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PUBLICATIONS THAT INCITE, SOLICIT, OR INSTRUCT: PUBLISHER RESPONSIBILITY OR CAVEAT EMPTOR?

Terri R. Day*

*"Congress shall make no law . . . abridging the freedom of speech, or of the press"*¹

*"[I]t is never possible to give complete expression to ideas in practice. It is the nature of things that action should come less near the truth than words."*²

I. INTRODUCTION

The constitutional guarantee of free speech and expression is not absolute. The United States Supreme Court has carved out certain categories of speech that fall outside the protection of the First Amendment.³ However, when challenged speech does not fit easily within one of these categories, courts have been reluctant to impose limits for fear of chilling the free exchange of ideas and the free access to information.

In cases involving publications which contain violent depictions or publications that invite the reader's reliance,

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1. U.S. CONST. amend. I.

2. DAVID SELBOURNE, *THE PRINCIPLE OF DUTY* 12 (1994) (quoting PLATO, *THE REPUBLIC*).

3. See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement to imminent lawless activity); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); see also, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (affording commercial speech limited protection commensurate with its subordinate position on the scale of First Amendment values).

either in the form of advertisements or "how to" instructions, courts generally afford protection to the publication and its publisher under the ambit of the First Amendment. This article will examine some of these cases and the novel theories upon which plaintiffs attempt to create liability and recover damages.

The plaintiffs in the cases discussed have been physically injured after relying on the information in "how to" books, have become victims of "gun for hire" advertisements, or have exhibited particular sensitivity to violence portrayed in movies and rock music. While the cases are factually distinct, the theories upon which plaintiffs urge recovery, and the courts' uniform rejection of such theories, are the common thread running throughout these cases.

Tort principles and First Amendment jurisprudence conflict in these cases. The First Amendment protection of the freedom of speech and of the press is "not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas."⁴ Therefore, a bedrock of First Amendment principles is that the state may not punish protected speech, directly or indirectly, whether by criminal penalty⁵ or civil liability.⁶

Tort principles depend upon a recognized duty owed to the plaintiff by the defendant. While the general rule is that "all persons are required to use ordinary care to prevent others from being injured as the result of their conduct,"⁷ whether the law will recognize a duty to a particular plaintiff depends on several factors. Those factors considered in determining whether the imposition of a duty is justified in a particular circumstance include the following: a balancing of the societal interests involved, including but not limited to, the guidance of history, the convenience of the rule, judgment as

4. *Herceg v. Hustler Magazine*, 814 F.2d 1017, 1019 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

5. *See, e.g., Hess v. Indiana*, 414 U.S. 105 (1973); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

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

7. *Weirum v. RKO General, Inc.*, 539 P.2d 36, 39 (Cal. 1975).

to where the loss should fall, and concepts of morality and justice; the severity of the risk; the burden upon the defendant; the foreseeability of harm; the likelihood of occurrence; and the relationship between the parties.⁸

In the publisher liability context, it is common practice for publishers to publish and distribute a third-party author's work. Consequently, courts have been reluctant to impose a guarantor's duty on publishers. According to many courts, to impose such a duty would severely burden publishers by requiring them to "scrutiniz[e] and even [test] all procedures contained in any of their publications."⁹ One consideration in tort law is the allocation of the risks and the distribution of the costs between publishers and the consuming public.¹⁰ Many courts have echoed a New Jersey court's belief that to place the risks and costs for injuries occasioned by a publication on the publisher "would have a staggering adverse effect on the commercial world and our economic system."¹¹

Most courts faced with a negligence claim against a publisher for injuries allegedly caused by its publication have concluded that the First Amendment bars such a claim.¹² However, the First Amendment does not preclude publisher liability based upon negligence.¹³ In refusing to consider a publisher's culpability in some of these cases, courts may be giving greater protection to speech than is necessary to en-

8. *Id.* (citing William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953)).

9. *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985); *see also*, *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App.), *cert. denied*, 353 So. 2d 674 (Fla. 1977); *Yuhas v. Mudge*, 322 A.2d 824 (N.J. Super. Ct. App. Div. 1974).

10. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 4, at 24 (5th ed. 1984) (discussing ability to bear or distribute loss as a factor affecting tort liability).

11. *Yuhas v. Mudge*, 322 A.2d 824, 825 (N.J. Super. Ct. App. Div. 1974).

12. This paper refers to nonlibel negligence claims unless expressly stated.

13. *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (recognizing that state libel law may impose liability so long as it is not liability without fault); *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 967-68 (1987) (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), and *Connick v. Myers*, 461 U.S. 138, 146-47 (1983), for the proposition that speech pertaining to private matters is deemed to be of lesser constitutional value); Brett L. Myers, *Read at Your Own Risk: Publisher Liability for Defective How-To Books*, 45 ARK. L. REV. 699, (1992) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), for the proposition that the First Amendment does not preclude publisher liability based upon negligence).

sure protection of First Amendment principles. While the publications at issue enjoy First Amendment protection, these cases do not involve matters of public concern in the sense of core First Amendment speech.¹⁴ Also, the state has an important interest in safeguarding persons from physical harm. To deny recovery in these cases lessens publishers' incentive to remove from the marketplace material that is dangerous and leads unwitting users to injure themselves, their property, or others.

This article concludes that a more reasoned approach to these cases is to apply a balancing test in which the state interest sought to be protected by imposing tort liability is balanced against the level of First Amendment interest embodied in the challenged communication. Although the Supreme Court's First Amendment jurisprudence favors broad rules of general application,¹⁵ the Court has implicitly recognized the need to apply a balancing test when faced with a novel issue.¹⁶

II. BROADCASTER'S LIABILITY FOR FORESEEABLE HARM

Foreseeability of risk prompted the California Supreme Court in *Weirum v. RKO General, Inc.* to hold a radio broadcaster liable for the content of its broadcast which caused injury to a third party.¹⁷ Family members of a deceased motor accident victim brought a wrongful death action against the radio station.¹⁸ The radio station had conducted a contest

14. The First Amendment recognizes "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (citations omitted).

15. The Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), feared that a balancing test between competing values on a case-by-case basis would "lead to unpredictable results and uncertain expectations, and . . . render [its] duty to supervise the lower courts unmanageable." *Gertz*, 418 U.S. at 343-44.

16. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); see also Aleinikoff, *supra* note 13, at 944 (discussing the frequency and commonplace use of "balancing" as a method of constitutional interpretation in First Amendment cases and others); Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 *YALE L.J.* 1, 2, 12-13 (1987) (discussing the model of the judicial "balance" which appeared in Justice Powell's opinions on free speech).

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

18. *Id.* at 37.

that awarded a prize to the first contestant who located a roving disc jockey who was broadcasting live from various locations.¹⁹ While racing to the next location, two teens listening to the broadcast collided with another motorist, killing the plaintiffs' husband and father.²⁰

The *Weirum* court upheld the plaintiffs' recovery from the radio broadcaster on a theory of negligence.²¹ Recognizing that "foreseeability of the risk is a primary consideration in establishing the element of duty,"²² the court found that the radio broadcaster owed a duty to the deceased.²³ It was immaterial that the particular type of accident had not happened before²⁴ or that the accident was caused by the reckless conduct of the youthful contestants.²⁵

The First Amendment was hardly mentioned by the *Weirum* court:

Defendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit. The issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.²⁶

In subsequent cases, plaintiffs have attempted to argue that their particular case is similar to *Weirum* in order to persuade the courts that negligence actions against broadcasters and publishers are not barred by the First Amendment. Courts, on the other hand, have characterized *Weirum* as a "true" incitement case,²⁷ notwithstanding the fact that the

19. *Id.* The radio station had a large teenage audience. *Id.*

20. *Id.*

21. *Id.* at 40, 42.

22. *Weirum v. RKO General, Inc.*, 539 P.2d 36, 39 (Cal. 1975).

23. *Id.* at 41.

24. *Id.* at 40 ("[T]he fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts.")

25. *Id.* ("Here, reckless conduct by youthful contestants, stimulated by defendant's broadcast, constituted the hazard to which decedent was exposed.")

26. *Id.*

27. The distinguishing characteristics between *Weirum* and the cases below, according to the courts addressing this issue, are the live broadcast which urged listeners to act in an inherently dangerous manner and the likely foreseeability that listeners would act in an inherently dangerous manner. These two characteristics — the advocacy to act in an inherently dangerous manner and the great likelihood that the listeners would act in an inherently dangerous

Weirum court never mentioned an incitement theory. In its decision, the Georgia Supreme Court noted, "In our opinion, *Weirum* . . . constitute[s] authority for the proposition that a tort defendant can be held liable if the defendant incited, within the meaning of *Brandenburg*, a third party to commit a crime against the plaintiff."²⁸

III. PUBLISHER'S LIABILITY UNDER AN INCITEMENT THEORY

Speech that advocates violence or lawlessness under the *Brandenburg v. Ohio* test falls outside the protection of the First Amendment.²⁹ Early Supreme Court cases addressed the tension between the First Amendment protection of speech and statutes that criminalized "fighting words"³⁰ or advocacy which creates a "clear and imminent" danger of lawlessness.³¹ Today, the test for incitement recognizes a dis-

manner — satisfy the *Brandenburg* incitement test. See *infra* note 29 and accompanying text. Cf. *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988) (holding that publisher of rock music did not incite listener to commit suicide); *Olivia N. v. National Broadcasting Co.*, 178 Cal. Rptr. 888 (Ct. App. 1981) (affirming judgment for nonsuit where plaintiff was artificially raped by assailants who recreated a scene from a NBC movie *Born Innocent*), *cert. denied*, 458 U.S. 1108 (1982); *Walt Disney Prod., Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981) (holding suit barred by First Amendment where plaintiff became blind after attempting to reproduce a sound effect demonstrated on a television show); *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982) (affirming summary judgment for defendants where teen hung himself after viewing hanging stunt on Johnny Carson show). All these cases distinguished *Weirum* on the grounds that the broadcast in *Weirum* was live and that it actively and repeatedly encouraged listeners to speed to the announced locations. These other cases did not involve "a 'real time' urging of listeners to act in a particular manner. There was no dynamic interaction with, or live importuning of, particular listeners." *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 196 (Ct. App. 1988).

