

Article

TORT LIABILITY FOR PHYSICAL INJURIES ALLEGEDLY RESULTING FROM MEDIA SPEECH: A COMPREHENSIVE FIRST AMENDMENT APPROACH

Andrew B. Sims*

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* Associate Professor of Law, Fordham University School of Law; B.A. 1970, Amherst College; J.D. 1973, Harvard University; Law Clerk, Hon. Charles D. Breitell, Ch. Judge, New York Court of Appeals, Albany, N.Y. 1973-75.

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INTRODUCTION

In recent years, courts have been increasingly confronted with lawsuits brought against media defendants for physical injuries allegedly caused by

speech which they disseminated.¹ Usually predicated on a theory of negligence, these cases present a wide variety of fact patterns. A television show instructs a child to blow up a balloon containing a BB pellet; the balloon explodes, blinding the child in one eye. A teenager emulates a method of "auto-erotic asphyxiation" depicted in a pornography magazine, and strangles himself in the process. A radio announcer urges listeners to speed to a site to claim a prize; those who respond injure others in auto accidents. A newspaper reveals the name and address of a rape victim whose assailant is still at-large; the assailant harasses her. A magazine prints a gun-for-hire advertisement that facilitates a would-be murderer to find his trigger-man to do the deed for him. A young girl attacks her father with household appliances, emulating the violence she watched on an afternoon cartoon program.

In the above examples, all but the last based on actual cases,² the plaintiffs alleged the injuries to be the direct result of media-disseminated speech under circumstances where the media obviously did not intend that such injuries should occur.³ When confronted with these media physical injury cases, many courts have accepted the argument that the media defendants deserved First Amendment protection beyond the common law and statutory defenses normally afforded negligence tort defendants under state law. However, in part because the fact patterns of the cases defied easy classification, and in part because First Amendment principles themselves have often seemed murky, undeveloped or in transition, a consistent and satisfactory jurisprudence has failed to develop in this area.⁴ More often than not,

1. The cases discussed include not only (1) those in which physical injuries resulted, but also (2) those in which injuries resulted in death, leading to "wrongful death" actions and (3) cases in which no physical injury actually occurred, but the threat thereof created emotional injury, leading to actions for the negligent or intentional infliction of mental distress.

The defendants in the cases discussed include not only those traditionally understood as being "media," such as broadcasters and publishers, but also those who originated or distributed speech of a type that the traditional media would frequently disseminate, such as motion pictures and sound recordings.

For purposes of brevity, all of these cases will hereinafter be referred to collectively as "media physical injury cases."

2. The last example is drawn from an episode of the television show, *The Simpsons* (Fox Broadcasting Co. 1991).

3. A few of the cases discussed are predicated on a theory of intentional, as opposed to negligent, tort; that the defendants did intend and desire that the injury should occur. These cases are included because of their close relationship to the media physical injury cases predicated on negligence theory, and for purposes of comparison. See discussions *infra* note 135, and accompanying text. The unified First Amendment approach proposed in this paper is designed to cover cases where the speech-related injuries are alleged to be either negligently or intentionally inflicted. See *infra* Part IV (notes 341-82).

4. The topic has been the subject of scholarly commentary in the past. See, e.g., 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); Gerald R. Smith, *Media Liability for Physical Injury Resulting from the Negligent Use of Words*, 72 MINN. L. REV. 1193 (1988); E. Barrett Prettyman, Jr. & Lisa A. Hook, *The Control of Media-Related Imitative Violence*, 38 FED. COMM. L.J. 317 (1987); Jonathan M. Hoffman, *From Random House to Mickey Mouse: Liability for Negligent Publishing and Broadcasting*, 21 TORTS & INS. L.J. 65 (1985); Nancy L. Miller, *Media Liability for Injuries that Result from Television Broadcasts to Immature Audiences*, 22 SAN DIEGO L. REV. 377 (1985); Lisa A. Powell, *Products Liability and the First Amendment: The Liability of Publishers for Failure to Warn*, 59 IND. L.J. 503 (1984);

the courts seem to be reaching an appropriate result, but often by following questionable constitutional logic that may only lead to greater confusion in future cases. Worse, a court will occasionally reach what seems to be an unfair result under what it believes to be, perhaps incorrectly, constitutional compulsion.

This Article seeks to clarify this heterogeneous area of the law. It evaluates the two major constitutional models which courts have used in the media physical injury cases — the clear and present danger test of *Brandenburg v. Ohio*,⁵ and the defamation jurisprudence distinguishing speech which is or is not "of public concern."⁶ It argues that both models are too exclusively focused on the content of the speech to make their use conceptually appropriate in the media physical injury cases; and that, as one consequence thereof, they offer a choice of over-protection or under-protection. This Article proposes that the more appropriate constitutional focus in these cases is on the potential contrariness between an important First Amendment interest, the functional role of the media as the disseminators of ideas and information to the public, and the principles of common law tortious negligence.⁷ It is argued that this potential contrariness should create a presumption in favor of constitutional protection for the media, which could be outweighed and rebutted by a consideration of various factors which are identified.⁸

This Article is divided into four parts. Part I surveys and classifies the media physical injury cases, describing the fact patterns, the common law and/or First Amendment analyses employed by the courts, and the results of the most important cases to date. Part II describes, compares and evaluates various judicial approaches to the First Amendment issue in the media physical injury cases, considering the appropriateness of their use in these cases. Part III argues that the central, unifying theme in these cases is the potential conflict between common law negligence principles and the constitutionally-valued, functional role of the media in disseminating ideas and information to the public. Proceeding from this argument, Part III proposes that a calibrated balancing test, based on Judge Learned Hand's clear and present danger formula in *Dennis v. United States*,⁹ is a preferable, more comprehensive First Amendment approach to these cases. Finally, Part IV suggests the factors that should be weighed in such a balancing test, and how such a test might be structured.

Steven J. Weingarten, *Tort Liability for Nonlibelous Negligent Statements: First Amendment Consideration*, 93 YALE L.J. 744 (1984); Michael I. Spak, *Predictable Harm: Should the Media Be Liable?*, 42 OHIO ST. L.J. 671 (1981); Gary L. Urwin, *Tort Liability of Broadcasters for Audience Acts of Imitative Violence*, 19 PUB. ENT. ADVERT. & ALLIED FIELDS L.Q. 314 (1981); Anne K. Hilker, *Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis*, 52 S. CAL. L. REV. 529 (1979).

5. 395 U.S. 444 (1960), discussed *infra* note 200, and accompanying text.

6. See discussion *infra* note 248, and accompanying text.

7. See discussion *infra* note 329, and accompanying text.

8. See *id.*

9. 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

I. THE LEADING MEDIA PHYSICAL INJURY CASES AND THEIR CATEGORIZATION¹⁰

Actions for speech-related physical injury and wrongful death brought against the media and related defendants, usually on common law negligence theory, can be grouped into four general categories: (1) where the injuries purportedly arose from media speech offering instructions for, thereby implicitly inviting participation in, an activity that was inherently dangerous; or which became dangerous because the instructions were erroneous (hereinafter, the "Instruction Cases"); (2) where the injuries purportedly arose as a consequence of obviously dangerous, reckless, and perhaps even unlawful, conduct in which the defendants actively encouraged or exhorted the speech recipient to engage (the "Exhortation Cases"); (3) where the injuries purportedly arose from violence or from dangerous activity inspired by, but not actively encouraged by, the defendants' speech (the "Inspiration Cases"); and (4) where violence against third-parties was supposedly facilitated by information provided by media defendants (the "Facilitation Cases"). Some of these general categories are sub-categorized for purposes of clarification and analysis.

Some of the important cases in this area might arguably be placed in more than one of these categories, or might even be said to "straddle" two categories, depending upon how the parties pleaded the cases and how the courts analyzed the facts. Indeed, while the proposed categories and sub-categories are conceptually distinguishable, the borderline between the categories is not that well-defined, and is subject to interpretation in specific cases.

A. The Instruction Cases

While all media-conveyed instructions may be thought of as implied invitations to speech recipients to engage in the activity for which instructions are offered, the Instruction Cases suggest two different negligence theories for recovery. Some activities, such as defusing a bomb, are inherently dangerous. If the instructions on how to defuse a bomb are correct, but an explosion and injuries nevertheless occur, actions are sometimes brought on the theory that it was negligent not to have adequately warned of the risks involved; or, that it was negligent to have ever encouraged so dangerous an activity by offering instructions to otherwise untrained or unqualified persons (the "Dangerous Instruction Cases").

On the other hand, some activities which are generally considered "safe" become dangerous if an incorrect or erroneous instruction is given (the "Erroneous Instruction Cases").¹¹ Cooking, for example, is not considered a dangerous activity, but if an erroneous instruction is accidentally given on the number of days to ferment a fish, food poisoning might result.¹² Notably, in

10. For examples of other proposed category structures or terminologies for the media physical injury cases, see Diamond & Primm, *supra* note 4, at 973-94; Hilker, *supra* note 4, at 530-47; Urwin, *supra* note 4, at 316-18.

11. See RESTATEMENT (SECOND) OF TORTS § 311 (1975) ("Negligent Misrepresentation Involving Risk of Physical Harm").

12. Cf. *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977) (plaintiff using cookbook suffered food poisoning when tasted raw piece of recipe ingredient that was

Erroneous Instruction Cases involving safe activities, the defendant speaker may not have recognized the danger. It is of course possible that a case could correctly combine both theories of negligence: the instructions on how to defuse a bomb might also be erroneous. More frequently, the two theories are confounded by the pleadings, if only because failure to give adequate warnings of a risk which was known or which should have been known might be characterized as an "erroneous instruction."¹³

Another important distinction drawn in the Instruction Cases is between those who create the instructions (the "speech originators") and those who only disseminate or transmit them to the public (the "speech disseminators"). Thus courts, applying common law negligence rules, recognize a distinction between the authors and the publishers of "how to" instruction books. While author liability for errors in the contents of books, designs or drawings is not firmly defined and will depend upon the facts of the case,¹⁴ publishers are not held liable for the contents of the works they publish unless the authors are their own employees for whom they would be liable under the doctrine of *respondeat superior* (the "Instruction Book Publication Cases").¹⁵ Plaintiffs' attempts to extend the principles of strict liability for defective products¹⁶ to the publishers of "how to" instruction books, by analogy to defective aeronautical or nautical maps or charts,¹⁷ have been unsuccessful.¹⁸ In these cases,

poisonous until cooked; alleged negligence for failure to warn of the danger; book retailer held not liable).

13. When injuries result from the high-risk activities in the Dangerous Instruction cases, the complaints will usually throw in for good measure the argument that the instructions were faulty, or at least not the best available given the risks involved. Conversely, the activities at issue in the Erroneous Instruction cases usually involve more obvious risks than cooking, and the complaints stress those dangers as correlative to the duty imposed upon the speaker to have detected the error.

14. See *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1217 (D.Md. 1988); *Lewin v. McCreight*, 655 F. Supp. 282, 283 (E.D. Mich. 1987); *Demuth Development Corp. v. Merck & Co., Inc.*, 432 F. Supp. 990, 993 (E.D. N.Y. 1977).

15. See, e.g., *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991) (publisher of *The Encyclopedia of Mushrooms* not liable to plaintiffs who became severely ill from picking and eating mushrooms in reliance thereon); *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216 (D. Md. 1988) (publisher of nursing textbook not liable to nursing student who injured herself following directions for self-administration of an enema); *Lewin v. McCreight*, 655 F. Supp. 282 (E.D. Mich. 1987) (publisher of *The Complete Metalsmith* not liable for injuries from explosion while following instructions for mixing a mordant); *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263 (Ill. App. 1985) (publisher of *The Making of Tools* was not liable to plaintiff injured when tool under construction shattered). Cf. *Cardozo*, 342 So. 2d 1053 (book retailer not liable for error in cookbook).

16. See generally RESTATEMENT (SECOND) OF TORTS § 402A (1977).

17. See, e.g., *Brocklesby v. United States*, 767 F.2d 1288 (9th Cir. 1985); *Saloomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983).

18. See, e.g., *Winter*, 938 F.2d 1033; *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1217-18 (D. Md. 1988). See also *Lewin v. McCreight*, 655 F. Supp. 282, 284 (E.D. Mich. 1987); *Walter v. Bauer*, 439 N.Y.S.2d 821, 822-23 (Sup.Ct. Erie County 1981).

Errors in instruction manuals accompanying products, the manuals being deemed a part of the products themselves, have led to recoveries for physical injuries on strict liability theory. See, e.g., *Jackson v. Baldwin-Lima-Hamilton Corp.*, 252 F. Supp. 529 (E.D. Pa. 1966); *Wichman v. Allis Chalmers Mfg. Co.*, 117 F. Supp. 857 (W.D. Mo. 1954). Some commentators have argued, by analogy, that publishers of "how to" instructional books and other media defendants should at least be subject to liability on negligence principles. See, e.g., *Diamond & Primm*, *supra* note 4, at 976-77. Cf., e.g., *Sears, Roebuck & Co. v. Employers*

the courts have often cited, in support of the common law rule, First Amendment concerns that speech would be chilled by imposing too heavy a burden upon the publishers.¹⁹

Winter v. G.P. Putnam's Sons,²⁰ a recent Ninth Circuit decision, is illustrative. The two plaintiffs had gone hunting for wild mushrooms, relying on *The Encyclopedia of Mushrooms* to determine which mushrooms were safe to eat. This reference work was written by two British authors and originally published by a British firm. The defendant, an American book publisher, had purchased copies of the book from the British publisher, and had distributed them in the United States without any editing on its part. After cooking and eating wild mushrooms described in the book, the plaintiffs became critically ill, both requiring liver transplants. Suing Putnam for products liability, breach of warranty, negligence, negligent misrepresentation, and false representations, the plaintiffs alleged that the book contained erroneous and misleading information concerning the identification of the most deadly mushroom species.²¹

In a unanimous decision, the Ninth Circuit upheld the federal district court grant of summary judgment for the defendant. Applying California tort law, the appeals court declined to analogize the book to aeronautical charts, and thus declined to impose strict liability.²² Products liability law, the court concluded, focuses on tangible items, whereas "how to use" books represent "pure thought and expression."²³ The court then rejected the plaintiffs' argument that Putnam had a duty to investigate the accuracy of books which it published,²⁴ citing numerous common law precedents to the contrary.²⁵ The court added 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."²⁶

As in the case of book publishers, the press and the broadcast media might also not be held liable, under common law negligence rules, for the "neutral dissemination" of instructions by third-party speech originators, depending on the circumstances of the case.²⁷ In analogous cases, media

Ins. of Warsaw, 585 F.Supp. 739 (N.D. Ill. 1983) (vendor's sale of an instruction manual, along with a power saw from a different company, was the sale of a "product" under vendor's insurance policy, so as to require insurer to defend when vendor was sued by vendee for injury from the power saw, allegedly as the result of inadequate instructions and warnings in the manual).

19. See, e.g., *Winter*, 938 F.2d 1033, 1037; *DeMuth Development Corp. v. Merck & Co.*, 432 F. Supp. 990, 993 (E.D. N.Y. 1977); *Alm v. Van Nostrand*, 480 N.E.2d 1263, 1267 (Ill. App. 1985); *Cardozo*, 342 So. 2d 1053, 1056-57.

20. 938 F.2d 1033 (9th Cir. 1991).

21. *Id.* at 1034.

22. *Id.* at 1034-36.

23. *Id.* at 1036.

24. *Id.* at 1037.

25. *Id.* at 1037, n.8.

26. *Id.* at 1037. The court also declined to impose on the publisher the duty to include a warning label that "this publisher has not investigated the text and cannot guarantee its accuracy," inasmuch as no publisher has the duty of guarantor.

27. Cf. *Walt Disney Productions, Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981), discussed *infra* note 31, and accompanying text. In *Shannon*, defendant Turner Broadcasting

defendants have not been held liable for carrying advertisements for products which prove to be dangerous in the hands of certain individuals, or dangerous as the result of erroneous or incomplete instructions,²⁸ provided that they have not endorsed the product ("the Media Advertisement Cases").²⁹

Thus, current negligence law principles are generally protective of media defendants who merely disseminate instructions, with the cases suggesting that if the common law did not require this result, the First Amendment would.³⁰ However, if negligence law is less protective of media defendants who both originated and disseminated dangerous or erroneous instructions, they may still be accorded First Amendment protection.

Walt Disney Productions v. Shannon,³¹ a Dangerous Instruction Case, is illustrative. Defendant Disney was the producer of a "Mickey Mouse Club" television program that featured a segment on creating your own sound effects. The young audience was shown how to reproduce the sound of a tire coming off of an automobile by placing a BB pellet inside of a large round balloon, inflating it, and rotating the pellet inside. An eleven-year-old boy who basically followed the instructions,³² was partially blinded when his balloon burst. He sued Disney, along with the syndicator and the broadcaster of the program.³³

Corp. was arguably in a similar position to the defendant book publisher in the *Winter* case, as a "neutral" disseminator of the instructional speech contained in a television program originated by another defendant, Walt Disney. However, the *Shannon* court made no distinction among the defendants, finding in favor of all of them on the theory that the First Amendment protected the speech on the basis of its content. *Id.* at 582-83. Query whether, under common law negligence analysis, a broadcaster's duty to screen independently-produced television programs for foreseeable risks to the viewing public would be comparable to that of a book publisher.

28. See, e.g., *Walters v. Seventeen Magazine*, 195 Cal. App.3d 1119, 241 Cal. Rptr. 101 (1987) (tampons); *Yuhas v. Mudge*, 322 A.2d 824 (N.J. 1974) (fireworks). Cf. *Daniel v. Dow Jones & Co., Inc.*, 520 N.Y.S.2d 334 (Civ.Ct. 1987) (faulty financial news report on computerized database). See also *Stewart v. Soldier of Fortune*, No. 616074, (Cal. Superior Ct. Orange Co. April 24, 1991) (Magazine was sued for injuries caused to two children watching a person build and detonate a bomb pursuant to instructions in a book advertised by the magazine. The plaintiffs alleged that the instructions in the book were inaccurate or incorrect, and thus presented a premature risk of explosion. They sought to hold the magazine liable under theories of strict liability or negligence. The court sustained the magazine's demurrer.). These cases should be distinguished from the recent "gun-for-hire" cases, where it has been alleged and found that by accepting advertisements which could have been construed as offering criminal services, the media have "facilitated" the ensuing crimes, and have been held liable in negligence to the victims. See discussion *infra* at note 147 and accompanying text.

29. See, e.g., *Hanberry v. Hearst Corp.*, 276 Cal.App.2d 680, 81 Cal.Rptr. 519 (1969) (liability found where *Good Housekeeping Magazine* placed its official "Consumer Guarantee Seal" on a pair of defective shoes which caused serious injury). But see *MacKown v. Illinois Publishing & Printing Co.*, 6 N.E.2d 526 (Ill. 1937) (no liability for injuries to reader for injury allegedly resulting from use of a dandruff product recommended in an article). The decision in *MacKown* was, however, based on privity requirements which may now be antedated. See, e.g., *Nelson v. Union Wire Rope Corp.*, 199 N.E.2d 769 (Ill. 1964).

30. See discussion *supra* at note 16 and accompanying text.

31. 276 S.E.2d 580 (Ga. 1981).

32. The boy followed the instructions with variations which the court apparently deemed immaterial. *Id.* at 581.

33. The syndicator and the broadcaster were SFM Media Services and Turner Communications, Inc., respectively. *Id.*

The Supreme Court of Georgia held that although what the defendant had invited the child to do "posed a foreseeable risk of injury,"³⁴ the First Amendment nevertheless mandated the grant of summary judgment to the defendants.³⁵ The court found that the instructions offered on the show did not create a "clear and present danger of personal injury to the plaintiff"³⁶ as required by *Schenck v. United States*.³⁷ Notably, the *Shannon* court apparently assumed that all three defendants were protected by the First Amendment, making no distinction between Disney, the program originator, and the broadcaster who transmitted the show to the public.³⁸

B. The Exhortation Cases

This category covers cases in which the media defendant is alleged to have actively encouraged the speech recipient to engage in dangerous, reckless, and perhaps even unlawful activity, to the injury of himself or other parties. The paradigmatic case is *Weirum v. RKO General, Inc.*³⁹ As part of a promotional contest, a disc jockey on a rock radio station repeatedly urged listeners in cars to intercept a fellow disc jockey who was driving around in a conspicuous car from location to location in the Los Angeles area, giving away cash to those who reached him first. Two teenagers driving in separate cars, speeding and jockeying recklessly with each other on a highway in pursuit of the disc jockey's vehicle, forced another car to crash into the center divider of the highway and overturn, killing the driver and sole occupant.

In a wrongful death action brought by the wife and children of the driver, the radio station was held liable for wrongful death based on negligence theory. The Supreme Court of California upheld the jury verdict, believing that the defendant's exhortations to listeners to enter into and continue the prize chase had "stimulated" the teenagers' reckless driving which resulted in the fatal accident.⁴⁰ The court specifically rejected the defendant's argument that the First Amendment should bar recovery,⁴¹ but without elaborate discussion or case analysis.⁴²

34. *Id.* at 583.

35. *Id.* at 582-83.

36. *Id.* at 583.

37. 249 U.S. 47, 52 (1919). It is unclear why the *Shannon* court used the *Schenck* formulation of this test rather than the formulation in *Brandenburg v. Ohio*, 395 U.S. at 447 (1969), which is generally thought to have superceded *Schenck*, and which the *Shannon* court cited elsewhere in its opinion. *Shannon*, 276 S.E.2d at 582, n.2. Presumably, the *Shannon* court thought that the *Brandenburg* test was limited to cases closer to it on the facts, and that *Schenck* still represented the general principle more appropriate in a tortious negligence case. See discussion *infra* at note 200.

38. If Disney's program had failed the "clear and present danger" test, it would have been proper for the court to have addressed the question whether the other two defendants, as "speech transmitters," would be entitled to additional protection under common law negligence principles or under the First Amendment.

39. 15 Cal. 3d 40, 123 Cal. Rptr. 468 (1975).

40. *Id.* at 46, 123 Cal. Rptr. at 472.

41. *Id.*

42. *Id.* at 472. The court simply concluded that "[T]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."

