinguished the facts of the case from Chaplinsky v. New Hampshire by noting that the reaction in the present case was against a third person who did not make the statement. Therefore, the “fighting words” exception was inapplicable to this situation.

4. Incitement

The Supreme Court has held that speech which is intended to produce imminent lawless conduct and which is likely to cause such conduct is not protected by the First Amendment. The Davidson court found that the content of 2Pacalypse Now does not rise to the level of incitement as defined by Brandenburg v. Ohio because it does not meet the “imminence” requirement, and because it was unlikely that the recording caused Ronald Howard to act as he had.

Although the plaintiffs had argued that Tupac Shakur specifically targeted his message to a “gangsta” subculture which is predisposed to violence, the court found that the plaintiffs faced great difficulty in showing that a commercial recording could ever meet the incitement standard. The Supreme Court has held that statements which are intended to incite must be directed to a specific person or group of persons. The court found that marketing to a nationwide demographic group could not yield immediacy and that the imposition of a duty upon a publisher to restrict access to a marginalized group would be constitutionally impermissible.

The court distinguished the message of 2Pacalypse Now from the incitement

75. Id.
76. Id. at *19.
79. Id. at *21.
80. Id. at *20.
82. Id.
contemplated by Brandenburg on other grounds as well.\textsuperscript{83} Although the plaintiffs alleged that Tupac Shakur intended his music to be "revolutionary," the court determined this type of speech to be precisely the abstract advocacy that the Supreme Court sought to protect with the Brandenburg standard.\textsuperscript{84}

The Davidson court further pointed out that Ronald Howard's reaction to 2Pacalypse Now was not imminent even as to the time he began listening to the tape.\textsuperscript{85} Howard had in fact been listening to the record over and over when he was stopped by Officer Davidson, and he had spent the day listening to other similar recordings.\textsuperscript{86} Thus, his violent reaction was the result of the confrontation with a police officer, not the content of the record.\textsuperscript{87} Had the reaction been immediate, as required by Brandenburg, he would have attacked whoever was present when the offending lyrics were played.

C. The Conclusions of the Davidson Court

The court structured its analysis on the presumption that the case was to be resolved based on the state's laws of negligence.\textsuperscript{88} Under this precept, the constitutional issues were considered only secondarily, presumably as a means of bolstering the holding for purposes of preventing a reversal on appeal. The court considered the First Amendment issues despite the court's belief that it was unnecessary.\textsuperscript{89} However, an examination of the court's reasoning reveals that the basis of the decision, on nearly every point, rests on the First Amendment rights of the defendants. The substantive law of negligence provided precious little guidance as to how to resolve the case without concurrent consideration of the constitutional rights of the parties. The holding of the Davidson court demonstrates that the negligence model provides an

\textsuperscript{83} Id. at *21.

\textsuperscript{84} Id. at *20. (See Brandenburg, 395 U.S. at 447-48 ("The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation exception where such advocacy is [deemed incitement]. . . . 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.").)

\textsuperscript{85} Davidson, 1997 WL 405907, at *21.

\textsuperscript{86} Id.

\textsuperscript{87} Id.

\textsuperscript{88} Id. at *9.

\textsuperscript{89} Id. at *15.
analytical framework which is well suited to the resolution of the difficult questions posed by a media violence case. However, in order for it to function correctly, the First Amendment rights of the defendant must be considered in the initial imposition of the duty.

IV. THE LEGAL BACKGROUND OF THE DAVIDSON DECISION

A. Foundations of Modern First Amendment Jurisprudence

The modern history of First Amendment law traces its roots to the Supreme Court’s decision in Schenck v. United States.\(^{90}\) That case stemmed from the activities of an anti-draft activist in the politically-charged climate of World War I.\(^{91}\) Schenck was prosecuted under the Espionage Act of 1917\(^ {92}\) for distributing a pamphlet which advocated resistance to the draft.\(^ {93}\) The pamphlet accused the federal government of despotism and intimidation, and questioned the authority of the federal government to send American soldiers to fight in a foreign war.\(^ {94}\) The defendant did not deny that the document was drafted with intent to influence potential conscripts and that the flyer could possibly have the effect of causing resistance, but he claimed the First Amendment as an absolute defense.\(^ {95}\)

A unanimous Court supported the opinion of Justice Holmes in which he articulated the standard by which the status of speech would be evaluated.\(^ {96}\) Justice Holmes stated that “the question in every case is whether the words used are in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”\(^ {97}\) The Court was emphatic in holding that Congress had the authority to restrict speech and that the inquiry into its permissibility turned on the particular circumstances of the speech sought to be restrained.\(^ {98}\) The Court held that the pamphlet in question met this standard, and that the government

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90. 249 U.S. 47 (1919).
91. \textit{Id.} at 48.
94. \textit{Id.} at 51.
95. \textit{Id.}
96. \textit{Id.} at 52.
97. \textit{Id.}
98. \textit{Id.}
was not barred from restricting this type of speech during wartime because the government had a legitimate interest in maintaining compliance with the draft. The clear and present danger test adopted in *Schenck* continued to be the yardstick by which government-imposed restrictions on speech were measured until *Dennis v. United States* greatly broadened the scope of government action which would be permissible under its terms. The *Dennis* case involved a prosecution under the Smith Act which made it unlawful to advocate or teach a duty or desirability of overthrowing or destroying any government of the United States by force. The *Dennis* Court noted two earlier decisions where the clear and present danger test had not been employed. In both *Gitlow v. New York* and *Whitney v. California*, the Court deferred to the finding of the state legislature that speech of a certain type could be inherently dangerous, and upheld the sentences of convicted political organizers. In each of these decisions, however, Justices Holmes and Brandeis dissented, pointing out the necessity for the legislature to demonstrate the connection between the regulation of speech and the substantive evil which the government could permissibly seek to prevent under *Schenck*. The Court went on to adopt the interpretation of the clear and present danger test proposed by the Second Circuit in the opinion of Judge Learned Hand. Judge Hand stated, "in each case, [the court] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." This represented a significant shift toward judicial flexibility in the test.

The Court's holding in *Schenck* required two elements: (1) the presence of

100. 341 U.S. 404 (1951).
104. 268 U.S. 652 (1925).
105. 274 U.S. 357 (1927).
107. *Id.* at 510.
108. *Id.*
109. *Dennis*, 341 U.S. at 510 (quoting *Dennis v. United States*, 183 F.2d 201, 212 (2d Cir. 1950)).
some substantive evil which could be brought on by the speech in question and (2) the imminent likelihood that this result will in fact occur if such speech is permitted. Only where both of these were present would the restriction of speech be within the constitutional power of the government. Judge Learned Hand's adaptation of the test created a standard where two dependent variables could act to mitigate or compensate for one another to allow a greater range of permissible government action. Under this test, a highly improbable harm (as was present in Dennis) may be permissibly repressed by the government if the gravity of the threatened harm was sufficient, and vice versa. Further broadening the standard, the Court in Dennis considered the "gravity of the evil" presented by an attempt to overthrow the government, rather than that of the actual overthrow of the government.

