

NATURAL BORN COPYCAT KILLERS AND THE LAW OF SHOCK TORTS

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The most pacifistic people in the world said they came out of this movie and wanted to kill somebody.

— Oliver Stone, director of *Natural Born Killers*¹

I. INTRODUCTION

Life imitates art, according to cliché, and, in some instances, so does death. This Article explores the legal ramifications inherent in the putative links between violent deaths—both homicides and suicides—and various entertainment industry products, including motion pictures, television programs, video games, and musical recordings.

We briefly review some examples in which popular entertainment-media

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1. Peter Schweizer, *Bad Imitation*, NAT'L REV., Dec. 1998, at 23.

allegedly played a significant role in spurring individuals to commit acts of violence against themselves or others. While some of these violent events have been widely reported, others are less well known. In any event, we provide some factual predicate in order to establish the context for one of the most controversial legal issues of modern times.

Then we examine the possibility of redress for the survivors of such tragedies through the legal system. Plaintiffs in these cases be the persons or their survivors (e.g., their parents) who absorb these shockingly violent entertainment-media messages and act them out by injuring or killing themselves. Plaintiffs can also be victims (or their survivors) injured or killed by violence acted out by others who have been exposed to shockingly violent forms of entertainment-media. We propose survivors of media-related tragedies seek redress with a new cause of action we have termed “shock torts.”

A shock tort is a cause of action based on acts of violence causally linked to the perpetrator’s exposure—especially if a minor—to shockingly violent forms of mass entertainment that, on their face, appear to be calculated primarily to appeal to persons with an appetite for killing or sociopathic behavior particularly of an unlawful nature. This definition, while admittedly imprecise, attempts to limit the cause of action to those forms of entertainment that objectively appear designed, created, and marketed to emphasize, and to exploit for profit, extremely violent, lawless, and senselessly destructive characteristics. As we shall see, despite the difficulties inherent in categorizing films, video games, music, and the like, reasonable, civilized persons may agree that a line exists which separates actionable from nonactionable examples.

We will discuss in detail multiple legal theories that potentially offer redress for harms caused by shock torts. We also analyze the primary obstacles to successful shock tort litigation, with emphasis on First Amendment concerns that stand as the main barrier to recovery. In the course of parsing the traditional modes of analysis, we propose a new test for evaluating the extent of First Amendment protection appropriate for defendants in these complex and difficult cases.

II. SHOCK TORTS IN RECENT HISTORY

Some of the more extreme examples of recent incidents that fit within our working definition of shock torts follow. During the course of our discussion of the legal issues attendant to shock tort litigation we will return to these examples.

A. Natural Born Killers and Other Motion Pictures

The Oliver Stone film, *Natural Born Killers*,² played on videotape again and again in a Tahlequah, Oklahoma cabin on the night of March 5, 1995. Two eighteen-year-old teenagers, Sarah Edmondson and Ben Darrus, spent the night watching that film repeatedly while consuming LSD tabs.³

The next morning, the pair left the cabin early and cruised the highway, armed with a loaded .38 caliber revolver that belonged to Edmondson's father, a judge from a politically prominent family. As they drove, Darrus spoke about reenacting scenes from the film by killing people at random. According to Edmondson, Darrus talked "crazy," "as if he was fantasizing from the movie."⁴ Then, on March 7, 1995, they drove to a cotton mill near Hernando, Mississippi. Darrus walked into the office and shot a total stranger, an elderly man named Bill Savage, twice in the head at point-blank range. Darrus took some money and returned to the car, where he mocked the groans of the dying man.⁵

The next day, around midnight, they drove to a Time Saver store in Ponchatoula, Louisiana. Darrus told Edmondson that it was her turn now. She entered the store with the revolver in her hand, shot the store cashier, Patsy Byers, and then ran outside, frightened. However, she quickly returned to take money from the cash register, whereupon she said to the bleeding Byers, "Poor ol' thing. You're not dead yet."⁶ Edmondson then departed with Darrus, leaving Byers paralyzed below the neck.⁷ Darrus and Edmondson were apprehended, convicted, and sentenced to thirty-five years in prison.⁸

The film *Natural Born Killers* has allegedly been linked to more than a dozen other murders as well. For example, in a suburb of Paris, France, a nineteen-year-old woman and her twenty-two-year-old boyfriend armed themselves with shotguns and led police on a car chase that culminated in the deaths of five people, including the boyfriend. The pair reportedly loved the film, and the woman's sole comment to police mirrored that of one of the

2. This 1994 motion picture deals with two fictional serial, mass murderers, Mickey and Mallory, who become celebrities and the objects of mass adulation because of their violent crimes. They slay approximately fifty-two people in three weeks, and ultimately escape punishment for their actions.

3. Mark Miller, *Can Pistols Get Smarter?*, NEWSWEEK, Aug. 2, 1999, at 42.

4. David Rubenstein, *Plaintiff Attorney Targets Warner Bros., Oliver Stone After Deadly Rampage*, 9 CORP. L. TIMES 54, 54 (1999).

5. *Id.*

6. Schweizer, *supra* note 1.

7. Byers died of cancer in 1997.

8. Rubenstein, *supra* note 4.

protagonists: "It's fate."⁹

On February 2, 1996, fourteen-year-old Barry Loukaitis walked into a math class at Frontier Middle School in Moses Lake, Washington. He fired an assault rifle while screaming, "This sure beats algebra, doesn't it?" He watched a classmate choke to death on his own blood; his teacher died with an eraser still in her hand. He also killed a popular boy who reportedly had been teasing him. Loukaitis loved the film *Natural Born Killers* and tried to emulate its main character. He even wore the same type of clothes on the day of his murders.¹⁰

Similarly, in 1994, a fourteen-year-old young man accused of decapitating a thirteen-year-old girl in Texas reportedly told police he wanted to be "famous like the natural born killers."¹¹ In Utah, a teenager became so obsessed with the motion picture that he shaved his head and wore the same type of distinctive glasses as the film's character Mickey. Allegedly, he went on to murder his stepmother and half sister.¹² A teenager in Georgia accused of shooting to death an eighty-two-year-old Florida man shouted at the television cameras, "I'm a natural-born killer!"¹³ Four other Georgians in their twenties allegedly killed a truck driver and stole his vehicle after viewing the film nineteen times.¹⁴

While *Natural Born Killers* provides perhaps the most notorious example of a violence-inspiring motion picture, other films have also been linked to murders and rapes. For example, in Great Britain in 1993, two eleven-year-old boys who had recently watched a videotape of the violent film, *Child's Play 3*, kidnapped a toddler named Jamie Bulger from a shopping mall. In the film, *Child's Play 3*, a baby doll comes alive and its face is splashed with blue paint. There is also a kidnaping. In the climax of the film, two boys mutilate and ultimately kill the doll on a train. Likewise, the two real-life assailants abducted Jamie, splashed blue paint on his face, and forced the toddler to walk two miles. Once they had compelled Jamie to stagger to remote railroad tracks, they mutilated, bludgeoned, and murdered him. Then, the two boys left Jamie on the tracks to be run over by the next train.¹⁵

9. Schweizer, *supra* note 1.

10. Susan Vaughan, *What Makes Children Kill?*, HARPER'S BAZAAR, Sept. 1998, at 546. Loukaitis reportedly was also obsessed with the music video for the Pearl Jam song, "Jeremy," which depicted a troubled hero who fantasizes revenge against classmates who had teased him.

11. Schweizer, *supra* note 1.

12. *Id.*

13. *Id.*

14. *Id.* See *Beasley v. Georgia*, 502 S.E.2d 235 (Ga. 1998) (regarding the Georgia slayings). See also *New Mexico v. Begay*, 964 P.2d 102 (N.M. 1998) (a New Mexico *Natural Born Killers* copycat case).

15. David B. Kopel, *Massaging the Medium: Analyzing and Responding to Media Violence*

Violence-inspiring films are not an entirely recent phenomenon. Films from earlier decades have also created controversy due to copycat crimes inspired by their example. For instance, the made-for-television film, *Born Innocent*, first aired on September 10, 1974. It included a scene in which an adolescent woman was “artificially raped” by four other teenage women using a “plumber’s helper.” This “art” was soon imitated in life when, on September 14, 1974, a group of minors at a San Francisco beach “artificially raped” a nine-year-old girl using a bottle. Prior to committing the crime, the assailants viewed and discussed the rape scene in *Born Innocent*.¹⁶

As a final example, the film, *The Warriors*, allegedly generated numerous acts of violence in early 1979. This motion picture depicted street gangs and their battles with one another. So many instances of copycat vandalism and violence—including homicide—followed showings of *The Warriors* that Paramount Pictures Corporation distributed a telegram which offered to release theater owners from their contractual obligation to show the film.¹⁷ Paramount also canceled all of its advertising for *The Warriors*. Both the contractual release and the cancelled advertising constituted unprecedented behavior for motion picture corporations.¹⁸

B. Musical Recordings

Musical recordings have allegedly caused several widely reported incidents of murder or suicide. Most often, heavy-metal rock and “gangsta” rap comprise the types of music that inspire violence.

For example, in April 1992, Ronald Howard drove a stolen automobile through Jackson County, Texas, when Officer Bill Davidson, a state trooper, stopped him for a possible traffic violation unrelated to the theft. Howard fatally shot Officer Davidson with a nine millimeter Glock handgun. At the time of the shooting, Howard was listening to a pirated copy of *2Pacalypse Now*, a recording by the rap artist Tupac Amaru Shakur. Howard later

Without Harming the First Amendment, 4 KAN. J.L. & PUB. POL’Y 17, 21 n.3 (1995). See also Vaughan, *supra* note 10.

16. *Olivia N. v. Nat’l Broad. Co.*, 178 Cal. Rptr. 888 (Cal. Ct. App. 1982).

17. *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1070 (Mass. 1989). The telegram read:

It has come to our attention through newspaper and television reports that acts of violence and vandalism have occurred in and around theatres exhibiting THE WARRIORS Please be advised that in the event you believe that the exhibition of this motion picture in your theatre poses a risk to persons or property, then Paramount will relieve you of your obligation to exhibit the picture

Id.

18. *Id.*

claimed that listening to this recording caused him to shoot Officer Davidson. Nonetheless, a jury convicted and sentenced Howard to death.¹⁹

One song on this recording, “Crooked Ass Nigga,” describes shooting police officers:

Now I could be a crooked nigga too
 When I’m rollin’ with my crew
 Watch what crooked niggas do
 I got a nine millimeter Glock pistol
 I’m ready to get you at the trip of the whistle
 So make your move and act like you wanna flip
 I fired 13 shots and popped another clip
 My brain locks, my Glock’s like a f—kin’ mop,
 The more I shot, the more mothaf—ka’s dropped
 And even cops got shot when they rolled up.²⁰

Two Las Vegas police officers were ambushed and shot by four juveniles in July 1992. The assailants claimed they were moved to commit their crime by a song entitled, “Cop Killer,”²¹ by “gangsta” rap artist Ice-T. Even after their arrest, the juveniles continued to chant the lyrics, which include this chorus:

Die, die, die, pig, die!
 F—k the police!
 Die, die, die, pig, die!
 F—k the police!
 F—k the police!
 F—k the police, for Rodney King.
 F—k the police, for my dead homies.
 F—k the police, for your freedom.
 F—k the police, don’t be a pussy.²²

The coda at the conclusion of “Cop Killer” features Ice-T urging his

19. Davidson v. Time Warner, Inc., No. 94-006, 1997 WL 405907, at *1 (S.D. Tex. Mar. 31, 1997).

20. *Id.* at *1 n.4. Further lyrics from the same song read, “I got a tech-9 now his smokin’ ass is mine . . . Comin’ quickly up the streets is the punk ass police, the first one jumped out and said freeze. I popped him in his knees.” Chuck Philips, *Rap Defense Doesn’t Stop Death Penalty*, L.A. TIMES, July 15, 1993, at F1. Howard was portrayed by his attorney as a “rap addict who lived, breathed and worshiped” the violent lifestyle portrayed in “gangsta” rap. In addition to Shakur’s recordings, Howard also listened to “cop killing” songs by such artists as the Geto Boys, Ice Cube, Ganksta N—I-P, and N.W.A., many of which include bloody descriptions of urban violence. *See id.*

21. Dennis R. Martin, *The Music of Murder*, 2 WM. & MARY BILL RTS. J. 159, 161 (1993).

22. *Id.* at 161-62.

listeners to sing along to the following lyrics:

F—k the police!
I'm a mothaf—kin' cop killer!
Cop killer!
Cop killer!²³

In September of 1996, eighteen-year-old Edward Gallegos shot to death three friends from Orange County, California. Gallegos repeatedly listened to “gangsta” rap artist Brotha Lynch Hung’s song, “Locc 2 da brain,” that describes a street gangster who kills his enemies with a nine-millimeter handgun. Gallegos used such a weapon to commit his murders.²⁴ Similarly, two seventeen-year-olds shot and killed Milwaukee Police Officer William Robertson during a sniper attack on a police van on September 7, 1994, “because of a Tupac Shakur record that talks about killing the police.”²⁵ Curtis Lee Walker, the alleged trigger man, told police that Shakur’s angry lyrics on the *N Gatz We Truss* album “geeked him up” to stalk and kill the officer.²⁶

An infamous example of a violent incident inspired by heavy-metal music occurred on October 26, 1984. A nineteen-year-old adolescent male with a history of alcohol abuse and serious emotional problems, John McCollum, spent much of that night in his family’s living room. McCollum listened repeatedly to Ozzy Osbourne’s recordings, including side one of the *Blizzard of Oz* album and side two of the *Diary of a Madman* album. At some point, he moved into his bedroom and used headphones to listen to the final side of the two-record Ozzy Osbourne album, *Speak of the Devil*. Then he placed a .22 caliber handgun next to his right temple and took his own life. When he was found the next morning, he still wore the headphones and the stereo still ran—the arm and needle riding in the center of the revolving record.²⁷

That night, McCollum had listened to an Osbourne song entitled “Suicide Solution.” This song includes a twenty-eight second instrumental break during which the following masked or subliminal lyrics are sung:

Ah know people
You really know where it’s at
You got it

23. *Id.* at 162.

24. H.G. Reza and Lily Dizon, *Rap’s Role in Crime Refuels Lyrics Debate*, L.A. TIMES, Sept. 28, 1996, at A1.

25. Chuck Philips, *Gangsta Rap: Did Lyrics Inspire Killing of Police?*, L.A. TIMES, Oct. 17, 1994, at F2.

26. *Id.*

27. *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 189-91, 202 (Cal. Ct. App. 1988).

Why try, why try,
Get the gun and try it
Shoot, shoot, shoot.²⁸

The “shoot, shoot, shoot” line repeats for about ten seconds. This song also features clear, unmasked lyrics:

Breaking laws, knocking doors
But there’s no one home
Made your bed, rest your head
But you lie there and moan
Where to hide,
Suicide is the only way out
Don’t you know what it’s really about.²⁹

This same Ozzy Osbourne recording allegedly spurred other youths to commit suicide, including Michael Waller. Waller, who has been described as a “troubled adolescent,” shot and killed himself with a pistol on May 3, 1986, after repeatedly listening to “Suicide Solution.”³⁰

Other heavy-metal songs have also allegedly contributed to teenager suicides. According to his father, one young man was listening to a Marilyn Manson³¹ recording when he killed himself.³² A 1978 recording by the band Judas Priest was linked to a suicide and an attempted suicide by two youths in Reno, Nevada.³³

In addition to suicide, heavy-metal and related types of music have been implicated in instances of violence against others. Indeed, two heavy-metal record labels, Metal Blade and Road Runner, reached an out-of-court settlement in 1997 with Donna Ream, who had been shot in an Oregon convenience store by four local teenagers. The assailants had allegedly been influenced to commit their crime by the recordings of two “death metal” bands, Deicide and Cannibal Corpse. Although the record labels insisted that the settlement implied no admission of responsibility for the shooting, they

28. *Id.* at 191.

29. *Id.*

30. Waller v. Osbourne, 763 F. Supp. 1144, 1145-46 (M.D. Ga. 1991).

31. The group Marilyn Manson, named in part for murderer Charles Manson, is an extreme example of heavy metal bands that seek to stretch the boundaries of the shocking.

32. Eun-Kyung Kim, *Music Warning Labels Probed*, AP ONLINE, June 17, 1998, at 1998 WL 6682454.

33. See Chris Riemenschneider, *Is It Only Rock 'n' Roll? Debate Continues over Role of Music in Columbine Shootings*, TULSA WORLD, June 4, 1999, at 3, available at 1999 WL 5402848. Subliminal suicide-related audio messages, including the words, “Do it,” were allegedly present in the *Stained Class* album and moved the teenagers to take their self-destructive actions (one of which resulted in immediate death, the other in grievous injury followed by death three years later). *Id.*

reportedly agreed to pay Ream eleven million dollars.³⁴

The March 1998 school shooting in Jonesboro, Arkansas, was also linked to the music listened to by the thirteen-year-old assailant, Mitchell Johnson. Reportedly, Johnson played recordings by “gangsta” rap artists such as Tupac Shakur and Bone Thugs ‘N Harmony over and over during the months immediately preceding his shooting rampage.³⁵

Popular music has frequently been blamed for a variety of problems in modern society. Although the accusations are not unique to “gangsta” rap or heavy metal music,³⁶ those categories of popular music have been the primary focal point for criticism and blame in recent years. The cause of this focus is partly due to the perceived relationship between heavy metal, “gangsta” rap, and acts of violence or self-destruction such as those described in this part of the Article.³⁷

C. Video or Computer Games

On December 1, 1997, a prayer meeting in West Paducah, Kentucky, turned into a reified version of the most violent video games. Michael Carneal, then fourteen years old, opened fire on his classmates at Heath High School, killing three of them. A court convicted Carneal of murder and attempted murder, and sentenced him to life imprisonment without possibility of parole for at least twenty-five years.³⁸

Allegedly, both a violent sequence in the film, *The Basketball Diaries*,³⁹ and his extensive experience with violent video and computer games influenced Carneal. According to Miami attorney Jack Thompson, video games such as *Doom* and the various versions of *Mortal Kombat* “trained the murderer, Michael Carneal, how to kill and to enjoy killing.”⁴⁰

These point-and-shoot video games, which reward fast and precise marksmanship and accustom their users to the virtually constant sight of realistic blood and gore, have been singled out as a key factor in the

34. Andrew Smith, *A Devil Gets All The Worst Tunes*, SUNDAY TIMES (London), May 18, 1997, § 11 (Culture Magazine), at 8.

35. Vaughan, *supra* note 10. Johnson reportedly also enjoyed the violent video game, *Mortal Kombat*. *Id.*

36. For example, convicted mass-murderer Charles Manson’s followers claimed that he had been influenced by the Beatles’ songs. See Reza & Dizon, *supra* note 24.

37. See generally RONIN RO, GANGSTA: MERCHANDIZING THE RHYMES OF VIOLENCE (1996).

38. Maria Puente, *Lawsuit Blames Media for School Slayings*, USA TODAY, Apr. 12, 1999, at A3.

39. The motion picture, *The Basketball Diaries*, starred teen idol Leonardo DiCaprio as a former high school basketball star who descended into a lifestyle of drugs and violent crime. In one sequence, DiCaprio’s character had a dream in which he gunned down his teachers and classmates at school.

40. Dave Shiflett, *The Children Strike Back*, AM. SPECTATOR, July 1999, at 42, 46.

shootings. As Thompson explained it, Carneal displayed “phenomenal marksmanship” despite never having previously fired a real handgun in his life; he fired eight shots—five hit the targets’ heads and three hit their upper torsos.⁴¹ Carneal used a shooting technique “that is totally unnatural and counter-intuitive.” He pulled the trigger at one target, only once, and then moved swiftly to the next target, contrary to the “natural, untrained instinct . . . to unload one’s gun into a target until it hits the ground.”⁴²

Commentators have also mentioned violent video and computer games, films, and other fantasy games such as *Dungeons and Dragons*,⁴³ as possible factors contributing to the infamous massacre at Columbine High School in Littleton, Colorado, on April 20, 1999.⁴⁴ Some commentators believe sophisticated virtual-reality video games, in effect, provide the equivalent of military training to their users, inuring them to frequent, reflexive firing of deadly weapons and, over time, aiding them to overcome the natural tendency to hesitate when presented with the opportunity to kill another person.⁴⁵ Repeated, prolonged experience at the controls of such video games may be no different from the type of reflex training armies use to improve their “kill” rates; the games serve as a form of “operant conditioning” or a process of stimulus-response that, over the course of hundreds of repetitions, conditions a person to perform without thinking, as a reflex.⁴⁶

Because of these and other instances in which graphically violent video or computer games have reportedly been a cause of real-life attacks, such games have attracted a great deal of scrutiny. Commentators have pondered the

41. *Id.* at 47.

42. *Id.*

43. *Dungeons and Dragons* will not be a major focal point in this Article because it lacks one of the key characteristics associated with shock torts; it is not an intentionally, shockingly violent form of mass entertainment. For many years this role-playing fantasy game has been blamed for numerous suicides, usually of teenagers. See Howard Witt, *Fantasy Game Turns Into Deadly Reality*, CHI. TRIB., Jan. 27, 1985, at C3. However, the game does not fit within the rubric we have set forth for shock torts. We are not attempting to fashion a one-size-fits-all cause of action that will encompass all harms that might be linked to entertainment industry products of whatever stripe. Rather, we are focusing only on those types of entertainment that are, on their face, calculated to shock, to outrage, and to violate societal norms of civilized behavior.

44. Marc Fisher, *‘Trench Coat’ Mafia Spun Dark Fantasy*, WASH. POST, Apr. 21, 1999, at A1. The motion picture, *The Basketball Diaries*, allegedly was an influence on the Littleton murders, who dressed in the same type of long black trench coats worn by the star of that film. *Id.*

45. See H.J. Cummins, *Training Kids to Kill: War Expert Says Video Games Breed Violence*, CHI. SUN-TIMES, Jan. 25, 1999, at 40, available at 1999 WL 6522562.

46. See generally DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (1995). In Grossman’s opinion, these video games are actually more dangerous than military training, because the military teaches soldiers some important safeguards, such as the law of armed conflict and to shoot only when ordered to do so by persons with proper official authority. In contrast, video games tend to condition people to shoot, not to refrain from shooting, and to do so as rapidly and efficiently as possible. *Id.* at 314-16.

need for legislation, warning labels, rating systems, and other means of protecting violent video or computer game users and those with whom the users may come into contact.⁴⁷ This Article, however, focuses on the potential use of tort law as a partial solution to the problem.

We now examine the approaches traditionally used for seeking redress of various media-related harms, some of which fit our definition of shock torts. During this analysis, we consider in some detail the facts and legal analysis of the seminal cases in which plaintiffs have sought to use the courts to gain compensation for physical harms that were allegedly caused by the entertainment-media industry. As part of our treatment of the case law, we explicate the various legal challenges that would face plaintiffs in shock tort litigation.

Because these cases tend to be heavily fact-specific, and many of the key cases fail to consider with any sophistication the facts underlying the relevant precedents, we will delve into the facts in considerable depth. Too often the courts have merely summarized each case in a single line to forge a litany of magic words that they then used as a string citation to bolster their judgments but also perpetuate misinterpretations. If the confusion that now prevails in media-related torts is to be ameliorated, it is essential to understand the factual predicate in each case.

III. THE CASE LAW OF MEDIA-RELATED TORTS

Historically, plaintiffs, who asserted tort claims arising out of physical injuries allegedly caused by communication or entertainment-media defendants, have enjoyed decidedly limited success in state and lower federal courts. There is, however, room within the existing case law for a new paradigm to emerge in the area of shock torts. Our analysis of the legal precedent will show that some of the courts have reflexively and uncritically employed certain modes of dealing with media-related cases, often failing to differentiate between significantly divergent types of cases. Although the results in these cases are not surprising given the rubric within which the courts have considered them, there is another valid method of dealing with these cases that may yield very different outcomes. We shall consider that alternative method in Part IV of this Article.

47. See, e.g., Matthew Hamilton, Comment, *Graphic Violence in Computer and Video Games: Is Legislation the Answer?*, 100 DICK. L. REV. 181 (1995).

A. *The Applicable First Amendment Principles in General*

The primary legal impediment to recovery in media-related cases, quite naturally, has been the First Amendment, which provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”⁴⁸ There is a vast, complex body of case law fleshing out the implications of those few, simple words. There are several cases, however, that stand out as landmarks and have influenced the outcome of the types of cases with which we are concerned in this Article.

Many of the shock torts cases in which the plaintiffs were unsuccessful turned on the courts’ reliance on *Brandenburg v. Ohio*.⁴⁹ In *Brandenburg*, a Ku Klux Klan leader addressed a meeting of twelve Klan members in what they called an “organizer’s meeting.”⁵⁰ Some of the attending Klan members carried firearms, and they burned a large wooden cross. The leader’s speech featured racist comments regarding African Americans and Jewish people, as well as the comment, “We’re not a revengent [sic] 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 [sic] taken.”⁵¹

The Supreme Court reversed the Klan leader’s conviction under Ohio’s criminal syndicalism statute on the basis that the statute was not properly limited to advocacy (1) “directed to inciting or producing imminent lawless action”⁵² and (2) “likely to incite or produce such action.”⁵³ The factors are conjunctive, not disjunctive—that is, absent the plaintiff’s establishment of both factors, “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

48. U.S. CONST. amend. I.

49. 395 U.S. 444 (1969).

50. *Id.* at 446.

51. *Id.* at 445-46. The Klan leader also spoke of a march on Congress by 4,000 men which was planned for the upcoming Independence Day. *Id.* at 446.

52. *Id.* at 447. The sole focus on words of incitement as unprotected was borrowed from the opinion by Judge Learned Hand in *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917), *rev’d*, 246 F. 24 (2d Cir. 1917), in which Judge Hand ordered the postmaster of New York not to exclude from the mails a revolutionary journal containing articles, poems, and cartoons attacking the war against Germany (later known as World War I). Judge Hand declared, “One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.” *Id.*

53. *Brandenburg*, 395 U.S. at 447. The Court cited the earlier case of *Whitney v. California*, 274 U.S. 357 (1927), and found that *Whitney*’s holding that an act of advocating violent means for change could be outlawed merely because it involved danger to the security of the state had been “thoroughly discredited” by later decisions. *Id.*

law violation.”⁵⁴

Some commentators have parsed the *Brandenburg* test to consist of the following elements: (1) direct advocacy of unlawful action; (2) the intent by the communicator to incite or produce such unlawful action; (3) the likelihood that such unlawful action would, in fact, occur; and (4) the lawless action would be imminent.⁵⁵ This analysis presents a very rigorous test, probably not intended by the Court to be applied literally nor to be applied in cases with fact patterns very different from the *Brandenburg* scenario, wherein persons are prosecuted and convicted for expressing highly unpopular political views that allegedly advocate crimes. The Court has never indicated an intent to use the *Brandenburg* test uniformly, across the entire spectrum of factual contexts.⁵⁶ Nonetheless, many lower courts have applied *Brandenburg* literally, in a wide variety of contexts, and left those injured with some very unfortunate results.⁵⁷ In general, lower courts have not read *Brandenburg* narrowly, nor restricted its analysis to cases presenting facts similar to its own. Most importantly, in the special circumstances of

54. *Id.*

55. Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach*, 34 ARIZ. L. REV. 232, 256 (1992).

56. *But see* N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982) (applying the *Brandenburg* test in a civil rather than criminal case). However, the *Claiborne* case did concern controversial political speech, as did the other forerunners and progeny of *Brandenburg* to reach the high court. In this instance, a civil rights organizer was sued by white merchants in Mississippi for organizing a boycott of their businesses. The organizer had given a speech in which he threatened violence against members of the African American community who failed to support the boycott, stating that “they would be watched,” would be “answerable to him,” and would “have their necks broken.” *Id.* at 900 n.28. The Court held, *inter alia*, that the speech did not rise to the level of incitement, and left open the question as to whether civil liability might have attached if violence had followed the speech.

57. In fact, the Supreme Court itself arguably misapplied the *Brandenburg* test in *Hess v. Indiana*, 414 U.S. 105 (1973). In *Hess*, there was a demonstration which involved participants blocking the passage of vehicles on a public street. When law enforcement officers attempted to clear the street, Hess shouted either “We’ll take the f—king street later” or “We’ll take the f—king street again.” *Id.* at 106-07. The majority held this remark could not be punished as incitement of unlawful action under *Brandenburg* because it “was not directed to any person or group of persons” and there was no evidence or rational inference that “his words were intended to produce, and likely to produce, imminent” violations of the law. *Id.* at 108-09. In dissent, Justice Rehnquist, joined by Chief Justice Burger and Justice Blackmun, stated, “Surely the sentence ‘We’ll take the f—king street later . . .’ is susceptible of characterization as an exhortation, particularly when uttered in a loud voice while facing a crowd.” *Id.* at 111. The majority opinion ignored the highly charged context in which the words were uttered, which made unlawful actions likely. Also, the majority misread the *Brandenburg* test as requiring that the speech, taken by itself and out of context, must be “intended to produce” imminent unlawful action “in the normal sense,” rather than “directed to inciting or producing imminent lawless action.” *Id.* at 108-09. Taken literally, the *Hess* formulation would immunize “even the most brazen incitement, if the crime is to take place a few moments in the future.” *See* David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 14-18 (1994).

shock torts, *Brandenburg* is not the appropriate analysis.

The extreme requirements of the *Brandenburg* test are most properly understood as a reflection of both the specific facts of that case and the then existing precedent of “clear and present danger” jurisprudence that the Court wished to modify. Since Justice Oliver Wendell Holmes initially formulated the “clear and present danger” test for a unanimous Court in *Schenck v. United States*⁵⁸—a case involving military insubordination and resistance to the World War I draft—virtually all of the Supreme Court cases following, that applied the “clear and present danger” test, involved criminal convictions of people who gave highly unpopular political speeches which allegedly advocated criminal activity.⁵⁹ Thus, the Warren Court’s restrictive *Brandenburg* modification of the “clear and present danger” test arose from the Court’s recognition of the political nature of these cases and a historical perception that the Court had not provided adequate First Amendment protection to these marginalized political speakers. Also, unlike the cases in which persons were prosecuted for merely subscribing to party manifestos or platforms advocating political change by means of unlawful force such as *Whitney* and *Gitlow*, *Brandenburg* featured a racist speaker directly addressing a like-minded gathering of armed Klansmen.⁶⁰

The Court’s use of the word “imminent” has generated considerable misunderstanding. As some commentators have suggested, the Court could not have intended “imminent” to mean “immediate” in the sense that the resultant action would ensue without any lapse of time.⁶¹ It would not make

58. 249 U.S. 47, 52 (1919).

59. The Court upheld such criminal convictions in a variety of political contexts. *See, e.g.*, *Noto v. United States*, 367 U.S. 290 (1961) (worker-member of Communist Party); *Scales v. United States*, 367 U.S. 203 (1961) (state chairperson of Communist Party); *Yates v. United States*, 354 U.S. 298 (1957) (second-level Communist Party leadership advocating the violent overthrow of the U.S. government); *Dennis v. United States*, 341 U.S. 494 (1951) (Communist Party leadership advocating the violent overthrow of the U.S. government); *Feiner v. New York*, 340 U.S. 315 (1951) (upholding a conviction based upon the “clear and present danger” that the listeners might react violently against the Communist Party speaker himself); *Whitney v. California*, 274 U.S. 357 (1927) (upholding criminal syndicalism conviction based on membership in a state Communist Labor Party which urged criminal syndicalism); *Abrams v. United States*, 250 U.S. 616 (1919) (urging a general strike to hamper American intervention against the Bolshevik revolution in Russia, thereby interfering with the World War I war effort). *See also* *Gitlow v. New York*, 268 U.S. 652 (1925) (upholding conviction for publishing the *Left Wing Manifesto* without using the “clear and present danger” test and deferring to legislative judgment as to the gravity of the danger presented by the crimes advocated).

60. The highly explosive atmosphere of the Klan meeting probably focused the Court’s attention on the need to protect unpopular political speech if “incitement” of imminent violence is not both intended by the speaker and likely to ensue.

61. The imminence requirement has been read literally by several lower courts, as we shall see. However, in contexts other than the *Brandenburg* scenario, in which a “live and in-person” speaker personally directs unpopular political speech at an “armed and dangerous” crowd, such a formalistic view is almost certainly not what the Court intended. In recognition of the over-protective nature of a

sense to protect speech that incites the listener to commit a crime an hour, a day, or a week later. The legal system, for instance, does not find a First Amendment bar to punishing a contract murder merely because the conspirators scheduled the killing for a future date.⁶² State and lower federal courts have therefore interpreted the imminence requirement more broadly, allowing prosecutions for the solicitation of criminal acts at some future time.⁶³ Rather than a requirement of temporal immediacy, when considered within the context of the “clear and present danger” test from which it emerged, the *Brandenburg* imminence requirement should be viewed as a measure of the predictability of the result.

