

# Journal of Civil Rights and Economic Development

---

Volume 15  
Issue 2 *Volume 15, Winter 2000, Issue 2*

Article 4

---

December 2000

## Tort Liability of the Media

Justine Wellstood

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

---

### Recommended Citation

Wellstood, Justine (2000) "Tort Liability of the Media," *Journal of Civil Rights and Economic Development*.  
Vol. 15 : Iss. 2 , Article 4.

Available at: <https://scholarship.law.stjohns.edu/jcred/vol15/iss2/4>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# TORT LIABILITY OF THE MEDIA

## INTRODUCTION

The parents of a teenage boy sue three major broadcast networks, after their son shoots and kills their 83 year old neighbor<sup>1</sup>. . . A widow sues "TuPac" and his record label after her husband, a state trooper was shot by an individual who claimed that TuPac's album caused him to shoot the officer<sup>2</sup>. . . A mother sues Hustler magazine after her son hangs himself to his death while attempting auto-erotic asphyxiation as depicted in the magazine.<sup>3</sup>

The above is a sampling of cases that have been brought against movie producers, magazine and book publishers, newspapers, radio, and television broadcasters for physical harm allegedly resulting from the speech they disseminate. These causes of action are grounded in various theories of tort, including negligence, negligent misrepresentation, strict products liability and attractive nuisance.<sup>4</sup> Most of these claims have been unsuccessful due to the rights guaranteed by the First Amendment.<sup>5</sup>

<sup>1</sup> See *Zamora v. Columbia Broad. Sys.*, 480 F. Supp. 199, 200 (S.D. Fl. 1979).

<sup>2</sup> See *Davidson v. Time Warner*, 1997 U.S. Dist. LEXIS 21559, at \*4 (S.D. Tex. 1997).

<sup>3</sup> See *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1018 (5th Cir. 1987).

<sup>4</sup> See Johnathan B. Becker, *The First Amendment Goes Tactical: New Media Negligence and Ongoing Criminal Incidents*, 15 LOY. L.A. ENT. L.J. 626, 627 (1995) (discussing causes of action available against media); Laura W. Brill, *The First Amendment and the Power of Suggestion: Protecting "Negligent" Speakers in Cases of Imitative Harm*, 94 COLUM. L. REV. 984, 986 (1994) (stating victims of media related harms have increasingly relied on tort of negligence in seeking judicial remedy); Sandra Davidson, *Blood Money: When Media Exposes Others to Risk of Bodily Harm*, 19 HASTINGS COMM. & ENT. L.J. 225, 229 (1997) (reviewing doctrines of negligence, strict liability and incitement); see also Jeffrey Haag, *If Words Could Kill: Rethinking Tort Liability in Texas for Media Speech that Incites Dangerous or Illegal Activity*, 30 TEX. TECH L. REV. 1421, 1424-1435 (1999) (discussing various theories of liability that have been employed in such cases).

<sup>5</sup> See Brill, *supra* note 4, at 987 (noting that such claims have almost always failed); see also E. Barrett Prettyman & Lisa A. Hook, *The Control of Media Related Imitative Violence*, 38 FED. COMM. L.J. 317, 380 (1987) (noting that courts are reluctant to impose liability); Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting From Media Speech: A Comprehensive First Amendment Approach*, 34 ARIZ. L. REV. 231, 233 (1992) (stating many courts have accepted

The First Amendment provides that "Congress shall make no law. . . abridging the freedom of speech, or of the press."<sup>6</sup> It affords protection for speech which offends, impassions, and angers.<sup>7</sup> This right, however, is not absolute.<sup>8</sup> The United States Supreme Court has carved out four categories of speech which are exempted from protection under the First Amendment: fighting words,<sup>9</sup> obscenity,<sup>10</sup> defamation,<sup>11</sup> and speech which is likely to incite imminent lawless action.<sup>12</sup>

argument that media defendants deserve First Amendment protection beyond common law and statutory defenses normally afforded negligence or tort defendants under state law); Alan Stephens, *First Amendment Guaranty of Freedom of Speech as Defense to Liability Stemming From Speech Allegedly Causing Bodily Injury*, 94 A.L.R. FED. 26, 2 (1999) (noting that liability, in cases of television broadcasts and movies, has generally been barred on First Amendment grounds).

<sup>6</sup> U.S. CONST. amend. I.

<sup>7</sup> See *Collins v. Jordan*, 102 F.3d 406, 414 (9th Cir. 1996); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 (1995) (discussing free speech); *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (discussing right of free speech.); see also Gerald S. Smith, *Media Liability for Physical Injury Resulting from the Negligent Use of Words*, 72 MINN. L. REV. 1193, 1200 (1988) (addressing underlying interests that are promoted by Freedom of Speech); Lise Vansen, *Incitement by Any Other Name: Dodging a First Amendment Misfire in Rice v. Paladin Enterprises, Inc.*, 25 HASTINGS CONST. L.Q. 605, 605 (1998) (discussing scope of fundamental right to free speech).

<sup>8</sup> See *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949) (stating right of free speech is not absolute); Terri R. Day, *Publications That Incite, Solicit, or Instruct: Publisher Responsibility or Caveat Emptor?*, 36 SANTA CLARA L. REV. 73, 73 (1995) (noting certain categories of speech fall outside of protection of First Amendment); see also Mike Quinlan and Jim Persels, *It's Not My Fault, The Devil Made Me Do It: Attempting to Impose Tort Liability on Publishers, Producers, and Artists for Injuries Allegedly "Inspired" By Media Speech*, 18 S. ILL. U. L.J. 417, 435 (1994) (recognizing categories of traditionally unprotected speech); Smith, *supra* note 7, at 1200 (noting that right of free speech is not absolute).

<sup>9</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (discussing statutes prohibiting fighting words); see also *Lewis v. City of New Orleans*, 415 U.S. 130, 130-34 (1973) (stating fighting words are not protected); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (holding that words, spoken directly to addressee and likely to provoke average person, causing breach of peace, are not protected). See generally Phyllis A. Flora, *Constitutional Law - Neutral Requirements Established for Expression Otherwise Unprotected Under the First Amendment*, 27 SUFFOLK U. L. REV. 175, 175 (1993) (discussing argument that fighting words are not protected speech).

<sup>10</sup> See *Miller v. California*, 43 U.S. 15, 23-24 (1973) (stating First Amendment allows carefully limited regulation of obscenity); see also *Ginzburg v. United States*, 383 U.S. 463, 474 (1966) (asserting that publications that appeal solely to prurient interests may be regulated); *Roth v. United States*, 354 U.S. 476, 484 (1957) (holding that obscenity is not constitutionally protected speech). See generally Donovan W. Gaede, *Constitutional Law - Policing the Obscene: Modern Obscenity Doctrine Re-Evaluated*, 18 S. ILL. U. L.J. 439, 439 (1995) (discussing obscenity).

<sup>11</sup> See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (stating First Amendment protections regarding public issues not relevant to defamatory speech); *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (holding defamatory statements are not immune from constitutional standards); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974) (finding defamation laws limited in matters of legitimate public concerns). See generally Rodric B. Schoen, *Defamation and Privacy in the Texas Supreme Court Since New York Times*, 37 S. TEX. L. REV. 81, 81 (1996) (discussing constitutional balancing in defamation decisions in Texas Supreme Court).

<sup>12</sup> See *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (articulating *Brandenburg* test to determine whether speech is likely to incite lawless action); see also *N.A.A.C.P. v. Claiborne*

Most courts confronted with First Amendment issues involving media defendants have barred recovery<sup>13</sup> based upon the incitement standard established in *Brandenburg v. Ohio*.<sup>14</sup> If the speech in question does not fall into one of the unprotected categories of speech, courts are reluctant to impose liability.<sup>15</sup> Some commentators have argued that the *Brandenburg* standard presents an almost impenetrable barrier for plaintiffs seeking redress for injuries allegedly caused by media defendants.<sup>16</sup>

Despite the long line of cases that have employed a *Brandenburg* analysis,<sup>17</sup> the court in *Rice v. Paladin Enterprises*<sup>18</sup> departed from this theory in a groundbreaking decision. In *Rice*, the United States

Hardware Co., 458 U.S. 886, 927-28 (1982) (asserting mere advocacy of violence does not remove constitutional protections); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (stating that words directed to inciting or producing imminent lawless action and likely to incite or produce such action are not protected under First Amendment). See generally Leigh Noffsinger, *Wanted Posters, Bulletproof Vests, and the First Amendment Distinguishing True Threats From Coercive Political Advocacy*, 74 WASH. L. REV. 1209, 1215 (1999) (noting that *Brandenburg* expanded First Amendment protections).

<sup>13</sup> See, e.g., *Hecceg v. Hustler Magazine Inc.*, 814 F.2d 1017, 1023 (5th Cir. 1987) (denying recovery under *Brandenburg* to survivors of teenager due to absence of incitement in magazine article describing autoerotic asphyxiation); *Zamora v. CBS, Inc.*, 480 F. Supp. 199, 206 (S.D. Fla. 1979) (finding no incitement under *Brandenburg*, and therefore no liability); *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193 (1988) (denying liability to record producer for suicide as no showing of intent to produce imminent lawless action in song lyrics); *Olivia N. v. Nat'l Broad. Co.*, 178 Cal. Rptr. 888, 893 (1981) (holding no liability for television network for portrayal of rape imitated by group of teenagers); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989) (holding no liability for "unprotected incitement" under *Brandenburg* where gang imitated violent scene portrayed in film); *Smith v. Linn*, 563 A.2d 123, 126 (Pa. Super. 1989) (holding theory of incitement insufficient to limit diet book publisher's First Amendment protections).

<sup>14</sup> 395 U.S. 444 (1969).

<sup>15</sup> See *Day*, *supra* note 8, at 73 (1995) (noting that if speech does not fall into one of unprotected categories, liability is barred); see also *Prettyman and Hook*, *supra* note 5, at 372 (stating if programming does not rise to level of incitement, speech is fully protected and may be unreachable by tort liability); *Quinlan and Persels*, *supra* note 8, at 435 (1994) (advocating that speech not satisfying *Brandenburg* requirements should be accorded First Amendment protection).

<sup>16</sup> See *Vansen*, *supra* note 7, at 610 (proposing reworking of *Brandenburg* standard); see also *David Crump*, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 54 (1994) (suggesting contextual case-by-case analysis); *Sims*, *supra* note 5, at 282 (proposing balancing test); *Smith*, *supra* note 7, at 1195 (arguing for application of traditional negligence theory); *Diane Zimmerman*, *Requiem for a Heavyweight and a Farewell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291, 318 (1983) (discussing difficulty of satisfying *Brandenburg*).