28. *Walt Disney Prod., Inc. v. Shannon*, 276 S.E.2d 580, 582 n.2 (Ga. 1981).

29. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *Brandenburg* created a two part test: advocacy for violence or lawlessness must be directed to incite or produce imminent lawless action *and* such advocacy must be likely to incite or produce such action. Merely advocating violence is not enough to meet the incitement test. *Id.* at 447.

30. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

31. *Whitney v. California*, 274 U.S. 357 (1927) (upholding California's criminal syndicalism statute), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In a concurring opinion, Justice Brandeis articulated the test for incitement as speech which advocates a "clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent." *Id.* at 373 (echoing the "clear and present danger" test articulated in *Schenck v. United States*, 249 U.S. 47, 52 (1919)). In *Schenck*, which addressed a violation under the Espionage Act, Justice Holmes articulated the "classic" example of unprotected speech: "falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919). Like *Whitney*, *Schenck* has been super-

inction between mere advocacy and incitement to imminent lawless action.

Plaintiffs who bring publisher liability suits under an incitement theory have consistently faced dismissal of their claims. In *Zamora v. Columbia Broadcasting System*, Ronny Zamora and his parents alleged that repetitive viewing of television violence offered by the three major networks "stimulated, incited and instigated [Ronny] to duplicate the atrocities he viewed on television."³² Plaintiffs' allegations did not target a particular broadcast, but rather alleged that all three networks broadcasting of violence over a ten year period caused Ronny Zamora to develop a sociopathic personality.³³ The court responded to the plaintiffs' incitement theory by quoting the concurring opinion of Justice Brandeis in *Whitney v. California*: "Advocacy of conduct proscribed by law is not . . . 'a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.'³⁴ Dismissing the claim,³⁵ the court stated that "the right of the public to have broad access to [television] programming and the right of the broadcaster to disseminate should not be inhibited by those members of the public who are particularly sensitive."³⁶

Improving upon the broad allegations of violence in *Zamora*, a father whose son was stabbed to death by a youth who had just come from viewing a violent movie, *The War-*

sed by later cases which recognize a distinction between mere advocacy and incitement to imminent lawless action.

32. *Zamora v. CBS*, 480 F. Supp. 199, 200 (S.D. Fla. 1979). The pleadings alleged that Ronny, from the age of 5 to 15, became "involuntarily addicted to and 'completely subliminally intoxicated' by the extensive viewing of television violence." *Id.* Plaintiffs alleged that the repetitive exposure to television violence incited Ronny to kill his 83-year-old neighbor. *Id.*

33. *Id.*

34. *Id.* at 206 (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)).

35. *Id.* at 201. The *Zamora* court held that the claim brought by Ronny and his parents failed to state a cause of action and was barred by the First Amendment. *Id.*

36. *Id.* at 205. See also *Watters v. TSR, Inc.*, 715 F. Supp. 819 (W.D. Ky. 1989) (dismissing a mother's wrongful death action against the manufacturer of the game "Dungeons & Dragons" claiming that the game dominated her son's mind causing him to commit suicide; manufacturer had no duty to warn "mentally fragile" persons of the unforeseeable dangerous consequences of playing the game), *aff'd*, 904 F.2d 378 (6th Cir. 1990).

riors, targeted the movie, produced and distributed by Paramount Pictures, as the unprotected incitement.³⁷ The theme of the movie involved a gang being pursued through the New York City subways by hostile youths wielding weapons, and the film portrayed numerous violent scenes.³⁸ Due to other incidents of violence outside movie theaters where the film was playing, Paramount notified distribution managers to advise theaters showing *The Warriors* to hire security guards and offered to pay for the extra security.³⁹ Plaintiff's son was stabbed after exiting the subway some distance from the movie theater by a youth who had just viewed *The Warriors* twice while becoming intoxicated on alcohol that he smuggled into the theater.⁴⁰

Based on a viewing of the film, the Yakubowicz court determined as a matter of law that the film did not constitute "incitement" for First Amendment purposes.⁴¹ Recognizing that whether the film constitutes "incitement" is essentially a question of fact, the court stated that "it is our responsibility to decide it incidental to our legal determination whether the movie is protected by the First Amendment."⁴² Although the Supreme Court, in other contexts, has expressed concern about putting judges in a position of "drawing thin lines" on an ad hoc basis in determining the "nature of speech,"⁴³ the

37. *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989).

38. *Id.* at 1069 ("The film includes numerous scenes of . . . violence in which youths battle with knives, guns, and other weapons as they pursue one gang . . . through the subways of New York City. Advertising for the film depicted menacing youths wielding baseball bats.").

39. *Id.*

40. *Id.* at 1069-70.

41. *Id.* at 1071.

42. *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989) (citing *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 505-06 (1984) and *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)). The court was referring to the constitutional obligation, as articulated in *Bose* and *New York Times*, of appellate courts to make an independent review of the whole record to ensure that a judgment does not infringe on First Amendment freedom of expression.

43. In the area of defamation, the Supreme Court has struggled with the *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), plurality opinion which created a test focusing on the nature of the subject matter rather than the status of the plaintiff for purposes of constitutional protection. Such a test requires judges to determine as a matter of law whether speech falls into one category or another, i.e., matters of public concern or matters of private concern. Justice Marshall's dissent articulated concern about putting judges in the role of determining what is and is not a matter of public concern. *Id.* at 79. In

Yakubowicz court had little difficulty, upon viewing *The Warriors*, in concluding that it did not fall within the unprotected speech category of incitement.

The present political climate makes success in a case like *Yakubowicz* more likely in the future. With presidential candidates making violence on television and in movies an issue in the 1996 presidential campaign, violence portrayed on movie screens and television has become a national political concern. As Congress debates the issue, and discussion of the "V-Chip"⁴⁴ makes national news, regulation of the film and television industry is likely to occur over the protests of First Amendment absolutists. Whether regulation is self-imposed or forced on the industry by Congress, cases similar to *Yabukowicz*, *Zamora*, and *Olivia N.* are likely to survive motions for dismissal and summary judgments. These motions would survive based on the existence of regulations that arguably could establish both duty and causation of a prima facie case. Of course, any regulation must survive the First Amendment challenges that are likely to arise before courts might be willing to recognize tort actions in these type of cases.

The incitement theory has been rejected in three other contexts involving rock music and lyrics,⁴⁵ a *Hustler* magazine article on autoerotic asphyxiation,⁴⁶ and a how-to diet book.⁴⁷ In *McCollum v. CBS, Inc.*, the parents of a nineteen year-old who committed suicide while listening to rock music

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court retreated from the test proposed by the *Rosenbloom* plurality, agreeing with Justice Marshall's *Rosenbloom* dissent that state and federal judges should not be forced to "draw thin lines" on an ad hoc basis in deciding which publications represent "core" speech and which do not.

However, later Supreme Court decisions appear to have resurrected a modified *Rosenbloom* test. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (determining that credit reports do not constitute commercial speech for First Amendment purposes), and *Connick v. Myers*, 461 U.S. 138 (1983) (articulating a test of content, form, and context to determine whether speech is a matter of public concern or private concern).

44. The V-Chip refers to a special circuit installed in televisions which can block specific channels, thus preventing violent and sexually explicit programming from being viewed in the home by children and those opposed to such programming.

45. *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988).

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

47. *Smith v. Linn*, 563 A.2d 123 (Pa. Super. 1989), aff'd, 587 A.2d 309 (Pa. 1991).

sued the artist and publisher contending that the music was the proximate cause of their son's suicide.⁴⁸ On the night of his suicide, John McCollum listened over and over again to *Blizzard of Oz*, *Diary of a Madman*, and *Speak of the Devil*. These recordings were made by John "Ozzy" Osbourne.⁴⁹ One of the songs on the albums that McCollum was listening to when he shot himself was called "Suicide Solution" which included lyrics stating that "suicide is the only way out."⁵⁰

Recognizing that the First Amendment guarantees of freedom of speech and expression extend to all artistic and literary expression, whether in music, concerts, plays, pictures, or books, the court determined that absent an incitement, the plaintiffs' claim was barred by the First Amendment.⁵¹ The *McCollum* court held that the incitement theory did not apply because music lyrics and poetry cannot be construed to contain the requisite "call to action" under the *Brandenburg* incitement test.⁵²

The court labeled John McCollum an emotionally fragile person whose adverse reaction to the music was not foreseeable to the defendants.⁵³ Courts are understandably reluctant to draw a causal connection between the challenged publication and a suicide.⁵⁴ However, cases such as these have prompted "grass-roots" organizations such as the Parent Mu-

48. *McCollum*, 249 Cal. Rptr. at 189.