The *Brandenburg* category of “incitement,” for example, words that are directed to, and likely to, incite or produce “imminent” lawless action, is one of four main categories of expression that the Court has held unprotected by the First Amendment. In addition to “incitement,” the Supreme Court has ruled that the government may properly proscribe “obscenity,”⁶⁴ “fighting words,”⁶⁵ and “defamatory invasions of privacy” in its many forms.⁶⁶ Of

strict imminence requirement, state and lower federal courts have deemed “imminent” criminal actions solicited for a future date, despite the time lapse between solicitation of the crime and the commission thereof. *See, e.g.*, *People v. Rubin*, 158 Cal. Rptr. 488, 492-93 (Cal. Ct. App. 1979) (holding an offer of \$500 to any person “who kills, maims, or seriously injures a member of the American Nazi Party,” made at a press conference in connection with the protest of a Nazi march planned for five weeks later, sufficient to constitute solicitation of murder and within the meaning of “imminent” for purposes of *Brandenburg*, and thus unprotected by the First Amendment). *See also* *United States v. Compton*, 428 F.2d 18 (2d Cir. 1970) (finding a threat to assassinate the President two weeks later “imminent”). *See also* *Crump*, *supra* note 57, at 58-62.

62. *Brandenburg* rejected decisions such as *Whitney* and *Dennis*, which allowed criminal convictions predicated upon the remote possibility of a proletarian revolution in the United States. The *Brandenburg* test’s imminence requirement reacted to the criminalization of advocacy with such improbable consequences. The flaw in the earlier cases was not so much that mass revolution would occur after some period of time, but instead, that it was not likely to result at all. A proletarian revolution in this country could only have occurred as a result of a great deal of persuasion and work over a span of many years. Predictability and probability of the result is what concerned the *Brandenburg* Court, not a gap in time. The act of setting a time-bomb creates an “imminent” danger, notwithstanding the fact that the bomb might not be timed to explode for a month or more. *See* *Crump*, *supra* note 57, at 60-61.

63. *See, e.g.*, *United States v. Compton*, 428 F.2d 18 (2d Cir. 1970); *Rubin*, 158 Cal. Rptr. at 492-93.

64. *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115 (1989); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

65. *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940). In the opinion of some commentators, the ambit of the “fighting words” exception has diminished over time. *See generally* Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135 (1994); Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527 (1993); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 510-11; Aviva O. Wertheimer, Note, *The First*

course, speech in numerous other forms can also constitute a crime or serve as a predicate to a crime.⁶⁷ Additionally, there is authority for the proposition that “commercial speech,”⁶⁸ such as advertising, is entitled to less First Amendment protection than types of expression not designed to gain profit. Other kinds of expression also receive less than plenary protection.⁶⁹ We shall return to the four explicit classes of unprotected speech and their marginally protected relatives shortly, as part of our detailed examination of shock torts case law.

It is important to note one other facet of First Amendment jurisprudence given the fact that virtually all of the paradigmatic shock torts within recent history have involved adolescents, and that we have incorporated the factor of a minor-age victim/consumer into our definition to a certain extent. Under settled Supreme Court doctrine, speech that would otherwise be protected under the First Amendment may be restricted if the restriction is necessary to protect minors.

For example, in *Sable Communications v. FCC*,⁷⁰ the Supreme Court stated:

The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further [that] interest. We have

Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence, 63 *FORDHAM L. REV.* 793 (1994). See *Cohen v. California*, 403 U.S. 15 (1971).

66. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Beauharnais v. Illinois*, 343 U.S. 250 (1952). See also *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (dealing with libel). The case law is complex and evolving, but there is generally a greater judicial willingness to allow defamation actions by nonpublic figures and in cases where the speech in question does not deal with a matter of public concern. See generally Arlen W. Langvardt, *Section 43(a), Commercial Falsehood, and the First Amendment: A Proposed Framework*, 78 *MINN. L. REV.* 309, 342-66 (1993).

67. Examples include treason, *Scales v. United States*, 367 U.S. 203, 228 (1961), and perjury, *LaChance v. Erickson*, 522 U.S. 262, 266-67 (1998) (citing *Dennis v. United States*, 384 U.S. 855 (1966)).

68. For the principle that “commercial speech” is entitled to a lesser degree of protection, see *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973); *Valentine v. Chrestensen*, 316 U.S. 52 (1942). The Court has become more protective of commercial speech over the years, but there are still lingering reservations indicating less than complete applicability of First Amendment safeguards. See Note, *Freedom of Expression in a Commercial Context*, 78 *HARV. L. REV.* 1191 (1965); Paul S. Zimmerman, Note, *Hanging Up On Commercial Speech: Moser v. F.C.C.*, 71 *WASH. L. REV.* 571 (1996).

69. Child pornography, for example, has been held unprotected. See *New York v. Ferber*, 458 U.S. 747 (1982).

70. 492 U.S. 115 (1989).

recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is [fully protected] by adult standards.⁷¹

The Supreme Court has repeatedly held that speech which adults have a constitutional right to see or hear may be restricted in order to prevent an improper influence on minors, so long as the restriction is “carefully tailored to achieve [that] end.”⁷² As the Court explained in *Reno v. American Civil Liberties Union*,⁷³ “[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials [so long as] that interest does not [result in] an unnecessarily broad suppression of speech addressed to adults.”⁷⁴

For the purposes of our discussion of shock torts that by definition involves expression by members of the entertainment industry, we must first review additional precedent to establish the proper framework for analysis. As a threshold matter, it should be reiterated that *Brandenburg* and many other landmark First Amendment cases centered around political speech that is at the core of the interests sought to be protected by the framers of the Constitution and the First Amendment.⁷⁵ Political speech is the lifeblood of the democratic process—the essential raw material from which our freedoms issue—and, as such, the Court has always afforded it the preeminent position in the pantheon of protected expression.

In modern times, the Court has also held other forms of expression, such as entertainment-media, worthy of at least some protection under the First Amendment. Nevertheless, the Court has not explicitly stated whether this nonpolitical speech enjoys the totally protective shield that guards political expression. At a minimum, case law clearly establishes the general applicability of the First Amendment to expression that takes the form of entertainment.

For example, one state court has stated “the overriding constitutional principle that material communicated by the public media, including fictional material such as the television drama here at issue, is generally to be

71. *Id.* at 126.

72. *Id.*

73. 521 U.S. 844 (1997) (striking down The Communications Decency Act of 1996).

74. *Id.* at 875. See *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 755 (1996); *Osborne v. Ohio*, 495 U.S. 103, 115 (1990); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *New York v. Ferber*, 458 U.S. 747 (1982).

75. See *Cohen v. California*, 403 U.S. 15, 19-23 (1971); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942). See generally Staughton Lynd, Comment, *Brandenburg v. Ohio: A Speech Test For All Seasons*, 43 U. CHI. L. REV. 151 (1975).

accorded protection under the First Amendment to the Constitution of the United States.”⁷⁶ Also, although political speech lies at the heart of almost all of the landmark First Amendment cases, freedom of expression is not limited to political expression or comment on public affairs.⁷⁷ Rather, freedom of expression must “embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”⁷⁸ However, mass entertainment-media, such as television broadcasting, poses “unique and special problems not present in the traditional free speech case.”⁷⁹ Let us consider some specific examples.

B. Plaintiff-Favorable Media-Related Precedent

A remarkable divergence in the case law exists in terms of the degree to which courts use the First Amendment as a determining factor in shock torts and other media-related tort cases. We first examine a group of decisions in which the courts have not found a First Amendment obstacle.

In *Weirum v. RKO General, Inc.*,⁸⁰ a highly popular Los Angeles rock radio station, KHJ, had an extensive teenage audience. The station conducted a contest on July 16, 1970, that rewarded the first contestant to locate a mobile disc jockey, Donald Steele Revert, known professionally as “The Real Don Steele.”⁸¹ Steele traveled in a conspicuous red automobile to a number of locations in the Los Angeles metropolitan area that day. Periodically, he apprised KHJ of his whereabouts and his intended destination, and the station broadcast the information to its listeners. KHJ promised the first person to physically locate Steele and fulfill a specified

76. *Olivia N. v. NBC*, 141 Cal. Rptr. 511, 513 (Cal. Ct. App. 1977). *See also Winters v. New York*, 333 U.S. 507, 510 (1948).

77. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

78. *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

79. *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 101 (1973). The broadcast medium has arguably received somewhat less First Amendment protection than other forms of communication. *See F.C.C. v. Pacifica Found.*, 438 U.S. 726, 762 (1978) (Powell, J., concurring). *See, e.g., F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984); *F.C.C. v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775 (1978); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367 (1969). *See also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 493, 503 (1952) (noting unique problems inherent in each medium).

80. 539 P.2d 36 (Cal. 1975). This oft-cited case has been interpreted and misinterpreted in many of the cases discussed *infra* Part IIIAB-C. Because a proper understanding of *Weirum* depends on an understanding of its unusual facts, they are recounted in some detail here.

81. In order to attract an even larger portion of the available audience and thus increase advertising revenue, KHJ launched a promotion entitled “The Super Summer Spectacular,” with a budget of approximately \$40,000 for the month, which was designed specifically to make the radio station “more exciting.” Among the programs included in the “Summer Spectacular” was a contest broadcast on July 16, 1970, the date of the accident. *Id.* at 38.

condition a small cash prize. In addition, Steele would briefly interview the winning contestant on the air.⁸²

The disc jockey never explicitly advocated any unlawful activity during the July 16 broadcasts, nor was it suggested that he ever exceeded the speed limit himself. The following excerpts from the broadcast illustrate the tenor of the contest announcements:

9:30 and The Real Don Steele is back on his feet again with some money and he is headed for the Valley. Thought I would give you a warning so that you can get your kids out of the street The Real Don Steele is out driving on—could be in your neighborhood at any time and he's got bread to spread, so be on the lookout for him The Real Don Steele is moving into Canoga Park—so be on the lookout for him. I'll tell you what will happen if you get to The Real Don Steele. He's got twenty-five dollars to give away if you can get it . . . and baby, all signed and sealed and delivered and wrapped up 10:54—The Real Don Steele is in the Valley near the intersection of Topanga and Roscoe Boulevard, right by the Loew's Holiday Theater—you know where that is at, and he's standing there with a little money he would like to give away to the first person to arrive and tell him what type car I helped Robert W. Morgan give away yesterday morning at KHJ. What was the make of the car. If you know that, split. Intersection of Topanga and Roscoe Boulevard—right nearby the Loew's Holiday Theater—you will find The Real Don Steele. Tell him and pick up the bread.⁸³

Two teenage listeners driving in separate automobiles pursued the disc jockey's car at high speed to its next stop.⁸⁴ Ultimately, they forced another motorist's car onto the center divider.⁸⁵ The vehicle overturned, and the driver, its sole occupant, was killed.⁸⁶ At trial, the jury found for the surviving widow and children on the basis of the tort of wrongful death and against RKO General, Inc., the owner of the radio station.⁸⁷

The appellate court found both that the defendant radio station owed a duty to the motorist arising out of its broadcast and that the record “amply supports the finding of foreseeability” of the resulting fatal incident.⁸⁸ The

82. *Id.*

83. *Id.*

84. *Id.* at 38-39.

85. *Weirum*, 539 P.2d at 39.

86. *Id.*

87. *Id.*

88. *Id.* at 39-40. The court found it of no consequence that the harm was inflicted by third parties

court noted that “neither the entertainment afforded by the contest nor its commercial rewards can justify the creation of such a grave risk.”⁸⁹

The court disposed of the defendant’s First Amendment argument with remarkable ease:

Defendant’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 achieved by word, rather than act.⁹⁰

Thus, the *Weirum* court established a useful precedent for shock torts litigation. The court found no First Amendment impediment to tort liability of a media defendant for resulting foreseeable harms caused by third parties, despite the fact that the disc jockey never explicitly urged his listeners to speed or violate the law. Thus, the disc jockey’s broadcast would not constitute incitement under the *Brandenburg* test and accordingly, the California Supreme Court bypassed the *Brandenburg* analysis entirely.⁹¹ The court instead focused on the likely effect the broadcast would elicit in immature audiences and on the duty of care the radio station owed to its listeners and to those with whom those listeners would foreseeably interact. Applied in shock torts contexts, this approach strongly favors civil liability for harms caused by the influence of musical recordings, films, and video games on immature adolescents.

The case of *Rice v. Paladin Enterprises, Inc.*,⁹² provides another unusual factual situation that further supports the concept of shock torts litigation. *Rice* centered around a book published by Paladin, entitled *Hit Man: A Technical Manual for Independent Contractors*.⁹³ The Court of Appeals for the Fourth Circuit reversed the district court’s grant of the media defendant’s

acting negligently because the young drivers’ intervening reckless conduct (unsafe driving) was likely to result from the broadcast. *Id.* at 40.

89. *Id.*

90. *Id.*

91. The court’s opinion does not mention *Brandenburg* or its incitement test in any way. This is in dramatic contrast with the approach used by the courts that have found insurmountable First Amendment obstacles under factual situations arguably more meritorious than those of the *Weirum* plaintiffs, as shall be seen *infra* Part III.C. Such divergence in the case law reflects the absence of definitive Supreme Court guidance on the scope of *Brandenburg*.

92. 128 F.3d 233 (4th Cir. 1997).

93. *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 838 (D. Md. 1996), *rev’d*, 128 F.3d 233 (4th Cir. 1997).

motion for summary judgment and remanded the case for trial.⁹⁴

A hitman used the book, which contained extremely detailed, step-by-step instructions on various methods of committing murder and escaping detection, to commit three murders. The Fourth Circuit excerpted dozens of examples from *Hit Man* to illustrate its graphic and explicit instruction in the methodology and potential rewards of murder for hire.⁹⁵ A few representative examples follow:

It is my opinion that the professional hit man fills a need in society and is, at times, the only alternative for “personal” justice. Moreover, if my advice and the proven methods in this book are followed, certainly no one will ever know Step by step you will be taken from research to equipment selection to job preparation to successful job completion. You will learn where to find employment, how much to charge, and what you can, and cannot, do with the money you earn Using your six inch, serrated blade knife, stab deeply into the side of the victim’s neck and push the knife forward in a forceful movement. This method will half decapitate the victim, cutting both his main arteries and wind pipe, ensuring immediate death When using a small caliber weapon like the 22, it is best to shoot from a distance of three to six feet. You will not want to be at point-blank range to avoid having the victim’s blood splatter you or your clothing. At least three shots should be fired to ensure quick and sure death.⁹⁶

The court also described the events leading to the *Rice* litigation:

On the night of March 3, 1993, . . . James Perry brutally murdered Mildred Horn, her eight-year-old quadriplegic son Trevor, and Trevor’s nurse, Janice Saunders, by shooting Mildred Horn and Saunders through the eyes and by strangling Trevor Horn [Perry] did not know any of his victims. Nor did he commit the murders in the course of another offense. Perry acted instead as 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 injuries that had previously left him paralyzed for life. At the time of the murders, this money was held in trust for the benefit of Trevor, and, under the terms

94. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997). The Court of Appeals for the Fourth Circuit also overturned the lower court’s dismissal, on First Amendment grounds, of plaintiffs’ claims that Paladin had aided and abetted a murderer in the commission of his crimes. *See id.*

95. 128 F.3d at 236-40.

96. *Id.* at 236-37.

of the trust instrument, the trust money was to be distributed tax-free to Lawrence in the event of Mildred's and Trevor's deaths.⁹⁷

The Fourth Circuit noted, with citation to numerous examples, that in soliciting, preparing for, and committing these murders, Perry meticulously followed a very large number of the detailed factual instructions contained within the 130 pages of *Hit Man*.⁹⁸ In what the court characterized as "Paladin's extraordinary stipulations," the publisher admitted that it not only knew that its book might be used by murderers, but also that it actually intended to provide assistance to murderers and would-be murderers and, in fact, assisted Perry in the commission of his murders.⁹⁹

In addressing the First Amendment issues on appeal, the Fourth Circuit discussed *Brandenburg* and other Supreme Court decisions in support of the following proposition:

[W]hile even speech advocating lawlessness has long enjoyed protections under the First Amendment, it is equally well established that speech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes.¹⁰⁰

In particular, the court emphasized that the First Amendment cannot be held to limit governmental regulation of "speech . . . brigaded with action,"¹⁰¹ lest the government be rendered powerless to protect the public from even the most severe criminal and civil wrongs.¹⁰² The court listed some

97. *Id.* at 239.

98. *Id.* at 239-41.

99. *Id.* at 242. It is surprising that Paladin would make such potentially damning admissions. Perhaps they wished to test the limits of the First Amendment protection they enjoyed and were confident in a favorable outcome, based on their understanding of the relevant precedent. In any event, the court stated:

Even without these express stipulations of assistance, however, a reasonable jury could conclude that Paladin assisted Perry in those murders, from the facts that Perry purchased and possessed *Hit Man* and that the methods and tactics he employed in his murders of Mildred and Trevor Horn and Janice Saunders so closely paralleled those prescribed in the book A jury likewise could reasonably find that Perry was encouraged in his murderous acts by Paladin's book.

Id. at 252.

100. *Id.* at 243. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (noting "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news").

101. *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring).

102. *Rice*, 128 F.3d at 244. The court's point is instructive. It is certainly true that the mere fact that someone uses words to express an idea does not insulate that person from the legal consequences—even criminal prosecution—under all circumstances.

examples,¹⁰³ including, extortion or blackmail,¹⁰⁴ threats and other improper influences in official and political matters,¹⁰⁵ perjury and various cognate crimes,¹⁰⁶ criminal solicitation,¹⁰⁷ threatening the life of the President,¹⁰⁸ conspiracy,¹⁰⁹ harassment,¹¹⁰ forgery,¹¹¹ successfully soliciting another to commit suicide,¹¹² and false public alarms.¹¹³

The court briefly distinguished the *Hit Man* situation from circumstances in which there is merely abstract advocacy. In fact, the court opined that the First Amendment might well circumscribe the power of the state to create and enforce a cause of action that would permit the imposition of civil liability for speech that constituted purely abstract advocacy, not “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.”¹¹⁴ However, the court also declared that “the instances in which such advocacy might give rise to civil liability under state statute would seem rare, but they are not inconceivable.”¹¹⁵ Indeed, in the instant case, the court found ample evidence that *Hit Man* went beyond abstract advocacy and could be actionable without violating the First Amendment. The lack of any “significant redeeming social value” and the thinly veiled intent to aid potential murderers in the commission of their homicides as evidenced by the plethora of detailed practical pointers, were enough to persuade the court that a genuine issue of civil liability existed for trial, notwithstanding the book’s several disclaimers such as “For informational purposes only” and “For academic study only!”¹¹⁶

In ruling that *Brandenburg* did not mandate the result reached by the

103. The crimes listed demonstrate some of the well-established ways in which speech can be proscribed under criminal statutes.

104. MODEL PENAL CODE § 223.4 (1962).

105. *Id.* § 240.2.

106. *Id.* §§ 241.1-9.

107. *Id.* §§ 2.06(3)(a)(i), 5.02.

108. 18 U.S.C. § 871 (1994).

109. MODEL PENAL CODE § 5.03.

110. *Id.* § 250.4.

111. *Id.* § 224.1.

112. *Id.* § 210.5(2).

113. *Id.* § 250.3.

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

115. *Rice*, 128 F.3d at 249. See *Debs v. United States*, 249 U.S. 211 (1919) (criminal attempt prosecution predicated upon such advocacy); *Frohwerk v. United States*, 249 U.S. 204 (1919) (same); *Schenck v. United States*, 249 U.S. 47 (1919) (criminal conspiracy prosecution predicated upon subversive advocacy).

116. *Rice*, 128 F.3d at 254-55, 263 n.10. The court found the disclaimers and warnings, including one on the book’s cover, “plainly insufficient in themselves to alter the objective understanding of the hundreds of thousands of words that follow, which, in purely factual and technical terms, tutor the book’s readers in the methods and techniques of killing.” *Id.* at 263 n.10. In fact, the court opined that the disclaimers were intended to titillate rather than to dissuade readers from killing. *Id.*

district court, the Fourth Circuit noted that *Brandenburg* did not hold that “mere teaching” is protected. Rather, the Court clearly held only that the “mere abstract teaching” of principles¹¹⁷ and “mere advocacy”¹¹⁸ are protected. In the Fourth Circuit’s view, it is not all teaching, “but only ‘the mere abstract teaching . . . of the moral propriety or even moral necessity’ for resort to lawlessness, or its equivalent, that is protected under the commands of *Brandenburg*.”¹¹⁹ The Fourth Circuit explained:

[T]he teaching of the “techniques” of violence . . . the instruction in the methods of terror [and] murder instructions . . . are, collectively, a textbook example of the type of speech that the Supreme Court has quite purposely left unprotected, and the prosecution of which, criminally or civilly, has historically been thought subject to few, if any, First Amendment constraints.¹²⁰

In stressing the unlawful motive of the *Rice* defendants, the court sought to distinguish the unusual facts of the *Hit Man* case from other scenarios that we describe as shock torts. The court opined, in dicta:

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. It would be difficult to overstate the significance of this difference insofar as the potential liability to which the media might be exposed by our decision herein is concerned.

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 Moreover, in contrast to the case before us, in virtually every “copycat” case, there will be lacking in the speech itself any basis for a permissible inference that the “speaker” intended to assist and facilitate the criminal conduct described or depicted. Of course, with few, if any, exceptions, the speech which gives rise to the copycat crime will not directly and affirmatively promote the criminal

117. *Brandenburg*, 395 U.S. at 447-48.

118. *Id.* at 448-49.

119. *Rice*, 128 F.3d at 263-64.

120. *Id.* at 249-50.

conduct, even if, in some circumstances, it incidentally glamorizes and thereby indirectly promotes such conduct.¹²¹

Nevertheless, *Rice* does represent a crack in the First Amendment shield for media defendants.¹²² Ironically, it may have been the overconfidence of the defendants in the invulnerability of their shield that led them to concede their intention that the book would be used to commit murder, although the court indicated that the publisher's concessions were not necessarily the only means by which the court could have reached the result in the case.¹²³ Perhaps the most significant aspect of the case is the proposition that publication of a book can constitute an action unprotected by the First Amendment.¹²⁴ The extreme facts of *Rice*—especially the admissions of the defendants as to their intent—may render its broader applicability problematic, but some of its principles could find their way into other types of media-related cases. In fact, *Rice* was cited as supporting authority in the following potentially landmark case.

In *Byers v. Edmondson*,¹²⁵ two crimes committed under the alleged influence of the film *Natural Born Killers* were at issue.¹²⁶ The Louisiana

121. *Id.* at 265-66. The court did not critically examine whether the *Brandenburg* test was the appropriate standard by which such other cases would be evaluated, perhaps because this entire discussion was not germane to the case before it.

122. See generally Gregory Akselrud, Note, *Hit Man: The Fourth Circuit's Mistake in Rice v. Paladin Enters., Inc.*, 19 LOY. L.A. ENT. L.J. 375 (1999); Lise Vansen, Comment, *Incitement by Any Other Name: Dodging a First Amendment Misfire in Rice v. Paladin Enters., Inc.*, 25 HASTINGS CONST. L.Q. 605 (1998); Avital T. Zer-Ilan, Note, *The First Amendment and Murder Manuals*, 106 YALE L.J. 2697 (1997).

123. *Rice*, 128 F.3d at 252.

124. If the *Brandenburg* test were applied to these facts in the way it has been understood by several other courts, the imminence factor would likely have been deemed absent. The *Rice* court's recognition that "imminence" does not refer to immediacy in time but instead to direct causality displays greater sophistication in this regard than that possessed by courts that assumed the opposite meaning. The Supreme Court could not have intended imminence to demand immediately ensuing action, because that would have eviscerated statutes that criminalize certain types of verbal conduct, irrespective of when or if a harmful result follows the communication. See Crump, *supra* note 57, at 14-17.

125. 712 So. 2d 681 (La. Ct. App. 1998), cert. denied, 526 U.S. 1005 (1999).

126. The facts were briefly set forth *supra* text accompanying note 38. In short, the plaintiffs' amended petition asserted that Sarah Edmondson and Benjamin Darrus participated in a crime spree culminating in the shooting of and permanent injury to Patsy Ann Byers (and the murder of another person) as a result of seeing and becoming inspired by the movie *Natural Born Killers* produced, directed and distributed by, inter alia, Time-Warner, Inc. and Oliver Stone. The amended petition further alleged:

All of the Hollywood defendants are liable, more particularly, but not exclusively for, distributing a film which they knew or should have known would cause and inspire people such as . . . Edmondson and . . . Darrus, to commit crimes such as the shooting of Patsy Ann Byers, and for producing and distributing a film which glorified the type of violence [Edmondson and Darrus] committed against Patsy Ann Byers by treating individuals who commit such violence as

state trial court dismissed plaintiffs' negligence and intentional tort claims on a peremptory exception, raising the objection of no cause of action. The court held that the "law simply does not recognize a cause of action such as that presented."¹²⁷ The Louisiana court of appeal reversed and remanded.

For purposes of the appeal, the court accepted as true the allegations in the plaintiffs' petition. Those allegations included the assertion that the defendants intentionally incited persons such as Edmondson and Darrus to commit their violent crimes.¹²⁸ The court found that, if the media defendants produced and released a film containing violent imagery which was intended to cause its viewers to imitate the violence, then they would be liable. Using the same rationale in *Weirum*,¹²⁹ the court indicated that media defendants' intentional actions would impose a duty on them.¹³⁰ Specifically, the court stated the following:

If in fact, plaintiffs can prove their allegation that the Warner defendants, through the creation and release of "Natural Born Killers," intended to urge viewers to imitate the criminal conduct of "Mickey and Mallory," the main characters in the film, then the risk of harm to a person such as Byers would be imminently foreseeable, justifying the imposition of a duty upon the Warner defendants to refrain from

celebrities and heroes, as well as for such other negligence as will be learned during discovery and shown at trial of this matter.

Id. at 684.

127. *Id.* at 685.

128. *Id.* at 684-85. Statements, such as that of director Oliver Stone, *supra* text accompanying note 1, were undoubtedly part of the plaintiffs' arsenal of evidence for use at trial. Specifically, plaintiffs alleged that the "Hollywood defendants" were liable:

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;

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.

129. 539 P.2d 36 (Cal. 1975). See also *supra* notes 80-91 and accompanying text.

130. *Byers*, 712 So. 2d at 687-88.

creating such a film. The breach of this duty would render the Warner defendants liable for the damages inflicted on innocent third parties such as Patsy Byers by viewers of the film imitating the violent imagery depicted in the film.¹³¹

As a threshold matter, the court noted that judicial recognition of potential tort liability constitutes governmental involvement sufficient to implicate First Amendment concerns, despite the fact that the government is not directly restricting expression.¹³² In the court's opinion, the chilling effect of permitting the imposition of civil liability may be "markedly more inhibiting than the fear of prosecution under a criminal statute."¹³³ However, the court acknowledged that freedom of expression is not absolute, and that limited classes of "speech" may be prevented or punished by the State consistent with First Amendment principles, as we have already discussed.¹³⁴

The Louisiana court of appeal interpreted the requirements of *Brandenburg*, as applied to the tort actions against the media defendants, as follows:

[T]o justify a claim that speech should be restrained or punished because it is (or was) an incitement to lawless action, the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent conduct. Speech directed to action at some indefinite time in the future will not satisfy this test. Moreover, speech does not lose its First Amendment protection merely because it has "a tendency to lead to violence."¹³⁵

Taking the allegations in the plaintiffs' petition as true, the court indicated that the film *Natural Born Killers* would constitute expression within the *Brandenburg* "incitement" category of unprotected speech, because it was "directed to inciting or producing imminent lawless action" and was "likely

131. *Id.* at 688.

132. *Id.* at 689.

133. See *Bill v. Superior Court*, 187 Cal. Rptr. 625, 627 (Cal. Ct. App. 1982) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964)). A dubious proposition, this is unverifiable as a practical matter.

134. *Byers*, 712 So.2d at 689. The court summarized the principal recognized classes of unprotected expression as (1) obscenity; (2) libel, slander, misrepresentation, perjury, false advertising, fraud, solicitation of crime, complicity by encouragement, conspiracy, and the like; (3) speech or writing used as an integral part of conduct in violation of a valid criminal statute; and (4) speech which is directed to inciting or producing imminent lawless action, and which is likely to incite or produce such action. *Id.* (citing *McCullum v. Columbia Broad. Sys.*, 249 Cal. Rptr. 187 (Cal. Ct. App. 1988)).

135. *Id.* at 690 (citing *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973)).

to produce such action,” similar to the book *Hit Man* in *Rice v. Paladin*.¹³⁶ The plaintiffs’ petition contained allegations of “the very [unlawful] intent on the part of the Warner defendants” deemed crucial by the *Rice* court.¹³⁷ The court quoted from *Rice* at length, finding parallels between the actions of the media defendants in both cases.¹³⁸

In holding that plaintiffs’ allegations of defendants’ unlawful intent stated a proper cause of action, however, the court indicated that it was not addressing the issue of whether the media defendants would subsequently be able to invoke First Amendment protection after discovery had taken place.¹³⁹ The court concluded:

We agree with *Rice v. Paladin Enterprises, Incorporated*, that the mere foreseeability or knowledge that the publication might be misused for a criminal purpose is not sufficient for liability. Proof of intent necessary for liability in cases such as the instant one will be remote and even rare, but at this stage of the proceeding we find that Byers’ cause of action is not barred by the First Amendment.¹⁴⁰

One judge wrote a brief concurrence in which he framed the issue in a way that may prove prescient:

[T]he issue of violence is one that has not been squarely submitted to the present Supreme Court for review in this format and intensity. Where the intentional, deliberative infliction of suffering and agony has the goal of emulation, such a product does not free from the specter of “liability 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.”¹⁴¹

The *Byers* case is still in litigation at this writing. As with *Rice*, the unusually telling facts regarding the actual intent of the media defendants to incite or induce harm may ultimately limit the broader applicability of the case. However, within the peculiar realm of shock torts, it is not uncommon to find at least circumstantial indicia of intent to harm because, by definition, shock tort types of entertainment exhibit at least the objective appearance of

136. *Byers*, 712 So. 2d at 690 (citing 128 F.3d 233 (4th Cir. 1997)).

137. *Id.* at 691.

138. *Id.* at 690-92.

139. *Id.*

140. *Id.* at 691-92 (citations omitted). The court also stated that its ruling obviated the need to address plaintiffs’ claim that the film constitutes obscene speech. *Id.* at 692.

141. *Byers*, 712 So. 2d at 692 (Fitzsimmons, J., concurring) (citing *Rice v. Paladin*, 128 F.3d 233, 248 (4th Cir. 1997)).

having been calculated to shock, outrage, and disturb their audience.

At this juncture it is appropriate to consider some other media cases that, albeit not directly on point, may offer support for shock torts plaintiffs. These cases deal with print media; the principles enunciated therein, however, may easily be transferred to other forms of mass media as well.¹⁴²

In *S & W Seafoods v. Jacor Broadcasting of Atlanta*,¹⁴³ a radio talk-show host, critical of a restaurant in his community, exhorted his listeners to make rude gestures to and to spit on the owner-manager of the restaurant.¹⁴⁴ The Georgia court of appeals ruled that the owner-manager could sue the radio station and the talk-show host for intentional infliction of emotional distress, despite the fact that no one who heard the broadcast actually carried out the host's instructions.¹⁴⁵ The court reasoned that the owner-manager could have suffered emotional distress from the threat of physical violence.¹⁴⁶ Further, because the host urged his listeners to commit what amounted to criminal assault and breach of the peace, the court held that his expression was not protected by the First Amendment.¹⁴⁷

In *Braun v. Soldier of Fortune Magazine*,¹⁴⁸ a man, hired as a result of a "gun for hire . . . all jobs considered" advertisement in a magazine devoted to mercenary military and combat matters, committed a murder.¹⁴⁹ The trial judge denied the magazine's motion for summary judgment, ruling that the advertisement unambiguously offered unlawful services, perhaps including murder.¹⁵⁰ The court stated that the advertisement could not be deemed "facially innocuous," and that its criminal intent was obvious from the text of the advertisement itself, not merely from the context in which it was printed.¹⁵¹

142. See generally Steve Reitenour, *Liability for Injuries Caused by Printed Media*, 14 J. PROD. LIAB. 71 (1992).

143. 390 S.E.2d 228 (Ga. Ct. App. 1990).

