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The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Materials

Richard C. Ausness

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THE APPLICATION OF PRODUCT LIABILITY
PRINCIPLES TO PUBLISHERS OF VIOLENT
OR SEXUALLY EXPLICIT MATERIAL

*Richard C. Ausness**

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INTRODUCTION

There have been a number of tragic incidents during the past few years in which mentally unstable teenagers have carried guns into school and shot teachers and fellow students. For example, on February 19, 1997, Evan Ramsey, aged sixteen, opened fire in Bethel, Alaska, killing his high school principal and one of his classmates and wounding two other students.¹ On October 1, 1997, Luke Woodham, another sixteen-year-old, stabbed his mother to death and then killed or wounded nine of his classmates in Pearl, Mississippi.² On December 1, 1997, fourteen-year-old Michael Carneal carried six guns into Heath High School in West Paducah, Kentucky, where he killed three of his classmates and wounded five others.³ On March 24, 1998, a thirteen-year-old boy and an eleven-year-old boy set off a fire alarm and then calmly opened fire on teachers and students as they exited from their classrooms at Westside Middle School in Jonesboro, Arkansas.⁴ Four students and one teacher were killed. Two months later, on May 21, 1998, Kip Kinkel, a fifteen-year-old high school freshman, killed his parents and then opened fire in a school cafeteria in Springfield, Oregon, killing two and wounding twenty-two students.⁵ Most recently, on April 21, 1999, two high school seniors, Eric Harris and Dylan

1. See *Principal, Students Slain; Teen Surrenders*, CHI. TRIB., Feb. 20, 1997, at 9.

2. See Thomas B. Edsall, *Mississippi Boy Held in School Killing Spree*, WASH. POST, Oct. 2, 1997, at A03.

3. See John Cheves, *Do Violent Images Cause Violent Action?*, LEXINGTON HERALD-LEADER, May 2, 1999, at A1.

4. See *Arkansas Boys Kill Five in Ambush Outside School*, ST. LOUIS POST DISPATCH, Mar. 25, 1998, at A1.

5. See Scott Sunde & Steve Miletich, *Teen's Rage Turns Deadly*, SEATTLE POST INTELLIGENCER, May 22, 1998, at A1.

Klebold, committed suicide after killing twelve classmates and a teacher and injuring twenty-three others at Columbine High School in Littleton, Colorado.⁶

These schoolyard killings have generated an intense debate about the problem of violence in our society. Some social commentators have attributed teenage violence to the widespread availability of firearms,⁷ while others blame parental neglect, lack of discipline in the schools, or the declining influence of religion and morality in contemporary culture. However, another source of concern is the popular media, which stands accused of purveying sex and violence on a massive scale to impressionable American youths. Critics point out that action movies, such as those which feature Arnold Schwarzenegger, Chuck Norris, Steven Segal or Jean-Claude Van Damme, continue to flood the market, while violence on television, both simulated and real, shows no sign of abating either. And then there are the lyrics of “gangsta” rappers and rock musicians who specialize in such unsavory topics as street crime, gang violence, suicide, drug abuse, and sexual perversion.⁸ To make matters worse, many of the video games that are popular with teenagers also exude violence.⁹ Indeed, some of these video games extend beyond the mere portrayal of violence and actually enable the player to create his own simulated blood bath.¹⁰ Last, but by no means least, there is pornography

6. See Mark Obmascik, *High School Massacre*, DENV. POST, May 21, 1999, at A1.

7. According to Barry Krisberg, President of the National Council on Crime and Delinquency, “[t]he violence in the media and the easy availability of guns are what’s driving the slaughter of innocents.” Richard Lacayo, *Toward the Root of the Evil*, TIME, Apr. 6, 1998, at 38.

8. See generally Peter A. Block, *Modern-Day Sirens: Rock Lyrics and the First Amendment*, 63 S. CAL. L. REV. 777, 783-85 (1990) (declaring that hate, sex, violence, and suicide are common threads among the “nihilistic” themes of today’s heavy metal music); Michelle Munn, Note, *The Effects of Free Speech: Mass Communication Theory and the Criminal Punishment of Speech*, 21 AM. J. CRIM. L. 433, 476 (1994) (stating that “[r]ap artists . . . address gang warfare, violence, poverty, and police brutality in their music, which has become a powerful medium of communication within the black community”).

9. See Anne W. Branscombe, *Internet Babylon? Does the Carnegie Mellon Study of Pornography on the Information Superhighway Reveal a Threat to the Stability of Society?*, 83 GEO. L.J. 1935, 1945 (1995) (observing that parents and psychologists are concerned about the violent material in video games).

10. See David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 32 (1994). For example, in one video game called *Night Trap*, masked and hooded figures pursue scantily-clad women and drain their blood with a gruesome device that constricts their victims’ necks. See *id.* Another popular game called *Mortal Kombat* enables the player to control a figure that kills his enemy by ripping out his spinal cord. See *id.* *Golden Eye*, a game in which the player spends most of his time drawing a bead on his victims down the barrel of a gun, seems almost benign in comparison. See Lacayo, *supra* note 7. These games not only inure players to the effects of violence on others, but, in some cases, actually teach them how to kill more efficiently. For example, Michael Carneal, coolly fired his weapon nine times, hitting eight people, five of them in the neck or head, a remarkable feat of

on the Internet. According to a study by Carnegie Mellon University, sexually explicit Web sites on the Internet currently offer much more than just naked ladies; commercial Web sites now routinely depict sadomasochism, bestiality, child pornography and other forms of *outré* behavior.¹¹

Anecdotal evidence suggests that homicidal teenagers view a great deal of violent and sexually explicit material and are profoundly influenced by it. For example, Eric Harris and Dylan Klebold, the killers at Columbine High School, called themselves the "Trenchcoat Mafia" and dressed in Gothic-style black coats similar to that worn by Keanu Reeves, a homicidal character in the movie, *Matrix*. Michael Carneal, convicted of killing his classmates at Heath High School, was allegedly influenced to kill by watching a violent scene from the movie *The Basketball Diaries*,¹² while Sarah Edmondson and Ben Darras were inspired to embark on their crime spree after repeatedly watching a video cassette copy of the movie *Natural Born Killers*.¹³ In addition, inflammatory lyrics in rap music have allegedly provoked gang violence and attacks on law enforcement officers.¹⁴ For example, in one case, Ronald Ray Howard, a 19-year-old auto thief and gang member, killed a state trooper who had pulled him over for a minor traffic violation.¹⁵ At his trial, Mr. Howard, a devotee of gangsta rap music, claimed that he was inspired to kill by listening to rap artist Tupac Shakur's music.¹⁶ In a somewhat similar fashion, the lyrics of heavy metal musicians Judas Priest¹⁷ and Ozzie Osborne¹⁸ allegedly inspired some of

marksmanship for a person who did not have much experience with guns. See John Leo, *When Life Imitates Video*, U.S. NEWS & WORLD REP., May 3, 1999, at 14. Carneal's impressive marksmanship might also be attributed to the fact that head shots pay a bonus in many video games. See *id.*

11. See Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849, 1889 (1995).

12. See Cheves, *supra* note 3.

13. See *Byers v. Edmondson*, 712 So. 2d 681, 684 (Ct. App.), *writ error denied*, 726 So. 2d 29 (La. 1998), *cert. denied*, *Time Warner Ent. Corp. v. Byers*, 526 U.S. 1005 (1999). This movie was blamed for inspiring at least a dozen "copycat" killings in the United States and Europe. See Sandra Davidson, *Blood Money: When Media Expose Others to Risk of Bodily Harm*, 19 HASTINGS COMM. & ENT. L.J. 225, 238 (1997).

14. See, e.g., Crump, *supra* note 10, at 63 (declaring that "some record distributors and gangsta rappers are not merely recklessly indifferent to the risk of violence that they create; they are aware with crystalline clarity that violent results are predictable").

15. See Munn, *supra* note 8, at 476-78. The offending lyrics appeared in Mr. Tupac's song *Crooked Ass Nigga*. See *id.* at 477.

16. See *id.* at 476.

17. See Laura W. Brill, Note, *The First Amendment and the Power of Suggestion: Protecting "Negligent" Speakers in Cases of Imitative Harm*, 94 COLUM. L. REV. 984, 1003 (1994) (discussing *Vance v. Judas Priest*, 16 Media L. Rep. 2241 (Nev. Dist. Ct. 1989)); Robert N. Houser, Comment, *Alleged Inciteful Rock Lyrics—A Look at Legal Censorship and Inapplicability of First Amendment*

their loyal fans to commit suicide.

Violent video games and pornography also may have encouraged some individuals to commit acts of violence. For example, the killing spree at Columbine High School resembled the plot of the video game *Postal*.¹⁹ According to students at Columbine High School, Eric Harris and Dylan Klebold were avid players of *Doom* and *Duke Nuke 'Em*, while *Doom*, *Quake*, and *Mortal Combat* were personal favorites of Michael Carneal.²⁰ In addition, an analysis of the data on Michael Carneal's computer revealed that he frequently visited pornographic Web sites on the Internet.²¹

The schoolyard violence described above has generated considerable public pressure to curb the perceived excesses of the popular media. Of course, the government has been doing just that, without much apparent success, for more than a hundred years.²² Recently, however, victims of teenage violence have enlisted trial lawyers in their fight against sex and violence in the popular media. For example, in April 1999, the parents of three students slain by Michael Carneal at Heath High School brought suit against the producers of the 1995 movie, *The Basketball Diaries*, and a number of video game manufacturers and suppliers.²³ For good measure, they also sued the owners of two adult-oriented Internet Web sites.²⁴ In their complaint, the plaintiffs alleged that each of these defendants contributed to the killings at Heath High School and asked for \$30 million in compensatory damages and \$100 million in punitive damages.²⁵ The case, styled *James v. Meow Media*,²⁶ is now being tried in a federal district court in western Kentucky.²⁷

Standards, 17 OHIO N.U. L. REV. 323, 329 (1992) (same).

18. See *Waller v. Osborne*, 763 F. Supp. 1144 (D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir. 1992); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Cal. Ct. App. 1988).

19. See Leo, *supra* note 10, at 14.

20. See Cheves, *supra* note 3.

21. See Cheves, *supra* note 3.

22. See E. Barrett Prettyman & Lisa A. Hook, *The Control of Media-Related Imitative Violence*, 38 FED. COM. B.J. 317, 320 (1987) (pointing out that "[f]or over one hundred years, individuals, groups and Congress have questioned the role of various media in creating a social climate conducive to increased violence"); see also Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741 (1992) (describing the history of censorship in the United States).

23. See Cheves, *supra* note 3.

24. See Cheves, *supra* note 3.

25. Complaint, ¶ 37, 38, *James v. Meow Media*, Civil Action No. 5:99 CV 0096-J (W.D. Ky. Apr. 13, 1999) [hereinafter referred to as "Complaint"].

26. Civil Action No. 5:99 CV 0096-J (W.D. Ky. Apr. 13, 1999). Meow Media is not a television network for cats; rather, it is a sexually explicit Web site that was frequently visited by Michael Carneal. See Complaint, ¶ 29.

27. The trial court judge granted the defendants' motion to dismiss on April 6, 2000. This

The complaint alleges that the producers of *Basketball Diaries* “fabricated a gratuitous and graphic murder spree” in order to increase the movie’s appeal to younger audiences.²⁸ According to the plaintiffs, this scene in the movie, a dream sequence in which the protagonist (played by Leonardo DiCaprio) massacres his teachers and fellow students at a Catholic school with a shotgun, inspired Michael Carneal to engage in a similar rampage at Heath High School.²⁹ The complaint also alleges that the defendant video game manufacturers and suppliers distributed “violent video games which made violence pleasurable and attractive, and disconnected the violence from the natural consequences thereof, thereby causing Michael Carneal to act out the violence.”³⁰ Furthermore, the plaintiffs claim that these video games “trained Carneal how to point and shoot a gun in a fashion making him an extraordinarily effective killer without teaching him any of the constraints or responsibilities needed to inhibit such a killing capacity.”³¹

Finally, the complaint alleges that the owners of two pornographic Web sites distributed obscene and pornographic material over the Internet which “served to further attenuate actions from consequences in Carneal’s mind, made virtual sex pleasurable and attractive, provoked violence in Carneal, and disconnected the violence from the natural consequences thereof, thereby causing Michael Carneal to act out the violence.”³² According to the complaint, Dr. Diane Schetky, an adolescent psychiatrist hired by the Carneal family to determine whether Michael was mentally ill within the meaning of the criminal code, concluded that he was “profoundly influenced by his exposure to the above violent/pornographic media. . . .”³³ According to the complaint, Dr. Schetky observed that “[t]he media’s depiction of violence as a means of resolving conflict and a national culture which tends to glorify violence further condoned his thinking.”³⁴

Although the complaint contains a number of negligence claims, the plaintiffs also rely on section 402A of the Restatement (Second) of Torts³⁵ as a basis for their claim that each of the defendants manufactured or distributed a defective product. For example, in Count I of their complaint, the plaintiffs argue that the so-called “*Diaries* Defendants”³⁶ “made and

ruling is currently being appealed. See Memorandum Opinion, *James v. Meow Media*, 90 F. Supp. 2d 798 (W.D. Ky. 2000).

28. Complaint, ¶ 13.

29. See *id.*

30. *Id.* ¶ 20.

31. *Id.* ¶ 21.

32. *Id.* ¶ 29.

33. *Id.* ¶ 8.

34. *Id.*

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

36. The *Diaries* Defendants included Time Warner, Inc., Palm Pictures, Island Pictures, New

sold a movie in a defective and unreasonably dangerous condition which caused harm to persons other than the users or consumers.”³⁷ In Count II, the plaintiffs claim that the various manufacturers and distributors of the video games, *Quake* and *Doom*, known as the “Video Game Defendants,”³⁸ “made and sold a game in a defective and unreasonably dangerous condition which caused harm to persons other than users or consumers.”³⁹ The complaint incorporates by reference a similar claim against several Web site owners, referred to as the “Internet Defendants.”⁴⁰

A victory for the plaintiffs in this litigation will no doubt encourage others to sue communication and entertainment companies when they are injured by teenage misfits. If this occurs, it will have a substantial economic impact upon these companies and may cause them to reevaluate the content of the music, movies, and video games that they sell to the public. While the teenage market is a profitable one,⁴¹ the costs of defending against tort actions will be considerable, and if media defendants lose these cases, the aggregate effect of multiple compensatory and punitive damages awards would have a disastrous effect on media publishers. Increased tort liability will also have a profound and detrimental effect on society at large. Not only will the costs of paying tort claims be passed on to consumers in the form of higher prices, the prospect of massive tort liability will discourage artistic expression, particularly in the movie, television and recording industries.

This Article examines the doctrinal and constitutional barriers that must be overcome by those who wish to recover from media defendants on a products liability theory. Part I provides an overview of cases. They are divided into two major categories: (1) claims arising from a publication’s information content and (2) claims arising from a publication’s point of view or idea content. This latter category can be further subdivided into cases where media defendants allegedly facilitate the commission of a

Line Cinema and Polygram Film Entertainment Distribution, Inc. *See* Complaint, ¶ 10.

37. Complaint, ¶ 15w.

38. The Video Game Defendants included Midway Home Entertainment, Apogee Software, Inc., Id Software, Inc., Virtus Corp., Acclaim Entertainment, Inc., Atari Corp., GT Interactive, Williams Entertainment, Inc., Square Soft, Inc., and Sony Computer Entertainment. *See id.* ¶ 19.

39. *Id.* ¶ 23w.

40. *Id.* ¶ 26. The Internet Defendants included Meow Media, Inc. and Network Authentication Systems, Inc. *See id.* ¶ 27.

41. United States movie box office sales were \$6.95 billion in 1998. The large portion of this revenue came from the teenage market. *See* Deborah Claymon, *Selling Violence: Link Between Popular Games and Tragic Events Puts Booming Industry in Conflict*, SAN JOSE MERCURY NEWS, May 9, 1999. Revenue from the sale or licensing of video games came to \$6.2 billion in 1998. *See id.* Action-oriented video games earned about \$1.5 billion during this period. *See id.* Adult-oriented Web sites are said to produce about \$1 billion a year in revenue. *See More Buck for the Bang*, NEWSWEEK MAG., Sept. 20, 1999, at 21.

crime, cases where publishers allegedly induce others to imitate violent acts that are portrayed in material disseminated to the public, and cases where they allegedly inspire readers or viewers to commit violent or illegal acts.

Part II identifies existing doctrinal barriers to product liability claims against media defendants. For example, plaintiffs who base their claims on a product liability theory will have to persuade the courts that books, movies, video games and other information media are *products* which are placed in the stream of commerce by their producers. Plaintiffs must also argue that commercial transactions which enable material to reach the consuming public should be characterized as *sales*. Furthermore, plaintiffs must prove the existence of a *defect* which makes the “product” unreasonably dangerous to users or consumers. In addition, regardless of whether plaintiffs rely on negligence or strict liability principles, they must prove that the actions of the publisher or the condition of the product have caused the plaintiffs’ injuries. Finally, plaintiffs will have to overcome the argument that the actions of listeners, viewers, or third parties were not sufficient to break the chain of causation.

Part III is concerned with whether media defendants should be allowed to invoke the protection of the First Amendment in order to shield them against product liability suits by injured parties. The first issue is whether the material disseminated by the media qualifies as speech or expression. Assuming that it does, the next issue is whether such material is protected speech or whether it falls into a category of unprotected speech, such as obscenity or incitement to violence. This Article concludes that both violent and sexually explicit portrayals are legitimate forms of expression and are, therefore, entitled to full constitutional protection.

Part IV evaluates three liability standards. The first would subject media publishers to strict liability in tort and deny them First Amendment protection for sexually explicit expression or expression that inspires violence or other illegal conduct. The second liability standard would also foreclose media defendants from claiming First Amendment protection, but would also require plaintiffs to prove that a publisher was negligent. The third liability standard, which is similar to the current state of the law, would essentially prohibit tort actions against media publishers on the basis of content.

The Article concludes by endorsing this last alternative. There are three reasons for taking this position. First, a rule that prohibits tort actions against media defendants would promote artistic expression and media coverage of mature or controversial subjects. Second, such a rule would discourage special interest groups from using the tort system as a vehicle to further their own social agendas. Third, removing media publishers from the pool of potential defendants will encourage moral leaders to place the blame where it really belongs—on those who do the actual killing—and

not allow it to be shifted elsewhere.

I. AN OVERVIEW OF THE CASELAW

Part I introduces a classification system that will be employed later in this Article.⁴² According to this taxonomy, tort actions against media publishers, other than those which involve defamation or invasion of privacy, can be divided into two basic categories: those based on a publication's information content and those based on a publication's idea content. The first category includes: (1) publications that involve inaccurate or misleading information, (2) publications that involve incorrect or incomplete instructions on how to perform a task or operation, (3) publications that involve advertisements of defective products, and (4) inaccurate aeronautical charts. The second category includes: (1) publications that facilitate violent acts, (2) publications that result in imitative violence, and (3) publications that inspire readers or viewers to engage in violent behavior.

A. *Claims Arising from a Publication's Information Content*

The first group of cases involves consumers who have been injured as the result of relying on information provided by a media publisher. In one case, the plaintiff sued the publisher of a popular travel guide, claiming that the defendant incorrectly assured readers that it was safe to body surf at Kekaha Beach on the island of Kauai in the Hawaiian Islands.⁴³ In another case, two mushroom pickers brought suit against the publisher of *The Encyclopedia of Mushrooms* after ingesting noxious fungi which had been mistakenly described as edible in the defendant's book.⁴⁴ The plaintiffs failed to prevail in these cases because they could not persuade the courts that the books in question were defective products.⁴⁵

A second group includes a large number of cases brought by readers who have been injured while attempting to follow instructions provided in self-improvement books and instructional guides.⁴⁶ In one case, an amateur

42. This classification system is loosely based on the work of Professor Sims. See Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting From Media Speech: A Comprehensive First Amendment Approach*, 34 ARIZ. L. REV. 231, 235 (1992).