49. *Id.* at 189-90.

50. *Id.* at 190-91.

51. *Id.* at 192 (citing *Schad v. Mount Ephraim*, 452 U.S. 61 (1981) (First Amendment protects non-obscene nude dancing)).

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

Reasonable persons understand musical lyrics and poetic conventions as the figurative expressions which they are. No rational person would or could believe otherwise nor would they mistake musical lyrics and poetry for literal commands or directives to immediate action. To do so would indulge a fiction which neither common sense nor the First Amendment will permit.

Id. at 194.

53. *Id.* at 198.

54. See *Watters v. TSR, Inc.*, 904 F.2d 378, 383-84 (6th Cir. 1990) (suicide of plaintiff's son not caused by the game "Dungeons & Dragons"; courts are reluctant to recognize suicide as a proximate consequence of a defendant's wrongful act); Scott A. Hampton, *Anatomy of a Suicide: Media Liability for Audience Acts of Violence*, 9 LOY. ENT. L.J. 95, 108-10 (1989) ("[C]ausation . . . presents unique difficulties of proof in so-called 'causing suicide' cases.").

sic Resource Center to lobby Congress for mandatory record labeling.⁵⁵

The incitement theory has been equally unsuccessful in written publication cases. In *Herceg v. Hustler Magazine*, which involved a youth who accidentally hung himself after reading a magazine article, the district court held that an article is not a product for purposes of product liability claims, but may constitute incitement.⁵⁶ On August 6, 1981, a young boy found the body of his fourteen year-old friend Troy hanging by a belt from a closet door; a *Hustler* magazine was lying at Troy's feet opened to an article titled "Orgasm of Death."⁵⁷ The article described the practice of autoerotic asphyxiation which "entails masturbation while 'hanging' oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm."⁵⁸

A jury awarded the plaintiffs \$182,000 under a theory that the article published by *Hustler* magazine caused Troy to hang himself by inciting him to try the practice of autoerotic asphyxiation described in the "Orgasm of Death" article.⁵⁹

55. See Hampton, *supra* note 54, at 112; see also TIPPER GORE, RAISING PG KIDS IN AN X-RATED SOCIETY (1988). Another case involving the deleterious effects of rock music is Vance v. Judas Priest, 1990 WL 130920 (Nev. Dist. Ct. Aug. 24, 1990). The parents of two teenage boys brought a wrongful death action against the band Judas Priest and its distributor CBS claiming that their sons' suicide pact was caused by the lyrics in combination with the beat of the music of Judas Priest's album *Stained Class*. The parents' claims for negligence and incitement were dismissed. The parents then brought a claim alleging that the album contained subliminal messages which caused the suicides. On a motion for summary judgment, the court considered whether subliminal messages are speech, and if so, whether the messages are protected by the First Amendment. The court concluded that the subliminal messages are not speech, and even if the court assumed, *arguendo*, that the messages are speech, they would constitute an invasion of privacy. The court denied the defendants' motion for summary judgment. *Id.*

56. *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 803 (S.D. Tex. 1983), *rev'd*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

57. See Lisa A. Powell, *Products Liability and the First Amendment: The Liability of Publishers for Failure to Warn*, 59 IND. L.J. 503, 505-06 (1984) (discussing the facts of *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802 (S.D. Tex. 1983), in the context of a products liability framework).

58. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1018 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

59. *Id.* at 1019 (reversing the jury verdict). The district court dismissed the plaintiffs' first complaint alleging claims of strict liability and negligent publication contending that the article was either an attractive nuisance for which *Hustler* magazine had a duty of social responsibility or that the article was a dangerous instrumentality or a defective product. *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802 (S.D. Tex. 1983), *rev'd*, 814 F.2d 1017 (5th Cir. 1987),

Although the district court sustained the allegations of incitement and allowed the case to proceed to trial, the appellate court reversed, finding that incitement was not a valid theory in this case.⁶⁰ The Fifth Circuit Court of Appeals focused on the incitement theory's inapplicability to the *Herceg* facts in stating that the "root of incitement theory appears to have been grounded in concern over crowd behavior."⁶¹

Despite the fact that the *Hustler* publication involved nonpolitical speech, the appellate court was unpersuaded to apply a less stringent standard than the *Brandenburg* test.⁶² According to two of the three judges, such an approach "would not only be hopelessly complicated but would raise substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality."⁶³ Concerned with a vague standard, the court eschewed an approach which would determine post-publication "that an article discussing a dangerous idea negligently helped bring about a real injury" thus avoiding the shield of the First Amendment simply because the published idea can be identified as "bad."⁶⁴ The court did not explain how such an approach would be different from any other speech case in which a court first determines if the challenged speech falls within or outside the categories of First Amendment protection.⁶⁵ The majority opinion, however, left

cert. denied, 485 U.S. 959 (1988). The district court granted the plaintiffs leave to amend suggesting that an incitement theory may be maintainable. *Id.* The case went to trial on an incitement theory, and the plaintiffs received a jury award totaling \$182,000. *Herceg*, 814 F.2d at 1019.

60. *Herceg*, 814 F.2d at 1023. "The crucial element to lowering the First Amendment shield [under an incitement theory] is the imminence of the threatened evil. . . . [N]o fair reading of [the article] can make its content advocacy, let alone incitement to engage in the practice." *Id.* at 1022-23.

61. *Id.* at 1023 (quoting John Stuart Mill in his dissertation, *On Liberty*: "An opinion that corn-dealers are starvers of the poor, or that private property is robbery ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer."). "Incitement cases usually concern a state effort to punish the arousal of a crowd to commit a criminal action." *Id.*

62. *Id.* at 1024.

63. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1018 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

64. *Id.*

65. See *supra* notes 41-42 and accompanying text (upon viewing the movie *The Warriors*, the court in *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989), determined that the movie did not constitute an incitement).

open the question whether the plaintiffs could have established a cause of action under a theory of negligence.⁶⁶

In her opinion, Judge Jones concurred in the reversal only because the plaintiffs did not appeal the district court's dismissal of their claims based on negligence.⁶⁷ While agreeing that an incitement theory was not applicable, Judge Jones characterized the *Hustler* article as pornography, and therefore, found no First Amendment barriers to a theory of liability based on negligence.⁶⁸ She suggested a two-prong analysis in cases such as *Herceg* which consider a publisher's liability for the harm occasioned on third persons caused by or in reliance upon the publication.

Judge Jones' analysis began with an examination of the publication. Disagreeing with the majority opinion, Judge Jones recognized that First Amendment analysis is an exercise in line-drawing, and that it is up to judges to determine where specific speech falls in the hierarchy of First Amendment jurisprudence.⁶⁹ Even if the speech is generally protected, the interest in protecting such speech balanced against other state interests might be lessened.⁷⁰

66. The court was mistaken in its statement that "[m]ere negligence . . . cannot form the basis of liability under the incitement doctrine any more than it can under the libel doctrine." *Herceg*, 814 F.2d at 1024. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (state libel laws may impose liability based on negligence when the plaintiff is a private figure and/or the speech pertains to a private matter). However, the court continued that it would not address whether the plaintiffs could establish a cause of action under a theory of negligence because the plaintiffs did not appeal the district court's dismissal of its first complaint alleging liability based on negligence. *Herceg*, 814 F.2d at 1024-25.

67. *Herceg*, 814 F.2d at 1025 (Jones, J., concurring and dissenting).

68. *Id.* (Jones, J., concurring and dissenting).

69. *Id.* at 1027 (Jones, J., concurring and dissenting). Judge Jones states: First Amendment analysis is an exercise in line-drawing between the legitimate interests of society to regulate itself and the paramount necessity of encouraging the robust and uninhibited flow of debate which is the life-blood of government by the people. That some of the lines are blurred or irregular does not, however, prove the majority's proposition that it would be hopelessly complicated to delineate between protected and unprotected speech in this case.

Id. (Jones, J., concurring and dissenting).