144. *Id.* at 229-30.

145. *Id.* at 230-31.

146. *Id.*

147. *Id.* at 230 (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

148. 749 F. Supp. 1083 (M.D. Ala. 1990).

149. *Id.* at 1084.

150. *Id.* at 1088.

151. *Id.* at 1088 n.1. The *Braun* court thus distinguished another *Soldier of Fortune* case, *Eimann v. Soldier of Fortune Magazine*, 880 F.2d 830 (5th Cir. 1989). In *Eimann*, two people were murdered by a killer contacted through an advertisement, but the Court of Appeals for the Fifth Circuit held that the advertisement was "facially innocuous" and at worst ambiguous as to whether the person offered unlawful services. The advertisement extolled the person's military background, including that of a weapons specialist and indicated that his services were available for "high risk assignments." *Id.* at 831, 834, 838. The court avoided the magazine's First Amendment defense, instead holding that there was no liability under Texas negligence law, under a risk/benefits balancing test. *Id.* at 834, 835-38.

The *Braun* court rejected the magazine's First Amendment defense, citing the rule that advertisements for unlawful services are not entitled to First Amendment protection.¹⁵² The court also noted that an advertisement which does not contain an explicit offer for murder-for-hire, but "which contains language easily interpreted as such an offer," should likewise be unprotected.¹⁵³

Similarly, *Norwood v. Soldier of Fortune Magazine, Inc.*¹⁵⁴ addressed two advertisements that touted a "gun for hire," contained the phrase "all jobs considered," and stressed that confidentiality would be preserved.¹⁵⁵ Pursuant to these advertisements the plaintiff received personal injuries from several unsuccessful murder attempts. The court denied the magazine's motion for summary judgement.¹⁵⁶ Employing the same reasoning as in *Braun*, the court ruled that the jury could properly find that the advertisements "had a substantial probability of ultimately causing harm to some individual."¹⁵⁷ Rejecting the First Amendment defense, the court stressed the difference between the high degree of protection accorded to political speech and the much lower protection accorded commercial advertising.¹⁵⁸

The extent to which courts are willing to emphasize the distinctions among various types of speech and varying degrees of First Amendment protection that might flow from such distinctions can be very important in determining the outcome of media-related cases. As we shall discuss in subsequent portions of this Article, *Brandenburg* and its progeny addressed political speech; it is not clear, although it has often been assumed, that the strict *Brandenburg* test should be applied to all varieties of nonpolitical

However, in dicta, the court noted that "the Supreme Court's recognition of limited first amendment protection for commercial speech . . . highlights the important role of such communication for purposes of risk-benefit analysis." *Id.* at 836. Although the plaintiff noted that the advertising of illegal activity is not protected by the First Amendment, the Fifth Circuit countered that "the possibility of illegal results does not necessarily strip an ad of its commercial speech protection." *Id.* at 837 (citing *Dunagin v. City of Oxford*, 718 F.2d 738, 743 (5th Cir. 1983) (en banc)).

152. 749 F. Supp. at 1086 (citing *Va. Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976)).

153. *Id.* at 1086 (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rights*, 413 U.S. 376 (1973)). *Pittsburgh Press* dealt with a municipal ordinance that prohibited newspapers from publishing "help wanted" advertisements in sex-oriented columns, except where the employer could freely make hiring decisions based on sex. The Court held that this ordinance did not violate the First Amendment. 413 U.S. at 388.

154. 651 F. Supp. 1397 (W.D. Ark. 1987).

155. *Id.* at 1397-98. One advertisement was the same one at issue in *Braun*, and the other was very similar.

156. *Id.* at 1403.

157. *Id.*

158. *Id.* at 1398-1402. This hierarchy of First Amendment protection based on the utility of the speech has considerable support in Supreme Court precedent, as will be discussed *infra* Part IV.A.

speech under all circumstances. Thus, it is unclear that the rigorous *Brandenburg* test should apply in the shock torts context, where for-profit entertainment consumed by minors remains far removed from the political speech category.

We will now consider two additional cases that, although not directly involving mass media, have been cited as authority in such cases. The first of these is *United States v. Buttorff*.¹⁵⁹

In *Buttorff*, the appellants participated in a series of public and private meetings attended by numerous employees of the John Deere Tractor plant in Dubuque, Iowa. Fifteen of those employees subsequently filed income tax withholding forms with John Deere, claiming allowances in excess of those to which they were entitled, or falsely certifying that they received no taxable income during the prior year and expected to receive none during the current year. These persons, as principals, were all convicted of tax-related criminal offenses. The appellants appealed their convictions of multiple counts of aiding and abetting the principals in filing their false or fraudulent income tax withholding forms. The appellants raised the issue of their First Amendment rights of freedom of assembly and freedom of speech. The Court of Appeals for the Eighth Circuit affirmed the convictions, but indicated that the facts presented a “close question.”¹⁶⁰

The trial court evidence showed that appellants had addressed at least four large public gatherings in northeastern Iowa and western Wisconsin early in 1975. All of the principals testified that they attended one or more of those meetings. Most of the testimony recalled speeches given by the defendants regarding the Constitution, the Bible, and the unconstitutionality of the graduated income tax. The evidence indicated that the discussions of the income tax withholding forms occurred primarily during question and answer sessions following the speeches.¹⁶¹

The principals all testified that they submitted false or fraudulent forms because of the appellants’ recommendations, advice, or suggestions. Some indicated that the appellants told them to divide their yearly salary by 750 to determine the number of claimed allowances necessary to stop withholding. Others testified that they heard the appellants say that thirty or forty claimed allowances would be sufficient to stop withholding. All of the principals claimed between twenty-eight and forty allowances on their subsequently filed income tax withholding forms.¹⁶²

159. 572 F.2d 619 (8th Cir. 1978).

160. *Id.* at 622.

161. *Id.*

162. *Id.* at 622-23.

Only one principal testified to an affirmative action, other than speaking, by either appellant. This principal indicated that Buttorff came to his father's home and provided him with a W-4 form. He stated that the form already had the number twenty written on it but either he or Buttorff changed it to twenty-eight.¹⁶³ No other principal testified that either appellant actually assisted a principal in preparing a form or was present to help file such a form. Most testified that they had other sources of information on tax evasion and other influences in the tax protest movement. However, all principals indicated that they filed withholding forms as a result of attending these tax protest meetings. Many paid various amounts of money to the appellants for a wide range of tax-related services.¹⁶⁴

The Eighth Circuit addressed the First Amendment issue in a rather perfunctory fashion. Citing *Brandenburg*, the court noted the distinction between "speech which merely advocates law violation and speech which incites imminent lawless activity. The former is protected; the latter is not."¹⁶⁵ The court concluded:

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.¹⁶⁶

The *Buttorff* holding thus read the *Brandenburg* "incitement" test very expansively, finding no First Amendment protection for the public speeches which "incited" several people to file false income tax withholding forms despite specifically finding that these speeches did not fall within the *Brandenburg* paradigm of incitement to imminent lawless action. The court asserted that the defendants went beyond mere advocacy by explaining, in practical terms, how to avoid withholding. This, however, does not appear to be more than a superficial distinction. The court also emphasized that several people were moved to commit unlawful acts following their contact with the defendants. If applied to entertainment-media cases, this line of reasoning

163. *Id.* at 623.

164. *Id.*

165. *Buttorff*, 572 F.2d at 624 (citations omitted).

166. *Id.*

could lead to a finding of incitement in situations where multiple people are spurred to action by the same stimulus, as is the case with the multiple crimes inspired by the film *Natural Born Killers*. The recognition of this indirect mode of incitement has made *Buttorff* an important decision in media-related cases and shock torts.

The other nonmedia case that prompts discussion here is *United States v. Barnett*.¹⁶⁷ This case involved, inter alia, an indictment of Gary Barnett for aiding and abetting Donald Hensley in the attempted manufacture of the illegal drug phencyclidine (PCP). Hensley had responded to an advertisement Barnett placed in *High Times*, a drug-related magazine offering “available drug manufacture instructions.”¹⁶⁸ On appeal, the court examined the validity of the search warrant for Barnett’s residence and whether there were sufficient facts to establish probable cause of Barnett’s aiding and abetting activity.

In upholding the validity of the search warrant, the Court of Appeals for the Ninth Circuit cited *Buttorff* with approval, noting that the defendants in *Buttorff* had virtually no personal contact with the persons who filed false income tax returns, but rather gave speeches before large groups encouraging, advising, and instructing others to evade their income taxes. The Ninth Circuit emphasized that the *Buttorff* court “affirmed the conviction despite the absence of any proof that *Buttorff* profited from the filing of false tax returns by others, or had any knowledge of the fact that such returns had been in fact filed.”¹⁶⁹ The court declared:

The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Crimes, including that of aiding and abetting, frequently involve the use of speech as part of the criminal transaction. The use of a printed message to a bank teller requesting money coupled with a threat of violence, the placing of a false representation in a written contract, the forging of a check, and the false statement to a government official, are all familiar acts which constitute crimes despite the use of speech as an instrumentality for the commission thereof.¹⁷⁰

167. 667 F.2d 835 (9th Cir. 1982).

168. *Id.* at 838.

169. *Id.* at 843. See also *United States v. Moss*, 604 F.2d 569, 571 (8th Cir. 1979) (citing *Buttorff* in holding that defendant has no First Amendment protection for a speech explaining how to violate federal income tax laws).

170. 667 F.2d at 842.

The Ninth Circuit clarified that the only issue before it was the existence of probable cause to support a search, not the merits of any defense Barnett might mount at his trial. Nonetheless, the court offered the following guidance:

To 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. Furthermore, it is unnecessary for the government to show that Barnett ever met with Hensley in order to prove that he aided and abetted him in his attempt to manufacture phencyclidine. The facts alleged in the search warrant established that Barnett provided essential information for the specific purpose of assisting Hensley in the commission of a crime. They also established that evidence of that crime could be found on the premises to be searched—Barnett’s residence. Nothing further was required.¹⁷¹

A search of the case law has disclosed no reported cases regarding harms allegedly caused by exposure to violent, shocking video or computer games. However, because such games may present opportunities for successful litigation under a shock torts rubric, it is necessary to examine some tangentially related precedent.

In *Watters v. TSR, Inc.*,¹⁷² a mother brought a wrongful death action against the manufacturers of the board game *Dungeons & Dragons*¹⁷³ after her son committed suicide. She claimed that her son’s suicide was the direct and proximate cause of his exposure to the game and was foreseeable to the game’s manufacturer. She averred that her son had become obsessed with the game, to the extent that “he lost control of his own independent will and was driven to self-destruction.”¹⁷⁴ However, the supporting proof was minimal at best, consisting of the board game itself and a conclusory affidavit signed by the mother. Although discovery had taken place, there was no meaningful evidence in the record to support the foreseeability argument. The district court granted summary judgment for the defendant on the grounds that the First Amendment barred liability.¹⁷⁵

171. *Id.* at 843.

172. 904 F.2d 378 (6th Cir. 1990).

173. The Court of Appeals for the Sixth Circuit described the game as a work of imagination similar to those to which the public is exposed by television, motion pictures, magazines, and books. *Id.* at 382.

174. *Id.* at 380.

175. 715 F. Supp. 819 (W.D. Ky. 1989), *aff’d on other grounds*, 904 F.2d 378 (6th Cir. 1990).

The Court of Appeals for the Sixth Circuit affirmed but on the narrower ground that the plaintiff, on the basis of the facts presented, could not succeed under Kentucky's common law of negligence because the game could not be shown to be the proximate cause of her son's suicide.¹⁷⁶ We include this case among those that may be favorable to plaintiffs in shock tort actions because the Sixth Circuit at least found the plaintiff's cause of action possible. The court, recognizing the fatally sparse record, ruled:

Mrs. Watters was not free simply to rest on her pleadings; she was required, by affidavits, deposition, answers to interrogatories, or the like, to "designate 'specific facts showing that there [was] a genuine issue for trial'" . . . This she failed to do. Aside from one vague reference to hearsay about the game's "dangerous propensities"—Mrs. Watters' affidavit concluded with a sentence reading, in its entirety, "I have subsequently read in many publications including the Paducah Sun of the dangerous propensities of the game Dungeons & Dragons"—the record sets forth no "specific fact" showing that the defendant's game was in fact dangerous¹⁷⁷

The Sixth Circuit noted that *Dungeons and Dragons* (an "imagination-stimulating" game in which the players take upon themselves various roles in a mythical world) never even mentions suicide, let alone encourages it.¹⁷⁸ Rather, the game's imaginary world "does not appear to be a world in which people kill themselves or engage in acts of wanton cruelty toward other people."¹⁷⁹

The case law pertaining to video or computer games is still in its infancy. However, the Court of Appeals for the Seventh Circuit has noted that "several district courts, ruling in a variety of factual contexts and upon requests for preliminary injunctions, have held that video games are not protected by the First Amendment."¹⁸⁰ For example, in *Marshfield Family*

176. 904 F.2d at 380-84. The court saw the analogy to tort cases based on entertainment media depictions of violent or dangerous activities, but found no precedent on point under Kentucky case law. *Id.* at 382. The court thus turned to such precedent from other jurisdictions, all of which it interpreted as favoring the defendant on the causation issue. *Id.* at 382-83.

177. *Id.* at 381.

178. *Id.* at 380, 382.

179. *Id.* at 382. There was no inference that the boy's suicide was in imitation of anything in the game, nor that the game contained subliminal exhortations to commit suicide. In fact, the court considered *Dungeons and Dragons* a creative learning tool. *Id.* at 380.

180. *Rothner v. City of Chicago*, 929 F.2d 297, 302-03 (7th Cir. 1991) (citing *Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297 (D. Mass. 1983)); *America's Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170 (E.D.N.Y. 1982). The *Rothner* court noted, however, that it was not "hold[ing] that, under all circumstances, all video games can be characterized as completely devoid of any first amendment protection." 929 F.2d at 303.

Skateland, Inc. v. Marshfield,¹⁸¹ the Supreme Judicial Court of Massachusetts upheld a flat ban on coin-operated amusement devices in a municipality. The court explained, “[T]hese video games . . . are, in essence, only technologically advanced pinball machines.”¹⁸² If widely adopted, such a view would, of course, significantly enhance the likelihood of success for plaintiffs. We will return to the issue of video games in more detail in Part IV.E of this Article.

C. Plaintiff-Unfavorable Media-Related Precedent

We will now review the case law that traditionally has been interpreted as a bar to many media-related torts.¹⁸³ Because the rationale in these cases is generally quite similar to those reviewed above, our discussion here will be less in-depth than in the previous section. In addition, the facts of some of these cases have already been outlined in Part II of this Article but, nevertheless, will be briefly recounted here. This section, similar to the last section, groups the cases by subject matter and discusses them sequentially, beginning with actions arising from motion pictures and television shows, and moving to those based on musical recordings.

In *Olivia N. v. National Broadcasting Co.*,¹⁸⁴ an action was brought on behalf of a nine-year-old girl who was attacked and forcibly “artificially raped” with a bottle by minors at a San Francisco beach. The assailants had viewed and discussed the “artificial rape” scene in the made-for-television film *Born Innocent*, and the film allegedly caused the assailants to decide to commit a similar act on the plaintiff. The plaintiff offered to show that NBC had knowledge of studies on child violence and should have known that susceptible persons might imitate the crime enacted in the film. Plaintiff alleged that *Born Innocent* was particularly likely to cause imitation and that NBC televised the film without proper warning in an effort to obtain the largest possible viewing audience. Plaintiff argued that NBC’s telecast

181. 450 N.E.2d 605 (Mass. 1983).

182. *Id.* at 610. *Accord* Caswell v. Licensing Comm’n for Brockton, 444 N.E.2d 922 (Mass. 1983).

183. See generally Mike Quinlan & Jim Persels, *It’s Not My Fault, the Devil Made Me Do It: Attempting to Impose Tort Liability on Publishers, Producers, and Artists for Injuries Allegedly “Inspired” by Media Speech*, 18 S. ILL. U. L.J. 417 (1994); Laura W. Brill, Note, *The First Amendment and the Power of Suggestion: Protecting “Negligent” Speakers in Cases of Imitative Harm*, 94 COLUM. L. REV. 984 (1994); Benjamin P. Deutsch, Note, *Wile E. Coyote, Acme Explosives and the First Amendment: The Unconstitutionality of Regulating Violence on Broadcast Television*, 60 BROOK. L. REV. 1101 (1994); Laura B. Schneider, Comment, *Warning: Television Violence May Be Harmful to Children; but the First Amendment May Foil Congressional Attempts to Legislate Against It*, 49 U. MIAMI L. REV. 477 (1994).

184. 178 Cal. Rptr. 888 (Cal. Ct. App. 1981).

proximately caused her physical and psychological damage.¹⁸⁵

NBC's motion for nonsuit was granted by the trial court immediately after the conclusion of plaintiff's opening statement.¹⁸⁶ This unusually early grant of a nonsuit materialized because, contrary to guidance received from the appellate court on an earlier defense motion for summary judgment, the plaintiff's attorney announced in his opening statement that the evidence would establish negligence and recklessness on defendant's part, rather than incitement.¹⁸⁷

The court's opinion began with a lengthy, yet unanalyzed, series of short quotations from Supreme Court decisions declaring the importance of the First Amendment and its general applicability to the entertainment industry.¹⁸⁸ After this prelude, the court focused on the *Brandenburg* "incitement" test as the proper standard for the case before it, particularly because other types of unprotected speech, such as obscenity, were not at issue.¹⁸⁹ The court assumed, without any analysis or discussion, that the

185. *Id.* at 891. The subject matter of *Born Innocent* was the harmful effect of a state-run home upon an adolescent girl who had become a ward of the state (played by Linda Blair of *The Exorcist*). In one scene, the young girl enters the community bathroom of the facility to take a shower. She is then shown taking off her clothes and stepping into the shower, where she bathes for a few moments. Suddenly, the water stops and a look of fear comes across her face. Four adolescent girls are standing across from her in the shower room. One of the girls is carrying a "plumber's helper," waving it suggestively by her side. The four girls violently attack the younger girl, wrestling her to the floor. The young girl is shown struggling as the older girls force her legs apart. Then, the film shows the girl with the plumber's helper making intense thrusting motions with the handle of the plunger until one of the four says, "That's enough." The young girl is left sobbing and naked on the floor. *Id.*

186. For purposes of appeal from the grant of a motion for nonsuit on opening statement, the appellate court must accept the facts, as recited in the opening statement, as true. *Id.*

187. *Id.* at 890. Plaintiff's attorney told the jury, as part of his opening statement:

At no time in this trial are we going to prove that either through negligence or recklessness there was incitement, which incitement is telling someone to go out encouraging them, directing them, advising them; that there will be no evidence that NBC ever told anybody or incited anyone to go out and rape a girl with an artificial instrument or in any other way So at all times during this trial, I want you to have in mind, ladies and gentlemen, that all of our proof will not be based on any type of incitement, but will be based on stimulation, foreseeability, negligence, proximate cause.

Id. at 890 n.1.

188. For example, First Amendment rights are accorded a preferred place in our democratic society. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). First Amendment protection extends to a "communication, to its source and to its recipients." *Va. Pharm. Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Free speech must "embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Television broadcasting poses "unique and special problems not present in the traditional free speech case." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973).

189. *Olivia N.*, 178 Cal. Rptr. at 893.

Brandenburg test was the only method of gauging whether incitement was the applicable standard. Because the plaintiff's opening statement conceded that there would be no proof of incitement (for example, no showing that the film was "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action"¹⁹⁰), the court found the film constitutionally protected.¹⁹¹

The court distinguished *Weirum*, but on specious grounds. The court contended that the *Weirum* broadcasts "actively and repeatedly encouraged listeners to speed to announced locations . . . [and] to act in an inherently dangerous manner."¹⁹² Nevertheless, as we have seen, the court in *Weirum* actually found no direct urging of any unlawful actions, including speeding, and the disc jockey, who listeners were to locate, did not himself exceed the speed limit at any time.¹⁹³

A second motion picture case, *Yakubowicz v. Paramount Pictures Corp.*,¹⁹⁴ also applied the incitement test. In *Yakubowicz*, the facts alleged that a sixteen-year-old boy was knifed to death by an individual who had just viewed the film *The Warriors*.¹⁹⁵ The boy's father brought an action against both the makers of the film and the theater that exhibited it, alleging, inter alia, that Paramount Pictures "produced, distributed, and advertised 'The Warriors' in such a way as to induce film viewers to commit violence in imitation of the violence in the film."¹⁹⁶

The court recited the oft-repeated quotation that "[m]otion pictures are a significant medium for the communication of ideas,"¹⁹⁷ which are protected by the First Amendment just like other forms of expression. The court also stated that it is "immaterial for First Amendment purposes whether speech is suppressed under the criminal law or by 'penalties' imposed by tort law."¹⁹⁸ The court then focused on the *Brandenburg* incitement test, again without

190. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

191. 178 Cal. Rptr. at 893.

192. *Id.* at 894.

193. *Weirum v. RKO General, Inc.*, 539 P.2d 36, 38 (Cal. 1975).

194. 536 N.E.2d 1067 (Mass. 1989).

195. *Id.* at 1068. *The Warriors* deals with street gangs and their violent, often deadly, battles. The film depicts "numerous scenes of juvenile gang-related violence in which youths battle with knives, guns, and other weapons as they pursue one gang, the 'Warriors,' through the subways of New York City. Advertising for the film depicted menacing youths wielding baseball bats." *Id.* at 1069.

196. *Id.* at 1068. Additional allegations concerned the continuing exhibition of the film after the defendants learned of "an unprecedented series of lawless violent acts" at or near theatres showing the film and the failure to take reasonable steps to protect people at or near the theatres. *Id.*

197. *Id.* at 1071 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)).

198. *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.")).

any discussion as to whether there might be any alternative standard of review.

The court treated whether the film constituted incitement for First Amendment purposes as a question of law.¹⁹⁹ Noting that speech does not lose its First Amendment protection merely because it has a “tendency to lead to violence,”²⁰⁰ the court concluded that *The Warriors* did not constitute incitement. Although the film is rife with violent scenes, it does not at any point exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers. It does not create the likelihood of inciting or producing “imminent lawless action” that would strip the film of First Amendment protection. The movie does not “purport to order or command anyone to any concrete action at any specific time, much less immediately.”²⁰¹ As a result, the defendants were held not to have acted unreasonably in producing, distributing, and exhibiting *The Warriors*, nor was there a failure to warn or to protect people at or near the theater from film-related violence.²⁰²

A somewhat similar fact pattern was present in *Bill v. Superior Court*.²⁰³ A girl was shot while walking down the street after leaving a theater which was showing the motion picture *Boulevard Nights*. This film, like *The Warriors*, is about street gangs and contains numerous violent scenes. The girl and her mother sued the film’s producers under the theory that they knew or should have known that this type of motion picture would attract violence-prone individuals to the vicinity of the theaters, and thus they should have taken security precautions that would have protected the girl.²⁰⁴

The California appellate court issued a writ of mandamus compelling the trial court to grant the media defendants’ motion for summary judgment on First Amendment grounds.²⁰⁵ It was significant that there was no allegation that the girl’s attacker had seen *Boulevard Nights*, probably because he had never been identified and the shooting did not take place in the theater. The plaintiffs argued that it was irrelevant whether the attacker had seen the film, under the theory that the subject matter of the film had drawn such violent people to the area surrounding the theater. They averred that judgment in their favor would not violate the First Amendment because it would not place

199. *Yakubowicz*, 536 N.E.2d at 1071.

200. *Id.* (quoting *Hess v. Indiana*, 414 U.S. 105, 109 (1973)).

201. *Id.* (citations omitted). The court misinterpreted the “imminent” aspect of the *Brandenburg* test. *See supra* note 61.

202. *Yakubowicz*, 536 N.E.2d at 1072.

203. 187 Cal. Rptr. 625 (Cal. Ct. App. 1982).

204. *Id.* at 626.

205. *Id.* at 634.

a burden on the film based on its specific content.²⁰⁶ However, the court noted that this argument did indeed focus on the content of the film, for instance, its violent, gang-related subject matter. The court stated:

[I]f the showing of the movie “Boulevard Nights” tended to attract violence-prone persons to the vicinity of the theater, it is precisely because of the film’s content, and for no other reason It is thus predictable that the exposure to liability in such situations would have a chilling effect upon the selection of subject matter for movies²⁰⁷

Not all film- or television-related tort actions arise out of the archetypally shocking types of entertainment, although the highly outrageous varieties are most applicable to shock torts theory.²⁰⁸ For example, in *DeFilippo v. National Broadcasting Company, Inc.*,²⁰⁹ plaintiffs’ claims arose from a May 23, 1979 broadcast of *The Tonight Show*, a well-liked popular comedy and talk show then hosted by Johnny Carson, on the NBC television network.

A professional stuntman, Dar Robinson, was one of Johnny Carson’s guests that night. Carson introduced Robinson, and after a short conversation showed film clips and photographs of Robinson’s dangerous stunts. Then, Carson announced that he would perform a stunt himself after the commercial break. Carson claimed that he would drop through a trap door with a noose around his neck.²¹⁰ At that point, Robinson said, “Believe me, it’s not something that you want to go and try. This is a stunt I’ve seen people try things like this. I really have. I happen to know somebody who did

206. *Id.* at 628.

207. *Id.* at 628-29. A similar fact pattern and result was obtained in *Lewis v. Columbia Pictures Indus.*, No. E011948, 1994 WL 758666, at *4-5 (Cal. Ct. App. Nov. 8, 1994), which held that the producers of the film *Boyz ‘N The Hood* had no duty to prevent harm to the plaintiff who was shot and wounded by a gang member while attending a screening of the film.

208. See *Walt Disney Prods., Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981). In *Shannon*, an eleven-year-old plaintiff sued after suffering injuries while attempting to recreate a sound effect demonstrated during a television broadcast of *The Mickey Mouse Club*. The broadcast showed how to use a BB pellet inside a balloon to demonstrate “the magic you can create with sound effects.” *Id.* at 581. The *Shannon* court interestingly reflects the lack of definitive precedent on point, holding plaintiff’s claims barred by the First Amendment but without applying the *Brandenburg* test. The court did not indicate why it considered the *Brandenburg* test inapplicable, but presumably the court believed that test should be reserved for cases similar to the *Brandenburg* facts. Instead, within the context of the negligence-based tort action before it, the court opted for a clear and present danger standard. Under this approach, the court found:

[A]n utterance can be suppressed or penalized on the ground that it tends to incite an immediate breach of peace if “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.”

Id. at 582 (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

209. 446 A.2d 1036 (R.I. 1982).

210. *Id.* at 1037.

something similar to it, just fooling around, and almost broke his neck.”²¹¹

After the commercial break, Carson stood on a gallows, a noose hung by his side, and Robinson and Carson exchanged some comic relief. A third man, named “the hangman,” then placed a hood over Carson’s head and the noose over the hood. The trap door opened, Carson fell through, and without injury survived the stunt to the audience’s joy.²¹²

The plaintiffs alleged that their thirteen-year-old son, Nicky, who regularly watched *The Tonight Show*, viewed this particular broadcast. Several hours after the broadcast, the DeFilippos found Nicky dead, hanging from a noose in front of the television set, which was still on and tuned to the station that had broadcast *The Tonight Show*.²¹³ As amended, plaintiffs’ complaint raised the following four causes of action: negligence, failure to warn, products liability, and intentional tort-trespass.²¹⁴

The trial judge rejected plaintiffs’ products liability claim, holding that the broadcast was not a product.²¹⁵ The court then held, as a matter of law, that the First Amendment barred the remaining claims, which the Supreme Court of Rhode Island upheld on appeal.²¹⁶ The court listed the usual categories of unprotected speech, and stated that First Amendment rights belong both to the broadcasters and to the “viewers and general public, whose rights are paramount and supersede those of the broadcasters.”²¹⁷ Once again, the court considered incitement the only possible avenue of relief for the plaintiffs and assumed the *Brandenburg* test to be the only proper standard. Under the *Brandenburg* analysis, the court found no basis for ruling the Tonight Show stunt a form of incitement.²¹⁸ The court noted that plaintiffs’ son was evidently the only person who tried to emulate the “hanging.” Distinguishing *Weirum*, the court then reasoned that far from attempting to encourage copycat actions by viewers, the stuntman had stressed the dangers of performing the stunt, warning, inter alia, “it’s not something that you want to go and try.”²¹⁹

211. *Id.* at 1037-38.

212. *Id.* at 1038.

213. *Id.*

214. *Id.*

215. *DeFillippo*, 446 A.2d at 1038. The appellate court did not address this holding, finding it obviated by its First Amendment analysis.

216. *Id.*

217. *Id.* at 1039 (citing *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 102 (1973); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969)).

218. *Id.* at 1041-42.

219. *Id.* at 1041. The court stated:

On the basis of Robinson’s warnings, the trial justice distinguished this case from *Weirum* . . . in which there was explicit incitement. We have viewed a video tape of Robinson’s segment on “The

The court concluded by offering some of the following cautionary thoughts as to the dangers of self-censorship:

[T]he incitement exception must be applied with extreme care since the criteria underlying its application are vague. Further, allowing recovery under such an exception would inevitably lead to self-censorship on the part of broadcasters, thus depriving both broadcasters and viewers of freedom and choice, for “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.”²²⁰

The final case in the television-film category which we will consider is *Zamora v. Columbia Broadcasting System*.²²¹ On June 4, 1977, in Miami Beach, Florida, fifteen-year-old Ronny Zamora shot and killed his eighty-three-year-old neighbor, Elinor Haggart. Zamora was subsequently tried and convicted. In a complaint that was both remarkably bold and diffuse, Zamora and his parents sued all three of the then major television networks (CBS, ABC, and NBC), alleging that from age five, Ronny had become involuntarily addicted to and “completely subliminally intoxicated” by the extensive viewing of television violence offered by the three defendants.²²² The defendants were charged with breaching their duty to plaintiffs by failing to use ordinary care to prevent Ronny from being “impermissibly stimulated, incited and instigated” to duplicate the atrocities he viewed on television. The plaintiffs continued to allege that as a result of defendants’ breach, Ronny developed a sociopathic personality, became desensitized to violent behavior, and became a danger to himself and others.²²³

The vague, overbroad, and general nature of the complaint contributed to the “weaknesses” that, in the district court’s view, required dismissal.²²⁴

Johnny Carson Show,” and we agree that *Weirum* is inapposite to the case at bar. Therefore, our analysis herein applies only to the facts of the instant case and not to situations in which there was explicit incitement.

Id. at 1041 n.7.

220. *Id.* at 1042 (quoting *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

221. 480 F. Supp. 199 (S.D. Fla. 1979).

222. *Id.* at 200.

223. *Id.* Plaintiffs did not allege that any particular program incited Zamora to commit his crime, nor that his viewing of one network was more or less frequent than his viewing of others. Moreover, no allegation in the complaint indicated when, in the ten-year span referred to, the suggested duty (and consequent failure to respond) applied to any one or all of the defendants, nor whether the minor plaintiff’s conduct was the product of pre-duty exposure or post-duty influence. *Id.* at 200-01.

224. *Id.* at 202-03. The court stated:

[P]laintiffs seek the imposition of a duty (a standard of care) which has no valid basis and would be against public policy. A recognition of the “cause” claimed by the plaintiffs would provide no

Additionally, the court considered the First Amendment implications, noting the following:

It was the judgment of the authors of the Constitution that society's best interests would be served by free expression, not limited by punishment or other sanction; and this concept has consistently been reflected in relevant judicial development except with respect to certain narrowly limited classes of speech. Those areas which are not afforded constitutional protection involve "the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words" ²²⁵

Interestingly, although the court did not mention *Brandenburg*, it did note that there was no suggestion in the complaint that Ronny's crime was a reaction to any specific program of an inflammatory nature, nor that he was "incited" or goaded into committing murder by any particular call to action. Rather, the hapless complaint asserted that at some unspecified point, young Zamora became captive to the violence he viewed and turned to murder. ²²⁶ Certainly, the facts as presented would have failed to meet the *Brandenburg* incitement test as well, had the court deemed that test applicable. However, the fact that the court completely omitted *Brandenburg* and the attendant test from its analysis provides further evidence of the widely divergent nature of First Amendment case law in the absence of controlling precedent.