43. See *Birmingham v. Fodor's Travel Publishers, Inc.*, 833 P.2d 70, 73 (Haw. 1992).

44. See *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1033 (9th Cir. 1991).

45. See *id.* at 1036; *Birmingham*, 833 P.2d at 79.

46. See *Lewin v. McCreight*, 655 F. Supp. 282 (E.D. Mich. 1987) (involving a suit against publisher by plaintiff who was injured while mixing a mordant according to instructions in defendant's book, *The Complete Metalsmith*); see also *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977) (involving a claim that author of exotic cookbook should have warned readers that raw Dasheen root was poisonous); *Alm v. Van Nostrand Rheinhold Co.*, 480 N.E.2d 1263 (Ill. Ct. App. 1985) (involving a suit by a reader of the defendant's book, *The Making of Tools*, who was

cook brought suit against the publishers of the *Trade Winds Cookery*, a cookbook which featured exotic ingredients from the tropics.⁴⁷ The plaintiff, who had munched on some raw Dasheen root while preparing a gourmet meal, alleged that the book failed to warn her that uncooked Dasheen root was poisonous.⁴⁸ In another case, a constipated nursing student sought damages after treating herself to a hydrogen peroxide enema in accordance with directions provided in the defendant's publication, a *Textbook for Medical and Surgical Nursing*.⁴⁹ Once again, the plaintiffs in these cases failed to recover because they based their claims on products liability theories and were unable to convince the court that the books in question should be classified as products.⁵⁰

A third group of cases involve suits by consumers who have been injured by defective products advertised in the defendant's newspaper or magazine. In one case, for example, a reader of *Popular Mechanics* sued the publishers after purchasing defective fireworks advertised in the defendant's magazine.⁵¹ In another case, a group of irate investors sued the *Wall Street Journal*, claiming that advertisements placed in the *Journal* by a Texas mortgage company were false.⁵² In yet another case, a woman brought suit against *Seventeen Magazine*, alleging that she suffered from toxic shock syndrome after using Playtex tampons in response to an advertisement placed in the defendant's magazine by the product's manufacturer.⁵³ The plaintiffs in these cases lost because the courts concluded that requiring editors and copywriters to check the truth of such advertisements would be too great a burden for newspaper and magazine publishers to bear.⁵⁴

A fourth group of cases is concerned with claims against the publishers of aeronautical charts which depict airways, flight procedures, navigation

injured while attempting to make a woodworking tool in accordance with the book's instructions); *Walter v. Bauer*, 439 N.Y.S.2d 821 (Sup. Ct. 1981), *aff'd* in part & *rev'd* in part on other grounds, 451 N.Y.S.2d 533 (App. Div. 1982) (involving a suit by a student who suffered eye injury while conducting an experiment with rubber bands and ruler as described in fourth-grade science textbook published by defendant); *Young v. Mallett*, 371 N.Y.S.2d 1 (1975) (alleging that plaintiff was injured as a result of ingesting excessive amounts of vitamin A, a practice allegedly recommended in the defendant's nutrition guide, *Let's Have Healthy Children*); *Smith v. Linn*, 563 A.2d 123 (Super. Ct. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991) (involving a suit by a reader who died of cardiac failure by following a liquid protein diet described and recommended in defendant's unintentionally prescient book, *The Last Chance Diet*).

47. *See Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977).

48. *See id.* at 1055.

49. *See Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216 (D. Md. 1988).

50. *See id.* at 1217; *Cardozo*, 342 So. 2d at 1056-57.

51. *See Yuhas v. Mudge*, 322 A.2d 824 (N.J. Super. Ct. 1974).

52. *See Pittman v. Dow Jones, Inc.*, 662 F. Supp. 921 (E.D. La. 1987).

53. *See Walters v. Seventeen Magazine*, 241 Cal. Rptr. 101 (Cal. Ct. App. 1987).

54. *See Pittman*, 662 F. Supp. at 922; *Walters*, 241 Cal. Rptr. at 103; *Yuhas*, 322 A.2d at 825.

and communication radio frequencies, restricted areas, landmarks and terrain.⁵⁵ In one case, an insurance company brought an indemnity action against the publisher of a landing approach chart, claiming that the chart was defective because the landing profile depicted in the chart was out of scale with other data represented on the chart.⁵⁶ Another case involved a suit against a chart maker by the crew of an airplane that crashed, contending that some of the data in defendant's instrument approach chart was misleading.⁵⁷ For the most part, these suits have been successful.⁵⁸ In contrast to other defective information cases, the courts in the aeronautical chart cases have almost always accepted the argument that inaccurate aeronautical charts are defective products.⁵⁹

B. *Claims Arising from a Publication's Point of View or Idea Content*

This category includes cases in which publishers either facilitate the commission of a crime, induce others to imitate violent acts that are portrayed, or inspire readers or viewers to commit violent acts.

1. Facilitation Cases

Those who bring lawsuits based on a facilitation rationale claim that the defendant increased the risk of criminal attack by publishing information about a crime victim or witness before the suspect has been taken into custody, publishing instructions on how to commit a crime, or publishing "gun-for-hire" advertisements.⁶⁰ *Hyde v. City of Columbia*,⁶¹ *Times Mirror*

55. See Robert B. Schultz, *Application of Strict Products Liability to Aeronautical Chart Publishers*, 64 J. AIR L. & COM. 431, 434 (1999). There are three types of charts: en route charts, area charts and approach charts. See David L. Abney, *Liability for Defective Aeronautical Charts*, 52 J. AIR L. & COM. 323, 324 (1986). En route charts show flight paths and airways across a large area. See *id.* Area charts show airways around major metropolitan area. Approach charts depict runway approach paths. See *id.*

56. See *Aetna Cas. & Sur. Co. v. Jeppeson*, 642 F.2d 339 (9th Cir. 1981); see also *Saloomey v. Jeppeson & Co.*, 707 F.2d 671 (2d Cir. 1983) (alleging that approach chart was defective).

57. See *Brocklesby v. United States*, 767 F.2d 1288 (9th Cir. 1985); see also *Fluor Corp. v. Jeppeson & Co.*, 216 Cal. Rptr. 68 (Cal. Ct. App. 1985) (claiming that a mistake in defendant's instrument approach chart caused plane crash).

58. The one exception is *Times Mirror Co. v. Sisk*, 593 P.2d 924 (Ariz. Ct. App. 1978), brought by the crew of a cargo jet which crashed into a mountain while attempting to land at an airport in the Philippines. However, in that case it was undisputed that the pilot was off course and was flying at the wrong elevation when the crash occurred. See *id.* at 927.

59. See *Brocklesby*, 767 F.2d at 1295; *Aetna Casualty*, 642 F.2d at 342.

60. See *Sims*, *supra* note 42, at 249.

61. 637 S.W.2d 251 (Mo. Ct. App. 1982).

Co. v. Superior Court,⁶² and *Risenhoover v. England*⁶³ are illustrative of the first subcategory. In *Hyde*, a kidnapping victim brought a successful action against a newspaper for disclosing her name to the public while her abductor was still at large.⁶⁴ In *Times Mirror*, a California court upheld an invasion of privacy claim by a murder witness against a newspaper which had published her name while the murderer was still free.⁶⁵ In *Risenhoover*, it was alleged that newspaper and television stations, having discovered that federal authorities were about to raid the headquarters of the infamous David Koresh, sent news teams out to the compound, thereby alerting Koresh, and allegedly causing the plaintiffs' deaths in the ensuing gun battle.⁶⁶ In several of these cases, the plaintiff prevailed, notwithstanding claims by the defendants that they were merely exercising their First Amendment rights.⁶⁷

Another type of facilitation case involves the publication of explicit instructions on how to commit an illegal act. The leading example of this genre is *Rice v. Paladin Enterprises, Inc.*⁶⁸ In *Rice*, murder victims brought suit against the publisher of a "hit man" instruction book.⁶⁹ In that case, the court exhibited no qualms about imposing liability after the defendant unwisely admitted that it had published its manual for the express purpose of training aspiring criminals.⁷⁰

The last group of facilitation cases involve "gun-for-hire" advertisements.⁷¹ They include *Eimann v. Soldier of Fortune Magazine, Inc.*,⁷² *Braun v. Soldier of Fortune Magazine, Inc.*⁷³ and *Norwood v. Soldier of Fortune Magazine, Inc.*⁷⁴ *Eimann* involved a suit against *Soldier of Fortune Magazine* by the wife who was injured by a hit man hired by her husband to kill her.⁷⁵ The husband had contacted the hit man through an "employment wanted" advertisement published in *Soldier of Fortune Magazine*.⁷⁶ In *Braun*, the suit was brought by sons of a parent who was murdered by a hit man hired through an advertisement placed in *Soldier of*

62. 244 Cal. Rptr. 556 (Cal. Ct. App. 1988).

63. 936 F. Supp. 392 (W.D. Tex. 1996).

64. *Hyde*, 637 S.W.2d at 25..

65. *Times Mirror*, 244 Cal. Rptr. at 559, 560.

66. *Risenhoover*, 936 F. Supp. at 396.

67. *See id.* at 405; *Times Mirror*, 244 Cal. Rptr. at 560.

68. 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998).

69. *Id.* at 241.

70. *Id.* at 265.

71. *See Crump*, *supra* note 10, at 23-25.

72. 880 F.2d 830 (5th Cir. 1989).

73. 968 F.2d 1110 (11th Cir. 1992).

74. 651 F. Supp. 1397 (W.D. Ark. 1987).

75. *Eimann*, 880 F.2d at 832.

76. *See id.*

Fortune.⁷⁷ In *Norwood*, the injured victim of a failed murder-for-hire assignment sued *Soldier of Fortune* for providing assistance to unemployed thugs and mercenaries.⁷⁸ The results in these “gun-for-hire” cases have been mixed. On one hand, the court in *Eimann* declared that the advertisement was so ambiguous that the magazine’s publisher could not reasonably have known of the hit man’s criminal intent.⁷⁹ On the other hand, the court in *Braun* concluded that the publisher should have known that the advertiser was offering to commit a murder.⁸⁰ The court in *Norwood* also held that the publisher could be held liable for any foreseeable harm to the plaintiff.⁸¹

2. Imitation Cases

These cases arise when a viewer deliberately tries to imitate a dangerous or illegal activity that is depicted in material of the defendant. For example, two teenagers, imitating a scene from the movie, *The Program*, lay down on a highway at night and, not surprisingly, were struck by a passing car.⁸² In *DeFilippo v. NBC*,⁸³ a thirteen-year old boy accidentally hanged himself while imitating a stunt that he had observed on television.⁸⁴ In *Herceg v. Hustler Magazine, Inc.*,⁸⁵ an oversexed teenager also inadvertently hanged himself while performing an exercise involving masturbation and asphyxiation.⁸⁶ This particular autoerotic episode was inspired by an article in *Hustler Magazine* aptly entitled “Orgasm of Death.”⁸⁷ The victim in *Sakon v. Pepsico, Inc.*⁸⁸ injured himself in a more prosaic fashion while engaged in “lake jumping,” an activity that appeared in various television commercials for the soft drink Mountain Dew.⁸⁹ Finally, in *Olivia N. v. National Broadcasting System*,⁹⁰ a young girl, was “artificially raped” at a public beach by a gang of vicious teenagers who

77. *Braun*, 968 F.2d at 1112.

78. *Norwood*, 651 F. Supp. at 1397-98.

79. *Eimann*, 880 F.2d at 834.

80. *Braun*, 968 F.2d at 1121.

81. *Norwood*, 651 F. Supp. at 1403.

82. See Mike Quinlan & Jim Persels, *It's Not My Fault, the Devil Made Me Do It: Attempting to Impose Tort Liability on Publishers, Producers, and Artists for Injuries Allegedly "Inspired" by Media Speech*, 18 S. ILL. U. L.J. 417, 419 (1994).

83. 446 A.2d 1036 (R.I. 1982).

84. *Id.* at 1038.

85. 814 F.2d 1017 (5th Cir. 1987).

86. See *id.*

87. See *id.* at 803.

88. 553 So. 2d 163 (Fla. 1989).

89. *Id.* at 164.

90. 178 Cal. Rptr. 888 (Cal. Ct. App. 1981), *cert. denied sub nom. Niemi v. National Broad. Co.*, 458 U.S. 1108 (1982).

had recently observed a similar event portrayed on television.⁹¹ In each of these cases, the defendant successfully argued that its actions should be protected by the First Amendment.⁹²

3. Inspiration Cases

In some cases, the plaintiffs have alleged that depictions of violence encouraged or inspired listeners and viewers to commit violent acts against themselves or others.⁹³ In one case, *Weirum v. RKO General, Inc.*,⁹⁴ a radio station offered a prize to the first person to locate its peripatetic disc jockey, "the Real Don Steele." Unfortunately, the plaintiff was killed when his car was run off the road by some inattentive teenagers who were pursuing the elusive Mr. Steele.⁹⁵ The court upheld the plaintiff's claim, reasoning that the radio station could have foreseen reckless driving by some contestants and, consequently, should have refrained from sponsoring such a dangerous event.⁹⁶

Other litigants, however, have not been so successful. For example, in *Bill v. Superior Court*,⁹⁷ an innocent bystander was shot outside a theater where the gang-related movie, *Boulevard Nights*, was being shown.⁹⁸ The plaintiff unsuccessfully argued that the producers of the film knew that such a movie would attract people who were inclined toward violent conduct, and therefore, should have protected theater patrons and bystanders against criminal attacks.⁹⁹

In *Zamora v. Columbia Broadcasting System*,¹⁰⁰ a teenage scofflaw sued a number of television networks, claiming that he had become involuntarily hooked on television violence and had shot and killed his 83-year-old neighbor while so addicted.¹⁰¹ The plaintiff's contention, apparently, was that he would have eschewed a life of crime if only the television networks had not broadcast so much violent programming.¹⁰² The court was not very impressed with this theory and summarily dismissed the case.¹⁰³ In another case, *Yakubowicz v. Paramount Pictures*

91. See *id.* at 891 (explaining what it means to be "artificially raped").

92. See *Herceg*, 565 F. Supp. at 805; *Olivia N.*, 178 Cal. Rptr. at 893; *Sakon*, 553 So. 2d at 166; *DeFilippo*, 446 A.2d at 1042.

93. See *Sims*, *supra* note 42, at 239-43.

94. 539 P.2d 36 (Cal. 1975).

95. See *id.* at 38-39.

96. See *id.* at 40-42.

97. 187 Cal. Rptr. 625 (Cal. Ct. App. 1982).

98. See *id.* at 626-27.

99. See *id.* at 628.

100. 480 F. Supp. 199 (S.D. Fla. 1979).

101. See *id.* at 200.

102. See *id.* at 201.

103. See *id.* at 200.

Corp.,¹⁰⁴ the parents of a young girl who was knifed to death sued the producers of the gang film, *The Warriors*, claiming that the movie incited viewers to commit violence.¹⁰⁵ A Massachusetts court, however, determined that the film did not advocate violence or encourage viewers to engage in illegal conduct.¹⁰⁶

Finally, two cases, *McCollum v. CBS, Inc.*¹⁰⁷ and *Waller v. Osborne*,¹⁰⁸ were brought by parents of emotionally disturbed teenagers who were allegedly induced to commit suicide by the lyrics of Ozzy Osborne's music.¹⁰⁹ In *McCollum*, a nineteen-year-old fan, shot and killed himself while listening to Osborne's music.¹¹⁰ A similar incident occurred in the *Waller* case.¹¹¹ In each instance, the court refused to hold Osborne liable because he did not directly incite his listeners to commit suicide.¹¹² The victim in *Byers v. Edmondson*¹¹³ was one of several individuals attacked by viewers of the film, *Natural Born Killers*.¹¹⁴ In that case, two teenage psychopaths, after repeatedly viewing a videotape of the film, went on a crime spree, shooting the plaintiff during the attempted robbery of a convenience store.¹¹⁵ The plaintiff brought suit against producers of the film, claiming that they intended to cause viewers to imitate the violent conduct of the movie's main characters.¹¹⁶ A state appeals court allowed the plaintiff to try to prove that the producers actually intended for viewers to commit violent crimes.¹¹⁷

In sum, courts are reluctant to subject the publishers of non-defamatory material to tort liability despite claims by plaintiffs that these materials have directly caused physical harm. When plaintiffs allege that the publication is a defective product, the courts tend to analyze these claim in terms of conventional tort doctrine. Although First Amendment issues often lurk in the background, they are seldom addressed explicitly. On the

104. 536 N.E.2d 1067 (Mass. 1989).

105. See *id.* at 1068. This was just one of many acts of violence perpetrated by teenaged viewers of *The Warriors*. See Sims, *supra* note 42, at 247.

106. 536 N.E.2d at 1071; see also *Watters v. TSR, Inc.*, 904 F.2d 378 (6th Cir. 1991) (holding that the publishers of the board game *Dungeons and Dragons* was not liable for the suicide of a teenager).

107. 249 Cal. Rptr. 187 (Cal. Ct. App. 1988).

108. 763 F. Supp. 1144 (D. Ga.), *aff'd*, 958 F.2d 1084 (11th Cir. 1991).

109. See *Weller*, 763 F. Supp. at 1145; *McCollum*, 249 Cal. Rptr. at 188.

110. See *McCollum*, 249 Cal. Rptr. at 189.

111. See *Weller*, 763 F. Supp. at 1145.

112. See *id.* at 1152; *McCollum*, 249 Cal. Rptr. at 198.

113. 712 So. 2d 681 (La. Ct. App. 1998), *cert. denied*, 119 S. Ct. 1143 (1999).

114. See *id.* at 683-84; see also Davidson, *supra* note 13, at 238 (observing that this movie had been blamed for about a dozen killings in the United States and Europe).

115. See *Byers*, 712 So. 2d at 684.

116. See *id.* at 687.

117. See *id.* at 688.

other hand, where plaintiffs allege negligence on the part of the publisher, the courts are more likely to resolve the case on First Amendment grounds.

II. DOCTRINAL ISSUES

In the past, claims against media publishers were usually based upon such legal theories as negligent publication, failure to warn, or negligent misrepresentation. Now, plaintiffs commonly rely upon principles of strict products liability as well. However, as we shall see below, there are serious doctrinal problems with treating publishers as sellers of defective products.

A. *Traditional Liability Theories*

The traditional liability theories are negligent publication, failure to warn, and negligent misrepresentation. Each of these theories requires the plaintiff to prove that his or her injury was caused by some sort of culpable conduct on the part of the publisher.

1. Negligent Publication

"Negligent publication" involves the publication of information that results in physical harm to another. In one group of cases, plaintiffs claimed that media defendants subjected them to the risk of criminal attack by publishing information about a crime victim or witness before the suspect had been taken into custody. For example, in *Hyde v. City of Columbia*,¹¹⁸ the victim of an abduction brought a negligent publication action against a newspaper for disclosing her name to the public despite the fact her abductor was still at large.¹¹⁹ Citing section 449 of the Restatement (Second) of Torts,¹²⁰ the court declared that the newspaper had a duty to protect the plaintiff against the foreseeable criminal acts of third parties.¹²¹ In *Risenhoover v. England*,¹²² when local newspaper and television stations found out that federal agents were planning to raid the headquarters of cult leader, David Koresh, they sent news teams out to the Branch Davidian compound, thereby alerting Koresh to the fact that a raid was imminent.¹²³ The court allowed a negligent publication suit by law enforcement officers killed in the ensuing gun battle to go to trial.¹²⁴

The negligent publication theory was also used in some of the "gun for

118. 637 S.W.2d 251 (Mo. Ct. App. 1982).

119. *See id.* at 253.

120. RESTATEMENT (SECOND) OF TORTS § 449 (1969).

121. *Hyde*, 637 S.W.2d at 253.

122. 936 F. Supp. 392 (W.D. Tex. 1996).

123. *See id.* at 400-403.

124. *See id.* at 405.

hire” cases. *Eimann v. Soldier of Fortune Magazine, Inc.*,¹²⁵ for example, involved a negligent publication suit against *Soldier of Fortune Magazine* by a wife who was shot by a hit man hired by her husband.¹²⁶ The plaintiff claimed that the publisher should have known that the advertiser was seeking employment as a hit man and, therefore, should have refused to publish the ad.¹²⁷ The court, however, determined that the advertisement was so ambiguous that the publisher could not have discovered its criminal purpose merely by reading it.¹²⁸ However, in *Braun v. Soldier of Fortune Magazine, Inc.*,¹²⁹ another negligent publication case, the court concluded that a similar advertisement was clear enough to alert the publisher to the fact that the advertiser was offering to perform criminal acts.¹³⁰

2. Failure to Warn

Some plaintiffs have argued that media defendants owe an affirmative duty to warn that information contained in their publications might not be accurate or that certain activities described in their publication involve inherent risks.¹³¹ A failure to warn claim is narrower than a negligent publication claim because the plaintiff does not seek to hold the defendant liable for publishing particular information, but only for failing to warn about the risks associated with its publication. Even so, this theory has found little favor with the courts. For example, in *Cardozo v. True*,¹³² the plaintiff brought suit against a retail seller of a cookbook which featured unusual ingredients from the tropics. The plaintiff was injured when she ate a bit of uncooked Dasheen root while preparing a meal and became seriously ill.¹³³ According to the plaintiff, the bookstore owner should have warned her that raw Dasheen root could be poisonous.¹³⁴ While conceding that the author of the cookbook might have been negligent, the court concluded that it would be unreasonable to impose a duty on retail sellers to warn customers about possible mistakes in the books they sold.¹³⁵

125. 880 F.2d 830 (5th Cir. 1989).

126. *See id.* at 831-32.

127. *See id.* at 833.

128. *See id.* at 834.

129. 968 F.2d 1110 (11th Cir. 1992).

130. *See id.* at 1121.

131. *See Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991); *see also Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977); *Birmingham v. Fodor's Travel Pubs., Inc.*, 833 P.2d 70 (Haw. 1992); *Walter v. Bauer*, 439 N.Y.S.2d 821 (N.Y. Sup. Ct. 1981), *aff'd* in part & *rev'd* in part on other grounds, 451 N.Y.S. 533 (N.Y. App. Div. 1982); *Way v. Boy Scouts of Am.*, 856 S.W.2d 230 (Tex. Ct. App. 1993).

132. 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977).

133. *See id.* at 1055.

134. *See id.*

135. *See id.* at 1057.