70. *Id.* at 1028. (Jones, J., concurring and dissenting). Judge Jones suggested looking to defamation cases in which recovery of damages is permitted (under less than an actual malice standard) as "an analogous framework." *Id.* She cited *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985), in which the Supreme Court balanced the state interest in that case against the First Amendment interest at stake. *Herceg*, 814 F.2d at 1028

The second part of the analysis entails an examination of the reasons for protecting the challenged speech under the First Amendment against the particular publisher's claim to unlimited constitutional protection.⁷¹ Judge Jones viewed *Hustler* magazine as a commercial enterprise.⁷² Therefore, the imposition of tort liability would have no chilling effect on *Hustler* so long as a market for such literature continues to exist.⁷³ In this way, Judge Jones likened *Hustler* magazine to commercial speech in which state regulation by means of tort recovery is appropriate when "tailored to specific harm and not broader than necessary to accomplish its purpose."⁷⁴

The Fifth Circuit Court of Appeals articulated strong reasons why an incitement theory is inappropriate to a claim by a third party for injuries allegedly caused by or in reliance on a publication. Nevertheless, two years after *Herceg v. Hustler Magazine*, a man brought a claim based on an incitement theory against the publisher of a diet book contending that by following the diet his wife developed complications and died.⁷⁵ The plaintiff's wife lost over 100 pounds on Dr. Linn's diet, which was published in the book *When Everything Else Fails . . . The Last Chance Diet*.⁷⁶ The trial court dismissed Mr. Smith's complaint on the ground that the diet book was protected by the First Amendment.⁷⁷ The appellate court rejected the plaintiff's argument that the book was unprotected speech in that "it [was] an incitement to immediate unreflecting action such as the action arising from shouting

(Jones, J., concurring and dissenting). The test of content, form, and context articulated in *Connick v. Myers*, 461 U.S. 138, 148-49 (1983), can be employed to determine whether the speech at issue is a matter of public concern. *Herceg*, 814 F.2d at 1028 (Jones, J., concurring and dissenting). While matters of private concern are not wholly unprotected, the Court in *Dun & Bradstreet* found that such speech is not substantially relative to important state interests. *Herceg*, 814 F.2d at 1028 (Jones, J., concurring and dissenting).

71. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1027-28 (5th Cir. 1987) (Jones, J., concurring and dissenting), *cert. denied*, 485 U.S. 959 (1988).

72. *Id.* at 1028-29 (Jones, J., concurring and dissenting).

73. *Id.* (Jones, J., concurring and dissenting).

74. *Id.* at 1029 (Jones, J., concurring and dissenting) (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980)).

75. *Smith v. Linn*, 563 A.2d 123 (Pa. Super. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991). Mr. Smith brought his claim under multiple theories including (1) incitement, (2) negligent publication, and (3) defective products, analogizing his situation to a drug company selling its marketed drugs without providing a warning of potential side effects. *Id.*

76. *Id.* at 125.

77. *Id.*

'Fire!' in a crowded theater."⁷⁸ Mr. Smith's alternative theories of recovery based on negligent misrepresentation, a products liability notion of a defective product, and failure to warn were also dismissed by the court.⁷⁹

IV. "GUN FOR HIRE" ADVERTISEMENTS: MODIFIED NEGLIGENCE STANDARD

Two cases involving "gun for hire" advertisements represent a *bridge* between the violent publication cases in which plaintiffs seek recovery for the consequences of a publication that *incites* violence and the "how-to" publication cases in which plaintiffs seek damages for the injuries caused by a publication intended to induce reliance based on theories of negligence, product liability, or negligent misrepresentation. *Braun v. Soldier of Fortune Magazine, Inc.*⁸⁰ and *Eimann v. Soldier of Fortune Magazine, Inc.*⁸¹ present factual situations in which readers of "gun for hire" advertisements that were placed in *Soldier of Fortune* magazine were able to locate or purchase the services of those willing to commit crimes, even murder, for the going rate. The surviving families or the victims of these crimes sued the publisher of the advertisement, *Soldier of Fortune*, for damages.

In *Braun*, a businessman hired a man who placed a "gun for hire" ad in *Soldier of Fortune* to kill his business partner, Richard Braun.⁸² In *Eimann*, a husband hired someone

78. *Id.* (referring to Justice Holmes' opinion in *Schenck v. United States*, 249 U.S. 47 (1919) (falsely shouting "fire" in a crowded theater)).

79. *Id.* at 126. For a discussion of other publisher liability cases alleging that a publication is a product for purposes of products liability law or a defective good under the UCC, see Daniel M. Lane, Jr., *Publisher Liability for Material that Invites Reliance*, 66 Tex. L.R. 1155, 1158, 1190 (1988) (suggesting a theory of reckless misrepresentation for injuries by publications that induce the user's reliance) and Lisa A. Powell, *Products Liability and the First Amendment: The Liability of Publishers for Failure to Warn*, 59 IND. L.J. 503, 508, 518 (1984) (suggesting a theory based on products liability law which requires a duty of disclosure from publishers when publishing material which invites reliance).

80. 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1028 (1993).

81. 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990).

82. *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1112 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1028 (1993). The ad read as follows: "GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete [sic] and very private. Body guard, courier, and other special skills. All jobs considered." *Id.* Mr. Savage, who placed the ad, testified that the overwhelming majority of the 30 to 40 calls per week that he received in response to

through a *Soldier of Fortune* advertisement to kill his wife.⁸³ The murders for hire were successful in both cases. The decedent's family in each case sued *Soldier of Fortune* for wrongful death.⁸⁴ Juries in both cases awarded the plaintiffs substantial damages.⁸⁵ The Fifth Circuit Court of Appeals in *Eimann* reversed the jury award.⁸⁶ Applying tort principles to the advertisement, which was considered commercial speech for First Amendment purposes, the court determined that under the applicable risk-utility balancing test,⁸⁷ *Soldier of Fortune* could not be held liable because the advertisement

his ad sought to hire him to engage in criminal activity such as murder, assault and kidnapping. *Id.*

83. *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 831 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990). Mr. Black, Jr. hired Mr. Hearn through an ad that Mr. Hearn placed in *Soldier of Fortune*. The ad read as follows: "EX-MARINES - - 67-69 'Nam vets - - ex-DI-weapons specialist - - jungle warfare, pilot, M.E., high risk assignments U.S. or overseas." *Id.* Mr. Hearn estimated that he received ten to twenty calls a day regarding the advertisement, and because of the many inquiries, he was forced to hire a professional answering service. About ninety percent of the calls received by Mr. Hearn were requests for illegal acts, including illegal drug activity, jail breaks, political assassinations, and illegal arms sales. *Id.* See Donald B. Allegro & John D. LaDue, *Constitutional Law — Eimann v. Soldier of Fortune and "Negligent Advertising" Actions: Commercial Speech in an Era of Reduced First Amendment Protection*, 64 NOTRE DAME L. REV. 157, 158 n.5 (1989) (discussing the lower court opinion which permitted the negligence action against *Soldier of Fortune*, but was reversed on appeal).

84. *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1112 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1028 (1993) (one of the decedent's sons, Michael Braun, was present when his father was murdered and received wounds of his own from the gun shots that were fired; in addition to a wrongful death claim, Michael brought his own claim against *Soldier of Fortune* for the personal injuries that he received at the time of his father's death); *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 831 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990) (the victim's son and mother brought a wrongful death action against *Soldier of Fortune*).

85. *Braun*, 968 F.2d at 1114 (the jury awarded plaintiffs \$2 million on their wrongful death claim and, to Michael Braun for his personal injury claim, \$375,000 in compensatory damages and \$10 million in punitive damages; the punitive damages award was reduced to \$2 million); *Eimann*, 880 F.2d at 833 (the jury awarded plaintiffs \$1.9 million in compensatory damages and \$7.5 million in punitive damages).

86. *Eimann*, 880 F.2d at 837.

87. *Id.* at 834. Applying Texas law, the court considered, according to a risk-utility balancing test, whether (1) the defendant owed a duty to the plaintiff and (2) the standard of conduct required to satisfy the obligation. *Id.* The test involved weighing the risk, foreseeability and likelihood of injury from certain conduct against the conduct's social utility and the burden of guarding against injury. *Id.* Adopting Judge Learned Hand's balancing test to determine whether the ad violated the standard of conduct, the court summed up the test as follows:

was ambiguous on its face.⁸⁸ "Given the pervasiveness of advertising in our society and the important role it plays, we decline to impose on publishers the obligation to reject all ambiguous advertisements for products or services that might pose a threat of harm."⁸⁹

In contrast, the Eleventh Circuit Court of Appeals upheld a jury verdict in *Braun v. Soldier of Fortune Magazine, Inc.*⁹⁰ Like the *Eimann* case, the *Braun* court applied risk/utility balancing principles to determine whether the jury's verdict against the publisher was "an appropriate reconciliation of [the state's] interest in providing compensation to victims of tortious conduct with the First Amendment concern that state law not chill protected speech."⁹¹ Since *Braun* came after *Eimann*, the court justified its departure from the Fifth Circuit Court of Appeals' opinion by distinguishing the case in two important ways.⁹² Consistent with its constitu-

As [Judge Hand] described it in algebraic terms, liability turns on whether the burden of adequate precautions, B, is less than the probability of harm, P, multiplied by the gravity of the resulting injury, L. In other words, an actor falls below the standard of conduct and liability attaches when B is less than PL. Conversely, the actor satisfies the obligation to protect against unreasonable risks when the burden of adequate precautions — examined in light of the challenged action's value — outweighs the probability and gravity of the threatened harm.

Id. at 835.

88. *Id.* at 837.

89. *Id.* at 838. The jury was given a straightforward negligence instruction: Whether *Soldier of Fortune* knew or should have known from the face or context of the challenged ad that it represented an offer to perform illegal acts. *Id.* at 833. Recognizing that the first amendment does not protect advertising of illegal activity, the court found that the challenged ad was ambiguous. *Id.* at 837 (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (newspaper's placement of employment ads in sex-segregated columns violated anti-discrimination laws)). For ads that do not clearly offer illegal activity, the court concluded that a requirement to investigate or to reject every ambiguous ad was too onerous a burden to place on publishers and the first amendment. *Id.* at 837-38. *But see* Michael I. Meyerson, *This Gun for Hire: Dancing in the Dark of the First Amendment*, 47 WASH. & LEE L. REV. 267 (1990) (discussing the application of tort principles to classified advertisements that are either explicitly illegal or those that reasonably suggest illegality; publisher would reject the clearly illegal ads and can either reject or rephrase the ambiguous ads to avoid "impermissible innuendo").