The court concluded with an interesting combination of the following slippery slope and *reductio ad absurdum* arguments:

At the risk of overdeveloping the apparent, 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. ²²⁷

recognizable standard for the television industry to follow. The impositions pregnant in such a standard are awesome to consider. Here the three major networks are charged with anticipating the minor's alleged voracious intake of violence on a voluntary basis; his parents' apparent acquiescence in this course, presumably without recognition of any problem and finally that young Zamora would respond with a criminal act of the type in question.

Id. at 202.

225. *Id.* at 204 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

226. *Id.*

227. *Zamora*, 480 F. Supp. at 206. Of course, none of the examples cited would fit within the definition of shock torts as it has been posited herein.

We will next turn to the cases arising out of harms attributed to musical recordings. Many of the legal issues will be familiar from the cases already discussed.²²⁸

In *Waller v. Osbourne*,²²⁹ the plaintiffs alleged that the heavy-metal rock star Ozzie Osbourne (the one-time leader of the group Black Sabbath) and his record company caused the wrongful death of their adolescent son, Michael Waller, by inciting him to commit suicide through the music, lyrics, and subliminal messages contained in the song “Suicide Solution” on the *Blizzard of Oz* album.²³⁰ As mentioned in more detailed in Part II.B, Michael took his own life on May 3, 1986, with a self-inflicted pistol wound to his head. Michael allegedly committed suicide after he had repeatedly listened to an Ozzy Osbourne cassette tape which contained audible and perceptible lyrics that directed him to do just that.²³¹

The court focused on whether there was credible evidence of a subliminal message on the recording, because it was convinced “that the presence of a subliminal message, whose surreptitious nature makes it more akin to false and misleading commercial speech and other forms of speech extremely limited in their social value, would relegate the music containing such to a class worthy of little, if any, first amendment constitutional protection.”²³²

228. See generally Peter Alan Block, Note, *Modern-Day Sirens: Rock Lyrics and the First Amendment*, 63 S. CAL. L. REV. 777 (1990) (analyzing First Amendment protection of rock music in the context of tort litigation, regulation of broadcasting, and industry self-regulation).

229. 763 F. Supp. 1144 (M.D. Ga. 1991).

230. *Id.* at 1145.

231. *Id.* at 1145-46. The audible lyrics in question were as follows:

Ah know people
 You really know where it's at
 You got it
 Why try, why try
 Get the gun and try it
 Shoot, shoot, shoot.

Id. at 1146 n.2. The alleged subliminal message was:

Alright now, people . . . [people is echoed]
 You really know what it's about,
 You've got it.
 Why try, why try . . .
 Take the gun, 'n' try it, try it . . .
 Shoot! shoot! shoot! shoot!
 Shooo . . . sshooo, sshooo, sshooooo,
 [. . . Laughter . . .]
 Sshoo, sshoo, sshooo . . . [sshooo sound repeats] Go'awn.

Id. at 1147 n.7.

232. *Id.* at 1148 (citing *Vance v. Judas Priest*, 1990 WL 130920 (Nev. Dist. Ct. Aug. 24, 1990) (providing an in-depth discussion of subliminal messages)). The *Vance* case dealt with two

The court opined that “[t]he most important character of a subliminal message is that it sneaks into the brain while the listener is completely unaware that he has heard anything at all.”²³³ However, in evaluating the evidence before it, the court concluded that there was nothing from which one could infer the existence of a subliminal message in the recording in question.²³⁴

Turning to the First Amendment issues, the court noted that “music in the form of entertainment represents a type of speech that is generally afforded first amendment constitutional protection,”²³⁵ which is “[a] constitutional protection that shields all who write, perform, or disseminate the music irrespective of whether it constitutes aberrant, unpopular, and even revolutionary music.”²³⁶ However, as with other forms of expression, First Amendment protection for those who produce, perform, and distribute music is not absolute.²³⁷ The usual exceptions apply:

Music legally classified as obscene or defamatory, or that which represents fighting words or incites imminent lawless activity is either entitled to diminished first amendment constitutional protection or none at all. Therefore, even though the court has found that defendants’ music does not contain subliminal messages, plaintiffs can

emotionally unstable young men who entered into a suicide pact and shot themselves with a sawed-off shotgun after listening to the *Stained Class* album of the “heavy metal” rock group, Judas Priest. One of the youths died instantly; the other, severely wounded, died three years later. On the media defendants’ motion for summary judgment, the court held that the music, lyrics, and video were protected by the First Amendment, but that any subliminal messages in the music would be unprotected. The court reasoned that subliminal messages are not protected by the First Amendment because (1) they do not advance any of the theories supporting free speech; (2) a person has a First Amendment right to be free from unwanted speech; and (3) hidden messages should not be forced upon an unknowing, unconsenting audience. *Vance v. Judas Priest*, 16 Media L. Rep. (BNA) 2241, 2247-54 (Nev. Dist. Ct. Aug. 1989). The court identified the “major theories” underlying First Amendment protection as being: (1) that free speech is necessary for the preservation of the uninhibited marketplace of ideas; (2) that free speech is essential to intelligent self-government in a democratic system; and (3) that free speech promotes individual self-fulfillment and self-realization. *Id.* at 2247. The court saw the first rationale as the most widely recognized theory. *Id.* After trial on the merits, the trial judge found that there were in fact subliminal messages in one song, but that they had been created accidentally—without the intent necessary to establish liability. 1990 WL 130920 at *17-19, 21-22. The judge also ruled that plaintiffs had failed to establish that such messages, even if perceived, could be the proximate cause of such violent conduct. *Id.* at *21.

233. *Waller*, 763 F. Supp. at 1149. The implication is that such a subconsciously received message would not meet the usual filters and analytical processes the brain uses to evaluate ordinary suggestions and, thus, could be more effective in inducing the desired response from the listener. *Id.* at 1149 n.9.

234. *Id.* at 1150.

235. *Id.* (quoting *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981)).

236. *Id.* (citing *High Oil’ Times, Inc. v. Busbee*, 456 F. Supp. 1035, 1041 (N.D. Ga. 1978)).

237. *Id.* (citing *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961)).

strip away the first amendment protection defendants now stand behind if they can demonstrate that defendants' music fits into one of the above categories.²³⁸

Incitement under the *Brandenburg* test and, in the court's view, refined by *Hess v. Indiana*²³⁹ to require that the primary focus be on the imminence of the threat,²⁴⁰ was again presumed to be the only arguably applicable exception. The court found as follows:

[T]he defendants did not engage in culpable incitement. There is no indication whatsoever that defendants' music was directed toward any particular person or group of persons. Moreover, there is no evidence that defendants' music was intended to produce acts of suicide, and likely to cause imminent acts of suicide; nor could one rationally infer such a meaning from the lyrics Viewing the facts in a light most favorable to the plaintiffs, the song "Suicide Solution" can be perceived as asserting in a philosophical sense that suicide may be a viable option one should consider in certain circumstances. And a strong argument can certainly be made that in light of the almost epidemic proportion of teenage suicides now occurring in this country it is irresponsible and callous for a musician with a large teenage following such as Ozzy Osbourne to portray suicide in any manner other than a tragic occurrence. Nevertheless, an abstract discussion of the moral propriety or even moral necessity for a resort to suicide, is not the same as indicating to someone that he should commit suicide and encouraging him to take such action.²⁴¹

238. *Id.* (citations omitted).

239. 414 U.S. 105 (1973). In *Hess*, the Court faced the issue of whether an antiwar demonstrator's First Amendment rights were violated when the State of Indiana arrested him for shouting, "We'll take the f--king street later," to a crowd the police were attempting to disperse. In upholding the demonstrator's First Amendment right to make that statement the Court concluded, "Since the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had 'a tendency to lead to violence.'" *Id.* at 108-09 (citations omitted).

240. This emphasis on temporal imminence is directly contrary to the more carefully considered approach taken by other courts, which has interpreted imminence to refer to the likelihood of the harm and not to a swiftness of reaction time. *See, e.g., United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978).

241. *Waller v. Osbourne*, 763 F. Supp. 1144, 1151 (M.D. Ga. 1991).

In support of their holding, the court cited *Shannon*²⁴² and *Zamora*,²⁴³ cases previously considered in this section. The court also distinguished *Weirum*²⁴⁴ on somewhat bizarre grounds, stating that “the California Supreme Court never made a finding in the case that it was dealing with protected speech entitled to full first amendment protection.”²⁴⁵ The conclusion in *Weirum*, however, was the result of subjecting the broadcaster’s actions in that case to the same type of First Amendment analysis employed in *Waller*. Yet *Weirum* reached the opposite conclusion using a different means, for example, finding First Amendment concerns subordinate to the other competing interests in the case. Nonetheless, the *Waller* court deemed *Weirum* inapplicable, and held plaintiffs’ claims barred by the First Amendment.²⁴⁶

The same recording, the same rock artist, and the same tragic fact pattern, were presented in *McCollum v. CBS, Inc.*²⁴⁷ The parents of the nineteen-year-old suicide victim brought an action against Ozzy Osbourne’s record company based on theories of negligence, products liability, and intentional misconduct.²⁴⁸

With regard to Osbourne’s “Suicide Solution” song, the court noted that the theme of life’s hopelessness and the acceptability or even desirability of suicide has recurred through the ages in literature and music.²⁴⁹ The court

242. 276 S.E.2d 580 (Ga. 1981).

243. 480 F. Supp. 199 (S.D. Fla. 1979).

244. 539 P.2d 36 (Cal. 1975).

245. 763 F. Supp. at 1152.

246. *Id.* at 1151. The plaintiffs had put forth other theories of liability such as negligence, nuisance, fraud, and invasion of privacy as well, but the court found that “all of those tort based theories, as asserted by plaintiffs, fail to overcome the defendants’ imposition of a valid first amendment defense.” *Id.*

247. 249 Cal. Rptr. 187 (Cal. Ct. App. 1988).

248. *Id.* at 189. On the night of his suicide, John McCollum listened repeatedly to side one of Osbourne’s *Blizzard of Oz* album and side two of his *Diary of a Madman* release. These albums were found the next morning stacked on the turntable of the family stereo in the living room. John preferred to listen there because the sound was more intense. However, he had gone into his bedroom and was using a set of headphones to listen to the final side of the two-record album, *Speak of the Devil*, when he placed a .22-caliber handgun next to his right temple and took his own life. When he was found the next morning he was still wearing his headphones and the stereo was still running with the arm and needle riding in the center of the revolving record. *Id.*

249. *Id.* at 190 n.4. Illustrative examples listed by the court included:

Hamlet’s “to be or not to be” soliloquy, in which he lists human sufferings and declares that suicide is preferable to life [Shakespeare, *Hamlet*, Act III, Scene I]; the sixteen suicides in Shakespearian drama alone; [] Tolstoy’s novel, *Anna Karenina*, in which Anna, concluding life and love are a “stupid illusion” and suicide the only way out, throws herself under a train; [] Sylvia Plath’s autobiographical *The Belljar*, in which she presents a passionate, reasoned defense of her own “rational” suicide; [] Arthur Miller’s Pulitzer prize-winning play, *Death of a Salesman*, where Willy Loman, confronting failure of his dreams, defends his planned suicide as a “courageous” way finally to achieve something and “takes more guts than to stand the rest of . . .

then recited the familiar line of cases establishing the importance of the First Amendment and its general applicability to artistic expression,²⁵⁰ as well as its equally familiar unprotected exceptions.²⁵¹

In the court's estimation, proof of incitement was the plaintiffs' only hope for a realistic possibility of relief. The court assumed, without discussion, the applicability of the *Brandenburg* test to the present case and stated:

In the context of this case we must conclude, in order to find a culpable incitement, (1) that Osbourne's music was directed and intended toward the goal of bringing about the imminent suicide of listeners and (2) that it was likely to produce such a result. It is not enough that John's suicide may have been the result of an unreasonable reaction to the music; it must have been a specifically intended consequence.²⁵²

To this end, plaintiffs alleged that Osbourne's musical lyrics on side one of *Blizzard of Oz*, lead down a path ending in suicide and could direct a susceptible listener to act out those lyrics. Many of these lyrics such as, "Get the gun and try it shoot, shoot, shoot" were "masked" and barely intelligible.²⁵³

The court concluded:

Apart from the "unintelligible" lyrics quoted above from "Suicide Solution,"²⁵⁴ to which John admittedly was not even listening at the time of his death, there is nothing in any of Osbourne's songs which could be characterized as a command to an immediate suicidal act. None of the lyrics relied upon by plaintiffs, even accepting their literal interpretation of the words, purport to order or command anyone to any concrete action at any specific time, much less immediately.

life ringing up zero"; [] and the operas of Puccini, Menotti and Verdi Aida . . . 249 Cal. Rptr. at 190 n.4. Again, obviously none of these works would fit our working definition of shock torts, because they do not constitute shockingly violent entertainment that appears calculated to appeal primarily to people with an appetite for killing or sociopathic behavior. The typical audience for those works do not consist of violent teenagers.

250. *McCollum*, 249 Cal. Rptr. at 191-92.

251. *Id.* at 192-93. The familiar exceptions, as enumerated by the *McCollum* court, are: (1) obscene speech; (2) libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like; (3) speech or writing used as an integral part of conduct in violation of a valid criminal statute; and (4) speech which is directed to inciting or producing imminent lawless action, and which is likely to incite or produce such action. *Id.* (citations omitted).

252. *Id.* at 193.

253. *Id.* at 197 n.5.

254. *See supra* notes 28-29 and accompanying text.

Moreover, as defendants point out, the lyrics of the song on which plaintiffs focus their primary objection can as easily be viewed as a poetic device, such as a play on words, to convey meanings entirely contrary to those asserted by plaintiffs.²⁵⁵

The court also cited, without detailed analysis, several of the other cases summarized herein in which media defendants prevailed on First Amendment grounds. The court also distinguished *Weirum*, opining that the “reckless importuning” by the disc jockey in that case resulted in “a very high degree of foreseeability of undue risk of harm to others,” rendering it “not . . . inappropriate to view [it] . . . as a specie [sic] of incitement to imminent lawless conduct for which no First Amendment protection is justified.”²⁵⁶

The court’s acceptance of both *Weirum* and the contrary precedent is symptomatic of the lack of doctrinal clarity typical of media tort cases. On one hand, the court suggested and cited to many cases supporting the view that the traditional *Brandenburg* test was the correct analytical lens through which to view incitement. On the other hand, the court also contended that the *Weirum* situation constituted actual incitement within the meaning of the *Brandenburg* test, despite significant evidence to the contrary.²⁵⁷ The court’s ruling thus appears to recognize a broader view of incitement in which the creation of “a very high degree of foreseeability of undue risk of harm” is sufficient to remove all First Amendment protection.²⁵⁸

A case dealing with “gangsta” rap reached a similar result. In *Davidson v. Time Warner, Inc.*,²⁵⁹ the dispute arose from the actions of Ronald Howard,

255. *McCollum*, 249 Cal. Rptr. at 193.

256. *Id.* at 196.

257. The *McCollum* court ignored the fact that there was no evidence demonstrating that the *Weirum* disc jockey was speeding or that he ever encouraged his listeners to violate the speed limits or any other laws. *Id.*

258. *Id.* It is ambiguous whether the court intended to say that the *Weirum* situation was actual incitement or some previously unrecognized functional equivalent of incitement. The court’s awkward statement that it is “not . . . inappropriate” to “view” the *Weirum* situation as a species of incitement, taken literally, means that the *Weirum* situation is truly incitement. In the field of taxonomy, to which the court was inartfully referring, a creature cannot be a species of a broader taxonomic grouping (such as genus or family) without being an actual member of that broader grouping. For example, the Monarch butterfly and the Tiger Swallowtail butterfly are both species of insects and, as such, both belong to the class Insecta. It would be totally inaccurate to say that both are species of insects if we substituted a cat for the Tiger Swallowtail. An organism is either a species within a broader taxon, or it is not. By analogy, a type of speech is either a species of incitement, and thus actually incitement, or it is not. Of course, it is doubtful whether the *McCollum* court had any knowledge of taxonomic principles, given its misuse of the word “specie,” and therefore the court may or may not have intended to use the term precisely.

259. No. 94-006, 1997 WL 405907 (S.D. Tex. Mar. 31, 1997).

who drove a stolen automobile through Jackson County, Texas, in April 1992. Officer Bill Davidson, a state trooper, stopped Howard for a possible traffic violation unrelated to the theft of the vehicle. During the traffic stop, Howard fatally shot Officer Davidson with a nine millimeter Glock handgun. At the time of the shooting, Howard was listening to an audio cassette of *2Pacalypse Now*, a recording performed by Tupac Shakur. During his criminal trial, in an unsuccessful attempt to avoid the death penalty, Howard claimed that listening to *2Pacalypse Now* caused him to shoot Officer Davidson. Davidson's survivors then brought a civil action based on negligence and products liability against Shakur and his record companies.²⁶⁰

The district court, after finding lack of personal jurisdiction over Shakur himself, ruled that the other media defendants were not liable under the applicable Texas negligence law, finding both a low probability of harm resulting from the recording and a very high burden of preventing harm on the defendants and society at large.²⁶¹ The court also quickly disposed of the products liability claim, holding that the content of the recording was not a product.²⁶²

Despite granting summary judgment for the remaining defendants on these grounds, the court also addressed the First Amendment issues in dicta. The court noted that First Amendment protection extends to rap music and other types of music in general,²⁶³ and then mentioned the following

260. *Id.* at *1. The Davidsons did not allege which song Howard was listening to at the time he murdered Officer Davidson. However, at least one song on the recording, "Crooked Ass Nigga," describes the commission of violence against police officers:

Now I could be a crooked nigga too
 When I'm rollin' with my crew
 Watch what crooked niggas do
 I got a nine millimeter Glock pistol
 I'm ready to get with you at the trip of the whistle
 So make your move and act like you wanna flip
 I fired 13 shots and popped another clip
 My brain locks, my Glock's like a f--kin mop,
 The more I shot, the more mothaf--ka's dropped
 And even cops got shot when they rolled up.

Id. at *1 n.4.

261. *Id.* at *2-14. The court noted that the act of violence in the instant case was the only one allegedly linked to this recording after more than 400,000 sales of the album.

262. *Id.* at *14 (citing *Way v. Boy Scouts of Am.*, 856 S.W.2d 230 (Tex. App. 1993) and *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991) (finding that products liability theory does not encompass the content of a publication)).

263. *Id.* at *15 (citing *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); *Atlantic Beach Casino, Inc. v. Morenzoni*, 749 F. Supp. 38, 41 (D.R.I. 1990) (extending First Amendment protection to a live performance of the rap group 2 Live

recognized categories of unprotected speech: obscenity, defamatory invasion of privacy, fighting words, and incitement.²⁶⁴ Although the plaintiffs had alleged that Shakur's recording fit all of the above unprotected categories of speech, the court found none of them applicable as a matter of law.²⁶⁵

Addressing the obscenity issue, the court mentioned that there was some precedent for the proposition that musical work could never be declared obscene, although the court declined to rule so expansively.²⁶⁶ Although it is "riddled with expletives and depictions of violence, and overall the album is extremely repulsive," the court found that the recording lacked the "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals" the court deemed required by the *Miller* case.²⁶⁷ Interestingly, even if the album were ruled obscene, the court opined that such a ruling would be irrelevant to a civil action based on the violent, not sexual, nature of the recording.²⁶⁸

In addition, the court easily held the defamation exception to the First Amendment defense inapplicable, given that the recording only referred to law enforcement officers in general and not to Officer Davidson specifically. The "fighting words" exception was also ruled inapposite, because "no reasonable jury could conclude that persons would reflexively lash out because of the language of Shakur's recording."²⁶⁹ The court reasoned that the words were offensive but were not "by their very nature" likely to cause violence. The recording did not direct its invective and epithets at any specific person, and thus the court held they were not "fighting words."²⁷⁰

Crew)).

264. *Id.* at *16.

265. *Davidson*, 1997 WL 405907 at *16-22.

266. *Id.* at *17 (citing *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 135 (11th Cir. 1992) ("agree[ing] [with petitioners 2 Live Crew that] because music possesses inherent artistic value, no work of music alone may be declared obscene"); *Soundgarden v. Eikenberry*, 870 P.2d 1050, 1055 (Wash. 1994) (en banc) (noting that "no state court has applied the obscenity test to a musical recording, and that no work of music alone has yet been held to be obscene even for minors"))).

267. *Id.* (citing *Miller v. California*, 413 U.S. 15, 25 (1973)).

268. *Id.* This is a novel assertion if the issue is the presence or absence of First Amendment protection. If a given type of speech lacks First Amendment protection, the reason the First Amendment does not apply is immaterial to the ensuing substantive cause of action. Whether a particular bit of expression is stripped of protection because it is obscene, defamatory, fighting words, or incitement, the practical effect should be identical; for instance, the cause of action may proceed on the merits without being barred by the First Amendment. Either the First Amendment applies or it does not.

269. *Id.* at *18 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

270. *Id.* at *19 (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1941))). The court noted that the "fighting words" precedent requires a fact-specific analysis to determine whether the doctrine applies. *See also Hess v. Indiana*, 414 U.S. 105, 107-08 (1973) (per curiam).

Lastly, the court focused, perhaps inappropriately, on the imminence requirement in the incitement exception and found it lacking. The court evidently believed that the incitement test required the violence Shakur encouraged to transpire immediately after listening to the recording. The court again mentioned that Davidson's murder was the only one linked to the recording and stated that Howard had been "listening to 2Pacalypse Now repeatedly, rewinding and replaying various songs, for some 45 minutes before killing Officer Davidson."²⁷¹

The court concluded with the oft-repeated fear that failure to grant summary judgment would result in undesirable self-censorship by the media and "prevent listeners from accessing important social commentary, not just the violent and aesthetically questionable 2Pacalypse Now."²⁷² While declaring that the "hundreds of thousands of copies" of the albums sold indicated "society's aesthetic and moral decay," the court noted that "the First Amendment became part of the Constitution because the Crown sought to suppress the Framers' own rebellious, sometimes violent views."²⁷³

We will conclude this section of the Article by briefly discussing additional case law that has been cited in media-related judicial opinions in support of a First Amendment bar to recovery and that has some relevance to shock torts litigation. These cases, for the most part, involve printed matter.²⁷⁴

In *Herceg v. Hustler Magazine*,²⁷⁵ the plaintiffs sued the magazine in tort under the theories of negligent publication and strict liability.²⁷⁶ Plaintiffs alleged that *Hustler* negligently published an inflammatory article on the practice of "autoerotic asphyxiation"²⁷⁷ entitled, "Orgasm of Death," that caused the death by hanging of the plaintiffs' fourteen-year-old son.²⁷⁸

271. *Davidson*, 1997 WL 405907 at *21. As we have seen, this highly literal, formalistic reading of the *Brandenburg* test cannot be what the Supreme Court intended. See *Crump*, *supra* note 57, at 14-17.

272. *Davidson*, 1997 WL 405907, at *22. The court stated that the public has the right to access "social, aesthetic, moral, and other ideas and experiences." *Id.* (quoting *Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)).

273. *Davidson*, 1997 WL 405907, at *22. We shall return to this quote at the conclusion of this Article with some analysis and commentary.

274. See generally Terri R. Day, *Publications that Incite, Solicit, or Instruct: Publisher Responsibility or Caveat Emptor?*, 36 SANTA CLARA L. REV. 73 (1995); Daniel McNeel Lane, Jr., Note, *Publisher Liability for Material That Invites Reliance*, 66 TX. L. REV. 1155 (1988); Edith L. Pacillo, Note, *Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography*, 28 SUFFOLK U.L. REV. 123 (1994).

275. 565 F. Supp. 802 (S.D. Tex. 1983).

276. *Id.* at 803.

277. *Id.* The article described in detail the practice of masturbating while hanging oneself to cut off the blood supply to the brain at the moment of orgasm so as to heighten sexual pleasure. *Id.*

278. *Id.* The boy was found by a friend, his naked body hanging in his closet, with a copy of

Plaintiffs asserted that the article, which contained a graphic description of the “autoerotic asphyxiation” technique, was both an attractive nuisance for which the magazine had a duty of social responsibility and a dangerous instrumentality or a defective, unreasonably dangerous product.²⁷⁹

The district court found the strict products liability claims “without support in existing case law.”²⁸⁰ The court reasoned it was aware of “no court which has held that the content of a magazine or other publication is a product within the meaning of section 402A of the Second Restatement of Torts.”²⁸¹ The court also found that “[n]o court has held that the written word is either an attractive nuisance which would impose a special duty on defendant magazine, or a dangerous instrumentality for which defendant would be strictly liable.”²⁸² In neither instance was the *Herceg* trial court inclined to make precedent to the contrary. In this respect, the court also followed what it viewed as established precedent on the issue of a publisher’s duty. Citing *Zamora*,²⁸³ the court held that *Hustler*, as a private publisher, had not been appointed to perform any public function, and thus there was no legal basis for finding a duty of social responsibility with regard to the content of its publications.²⁸⁴ Turning to the policy considerations, the court then referred to *Zamora*,²⁸⁵ *Olivia N.*,²⁸⁶ and *DeFilippo*²⁸⁷ in support of a First Amendment bar to recovery.²⁸⁸ The court granted defendant’s motion to

Hustler magazine near his feet, open to the page of the “Orgasm of Death” article.

279. *Id.*

280. *Id.* (citing *Cardozo v. True*, 342 So. 2d 1053, 1056-57 (Fla. Dist. Ct. App. 1977) (holding that a bookseller’s strict liability under implied warranty under the Uniform Commercial Code is limited to the physical properties of books, such as the paper, the cover, and the binding, not the material communicated therein)). *But see* *Comshare, Inc. v. United States*, 27 F.3d 1142 (6th Cir. 1994).

281. 565 F. Supp. 802, 803 (S.D. Tex. 1983).

282. *Id.*

283. 480 F. Supp. 199, 201 (S.D. Fla. 1979).

284. *Herceg v. Hustler Magazine*, 565 F. Supp. 802, 803 (S.D. Tex. 1983). The court stated as follows:

Outside the realm of defamation, the only authority . . . for imposition of a duty on a publisher with regard to the contents of its publications are those cases in which the defendant was the United States. For example, in *Reminga v. United States*, 631 F.2d 449 (6th Cir. 1980), the government was held to have a duty with respect to the publication of a navigational chart or map which, because it was inaccurate, caused harm to the plaintiff. Similarly, in *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 149 (5th Cir. 1971), the United States Court of Appeals for the Fifth Circuit noted that “the duty arises out of the statutory and traditional position of the role played by the government in furnishing charts to mariners with the legal demand they may be effectively available and used”

565 F. Supp. at 803.

285. 480 F. Supp. 199 (S.D. Fla. 1979).

286. 178 Cal. Rptr. 888 (Cal. Ct. App. 1981).

287. 446 A.2d 1036 (R.I. 1982).

288. 565 F. Supp. at 804-05.

dismiss, but with leave to amend to add an allegation of incitement, stating: "It is conceivable that plaintiffs could prove facts showing that *Hustler's* article was 'directed to inciting or producing' the death which occurred and was 'likely to incite or produce' the death, which would entitle them to relief."²⁸⁹ Plaintiffs did in fact file an amended complaint alleging incitement, tried the incitement claim before a jury, and won.²⁹⁰ On appeal, however, a majority of the Court of Appeals for the Fifth Circuit reversed finding that "[e]ven if the article paints in glowing terms the pleasures supposedly achieved by the practice it describes, as the plaintiffs contend, no fair reading of it can make its content advocacy, let alone incitement to engage in the process."²⁹¹

In an interesting side comment, the Fifth Circuit opined that the *Brandenburg* incitement analysis as applied to the type of conduct with which *Hustler* magazine was charged "appears inappropriate."²⁹² The court explained:

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

289. *Id.* at 805. With regard to the prospects of such an incitement allegation, however, the court noted that the *Hustler* article begins with an "Editor's Note," stating in italics, "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." *Id.* at 805 n.3.

290. *Herceg v. Hustler Magazine, Inc.*, 583 F. Supp. 1566 (S.D. Tex. 1984), *rev'd*, 814 F.2d 1017 (5th Cir. 1987).

291. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1022-23 (5th Cir. 1987). The court mentioned that the two-page article, was featured as part of a series on "Sexplay," including discussions of "sexual pleasures [that] have remained hidden for too long behind the doors of fear, ignorance, inexperience and hypocrisy" and were presented "to increase [readers'] sexual knowledge, to lessen [their] inhibitions and -- ultimately -- to make [them] much better lover[s]." The court noted that the piece warned its readers at least ten different times that the practice described therein is dangerous, self-destructive, and deadly. It stated that persons who successfully perform the technique can achieve intense physical pleasure, including sexual "high" and "thrill," but that the attendant risk is that the person may lose consciousness and die of strangulation. *Id.* at 1018 (alterations in original).

292. *Id.* at 1023.

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 now reach.²⁹³

Concurring in part and dissenting in part,²⁹⁴ Judge Jones decried the availability and influence of magazines such as *Hustler* with regard to adolescent males and attacked the article’s warnings such as “no” or “caution” that could be seen by such immature readers as “invitations rather than taboos.”²⁹⁵ Judge Jones recognized the hierarchy of First Amendment speech classifications that has developed and would have made room in the lower realms of the hierarchy for material such as that which cost young Mr. Herceg his life.²⁹⁶ She reviewed the precedent with regard to the hierarchy of First Amendment protection and summarized her rationale as follows:

Measured by this standard, both *Hustler* in general and “Orgasm of Death” in particular deserve limited only first amendment protection. *Hustler* is a profitable commercial enterprise trading on its prurient appeal to a small portion of the population. It deliberately borders on technical obscenity, which would be wholly unprotected, to achieve its purposes, and its appeal is not based on cognitive or intellectual appreciation. Because of the solely commercial and pandering nature of the magazine, neither *Hustler* nor any other pornographic publication is likely to be deterred by incidental state regulation. 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.’”²⁹⁷

293. *Id.* (footnotes omitted).

294. Judge Jones concurred in the result on procedural grounds and dissented on First Amendment grounds. *See* 814 F.2d at 1026-30.

295. *Id.* at 1026.

296. *Id.* at 1026-30.

297. *Id.* at 1028 (footnotes omitted) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985)). In *Greenmoss*, the Court held that a person harmed by a negligently incorrect and unfavorable credit report could recover presumed and punitive damages in a defamation action without the need to prove “malice,” because unlike the situation in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the matter was one of “private concern” rather than “public concern.” The Court concluded that matters of private concern implicate a less important First Amendment interest and are therefore entitled to less protection. 472 U.S. at 763. *See generally* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990).

Finally, in response to the majority's fears regarding the chilling effect on free expression that might ensue from civil liability in such cases, Judge Jones stated:

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. First, any given issue of Hustler may be found legally obscene and therefore entitled to no first amendment protection. Second, tort liability would result after-the-fact, not as a prior restraint, and would be based on harm directly caused by the publication in issue. Third, to the extent any chilling effect existed from the exposure to tort liability, this would, in my view, protect society from loss of life and limb, a legitimate, indeed compelling, state interest. Fourth, obscenity has been widely regulated by prior restraints for over a century. Before *Roth v. United States*, there was no Hustler magazine and it would probably have been banned. Despite such regulation, it does not appear that the pre-Roth era was a political dark age. Conversely, increasing leniency on pornography in the past three decades has allowed pornography to flourish, but it does not seem to have corresponded with an increased quality of debate on "public" issues. These observations imply that pornography bears little connection to the core values of the first amendment and that political democracy has endured previously in the face of "majoritarian notions of social propriety."²⁹⁸

It remains unsettled as to whether the *Herceg* majority or dissent will resonate more loudly during the decades to come. In the following section of this Article we shall return to some of the thoughts contained in Judge Jones's dissent in light of their implications for shock torts theory.

Another oft-cited publisher's case is *Winter v. G.P. Putnam's Sons*,²⁹⁹ which concerned two individuals who relied on information about which types of mushrooms were safe to eat in *The Encyclopedia of Mushrooms*, and became critically ill after eating some wild mushrooms described in the book.³⁰⁰ The Ninth Circuit unanimously upheld the district court's grant of

298. 814 F.2d at 1029 (footnotes omitted) (citing *Roth v. United States*, 354 U.S. 476 (1957)). Judge Jones emphasized a utilitarian approach to First Amendment issues, examining the role speech plays in shaping the direction and form of debate on public issues. As we shall discuss *infra* Part IV.A, there is a contrary, if less prevalent, view that stresses the intrinsic value of free speech, quite apart from any contribution it might make to the socio-political process.

299. 938 F.2d 1033 (9th Cir. 1991).