The Court took a great step toward narrowing the range of permissible government restriction on speech in Brandenburg v. Ohio. The defendant in Brandenburg was a local leader of the Ku Klux Klan who was prosecuted under the Ohio Criminal Syndicalism Act. In reversing the conviction, the Court elevated the standard to a requirement of "incitement to imminent lawless action" in order to justify government regulation of private speech. The Court expressly disallowed governmental repression of speech which advocates violation of law or even the use of force where such advocacy falls short of incitement.

The Supreme Court has defined at least two other categories of speech which enjoy less stringent protection under the First Amendment and which may be

111. Schenck, 249 U.S. at 52.
112. Id.
113. By this time, Justices Brandeis and Holmes had moved toward stronger protection of speech, when in dissenting opinions in Whitney, they expressed the willingness to elevate the standard to a requirement of "clear and imminent" danger. Whitney, 274 U.S. at 373.
114. Dennis, 341 U.S. at 506.
116. Id. at 444.
118. Brandenburg, 395 U.S. at 448-49.
governed by criminal statute by the states. In *Miller v. California*, the Court held that a state could prohibit obscene speech where the following factors were satisfied: (1) a work appeals to the prurient interest; (2) the work is patently offensive as defined by community standards; and (3) the work lacks social value of some sort. The Court has also upheld the right of the states to prosecute against "fighting words," speech which is lewd or insulting and which by its very nature tends to provoke disturbances in the peace.

Although this body of case law has provided the courts with a framework to evaluate the severity and the probability of harm that may result from speech, all of these cases address the burden of the government in justifying criminal prosecution for speech offenses. The Constitution makes no express provision for, and the Supreme Court has not evaluated, what limitations would apply to an action by a citizen seeking civil redress for personal injury which is alleged to be the result of some type of speech. Most lower courts have assumed that the *Brandenburg* standard applies in determining the protected status of film, television programs or music against which a media violence claim is brought, but since *Brandenburg* was a criminal prosecution and not a civil case, this proposition is not beyond doubt.

**B. Protected Speech and the Law of Libel**

Some critics have suggested that the media violence claim may be more appropriately analogized to the law of libel. *New York Times v. Sullivan* established that in order to recover damages in a libel action, a public figure must demonstrate that a defamatory statement was made with knowledge of

121. 413 U.S. 15, 24-25 (1972).
falsity or with reckless disregard for the truth or falsity.125 When applied to claims by private parties, the Court has held that the Constitution does not prohibit the states from allowing private parties to bring claims under a lower standard.126 The standard articulated in *Gertz v. Robert Welch, Inc.* bars strict liability, but a plaintiff may recover damages upon proof that the defendant made a defamatory statement which was false and that the defendant is guilty of some fault.127 Perhaps the most important and most cited concept to come out of this field of law for purposes of this topic is the recognition that civil liability can have the same restrictive effect on the free exchange of ideas as any government action and, as such, is subject to the same constitutional limitations as government action.128

The standards presented by *New York Times* and *Gertz*, like that of *Brandenburg*, are not well suited to evaluation of the media violence claim. A cause of action for libel or defamation is perhaps comparable to a personal injury claim in that it addresses the redress of harm from the individual who caused the injury. However, the application of the *New York Times* or *Gertz* standard is inappropriate for two reasons. First, the interests protected are fundamentally different. The law of libel protects against harm to one's reputation, while a physical injury, as is usually present in a media violence claim, is arguably more basic.129 Second, the directness of the harm to reputation caused by the defamatory statement is clear, where the injury in a media violence case may be too remote in its causal connection.

C. Modern First Amendment Cases in the Lower Courts

Government repression of speech may be permissible when such expression is deemed incitement, but the law does not offer civil redress for such offense. The same is true for speech which may be considered obscene or fighting words. A plaintiff who has been harmed in reputation by the words of another may recover for civil damages, but this cause of action does not allow for compensation for a physical injury. Presuming that a plaintiff can overcome the hurdle presented by the First Amendment, it is necessary for the plaintiff to frame his/her injury within the bounds of a cause of action which could afford

127. *Id.*
129. *See Herceg*, 814 F.2d at 1025 (Jones, J., concurring and dissenting).
relief, namely under products liability and negligence claims. This note will
address only the negligence cause of action.

One influential case brought under the negligent speech (broadcasting or
publishing) category is the decision of the California Supreme Court affirming a
jury verdict in Weirum v. RKO General, Inc. In that case, the plaintiff was a
motorist who was injured when he was run off the highway by listeners of the
defendant radio station who were participating in a contest. The offending
listeners caused the accident while attempting to claim a cash prize by being the
first to arrive at a location broadcast by the station where a disc jockey from the
station would make an appearance. In finding that the imposition of a duty
was appropriate, the court took note of the level of influence that the radio
station had with young listeners. This influence was reinforced by the
“money and a small measure of notoriety” which the station offered to its fans
for such behavior.

The court weighed the social utility of the broadcast against the risk of harm
that it presented and found that the likelihood of injury created by the contest
was not justified by any benefit that it may have generated. The court
considered the value of the broadcast only in terms of commercial revenue and
entertainment value. The court rejected the defendant’s argument that the
intervening act by a third party insulated them from liability, noting that the
conduct of the radio station had encouraged these very acts.