The Supreme Court of Hawaii reached a similar conclusion with respect to publishers in *Birmingham v. Fodor's Travel Publishers, Inc.*¹³⁶ In that case, the plaintiff contended that the defendant's travel book should have warned its readers that it was not safe to body surf in the waters off of Kehaha Beach in Hawaii. The court, however, rejected the plaintiff's claim, concluding that imposing such a duty would require a book publisher to independently verify the accuracy of every statement in the books it published.¹³⁷ According to the court, such a burden would be an unreasonable one for the publishing industry.¹³⁸

3. Negligent Misrepresentation

Some plaintiffs have relied upon the concept of negligent misrepresentation in order to recover against media publishers. In order to recover damages under a negligent misrepresentation theory, the injured party must establish that: (1) the defendant owed a duty to the plaintiff to disclose the true facts; (2) the defendant negligently misrepresented a material fact; (3) the plaintiff justifiably relied on the defendant's misrepresentation; and (4) an actual loss resulted from this reliance.¹³⁹ Most of the negligent misrepresentation cases have been concerned with pecuniary losses,¹⁴⁰ but at least one, *Alm v. Van Nostrand Reinhold Co.*,¹⁴¹ involved physical injuries. The *Alm* case involved a suit against the publisher of a book entitled *The Making of Tools* by a reader who was injured while attempting to make a woodworking tool according to the book's instructions.¹⁴² The court concluded that the plaintiff had failed to

136. 833 P.2d 70 (Haw. 1992).

137. *See id.* at 76.

138. *See id.*

139. *See* Steven J. Weingarten, Note, *Tort Liability for Nonlibelous Negligent Statements: First Amendment Considerations*, 93 YALE L.J. 744, 754 (1984). It should be noted, however, that a number of states limit negligent misrepresentation suits to claims involving economic loss and exclude negligent misrepresentation suits based on personal injury claims. *See, e.g.*, Daniel M. Lane, Jr., Note, *Publisher Liability for Material that Invites Reliance*, 66 TEX. L. REV. 1155, 1182 (1988).

140. *See* *Barden v. Harper Collins Publishers, Inc.*, 863 F. Supp. 41, 42-45 (D. Mass. 1994) (refusing to impose liability on publisher of book which allegedly misrepresented an attorney's qualifications to handle child abuse cases); *see also* *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990, 992 (E.D.N.Y. 1977) (granting summary judgment for publisher of chemical encyclopedia who misrepresented the toxicity of germ-killing chemical produced by plaintiff for use in hospitals); *Roman v. New York*, 442 N.Y.S.2d 945, 947-48 (N.Y. Sup. Ct. 1981) (dismissing negligent misrepresentation suit against Planned Parenthood alleging that it provided inaccurate information about contraception methods in one of its pamphlets); *Gutter v. Dow Jones, Inc.*, 490 N.E.2d 898, 902 (Ohio 1986) (upholding dismissal of negligent misrepresentation claim against financial newspaper for investment losses).

141. 480 N.E.2d 1263 (Ill. Ct. App. 1985).

142. *See id.* at 1264.

make out a negligent misrepresentation claim and also expressed concern about the chilling effect misrepresentation claims might have on the publishing industry if they were recognized.¹⁴³

B. *Strict Products Liability*

None of these negligence-based theories are especially helpful to plaintiffs, because they all require the plaintiff to establish that the publisher failed to exercise due care. Consequently, in recent years, injured parties have begun to base their claims to compensation on a strict liability theory instead of negligence. Strict liability in tort does not require the plaintiff to prove that the producer or seller of a defective product was in any way at fault.¹⁴⁴ According to traditional principles of strict liability, however, there must be both a product and a sale. In addition, the product involved must be defective in some way and this defect must be the cause-in-fact of the plaintiff's injury. Finally, harm that occurred must be foreseeable, and the product seller must have a duty to protect the plaintiff against it. Thus, the doctrinal issues that may arise under a strict products liability theory include: (1) what is a product? (2) what kinds of transactions are subject to strict liability? and (3) what makes a product defective? In addition, a products liability case will also involve garden variety causation and proximate cause issues, just as a negligence case would.

1. The Product Requirement

Restatement (Second) of Torts section 402A declares that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to [strict] liability."¹⁴⁵ Its successor, the Third Restatement of Torts, provides that "[o]ne . . . who sells or distributes a defective product is subject to [strict] liability for harms to person or property caused by the defect."¹⁴⁶ Under either of these formulations both a product and sale (or sale-like transaction) are required in order to subject the seller to strict liability. It should be noted, however, that there is considerable overlap between the "product" requirement and the "sale" requirement. Thus, in determining whether strict liability is an appropriate liability standard to employ in a particular case, some courts emphasize the product issue, while others focus on the nature of the

143. *See id.* at 1267.

144. *See* Schultz, *supra* note 55, at 433 (observing that "[t]he doctrine of strict product liability eliminates the plaintiff's need to prove the fault or culpable conduct of the defendant manufacturer or seller").

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

146. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998).

transaction.¹⁴⁷

According to generally accepted doctrine, strict liability is applicable only to an injury that is caused by a defective “product.”¹⁴⁸ This term was not explicitly defined in section 402A, although the drafters of the Second Restatement placed that section in a chapter entitled “Suppliers of Chattels.”¹⁴⁹ Since chattels are defined as a species of property that are tangible and movable,¹⁵⁰ one could infer that the drafters intended section 402A to apply only to the sale of such goods. The Third Restatement also appears to require that a product be tangible because it defines it as “tangible personal property distributed commercially for use or consumption.”¹⁵¹ Many courts¹⁵² and commentators,¹⁵³ however, have

147. See Gary T. Walker, *The Expanding Applicability of Strict Liability Principles: How Is a “Product” Defined?*, 22 TORT & INS. L.J. 1, 4 (1986) (observing that “the Restatement phrase ‘sells any product’ may be divided into: (1) a product analysis which centers on whether the article should be viewed as a product; and (2) a transaction analysis which examines whether a given transaction involves the sale of a product or the rendering of a service”); see also John C. Wunsch, *The Definition of a Product for the Purposes of Section 402A*, 50 INS. COUNS. J. 344, 345 (1983) (declaring that “a distinction must be made between a *product analysis*, which focuses on whether a given good should be characterized as a product, and a *transaction analysis*, which focuses on whether a given transaction involves the sale of a product or the rendering of a service”).

148. See Lars Noah, *Authors, Publishers, and Products Liability: Remedies for Defective Information in Books*, 77 OR. L. REV. 1195, 1203 (1998).

149. See Susan Lanoue, Comment, *Computer Software and Strict Products Liability*, 20 SAN DIEGO L. REV. 439, 444-45 (1989).

150. See *Castle v. Castle*, 267 F. 521, 522-23 (9th Cir. 1920) (citing Blackstone’s definition of chattels as property that is capable of being moved from place to place).

151. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 (1998). A number of state statutes also define “product” in terms of tangibility or movability. See, e.g., ARK. CODE ANN. § 16-116-102(2) (Michie 1987) (defining “product” as any tangible object or goods); IDAHO CODE § 6-1302(3) (Michie 1998) (stating that a product must possess intrinsic value, must be capable of delivery, and must be produced for commercial purposes).

152. See *Kaneko v. Hilo Coast Processing*, 654 P.2d 343, 350 (Haw. 1982) (citing public policy considerations as the basis finding a prefabricated commercial building to be a product); see also *Lowrie v. City of Evanston*, 365 N.E.2d 923, 928 (Ill. Ct. App. 1977) (concluding on public policy grounds that a municipal garage was a product); *Papp v. Rocky Mountain Oil & Minerals*, 769 P.2d 1249, 1253-56 (Mont. 1989) (finding that public policy did not support the conclusion that an oil separator facility was a product).

153. See Roy W. Arnold, Note, *The Persistence of Caveat Emptor: Publisher Immunity from Liability for Inaccurate Factual Information*, 53 U. PITT. L. REV. 777, 781-82 (1992) (declaring that “[i]nstead of relying on the tangible-intangible distinction invoked by some courts, a more modern approach to the product issue would examine the policies underlying products liability”); see also Andrew T. Bayman, Comment, *Strict Liability for Defective Ideas in Publications*, 42 VAND. L. REV. 557, 562 (1989) (stating that “[t]he most popular approach is to define the ‘sale of a product’ for purposes of section 402A entirely in terms of the social policy justifications for the imposition of strict liability”); James P. Maloney, Note, *What Is or Is Not a Product Within the Meaning of Section 402A*, 57 MARQ. L. REV. 625, 627 (1974) (concluding that “[u]ltimately both the definition of product and sale can be determined only with reference to . . . policy justifications”). But see Anita Bernstein, *How Can a Product Be Liable?*, 45 DUKE L.J. 1, 54 (1995)

rejected tangibility as an essential criterion, and instead look to see whether subjecting the seller to strict liability will promote accident cost avoidance, risk-spreading, or other policies associated with modern products liability law.

For the most part, the courts have refused to classify information as a product.¹⁵⁴ In *Jones v. J.B. Lippincott Co.*,¹⁵⁵ for example, a nursing student treated her constipation problem with a hydrogen peroxide enema in accordance with directions printed in the defendant's medical textbook.¹⁵⁶ This potent concoction proved to be quite harmful and the unhappy plaintiff brought a product liability claim against the book's publisher.¹⁵⁷ The plaintiff contended that textbooks should be treated like aeronautical charts, which were subject to strict liability. However, the court rejected this analogy and concluded strict liability was not appropriate because of the chilling effect it might have on book publishers.¹⁵⁸ In *Smith v. Linn*,¹⁵⁹ the plaintiff attempted to lose weight by following the dictates of liquid protein diet as set forth in the defendant's book, *The Last Chance Diet*.¹⁶⁰ Although the diet was at first successful, she eventually died of cardiac failure allegedly caused by the diet.¹⁶¹ The plaintiff in *Smith* also invoked the analogy of the navigational chart to argue that the diet book should be treated as a product, subject to strict liability. However, the court, apparently concerned with the potential effect of publisher liability on free speech, concluded that a diet book did not resemble an aeronautical chart and refused to hold the publisher to a strict liability standard.¹⁶²

In *Winter v. G.P. Putnam's Sons*,¹⁶³ two mushroom pickers relied on the defendant's book, *The Encyclopedia of Mushrooms*, to enable them determine which mushrooms were poisonous and which were safe to eat. According to the plaintiffs, the *Encyclopedia* mistakenly identified one of

(arguing that "symbolic interactionism suggests that a product must be capable of existence in tangible, material form").

154. See Jonathan B. Mintz, *Strict Liability for Commercial Intellect*, 41 CATH. U. L. REV. 617, 617 (1992) (stating that "[c]ourts have almost uniformly refused to classify written words or an idea as a 'product' for purposes of imposing the various forms of products liability"); see also Davidson, *supra* note 13, at 257 (stating that "attempts to treat the printed contents of magazines, newspapers, or books as products have failed"); Lane, *supra* note 139, at 1176 (contending that "courts usually refuse to recognize publications as a product for strict liability purposes").

155. 694 F. Supp. 1216 (D. Md. 1988).

156. See *id.* at 1216.

157. See *id.* at 1217.

158. See *id.*

159. 563 A.2d 123 (Super. Ct. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991).

160. See *id.* at 124.

161. See *id.*

162. See *id.* at 127.

163. 938 F.2d 1033 (9th Cir. 1991).

the most virulent species of mushroom as perfectly edible.¹⁶⁴ The plaintiffs were seriously injured when they consumed one of these mushrooms, thinking that it was safe to eat. In their suit against the *Encyclopedia's* publisher, the plaintiffs argued that instructional books were products and, like navigation charts, should be subject to strict liability in tort. The court, however, declared that products liability should be limited to tangible objects and that the "pure thought and expression" contained in the *Encyclopedia* should not be subject to this sort of liability.¹⁶⁵ Finally, the publisher of a board game version of *Dungeons and Dragons* was accused in *Watters v. TSR, Inc.*¹⁶⁶ of contributing to a teenage boy's suicide.¹⁶⁷ The claim was based on strict products liability. However, a federal appeals court refused to apply strict liability to words or pictures.¹⁶⁸

For some inexplicable reason, aeronautical charts, although they contain printed information like books and magazines, are treated differently by the courts.¹⁶⁹ Thus, in *Aetna Casualty & Surety Co. v. Jeppeson*,¹⁷⁰ a federal appeals court held that a chart was a defective product because the landing profile depicted in the chart was out of scale with the other data represented on the chart.¹⁷¹ In *Saloomey v. Jeppeson & Co.*,¹⁷² the court distinguished between architectural plans which were supplied pursuant to a professional service contract, and charts which were mass-produced and marketed by map publishers; the latter were considered to be products and the publisher could properly be held strictly liable for any inaccuracies in the chart.¹⁷³ In *Brocklesby v. United States*,¹⁷⁴ the court held the chart-maker strictly liable even though it merely republished procedures developed by the government.¹⁷⁵ Finally, in *Fluor Corp. v. Jeppeson & Co.*,¹⁷⁶ a California intermediate appellate court concluded that a chart-maker could be held strictly liable where an omission from the defendant's instrument approach chart caused a plane crash.¹⁷⁷

Frankly, it is difficult to see how an aeronautical chart is so different from a book that the former item can be classified as a product while the

164. *See id.* at 1034.

165. *Id.* at 1036.

166. 904 F.2d 378 (6th Cir. 1990).

167. *See id.* at 379.

168. *See id.* at 381.

169. *See* Abney, *supra* note 55, at 350; Schultz, *supra* note 55, at 431.

170. 642 F.2d 339 (9th Cir. 1981).

171. *See id.* at 344.

172. 707 F.2d 671 (2d Cir. 1983).

173. *See id.* at 677.

174. 767 F.2d 1288 (9th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986).

175. *See id.* at 1295.

176. 216 Cal. Rptr. 68 (Cal. Ct. App. 1985).

177. *See id.* at 72.

latter is not.¹⁷⁸ Both are mass-produced for a general market. Consumers purchase both charts and books to obtain the information contained therein and these publications have little utility or value aside from their informational content.¹⁷⁹ It seems, therefore, that these cases can be dismissed as aberrations. Aside from the aeronautical chart cases, the overwhelming body of case law supports the notion that the information and idea content of printed materials is not a product.¹⁸⁰ At the present time, the courts have not ruled on whether records, movies, video games or Web sites should be considered to be products for purposes of tort liability. However, these media share the same characteristics as books and magazines, that is, they are tangible objects (in most cases), but their principal function is to serve as vehicles for the distribution of ideas and information. Thus, the same reasoning that has led courts to conclude that books and magazines are not products should also lead them to conclude that records, movies, video games and Web sites are not products either.

C. The Sale Requirement

Both versions of the Restatement require the “sale” of a product as a prerequisite for strict liability.¹⁸¹ Pure services, on the other hand, are ordinarily not subject to a rule of strict liability.¹⁸² For purposes of this rule,

178. Commentators have not found these judicial attempts to distinguish between books and charts very persuasive. See Noah, *supra* note 148, at 1195 (declaring that, “This distinction makes little sense, however, because purchasers read and rely on the information in such charts in much the same way that they use the instructions in mass-produced textbooks, cookbooks, field guides, and similar ‘How to’ manuals. . . .”); Schultz, *supra* note 55, at 446 (contending that “a book of aeronautical charts is no more like a compass than a book of mushrooms is like a pot”).

179. See Bayman, *supra* note 153, at 573 (arguing that aeronautical charts “are similar to books because a consumer is purchasing the charts to obtain the information contained therein, not the charts themselves”).

180. See 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, 983 (1988) (arguing that maps are more like services than products and, therefore, should not be subject to strict liability).

181. Section 402A declares that “[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to [strict] liability.” RESTATEMENT (SECOND) OF TORTS § 402A (1965). The Third Restatement of Torts provides that “[o]ne . . . who sells or distributes a defective product is subject to [strict] liability for harms to person or property caused by the defect.” RESTATEMENT THIRD, TORTS: PRODUCTS LIABILITY § 1 (1998).

182. See Mintz, *supra* note 154, at 630 (stating that “[s]ervices cannot be the basis for a strict products liability claim”); see also William C. Powers, Jr., *Distinguishing Between Products and Services in Strict Liability*, 62 N.C. L. REV. 415, 419 (1984) (declaring that “nearly all courts have refused to extend strict products liability to pure service transactions”). But see Jon Chait, Note, *Continuing the Common Law Response to the New Industrial State: The Extension of Enterprise Liability to Consumer Services*, 22 UCLAL. REV. 401, 412 (1974) (arguing on economic efficiency

a pure sale is a transaction solely devoted to the purchase of a tangible object.¹⁸³ In contrast, a pure service transaction involves the exercise of reasonable care, competence and skill in the performance of a particular task.¹⁸⁴ In addition, the performance of a service typically involves direct contact between the service provider and the ultimate consumer.¹⁸⁵ Commentators have offered various reasons for applying a negligence standard to services, rather than strict liability. First, service providers are not able to spread losses as effectively as product sellers;¹⁸⁶ second, because there are no middlemen, injured parties can easily determine who is responsible for service-related injuries;¹⁸⁷ third, services are not mass-produced, but are unique to each customer;¹⁸⁸ and finally, consumers expect a greater degree of consistency and reliability when they buy a product than when they employ someone to perform a service.¹⁸⁹

Most of the controversy in this area involves hybrid transactions rather than pure sales or services. A hybrid transaction is one in which the service provider provides a product during the course of performing a service.¹⁹⁰ Since a hybrid transaction contains elements of both a sale and a service, the problem is to determine which aspect predominates.¹⁹¹ The most

grounds that pure services should be subject to strict liability).

183. See Dana Shelhimer, Comment, *Sales-Service Hybrid Transactions and the Strict Liability Dilemma*, 43 SW. L.J. 785, 790 (1989) (concluding that "[a] pure sale transaction occurs when the sole purpose of the transaction is to purchase a product").

184. See James B. Sales, *The Service-Sales Transaction: A Citadel Under Assault*, 10 ST. MARY'S L.J. 13, 18 (1978) (contending that "[t]he very essence of a transaction involving the service provider is the performance of a particular service with reasonable care, competence, and skill").

185. See Mintz, *supra* note 154, at 630 (arguing that "[i]n order for a transaction to qualify as a service, there must be some personal or direct interaction with the consumer").

186. See John Riper, Note, *Strict Liability in Hybrid Cases*, 32 STAN. L. REV. 391, 396 (1980) (pointing out that "[t]he lack of substantial assets and the small pool of customers limit the servicer's ability to spread the costs of liability, and make it a far poorer risk-spreader than the seller of goods").

187. See Powers, *supra* note 182, at 429 (observing that "the special obstacles of proof encountered by plaintiffs in products cases are not as acute in service cases").

188. See Charles Cantu, *The Illusive Meaning of the Term "Product" Under Section 402A of the Restatement (Second) of Torts*, 44 OKLA. L. REV. 635, 640 (1991) (contending that "services are not mass-produced, but rather they are rendered to the person requesting them; therefore, the policy reasons for strict liability do not apply").

189. See Riper, *supra* note 186, at 397 (stating that "[w]hile purchasers of goods expect a product free of defects, hirers of services normally contract for the services of an expert rather than for a particular result").

190. See Wunsch, *supra* note 147, at 357 (declaring that "[h]ybrid transactions . . . involv[e] both the sale of a good and the rendition of a service"); see also Susan Lanoue, Comment, *Computer Software and Strict Products Liability*, 20 SAN DIEGO L. REV. 439, 453 (1983) (defining a hybrid transaction as one which involves both the sale of a product and a service).

191. See Mintz, *supra* note 154, at 631-32.

popular approaches are the essence test, the predominate factor test, the source-of-the-defect test, and the stream of commerce test. The essence of the transaction test, which was originally concerned with whether a transaction fell within the Statute of Frauds,¹⁹² examines the essential element of the transaction to see whether it resembles a service or a sale.¹⁹³ A closely-related approach, the predominant factor test, focuses on the parties' motivation for entering into the transaction. If the defendant's knowledge, expertise or reputation is the primary motivating factor, the transaction will be treated as a service; however, if this consideration is merely incidental, the transaction will be characterized as a sale.¹⁹⁴ Some courts employ a source-of-the-defect test: if the injury is caused by a defective product, strict liability applies, but if the injury results from lack of due care with respect to the service component of the hybrid transaction, the plaintiff's suit must be for negligence.¹⁹⁵ Finally, under the stream of commerce test, strict liability is applied if the transaction is considered to be a commercial in nature, but a transaction that occurs in the context of a professional relationship is considered to be a service.¹⁹⁶

So far, the sale-service issue has only arisen in one media publisher case, *Appleby v. Miller*.¹⁹⁷ In *Miller*, a dental patient unsuccessfully sued the publisher of a medical history intake form which failed to inquire adequately about the patient's physical and medical condition.¹⁹⁸ There are a number of potentially serious problems with the sale/service distinction in media publisher cases. One problem is that some modern marketing practices involve transactions that cannot be described as either sales or services in the traditional sense. The other problem is that consumers are exposed to the information and ideas by means transactions that may be characterized as services in one context and sales in another.

192. See William R. Russell, Note, *Products and the Professional: Strict Liability in the Sales-Service Hybrid Transaction*, 24 HASTINGS L.J. 111, 113 (1972). This approach looked to see whether or not the defendant's efforts produced tangible goods which could be bought and sold. See *id.* at 114.

193. See Riper, *supra* note 186, at 399-402; see also *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974); *Allied Properties v. John A. Blume & Assocs.*, 102 Cal. Rptr. 259, 264 (Cal. Ct. App. 1972); *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 394 (Tex. 1982).

194. See Cantu, *supra* note 188, at 643-44.; see also *Hector v. Cedars-Sinai Med. Ctr.*, 225 Cal. Rptr. 595, 597 (Cal. Ct. App. 1986); *Anthony Pools v. Sheehan*, 455 A.2d 434, 441 (Md. 1983); *Trujillo v. Berry*, 738 P.2d 1331, 1334 (N.M. Ct. App. 1987).

195. See Riper, *supra* note 186, at 402-04; see also *Hoover v. Montgomery Ward & Co.*, 528 P.2d 76 (Or. 1974); *Barbee v. Rogers*, 425 S.W.2d 342, 346 (Tex. 1968).