<sup>17</sup> See, e.g., *Hecceg*, 814 F.2d at 1023 (denying recovery under *Brandenburg* for magazine article); *Zamora*, 480 F. Supp. at 206 (finding no incitement under *Brandenburg*); *McCullum*, 249 Cal. Rptr. at 193 (holding that no intent by record company to produce imminent lawless action); *Olivia N.*, 178 Cal. Rptr. at 888 (holding no liability for television network portrayal of rape); *Yakubowicz*, 536 N.E.2d at 1071 (finding no liability for violent film scene due to absence of incitement under *Brandenburg*); *Smith*, 563 A.2d at 123 (holding that incitement was insufficient under *Brandenburg*).

<sup>18</sup> 128 F.3d 233 (4th Cir. 1997).

Court of Appeals for the Fourth Circuit, reversed the District Court's decision, and held a defendant publisher may be liable under a theory of civil aiding and abetting.<sup>19</sup> This decision may have a profound impact on the First Amendment interests of the media.<sup>20</sup> *Rice* has provided plaintiffs with a novel cause of action in cases against media defendants, and most importantly, it has seemingly removed this class of cases from the purview of the First Amendment.<sup>21</sup>

This Note will consider the potential impact of the decision in *Rice*. Part I will discuss the evolution of incitement as constitutionally unprotected speech, and the development of the *Brandenburg* analysis. Part II of this Note will examine leading cases in the context of media liability for words that allegedly cause physical harm or injury. Part III will discuss the decision in *Rice v. Paladin Enterprises*, as well as the decision's impact on future cases. Part IV will explore the feasibility of the theory developed in this case, concluding that future courts should not follow the rationale evoked by the Circuit court in *Rice*. In conclusion, this Note proposes that courts should adhere to a bright line *Brandenburg* analysis when assessing cases involving media defendants.

## I. THE DEVELOPMENT OF THE BRANDENBURG "INCITEMENT" ANALYSIS

### A. *Hand's Masses Approach*

In *Masses Publishing Co. v. Patten*,<sup>22</sup> Judge Hand created a First

<sup>19</sup> See *Rice*, 128 F.3d at 267 (holding that First Amendment poses no bar to civil aiding and abetting, and that this claim is sufficient to withstand summary judgment).

<sup>20</sup> See Isaac Molnar, *Resurrecting the Bad Tendency Test to Combat Instructional Speech; Militias Beware: Rice v. Paladin Enterprises*, 59 OHIO ST. L.J. 1333, 1333 (1998) (discussing impact of decision in *Rice*); see also Robert J. Coursey III, *Another Case of Freedom vs. Safety: Stretching the First Amendment to Protect the Publication of Murder Manuals – Brandenburg Need Not Apply?*, 14 GA. ST. U. L. REV. 875, 897 (1998) (analyzing decision in *Rice* as oversimplification); Haag, *supra* note 4, at 1449 (addressing implications of *Rice* as alternative theory of liability). See generally Amy K. Dilworth, *Murder in the Abstract: The First Amendment and the Misappropriation of Brandenburg*, 6 WM. & MARY BILL OF RTS. J. 565 (1998) (discussing decision in *Rice*).

<sup>21</sup> See *Rice*, 128 F.3d at 242 (stating First Amendment poses no bar to civil aiding and abetting); see also Coursey III, *supra* note 20, at 897 (discussing implications of *Rice*); Haag, *supra* note 4, at 1449 (arguing *Rice* decision has provided additional cause of action); Molnar, *supra* note 20, at 1333 (discussing consequences of *Rice*).

<sup>22</sup> See *Masses Publ'g Co. v. Patten*, 244 F. 535, 535 (S.D.N.Y. 1917) (granting injunction preventing postmaster from excluding from mail monthly periodical that was highly critical of United States' war efforts during World War I), *rev'd*, 246 F. 24, 38-39 (2d. Cir. 1917)

Amendment analysis allowing suppression of speech when a speaker's words were a direct incitement to illegal activity.<sup>23</sup> This approach focused less upon the likelihood that the speech would produce danger, and focused more on the nature of the words themselves.<sup>24</sup> Although Judge Hand's decision was reversed on appeal, his ideas would later be adopted.<sup>25</sup>

### B. *Clear and Present Danger*

In *Schenck v. United States*,<sup>26</sup> Justice Holmes developed the 'clear and present danger' test.<sup>27</sup> Under this test, the question in every case becomes whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.<sup>28</sup> Subsequently, Justice Holmes' dissent in *Abrams v. United States*<sup>29</sup> modified the clear and present danger standard to incorporate an immediacy element, which would signify a more speech protective standard.<sup>30</sup>

(reversing injunction granted by district court holding that since words were used in effort to persuade, it was irrelevant that they did not directly incite).

<sup>23</sup> See *Masses*, 244 F. at 536 (stating objective scrutiny of speaker's words must be applied before denouncing speech in question).

<sup>24</sup> See *id.* at 536 (noting only words whose objective meaning causes direct incitement may be prohibited); Cf. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (noting that circumstances determine whether speech is protected).

<sup>25</sup> See Michael P. Kopech, *Shouting 'Incitement!' In the Courtroom: An Evolving Theory of Civil Liability?*, 19 ST. MARY'S L.J. 173, 177 (1987) (noting that although case was reversed on appeal, Judge Hand proved to be far ahead of his contemporaries with regard to protection of free speech); see also Frederick M. Lawrence, *The Day the Presses Stopped, A History of the Pentagon Papers Case: The Collision of Rights in Violence Conductive Speech*, 19 CARDOZO L. REV. 1333, 1344 (1998) (discussing Hand's analysis).

<sup>26</sup> See *Schenck*, 249 U.S. at 47-49 (1919) (affirming convictions for obstructing recruitment and enlistment activities of military by distributing pamphlets).

<sup>27</sup> See *Schenck*, 249 U.S. at 52 (discussing clear and present danger test); see also Lawrence, *supra* note 25, at 1338 (discussing Holmes analysis in *Schenck*). See generally Edward J. Bloustein, *Criminal Attempts and the Clear and Present Danger Theory of the First Amendment*, 74 CORNELL L. REV. 1118, 1118 (1989) (discussing *Schenck* decision); Martin H. Redish, *Advocacy of Unlawful Conduct and The First Amendment*, In *Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1166-67 (discussing development of clear and present danger test).

<sup>28</sup> See *Schenck*, 249 U.S. at 52 (reasoning that *Schenck's* distribution of leaflets during wartime created danger that young men would dodge draft, creating evil Congress had both right and obligation to prevent); Tom Hentoff, *Speech Harm and Self Government, Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1457 (1991) (discussing *Schenck* decision); see also Theresa J. Pulley Radwan, *How Imminent is Imminent?: The Imminent Danger Test Applied to Murder Manuals*, 8 SETON HALL CONST. L.J. 47, 53-54 (1997) (discussing courts analysis in *Schenck*).

<sup>29</sup> See *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (upholding defendant's conviction under Espionage Act for protesting American intervention in Russian revolutionary battle).

<sup>30</sup> See *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting) (stating only present danger of

The clear and present danger doctrine was further developed in Justice Brandeis' concurrence in *Whitney v. California*.<sup>31</sup> Justice Brandeis stated that the clarity of the danger lies in the distinction between advocacy and incitement.<sup>32</sup> He further argued that advocacy, even of a morally reprehensible violation of law, is insufficient to comprise incitement.<sup>33</sup> Justice Brandeis recognized the flaw in the clear and present danger test was that fear of serious injury alone cannot justify suppression of free speech.<sup>34</sup> In *Dennis v. United States*,<sup>35</sup> the clear and present danger test evolved into a balancing test, which weighed the gravity of the danger against the likelihood that if the speech was permitted, the feared danger would occur.<sup>36</sup> The essence of a balancing test is that if one factor increases, the other factor may decrease without affecting the result.<sup>37</sup>

immediate evil is sufficient to suppress speech); see also Bloustein, *supra* note 27, at 1141-42 (noting that modifications made in *Abrams* gave more protection); Lawrence, *supra* note 25, at 1338 n.16 (discussing Holmes dissent in *Abrams*). See generally G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 392 (1992) (discussing Holmes opinions from *Schenck* to *Abrams*).

<sup>31</sup> 274 U.S. 357, 372 (1927) (outlining elements necessary to satisfy clear and present danger doctrine); see also Redish, *supra* note 27, at 1171 (discussing Court's decision in *Whitney*).

<sup>32</sup> See *Whitney*, 274 U.S. at 374 (noting wide difference between advocacy and incitement, preparation and attempt, and assembling and conspiracy); see also Bloustein, *supra* note 27, at 1144 n.152 (citing Brandeis' concurring opinion in *Whitney*).

<sup>33</sup> See *Whitney*, 274 U.S. at 377 (stating incitement occurs when immediate evil, advocated by utterance, will occur before remedy can be effected); see also Hentoff, *supra* note 28, at 1459 n.30 (discussing distinction between advocacy and incitement); Redish, *supra* note 27, at 1179 (discussing incitement standard); Christina E. Wells, *Of Communists and Anti-Abortion Protestors: The Consequences of Falling Into the Theoretical Abyss*, 33 GA. L. REV. 1, 3 n.10 (1998) (noting Supreme Court in recent decades has adopted more explicit rules prohibiting, both directly and indirectly, government suppression of particular viewpoints).

<sup>34</sup> See *Whitney*, 274 U.S. at 376 (stating speech should be protected unless immediate serious violence was advocated or to be expected); see also Coursey, *supra* note 20, at 883 (discussing *Whitney* decision); Hentoff, *supra* note 28, at 1459 n.31 (discussing requirement of serious and immediate violence).

<sup>35</sup> 341 U.S. 494, 497 (1951) (upholding convictions of communist party members who organized group advocating violent overthrow of government in violation of Smith Act).

<sup>36</sup> See *Dennis*, 341 U.S. at 510 (discussing balancing test); see also Lawrence, *supra* note 25, at 1344 (noting flaws of clear and present danger doctrine exposed in *Dennis*); Redish, *supra* note 27, at 1171-72 (discussing court's analysis in *Dennis*). See generally Radwan, *supra* note 28, at 56-57 (discussing *Dennis* decision).