The value of this decision as a precedent has been greatly limited by the
California court’s cursory treatment of the First Amendment protection afforded
to the media defendant. The court brushed aside the defendant’s
constitutional defense, apparently applying a lower level of protection for this
type of broadcast because the action was a civil suit. While a finding of
reckless disregard under New York Times could be implied from the court’s

130. 539 P.2d 36 (Cal. 1975).
131. Id. at 38.
132. Id.
133. Id.
134. Id. at 40.
135. Id.
137. Id. (citing Richardson v. Ham, 44 P.2d 269 (Cal. 1955)).
138. Id.
139. Id.
reasoning, or the court's evaluation could be seen as meeting the "clear and present danger" standard mandated by Schenk or even the incitement standard under Brandenburg, the court dismissed the First Amendment issue without reference to a single authority.\textsuperscript{140}

In Clift v. Naragansett, the family of a suicide victim brought an action against a local television station which had broadcast a taped interview with the victim during an armed standoff with the police.\textsuperscript{141} After hearing the fatal shot, the police entered the home and found the victim dead by his own hand in front of the television tuned to the defendant station's news program.\textsuperscript{142} The court cited the rule which permits a civil action where a suicide is the result of an uncontrollable impulse caused by a defendant's negligent act.\textsuperscript{143} While considering the constitutional issues, the court observed that the First Amendment did not protect the press against laws of general applicability and thus the defendant television station was subject to the "uncontrollable impulse rule."\textsuperscript{144} The court held that to bar a negligence cause of action on constitutional grounds in this situation would give unnecessary and overly broad protection to that class of defendants.\textsuperscript{145}

In Hyde v. City of Columbia, an abduction victim brought an action in negligence against both the city and a local newspaper for having published her name and address while her assailant was still at large.\textsuperscript{146} The release of the information about the plaintiff allowed her attacker to terrorize her on several occasions before his eventual capture.\textsuperscript{147} The court held that the newspaper owed a duty of reasonable care to the plaintiff and that the requirements of New York Times were inapplicable to a negligence cause of action.\textsuperscript{148}

The negligent speech cause of action has been brought successfully against non-media defendants as well.\textsuperscript{149} In the case of In re Factor VIII, the defendant, the National Hemophilia Foundation (NHF), was a non-profit organization

\begin{footnotesize}
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    \item 140. Id.
    \item 141. 688 A.2d 805, 806 (R.I. 1996).
    \item 142. Id. at 807.
    \item 143. Clift, 688 A.2d at 808 (citing Bogust v. Anderson, 102 N.W.2d 228, 232 (Wis. 1960)).
    \item 144. Id. at 811.
    \item 145. Id.
    \item 146. 637 S.W.2d 251 (Mo. Ct. App. 1982).
    \item 147. Id. at 253.
    \item 148. Hyde, 637 S.W.2d at 270.
    \item 149. See, e.g., Liberty Lobby, Inc. v. Rees, 111 F.R.D. 19, 20 (D.D.C. 1986) ("There is no distinction between the protections afforded freedom of the press and freedom of speech.").
\end{itemize}
\end{footnotesize}
composed of members of the plasma industry.\textsuperscript{150} The plaintiffs asserted that through NHF reports, they received false and misleading information on the treatment of Hemophilia and use of factor concentrates which caused them to be infected with the HIV virus.\textsuperscript{151} The court balanced the interests of the plaintiffs injured by the provision of erroneous medical information against the restrictive effects of imposing negligence liability on scientific discussion.\textsuperscript{152} The court concluded that the accepted negligence framework was well suited to the accommodation of these interests and that the First Amendment did not protect the defendant from liability for such negligence.\textsuperscript{153}

While the cause of action for negligent speech has been recognized and advanced in several cases, it has more often been rejected as inappropriate. The courts have consistently refused to impose a duty on defendants where the link between the publication and the injury to the plaintiff is tenuous.

In \textit{Way v. Boy Scouts of America}, the Texas Court of Appeals granted summary judgment to the publisher of "Boy's Life" magazine.\textsuperscript{154} The case involved an advertising supplement designed to give information on firearms and to promote shooting among boys.\textsuperscript{155} The court employed a risk-utility test in examining the duty of the publisher.\textsuperscript{156} The court found that the emphasis on safety and supervision in the article was valuable, attributing a great deal of utility to the advertisement.\textsuperscript{157} The critical element was the lack of foreseeability that a child would react to the article by experimenting with guns.\textsuperscript{158} The court declined to impose a duty on the publisher.\textsuperscript{159}

The courts have come to the same conclusion when faced with the duty question where mushroom enthusiasts ate poisonous mushrooms in reliance on a handbook;\textsuperscript{160} where a child hung himself accidentally while imitating a stunt he

\begin{footnotes}
\item[151] \textit{Id.} at 840.
\item[152] \textit{Id.} at 845.
\item[153] \textit{Id.} at 846.
\item[154] 856 S.W.2d 230, 232 (Tex. App. 1993).
\item[155] \textit{Id.}
\item[156] \textit{Id.} at 234.
\item[157] \textit{Id.} at 236.
\item[158] \textit{Id.}
\item[159] \textit{Id.}
\item[160] Winter v. G.P. Putnam's Sons, 938 F.2d 1033 (9th Cir. 1991).
\end{footnotes}
saw on a television talk show; and where a man hung himself while attempting to replicate the experience of auto-erotic asphyxiation described in a pornographic magazine. In each of these cases, the courts found that no liability could attach to the alleged negligent speaker's conduct.

The particular facts are critical in the determination of whether a duty may be imposed upon a media defendant. This is evident in the parallel cases of Braun v. Soldier of Fortune, Inc. and Eimann v. Soldier of Fortune, Inc. In both Braun and Eimann, the plaintiffs sued the magazine under a negligent publishing theory for injuries resulting from murders which were solicited through the classified ads run in Soldier of Fortune. Both courts addressed the duty question under the rubric of Judge Learned Hand's risk-utility test. The court in Braun examined the permissibility of imposing a duty on Soldier of Fortune within the guidelines of commercial speech and libel cases, and concluded that a "modified" negligence standard was permissible under the First Amendment. Such a standard would allow the imposition of tort liability on publishers "for injury caused by the advertisements they print only if the ad on its face, without the need to investigate, makes it apparent that there is a substantial danger of harm to the public." The court affirmed a jury verdict against Soldier of Fortune.

The court in Eimann encountered essentially the same set of facts. However, the jury in that case had been instructed that they could hold Soldier of Fortune liable if they found that the advertisement, within such a context, could be reasonably interpreted as an offer to commit crime. In interpreting the

163. 968 F.2d 1110 (11th Cir. 1992).
164. 880 F.2d 830 (5th Cir. 1989).
165. Braun, 968 F.2d at 1110; Eimann, 880 F.2d at 830.
167. Braun, 968 F.2d at 1118.
168. Id. at 1118-19.
169. Id. at 1122.
170. 880 F.2d 830, 831-32 (5th Cir. 1989).
171. Id. at 833.
district court's instructions to the jury, the court observed that the duty here went further than a duty to investigate each ad.\textsuperscript{172} It required publishers to recognize potentially dangerous ads under a highly flexible standard.\textsuperscript{173} The \textit{Eimann} court noted the value to society of the classified ads as commercial speech while discounting the actual knowledge of the publisher that their ads had been used to solicit criminal activity in the past, including murder.\textsuperscript{174} In reversing the jury's verdict, the appellate court concluded that the duty imposed by the trial court was too high given the ambiguous character of the ad which was the basis of the claim.\textsuperscript{175} The court held that a publisher could not be charged with the responsibility of rejecting advertisements which were ambiguous as to their potential to cause harm.\textsuperscript{176}