196. See Shelhimer, *supra* note 183, at 812; see also *Newmark v. Gimbel's, Inc.*, 258 A.2d 697, 702 (N.J. 1966). But see Steve Brook, Comment, *Sales-Service Hybrid Transactions: A Policy Approach*, 28 Sw. L.J. 574, 597 (1974) (arguing that courts "should look beyond mere word categorizations such as 'commercial' or 'professional'").

197. 554 N.E.2d 773 (Ill. Ct. App. 1990).

198. See *id.* at 776.

Some transactions do not fit the conventional definitions of sales or services, nor can they be easily characterized as hybrid transactions. Technological advances have enabled media publishers to market their wares in a variety of new ways. Some of the most promising methods involve the Internet. For example, it is now possible for customers to download books, musical recordings and other material from Internet sites. Since the only things that are transferred are electrons, one can argue that no sale has occurred. On the other hand, it is hard to characterize this sort of transaction as a service. Another marketing device is to allow customers to download samples of material for free from Internet sites in the hopes that they will eventually purchase similar material from the vendor. In this case, nothing tangible is transferred and no money changes hands.

The second problem is that the dissemination of some material to the public can be structured either as a service or as a sale. For example, the showing of a movie in a theater is a form of entertainment, like a musical play or a baseball game, and would seemingly be a service rather than a sale. On the other hand, video cassette versions of movies are often transferred from distributors to members of the public by means of sales and rental transactions. Likewise, over-the-air television broadcasts ordinarily would not be considered sales because nothing tangible is transferred to the consumer. Even when television signals are transmitted by cable or satellite dish, the transaction between the provider and the consumer resembles a service rather than a sale. But what about "pay per view" transactions where the cable or satellite company authorizes (and even encourages) the consumer to record the program? This is functionally the same as purchasing a videotape of the program, a transaction that would seem to resemble a sale.

By the same token, a musical recording played over the radio, as well as music made available free of charge over the Internet, would presumably be treated as a service. However, musical recordings are commonly sold to the public in the form of records, audio cassettes and compact discs. Similarly, entrepreneurs who make video games available to consumers in arcades clearly provide a service because nothing tangible is transferred. At the same time, video games in a diskette or CD format are commonly sold and rented. Likewise, viewing underdressed and oversexed performers on the Internet is not unlike watching a blue movie at a theater or on cable television, but downloading pornographic material from a Web site to an individual computer hard drive for a fee resembles a sale.

It is evident that the Restatement's traditional distinction between sales and services will not provide much assistance to courts who are trying to decide whether strict liability is an appropriate liability standard to apply to media defendants. This may explain why most courts have chosen to

avoid this particular can of worms in favor of more manageable issues such as “what is a product?”

D. The Defect Requirement

Although strict liability subjects product sellers to liability without fault,¹⁹⁹ it does not impose absolute liability,²⁰⁰ because liability is conditioned upon the existence of some sort of “defect” in the product.²⁰¹ Defects are normally divided into three categories: manufacturing defects, design defects and inadequate warnings.²⁰² A manufacturing defect is a one-of-a-kind condition that arises because of some flaw in the production process.²⁰³ A design defect exists when every product from a particular production line possesses the same dangerous characteristic.²⁰⁴ In addition, an otherwise defect-free product may be treated as defective when the seller fails to provide adequate warnings or instructions.²⁰⁵ It should be

199. See *Waterson v. General Motors Corp.*, 544 A.2d 357, 372 (N.J. 1988) (declaring that “[t]he essence of an action in strict liability is that the injured party is relieved of the burden of proving the manufacturer’s negligence”).

200. See *Kaneko v. Hilo Coast Processing*, 654 P.2d 343, 353 (Haw. 1982) (declaring that “[s]trict products liability was never intended to be ‘absolute liability’”); *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 181 (Mich. 1984) (observing that courts “have never gone so far as to make sellers insurers of their products and thus absolutely liable for any and all injuries sustained from the use of those products”); *Bellotte v. Zayre Corp.*, 352 A.2d 723, 724 (N.H. 1976) (holding that “[s]ellers are not insurers nor are they subject to absolute liability”); *Shawver v. Roberts Corp.*, 280 N.W.2d 226, 231 (Wis. 1979) (concluding that “[s]trict liability does not make the manufacturer or seller an insurer nor does it impose absolute liability”).

201. See *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 879 (Alaska 1979) (holding that a product “must be defective as marketed if liability is to attach, and ‘defective’ must mean something more than a condition causing physical injury”); see also Michael J. Tdoke, Note, *Categorical Liability for Manifestly Unreasonable Designs: Why the Comment d Caveat Should Be Removed from the Restatement (Third)*, 81 CORNELL L. REV. 1181, 1205-06 (1996) (stating that “[a]t the center of traditional products liability doctrine is the idea that a product must be defective in some way before its manufacturer will be held legally responsible for injuries resulting from its use”).

202. See David G. Owen, *The Graying of Products Liability Law: Paths Taken and Untaken in the New Restatement*, 61 TENN. L. REV. 1241, 1243 (1994).

203. See *Caprara v. Chrysler Corp.*, 417 N.E.2d 545, 552-53 (N.Y. 1981) (stating that a defectively manufactured product “result[s] from some mishap in the manufacturing process itself, improper workmanship, or because defective materials were used in construction”).

204. See *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843, 846 (N.H. 1978) (declaring that “[a] design defect occurs when the product is manufactured in conformity with the intended design but the design itself poses unreasonable dangers to consumers”).

205. See *Koonce v. Quaker Safety Prod. & Mfg. Co.*, 798 F.2d 700, 716 (5th Cir. 1986) (holding that “[t]he absence of adequate warnings or directions may render a product defective and unreasonably dangerous, even if the product has no manufacturing or design defects”); *Pavlidis v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984) (declaring that “[t]he lack of adequate warnings renders a product defective and unreasonably dangerous even if there is no manufacturing or design defect in the product”).

noted that the new Restatement of Torts limits product defects to these three categories.²⁰⁶

Because no single definition is adequate to cover every type of product defect, courts have developed a number of different approaches. For example, according to the “deviation from the norm” test, usually confined to manufacturing defect situations, a product is classified as defective if it deviates from the manufacturer’s intended design or if it is inferior in workmanship or materials to similar products.²⁰⁷ Another approach, known as the consumer expectation test, is derived from Section 402A, comment i, which defines the term “unreasonably dangerous.”²⁰⁸ The consumer expectations test treats a product as defective if it turns out to be more dangerous than an ordinary consumer would expect it to be.²⁰⁹ The most popular approach, the risk-utility test, characterizes a product as defective if the risks associated with the product exceed its overall utility.²¹⁰

It can be readily seen that neither the various categories of product defect, nor the tests for determining the existence of a defect, fit very well with the concept of either misinformation or harmful ideas. Perhaps, one could argue that failing to warn about the inherent dangers of engaging in an activity described by the defendant is equivalent to failing to warn about the inherent dangers associated with an otherwise non-defective product.²¹¹ Providing actual misinformation, as opposed to failing to warn altogether, might be compared to providing instructions or warnings that are factually inaccurate.²¹² At least in these cases, it is theoretically possible, as with other types of warnings, to compare the publisher’s conduct to an objective standard.

However, there is really no obvious relationship between “bad” ideas and any accepted category of product defect. One analogy would be product category liability, a controversial theory which does away with the

206. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

207. See *O’Brien v. Muskin Corp.*, 463 A.2d 298, 304 (N.J. 1983) (observing that a product can be considered defective if it fails to conform to the manufacturer’s own standards or to products of the same kind).

208. RESTATEMENT (SECOND) OF TORTS § 402A, cmt. i (1965).

209. See *Tiderman v. Fleetwood Homes*, 684 P.2d 1302, 1305 (Wash. 1984) (observing that “[a] product is not reasonably safe when it is unsafe to an extent beyond which would be reasonably contemplated by the ordinary consumer”).

210. See *Barker v. Lull Eng’g Co.*, 573 P.2d 443, 454 (Cal. 1978) (concluding that a product may be found defective “if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design”).

211. See Sandra K. Ross, Note, *The Imposition of Tort Liability on Publishers Who Fail to Warn*, 39 WAYNE L. REV. 261, 268 (1992) (arguing that “[a] publication is defective . . . if distributed without warnings sufficient to notify the reader of the possibility of danger”).

212. See Noah, *supra* note 148, at 1211 (pointing out that “products liability claims against authors and publishers of books containing hazardous misinformation more closely resemble claims premised on inadequate warnings”).

requirement of a specific defect and allows the court to condemn an entire category of products, such as handguns or cigarettes, if the perceived risks associated with the particular category outweigh its perceived benefits.²¹³ However, this theory has been rejected by the drafters of the Third Restatement²¹⁴ as well as the vast majority of courts.²¹⁵ Moreover, even if a risk-benefit test were adopted, there would be no principled way for courts or juries to measure the largely intangible risks and benefits that flow from publishing. Finally, it would be inconsistent with First Amendment values to have courts or juries decide on the basis of ideological content whether a publication is defective or not. The notion of ideas being defective is repugnant to the principle of free expression.

E. Cause-in Fact

Courts employ the “but for” test or the substantial factor test to determine cause-in-fact.²¹⁶ In most cases, the appropriate test of causation is the “but for” test, under which the plaintiff must prove that he or she would not have been injured if the act in question had not occurred.²¹⁷ It should be noted that more than one act or event in a particular case may satisfy the “but for” test of causation; the purpose of this test is merely to determine whether a specific act committed by the defendant is among the many “but for” causes of the plaintiff’s injury. If it is, the defendant may be held liable. However, if the plaintiff’s injury would have occurred anyway, the defendant’s act will not be considered to be a “but for” cause of the plaintiff’s injury and the defendant will not be held liable. When the

213. See generally James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1297-1328 (1991) (discussing the theory of product category liability); Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429, 1440-54 (1994) (same).

214. See Richard C. Ausness, *Product Category Liability: A Critical Analysis*, 24 N. KY. L. REV. 423, 428-29 (1997).

215. See *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1225 (1st Cir. 1990), *vacated*, 505 U.S. 1215, *reaff’d on remand*, 981 F.2d 7 (1st Cir. 1992) (tobacco products); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988) (tobacco products); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1533-34 (11th Cir. 1986) (handguns); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1274 (5th Cir. 1985) (handguns); *Miller v. Brown & Williamson Tobacco Corp.*, 679 F. Supp. 485, 489 (E.D. Pa.), *aff’d*, 856 F.2d 184 (3d Cir. 1988) (tobacco products); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 773 (D.N.M. 1987), *aff’d*, 843 F.2d 406 (10th Cir. 1988) (handguns); *Richardson v. Holland*, 741 S.W.2d 751, 754 (Mo. Ct. App. 1987) (handguns); *Dauphin Deposit Bank & Trust Co. v. Toyota Motor Corp.*, 596 A.2d 845, 849 (Pa. Super. Ct. 1991) (alcoholic beverages).

216. See Gerald R. Smith, Note, *Media Liability for Physical Injury Resulting from Negligent Use of Words*, 72 MINN. L. REV. 1193, 1197 (1988).

217. See Anne K. Hilker, Note, *Tort Liability of the Media for Audience Violence: A Constitutional Analysis*, 52 S. CAL. L. REV. 529, 534 (1979).

“but for” test does not work properly, courts are forced to rely on the substantial factor test. Under this approach, the defendant’s act may be considered a cause-in-fact if it substantially contributes to the plaintiff’s harm.²¹⁸ This test is often used when two actions occur, each of which is sufficient to cause the injury in question.²¹⁹

A number of empirical studies suggest that there is some sort of causal connection between portrayals of violence and violence in real life, particularly when viewed by children or young people.²²⁰ Social scientists who examined the subject of television have developed a number of theories to explain this phenomenon.²²¹ According to one theory, known as the modeling or instructional theory, children learn to behave aggressively by watching violent acts on television in much the same way that they learn behavioral patterns from parents and other role models.²²² A second theory suggests that viewing violence desensitizes viewers to the negative effects of violence and thereby reduces their inhibitions against aggression toward others.²²³ A third theory assumes that an observer may be directly stimulated to engage in aggressive behavior after viewing violent acts on television.²²⁴ These behavioral theories are presumably applicable to violence depicted in movies, video games, and musical lyrics, as well as they are to television violence.²²⁵

218. See RESTATEMENT (SECOND) OF TORTS § 431-433 (1965).

219. The classic example of this is the twin fires hypothetical in which fires are set by the negligence of two individuals. The fires come together and burn the plaintiff’s house. If each fire was sufficiently strong to burn down the house on its own, neither act of negligence would qualify as a “but for” cause of the plaintiff’s loss. However, under the substantial factor test, a jury could find that each defendant’s negligence substantially contributed to the destruction of the plaintiff’s house.

220. See generally Thomas G. Krattenmaker & Lucas A. Powe, *Televised Violence, First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1136-57 (1978) (discussing studies); John P. Murray, *The Impact of Televised Violence*, 22 HOFSTRA L. REV. 809, 813-21 (1992) (same); Emily Campbell, Comment, *Television Violence: Social Science vs. the Law*, 10 LOY. ENT. L.J. 413, 419-36 (1990) (same).

221. See WILLIAM R. CATTON, *MASS MEDIA AS ACTIVATORS OF LATENT TENDENCIES in MASS MEDIA AND VIOLENCE* 301, 303 (1971) (discussing some of these theories).

222. See Patricia J. Falk, *Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 769 (1996); see also Prettyman & Hook, *supra* note 22, at 327 (describing the modeling theory of violence).

223. See Stephen J. Kim, Comment, “Viewer Discretion Is Advised”: A Structural Approach to the Issue of Televised Violence, 142 U. PA. L. REV. 1383, 1391 (1994).

224. See Michael I. Spak, *Predictable Harm: Should the Media Be Liable?*, 42 OHIO ST. L.J. 671, 674 (1981).

225. See Peter Johnson, *Pornography Drives Technology: Why Not to Censor the Internet*, 49 FED. COMM. L.J. 217, 224 (1996) (pointing out that some psychologists believe that computer violence, because it is interactive, might have a socializing effect).

Of course, not everyone agrees with these conclusions.²²⁶ Critics point out that most of the social science research has focused on the statistical correlation between viewing patterns of large groups over time rather than focusing on the effects of single viewings of violent material.²²⁷ It has also been suggested that results based on laboratory experiments do not sufficiently replicate real world conditions to allow researchers to form any firm conclusions about media violence and violence in the real world.²²⁸ Finally, only a small fraction of viewers of media violence actually engage in violent behavior,²²⁹ thereby calling into question the thesis that media violence is a significant cause of real-life violence.

The causation issue is also muddled with respect to obscene and sexually explicit material. A number of social scientists and legal commentators claim that viewers of such material are more likely than non-viewers to commit rape and other acts of sexual abuse against women.²³⁰ Some years ago, a study by the Attorney General's Commission on Pornography, known as the Meese Commission, also concluded that certain forms of pornography could lead to crimes of sexual violence.²³¹

226. See Krattenmaker & Powe, *supra* note 220, at 1157 ("Perhaps violent fare on television causes harmful, illegal violence in isolated individuals, in identifiable groups (large or small), or throughout society at large. We have, however, seen little convincing evidence that it does."); see also Michael A. Coletti, Comment, *First Amendment Implications of Rock Lyric Censorship*, 14 PEPP. L. REV. 421, 439 (1987) (arguing that "antisocial behavior has not been conclusively traced to the media"); John W. Holt, Comment, *Protecting America's Youth: Can Rock Music Lyrics Be Constitutionally Regulated?*, 16 J. CONTEMP. L. 53, 68 (1990) (concluding that "[t]here is no conclusive evidence that anti-social illegal behavior can be traced to sexual or violent themes in the media").

227. See Prettyman & Hook, *supra* note 22, at 362.

228. See Campbell, *supra* note 220, at 449 (claiming that "[i]t is misleading to juries to have social science experts testify that viewing violence leads to aggressive behavior, when the types of behavior studied in a controlled environment are different from those in the cases presented before the courts").

229. See Campbell, *supra* note 220, at 436 ("the evidence does not suggest that television violence has a uniform negative effect, or that it affects a majority of children").

230. See Catherine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 42-45 (1985) (declaring that "[s]pecific pornography directly causes some [sexual] assaults"); Frederick Shauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737, 767 (stating that "sexually violent material, some but not much of which happens to be sexually explicit and some but even less of which is legally obscene, bears a causal relationship, taken probabilistically, to the incidence of sexual violence in this society"); Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 479 (1984) (contending that "[a]n increasing number of recent studies suggest that exposure to violent pornography has a negative effect on a male viewer's attitudes toward women and may decrease his reluctance to abuse them").

231. See Attorney General's Comm'n on Pornography, U.S. Dept. of Justice, Final Report 326 (1986) (concluding that "substantial exposure to sexually violent materials as described here bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, possibly to unlawful acts of sexual violence").

However, others deny that such a causal link exists between pornography and sexual violence.²³² They point out that most viewers of sexually explicit material do not commit acts of sexual violence against women.²³³ Indeed, some commentators have suggested that pornography may actually discourage sexual violence.²³⁴

In any event, even if a plaintiff can show a generalized connection between portrayals of sex or violence in the media and violent behavior in the real world, he or she will also have to prove that specific depictions of sex or violence by the defendant have directly caused the injury in question. Even though the plaintiff would not have to prove that a specific item of violence or pornography was the *sole* cause of the plaintiff's injury, he or she would still have to establish the injury would not have occurred if the defendant had not published the particular item of violence or pornography.²³⁵

Of course, there are some cases where cause-in-fact may be less of a problem for the plaintiff. For example, causation is easier to prove when a plaintiff relies on incorrect information provided by the defendant, as in *Winter*²³⁶ or *Cardozo*,²³⁷ and that reliance directly leads to the injury in question. Plaintiffs should also be able to satisfy the causation requirement in cases like *Rice v. Paladin Enterprises, Inc.*²³⁸ where a third party faithfully follows explicit instructions provided by the defendant, a jury could reasonably conclude that the third party could not have committed the crime without the defendant's assistance. Likewise, in "gun-for-hire"

232. See Stephen G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1600 (1988) (claiming that "no one has been able to demonstrate that identifiable, physical harms result directly from pornography"); Jessalyn Hershinger, Note, *State Restrictions on Violent Expression: The Impropriety of Extending an Obscenity Analysis*, 46 VAND. L. REV. 473, 491 (1993) (declaring that "feminist theorists have not produced sufficiently persuasive data to substantiate their claim that obscenity leads to violence against women").

233. See Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 600 (observing that "[m]ost consumers of pornography do not commit acts of sexual violence").

234. See Johnson, *supra* note 225, at 223 (stating that "several studies have suggested that, far from creating sexist, violent feelings in young men, pornography has a calming, cathartic effect, easing adolescent cares with a dose of mild erotica").

235. See Elise M. Whitaker, Note, *Pornographic Liability for Physical Harms Caused by Obscenity and Child Pornography: A Tort Analysis*, 27 GA. L. REV. 849, 893 (1993) (declaring that "an abstract link between pornography [or media depictions of violent acts] and criminal behavior is actually irrelevant, for plaintiffs must prove a causal link in their own cases in order to recover").

236. *Winter*, 938 F.2d at 1033.

237. *Cardozo*, 342 So. 2d at 1053.

238. 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998).

cases like *Norwood*,²³⁹ *Eimann*,²⁴⁰ or *Braun*,²⁴¹ the plaintiff could argue that prospective employers could not contact hit men and, thus, could not carry out their murderous plots, without the defendant's direct assistance. Cause-in-fact is also relatively easy to prove in cases such as *DeFilippo*,²⁴² *Herceg*,²⁴³ *Sakon*,²⁴⁴ *Olivia N*,²⁴⁵ where the recipient closely imitates an activity that has been depicted in the media.

Plaintiffs, on the other hand, would have considerable more difficulty proving cause-in-fact in inspiration cases such as *McCollum*²⁴⁶ and *Waller*,²⁴⁷ where disturbed teenagers were allegedly induced to commit suicide by Ozzy Osborne's music, or *Byers*,²⁴⁸ where viewers imitated a crime spree portrayed in the movie *Natural Born Killers*. Although plaintiffs might go far with the help of compliant experts and sympathetic juries, it will be hard for them to dispute the fact that mentally unstable teenagers are often human time bombs waiting for some trivial event to set them off. Thus, defendants can argue that the violent acts would have occurred anyway.

F. Proximate Cause

Even if the plaintiff proves the existence of a causal relationship between the defendant's actions and the plaintiff's physical injury, a court may still deny liability for lack of proximate cause.²⁴⁹ There are two scenarios where a proximate cause analysis is relevant to the issue of liability in media publication cases. The first is where the victim seeks to hold a third party liable for his or her own suicide; the second is where the victim is injured by the intervening criminal acts of third parties. In the first scenario, the plaintiff would contend that the defendant should be aware of his or her suicidal tendencies and, therefore, avoid publishing material that might induce the plaintiff to commit suicide. According to the traditional rule, suicide is considered to be a voluntary act and, therefore, a superseding cause, even though the defendant's wrongful conduct contributes to it.²⁵⁰ To be sure, courts sometimes impose an affirmative

239. *Norwood*, 651 F. Supp. at 1397.

240. *Eimann*, 880 F.2d at 830.

241. *Braun*, 968 F.2d at 1110.

242. *DeFilippo*, 446 A.2d at 1037-38.