On its facts, *Weirum* is a case about "instructions," but it would be misleading to classify it as an Instruction Case.⁴³ Granted, there is some affinity between an Exhortation Case like *Weirum* and a Dangerous Instruction Case like *Shannon*. Both categories are about encouragement to participate in activities which are dangerous and injurious to the speech recipient or to third parties, or to both. Nevertheless, there are sufficient differences between *Weirum* and *Shannon* to justify categorizing them separately. While offering instructions on how to engage in a dangerous activity may be viewed as an implicit invitation to engage in it, there is still a difference between implicit invitation and active encouragement or exhortation, if only one of degree. Notably, the state high courts apparently considered the defendants in both cases properly chargeable with negligence;⁴⁴ only different attitudes towards the First Amendment's applicability dictated the different results.

1. Exhortation to Activity Unlawful as well as Dangerous

In an important sub-category of the Exhortation cases, the activity purportedly exhortated by the media defendant was not only dangerous to the speech recipient or others, but also unlawful.⁴⁵

In *S & W Seafoods v. Jacor Broadcasting*,⁴⁶ for example, a radio talk show host, disparaging a local restaurant, urged his listeners to confront the owner-manager with rude gestures, and to spit on him.⁴⁷ Although apparently none of the listeners actually followed through on this advice,⁴⁸ the Georgia appellate court ruled that the owner-manager could sue the radio station and its talk show host for the intentional infliction of emotional distress.⁴⁹ The court reasoned that the owner-manager could have suffered emotional distress from, *inter alia*, the threat of physical violence,⁵⁰ and that, in having urged criminal assault and breach of the peace, the talk show host's speech was unprotected by the First Amendment.⁵¹

Weirum,⁵² which differs from *S&W Seafoods* in that a negligent rather than an intentional tort was alleged, might also arguably be read as a case of

43. It is certainly not a "true" Erroneous Instruction Case. See discussion *supra* note 11 and accompanying text. Indeed, we could hypothesize a fanciful variation on the *Weirum* fact pattern which would fit that category quite nicely: the disc jockey urged the listeners to exercise caution in driving, but in telling the listeners how to reach the "moving situs" of the prize, accidentally instructed them to make a turn onto a one-way street, going in the wrong direction.

44. See *Weirum*, 15 Cal. 3d at 45-46, 123 Cal. Rptr. at 471-72; *Shannon*, 276 S.E.2d 580, 583.

45. This distinction will have decisive consequences in terms of the application of the *Brandenburg* test under the First Amendment (see generally discussion *infra* at notes 200-42), and may have some bearing on the court's determination as to whether or not the media defendant's conduct could be deemed negligent under state law.

46. 390 S.E.2d 228 (Ga. 1990).

47. *Id.* at 229.

48. *Id.* at 230-31.

49. *Id.*

50. *Id.*

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

52. *Weirum*, 15 Cal. 3d 40, 123 Cal. Rptr. 468, discussed *supra* note 39 and accompanying text.

exhortation to activity that was unlawful as well as dangerous. Whether the activity specifically urged in *Weirum* was unlawful is, however, debatable. The radio broadcast continually "exhorted" the listeners to participate in the contest; and due to the nature of the contest, the court found that this "stimulated" the reckless conduct by the youthful contestants,⁵³ which the radio station should have anticipated.⁵⁴ There was, however, no explicit finding that the broadcast had specifically urged unlawful action such as speeding or other moving vehicle violations, or that the radio station had intended such a result. Rather, the court held that such consequences should have been foreseen.⁵⁵

2. Subliminal Messages: Exhortation to the Subconscious

In some recent cases, plaintiffs have alleged an exhortation to dangerous activity directed at the speech recipients' subconscious faculties.⁵⁶ *McCollum v. CBS, Inc.*,⁵⁷ was an action brought in the California state courts against the singer, John "Ozzy" Osbourne, his record company, and its distributors, by the parents of a nineteen-year-old who committed suicide after listening to Osbourne's music, purportedly under the influence of a specific song, "Suicide Solution".⁵⁸ One of the plaintiffs' theories⁵⁹ was that there were "masked lyrics" included in a twenty-eight-second instrumental break in the song, which were sung at extra-fast speed, so as not to be immediately intelligible, and which specifically urged the listener to take a gun and shoot himself; what might be described as an exhortation to the subconscious.⁶⁰

A California appellate court upheld the trial court's dismissal of the complaint, holding that nothing in the music was beyond the First

53. *Id.* at 46-47, 539 P.2d at 40, 123 Cal.Rptr. at 472.

54. *Id.* at 46, 539 P.2d at 39-40, 123 Cal. Rptr. at 471-72.

55. *Id.* at 46-47, 539 P.2d at 40, 123 Cal. Rptr. at 472.

56. Subliminal communication is generally defined as the projection of messages by light or sound so quickly or faintly that they are received by the listener below the level of conscious awareness. See *Vance v. Judas Priest* 16 Media L. Rep. (BNA) 2241, 2244 (Nev. Dist. Ct., Aug. 23, 1989) (No. 86-5844, 86-3939) (hereinafter *Vance I*); Olivia Godkin & Maureen Ann Phillips, Note, *The Subconscious Taken Captive: A Social, Ethical and Legal Analysis of Subliminal Communication Technology*, 54 S. CAL. L. REV. 1077, 1080 (1981). For an erudite discussion of the history of subliminal communications and government responses thereto, see *Vance I*, *supra*, at 2244-46.

57. 202 Cal. App. 3d 989, 249 Cal. Rptr. 187 (1988).

58. The cases in this sub-category have not to date involved the traditional media, but an analogous medium, that of mass-distributed sound recordings. It is not difficult to hypothesize future cases in which a radio station is sued for having "negligently" broadcasted a sound recording which purportedly had similar consequences.

59. The plaintiffs' other theory was that the song preached that suicide was the only way out and was a recommended course of action, which, with the hemisync tones of Osbourne's music, would obviously influence the emotions and behavior of individuals such as their son, who, because of their emotional instability, were susceptible to this idea.

60. The *McCollum* action, as well as the similar case of *Vance v. Judas Priest*, 1990 WL 130920 (Nev. Dist. Ct., Aug. 24, 1990) [hereinafter *Vance II*], discussed *infra* note 64 and accompanying text, is thus different from most of the cases under consideration in that the primary theory of these complaints is that the speaker intended for the harm to happen, and not that the harm was the result of the speaker's negligence. Nevertheless, a discussion of these cases is included herein because of their close relationship to the Inspiration Cases, discussed *infra* note 78 and accompanying text.

Amendment's protection,⁶¹ and that in any event there was no intentional or negligent invasion of the plaintiffs' rights.⁶² Subsequently, a federal district court in Georgia granted Osbourne summary judgment in a very similar wrongful death action, reaching the same conclusion with regards to the First Amendment.⁶³

In *Vance v. Judas Priest*,⁶⁴ however, a trial judge was more receptive to a similar claim that teenage suicides had resulted from subliminal messages in "heavy metal" music recordings. Raymond Belknap, eighteen, and James Vance, twenty, emotionally-unstable young men with a history of drug and alcohol abuse, entered into a "suicide pact" and shot themselves with a sawed-off shotgun after listening to the "Stained Class" album of the British "heavy metal" group, Judas Priest. Belknap died immediately; Vance, severely wounded, died three years later. Their families sued Judas Priest,⁶⁵ CBS Records, and others involved in the production and distribution of Judas Priest albums, for wrongful death in a Nevada state court.

On defendants' initial motion for summary judgment, the trial judge held that Judas Priest's music, lyrics, and videos were protected by the First Amendment,⁶⁶ but that any subliminal messages in the music, should they be found to exist,⁶⁷ would not be.⁶⁸ The court ruled that subliminal messages were not First Amendment-protected speech because: (1) such messages do not advance any theories supporting free speech;⁶⁹ (2) the individual has a First Amendment right to be free from unwanted speech;⁷⁰ and (3) hidden messages should not be forced upon an unknowing and unconsenting audience.⁷¹

61. *McCollum*, 202 Cal. App. 3d at 1001, 249 Cal. Rptr. at 193-94, using the "incitement" test of *Brandenburg* discussed *infra* at note 200 and accompanying text.

62. *Id.* at 1004-07, 249 Cal. Rptr. at 195-98.

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

64. *Vance v. Judas Priest (Vance I)*, 16 Media L. Rep. (BNA) 2241 (Nev. Dist. Ct. Aug. 1989), *supra* note 56; *Vance v. Judas Priest (Vance II)*, 1990 WL 130920 (Nev. Dist. Ct., Aug. 24, 1990), *supra* note 60.

65. In *Judas Priest v. District Court*, 760 P.2d 137 (Nev. 1988), the Nevada Supreme Court upheld the use of the state's long-arm jurisdiction statute to reach Judas Priest and other British defendants.

66. *Vance I*, 16 Media L. Rep. (BNA) 2241, 2244, 2246. The trial court judge did not elaborate as to why he believed the Judas Priest lyrics would not pass the "incitement" standard of *Brandenburg*. The lyrics quoted in the opinion (*Id.* at 2243) might be interpreted as endorsing the idea of suicide. However, absent exhortation to the act, it is doubtful that the lyrics could be construed as incitement to commit suicide, let alone pass the imminency, intent and likelihood requirements of the *Brandenburg* test.

67. The defendants always denied that there were subliminal messages in the Judas Priest albums. *Id.* at 2244.

68. *Id.* at 2247.

69. *Id.* at 2247-49. The trial judge described these "major theories" as being the following: (i) that free speech is necessary for the preservation of the uninhibited marketplace of ideas ("the most widely-recognized [theory]"); (ii) that free speech is essential to intelligent self-government in a democratic system; and (iii) that free speech promotes individual self-fulfillment and self-realization. *Id.* at 2247. For a discussion of these different theories supporting the First Amendment, see *infra* note 282.

70. *Id.* at 2249-51.

71. *Id.* at 2251-54.

However, this emphasis on the intentional invasion of privacy ultimately proved fatal to the plaintiffs' claim. After a trial on the merits, the trial judge ruled⁷² that there were indeed subliminal messages in one song,⁷³ but that they had been formed accidentally and unknowingly,⁷⁴ and without the intent necessary to hold Judas Priest liable.⁷⁵ Moreover, the judge ruled that the plaintiffs had failed to establish by a preponderance of the evidence that such messages, even if perceived, could be the proximate cause of "conduct of this magnitude."⁷⁶

Although the plaintiffs did not succeed, the opinions in *Vance* suggest that a separate jurisprudence of Subliminal Exhortation could possibly emerge, and that these cases need not necessarily be viewed as merely pleading, more aggressively and imaginatively, media-inspired psychological mood-shifts.⁷⁷

C. The Inspiration Cases

This category of cases is characterized by allegations that the speech recipient was "inspired" by the media speech to do injury either to himself or to third parties, albeit the facts of the case would not support a claim that the media defendant had either exhorted such actions or had invited them by way of instruction.

Although this would seem to be a weak theory,⁷⁸ plaintiffs have brought a significant number of cases in this category. Indeed, upon closer examination, the broad concept of "inspiration" actually embraces a number of different theories for recovery. The discussion which follows therefore examines various sub-categories of cases: (1) where the speech recipient allegedly imitated media-depicted activity (the "Imitation Cases");⁷⁹ (2) where the media allegedly induced a psychological mood shift in the speech recipient, resulting in either depression and suicide, or violence and injury by the speech recipient to third parties (the "Mood Shift Cases");⁸⁰ and lastly, (3) where it is alleged that media depictions attracted violent persons to the situs of the speech, resulting in injury of third parties (the "Attracted Violence Cases").⁸¹

1. The Imitation Cases

These cases involve the imitation by the speech recipient of violent or otherwise dangerous acts depicted or described in media communications, resulting in injury to the speech recipient or to third parties. The Imitation Cases can be subdivided into cases where the speech recipient intentionally or accidentally injured themselves, purportedly through imitation of a dangerous

72. *Vance II*, 1990 WL 130920.

73. *Id.* at 17-18.

74. *Id.* at 18-19.

75. *Id.* at 21-22 & 46-47.

76. *Id.* at 41.

77. See discussion *infra* note 97 and accompanying text.

78. In no Inspiration Case found has a plaintiff succeeded in winning a final judgment.

79. See discussion *infra* note 82 and accompanying text.

80. See discussion *infra* note 97 and accompanying text.

81. See discussion *infra* note 122 and accompanying text.

media-depicted act, and cases where the speech recipient directed the imitated violence against third parties.

Self-injury or suicide by imitation is exemplified by *DeFilippo v. National Broadcasting Co.*⁸² On defendant network's popular late-night comedy and talk show, "The Tonight Show," a guest, a professional stuntman, demonstrated a stunt by appearing to "hang" the show's host, Johnny Carson, from a gallows. The stuntman made some general remarks to the effect that people should not attempt the stunt.⁸³ A thirteen-year-old boy, attempting to imitate the stunt right in front of his television set, accidentally hung himself with a noose. The parents sued the network for wrongful death. The Supreme Court of Rhode Island affirmed the trial court's grant of summary judgment for the defendant on the theory that there was no "incitement" as required by the First Amendment.⁸⁴

Imitated violence by the speech recipient directed against third parties is exemplified by *Olivia N. v. National Broadcasting Co.*⁸⁵ The defendant television network had broadcast nationally at "prime time" a made-for-TV movie entitled "Born Innocent," which depicted in one scene the "artificial rape," with a tool called a "plumber's helper" or "plunger," of an adolescent by fellow "inmates" in a state-run home for girls. Four days after the broadcast, the plaintiff, a nine-year-old girl, was attacked and "artificially raped" with a soft-drink bottle by a group of minors at a San Francisco beach. Her assailants had viewed and discussed the artificial rape scene in "Born Innocent," and apparently had decided to imitate it.⁸⁶ It was alleged that the film had caused the attack,⁸⁷ and moreover, that the defendant NBC had prior knowledge of studies on child violence which indicated that susceptible persons might try to imitate the violent act that NBC later depicted.⁸⁸ The California appellate court held that the First Amendment barred the negligence claim, affirming the trial court's grant of a judgment of nonsuit to defendant.⁸⁹

As illustrated by *DeFilippo* and *Olivia N.*, what distinguishes the Imitation Cases from the Instruction and Exhortation Cases is that there is no assertion that the media speaker impliedly or expressly invited, encouraged or urged that the speech recipient engage in the violent or dangerous conduct. Rather, the allegation is that the media speaker should have reasonably known that such imitation would occur, and therefore should never have depicted the act, even when accompanied by an express warning to the speech recipients against imitation.

But for such an express warning against imitation, one significant case might arguably be better categorized with *Shannon* as one of Dangerous

82. 446 A.2d 1036 (R.I. 1982).

83. *Id.* at 1037-38.

84. *Id.* at 1041-42.

85. 126 Cal. App. 3d 488, 178 Cal. Rptr. 888, *cert. denied*, 458 U.S. 1108 (1982).

86. *Id.* at 493, 178 Cal. Rptr. at 891.

87. *Id.*

88. *Id.*

89. *Id.* at 495-7, 178 Cal. Rptr. at 892-4.

Instruction,⁹⁰ rather than grouped here with *DeFilippo* as a case of "suicide-by-imitation." In *Herceg v. Hustler*,⁹¹ a fourteen-year-old boy hung himself to death while attempting to imitate the practice of "autoerotic asphyxiation" — masturbation while "hanging" oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm⁹² — as described in an article in *Hustler Magazine* (*Hustler*). The article described the practice in detail and the sexual pleasures it supposedly induced, purportedly for "educational" purposes,⁹³ but warned the readers some ten different times in two pages of the dangers of the practice,⁹⁴ and told them specifically not to attempt it themselves.⁹⁵ A divided Fifth Circuit Court of Appeals overturned a district court wrongful death judgment against the magazine, reasoning that the First Amendment would proscribe liability where there was no "advocacy," let alone "incitement," to engage in the practice.⁹⁶

2. The Mood Shift Cases

This sub-category of Inspiration Cases are premised on the theory that the media speech induced a psychological mood shift in the speech recipient, causing despondency leading to suicide or self-injury; or, alternatively, causing aggressive and violent behavior resulting in injury to third parties. Because the claim of proximate causation on a mood shift theory is so attenuated, and the chance of recovery so remote, these cases are usually pleaded aggressively so as to assert subliminal exhortation by, or imitation of, the media speech. There are, nevertheless, a few cases illustrating this sub-category which are useful in distinguishing the Subliminal Exhortation⁹⁷ and Imitation⁹⁸ Cases previously discussed.

*Watters v. TSR, Inc.*⁹⁹ is a good example of a mood-shift suicide case, although not one involving the media or media-disseminated speech. Rather, the subject of *Watters* was a parlor board game, what the Sixth Circuit Court of Appeals referred to as "a work of imagination" similar to those to which the public is exposed by television, movies, magazines and books.¹⁰⁰ *Watters* was a wrongful death action brought by a mother against the manufacturer of the game *Dungeons and Dragons*. She claimed that her son's suicide had resulted from his obsession with playing the game, in which he was so

90. See discussion *supra* note 31 and accompanying text.

91. 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

92. *Id.* at 1018.

93. *Id.*

94. *Id.* at 1019.

95. *Id.* at 1018.

96. *Id.* at 1021-24. The Fifth Circuit majority applied the "incitement" test of *Brandenburg*, while expressing doubt that the "incitement" required could be found outside of the context of arousing a crowd to commit criminal action. *Id.* at 1023.

97. See discussion *supra* note 56 and accompanying text.

98. See discussion *supra* note 82 and accompanying text.

99. 904 F.2d 378 (6th Cir. 1990).

100. *Id.* at 382. The Sixth Circuit, recognizing the analogy to injury claims brought on the basis of media depictions of violence or dangerous activities, looked for such precedents under Kentucky caselaw but failed to find any. *Id.* The court therefore looked to cases in other jurisdictions — *Zamora*, 480 F. Supp. 199; *Herceg*, 814 U.S. 105; *DeFilippo*, 446 A.2d

absorbed that "he lost control of his own independent will and was driven to self-destruction."¹⁰¹ The federal district court granted the defendant summary judgment on the grounds that the First Amendment would bar liability.¹⁰²

The Sixth Circuit affirmed, but specifically on the narrower ground that the plaintiff could not possibly succeed under Kentucky's common law of negligence: the defendant's game could not be deemed the proximate cause of the son's decision to commit suicide.¹⁰³ The court of appeals noted that *Dungeons and Dragons*, a "let's pretend" game requiring participants to use their imagination to re-create roles in an imaginary, mythical world, never encouraged suicide, nor even mentioned it;¹⁰⁴ the imaginary world of the game "does not appear to be a world in which people kill themselves or engage in acts of wanton cruelty toward other people."¹⁰⁵

The appellate court's conclusions preclude an inference that the suicide was in imitation of anything seen in the game, thus distinguishing *Watters* from *DeFilippo*,¹⁰⁶ the paradigmatic suicide-by-imitation case.¹⁰⁷ *Watters* is also distinguishable from *McColum*¹⁰⁸ and *Vance*¹⁰⁹ in that there was no assertion in *Watters* that the game contained subliminal exhortations to commit suicide.

*Zamora v. Columbia Broadcasting System*¹¹⁰ exemplifies a different type of Mood Shift case, in which the violence allegedly inspired in the speech recipient by the medium is directed at third parties. *Zamora* was an action brought against all three of the major television networks on the theory that television violence had caused the fifteen year-old plaintiff to become so addicted and de-sensitized to violence that he shot and killed his neighbor, an eighty-three-year-old woman. The federal district court dismissed the complaint for failing to state a cause of action for negligence under Florida law,¹¹¹ and additionally, because the First Amendment would bar such an action.¹¹²

Again, given the unlikelihood of recovery under a theory as attenuated as that of *Zamora*, plaintiffs will more likely plead similar claims as "imitation" of media-depicted violence or, if possible, as "subliminal exhortation." *Yakubowicz v. Paramount Pictures Corp.*,¹¹³ for example, was a wrongful death action brought against the company that had made and distributed the motion picture, "The Warriors," a work of fiction that portrayed the adventures of one youth gang being pursued through the subways of New York City

1036; *Shannon*, 276 S.E.2d 580; *Olivia N.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 — all of which it believed favored the defendants. 904 F.2d at 382-83.

101. 904 F.2d at 380.

102. *Watters v. TSR, Inc.*, 715 F. Supp. 819 (W.D. Ky. 1989), *aff'd*, 904 F.2d 378 (6th Cir. 1990).

103. *Watters*, 904 F.2d. at 380-84.

104. *Id.* at 380, 382.

105. *Id.* at 382.

106. *DeFilippo*, 446 A.2d 1036.

107. See discussion *supra* note 82, and accompanying text.

108. *McColum*, 202 Cal. App. 3d. 989, 249 Cal. Rptr. 187, discussed *supra* note 57, and accompanying text.

109. See discussion *supra* note 64 and accompanying text.

110. 480 F. Supp. 199 (S.D. Fla. 1979).

111. *Id.* at 201-03.

112. *Id.* at 203-07.

113. 536 N.E.2d 1067 (Mass. 1989).

by other hostile gangs.¹¹⁴ In a series of widely publicized incidents throughout the nation, adolescents who had viewed this film went on violent rampages after emerging from the theaters;¹¹⁵ Yakubowicz's sixteen-year-old son was knifed to death by another young man who had just viewed the film in Boston. Yakubowicz alleged that Paramount had produced, distributed, and advertised the motion picture "in such a way as to induce film viewers to commit violence in imitation of the violence in the film."¹¹⁶

The Massachusetts Supreme Judicial Court affirmed the trial court's grant of summary judgment for the defendants. The court noted that the film "includes numerous scenes of juvenile gang-related violence in which youths battle with knives, guns, and other weapons,"¹¹⁷ and concluded that the defendants owed a duty of reasonable care to members of the public, including the slain Yakubowicz boy, "with respect to the producing, exhibiting and advertising of movies."¹¹⁸ However, the court concluded, perhaps incongruously, that defendants did not violate their duty of reasonable care, because the First and Fourteenth Amendment free speech guarantees would bar the action where there was no advocacy or incitement of "unlawful or violent activity on the part of viewers."¹¹⁹

Although *Yakubowicz* was pleaded as an Imitation Case, some differences from the comparable case in that sub-category, *Olivia N.*, should be noted. The defendants in *Olivia N.* had purportedly viewed "Born Innocent," and from it had gotten the novel idea¹²⁰ of committing an "artificial rape." They carried out the idea several days later. The assailant in *Yakubowicz*, in contrast, apparently acted spontaneously under some kind of psychologically induced mood of frenzied violence triggered by viewing the film. Something more than the mere imitation of a violent act seems to have occurred — perhaps a psychological bonding with the beleaguered protagonists of the film plot. The assailant must have been previously exposed to media depictions of knife-stabbings on countless occasions where no such violent reactions were triggered. Thus, although pleaded as an Imitation Case, *Yakubowicz* is more appropriately classified as a Mood Shift Case.¹²¹

3. The Attracted Violence Cases

Clearly related to the Inspiration Cases are those cases in which it is asserted that the defendant should be held responsible for injuries to third-parties when its depictions of violence attract violence-prone people to a situs,

114. *Id.* at 1069.