It is possible that the distinction between the decisions of \textit{Braun} and \textit{Eimann} may be found in the content of the classified advertisements themselves. The ad in \textit{Braun} was found to pose an unreasonable risk of harm to the public which was clearly identifiable on its face.\textsuperscript{177} In contrast, the court in \textit{Eimann} observed that the text of the ad was facially innocuous, and, at worst, ambiguous as to the intent of the advertiser.\textsuperscript{178} While there are slight factual differences between the two cases, the holdings seem irreconcilable.\textsuperscript{179}

The cause of action for injuries resulting from negligent speech has been recognized where the speaker's conduct puts a particular person at risk.\textsuperscript{180} The state of the law is unclear where the impact of the speaker's influence is apparent, but the foreseeability of harm towards a particular victim is not certain.\textsuperscript{181} Within this class of cases, a theory is proposed that the media, in its

\textsuperscript{172} \textit{Id.} at 836.
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} \textit{Id.} at 835-36.
\textsuperscript{175} \textit{Id.} at 838.
\textsuperscript{176} \textit{Eimann}, 880 F.2d at 838.
\textsuperscript{177} \textit{Braun}, 968 F.2d at 1115.
\textsuperscript{178} \textit{Eimann}, 880 F.2d at 836.
\textsuperscript{179} See also Norwood v. Soldier of Fortune Magazine, Inc. 651 F. Supp. 1397 (W.D. Ark. 1987) (holding that the First Amendment does not preclude publisher liability for "Gun for Hire" advertisement on motion for summary judgment).
\textsuperscript{180} E.g., Hyde v. City of Columbia, 637 S.W.2d 251, 270 (Mo. Ct. App. 1982).
omnipresent and increasingly powerful forms, affects the consciousness of its consumers to such a degree that they succumb to impulses which are intentionally or unintentionally produced by the barrage. In this state of mind, the media consumer is capable of violence toward others. Where a member of the audience acts on this influence, liability of the producer is proposed.

Plaintiffs have had very little success under such theories. The courts have rejected claims where the family of a suicide victim has alleged that his suicidal drives were caused by a rock song;182 where a boy alleged that he had become addicted and desensitized to violence through media contact such that he became a danger to himself and others;183 where a victim alleged that filmmakers produced a film in such a way that it caused viewers to imitate the violent acts contained therein;184 and where a group of children committed rape in imitation of a television movie.185

However, claims have been allowed to proceed in circumstances which are not easily distinguished from these cases. In Byers v. Edmondson, the plaintiff named the producers of the film “Natural Born Killers” as defendants after she was shot in a robbery allegedly inspired by the film.186 The court held that the plaintiffs had stated a viable cause of action when they alleged negligence in the production of a film which glorified and inspired violence.187 On a motion on the pleadings, the court relied heavily on the allegations, accepted as true, of intentional incitement by the defendants which brought the case within the Brandenburg exception.188

Similarly, in Rice v. Paladin Enterprises, Inc., the Fourth Circuit overturned a summary judgment for a defendant who published what the plaintiffs described as a “murder manual” which was allegedly consulted in a contract killing.189 In this case, the court rejected a First Amendment defense and construed a stipulation of the parties to be an admission by the defendant that they had

1998) (victim of crime spree inspired by the movie Natural Born Killers stated a cause of action against the producers of the film for resulting injuries).


185. Olivia N., 178 Cal. Rptr. at 888.


187. Id. at 686-87.

188. Id. at 691.

189. 128 F.3d 233 (4th Cir. 1997).
intended to aid and abet potential murderers by publishing the book.\textsuperscript{190}

At first glance, these cases seem to represent a lower First Amendment standard than was previously permissible in civil suits. However, they are best understood within their procedural contexts. In \textit{Rice}, the defendant stipulated the critical element of intent in order to make the First Amendment defense ripe for summary judgment.\textsuperscript{191} In \textit{Byers}, the court was bound to accept the plaintiff's allegations that the defendant had intended to cause imitative violence because the decision was a motion on the pleadings.\textsuperscript{192} The elements of intent that the courts relied on in both cases were critical to the sustainability of the claim, yet proof of such factors at trial would be very difficult. The critical question is whether these decisions are indicative of a changing view of the First Amendment which would limit the extent of constitutional protection where a speaker causes harm to an innocent third party.

V. THE LAW OF NEGLIGENCE AS AN ANALYTICAL FRAMEWORK FOR THE "MEDIA VIOLENCE CLAIM"

Because of the novelty of the media violence claim and the lack of consensus as to its validity, no uniform approach, nor precise analytical framework for its resolution has yet evolved. A majority of courts hearing media violence cases have first attempted to resolve them under state law without consideration of the constitutional issues presented, deciding the cases using common law negligence rules.\textsuperscript{193} While the principle of judicial restraint embodied by this approach is well advised, the unique considerations brought together in a media violence claim create the necessity of a new approach. This discussion will propose that the rights and responsibilities of the parties are best determined by an incorporation of First Amendment principles into the traditional negligence framework.

A. Duty

In all negligence cases, the first question for the court is whether the

\textsuperscript{190} Id. at 267.
\textsuperscript{191} Id.
\textsuperscript{192} Byers, 712 So. 2d at 683.
defendant owes a duty to the plaintiff. 194 "Where there is no need to decide a constitutional question, it is a venerable principle of this Court's adjudicatory processes not to do so, for '[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" 195 In many cases it is possible to first address issues which can be resolved under state law and thereby avoid the necessity of deciding on a constitutional question. This is precisely the approach which the Davidson court purported to take. 196

The doctrine of ripeness and judicial restraint counsel for such an approach but the applicability of these considerations to the duty question in a media violence claim is doubtful. In a media violence claim, the plaintiff proposes to "punish" the defendant for his speech and therefore the defendant's First Amendment rights present a question which is ripe for review. Where a court attempts to examine the law of negligence separately from the constitutional issues in determining this type of liability, the separation is artificial. The First Amendment operates at precisely this level and is the principal determinant of whether a duty may be imposed on a defendant.