90. *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1112 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1028 (1993).

91. *Id.* at 1115.

92. Of course, the Eleventh Circuit Court of Appeals is not bound by the decisions of the Fifth Circuit Court of Appeals. However, the similarities be-

tional responsibility to conduct an independent review, the *Braun* majority found that the language of the ad was not ambiguous, and unlike *Eimann*, it clearly implied that the advertiser would consider illegal jobs.⁹³ However, the key distinction centered on the different jury instructions which were given in each case.

The jury in the *Braun* case was instructed in part as follows:

In order to prevail in this case Plaintiffs must prove to your reasonable satisfaction by a preponderance of the evidence that a reasonable reading of the advertisement in this case would have conveyed to a magazine publisher, such as *Soldier of Fortune*, that this ad presented the clear and present danger of causing serious harm to the public from violent criminal activity. The Plaintiffs must prove that the ad in question contained a clearly identifiable unreasonable risk, that the offer in the ad is one to commit a serious violent crime, including murder.⁹⁴

Although the court did not comment on such, the jury instruction contains the "clear and present danger" language from the *Schenck v. United States* and *Whitney v. California* incitement cases.⁹⁵

Because the jury was instructed to apply a "modified" negligence standard under which [*Soldier of Fortune*] had no legal duty to investigate the ads it printed,⁹⁶ the court concluded that imposing publisher liability in this case was consistent with First Amendment principles.⁹⁷ The court articulated the following rule: "[T]he First Amendment permits a state to impose upon a publisher liability for compensatory damages for negligently publishing a commercial advertisement where the ad on its face, and without the need for investigation, makes it apparent that there is a substantial danger

tween *Braun* and *Eimann*, both on the facts and the law, made it difficult for the *Braun* court not to address the *Eimann* decision.

93. *Braun*, 968 F.2d at 1121. Judge Eschbach disagreed with the majority opinion on the basis that he believed the language of the advertisement was ambiguous. *Id.* at 1122 (Eschbach, J., dissenting).

94. *Id.* at 1113.

95. See *supra* note 31.

96. *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1118 (11th Cir. 1992), cert. denied, 113 S. Ct. 1028 (1993).

97. *Id.* at 1119.

of harm to the public.”⁹⁸ In response to the publisher’s argument that the judgment would force the magazine out of business and silence its protected speech, the court stated that the First Amendment interest in protected speech does not entitle “publishers and broadcasters [to] enjoy an unconditional and infeasible immunity from [tort] liability.”⁹⁹ The rule articulated in *Braun* presents a good compromise between tort liability for the negligent publication of commercial advertisements and First Amendment protection. By imposing liability without a corresponding duty to investigate, only those advertisements which facially present a clearly identifiable unreasonable risk will subject publishers to liability. However, the *Braun* rule may give more protection to commercial advertisement than is necessary to safeguard First Amendment principles. As Professor Meyerson has suggested, a rule imposing liability on ambiguous advertisements would not necessitate an obligation to investigate.¹⁰⁰ The only additional burden on publishers would be to reject or to edit the ambiguous ad; this is already a step in the publication process. 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.

Like these commercial advertisement cases, courts that decide claims against publishers of “how to” books are reticent to impose a duty to investigate upon the publishers. Because a clearly identifiable unreasonable risk may not be facially detectable, it may be more difficult in the “how to” publication cases to fashion a rule which reconciles the state’s interest in providing compensation to victims of tortious conduct with the First Amendment concern that the fear of liability may chill protected speech.

98. *Id.* Citing to *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the court recognized that a different rule would apply to presumed damages or punitive damages. *Braun*, 968 F.2d at 1119 n.7.

99. *Id.* at 1119 n.8 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)).

100. Meyerson, *supra* note 89, at 275-76.

V. "HOW TO" PUBLICATIONS: PRODUCTS OR SPEECH?

A. *Negligent Publication*

So long as the publisher has neither authored nor guaranteed the accuracy of the publication, injuries sustained by plaintiff acting in reliance on information contained in the publication have not been redressable under a negligence theory. As a matter of policy, courts in these situations have uniformly held that "absent guaranteeing or authoring the contents of the publication, a publisher has no duty to investigate and warn its readers of the accuracy of the contents of its publications."¹⁰¹

In *Birmingham v. Fodor's Travel Publications, Inc.*, a newlywed couple in preparation for their honeymoon trip to Hawaii purchased a copy of *Fodor's Hawaii 1988* travel guide.¹⁰² Based on the information acquired from the *Fodor's* guide, the honeymooners decided to go to Kekaha Beach to body surf, swim, and relax.¹⁰³ After arriving at their destination, Joseph Birmingham sustained personal injuries from body surfing in ocean waters off Kekaha Beach.¹⁰⁴ The Birminghames sued *Fodor's* claiming that it was negligent in failing to warn them of the dangerous swimming conditions at Kekaha Beach.¹⁰⁵

101. *Birmingham v. Fodor's Travel Publications, Inc.*, 833 P.2d 70, 75 (Haw. 1992). *But see* *Mark v. Zulli*, No. CV 075386 (Cal. Super. Ct. Oct. 7, 1994); *David v. Jackson*, No. 540624 (Cal. Super. Ct. Sept. 8, 1994)(unpublished opinions discussed in *News Notes*, 22 Media L. Rep. (BNA) No. 42, (Nov. 1, 1994)). In these cases the plaintiffs brought suit against the authors of *The Courage to Heal* and *The Courage to Heal Workbook*, self-help books intended to assist victims of child sexual abuse, even if they have repressed memories of the abuse. The plaintiffs alleged that the books (and several therapists) induced them to believe that memories of childhood sexual abuse were real. The plaintiffs sought recovery for the emotional damages suffered by them and their families. Both cases were dismissed. Despite the fact that the plaintiffs sued the authors, the court found that authorship created no duty. "The fact that [the authors] intended [the books] to provide information and guidance to the general public does not give rise to a duty to every member of the public who reads the book." *Id.*

102. *Birmingham*, 833 P.2d at 73.

103. *Id.* The section in the travel guide upon which the Birminghames relied in deciding to visit Kekaha Beach states the following: "Kekaha Beach Park on the south shore is a long, luxurious strip of sand recalling the beaches of California. Great for dune buggy action!" *Id.* at 73 n.1.

104. *Id.* at 73.

105. *Id.* The Birminghames sued *Fodor's*, the State, and the County alleging in part that: (1) the defendants recommended, encouraged and invited plaintiffs and other members of the public to use Kekaha Beach and the adjacent waters;

The Hawaii Supreme Court affirmed the trial court's granting of summary judgment in favor of *Fodor's*.¹⁰⁶ Upon a consideration of publisher liability cases from various jurisdictions, the court concluded that policy reasons and First Amendment concerns mandated that the courts restrain from imposing a new duty on publishers.¹⁰⁷ "[W]e are reluctant to impose a new duty upon members of our society without any logical, sound, and compelling reasons taking into consideration the social and human relationships of our society."¹⁰⁸ Agreeing with other courts which have considered such cases, the Hawaii Supreme Court concluded that a publisher has no

(2) the defendants knew, or in the exercise of reasonable care should have known, that the wave and water conditions along the Beach were dangerous to swimmers; (3) the defendants failed to warn of the dangerous conditions; and (4) the failure to warn caused the Birmingham's injuries and damages. *Id.*

106. *Id.* at 83.

107. *Birmingham*, 833 P.2d at 76. Cases uniformly refuse to impose a duty on publishers to investigate the contents of their publications. See *First Equity Corp. v. Standard & Poor's Corp.*, 869 F.2d 175, 179-80 (2d Cir. 1989) (losses suffered by investors who relied on inaccurate financial publications to their detriment may not be recovered); *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1216-17 (D. Md. 1988) (publisher of medical textbook not liable in negligence to nursing student who suffered personal injury after following treatment described in book); *Lewin v. McCreight*, 655 F. Supp. 282, 283-84 (E.D. Mich. 1987) (publisher of book titled *The Complete Metalsmith* not liable to plaintiffs who were injured in an explosion while mixing a mordant according to the book's instructions); *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985) (publisher not liable to plaintiff who injured his hand while following instructions in book on how to make tools); *Roman v. City of New York*, 442 N.Y.S.2d 945, 948 (Sup. Ct. 1981) (Planned Parenthood not liable for misstatement in contraceptive pamphlet); *Gutter v. Dow Jones, Inc.*, 490 N.E.2d 898, 902 (Ohio 1986) (*Wall Street Journal* not liable for inaccurate description of certain corporate bonds); *Smith v. Linn*, 563 A.2d 123, 126 (Pa. Super. 1989) (publisher of diet book not liable for death caused by complications from following the diet), *aff'd*, 587 A.2d 309 (Pa. 1991); cf. *Libertelli v. Hoffman-La Roche*, 7 Med. L. Rptr. (BNA) 1734, 1736 (S.D.N.Y. 1981) (publisher of *Physician's Desk Reference* not liable for failure to include drug warning because the book was similar to a published advertisement of products rather than a reference book); *Mark v. Zulli*, No. CV 075386 (Cal. Super. Ct. Oct. 7, 1994) and *David v. Jackson*, No. 540624 (Cal. Super. Ct. Sept. 8, 1994) (author and publisher of book intending to assist victims of child sexual abuse to revive memories of such abuse not liable to readers and their families for resulting emotional damages); *Yuhav v. Mudge*, 322 A.2d 824, 825 (N.J. Super. Ct. App. Div. 1974) (magazine publisher not liable for injuries caused by defective fireworks advertised in its magazine); *Beasock v. Dioguardi Enters., Inc.*, 494 N.Y.S.2d 974, 979 (Sup. Ct. 1985) (truck association not liable for injuries caused by products manufactured according to industry standards adopted, approved and published by association).