115. *Id.*

116. *Id.* at 1068.

117. *Id.* at 1069.

118. *Id.* at 1070-71.

119. *Id.* at 1071.

120. *Olivia N.*, 126 Cal. App. 3d 488, 491-92, 178 Cal. Rptr. 888, 891-92. Notably, in *DeFilippo*, 466 A.2d 1036, and *Herceg*, 814 F.2d. 1017, the two other Imitation Cases discussed, the speech recipients were also imitating what were to them "novel" activities. See discussion, *supra* notes 82 & 91 and accompanying text.

121. *Yakubowicz* is, however, clearly different than *Zamora*, 480 F. Supp. 199, in that the violence in *Yakubowicz* was purportedly inspired by one specific motion picture, rather than by long-term exposure to media-depicted violence in general. 536 N.E.2d at 1067.

such as to the vicinity of a movie theater. An example of this phenomenon, was the cinematic opening of the film "Boyz 'N the Hood." According to the film's distributor, Columbia Pictures, violence broke out at about twenty of the 900 theaters showing the film when it opened on July 14, 1991, leading to thirty-one injuries and one fatality.¹²² Notably, the content of this movie was "an anti-gang message,"¹²³ but there was speculation that the violence had resulted because the movie had attracted rival gangs into close proximity with each other.¹²⁴

The paradigmatic case, *Bill v. Superior Court of the City and County of San Francisco*,¹²⁵ was an action brought by a girl and her mother to recover for injuries that the girl sustained when she was shot while walking down the street after exiting from a theater showing the movie "Boulevard Nights." Like "The Warriors," this movie was about urban gangs and contained depictions of violence. The plaintiffs' theory was that defendants, the producers of the film, should have realized that the violent nature of the movie would attract violence-prone people to the vicinity of the theaters, and should have taken security precautions that would have protected the victim.¹²⁶ The California appellate court granted a writ of mandamus compelling the trial court to grant the defendants summary judgment on First Amendment grounds.¹²⁷

Notably, the plaintiffs in *Bill* never alleged that the assailant had viewed "Boulevard Nights," perhaps because he had never been identified and an assertion was therefore not provable. Indeed, the plaintiffs argued that it was irrelevant whether the assailant had in fact viewed the film, if the general subject of the film had lured this violent person to the vicinity of the theater. Plaintiffs thus argued that judgment in their favor would not infringe upon the First Amendment, since it would not burden the film on the basis of its specific content.¹²⁸ The state appellate court, however, noted a flaw in the plaintiffs' logic: the argument that the film attracted violence-prone people to the theater's vicinity because of its violent nature was precisely focused on the film's content.¹²⁹

122. Richard W. Stevenson, *An Anti-Gang Movie Opens to Violence*, N.Y. TIMES, July 14, 1991, at 10, col. 2. As of this date, at least one lawsuit has been filed against Columbia Pictures and an exhibitor. See *Phillips v. Syufy Enterprises*, No. C92-01287 (Sup. Ct. Contra Costa County, Calif., March 17, 1992).

123. *Id.*

124. *Id.*

125. 137 Cal. App. 3d 1002, 187 Cal. Rptr. 625 (1982).

126. *Id.* at 1005, 187 Cal. Rptr. at 626.

127. *Id.* at 1015, 187 Cal. Rptr. at 634.

128. *Id.* at 1007, 187 Cal. Rptr. at 628.

129. *Id.* at 1005, 187 Cal. Rptr. at 627. Given the gravamen of the complaint, one might have imagined that the plaintiffs' claim would have focused more on the content of the promotional advertising of the film. However, according to the appellate court, "[p]laintiffs do not suggest, ... and there was no evidence, that the trailers or the advertisements themselves contributed to the danger of violence at theaters where the movie was shown." *Id.* Rather, the complaint seemed to suggest that public awareness of the nature of the plot might have been fostered by press accounts linking "Boulevard Nights" with "The Warriors" (which had opened earlier) as both being "gang movies." The plaintiffs alleged that the defendants had been aware of such press linkage and had considered taking security measures at the theaters, but had failed to do so. *Id.* at 1005-06, 187 Cal. Rptr. at 627.

Bill thus represents an unsuccessful attempt by plaintiffs to place an Inspiration Case into a line of jurisprudence recognizing the duty of event-promoters to provide reasonable security measures.¹³⁰ If the shooting had occurred within the movie theater lobby or auditorium, the plaintiffs might have had a stronger argument. In most instances, however, the Attracted Violence cases are about "inspiration," whether that inspiration is drawn from the specific content of the speech or from its general subject matter.

D. The Facilitation Cases

This category encompasses cases in which it is alleged that the media provided information to the speech recipients which the latter needed and used, directly or indirectly, in inflicting injury or death upon third parties. Thus, it is argued that the media defendant "facilitated" the commission of the tort or crime. The cases which have appeared to date are of two very different types. One sub-category of cases involves the revelation of information about a crime victim or crime witness where the crime suspect is still at-large and perhaps unknown (the "Endangering Revelation Cases"). A second sub-category of cases involves "gun-for-hire" or similar advertisements which facilitated the making of contacts for, and contracts of, "crime-for-hire" (the "Criminal Advertisement Cases").

1. The Endangering Revelation Cases

In *Hyde v. City of Columbia*,¹³¹ the plaintiff, Ms. Hyde, had reported to the Columbia, Missouri police that she been the victim of an abduction and assault. Ms. Hyde alleged that she had been accosted while walking home after midnight by a male stranger in his late twenties. He allegedly opened the door of his red Mustang automobile, levelled a sawed-off shotgun at her, and ordered her into the car. When she was inside, he threatened to blow her head off if she did not do as he said. As the abductor began to start up the car, the plaintiff jumped out of the car. The abductor clung to her dress, but it tore, allowing the plaintiff to escape. A full report of the crime was made to the city police. The police released the details of the crime, as well as the plaintiff's name and address, without her permission, to reporters for two local newspapers. After both newspapers published this information, the plaintiff reported seven separate incidents in which her assailant tried to terrorize her in person or over the telephone.

Ms. Hyde sued the City of Columbia for the "negligent disclosure" of her name and address by the city police, and the two newspapers and their reporters for their "negligent publication" of that information.¹³² The trial court granted the defendants' motion to dismiss on the grounds that the allegations of the complaint failed to state a claim for which relief could be granted.

130. See, e.g., *American Motorcycle Ass'n v. Superior Court*, 20 Cal. App. 3d 578, 146 Cal. Rptr. 182 (1978) (promoter of a cross-country motorcycle race liable for negligent safety measures). See generally *Diamond & Primm*, *supra* note 4, at 983-89 (arguing that both *Bill* and *Weirum* should have been treated as "media-sponsored events," and analyzed under traditional negligence principles rather than the First Amendment).

131. 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1982).

132. *Id.* at 253.

The Missouri appellate court reversed and remanded.¹³³ Finding that the information was not a "public record" under the state's Sunshine Law,¹³⁴ the court held that the averments stated a cause of action for negligence under Missouri common law principles.¹³⁵ The court rejected the newspapers' and reporters' defense that the publication was protected because the information was "newsworthy." The court noted that while this defense might be available in other areas of tort law, such as invasion of privacy, outrageous conduct and defamation, it was not available as a defense in a negligence action.¹³⁶ Moreover, the court concluded that the First Amendment's requirements protecting publications on "matters of public concern" were here satisfied because the complaint sounded in negligence rather than strict liability,¹³⁷ in conformance with its reading of the Supreme Court's holding in the defamation case of *Gertz v. Robert Welch, Inc.*¹³⁸

*Times Mirror Co. v. Superior Court (Doe)*¹³⁹ is an Endangering Revelation Case reminiscent of *Hyde*, but with some important differences. The anonymous plaintiff in *Times Mirror*, "Jane Doe," was a murder witness: entering her apartment late one night, she found lying on the floor the nude body of her roommate, Rose Rende, who had been raped, beaten and strangled. A man was still standing over the victim. Jane Doe looked at him, fled the apartment, and found a police officer. A summer intern working at the *Times Mirror*, hearing about the crime on the radio, phoned the coroner's office and purportedly obtained Jane Doe's name from an unidentified individual there.¹⁴⁰ The next morning, the *Times Mirror* published an account of the Rende murder, mentioning Doe by name as the discoverer of the body. Doe sued the newspaper and its intern reporter for invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress.¹⁴¹

A divided California appellate court upheld the trial court's refusal to grant summary judgment to the defendants.¹⁴² Citing *Hyde* as relevant authority, the *Times Mirror* court held that where the suspected murderer was still at-large, the First Amendment did not provide absolute protection from liability for printing the witness' name.¹⁴³ The court concluded that although the fact of the murder and the name of the victim may have been

133. *Id.* at 273.

134. *Id.* at 258-64.

135. *Id.* at 258, 272-73. The court noted that Missouri law "imposes liability in negligence for an intentional injury where the original actor creates a condition which he knows or should foresee will give occasion to a third person to commit an intentional injury upon the plaintiff." *Id.* at 272 (citing Missouri cases as well as RESTATEMENT (SECOND) OF TORTS §§ 302B, 449 (1965)).

136. 637 S.W.2d at 264. The appellate court specifically rejected the defendants' attempt to characterize the plaintiffs' suit as one for invasion of privacy or outrageous conduct. *Id.* at 255.

137. *Id.* at 264-67.

138. 418 U.S. 323 (1974), discussed *infra* note 270, and accompanying text.

139. 198 Cal. App. 3d 1420, 244 Cal. Rptr. 556 (Cal. Ct. App. 1988), *cert. dismissed*, 489 U.S. 1094 (1989).

140. The trial court apparently considered the question of how the *Times Mirror* obtained the information to be a triable issue of fact. *Id.* at 1429, 244 Cal. Rptr. at 562.

141. *Id.* at 1424, 244 Cal. Rptr. at 558.

142. *Id.* at 1433, 244 Cal. Rptr. at 565.

"newsworthy" for purposes of common law immunity, whether or not the name of the witness was "newsworthy" was a question for the jury.¹⁴⁴ Moreover, the defendants' asserted First Amendment right to publish "lawfully obtained truthful information" was deemed to be "overcome" by the state's interest in protecting witnesses and pursuing criminal investigations.¹⁴⁵

Although the *Hyde* and *Times Mirror* cases are very similar in their fact patterns and holdings, some differences are worth noting. Ms. Hyde alleged specific acts by the suspect-at-large which would have established that he had indeed been a speech recipient whose actions had been "facilitated" by the press. Jane Doe, on the other hand, did not allege any specific acts of terrorization or other injury by the suspect-at-large; she alleged only the terror that she reasonably felt on the assumption that such "facilitation" by the press might have occurred. The absence of specific acts of terrorization was not an impediment to plaintiff's successfully pleading the cause of action for "negligent infliction of emotional distress" in *Times Mirror*, and the California court seems correct in having treated that difference from *Hyde* as inconsequential.

A more significant difference in the analyses in these two cases resulted from the fact that Jane Doe apparently made her primary claim "the invasion of privacy," a cause of action which Ms. Hyde did not plead at all. In consequence, both the majority and the dissent in *Times Mirror* focused almost exclusively on the common law and First Amendment dimensions of the tort of "privacy invasion" rather than on the tort of "negligent infliction of emotional distress."¹⁴⁶

2. The Criminal Advertisement Cases

In these cases, advertisements in the media are used to establish contacts and contracts between those who want to have others commit crimes for them (the "criminal principals") and those who are willing to commit those crimes for pay (the "criminal agents"). In theory, either the criminal principals or the criminal agents could place the advertisements, but in the three major cases that have arisen in this category, it was the criminal agents who placed the ads, specifically, in one magazine, *Soldier of Fortune*.¹⁴⁷

Eimann v. Soldier of Fortune Magazine, Inc.,¹⁴⁸ was a wrongful death action brought by the mother and son of a murder victim. Sandra Black was shot and killed by John Wayne Hearn, who had been offered \$10,000 by Sandra's husband, Robert, to murder her. Robert Black had contacted Hearn through an ad which Hearn had placed in *Soldier of Fortune* magazine (*SOF*).

143. *Id.* at 1426, 244 Cal. Rptr. at 560.

144. *Id.* at 1428-29, 244 Cal. Rptr. at 561-62.

145. *Id.* at 1432, 244 Cal. Rptr. at 564.

146. For an argument that the *Times Mirror* court's focus on the privacy invasion claim was incorrect and misleading, see discussion, *infra* note 237 and accompanying text.

147. Under the general rules set forth in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 566 (1980), there is no First Amendment protection for speech that advertises unlawful services or products. None of the ads in the three cases herein discussed explicitly mentioned unlawful services, but the results turned largely on whether the courts felt that as much was implied.

148. 880 F.2d 830 (5th Cir. 1989).

In the ad, Hearn had described himself as an ex-Marine, Vietnam veteran, and weapons specialist, with experience as a pilot and he offered his services for "high risk assignments, U.S. or overseas."¹⁴⁹ Robert Black's initial inquiry to Hearn was about a lawful activity — serving as a bodyguard — and Black later met Hearn personally to view and admire his gun collection. Only later did Black proposition and obtain Hearn's services for uxoricide.

The *Eimann* plaintiffs won a verdict for a sizeable judgment in a jury trial held in the federal district court in Houston,¹⁵⁰ and judgment was entered upon the verdict.¹⁵¹ By a series of special interrogatories, the jury found: (1) that Hearn's ad was "related to" an illegal activity; (2) that *SOF* knew or should have known "from the face or the context of the Hearn advertisement that the advertisement could reasonably be interpreted as an offer to engage in illegal activity"; (3) that *SOF*'s negligence was the proximate cause of Sandra Black's death; and (4) that *SOF*'s negligence constituted "gross negligence," defined as "conscious indifference."¹⁵²

On appeal, the Fifth Circuit reversed and rendered judgment in favor of *SOF*.¹⁵³ The Court of Appeals avoided ruling on *SOF*'s First Amendment defense,¹⁵⁴ holding instead that *SOF* could not be deemed liable under Texas negligence law.¹⁵⁵ As the appellate court saw it, Hearn's ad was "facially innocuous" and at best ambiguous as to whether or not he was offering unlawful services.¹⁵⁶ Using a "risks/benefits" balancing test,¹⁵⁷ the court concluded that, "[g]iven the pervasiveness of advertising in our society and the important role that it plays,"¹⁵⁸ it made no sense to impose on publishers the obligation to reject all ambiguous advertisements which might pose a risk of harm.¹⁵⁹

As *Eimann* illustrates, the Criminal Advertisement Cases may be conceptually similar to Instruction Cases like the *Winter* mushroom case,¹⁶⁰ which hold book publishers free of negligence. Media defendants in both categories have been viewed by courts to be neutral disseminators, not originators, of the speech that allegedly caused the injury, and therefore not negligent under common law. It is also notable that the Criminal Advertisement Cases are, in this regard, quite different from the other sub-category of Facilitation

149. *Id.* at 831.

150. The judgment totalled \$9.4 million, consisting of \$1.9 million in compensatory damages and \$7.5 million in punitive damages. *Id.* at 830, 833.

151. See also *Eimann v. Soldier of Fortune Magazine, Inc.*, 680 F. Supp. 863 (S.D. Tex. 1988), *rev'd*, 880 F.2d 830 (5th Cir. 1989).

152. *Eimann*, 880 F.2d at 833.

153. *Id.* at 830, 838.

154. *Id.* at 834.

155. *Id.* at 834, 838.

156. *Id.* at 836.

157. *Id.* at 835-38 (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Judge Learned Hand's analysis); WILLIAM KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON TORTS § 31, at 173 (5th ed. 1984) [hereinafter PROSSER]; RESTATEMENT (SECOND) OF TORTS § 291 (1965); *Hendricks v. Todora*, 722 S.W.2d 458, 461 (Tex. Ct. App. 1986) (Texas' own common law precedent)).

158. *Eimann*, 800 F.2d at 838.

159. *Id.*

160. 938 F.2d 1033. See discussion *supra* note 20, and accompanying text.

Cases previously described,¹⁶¹ the Endangering Revelation Cases, where the newspapers were both speech originators and disseminators when they revealed the witness/victims' names.

In other Criminal Advertisement Cases, however, where injury or death resulted from ads in *SOF* which were less "ambiguous" than was the ad in *Eimann*, courts have concluded that the magazine should be subject to negligence judgments. *Braun v. Soldier of Fortune Magazine*¹⁶² is illustrative. Bruce Gastwirth hired Richard Savage to murder his business associate, Richard Braun, through a "gun-for-hire," "all-jobs-considered" ad which Savage had placed in *SOF*. Shawn Trevor Doutre, an "employee" of Savage's, shot Braun to death in his driveway and wounded his sixteen-year old son, Michael. Michael and an older brother sued *SOF* and its parent company, the Omega group, for wrongful death and, in Michael's case, personal injury.

A federal district court in Alabama denied *SOF*'s motion for summary judgment.¹⁶³ The trial judge ruled that the ad unambiguously offered unlawful services, perhaps including murder, as well as lawful ones.¹⁶⁴ It was therefore a question for the jury whether or not the criminal activity which ensued was foreseeable by the magazine and whether the latter had thereby breached a duty to the plaintiffs by failing to pull the ad.¹⁶⁵ The court found that Savage's ad, unlike the one in *Eimann*, could not be classified as "facially innocuous"; that its criminal intent was derived, not merely from the context in which it was printed, but was obvious from the advertisement itself.¹⁶⁶ Applying the same "risk/benefits" balancing test that the *Eimann* court had used,¹⁶⁷ the *Braun* court concluded that:

the likelihood and gravity of the possible harm from an advertisement which, on its face, implies that the advertiser is available to kill others is so great, and that the social utility of advertising criminal activity is so small, that imposing a duty on the publisher not to publish the ad is justified.¹⁶⁸

The district court in *Braun* also rejected the defendants' First Amendment defense. Under the rule of *Central Hudson Gas & Electric Corp. v. Public Service Commission*,¹⁶⁹ advertisements for unlawful services are not protected under the First Amendment.¹⁷⁰ The *Braun* court cited the Supreme Court's decision in *Pittsburgh Press Co. v. Pittsburgh Commission on Human*

161. See discussion *supra* note 131 accompanying text.

162. 749 F. Supp. 1083 (M.D. Ala. 1990).

163. *Id.* at 1088.

164. *Id.*

165. *Id.* at 1085.

166. *Id.* at 1088 n.1.

167. *Id.* at 1085. The federal court noted that this test was accepted under Georgia law, citing *Ely v. Barbizon Towers, Inc.*, 115 S.E.2d 616 (Ga. 1960).

168. *Braun*, 749 F. Supp. at 1085.

169. 447 U.S. 557 (1980).

170. *Id.* at 566.

*Rights*¹⁷¹ for the proposition that an advertisement which does not contain an express offer to murder others, "but which contains language easily interpreted as such an offer," should be similarly unprotected.¹⁷² The *Braun* plaintiffs ultimately received a multi-million dollar verdict in their favor, which the district court reduced but refused to overturn.¹⁷³

Similar to *Braun* is *Norwood v. Soldier of Fortune Magazine, Inc.*¹⁷⁴ The *Norwood* plaintiff alleged that he had received personal injuries from several unsuccessful attempts on his life which had been engineered through separate conspiracies formed by means of "gun for hire" ads placed in the magazine. One of these ads was that of Richard Savage, the same ad that became the basis of the murder pact in *Braun*. The second was an almost identical ad placed by Michael Wayne Jackson. Both ads used the term "gun for hire," emphasized that "all jobs [would be] considered," and emphasized that confidentiality would be maintained.¹⁷⁵ Another defendant, Larry Elgin Gray, was alleged to have entered into separate conspiracies with Savage and Jackson to have *Norwood* killed.¹⁷⁶

The federal district court in Arkansas denied *SOF's* motion for summary judgment.¹⁷⁷ As in *Braun*, the judge ruled that a juror could find that the advertisements "had a substantial probability of ultimately causing harm to some individual."¹⁷⁸ The court also rejected the magazine's First Amendment defense,¹⁷⁹ emphasizing the difference between the protection accorded ideological communication and that accorded commercial advertising.¹⁸⁰

Summary of Cases

The only cases surveyed in which the causes of action for physical injury, wrongful death, or emotional distress were permitted to stand were Exhortation Cases (*Weirum* disc jockey case,¹⁸¹ *S&W Seafoods* "spit at the restaurateur" case,¹⁸² and *Vance I*, the Judas Priest subliminal message case¹⁸³) or Facilitation Cases (*Hyde*¹⁸⁴ and *Times Mirror*,¹⁸⁵ the two

171. 413 U.S. 376 (1973). A Pittsburgh municipal ordinance that forbade newspapers from publishing "help-wanted" advertisements in sex-designated columns, except where the employer can freely make hiring decisions based on sex, did not violate the freedoms of speech and press guaranteed by the First and Fourteenth Amendments.

172. *Braun*, 749 F. Supp. at 1086.

173. 757 F. Supp. 1325, 1325 (M.D. Ala. 1991). The jury awarded Michael Braun \$10 million in punitive damages and \$375,000 for his personal injury claim, with an additional \$2 million to Michael and his brother on the wrongful death claim. The district court judge found only the \$10 million punitive damage award excessive, and ordered a remittitur to \$2 million. *SOF* has filed an appeal with the United States Court of Appeals for the Eleventh Circuit. *Braun v. Soldier of Fortune*, No. 91-7130 (11th Cir. 1991).

174. 651 F. Supp. 1397 (W.D. Ark. 1987).

175. *Id.* at 1397-98.

176. *Id.*

177. *Id.* at 1403.

178. *Id.*

179. *Id.* at 1398-1402.

180. *Id.* at 1399, 1401.

181. *Weirum*, 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468, discussed *supra*, note 39 and accompanying text.