Perhaps the most influential decision in shaping modern negligence law is that of United States v. Carroll Towing Co. 197 In this landmark case, Judge Learned Hand articulated in algebraic formula an operational definition of unreasonable risk under negligence law. 198 The presence of a legal duty is a function of: (1) the probability that harm will result from a defendant's conduct; (2) the gravity of the harm; (3) the burden imposed by the precautions adequate to prevent the harm. 199 Where the burden of precaution is less than the gravity of the harm multiplied by the probability that it will occur, the imposition of a legal duty is appropriate. 200

The duty question in Davidson was framed, like the standard in Texas, under

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196. Davidson, 1997 WL 405907, at *9 (after determining that the court could not exercise personal jurisdiction over the defendants).
197. 159 F.2d 169 (2d Cir. 1947).
198. Id.
199. Id. at 173.
200. Id.
the risk-utility test. 201 This test is fundamentally similar to the Hand formula, except that this version includes a more detailed examination of the burden on the defendant which expressly mandates that the social utility of the conduct and the consequences of the imposition of the burden be considered. 202 The test considers the risk of harm and the likelihood of injury weighed against (1) the social utility of the actor's conduct; (2) the magnitude of the burden of guarding against the injury; and (3) the consequences of placing that burden on the actor. 203

The imposition of civil liability has been deemed the equivalent of government regulation when applied to speech. 204 Therefore, the evaluation of the burden of preventing the harm in any case where the conduct complained of is "speech" must be seen as directly invoking a First Amendment analysis. Under the present state of First Amendment jurisprudence, this can be seen as requiring at least a "clear and present danger" or, more likely, incitement as defined by Brandenburg. 205

Where the conduct is "speech," the social utility of the actor's conduct also requires First Amendment analysis:

The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas. 206

The utility of speech, regardless of violent content, has been deemed to be very high. 207

201. Davidson, 1997 WL 405907, at *10 (quoting Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983)).
203. Foreseeability is also an element of the risk-utility test, but for purposes of analytical clarity foreseeability will be considered within the discussion of proximate cause.
207. See Roth v. United States, 354 U.S. 476, 483-84 (1957) ("The importance of [freedom of speech] consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of
An inquiry into the consequences of burdening the defendant where the conduct complained of is “speech” represents the very rationale for the creation of the First Amendment. Judicial opinions which consider such consequences indicate that the imposition of liability would seriously limit the range of commercially publishable works\textsuperscript{208} and chill vital public debate.\textsuperscript{209}

The proper place for consideration of the constitutional rights of the defendant in a case of “negligent speech” or imitative harm is in the initial imposition of a duty. This question of law has evolved precisely for the purpose of taking into consideration issues of such fundamental importance to society. Numerous decisions, including \textit{Davidson}, have purported to resolve such claims under state law, but in doing so have relied on constitutional arguments. Such reasoning needlessly confuses the issues. The media violence plaintiff faces a difficult task in showing that the gravity of the harm presented by a broadcast and the likelihood that the harm will occur justify the burden imposed upon a defendant and society of denying Constitutional protection.

A model of the negligence cause of action which incorporates First Amendment considerations into the imposition of a legal duty would correctly place the burden on the plaintiff of proving why a legal duty should be imposed. Yet, this framework would not exclude a cause of action categorically, and would allow a plaintiff to proceed where compensable injury has occurred. Where, as in \textit{Davidson}, the duty is perceived by the court to be simply a duty not to publish a particular viewpoint, that burden may prove to be incalculably high.\textsuperscript{210} Where the facts of a case provide the ability to propose a more limited duty, the burden which is imposed upon the defendant and society at large is correspondingly lower, and the consequences of imposing such a duty can be less drastic. This is readily ascertainable from the cases where the Court has found that the defendant owed a duty to the plaintiff. In \textit{Braun v. Soldier of Fortune Magazine, Inc.}, the court held that the publisher had a duty to recognize ads which on their face, without investigation, pose a substantial danger of criminal activity to the public.\textsuperscript{211} In \textit{Hyde v. City of Columbia}, the court held

\begin{quote}
thought between subjects, and its consequential promotion of union among them, whereby oppressive honourable and just modes of conducting affairs.” (quoting \textit{I Journals of the Continental Congress 108 (1774)}).
\end{quote}

\begin{itemize}
\item \textsuperscript{208} \textit{McCollum}, 289 Cal. Rptr. at 197.
\item \textsuperscript{209} \textit{Olivia N.}, 178 Cal. Rptr. at 892.
\item \textsuperscript{210} \textit{Davidson}, 1997 WL 405907, at *10 (“the Court must conclude that Defendants had no duty [to] prevent the distribution of \textit{2Pacalypse Now}.”).
\item \textsuperscript{211} \textit{Braun v. Soldier of Fortune Magazine, Inc.}, 968 F.2d 1110, 1119 (11th Cir. 1992).
\end{itemize}
that the newspaper had a duty to use reasonable care not to give occasion for the
plaintiff's assailant to do her injury by publication of her name and address.\textsuperscript{212}
When the duty is defined in narrow, specific terms, the burden on the defendant
is lower, the consequences of imposing the duty are less drastic, and the
deleterious effects of restricting speech are limited.

It is clear that the Supreme Court has delineated several types of speech
which are not entitled to First Amendment protection.\textsuperscript{213} If the conduct of a
defendant can be shown to fall within one of these exceptions, the obstacles
presented by this analysis would be correspondingly lower. Indeed, the burden
on society of restricting such speech would be nothing at all. This situation
raises a new problem where, for instance, a work is stripped of its First
Amendment protection based on its status as obscenity, and the complaint is of a
personal injury resulting from the violent act of a third person. There is no
obvious connection between the injury and the rationale for depriving the
publisher of their First Amendment rights. Though a work is obscene, a
publisher would have no reason to suspect that violence would result from its
publication. Some courts have held that where there is no causal relationship
between the asserted reason for removing First Amendment protection and the
harm they plead, no such review is proper.\textsuperscript{214}

Yet this apparent non sequitur would not create publisher liability unless the
work genuinely poses a threat to the public, that is, unless it could be shown to
have proximately caused the injury. Assuming that First Amendment protection
is withdrawn based on such a finding, the gravity of the harm discounted by the
level of risk would still have to be shown to exceed the burden of preventing the
harm.\textsuperscript{215} With the determination in place that: (1) the work appeals to the most
base interest; (2) the work is patently offensive by community standards; and (3)
the work has no redeeming social value,\textsuperscript{216} the publisher would still only be
liable where a work causes foreseeable harm to others. This standard does not
place an unfair burden upon producers of obscene materials or others who may
meet the exceptions to First Amendment protection.