<sup>37</sup> See *Dennis*, 341 U.S. at 509-11, 516 (applying balancing test, Court held *Dennis*' speech could be prohibited given gravity of harm advocated, overthrow of government, and likelihood of his speech inciting listener to act); see also Redish, *supra* note 27, at 1172 n.62 (recognizing if danger is serious, likelihood of its occurrence need only be minimal, whereas if likelihood of occurrence is exceedingly great, seriousness of harm need not be so severe). See, e.g., *Herceg v. Hustler Magazine Inc.*, 814 F.2d 1017, 1021 (5th Cir. 1987) (discussing balancing test); *Aryan v. Mackey*, 462 F. Supp. 90, 93 (N.D. Texas 1978) (applying balancing test). See generally Lawrence, *supra* note 25, at 1344 n.47 (discussing balancing test).

### C. *Brandenburg v. Ohio*

In *Brandenburg v. Ohio*,<sup>38</sup> the Supreme Court announced the modern test to be applied to cases involving infringement upon free speech.<sup>39</sup> Under this standard, a court must find that advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.<sup>40</sup> Advocacy susceptible to regulation must satisfy four elements: (1) direct advocacy of unlawful action;<sup>41</sup> (2) directed or intended toward the goal of inciting or producing lawless action;<sup>42</sup> (3) the likelihood that such action would occur,<sup>43</sup> and (4) that such occurrence was imminent.<sup>44</sup>

<sup>38</sup> 395 U.S. 444, 446-47 (1969) (striking down conviction of Ku Klux Klan leader who made speeches containing threats against national political leaders and hostile statements concerning Blacks and Jews). *Brandenburg* was convicted under a state syndicalism statute that prohibited "advocat[ing] . . . the duty, necessity, or propriety or crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." *Id.* at 445. The Court found the statute unconstitutional because it criminalized mere advocacy of violence as a means of achieving social and political change, without regard to whether the speech was either intending or likely to incite imminent lawless action. *Id.* at 447.

<sup>39</sup> See *Herceg*, 814 F.2d at 1021 (discussing balancing test); see also Brill, *supra* note 4, at 987 (recognizing majority of courts apply *Brandenburg* analysis); Lawrence, *supra* note 25, at 1345 (stating *Brandenburg* best articulates current doctrine); Vansen, *supra* note 7, at 608 (noting most courts apply *Brandenburg*).

<sup>40</sup> See *Brandenburg*, 395 U.S. at 447-49 (noting failure to distinguish advocacy from incitement abridges speech and press freedoms). See generally Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754-55 (1975) (arguing *Brandenburg* test is synthesis based upon Hands' *Masses* approach and Holmes-Brandeis clear and present danger test); Linde, "Clear and Present Danger" Reexamined: Dissonance in the *Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1185 (1970) (discussing danger and incitement distinguished to overrule *Whitney*).

<sup>41</sup> See *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (stating intent to advocate imminent lawless action must be gleaned from 'import of language'); Lawrence, *supra* note 25, at 1346 (discussing direct incitement); see also *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (stating advocacy of morally reprehensible evil short of incitement not prohibitable); Kopec, *supra* note 25, at 182 (arguing "the simple act of expressly urging idea or action, even violent or illegal action, without more, cannot be constitutionally punished").

<sup>42</sup> See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) (mandating specific intent necessary to impose liability); see also *Hess*, 414 U.S. at 109 (stating no liability without evidence that words intended to produce illegal action); *Herceg*, 814 F.2d at 1024 (noting mere negligence cannot form basis of liability for incitement). See generally Redish, *supra* note 27, at 1175-76 (discussing requirements of *Brandenburg*).

<sup>43</sup> See Kopec, *supra* note 25, at 185 (distinguishing likelihood element, which addresses necessity of finding high probability that feared action will actually come to fruition before prohibition of the speech is justified, from imminence element, which consolidates concepts of proximity of time and of place with an emphasis on importance of concluding the speech represents legitimate danger).

<sup>44</sup> See *Hess*, 414 U.S. at 108 (stating advocacy of future illegal action is insufficient to impose liability); *Whitney*, 274 U.S. at 374 (Brandeis, J., concurring) (asserting remoteness of danger is one factor in determining whether incitement is imminent); see also Hentoff, *supra* note 28, at 1454-55 (discussing requirements of *Brandenburg*). See generally Radwan, *supra* note 28, at 59-60 (discussing imminence requirement).



## II. LEADING CASES INVOLVING MEDIA LIABILITY

Where recovery is sought for injuries allegedly resulting from media speech, plaintiffs generally rest their claims on a tort theory of negligence.<sup>45</sup> The majority of courts that hear such cases apply a *Brandenburg* analysis.<sup>46</sup> Therefore, in addition to satisfying the elements of a tort cause of action, a plaintiff must survive the scrutiny of the First Amendment.<sup>47</sup> If the speech in question does not fall into one of the above four categories of unprotected speech, fighting words, obscenity, defamation or speech which is likely to incite imminent lawless action, courts are reluctant to find liability and recovery will almost always be barred.<sup>48</sup>

These cases can generally be placed into one of four categories: (1) "exhortation" cases; (2) "instruction" cases; (3) "facilitation" cases; and (4) "inspiration" cases.<sup>49</sup>

<sup>45</sup> See Day, *supra* note 8, at 74 (discussing negligence theory); see also Smith, *supra* note 7, at 1196 (discussing negligence theory and First Amendment).

<sup>46</sup> See, e.g., *Herceg*, 814 F.2d at 1023 (denying recovery to survivors of teenager due to absence of incitement under *Brandenburg* in magazine article describing autoerotic asphyxiation); *Zamora v. CBS*, 480 F. Supp. 199, 200 (S.D. Fla. 1979) (finding no incitement under *Brandenburg*, therefore liability barred); *McCollum v. CBS*, 249 Cal. Rptr. 187, 193 (Cal. Ct. App. 1988) (denying liability to record producer for suicide that allegedly resulted from lyrics of record, holding no intent to produce imminent lawless action); *Olivia N. v. NBC*, 178 Cal. Rptr. 888, 893 (Cal. Ct. App. 1981) (holding no liability for network where televised portrayal of simulated rape was imitated by group of teenagers); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989) (holding no liability due to absence of incitement under *Brandenburg* where gang imitated violent scene portrayed in film); *Smith v. Linn*, 563 A.2d 123, 126 (Pa. Super. Ct. 1989) (holding insufficient incitement under *Brandenburg*).

<sup>47</sup> See Vansen, *supra* note 7, at 610 (proposing reworking of *Brandenburg* standard); see also Crump, *supra* note 16, at 52-54 (1994) (suggesting case-by-case analysis); Sims, *supra* note 5, at 282 (proposing balancing test); Smith, *supra* note 7, at 1195 (arguing for application of traditional negligence theory).

<sup>48</sup> See Day, *supra* note 8, at 73 (noting that if speech does not fall into one of unprotected categories, liability is barred); see also Quinlan and Persels, *supra* note 8, at 435 (recognizing that speech not satisfying *Brandenburg* requirements should be accorded First Amendment protection).

<sup>49</sup> See Sims, *supra* note 5, at 235. Professor Sims categorizes media liability cases into four categories: (1) "instruction cases," where the injuries allegedly arose from media speech offering instructions for inherently dangerous activities, or where the activity was made dangerous because the instructions were erroneous; (2) "exhortation cases," where the defendants actively encouraged or exhorted the plaintiffs to get involved in obviously dangerous, reckless or unlawful activity and injury resulted from that involvement; (3) "facilitation cases," where violence against a third party was purportedly facilitated by information provided by the media defendants; and (4) "inspiration cases," where the plaintiff's injuries allegedly results from violence or dangerous activity inspired by the media speech. *Id.*

### A. *Exhortation Cases*

An "exhortation" case is one where the defendants actively encouraged or exhorted the plaintiffs to become involved in obviously dangerous, reckless or unlawful activity; and injury results from such involvement.<sup>50</sup>

#### 1. *Davidson v. Time Warner*<sup>51</sup>

On April 11, 1992, Ronald Ray Howard, a nineteen-year old black male, sped down a Texas highway in a stolen Chevy Blazer with rap music blaring from the windows. As a result of the loud music, Howard was stopped by state trooper Bill Davidson.<sup>52</sup> When Howard was asked to produce a driver's license, he fatally shot Officer Davidson with a nine millimeter Glock handgun.<sup>53</sup> At the time of the shooting, Howard was listening to a cassette entitled *2Pacalypse Now*, which is a recording performed by Tupac Amaru Shakur.<sup>54</sup> Davidson's widow brought suit against Shakur and his record producers claiming the lyrics were intended to incite young black males to kill policemen.<sup>55</sup> In an attempt to avoid the death

<sup>50</sup> See Sims, *supra* note 5, at 239. See, e.g., *McCollum*, 249 Cal. Rptr. at 188. In *McCollum*, the plaintiffs brought an action against Ozzy Osbourne and CBS Records for \$9 million in punitive damages when their nineteen-year old son shot himself in the head after repeatedly listening to Osbourne's song *Suicide Solution*. See *id.* at 189. Consequently, the plaintiffs allege that Osbourne's music was the proximate cause of their son's suicide. See *id.* at 191. The court, applying a *Brandenburg* analysis, reasoned that there is nothing in any of Osbourne's songs which could be interpreted as an inducement to an act of suicide by a listener. See *id.* at 193. No rational person would mistake musical lyrics and poetry for literal commands or directives to immediate action; to support such a conclusion would indulge a fiction which neither common sense nor the First Amendment will permit. See *id.* at 194. Furthermore, the court stated, it is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. See *id.* at 197. Therefore, the court dismissed the suit, concluding that the First Amendment posed an absolute bar to the plaintiff's claim. See *id.* at 188.

<sup>51</sup> No. V-94-006, 1997 U.S. Dist. LEXIS 21559, at \*4 (S.D. Tex., Mar. 31, 1997).

<sup>52</sup> See *Davidson*, No. V-94-006, 1997 U.S. Dist. LEXIS 21559, at \*4 (S.D. Tex., Mar. 31, 1997). See generally *Orozco v. Dallas Morning News*, 975 S.W.2d 392, 393 (5th Cir. 1998) (discussing liability of newspaper where plaintiff's were gunned down at their home by gang members).

<sup>53</sup> See *id.* at \*4.