182. 390 S.E.2d 228, discussed *supra* note 46 and accompanying text.

183. *Vance I*, 16 Media L.Rptr. 2241, discussed *supra* note 64 and accompanying text.

Endangering Revelation Cases; and *Braun*¹⁸⁶ and *Norwood*,¹⁸⁷ two of the three Criminal Advertisement Cases). In all of these cases, the courts expressly considered, and rejected, the possibility that the First Amendment might bar the action.¹⁸⁸

The courts viewed the First Amendment as a bar to the actions in most of the Instruction Cases,¹⁸⁹ in all of the Inspiration Cases,¹⁹⁰ and in *McCollum*,¹⁹¹ one of the Subliminal Exhortation Cases.¹⁹² Only in some of the Instruction Book Publication Cases¹⁹³ and Media Advertisement Cases,¹⁹⁴ and also — notably — in *Eimann*,¹⁹⁵ a Criminal Advertisement Case, did courts avoid the constitutional question altogether and rely exclusively on common law negligence principles in determining that liability was precluded. Again, what these cases apparently had in common was that the courts viewed the media defendants as neutral speech disseminators rather than speech originators.

II. JUDICIAL APPROACHES TO THE CONSTITUTIONAL PROBLEM

In the media physical injury cases surveyed and categorized in Part I, the courts looked to three different areas or "models" of First Amendment jurisprudence for guidance: (A) the clear and present danger test of *Brandenburg v. Ohio*,¹⁹⁶ (B) the invasion of privacy,¹⁹⁷ and (C) the limitations on the recovery of damages for defamation based upon whether the subject matter of the speech was or was not "a matter of public concern,"¹⁹⁸ the

184. 637 S.W.2d 251, discussed *supra* note 131 and accompanying text.

185. 198 Cal. App. 3d 1420, 244 Cal. Rptr. 556, discussed *supra* note 139 and accompanying text.

186. 749 F. Supp. 1083, discussed *supra* note 162 and accompanying text.

187. 651 F. Supp. 1397, discussed *supra* note 174 and accompanying text.

188. *Weirum* reached this conclusion without applying any specific First Amendment test. *Vance* thought that *Brandenburg* would protect all but the subliminal lyrics, the latter deemed not to be protected by the First Amendment at all. In the Endangering Revelation cases, *Hyde* drew analogies to *Gertz*, while *Times Mirror* stressed that public interests were weightier. Finally, in the *Braun* and *Norwood* cases, the ads were deemed unambiguous in offering illegal services, and thus Constitutionally-unprotected under the rule of *Central Hudson Gas & Electric*.

189. See discussion, *supra* note 30 and accompanying text.

190. See discussion, *supra* note 78 and accompanying text.

191. *McCollum*, 202 Cal. App. 3d 989, 249 Cal. Rptr. 187, discussed *supra*, note 57 and accompanying text.

192. The courts in *McCollum*, 202 Cal. App. 3d 989, 249 Cal. Rptr. 187; *DeFilippo*, 446 A.2d 1036; *Olivia N.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888; *Herceg*, 814 F.2d 1017; *Yakubowicz*, 536 N.E.2d 1067; and *Bill*, 137 Cal. App. 3d 1002, 187 Cal. Rptr. 625, all cited the First Amendment "clear and present danger" test of *Brandenburg*, 395 U.S. 444, as barring the actions; and the court in *Shannon* reached the same conclusion using the balancing test of *Schenck*, 249 U.S. 47. See discussion *supra* note 37 and accompanying text.

193. See discussion *supra* note 14 and accompanying text.

194. See discussion *supra* notes 27-29 and accompanying text.

195. *Eimann*, 880 F.2d 830, discussed *supra* notes 153-59 and accompanying text.

196. 395 U.S. 444. See discussion *infra* notes 200-32 and accompanying text.

197. See discussion, *infra* notes 233-47 and accompanying text.

198. See discussion, *infra* notes 248-81 and accompanying text.

distinction delineated by the Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*¹⁹⁹

Part II examines these three models of First Amendment jurisprudence and the way that courts have employed them in the media physical injury cases, and considers whether the analogies drawn in specific cases or categories were appropriate. Moreover, the section evaluates each model as a potential basis for a unified First Amendment approach to the media physical injury cases, considering *inter alia*, whether the analogy is conceptually appropriate, whether the First Amendment values sought to be protected are the same, and whether, in application, the tests would be over-protective or under-protective as applied in the media physical injury cases.

A. The Clear and Present Danger Test of *Brandenburg v. Ohio*

Most courts which have held that the First Amendment barred negligence suits brought against media defendants have applied the rule of *Brandenburg v. Ohio*.²⁰⁰ *Brandenburg* holds that the constitutional guarantees of free speech and free press, as embodied in the First and Fourteenth Amendments, "do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent unlawful action and is likely to incite or produce such action."²⁰¹ The *Brandenburg* test is thus a "bright-line" one, with several major "hurdles" to be cleared by the government or, in the media physical injury cases, by tort plaintiffs suing under state negligence law.²⁰² Namely, they must prove: (1) direct *advocacy* of *unlawful* action; (2) the *intent* to incite or produce such action; (3) the *likelihood* that such action would occur; and (4) that such occurrence might have been *imminent*. It is a test focusing specifically on the content of the speech and the circumstances under which it is conveyed.

The *Brandenburg* test is so rigorous that if it were read literally and applied universally in the media physical injury cases, recovery would be barred in almost all instances. The fact patterns of the media physical injury cases rarely fit the *Brandenburg* mold.²⁰³ The Inspiration and Facilitation

199. 472 U.S. 749 (1985), discussed *infra* note 255 and accompanying text.

200. 395 U.S. 444. See, e.g., *DeFilippo*, 446 A.2d 1036; *Olivia N.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888; *Herceg*, 814 F.2d 1017; *Yakubowicz*, 536 N.E.2d 1067; *McCollum*, 202 Cal. App. 3d 989, 249 Cal. Rptr. 187; *Bill*, 137 Cal. App. 3d 1002, 187 Cal. Rptr. 625; and *Vance I*, 16 Media L. Rep. (BNA) 2241 (the last, as to the non-subliminal lyrics only).

Notably, the court in *Shannon*, 276 S.E.2d 580, discussed *supra* note 31 and accompanying text, in ruling that the First Amendment barred the action, did not employ *Brandenburg*, but rather, the original formulation of the clear and present danger test posited by Justice Holmes in *Schenck*, 249 U.S. 47 (1919), discussed *infra* note 37 and accompanying text.

201. *Brandenburg*, 395 U.S. 444, 447.

202. It is assumed in these cases that the state's provision of a private remedy for tortious injury or wrongful death by way of a civil damage suit is sufficient to create "state action" as required for the applicability of the First and Fourteenth Amendments, by analogy to the milestone defamation ruling in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

203. For an example of one that might, see *S&W Seafoods*, 390 S.E.2d 228, discussed *infra* note 46 and accompanying text.

Cases would fail the test for lack of "advocacy," and a characterization of most of the Instruction Cases as involving "advocacy" would be very tenuous. Only Exhortation cases, like the *Weirum* disc jockey case²⁰⁴ or the *S & W Seafoods* "spit-on-the-restauranteur" case,²⁰⁵ are likely to meet the *Brandenburg* "advocacy" requirement.

Indeed, if *Brandenburg* requires that the action "advocated" be an "unlawful" one, even *Weirum* might not meet this requirement, depending upon how its facts are interpreted.²⁰⁶ Among the Exhortation and Instruction Cases, the actions allegedly urged or invited are rarely "unlawful" in the technical sense, but perhaps "dangerous" to the speech recipient or others, as in both *Weirum* and *Shannon*,²⁰⁷ or "self-destructive," such as the suicides allegedly exhorted in *McCollum* and *Vance*.²⁰⁸

If the *Brandenburg* test could not by its terms permit recovery in an Instruction Case like *Shannon*, or perhaps not even in an Exhortation Case like *Weirum*, then it is arguably an overly protective "safe harbor" as applied to many of the media physical injury cases. Moreover, from a conceptual as well as a practical standpoint, there are a number of reasons why *Brandenburg's* application to these cases might be inappropriate.

First, the ultra-protective language of *Brandenburg* may reflect both the specific facts of that case and the history of the Court's clear and present danger jurisprudence, neither of which are likely to have many analogues among the media physical injury cases. Although the clear and present danger test is considered to be a constitutional limitation on the ability of government to punish the advocacy of a wide range of criminal activities,²⁰⁹ almost all of the cases in which the Supreme Court has confronted this issue, since Justice Holmes's original formulation of the test in 1919,²¹⁰ have involved the

204. See discussion *supra* notes 245-47 and accompanying text.

205. See discussion *supra* notes 46-51 and accompanying text.

206. See discussion *supra* at text accompanying notes 39-42 & 52-55.

207. Because the *Shannon* court found that the instructed activity could not be termed "lawless," it deemed *Brandenburg* to be inapposite. *Shannon*, 276 S.E.2d 580, 582 n.2, discussed *supra* notes 31-38 and accompanying text.

208. See discussions of these cases *supra* notes 57-77 and accompanying text. With regards to the applicability of the *Brandenburg* test to the advocacy or encouragement of suicide, see discussion *infra* notes 355-57 and accompanying text.

209. Lower federal and state courts have apparently assumed that the *Brandenburg* test is applicable generally to the advocacy of all types of crime and have conformed the relevant penal statutes accordingly. See, e.g., *United States v. Rowlee*, 899 F.2d 1275 (2d Cir. 1990) (advocating criminal tax fraud); *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (advocating criminal tax fraud); *United States v. King*, 335 F. Supp. 523 (S.D. Cal. 1971), *aff'd*, 478 F.2d 494 (9th Cir. 1971) (construing 18 U.S.C. § 1403(a) (1956), which prohibits the use of any communication facility in, *inter alia*, committing Narcotics Control Act offenses); *Atlantic Beach Casino, Inc. v. Morenzoni*, 749 F. Supp. 38, 42-45 (D. R.I. 1990) (*Brandenburg* followed in overturning ban on performance by the rap group, "2 Live Crue"); *People v. Dietze*, 75 N.Y.2d 47, 549 N.E.2d 1166, 550 N.Y.S.2d 595 (1989) (personal harassment); *People v. Mighty*, 535 N.Y.S.2d 944, 42 Misc. 2d 37 (N.Y. City Ct. 1988) (incitement to riot); *Sheeran v. State*, 526 A.2d 886 (Del. 1987) (solicitation to commit arson and assault); *State v. Neal*, 500 So. 2d 374 (La. 1987) (solicitation of prostitution); *State v. Davis*, 272 S.E.2d 721 (Ga. 1980) (solicitation of sale of marijuana).

210. *Schenck*, 249 U.S. 47, 52. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger

prosecution and conviction of individuals who had allegedly advocated crimes while voicing highly unpopular political views.²¹¹

While some justices expressed concern that the defendants' political views or affiliations might have adversely affected the outcome of their cases,²¹² the Court's earlier decisions had provided these "political" defendants little relief. The clear and present danger test was for decades virtually ignored in deference to legislative judgment respecting the gravity of danger posed by the crimes advocated.²¹³ Later, in *Dennis v. United States*,²¹⁴ the test was resurrected in the form of a balancing test wherein the improbability of a criminal action occurring might be outweighed by the danger potentially posed if the criminal action ultimately occurred.²¹⁵ Consequently, prior to *Brandenburg*, the Court rarely used the clear and present danger theory to overturn the convictions of those who had advocated violent overthrow of the government or other unlawful activity.²¹⁶ *Brandenburg's* ultra-protective reformulation of the test may not only reflect the liberal Warren Court's sense of

that they will bring about the substantive evils that Congress has a right to prevent." *Id.* Schenck had been convicted of encouraging insubordination in the military and of obstructing the World War I draft, having mailed letters to draftees urging them to assert their rights in terms which the jury interpreted as violative of the statute. *Id.*

211. 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 chairman of Communist Party); *Yates v. United States*, 354 U.S. 298 (1957) (second-level leadership of Communist Party; advocacy of violent overthrow of government); *Dennis v. United States*, 341 U.S. 494 (1951) (organization and leadership of the Communist Party of the United States, and advocacy of violent overthrow of the federal government); *Whitney v. California*, 274 U.S. 357 (1927) (membership in a state communist labor party which advocated criminal syndicalism); *Gitlow v. New York*, 268 U.S. 652 (1925) (advocacy of mass political strikes for the destruction of the parliamentary state); *Abrams v. United States*, 250 U.S. 616 (1919) (advocating a general strike to frustrate U.S. military intervention against the Bolshevik revolution in Russia, thereby impeding the war effort against Germany); *Schenck*, 249 U.S. 47 (advocating insubordination in the military and resistance to the World War I draft).

212. See, e.g., *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring); *Abrams*, 250 U.S. at 629-30 (Holmes, J., dissenting).

213. See, e.g., *Whitney*, 274 U.S. 375; *Gitlow*, 268 U.S. 652.

214. 341 U.S. 494.

215. See *id.* at 510. *Dennis* was a post-World War II federal prosecution of high-ranking leaders of the American Communist Party under the Smith Act of 1940. The latter was in effect a federal version of the state criminal syndicalism statutes upheld in *Gitlow* and *Whitney*. In affirming the convictions, the Court expressly adopted the reformulation of the "clear and present danger" test devised by Judge Learned Hand in his opinion in *Dennis*: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." See *Dennis v. United States*, 183 F.2d 201, 212 (2d Cir. 1950).

Query whether Judge Hand's *Dennis* test was, properly speaking, a "clear and present danger" test at all. Nothing in his formulation referred to the imminence of the danger, and as for its likelihood, that was to be discounted by its gravity. As in the case of Communist-advocated revolution, the low probability of the danger could be discounted in view of the terrible consequences should it come to fruition.

216. The exceptions were cases in which the Court found the defendants had been convicted for affiliation with a party advocating the violent overthrow of the government, but that the defendants had at most advocated or subscribed to abstract doctrine. See, e.g., *Yates*, 354 U.S. 298 (reversing the conviction of second-string Communist party officials, finding in the record no adequate evidence of the advocacy of unlawful action, as opposed to abstract doctrine); *Noto*, 367 U.S. 290 (reversing conviction of Communist party worker on similar grounds).

the "political" nature of the clear and present danger cases, but also, perhaps, a sense that the Court had historically failed to provide adequate protection.²¹⁷

The toughness of the *Brandenburg* formulation may also reflect the specific facts of that case. Unlike precedents which had involved the prosecution of persons who had subscribed to party manifestos or platforms advocating political change by unlawful force,²¹⁸ *Brandenburg* involved the prosecution, under a state criminal syndicalism statute,²¹⁹ of a Ku Klux Klan leader who had urged similar actions and voiced racist epithets at a Klan rally;²²⁰ a "live" speaker haranguing an empathetic crowd. The rigorous clear and present danger test posited by the Court, in unanimously reversing the conviction,²²¹ may be premised on the assumption that even in this combustible situation, the speaker may still deserve constitutional protection if "incitement" to imminent unlawful action is not both the intention and the likelihood.²²²

217. The *Brandenburg* test incorporates all of the protections that Holmes and Brandeis had been concerned about — intent, likelihood, and imminency — and adds another important protection as well. Under *Brandenburg*, abstract teaching cannot be the basis for criminal sanction; the words themselves must be "directed to" the incitement or production of the imminent lawless action. *Id.* at 448-49.

Holmes himself might have disagreed on this point. In his dissent in *Gilow*, he wrote: Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.

268 U.S. at 673.

However, the distinction between advocacy of abstract doctrine and direct incitement was developing contemporaneously to the "clear and present danger" doctrine itself. See, e.g., Judge Hand's distinction between "keys of persuasion" and "triggers of action" in *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917) (granting injunction to publisher of anti-war magazine against New York City postmaster who had denied him access to mails under Espionage Act of 1917). The Supreme Court had accepted the distinction prior to *Brandenburg*. See, e.g., *Noto*, 367 U.S. at 297-98 ("[T]he mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action or steeling it to such action."); *Yates*, 354 U.S. 298.

218. See, e.g., *Whitney*, 274 U.S. 357; *Gilow*, 268 U.S. 652.

219. These statutes punish the advocacy of political revolution by armed force, violence, or terror. Between 1917 and 1920, twenty states and two territories had adopted identical or similar laws (see *Brandenburg*, 395 U.S. at 447 (citing E. DOWELL, A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES 21 (1939))), apparently as part of a widespread political back-lash to the Communist-led revolutions which had swept central and eastern Europe in the wake of World War I. Prosecutions under similar laws had been upheld in *Whitney*, 274 U.S. 357, and *Gilow*, 268 U.S. 652.

220. A Cincinnati television reporter-announcer had been invited to attend and film a small Ku Klux Klan rally, at which a number of the participants wore firearms, a cross was burned, and the leader made some disjointed remarks that could have been taken as a threat of armed violence against the federal government. The KKK leader had said, *inter alia*: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." See *Brandenburg*, 395 U.S. at 446. He then mentioned a march on Congress by 4,000 men on July 4th. *Id.* In a second film, the leader expressed his personal opinion that races he considered undesirable should be deported from the country. *Id.* at 447. Portions of the first film were later broadcast on a local station and on a national network.

221. *Id.* at 449.

222. See, e.g., *Hess v. Indiana*, 414 U.S. 105 (1973). A Vietnam War demonstrator, part of a crowd cleared off of a college campus street and onto the sidewalks by the local police, was arrested for disorderly conduct when he said to the crowd, "We'll take the fucking street

Aside from the fact that very few of the media physical injury cases are likely to have the political dimension that arguably "put the teeth" into the *Brandenburg* test, there is another important conceptual difference between the two lines of jurisprudence. The *Brandenburg* test is, again, a limitation on the power of governments to impose prior restraints or subsequent punishment upon those who advocate unlawful actions. It is irrelevant whether the listeners responded and whether the unlawful actions, or any injuries or damages consequential thereto, actually occurred.²²³ In the media physical injury cases, by comparison, the speech recipient or a third-party victim has already sustained injuries alleged to be the proximate result of the speech, and seeks compensation by way of damages under state tort law.²²⁴ This conceptual difference might explain in part why the *Brandenburg* test is as speech-protective as it is, and why it is arguably too speech-protective to be applied to the media physical injury cases.

If one were to put aside the conceptual problems with the clear and present danger analogy, and look only to outcome-oriented practicalities, one possible solution might be to construe the *Brandenburg* language as broadly as possible, so that the test would be less speech-protective as applied in the media physical injury cases. There is some precedent and authority to support this strategy.

For example, it has been argued that the *Brandenburg* test was always designed to reach the advocacy of actions that were "dangerous" even if not technically "unlawful," as long as it was within the legislative power to criminalize the action.²²⁵ Certainly this would make for fairer results in actions for negligent physical injury than the narrow, literal *Brandenburg* language.²²⁶ Indeed, in most of the media physical injury cases, the difference between the "dangerous" and the "dangerous and unlawful" is arguably only the difference between legislative oversight and hindsight. For purposes of civil liability, *Weirum* should be decided in the plaintiff's favor whether or not the radio

later," or, by other accounts, "We'll take the fucking street again." *Id.* at 107. The Supreme Court, employing the *Brandenburg* test, reversed his conviction noting that "[a]t best ... the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time." *Id.* at 108.

223. Indeed, in most of the advocacy of unlawful action cases in which the Court has ruled, it was clear that the criminal action advocated had not occurred. See, e.g., *Abrams*, 250 U.S. 616; *Gitlow*, 268 U.S. 652; *Whitney*, 274 U.S. 357; *Dennis*, 341 U.S. 494; *Brandenburg*, 395 U.S. 444; *Hess*, 414 U.S. 105. In other cases, such as *Schenck*, 249 U.S. 47, it would have been difficult to know whether or not the criminal action had occurred; but again, proof thereof is not required for conviction under the federal statute in that case or similar statutes, nor would *Brandenburg* require such proof.

224. In this respect, the media physical injury cases are more analogous to actions for the recovery of damages for defamation. See discussion, *infra* notes 248-78 and accompanying text.

225. See Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 698-99; Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1179 n.91 (1982). Notably, Justice Holmes, in his original formulation of the test in *Schenck*, referred to the words of the speaker creating "a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." 249 U.S. at 52 (emphasis added).

226. Many dangerous, violent or self-injurious actions might, however, be technically characterized as unlawful "breaches of the peace" in order to fit the *Brandenburg* terminology.

announcer specifically "intended" that his listeners commit moving vehicle violations, even if such intent might be required for purposes of criminal liability.

Similarly, if intentional subliminal exhortation to commit suicide had been found in *McCollum* or *Vance*, the outcome on the question of civil liability should not have turned upon whether it was technically "unlawful" within the jurisdiction to commit or to attempt to commit suicide.²²⁷

Another way to make the *Brandenburg* test less over-protective in the media physical injury cases would be to loosely interpret the "imminency" requirement. State and lower federal courts have done this in prosecutions for the solicitation of criminal action at a future date, suggesting that where the crime is grave enough, it would be deemed "imminent" notwithstanding the time lapse from the solicitation.²²⁸ Notably, the practical effect of this broad construction of the imminency requirement is to bring *Brandenburg* closer to its "predecessor" clear and present danger test, that of *Dennis v. United States*, where the gravity of the danger could be discounted by its improbability, and imminency did not seem to be a requirement at all.

Even if *Brandenburg's* constitutionally unprotected zone were "broadened" by substituting a "dangerous" requirement for the "unlawful" requirement, even if "imminency" and "intent" were loosely interpreted as well, an approach predicated on "advocacy" or "incitement" would still arguably be overly-protective as applied in the media physical injury cases. For example, this "modified *Brandenburg*" test would apparently offer a "safe harbor" protection in Dangerous Instruction Cases.²²⁹ Should invitation by way of instruction to an activity whose danger is not obvious to the speech

227. The court in *McCollum* apparently assumed that the advocating of suicide could satisfy the *Brandenburg* test. 202 Cal. App. 3d at 1000, 249 Cal. Rptr. at 193. The *Hercege* court expressly avoided this same question. 814 F.2d at 1022. Notably, while no state still criminalizes by statute the act of committing suicide or attempting to commit suicide, many states do criminalize by statute the encouragement or solicitation of another to commit suicide. See, e.g., CAL. PENAL CODE § 401 (West 1988 & 1992 Supp.); DEL. CODE ANN. tit. 11, § 645 (1987 & 1990 Supp.); KAN. STAT. ANN. § 21-3406 (1988); MONT. CODE ANN. § 45-5-105 (1990); MISS. CODE ANN. § 97-3-49 (1972); N.J. STAT. ANN. § 26:11-6 (West 1982); N.Y. PENAL LAW § 120.30 (McKinney 1987); 18 PA. CONS. STAT. ANN. § 2505(b) (1983 & 1991 Supp.); TEX. PENAL CODE ANN. § 22.08 (West 1989 & 1992 Supp.). Suicide was a felony and attempted suicide was a misdemeanor at common law. See 4 BLACKSTONE, COMMENTARIES *189. Some older common law decisions, deeming suicide to be "unlawful," albeit rulings of questionable status, might still survive. See, e.g., *Wallace v. State*, 116 N.E.2d 100 (Ind. 1953); *Commonwealth v. Mink*, 123 Mass. 422 (1877). See generally Thomas J. Marzen, Mary K. O'Dowd, Daniel Crone, and Thomas J. Balch, *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1 app. (1985) (including a state-by-state survey of American suicide laws).