300. *Id.* at 1034. The plaintiffs both required liver transplants as a result of their adventuresome

summary judgment for Putnam. The court declined to analogize the book to aeronautical charts and thus ruled that strict liability should not be imposed.³⁰¹ The court held that products liability law focuses on tangible items, while “how to” books constitute “pure thought and expression.”³⁰² The court also refused to find a duty of publishers to investigate the accuracy of the books they publish, stating that “[w]ere we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs.”³⁰³

We now have established a comprehensive view of the relevant case law. With this as a foundation, we will set forth a doctrinal framework for shock torts, including each of the most propitious theories for gaining redress.

IV. THEORIES OF SHOCK TORTS LIABILITY

Our discussion thus far has amply demonstrated that the jurisprudence in the area of media liability for media-induced physical harms is far from settled. The United States Supreme Court has not directly addressed the subject, and there is a paucity of precedent in the federal circuit courts as well. The federal district courts and the various levels of state courts have generated a body of divergent case law that leaves the matter ripe for a coherent, consistent analysis. The specific category of shock torts presents an excellent opportunity for the courts to clear the path for such a doctrinal reformation, because shock torts represent extreme fact patterns that can aid in focusing on the underlying core principles and interests involved in media

gastronomic experiment. They sued Putnam, an American book publisher, that had purchased and distributed copies of the book from a British publisher and distributed the book in the United States without performing any editing. The plaintiffs sued on the basis of products liability, breach of warranty, negligence, negligent misrepresentation, and false representations, alleging that the book contained erroneous and misleading information as to the proper identification of the most dangerous species of mushroom. *Id.*

301. *Id.* at 1034-36.

302. *Id.* at 1036. *But see* Comshare, Inc. v. United States, 27 F.3d 1142 (6th Cir. 1994); Brocklesby v. United States, 753 F.2d 794 (9th Cir. 1985), *vacated*, 767 F.2d 1288 (9th Cir. 1985). In *Brocklesby*, the Ninth Circuit held that navigational charts are either nonspeech products or commercial speech, and thus, not entitled to substantial First Amendment protection. 753 F.2d at 800 & n.9, 803.

303. *Winter*, 938 F.2d at 1037. This ruling was consistent with other cases regarding publisher liability. *See, e.g.*, Jones v. J.B. Lippincott Co., 694 F. Supp. 1216 (D. Md. 1988) (holding publisher of a nursing textbook not liable to a nursing student who injured herself while following directions for self-administering an enema); Lewin v. McCreight, 655 F. Supp. 282 (E.D. Mich. 1987) (holding publisher of *The Complete Metalsmith* not liable for injuries resulting from an explosion which ensued while following instructions for mixing a mordant); Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263 (Ill. App. Ct. 1985) (holding publisher of *The Making of Tools* not liable to a person who was injured when a tool being made shattered during the process).

liability.

The lack of definitive precedent permits shock torts plaintiffs to prevail in court without the need for any new doctrinal formulations, just as easily as it allows plaintiffs to fail without a new doctrine. We have discussed examples of both results, and although there are certainly more cases in the latter category, plaintiffs have, at times, been able to cobble together a successful case from the pieces of existing precedent. The primary outcome-determinative factors have included whether the court applied the *Brandenburg* test for incitement³⁰⁴ and, if it did, whether the specific facts of the case could meet the requirements of that test as interpreted by the court.³⁰⁵

The following is a multitiered examination of the primary means by which courts could evaluate shock torts consistently with established precedent and constitutional principles. In each instance, we evaluate the degree to which the approach requires a modification or reinterpretation of extant case law. Additionally, there is an analysis of the normative factors attendant to each approach.

A. *Inapplicability of the Brandenburg Test*

The misapplication of the *Brandenburg* test has contributed more than any other factor to the confused, inconsistent legal landscape in the area of media-related torts. In the absence of controlling precedent, courts have often assumed either the applicability or inapplicability of *Brandenburg* without significant analysis. This assumption has proved outcome-determinative in most, if not all, cases, given the strictness of the *Brandenburg* formulation as it has generally been understood. The courts that have applied *Brandenburg* in media-related cases have almost always found its requirements unsatisfied,³⁰⁶ while those that have not applied the test have tended to rule in

304. *Weirum v. RKO General*, 539 P.2d 36 (Cal. 1975), is the most notable case to eschew the *Brandenburg* test completely.

305. See, e.g., *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997); *Byers v. Edmondson*, 712 So. 2d 681 (La. Ct. App. 1998), *cert. denied*, 526 U.S. 1005 (1999). Successful media-injury cases have also drawn support from cases such as *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982), *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978), *Braun v. Soldier of Fortune Magazine*, 749 F. Supp. 1083 (M.D. Ala. 1990), *Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F. Supp. 1397 (W.D. Ark. 1987), and *S & W Seafoods Co. v. Jacor Broad. of Atlanta*, 390 S.E.2d 228 (Ga. 1990).

306. See, e.g., *Zamora v. Columbia Broad. Sys.*, 480 F. Supp. 199, 206 (S.D. Fla. 1979); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1070-72 (Mass. 1989); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193 (Cal. Ct. App. 1988); *Bill v. Superior Court*, 187 Cal. Rptr. 625, 628 (Cal. Ct. App. 1982); *DeFilippo v. Nat'l Broad. Co.*, 446 A.2d 1036, 1040 (R.I. 1982); *Olivia N. v. Nat'l Broad. Co.*, 178 Cal. Rptr. 888, 893 (Cal. Ct. App. 1982).

favor of the injured plaintiffs.³⁰⁷

The lower courts have frequently approached media-related injury cases with the presupposition that, in order for media defendants to be subject to civil liability for their communicative enterprises, the communication must fall within one of the recognized categories of unprotected or limited-protection speech.³⁰⁸ The usual analysis consists of a brief recitation of the clearly inapplicable categories of unprotected speech, such as obscenity or fighting words.³⁰⁹ By process of elimination, these courts then focus on incitement as the only feasible avenue of redress for plaintiffs' claims, absent judicial recognition of a new form of unprotected or limited-protection speech.³¹⁰ Moreover, without further analysis, these courts uniformly reach for the *Brandenburg* test as the only valid method for evaluating incitement cases.

We will discuss the possibility of an additional species of limited-protection speech for shock torts subsequently in Part IV.D of this Article. For the purposes of our current topic, the lower courts have not been inclined to blaze the trail for new law in this area of First Amendment jurisprudence. It is important to note, however, that speech does not necessarily have to fit within an unprotected or limited-protection class to fall within governmental regulation, which includes civil liability in the courts.

Freedom of expression is not absolute, even for speech that does not meet the description of one of the unprotected categories.³¹¹ The First Amendment does not totally bar governmental regulation of protected expression, but rather requires strict scrutiny of such regulation; the restriction can be upheld if the state's interest is compelling and the means of regulation is narrowly tailored to that end.³¹² Of course, there is an important distinction to be drawn

307. See, e.g., *Weirum v. RKO General*, 539 P.2d 36 (Cal. 1975).

308. See generally John L. Diamond & James L. Primm, *Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries: From the Mickey Mouse Club to Hustler Magazine*, 10 HASTINGS COMM. & ENT. L.J. 969 (1988).

309. See, e.g., *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1022-23 (5th Cir. 1987).

310. *Id.*

311. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 (1961).

312. See *Herceg*, 814 F.2d at 1020. The inquiry does not cease at the point where a court determines that the speech is not within an unprotected category; after this, the court must still consider whether the regulation passes strict scrutiny. See *Sable Communications v. F.C.C.*, 492 U.S. 115, 126 (1989) (concluding that indecent speech is not obscene and then applying strict scrutiny to determine whether the law is nonetheless constitutional); *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (concluding that flag-burning does not constitute "fighting words" and then applying strict scrutiny to see whether the law is nonetheless constitutional). Similarly, for expression that does not quite fit within the unprotected incitement genre, state restrictions should nonetheless be evaluated to determine whether it passes strict scrutiny. See Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1527-29 (1995) (asserting that a court considering regulation of television violence cannot simply conclude that such depiction of violence is not

between content-based and content-neutral regulation. Content-based regulation includes governmental actions aimed at the specific message or viewpoint expressed³¹³ as well as governmental restrictions directed at the impact of the ideas or information communicated.³¹⁴ Content-neutral regulation encompasses government regulation of communicative opportunity, but in instances where government does not focus directly on the ideas expressed or the impact of the communication.³¹⁵

Content-based restrictions are presumptively violative of the First Amendment³¹⁶ because of the repressive dangers inherent in penalizing individuals for allowing certain ideas or information to enter the marketplace of ideas, discussion, and awareness.³¹⁷ Content-based restrictions are traditionally subject to strict scrutiny³¹⁸ and virtually always held unconstitutional unless the communication in question falls within one of the unprotected or limited-protection varieties of speech.³¹⁹ Even here, however, a distinction emerges between direct and indirect abridgement of speech by the government, with the former strongly disfavored and the latter more apt to pass constitutional muster.³²⁰

unprotected incitement, but must also consider whether the regulation passes strict scrutiny).

313. This has become generally known as a category 1(a) restriction on speech. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 789 (2d ed. 1988).

314. This is category 1(b). *Id.* If the First Amendment means anything, it means that ordinarily at least the “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of the City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190-93 (1983).

315. Content-neutral regulation is called category 2. See TRIBE, *supra* note 313, at 789-90.

316. Professor Tribe coined the term “track one” to describe the rigorous analysis applied to the content-based category 1 regulation of expression. *Id.* at 791-92.

317. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). See generally Clay Calvert, *Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L. REV. 69 (1997); Christopher M. Schultz, Note, *Content-Based Restrictions on Free Expression: Reevaluating the High Versus Low Value Speech Distinction*, 41 ARIZ. L. REV. 573 (1999).

318. Also known as the “compelling interest” approach, the strict scrutiny test was established in *Korematsu v. United States*, 323 U.S. 214 (1944).

319. These disfavored categories of speech themselves represent a balancing of competing interests, in that they reflect judicial weighing of the benefits offered by each type of speech and the harms typically caused by them. The principal difference is that for the disfavored species of speech the balancing test has been done in advance, as opposed to an ad hoc balancing in each individual case of all relevant factors. The merits of the categorical versus ad hoc balance have been debated in the scholarly literature. See Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983).

320. Renowned First Amendment absolutist Justice Black recognized a separate category for indirect abridgements of speech, the constitutionality of which is determined by balancing the

Content-neutral restrictions, on the other hand, are usually analyzed through application of a case-by-case balancing test and are upheld if they do not unduly constrict the free flow of information and ideas.³²¹ For example, an ordinance banning noisy demonstrations on streets abutting schools while classes are in session may be upheld if the harm caused by such demonstrations, irrespective of the actual ideas conveyed, outweighs the benefits of unfettered expression.³²²

An undercurrent of rationales for the ultimate meaning and purpose of freedom of expression runs through all First Amendment jurisprudence. There is no definitive pronouncement from the Supreme Court illuminating a hierarchy or system of priorities that would enable us to determine which interests are paramount and which may be subservient to other concerns. It is possible, however, to glean from various cases and from scholarly commentaries at least two main theories underlying freedom of speech, but no single theory has an irrefutable and exclusive claim of legitimacy.³²³

Probably the most frequently articulated theory consists of an instrumental or practical approach, defining freedom of speech essentially as a means to an end. The end is often identified as informed self-government or social stability within a democratic system³²⁴ or, more broadly, the discovery and dissemination of truth.³²⁵ The familiar marketplace of ideas concept is an aspect of the instrumental theory.³²⁶ The instrumental paradigm

competing interests. See Paul A. Freund, *Mr. Justice Black and the Judicial Function*, 14 UCLA L. REV. 467, 471-72 (1967).

321. Tribe calls the analytical framework for category 2 restrictions "track two." See TRIBE, *supra* note 313, at 792. Courts consider the extent to which the restriction limits communication, the substantiality of the government interests served by the restriction, and whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment. See *Schad v. Bourough of Mount Ephraim*, 452 U.S. 61, 70 (1981).

322. *Grayned v. Rockford*, 408 U.S. 104 (1972). Time, place, and manner regulations have been upheld on a similar basis. See, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). However, the jurisprudence in this area is not without its own controversies. See generally Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921 (1993).

323. See generally CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1995); Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275 (1998).

324. This view has many famous champions, past and present. See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT* 18-19, 22-27 (1948); JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 203 (London, Parker, Son, and Bourn 1861); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 20-35 (1971); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

325. TRIBE, *supra* note 313, at 785. See also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983).

326. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *But see* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

makes room for hierarchies of speech based on value to the socio-political process, with political speech at the apex. An alternative or supplementary approach views freedom of speech at least in part as an end in itself, an expression of the type of society we wish to become and the type of people we wish to be. Under this theory, hierarchical classifications of speech are de-emphasized, because all expression is valued, regardless of whether it makes an identifiable contribution to the political or social discourse of the nation.³²⁷

These divergent views regarding the fundamental reasons behind the enactment of the First Amendment substantially contribute to the lack of a coherent jurisprudence in this area. The inconsistent approaches courts have taken in media injury cases reflect a lack of agreement concerning freedom of expression generally. Disparate doctrinal strands wafting through the case law become inevitable when there is serious disagreement on an issue of such fundamental importance.³²⁸

In this light, it is not surprising that the content-neutral and content-based nomenclature described above does not intuitively indicate what mode of analysis should be employed in any given case. In the usual shock torts situation, for example, it is debatable whether judicial provision for a civil cause of action is in any way a content-based restriction of expression.³²⁹ Even assuming that a civil cause of action is a content-based restriction, the act of supplying a level playing field for private litigants to use in resolving their private disputes can be viewed as, at most, an indirect abridgement of expression and thus can be parsed through a balancing test analysis.³³⁰

327. *TRIBE*, *supra* note 313, at 785, 787-89. *See also* *Whitney v. California*, 274 U.S. 357, 375-77 (Brandeis, J., concurring); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 *PHIL. & PUB. AFF.* 204 (1972); David A. Strauss, *Persuasion, Autonomy and Freedom of Expression*, 91 *COLUM. L. REV.* 334 (1991).

328. It is beyond the scope of this Article to attempt to forge a definitive theory of First Amendment jurisprudence. We will focus instead on the dominant approaches articulated in Supreme Court decisions, as they relate to shock torts cases.

329. It is arguable whether some forms of shock torts entertainment can be said to express ideas at all. Certain types appear more akin to conduct than speech. Moreover, where subliminal messages are involved, courts may be willing to find the First Amendment completely inapplicable. The ubiquitous and aggressive use of tailored advertising of these products to appeal to particularly vulnerable consumers may be a factor arguing for reduced First Amendment protection as well, if the advertising is deemed to be a form of emotional coercion along the lines of subliminal messages. But, for the most part, there is at least an inchoate and generalized, albeit poorly articulated, idea at the core of shock torts entertainments. That idea is that wild, unlawful, wanton violence is desirable, and the more graphic, explicit, and excessive the violence, the better. Alternatively, and phrased as charitably as possible, the message is that society as a whole is deeply flawed and violence is an appropriate response to the ubiquitous evil and injustice. Thus, the better view is that toleration of civil actions for the redress of shock torts does constitute a form of content-based regulation.

330. The government's provision of a private remedy in tort has been deemed sufficient state

Although the government is involved in resolving the content-based dispute, it is an indirect as opposed to a direct abridgement of expression, that proves much less intrusive and chilling than overt statutory or regulatory content-based restrictions. In cases such as *Weirum*, courts bypassed the incitement analysis entirely on this basis and had no difficulty ruling in favor of plaintiffs against media defendants using an ad hoc balancing test to weigh the competing interests.

Less adventuresome courts that are unwilling either to (1) engage in a conventional balancing-test analysis where First Amendment interests are implicated, as in shock torts cases, or to (2) carve out a new type of unprotected or limited-protection expression, will ineluctably focus on incitement as the only alternative to strict scrutiny. Even assuming incitement is presumptively the only real option for shock torts plaintiffs, however, the *Brandenburg* standard is by no means the only clearly proper rule to apply in cases involving a wide spectrum of factual and procedural situations, especially as courts endeavor to winnow the chaff of unprotected incitement from the wheat of protected expression.

There has never been a United States Supreme Court decision definitively setting forth the proper ambit for the *Brandenburg* test. Therefore, important questions remain unresolved.³³¹ Does the test apply to all forms of expression afforded First Amendment protection? If so, is there any variation of the test's requirements depending on the type of expression at issue? Does the test apply when it is the interests of a private party rather than the government that stand opposite the source of the expression? Does it apply when the communication is either aimed at or received by a minor?

The *Brandenburg* case and its progenitors and progeny at the Supreme Court level concerned a highly specific subcategory of protected expression—very unpopular political advocacy by and for marginalized members of society with a view towards spurring listeners to action. This type of speech has frequently been viewed as “core” First Amendment expression, at least within the predominant utilitarian theory. Precisely this action-advocating species of expression—political speech by persons who have been politically disfavored by the governing majority because of their status and views—comprises the raw material that fuels the engine of democracy. Within the context of the time a given case arises, the speech protected by *Brandenburg* is such controversial speech, usually aimed to transform the established system of government in one or more particulars,

action to implicate the First Amendment by analogy to the defamation ruling in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

331. See generally Lynd, *supra* note 75, at 153-56.

that it is at once most valuable to the democratic form of government and also most fragile and susceptible to majoritarian suppression.

Moreover, the facts of *Brandenburg* and many of the related cases involved direct, face-to-face political advocacy by a leader to a live audience. The immediacy of this communication made it even more crucial that the Court impose the most stringent safeguards on the expression, because such direct advocacy has both the highest potential for generating responsive political action and the greatest risk of provoking governmental interference. Historically, at least before the modern era of ubiquitous and instantaneous telecommunication, people usually have been inspired to take political action not by reading leaflets or viewing films, but by the potent influence of an in-person speaker and the synergistic energy such a speaker produced in the live audience.

Political advocacy by members and often by leaders of the civil rights movement, the American Communist Party, the Ku Klux Klan, and various anti-war movements is a type of expression protected within a venerable legal tradition in the United States. Tracing its roots as far back as the political turmoil that spawned this nation's war for independence, such action-oriented advocacy by disempowered, controversial, and unpopular political agitators is both very powerful and very weak. It is powerful because bold and impassioned argument for dramatic, and often revolutionary, societal transformation has the potential, particularly when made in-person to a live audience, to ignite the spirits of those who hear it and spark a mass movement that could effect real change. Simultaneously, it is weak because it is perceived as inimical to the self-interest of the power-wielding governing majority, that possesses both the means and the motive to squelch the threat through early, preemptive restraints on those who would foment rebellion.

The Court has correctly perceived the special nature of this form of disfavored political expression, recognizing that without very strong protection from majoritarian suppression, a vital component of the machinery of freedom would likely be imperiled or lost. Nations, including our own, are created in the white-hot crucible of political turmoil, where inchoate progressive movements are in imminent danger of destruction by the established power structure. It is not surprising, then, that the Court has reserved a unique place of honor in the pantheon of protected expression for the fuel of freedom. If unpopular political-action speech is not safeguarded, the bedrock principles upon which the United States was founded are themselves threatened, because then the nation will have lost its commitment to political change within the democratic system.

Lower courts have tended to ignore the fact that the Supreme Court

decisions that set down the foundation for *Brandenburg*, the *Brandenburg* case itself, and those incitement decisions that came afterwards, all dealt directly with this type of “core” First Amendment expression. In light of the preeminent protected status of such speech, it is understandable that the *Brandenburg* test was framed in such rigorous, almost impossibly demanding terms. The Court intended to erect a standard that would safeguard action-advocating speech by the most disfavored political entities in the country, even—or perhaps especially—the Ku Klux Klan, the Communist Party, and the like. This almost impervious shield for what might well be violent, hateful, and dangerous individuals directly addressing a crowd, or a mob, of people was seen as part of the price a free society pays for its continued viability.

It could be asserted that some shock torts communication does express a form of “core” political thought. For example, the rapper Ice-T’s work in “Cop Killer” was defended by Time Warner as containing at least some degree of political speech. Time Warner reasoned that the lyrics express the “rage and frustration of a young black person in the face of official brutality and systematic racism. . . . Our job as a society is to address the causes of this anger, not to suppress its articulation.”³³² However, “fighting words,” a venerable form of unprotected speech, may convey that same type of sentiment, yet remain unprotected.³³³

An additional, possibly very significant factor distinguishing *Brandenburg* and its progeny from the shock torts cases, is the element of prior restraint. As Judge Jones indicated in her opinion in *Herceg*, the *Brandenburg* case “addressed prior restraints on public advocacy of controversial political ideas.”³³⁴ In fact, *Brandenburg* and all of the other key First Amendment cases dealing with various forms of criminal syndicalism statutes involved government action to proscribe in advance certain disruptive forms of expression. In contrast, shock torts civil actions are a retrospective measure, designed not to restrain speech prospectively, but rather to distribute the costs of harm actually caused by speech, after the fact—an important distinction.

332. Martin, *supra* note 21, at 162.

333. In the seminal “fighting words” case, the defendant vented similar rage when he called a city official a “racketeer” and a “damned fascist,” but the Court held this defendant’s words unprotected. The Court based this decision on the grounds that the defendant’s words were “no essential part of the exposition of ideas,” and also on the grounds that the words had the potential for causing injury and disruption of the peace. Thus, even if speech constitutes the venting of politically charged rage, it has only “slight” speech value, unless it also contains other expressive elements deserving of more protection. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

334. 814 F.2d 1017, 1029 (5th Cir. 1987) (Jones, J., dissenting in relevant part).

Strictly speaking, expression that meets the *Brandenburg* incitement test is by definition not protected by the First Amendment, while traditional prior restraint doctrine involves restrictions on protected speech. However, there is a similar fundamental principle at work in both situations. The strictness of both the *Brandenburg* test and the standard for upholding prior restraint reflects judicial reluctance to cut off communication preemptively.

Historically, the Supreme Court has viewed prior restraints on expression as the most disfavored forms of encroachment upon First Amendment rights.³³⁵ The Court has consistently opined that prior restraints are particularly burdensome on free expression and has issued a series of rulings that display virtually absolute rejection of prior restraint measures. The Court has stated on several occasions that any “system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”³³⁶ One rationale for this extremely strict judicial scrutiny follows:

[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.³³⁷

In light of this, it is noteworthy that *Brandenburg* and its progeny concerned situations in which the government sought to impose restrictions in advance or subsequent criminal punishments on those who advocated unlawful actions, utterly irrespective of whether any unlawful actions actually resulted from the advocacy. In fact, and in direct contrast to the shock torts cases, the *Brandenburg* line consists of a parade of cases in which no harm resulted at all.³³⁸ It is reasonable that a very different legal standard would apply to situations involving the criminalization and official prosecution of the mere possibility of harm versus the after-the-fact allowance of a civil remedy for a private citizen who was actually damaged.

335. See, e.g., *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980); *Nat’l Socialist Party v. Skokie*, 432 U.S. 43 (1977) (per curiam); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Near v. Minnesota*, 283 U.S. 697 (1931).

336. See, e.g., *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 556-59 (1976); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

337. *S.E. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis in original).

338. See, e.g., *Hess v. Indiana*, 414 U.S. 105 (1973); *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919).

The Court, in recognition of the peculiar perniciousness of the fact situation present in cases similar to *Brandenburg*, has indicated that prior restraints would be constitutional only in “exceptional cases.”³³⁹ This has been borne out in decisions holding ostensibly vital concerns insufficient to justify prior restraints.³⁴⁰ The comparatively few instances in which prior restraints have been upheld have involved, primarily, noncore speech, such as pornographic films³⁴¹ or commercial speech.³⁴² While some commentators have criticized certain aspects of prior restraint jurisprudence,³⁴³ there is no question that the Court has viewed prior restraints in general as a very extreme intrusion on freedom of expression and has subjected efforts to impose prior restraints to strict scrutiny. It is therefore reasonable to conclude that the *Brandenburg* test would not be as strict as it is if it had not been crafted at least in part to address a close relative of prior restraint—i.e., a highly suspect breed of infringement on free expression.

It is thus a mistake to apply the *Brandenburg* standard to all forms of expression in all contexts, especially those far removed from the realm of preemptive restriction or criminal punishment of marginalized political advocacy. The farther along the spectrum one moves away from “core” speech, the weaker the policy rationale becomes for subjecting competing interests to a virtually insurmountable barrier.³⁴⁴ In addition, where

339. *Near*, 283 U.S. at 716. In *Near*, the Court listed, in dicta, three examples of such exceptional cases: (1) restraints during wartime to prevent the disclosure of troop movements; (2) enforcement of obscenity laws; and (3) enforcement of laws against incitement to acts of violence or revolution. This is significant for the purposes of a shock torts analysis because incitement, the subject of the *Brandenburg* test, was explicitly listed as one of the extremely rare permissible uses of prior restraint. The strictness of the *Brandenburg* formulation is very logical within this frame of reference.

340. Such insufficiently “exceptional” cases have involved, inter alia, threats to national security in *New York Times Co.*, 403 U.S. at 714; the Sixth Amendment rights of criminal defendants in *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 551-56 (1976); the privacy rights of homeowners in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); and the psychological well-being of Holocaust survivors in *National Socialist Party v. Skokie*, 432 U.S. 43 (1977) (per curiam).

341. See *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961).

342. See, e.g., *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986); *Donaldson v. Read Magazine*, 333 U.S. 178, 189-91 (1948); *FTC v. Standard Educ. Soc’y*, 302 U.S. 112 (1937).

343. See, e.g., Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 35-38 (1981); Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 649 (1955); John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 437 (1983); William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 246 (1982).

344. There are many examples of noncore speech that are routinely regulated or even criminalized, but it is easy to overlook them as we focus too narrowly on one small segment of the law. Catharine MacKinnon has pointed out that giving the order to murder someone, committing bribery, engaging in price-fixing, sexually harassing an employee, and either uttering or placing a “White Only” sign in a public restaurant are all formal acts of speech that are not protected by the First Amendment. Rather, although they do express ideas and thoughts, the law perceives their defining

preemptive or punitive sanction by the government's criminal justice system is replaced with retrospective civil liability for private litigants, there is a much weaker precedential and prudential³⁴⁵ basis for subjecting plaintiffs to the sheer, vertiginous cliffs of the *Brandenburg* test.

It is always difficult to draw lines categorizing speech on the basis of content, but particularly in the area of shock torts, the poor fit of the *Brandenburg* test becomes apparent. It would be more equitable, and arguably more in line with First Amendment doctrine, to limit application of the *Brandenburg* test to cases somewhat similar to its historically archetypal situations, i.e., "core" speech, particularly where the government seeks to restrain in-person, unpopular political speech. Conversely, the courts should deal with shock torts, and perhaps other species of expression that are very different from the *Brandenburg* paradigm, under an alternate rubric.

Would the Supreme Court have created the *Brandenburg* test in the first place, or would it apply that test now, to situations very different from the criminalization of in-person, marginalized political advocacy that gave rise to the test's rigorous standards? More precisely, would that almost-insurmountable obstacle have been placed in the path of garnering civil redress for severely wronged, usually very young, vulnerable, private individuals, or would the Court have reserved the severity of the *Brandenburg* standard for the vastly more powerful and dominant established government that attempts to impose criminal punishment on oppressed political activists? Would that same daunting obstacle have been lodged in defense of wealthy, famous, often highly popular³⁴⁶ public figures rather than disempowered, anathematized political dissidents? And would that degree of strict judicial scrutiny have been applied, not to "core" political speech but to for-profit entertainment crafted primarily to shock a youthful audience with extremely violent, lawless, and often sociopathic images and

characteristics on the basis of what they do, instead of what they say. CATHARINE A. MACKINNON, ONLY WORDS 12-13 (1993). See also Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293 (1993).

345. It is debatable whether, as a practical matter, criminal action brought by the government's prosecutors is more likely to chill free expression than the prospect of potentially large civil damages after the fact. Nevertheless, courts have been more reluctant to uphold the former, seeing them, rightly or wrongly, as the greater threat to First Amendment rights.

346. The Recording Industry Association of America (R.I.A.A.) maintains an on-line database of musical recordings that have been certified as "gold" or "platinum," reflecting sales of 500,000 and 1,000,000 albums, respectively. According to R.I.A.A. data as of October 29, 2000, the Ozzy Osbourne albums *Blizzard of Oz* and *Diary of a Madman* have sold over four million and three million copies, respectively, and Osbourne has been credited with a total of two gold or platinum recordings. Judas Priest has eleven gold or platinum recordings, including the *Stained Class* album (certified gold). Ice-T has six certified gold albums. See R.I.A.A. Gold & Platinum Database Search, available at <http://www.riaa.com/Gold-Intro-2.cfm> (last visited Oct. 29, 2000).

words? The answer to all of these questions is almost certainly no.

Very different normative considerations attach to the archetypal *Brandenburg* situation than to the typical shock torts scenario. Indeed, the balance of equities is virtually reversed in the two sets of circumstances. The disparity in power and resources is firmly in favor of the media-related communicator in the shock torts cases, and at least equally strongly against the political advocate in the *Brandenburg* cases. Moreover, the expression in the shock torts situations is far removed from the “core” First Amendment speech at risk in the *Brandenburg* cases. Rather than marginalized, unpopular political speech aimed at changing significant portions of American government or society, the archetypal shock torts speech is nonpolitical, commercially sold entertainment that is aggressively marketed for appeal to a mass audience, usually comprised of minors, to sell as many copies as possible of the work in question.³⁴⁷ In sharp contrast to the aim of shaping the political direction of the nation, shock torts expression is at least primarily, if not exclusively, designed to appeal to the tastes of a particular segment of consumers, so as to earn as much revenue as possible for the creators, producers, and distributors of that type of entertainment.

The entertainers whose works have been linked to violent, destructive incidents have often been phenomenally successful in their efforts to attract customers willing to pay for their wares. In sharp contrast to the *Brandenburg* archetype of anathematized political activists struggling to convey their message to even a few receptive listeners, shock torts defendants are typically prosperous objects of adulation in their chosen market niche and often reach hundreds of thousands, and even millions, of paying consumers with each new product. The nearly impregnable shield which the Court originally deemed necessary to protect the *Brandenburg* political dissidents is understandable and defensible within that context and perhaps considerably beyond, but not in all contexts and not under all circumstances. It is manifestly inappropriate to shelter from liability for their shock torts the show-business idols who routinely sell staggering quantities of their works.

It is unlikely that the motion pictures, musical recordings, or video games

347. See Josh Chetwynd, *Marketing Violent Content to Kids is a “Successful Strategy,”* USA TODAY, Sept. 12, 2000, at A7 (reporting that Federal Trade Commission’s report revealed entertainment industry’s aim to aggressively market R-rated movies and M-rated (mature) video games to males under 17); *U.S. Report Accuses Entertainment Industry of Targeting Kids*, XINHUA GENERAL NEWS SERVICE, Sept. 11, 2000 (reporting that Federal Trade Commission said violent movies and video games are routinely and intentionally targeted to underage audiences, undermining the credibility of the entertainment industry’s ratings system), available in LEXIS, Nexis Library, Wire Service Stories File.

at issue in shock torts litigation would have been created with such extremely violent features if the entrepreneurs involved did not believe that these characteristics would enhance the sales potential of their product. Perversely, for some potential consumers, outrageous violence and strongly antisocial themes are powerful selling points that translate into purchases. Generally, less mature adolescent or near-adolescent males comprise the market segment that favors the most rebellious, shocking forms of entertainment.³⁴⁸ Such youths may gravitate towards overtly fringe diversions as they struggle against parental authority and the perceived confining strictures of established, civilized society. If their preferred amusements scandalize and dismay the relevant authority figures, this is seen as desirable, because it reinforces their individuality and refusal to be co-opted by the prevailing system.³⁴⁹ Rational business judgment moves some entertainers and their marketing support structure to attempt to cater to this lucrative consumer base with material that shocks authority figures and reinforces the customers' defiant self-image.

Unfortunately, some members of this target group are also the emotionally disturbed, unstable individuals who are especially prone to imitate or act out the destructive messages sent from the entertainment-media that pervades their lives.³⁵⁰ It is also unfortunate that the definition of "shocking" is a moving target. Material that is on the fringe at one point in time quickly becomes assimilated into the boring mainstream in the opinion of the youthful consumers, and so the purveyors of shocking entertainment

348. For the extensive literature and research cited therein, see generally Brandon S. Centerwall, *Television and Violence: The Scale of the Problem and Where to Go from Here*, 267 JAMA 3059 (1992).