The First Amendment would likely prevent the imposition of a duty in the

\textsuperscript{212} Hyde v. City of Columbia, 637 S.W.2d 251, 269 (Mo. Ct. App. 1982).
\textsuperscript{213} See Brandenburg, 395 U.S. at 448-49; Miller, 413 U.S. at 24; Chaplinsky, 315 U.S. at 571-
\textsuperscript{215} See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).
\textsuperscript{216} See Miller v. California, 413 U.S. 15, 24 (1972).
majority of cases, but in those circumstances where such protection is not applicable, the defendant is still held only to a reasonableness standard. Under the negligence framework, the defendant would have the early opportunity to avoid the expense of a trial by moving for summary judgment on this pure question of law, but a plaintiff who had suffered compensable injury would have an opportunity to make a case.

B. Cause "In Fact"

Where a claim of negligence is brought against a defendant, it is necessary that the plaintiff demonstrate by a preponderance of the evidence that the defendant's conduct is the cause of the plaintiff's injury. This element in nearly all jurisdictions is bifurcated into two separate inquiries: cause "in fact" and "proximate" cause. Cause in fact is correctly seen as an empirical inquiry, a question of fact which is left to the jury. In proving this element of the case, two analytical steps are helpful. First, it must be shown that the type of conduct involved can cause the injury; and second, it must be shown that the conduct of the defendant did cause the injury to the plaintiff.

Current research in behavioral psychology may be seen as supporting the proposition that exposure to portrayals of violence through film, television, or other media may predispose an individual toward aggression. The hypothesis that "media violence equals actual violence" has gained broad support within the field, and theoretical models as well as empirical studies continue to reinforce its veracity. Research study of the effects of portrayals of violence began in the mid-1950s and results of such studies have been sufficiently consistent and sufficiently capable of repetition to afford them credibility in scientific terms. There are critics of these theories within and without the community of social psychology, but the breadth of acceptance is indicated by the fact that the

218. Id. § 41, at 265.
221. See, e.g., Jonathan L. Freedman, Television Violence and Agression: a Rejoinder, 100 Psychol. Bull. 372 (1986); see also Bruce W. Sanford & Bruce D. Brown, Hit Man's Miss Hit,
National Institute of Mental Health, the American Psychological Association, and the United States Surgeon General have each published reports which conclude that exposure to media violence can cause persons to commit acts of aggression that they otherwise would not commit. The body of research in this field is vast, and a review of that work is beyond the scope of this note, but a brief discussion of some of the prominent works is necessary. In a seminal experiment, Bandura, Ross and Ross exposed pre-schoolers to adults engaged in either aggressive or non-aggressive play with toys. It was observed that the children who had seen the aggressive behavior of adults reliably displayed more hostile behavior than children who had seen no adult behavior, while the children who had seen the non-aggressive adults displayed less hostile behavior than both the control group and the children who had seen the aggressive behavior. The researchers concluded that violent stimuli had the effect of evoking aggressive behavior and that the adults' behavior had shaped the exact form of these acts. This study and others like it show a short term effect—a reaction close in time to the exposure.

This experiment is the earliest foundation upon which subsequent researchers have built, refining the conclusions of Bandura, Ross and Ross. Other studies have established factors which may exacerbate the effects of

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27 N. KY. L. REV. 69, 70 (2000) ("Indeed, the social science research linking media violence to violent behavior is pitifully underwhelming.").
227. Id. at 582.
228. Id.
229. Id.; See also Leonard Berkowitz, AGGRESSION: A SOCIAL PSYCHOLOGICAL ANALYSIS 236 (1962).
230. E.g., O. Ivar Lovaas, Effect of Exposure to Symbolic Aggression on Aggressive Behavior, 32 CHILD DEV. 37 (1961) (experiment which paralleled the findings of Bandura et al., supra note 226).
exposure to violence in various ways. Subjects often feel threatened by the world around them as a result of exposure to violent films. Children associate the use of force with achieving results. Children will pattern their behavior after the aggressive conduct of a “bad guy” if it is successful, although they recognize that it is wrong. Aggression which is portrayed as “just” in a film or program is even more likely to lead to hostility in viewers.

For purposes of proving cause in fact, presentation of such research would constitute a prima facie showing of the first part of this element. That is, violent films, TV programs or music can cause a person to commit an act of violence that they otherwise would not commit.

Within the facts of the Davidson case, the second part of the analysis follows naturally. The lyrics of 2Pacalypse Now could have caused such a reaction in Ronald Howard. As Howard fled in the stolen car, he must have felt that the world was closing in around him. He was threatened by anyone who might compromise him, and in that state of mind he was clearly predisposed to violence. The words of Tupac Shakur echoed in the stolen Chevy Blazer, describing a criminal lifestyle which defies the authority of the white police and recognizes gun violence as an absolute equalizer. When confronted by a police officer, his reaction was instant. At Tupac’s insistence, he shot.

It is cynically said that the law is usually half a lap behind the progress of the rest of society and limping; this would seem to be no exception. While private businesses, electoral candidates, musical artists, even federal and local governments have accepted and embraced the power of the media to effect changes in the attitudes and behaviors of whole populations, “cause” is still a controversial proposition in the courtroom.

While many critics cite cause as the critical failure of the media violence claim, among many professionals within the media it is considered a settled issue of fact that exposure to radio, TV, print media or the Internet can and does cause certain types of behavior. Many people depend for their livelihoods

231. Id.
234. See Albert Bandura et al., supra note 226.
236. See, e.g., Rajeev Batra and Michael L. Ray, How Advertising Works at Contact, PSYCHOL. PROCESSES AND ADVERTISING EFFECTS 13 (Linda F. Alwitt and Andrew A. Mitchell, eds., 1985);
upon this premise and billions of dollars are spent every year in direct reliance on this belief with success which can be measured in economic terms. The common sense proof of the causal element is the prevalence of advertising. There is an unseemly irony in the fact that many of the high profile defendants in media violence claims have made the argument that their conduct could not have caused the injury while their very existence as a business depends upon their ability to convince advertisers that their medium can be used to cause consumers to buy their products. There are countless theories among scientists as to why and how exposure to mass media functions to affect behavior, but none seem to fully explain the complexity of the power of this communication. It is beyond question, however, that advertising, if effectively employed, can in fact allow a speaker to cause members of an audience to do certain things. This is well supported by scientific research.237

C. Proximate Cause

Once it has been established that a defendant's conduct has in fact been a cause of a plaintiff's injury, the question remains as to whether the defendant should be legally responsible for the injury.238 This question is one of legal policy which serves to allocate the burden of injury among the parties. Proximate cause is properly seen as a set of undefined factors which can limit liability even where the fact of causation is clearly established.239 An inclusive definition of the components of proximate cause is impossible, but it surely is to be decided on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent.240 This discussion will consider three approaches to proximate cause: (1) intervening superceding cause; (2) other substantial factors in causation; (3) foreseeability.241


237. Id.
238. KEETON, supra note 217, § 42.
239. KEETON, supra note 217, § 45, at 321.
240. L. STREET, FOUNDATIONS OF LEGAL LIABILITY 110 (1906).
241. For purposes of the discussion of proximate cause, it is assumed that cause in fact is established.
1. The Act of Ronald Howard as a Superceding Intervening Cause

The most obvious problem with a media violence claim is that the defendant is not the person who actually inflicted the injury. The conduct of the criminal actor can be seen as an intervening, superseding cause which precludes liability. An intervening cause is a new force which joins with the defendant’s conduct to cause the plaintiff’s injury. The determination of whether the act of a third party supercedes the act of the defendant is ordinarily a question of fact which is based on the specific circumstances of a case. Where an intervening act is extraordinary under the circumstances and independent from the defendant’s conduct, it may break the “causal” nexus, relieving him of liability.