228. See, e.g., *People v. Rubin*, 96 Cal. App. 3d 968, 978, 158 Cal.Rptr. 488, 492-93 (1979), cert. denied, 449 U.S. 821 (1980) (an offer of \$500 to anyone "who kills, maims, or seriously injures a member of the American Nazi Party," made at a press conference in connection with a protest of a Nazi march planned for five weeks hence, could constitute solicitation to murder and was not protected by the First Amendment; "imminent" under *Brandenburg* even if not intended to take place until five weeks had passed). Cf. *United States v. Compton*, 428 F.2d 18 (2d Cir. 1970), cert. denied, 401 U.S. 1014 (1971) (threat to assassinate the president two weeks later). See also *United States v. Kelner*, 534 F.2d 1020, 1029 (2d Cir. 1976) (Mulligan, J., concurring).

229. See discussion *supra* notes 10-38 and accompanying text.

recipient, as in *Shannon*, be constitutionally-protected from civil liability, while exhortation to an activity with a danger obvious to all be unprotected? *Brandenburg's* protection would still automatically be extended to *Hustler in Herceg*, which, again, is also arguably viewed as a Dangerous Instruction Case.²³⁰ Finally, and perhaps most significantly, if *Brandenburg* had been the chosen First Amendment model in *Hyde* and in *Times Mirror*, the Endangering Revelation Cases, it would have barred the actions. The newspapers arguably aided criminal action when they printed the names of the crime victim and witness, but they certainly did not advocate or incite criminal action.

The *Brandenburg* test is thus overly-protective as applied to some, and conceptually inappropriate as applied to the majority, of the media physical injury cases. The practical problems of over-protection are alleviated, but not fully eliminated, by current theories for broadening the construction of its terms. The remaining practical problems could be eliminated by further "stretching" the *Brandenburg* language, so that words like "advocacy" and "incitement" no longer have their common meanings. The ultimate question would be how much elasticity could be injected into *Brandenburg's* language before it would no longer be the *Brandenburg* test, having metamorphosed into something entirely different.

Not all of the courts or judges reviewing negligent media injury cases have, however, assumed that the proper constitutional focus was on the *Brandenburg* clear and present danger test. Analogies have also been made to First Amendment jurisprudence relating to the torts of privacy invasion²³¹ and defamation.²³²

B. Analogy to Privacy Invasion

In *Times Mirror Co. v. Superior Court*,²³³ the Endangering Revelation case, the court focused on First Amendment jurisprudence respecting the right to privacy.²³⁴ The plaintiff apparently made the invasion of privacy her primary claim. In its defense, the *Times Mirror* raised an entire line of cases establishing the press' right to print "lawfully-obtained, truthful information" in the face of civil privacy invasion claims or state enforcement of statutes designed to protect privacy.²³⁵ While leaving open the question of whether future fact-findings at trial might bring this case in line with these precedents, the appellate court concluded that the state's interest in protecting crime witnesses and conducting criminal investigations would be sufficient to overcome

230. See discussion *supra* notes 90-96 and accompanying text.

231. See discussion *infra* notes 233-47 and accompanying text.

232. See discussion *infra* notes 248-78 and accompanying text.

233. 198 Cal. App. 3d 1420, 244 Cal. Rptr. 556 (1988), cert. dismissed, 489 U.S. 1094 (1989), discussed *supra*, notes 139-46 and accompanying text.

234. *Id.* at 1425-26, 244 Cal. Rptr. at 559-60.

235. *Id.* at 1431-32, 244 Cal. Rptr. 563-64 (citing, *inter alia*, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977)). The most recent important decision in this line of jurisprudence is *The Florida Star*, 491 U.S. 524.

defendant's First Amendment rights, and precluded summary judgment for the media defendant.²³⁶

Times Mirror is not, however, a true privacy invasion case, and the court's focus on this claim is misleading. The tort of "privacy invasion" is about the public revelation of truthful facts that are humiliating and embarrassing.²³⁷ There was nothing inherently embarrassing about this plaintiff's status as a crime witness,²³⁸ and that "status" would not have remained "private" if the suspect had been apprehended later and brought to trial. When the press reveals the name and whereabouts of a crime victim and/or witness when the suspect is still at-large, the primary tort at issue is the negligent infliction of emotional distress, and perhaps injury or death as well. As in the *Hyde* case,²³⁹ the true issue in *Times Mirror* was negligent endangerment, which in both cases caused emotional distress even though the plaintiffs were spared worse consequences.²⁴⁰

In the Endangering Revelation cases, companion causes of action for privacy invasion might be well-pleaded where there is something arguably embarrassing about the endangered witness' status as a victim of rape, sodomy, incest, child molestation or similar crimes.²⁴¹ Although neither *Times Mirror* nor *Hyde* fits this description, there might be, in some Endangering

236. *Times Mirror*, 244 Cal. Rptr. at 564, 198 Cal. App. 3d at 1432.

237. The cause of action for invasion of privacy requires the publication concerning the private life of another "if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." RESTATEMENT (SECOND) OF TORTS § 652(D) (1977). See, e.g., *McSurely v. McClellan*, 753 F.2d 88 (D.C. Cir. 1985); *Beaumont v. Brown*, 257 N.W.2d 522 (Mich. 1977). For examples of privacy invasion actions brought under state common law or statute for the revelation of the names of rape victims, see, e.g., *The Florida Star*, 491 U.S. 524; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). See also *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir.), cert. denied 493 U.S. 935 (1989).

238. Justice Butler, dissenting in *Times Mirror*, argued that the defendants' identification of the plaintiff as the discoverer of the murder would not be a revelation of private matters so offensive and embarrassing as to form the basis of a privacy action. 198 Cal. App. 3d at 1436, 244 Cal. Rptr. at 566-67 (Butler, J., dissenting).

239. *Hyde v. City of Columbia*, 637 S.W.2d 251 (Mo. App. 1982), cert. denied, 459 U.S. 1226 (1983), discussed *supra* notes 131-38 and accompanying text.

240. See *Times Mirror*, 198 Cal. App. 3d at 1426, 244 Cal. Rptr. at 560 (comparing the case to *Hyde*). However, the court in *Times Mirror* specifically avoided the question whether the plaintiff could maintain independent causes of action for intentional and negligent infliction of emotional distress if summary judgment had been granted on the invasion of privacy cause of action. *Id.* at 1433 n.5, 244 Cal. Rptr. at 565 n.5.

Justice Butler, dissenting in *Times Mirror*, believed that all of the plaintiff's causes of action must fail. *Id.* at 1436-37, 244 Cal. Rptr. at 567 (Butler, J., dissenting). Because he believed the revelation of the victim's name to be "newsworthy", Justice Butler concluded that the defendants enjoyed an absolute First Amendment immunity in publishing the name. *Id.* at 1433-37, 244 Cal. Rptr. at 565-67 (Butler, J., dissenting).

The year after the *Times Mirror* decision, the Supreme Court in *Florida Star*, 491 U.S. 524, made its most recent ruling to date on the First Amendment's impact on state privacy invasion statutes and actions, in a case where privacy invasion and negligent endangerment theories did converge. For an explanation why the *Florida Star* ruling would not necessarily preclude state-enforced recovery for intentional and negligent infliction of mental distress or physical injury or wrongful death on a theory of endangerment of crime witnesses, including victims, by the publication of their names, see discussion *infra* note 242.

Revelation Cases, a convergence of a privacy invasion cause of action with one predicated on a theory of negligent endangerment. There is, however, no particular reason to analogize one line of jurisprudence to the other, even in the category-specific situation where this convergence might occur.²⁴²

A very different type of analogy to the privacy invasion jurisprudence is found in the trial court's initial ruling in *Vance I*.²⁴³ Again, the court ruled that subliminal exhortations to suicide might be the basis for a cause of action predicated on the intentional invasion of the privacy of one's thoughts.²⁴⁴ While this novel and interesting approach might have some intrinsic merit, it is much too category-specific to be of any use in devising a general approach to the media physical injury cases. Indeed, the "subliminal exhortation to suicide" cases like *Vance* and *McCollum*²⁴⁵ are different than all of the other cases under discussion, except *S&W Seafoods*,²⁴⁶ the "spit on the restaurateur" case. In each of these three cases, the plaintiff's theory was that defendant intended that harm to someone should occur,²⁴⁷ rather than that such harm was the consequence of the defendant's negligence.

241. See, e.g., *Florida Star*, 491 U.S. 524, discussed *infra* note 242 and accompanying text.

242. In *Florida Star*, the Supreme Court ruled that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order," in holding that a Florida statute could not impose civil damage liability on a newspaper for publishing the name of a rape victim obtained from a police report to which the press was given access. *Id.* at 541

The physical protection of witnesses was argued to be one of the interests vindicated by the Florida statute, along with the protection of the privacy of victims of sexual offenses and the state policy of encouraging rape victims to report the crimes without fear of exposure. *Id.* at 537. Notably, the Court never suggested that these asserted state interests would not be "of the highest order"; indeed, the Court described these three interests as being "highly significant." *Id.*

Rather, the Florida statute failed for not being narrowly tailored enough on its face and as applied in the case at hand: the press had gotten the information from a government press release because the sheriff's office had failed to abide by the statutory policy; the use of a negligence *per se* standard by the courts below was deemed inappropriate; and the statute's facial underinclusiveness in only reaching the mass media undercut the state's asserted interest in protecting privacy. *Id.* at 537-41.

Florida Star would not, therefore, preclude the possibility of state imposition of civil liability for physical injury, wrongful death, or related emotional distress resulting from media dissemination of truthful, lawfully-obtained information respecting the identity or location of crime witnesses (including crime victims), as in *Hyde*, 637 S.W.2d 251, and *Times Mirror*, 198 Cal. App. 3d 1420, 244 Cal. Rptr. 556.

243. *Vance I*, 16 Media L. Rep. (BNA) 2241. See discussion *supra* at notes 64-77 and accompanying text.

244. 16 Media L. Rep. (BNA) at 2251-54.

245. *McCollum*, 202 Cal. App. 3d 989, 249 Cal. Rptr. 187, discussed *supra* note 56-63 and accompanying text.

246. 390 S.E.2d 228 (Ga. Ct. App. 1989), discussed *supra* note 46-51 and accompanying text.

247. Again, the failure of the plaintiffs to prove that the defendants had intentionally inserted the subliminal exhortation was the grounds for the *Vance* court's grant of judgment to the defendants. See *Vance II*, 1990 WL 130920, at 18-19, discussed *supra* notes 64-77 and accompanying text.

C. Analogy to Defamation

Constitutional standards for the recovery of damages in defamation actions have also been used for purposes of analogy in the search for First Amendment standards in the negligent media injury cases. The analysis varies according to whether the speech alleged to have caused the injury is or is not deemed a matter "of public concern."

In her concurrence/dissent in the *Herceg* autoerotic asphyxiation case, Judge Edith H. Jones emphasized that the Supreme Court had recognized a "hierarchy" of First Amendment values in its First Amendment jurisprudence.²⁴⁸ That hierarchy is exemplified by stronger protection for the media where the subject of a defamation action is a matter "of public concern" as opposed to a matter "of private concern."²⁴⁹ For Judge Jones, it was irrelevant that *Hustler's* pornographic article on autoerotic asphyxiation did not fit into historical categories of unprotected speech;²⁵⁰ irrelevant that it might not be technically "obscene" under the Court's jurisprudence, but might only border upon that category;²⁵¹ and irrelevant that it could not pass the *Brandenburg* test for unprotected advocacy of unlawful action.²⁵² Indeed, Judge Jones considered the majority's analogy to *Brandenburg* to be "inappropriate,"²⁵³ in part because the latter "addressed prior restraints on public advocacy of controversial political ideas," and its holding therefore rested "in the core values protected by the first amendment."²⁵⁴

Rather, Judge Jones felt that the better analogy for *Herceg* was *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,²⁵⁵ wherein the Supreme Court had held that the subject of the defamation action, a negligently erroneous credit report, was not a matter "of public concern," having been prepared only for the individual interest of the speaker and a specific business, and, like advertising, representing a form of speech unlikely to be deterred by incidental state regulation.²⁵⁶ The Court had concluded that the First Amendment interest at stake in *Greenmoss* was less important than if it had been a matter "of public concern," and consequently the recovery of presumed and punitive

248. *Herceg v. Hustler*, 814 F.2d 1017, 1027 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

249. *Id.* at 1028-29 (comparing *Gertz*, 418 U.S. 323, discussed *infra* note 253, with *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)).

In *Greenmoss*, the Court held that the victim of a negligently erroneous credit report might recover presumed and punitive damages without proving "malice," because, unlike *Gertz*, the matter was one "of private concern." 472 U.S. at 763. See Cynthia Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990).

250. *Herceg*, 814 F.2d at 1026 (citing child pornography, fighting words, incitement to lawless conduct, libel, defamation or fraud, and obscenity).

251. *Id.* at 1026-27.

252. *Id.* at 1029.

253. *Id.* at 1029-30.

254. *Id.* at 1029.

255. 472 U.S. 749 (1985).

256. See *Herceg*, 814 F.2d at 1028-29.

damages would not require proof of malice as it would in the latter case, under the Court's prior ruling in *Gertz v. Robert Welch, Inc.*²⁵⁷

By analogy to *Greenmoss*, Judge Jones believed that *Hustler* magazine in general, and its "Orgasm of Death" article in particular, deserved only limited First Amendment protection.²⁵⁸ She viewed *Hustler* as a "profitable commercial enterprise," "pandering" to a small portion of the population with a prurient, borderline obscenity appeal that "is not based on cognitive or intellectual appreciation."²⁵⁹ For her, it was easy to reach the same conclusion as the Supreme Court had in *Greenmoss*; that is, that the speech at issue was not that which "requires special protection to insure that 'debate on public issues [will] be uninhibited, robust, and wide-open.'"²⁶⁰ Such pornography, whether or not found to be technically obscene under the current First Amendment jurisprudence,²⁶¹ should, in Judge Jones' opinion, be accorded "a lower value on the scale of constitutional protection,"²⁶² and the state should be permitted to regulate it by means of tort recovery for injury directly caused thereby, so long as such recovery is "tailored to specific harm and not broader than necessary to accomplish its purpose."²⁶³

The full implications of Judge Jones' analysis are unclear. Her observations may, on the one hand, be viewed as category-specific and of limited application: *Herceg* is unusual among the cases surveyed both in that "Orgasm of Death" was at best pornography bordering on unprotected obscenity,²⁶⁴ and in that, as a case ostensibly about "imitation" in the face of express warnings against such, it still tread perilously close to being one in

257. 418 U.S. 323. In *Gertz*, an attorney representing the family of a youth, slain by a policeman, in a wrongful death action, was defamed in an article in a right-wing newspaper. The Supreme Court acknowledged that Gertz was not a "public figure" and therefor not subject to the so-called "malice" requirement (that the defamatory statement was made with knowledge of the falsity or reckless disregard of the truth) of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Nevertheless, because the matter in which the defamation arose was one "of public concern," the Court ruled that "malice" had to be shown for Gertz to recover for any damages beyond those attributable to "actual injury," such as presumed or punitive damages. 418 U.S. at 349.

258. *Herceg*, 814 F.2d at 1028.

259. *Id.* at 1028.

260. *Id.* at 1028 (quoting *Greenmoss*, 472 U.S. at 762, which, in turn, quoted *Sullivan*, 376 U.S. at 270).

261. Under the current standard set forth by the Supreme Court in *Miller v. California*, 413 U.S. 15, 24 (1973), "obscenity" such as may be regulated by the states by means, *inter alia*, of prior restraints, is to be determined by the fact-finder by consideration of these "basic guidelines":

[(a)] whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; [(b)] whether the work depicts or describes, in a patently offensive way, sexual 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.

Id. at 24 (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972) (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957))).

262. *Herceg*, 814 F.2d at 1029.

263. *Id.*

264. Judge Jones noted that at trial, "Orgasm of Death" might be found to be "obscene" under the *Miller* test, and therefore unprotected altogether. *Herceg*, 814 F.2d at 1029.

which there was straightforward "invitation by instruction" to engage in an ultra-dangerous activity.²⁶⁵

On the other hand, Judge Jones' emphasis on a "hierarchy" of protection levels among different types of First Amendment-protected speech, and her suggestion that one way of defining that hierarchy should be the dichotomy between speech on matters "of public concern" and speech on matters "of private concern" as developed in the First Amendment defamation cases, might have much broader implications for the present discussion. If speech on matters "of public concern" were narrowly defined as that which is necessary to "debate on public issues,"²⁶⁶ it is doubtful that the speech at issue in most of the media physical injury cases under discussion, or in many that would arise in the future, could be characterized as fitting that definition. If *Greenmoss* were deemed to be the proper analogy to these cases, on the theory that the speech involved was merely "of private concern," a possible implication is that the First Amendment would not, in most cases, act as a bar to or other limitation upon a negligence claim against the media for physical injury or wrongful death.

Indeed, the analogy to the First Amendment defamation jurisprudence might afford little constitutional protection even in the media physical injury cases where the subject speech was about a matter "of public concern." In *Gertz v. Robert Welch, Inc.*,²⁶⁷ the case distinguished from *Greenmoss* because the defamation was held to concern a "private person" but related to a matter "of public concern,"²⁶⁸ the Supreme Court had 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."²⁶⁹ Correspondingly, the court in *Hyde*,²⁷⁰ the Endangering Revelation case, looked to *Gertz* by analogy to conclude that, even if the crime victim's name was a matter "of public concern," as the defendant newspapers had asserted, the plaintiff would still be in compliance with the First Amendment because she had pleaded a cause of action in negligence, and had not merely alleged strict liability.²⁷¹

Worse, if the speech in a media physical injury case were about a matter "of private concern," and the analogy were to *Greenmoss*, it is also arguable that, from the standpoint of the First Amendment, strict liability would suffice. In *Greenmoss*, the Court did not take the opportunity to restate what it had said a decade earlier in *Gertz* about "no strict liability." Although this omission in *Greenmoss* might be explained in that the Vermont courts had

265. Judge Jones noted that *Hustler* knew that "the article is dangerously explicit, lethal, and likely to be distributed to those members of society who are most vulnerable to its message." *Id.* at 1027 (Jones, J., concurring in part & dissenting in part).

266. *Id.* at 1028-29 (Jones, J., concurring in part & dissenting in part) (citing *Sullivan*, 376 U.S. at 270).

267. 418 U.S. 323, discussed *supra* note 257.

268. *Id.* at 347.

269. *Id.*

270. 637 S.W.2d 251, discussed *supra* note 138 and accompanying text.

271. *See id.*

already conformed the state's defamation law to *Gertz*,²⁷² and negligence had been both pleaded and found by the jury,²⁷³ some commentators have interpreted the omission as a signal that states can revert to strict liability for defamation in the "private person/private concern," *Greenmoss*-type case.²⁷⁴ The Supreme Court has not yet had the opportunity to clarify the matter.

Therefore, if the media physical injury cases were "constitutionalized" along the First Amendment defamation law model, with specific analogy to *Greenmoss*, it is uncertain whether even negligence would be required; strict liability might suffice.²⁷⁵

Granted, this is a "worst-case scenario." The Court has not specifically ruled that strict liability would suffice in *Greenmoss*-type cases. Moreover, arguably the *Hyde* court read the analogy to defamation law too literally when it concluded that, by analogy to *Gertz*, proof of mere negligence would have sufficed if the crime victim's name were assumed to be a matter "of public concern."²⁷⁶ After all, the Supreme Court had intended that some very significant differences, as to damage recovery, and perhaps as to the elements of the cause of action as well, should turn on the *Gertz/Greenmoss* "of public/private concern" distinction. Perhaps the proper conclusion to be drawn from the analogy to defamation is that when the speech in the media physical injury cases regards a matter "of public concern," something more than negligence should be constitutionally required; and that when the speech regards a

272. See *Lent v. Huntoon*, 470 A.2d 1162, 1168 n.1 (Vt. 1983) (reading *Gertz* as stating a general rule of "no strict liability" in defamation, at least not for media defendants). Most of the states had subsequently conformed their statutory or decisional defamation law by eliminating strict liability and substituting some requirement of fault, usually equated with "negligence" or something more. See, e.g., *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 771 P.2d 406, 257 Cal. Rptr. 708 (1989); *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61, 1 Media L.Rep.(BNA) 1693 (1975).

273. *Greenmoss*, 472 U.S. at 752-55.

274. See, e.g., Rodney 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) (hereinafter Smolla); *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).

275. Notably, Judge Jones in her *Herceg* concurrence/dissent thought it inappropriate to speculate on what theory of liability the Texas courts might accept in that case, although she did mention negligence and attractive nuisance as seeming "theoretically appropriate." *Herceg*, 814 F.2d at 1030 (Jones, J., concurring in part, dissenting in part). And attractive nuisance is, today, also understood in "negligence" terms. See RESTATEMENT (SECOND) OF TORTS § 339 (1977); PROSSER, *supra* note 157 § 59, at 402.