In July 2000, four national health associations formally announced their conclusion directly linking violence in television, music, video games, and movies to increasing violence among children. The joint statement released by the American Medical Association, the American Academy of Pediatrics, the American Psychological Association, and the American Academy of Child and Adolescent Psychiatry stated that "[t]he conclusion of the public health community, based on over 30 years of research, is that viewing entertainment violence can lead to increases in aggressive attitudes, values and behaviors, particularly in children," and that "[i]ts effects are measurable and long lasting." Associated Press, *Media Tied to Violence Among Kids*, DENVER POST, July 26, 2000, at A4, available at 2000 WL 4468345.

349. Associated Press, supra note 348, available at 2000 WL 4468345. See S. 1383, *Children's Protection from Violent Programming Act of 1993*, S. 973, *Television Report Card Act of 1993*; and S. 943, *Children's Television Violence Protection Act of 1993: Hearing Before the Senate Comm. On Commerce, Science and Transp.*, 103d Cong. 33, 35 (1993) (statement of Janet Reno, U.S. Attorney General).

350. See generally Brandon S. Centerwall, *Exposure to Television as a Risk Factor for Violence*, 129 AM. J. EPIDEMIOLOGY 643 (1989) (study limited to United States and South-African Caucasians). But see Victor Strassburger, *Television and Adolescents: Sex, Drugs, Rock 'n' Roll*, 1 ADOLESCENT MED. 161 (1990) (suggesting that Centerwall's statistics are overstated).

must continually exert themselves to stretch the boundaries of acceptability further. If the product does not become more violent and explicit, it will not appeal to those youths who demand that they be afforded with “cutting edge” material, both literally and figuratively. Thus, over time, the trend inexorably leads towards increasingly graphic, sociopathic blood sports.³⁵¹

If large for-profit companies tailor their product to appeal to the fringe elements of the adolescent male subculture and aggressively market their product to induce such youths to buy, an occasional civil judgment against them in response to the harms they generate in their target group may properly be viewed as one of the costs of doing business. The lower courts that have summarily barred shock torts actions through application of the *Brandenburg* test³⁵² have missed the mark. The better view utilizes the torts system in these cases to spread the risk of loss among those best capable of absorbing it, rather than shifting the loss entirely to the injured teenagers, their third-party victims, or, in many instances, their bereaved survivors. But then we must ask what, if anything, would replace the *Brandenburg* standard in evaluating shock torts cases?

One approach combines abandonment of the *Brandenburg* test with judicial recognition of a new category of unprotected or less protected speech—that of “shockingly violent mass entertainment.” We will cover this option in Part IV.D of this Article.

Another possibility, somewhat related, replaces the *Brandenburg* standard with an alternative balancing test in civil cases where, as in shock torts,

351. This phenomenon can be observed easily by comparing the various versions of the video/computer game *Mortal Kombat*. The blood and mayhem that was beyond the pale to many only a few years ago seems mild when compared to the more realistic and extreme violence depicted in its latest iterations. Rapid advancements in computer graphics and virtual reality technology greatly facilitate the movement towards ever more explicit violence in such games. See Dan Gillmor, *Mortal Kombat II: Video Sleaze Strikes Again*, DAYTON DAILY NEWS, Oct. 16, 1994, at 2G; Robert J. Hawkins, *Video Games Blood, Gore and Body Parts Are Getting More Real All the Time*, SAN DIEGO UNION-TRIB., Sept. 18, 1993, at E1. In the realms of music and film, direct comparisons are less accessible, but it is not difficult to detect a trend in the direction of more extreme, vividly violent, antisocial forms in categories such as “gangsta rap”.

352. See, e.g., *Zamora v. Columbia Broad. Sys.*, 480 F. Supp. 199, 206 (S.D. Fla. 1979); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193 (Cal. Ct. App. 1988); *Bill v. Superior Court*, 187 Cal. Rptr. 625, 628 (Cal. Ct. App. 1982); *Olivia N. v. Nat’l Broad. Co.*, 178 Cal. Rptr. 888, 893 (Cal. Ct. App. 1981); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1070-72 (Mass. 1989); *DeFilippo v. Nat’l Broad. Co.*, 446 A.2d 1036, 1040 (R.I. 1982). Concededly, the great majority of lower courts that have addressed this issue have presumed *Brandenburg* applicable in contexts quite different from the original political dissident paradigm. No argument is made that *Brandenburg* was wrongly decided at the time, nor that it should now be entirely overruled. Moreover, *Brandenburg* should not be construed as narrowly as possible so as to confine it to a small and highly fact-specific legal cabin. However, this Article questions both the precedential mandate and the normative rationale for applying its formidable legal obstacle to circumstances as far from its point of origin as shock torts.

plaintiffs allege that communicative processes are the proximate cause of actual physical injury to one or more people. Despite dicta in existing cases stating that civil liability is at least as apt as criminal prosecution to chill free speech, a crucial distinction remains in that the government affirmatively brings the action against the communicator in criminal cases, whereas it only provides a forum—a level playing field—in the civil context. Far greater risk of governmental oppression, suppression, and tyranny exists when governmental agents actively investigate and prosecute defendants using all the resources of the state to do so, than in civil actions where the state hosts a fair contest as impartial arbiter of justice and concerns itself with ensuring its own neutrality.

Further, equity tips in favor of a plaintiff who has suffered physical harm (often maiming or death) as a result of the speech of another. As we have seen, instances of such harm are quite rare, even when companies repeatedly direct extremely violent messages at millions of impressionable, immature targets. Therefore, the risk of a significant chilling effect on expression should be minimal. Because the profitability of mass media entertainment is so enormous, and the frequency of incidence of resultant physical harm is so minute, it remains improbable that a rational utility maximizer in the entertainment industry would opt to self-censor to any appreciable extent. Thus, prudence dictates that the state provide some avenue of redress to a few physically damaged plaintiffs rather than withhold all such relief in favor of an absolute First Amendment shield for mass media defendants. This alternative balancing test assigns appropriate weight to all of the key interests in shock torts cases rather than maintaining the very hefty thumb of *Brandenburg* pressing down so heavily in favor of the media defendants' side of the scales.³⁵³

Professor Andrew Sims has proposed one such balancing test.³⁵⁴ His rather complex test requires a preliminary inquiry whether the speech in question is categorically unprotected by the First Amendment.³⁵⁵ If it is not completely unprotected, one moves to the first level of the balancing test, whether the “speech dissemination/liability factor” should weigh in favor of

353. See Amy K. Dilworth, Note, *Murder in the Abstract: The First Amendment and the Misappropriation of Brandenburg*, 6 WM. & MARY BILL RTS. J. 565, 592 (1998). See generally Robert N. Houser, Comment, *Alleged Inciteful Rock Lyrics—A Look at Legal Censorship and Inapplicability of First Amendment Standards*, 17 OHIO N.U. L. REV. 323 (1990) (examining the *McCullum* decision and concluding that it was correct but that “cursory” application of the *Brandenburg* test should yield to an evaluation of all “relevant factors of each case”).

354. See Sims, *supra* note 55, at 279-92.

355. *Id.* at 280.

the media defendant.³⁵⁶ This analysis consists of the following elements and subquestions:

- (1) An initial presumption in favor of media protection . . . (2) Was a specific potential plaintiff identifiable in advance of the speech? . . .
- (3) Did the media speaker know of, or should the media speaker have foreseen, the danger? . . . (4) How grave was the danger? . . . (5) How was the speech recipient led to engage, or how did he come to engage, in the activity that was dangerous to himself and/or others? . . . (6) Was the danger obvious to the speech recipient? . . . [and] (7) Did the media defendant participate in the origination of the subject speech, or was it only a “neutral disseminator” of the speech of others?³⁵⁷

The second level of the test weighs the arguments in favor of First Amendment protection under the specific circumstances of the case. This analysis consists of the following two questions:

- (1) Categorized according to its content, is the speech at issue entitled to receive special constitutional protection, or less constitutional protection, compared to First Amendment-protected speech generally? . . . [and] (2) If there is no First Amendment bar to the desired civil sanction, how invasive, chilling or otherwise damaging might imposing liability be to the functional role of the media in the future?³⁵⁸

The Sims test, or any number of possible variants thereof,³⁵⁹ proves more equitable and appropriate in the shock torts, or media-related torts, context

356. *Id.* at 282.

357. *Id.* at 280-88. The second factor in the Sims test alludes to cases in which details concerning facts such as a crime victim’s name and address were published and led to the subsequent endangerment of that person. *See, e.g., Times-Mirror Co. v. Superior Court*, 244 Cal. Rptr. 556 (Cal. Ct. App. 1988); *Hyde v. City of Columbia*, 637 S.W.2d 251 (Mo. Ct. App. 1982).

358. *Sims, supra* note 55, at 288-92.

359. For example, Professor Crump has posited a case-by-case approach that evaluates eight evidentiary factors to determine whether a given utterance constitutes incitement under *Brandenburg*. Crump considers his test a refinement rather than a replacement of the *Brandenburg* test. He proposes consideration of the following factors, none of which is alone dispositive: (1) the express words or symbols uttered; (2) the pattern of the utterance, including any parts that both 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 alternate means of expressing a similar message; (7) the inclusion of disclaimers; and (8) whether the utterance has “serious literary, artistic, political, or scientific value” (or, alternatively, whether it is “speech on a matter of public concern”). Crump, *supra* note 57, at 52-67.

than the *Brandenburg* test.³⁶⁰ Courts have the ability to capably afford due deference to First Amendment concerns while also holding the door open for plaintiffs with genuinely meritorious claims under appropriate sets of circumstances. With these precepts in mind, we offer the following proposal for a new balancing test.

B. A New Alternative to the Brandenburg Test

Although not meant to supplant *Brandenburg* in all cases, this alternative test should rework the *Brandenburg* analytical framework to address more appropriately the particular factual and legal features that prevail in the shock torts context and related situations. Specifically, courts should use the test when some physical harm has allegedly resulted from mass-media speech, and the only avenue of redress in light of the First Amendment is some form of incitement.³⁶¹

We can summarize the test in the following abbreviated manner:

$$V \Leftrightarrow M \times P \times B,$$

where V is the “value” of the speech, M is the “magnitude” of resultant physical harm, P is the “probability” of physical harm ensuing from the speech, and B is the degree to which the “balance” of hardships favors the plaintiff. Let us explain each term in some detail.

The “value” of the speech comprises the extent to which First Amendment protection applies to the type of communication at issue. This protection reaches its maximum level in archetypal *Brandenburg* situations, such as the in-person not-for-profit expression of unpopular political advocacy. Conversely, the protection reaches its minimum level when the speech is virtually indistinguishable from the standard species of unprotected expression, such as that bordering on obscenity, incitement, defamation, or the like. Value can be conceptualized as a continuum—a sliding number on a scale—moving according to the presence or absence of multiple factors. The

360. The Sims test and the Crump variant on *Brandenburg* are both quite lengthy and perhaps too unwieldy to gain significant numbers of adherents in the courts, but clearly it is feasible to craft a rubric for media-related torts that would be preferable to the undue severity and one-sidedness of the *Brandenburg* test.

361. This test presupposes that there will be no new categories of disfavored expression added to the familiar varieties such as obscenity and defamation. We use the term “incitement” with the understanding that many of the scenarios that we have considered in the shock torts genre would not qualify as incitement under the *Brandenburg* test as traditionally applied. It is for this reason, in fact, that a new test is necessary. As described in the previous subsection of this Article, the classic *Brandenburg* test was probably never intended for use in situations such as shock torts, and it is inappropriate to force the test onto such subject matter.

value of the expression at issue diminishes as one or more of the archetypal *Brandenburg* features are replaced by other aspects less at the core of First Amendment protection.

For example, if the purpose of the speech is profit-seeking entertainment rather than political advocacy, the difference constitutes a significant diminution of “value” in terms of the extent to which First Amendment protections are implicated. Likewise, focusing within the narrower realm of commercial entertainment, if the speech reflects some basic sense of cultural or artistic merit under prevailing societal standards,³⁶² like the film *Saving Private Ryan*, it would have a greater value than speech that appears objectively designed primarily to disgust and shock parental authority figures through graphic depiction of wanton, lawless violence. Finally, even within the very limited subcategory of intentionally disgusting and shocking entertainment, speech that actively seeks to encourage the audience to sing along, do it, or otherwise attempt to elicit copycat behavior would warrant the lowest value of protection. Value thus provides a flexible mechanism for gauging the degree to which a particular form of expression warrants the full measure of constitutional protection based on established Supreme Court precedent and shifting societal norms.

The “magnitude” of the physical harm that actually results from the expression at issue comprises the first factor on the other side of the equation balanced against the First Amendment value. In shock torts cases, the magnitude of the harm will typically prove extremely high. As we have seen, these cases often result in the death of one or more persons, whether by suicide, murder, or both. The youthfulness of most of the victims may also serve to increase the magnitude factor, in recognition of the fact that the people who lose their lives early have lost the majority of their full, normal lifespan. Of course, these cases also result in maiming or disfigurement, and these injuries are particularly severe when they afflict an adolescent just on the threshold of independence and access to the full range of life experiences.

The “probability” of the speech in question causing harm provides a factor that discounts the magnitude of the harm. For this factor courts would consider anecdotal evidence, such as the presence or absence of other reported instances of violence attributed to the same film, recording, or video game. An assessment of probability would also include any advertising or

362. In general, where the violence is organic to the story and is not portrayed so as to make lawless, sadistic, wanton violence an ideal to be emulated but, rather, is depicted as a tragic and sometimes necessary evil (as in war), such merit would likely be found. The key distinction is between works that, taken as a whole, reasonably appear to glorify, legitimize, and glamorize unlawful violence and those that show it as horrible, tragic, and regrettable.

promotional campaigns that had been launched to encourage people to patronize the product in question and the demographic characteristics of the primary target groups. A product aggressively and actively aimed at immature, violence-prone, adolescent males would earn a higher probability value than one focused on groups less apt to respond to violent stimuli.³⁶³

When dealing with mass entertainment-media, the probability factor should also focus on the number of people exposed to the speech. There are actually two groups of people we should consider: the people who absorb the messages in shock torts entertainment, and those who are injured or killed as a result of acting out these messages. In the case of a suicide, these can be one and the same person. In the case of murder, they are different persons. Shock tort plaintiffs can thus include both the survivors (parents) of those who took their own life, and the victims or the victims' survivors, who were attacked by the people spurred to violence by shock tort entertainment.

Courts should not limit this inquiry to the percentage of exposed people who were apt to be adversely affected; that number will always be extremely small.³⁶⁴ Instead, courts must examine the likelihood that some individual people would be harmed—even if not in the defined at risk group—given the huge numbers of people exposed. If sixteen million children watch a given episode of a television program, there may be a foreseeable risk of harm to some of them, although the risk to any particular child may be very low.³⁶⁵ Naturally, entertainment industry professionals strive to reach the largest possible audience or customer base, and at times they succeed in persuading many millions of people to sample their products. This success must be taken into account in gauging the probability of harming some few members of that large population of customers.

The probability factor aims at identifying “speech . . . brigaded with action,” which even Justice Douglas was willing to punish criminally.³⁶⁶ The predictability of causing serious harm is one reason why Justice Douglas

363. See William H. Dietz & Victor C. Strasburger, *Children, Adolescents, and Television*, CURRENT PROBS. IN PEDIATRICS, Jan. 1991, at 8, 14; Gordon Hughes, *Sex, Violence, and Video Games: The Regulation of Computer Games and Bulletin Boards*, 58 LAW INST. J. 374, 374-75 (1994). See generally Steven Stack, *Media Impacts on Suicide*, in CURRENT CONCEPTS OF SUICIDE 107 (David Lester ed., 1990).

364. However, for an illuminating comparison between the degree and probability of the harms attributable to pornography and the equivalent data for various carcinogens, see Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 601. Sunstein argues that possible carcinogens are subjected to very costly regulation in many cases where there is considerable uncertainty as to the causal nexus between a particular substance and cancer, and that pornography is at least as harmful as many carcinogens now subject to regulation.

365. See *Walt Disney Prods., Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981).

366. *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring).

considered it illegal to call out, falsely, "Fire!" in a crowded theater.³⁶⁷

Probability is in some sense an indicator of fault on the part of the disseminator of speech, although of course fault is more appropriately considered on the merits in a negligence action once the plaintiff survives the First Amendment obstacle. Probability is part of the First Amendment balancing test because, as a normative matter, it should make a difference whether someone specifically gears a form of entertainment toward a market segment that is particularly vulnerable to its most harmful influences. If one chooses, irresponsibly, to design and promote a shockingly violent film, recording, or video game for economic gain to appeal to a group of young people with less maturity and higher propensity for violence than society as a whole, that conscious, exploitative act should carry with it the concomitant cost of an incremental diminution of one's First Amendment protection.

The final factor, the extent to which the "balance" of hardships tips in favor of the plaintiff, attempts to include any other relevant considerations that might affect the First Amendment calculus. The relative risk-spreading capabilities of the plaintiff and defendant can be part of this factor. For example, if the plaintiff is a resource-poor private individual while the defendant is a highly profitable corporation that reaped vast profits from the entertainment product in question, those facts would tend to increase the weight of the "balance" factor in favor of the plaintiff. On the other hand, if the defendant were a struggling, independent street musician or film maker striving to win an audience for his or her art without the financial support of a major money-making organization, those facts would tend to reduce the "balance" in favor of the plaintiff. For artists under contract as well, the level of commercial success can influence this factor. People, and their corporate backers, who sell hundreds of thousands or even millions of copies of a given work are better able to absorb some of the costs of the incidental harms their work inflicts on society than those who sell very few copies.

The balance factor creates an avenue for common sense and basic notions of fair play to enter the First Amendment equation. Certainly, the First Amendment itself benefits, in part, society as a whole by fostering free exchange of ideas and opinions. Tort law also serves an important societal purpose as it seeks to spread the risk of loss in such a way as to burden those whose actions have caused a loss, and who can afford to compensate those

367. *Id.* Although such a shout of "Fire!" contains no express incitement to mass panic, the high probability of this result, with the illegal message implied, takes the speech outside the realm of protected expression. *See* *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) (declaring that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic").

whom they have harmed. Where the plaintiffs in a given case are the grieving, decidedly nonwealthy parents of a young suicide victim and the defendants are fabulously prosperous media stars and their profit-making companies, the balance factor would allow judges to take this vast disparity in risk-spreading capability into account, as seems eminently just. Conversely, where the defendant is an aspiring social commentator who is no wealthier than the plaintiffs, it seems fair to make allowances for the fact that it is precisely this type of artist who is most in danger of suffering from any “chilling effect” brought on by civil liability.

Taken as a whole, the balancing test in operation would work as follows: The court would examine all the facts and circumstances relevant to each of the four factors, and would then arrive at some judgment as to the general weight each factor deserves in the case at issue. Next, the court would gauge whether the product of the three factors on one side of the equation (the M, P, and B) outweighs the value of the speech in question (the V). If it does not, then the court would hold that the First Amendment bars the cause of action unless it can pass strict scrutiny.³⁶⁸ If, however, the scales tip in the direction opposite the value of the speech, the court would hold that the First Amendment does not constitute an impediment to allowing the case to go forward on the merits.

As with any balancing test or legal formula, this test inevitably includes substantial quantities of subjectivity and imprecision. It does not offer the rigorous scientific objectivity of a true mathematical formula, despite the use of symbols traditionally employed in that discipline. This imprecision by no means renders the test different from other judicial or legal formulas nor does it vitiate its efficacy. On the contrary, not only in shock torts cases, but in other areas of media liability as well, the test capably renders reasonably consistent, predictable, and fair results. The test assigns appropriate degrees of deference and weight to all the primary competing interests at work in these exceedingly difficult cases and would thus enable courts to reach more equitable and legally satisfactory results than those produced under

368. In actual practice, courts might not proceed to analyze a given case under strict scrutiny once they have determined that the balancing test favors the media defendant because many of the relevant factors will be the same, and the result will almost always be a ruling that the First Amendment precludes the cause of action. However, under existing doctrine, it is more correct to view the balancing test as a method for determining whether the usually high degree of First Amendment protection is appropriate for the expression at issue in the instant case. If it is, this conclusion is akin to a finding that the speech does not fall within any of the recognized categories of unprotected or less-protected expression, and thus strict scrutiny should be applied to any attempt to regulate or restrict it. Conversely, if the test yields a reason to view the speech as less than fully protected, then strict scrutiny should not be used; instead, the court is free to judge the case on the merits.

misapplication of the *Brandenburg* formulation.

Would the current Supreme Court find this test acceptable? Granted, in some respects the new test resembles the *Dennis* “clear and present danger” test which *Brandenburg* largely, if not entirely, superseded. The “clear and present danger test” required courts in each case to inquire “whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”³⁶⁹ However, the fact that the Court subsequently used the *Dennis* formulation to set the standard for determining the permissibility of an injunction barring publicity in a criminal trial during the pre-trial phase illustrates that the *Dennis* test survived *Brandenburg* in certain contexts.³⁷⁰ Therefore, at least within the category of shock torts and perhaps other media-related torts, some room for a principled, nuanced balancing test such as has been proposed here exists.

The key to judicial acceptance of our shock torts balancing test is the fact that we have defined shock torts to be primarily, if not exclusively, applicable to cases in which a minor child is the recipient of the communication. As discussed above, the Court has been more willing to uphold content-based restrictions on expression when the restrictions aim to protect children.³⁷¹ Perhaps the only situation in which the current Supreme Court would accept this departure from *Brandenburg* is the classic shock torts scenario involving a minor child as the victim or receiver of the media-related communication.³⁷² If that is true, it is important to call attention to the factors enunciated herein that militate against a reflexive application of *Brandenburg* to these special circumstances; using *Brandenburg* as the test

369. *Dennis v. United States*, 341 U.S. 494 (1951). The test owed much to the method devised by Judge Learned Hand in *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947), whereby liability turns on whether the burden of adequate precautions (the B) is less than the probability of harm (the P) multiplied by the gravity of the resulting injury (the L). *Id.*

370. In *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976), the Court modified the *Dennis* test as follows for purposes of balancing the accused’s Sixth Amendment right to a fair trial, the State’s interest in prosecuting criminals, and the First Amendment rights of the press and the reading public. The court must examine: (1) the nature and extent of pre-trial press coverage; (2) the likely effectiveness of alternative means of restricting pre-trial publicity; and (3) the likely effectiveness of a prior restraint in preventing prejudice to the accused. *Id.* at 562-70. Because *Stuart* was decided after *Brandenburg*, the Court demonstrated the continuing viability of First Amendment balancing along the lines of the *Dennis* formula, at least in cases contextually remote from the *Brandenburg* paradigm of criminal proscription of political advocacy. See Sims, *supra* note 55, at 278-79.

371. See, e.g., *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 755 (1996); *Sable Communications v. F.C.C.*, 492 U.S. 115 (1989); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *New York v. Ferber*, 458 U.S. 747 (1982). See also *Reno v. ACLU*, 521 U.S. 844, 875 (1997).

372. See generally Rebecca J. Dessoffy, Note, *Salvaging the Communications Decency Act in the Wake of ACLU v. Reno and Shea v. Reno*, 45 CLEV. ST. L. REV. 271 (1997); Debra M. Keiser, Note, *Regulating the Internet: A Critique of Reno v. ACLU*, 62 ALB. L. REV. 769 (1998).

in these cases virtually ensures judicial defeat for the families of youthful suicide victims or those harmed by the youths influenced to commit acts of violence.

In some percentage of cases, perhaps a small minority, application of this new balancing test will result in a ruling that the First Amendment does not demand strict scrutiny (or a virtually certain finding of a constitutional bar) of the plaintiff's case. In such cases, a constitutional defense will not stand, and the plaintiff may freely attempt to prove his or her case on the merits. There are various causes of action available in the typical shock torts scenario; negligence is probably the most familiar and traditional option.³⁷³

Generally, a negligence case consists of the following elements:

1. the defendant owed the plaintiff a duty of care, for instance, not to engage in unreasonably risky conduct;
2. the defendant breached that duty by his [or her] unreasonably risky conduct;
3. the defendant's conduct in fact caused harm to the plaintiff;
4. the defendant's conduct was not only a cause in fact of the plaintiff's harm but also a proximate cause, meaning that the defendant's conduct is perceived to have a significant relationship to the harm suffered by the plaintiff; and
5. the existence and amount of damages, based on actual harm of a legally recognized kind such as physical injury to person or property.³⁷⁴

Survival of the balancing test thus is no guarantee of success on the merits; it is simply a necessary but not sufficient precondition to victory. The challenges of proving all the elements of a negligence case remain formidable even after a favorable balancing test result. At least, however, the litigants and the court would be on familiar legal territory once the case progresses to the merits of the negligence case as the issues are the same as in any other negligence action.

There are other options for the plaintiff as well. The following section of this Article illustrates a powerful alternative to a negligence claim, but one

373. See generally John L. Diamond & James L. Primm, *Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries: From the Mickey Mouse Club to Hustler Magazine*, 10 HASTINGS COMM. & ENT. L.J. 969 (1988).

374. DAN B. DOBBS, *THE LAW OF TORTS* 269 (2000).

which requires some judicial willingness to acknowledge the evolving nature of law in relation to modern society.

C. Products Liability and Mass Entertainment-Media

Aside from a negligence theory, an alternate avenue of recovery for shock torts plaintiffs may lie in the field of products liability. Although most entertainment “products” have not yet been held to fall within the scope of products liability as outlined herein, the doctrinal foundation that would allow it is in place.

The *Restatement (Second) of Torts*, section 402A, states:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.³⁷⁵

Two primary questions stand as obstacles to the application of products liability law to entertainment-media. First, are films, recordings, and video games “products?” Second, if they are “products,” are they “defective?” We shall address these questions in turn.

The controversial *Restatement (Third) of Torts* rules out product status for media entities, categorizing them as “services,” rather than products.³⁷⁶ The analysis states:

Although a tangible medium such as a book, itself clearly a product, delivers the information, the plaintiff’s grievance in such cases is with

375. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

376. “Services, even when provided commercially, are not products.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19(b) (1998).

the information, not with the tangible medium. Most courts, expressing concern that imposing strict liability for the dissemination of false and defective information would significantly impinge on free speech have, appropriately, refused to impose strict products liability in these cases.³⁷⁷

The traditional line of judicial reasoning in media-related cases holds that the only aspects of such items that are properly considered products are the product's tangible physical features.³⁷⁸ Thus, courts consider a book a product only with regard to such reified components as the binding, the cover, the ink, and the paper on which it is printed. Similarly, under this reasoning, courts view a computer game as a product only in terms of the plastic or other materials that physically form the CD-ROM or other type of computer disk that contains and delivers the code that constitutes the heart of the software program. Similarly, courts consider a motion picture a product only for purposes of the actual tangible film or videotape from which the images can be viewed. Courts recognize a musical recording as a product only with regard to the plastic and other physical materials that make up the compact disc or cassette tape.

Although the traditional view does represent the weight of the historical precedent,³⁷⁹ it fails to reflect recent developments in the fields of electronic entertainment and computer technology. Contemporary society has found uses for an enormous proliferation of consumer goods that did not exist a few years ago. Only devotees of science fiction could have imagined in 1970, that personal computers and the software they use would shortly occupy their current position of importance and widespread enjoyment for the average person. The capabilities of compact discs, CD-ROMs, and DVD goods would have been so far-fetched as to be fanciful, as would the notion that soon it would be commonplace for people to own personal copies of numerous motion pictures for viewing in their homes. In light of the dizzying pace of technological advancement, the traditional concept of "product" is totally inadequate to encompass modern realities.

377. *Id.* §19 cmt. b.

378. *See, e.g.,* *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991) (citing other relevant cases); *Way v. Boy Scouts of America*, 856 S.W.2d 230 (Tex. App. 1993). In this view, a book consists of two parts—the physical materials and the ideas and expressions printed within it; the former may be a product, but the latter is not. The latter is governed by copyright laws, and to the extent permitted by the First Amendment, the laws of libel, misrepresentation, negligent misrepresentation, negligence, and mistake, but not by products liability law.

379. *See generally* Lisa A. Powell, Note, *Products Liability and the First Amendment: The Liability of Publishers for Failure to Warn*, 59 *IND. L.J.* 503 (1984).

It is both anachronistic and specious to deem entertainment goods to be “products” only with regard to their tangible physical materials. No one who purchases computer software would be satisfied if the CD-ROM or other floppy disk were merely intact and properly labeled. If the software fails to perform, for example, does not accomplish as advertised a specific variety of functions, then it is no solace to the purchaser that the compact disc was shiny, unscratched, and unbroken. A consumer buys computer software precisely because he or she wants to use the “ideas” reified therein for certain purposes, not because the plastic components make serviceable coasters for drinking glasses. Viewing communicative media as only products in terms of their tangible shells has passed. Modern technology has allowed sellers to amass huge amounts of wealth with essentially negligible amounts of traditional raw materials. Rather, ideas, with a little silicon and plastic added, are what sellers sell and what people buy.³⁸⁰

Courts and scholars have begun to adopt this more realistic view of the concept of tangible versus intangible products in related legal areas.³⁸¹ For example, in *Comshare, Inc. v. United States*,³⁸² the Sixth Circuit recognized that computer software, including the information and ideas embodied in the software, constitutes “tangible property.”³⁸³ In *Comshare*, a computer company sued the federal government to obtain income tax deductions for funds expended on the purchase of “computer program source codes embodied in magnetic tapes and discs.”³⁸⁴ The Internal Revenue Service (IRS) disputed the deduction, arguing that the information contained on the magnetic tapes and discs was intangible thoughts and ideas and that “only investments in tangible property could qualify for the favorable tax treatment.”³⁸⁵ Rejecting the IRS’s arguments, the Sixth Circuit ruled that the software and the information and ideas embodied therein constitute “tangible property.”³⁸⁶ Specifically, the court held:

Although the master tapes and discs purchased by Comshare were tangible, the information they contained was not. Without the encoded

380. Also, if the ideas on the product are different from what consumers expect, consumers would surely have a legitimate complaint. For example, if a person buys a video tape with a “Big Bird in China” label and finds that the tape actually is the film *Natural Born Killers*, there is a products liability issue, one would think.

381. See generally Peter A. Alces, *W(h)ither Warranty: The B(l)oom of Products Liability Theory in Cases of Deficient Software Design*, 87 CAL. L. REV. 269 (1999).

382. 27 F.3d 1142 (6th Cir. 1994).

383. *Id.* at 1145 (emphasis added).

384. *Id.* at 1142.

385. *Id.*

386. *Id.* at 1142-43.

information, the tapes and discs would have cost only a minuscule fraction of the price the company actually paid. Yet without the tapes and discs, the record establishes, there would have been no sale. The company would have paid nothing if the seller had been unable to deliver the source codes on tapes or discs. The value of the source codes was thus entirely dependent upon the existence of tapes and discs. Where the value of information is dependent upon its having been embodied in a tangible medium, case law from other circuits teaches, acquisition of the medium at a price that includes the value of the information encoded on it constitutes acquisition of “tangible” property the full cost of which qualifies for the tax benefits associated with such property.³⁸⁷

A fact critical to the *Comshare* decision was that the intangible information contained in the software was worthless unless “embodied on tapes and discs accessible to the taxpayer.”³⁸⁸ The court noted that the “human thought and effort” embodied in the software could not be distinguished from the human thought and effort used in designing and manufacturing universally recognized “products” such as boats, cars, coins, or bronze models. The court stated:

[I]t is worth emphasizing that however exotic *Comshare*’s computer tapes and discs would have appeared in earlier times, these tapes and discs were production tools indistinguishable in function from the tools that have always been found in the workshops of the world. And the fact that the raw materials from which these particular tools were made had been enhanced in value by the incorporation of coded information hardly makes the tapes and discs unique. The dies from which the ancient Romans struck their coins, the models used in casting bronze, the templates used only yesterday (and perhaps still used) in fashioning boats and cars, all embodied “information” that shaped the end product. It was human thought and effort that gave the older tools their intrinsic value, just as it was human thought and effort that gave *Comshare*’s tapes and discs their intrinsic value—and in each case, the tools were tangible capital assets created to improve efficiency in production.³⁸⁹

387. *Id.*

388. *Comshare*, 27 F.3d at 1150.

389. *Id.* at 1146.

The weight of historical precedent notwithstanding, the *Comshare* doctrine is apt to find support in other circuits.³⁹⁰ The doctrine acknowledges the present-day reality that many of the most important items bought, sold, and traded in commerce are not the ones that formed the basis for the economies of the Nineteenth Century, or even of the mid-Twentieth Century. Contemporary society functions on the basis of rapid information flow, electronic transactions, and myriad computer applications. It is certainly true that modern electronic entertainment media contain the fruits of human thought processes and creativity, but that has always been the case for man-made products of all types—albeit not always in such dramatic fashion.³⁹¹ Subtracting the human creative element from any man-made product renders it virtually worthless. Likewise, subtracting the human creative element from entertainment-media goods for purposes of tort doctrine engages in slavishly formalistic legal reasoning.