The presence of an intervening cause which supercedes the role of the defendant has been found, for example, where the defendant spills gasoline creating a dangerous situation, but a third party intentionally ignites it. In contrast, no such superceding effect was found where the defendant’s negligence created an opportunity for theft, although another actually stole valuables from the plaintiff. Although the cases provide boundaries of a test that can be applied to this situation, there are important distinctions which make it difficult. The normal scenario in which the rule applies is one where the defendant in fact creates a situation in which the plaintiff is at risk. In Davidson, the defendants cannot be said to have created an opportunity for the crime to be committed, nor to have initiated the confrontation between Officer Davidson and Ronald Howard. No act of the defendant set a chain of events into motion which created the situation unless the persuasive effect of the lyrics of 2Pacalypse Now can be found to have motivated the killing. Thus the rule may be interpreted here to require two elements: first, the mental state instigated by listening to 2Pacalypse Now must be so volatile as to present imminent danger; second, the act of Ronald Howard must not have been extraordinary and independent such that it supercedes the effect of this influence. For purposes of this discussion, it is assumed that the first element is satisfied.

Ronald Howard was an adult member of a gang who was capable of

243. See Watson v. Kentucky & Indiana Bridge & Ry., 126 S.W. 146 (Ky. 1910) (holding that intentional wrongdoing of a third party must preclude liability of defendant on proximate cause grounds; however, if the act of the third party had been merely negligent, the defendant may still be held liable).
244. Id.
committing an act of violence of his own free will. \(^{246}\) When he was stopped by a police officer he had already committed a felony by stealing a car and had armed himself for a possible confrontation. \(^{247}\) From the conduct of Howard before the incident it can be inferred that he was prepared to commit acts of violence before he began listening to *2Pacalypse Now* on that day. His actions were the result of his own design and not a reflexive reaction to Tupac Shakur’s message. The defendants have a strong argument that the act of Ronald Howard was an intervening superceding cause which must relieve them of liability.

The plaintiffs in this suit sought to assign blame to the media defendants for Howard’s conduct based on the defendants’ act of producing and distributing the record, yet the murderer who committed the act was not named as a defendant. Allowing liability against the media defendants in this case has the appearance of ignoring the true wrongdoer in favor of the more attractive defendant.

2. The Substantial Factors in Causation of Media Related Violence

Exposure to film or art may trigger a response from a viewer, but every day there are multitudes of factors which influence the consciousness of an actor. The breadth of media influences on every person who grows up in the age of mass media makes it unconscionable to hold a single artist or producer liable based on temporal exposure. The media violence claim generally points to only one violent influence that the offender was exposed to, probably the most recent one. Yet, it is likely that the offender actually developed the capacity for sociopathic behavior over the course of a lifetime.

The First Restatement of Torts adopted the “Substantial Factor” test as a viable approach to proximate cause. \(^{248}\) Under this standard, the defendant’s tort need not have been the only cause of the plaintiff’s injury, but must have been a “substantial factor” in producing the injury. \(^{249}\) Research in social psychology supports the conclusion that media outlets can shape the conduct of their audience. \(^{250}\) However, the same type of research reveals that many other factors

\(^{246}\) *Davidson*, 1997 WL 405907, at *13.
\(^{247}\) *Id.*
\(^{248}\) *Restatement (First) of Torts* §§ 431, 433, 435 (1934).
\(^{249}\) *Id.*
may be more fundamental to a person’s development. A recent study found relationships between aggression and parents’ social class, parents’ education level, and a child’s level of academic achievement. Environmental factors such as cold and crowding have been found to affect human aggression, as has consumption of alcohol. Each of these factors has been found to have causal effects on aggression similar in magnitude to that of exposure to media violence. The scientific community has identified dozens of “causes” of aggression, demonstrating the complexity of the problem.

Under a media violence claim, a single defendant is asked to bear the burden of an injury which can be shown to have been caused by a whole host of factors. The theory that media violence has a cumulative effect on human aggression is broadly accepted within the community of social psychology even if it is yet unsupported by specific research. Researchers in this field theorize that the steady stream of violence which modern consumers take in through the media encourages violent behavior and fosters an acceptance of violence in the world around us.

If a propensity toward explosive violence is the result of a lifetime of exposure to hundreds of thousands of media influences of all types, then the imposition of liability for any single media violence claim is effectively based on the media defendant’s status as the straw that broke the camel’s back. The determination that one program or song “substantially caused” the injury would seem to be based more on the coincidence of the timing of the violator’s exposure rather than on the actual amount of influence exerted by the defendant. If the “cumulative effect” theory is viable, then no one media influence can be said to be a “substantial cause” of such violence. In this way, assigning liability to the publisher of the last episode of violence seen or heard by the criminal is arbitrary and capricious. Whether such lawsuits could have the effect of reducing violence is by no means clear. Without such knowledge, to allow

252. Id.
253. Wood, supra note 250.
255. Wood, supra note 250, at 379.
256. E.g., Wood, supra note 250, at 379; Andison, supra note 220, at 323; Molitor, supra note 219, at 192.
257. Andison, supra note 220, at 315-16.
liability in such a case would create the perception that the cause of action seeks not to prevent violence or to appropriately allocate the burden, but rather to give plaintiffs access to a defendant against whom recovery can be had.

3. Foreseeability

The foreseeability of an injury is established by proof that the actor, as a person of ordinary intelligence, should reasonably have anticipated the danger to others created by his act. In the Davidson case, that inquiry turns on whether Tupac Shakur should have reasonably anticipated that the lyrics on his record, 2Pacalypse Now, would cause someone to do violence to a police officer. This discussion assumes that cause in fact can be established and that First Amendment concerns are considered separately in order to isolate the question of the foreseeability of Officer Davidson’s killing.