<sup>54</sup> See *id.* The Davidsons do not allege which song Howard was listening to at the time of the shooting. *Id.* at \*4 n.4. At least one song on the album makes reference to commission of violence against police officers containing the following lyrics: "Now I could be a crooked nigga too. When I'm rolling with my crew, watch what crooked niggas do. I got a nine millimeter Glock pistol. . . I fired 13 shots and popped another clip. . . The more I shot, the more mothaf—ka's dropped, and even cops got shot when they rolled up." *Id.* at \*4 n.4.

<sup>55</sup> See *id.* at \*6. The Davidsons also claim that the album is obscene, contains "fighting words", and defames peace officers like Officer Davidson. *Id.* The plaintiffs claim that because the record lacks constitutional protection, the defendants are liable for producing violent music that proximately caused the death of Officer Davidson. *Id.*

penalty, Howard contended that the song and its lyrics "incited" him to shoot the officer.<sup>56</sup> The jury did not accept such a defense and sentenced Howard to death.<sup>57</sup>

In evaluating the liability of the record producers of *2Pacalypse Now*, the court employed the *Brandenburg* analysis and held that *2Pacalypse Now* does not incite imminent violence.<sup>58</sup> The court reasoned that it was far more likely that Howard, a gang member driving a stolen automobile, feared arrest, and shot Officer Davidson to avoid capture.<sup>59</sup> After more than 400,000 sales of *2Pacalypse Now*, the case at bar is the only one alleging that the song incites listeners to commit violence against police officers, suggesting that the chances of such incitement are quite low.<sup>60</sup> The court added that the murder of Officer Davidson was an irrational and illegal act, whereupon the defendants are not necessarily bound to foresee and plan against such conduct.<sup>61</sup> Moreover, the burden of preventing the harm is very high, both to the defendants and to society at large, because of the profound and adverse affects on

<sup>56</sup> See *id.* at \*4; *Waller v. Osbourne*, 763 F. Supp. 1144, 1145 (M.D. Ga. 1991) (claiming defendant musician's lyrics directed plaintiff to commit suicide).

<sup>57</sup> See *id.* at \*5. See generally *Vance v. Judas Priest*, No. 86-5844/86-3939 (D.C. Nev., Aug. 24, 1990) (discussing liability based on subliminal messages).

<sup>58</sup> See *Davidson*, No. V-94-006, 1997 U.S. Dist. LEXIS 21559, at \*62 (S.D. Tex., Mar. 31, 1997) (recognizing most courts rely upon *Brandenburg's* "incitement" analysis when addressing media violence); see also *Waller*, 763 F. Supp. at 1150 (analyzing Ozzy Osbourne's song *Suicide Solution* under *Brandenburg*); *McCullum v. CBS, Inc.*, 202 Cal. App.3d 989, 1000 (1988) (applying *Brandenburg* to *Suicide Solution*); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989) (holding violent film did not incite gang violence for purposes of *Brandenburg*).

<sup>59</sup> See *Davidson*, No. V-94-006, 1997 U.S. Dist. LEXIS 21599, at \*66 (S.D. Tex., Mar. 31, 1997) ("Courts addressing similar issues have repeatedly refused to find musical recording or broadcast incited certain conduct merely because certain acts occurred after the speech."). See generally *Waller*, 763 F. Supp. at 1146 (refusing to hold that conduct has direct link to music); *McCullum*, 202 Cal. App. 3d at 1000 (holding that lyrics did not constitute incitement).

<sup>60</sup> See *Davidson*, No V-94-006, 1997 U.S. Dist. LEXIS 21599, at \*40 (S.D. Tex., Mar. 31, 1997) (stating fact that music is violent and offensive is not sole factor when deciding foreseeability); see also *DeFillippo v. NBC*, 446 A.2d 1036, 1041 (R.I. 1982) (finding plaintiff was only person who alleged emulating action portrayed during broadcast and stating that "[i]n such a case, we cannot say that the broadcast constituted incitement"); *McCullough v. Amstar Corp.*, 833 S.W.2d 312, 313 (Tex. App. 1992) (affirming summary judgment when evidence established that plaintiff was first person who suffered injury as result of exposure to steepwater fumes at defendants' facility).

<sup>61</sup> See *Davidson*, 1997 U.S. Dist. LEXIS, at \*40 (holding that homicide of Officer Davidson was not random act of violence against peace officer, but attempt to elude justice by adult gang member driving stolen automobile); see also *Peek v. Oshman's Sporting Goods, Inc.*, 768 S.W.2d 841, 846 (Tex. App. 1989) (stating one is not bound to anticipate negligent or unlawful conduct on part of another). See generally *Williams v. Sun Valley Hosp.*, 723 S.W.2d 783, 787 (Tex. App. 1987) (refusing to impose liability for unpredictable conduct of patient with mental disorder). *But see Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996) (noting that governmental entity is entitled to sovereign immunity and actions did not constitute waiver under Texas Tort Claims Act).

speech.<sup>62</sup>

## B. Instruction Cases

An "instruction" case may be described as one where the plaintiff's injuries allegedly arose as a result of media speech offering instructions for inherently dangerous activities, or where the activity was made dangerous because the instructions were erroneous.<sup>63</sup>

### 1. Smith v. Linn<sup>64</sup>

In January of 1977, Patricia Smith purchased a copy of Dr. Linn's book entitled *When All Else Fails...The Last Chance Diet*.<sup>65</sup> After following the book's instructions for weight loss, she had lost over 100 pounds by June 1977 when she died from cardiac failure.<sup>66</sup> The administrator of her estate brought an action to recover for the death of the decedent, alleging her death was caused by the liquid protein

<sup>62</sup> See *Davidson*, 1997 U.S. Dist. LEXIS, at \*37 (stating that to create duty requiring defendants to police their recordings would be "enormously expensive and would result in sale of only most bland, least controversial music" and would further lead to self censorship). See generally *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (stating that music is form of expression and communication protected under First Amendment); *Betts v. McCaughtry*, 827 F. Supp. 1400, 1406 (W.D. Wis. 1993) (asserting that "it is undisputed that rap music constitutes speech protected by First Amendment"), *aff'd*, 19 F.3d 21 (7th Cir. 1994).

<sup>63</sup> See *Sims*, *supra* note 5, at 243; see, e.g., *Birmingham v. Fodor's Travel Publ'ns, Inc.*, 833 P.2d 70 (Haw. 1992). *Fodor's* is a publisher of travel guides and has published over 700 different titles since 1949. See *id.* at 73. The Birmingham's bought a copy of *Fodor's* publication as a guide for their honeymoon in Hawaii. Based on information obtained from the guide, the Birmingham's decided to visit Kekaha Beach. See *id.* Consequently, Joseph Birmingham sustained personal injuries from body surfing in ocean waters off Kekaha Beach. See *id.* at 75. As a result of this injury, the Birmingham's brought suit against *Fodor's* alleging that *Fodor's* was negligent in their failure to warn of the existing dangerous conditions, which the Birmingham's alleged was the proximate cause of their injuries. In its analysis, the court began by stating that "no jurisdiction has held a publisher liable in negligence for personal injury suffered in reliance upon information contained in the publication, unless such publisher 'authored' or 'guaranteed' the information." See *id.* Since *Fodor's* is neither the author of the Guide, nor guarantees the contents of its publication, the court concluded that *Fodor's* did not owe a duty to warn the Birmingham's of the accuracy of the contents of the Guide. See *id.* at 83.

<sup>64</sup> 563 A.2d 123 (Pa. Super. Ct. 1989), *appeal granted*, 575 A.2d 568 (Pa. 1990), *aff'd*, 587 A.2d 568 (Pa. 1991). See generally *Daniel McNeel Lane, Jr., Publisher Liability for Material That Invites Reliance*, 66 TEX. L. REV. 1155, 1156 (1988) (discussing tort liability of publishers).

<sup>65</sup> See *Smith*, 563 A.2d at 125 (noting she followed diet under care of her physician, also defendant in this suit). See generally *Roy W. Arnold, The Persistence of Caveat Emptor: Publisher Immunity From Liability For Inaccurate Factual Information*, 53 U. PITT. L. REV. 777, 789 (1992) (discussing last chance diet).

<sup>66</sup> See *Smith*, 563 A.2d at 125; see also *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985) (holding publisher not liable for injuries to plaintiff resulting from reliance on how-to book on making tools).

regimen as provided in the book.<sup>67</sup> The plaintiff argued that the book should not be granted First Amendment protection because it was an "incitement to immediate unreflecting action such as the action arising from shouting 'Fire!' in a crowded theater."<sup>68</sup> The court disagreed, refusing to hold the publisher liable for negligence.<sup>69</sup>

### C. Facilitation Cases

Facilitation cases can be characterized where violence against a third party is allegedly facilitated by information provided by the media defendant.<sup>70</sup>

<sup>67</sup> See *Smith*, 563 A.2d at 125; see also *Hartford Mut. Ins. Co. v. Moorhead*, 578 A.2d 492, 493 (Pa. Super. Ct. 1989) (attempting to hold defendant publisher liable for negligent failure to warn).

<sup>68</sup> See *Smith*, 563 A.2d at 125. See generally *Barden v. Harper Collins*, 863 F. Supp. 41, 42 (Mass. Dist. Ct. 1994) (discussing tort liability as applied to publishers).

<sup>69</sup> See *Smith*, 563 A.2d at 127 (holding that diet book is protected under First Amendment); see also *Winter v. G.P. Putnam Sons*, 938 F.2d 1033, 1033 (9th Cir. 1991) (holding defendant publisher not liable where plaintiffs were allegedly injured as result of information contained in publisher's book); *Mackown v. Ill. Publ'g and Printing Co.*, 6 N.E.2d 526, 526 (Ill. App. Ct. 1937) (holding newspaper publisher not liable for injuries resulting from reader's use of reproduced dandruff formula). *But see Brocklesby v. U.S.*, 767 F.2d 1288, 1291 (9th Cir. 1985) (finding publisher negligent in publishing graphic flight chart based on erroneous government information which allegedly caused plane crash).