276. Actually, the *Hyde* court's use of a negligence standard, by accepting for the sake of argument the newspaper defendants' claim that the victim/witness' name was "of public concern" and therefore analogous to *Gertz*, arguably produced the correct result in this case, if perhaps for the wrong reason. If the victim/witness' name was not a matter "of public concern" given the risk to her while her assailant was still at-large, then either the "malice" standard of *Sullivan*, or the clear and present danger test of *Brandenburg*, would have been over-protective of the press. For an explanation of why the defamation analogy is more appropriate in the Endangering Revelation cases than in any other of the media physical injury cases, see discussion *infra* Section IV(b)(2).

matter "of private concern," then negligence, but not strict liability, would constitutionally suffice.²⁷⁷

Still, the defamation analogy remains problematical in requiring difficult and highly subjective judgments as to what is or is not "of public concern." If that definition were as limited as Judge Jones suggested in *Herceg*, few of the negligent media physical injury cases would merit constitutional protection. On the other hand, from a conceptual standpoint, the defamation analogy would have an advantage over the *Brandenburg* clear and present danger analogy in that, like the media physical injury cases, the defamation cases are about the compensation for injuries after they have occurred.²⁷⁸

To summarize, all three of the First Amendment "models" being currently used in the media physical injury cases are in one way or another problematic. The analogy to privacy invasion, used in *Times Mirror*, the Endangering Revelation Case, is incorrect and misleading. The two favored, potentially conflicting,²⁷⁹ models for purposes of analogy to the media physical injury cases — the *Brandenburg* clear and present danger test and the *Gertz/Greenmoss* defamation jurisprudence — offer alternatives that are almost bipolar and neither satisfactory. *Brandenburg*, used to offer a "safe harbor" with a narrow range of protection denial, is over-protective. The *Greenmoss* "of public concern" test, drawn from the defamation cases as a *de minimis* requirement for protection, would be highly under-protective. As suggested,²⁸⁰ there may be ways to broadly interpret each of these tests so as to try to mitigate these consequences when applied to the media physical injury cases.

Nevertheless, broad construction will not totally solve all of the practical problems presented by these two models, and will not address the conceptual ones. The problem may lie not merely with the analogies that courts are presently using in the media physical injury cases, but perhaps in any approach to the problem focused exclusively on the content of the speech and its categorization.²⁸¹

Emphatically, if the only practical choice were between an over-protective, content-categorizing test such as *Brandenburg*'s, and an under-protective, content-ranking test such as *Greenmoss*', the First Amendment should require that the former be chosen. Courts could continue to use a loosely-construed

277. Judge Jones, in her *Herceg* dissent, did not go so far as to suggest that strict liability would suffice in that case. Rather, her opinion allowed that, given the analogy to defamation, an article "not of public concern" like "Orgasm of Death" deserved "limited ... first amendment protection." 814 F.2d at 1028 (Jones, J., dissenting). Elsewhere, she suggested that were the Texas courts permitted to fashion a theory of liability in *Herceg*, "negligence and attractive nuisance [would be] theoretically appropriate." *Id.* at 1030 (Jones, J., dissenting).

278. See discussion *supra* notes 223-24 and accompanying text.

279. See *Herceg*, 814 F.2d 1017, discussed *supra* notes 90-96 and accompanying text.

280. See discussions *supra* notes 224-32 & 275-77 and accompanying text.

281. In this regard, *Brandenburg* has multiple deficiencies, having been designed to protect controversial political speech in the context of incitement. The analogy to the *Gertz/Greenmoss* "of public concern" distinction, on the other hand, looks only to the "social utility" of the speech in terms of the "political theory" of the First Amendment or, at best, the broader search for "truth" in the "marketplace of ideas" which permits judges to make highly subjective judgments about what speech is valuable in our society.

version of the *Brandenburg* test to provide a relatively wide "safe harbor" in the media physical injury cases, and if the Endangering Revelation Cases cannot be conceptually reconciled, or if occasionally an unjust result occurs, as many might think the case in *Shannon*, arguably these would be small prices to pay for the broad protection of free speech.

The question remains, however, whether these two models do in fact represent the only practical approaches to the media physical injury cases, or the most conceptually accurate ones.

Part III, which follows, suggests a different First Amendment approach to the media physical injury cases. It focuses on the media's role in the dissemination of speech, and the relationship between the dissemination of speech and common law negligence principles.

III. TOWARDS A NEW, UNIFIED FIRST AMENDMENT APPROACH

A. Identifying the First Amendment Values at Stake in the Media Physical Injury Cases

The Supreme Court has yet to establish or recognize a single, comprehensive theory of the First Amendment.²⁸² Rather, the Court has addressed First Amendment problems on a case-by case basis in diverse and often unrelated areas of concern — criminal incitement,²⁸³ fighting words,²⁸⁴ hostile audiences,²⁸⁵ disclosures of information affecting national security,²⁸⁶ defamation,²⁸⁷ privacy invasion,²⁸⁸ commercial speech,²⁸⁹ obscenity²⁹⁰ —

282. The three major theories in support of the First Amendment are: (i) that free speech is necessary for the preservation of an uninhibited marketplace of ideas in the pursuit of "truth" (the "marketplace of ideas theory") (see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Abrams*, 250 U.S. at 629-31 (Holmes, J., dissenting)); (ii) that free speech is essential to intelligent self-government in a democratic system (the "political theory") (see *Roth v. United States*, 354 U.S. 476, 484 (1957); *Bridges v. California*, 314 U.S. 252, 270 (1941); *Stromberg v. California*, 283 U.S. 359, 369 (1931). See also *Sullivan*, 376 U.S. at 269-271 ("debate on public issues"); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1960); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948)); and (iii) that free speech promotes individual self-fulfillment and self-realization (see *Red Lion Broadcasting Co.*, 395 U.S. at 390; *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982)). See generally GERALD GUNTHER, *CONSTITUTIONAL LAW* 998-1001 (12th ed. 1991); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 786-89 (2d ed. 1988); JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* § 16.6, at 835-37 (3d ed. 1986).

283. See, e.g., *Hess*, 414 U.S. 105; *Brandenburg*, 395 U.S. 444; *Schenck*, 249 U.S. 47. See generally discussion *supra* notes 200-32 and accompanying text.

284. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

285. See, e.g., *Feiner v. New York*, 340 U.S. 315 (1951).

286. See, e.g., *New York Times Co. v. United States (The Pentagon Papers Case)*, 403 U.S. 713 (1971).

287. See, e.g., *Greenmoss*, 472 U.S. 749; *Gertz*, 418 U.S. 323; *Sullivan*, 376 U.S.

254. See generally discussion *supra* notes 248-47 and accompanying text.

288. See, e.g., *The Florida Star*, 491 U.S. 524, discussed *supra* note 242.

thereby creating a jurisprudence of divergent strands. It is nevertheless notable that the Court developed each strand of that jurisprudence in response to government-imposed penalties and regulations which the Court viewed as inimical to identifiable First Amendment values in a particular area of concern.

The problem is to identify the First Amendment values that would justify placing constitutional limitations on the ability of plaintiffs to recover damages for physical harm resulting from allegedly negligent media speech. To date, the constitutional debate has focused primarily on the content of the subject speech. In the *Inspiration Cases*, for example, most of the judges were willing to rely on *Brandenburg's* bright-line, safe-harbor test: if the speech was not criminal advocacy, it did not really matter very much what it was; the First Amendment should protect it from negligence suits for physical injury as it would against prior restraints or government sanctions.²⁹¹ The notable exception here was, of course, Judge Jones, who in *Herceg* emphasized the low social value of pornography and the *de minimis* constitutional protection it deserved.²⁹² To her mind, non-obscene pornography might not be subject to prior restraints, but it should be subject to civil negligence actions for physical harm. Using the *Gertz/Greenmoss* analogy, she might well say the same for all speech not "of public concern."

Notably, though, both sides of this debate are focusing on questions about the general classification or specific content of the speech. Without suggesting that these are irrelevant to the present inquiry, it is submitted that the exclusive focus thereon may obscure the important First Amendment value which is served by bringing the amendment into play in speech-related media physical injury cases.

The public has a very strong interest in receiving speech encompassing a broad panoply of ideas and information. The Supreme Court has spoken of the First Amendment right of the media audience to have access to "social, political, esthetic, moral, and other ideas and experiences."²⁹³ Over the years,

289. See, e.g., *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

290. See, e.g., *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973).

291. Indeed, the judges' near-unanimous reluctance to evaluate the content or social value of the subject speech is entirely understandable given both the Supreme Court's historical reluctance to formally adopt any single theory for the First Amendment. See discussion *supra* notes 282-90 and accompanying text.

292. 814 F.2d at 1028 (Jones, J., dissenting). See discussion *supra* notes 248-66 and accompanying text. Recent Supreme Court decisions arguably support her view in this regard. See, e.g., *Barnes v. Glen Theatre*, 111 S.Ct. 2456, 2460 (1991). See discussion *infra* notes 375-77 and accompanying text.

293. *Red Lion*, 395 U.S. at 390. This decision upheld the FCC's fairness doctrine, which required broadcast licensees to give air-time to persons attacked on their program and to proponents of opposing views on topics on which they had editorialized. In *Red Lion* and subsequent cases, this "right to receive information" has been viewed as derivative of the two leading theories of the First Amendment, the "political theory" and the "marketplace of ideas," focusing respectively on the right to receive information of political value and information useful in the pursuit of "truth." See *id.* at 390. See also *First National Bank v. Bellotti*, 435 U.S. 765 (1978) (public's right to hear corporate speech on public issues); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (consumers' right to prescription drug pricing information); *Kleindienst v. Mandel*, 408 U.S. 753 (1972)

the Court has vindicated that societal interest by a gradual expansion of the types of speech deemed to be protected by the First Amendment; eroding those categories of speech historically assumed to be beyond its ambit.²⁹⁴ The First Amendment value at stake in the media physical injury cases inheres in the special role that the media plays in its ability to widely disseminate and amplify speech for the public's benefit, and the relationship of that role to common law negligence principles.

B. The Speech Dissemination/Liability Factor: The Potentially Contrary Relationship Between the Public Interest in the Widespread Dissemination of First Amendment-Protected Speech, and Negligence Tort Law Principles for the Compensation of Physically-Injured Parties

Most of the media physical injury cases surveyed are brought, *inter alia*, on a theory of negligence, either as a separate tort²⁹⁵ or as the alleged conduct giving rise to other torts.²⁹⁶ A cause of action founded upon negligence, from which liability will follow, requires: (1) a duty or obligation, recognized by the law, that requires the person to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) a breach of that duty (i.e. the failure to conform to that standard of conduct); (3) a reasonably close causal connection between the conduct and the resulting injury, what is

(American scholars' right to hear speech by Belgian professor). Some commentators have proposed that the Court should recognize a broader right to receive information that has a personal value to either the listener or the speaker, including perhaps obscenity, for purposes of "self-realization". See, e.g., Redish, *supra* note 282, at 593. However, the Supreme Court has never officially endorsed this theory, and the Court has retrospectively narrowed the rationale for the strongest case arguably pointing in the direction of such a broad approach. Compare *Stanley v. Georgia*, 394 U.S. 557 (1969) (voiding statute punishing knowing possession of obscenity, as applied to adult possessing obscenity in his home), with *Osborne v. Ohio*, 495 U.S. 103 (1990) (possession of child pornography unprotected); *United States v. Reidel*, 402 U.S. 351 (1971) (mailing of obscenity to consenting adults unprotected); *United States v. Orito*, 413 U.S. 139 (1973) (same for transporting); and *United States v. 12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973) (same for importing).

294. See, e.g., *The Pentagon Papers Case*, 403 U.S. 713. Compare *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (commercial speech not protected by the First Amendment), with *Virginia State Board of Pharmacy*, 425 U.S. at 763 (consumers right to prescription drug pricing information), and *Central Hudson Gas & Electric Corp.*, 447 U.S. at 563 (commercial speech constitutionally protected unless advertises unlawful goods or services or is fraudulent or misleading). Compare *Roth*, 354 U.S. 476 (obscenity not protected by First Amendment), with *Miller*, 413 U.S. at 24 ("obscenity" confined to works which depict or describe sexual conduct, and which lack serious literary, artistic, political, or scientific value). Compare *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (libellous speech not constitutionally protected), with *Gertz*, 418 U.S. 323, and *Sullivan*, 376 U.S. 254.

295. See, e.g., *Shannon*, 276 S.E.2d 580; *Bill*, 137 Cal. App. 3d 1002, 187 Cal. Rptr. 625; *Zamora*, 480 F. Supp. 199. Negligence has been recognized as a separate tort, an independent basis for liability, since the early 19th century. See generally, PROSSER, *supra* note 157, at 160-61.

296. Negligent misrepresentation (see, e.g., *Alm v. Van Nostrand*, 480 N.E.2d 1263 (Ill. 1985), discussed *supra* at note 15); wrongful death by virtue of negligence (see, e.g., *Weirum*, 15 Cal.3d 40, 123 Cal. Rptr. 468, 539 P.2d 36, discussed *supra* at notes 39-44 & 52-55; *Yakubowicz*, 536 N.E.2d 1067, discussed *supra* at notes 113-21; *Braun*, 749 F.Supp. 1083, discussed *supra* at notes 162-73; *Eimann*, 880 F.2d 830, discussed *supra* at notes 148-59); negligent infliction of mental distress (see, e.g., *Hyde*, 637 S.W.2d 251, discussed *supra* at

normally referred to as "proximate cause"; and (4) actual loss or damage resulting to the interests of another.²⁹⁷

Negligence is conduct "which falls below the standard established by law for the protection of others against unreasonable risk of harm."²⁹⁸ It may be caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from his action.²⁹⁹ Such was arguably the case with the "balloon pellet" broadcast in *Shannon*³⁰⁰ and the disc jockey's radio broadcast in *Weirum*.³⁰¹ Alternatively, it may arise where the responsible party weighed the possible consequences carefully, and exercised what it considered to be its best judgment,³⁰² as was probably the case with the newspaper that revealed the victim's name in *Hyde*.

To be negligent, the conduct must be unreasonable in light of the recognizable risk.³⁰³ The graver or more serious the possible harm, the less the probability or likelihood of the occurrence required to create a duty of care.³⁰⁴ All of the injuries presented by the cases under consideration were serious; indeed, most of the cases are wrongful death actions. The least serious injuries were the mental distress suffered by the plaintiffs in the Endangering Revelation cases, *Hyde* and *Times Mirror*, and even there, more serious consequences might have ensued.

What is novel and unusual about the speech-related, physical injury negligence actions brought against the media is the factor of the probability or likelihood of the harm. In the context of media broadcasts or other dissemination of speech, what might at most be characterized as a remote risk of harm posed by the speech becomes multiplied a million-fold based on the number of speech recipients. For example, sixteen million children were estimated to have watched the broadcast of Disney's "Mickey Mouse Show," yet only the Shannon child is known to have been injured.³⁰⁵ Perhaps the chance of self-injury from blowing up a balloon with a pellet in it is remote; the chance of serious injury even more remote; but, given the size of that audience, the Georgia Supreme Court could not help but conclude that there had been a foreseeable risk that someone, somewhere, would be seriously injured.³⁰⁶

A different but related problem of negligence tort actions against the media is the potential for an unlimited class of plaintiffs. In the Erroneous Instruction and Dangerous Instruction Cases, for example, given the potential size of the audience, there is a potential for unlimited liability for either accidental errors or misjudgments, predicated on a theory of negligent misrepre-

notes 131-38; *Times Mirror*, 198 Cal. App. 3d 1420, 244 Cal. Rptr. 556, discussed *supra* at notes 139-46).

297. PROSSER, *supra* note 157, § 30, at 164-65.

298. RESTATEMENT (SECOND) OF TORTS § 282 (1965).

299. PROSSER, *supra* note 157, § 31, at 169.

300. See discussion *supra* notes 31-38 and accompanying text.

301. See discussion *supra* notes 39-44 & 52-55 and accompanying text.

302. PROSSER, *supra* note 157, § 31, at 169.

303. *Id.* at 170.

304. *Id.* at 171.

305. *Shannon*, 276 S.E.2d 580, discussed *supra* notes 31-38 and accompanying text.

306. *Id.* at 583.

sentation.³⁰⁷ Courts have historically placed limitations on defendants' potential liability in negligent misrepresentation actions, but only when the plaintiffs were claiming pecuniary losses in a business context.³⁰⁸ By comparison, courts might well be loath to limit recovery where plaintiffs seek to recover for physical injuries, wrongful death, or emotional injury.

Thus, the broad dissemination of ideas and information which make the mass media valuable to society from a First Amendment standpoint make them potentially more vulnerable as defendants in common law negligence actions, both in terms of the magnitude of the risk presented and the correlative duty imposed, and in terms of the potential plaintiff class. The more widely-disseminated the speech, the greater the potential tort liability exposure (hereinafter, the "Speech Dissemination/Liability Factor").

Notably, in this regard, most³⁰⁹ of the media physical injury cases are conceptually different from the defamation cases to which they have been sometimes analogized for First Amendment purposes.³¹⁰ In defamation law, the size of the audience is generally irrelevant to meeting the pre-requisite elements of the tort; publication to a single person would suffice.³¹¹ Moreover, while the size of the audience to which the defamation is ultimately disseminated might have some relevance for purposes of pleading and proving special damages,³¹² both the number of potential plaintiffs,³¹³ and the general damages which may be presumed by the fact-finder to have resulted from the loss of reputation,³¹⁴ depend primarily upon the content of the defamatory

307. Misrepresentation in the form of misleading words frequently occurs in negligence actions for personal injury or property damage, and is not ordinarily distinguished from other types of negligence. PROSSER, *supra* note 157, § 105, at 725-26 & § 107, at 745.

308. See, e.g., *Gutter v. Dow Jones, Inc.*, 490 N.E.2d 898 (Ohio 1986). See generally PROSSER, *supra* note 157, § 107, at 745, n.61 (citing Justice Cardozo's opinion in *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931)). New York precludes plaintiffs from recovering against accountants and other professional information-providers for negligent representation giving rise to pecuniary loss. See *Credit Alliance v. Arthur Anderson & Co.*, 65 N.Y.2d 536, 483 N.E.2d 110, 493 N.Y.S.2d 435 (1985). But see *Rosenblum v. Adler*, 461 A.2d 138 (N.J. 1983).

309. The Endangering Revelation cases are conceptually different, and might be better analogized to the defamation cases. See discussion *infra* Section IV(b)(2).

310. See discussion, *supra* notes 248-78 and accompanying text.

311. See, e.g., *Bonkowski v. Arlan's Dep't. Store*, 174 N.W.2d 765, 767 (Mich. 1970); *Berry v. City of New York Ins. Co.*, 98 So. 290, 292 (Ala. 1923). See generally PROSSER, *supra* note 157, § 113, at 798 ("There may be publication to *any* third person.") (emphasis added).

312. Special damages consist of the loss of something having economic or pecuniary value, which the plaintiff can specifically identify and trace its causation to the defamatory statement. See generally RESTATEMENT (SECOND) OF TORTS § 575 Cmt. b; PROSSER, *supra* note 157, § 116A, at 844.

313. With respect to group libel, see generally, RESTATEMENT (SECOND) OF TORTS § 564A; PROSSER, *supra* note 157, at 784.

314. See generally RESTATEMENT (SECOND) OF TORTS § 904; PROSSER, *supra* note 157, § 116A, at 843.

statement, the fact of its publication,³¹⁵ and the *mens rea* of the defendant in publishing it.³¹⁶

C. Speech Dissemination and Speech Origination: The Media's Dual Functions in Bringing First Amendment-Protected Speech to the Public

In serving the public interests represented by the First Amendment, the media serve two distinct functions. They disseminate speech and, often, they originate speech. In most of the media physical injury cases herein surveyed, the media defendants disseminated speech which they themselves had originated. In some cases, however, such as the *Winter* mushroom book publisher case³¹⁷ and the *Eimann* "gun-for-hire" advertisement case,³¹⁸ the media were perceived as having disseminated speech which had been originated by others; as having been the "neutral," albeit financially remunerated, transmitters of speech. A third possibility is suggested by the *Shannon* balloon pellet case, wherein defendant Disney had only originated the speech, having relied on its fellow defendant, the Turner Broadcasting Corporation, to disseminate the program to the public on its television station.

Where the media defendants both disseminated and originated the speech which allegedly gave rise to physical injury, courts have tended to focus exclusively on the content of the speech which the media originated, inquiring whether it was First Amendment-protected under either a *Brandenburg* clear and present danger or *Gertz/Greenmoss* "of public/private concern" analysis.³¹⁹ Both of these tests are content-focused. Not surprisingly, it was in cases where the media defendants were perceived as having only neutrally disseminated speech originated by others, such as *Winter* and *Eimann*, that the courts focused on the functional role of the media as speech disseminators, and its First Amendment value.

The *Eimann* case is particularly instructive. Again, the Fifth Circuit, applying the balancing test of *United States v. Carroll Towing Co.*,³²⁰ concluded that *SOF*, under the Texas common law of negligence, did not owe a duty to the plaintiffs' decedent to screen advertisements that were at most "facially innocuous" and "ambiguous" to determine whether they were offer-

315. See generally PROSSER, *supra* note 157, § 116A, at 843.

[I]n the absence of rebuttal testimony to show that the only recipients to whom the defamatory matter was published did not believe it, the presumption [of impairment of reputation] should continue to be applied, at least to libel which is published publicly. Normally, the publication of false and defamatory matter about the plaintiff is circumstantial evidence in and of itself that there was some impairment to reputation.

Id.

316. See generally RESTATEMENT (SECOND) OF TORTS § 621, which took the position that general damages should be recoverable only upon proof that the defamation had been published with knowledge of its falsity or reckless disregard of the truth, even in cases where the defamation concerned a private person in a matter of private concern. As such, the common law extends the "malice" requirement beyond what would be constitutionally-required. Compare *Gertz*, 418 U.S. 323, with *Greenmoss*, 472 U.S. 749.

317. See discussion *supra* notes 20-26 and accompanying text.

318. See discussion *supra* notes 153-59 and accompanying text.

319. See discussion *supra* Section II(a) & (c).

320. 159 F.2d 169 (2d Cir. 1947).

ing criminal services.³²¹ The *Carroll Towing* test, formulated by Judge Learned Hand, imposes a duty upon the defendant where the burden of taking adequate precautions to overcome the dangerous condition is greater than the probability of the injury risked, multiplied by the gravity of the injury risked.³²²

Applying this test, the *Eimann* court found that the ads in *SOF* represented "a serious threat of harm,"³²³ and that the risk presented was "more than remote."³²⁴ On the other hand, the court found that the burden of preventing that harm was too heavy for *SOF* to have been expected to bear, if this prevention could only have been achieved by *SOF*'s screening all of the ads or not publishing any of them at all. In reaching this conclusion, the *Eimann* court noted the pervasiveness of advertising in our society,³²⁵ as well as "the important role of such communication for purposes of risk-benefit analysis,"³²⁶ as highlighted by the Supreme Court's protection, albeit limited, of commercial speech under the First Amendment.³²⁷

Thus, although the *Eimann* court did not reach the defendant's First Amendment arguments, it incorporated First Amendment interests into the *Carroll Towing* balancing test. Against a less than remote risk of serious harm, the burden to be weighed encompassed not only the burden of precaution imposed upon *SOF* and others similarly situated, but also, the damage to the public's First Amendment-protected interests in receiving the commercial speech that the imposition of so great a burden of precaution on the media would entail.