It is objectively possible to find that violence is a foreseeable consequence of the overt call by a leader for violence against an identified target. Tupac Shakur’s status as a recording artist makes his views accessible to a broad, global audience and makes him a leader among young people. Tupac Shakur is also a credible advocate of violence. In addition to his own criminal record, his pedigree as the son of two Black Panther militants lends additional legitimacy to a belief that he means it when he advocates violence. Although

259. Although these considerations are assumed here, each would bear heavily on the plaintiff’s argument if foreseeability is established. Even if violence against a police officer is a foreseeable consequence of a publication or broadcast, existing First Amendment jurisprudence may protect even direct advocacy of violence if it does not amount to incitement.
261. Connie Bruck, The Takedown of Tupac. THE NEW YORKER, July 7, 1997, at 48. Mr. Shakur’s mother, Afeni Shakur, was on trial for conspiracy to commit terrorism with a notorious group of co-defendants, the Panther 21, while she was pregnant with her son. She represented herself and was acquitted. Mr. Shakur’s step-father, Dr. Mutulu Shakur, is a former Black Panther militant and is currently serving a sixty year sentence on a federal charge of conspiracy to commit armed robbery and was on the F.B.I’s “10 most wanted list” until his capture in 1986. Mr. Shakur’s godfather, Elmer “Geronimo” Pratt, is a former Black Panther who served almost all of a twenty-
Mr. Shakur was not involved in gang violence prior to his career as a rap singer, he was involved in several widely reported incidents during his career which led to criminal charges and civil suits.262

On 2Pacalypse Now, Tupac Shakur asserts that the United States government systematically operates to perpetuate poverty and suffering in the black community.263 The record contains numerous descriptions of discrimination and mistreatment against African-Americans.264 The record contains descriptions of at least three different scenes in which the protagonist beats and kills police officers.265 The record identifies police officers as the enforcers of the unjust order which is described.266 Mr. Shakur comes to the conclusion that the worst part about the lamentable situation in the black community is that “we’re not fighting back.”267 In sum, the record asserts the need for violence, offers a justification for violence, and identifies a target and a means of attack: gun violence against police officers. If a listener is persuaded by the arguments of Tupac Shakur, it seems perfectly foreseeable that they might attack a police officer, especially if they are detained, even legitimately, by the police.

However, it is recognized that the foreseeability of human conduct, particularly unlawful or negligent conduct, is more difficult to determine than the foreseeability of other events. Ordinarily, a defendant is not expected to foresee unlawful or negligent conduct on the part of a third party.268

Foreseeability has been a particularly difficult obstacle for the media violence plaintiff. Courts have repeatedly found that the imitative acts of viewers and listeners are not foreseeable and that acts of violence purported to

seven year sentence for the killing of a bystander during a robbery. His conviction was recently reversed on grounds that the government suppressed relevant evidence.

262. Id.

263. TUPAC SHAKUR, Words of Wisdom, on 2PACALYPSE NOW (Interscope Records 1991).


265. TUPAC SHAKUR, Trapped, Soulja’s Story, Violent, on 2PACALYPSE NOW (Interscope Records 1991).

266. TUPAC SHAKUR, Trapped, I Don’t Give a F---, Words of Wisdom, on 2PACALYPSE NOW (Interscope Records 1991).


268. Peek v. Oshman’s Sporting Goods, Inc., 768 S.W.2d 841 (Tex. Ct. App. 1989) (holding that it was not foreseeable that firearm sold to an adult would lead to a shooting where purchaser was not manifestly insane or irrational).
be reactions to media influences are unpredictable.\textsuperscript{269} The mass media provide exposure of violent content to an audience which includes elements of society with lawless proclivities and viewers who may be highly impressionable to suggestion. Yet the risk presented by such people has been deemed to be present in all areas of modern life and therefore not indicative of foreseeable harm.\textsuperscript{270}

One case where the injurious conduct of a third party was held to be foreseeable was \textit{Weirum v. RKO General, Inc.}\textsuperscript{271} In that case, the defendant radio station played an active role in the creation of the risk to the plaintiff at the time the situation occurred.\textsuperscript{272} The employees of the radio station created an immediate impetus for their listeners' behavior and encouraged it as it happened.\textsuperscript{273} The same cannot be said about the defendants in \textit{Davidson}. The act of producing a record with violent content was physically remote from the injury of the plaintiff in both time and space. In order to find foreseeability in this situation, the lyrics of \textit{2Pacalypse Now} must be capable of spontaneously prompting the formation of the intent to kill. The foreseeability of Ronald Howard's reaction under \textit{Weirum} would require a contemporaneous knowledge of the circumstances under which the incident would occur.\textsuperscript{274} This knowledge was not in fact possessed by the defendants in this case.

The element of proximate cause is most accurately seen as an opportunity to consider the wisdom of imposing liability for a specific type of conduct based on contemporary social values. Based on the level of uncertainty as to the effectiveness that imposition of liability would have in reducing imitative and inspired violence, these considerations counsel against allowing such cases to proceed in most situations.

\section*{VI. Conclusion}

The occurrence of the type of injury alleged in the media violence claim has become increasingly common, yet the results in such cases have been inconsistent. The adoption of a uniform approach to such cases would help to promote consistency and fairness in their resolution. Examination of such a

\textsuperscript{269} See, e.g., \textit{Sakon v. Pepsico, Inc.}, 553 So. 2d 163, 167 (Fla. 1989).
\textsuperscript{271} 15 Cal. 3d 40 (Cal. 1975).
\textsuperscript{272} \textit{Id.} at 44.
\textsuperscript{273} \textit{Id.}
\textsuperscript{274} \textit{Id.} at 47.
claim must consider the First Amendment protection afforded to all citizens, but in order to afford recovery to a plaintiff, the claim must be brought under a recognized cause of action within the law of torts.

The law of negligence provides an excellent framework for the evaluation of publisher or media liability. The elements of negligence allow analytical clarity through discreet inquiries into each of the vital considerations. Constitutional protections are properly considered in the initial duty question. Under this model, the plaintiff must overcome the presumed protection afforded by the First Amendment early in the proceeding or face dismissal.

The limited amount of cases which have addressed this type of injury demonstrates that no defendant can claim the First Amendment as a defense for every type of alleged injury. Media defendants and speakers are subject to laws of general applicability and, as such, must answer in court to claims brought against them even where constitutional rights may be involved. The circumstances which will allow recovery are extremely narrow, but examination of such a claim under this framework allows for the protection of the rights to free speech of defendants while giving the courts the ability to allow redress where compensable injury can be shown.