<sup>70</sup> See *Sims*, *supra* note 5, at 243. See, e.g., *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989). *Eimann* was a wrongful death action brought by the mother and son of a murder victim. See *id.* at 831. John Wayne Hearn shot and killed Sandra Black at the order of her husband for the amount of \$10,000. See *id.* Her husband, Robert Black, contacted Hearn through an ad he ran in *Soldier of Fortune Magazine*, a publication that focuses on mercenary activities and military affairs. In the advertisement, Hearn described himself as an ex-marine, Vietnam veteran, and weapons specialist, and offered his services for "high risk assignments, U.S. or overseas." The plaintiffs won a \$9.4 million jury verdict against *Soldier of Fortune Magazine, Inc.* See *id.* On appeal, the Fifth Circuit reversed the jury verdict and rendered judgment in favor of *Soldier of Fortune*. The Court of Appeals did not address *Soldier of Fortune's* First Amendment defense, holding that *Soldier of Fortune* could not be held liable under Texas negligence law. See *id.* at 834. The court affirmatively held that *Soldier of Fortune* owed no duty to refrain from publishing a facially innocuous advertisement, since the ad's context was ambiguous. See *id.* at 834 n.1. Applying a risk-utility analysis, the court reasoned that because of the pervasiveness of advertising in our society and its importance to free expression, it would be a disproportionate burden to require publishers to decline all advertisement for products or services that might pose a threat of harm. See *id.* at 837. *But see Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110 (11th Cir. 1992). In *Braun*, Bruce Gastwirth hired Richard Savage to murder his business associate Richard Braun, through a "Gun for Hire" advertisement which Savage had placed in *Soldier of Fortune Magazine*. Savage and another individual went to Braun's suburban home, shot Braun to death and injured his sixteen year old son, Michael. See *id.* A wrongful death action was brought by Michael and an older brother against *Soldier of Fortune Magazine, Inc.* See *id.* The District Court found that Savage's advertisement, which specifically stated "Gun for Hire", unlike the more ambiguous advertisement in *Eimann*, subjected the public to a clear risk of harm. See *id.* at 1113. Applying a risk/benefits balancing test, the court concluded that the likelihood and gravity of the possible harm that may result from an advertisement which offers a "Gun for Hire" outweighed the social utility of advertising such criminal activity. See *id.* 1114.

### 1. *Way v. Boy Scouts of America*

In *Way v. Boy Scouts of America*<sup>71</sup> a twelve-year old boy, Rocky Miller, was killed when the rifle that he and several friends were playing with accidentally discharged.<sup>72</sup> After reading a 16-page advertising supplement on shooting sports in *Boys' Life* magazine,<sup>73</sup> the children located an old rifle and a .22 caliber cartridge, which was accidentally fired, killing Rocky.<sup>74</sup> The child's mother sued the magazine for the death of her son, basing her action on the theories of negligence and strict products liability.<sup>75</sup> She alleged that her son was motivated to experiment with the rifle and cartridge as a direct result of the supplemental edition to the magazine.<sup>76</sup>

The court flatly rejected the plaintiff's negligence claim, concluding that Rocky's experimentation with the rifle was not a reasonably foreseeable consequence of the supplement.<sup>77</sup> Furthermore, Rocky was unsupervised, while the supplement emphasized the importance of supervision and safe and responsible

<sup>71</sup> 856 S.W.2d 230 (Tex. App. 1993). See generally Arnold, *supra* note 65, at 778 (discussing tort liability of publishers for injuries resulting from inaccurate information); Lisa A. Powell, *Products Liability and the First Amendment: The Liability of Publishers for Failure to Warn*, 59 IND. L.J. 503, 504 (1985) (discussing publisher negligence in context of products liability).

<sup>72</sup> See *Way*, 856 S.W.2d at 232; see also Suarez v. Underwood, 426 N.Y.S.2d 208, 209-11 (N.Y. Sup. Ct. 1980) (rejecting claims against newspaper that ran ad for dangerous hair implant system). See generally Lars Noah, *Authors, Publishers and Product's Liability: Remedies for Defective Information in Books*, 77 OR. L. REV. 1195, 1195 (1998) (discussing tort liability and book publishers).

<sup>73</sup> See *Way*, 856 S.W.2d at 232. The supplement supplied information about earning merit badges for shooting, the Presidential Sports Award and Olympic sport shooting as well as a checklist on firearm safety. *Id.*

<sup>74</sup> See *Way*, 856 S.W.2d at 232; see also *Libertelli v. Hoffman-La Roche, Inc.*, No. 80 Civ. 56-26, 1981 U.S. Dist. LEXIS 11049, (S.D.N.Y. 1981) (dismissing tort claim against publisher of Physician's Desk Reference for failing to warn of Valium's addictive nature).

<sup>75</sup> See *Way*, 856 S.W.2d at 232; see also *Yuhas v. Mudge*, 322 A.2d 824, 825 (N.J. Super. Ct. App. Div. 1974) (finding publisher not liable for implied warranty of fireworks advertised in magazine). See generally Gary T. Schwartz, *Implications For Product's Liability: New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 796 (1983) (discussing overview of products liability law); John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820, 1821 (1987) (discussing tort liability of media).

<sup>76</sup> See *Way*, 856 S.W.2d at 236 (noting that foreseeability provides touchstone in determining whether circumstances give rise to duty); see also *Mellon Mortgage Company v. Holder*, 1999 Tex. Lexis 107, 1, 4-5 (Tex. 1999) (discussing two part foreseeability test in negligence causes of action); see also *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) (discussing significance of foreseeability in negligence actions); see also *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987) (discussing element of duty in negligence cause of action).

<sup>77</sup> See *Way*, 856 S.W.2d at 236 (discussing foreseeability of accident); see also *Yanase v. Auto. Club of S. Cal.*, 260 Cal. Rptr. 513, 514-19 (Cal. Ct. App. 1989) (rejecting negligence claims against publisher of tour book recommending hotel where plaintiff's husband was shot).

gun use.<sup>78</sup> The supplement provided useful information about lawful products which the court deemed to be of significant social utility.<sup>79</sup> Moreover, the court recognized the pervasive and important role of advertising in society.<sup>80</sup> Weighing the risk, foreseeability, and likelihood of injury, against the social utility of the conduct, the court concluded that the firearms supplement did not create a duty on the part of the publisher to either refrain from publishing the supplement or add warnings about the danger of firearms and ammunition.<sup>81</sup>

The court also rejected the plaintiff's strict liability claim that the information contained in the supplement made the magazine a defective product.<sup>82</sup> The court recognized that the very essence of a strict liability cause of action under §§ 402A or 402B of the Restatement (Second) of Torts is the existence of a *product* within the meaning of that section.<sup>83</sup> Ideas and information are intangible characteristics, not tangible properties.<sup>84</sup> To illustrate this distinction, the court quoted a Ninth Circuit opinion: "A book

<sup>78</sup> See *Way*, 856 S.W.2d at 236 (noting supplement emphasized supervision and use of firearms in structured environment, not as experiment).

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*; see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) (stating "as to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate"); *Eimann v. Soldier of Fortune Magazine*, 880 F.2d 830, 838 (5th Cir. 1989) (noting importance of advertising in society); *Walters v. Seventeen Magazine*, 195 Cal. App. 3d 1119, 1122 (Cal. App. 1987) (noting Supreme Court's continued linkage of commercial speech to First Amendment protection).

<sup>81</sup> See *Way*, 856 S.W.2d at 237 (stating balance of guarding against risk of harm, actual risk of harm presented, and burden of preventing harm weighs in favor of defendant); see also *Pittman v. Dow Jones & Co.*, 662 F. Supp. 921, 922 (E.D. La. 1987) (holding defendant had no duty because burden would be too onerous); *Lewin v. McCreight*, 655 F. Supp. 282, 284 (E.D. Mich. 1987) (balancing societal interest, severity of risk, burden on defendant, and likelihood of occurrence, concluding defendant publisher had no duty to warn of defective ideas in its book).

<sup>82</sup> See *Way*, 856 S.W.2d at 238 (discussing Restatement (Second) of Torts section 402A which provides that "(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. . . ."); see also *Walter v. Bauer*, 439 N.Y.S.2d 821, 822 (N.Y. Sup. Ct. 1981) (finding science book is not defective product giving rise to strict liability in tort).

<sup>83</sup> See *Way*, 856 S.W.2d at 239 (noting plaintiff is not complaining about physical property of supplement, but rather alleging ideas and information in magazine encouraged children to engage in activities that were dangerous).

<sup>84</sup> See *Way*, 856 S.W.2d at 239; see also *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1216-17 (D. Md. 1988) (holding publisher of nursing textbook not liable for physical harm to nursing student under theory of either negligence or strict liability); *Cardozo v. True*, 342 So. 2d 1053, 1054 (Fla. 1977) (distinguishing between tangible and intangible portions of books; holding warranty applies to tangible portion but not to ideas); John A. Gray, *Strict Liability for Dissemination of Dangerous Information*, 82 L. LIBR. J. 497, 497-98 (1990) (discussing whether information is product or service).

containing Shakespeare's sonnets consists of two parts, the material and the print therein, and the ideas and expression thereof. The first may be a product, but the second is not."<sup>85</sup> The court concluded that the ideas, thoughts, words, and information conveyed by the magazine and the supplement did not constitute a product.<sup>86</sup>

#### D. Inspiration Cases

"Inspiration" cases involve plaintiffs who are allegedly injured as a result of violence of dangerous activity inspired by the media speech.<sup>87</sup>

<sup>85</sup> *Way*, 856 S.W.2d at 239 (quoting *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991)).

<sup>86</sup> See *Way*, 856 S.W.2d at 239; see also *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991) (noting that because "how-to" book contains only thought and expression, it cannot be basis for products liability action); *Garcia v. Kusan*, 655 N.E.2d 1290, 1293-94 (Mass. App. Ct. 1995) (stating products liability is limited to tangible portion of book but not to ideas).