Moreover, the *Eimann* court's use of First Amendment concerns in the *Carroll Towing* test focused not merely on the content of the speech, but also, significantly, on the functional role of the media in disseminating it. In this respect, the *Eimann* court took a broader view of the issue than those courts or judges which, on the constitutional question which *Eimann* avoided, used only narrow, content-based analogies to *Brandenburg* or *Gertz/Greenmoss* defamation. Indeed, *Eimann* focused on the content of the speech only from the broadest viewpoint: advertising is pervasive and important in our society and is now generally protected under the First Amendment, even if not as protected as other types of speech. There was no inquiry as to whether "gun-for-hire" advertisements might be less socially valuable, or more inherently suspect, than other types of advertisements. The public was entitled to receive a wide spectrum of commercial speech.

Thus, *Eimann*'s weighing of the public's First Amendment interests, in determining that *SOF* should not be deemed negligent and liable for damages, reflected two related concerns. The general concern was to protect the pub-

321. *Eimann*, 880 F.2d 830, 835-38.

322. *Carroll Towing*, 159 F.2d at 173.

323. *Eimann*, 880 F.2d at 835.

324. *Id.* The court noted that of the approximately 2,000 personal service ads printed by *SOF* between 1975 and 1984 (when the ad in question was run), the plaintiffs' evidence established that as many as nine had served as links in criminal plots; that *SOF* staffers had aided police investigations in two of these; and that other crimes had received media coverage. *Id.*

325. *Id.* at 836.

326. *Id.*

327. See discussion *infra* notes 365-68 and accompanying text.

lic's interest in receiving the messages — the ideas or information — contained in First Amendment-protected speech (i.e. the advertisements). The specific concern was to preserve the system by which this speech is disseminated; a system in which the media play a critical role. It is the public's interest in the broad dissemination of First Amendment-protected speech, encompassing both of these concerns, that is the central focus of the Speech Dissemination/Liability Factor previously described.

Eimann, again, involved a media defendant who had disseminated the speech at issue, but had not originated it. The common law rule applied therein might arguably be applicable only to media defendants comparably-situated, such as publisher G.P.Putnam's Sons in the *Winter* mushroom book case. In contrast, in many of the physical injury cases surveyed, the media were disseminating speech which they themselves originated. In such a case, the fact that the media defendant was a speech originator as well as a speech disseminator might well change the analysis of the duty of care which, under the circumstances, it owed to the public or others. It might also change judicial perception of how imposing liability on a media defendant in a given case would impact upon the speech dissemination process.

Nevertheless, as the *Eimann* decision suggests, the public's interest is in the broad dissemination of First Amendment-protected speech. A media defendant that disseminated its own speech, rather than the speech of others, was also serving that interest. So too, arguably, was even a "non-media" defendant like Disney in the *Shannon* balloon pellet case, when it allowed its speech to be widely disseminated by the media. Those who participate in the speech dissemination process, or who originate speech for widespread media dissemination, are serving the public's interest in receiving a broad variety of First Amendment-protected speech. At the same time, these speech originators and disseminators increase their exposure to common law tort liability. Even if the service to the public must be balanced against the harm that the media have allegedly caused, the valuable First Amendment interests served should still receive consideration.

Again, both the *Brandenburg* clear and present danger test and the *Gertz/Greenmoss* "of public/private concern" distinction focus solely on the speech content; specifically, on either its dangerous or social utilitarian nature. They do not focus on the functional role of the media as the disseminator of First Amendment-protected speech, both the media's own speech and that of others.³²⁸ Furthermore, they do not consider the Speech Dissemination/Liability Factor, that is, the potentially contrary relationship between that

328. Because the analogy between media physical injury cases and the *Gertz/Greenmoss* defamation categorizations is drawn solely on the basis of content, i.e. the "of public concern/private concern" distinction, it is not germane to the present discussion that the *Gertz* court flirted with the possibility of limiting the protection of its holdings to media, as opposed to non-media, defendants. See *Gertz*, 418 U.S. at 366-69 (Brennan, J., dissenting). See also *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-77 (1986). Subsequently, in the *Greenmoss* decision, at least five of the judges explicitly rejected the distinction drawn in *Gertz* between media and non-media defendants. See *Greenmoss*, 472 U.S. at 773 (White, J., concurring); 472 U.S. at 782-83 n.7 & 783-84 n.9 (Brennan, J., dissenting). The Court may now consider the question an open one. See *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695, 2706 n.6 (1990).

constitutionally favored speech dissemination process and common law negligence principles. The proposed solution is a calibrated balancing test in which all of these factors are taken into consideration.

D. An Alternative Approach: A First Amendment Balancing Test Based on Dennis v. United States

The recognition of the First Amendment value of the media's functional role, and the correlative enhanced risk of tort liability, might justify a possible constitutional intervention in these cases. The potential contrariness, between what is constitutionally valued and what is correspondingly more tort-susceptible, should create a presumption in favor of First Amendment protection for media defendants in the physical injury cases. This presumption could, however, be strengthened or rebutted when a number of other factors, including the social value or utility of the speech, are considered and weighed.³²⁹

The "clear and present danger" test of *Dennis v. United States*³³⁰ could provide the basis for such a constitutional standard, along the lines suggested by the *Eimann* court's use of *Carroll Towing*. Under the *Dennis* test, appropriately derived by Judge Learned Hand, author of the *Carroll Towing* negligence formula, courts are to ask in each case "whether the gravity of the 'evil' [that might be caused by the speech], discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."³³¹ The *Dennis* test, like that of *Carroll Towing* and unlike that of *Brandenburg*, is a balancing test rather than a "bright-line" test. Unlike *Brandenburg*, there is no requirement of either "advocacy" or "incitement" to "unlawful" action; the focus is rather on the gravity of the danger and its likelihood. Also, unlike *Brandenburg*, neither imminence nor intent are required by the *Dennis* test. Free of the ultra-protective, highly restrictive language of *Brandenburg*, and employing a formula that balances danger and risk in a way correlative to and reminiscent of the common law negligence principles from which Judge Hand might well have derived it, the *Dennis* test offers an ideal, flexible foundation for a unified, broad-based approach to the media physical injury cases.

Preliminarily, however, a potential problem must be addressed. The *Dennis* test, as it stands, offers courts little guidance in balancing the competing interests in media physical injury cases. Indeed, given its broad terms, there would be considerable potential for unbridled, *ad hoc* balancing.³³² The Supreme Court has, however, established a precedent and model for calibrating the *Dennis* test.

In *Nebraska Press Association v. Stuart*,³³³ the Court used the *Dennis* formula to articulate a standard for determining the permissibility of an injunction against pre-trial publicity in a criminal trial.³³⁴ In order to balance the

329. For an identification and discussion of these factors, see *infra* Part IV.

330. 183 F.2d 201, discussed *supra* notes 214-15 and accompanying text.

331. *Id.* at 212.

332. See *Brandenburg*, 395 U.S. at 454-55 (Douglas, J., concurring). See generally JOHN H. ELY, *DEMOCRACY AND DISTRUST* 109-10 (1980).

333. 427 U.S. 539 (1976).

334. See *Nebraska Press Association*, 427 U.S. at 562-70.

criminal defendant's sixth amendment right to a fair trial, as well as the government's interest in prosecuting law-breakers, against the First Amendment rights of the press and its audience, *Stuart* directs the trial judge to examine: (1) the nature and extent of pre-trial coverage; (2) the likely effectiveness of alternative means of restricting pretrial publicity (such as changing venue); and (3) the likely effectiveness of a prior restraint in preventing prejudice to the defendant.³³⁵ Moreover, the *Stuart* standard looks to see how broad, and therefore, how invasive of First Amendment interests, the proposed gag order is.³³⁶

Stuart demonstrates that a principled and consistent approach to balancing First Amendment rights against competing governmental and individual interests, based upon the *Dennis* formula, is possible. Moreover, it attests that *Dennis* survives as a viable precedent notwithstanding the later *Brandenburg* decision which, arguably, superseded it, at least in the context of the advocacy of unlawful action cases.³³⁷

The question remaining is how to calibrate *Dennis* in the context of the media physical injury cases. Notably, *Stuart* involved the calibration of *Dennis* in order to assess the wisdom of issuing a gag order, a form of prior restraint. Although normally deemed more constitutionally suspect than other burdens upon free speech,³³⁸ a prior restraint at least would not chill media speech through self-censorship.³³⁹ It is no doubt the fear of such self-censorship that has made the *Brandenburg* test an attractive "safe harbor" in so many of the media physical injury cases, even if it is sometimes over-protective and is often poorly analogized. Any calibrated balancing test based on *Dennis* which is offered as a substitute for *Brandenburg* in the media physical injury cases should therefore be initially weighted in the media's favor, starting with a presumption of protection based upon the Speech Dissemination/Liability Factor.³⁴⁰ Part IV, which follows, considers the factors that should be weighed in a balancing test, and how that test might be structured.

IV. A PROPOSED BALANCING TEST: FACTORS AND STRUCTURE

The primary purpose of this section is to identify the factors that would be properly considered in a calibrated balancing test designed to determine whether the First Amendment should protect a media defendant in a speech-related physical injury case, and to suggest the kind of weight that these factors should be given. It also suggests a possible structure for such a test, and identifies the various relevant factors in the context of that structure.

There are probably numerous possible structures for a balancing test that would be appropriate in the media physical injury cases. The structure

335. See *id.*

336. See *id.*

337. See *Brandenburg*, 395 U.S. at 454-55 (Douglas, J., concurring).

338. See *The Pentagon Papers Case*, 403 U.S. 713; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 283 U.S. 697, 717-20 (1931).

339. See generally John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 429-30 (1983).

340. See discussion *supra* notes 305-28 and accompanying text.

suggested herein is set forth for purposes of illustration and discussion only, in the hope that judicial experimentation in future cases, along the lines suggested, will lead to further refinement and innovation.

Sub-part "A" of Part IV describes a preliminary inquiry that must be made before any balancing test commences: whether the subject speech was categorically unprotected by the First Amendment.

Sub-part "B" describes an initial phase ("the First Level") of a balancing test, in which the inquiry is whether the defendant in a speech-related physical injury case deserves to have weighed in its favor an initial presumption against liability predicated on the Speech Dissemination/Liability Factor previously described.³⁴¹ Whether that presumption will stand, be weakened, or be fully rebutted requires the consideration of a number of factors focusing on the specific facts of the case and on the defendant's conduct, some of this analysis tracking that of common law negligence.

Sub-part "C" describes the second and final phase ("the Second Level") of the balancing test, to determine whether the First Amendment should intervene to forestall a negligence judgment against the defendant. Here, the presumption in favor of media protection based on the Speech Dissemination/Liability Factor — if it has survived the First Level of the balancing test — is weighed in conjunction with other factors which might favor non-liability.

A. Preliminary Inquiry: Was the Speech Categorically Unprotected by the First Amendment?

If the physical injuries were allegedly caused by media speech which, based upon its content, is found not to have been First Amendment-protected speech, a constitutional defense in a civil tort case could not stand. Historically, the Supreme Court has recognized a number of categories of speech that are beyond the shelter of the First Amendment, and the preliminary inquiry in each case should be whether or not the subject speech falls into one of these categories. Thus, speech which constitutes advocacy of unlawful action and satisfies the tough clear and present danger standards of *Brandenburg* would have no First Amendment protection.³⁴² Nor would a constitutional defense stand if injuries resulted from speech that would meet the constitutional definition of "obscenity."³⁴³

The advertisement of unlawful products or services also has no First Amendment protection.³⁴⁴ Any advertisement expressly offering such products or services could not have the benefit of a First Amendment defense in a civil action for physical injuries that allegedly resulted therefrom. The

341. See *id.*

342. See discussion *supra* notes 200-30 and accompanying text.

343. See *Miller v. California*, 413 U.S. 15, 24 (1973), discussed *supra*, note 261. Notably, Judge Jones, in her concurrence/dissent in *Herceg*, believed that this issue had not yet been adjudicated. See *Herceg*, 814 F.2d at 1025 (Jones, J., concurring in part, dissenting in part), discussed *supra*, notes 248-66 and accompanying text.

344. *Central Hudson Gas & Elec. Corp. v. Public Ser. Comm'n*, 447 U.S. 557, 563-64 (1980) (citing *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388 (1973)).

same would be true of any advertisement which was fraudulent or misleading, as this too is a category excluded from First Amendment protection.³⁴⁵

In *Braun* and *Norwood*, the Criminal Advertisement cases,³⁴⁶ the courts went a step further and concluded that there could be no First Amendment protection because the "gun-for-hire" ads in *Soldier of Fortune*, while not explicit on the point, could easily have been interpreted as offering unlawful services.³⁴⁷ Assuming that these were correct interpretations and applications of the Supreme Court's precedents delineating the scope of constitutionally unprotected commercial speech,³⁴⁸ the First Amendment defense would be unavailable in civil actions for physical injury or wrongful death alleged to have resulted from these and similar advertisements.

The power of a state to ban an activity outright includes the "lesser power" to permit the activity but ban or regulate advertisements thereof.³⁴⁹ Assume, for example, that it would be constitutional for a state, in the name of public safety, to limit gun-for-hire employment to individuals who are registered with a state agency.³⁵⁰ Further assume that a state implementing such a registration program made it unlawful for unregistered individuals to engage in gun-for-hire advertising of any type within the state. If such a prohibited ad by an unregistered individual were to result in physical injuries to a third party, the First Amendment might be unavailable as a defense for the media defendant in the ensuing civil action. This might be true even if the unlawful ad was more like the one found to be "innocuous" in *Eimann*, and less like the ones found to be easily interpreted as offering criminal services in *Braun* and *Norwood*. Indeed, it might be true even if the unlawful ad specifically disclaimed an intention to engage in unlawful activities.³⁵¹

345. See *Central Hudson Gas & Electric Corp.*, 447 U.S. at 567 n.10 (citing *Friedman v. Rogers*, 440 U.S. 1 (1979) (upholding Texas statute which prohibited the practice of optometry under a trade name)).

346. See discussion *supra* notes 162-80 and accompanying text.

347. See *Braun*, 749 F. Supp. 1083, 1086; *Norwood*, 651 F. Supp. 1397, 1401. For a discussion of these cases, see *supra* notes 162-80 and accompanying text.

348. See *Braun*, 749 F. Supp. at 1086 (relying on *Pittsburgh Press Co.*, 413 U.S. 376). In *Pittsburgh Press Co.*, the Court upheld the Human Relations Commission's order banning the practice of placing job opening advertisements under columns headed "Jobs — Male Interest" and "Jobs — Female Interest" discrimination on the basis of sex unlawful. The Court found that these ads, as placed in labelled columns, proposed unlawful discrimination, and therefore the First Amendment did not apply. 413 U.S. at 388.

349. See *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 346 (1986) (Puerto Rico could have prohibited casino gambling by its residents, therefore it could constitutionally ban advertising for such gambling directed at its residents, even where it permitted such advertising to be directed at non-residents.).

350. While this assumption no doubt can be safely made, the precise constitutional limitations on a state's ability to proscribe a product or an activity remain unclear. The Court has been reluctant to strike down state economic regulations as being violative of either the Fourteenth Amendment Due Process Clause (see, e.g., *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125, *reh'g denied*, 439 U.S. 884 (1978); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949)), or of the Fourteenth Amendment Equal Protection Clause (see, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 306 (1976), *overruling Morey v. Doud*, 354 U.S. 457 (1957)), requiring in both instances only a "rational" basis for the enactment.

351. This is theoretically true, but as a practical matter, the rule might prove unduly burdensome for First Amendment purposes, where media coverage spills over from one state to

B. The Balancing Test — First Level: In determining whether there should be First Amendment protection, should the Speech Dissemination/Liability Factor be weighed in the defendant's favor, given the specific facts of the case?

1. An initial presumption in favor of media protection based on the Speech Dissemination/Liability Factor

A priori, the public has a right to hear all First Amendment-protected speech, no matter how highly valued the message is from a categorical standpoint, and no matter how trivial the specific subject matter. The media play a crucial First Amendment role in disseminating and magnifying the speech for the public, but again, that very process enhances the media's potential exposure to tort liability for negligently inflicting physical injuries: under common law negligence principles, both the scope of the media speaker's duty of care, and the potential plaintiff class if there is error or misjudgment, expand as the audience enlarges (the Speech Dissemination/Liability Factor). Where the First Amendment values and common law negligence principles are potentially in conflict, there should be an initial presumption of media protection where, *a posteriori*, someone is injured, allegedly as a result of the speech.

Again, it has been argued that the flaw in the constitutional analogies presently being used by courts in the media physical injury cases is that they focus exclusively on the content of the subject speech, and fail to take into account either the functional role that the media in general serve in the wide dissemination of First Amendment-protected speech, or the correlative risks that the media take because of the potential contrariness of common law negligence principles. Therefore, the First Level of the proposed balancing test considers whether the functional role that the media generally play in the broad dissemination of First Amendment-protected speech, notwithstanding the attendant risks (the Speech Dissemination/Liability Factor), should be weighed in favor of the media defendant in the case at hand.

Although the Speech/Dissemination Liability Factor is related to the broader constitutional question of whether imposing liability in a given case will chill First Amendment speech by others in the future,³⁵² its consideration at the First Level of the balancing test focuses specifically on the question of fairness to the defendant in the case at hand. Thus, while the First Level of the balancing test begins with a presumption in the media defendant's favor based on the Speech Dissemination/Liability Factor, this presumption may be weakened or rebutted by consideration of a number of factors specific to the case.

In some cases, for example, given the identifiability of the potential plaintiffs in advance, arguably the Speech Dissemination/Liability Factor is not significantly implicated and should have little impact. In other cases, it may be determined that the media defendant should have realized that whatever functional value inhered in the wide dissemination of the First Amendment speech at issue, such value would be outweighed by the significant risk to the public

another, as in broadcasting. Query whether it would be fair to ask the media to police the registration status of persons offering gun-for-hire services.

352. See discussion *supra* notes 338-40 and accompanying text, and *infra* Part IV(c)(2).

that the speech dissemination posed. This would be determined by weighing various factors applicable to the case, in an analysis which to some degree tracks that of common law negligence,

In other words, the significance of the Speech Dissemination/Liability Factor cannot be assessed in isolation from the defendant's conduct. Thus, after consideration of a number of identified factors, the presumption favoring protection predicated on the Speech Dissemination/Liability Factor might be weakened by strong evidence of negligence or even totally rebutted by a court's determination that the evidence could support a fact-finding of gross negligence on the defendant's part.

2. Was a specific potential plaintiff identifiable in advance of the speech?

This is one of the most important factors to be considered at the First Level. If a specific potential plaintiff is identifiable in advance, as in Endangering Revelation cases like *Hyde* and *Times Mirror*, then a strong presumption in favor of media protection cannot be premised on the Speech Dissemination/Liability Factor. If the potential plaintiff, the individual to whom the duty is owed, is identifiable in advance, then the possible danger to that individual — and the media's correlative duty — is not an unknown consequence of projecting the speech to the public. The potential for injury and for media liability are there from the start, albeit the gravity of the injury and the scope of media liability may be unknown.

In *Hyde* and *Times Mirror*, for example, the newspapers knew or should have known that the plaintiff crime victim or crime witness would suffer emotional injury from the threat of physical harm if they printed her name while the assailant was still at-large. What the newspapers would not have known for sure was whether the assailant would read or learn the information, and if so, whether he would take action upon it to the physical injury or death of the witness.

The better analogy to the Endangering Revelation cases, therefore, may be the First Amendment treatment of the defamation cases. The particular individuals to whom the duty is owed are known when the media disseminates information about them, although the potential scope of the liability may not be. In the Endangering Revelation cases, as in the defamation cases, any presumption in favor of First Amendment protection must rest not on the Speech Dissemination/Liability Factor, but in the "quality" of the speech that was disseminated. In the Endangering Revelation cases, for example, the answer may turn on whether the victim/witness' name is a matter "of public concern" when the fact of the crime is a matter "of public concern."³⁵³

Most types of media physical injury cases differ from the Endangering Revelation cases, in that the potential plaintiffs are not identifiable in advance. Still, the initial presumption in favor of protection based on the Speech Dissemination/Liability Factor can be rebutted when, taking a number of other factors into consideration, the conclusion is that the media defendant should

353. See, e.g., *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir.), cert. denied, 493 U.S. 935 (1989). See also *The Florida Star*, 491 U.S. 524; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

nevertheless be deemed responsible for the consequences of the speech. These factors include whether the media defendant knew of or should have foreseen the danger; the gravity of the danger; how the speech recipient was led to engage, or came to engage, in the activity dangerous to himself or others; how obvious the danger was or should have been to the speech recipient; and whether the media participated in the origination of the speech, or only disseminated it.

These factors are examined in the discussion which follows. If a consideration and balancing of these factors would lead a court to conclude that the media defendant could not be found negligent under traditional tort principles, the court might grant summary judgment without recourse to the First Amendment. If, however, the evidence might support a jury verdict for negligence, the court might let the presumption stand, calibrating its strength according to its analysis of these factors. If, having considered these factors, the court felt that the evidence might support a verdict for gross negligence, the presumption of protection raised by the Speech Dissemination/Liability Factor might be deemed totally rebutted.

3. *Did the media speaker know of, or should the media speaker have foreseen, the danger?* and

4. *How grave was the danger?*

These two interrelated questions closely track the *Dennis* formula as well as common law negligence principles. The greater the danger, and the greater degree of actual or imputed knowledge thereof on the media speaker's part, the weaker the presumption of media protection. Notwithstanding the First Amendment interests in the speech being disseminated and received, the media speaker should have realized that the danger posed might outweigh the value of the speech.