243. *Herceg*, 565 F. Supp. at 802.

244. *Sakon*, 553 So. 2d at 163.

245. *Olivia N*, 178 Cal. Rptr. at 891.

246. *McCollum*, 249 Cal. Rptr. at 187.

247. *Waller*, 763 F. Supp. at 1144.

248. *Byers*, 712 So. 2d at 681.

249. See *Prettyman & Hook*, *supra* note 22, at 363.

250. See *Lancaster v. Montesi*, 390 S.W.2d 217, 221 (Tenn. 1965) (declaring that "[w]here

duty to prevent suicide upon psychiatrists and hospitals when the victim is known to be insane or emotionally unstable.²⁵¹ However, these cases typically involve some sort of custodial or professional relationship between the defendant and the suicide victim. In contrast, no such relationship exists between media publishers and their customers. The only relationship that does exist, and it is an attenuated one at that, is an arm's length commercial relationship. Only the most optimistic plaintiff would argue that a duty to protect a third party against his or her own self-destructive acts could arise from such a purely commercial relationship.

In the second scenario, the plaintiff would argue that media defendants have a duty to refrain from conduct that would cause other listeners or viewers to commit violent criminal acts against them. As a general rule, there is no affirmative duty to protect someone against the acts of a third person.²⁵² This is particularly true when the intervening conduct involves intentional or criminal misconduct.²⁵³ After all, it is the third party, not the defendant, who is the actual perpetrator of the crime. However, there are a number of exceptions to this general rule. For example, a defendant may be liable for failing to protect the plaintiff from the criminal acts of third persons (1) when the defendant has a contractual or relational duty to do so and fails to act, (2) when the defendant's affirmative act defeats the plaintiff's protective efforts, (3) when the defendant brings the plaintiff into close association with third parties who are likely to commit crimes, and (4) when the defendant has taken a dangerous person into custody and then fails to properly restrain him.²⁵⁴ However, it is difficult to see how any of these exceptions apply to media publishers. There is rarely any special relationship between publishers and victims; indeed, there is no relationship at all except a purely commercial one. Nor can it be said that the publication of violent or sexually explicit material frustrates any affirmative protective measures that potential victims may have taken to protect themselves against the violent acts of third parties. Since there is no personal contact between media publishers and their listeners or

the intervening cause relied on takes the form of suicide, then the cases both in this jurisdiction and elsewhere have generally held there to be no liability").

251. See *Meier v. Ross Gen. Hosp.*, 445 P.2d 519, 522-23 (Cal. 1968) (holding that "[i]f those charged with the care and treatment of a mentally disturbed patient know of facts from which they could reasonably conclude that the patient would be likely to harm himself in the absence of preclusive measures, then they must use reasonable care under the circumstances to prevent such harm").

252. RESTATEMENT (SECOND) OF TORTS § 315 (1965).

253. See *id.* § 447 (1965); see also *Whitaker*, *supra* note 235, at 886 (observing that "[a]s a general rule, intentional torts or crimes committed by independent actors relieve a defendant from liability because the intervening conduct is said to break the causal chain").

254. See JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 321-22 (9th ed. 1994); see also *Hilker*, *supra* note 217, at 537-38.

viewers, or between media publishers and individual victims, there would be no reason to conclude that media publishers have brought victims into contact with dangerous third parties. This lack of personal contact between criminal or victim would also seem to defeat any liability based on a custody rationale.

G. Conclusion

The prospects for recovery against media publishers are extremely poor as long as courts insist that plaintiffs scrupulously satisfy all of the doctrinal requirements. For example, the Third Restatement of Torts defines the term product as “tangible” property,²⁵⁵ a definition that may exclude information and ideas, particularly when they are not embodied in a tangible medium that can be transferred from the producer to the consumer. The sale requirement may be excluded in cases where no tangible object is transferred. The defect requirement is another stumbling block. While a court might allow a jury to determine that inaccurate factual information is “defective,” it is doubtful that it will permit a jury to subject the publisher to civil liability just because it disapproves of the publisher’s ideas or viewpoint. Likewise, plaintiffs will have to prove causation. This might be possible where the defendant publishes inaccurate information, or when facilitation or imitation is involved; however, plaintiffs will find it almost impossible to prove causation when a media publisher merely inspires another to engage in violent conduct. Finally, courts are reluctant to hold someone responsible, in the absence of a special relationship, for the independent acts of third parties.

III. FIRST AMENDMENT ISSUES

Media publishers are not shy about claiming First Amendment protection and, so far, their efforts have been highly successful. When sexually explicit material is involved, one would expect courts to turn to the law of obscenity for guidance. On the other hand, courts seem disposed to apply *Brandenburg v. Ohio*’s²⁵⁶ incitement analysis to decide claims against the media involving depictions of violence.

A. *The Nature and Scope of the First Amendment*

The First Amendment to the Constitution declares, among other things, that “Congress shall make no law . . . abridging the freedom of speech. . . .”²⁵⁷ This language prohibits the federal government from

255. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 (1998).

256. 395 U.S. 444 (1969).

257. U.S. CONST., amend. I.

enacting laws that attempt to restrict or prohibit free expression.²⁵⁸ Not all speech receives the same degree of First Amendment protection.²⁵⁹ Speech about important political, social, cultural or scientific topics lies at the apex of the constitutional pyramid; commercial speech appears to occupy an intermediate level; and so-called “low value” speech languishes at the bottom.

Although some scholars maintain that First Amendment protection should be limited to political speech,²⁶⁰ the Supreme Court has expanded concept of protected speech to include observations about art, literature, science, religion, and all other aspects of culture and society.²⁶¹ Furthermore, protected speech is no longer limited to written or spoken work, but now extends to many forms of expression,²⁶² such as art,²⁶³ music,²⁶⁴ movies,²⁶⁵ and even dancing.²⁶⁶ According to accepted doctrine,

258. The right of free speech is also protected against state legislation by the fourteenth amendment. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 599 n.2 (1980) (Stewart, J., concurring); Edward J. Naughton, Note, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L.J. 409, 413 (1992).

259. *See* Diamond & Primm, *supra* note 180, at 971 (discussing the hierarchy of free speech categories); *see also* Thomas C. Kates, Note, *Publisher Liability for “Gun for Hire” Advertisements: Responsible Exercise of Free Speech or Self-Censorship?*, 35 WAYNE L. REV. 1203, 1206-07 (1989) (same).

260. *See, e.g.*, ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 62 (1975) (declaring that “the First Amendment should protect and indeed encourage speech so long as it serves to make the political process work”); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 358 (1978) (contending that “the sole legitimate first amendment principle protects only speech that participates in the process of representative democracy”).

261. *See* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (declaring that “our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection”).

262. *See* C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 CAL. L. REV. 979, 983 (1997) (pointing out that “[m]usic, art, and photographs, whether or not they have propositional content, receive protection under the constitutional term ‘speech’”); Block, *supra* note 8, at 790 (observing that “[t]he first amendment guarantee of freedom of speech extends to all artistic and literary expression, including concerts, plays, pictures, books, movies, music, and nude dancing”); Scot Silvergate, Comment, *Subliminal Perception and the First Amendment: Yelling Fire in a Crowded Mind?*, 44 U. MIAMI L. REV. 1243, 1249 (1990) (stating that “motion pictures, radio broadcasts, television, and musical and dramatic works . . . fall within the first amendment’s guarantee of freedom of expression”).

263. *See* *Southeastern Promotions v. Conrad*, 420 U.S. 546, 557-58 (1975); *Interstate Circuit v. Dallas*, 390 U.S. 676, 682 (1968); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); *see also* Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 77 (1996) (observing that “it is generally accepted that the First Amendment contemplates protection of art”); Note, *Standards for Federal Funding of the Arts: Free Expression and Political Control*, 103 HARV. L. REV. 1969, 1980 (1990) (arguing that “[a]n examination of first amendment doctrine strongly suggests that works of art are presumptively protected speech”).

264. *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (holding that “[m]usic, as

government cannot regulate core speech on the basis of subject matter or viewpoint²⁶⁷ unless it shows that the regulation in question is necessary to serve a compelling governmental interest.²⁶⁸ The burden of justification is particularly great when the government's regulation amounts to prior restraint of free expression.²⁶⁹

Commercial speech occupies a position somewhere between fully-protected speech and "low value" speech in the First Amendment hierarchy.²⁷⁰ In its simplest form, commercial speech can be defined as

a form of expression and communication, is protected under the First Amendment"); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 567 (9th Cir. 1984); Holt, *supra* note 226, at 53 (stating that music is protected under the First Amendment); *see also* Coletti, *supra* note 226, at 446 (discussing the ideological and philosophical aspects of music).

265. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952); *see also* Kenneth D. Rozell, Comment, *Missouri Statute Attacks "Violent" Videos: Are First Amendment Rights in Danger?*, 10 LOY. ENT. L.J. 655, 664 (1990) (declaring that "motion pictures are included in the free speech and free press guaranty of the first and fourteenth amendments").

266. *See* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (stating that "[e]ntertainment, as well as political and ideological speech, is protected").

267. Although the principal dichotomy is between "content-based" and "content-neutral" regulations, the former category can be divided into state action that regulates speech on the basis of subject matter and state action that regulates speech on the basis of viewpoint. The first subcategory involves regulations that restrict speech on the basis of subject matter, regardless of the author's point of view on the subject; the second subcategory includes regulations that censor particular opinions or viewpoints on a subject. *See* Sunstein, *supra* note 233, at 609-10.

268. *See* *Arkansas Writers' Project, Inc.*, 481 U.S. at 230 (stating that "[s]uch official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press"); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (holding that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) (declaring that "[t]he Constitution forbids the state to declare one perspective right and silence opponents"); *Naughton, supra* note 258, at 413 (declaring that "[i]t is clear that the States and congress may not prohibit speech on the basis of its content or viewpoint without a compelling governmental interest"); *Ross, supra* note 211, at 272 (stating that "[a] regulation found to be aimed at the content of speech will be invalidated unless it either comes within one of the narrow exceptions or is necessary to further a compelling state interest").

269. *See* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 283 U.S. 697, 713 (1931); *see also* *Prettyman & Hook, supra* note 22, at 377 (arguing that "[h]istorically, prior restraints on speech have been considered particularly burdensome, and thus bear a heavy presumption of invalidity"); *Hilker, supra* note 217, at 568 (declaring that prior restraints "carry a heavy presumption against their constitutional validity because they are especially burdensome on free speech").

270. *See* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (declaring that "we . . . have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values"); *see also* Timothy J. Tatro, Casenote, *Braun v. Soldier of Fortune: Tort Law Enters the Braun's Age as Constitutional Safeguards for Commercial Speech Buckle 'Neath the Crunch of Third-Party Liability*, 30 SANDIEGO L. REV. 957, 967 (1993) (stating that "[c]ommercial speech was not afforded absolute protection, however, and

speech, such as an advertisement, that proposes a commercial transaction.²⁷¹ More broadly, commercial speech is “expression related solely to the economic interests of the speaker and its audience.”²⁷² In *Central Hudson Gas & Electric Corp. v. Public Service Committee*, the Court set forth a number of criteria that must be met before the government can regulate commercial speech.²⁷³ First, the Court declared that commercial speech that was deceptive or intended to serve an illegal purpose could be summarily banned.²⁷⁴ Other commercial speech could be regulated only if: (1) regulation was necessary to advance a substantial governmental interest; (2) the regulation in question would directly advance that interest; and (3) the regulation was no more extensive than necessary.²⁷⁵ While the level of constitutional protection accorded to commercial speech under the *Central Hudson* approach is significant, it still falls below that enjoyed by other forms of protected speech.²⁷⁶

At the very bottom of the constitutional hierarchy is so-called “low value” speech,²⁷⁷ which is characterized by minimal communicative value coupled with a high risk of social harm.²⁷⁸ This type of speech includes (1) “fighting words,”²⁷⁹ (2) defamation,²⁸⁰ (3) obscenity,²⁸¹ (4) profanity,²⁸² (5)

still sits somewhat lower in the constitutional hierarchy than political speech”).

271. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *Ohralik*, 436 U.S. at 455-56.

272. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Corp.*, 447 U.S. 557, 561 (1980). At the same time, protected speech does not lose its privileged status merely because it is published for profit. See Lars Noah & Barbara A. Noah, *Liberating Commercial Speech: Product Labeling Controls and the First Amendment*, 47 FLA. L. REV. 63, 75 (1995).

273. 447 U.S. at 557.

274. See *id.* at 566.

275. See *id.*

276. See Noah, *supra* note 148, at 1224-25 (stating that “[a]t present, the court utilizes a form of intermediate scrutiny to assess challenges to restrictions on commercial speech, providing that false or misleading commercial speech receives no protection”); David W. Kantaros, Comment, *Constitutional Law: Striking an Appropriate Balance Between Negligence and Freedom of the Press for Publishers*—*Brown v. Soldier of Fortune Magazine*, 27 SUFFOLK U.L. REV. 244, 246 (1993) (observing that “the Supreme Court of the United States has determined that the First Amendment provides less protection to commercial speech than to other forms of speech”).

277. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983) (discussing the concept of low value speech); Tom Hentoff, Note, *Speech, Harm, and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1464 (1991) (same).

278. See *Crump*, *supra* note 10, at 48; see also Sunstein, *supra* note 233, at 603-04.

279. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

280. See *Beauharnais v. Illinois*, 343 U.S. 250, 255-56 (1952).

281. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973); *Miller v. California*, 413 U.S. 15, 19-20 (1973); *Roth v. United States*, 354 U.S. 476, 485 (1957) (declaring that “obscenity is not within the area of constitutionally protected speech or press”).

282. See *Cohen v. California*, 403 U.S. 15, 19 (1971).

speech or writing, such as perjury, which is inherently unlawful or which is used to carry out a criminal act,²⁸³ (6) incitements to imminent unlawful action,²⁸⁴ and (7) child pornography.²⁸⁵ Although the government cannot suppress low-value speech arbitrarily,²⁸⁶ courts will normally uphold restrictions, or even complete prohibitions, of low-value speech as long as the government can show a rational basis for its actions.²⁸⁷

B. *First Amendment Protection for Movies, Video Games, and Internet Web Sites*

To assess whether a particular communication is protected by the First Amendment, a court must first determine if the defendant's actions amount to speech or expression. Once that issue is resolved, the court must decide if the defendant's expression falls within the ambit of protected speech or not. As far as the first question is concerned, it seems clear that actions depicted in movies, as well as dialogue, are a recognized form of expression.²⁸⁸ The same is true for visual representations in paintings and photographs.²⁸⁹ Presumably, such materials are also protected speech when they appear on Web sites.

On the other hand, no court has squarely held that video games constitute a form of expression for First Amendment purposes. Indeed, in the early 1980s a number of courts concluded that video games were not a recognized form of speech.²⁹⁰ These courts reasoned that protected

283. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949); *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982); *United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985); see also C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 982 (1997) (observing that "[s]peech can be a means of committing or attempting to commit a crime defined in nonspeech terms").

284. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

285. See *New York v. Ferber*, 458 U.S. 747, 758 (1982).

286. See *Stone*, *supra* note 277, at 195 (observing that "[t]he conclusion that a particular class of speech has only low first amendment value does not mean that the speech is wholly without constitutional protection or that the government may suppress it at will").

287. See *Block*, *supra* note 8, at 794 (stating that "[o]nce speech is labelled 'obscene,' only a rational basis for eliminating that speech is required").

288. See *Joseph Burstyn, Inc.*, 343 U.S. at 502 (holding that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments").

289. See *Baker*, *supra* note 262, at 983 (contending that "art and photographs, whether or not they have propositional content, receive protection under the constitutional term 'speech'").

290. See *Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297, 299 (D. Mass. 1983) (declaring that "video games are not protected speech within the First Amendment"); *America's Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 174 (E.D.N.Y. 1982)

expression required the communication of information or ideas.²⁹¹ In their view, the primitive video games of yesteryear were little more than glorified pinball machines.²⁹² Even so, at least one court intimated that video games might evolve to the point where they had sufficient idea content to qualify as protected speech under the First Amendment.²⁹³ Modern games are certainly more complex and sophisticated than their earlier predecessors. The programming architecture has sufficient intellectual content that video game software may qualify as an original work under copyright law.²⁹⁴ Moreover, modern computer games have music, dialogue, and plots. Arguably, therefore, they satisfy the threshold requirements of free expression.

Assuming that material depicted in movies, video games and Internet Web sites can be considered forms of expression, we must then determine if these particular forms of expression are core speech protected by the First Amendment or whether they are merely low-value speech.

1. Liability for the Dissemination of Sexually Explicit Material

As mentioned earlier, the plaintiffs in *James v. Meow Media* contend that sexually explicit material obtained by Michael Carneal from commercial Web sites contributed to his violent behavior and, therefore, argue that the owners of these Web sites should be held liable in tort for their injuries.²⁹⁵

When discussing sexually explicit material, it is important to

(observing that "although video game programs may be copyrighted, they 'contain so little in the way of particularized form of expression' that video games cannot be fairly characterized as a form of speech protected by the First Amendment"); *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605, 610 (Mass. 1983) (stating that "[w]e are not prepared . . . to hold that these video games . . . are entitled to constitutional protection"); *Caswell v. Licensing Comm'n for Brockton*, 444 N.E.2d 922, 926-7 (Mass. 1983) (holding that the plaintiff "has failed to demonstrate that video games import sufficient communicative, expressive or informative elements to constitute expression protected under the First Amendment").

291. See *America's Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 173 (E.D.N.Y. 1982) (holding that "there must be some element of information or some idea being communicated"); *Caswell*, 444 N.E.2d at 925 (declaring that "[e]ntertainment may come within the ambit of the First Amendment, but to gain protected status, that entertainment must be designed to communicate or express some idea or some information").

292. See *America's Best Family Showplace Corp.*, 536 F. Supp. at 174 (holding that "a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational content"); *Marshfield Family Skateland, Inc. v. Town of Marshland*, 450 N.E.2d 605, 610 (Mass. 1983) (describing video games as "technologically advanced pinball machines").

293. See *Marshfield Family Skateland*, 450 N.E.2d at 609-10 (declaring that "in the future video games which contain sufficient communicative and expressive elements may be created").

294. See *Stern Elec's, Inc. v. Kaufman*, 669 F.2d 852, 856-7 (2d Cir. 1982) (holding that a video game was sufficiently original to qualify for copyright protection).

295. Complaint, ¶ 29.

distinguish between obscenity and other material. The Supreme Court, in *Miller v. California*,²⁹⁶ set forth some of the distinguishing characteristics of obscenity. According to the Court, in judging whether something was obscene, one should consider: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes sexual conduct in a patently offensive way; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.²⁹⁷ As mentioned earlier, obscenity is not regarded as protected speech²⁹⁸ and the government may restrict access, even by willing recipients, to obscene material.²⁹⁹

Despite its sexual content, pornography is thought to have some redeeming social value.³⁰⁰ From the time of Aristophanes, authors have engaged in sexually-explicit expression to criticize existing social and political values.³⁰¹ Consequently, while courts have upheld reasonable time, place and manner regulations,³⁰² they have generally not allowed the government to restrict pornography solely on the basis of its sexual

296. 413 U.S. 15 (1973).

297. *Id.* at 24. While the Court has defined obscenity as a legal term of art, it has not attempted to do the same for pornography. See Amy Adler, *What's Left? Hate Speech, Pornography, and the Problem of Artistic Expression*, 84 CAL. L. REV. 1499, 1509 n.35 (1996); see also Nadine Strosser, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1104 (1993). Others, however, have defined pornography as "materials that are highly sexually explicit and are designed and are, in fact, used primarily for the purpose of sexual arousal." Shauer, *supra* note 230, at 738. Pornography is often classified as "hard core" or "soft core"; the former depicts actual sexual contact, while the latter merely depicts nudity or lascivious exhibition. See Rimm, *supra* note 11, at 1849 n.1.

298. See *Sable Communications v. FCC*, 492 U.S. 115, 124 (1989) (declaring that "[w]e have repeatedly held the protection of the First Amendment does not extend to obscene speech"); *Miller v. California*, 413 U.S. 15, 23 (1973) (stating that "[t]his much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment"); *Ginsberg v. New York*, 390 U.S. 629, 635 (1968) (holding that "[o]bscenity is not within the area of protected speech or press"); *Roth v. United States*, 354 U.S. 476, 485 (1957) (declaring that "obsenity is not within the area of constitutionally protected speech or press").

299. See *United States v. Reidel*, 402 U.S. 351 (1971).

300. See Johnson, *supra* note 225, at 218 (arguing that "[p]ornography, far from being an evil that the First Amendment must endure, is a positive good that encourages experimentation with new media").

301. See Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097, 1152 (1994) (declaring that "[s]exual expression has long been used to order, challenge, and subvert the status quo").

302. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991) (upholding enforcement of general statutory ban on nudity against nude dancers); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (upholding zoning restrictions on adult movie theaters); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976) (same).

content.³⁰³ On the other hand, some sexually explicit material may be considered obscene when viewed by minors even though it is not obscene when sold to adults.³⁰⁴ Therefore, it should come as no surprise that governmental officials often claim that restrictions on pornography are intended to protect children, rather than to interfere with adults' access to sexually explicit material.³⁰⁵

Congress relied on this rationale when it enacted the Communications Decency Act of 1996,³⁰⁶ a statute that attempted to regulate the dissemination of sexually explicit material over the Internet.³⁰⁷ Section 223(a)(1)(B)(ii) imposed criminal sanctions for the "knowing" transmission of "obscene or indecent" messages to any recipient under the age of eighteen (the indecent transmission provision).³⁰⁸ In addition, section 223(d) imposed criminal liability for the knowing sending or displaying to a person under the age of eighteen of any message "that, in context, depicts or describes in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" (the "patently offensive display provision").³⁰⁹ The statute allowed certain defenses based on good faith attempts by the sender to restrict offending messages to adults.³¹⁰ A number of parties promptly challenged the constitutionality of the Act and a three-judge court enjoined enforcement of its patently offensive display provisions in their entirety along with the indecent transmission provisions insofar as they affected the dissemination of indecent, as opposed to obscene, material.³¹¹ The United Supreme Court affirmed the lower court's decision in *Reno v. American*

303. See *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (declaring that content-based regulation of Internet communications was not sufficiently precise to be valid); *Sable Communications*, 492 U.S. at 126 (holding that the government may not regulate the content of protected speech unless it demonstrates a compelling reason to do so).

304. See *Ginsberg v. New York*, 390 U.S. 629 (1968). Obscenity as to minors is defined by adopting the definition of obscenity for adults (appeal to prurient interest, patent offensiveness to community standards, and lack of redeeming social value) to younger recipients. See John C. Clearly, Note, *Telephone Pornography: First Amendment Constraints on Shielding Children from Dial-A-Porn*, 22 HARV. J. ON LEGIS. 503, 523 (1985).

305. See *Sable Communications*, 492 U.S. at 115 (invalidating federal statute insofar as it purported to regulate "indecent" telephone messages as opposed to obscene ones).

306. 47 U.S.C. § 223 (1996).

307. The Communications Decency Act was part of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996). The Telecommunications Act was primarily intended to promote competition in telephone, cable and over-the-air broadcasting markets. See *Reno*, 512 U.S. at 857-58.

308. 47 U.S.C. § 223(a)(1)(B)(ii) (1996).

309. *Id.* § 223(d).

310. See *id.* § 223(e)(5) (1996).

311. See *Reno v. ACLU*, 929 F. Supp. 824 (E.D. Pa. 1996).

*Civil Liberties Union.*³¹²

The *Reno* Court was extremely critical of the Act and clearly regarded it as an egregious case of legislative overkill. In particular, the court criticized the Act because it interfered with the right of parents to control what their children were exposed to by punishing the transmission of indecent material, regardless of whether there was parental consent or not.³¹³ The Court considered this to be an unwarranted invasion of parental rights and declared that parents, not the government, should decide what their children viewed on the Internet. In the Court's view, these paternalistic aspects of the Act were aggravated by the fact that its provisions applied to all children under the age of eighteen, despite the fact that older teenagers were likely to be more mature than younger children when it came to sexual matters.³¹⁴ The Court also observed that the Act banned all patently offensive material regardless of whether it had any serious literary, artistic, political or scientific value.³¹⁵ Thus, according to the Court, regulated subject matter might include "discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library."³¹⁶ The Court also expressed doubts about the Act's excessively broad reach. Contrary to the usual practice, the Act criminalized not only commercial transactions, but also personal communications between private individuals.³¹⁷ Thus, the transmission of a private e-mail message could conceivably result in the same criminal liability as the sale of hard-core pornography over the Internet.³¹⁸ Finally, the Court pointed out the effect the Act's vague provisions might have on the exercise of protected speech by both children and adults.³¹⁹ In the Court's opinion, Congress had made no effort to narrowly tailor the Act in order to avoid imposing such a heavy burden on free speech.³²⁰

The Court also viewed with suspicion various arguments advanced by the government to justify its broad content-based regulatory scheme. For example, the government claimed that its legal authority to regulate speech over the Internet was comparable to its regulatory power over the radio and

312. 521 U.S. 844 (1997). For a discussion of the *Reno* case see Praveen Goyal, Comment, *Congress Fumbles with the Internet: Reno v. ACLU*, 21 HARV. J.L. & PUB. POL'Y 637 (1998).

313. *See Reno*, 521 U.S. at 865.

314. *See id.* at 865-66.

315. *See id.* at 865.

316. *Id.* at 878.

317. *See id.* at 865.

318. *See id.* at 878 (pointing out that a parent who send his 17-year old college freshman birth control information by e-mail could be incarcerated for violating the Act).

319. *See id.* at 871-74.

320. *See id.* at 879.

television broadcasting industry.³²¹ Earlier Supreme Court opinions had upheld regulations of the broadcast media because of the prior history of extensive regulation with respect to broadcasting,³²² the scarcity of available broadcast frequencies,³²³ and the invasive nature of material broadcast over the airwaves.³²⁴ The Court in *Reno*, however, rejected this supposed analogy between the broadcast industry and the Internet.³²⁵ The court observed the Internet was not regulated as extensively as the broadcast industry.³²⁶ Moreover, unlike the situation in the broadcast industry, virtually anyone could use the Internet as a forum for expression.³²⁷ Finally, the Court declared that the Internet was not an invasive medium and concluded that users would rarely encounter unwanted sexually explicit material purely by accident.³²⁸

The government also contended that the Act's provisions were necessary to protect children from exposure to indecent and sexually explicit material on the Internet.³²⁹ While the Court acknowledged that the government had a legitimate interest in protecting children from exposure to harmful material,³³⁰ it declared that this interest was not sufficient to justify regulations that unnecessarily restricted adult speech.³³¹ Furthermore, the Court disputed the government's contention that the Act's regulatory scheme would not interfere with adult-to-adult communication.³³² It noted that there was a difference between devices that would allow *parents* to prevent their children from reaching certain Web sites and devices that would allow *owners* of sexually explicit Web sites to detect and screen out underage viewers. The Court found that inexpensive technology was readily available for parents to screen out unwanted material, but that it would be prohibitively expensive for Web

321. *See id.* at 868-70.

322. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 399-400 (1969).

323. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637-38 (1994); Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1070 (1994) (stating that "[t]he current legal regime permits significant broadcast regulation on the grounds that the electromagnetic spectrum is a scarce public resource").

324. *See* FCC v. Pacifica Found., 438 U.S. 726 (1978).

325. *See Reno*, 521 U.S. at 868.

326. *See id.* at 868-69.

327. *See id.* at 870.

328. *See id.* at 869.

329. *See id.* at 874.

330. *See id.* at 875; *see also* FCC v. Pacifica Found., 438 U.S. 726, 749 (1978); Ginsberg v. New York, 390 U.S. 629, 639 (1968).

331. *See Reno*, 521 U.S. at 875; *see also* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 759 (1996); Sable Communications v. FCC, 492 U.S. 115, 128 (1989); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74-75 (1983); Butler v. Michigan, 352 U.S. 380, 383 (1957).

332. *See Reno*, 521 U.S. at 876-77.

site owners to verify whether viewers who accessed their Web site were adults or not. Consequently, the Court concluded that requiring Web site owners to keep minors from accessing their Web sites would significantly restrict access to the Internet by adults.³³³

The government also maintained that the unregulated availability of sexually explicit material on the Internet was driving away people who were afraid to risk exposure to such material.³³⁴ The Court, however, characterized this claim as “singularly unpersuasive.”³³⁵ As the Court observed, the impressive growth of the Internet in recent years belied the notion that people were being discouraged from using it.³³⁶ In the Court’s words, “[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.”³³⁷

The *Reno* decision involved a criminal statute and, therefore, would not be directly applicable to the issue of tort liability. However, *Reno* does suggest that the Court will not look with favor upon actions which potentially chill free expression on the Internet. If tort liability poses a threat to free expression on the Internet, the Court, if it adheres to the spirit of *Reno*, will almost certainly restrict the right of plaintiffs to sue the owners of pornographic Web sites.

One way plaintiffs might attempt to get around the First Amendment’s protection of free expression is to characterize sexually explicit material on Web sites as obscene, rather than merely pornographic, and thus subject to greater regulation. The problem with this approach is that, at least under traditional criteria, most pornographic material is not obscene. Prohibitionists have attempted to overcome this problem by advocating a shift from a test of obscenity that emphasizes the material’s appeal to the prurient interest and its patent offensiveness to one that focuses on the material’s depiction of women.

The inspiration for this novel view of pornography comes from the work of feminist theorists like Andrea Dworkin³³⁸ and Catherine MacKinnon.³³⁹ These writers have concluded that pornography portrays women in ways that are distorted and degrading and thereby contributes to the subordination of women.³⁴⁰ Not only does pornography harm those

333. *See id.*

334. *See id.* at 885.

335. *Id.*

336. *See id.*

337. *Id.*

338. *See generally* ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981).

339. *See generally* CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987); MacKinnon, *supra* note 230.

340. *See Meyer, supra* note 301, at 1135 (observing that “[m]uch pornography, even when it does not depict violence, portrays women in ways that are distorted and degrading”).

women who participate in the production of pornography,³⁴¹ but, according to these commentators, pornography also “celebrates, promotes, authorizes, and legitimizes” such abuses against women as rape, spouse abuse, sexual harassment, prostitution, and sexual child abuse.³⁴² Consequently, they argue that material which depicts violence against women or portrays them in a sexually submissive manner should be stripped of First Amendment protection.³⁴³ Free speech advocates however, contend that feminists want to suppress pornography, not because it is sexually explicit, but because they disapprove of what pornography has to say about women.³⁴⁴ To suppress pornography solely on the basis of its ideological content, however, seems to conflict with basic principles of First Amendment jurisprudence.³⁴⁵ Nevertheless, many scholars have supported the Dworkin-MacKinnon position.³⁴⁶

So far, the Dworkin-MacKinnon theory of pornography has not fared very well in the courts. For example, a federal appellate court in *American Booksellers Ass’n, Inc. v. Hudnut*,³⁴⁷ struck down an anti-pornography ordinance modeled along the lines suggested by Dworkin and MacKinnon.

341. See Sunstein, *supra* note 233, at 595 (observing that “pornography harms those women who are coerced into and brutalized in the process of producing pornography”).

342. MacKinnon, *supra* note 230, at 17.

343. See Marianne Wesson, *Girls Should Bring Lawsuits Everywhere . . . Nothing Will Be Corrupted: Pornography as Speech and Product*, 60 U. CHI. L. REV. 845, 851-53 (1993) (arguing that women harmed by pornography, as defined by Dworkin and MacKinnon, should be allowed to recover damages from producers and distributors of pornographic material).

344. See Alan Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. CAL. L. REV. 1887, 1896 (1992) (pointing out that “[t]he subordination of women in pornographic literature is an example of speech that may be characterized as non-political but which clearly conveys political-ideological messages and values”).

345. See Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General’s Commission on Pornography Report*, 1987 ABARES.J. 681, 683 (stating that, The standard liberal view is that “pornography is a form of speech and therefore contributes to the cultural dialogue, even if its propositions turn out to be false. We ought to let it flourish; we should give it full First Amendment protection and then leave it alone.”).

346. See Strosser, *supra* note 297, at 1107 (disclosing that “[t]he majority of law journal publications concerning this issue since 1980 have supported the Dworkin-MacKinnon analysis and endorsed censorship”). Advocates of Dworkin-MacKinnon approach argue that censorship is justified because pornography undermines the credibility of women to such an extent that they cannot effectively counteract the undesirable message that pornography disseminates. See John F. Wirenius, *Giving the Devil the Benefit of Law: Pornographers, the Feminist Attack on Free Speech, and the First Amendment*, 20 FORDHAM URB. L.J. 27, 57 (1992) (declaring that “[f]or MacKinnon, the conditions under which counter-speech can be effective do not exist because pornography undermines women’s credibility when they do speak and terrorizes them into not speaking at all”); Comment, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 475-76 (1984) (stating that “because women have never acquired equal status, their rebuttal of pornography’s defamatory images is discounted, leaving them with no effective means of breaking the cycle of stereotyping and discrimination”).

347. 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

The ordinance, enacted by the City of Indianapolis, defined pornography as the graphic depiction of the sexually explicit subordination of women and declared it to be a form of illegal sex discrimination.³⁴⁸ The ordinance provided that people could not “traffic” in pornography, “coerce” others into performing in pornographic works or “force” pornography upon unwilling individuals.³⁴⁹ Furthermore, the ordinance created a right of action against the creators or sellers of pornographic works on behalf of anyone who could claim to have been injured by a reader or viewer of pornography.³⁵⁰

Shortly after the Indianapolis ordinance was passed, several media trade associations challenged its constitutionality.³⁵¹ A federal district agreed with the plaintiffs and concluded that the ordinance violated the First Amendment.³⁵² On appeal, the court examined the ordinance’s definition of “pornography” and concluded that it was fatally defective.³⁵³ According to the courts, the ordinance was invalid because it regulated solely on the basis of viewpoint: sexually explicit depictions that “subordinated” women were prohibited, while equally graphic material that portrayed women in positions of equality (or perhaps even superiority) was not regulated by the ordinance.³⁵⁴ The City claimed that pornography was not an idea, but an injury, since it achieved the subordination of women by socialization rather than by persuasion.³⁵⁵ The court agreed that depictions of subordination tended to perpetuate subordination and, in that respect, contributed to discriminatory treatment of women.³⁵⁶ But, as the court pointed out, other forms of speech affected public attitudes and behavior in the same manner as pornography.³⁵⁷ The court declared that under the American constitutional system, harmful speech must be tolerated for to do otherwise would leave the government in control of all of the institutions of culture.³⁵⁸

The City also contended that First Amendment protection should not apply to ideas that could not be effectively challenged or rebutted by opponents.³⁵⁹ However, the court observed that the City’s argument

348. *See American Booksellers Ass’n, Inc. v. Hudnut*, 598 F. Supp. 1316, 1327 (S.D. Ind. 1984).

349. *Hudnut*, 771 F.2d at 325.

350. *See id.*

351. *See id.* at 326-27.

352. *See Hudnut*, 598 F. Supp. at 1341-42.

353. *See Hudnut*, 771 F.2d at 332.

354. *See id.* at 328.

355. *See id.* at 328; *see also MacKinnon, supra* note 230, at 17-18.

356. *See Hudnut*, 771 F.2d at 329.

357. *See id.*

358. *See id.* at 330.

359. *See id.*

assumed that some ideas were inherently good and that some were inherently bad, a principle that was contrary to established constitutional doctrine.³⁶⁰ In the court's view, the City's position would leave "the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us."³⁶¹ Finally, the defendant claimed that pornography, as defined by the ordinance, was like obscenity and, therefore, could be regulated like other "low value" speech.³⁶² The court, however, disagreed with this characterization. It noted that sexually explicit material would not be considered obscene unless it was utterly without redeeming social value.³⁶³ Since the Indianapolis ordinance banned sexually explicit speech solely on the basis of viewpoint, without any consideration of its literary, artistic, political or scientific value,³⁶⁴ it would undoubtedly suppress speech that was not obscene under the *Miller* test.³⁶⁵

Although *Hudnut* was not a tort case, it did involve civil liability, since the ordinance allowed injured parties to seek compensation through an administrative hearing process.³⁶⁶ Therefore, it would seem that the court's reasoning in that case would be applicable if a tort claimant sought to defeat an assertion of First Amendment protection of the defendant by urging the court to treat pornography, as defined by Dworkin and MacKinnon, as a form of low value speech. However, even if a court were to adopt the Dworkin-MacKinnon approach in sexual abuse cases, it would not help the victims of schoolyard violence since such violence is seldom directed specifically at women. This suggests that plaintiffs who wish to recover from the owners of sexually explicit Web sites will not be able to characterize the material on such Web sites as obscene, but instead will have to show that it incited viewers to violence.

2. Liability for the Dissemination of Violent Material

The plaintiffs in *James v. Meow Media* also contend that movie producers and video game manufacturers should be held strictly liable for disseminating material to the public that encourages or inspires violence on the part of viewers.³⁶⁷ Unlike obscenity, depictions of violence, along with advocacy of violence in the abstract, are ordinarily protected by the

360. See *id.* at 331; see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (declaring that "[u]nder the First Amendment there is no such thing as a false idea").

361. *Hudnut*, 771 F.2d at 331.

362. See *id.* at 331.

363. See *id.*

364. See *id.*

365. See *id.* at 331-32.

366. See *id.* at 326.

367. Complaint, ¶¶ 15w & 23w.

First Amendment.³⁶⁸ *Video Software Dealers Ass'n v. Webster*³⁶⁹ is illustrative. In that case, a federal appellate court struck down a Missouri statute which attempted to restrict access of violent video cassettes to minors.³⁷⁰ Although the statute was apparently aimed at "slasher" movies,³⁷¹ its actual scope was much broader.³⁷² The statute required video dealers to keep violent videos in a separate area of the store and prohibited their sale or rental to persons under the age of seventeen.³⁷³

The state conceded that depictions of violence were ordinarily protected by the First Amendment, but argued that violent videos were obscene as far as children were concerned and, therefore, could be regulated as long as the regulation was rationally related to the state's objective of protecting minors.³⁷⁴ The court, however, rejected this argument, observing that videos that contained violence, but not explicit sexual material, did not meet the legal definition of obscenity for either children or adults.³⁷⁵

The state also contended that its interest in protecting children gave it the power to determine what material children could see.³⁷⁶ The court, however, noted that the statute was content-based and ruled that the state had failed to show that the statute was narrowly tailored to advance an articulated compelling governmental interest.³⁷⁷ According to the court, even if the state could demonstrate a compelling interest in restricting the exposure of children to slasher movies, the statute covered many other types of violence and, therefore, constituted an unwarranted infringement upon other areas of protected speech.³⁷⁸ The court also held that the statute was unconstitutionally vague because it did not adequately define the term "violence."³⁷⁹ Finally, the court concluded that the statute was

368. See *Winters v. New York*, 333 U.S. 507, 508 (1948); see also *Eclipse Enter., Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997) (striking down county ordinance which restricted sale of trading cards to minors which depicted heinous crimes or criminals); *Sovereign News Co. v. Falke*, 448 F. Supp. 306 (N.D. Ohio 1977), *remanded on other grounds sub nom. Sovereign News Co. v. Corrigan*, 610 F.2d 428 (6th Cir. 1979).

369. 968 F.2d 684 (8th Cir. 1992).

370. See *id.* at 691.

371. See Rozell, *supra* note 265, at 666.

372. The statute applied to videos which (1) had a tendency to appeal to morbid interests in violence for persons under the age of seventeen, (2) depicted violence in a way which was patently offensive to the average person, and (3) lacked serious literary, artistic, political or scientific value. See *Video Software*, 968 F.2d at 687. In effect, the statute applied the *Miller* criteria for obscenity to violence.

373. See *id.*

374. See *id.* at 688.

375. See *id.*

376. See *id.*

377. See *id.* at 689.

378. See *id.*

379. See *id.* at 689-90.

unconstitutional because it imposed criminal liability upon dealers regardless of whether or not they were aware of a video's contents.³⁸⁰ In the court's view, this sort of criminal liability could unreasonably chill protected speech.³⁸¹

Another federal court applied a similar analysis in *Eclipse Enterprises, Inc. v. Gulotta*.³⁸² *Eclipse Enterprises* involved the validity of a county ordinance which prohibited the sale of trading cards to any person under the age of seventeen which depicted heinous crimes or criminals, and which was harmful to minors.³⁸³ Like the ordinance in *Video Software*, the term "harmful to minors" relied heavily on the *Miller* criteria.³⁸⁴ However, unlike the Missouri statute, the ordinance in *Eclipse Enterprises* imposed criminal liability only when the seller was aware of the card's character or content.³⁸⁵ The avowed purpose of the ordinance was to discourage juvenile crime, which was allegedly stimulated by the sale of these trading cards.³⁸⁶

As in *Video Software*, the court first determined that the ordinance regulated speech on the basis of its content, that is to say, the intent of the ordinance was to suppress information contained in the trading cards because the government thought it was harmful to minors.³⁸⁷ Once the court found the ordinance to be content-based, it looked to see if the ordinance was narrowly drawn and if it advanced a compelling governmental interest.³⁸⁸ The court found that there was no empirical evidence, other than studies of television violence, to suggest that sales of crime-related trading cards harmed minors or contributed to juvenile crime.³⁸⁹ Instead, the court concluded that the government had largely relied on nonscientific testimony from community activists.³⁹⁰ Nor did the county attempt to regulate other descriptions of crime and criminals that were similar to those found on the trading cards, thereby undercutting the county's claim that depictions of crimes and criminals were a significant social evil.³⁹¹ Consequently, the court ruled that the ordinance did not promote a compelling governmental interest and was, therefore, invalid.³⁹²

380. *See id.* at 690.

381. *See id.* at 690-91.

382. 134 F.3d 63 (2d Cir. 1997).

383. *See id.* at 64.

384. *See id.*

385. *See id.*

386. *See id.* at 64-65.

387. *See id.* at 66-67.

388. *See id.* at 67.

389. *See id.* at 67-68.

390. *See id.* at 68.

391. *See id.*

392. *See id.*

Video Software and *Eclipse Enterprises* indicate that violent expression will be fully protected under the First Amendment. Accordingly, criminal laws that attempt to regulate speech on the basis of its violent content will be classified as content-based regulations and will be struck down unless they are narrowly tailored to serve a compelling state interest.