108. *Birmingham v. Fodor's Travel Publications, Inc.*, 833 P.2d 70, 76 (Haw. 1992).

duty to investigate the accuracy of the contents of its publication, no duty to warn its readers that the information is incomplete and not to be relied on, or that the publisher does not guarantee the accuracy of the information.¹⁰⁹

The Hawaii Supreme Court discussed and relied upon the Ninth Circuit Court of Appeals' opinion in *Winter v. G.P. Putnam's Sons*.¹¹⁰ In *Winter*, mushroom enthusiasts who became severely ill from picking and eating mushrooms after relying on information in *The Encyclopedia of Mushrooms* brought suit against the publisher.¹¹¹ The plaintiffs relied on the descriptions in *The Encyclopedia of Mushrooms* in deciding which mushrooms were safe to eat.¹¹² After eating the mushrooms, the plaintiffs became critically ill and required liver transplants.¹¹³

Plaintiffs advanced many alternative theories of recovery including products liability, breach of warranty, negligence, negligent misrepresentation, and false representation.¹¹⁴ As to the negligence claim, the court refused to recognize a duty on a publisher to investigate the accuracy of the contents of the books it publishes.¹¹⁵ "Were we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs."¹¹⁶

Recognizing that a publisher may voluntarily assume a duty to investigate and guarantee the contents of its publication, a duty would then exist exposing publishers to possible liability for negligent publication.¹¹⁷ The court declined to find that a publisher should warn either (1) that the information in the book is not complete and therefore, a consumer should not fully rely on it, or (2) that the publisher has not

109. *Id.*

110. 938 F.2d 1033 (9th Cir. 1991).

111. *Winter*, 938 F.2d at 1034.

112. *Id.* *The Encyclopedia of Mushrooms* is a reference guide containing information on the habitat, collection, and cooking of mushrooms. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1037.

116. *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1037 (9th Cir. 1991).

117. *Id.* at 1037 n.7 (citing *Hanberry v. Hearst Corp.*, 81 Cal. Rptr. 519, 521 (Ct. App. 1969) (Good Housekeeping held liable for defective product that it guaranteed by endorsing the product with the Good Housekeeping's Consumer's Guaranty Seal. In *Hanberry*, the defendant had made an independent examination of the product which were shoes guaranteed not to be slippery and issued an express, limited warranty.)). *Id.*

investigated the text and cannot guarantee its accuracy.¹¹⁸ "We will not introduce a duty we have just rejected by renaming it a 'mere' warning label."¹¹⁹

The court assumed that informing the public that a publisher does not guarantee the contents of its publications is tantamount to imposing on a publisher a duty to investigate. The former is similar to truth in advertising disclosures, and it is difficult to see how such disclosures would chill publishers' First Amendment rights. In fact, a requirement that a publisher notify the consuming public that it is neither author nor guarantor of the contents of its publications provides information that may foster intelligent, well-informed economic decisions.¹²⁰

B. *Strict Liability Under Products Liability Law*

The plaintiffs in both *Birmingham v. Fodor's Travel Publications, Inc.* and *Winter v. G.P. Putnam's Sons* argue strict liability claims premised on the theory that the publications at issue are "products."¹²¹ A producer of a product may be held to a strict liability standard when the product is defectively designed, when it contains a dangerous design or defect, and/or when there is a failure to warn about a danger attendant upon the use of the product.¹²² Strict liability prin-

118. *Id.* at 1037. As to the first warning, the court reasoned that a publisher would not know what warnings were required without analyzing the factual contents of the book. *Id.* In somewhat circular reasoning, the court stated: "With respect to the second, such a warning is unnecessary given that no publisher has a duty as a guarantor." *Id.* at 1038.

119. *Id.* at 1037-38.

120. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (holding that "even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy," both individual consumers and society in general have strong interests in the free flow of commercial information).

121. *Birmingham v. Fodor's Travel Publications, Inc.*, 833 P.2d 70, 77 (Haw. 1992); *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991).

122. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98, at 692-93 (5th ed. 1984). Several cases considering strict liability claims have cited section 402(a) of the Restatement (Second) of Torts, which states in relevant part:

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

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

ciples further the "cause of accident prevention . . . [by] the elimination of the necessity of proving negligence."¹²³

The *Winter* court, following a long line of cases that have declined to extend products liability law to ideas or knowledge published in a book,¹²⁴ recognized that products liability "is geared to the tangible world."¹²⁵ The court states the following:

A book containing Shakespeare's sonnets consists of two parts, the material and print therein, and the ideas and expression thereof. The first may be a product, but the second is not. The latter, were Shakespeare alive, would

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- (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
 - (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1964). See, e.g., *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991); *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1217 (D. Md. 1988).

123. *Winter*, 938 F.2d at 1035 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98, at 93 (5th ed. 1984)). "Under products liability law, strict liability is imposed on the theory that '[t]he costs of damaging events due to defectively dangerous products can best be borne by the enterprisers who make and sell these products.'" *Id.* at 1034-35 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98, at 92-93 (5th ed. 1984)).

124. See, e.g., *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1217 (D. Md. 1988) (holding a publisher of a medical textbook not strictly liable for the contents of its publication because strict liability has not been extended to the dissemination of an idea or knowledge in books); *Lewin v. McCreight*, 655 F. Supp. 282, 284 (E.D. Mich. 1987) (holding there can be no duty to warn of "defective ideas" upon publishers of information supplied by third-party authors); *Walter v. Bauer*, 451 N.Y.S.2d 533, 534 (App. Div. 1982) (holding that a publisher of a textbook containing science experiments is not strictly liable for defective design and failure to warn). Courts, however, have applied strict liability to the narrow area of published maps or charts. See, e.g., *Brocklesby v. United States*, 767 F.2d 1288, 1295 (9th Cir. 1985) (finding a graphic instrument approach chart to be a product subject to strict liability law), *cert. denied*, 474 U.S. 1101 (1986); *accord Salomey v. Jeppesen & Co.*, 707 F.2d 671, 676-77 (2d Cir. 1983) (reasoning that "the mass production and marketing of these charts requires Jeppesen to bear the costs of accidents that are proximately caused by defects in the charts"); *Aetna Casualty and Surety Co. v. Jeppesen & Co.*, 642 F.2d 339, 341-42 (9th Cir. 1981) (approach charts are "products"). The underlying theory for applying strict liability to these kinds of charts is the analogy of a nautical chart or an airline chart to other instruments of navigation such as a compass or radar finder which, when defective, will be dangerous. *J.B. Lippincott, Co.*, 694 F. Supp. at 1217.

125. *Winter*, 938 F.2d at 1034.

be governed by copyright laws; the laws of libel, to the extent consistent with the First Amendment; and the laws of misrepresentation, negligent misrepresentation, negligence, and mistake. These doctrines applicable to the second part are aimed at the delicate issues that arise with respect to intangibles such as ideas and expression.¹²⁶

The court acknowledged both the appeal and the danger of the involuntary spreading of costs of injuries occurred in reliance on incomplete or defective information in "how to" publications.¹²⁷ If strict liability concepts were applied to words and ideas, First Amendment principles protecting the "unfettered exchange of ideas" would be chilled.¹²⁸ Echoing the sentiments of a New York court, the *Winter* court questioned whether, under strict liability standards, "any author [or publisher] [would] wish to be exposed . . . for writing on a topic which might result in physical injury? e.g., How to cut trees; how to keep bees?"¹²⁹

While the cases have declined to extend products liability law to publishers, a few courts have left open the question whether author liability would be similarly limited. "Author liability for errors in the content of books, designs, or drawings is not firmly defined and will depend on the nature of the publication, on the intended audience, on causation in fact, and on the foreseeability of damage."¹³⁰ In *Lewin v. McCreight*, a Michigan court declined to impose a duty to warn of defective ideas upon publishers of information supplied by third party authors because of concern that such a duty would chill free speech.¹³¹ However, the burden would not be as weighty if the publisher contributed to the content of the

126. *Id.*

127. *Id.* at 1035.

128. *Id.* ("We accept the risk that words and ideas have wings we cannot clip and which carry them we know not where.")

129. *Id.* at 1035 (citing *Walter v. Bauer*, 439 N.Y.S.2d 821, 823 (Sup. Ct. 1981) (student injured following science experiment described in textbook does not have a cause of action against the publisher based on a theory of products liability), *aff'd in part & rev'd in part on other grounds*, 451 N.Y.S.2d 533 (App. Div. 1982). See Brett L. Myers, *Read at Your Own Risk: Publisher Liability for Defective How-To Books*, 45 ARK. L. REV. 699 (1992) (discussing the *Winter* case and suggesting the application of strict liability under section 402A of *Restatement (Second) of Torts* to publishers and sellers of highly technical, highly factual "How To" books and other reference materials).