<sup>87</sup> See *Sims*, *supra* note 5, at 243; see, e.g., *Olivia N. v. Nat'l Broad. Co.*, 126 Cal. App. 3d 488 (Cal. Ct. App. 1981). Suit arose from a copy-cat sexual assault after NBC broadcast the film "Born Innocent" which contained a dramatization of an adolescent girl being assaulted in a shower of a state-run home by four other girls using the handle of a bathroom plunger. See *id.* at 491. Four days after the film's broadcast, the plaintiff, a nine-year-old girl, was "artificially raped" with a bottle by minors at a San Francisco beach. She brought suit against NBC claiming she suffered physical and psychological damage as proximate result of the telecast. The plaintiff argued that negligence liability could constitutionally be imposed despite the absence of proof of incitement as defined in *Brandenburg*. See *id.* at 492. The California Court of Appeals disagreed, stating that incitement is the proper test. See *id.* at 494. Since the television broadcast failed to meet the requirements of *Brandenburg*, the court concluded that imposing liability on simple negligence theory would frustrate vital freedom of speech guarantees. See *id.* at 496. The deterrent effect of subjecting the television networks to negligence liability because of their programming would lead to self-censorship, which would dampen the vigor and limit variety of public debate. See *id.* at 494. In 1982, the Supreme Court of Rhode Island held that the First Amendment barred suit against a television station that broadcast a "Johnny Carson Show" featuring a stuntman who "hanged" Carson. See *DeFillipo v. Nat'l Broad. Co.*, 446 A.2d 1036, 1037-38 (R.I. 1982). In *DeFillipo*, the parents of a thirteen-year-old boy sued NBC for wrongful death, after their son, imitating the stunt he had seen on the Carson show, hanged himself. See *id.* at 1037. The plaintiffs alleged that the network had been negligent in broadcasting the stunt. See *id.* at 1038. The appellate court affirmed a lower court decision granting summary judgment for the network after finding that the incitement standard of *Brandenburg* would be the only exception to the First Amendment protection under which plaintiffs could maintain this action. See *id.* at 1040. The court held that since the broadcast provided an explicit warning not to try the stunt, it had not advocated any harmful conduct, and therefore, did not constitute incitement. See *id.* at 1041-42. The court reasoned that permitting liability, despite the warning, would invariably lead to self censorship by broadcasters to remove any matter that may be emulated and lead to a law suit. See *id.* at 1041. Such self-censorship is not only violative of the defendant's right to make programming decisions, but also violative of the "paramount rights of the viewers to suitable access to 'social, esthetics, moral, and other ideas and experience.'" See *id.* at 1041-42.



### 1. Herceg v. Hustler Magazine<sup>88</sup>

In its August 1981 issue, as part of a series about the pleasures and dangers of unusual and taboo sexual practices, Hustler Magazine printed an article entitled "Orgasm of Death" discussing the practice of autoerotic asphyxia.<sup>89</sup> Troy D., a fourteen-year old boy, obtained a copy of the August 1981 issue and attempted the practice.<sup>90</sup> The next morning, his body was found, hanging in his closet, a copy of the magazine was found near his feet.<sup>91</sup> The plaintiffs, Troy's mother and the close friend who found the body, argued that the Hustler article was directed to inciting or producing Troy's death.<sup>92</sup> The court held that "even if the article paints in glowing terms the pleasures supposedly achieved by the practice it describes. . .no fair reading of it can make its content advocacy, let alone incitement to engage in the practice."<sup>93</sup>

<sup>88</sup> 814 F.2d 1017 (5th Cir. 1987).

<sup>89</sup> See *Herceg*, 814 F.2d at 1018. This practice entails masturbation while "hanging" oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm. *Id.* An editor's note, positioned to ensure the reader would see it, read: "Hustler emphasizes the often fatal dangers of the practice of 'auto-erotic asphyxia' . . . DO NOT ATTEMPT this method. The facts presented are solely for educational purposes". *Id.* The article began with a vivid description of the tragic result the practice may create, specifically, that as many as 1,000 United States teenagers die in this manner each year. *Id.* The two-page article warned readers "at least ten different times that the practice is dangerous, self-destructive and deadly." *Id.* Furthermore, "auto-asphyxia is one form of sex play you try only if you're anxious to wind up in cold storage with a coroner's tag on your big toe." *Id.* at 1019.

<sup>90</sup> See *id.* at 1019.

<sup>91</sup> See *Herceg*, 814 F.2d at 1019.

<sup>92</sup> See *id.* The plaintiffs also alleged that Hustler was responsible for Troy's death on grounds of negligence, products liability, dangerous instrumentality and attractive nuisance. *Id.* Plaintiffs also sought to recover damages for emotional and psychological harms suffered as a result of Troy's death, as well as exemplary damages. *Id.* In order for plaintiffs to prevail, they would have to prove, "1. Auto-erotic asphyxiation is a lawless act. 2. Hustler advocated this act. 3. Hustler's publication went even beyond 'mere advocacy' and amount to incitement. 4. The incitement was directed to imminent action". *Id.* at 1022.

<sup>93</sup> *Id.* at 1022-23. Plaintiffs argued in the alternative for a less stringent standard than *Brandenburg* "in cases involving non-political speech that has actually produced harm." *Id.* at 1024. The court declined to do so, stating "the Supreme Court generally has not attempted to differentiate between different categories of protected speech . . . [s]uch an endeavor 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." *Id.* See also *Walt Disney v. Shannon*, 276 S.E.2d 580, 580 (Ga. 1981) (dismissing plaintiff's claim that program caused plaintiff's son to be injured when son imitated experiment performed on program). See generally *Bill v. Superior Ct. City and County of San Francisco*, 137 Cal. App. 3d 1002, 1003 (Cal. App. 1st Dist. 1982) (dismissing plaintiff's claim that producer of gang violence film was liable for shooting of plaintiff's daughter by third party shortly after viewing film).

## 2. *Zamora v. Columbia Broadcasting System*<sup>94</sup>

In *Zamora*, the plaintiff, Ronny Zamora, a fifteen year old, shot and killed his 85 year old neighbor.<sup>95</sup> Zamora, together with his parents, sued ABC, CBS and NBC alleging that Ronny had become involuntarily “addicted to and completely subliminally intoxicated” by the extensive viewing of violence offered by the defendants.<sup>96</sup> The plaintiffs alleged that the defendants breached their duty to use ordinary care to prevent Ronny Zamora from being “impermissibly stimulated, incited and instigated” to imitate the atrocities he saw on television.<sup>97</sup> The complaint further alleged that he had been “deprived of his liberty and imprisoned; ha[d] developed a sociopathic personality and [could not] lead a normal life.”<sup>98</sup>

The court held that there is a prevailing right of the public to have broad access to programming as well as a right of broadcasters to disseminate uninhibited by those members of the public who are particularly sensitive.<sup>99</sup> Permitting such liability “would place broadcasters in jeopardy for televising Hamlet, Julius Caesar, Grimm’s Fairy Tales. . .and even The Holocaust.”<sup>100</sup> The court found that the complaint was so devoid of guidance and so lacking in a showing of legal cause that it was dismissed.<sup>101</sup>

<sup>94</sup> 480 F. Supp. 199 (D.C. Fla. 1979).

<sup>95</sup> See *Zamora*, 480 F. Supp. at 200. The complaint did not allege the circumstances under which the shooting took place. *Id.*

<sup>96</sup> See *Zamora*, 480 F. Supp. at 200. *But cf.* Nat’l Broad. Co., Inc., et al. v. Olivia Niemi, 434 U.S. 1354 (alleging injury resulted from specific program not reaction to general viewing); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1069 (Mass. 1989) (alleging that violence resulted from specific movie, not viewing in general).

<sup>97</sup> See *Zamora*, 480 F. Supp. at 200. It was further charged that plaintiff developed a sociopathic personality, became desensitized to violent behavior and became a danger to himself and others. *Id.*

<sup>98</sup> *Id.* The complaint also alleged that both parents have sustained certain losses for which they may recover. *Id.*

<sup>99</sup> *Id.* at 205. To permit such a claim presents a situation which would “give birth to a legal morass through which broadcasting would have difficulty finding its way.” *Id.* at 206. The Court notes that this right of the public is tantamount over the right of broadcasters. *Id.* at 205. For a discussion of Congress’ power to regulate broadcaster versus the public’s First Amendment right to receive information, see *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969). In *Pinkus v. United States*, 436 U.S. 293 (1978), the Court held that applying contemporary community standards ensure that material would be judged by its impact on the average person rather than a particularly sensitive individual.

<sup>100</sup> *Id.* at 206 (stating imposition of duty claimed would discriminate among television productions on basis of content which is impermissible under Constitution); see also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-12 (1975) (holding that ban on movies containing nudity impermissibly distinguished such movies from all other movies). *But cf.* *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (noting that states could enact time, manner, and place restrictions on speech irrespective of content).

<sup>101</sup> See *Zamora*, 480 F. Supp. at 203. The court noted that the minor’s alleged voracious

## III. RICE V. PALADIN ENTERPRISES

## A. District Court

"It is my opinion that the professional hit man fills a need in society. . . . But few have the courage or knowledge to make that dream a reality. . . . The kill is the easiest part of the job. . . . [If you decide to kill your victim with a knife, the knife. . . should have a six-inch blade with a serrated edge for making efficient, quiet kills. . . . [You might also use an ice pick to murder your victim]. . . . An ice pick can. . . be driven into the victim's brain, through the ear. . . . When using a small caliber weapon like the 22, it is best to shoot from a distance of three to six feet. . . aim for the head. . . preferably the eye sockets. . . [In order to dispose of a corpse], you can simply cut off the head after burying the body. . . take the head to some deserted location. . . and blow the telltale dentition to smithereens. . . [Or] you can always cut the body into sections and pack it into an ice chest for transport and disposal at various spots around the countryside. . . . After you have arrived at home the events that took place take on a dreamlike quality. . ."102

On March 3, 1993, James Perry murdered Mildred Horn, her eight year old quadriplegic son, Trevor Horn, and the child's nurse, Janice Sanders.<sup>103</sup> Perry was hired by Lawrence Horn, Mildred's husband, who wanted his son dead, so that he could obtain the \$2 million settlement his son received for the injuries that left him paralyzed for life.<sup>104</sup> On January 24, 1992, Perry ordered 2 books from Paladin Enterprises mail order catalogue; *Hit Man: A Technical Manual for Independent Contractors* and *How to Make a Silencer*, both of which he consulted in the perpetration of the murders.<sup>105</sup> The plaintiffs brought this wrongful death and survival action against Paladin Enterprises, the publisher of the two books, claiming that the

intake of violence was on a voluntary basis, and with his parents apparent acquiescence. *Id.* at 202. The First Amendment casts a heavy burden on those who seek to censor, and the plaintiffs' complaint wholly fails to allege any specific broadcasting conduct which is unprotected because it incited Zamora to shoot and kill his neighbor. *Id.* at 206.

<sup>102</sup> Selected passages from REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS (Paladin Enters., Inc. 1983). The author of this book is actually a woman who has remained unidentified. Thirteen thousand copies have been sold nationally. See *nlso 60 Minutes* (CBS television broadcast, Mar. 2, 1997).

<sup>103</sup> See *Rice v. Paladin Enter., Inc.*, 940 F. Supp. 836, 839 (D. Md. 1996).