There have been a number of tort cases where media defendants claimed the protection of the First Amendment to immunize them from liability for physical injuries caused by the dissemination of violent material to teenage audiences. In most of these cases, the courts have relied heavily on *Brandenburg v. Ohio*'s incitement analysis.³⁹³ Under the *Brandenburg* test, the government may not suppress speech which inspires violence unless it can show that the speaker explicitly advocates some sort of unlawful action, that the speaker intended thereby to incite or produce such action, that there was a high likelihood that such unlawful action would occur, and that the occurrence of such action was imminent.³⁹⁴

In *Brandenburg v. Ohio*,³⁹⁵ the Court held in favor of a Ku Klux Klan leader who was convicted of violating Ohio's criminal syndicalism statute for threatening violence at some indeterminate time in the future if the federal government continued to support the social and political aspirations of Blacks.³⁹⁶ The Court invalidated the Ohio statute because it punished the mere advocacy of violence as opposed to the "incitement to imminent lawless action."³⁹⁷ The Court subsequently amplified the *Brandenburg* holding in *Hess v. Indiana*.³⁹⁸ In *Hess*, the Court reversed the conviction of a college student who was charged with disorderly conduct after threatening to "take the fucking street back later" in response to police efforts to clear the area of anti-war demonstrators.³⁹⁹ According to the Court, the defendant's remarks were constitutionally protected because they were not intended to produce, and not likely to produce, *imminent* disorder or violence.⁴⁰⁰

Most of the tort cases in which the *Brandenburg* standard has invoked involve either facilitation,⁴⁰¹ imitation,⁴⁰² or inspiration.⁴⁰³ *Rice v. Paladin*

393. See Sims, *supra* note 42, at 256 (observing that "[m]ost courts which have held that the First Amendment barred negligence suits brought against media defendants have applied the rule of *Brandenburg v. Ohio*").

394. See Sims, *supra* note 42, at 256.

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

396. See *id.* at 444-45.

397. *Id.* at 448-49.

398. 414 U.S. 105 (1973).

399. *Id.* at 106-07.

400. See *id.* at 109.

401. See *Rice v. Paladin Enter., Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998).

402. See *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802 (S.D. Tex. 1983); see also *Olivia*

*Enterprises, Inc.*⁴⁰⁴ provides a good example of a facilitation case. In *Rice*, the relatives and personal representatives of three murder victims brought suit against the publisher of *Hit Man: A Technical Manual for Independent Contractors*, an instruction manual for aspiring hit men.⁴⁰⁵ The murderer, James Perry, who was hired by Lawrence Horn, the ex-husband of one of the victims, faithfully followed the advice and instructions provided in the defendant's book.⁴⁰⁶ The publisher, Paladin Enterprises not only agreed that it knew that its book would be used by murderers, but actually admitted that it intended to provide assistance to them.⁴⁰⁷ Even so, Paladin contended that the publication of its book was still protected as a matter of law by the First Amendment.⁴⁰⁸ While acknowledging that the publisher was free to advocate lawless behavior in the abstract, the court concluded that *Brandenburg's* imminence requirement was not applicable because Paladin's conduct went beyond the mere advocacy of unlawful conduct, and amounted to active assistance in the performance of a criminal act.⁴⁰⁹ Furthermore, the court reasoned that because First Amendment concerns did not prohibit the government from imposing criminal sanctions on those who aided and abetted criminals, it should not preclude civil damage awards against such individuals either.⁴¹⁰

Finally, the court rejected the argument that tort liability would chill lawful speech.⁴¹¹ According to the court, liability in this case was predicated upon Paladin's admitted *knowledge* that readers would use the book to help them commit crimes and its *intent* that they should do so.⁴¹² According to the court, few publishers would be so foolish as to admit

N v. National Broad. Co., 178 Cal. Rptr. 888 (Cal. Ct. App. 1981), *cert. denied sub nom.*; *Niemi v. National Broad. Co.*, 458 U.S. 1108 (1982); *DeFilippo v. National Broad. Co.*, 446 A.2d 1036 (R.I. 1982).

403. See *Waller v. Osborne*, 763 F. Supp. 1144 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir.), *cert. denied*, 506 U.S. 916 (1992); see also *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1982); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989); *Byers v. Edmondson*, 712 So. 2d 681 (La. Ct. App. 1998), *cert. denied*, 119 S. Ct. 1143 (1999).

404. 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998).

405. The author of this revealing text prudently published under the pseudonym, "Rex Feral," instead of using his (or her) real name. See Davidson, *supra* note 13, at 240.

406. See *Rice*, 128 F.2d at 239. One of the victims, Lawrence Horn's eight-year old quadriplegic son, was the beneficiary of a \$2 million trust fund. Any money left in the trust at the death of his son and ex-wife was to go to Mr. Horn. Horn decided to expedite matters by hiring Perry to kill his ex-wife and child. See *id.*

407. See *id.* at 242.

408. See *id.* at 241.

409. See *id.* at 246-47.

410. See *id.* at 247.

411. See *id.* at 265-67.

412. See *id.* at 265.

such things in the future.⁴¹³ The court confidently predicted that descriptions of criminal acts, no matter how explicit, in news reports would not result in liability because newscasters would not have the requisite intent to break the law.⁴¹⁴ Even the publishers of instruction manuals for hit men could escape liability in most instances since knowledge on the part of the publisher that such information might be misused for criminal purposes would not be enough to support liability under the court's analysis.⁴¹⁵

A number of imitation cases have also employed a *Brandenburg* analysis to protect publishers from liability.⁴¹⁶ *Olivia N v. National Broadcasting Co.*⁴¹⁷ is illustrative. In that case, a young girl sued a television network for the broadcast of a film drama entitled "Born Innocent."⁴¹⁸ The plaintiff was attacked on a public beach by a group of teenage thugs who imitated an "artificial rape" scene which been portrayed on the show several days previously.⁴¹⁹ The plaintiff argued that the court should adopt a negligence standard rather than *Brandenburg*'s more rigorous incitement approach.⁴²⁰

The California court observed that movies and television broadcasts were normally protected by the First Amendment.⁴²¹ It also rejected a negligence approach and declared that "[i]ncitement is the proper test here."⁴²² The court adhered to the stricter *Brandenburg* standard because it determined that "television networks would become significantly more inhibited in the selection of controversial materials if liability were to be imposed on a simple negligence theory."⁴²³ Since the plaintiff had not alleged that the television show intended to encourage others to commit sexual assaults, the court concluded that the incitement requirement had not been satisfied.⁴²⁴ The court also distinguished *FCC v. Pacifica Foundation*,⁴²⁵ which had upheld FCC regulations against the broadcast of indecent, but not obscene, material in order to protect children. The court

413. *See id.* at 265-66.

414. *See id.* at 266.

415. *See id.*

416. *See Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 804-05 (S.D. Tex. 1983); *Olivia N v. National Broad. Sys.*, 178 Cal. Rptr. 888, 893 (Cal. Ct. App. 1981), *cert. denied sub nom.*, *Niemi v. National Broad. Co.*, 458 U.S. 1108 (1982); *DeFilippo v. NBC*, 446 A.2d 1036, 1040 (R.I. 1982).

417. 178 Cal. Rptr. 888 (Cal. Ct. App. 1981).

418. *See id.* at 890.

419. *See id.* at 890-91.

420. *See id.* at 891.

421. *See id.* at 892.

422. *Id.* at 893.

423. *Id.* at 892.

424. *See id.* at 892-93.

425. 438 U.S. 726 (1978).

found that the holding in *Pacifica* applied only to the government's power to regulate indecency and should not be expanded to cover depictions of violent conduct.⁴²⁶

Several courts have also relied on a *Brandenburg* analysis to protect publishers against tort liability in inspiration cases.⁴²⁷ One such case was *McCollum v. CBS, Inc.*,⁴²⁸ which involved the celebrated musician, Ozzy Osborne. The music of Mr. Osborne and other heavy metal musicians tended to focus on such unwholesome themes as hate, sex, rebellion, violence and suicide,⁴²⁹ with occasional digressions into sexual perversion, necrophilia and satanism.⁴³⁰ One of Osborne's songs, "Suicide Solution," suggested that suicide might be an acceptable way for some people to deal with the vicissitudes of life.⁴³¹ John McCollum, shot and killed himself while listening to Osborne's music.⁴³² The decedent's parents alleged that Osborne's music was intentionally fashioned to appeal to teenage misfits and, therefore, the producers and distributors of Osborne's music should have known that some of them might take Osborne's advice and commit suicide.⁴³³

The court began its analysis of the plaintiffs' claim by observing that the First Amendment protected all forms of artistic expression, including musical lyrics.⁴³⁴ The issue, therefore, was whether Osborne's music could be characterized as "speech which is directed to inciting or producing imminent lawless action and which is likely to incite or produce such action."⁴³⁵ According to the court, the *Brandenburg* standard required that: (1) Osborne's music be *directed* and *intended* toward the goal of bringing about the imminent suicide of listeners; and (2) that his music be *likely* to produce such a result.⁴³⁶ In other words, the plaintiffs could not prevail merely by proving that McCollum's suicide was a foreseeable reaction to Osborne's music; they also had to show that their son's suicide was a

426. *See id.* at 894.

427. *See Waller v. Osborne*, 763 F. Supp. 1144, 1150-51 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir.), *cert. denied*, 506 U.S. 916 (1992); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193 (Cal. Ct. App. 1988); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071-72 (Mass. 1989); *Byers v. Edmondson*, 712 So. 2d 681, 689 (La. Ct. App. 1998), *cert. denied*, 119 S. Ct. 1143 (1999).

428. 249 Cal. Rptr. 187 (Cal. Ct. App. 1988).

429. *See Block*, *supra* note 8, at 783-85.

430. *See Holt*, *supra* note 226, at 58 (observing that "[m]uch of this music promotes themes of extreme rebellion, violence, substance abuse, sexual perversion, necrophilia, suicide and satanism").

431. *See McCollum*, 249 Cal. Rptr. at 190.

432. *See id.* at 189.

433. *See id.* at 190-91.

434. *See id.* at 192.

435. *Id.* at 193 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

436. *See id.* at 193.

specifically intended consequence.⁴³⁷ Not surprisingly, this proved to be an impossible standard for the plaintiffs to meet.

The court could find no explicit command in the lyrics of Osborne's songs, including "Suicide Solution," to commit suicide in the immediate future or at any other specific time.⁴³⁸ According to the court, the lyrics were nothing more than a form of artistic expression that were not intended to be taken literally and which would not be interpreted as an incitement to suicide by any reasonable person.⁴³⁹ The court also declared that music that focused on the darker side of human nature or evoked a mood of depression could not be characterized as a direct incitement to imminent violence.⁴⁴⁰ Finally, the court concluded that Osborne had no duty to modify his lyrics in order to prevent harm to a small group of emotionally troubled listeners.⁴⁴¹ According to the court, to impose such a duty upon performers would "quickly have the effect of reducing and limiting their artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy."⁴⁴²

The *Brandenburg* standard was also employed in *Byers v. Edmondson*,⁴⁴³ a recent case involving Oliver Stone's controversial movie *Natural Born Killers*. The plaintiff in that case, Patsy Byers, was shot and seriously wounded during an armed robbery at the convenience store where she worked.⁴⁴⁴ In her suit against the producers and distributors of *Natural Born Killers*, Ms. Byers alleged that the robbers had gone on a crime spree after repeatedly viewing the film.⁴⁴⁵ The plaintiff argued that the defendants should be held liable for negligence because they knew or should have known that a film which glorified criminal violence and portrayed criminal psychopaths as heroes and celebrities would inspire other people to commit violent acts.⁴⁴⁶ Furthermore, Byers claimed that the defendants intended for the film's viewers to imitate some of the violent scenes in the film.⁴⁴⁷ The trial court dismissed the suit and Ms. Byers appealed.⁴⁴⁸

As in *McCollum*, the court in *Byers* court began with an acknowledgment that motion pictures were protected by the First

437. *See id.*

438. *See id.*

439. *See id.*

440. *See id.* at 194.

441. *See id.* at 197.

442. *Id.*

443. 712 So. 2d 681 (La. Ct. App. 1998), *cert. denied*, 119 S. Ct. 1143 (1999).

444. *See id.* at 683.

445. *See id.* at 684.

446. *See id.*

447. *See id.* at 687.

448. *See id.* at 685-86.

Amendment to the same extent as other forms of expression.⁴⁴⁹ Invoking the *Brandenburg* standard, the court proceeded to consider whether the defendant's conduct amounted to an incitement to imminent criminal activity.⁴⁵⁰ The court noted that mere knowledge on the part of the defendants that the movie might trigger criminal misconduct by third parties was not enough to constitute incitement.⁴⁵¹ At the same time, relying on *Rice v. Paladin Enterprises, Inc.*,⁴⁵² the court concluded that the defendants could be held liable under an incitement theory if the plaintiff could prove that they *intentionally* urged viewers to imitate the criminal conduct of the main characters in the film.⁴⁵³ Since the court was required to accept the plaintiff's factual allegations as true for purposes of reviewing the lower court's dismissal of the plaintiff's claim, it felt compelled to reverse the trial court and allow Byers to prove the existence of intent at trial.⁴⁵⁴ This decision was technically correct, but it allowed the plaintiffs to take their case forward to the discovery stage of the trial process by alleging the existence of intent, even though there was no credible evidence to support such an allegation.

C. Conclusion

Unless existing constitutional standards are changed, there seems little chance that the courts will impose tort liability on those who disseminate sexually explicit or violent material. So far, the distinction between obscene material and sexually explicit protected speech remains a cornerstone of First Amendment jurisprudence, notwithstanding the efforts of feminists and religious fundamentalists to persuade courts that some of this material should be demoted to an unprotected category of expression. Likewise, attempts by the government to restrict access to sexually explicit speech on the Internet under the guise of protecting children have met with failure. While no one knows what the future will bring, for the time being, government attempts to regulate sexually explicit material on the Internet have been unsuccessful. In light of the acknowledged ability of tort liability to chill protected speech, it is unlikely that the courts will allow private individuals to recover damages from the owners of pornographic Web sites as long as they make reasonable efforts to prevent minors from viewing sexually explicit material on such sites.

Those who claim to have been injured by the portrayal of violent

449. *See id.* at 689.

450. *See id.* at 689-90.

451. *See id.* at 691.

452. 128 F.3d 233 (4th Cir. 1997).

453. *See Byers*, 712 So. 2d at 688.

454. *See id.* at 691-92.

material in movies or video games are also unlikely to prevail as long as most courts rely on the *Brandenburg* standard.⁴⁵⁵ First of all, plaintiffs must point to specific words or acts by the publisher that directly incite others to engage in violent acts. However, while movies and video games often portray violent conduct, they almost never expressly urge viewers to commit violent acts.⁴⁵⁶ Second, the plaintiff must show that the publisher intended to cause violence.⁴⁵⁷ This requires a subjective desire on the part of the defendant to cause violence or knowledge that violence was substantially certain to result.⁴⁵⁸ The mere possibility, or even the probability, that some violent acts might occur will not satisfy this requirement.⁴⁵⁹ Finally, liability may only be imposed upon a publisher for speech that threatens imminent harm.⁴⁶⁰ The imminence requirement would be difficult to satisfy in situations where a viewer is subjected to violent

455. See Davidson, *supra* note 13, at 279 (declaring that “the ‘incitement’ standard under *Brandenburg* is an extremely difficult one to satisfy”); see also Laura W. Brill, Note, *The First Amendment and the Power of Suggestion: Protecting “Negligent” Speakers in Cases of Imitative Harm*, 94 COLUM. L. REV. 984, 987-88 (1994) (pointing out how difficult it is for plaintiffs to show that harm to them was likely, imminent or intended).

456. See Diamond & Primm, *supra* note 180, at 972 (observing that “[m]ost media portrayals do not involve direct advocacy of unlawful conduct, but will only indirectly incite someone to action”); see also Prettyman & Hook, *supra* note 22, at 375 (declaring that “whereas verbal statements may directly incite others to violence, visual portrayals can only show violent conduct, i.e., they can only indirectly advocate unlawful acts”).

457. See Smith, *supra* note 216, at 1203 (declaring that “[u]nder the *Brandenburg* incitement standard, the speaker must intend to produce the activity”). But see Hilker, *supra* note 217, at 570 (arguing that “[t]he ‘directed to inciting or producing imminent lawless action’ language of *Brandenburg* need not—and should not—be construed to require more than negligence on the part of the media defendant in determining liability for imitative violence”).

458. See Michael P. Kopech, Comment, *Shouting “Incitement!” in the Courtroom: An Evolving Theory of Civil Liability?*, 19 ST. MARY’S L.J. 173, 184 (1987) (stating that “[i]ntent indicates a purpose on the part of the actor to procure the consequences of his act, but extends as well to the consequences that the actor knows are substantially certain to follow”).

459. See Campbell, *supra* note 220, at 440 (stating that “[i]ncitement implies that a high probability of danger is intended by the speaker, while foreseeability also incorporates unintended consequences”).

460. See Hentoff, *supra* note 277, at 1458 (contending that “[n]o matter how serious a harm is, if the harm is not imminent, speech cannot be regulated under the [*Brandenburg*] test”). The imminence requirement is apparently based on the notion the government should be allowed to restrict speech only when an audience might be emotionally swayed by the speaker and would have no time for discussion or reflection. See Harry Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1141 (1979) (declaring that “[i]f there is no time for discussion through talk, a clear and present danger test—or a similar test by any other name—is appropriate”); Hilker, *supra* note 217, at 570 (pointing out that “[t]he required temporal relationship between the communication and the alleged resultant unlawful act forces analysis of whether the advocacy in question was so closely related in time to the harmful action that when the supposedly protected speech was made it was clear that ‘more speech’ could not have prevented the harm”).

material over a long period of time rather than responding immediately to a specific stimulus.

IV. LIABILITY ISSUES

A. *Three Liability Standards*

This portion of the Article looks at three liability standards under which personal injury claims against media publishers might be adjudicated. The first liability standard is based on strict products liability. Under this approach, injured parties would be allowed to sue under a defective product theory and media publishers would not be permitted to claim any First Amendment protection. The second standard employs negligence principles. Under such a regime, plaintiffs would be required to show that a publisher failed to exercise due care, but defendants would be foreclosed from avoiding liability on First Amendment grounds. The third alternative would essentially retain the liability standard that currently applies to book publishers, recording companies and movie producers and would extend this standard to all other media publishers.

1. Strict Liability

This liability standard would be most favorable to victims' interests. Under a strict liability approach, the traditional product, sale and defect requirements of products liability law would be relaxed so that those who commercially disseminate information or ideas embodied in books, magazines, records, CDs, movies, radio or television broadcasts, video cassettes, computer programs, or who make information or ideas available to the public over the Internet, would be potentially subject to liability as product sellers. Media defendants would not be able to defeat strict liability by raising defenses based on First Amendment privilege; however, they could still defeat liability by raising cause-in-fact or proximate cause issues.

A strict liability standard would probably work best in a case where the plaintiff's claim is based on the publication's information content. Since the focus is on the condition of the product, not the manufacturer's conduct in a strict liability case,⁴⁶¹ liability would depend almost entirely on

461. See *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 883 (Alaska 1979) (declaring that "[t]he focus of strict products liability is on the condition of the product, not on the manufacturing and marketing decision of the defendant"); see also *Jackson v. Harsco Corp.*, 673 P.2d 363, 365 (Colo. 1983) (stating that "the focus is upon the nature of the product, and the consumer's reasonable expectations with regard to that product"); *Phipps v. General Motors Corp.*, 363 A.2d 955, 958 (Md. 1976) (contending that "[t]he relevant inquiry in a strict liability action focuses not

whether the published material was accurate or not. Presumably, in such cases, it would not matter that the defendant could not have discovered the error by means of reasonable inspection. Thus, if a strict liability standard were adopted, book companies that published another's work would be held strictly liable to consumers for any affirmative statements that caused physical harm.⁴⁶² Retail sellers would also be subject to liability even though they could not realistically verify the accuracy of the books they sold.⁴⁶³ Moreover, claims would not need to be limited to the publication of inaccurate information; consumers who were injured because of ambiguous information, or even omissions, could also sue just as they do in inadequate warning cases.⁴⁶⁴

However, it would be difficult to apply strict liability principles to claims based on a publication's idea or expressive content. Perhaps, a court would hold a defendant strictly liable if the publication's message was sufficiently dangerous or anti-social that it could be classified as "defective." The problem with this approach, however, is that it would give courts and juries the power to censor unpopular ideas or publishers. Another alternative would be to reduce the liability issue solely to one of causation. Thus, if the plaintiff could prove that the defendant's message, whatever it was, facilitated or inspired a viewer or listener to injure himself or another, the publisher would be required to compensate the victim. Although this standard would be broader than the first alternative, at least liability would not depend on a court or jury's evaluation of the publication's viewpoint or content.

The principal benefit of a strict liability standard is that it would make it easier for those injured by speech-inspired violence to obtain compensation for their injuries. Since liability would be limited to commercial publishers, these defendants could, at least in theory, spread losses through insurance or the pricing mechanism much the way other commercial enterprises do.⁴⁶⁵ Not only would a strict liability standard ensure that losses did not fall solely upon individual victims, it would provide a financial incentive for publishers to exercise a greater degree of

on the conduct of the manufacturer but rather on the product itself").

462. See, e.g., *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991) (book publisher made no attempt to check accuracy of statement by authors that a certain mushroom was safe to eat); *Birmingham v. Fodor's Travel Publishers, Inc.*, 833 P.2d 70 (Haw. 1992) (no independent verification by travel book company of statement by author that it was safe to body surf at Kekaha Beach).

463. See *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977) (suit against retail seller of cookbook).

464. See *id.* at 1054 (author who discussed how to cook Dasheen root failed to warn that raw Dasheen root was poisonous).