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

131. *Lewin v. McCreight*, 655 F. Supp. 282, 284 (E.D. Mich. 1987).

book.¹³² The court also considered that a publisher would have greater responsibility where the risk of harm is "plain and severe such as a book titled *How to Make Your Own Parachute*."¹³³

The dismissal of two claims against the authors of *The Courage to Heal* and *The Courage to Heal Workbook*, books intended to help victims of child sexual abuse to revive repressed memories of the abuse, suggests that authorship of a self-help book creates no duty to the consuming public.¹³⁴ These cases present a possible anomaly in the law. Conceivably, if the readers of the *Courage to Heal* books had received the same information from the authors in a therapist/client context, the plaintiffs might have had a cause of action against those therapists for malpractice. Professionals who would not be shielded from liability for negligent advice given in a therapist/client relationship may be shielded from liability for disseminating the same advice to the consuming public via self-help books.¹³⁵

C. Negligent Misrepresentation

The publisher of *The Courage to Heal* was sued in another lawsuit for negligent misrepresentation.¹³⁶ The first publication of *The Courage to Heal* included a list of attorneys who could help women survivors of child abuse.¹³⁷ The plaintiff, an adult victim of child abuse, purchased and read defendant's book.¹³⁸ She contacted one of the attorneys recommended and paid him a retainer; however, he failed to provide the promised legal services.¹³⁹ The plaintiff sued the publisher contending that it had misrepresented the qualifi-

132. *Id.* (implying in dicta that the burden of determining if the content is accurate is less if the publisher contributes to the content of the book).

133. *Id.*

134. *See supra* note 101.

135. Perhaps the First Amendment should protect professionals who provide information and guidance to the general public through publications, even if the same information could form the basis of a malpractice claim if given in a professional/client relationship. Similar to the distinctions made in the violent publication cases between *true* incitement, i.e., the *Weirum* case, and the cases discussed in Part III above, there is no "real time" interaction with clients or live importuning with real people in the publication cases. *See supra* note 27.

136. *Barden v. HarperCollins Publishers, Inc.*, 863 F. Supp. 41, 42 (D. Mass. 1994).

137. *Id.*

138. *Id.*

139. *Id.*

cations of the attorneys listed in *The Courage to Heal*.¹⁴⁰ The court cited a number of cases which refused to hold publishers liable for non-defamatory negligent misrepresentations relied upon by readers.¹⁴¹ The court granted summary judgment in favor of the publisher concluding that the plaintiff's claim of negligent misrepresentation was an "untenable legal theory."¹⁴² Concerned about opening a Pandora's box, the court stated that "[t]he burden placed upon publishers to check every fact in the books they publish is both impractical and outside the realm of their contemplated legal duties."¹⁴³

Other plaintiffs have been equally unsuccessful in holding publishers liable for negligent misrepresentations. In *Alm v. Van Nostrand Reinhold Co.*,¹⁴⁴ a plaintiff was injured when a tool he was making in accordance with directions in *The Making of Tools* shattered.¹⁴⁵ The plaintiff alleged that the publisher had a duty to provide adequate and safe instructions and warnings to intended purchasers and users of its publication.¹⁴⁶ Relying on section 311 of the *Restatement (Second) of Torts* and its comments, the plaintiff argued that liability for negligent misrepresentations "extends to any person who . . . undertakes to give information to another, and knows or should realize that the safety of the person . . . may depend upon the accuracy of the information."¹⁴⁷

Although the plaintiff argued that the court could, consistent with First Amendment jurisprudence, distinguish bad advice in "how to" books from "a treatise on politics, religion, philosophy, interpersonal relationships, or the like,"¹⁴⁸ the court responded "that such a distinction would lead to further First Amendment problems involving content-based discrimination."¹⁴⁹ Finding no precedent for extending section 311 of

140. *Id.* (alleging that the book contained false and unverified facts).

141. *Barden v. HarperCollins Publishers, Inc.*, 863 F. Supp. 41, 44-45 (D. Mass. 1994); see *supra* note 107.

142. *Barden*, 863 F. Supp. at 45.

143. *Id.* Such a burden would "produce just such a chilling effect on the free flow of ideas as first amendment jurisprudence has sought to avoid." *Id.* (citing *Geiger v. Dell Publishing Co.*, 719 F.2d 515, 515 (1st Cir. 1983) (suing a publishing company for defamation contained in a non-fiction work)).

144. 480 N.E.2d 1263, 1264 (Ill. App. Dist. Ct. 1985).

145. *Alm*, 480 N.E.2d at 1264.

146. *Id.*

147. *Id.* at 1266 (citing RESTATEMENT (SECOND) OF TORTS § 311 cmt. b (1965)).

148. *Id.* at 1267.

149. *Id.* (citation omitted).

the *Restatement (Second) of Torts* to publishers of information supplied to third parties, the court affirmed the dismissal of the plaintiff's complaint.¹⁵⁰ The court acknowledged the respective rights of society to receive knowledge, and publishers to disseminate knowledge, concluding that liability "would serve neither justice nor the public interest because of its manifestly chilling effect."¹⁵¹

In order to reconcile First Amendment concerns with the state interest in protecting persons relying on "how to" publications from injury, the plaintiff suggested that courts could first determine whether the challenged speech was "core speech." Then, depending upon the results, courts could apply a balancing test.¹⁵² Because First Amendment jurisprudence has consistently involved balancing the interest in protecting particular speech against a particular state interest,¹⁵³ it is doubtful that such an approach would involve problems of content-based discrimination.¹⁵⁴

150. *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1266-67 (Ill. App. Dist. Ct. 1985). The court cited the following precedents: *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990 (E.D.N.Y. 1977) (no liability imposed on the publisher of a chemical encyclopedia for allegedly misrepresenting the toxicity of a chemical used in plaintiff's product); *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App.) (publisher of a cookbook not liable for failure to warn that an uncooked ingredient is poisonous if eaten), *rev. denied*, 353 So. 2d 674 (Fla. 1977); *MacKown v. Illinois Publishing & Printing Co.*, 6 N.E.2d 526 (Ill. App. Ct. 1937) (no liability for injuries caused by a dandruff remedy recommended in an article published by the defendant); *Yuhas v. Mudge*, 322 A.2d 824 (N.J. Super. Ct. App. Div. 1974) (publisher not liable for injuries caused by defective fireworks advertised in its magazine).

151. *Alm*, 480 N.E.2d at 1267 (citing to *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990 (E.D.N.Y. 1977) (citations omitted)).

152. *See supra* notes 43, 69 and accompanying text.

153. *See supra* note 16 and accompanying text.

154. For a discussion of some of the cases discussed in Part IV and a proposed theory of liability based on a variation of negligent misrepresentation under § 311 of the *Restatement (Second) of Torts*, see Daniel M. Lane, Jr., *Publisher Liability for Material That Invites Reliance*, 66 TEX. L. REV. 1155, 1190 (1988) (suggesting a theory of liability under a "reckless misrepresentation" standard which would "compensate[] consumers who are injured by reckless publication while carefully limiting liability to minimize any chilling effect on the exercise of free speech") and Steven J. Weingarten, *Tort Liability for Nonlibelous Negligent Statements: First Amendment Considerations*, 93 YALE L.J. 744 (1984) (recommending a theory of recovery for physical injuries caused by nonlibelous negligent statements based on a modified misrepresentation theory).

D. *Publication as a "Good" Under UCC — Implied Warranty*

In *Cardozo v. True*, the court proposed a novel theory of recovery for a purchaser and user of a cookbook who became ill due to a failure by the author, publisher, and seller of the cookbook to adequately warn that uncooked ingredients used in a recipe were poisonous.¹⁵⁵ The plaintiff sued the retail book dealer from which she purchased the book titled *Trade Winds Cookery*.¹⁵⁶ Under the Uniform Commercial Code (UCC), the plaintiff brought her claim against the retail book dealer for breach of an implied warranty of merchantability.¹⁵⁷

Distinguishing between the tangible properties of books — the printing and binding — and the thoughts and ideas conveyed in them, the court concluded that only the physical properties of the books are "goods" for purposes of the UCC's implied warranty of merchantability.¹⁵⁸ "It is unthinkable . . . that a book seller [would have a duty] to evaluate the thought processes of the many authors and publishers of the hundreds and often thousands of books which the merchant offers for sale."¹⁵⁹

The court recognized that imposing liability on a bookseller under an implied warranty of merchantability would violate First Amendment precedents which hold that there is no liability without fault on publishers of defamatory

155. *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App.), *rev. denied*, 353 So. 2d 674 (Fla. 1977). Plaintiff got sick when she ate a small slice of uncooked Dasheen roots. *Id.* at 1054. The plaintiff was following a recipe in the cookbook for the preparation and cooking of the Dasheen plant, commonly known as "elephant's ears." *Id.* The recipe did not warn that the uncooked Dasheen roots are poisonous. *Id.*

156. *Id.* at 1054. *Trade Winds Cookery* is an anthology of recipes using tropical fruits and vegetables selected and prepared by its author, Norma True. *Id.* The book was published by a Virginia corporation which sold the book to Ellie's Book and Stationery, Inc., one of the defendants. *Id.*

157. *Id.* at 1055.