Similar to *Comshare*, recent decisions have expanded the Uniform Commercial Code (U.C.C.) definition of “goods” to include computer software and the information and ideas contained therein. For example, in *Advent Systems Ltd. v. Unisys Corp.*,³⁹² a producer of computer software brought suit for breach of contract stemming from the sale of software. The buyer argued that the contract was for the sale of goods and that the U.C.C. applied.³⁹³ On appeal, the Court of Appeals for the Third Circuit found the U.C.C. applicable and recognized the software as a “good” rather than a “service.”³⁹⁴ The court acknowledged that the U.C.C. does not specifically

390. Other significant decisions recognize that “intangibles” are “products” and subject to strict liability if the “intangibles” are sold to and consumed by the public. *See, e.g.*, *Bryant v. Tri-County Elec. Membership Corp.*, 844 F. Supp. 347 (W.D. Ky. 1994); *Wal-Mart Stores, Inc. v. City of Mobile*, 696 So. 2d 290, 291 (Ala. 1996); *S. Cent. Bell Tel. Co. v. Barthelemy*, 643 So. 2d 1240, 1241 (La. 1994). *See also* Suzanne Bagert, *South Central Bell v. Barthelemy: The Louisiana Supreme Court Determines that Computer Software is Tangible Personal Property*, 69 TUL. L. REV. 1367, 1368 (1995) (stating that “[s]ince 1983, most courts have found computer software tangible”); Ruhama Dankner Goldman, Comment, *From Gaius to Gates: Can Civilian Concepts Survive the Age of Technology?*, 42 LOY. L. REV. 147, 158 (1996) (identifying the trend to classifying software as tangible property).

391. The people who design automobiles, for example, are engaged in an expressive enterprise similar to those who produce a film. Each type of vehicle is crafted to present a certain distinctive look and feel that the designers hope will appeal to some types of potential buyers. A sports car is typically designed with some features distinct from those associated with station wagons or minivans. These design features are a form of expression and are aimed at eliciting a favorable response from certain categories of recipients of the expression. The same is true for entertainment products.

392. 925 F.2d 670 (3d Cir. 1991).

393. *Id.* at 672. *See also* *Norwest Corp. v. Comm’r of Internal Revenue*, 108 T.C. 358, 359 (T.C. 1997) (holding that computer software is tangible personal property for purposes of the investment tax credit).

394. 925 F.2d at 675.

mention software in the definition of “goods,” but, in the “absence of express legislative guidance,” the court held that it may “interpret the Code in light of commercial and technological developments.”³⁹⁵ The court also rejected the “intangibility” argument, holding that once a computer program has been transferred to a floppy disk or other medium and mass distributed, it becomes a “good” under the U.C.C. and is no longer an amorphous, intangible idea.³⁹⁶

The price at which entertainment-media goods are sold buttresses the proposition that such items are properly viewed as products. The traditional notion that only the physical materials associated with films, recordings, or computer games are products might be consonant with reality if the price of such entities were in any way similar to the retail value of their physical materials.

Even the most inexpensive motion picture theaters could not stay in business for long if they projected onto their screens blank celluloid films for ticketholders to watch.³⁹⁷ People pay several dollars apiece for tickets that provide them the opportunity to watch interesting moving images and to hear words, sound effects, and music. They do not pay to see only a plain white screen, nor to listen to only the sound of the projector whirring softly in the back of the room. The physical features of film are identical, irrespective of whether it bears a motion picture; filmgoers care about more than the physical quality of the celluloid and are willing to pay a substantial premium to see film with “intangible” images and sounds added to it.

Similarly, the price rational consumers pay for a blank videocassette tape is always much less than the amount they are willing to spend for prerecorded videotapes of motion pictures. The program on the tape renders it much more valuable, despite the fact that the quality of the physical tape is indistinguishable from that of a blank tape. Empty computer floppy disks also can be purchased very cheaply, even for packages of dozens of disks, while a superficially identical single disk often sells for hundreds of times more when it contains usable software for games or practical applications. Finally, no one would pay a price for a blank audiotape or a blank recordable compact disc approaching the amount that is routinely paid for exactly the same physical materials with the addition of “intangible” prerecorded music.

The better view recognizes that these entities are products in their entirety. The images, music, and software code cannot realistically be dissevered from the meager quantities of plastic and silicon that confer

395. *Id.* at 672.

396. *Id.*

397. Conceivably, some sophisticated viewers might be satisfied for a time if they believed they were watching a particularly bold and innovative minimalist work by the late artist Andy Warhol.

physicality upon them. Anyone who bought a movie ticket, or a prerecorded videotape, audio recording, or a software product, would swiftly and indignantly demand a refund if they found that their money had only purchased the physical shell and not the entertainment products the shell promised to contain. The producers and marketers establish prices that reflect their own belief that they are selling something of considerably more value than merely the material trappings that deliver the goods. The results are, for the more successful entertainment industry entrepreneurs, enormous profits, yet without the concomitant liability for defective products that are taken for granted in other fields of commerce.³⁹⁸ It is impossible to distribute these items without some physical instrumentality, however minimal. A realistic and commonsensical approach then, is to recognize these goods, in their entirety, as products for purposes of products liability law.³⁹⁹

If mass entertainment-media products are in fact recognized as products, other issues remain to be resolved before products liability suits may be successfully brought for shock torts. For example, are the forms of entertainment that would fall within the ambit of shock torts in a “defective condition unreasonably dangerous”⁴⁰⁰ so as to constitute a design defect? This question requires an analysis of multiple factors to resolve its two interrelated aspects: (1) whether the product is defective and (2) whether it is unreasonably dangerous.

Shock torts entertainment-media products are perhaps unique within the realm of products liability cases. Unlike most products, which are designed to be safe when used as intended and even include a margin of error for

398. For example, software products of all types, not only those in the entertainment genre, enjoy vast penetration of modern society at virtually every level. Their influence is ubiquitous. Software products regulate almost every aspect of our lives, yet, despite this enormous influence, consumers have little or no control over the products and essentially no recourse if they are harmed by them. If the “thoughts and ideas” contained in computer software products fail or are defectively designed, or the products are defectively manufactured, the consequences can be both widespread and disastrous. Likewise, if the “thoughts and ideas” embodied in popular films and recordings are harmful to some of the millions of people who receive them, murders and suicides can be the result. But the anachronistic view of products liability in the “intangibles” context has allowed these entrepreneurs to enjoy what amounts to immunity in the products liability area. Any other entrepreneur who reaped such abundant fruits of product consumption would be held to a strict liability standard if his or her products were defective. Until products liability law catches up to the changed realities of contemporary society, successful and extraagently wealthy software and other mass entertainment-media industry entrepreneurs will remain in a protected class by themselves, legally shielded as if they were helpless, impoverished, and fragile.

399. As the *Comshare* court stated, regardless of how novel modern entertainment products may have appeared in earlier times, today’s software-driven society cannot differentiate between the thoughts and ideas that are embodied in such products and the thoughts and ideas that are embodied in products like cars or boats.

400. RESTATEMENT (SECOND) OF TORTS, *supra* note 375.

predictable improper use, shock torts products are, in essence, designed to be defective. Recall that we have defined shock torts as applying especially to minor suicide victims/consumers and/or those attacked by youths influenced to commit violent acts and involving shockingly violent forms of mass entertainment that, on their face, appear to be calculated primarily to appeal to those persons with an appetite for killing or sociopathic behavior particularly of an unlawful nature. Such products are usually, if not always, crafted specifically to contain large quantities of extremely graphic, violent, and destructive images and words. It is this very excess that makes these products desirable to immature adolescent males, who comprise the primary target customer base for their purveyors.⁴⁰¹ Thus, far from being inadvertent defects, the boundary-straining elements that might induce a violent response in a portion of the consumer populace are incorporated in these products knowingly and deliberately as actual selling points.

In light of this “intentional defectiveness,” a novel question presents itself: Can intentionally selected features, incorporated into a product specifically because they are believed to enhance the marketability of that product to its intended target customers, be deemed design defects for purposes of products liability actions? From a normative perspective, the answer should be yes. One can analogise this to the situation where cigarette manufacturers allegedly add addictive chemicals to their products. Should such conduct escape legal consequences?

Products liability law is conventionally employed to spread the risk of loss to those most capable of preventing harm—who also tend to be those most able to absorb the cost of losses that do occur. If sellers of a product can be held strictly liable for harms that result from that product’s “unreasonably dangerous” features that are present despite the exercise of “all possible care in the preparation and sale,”⁴⁰² *a fortiori* entertainment-media sellers should be liable for unreasonably dangerous features that are deliberately incorporated into the product. It would be a most perverse legal doctrine that would shield the sellers of intentionally dangerous products while holding liable the sellers who exert every effort to make their products safe.⁴⁰³

The unusual concatenation of factors found in shock torts forms of entertainment presents an interesting defects-analysis problem. Courts

401. See generally Steven Stack, *The Effect of the Media on Suicide: Evidence from Japan, 1955-1985*, 26 SUICIDE & LIFE-THREATENING BEHAV. 132 (1996).

402. RESTATEMENT (SECOND) OF TORTS, *supra* note 375.

403. However, in the mass media context, First Amendment concerns probably mandate that courts apply a form of fault-based liability instead of strict liability, as will be discussed *infra* notes 419-23 and accompanying text.

traditionally apply at least three different tests to assess defects. We shall briefly summarize each view and then consider how each method might evaluate shock torts products. Of course, the jury generally decides the ultimate question as to whether a product is defective, but, in order to reach the stage of trial on the merits, claims must first survive motions to dismiss, at which juncture the courts employ the following tests.

The constructive knowledge test lets the court presume that “the defendant knew of the dangerous condition of the product and ask whether it was then negligent in putting it on the market or supplying it to someone else.”⁴⁰⁴ This test rewards manufacturers and sellers who are careful and encourages the design of safer products.⁴⁰⁵ It also sets a relatively high standard for liability by using a negligence analysis, thus guarding against unwarranted findings of defectiveness.⁴⁰⁶

The consumer expectation test holds that a product is defective if it fails to perform in a manner reasonably expected by the user.⁴⁰⁷ The *Restatement (Second) of Torts* adopted this test, indicating that a product is defective if “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to . . . [the product’s] characteristics.”⁴⁰⁸

Finally, the utility/risk test requires courts to balance the risk of harm against the usefulness of the product in its present condition.⁴⁰⁹ This test generally involves analysis of a number of factors, such as the usefulness and desirability of the product to the general public, the likelihood that the product will cause injury and the probable seriousness of such injury, the availability of safer substitute products, the manufacturer’s economic ability to eliminate the unsafe features of the product, the user’s awareness of the product’s inherent dangers, and the user’s ability to avoid danger through the exercise of care.⁴¹⁰ The utility/risk test is probably the most flexible of the three primary approaches to defect analysis.

404. See John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 834-35 (1973).

405. See *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 185 (Mich. 1984).

406. *Id.*

407. See *Miller v. Dvornik*, 501 N.E.2d 160, 165 (Ill. App. Ct. 1986).

408. RESTATEMENT (SECOND) OF TORTS, *supra* note 375, § 402A cmt. i. This test has been criticized as vague and too close to the “reasonable person” standard found in negligence cases. See *General Motors Corp. v. Simmons*, 545 S.W.2d 502, 513 (Tex. App.), *rev’d on other grounds*, 558 S.W.2d 855 (Tex. 1977).

409. See *O’Brien v. Muskin Corp.*, 463 A.2d 298, 304 (N.J. 1983).

410. See Laura A. Lyon, Comment, *Subliminal Song Lyrics as Product Defects*, 96 DICK. L. REV. 125, 140-41 n.150 (1991).

How might courts assess the defect issue for shock torts products under each of the standard tests? We will consider each test in turn.

The constructive knowledge test would posit whether a manufacturer is negligent in distributing a film, recording, or video game knowing that immature and perhaps unstable adolescents would access the extremely violent images and words and thereby be induced to take violent actions against themselves⁴¹¹ or others. Presumably, the court would deem the media-related defendant aware of the numerous instances in which such individuals were moved to harmful actions by violent products, as described in this Article. Such actual or imputed knowledge of the dangers, coupled with the aggressive marketing that media defendants often use to sell their violent products to the very people who are most likely to do harm to themselves or others after their use, may lead a court to find that the case should go to the jury to determine whether, as a matter of fact, there was a design defect.

Under the consumer expectation test, the result would depend on which consumers were chosen as the benchmark. If the applicable community of consumers is construed narrowly and held to be the usual consumers of the particular type and “flavor” of product in issue, as is most probable, the outcome almost certainly would be a finding of no defect. The consumers in the market for shock torts entertainment affirmatively seek out graphically and excessively violent products. In fact, paradoxically, such individuals would probably consider a shock torts product defective if it did not contain sufficient violence. Consumers of heavy metal or “gangsta” rap music, for example, would be outraged to find that a recording they had purchased, contrary to their expectations, consisted of soft rock, classical, or big band music. These consumers have very particular expectations for the entertainment products they buy, and it is those very expectations that motivate entrepreneurs to satisfy them with explicit, graphic violence in great abundance.

Alternatively, if the benchmark consumer community were held to be the broader customer base for films, music, or video games in general, the result might be different. Shock torts products virtually by definition are contrary to the established norms and mores of civilized society as a whole. Within the broader category of filmgoers, for example, *Natural Born Killers* might be deemed repulsive and beneath contempt, whereas for some immature adolescent males it might be a true crowd-pleaser. However, even if the

411. It has been held that suicide, as a matter of law, is not a superseding cause in negligence law that would preclude liability. *See Fuller v. Preis*, 322 N.E.2d 263, 264-65 (N.Y. 1974). *See also Padula v. State*, 398 N.E.2d 548 (N.Y. 1979).

wider customer base were used as the benchmark, it would seem appropriate to take into account customer expectations with regard to the specific genre of the product in question. People would likely have very different expectations depending, for example, on whether they were going to see an “action movie” or a children’s animated feature. Thus, the bar would be set considerably higher (or lower, depending on one’s perspective) in assessing expectations for the types of entertainment at issue in shock torts cases. Thus, even if the broader community of consumers were used, it is improbable that a design defect would be found.

Application of the utility/risk balancing test would in all likelihood yield a diversity of outcomes, depending on which of the many possible factors were chosen and the relative weight assigned to each. However, applying the most typically used factors and affording each of those factors approximately equal importance, the test could easily lead to the conclusion that shock torts products are defective in their design.

For example, the usefulness and desirability of shock torts products, i.e., their utility to the user and to the general public, is debatable. Some would argue that violent forms of entertainment provide a safe and essential safety valve that enables people to channel their hostile impulses into harmless diversions. It could be asserted that fantasy forms of violence are a valuable way for society to defuse destructive tendencies. Also, one could point to the fact that all varieties of entertainment, including shock torts products, supply their aficionados with a measure of fun, fulfillment, relaxation, pleasure, excitement, or other benefits people derive from whatever particular art forms appeal to them.

However, the contrary view is also entirely plausible, particularly in light of the anecdotal evidence of violence spawned by these products. It may be that repeated exposure to violent stimuli increases rather than lessens the tendency for most people, and especially immature adolescent males, to act out violently. In this view, immersion in shock torts entertainment-media would tend to light a fuse sparking destructive action rather than defuse such impulses. The deaths and other serious injuries caused by these incidents would outweigh the subjective enjoyment some people gain from this entertainment.

The safety aspects of the products, for example, the likelihood that they will cause injury and the probable seriousness of the injury, must be viewed in light of the special vulnerabilities of the targeted consumer group and the enormous market penetration these products enjoy within that group. Although only an infinitesimal percentage of the population as a whole would be moved to violence by these products, the risks of harm are considerably higher within the subsegment of society to whom the products

are aggressively marketed.⁴¹² Further, the gravity of the harm that does result when such products influence a susceptible person is very great; serious injury or death, whether inflicted on oneself, on others, or both, is typically the outcome. Thus, the equation could be worked out as follows: a small but real probability of harm in any one person, multiplied by the large number of people who are exposed, multiplied by a very high gravity of harm, yields a significant safety hazard.

The availability of a substitute product which would meet the same need and not be unsafe seems readily apparent in the shock torts context. For every excessively violent film, recording, or video game on the market at any point in time, there are many more that are well within the normal limits of civilized society and virtually never cause physical harm to anyone. These less violent alternatives are easily available and cost no more than shock torts products. The only real question is whether these substitutes can be said to “meet the same need” as the ultraviolent products they would replace. If “need” is defined in the conventional sense, as the desire or impulse for some general form of entertainment, amusement, edification, or diversion, then certainly mainstream products satisfy “need” at least as well as shock torts varieties. However, it might be asserted that for the discrete subculture that consumes ultraviolent entertainment, mainstream alternatives are unacceptable. Dissatisfaction with mainstream alternatives would arise as a matter of the personal appetites and tastes of the consumers involved,⁴¹³ but such preferences should not be held to rise to the level of actual need. This factor, therefore, would support a defect finding.

The manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or rendering it unreasonably expensive likewise seems clear. As with the previous factor, the answer is apparent from the plethora of safe, equally affordable alternatives to every

412. This factor essentially focuses on whether the product is unreasonably dangerous. Certainly, even the most excessive forms of mass entertainment-media products do not provoke those exposed to commit murder or suicide in more than a minuscule percentage. Yet these products are intended to reach, and often do reach, millions of people. Moreover, the millions of people who are exposed tend to be members of a specific target group for whose unique tastes and proclivities the products are carefully tailored. Shock torts products are in general quite deliberately aimed at a subsegment of society—immature adolescent males—that may be significantly more susceptible to violent or destructive influences than members of society at large. Thus, the probability of the risk is magnified, both because of the huge number of people exposed and the heightened vulnerability of members of the selectively targeted consumer base.

413. If nonextreme alternatives were acceptable as a matter of preference to the persons who consume most shock torts entertainment products, there would not be such a huge market for violent entertainment within this market group. Immature adolescent males would be standing in line to see the latest Disney animated film, while listening to Mozart on their headphones and playing Super Mario on their hand-held electronic game devices.

excessively violent motion picture, recording, or video game. But would these less violent alternatives constitute impaired usefulness, at least from the perspective of the unusual class of consumers of shock torts products? Again, it is clear that these consumers would be disappointed and dissatisfied with more mainstream substitutes, but this is in the realm of personal preferences and not actual usefulness. Some people might prefer to drive cars that did not contain seatbelts, for example, but that matter of personal taste would not override the safety concerns that mandate the requirement for universal inclusion and use of this safety feature.

Are the users of these products able to avoid danger by the exercise of care? The vast majority of people even within the particular subgroup that consumes shock torts entertainment products are never spurred to violence arising out of their exposure. In that sense, then, the ordinary adolescent male is capable of using these products without becoming violent, by exercising a normal measure of self-control, distinguishing fantasy from reality, and utilizing other coping mechanisms. Yet, for some minority of users, typically those who suffer from emotional problems, drug and alcohol dependency, and/or other difficulties, there may not be the ordinary capability of dealing effectively with excessive violence. Obsessive behavior, manifested in many and frequent repetitions of exposure to these products, may be beyond the control of such disturbed youths. Their ability to discern reality from fantasy, to filter and process the impulses they receive, and to channel urges into appropriate activities can be impaired and insufficient to enable safe use of shock torts products.

It is again noteworthy that shock torts products are generally designed and marketed specifically for young people with an appetite for extreme violence and destruction. By directly and vigorously aiming the products themselves and their supporting advertising campaigns at these people, the entrepreneurs affirmatively solicit users who may be especially ill-equipped to deal maturely, responsibly, and safely with the products. Therefore, this factor may also support a finding of defectiveness.

Defect analysis typically includes inquiry as to the user's awareness of dangers inherent in the product and their avoidability, either because of general public knowledge of the obvious dangers of the product or the existence of suitable warnings or instructions. This factor essentially focuses on assumption of risk. In the case of shock torts products, it is doubtful that most members of the general public are familiar with more than one or two of the numerous examples of violence linked to these forms of

entertainment.⁴¹⁴ It is even less likely that the primary users of these products would be cognizant of the dangers, given their youthfulness, immaturity, and attendant lack of experience or knowledge of nonlocal news events.⁴¹⁵ As to warnings or instructions, these are minimal or nonexistent in the entertainment context. Indeed, it may be that “R” or “NC-17” ratings for films, “Parental Advisory” notices of objectionable language on recordings, and “Violent Content” labels on video games serve more to entice youthful customers than to dissuade them. These warnings do little or nothing to prevent young people from gaining access to the products, and the “forbidden fruit” connotation may instead perversely serve as a drawing card.⁴¹⁶

The final factor generally considered is the feasibility on the part of the manufacturer to spread the loss by adjusting the price of the product or carrying liability insurance. This factor clearly favors a finding of a design defect for shock torts products. Even if civil liability were allowed, there would not be many successful plaintiffs,⁴¹⁷ and the money they might be awarded would be dwarfed by the enormous profits that are earned within the entertainment industry. It is unlikely that the price of goods would be raised at all, and industry members would probably self-insure, given the improbability of significant outflows of capital to successful litigants.

A utility/risk analysis thus would likely generate a finding of a product defect under the typical shock torts scenario. Of course, each case would present unique variations in facts and circumstances, so the outcome could differ in accordance with these variations.

We have now determined that there is no doctrinal barrier to addressing shock torts through conventional products liability means, under at least two of the standard approaches to determining product defects. If courts are amenable to a modern concept of products that encompasses the advancements of the information age, the door is open to consider shock tort product liability cases along established lines of product liability law. However, we must now consider whether there is a First Amendment bar, as

414. See generally *supra* Part II.

415. See Federal Trade Commission, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording, and Electronic Game Industries*, at www.ftc.gov/os/2000/09/violencerttest.htm (Sept. 12, 2000).

416. “Hustler should understand that to such a mentality the warnings ‘no’ or ‘caution’ may be treated as invitations rather than taboos.” *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1026 (5th Cir. 1987) (Jones, J., dissenting in relevant part). See also *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 263 n.10 (4th Cir. 1997).

417. This is due to the rarity of resultant physical harm from mass entertainment-media, the difficulty of overcoming the First Amendment obstacle, and the practical problems of proof at trial.

has so commonly been supposed in the past, within the particular context of products liability.⁴¹⁸

Certainly, courts should not ignore the First Amendment implications in entertainment-media products liability suits. Rather, some form of a balancing test such as that propounded in this Article would be an appropriate supplement to the standard products liability analysis where, as in shock torts, a form of communicative mass-media product is at issue. The core inquiry would be whether, notwithstanding satisfaction of the conventional elements of a products liability cause of action, there are overriding constitutional issues that require a finding in favor of the media defendant. When a thorough inquiry of this type is made, however, the likely result would be that the same multifaceted rationale that holds the *Brandenburg* test inapplicable to shock torts also militates against an absolute First Amendment bar to a products liability cause of action against media-related defendants.

The First Amendment would likely require that courts not impose strict liability, notwithstanding the result of any products liability analysis; rather, a negligence fault-based theory would be substituted for strict liability.⁴¹⁹ *Gertz v. Robert Welch, Inc.* probably mandates the elimination of strict liability in shock torts cases.⁴²⁰ The *Gertz* Court held that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”⁴²¹ However, the issue is not completely clear, because a decade later in *Greenmoss*,⁴²² the Court did not restate its rule against strict liability. This omission could be explained on the basis of the intervening changes in that state’s defamation law to conform to *Gertz*, and the fact that negligence had been both pleaded and found by the jury. On the other hand, the Court has not explicitly addressed this issue, and some commentators have interpreted *Greenmoss* to mean that states may now

418. See, e.g., *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1037 (9th Cir. 1991); *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990, 993 (E.D.N.Y. 1977); *Cardozo v. True*, 342 So. 2d 1053, 1056-57 (Fla. Dist. Ct. App. 1977); *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1267 (Ill. Ct. App. 1985).

419. There are some advantages to a products liability approach over a traditional negligence action even in the absence of the strict liability aspect. The elements a plaintiff must prove would be different, and under some circumstances plaintiffs may find it easier to establish a products liability case. For example, there would not be a requirement to prove a duty of care owed to the plaintiff by the media defendant. In practice, it is probable that plaintiffs would pursue a products liability claim in addition to other theories for redress, including negligence and aiding and abetting, among others.

420. 418 U.S. 323 (1974)

421. *Id.* at 347.

422. 472 U.S. 749 (1985).

apply strict liability in defamation cases involving private individuals, i.e., nonpublic figures, and matters of private concern.⁴²³ In any event, strict liability is more problematic than a fault-based approach, owing to the First Amendment concerns. Thus, from this point onward, we will focus on something other than liability without fault.⁴²⁴ But to what extent does the First Amendment stand in the way of a fault-based products liability claim for shock torts?

The mass entertainment-media industry is not in the business of free or at-cost, not-for-profit distribution of *samizdat* political literature. The people who create and produce motion pictures, musical recordings, and computer and video games do so with the intention and goal of making profits—often extremely large profits—from the consumers who pay substantial sums of money for their wares. They assign prices for their goods at a level far above that sufficient for the recoupment of their costs. They spend sizable amounts of money to advertise their products aggressively and effectively to ensure that potential buyers are well aware of every new release and are bombarded with persuasive reasons to purchase it. It is inappropriate to shelter such successful entrepreneurs⁴²⁵ from liability for the harms their products cause as if they were impoverished, persecuted political activists struggling altruistically to achieve their vision for a better society.

The First Amendment concerns that would likely constitute a constitutional defense sufficient to bar products liability arising out of political advocacy, whether in the form of literature, recordings, or films, do not exist in the shock torts context. Unpopular, marginalized members of society need protection as they labor to spread their political ideas to others

423. See, e.g., Don Lewis, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, Philadelphia Newspapers, Inc. v. Hepps, and *Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law*, 20 IND. L. REV. 767, 774-75 (1987); Rodney A. Smolla, *Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1545-48 (1987).

424. It is certainly possible that some courts after concluding that shock torts entertainment-media is amenable to a products liability analysis, will also conclude that such entertainment-media products should be subject to strict liability as is any other defective product. *Greenmoss* implicitly might allow such a development. However, no court has yet held strict liability applicable to mass entertainment products.

425. Certainly not all film makers, musicians, and software designers are wealthy, or even moderately successful. Many never move beyond the aspirational phase of their careers. As a practical matter, however, for purposes of shock torts, it is highly unlikely that unsuccessful artists or creators would ever find themselves as defendants in a law suit. Only those who sell large numbers of units can reach enough consumers to have a significant probability of harming the minuscule fraction of the populace who might be susceptible to destructive media influence. Films, games, and recordings accessed by hundreds of thousands or even millions of people have a far greater statistical probability of reaching and affecting emotionally disturbed, immature individuals than the offerings of struggling street performers or independent artists.

not-for-profit, but because they fervently believe in the justness of their cause and its principles. Such activists lack the financial resources to defend against, or to pay damages awarded under, products liability suits, or to mass-market their ideas to reach millions of potential converts. Isolated from the wealth and power of the established political, legal, and social system, such activists are ill-equipped to defend against civil suits. They do what they do to persuade others and motivate others to political action, not to entertain them or to make money.

As evidenced in the majority of cases to date that have dealt with entertainment-media torts, many contemporary judges reflexively view the First Amendment as virtually an absolute bar. These decisions typically assumed, without subjecting the issue to sophisticated analysis, that the *Brandenburg* test controlled irrespective of the facts and circumstances of the particular case. Moreover, absent satisfaction of *Brandenburg*'s rigorous requirements, no other avenue for redress existed. We have seen that these assumptions have resulted in a body of lower court decisions that, as a whole, is unfavorable to shock torts plaintiffs. Because of their heavy reliance on *Brandenburg*, however, the doctrinal underpinnings of these holdings are fragile and they fail to reflect the political and societal realities and equities in conflict in these unusual shock tort cases. Our discussion of the inapplicability of *Brandenburg* in the shock torts context is intended to reorient judicial attention in a more realistic and equitable direction.

Near the conclusion of this Article we will return to the aura of inevitability that has veritably dragged several courts to decisions against shock torts plaintiffs. Experienced judges have expressed their distress, and even their despair, at ruling in favor of wealthy and powerful media figures and against the bereaved parents of troubled teenagers.⁴²⁶ But the reason these decisions feel so wrong to such judges is that they are wrong.

Succinctly stated, the key factors that gave birth to the formidable body of First Amendment Supreme Court precedent are not present in shock torts cases. In fact, the political, economic, and societal forces at work in the archetypal shock torts situation are the polar opposite of those that so powerfully led the Court to forge its great body of protective First Amendment case law. For example, the seminal First Amendment cases involved the criminal prosecution, without any evidence of actual resultant harm, of marginalized, resource-poor, disempowered private individuals, for the nonprofit, often in-person dissemination of extremely unpopular, antiestablishment political views. In contrast, the entirely lower and state

426. See, e.g., *Waller v. Osbourne*, 763 F. Supp. 1144, 1153 (M.D. Ga. 1991).

court shock torts decisions all involved civil actions brought by private individual plaintiffs—almost always minors—who had actually suffered very serious physical injuries or death, in the aftermath of widespread, for-profit, professionally promoted and advertised mass entertainment-media products disseminated by wealthy, famous media figures, that deal with nonpolitical, commercially successful subject matter. In the classic First Amendment case, the weak, vulnerable, exploited party is the criminal defendant, against whom the government brings its full coercive force. In shock torts cases, the only weak, vulnerable, exploited party is the private plaintiff or the plaintiff's survivors.

The shock torts entertainment industry vigorously pursues young, impressionable, alienated adolescents as lucrative customers. These private individuals have been the chosen target of well-financed and professionally managed product creation, advertisement, and marketing campaigns. Moreover, the patronage of millions of such children keeps that industry immensely profitable. When harms result, and the injured persons seek civil redress, the entertainment industry enjoys the finest legal counsel money can buy. The government does not array its power against the media defendant in these civil actions; in fact, through the courts and their ill-conceived application of First Amendment precedent, the government is actually one more obstacle separating the injured citizens from any compensation for their loss, even the loss of a loved child.

Perhaps we could tolerate these inequities if they were the price paid for preserving the free, unfettered exchange of political ideas. But mass-media corporations and their associates involved in producing shock torts products do not expend huge sums of money to spread unpopular political views. Shock torts products do not typically carry any political message. Most typically, shock torts express at best, generalized rage, and at worst, the notion that violence and destruction are worthy of glorification and emulation. When a few of their millions of young customers internalize this violent and destructive message to the extent that they do emulate through action, the First Amendment should not pose a virtually absolute bar to recovery.

Fear of a chilling effect on free expression has brought about the current confused, and often unfair, state of the case law in the shock torts realm. This classic manifestation of the "slippery slope" argument bars even the slightest step toward holding the purveyors of mass entertainment products civilly liable for the physical harms they cause because of the fear that it could eventually lead to widespread censorship, self-repression, and suppression of free speech. However, these fears are unfounded for multiple reasons, whether in a negligence action or, as we are discussing now, a fault-based

products liability action.

First, allowing a fault-based products liability remedy for those few people who suffer death or grievous bodily harm from shock torts would be unlikely to chill the highly profitable entertainment industry. One may look to the pornography industry by way of analogy. That line of commercial enterprise remains prodigiously successful despite decades of unfavorable zoning ordinances⁴²⁷ and the real prospect of criminal prosecution for obscenity.⁴²⁸ There is no reason to suppose that the prospect of a far less severe or widespread form of regulation would significantly chill the motion picture, popular music, or video game industries.

Second, the mass entertainment-media industry could readily obtain insurance, just as manufacturers of other products do to protect themselves from civil liability. Such insurance should be entirely affordable given the profitability of the industry and the rarity of any resultant physical harms. Entrepreneurs across the entire spectrum of commercial activity either purchase insurance or self-insure to deal with the damage some products inevitably cause. Many of these industries are much less profitable than the entertainment world, yet they do not cease to exist because of either insurance costs or legal judgments.⁴²⁹

Third, with the exception of the last two or three decades, mass entertainment-media historically did not feature any appreciable quantities of products of the shock torts variety. Films, music, and games included a vast palette of other subjects in an endlessly creative array of possibilities—not because of the threat of occasional civil lawsuits, but because there was no perceived reason to shock and disgust consumers. Yet the prolonged periods of history before the advent of shock torts products are not usually viewed as a political dark age fraught with governmental suppression of free speech or repressive cultural strictures. Conversely, the proliferation of shock torts products during recent years, along with the explosive growth of the pornography industry, does not appear to correlate with a new renaissance featuring an improvement in the quality of debate on political issues or a blossoming of great art in the entertainment field.⁴³⁰

427. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

428. Despite numerous, actively enforced laws, the production, distribution, and sale of pornographic materials has actually grown to become a multibillion dollar industry in the United States. See ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT vol. I, at 366-72, vol. II, ch. 8, at 1351 (1986).