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

defendants aided and abetted the murders of the three decedents by publishing these books.<sup>106</sup>

Paladin's marketing strategy was intended to attract and assist criminals who needed information on how to commit murders.<sup>107</sup> Paladin has stipulated that it intended and had knowledge that their publications would be used, upon receipt, by criminals and potential criminals to plan and execute the crime of murder for hire, in the manner set forth in the publications.<sup>108</sup>

The plaintiffs argued that Paladin's books are not protected by the First Amendment for two reasons. First, they argued that the First Amendment does not protect communications that aid and abet the commission of a crime.<sup>109</sup> Second, plaintiffs argued that Paladin's books are unprotected as inciteful speech.<sup>110</sup>

The District Court noted that if the Court found that *Hit Man* was protected by the First Amendment, the plaintiffs are barred from maintaining any tort claims against Paladin.<sup>111</sup> The court rejected the argument that speech which aids and abets a crime is not protected under the First Amendment.<sup>112</sup> The court reasoned that the theory of aiding and abetting has never been applied in cases involving the media.<sup>113</sup> Since the theory of aiding and abetting has never been used in this context, the court held that it could not extend the theory to media defendants, nor could the court create a new category of unprotected speech, i.e., speech that aids and abets murder.<sup>114</sup>

The court proceeded to apply the *Brandenburg* analysis.<sup>115</sup> The

<sup>106</sup> See *id.* at 838.

<sup>107</sup> See *id.* at 840. All parties agree that Paladin's marketing strategy was intended to maximize sales to the public including authors who desire such information for the purpose of writing books about crime and criminals, law enforcement officers and agencies who seek information concerning the means and methods of committing crimes, people who enjoy reading about crime for entertainment purposes, and criminologists and others who study criminal methods and mentality. *Id.*

<sup>108</sup> See *id.*

<sup>109</sup> See *Rice*, 940 F. Supp. at 841.

<sup>110</sup> See *id.*

<sup>111</sup> See *id.* at 840. The court stated that "the First Amendment bars the imposition of civil liability on Paladin unless *Hit Man* falls within one of the well defined and narrowly limited classes that are unprotected by the First Amendment." *Id.*

<sup>112</sup> See *Rice*, 940 F. Supp. at 842. The court recognized the absence of any reported decision suggesting that Maryland extends the tort of aiding and abetting to the circumstances of this case. *Id.*

<sup>113</sup> See *id.* at 842-43 (asserting that cases which have involved such theory are distinct from facts of this case).

<sup>114</sup> See *id.* at 842.

<sup>115</sup> See *id.* at 845-46. The court rejected plaintiffs argument that the 'actual malice'

court rejected the plaintiffs' argument that *Brandenburg* only applies in cases dealing with issues of social or political concern, stating that the standard is not inherently limited to political speech.<sup>116</sup> The court concluded that Paladin's book did not constitute "incitement" as provided by *Brandenburg*.<sup>117</sup> Although Paladin may have intended that the manual be used by criminals, it did not intend for Perry to murder the three decedents in the case.<sup>118</sup> Moreover, the murders were committed a year after Perry received the books.<sup>119</sup> The court also found that the book did not constitute "a call to action."<sup>120</sup> Rather, the book merely teaches what must be done to implement a professional hit, and does not cross the line between permissible advocacy and impermissible incitation to crime or violence.<sup>121</sup> The court held that while the books may be deemed "reprehensible and void of any significant redeeming social value", the books were nonetheless entitled to full First Amendment protection and granted summary judgment in favor of Paladin.<sup>122</sup>

### B. Circuit Court

On appeal, the United States Court of Appeals for the Fourth Circuit reversed the District Court's decision, holding that Paladin Enterprises may be liable for aiding and abetting the triple

standard developed in *New York Times v. Sullivan*, 376 U.S. 254 (1964), was applicable. *Id.* at 844.

<sup>116</sup> See *Id.* at 846 (recognizing vast majority of cases have found *Brandenburg* was applicable); see, e.g., *Hecceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1023 (5th Cir. 1987) (denying recovery to survivors of deceased teenager due to absence of incitement in magazine article describing autoerotic asphyxiation under *Brandenburg*); *Zamora v. CBS, Inc.*, 480 F. Supp. 199, 200 (S.D. Fla. 1979) (finding no incitement under *Brandenburg*, therefore liability barred); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193-195 (1988) (denying liability to record producer for suicide that allegedly resulted from lyrics of record on grounds that there was no intent to produce imminent lawless action); *Olivia N. v. Nat'l Broad. Co.*, 178 Cal. Rptr. 888, 893 (1981) (holding no liability for network where televised portrayal of simulated rape was imitated by group of teenagers); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989) (holding that producer had no liability where gang imitated violent scene portrayed in film due to absence of incitement under *Brandenburg*); *Smith v. Linn*, 563 A.2d 123, 126 (Pa. Super. Ct. 1989) (finding insufficient incitement under *Brandenburg*).

<sup>117</sup> See *Rice*, 940 F. Supp. at 846.

<sup>118</sup> See *id.*

<sup>119</sup> See *id.*

<sup>120</sup> See *id.* (stating book does not purport to order or command anyone to any concrete action at any specific time, much less immediately).

<sup>121</sup> See *id.* (citing *Noto v. United States*, 367 U.S. 290, 97-98 (1961)) (noting that mere abstract teaching of moral propriety or even moral necessity of resort to force and violence is not same as preparing group for violent action and steering it to such action).

<sup>122</sup> See *Rice*, 940 F. Supp. at 849 (stating however loathsome one characterizes publication, *Hit Man* simply does not fall within parameters of any of recognized exceptions to general First Amendment principles of freedom of speech).

homicide.<sup>123</sup> At the outset, the parties stipulated that the sole issue to be decided by the Court was whether the First Amendment was a complete defense, as a matter of law.<sup>124</sup> Paladin has stipulated not only that, in marketing *Hit Man*, Paladin “intended to attract and assist criminals and would-be criminals who desire information on how to commit crimes”, but also that it assisted Perry in the perpetration of the murders that are the subject matter of this case.<sup>125</sup> The court recognized that at all relevant times, Paladin possessed no specific knowledge that either: (1) Perry or Horn planned to commit a crime; (2) Perry or Horn had entered into a conspiracy for the purpose of committing a crime; or (3) Perry had been retained by Horn to murder the three decedents.<sup>126</sup>

The court began its analysis by stating that spoken or written words which constitute criminal or civil aiding and abetting does not enjoy protection under the First Amendment.<sup>127</sup> The court assumed that speech acts which the government may criminally prosecute without concern for the First Amendment, may also be subject to civil penalty.<sup>128</sup> Therefore, the court reasoned that the First Amendment would not pose a bar to a finding that Paladin is civilly liable for aiding and abetting Perry’s triple contract murder.<sup>129</sup>

The circuit court suggested that a First Amendment instruction would only be needed where the speech was of abstract generality, which is distinct from advice to commit a specific criminal act.<sup>130</sup>

<sup>123</sup> See *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 243 (4th Cir. 1997).

<sup>124</sup> See *id.* at 241.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.* at 241 n.2.

<sup>127</sup> See *id.* at 244 (citing *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982). See generally *S.E.C. v. Lowe*, 725 F.2d 892 (2d. Cir. 1984) (discussing aiding and abetting); *U.S. v. Nolan*, 718 F.2d 589 (3d. Cir. 1982) (discussing use of aiding and abetting); *U.S. v. Percuoco*, 630 F. Supp. 784, 784 (D. Mass. 1986) (discussing criminal and civil aiding and abetting).

<sup>128</sup> See *Rice*, 128 F.3d at 247. See generally *U.S. v. Fagan*, 821 F.2d 1002, 1002-03 (5th Cir. 1987) (discussing aiding and abetting); *U.S. v. Graewe*, 774 F.2d 106, 107 (6th Cir. 1985) (discussing same).

<sup>129</sup> See *Rice*, 128 F.3d at 243. See generally *Brown v. Hartlage*, 456 U.S. 45, 45-46 (1982) (rejecting First Amendment defense when activity sought to be protect was illegal); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 491 (1949) (rejecting First Amendment challenge to injunction forbidding union members from picketing to support illegal business arrangement).

<sup>130</sup> See *Rice*, 128 F.3d at 245 (citing *U. S. v. Freeman*, 761 F.2d 549, 551-52 (9th Cir. 1985)). See generally *Scales v. U.S.*, 367 U.S. 203, 235 (1961) (discussing theoretical advocacy); *Yates v. U.S.*, 354 U.S. 298, 320 (1957) (discussing concept of principles divorced from action); *U.S. v. Fleschner*, 98 F.3d 155 (4th Cir. 1996) (stating First Amendment is not defense to tax fraud); *U.S. v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970) (stating speech not protected by First Amendment when it is very vehicle of crime itself).

The court further stated that *Brandenburg's* imminence requirement generally poses little obstacle to the punishment of speech that constitutes criminal aiding and abetting, because culpability in such cases is premised not on the speaker's advocacy of criminal conduct, but on the speaker's successful efforts to assist others by providing detailed means of accomplishing the crime.<sup>131</sup>

The court found that a heightened standard of intent would be satisfied, since Paladin had stipulated that they intended the manual to be used by criminals.<sup>132</sup> Moreover, the court believed that even without such stipulations a jury could infer the requisite intent.<sup>133</sup>

In summary, the circuit court concluded that Paladin's astonishing stipulations<sup>134</sup> coupled with the extraordinary comprehensiveness, detail and clarity of *Hit Man's* instructions for murder, and the book's lack of legitimate purpose, would allow a reasonable jury to find Paladin liable for aiding and abetting Perry's triple homicide.<sup>135</sup>

### C. Implications of Rice

The Circuit Court's decision in *Rice v. Paladin Enterprises, Inc.*<sup>136</sup> represents a departure from the analysis traditionally applied by courts addressing cases involving media liability. First, the *Rice* decision provides plaintiffs with an additional cause of action, namely, civil aiding and abetting.<sup>137</sup> Most cases seeking recovery for injuries allegedly resulting from media speech have been premised

<sup>131</sup> See *Rice*, 128 F.3d at 246. See generally *U.S. v. Buttorff*, 572 F.2d 619, 623 (8th Cir. 1978) (discussing aiding and abetting).

<sup>132</sup> See *id.* at 248.