158. *Cardozo*, 342 So. 2d. at 1056.

159. *Id.* Citing cases that deny publisher liability for the injuries caused by products advertised in its publications, the court states: "The principles of law and considerations of public policy which support denial of liability of a publisher in these instances more urgently mandates [sic] denial of liability of a newsdealer." *Id.*

speech.¹⁶⁰ Addressing First Amendment concerns, the court stated the following:

[I]deas hold a privileged position in our society. They are not equivalent to commercial products. Those who are in the business of distributing the ideas of other people perform a unique and essential function. To hold those who perform this essential function liable, regardless of fault, when an injury results would severely restrict the flow of the ideas they distribute.¹⁶¹

The courts have consistently rejected theories of liability in these cases which construe publications as products and impose a strict liability standard. Additionally, courts have eschewed any liability based on negligence for fear that imposing a duty to investigate the contents of its publications on the publisher would chill speech protected by the First Amendment.

It is interesting to note that apart from the defamation cases,¹⁶² none of these publisher liability cases considered a balancing test. While balancing approaches to constitutional law have been criticized,¹⁶³ it is widely recognized that balancing has attained legitimacy particularly in First Amendment cases.¹⁶⁴

A survey of the cases suggests that, First Amendment concerns notwithstanding, courts are reluctant to extend tort liability for injuries caused by or in reliance on publications as a matter of policy. In the case of defamation, it is the publication itself that causes injury. Therefore, courts may be more willing to balance First Amendment concerns against a state's interest in protecting reputation, especially when the

160. *Cardozo*, 342 So. 2d at 1056 (citing *Time Inc. v. Firestone*, 424 U.S. 448 (1976) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

161. *Id.* at 1056-57.

162. *But see Herceg v. Hustler Magazine*, 814 F.2d 1017, 1025 (5th Cir. 1987) (Jones, J., dissenting), *cert. denied*, 485 U.S. 959 (1988).

163. *See T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (discussing some criticisms of the wide use of balancing in constitutional law including, but not limited to, the following: balancing as a method of constitutional adjudication replicates the job of the legislature; balancing treats interests equal to rights; balancing attempts to avoid the hard constitutional choices in lieu of cost-benefit calculations; constitutional supremacy diluted because balancing assigns values along a continuum rather than recognizing that a constitutional judgment "trumps").

164. *See supra* note 16.

causation between the challenged speech and alleged injury is not in question.

Common sense dictates that courts recognize the important state interest in safeguarding persons from physical harm. Certainly, the importance of providing remedies for victims of physical harm is as paramount as providing remedies for victims of reputational injury. One possible explanation for the difference in the courts' treatment of defamation cases from other publisher liability cases is an unwillingness by the courts to recognize a causal relationship between the challenged speech and the resulting injuries.¹⁶⁵

Even in the "how to" publication cases, where the direct link between the challenged speech and resulting injuries seems easily identifiable, the connection may be too tenuous. The imposition of liability would presuppose that a consumer of the publication followed the directions correctly or used the information exactly as intended.¹⁶⁶ One way to avoid the problems of comparative negligence and assigning fault is to adopt a strict liability standard. However, as the cases indicate, a strict liability rule would have a chilling effect on protected speech and a staggering effect on the commercial world and our economic system.

VI. CONCLUSION

This article has explored a variety of cases in which plaintiffs have attempted to recover damages for injuries allegedly caused by or in reliance on a publication. Although the theories upon which plaintiffs bring their claims are varied, the courts almost uniformly deny relief. Courts are reluctant to extend the law of torts to these publisher liability cases for fear of chilling First Amendment speech and for fear of the "slippery slope." The cases discussed present different challenges to both tort law and First Amendment principles. Therefore, different solutions are warranted.

The incitement theory of liability has proven untenable to plaintiffs seeking recovery for the physical injuries occasioned by violent publications. The effect of violence por-

165. Causation, or foreseeability of the risk, is one element considered in establishing the element of a duty. *See supra* notes 7-8 and accompanying text.

166. Of course, most jurisdictions follow comparative negligence rules, but it would be extremely difficult for publishers to prove as an affirmative defense negligent use of its publication by an unknown (until a lawsuit is filed) plaintiff.

trayed in television programming, movies, and rock music on viewers' subsequent violent behavior is an issue which the law will have to address in the future. As studies regarding the social impact of graphic violence share more decisive results, the courts may come to recognize that publications which contain such violence deserve less First Amendment protection.¹⁶⁷ "One day, medical or other sciences with or without the cooperation of programmers may convince the FCC or the courts that the delicate balance of First Amendment rights should be altered to permit some additional limitations in programming."¹⁶⁸

In the meantime, a balancing test such as that suggested by Judge Jones in her dissenting opinion in *Herceg v. Hustler Magazine* presents a good solution to these violent publication cases.¹⁶⁹ First Amendment principles do not demand that publishers be entitled to publish violence with impunity. Allowing civil damages for the effects of violent publications when appropriate under a balancing test might encourage professional responsibility among publishers of TV programming and rock music.¹⁷⁰

Commercial advertisement cases present an attempt to resolve the state interest in compensating victims of crimes instigated by ads soliciting illegal activity with the First Amendment objective that threat of civil liability not chill protected speech. Applying a negligence standard creates a duty in the publisher to reject ads which are clearly illegal and to reject or edit ambiguous ads without obligating the publisher to investigate every advertisement. This is not an onerous burden for two reasons: (1) under existing law,

167. Issues of constitutional proportions have been decided based on empirical studies and statistics. See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (under an Equal Protection challenge, intermediate scrutiny applied to benign race conscious measures by Congress favoring licensing of broadcast stations to minorities when supported by studies which demonstrate a link between minority ownership of broadcast stations and an increase in the diversity of viewpoints presented over the airwaves).

168. *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199, 206-07 (S.D. Fla. 1979).

169. See *supra* notes 67-74 and accompanying text.

170. Although it has been urged before by grass-roots parent and church organizations, the TV and recording industries might institute a voluntary rating system similar to the motion picture and film industry or some other system to warn the consuming public of violence portrayed in its publications. This could be a duty prescribed by the professional guilds and not imposed by law. See *supra* note 55.

clearly illegal advertisements are not protected; and (2) submitted copy of advertisements are routinely screened for readability and possible editing as part of the publication process.

The "how to" publication cases would appear, on first glance, to present the easiest path for permitting tort actions consistent with First Amendment principles. When information, advice or facts are published with the intent that the material contained in the publication will be relied upon by readers, it is surprising that plaintiffs who are injured when relying on these "how to" publications are denied recovery. Nevertheless, the theory applied to these cases is *caveat emptor*.

Although courts have rejected suggestions that publishers warn unwitting consumers that they did not investigate the text and cannot guarantee its accuracy, those courts wrongly assume that requiring such a warning is tantamount to imposing a duty to investigate. Since the publication of a third-party author's work is a commercial endeavor, the disclosure that a publisher is neither author nor guarantor of the publication promotes the free flow of commercial information. Both individual consumers and society in general would benefit from a disclosure that a publisher neither authors nor guarantees its publication. Such disclosures may aid consumers in deciding whether to purchase and rely upon a "how to" publication.

Popular sentiment, as gleaned from news reports and the political arena, seems unconcerned with First Amendment principles as evidenced by a national clamoring to regulate violence and sexually explicit material on television and movie screens, in magazines and books, and in cyberspace. Some argue, however, that it is not constituents, but politicians clamoring for regulation. Nevertheless, the jurisprudence which develops in trying to control either physical or dignitary harms, that are occasioned by or in reliance on the publication of information, will be transformed as we enter the twenty-first century and the information superhighway.

Although the cases discussed in this article demonstrate that courts are reluctant to extend tort principles to publisher liability cases, Congress may provide the "green light" for courts to recognize publisher liability torts through regulation of violence supplied by the media and entertainment in-

dustry — an acknowledgment of the causation between media violence and subsequent violent behavior.¹⁷¹ Aside from the First Amendment issues raised by publisher liability cases, congressional action affecting either increased tort liability or increased protection from tort liability through tort reform raises federalism concerns.

This article raises more questions than it answers regarding the issue of publisher liability. However, the jurisprudence in this area, although overwhelmingly protective of publishers' First Amendment rights, should recognize that tort liability and First Amendment protection can co-exist in these cases, allowing redress to injured plaintiffs while providing publishers with First Amendment protections. Through balancing the interest in protecting the challenged speech against other state interests involved in recognizing tort liability, the type of harm for which plaintiffs seek redress in publisher liability cases can be compensated while still protecting the values and principles embodied in the First Amendment.

171. On the other hand, Congress is also considering major tort reform which, if passed, would give greater protection to manufacturers and doctors in product liability and medical malpractice actions. See A.B.A. J., August 1995, at 56-75; Richard B. Schmitt, *Groups Push for Action on Tort Reform*, WALL STREET JOURNAL, August 7, 1995, at B5. It is uncertain how such proposed tort reform would effect publisher liability tort actions. If the business and medical communities are successful in lobbying Congress to pass such tort reforms, the communication/media industry will likewise lobby Congress for national tort reform if the industry is faced with increased publisher liability.