429. See *Comshare, Inc. v. United States*, 27 F.3d 1142, 1143 (6th Cir. 1994).

430. See *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1029 (5th Cir. 1987) (Jones, J., dissenting in relevant part).

[O]bscenity has been widely regulated by prior restraints for over a century. Before *Roth v. United*

Fourth, fault-based products liability would not constitute a prior restraint on expression, but rather would operate subsequent to the release of any given product. If, as a result of exposure to a specific product, loss of life or other physical injury ensues, these harms would be linked only to that product, not to the industry as a whole. This is significantly different from prior restraints, which operate to ban communication before it occurs and may result in many and various types of expression never taking place at all. The chilling effect of subsequent tort liability, if any, would be of a lower order of magnitude than that which led in large part to strict judicial scrutiny in the line of political speech and prior restraint First Amendment cases.

Finally, society can afford to accept the minuscule degree of self-censorship that might result within the entertainment industry from exposure to fault-based products liability for shock torts. The death and maiming of young people and other victims is a most serious harm, the redressing of which is a legitimate if not compelling governmental interest. Although many people have fought and died for the cause of freedom, these deaths have been in the context of war or social struggle—not the result of exposure to shockingly violent and sociopathic entertainment products. The death of young people is a very high price to pay for the unfettered freedom of shock torts purveyors to carry on their trade with absolute protection from civil liability.

In fact, for purposes of the ultimate disposition of the First Amendment issue in either the products liability context or in a negligence action, the youthfulness of the victims and perpetrators in most shock torts cases may be highly significant. As mentioned previously, speech that is normally protected may be restricted if the restriction is narrowly crafted and necessary to protect minors.⁴³¹ The Supreme Court has recognized a compelling interest in “protecting the physical and psychological well-being of minors” which “extends to shielding minors from the influence of literature that is [fully protected] by adult standards.”⁴³² So long as the restriction on speech is “carefully tailored to achieve” the end of preventing an improper influence

States, there was no *Hustler* magazine and it would probably have been banned. Despite such regulation, it does not appear that the pre-Roth era was a political dark age. Conversely, increasing leniency on pornography in the past three decades has allowed pornography to flourish, but it does not seem to have corresponded with an increased quality of debate on “public” issues. These observations imply that pornography bears little connection to the core values of the first amendment and that political democracy has endured previously in the face of “majoritarian notions of social propriety.”

Id. (citations omitted).

431. *Sable Communications v. F.C.C.*, 492 U.S. 115 (1989).

432. *Id.* at 126.

on minors, the Court has held that speech which adults have a constitutional right to see or hear may be restricted.⁴³³

The fact that so many shock torts cases involve a juvenile as the injured party could be pivotal as courts deal with competing First Amendment interests. The youthfulness of the plaintiffs may supply an additional factor that some judges will demand in order to hold First Amendment concerns adequately addressed, over and above the other considerations in favor of shock torts plaintiffs in general. Indeed, to the extent shock torts ever involve adults as the media-influenced party, there could be a divergence of results, with juvenile plaintiffs securing favorable outcomes and adults finding their actions unable to overcome the First Amendment hurdle. As discussed above, there are powerful reasons to allow shock torts plaintiffs to withstand First Amendment challenges irrespective of the age of the influenced person, but because of the absolutist nature of some of the First Amendment case law, the dichotomy between adults and minors may be dispositive for some judges, at least absent Supreme Court guidance on the matter.

D. A New Category of Limited-Protection Expression

As has been shown, there are viable legal arguments within the existing case law for at least two distinctly separate avenues for relief of shock torts plaintiffs. Courts may evaluate the merits of these cases on the basis of negligence principles, or they may use a modernized form of products liability analysis. In either approach, the First Amendment issues can be thoroughly explicated without applying the over-restrictive filter of the *Brandenburg* test. We have offered an alternative balancing test that affords appropriate consideration to all of the competing interests.

There remains one other potential means of reform that would also allow courts to address the merits of shock torts litigation: the courts could carve out a new class of limited-protection expression. This means of reform could be done either in conjunction with the affirmative rejection of the *Brandenburg* test as applied to shock torts or independently, but it fits well as part of a reasoned doctrinal departure from *Brandenburg* within a very specific type of speech.

In the *Brandenburg* context, and in the course of our review of the case

433. *Id. See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997). “[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials” so long as “that interest does not [result in] an unnecessarily broad suppression of speech addressed to adults.” *Id.* at 875. In *Reno*, the Court struck down The Communications Decency Act of 1996 as failing to meet that standard. *Id.* at 875-79. *See also Osborne v. Ohio*, 495 U.S. 103, 115 (1990) (finding Ohio statute prohibiting child pornography constitutional).

law governing entertainment-media torts, we have mentioned repeatedly the categories of expression that have been viewed by the Supreme Court as deserving of either no First Amendment protection or reduced protection. To summarize briefly, the Court has ruled that in addition to the *Brandenburg* species of “incitement” and crime-related expression such as perjury, those classes of speech which the government may prohibit and punish include “obscenity,”⁴³⁴ “fighting words,”⁴³⁵ and “defamatory invasions of privacy,”⁴³⁶ with somewhat diminished protection for “commercial speech” as well.⁴³⁷ Less than absolute protection has also been held appropriate for other forms of expression, with the implication that the current list of disfavored forms of speech is not necessarily exclusive.⁴³⁸

In considering whether another type of expression should be added to this pantheon of unprotected speech, we are hampered by the paucity of precision underlying the judicial decisions that recognized these exceptions. Although some opinions reflect the notion that the exceptions do not contribute meaningfully to the “marketplace of ideas,” others have noted that unprotected speech such as fighting words can be very expressive, albeit of unpleasant and hateful notions.⁴³⁹ To some extent then, judicial recognition of categories of disfavored speech represents a value judgment as to the worthiness of the speech rather than a finding that the speech fails to bring

434. *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115 (1989); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

435. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940).

436. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

437. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973); *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

438. Courts have held child pornography as not worthy of full First Amendment expression. *See New York v. Ferber*, 458 U.S. 747 (1982). The Court stated that even if child pornography has as its main purpose the expression of ideas about children, sexuality, and the like, it would still be permissible for the courts to censor such material and punish those involved in its production, distribution, and consumption. Because the potential and actual harms to children are so great, and because children lack the autonomy of adults to make informed decisions about their lives and activities, the Court categorized child pornography as low-value speech irrespective of any artistic, scientific, or political nature of the expression. *Id.* at 761-62.

439. *See R.A.V. v. St. Paul*, 505 U.S. 377, 384-85 (1992). Justice Scalia wrote:

It is not true that “fighting words” have at most a “de minimis” expressive content, or that their content is in all respects “worthless and undeserving of constitutional protection,” sometimes they are quite expressive indeed. We have not said that they constitute “no part of the expression of ideas,” but only that they constitute “no essential part of any exposition of ideas.”

Id. (citations omitted).

ideas to the marketplace.

The new category of disfavored expression would possess the same features that define shock torts, and, for ease of reference, it could be called “shockingly violent mass entertainment.” Specifically, this form of speech would consist of shockingly violent forms of mass entertainment—especially when the consumer is a minor—that, on their face, appear to be calculated primarily to appeal to those persons with an appetite for killing or sociopathic behavior particularly of an unlawful nature.⁴⁴⁰

Reversal-averse courts would probably be reluctant initially to create this “shockingly violent mass entertainment” variety of limited-protection expression. As with obscenity, there would be definitional difficulties, those vexing line-drawing problems that plague judges and render them eager to resort to well-established First Amendment principles. Courts may find it easier to gravitate toward an absolutist view that finds a complete First Amendment bar to all types of legal restriction, whether in the form of criminal prosecution, governmental regulation, or the entertaining of civil causes of action for injured persons.

Certainly, there would be some knotty problems for courts to handle in determining whether a given communicative product fits within the definition of “shockingly violent mass entertainment.” Courts must scrutinize complex conglomerations of facts in many situations, and the results are not always satisfactory. Does a particularly graphic combat film such as *Saving Private Ryan* or *Braveheart* fit the definition of “shockingly violent mass entertainment,” or does the broader message of heroism, patriotism, courage, and the human tragedy of armed conflict in wartime override the allegation that these motion pictures appear to be “calculated primarily to appeal to those persons with an appetite for killing or sociopathic behavior particularly of an unlawful nature?” Is *Hamlet*, with all of its killing and treachery, within the definition, or does it possess features which appeal primarily to a different audience from that associated with violent action films and heavy metal music? Would a realistically explicit filmed version of *The Bible*,

440. This definition incorporates the key elements of our definition of shock torts. Crump has proposed a new category of disfavored violent speech, drawn by analogy from the definition of obscenity. Under his formulation, the court would consider the following:

- (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interests [in violence];
- (b) whether the work depicts or describes, in a patently offensive way, [violent] conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Crump, *supra* note 57, at 30-31 (quoting *Miller v. California*, 413 U.S. 15 (1973)) (alterations in original).

replete with mass slaughter, genocide, murders, and numerous bloody wars fall within the new species of disfavored expression, or would it be deemed to appeal on the whole to other impulses and yearnings of human beings?

There are lines to be drawn in these cases, to be sure, but it is reasonable to presume that mature jurists would be capable of drawing a line when faced with such facts. Judges are entrusted with many delicate and difficult matters of judgment. It is likely that they could distinguish between *Saving Private Ryan*, *Braveheart*, *Hamlet*, and *The Bible*, on one hand, and *Natural Born Killers* or *Cop Killer* on the other. If they are incapable of drawing such distinctions, it does not auger well for their judicial temperament in weighing the relative merits in a host of other contexts.

As mentioned previously, it may also be appropriate to draw the lines differently depending upon the age of the person affected by the particular form of entertainment. Courts would likely be more willing to carve out a new type of disfavored speech if its application were limited to the situation in which the speech is aimed at juveniles. Taking a cue from the Supreme Court cases recognizing more room for restrictions on speech where the interests of children are implicated,⁴⁴¹ courts could tailor the definition of “shockingly violent mass entertainment” to include in all cases a necessary, additional qualifier such as “aimed at minors.” So modified, the new category would have a reasonable chance of surviving appellate review.

Taken alone, judicial adoption of “shockingly violent mass entertainment” as an additional form of disfavored expression would substantially reduce the obstacles in the path of shock torts plaintiffs. Of course, courts could determine either that “shockingly violent mass entertainment” deserves no First Amendment protection or, alternatively, deserves only limited First Amendment protection. The former view would obviate the need for a First Amendment analysis, resulting from the point at which the expression is found to fall within the shock torts genre onward in a conventional trial on the merits, whether on the basis of products liability or negligence grounds. The latter option would still require a case-by-case weighing of First Amendment concerns. Thus, the balancing test proposed previously in this Article could be employed in conjunction with a determination that the case involves “shockingly violent mass entertainment.” In either event, the playing field would be much more level for all parties than has previously been the case.

441. See, e.g., *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 755 (1996); *Osborne v. Ohio*, 495 U.S. 103, 115 (1990); *Sable Communications v. F.C.C.*, 492 U.S. 115 (1989); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *New York v. Ferber*, 458 U.S. 747 (1982).

E. The Special Circumstances of Video Games

Throughout this Article, we have discussed the various forms of mass entertainment-media as if they were interchangeable. In many respects, they are fungible. However, certain types of video or computer games deserve separate discussion.

As a threshold matter, there is precedent indicating that video games are not protected by the First Amendment.⁴⁴² Some courts have viewed them as essentially nothing more than high-tech pinball games, devoid of expressive content for purposes of the First Amendment.⁴⁴³ This conclusion is logical in some respects, because it is difficult to identify the communicative elements of most games, other than the disclaimers, instructions, and credits. However, some games do begin with a textual introduction, that sets the stage for the ensuing action and describes an imaginary situation into which the player is about to enter. This introduction is usually either displayed on the video screen or played audibly from the game's speakers. Once beyond such introductory material, however, it is rare for a game to contain any words or verbal content, other than grunts, moans, and other sounds of combat and pain.⁴⁴⁴ The great bulk of the content of video games consists of visual images and nonverbal, nontextual sound effects. Although there is arguably some expressive content in some games, it is minimal. Therefore, courts confronted with shock torts involving many violent video games may find it

442. See, e.g., *Rothner v. City of Chicago*, 929 F.2d 297, 302-03 (7th Cir. 1991) (upholding restrictions on the use of video games by minors); *Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297, 299 (D. Mass. 1983) (stating that "video games are not protected speech within the First Amendment"); *America's Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (holding that video games "'contain so little in the way of particularized form of expression' that [they] . . . cannot be fairly characterized as a form of speech protected by the First Amendment"); *Caswell v. Licensing Comm'n for Brockton*, 444 N.E.2d 922 (Mass. 1983) (holding that video games are not protected under the First Amendment). Note, however, that the *Rothner* court stated that it was not holding that, under all circumstances, all video games can be characterized as completely devoid of First Amendment protection or artistic value. The court acknowledged that it could not tell from the record whether the video games at issue "are simply modern day pinball machines or whether they are more sophisticated presentations involving storyline and plot that convey to the user a significant artistic message protected by the first amendment." 929 F.2d at 303.

443. See, e.g., *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605 (Mass. 1983) (upholding a flat ban on coin-operated amusement devices in a municipality). The court opined that "these video games . . . are, in essence, only technologically advanced pinball machines." *Id.* at 610.

444. Occasionally, as in the *Mortal Kombat* series, a message such as "Finish him!" is directed toward the player during the heart of the game at the point when he or she has rendered the opponent helpless. The message exhorts the player to "kill" the now defenseless enemy with one more blow. A particularly effective killing, such as tearing off the opponent's head or ripping out his or her still-beating heart, is then praised with the words "Flawless victory!" See Peter Tulupman, *Video Games: The School of Hard Knocks, Knives, and Numchaks*, 87 BUS. & SOC'Y REV. 41, 41 (1993).

unnecessary to delve deeply into First Amendment doctrine, and instead may focus on the merits of the case.

There is another key distinguishing feature of video games. In contrast to motion pictures or musical recordings, video games generally require active involvement by the user rather than passive absorption. There is considerable variation in terms of how the user interacts with the game. In arcade games, there is often a replica of a semiautomatic pistol, machine gun, or other firearm which the user aims and shoots in a manner very similar to that employed by actual marksmen. Alternatively, many arcade games as well as home computer games feature a control panel or “joystick” with buttons and knobs that enable the user to manipulate some aspects of the game.

Many video and computer games do not involve excessive, graphic violence, and may actually serve a useful and productive purpose by fostering fine motor control and eye-hand coordination in young people. Children can be enthralled by the opportunity to manipulate colorful and interesting animated characters in a variety of adventuresome settings and will spend numerous hours playing these games. There is a definite appeal to the experience of feeling a sophisticated piece of equipment respond to one’s commands. Also, many games present several levels of action, and reward expertise with the opportunity to advance to new realms of fantasy play, thus encouraging repeated play and the refining of skills through experience. The more proficient one becomes, the richer the play experience one may enjoy. Thus, there is a reward-feedback system in place in virtually all computer and arcade games that tends to encourage the user to play again and to play often.

This reward-feedback system—a form of conditioned response generator—may be relatively harmless in nonviolent games, assuming play is limited to a reasonable numbers of hours in relation to other pursuits. The reward-feedback system can be much more serious when the same conditioned response mechanism is embodied in extremely violent games.

There are at least two basic categories of graphically violent games. One type, such as the various iterations of *Mortal Kombat*, involves one-on-one battles between an animated character controlled by the user and a second such character controlled either by the game’s artificial intelligence function or by another player. These games usually do not include firearms, but instead employ an assortment of martial arts kicks, throws, and punches for the players to use in battle, as controlled by a system of buttons and “joysticks.” Another common type of game, such as *House of the Dead* or *Area 51*, features large numbers of animated human or humanoid characters, emerging from behind obstacles or otherwise suddenly appearing, and then moving threateningly towards the user. The user must then point and shoot a

weapon to destroy these characters before they destroy the user and possibly terminate his or her turn at play. These games often require virtually constant, precise, and rapid firing to shoot the numerous, quickly moving “enemies” with sufficient accuracy and speed to allow continued play. It is sometimes necessary to shoot attackers in a certain vulnerable spot, usually the head or heart, to stop them.⁴⁴⁵ Yet menacing opponents stalk the user in such profusion that even a novice should be able to “kill” a dozen or more before being overwhelmed by the relentless onslaught.

Both species of violent games expose the user to enormous quantities of simulated blood and gore at a virtually nonstop pace. Additionally, there is a constant stream of graphically depicted fatalities, as opponents are slain in great numbers. With practice, users can hone their combat skills, improve their kill rates, and gain the reward of meeting new and more challenging levels of threats.

Just as nonviolent computer games can perform a teaching function based on the skills they emphasize and the frequency with which their users repeat the necessary actions, so too can graphically violent games. The marksmanship games teach their users effective techniques for aiming and shooting firearms at moving human or humanoid targets, a form of hands-on, interactive combat training.⁴⁴⁶ If the user does not learn to be adept at these point and shoot methods, he or she will likely stop playing the game entirely after becoming frustrated by the short duration of each turn and the swiftness of defeat. Additionally, the graphically violent games may inure their players to bloody combat, including the maiming and killing of human beings. Repeated exposure to the realistically simulated slaughter of dozens, even hundreds, of people, replete with splattering blood, exploding skulls, and exposed internal organs may accustom the user to such ordinarily repellent and foreign sights.⁴⁴⁷ After participating directly in the virtual slayings of hordes of human-like characters, devotees of marksmanship games could experience a form of the detachment and callousness that can characterize battle-hardened combat soldiers in wartime.⁴⁴⁸

Even if, contrary to precedent, courts recognize some First Amendment protection for video games, the combination of these two lessons—improved marksmanship techniques and the acceptance as routine of bloody killing—

445. See Dave Shiflett, *supra* note 40, at 46-47.

446. See generally GROSSMAN, *supra* note 46.

447. See Brad J. Bushman & Russell G. Green, *Role of Cognitive-Emotional Mediators and Individual Differences in the Effects of Media Violence on Aggression*, 58 J. PERSONALITY & SOC. PSYCHOL. 156, 160-62 (1990); Michael B. Rothenberg, *Effect of Television Violence on Children and Youth*, 234 JAMA 1043, 1044 (1975).

448. See Rothenburg, *supra* note 447.

taught effectively by the interactive and repetitive involvement of the user with the game, may place certain violent video games in a class distinct from other entertainment products for shock torts purposes. By actively involving the user in a two-way exchange with the game, these products move into a realm that films or recordings cannot yet enter, a participatory, interactive level of exchange between the medium and the individual. For products liability purposes, this aspect of violent games may be an important factor in the determination of defectiveness, particularly when considered in consort with the aggressive marketing of these games toward immature, adolescent males. Courts may be willing to find that, even if adults could reasonably be expected to suffer no serious harm from exposure to violent games, the selected target audience lacks the judgment, life experience, and maturity to deal with such an avalanche of bloodshedding.

F. Practical Considerations

The focus of this Article has been on the legal theories that could support a cause of action for shock torts, together with the attendant doctrinal and constitutional impediments. In addition to the threshold legal obstacles, of course, plaintiffs in shock torts litigation would also face formidable practical challenges.

Proof of causation—both cause-in-fact and proximate cause—will often be difficult. A host of influences affect all of us, including the troubled youths typically influenced and/or harmed in shock torts cases. The extent to which plaintiffs can prove that the media defendants and their products exerted an influence identifiable among all the other environmental and internal stressors will be a daunting evidentiary hurdle. The defendants will show, even in the most extreme cases, that the film, recording, or video game in question was accessed by a very large number of people, sometimes millions, with only a minuscule minority presenting any claims of harm. Moreover, if the injured young person was also afflicted with one or more serious emotional and substance abuse problems, as is frequently the case, proving the significance of the role played by the media defendants may be elusive.

Issues of contributory or comparative negligence may also arise, depending on the legal theory asserted and the applicable law within the particular jurisdiction. A person who habitually abuses himself or herself with drugs or alcohol, or ignores the counsel of parents or mental health providers, could undermine any cause of action for shock torts. Indeed, reliance on civil litigation in such cases may be seen by some as merely one more example of the familiar modern phenomenon of persons failing to

accept responsibility for their own actions and, as a result, meet with disapproval at the hands of the jury notwithstanding successful navigation through the legal hazards.

Certainly, some plaintiffs would prevail despite these practical obstacles. The point is, however, that there is scant likelihood of the proverbial “torrent of litigation” and with it a pandemic chilling effect on free speech resulting from a liberalized legal standard for shock torts. Few people are ever harmed, or even allegedly harmed, by shock torts entertainment products. Fewer than those harmed or allegedly harmed would be able to bring a legal case all the way through the system to a successful outcome. Under these circumstances, the legal system can afford to offer justice in the individual case without jeopardizing the overarching concerns for justice in the abstract or the constitutional pillars of our freedoms.

V. CONCLUSION

As we have seen from our review of those mass-media torts cases in which lower courts applied *Brandenburg*,⁴⁴⁹ the results have been devastating for the individuals and their families who have been denied redress for media-generated harms. These cases almost always involve young people in their adolescent years. In many instances, these young people have a history of emotional problems, substance abuse, and other indicia of instability that rendered them particularly susceptible to influence of a perverse nature. When persons of such vulnerability are specifically targeted as the primary consumers of shockingly violent forms of entertainment, the profit motive of the media purveyors is placed in direct conflict with the best interests of the consumers and those with whom the consumers associate.

The title of this Article is meant to focus attention on the heightened preexisting vulnerability of most of the people who are harmed by ultraviolent entertainment, as well as to play on the words in the title of the most infamous motion picture in this genre.⁴⁵⁰ These troubled young people are, in a sense, “natural born copycat killers” to the extent that their unfortunate circumstances and early life experiences render them acutely amenable to certain powerful and destructive outside influences. Predisposed

449. See, e.g., *Zamora v. Columbia Broad. Sys.*, 480 F. Supp. 199, 206 (S.D. Fla. 1979); *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193 (Cal. Ct. App. 1988); *Bill v. Superior Court*, 187 Cal. Rptr. 625, 628 (Cal. Ct. App. 1982); *Olivia N. v. Nat'l Broad. Co., Inc.*, 178 Cal. Rptr. 888, 893 (Cal. Ct. App. 1981); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1070-72 (Mass. 1989); *DeFilippo v. Nat'l Broad. Co.*, 446 A.2d 1036, 1040 (R.I. 1982).

450. More than a dozen murders have allegedly been inspired by the film *Natural Born Killers*. John Gibeaut, *Deadly Advice Targeted*, 84 A.B.A. J., July 1998, at 24-25.

to acts of imitative violence, these troubled youths can be sparked into explosive behavior by shock torts entertainment. They are also predisposed to exhibit consumer preferences for that type of fringe-group entertainment. When the entertainment industry affirmatively seeks to exploit those preferences by designing and marketing products to appeal to violent urges, it is difficult to justify mechanical application of the *Brandenburg* test, or an outmoded view of products liability law to shield entertainment-media defendants from all civil liability for the resulting harms.

It is, in part, this targeting of vulnerable individuals that explains why tort liability is appropriate for entertainment industry professionals whose work triggers destructive impulses in disturbed youths. Some commentators have argued that creative artists and their corporate backers should not be held responsible for the preexisting psychological and emotional problems of some members of their intended audience.⁴⁵¹ The fear, which has also been voiced by some judges, is that a small minority of troubled people could become the benchmark standard for a wave of self-censorship, resulting in nothing but bland, utterly unimaginative entertainment for all.⁴⁵² Yet, by definition, shock torts entertainments are aimed at people, usually minors, with very atypical tendencies and appetites. By creating extremely violent and destructive entertainment and then marketing it toward persons with violent and destructive proclivities, the industry professionals have by a conscious, rational, business decision placed themselves in a position of responsibility for the harms that ensue.

Additionally, the disturbed youths who are the usual shock torts victims can be viewed as a classic example of the “thin skull” principle of tort law.⁴⁵³ The general rule is that, for purposes of establishing proximate cause, a defendant takes the plaintiff as is, and is liable for all the harm done even if a “normal” person would not have been seriously harmed by defendant’s

451. See generally Quinlan & Persels, *supra* note 183; Brill, *supra* note 183; Deutsch, *supra* note 183.

452. See *McCullum*, 249 Cal. Rptr. at 197.

[I]t is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation, and controversy.

Id. See *Davidson v. Time Warner, Inc.*, No. Civ. 94-006, 1997 WL 405907, at *22 (S.D. Tex. Mar. 31, 1997) (“This self-censorship not only would affect broadcasters, who would be chilled into producing only the most mundane, least emotional material. This self-censorship would also prevent listeners from accessing important social commentary, not just the violent and aesthetically questionable *2Pacalypse Now*.”).

453. DOBBS, *supra* note 374, at 464-65.

actions and the extent of harm that results in a particular case was not foreseeable.⁴⁵⁴ As the principle is sometimes stated, a defendant is liable for aggravation of preexisting injuries or conditions.⁴⁵⁵ Indeed, if a given shock torts entertainment product would have only mildly unsettled a “normal” person, the defendant would be liable for the much greater effect the product invokes in disturbed individuals.⁴⁵⁶ Moreover, to the extent the defendant knew or should have known of the heightened susceptibility of the plaintiff, as is the case with a small but genuine percentage of the consumer base for shock torts entertainment, the defendant should be required to exercise a degree of care that takes that susceptibility into account.⁴⁵⁷

As a final point for those who foresee rampant self-censorship and bland-norming as the inevitable consequence of shock torts liability, let us put things into perspective. We have mentioned the practical legal hazards plaintiffs must successfully negotiate, even if they survive the potent constitutional defense.⁴⁵⁸ In light of (1) the rarity of shock torts cases in the first place, (2) the difficulty of surmounting the legal and practical obstacles that confront those few who are injured, and (3) the immense profitability of the entertainment industry, there is no realistic prospect of a chilling effect. Rather than a “nuclear winter” of chilled, deadened expression, shock torts liability would bring a breath of fresh air.

Let us return for a moment to the anguish expressed by some of the judges involved in shock torts and related cases where the plaintiffs’ claims were held to be barred by the First Amendment. These experienced jurists used language rarely found in judicial opinions to express their dismay with the legal view expressed by the majority in each case.

In *Herceg*,⁴⁵⁹ Judge Jones wrote:

What disturbs me to the point of despair is the majority’s broad reasoning which appears to foreclose the possibility that any state might choose to temper the excesses of the pornography business by

454. See, e.g., *Chicago City Ry. Co. v. Saxby*, 72 N.E. 755 (Ill. 1904); *David v. DeLeon*, 547 N.W.2d 726 (Neb. 1996).

455. See, e.g., *Vaughn v. Nissan Motor Corp. in U.S.A., Inc.*, 77 F.3d 736, 738 (4th Cir. 1996). It is important to note that the “thin skull” rule applies to issues of proximate cause, not to issues of negligence. A defendant is not required to exercise special care for an unforeseeably vulnerable plaintiff; the defendant’s duty of care is measured by the ordinary person. But if the defendant’s conduct would in some way place “normal” people at risk, the defendant is liable for all resulting injuries, even if much greater than those a “normal” person would have suffered. *Id.*

456. *Id.*

457. DOBBS, *supra* note 374, at 465 n.7.

458. See *supra* Part IV.F.

459. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1025 (5th Cir. 1987) (Jones, J., dissenting in relevant part).

imposing civil liability for harms it directly causes. Consonant with the first amendment, the state can protect its citizens against the moral evil of obscenity, the threat of civil disorder or injury posed by lawless mobs and fighting words, and the damage to reputation from libel or defamation, to say nothing of the myriad dangers lurking in “commercial speech.” Why cannot the state then fashion a remedy to protect its children’s lives when they are endangered by suicidal pornography? To deny this possibility, I believe, is to degrade the free market of ideas to a level with the black market for heroin. Despite the grand flourishes of rhetoric in many first amendment decisions concerning the sanctity of “dangerous” ideas, no federal court has held that death is a legitimate price to pay for freedom of speech.⁴⁶⁰

At the conclusion of her dissent, Judge Jones wrote:

Eliminating the Brandenburg incitement theory as a basis for recovery would have been sufficient to reverse the jury award here. The majority go much further, however, and afford Hustler virtually complete protection from tort liability under the first amendment. I vigorously oppose their unnecessary elaboration on first amendment law, which, I believe, will undercut the ability of the states to protect their youth against a reckless and sometimes dangerous business which masquerades as a beneficiary of the first amendment.⁴⁶¹

In *Byers*,⁴⁶² Judge Fitzsimmons expressed similar thoughts:

I note that the issue of the protection that has afforded so many so much under the First Amendment has been considered sparingly by the United States Supreme Court. Rightfully so. Yet the issue of violence is one that has not been squarely submitted to the present Supreme Court in this format and intensity.

Where the intentional, deliberative infliction of suffering and agony has the goal of emulation, such a product does not free from the specter of “liability 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.”⁴⁶³

460. *Id.* at 1025-26.

461. *Id.* at 1030.

462. *Byers v. Edmondson*, 712 So. 2d 681, 692 (La. Ct. App. 1998) (Fitzsimmons, J., concurring), *cert. denied*, 526 U.S. 1005 (1999).

463. *Id.* (quoting *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 248 (4th Cir. 1997)). This Article has demonstrated that the *Brandenburg* incitement test has been applied repeatedly by lower courts to

In *Waller*,⁴⁶⁴ the court declared its sympathy for the defeated plaintiffs as follows:

Having ruled on the matter before the court, this order cannot be signed without an expression of sympathy for the parents of Michael Jeffrey Waller who have shown their devotion to his memory by the filing and prosecution of this lawsuit. The court has no doubt as to the sincerity of their motives in following through with what must be an extremely painful course of action. The death of anyone before he has had a full measure of life is tragic and especially so if the person is a much loved teenaged son. If the death is by suicide the pain and grief to those left behind is almost unbearable. Although the court must render all its decisions without regard to sympathy, that does not mean it loses its capacity to experience that emotion.⁴⁶⁵

Perhaps most interesting of all is this final comment from the *Davidson*⁴⁶⁶ opinion:

2Pacalypse Now is both disgusting and offensive. That the album has sold hundreds of thousands of copies is an indication of society's aesthetic and moral decay. However, the First Amendment became part of the Constitution because the Crown sought to suppress the Framers' own rebellious, sometimes violent views. Thus, although the Court cannot recommend 2Pacalypse Now to anyone, it will not strip Shakur's free speech rights based on the evidence presented by the Davidsons.⁴⁶⁷

A quicksand of legal hopelessness seems to drag reluctant judges inexorably down toward such conclusions in several of the shock torts type decisions. As the above quotes demonstrate, in some cases judges have felt compelled to rule in favor of the entertainment industry defendants despite their revulsion toward the products involved and their desire to ameliorate, in some part, the tragic loss of young life caused by these products. The excerpt from *Davidson* is a good example of the tortured reasoning courts have

bring about the very result deplored by Judge Fitzsimmons. In all but the most extraordinary circumstances, shock torts plaintiffs cannot survive the *Brandenburg* test as it has traditionally been understood. It is for this reason that judicial recognition of the shock torts concept coupled with adoption of a legal approach appropriate for the peculiar characteristics of shock torts is important.

464. *Waller v. Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991).

465. *Id.* at 1153.

466. *Davidson v. Time Warner, Inc.*, No. Civ. 94-006, 1997 WL 405907 (S.D. Tex. Mar. 31, 1997).

467. *Id.* at *22.

employed to justify what they thought to be the result demanded by the First Amendment. The court, in essence, equated a product that is both a cause and a symptom of the “decay” of our contemporary society with the human yearning for freedom and self-determination that fueled the American war for independence and ultimately resulted in the birth of this nation. Decay is the polar opposite of birth. Likewise, the blatantly destructive commercial products at issue in shock torts cases are the polar opposite of the political speech that initially gave rise to the United States and now maintains the freedom of its citizens.

This Article has demonstrated that shock torts cases are not doomed to the defeat presumed to be foreordained by some judges. Within the framework of the existing case law there is room for a different result, a result based on a new legal theory that recognizes the shock torts concept. Through multiple legal avenues, there is a path toward resolution of these cases, a resolution that affords proper deference to First Amendment concerns while simultaneously allowing aggrieved plaintiffs a reasonable prospect of redress in appropriate cases.