Part of the problem in this part of the analysis is determining what the "danger" refers to in specific cases, both with respect to gravity and foreseeability. In *Shannon*, for example, where millions of children were urged to blow-up balloons with BB pellets inside, there was a high risk that many balloons were going to explode; probably some considerable risk of numerous minor injuries; but a much lower risk that any serious, let alone mortal, injury would result therefrom. In *Herceg*, on the other hand, there was a very high risk of mortality if any single individual attempted "auto-erotic asphyxiation," but a much lower risk that any individual would be foolish enough to attempt it.

For purposes of this part of the analysis, the "gravity of the danger, discounted by its improbability" must take a collective, cumulative, societal-level view of the possible impact of the speech. Thus, a judge could reasonably conclude that a foreseeable, high-probability risk of serious but non-mortal injuries to a large number of children in *Shannon* should serve to rebut the presumption of media protection as strongly as the lower probability-risk of fatal injury to one or two persons in *Herceg*.

The gravity and foreseeability of the danger factors should serve to bolster the presumption of media protection in the Erroneous Instruction cases where the activities were not inherently dangerous.

5. *How was the speech recipient led to engage, or how did he come to engage, in the activity dangerous to himself and/or others?*

The more strongly the media speaker urges the speech recipient to engage in an activity for which at least some degree of danger was or should have been anticipated by the media speaker, the more strongly it should weigh as a factor rebutting the presumption of protection. The strongest type of urging described herein has been referred to as "exhortation" and is exemplified by the *Weirum* case.³⁵⁴ Notably, the *Brandenburg* clear and present danger test looked only for this high degree of urging, there equated with "advocacy" of or "incitement" to imminent unlawful action.³⁵⁵ Again, *Brandenburg's* stringent requirements need not be met in the context of this balancing test.³⁵⁶ Exhortation to an inherently and obviously dangerous activity, as in *Weirum* and perhaps in the Subliminal Exhortation cases, should suffice to rebut the presumption of protection.

While far less forceful than exhortations, instructions are also implicitly an invitation to engage in the activity, and may, as in *Shannon*, be accompanied by some additional active encouragement. Cases like *Herceg* remain difficult to categorize here because instructions are being given with warnings not to follow them.

Where the media is alleged only to have "inspired" activity that was dangerous or injurious to the speech recipient or others, either through imitation or through inducement to a psychological mood shift, the media is least culpable, having never intended that any action be taken by the speech recipient. If this is true for the Imitation Cases, it should be even more true for the Mood Shift Cases. The presumption of protection should stand unless one of the other factors cited is extraordinarily adverse to this result.

6. *Was the danger obvious to the speech recipient?*

This factor is particularly important in the Instruction Cases. As *Shannon* illustrates, where the danger of an activity is not as obvious to the speech recipient as it was or should have been to the media speaker, invitation by way of instruction might be almost as culpable as exhortation to an obviously dangerous activity. In this situation, the factor weighs strongly towards rebutting the presumption of protection.

Conversely, if the danger was or should have been obvious to speech recipients who nevertheless engaged in the activity, that might be a factor bolstering the presumption in favor of media protection. While this should not be a significant factor in an Exhortation Case like *Weirum*, it might have been helpful to *Hustler's* defense in the *Herceg* case. *Hustler's* argument would be that, in addition to its warnings not to attempt the described technique, it could

354. See discussion *supra* notes 39-44 & 52-55 and accompanying text.

355. See discussion *supra* notes 200-30 and accompanying text.

356. See discussion *supra* Part III(d).

have reasonably relied on the danger of strangulation being obvious to anyone old enough to read and follow the instructions.³⁵⁷

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?

In the "how to" instruction book cases, like the *Winter* mushroom case, the courts have drawn a distinction between the book author, who originates the speech, and the book publisher, who disseminates it. The courts have imposed no liability on the latter as a matter of common law, and have suggested that to do otherwise would pose First Amendment problems.³⁵⁸ The same protection has been accorded to newspaper and magazine publishers for

357. The current best-seller, *Final Exit*, is a book which offers instructions on how to commit suicide, expressly disclaiming the advocacy thereof. Not yet the subject of litigation, it is nevertheless interesting to speculate on how an action for wrongful death, based on a hypothetical decedent's having purportedly used this or a similar book to commit suicide, might be approached under the proposed balancing test. DEREK HUMPHRY, *FINAL EXIT* (1991).

Those inclined to be speech-protective without reaching the First Amendment might well argue the lack of proximate cause by virtue of intervening causation in the free-willed decision of the suicide. Based on current tort law principles, this latter argument might be decisive. This is not absolutely certain, however, particularly where causation-in-fact (e.g. but for the suggestions in defendant's book, the decedent lacked the nerve to commit the deed, or did not believe that it could be performed "with dignity") could be proven. The closest analogy is the question whether one who physically injures another, leading to the victim's mental impairment or depression, in turn resulting in suicide, should be responsible for the fatal act. The older and apparently still predominant rule answers the question in the negative, except where the original accident had left the victim insane, emphasizing the free-willed suicide decision of the sane victim as the intervening cause of death. See generally RESTATEMENT (SECOND) OF TORTS § 455; PROSSER, *supra* note 157, § 44, at 311. However, some recent decisions have placed greater emphasis on foreseeability and traceability to reach different results. See, e.g., *Fuller v. Preis*, 35 N.Y.2d 425, 363 N.Y.S.2d 568, 322 N.E.2d 263 (1974); *Tate v. Canonica*, 180 Cal. App.2d 898, 5 Cal Rptr. 28 (1960).

Still, the argument in the suicide instruction book case would have to be based exclusively on foreseeability; unlike the personal injury leading to suicide case, the author's common law duty to the suicide victim is not clear. Moreover, aside from the issues of proximate cause and duty, some judges might conclude that it was not "negligent" to publish a book of this sort, even if it were foreseeable that it might be the decisive factor in the decision of some individuals to commit suicide.

Assume, however, for the sake of argument, that a court felt constrained to reach the First Amendment issue in such a case. Those inclined to be speech-protective might argue that this would be an ideal case for *Brandenburg's* "safe harbor": even if the test were stretched to cover an activity that was self-destructive, if not unlawful, there is still no advocacy or incitement here. See discussion *supra* notes 200-30 & 338-40 and accompanying text.

The same result of non-liability for wrongful death, however, could and should be readily reached by using the balancing test proposed herein. This would be achieved in part by emphasizing, in the First Level of the balancing test, the last two factors discussed: that unlike *Weirum*, this is a case of instruction, not one of exhortation; and that, as an instruction case, it is one where the dangers are obvious to adult readers, unlike the dangers posed to the children in the *Shannon* balloon pellet case or to the users of erroneous "how to" instruction books. The Speech Dissemination/Liability Factor would not be rebutted and would weigh in the defendant's favor. Moreover, in the Second Level of the balancing test, discussed *infra* Part IV(c), it may be strongly argued that instructions on how to commit suicide, like the abstract advocacy of suicide as a solution to some of life's problems, are a combination of information and ideas that are highly-relevant in today's marketplace of ideas. As such, both the abstract theory and the specific instructions are "of public concern", and are therefore, unlike *Hustler's* autoerotic asphyxiation article as viewed by Judge Jones in *Herceg*, of a highly-protected order in any potential hierarchy or ranking of First Amendment speech.

the "neutral transmittal" of advertisements without endorsement, as in the *Eimann* gun-for-hire case.³⁵⁹ The speech disseminators are recognized as being in a poorer position to exercise due care than are the speech originators.

By the same logic, where the media defendant is found to have been a "neutral disseminator" of the speech of others that purportedly led to injury, this should be a factor supporting the constitutional presumption of protection. This would be true in a gun-for-hire advertisement case like *Eimann*,³⁶⁰ again assuming that the ads are not readily interpreted as offering unlawful goods or services, as was found to be the case in *Braun* and in *Norwood*.³⁶¹

This factor would also weigh strongly against media liability in Erroneous Instruction Cases where the media defendant was not the preparer or originator of the instructional programming, but was merely a "neutral disseminator" of the information, and nothing in the nature of the instructions suggested the danger. By comparison, if the media is a "neutral transmitter" of instructions to inherently dangerous activities, not exhorting participation in the activity, this factor might still weigh in the media defendant's favor, although not as heavily as in the Erroneous Instruction Cases. In *Shannon*, a Dangerous Instruction Case, defendant Disney was not the speech transmitter, but rather, the speech originator; therefore this factor should not have weighed in its favor.³⁶² Rather, the factor should have weighed in favor of co-defendant Turner Broadcasting Corporation, which transmitted Disney's program.

In determining whether to accord a media defendant the benefit of the "neutral dissemination" factor, courts should remain flexible in defining "neutrality." The media's profit motivation, for example, should not preclude a finding of "neutral dissemination." Publishers profit from printing authors' books, as do magazines and newspapers from printing ads, yet both are correctly treated as neutral transmitters by the courts. Similarly, the employment status of the author might not alone be deemed determinative. In *Herceg*,³⁶³ the inquiry should not turn on whether the author of an article on autoerotic asphyxiation for *Hustler* was technically an employee of the journal or a freelance writer; the transmission of the article would have been doubtfully "neutral" in either case.

While "neutral" dissemination should be viewed as a positive factor supporting the media defendant's presumption of constitutional protection, the absence thereof should not be viewed as dispositive for its rebuttal. The vast majority of the journalism and broadcast media are acting as speech originators as well as speech disseminators. That they originated the speech might be relevant as to whether they exercised appropriate care under the circumstances, but this should be only one of the factors to be weighed in determin-

358. See discussion *supra*, notes 14-26 and accompanying text.

359. See discussion *supra*, notes 148-61 and accompanying text.

360. See *id.*

361. Again, if such were the case, the ads would be categorically excluded from First Amendment protection. See discussion *supra*, notes 344-48 and accompanying text.

362. See discussion *supra* notes 33-38 and accompanying text.

363. See discussion *supra* notes 90-96 & 248-65 and accompanying text.

ing whether they have the benefit of the constitutional presumption based on the Speech Dissemination/Liability Factor.

C. The Balancing Test — Second Level: Weighing the Arguments in Favor of First Amendment Protection

At the First Level of the balancing test, the objective was to see whether a presumption in favor of constitutional protection predicated on the Speech Dissemination/Liability Factor would be weakened or rebutted by an assessment of various factors. Some factors, such as the identifiability of the plaintiff in advance, might suggest that the presumption of protection was conceptually ill-founded, while a consideration of all of the factors might suggest such extreme negligence on the part of the media defendant that it should not have the benefit of the presumption at all.

If, however, a strong or weaker presumption of constitutional protection has survived the First Level of the balancing test, it can be weighed in conjunction with two other considerations relevant to whether or not First Amendment protection should be extended to the media defendant in a given case.

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? ("the Content Categorization Factor").

The Supreme Court historically has focused on the distinction between speech that was constitutionally protected and categories of speech that were deemed unprotected on the basis of content. More recently, however, the Court has suggested gradations of protection among various categories of First Amendment speech, correlative to the perception that some types of speech have greater quality or social utility than others.

For many years, of course, the Court had recognized that speech that was of special value in the political decision-making process, often referred to as "core" First Amendment speech, required special protection.³⁶⁴ More recently, as the umbrella of First Amendment protection has expanded, eroding categories of speech once deemed constitutionally unprotected, the Court has suggested that the newly constitutionalized speech might be accorded a somewhat lesser degree of First Amendment protection than other First Amendment speech.

Commercial speech, for example, which had been deemed totally unprotected by the First Amendment prior to the 1970's,³⁶⁵ is today recognized as protected.³⁶⁶ Government may, however, burden commercial speech for "important" reasons,³⁶⁷ whereas traditionally, only "compelling" reasons had

364. See, e.g., *Lehnert v. Ferris Faculty Assoc.*, 111 S.Ct. 1950, 1960 (1991); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968); *Roth v. United States*, 354 U.S. 476, 484 (1957).

365. See *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

366. See, e.g., *Central Hudson Gas & Electric Corp.*, 447 U.S. 557; *Virginia State Board of Pharmacy*, 425 U.S. 748.

367. See *Central Hudson Gas & Electric Corp.*, 447 U.S. at 568-69.

been held to justify content-based restrictions on First Amendment-protected speech.³⁶⁸ Similarly, the current test for what is constitutionally unprotected as "obscenity"³⁶⁹ probably delineates a smaller category of unsheltered speech than would have been subject to government proscription when the Court first constitutionalized the area.³⁷⁰ Nevertheless, in recent cases, the Court has suggested that some of the newly protected pornography, bordering on categorically-unprotected "obscenity," may be entitled to less protection than other, more socially utilitarian forms of speech.³⁷¹

Again, the media defendant should start with a presumption of First Amendment protection when it is disseminating First Amendment-protected speech. This is in part because the public has a strong interest in receiving a broad panoply of ideas and information, without fine, subjective quality-judgments about the social utility or preferential status of the type of speech transmitted. The initial question, at the First Level, is to assess how strong or weak that presumption is, given the specific facts of the case and weighing a number of different factors. Where the Supreme Court has indicated that the category of the subject speech deserves more or less protection than other First Amendment-protected speech, such categorization of the speech according to its content should be taken into consideration only *a posteriori*.³⁷²

In the Endangering Revelation cases, for example, it was noted at the First Level of the balancing test that the identifiability of the potential plaintiff in advance of the speech would undermine much of the rationale for the presumption of protection based on the Speech Dissemination/Liability Factor. Moreover, any presumption remaining in the media's favor would be further undermined because of the gravity of the danger and the media's advance awareness thereof.

Nevertheless, the media's defense in an Endangering Revelation Case is that the facts about the crime, including the name of the victim/witness, are matters "of public concern". Speech fitting this classification has been accorded increased First Amendment protection in defamation cases³⁷³ and elsewhere.³⁷⁴ If the Supreme Court were to hold that the name of the

368. See *Osborne*, 495 U.S. 103; *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972); *Stanley v. Georgia*, 394 U.S. 557, 568, n.11 (1969).

369. See *Miller*, 413 U.S. 15, discussed *supra*, note 261.

370. See *Roth*, 354 U.S. 476.

371. See, e.g., *Barnes v. Glen Theater*, 111 S.Ct., 2456, 2460 (1991) ("[live] nude dancing ... is expressive conduct within the outer perimeters of the First Amendment, [but] only marginally so."). Cf. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976) (upholding municipal zoning ordinances which discriminated against theaters exhibiting "adult," sexually explicit, but not "obscene," motion pictures).

372. Learned Hand's *Dennis* test focuses on the danger posed by the speech — its gravity and probability — and not on the social utility or quality of a particular type of speech. However, the preservation of First Amendment values is the very *ratio vivendi* for the *Dennis* test; the broader questions about how those values are served should certainly be factored into this calibration of that test for use in the physical injury cases.

373. Compare *Gertz*, 418 U.S. 323, with *Greenmoss*, 472 U.S. 749, discussed *supra*, at notes 248-78 and accompanying text.

374. Compare *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), with *Connick v. Myers*, 461 U.S. 138 (1983). See generally *Estlund*, *supra* note 249.

victim/witness were a matter "of public concern" even when the assailant is still at-large, then the higher categorical "rating" of constitutional protection for the speech based upon its social utility might off-set the low presumption of protection established at the First Level of the balancing test.

By comparison to the media defendants in the Endangering Revelation cases, *Hustler*, the media defendant in *Herceg*, would have come out of the First Level of the balancing test with a rather strong presumption of protection. The Speech Dissemination/Liability Factor worked strongly in its favor: the pornography was presumptively protected as "non-obscene";³⁷⁵ the public had a right and an interest in receiving it; millions of readers had apparently wanted the "information" and whatever stimulation the "idea" offered. Providing so many persons with the information might have posed a risk that someone in the audience would disobey the warnings, but this could not have been foreseen with certainty. While the danger of the activity, if attempted, was grave indeed, this should have been apparent to the speech recipient as well, and should have served as a further deterrent.³⁷⁶

Judge Jones argued, on the other hand, that because of the content of the speech — pornography at best "bordering" on obscenity — it should have been given lesser constitutional protection, specifically in the context of physical injury suits. There are now more Supreme Court precedents suggesting the creation of such a "lesser protected" category.³⁷⁷ If the Supreme Court had more definitively identified border-line obscenity as a lesser protected-category of First Amendment speech prior to *Hustler's* publication of the auto-erotic asphyxiation article, that would have made for a stronger counter-weight to what was arguably a strong constitutional presumption in *Hustler's* favor. Given the Supreme Court's clearer stance on this point, a future defendant in a similar case might suffer a different judgment.

As for commercial speech, its lower formal First Amendment standing and protection level have already been noted.³⁷⁸ However, as the *Eimann* court properly recognized,³⁷⁹ this lower ranking does not negate the enormous

In *Pickering*, the dismissal of a high school teacher for publicly criticizing the board of education on its allocation of school funds between athletics and education, and its methods for informing taxpayers of the need for additional revenue, was held impermissible under the First Amendment because the subject of the speech was "a matter of legitimate public concern." 391 U.S. at 571-72.

In *Connick*, an assistant district attorney threatened with transfer to another department circulated an inter-office questionnaire concerning, *inter alia*, office transfer policy and office morale. For this act, she was discharged for insubordination. The Court, distinguishing *Pickering*, held that most of the speech in the questionnaire was not that of a citizen upon matters of public concern, but rather, that of an employee upon matters of private interest. *Id.* at 147-49. Such speech, the Court concluded, might be entitled to some First Amendment protection by way of administrative action, but did not require federal court orders to protect a fundamental right. *Id.* at 146-47.

375. Notably, Judge Jones did not feel that this issue had yet been adjudicated. See *Herceg*, 814 F.2d at 1026 (Jones, J., concurring in part, dissenting in part).

376. See discussion *supra* Part IV(b)(6).

377. See *supra* notes 292-96 & 371 and accompanying text.

378. See discussion *supra* notes 367-68 and accompanying text.

379. See discussion *supra* notes 320 and accompanying text.

social utility of commercial speech, and its prevalent and essential role in society. The *Eimann* court properly treated the lower constitutional ranking of commercial speech as a secondary factor given the likely damage to the media's function in disseminating commercial speech if it were effectively forced — on threat of tort liability — to investigate or to drop ads that might lead to the sale of unlawful services.³⁸⁰ It is the impact of a court's decision in creating and imposing future duties of care on the media, and the possible chilling effect on First Amendment speech, that is the final consideration to be weighed at the Second Level of the balancing test.

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? ("the Chilling Effects Factor").

This factor looks not only to the communication at issue in the suit, but also to the broader question of what media speech might be chilled in the future if liability were found. Sometimes, the imposition of liability would not be terribly invasive of the media's role. In *Hyde and Times Mirror*, for example, only the media's ability to publish the names of crime witness/victims was at stake; imposing liability for that would not significantly chill the media's vigorous reporting of crimes. If the line drawn in the gun-for-hire cases were between the protection of an "innocuous" ad in *Eimann* and no protection for the clearly more suggestive ads in *Braun* and *Norwood*, imposing liability in the latter cases would not have a major chilling effect upon the media's role in general or even upon this specific type of commercial speech.

By comparison, in the Inspiration Cases, this factor would militate strongly in favor of First Amendment protection. The artistic, creative speech which frequently is the subject of the Inspiration Cases would be seriously chilled if liability were imposed where one speech recipient among millions has an unexpected and unintended reaction.

In the Instruction Cases, the effect of denying First Amendment protection would impact only on the originators of instructional speech. Again, there is, at least at present, an established common law jurisprudence protecting media defendants who are merely transmitting dangerous or erroneous instructions. Denying First Amendment protection to the originators of dangerous media-transmitted instructions, such as Disney in *Shannon*, would not seem a serious consequence. In the case of "erroneous" instructions, on the other hand, it would be difficult for the media to protect itself short of eliminating a broad range of instructional speech.

Whether the media defendant was the neutral disseminator of the speech, previously noted as relevant in determining whether the defendant had less of a duty of care than a media defendant who originated the speech, is also relevant in this part of the analysis. As suggested by the *Eimann* court, where the media are exclusively engaged in neutral dissemination of ideas or information originated by others, imposing liability would have a significant chilling effect on the broad dissemination of First Amendment-protected

380. See *Eimann*, 880 F.2d at 835-38.

speech. At present, courts have been protecting media defendants in this posture with common law negligence analyses, often infused with First Amendment principles.³⁸¹ However, it cannot be certain that all courts will continue to extend such common law protection in the future, and some commentators have urged that they should not.³⁸²

Summarizing, then, three different factors potentially favoring First Amendment protection for the media defendant — the Speech Dissemination/Liability Factor, the Content Categorization Factor, and the Chilling Effects Factor — are to be weighed at the Second Level of the balancing test against the state's interest in compensating tort victims suffering physical injury, wrongful death, or emotional distress.

SUMMARY AND CONCLUSIONS

In the media physical injury cases, most courts have sensed that some constitutional protection was appropriate, and have analogized the problem to two different areas of First Amendment jurisprudence — the clear and present danger test of *Brandenburg* and the defamation distinction regarding matters that are or are not "of public concern" in the *Gertz* and *Greenmoss* cases.

These analogies are of limited usefulness: the *Brandenburg* model is needlessly over-protective of the media while the *Gertz/Greenmoss* model would be dangerously under-protective. Moreover, these analogies have led the courts into an exclusive and narrow focus on the content of the subject speech which, while not incorrect or irrelevant in and of itself, has obscured the important, unifying First Amendment interest that was at stake in almost all³⁸³ of these cases. That interest is the need to protect the media and media-related enterprises when, in playing their important First Amendment role as the disseminators and magnifiers of speech, they face potentially conflicting common law negligence principles which would expand both the scope of the duty and the potential plaintiff class as the audience increases.³⁸⁴

Using Judge Learned Hand's clear and present danger formulation in *Dennis v. United States*, this Article proposes a calibrated balancing test for use in the media physical injury cases. It is designed to take into account the "speech dissemination/liability factor" as well as other factors, including speech content, which are properly considered in drawing an appropriate balance between the First Amendment interest in protecting the functional role of the media and the states' interests in providing damage remedies for injured parties.

381. See discussion *supra* notes 14-29 & 148-61 and accompanying text.

382. See, e.g., *Diamond & Primm*, *supra* note 4.

383. Again, the Endangering Revelation cases, such as *Hyde* and *Times Mirror*, do not fit this pattern. See discussion *supra* Part IV(b)(2).

384. See discussion *supra* Part III(b).