465. See *Lane*, *supra* note 139, at 1180 (contending that "the publisher can spread the costs of its liability among users of the material as a whole").

care and social responsibility. At the very least, the prospect of strict liability would cause media publishers to check the accuracy of some of the factual information that they distribute to the reading public.⁴⁶⁶ A strict liability standard might also induce publishers to exercise more restraint in disseminating material to younger audiences that might encourage violence.

2. A Negligence Standard

A number of legal scholars have advocated that media defendants be subject to liability when they negligently cause physical injury to others.⁴⁶⁷ They point out that negligence is often employed as a basis for liability for oral or written statements, such as defamation or misrepresentation, that cause harm to others. If a negligence standard were adopted, the liability of media defendants would be determined by balancing the utility of the particular expression against the likelihood that viewers, listeners, or innocent third parties would be harmed, as well as the gravity of such harm.⁴⁶⁸ If the utility of the defendant's conduct did not outweigh the harm it caused, the court would impose liability for negligence and the defendant would not be able to invoke any constitutional privilege.

This approach would be similar to that followed in defamation cases involving private figures.⁴⁶⁹ In *Gertz v. Robert Welch, Inc.*,⁴⁷⁰ the Court declared that a plaintiff could not recover against a media defendant in a libel action unless he or she could show that the defendant's conduct was negligent.⁴⁷¹ The negligence standard in *Gertz* represents a balance between the interest of plaintiffs in their good reputation and the First Amendment interest of media publishers. Although defendants could still invoke common-law absolute and qualified privileges, they could not make

466. See Terri R. Day, *Publications that Incite, Solicit, or Instruct: Publisher Responsibility or Caveat Emptor?*, 36 SANTA CLARA L. REV. 73, 91 (1995) (arguing that "[a] rule that requires publishers to police their ads more carefully may be an incentive to create more social responsibility among publishers without chilling First Amendment speech").

467. See Nancy L. Miller, Comment, *Media Liability for Injuries that Result from Television Broadcasts to Immature Audiences*, 22 SAN DIEGO L. REV. 377, 381 (1985) (declaring that "[t]he broadcaster should not be immunized from liability exposure if an innocent victim has been injured as a direct result of a negligent broadcast"); Smith, *supra* note 216, at 120-21 (arguing that "[c]arefully applied traditional negligence theory, balancing the interests of plaintiffs and defendants on a case-by-case, ad hoc basis, will provide for the imposition of liability in appropriate circumstances without threatening the protections of free speech").

468. See Sims, *supra* note 42, at 280-92 (proposing a balancing test which also includes First Amendment interests).

469. See Diamond & Pimm, *supra* note 180, at 981 (pointing out that "writings and oral communications may often expose one to a negligence action").

470. 418 U.S. 323 (1974).

471. See *id.* at 349.

additional First Amendment claims once the plaintiff has met the applicable liability standard, be it negligence or actual malice.

A negligence standard might work satisfactorily in cases based on a publication's information content. Under this approach, a publisher would be required to take reasonable steps to ensure the completeness and accuracy of its information, but would not be expected to achieve perfection. For example, a standard of due care might require a chart maker to ensure that its charts accurately depicted the data provided to it by the federal government, but it might not hold the chart maker liable for failing to independently verify the accuracy of this data. Likewise, under a negligence standard, publishers of cookbooks and travel guides might be held liable for deficiencies in the editing process and for failing to catch obvious errors, but they would not be expected to check the factual accuracy of manuscripts submitted to them for publication. However, a negligence standard appears to be less workable in cases based on a publication's viewpoint or idea content. A negligence standard works tolerably well in speech cases when defendant's statements can be proved or disproved; many ideas and viewpoints, however, are inherently capable of proof.⁴⁷² Therefore, the only thing a court could do would be to balance the social benefits of an idea or point of view against its social costs. As a practical matter, such an exercise would be highly impracticable.

3. A Modified *Brandenburg* Standard

A third alternative is to retain some version of the *Brandenburg* standard. According to *Brandenburg*, speech that encourages or inspires unlawful acts is fully protected unless it can be shown that the speaker intended to incite unlawful actions, that there was a high likelihood that such actions would occur, and that the occurrence of such actions was imminent.⁴⁷³ One advantage of this approach is that it reflects the current state of the law and courts are already familiar with it. However, as some legal scholars have pointed out, the *Brandenburg* standard, which was developed to review state sedition and criminal syndicalism laws,⁴⁷⁴ is not well suited for use in civil cases involving personal injuries.⁴⁷⁵ In

472. See Brill, *supra* note 17, at 984 (arguing that depictions or portrayals of violence "are more like opinions or moral arguments"); Hilker, *supra* note 217, at 554 (declaring that "[i]n contrast to false statements of fact, however, media portrayals can constitute the communication of ideas").

473. See Sims, *supra* note 42, at 256.

474. See Coletti, *supra* note 226, at 440 (pointing out that "[t]he incitement doctrine originated as a response to the criminal syndicalism acts of the 1930s and the 1950s").

475. See Sims, *supra* note 42, at 262 (arguing that the *Brandenburg* standard is "conceptually inappropriate as applied to the majority of the media physical injury cases"); see also Lane, *supra* note 139, at 1167 (contending that the incitement requirement "developed in the context of

particular, *Brandenburg's* imminence requirement does not seem very relevant to the question of whether media publishers should be held civilly liable for the crimes of homicidal teenagers.

On the other hand, it is difficult to think of an acceptable substitute for the *Brandenburg* standard. One possibility would be to implement an actual malice standard, such as that applied to defamation claims by public officials as a result of *New York Times v. Sullivan*. However, the *New York Times* standard requires subjective knowledge or reckless disregard of a statement's truth or falsity; arguably, this approach is not appropriate when viewpoints or opinions are involved since they are not inherently true or false. Another possibility would be recognize a privilege similar to the absolute privilege that applies in defamation cases for statements made in judicial or legislative proceedings.

Perhaps, the best approach may be to require the plaintiff in media defendant cases to prove that the published material was intended to incite viewers or listeners to commit violent or illegal acts, and that such material directly caused a viewer or listener to commit the act that caused the harm in question. In order to satisfy this standard, plaintiff would have to show that the media defendant directed, urged or commanded viewers or listeners to commit violence. Merely depicting, condoning or approving of violent behavior would not be enough to establish liability. On the other hand, *Brandenburg's* imminence requirement need not be retained. Although the passage of time between the actor's exposure to a particular publication and the commission of a criminal act might be relevant to the causation issue, it would not be a formal element of the liability standard.

B. *The Benefits of Limited Liability for Media Defendants*

A limited liability standard, such as that proposed above, would achieve three objectives: (1) it would maximize the benefits of free expression; (2) it would discourage lawsuits by those who wish to use the tort system to advance their own political agendas; and (3) it would focus public attention on those who actually commit violent acts instead of shifting blame to others.

1. Encouragement of Free Expression

Free expression provides important benefits to society.⁴⁷⁶ This is so

determining the constitutionality of criminal statutes condemning overtly political speech that advocated lawless action; it has never concerned private actions based on tort law").

476. For example, the First Amendment's protection of free speech allows individuals to fully exercise their rights as citizens by exchanging information and comments about their government without fear of interference by public officials. See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 587 (1980); *Red Lion Broad. v. FCC*, 395 U.S. 367, 390 (1969); David Logan, *Tort Law and*

even though much of it is vulgar, hateful, and on occasion, downright stupid. However, our society tolerates “bad” speech because it does not want the government to decide what expression is suitable for public consumption and what is not. Instead, we assume that individuals are capable of making rational decisions based on exposure to an open competition of ideas, opinions and information.⁴⁷⁷ The assumption is that

the Central Meaning of the First Amendment, 51 U. PITT. L. REV. 493, 497 (1990) (arguing that “political speech—speech about matters of self-governing importance—is the essence of our democratic system and deserves the full protection of the first amendment”). Free expression also serves as a “safety valve” for society by allowing those who are displeased with the existing state of affairs to blow off steam. Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1162 (1982) (declaring that “the first amendment helps to achieve a stable society by providing cathartic opportunity to those who are displeased with society”). Furthermore, free expression promotes individual autonomy in various ways. The act of speaking itself can be a significant exercise of personal autonomy. See C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 CAL. L. REV. 979, 980 (1997). In addition, free expression fosters independent judgment by providing individuals with access to competing ideas and viewpoints. See *Associated Press v. United States*, 326 U.S. 1, 20 (1944); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 143 (1989) (observing that “[b]y affording people the opportunity to hear and digest competing positions and to explore options in conversations with others, freedom of discussion is thought to promote independent judgment and considerate decision, what might be characterized as autonomy”); Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289, 291 (1987) (declaring that “[t]he first amendment assumes that access to information facilitates personal autonomy in decision making because individuals are free to choose ideas from many, diverse sources”). Finally, free expression is essential to an individual’s moral and emotional development. See *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 534 n.2 (1980) (pointing out that the First Amendment “protects the individual’s interest in self-expression”). This is based on the notion that “[a]n individual’s ‘mental’ processes cannot be limited to the receipt and digestion of cold, hard theories and facts, for there is also an emotional element that is uniquely human. . . .” Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 628 (1982). “Nonrational” forms of communication, such as art and music, are particularly important to this emotional development. *Id.*

477. See Jonathan M. Hoffman, *From Random House to Mickey Mouse: Liability for Negligent Publishing and Broadcasting*, 21 TORT & INS. L.J. 65, 81 (1985) (asserting that “[t]he basic assumption of our form of government is that each citizen in a free society is deemed to have the judgment and responsibility to decide which theories and ideas to accept, not because we assume that everyone will exercise that judgment wisely or responsibly, but that we are, on the whole, far better off leaving these matters to the marketplace of ideas than to legislature, judge, or jury”); Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 636 (1996) (declaring that “the fundamental premise of the First Amendment—indeed, of the very democratic system of which the First Amendment is such an important part—is that citizens must be trusted to make their own lawful choices on the basis of a free and open competition of ideas, opinions and information”); Wirenius, *supra* note 346, at 67 (observing that, “The very nature of a democratic-republican form of government is that the people are presumed to be capable of self-rule. And in order to be capable of self-rule, as indicated before, people must be able to distinguish between good and evil, true and false, wisdom and prudence. If the people—as individuals—are not able to make personal decisions about reading or viewing, how can they be assumed to be able to choose representatives, and make difficult and key policy decisions.”).

truth will ultimately prevail over error.⁴⁷⁸ While there is reason to believe that marketplace of ideas does not always live up to popular expectations,⁴⁷⁹ it continues to provide a powerful justification for the protection of free speech.⁴⁸⁰

At the same time, there is good reason to suspect that tort actions against media publishers will chill protected speech.⁴⁸¹ A chilling effect occurs when the fear of legal liability causes publishers to shy away from expressing legitimate, but controversial, ideas or viewpoints.⁴⁸² Of course,

478. See Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (declaring that "[t]he advancement of knowledge depends on unfettered competition between today's prevailing opinions and those opinions that may come to prevail tomorrow").

479. See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 7 (declaring that "[o]n the whole, current and historical trends have not vindicated the market model's faith in the rationality of the human mind"); see also Redish, *supra* note 476, at 1162 (observing that "the basic assumption that exposure to the so-called 'false' speech will help society to discover and appreciate 'true' speech is empirically dubious"); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 349 (1991) (stating that "[n]o matter how we define the ground rules, there is no theory that explains why competition in the realm of ideas will systematically produce good or truthful or otherwise desirable outcomes").

480. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (observing that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas"); see also *Red Lion Broad. v. FCC*, 395 U.S. 367, 390 (1969) (declaring that "it is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail"); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (asserting that "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market").

481. See Mike Quinlan & Jim Persels, *It's Not My Fault, the Devil Made Me Do It: Attempting to Impose Tort Liability on Publishers, Producers, and Artists for Injuries Allegedly "Inspired" by Media Speech*, 18 SO. ILL. U. L.J. 417, 437 (1994) (arguing that "tort liability cannot, consistent with the First Amendment, be imposed on those in the communicative industries for harms allegedly 'inspired' by media speech"); see also Bayman, *supra* note 153, at 578 (observing that "[i]deas are not commercial products, and imposing strict liability on those who distribute information would have a chilling effect on first amendment freedoms"); Brill, *supra* note 17, at 1038 (contending that "[m]edia liability for third-party acts is likely to result in considerable self-censorship because speakers will be unable to predict which speech acts will subject them to liability"); Scott A. Hampton, Casenote, *Anatomy of a Suicide: Media Liability for Audience Acts of Violence*, 9 LOY. ENT. L.J. 95, 108 (1989) (maintaining that "[t]he threat of criminal or civil liability on artists, producers and distributors stifles creativity and expression"); Lane, *supra* note 139, at 1155 (concluding that the imposition of tort liability on publishers "might have deleterious short-term effects, restraining the flow of published materials"); Brett L. Myers, Note, *Read at Your Own Risk: Publisher Liability for Defective How-To Books*, 45 ARK. L. REV. 699, 716 (1992) (stating that "[t]he judicial stance against finding publishers liable is based upon a concern about the chilling effect such liability would have on the free flow of ideas").

482. See Hampton, *supra* note 481, at 104 (stating that "[a] chilling effect results when recording artists and distributors fear legal liability and become reluctant to disseminate controversial or questionable matter").

criminal sanctions can also chill constitutionally protected speech,⁴⁸³ but the prospect of civil liability often presents an even greater threat to free expression.⁴⁸⁴ The Court recognized this in *New York Times Co. v. Sullivan*⁴⁸⁵ when it held that the imposition of liability under common-law libel principles should be characterized as state action, and therefore, subject to First Amendment limitations.⁴⁸⁶

There are two aspects of tort liability that are especially troublesome. One is the flawed nature of the adjudicatory process and the other is the extent of the publisher's potential financial exposure when many persons are injured by a single distribution. Media defendants are rightly concerned about the adjudicatory process. As we have seen, the concept of "defect" provides little guidance to publishers as to what sort of material to avoid.⁴⁸⁷ The negligence standard also fails to provide much enlightenment to publishers about their potential liability.⁴⁸⁸ The problem of vague liability rules is exacerbated by the propensity of some jurors to behave irresponsibly unless properly supervised by the trial judge. In particular, publishers of controversial or sexually explicit material have good reason to fear that juries will act as moral censors, rather than as fact finders, when personal injury cases are tried.⁴⁸⁹

Another problem with tort liability is the possibility of large numbers of damage claims arising from a single publication. The more widely a publication is disseminated, the greater the publisher's exposure to tort liability.⁴⁹⁰ Thus, publishers who typically reach mass audiences run the

483. See *Dombroski v. Pfister*, 380 U.S. 479, 494 (1965).

484. See Brill, *supra* note 17, at 1015-24 (discussing the differing effects of criminal and civil liability on the exercise of free speech rights). But see Smith, *supra* note 216, at 1193 (arguing that "[p]unishing speech itself presents a greater danger to the first amendment than allowing liability in negligence for the harm resulting from the speech").

485. 376 U.S. 254 (1964). In that case, the Court declared that "[t]he fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.* at 277.

486. See *id.* at 265.

487. For example, would the publisher of a modern edition of Shakespeare's *Romeo and Juliet* be potentially liable for the suicides of star-crossed teenage lovers? See Meyer, *supra* note 301 (describing such a possible scenario).

488. See Davidson, *supra* note 13, at 306 (declaring, "In short, for the mass media, an 'incitement' theory does not pose a great potential danger. But negligence is a different matter. While incitement requires 'intent,' which is difficult to prove, negligence merely requires 'foreseeability'—determined, one might say, with twenty-twenty hindsight."); Diamond & Primm, *supra* note 180, at 993 (arguing that "[w]here the media defendant does not intend to elicit a behavior, but merely to convey ideas, negligence theory is insufficient to protect unpopular views and is therefore offensive to first amendment values").

489. See Brill, *supra* note 17, at 1031 (observing that "[t]he juror's view of the utility of the speech will most likely vary in direct proportion to her or his fondness for the message").

490. See Sims, *supra* note 42, at 273-41.

risk of being sued by a potentially large, but indeterminate, number of claimants.⁴⁹¹ This raises the risk that publishers, such as movie producers, record companies and television networks, who are more susceptible to this risk of massive liability, will tend to avoid discussing controversial subjects such as violent crime, mental illness, suicide, child abuse, or spouse abuse.

2. Discouragement of Ideologically-Motivated Litigation

The primary objective of tort litigation should be to compensate injured parties so they can get on with their lives. Unfortunately, these days some lawsuits seem to be more concerned about punishing defendants than compensating plaintiffs. For example, Jack Thompson, one of the plaintiffs' lawyers in *James v. Meow Media* was quoted as saying "We intend to hurt Hollywood. We intend to hurt the video game industry. We intend to hurt sex porn sites on the Internet."⁴⁹² Russ Herman, a plaintiff's attorney in *Castano v. American Tobacco Co.*,⁴⁹³ in an unsuccessful class action brought on behalf of all nicotine-dependent persons in the United States, exclaimed that "we want to . . . kill a dragon."⁴⁹⁴ Commenting on a lawsuit his organization was planning to bring against gun manufacturers, NAACP president Kweisi Mfume declared that "we will be filing litigation against the gun industry in an effort to break the backs of those who help perpetuate the sale of weapons in our communities."⁴⁹⁵ Of course, some of these statements may be nothing more than empty rhetoric. Nevertheless, they suggest that some plaintiffs and their lawyers believe that they have a moral duty to seriously cripple or destroy commercial enterprises they believe are evil.

That is not to say that tort law cannot be used for vindicatory purposes. Lawsuits do provide a forum for victims to tell their story and seek support

491. See Bayman, *supra* note 153, at 576 (arguing that the prospect of strict tort liability "would discourage authors from writing and publishers from publishing because of a fear of exposure to liability from the vast number of plaintiffs that foreseeably would have access to their publications in the mass market"); see also Brill, *supra* note 17, at 1027-28 (observing that "if courts were to recognize a negligence cause of action in mimicry cases, the defendants could be subject to liability for harms to a large and unidentifiable class of people"); Lane, *supra* note 139, at 1170 (observing that "[t]he unbounded dissemination of television broadcasts may frighten courts from imposing liability because of the vast, and sometimes indeterminate, class of potential plaintiffs").

492. *Game Companies Sued for Violence*, GAME NEWS, CNET Gamecenter.com, <<http://gcl.gamecenter.com/news/item/0%2C3%2C0-2666%2C00.html>> (visited Apr. 13, 1999).

493. 84 F.3d 734 (5th Cir. 1996).

494. Myron Levin, *As Tobacco Litigation Goes, Castano Suit Is Super Bowl*, L.A. TIMES, May 22, 1996, at A1.

495. William Neuman, *NAACP to Target Gun Industry in Lawsuit*, N.Y. POST, July 13, 1999, at O16.

or comfort from the community.⁴⁹⁶ In addition, damage awards help accident victims to overcome their sense of outrage⁴⁹⁷ and provide a degree of public accountability for violators.⁴⁹⁸ Nevertheless, there is something disturbing about allowing the legal tort system to be used to advance the political or ideological agendas of special interests. The prospect of “vigilante litigation” is particularly unsettling when special interest groups are allowed to pursue a vendetta against media defendants. Limiting the liability of media publishers will make it more difficult for such groups to use the tort system as a weapon against the media.

3. Imposition of Responsibility on Criminal Actors

Finally, restricting lawsuits against media publishers will uphold the principle of personal responsibility. Allowing plaintiffs to sue media defendants arguably deflects public attention away from teenage killers and shifts it to parties who have no direct connection with the plaintiff’s injury. To be sure, violent video games and pornographic Web sites, along with guns, bad parenting, inattentive teachers, and insensitive classmates all play a role in producing teenage killers, but ultimately the individual who commits the crime must be held accountable. Expanding the list of defendants in a tort action diffuses moral responsibility for criminal behavior rather than focusing on the individual who is primarily responsible. Consequently, plaintiffs should not be permitted to cast their nets too far.

CONCLUSION

The personal representatives of three of the schoolchildren murdered by Michael Carneal have brought suit against a group of moviemakers,

496. See Peter A. Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177, 1218 (1990) (declaring that “[t]his opportunity to speak and be heard about personal tragedy may be the most important feature of tort for accident victims, more important in some ways than obtaining monetary compensation”); Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 862 (arguing that “[t]ort litigation provides a place for victims to tell their stories to the public and make the perpetrators listen”).

497. See Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 781 (1985) (contending that “[c]ompensation may restore the plaintiff’s sense of self-value, and erase his sense of outrage”).

498. See Joseph W. Little, *Up With Torts*, 24 SAN DIEGO L. REV. 861, 869 (1987) (observing that accident victims “want accountability, which in a civilized society means access to a forum and a set of rules by which they may publicly prove themselves right and someone else wrong”); see also Timothy D. Lytton, *Responsibility for Human Suffering: Awareness, Participation, and the Frontiers of Tort Law*, 78 CORNELL L. REV. 470, 504 (1993) (observing that “[t]ort law not only remedies injustice by imposing damage awards, it also exposes normative features of relations between parties by articulating and applying conceptions of responsibility”).

video game manufacturers and Web site owners, claiming that these media defendants encouraged or inspired Carneal to kill his classmates. Although the plaintiffs are seeking \$130 million, the avowed purpose of the suit is not only to obtain compensation for the victims' injuries, but also to force media defendants to change the content of the material that they disseminate to the public. While this objective is no doubt well-intentioned, if lawsuits like this are successful, their ultimate effect will be to greatly reduce the variety of material that is made available to adult audiences. Therefore, courts should resist the temptation to change existing tort and constitutional doctrines in any way that encourages others to bring these types of lawsuits against media defendants.