<sup>133</sup> See *id.* at 252. The court concluded that a jury could draw such inferences from: the powerful prose and imperative voice, the fact that Perry's methods and tactics closely paralleled that of *Hit Man*, the purpose of the book, the book's extensive and pointed promotion of murder, and Paladin's marketing strategy. *Id.*

<sup>134</sup> See David Montgomery, *Murder Manual Lawsuit Test First Amendment*, WASH. POST., July 22, 1996, at B1. Montgomery explains that Paladin's attorneys assumed the worst set of facts imaginable so that the other side could not argue the facts were in dispute that a jury must decide. It was part of their strategy to kill the lawsuit before it reached the jury. If the judge did order a trial, Paladin's stipulations would be voided, since they were made only for the purpose of a summary judgment motion, and the two sides would argue over the true intent of *Hit Man*. *Id.* Paladin's stipulations were to avoid probing discovery motions and trial. See David S. Savage, *Did Hired Killer Go by the Book*, L.A. TIMES, May 7, 1997, at A17. Paladin's attorneys agreed to accept the stipulations for the summary judgment motion in exchange for a quick ruling on whether the first amendment barred liability. *Id.*

<sup>135</sup> See *Rice*, 128 F.3d at 255.

<sup>136</sup> 128 F.3d 233, 243 (4th Cir. 1997).

<sup>137</sup> See *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 842 (D. Md. 1996) (arguing that aider and abettor tort liability has never been applied in such context).

on theories of negligence, products liability, or attractive nuisance.<sup>138</sup> Furthermore, if a plaintiff's cause of action is brought on the basis of aiding and abetting, the First Amendment will not serve as a defense.<sup>139</sup> While, the theory of aiding and abetting has generally not been applied in cases of media tort liability, *Rice* may have paved the way for a proliferation of suits against the media premised on this novel cause of action.<sup>140</sup>

Second, the circuit court in *Rice* seems to suggest that the *Brandenburg* analysis is not applicable to cases involving the media if political or social speech is not involved.<sup>141</sup> The court stated in conclusory terms that "one find[s] in *Hit Man* little if anything, even remotely characterizable as the abstract criticism that *Brandenburg* jealously protects."<sup>142</sup> The circuit court, however, determined this without analyzing the case under the elements of the *Brandenburg* test, which has served as "the modern test for protection of speech which has a 'tendency to lead to violence.'"<sup>143</sup> Most courts address the threshold issue of whether the speech is protected or not under

<sup>138</sup> See Brill, *supra* note 4, at 986 (stating victims of media related harms have increasingly relied on tort of negligence in seeking judicial remedy); see also Davidson, *supra* note 4, at 229 (reviewing doctrines of negligence, strict liability and incitement); Sims, *supra* note 5, at 272 (discussing various theories of tort liability).

<sup>139</sup> See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997) (stating under speech-act doctrine, First Amendment poses no bar to theory of civil aiding and abetting); see, e.g., Model Penal Code section 223.4 (extortion or blackmail); Model Penal Code section 240.2 (threats and other improper influences in official and political matters); Model Penal Code section 241 (perjury and various cognate crimes); Model Penal Code sections 5.02 and 2.06(3)(a)(i) (criminal solicitation); 18 U.S.C. section 871 (threatening life of President); Model Penal Code section 5.03 (conspiracy); Model Penal Code section 250.4 (harassment); Model Penal Code section 224.1 (forgery); Model Penal Code section 250.3 (false public alarms). See generally *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (stating that "it rarely has been suggested that the constitutional freedom for speech and press extends to speech or writing used as an integral part of conduct in violation of a valid criminal statute."); *Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994) (stating fact that "aiding and abetting of an illegal act may be carried out through speech is no bar to its illegality").

<sup>140</sup> See Haag, *supra* note 4, at 1449 (recognizing that *Rice* may have created additional cause of action for plaintiffs); Molnar, *supra* note 20, at 1333 (contending that *Rice* established new class of unprotected speech in which liability attaches based upon tendency of words used). See generally, Todd E. Simon, *Libel As Malpractice: News Media Ethics and the Standard of Care*, 53 *FORDHAM L. REV.* 449, 451 (1984) (discussing strict liability as applied to media defendants); Wade, *The Tort Liability of Investigative Reporters*, 37 *VAND. L. REV.* 301, 303 (1984) (discussing nature of liability in media related suits).

<sup>141</sup> See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 264 (4th Cir. 1997) (suggesting *Brandenburg* would apply in context of speech that is part and parcel of political or social discourse); see also George Askelrud, *Hit Man: The Fourth Circuit's Mistake in Rice*, 19 *LOY. L.A. ENT. L.J.* 375, 395 (1999) (arguing that *Brandenburg* should have applied in *Rice*); Haag, *supra* note 4, at 1450 (stating that *Rice* has raised serious questions as to whether *Brandenburg* applies in cases involving media defendants); Molnar, *supra* note 20, at 1353 (noting that circuit court felt that *Brandenburg* did not apply to *Rice*).

<sup>142</sup> *Rice*, 128 F.3d at 262. (discussing *Hitman's* instructions to murder).

<sup>143</sup> See generally Crump, *supra* note 16, at 4 (discussing *Brandenburg* as defense).



the First Amendment.<sup>144</sup> If the speech does not fall outside of the protection of the First Amendment, it is a well settled principle of First Amendment jurisprudence, that one may not be subject to criminal or civil liability.<sup>145</sup> By abandoning this analysis, *Rice* has potentially provided media defendants with less protection under the First Amendment.

#### IV. THE FEASIBILITY OF THE CIRCUIT COURT DECISION IN *RICE*

##### A. *The Theory of Aiding and Abetting In the Context of the Media*

A major flaw in the circuit court's analysis in *Rice* was that the court failed to analyze the facts of the case under the elements of a cause of action in aiding and abetting.<sup>146</sup> Although the court stated that the First Amendment has generally posed no bar to an aiding and abetting cause of action,<sup>147</sup> the court failed to test the feasibility of the theory as applied to the context of the case.<sup>148</sup> While it may be

<sup>144</sup> See Day, *supra* note 8, at 73 (noting that if speech does not fall into one of unprotected categories, liability is barred); see also Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 47 (1990) (discussing commercial advertising as speech excluded from full protection of First Amendment); Martin F. Hansen, *Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech*, 62 GEO. WASH. L. REV. 43, 45 (1993) (discussing fact/opinion distinction with respect to First Amendment); Quinlan, *supra* note 8, at 435 (1994) (recognizing that speech not satisfying *Brandenburg* requirements should be accorded First Amendment protection).

<sup>145</sup> See *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964) (stating "[w]hat a State may not constitutionally bring about by means of criminal statute is likewise beyond the reach of its civil law"); see also Day, *supra* note 12, at 74 (recognizing fundamental principle of First Amendment that "state may not punish protected speech, directly or indirectly, whether by criminal penalty or civil liability"); Hansen, *supra* note 145, at 53 (discussing crime of perjury related to speech issue). See generally Askelrud, *supra* note 142, at 393, (noting that protected speech may not be punished); Estlund, *supra* note 145, at 46 (providing that full First Amendment protection is afforded ethical matters).

<sup>146</sup> See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 252 (4th Cir. 1997). The court stated that a jury could find that Paladin assisted Perry in his commission of the murders since Perry purchased *Hit Man* and because the method Perry used closely paralleled those contained in the book. However, the court stated this without applying the fact to the elements of civil aiding and abetting. *Id.*

<sup>147</sup> See *Rice*, 128 F.3d at 243 (following speech-act doctrine, First Amendment poses not bar to action based on theory of civil aiding and abetting); see also *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (stating that "[i]t rarely has been suggested that the constitutional freedom for speech and press extends to speech or writing used as an integral part of conduct in violation of a valid criminal statute."); Nat'l Org. for Women v. Operation Rescue, 37 F.3d 646, 656 (D.C. Cir. 1994) (stating fact that "aiding and abetting of an illegal act may be carried out through speech is no bar to its illegality").

<sup>148</sup> See *Rice*, 128 F.3d at 267. Without ever evaluating the case under the elements of aiding and abetting, the court assumed that due to the "extraordinary comprehensiveness, detail and clarity of *Hit Man's* instruction for criminal activity and murder in particular, the boldness of

well settled that where speech is found to constitute aiding and abetting, the First Amendment provides no defense;<sup>149</sup> this Note contends that Paladin's publication fails to satisfy the requisite elements of this cause of action.

The landmark case for aiding and abetting is *Halberstam v. Welch*.<sup>150</sup> *Halberstam* articulated the elements necessary to establish a cause of action in aiding and abetting: (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.<sup>151</sup> Liability for aiding and abetting often turns on how much encouragement or substantial assistance

its palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction, the notable absence from its text of the kinds of ideas for the protection of which the First Amendment exists, and the books evident lack of any even arguable legitimate purpose beyond the promotion and teaching of murder. . . we are confident that the First Amendment does not erect an absolute bar to the imposition of civil liability." *Id.*

<sup>149</sup> See *Cohen v. Cowles Media*, 501 U.S. 663, 669 (1991) (noting well established line of decisions hold that generally applicable laws do not offend First Amendment); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498-502 (1949) (stating First Amendment is no defense where speech or writing used is integral part of conduct in violation of criminal statute); *Nat'l Org. for Women v. Operation Rescue*, 37 F.3d 646, 656 (D.C. Cir. 1994) (stating fact that aiding and abetting of an illegal act may be carried out through speech is no bar to its illegality).

<sup>150</sup> See *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1982). In *Halberstam*, the United States Court of Appeals for the District of Columbia held the live in companion of a burglar civilly liable for a murder that occurred during the course of a burglary, on theories of aiding and abetting as well as conspiracy. *Id.* at 474. The facts in *Halberstam* demonstrated that Bernard Welch, who had committed numerous burglaries in the Washington area, killed Michael Halberstam, while in the process of burglarizing Halberstams' home. *Id.* at 472. Halberstams' estate brought a wrongful death and survival action against Bernard Welch and Linda Hamilton, his live in companion, alleging that the two engaged in a joint criminal venture and conspiracy. *Id.* at 474. Welch had no outside employment, yet the couple rose from "rags to riches" in a short period of time as a result of Welch's innumerable burglaries. *Id.* In the words of the district court "[s]he closed neither her eyes nor her pocketbook to the reality of the life she and Welch were living. She was compliant, but neither dumb nor duped, so long as her personal comfort and fortune were assured". *Id.* Hamilton was well aware of the means by which Welch acquired their wealth. *Id.* at 475-76. Additionally, Hamilton typed transmittal letters for the sales of the stolen goods, she did inventory of the goods sold, and did general secretarial work and bookkeeping for Welch's "business". *Id.* at 475. Buyers of the goods made check payable to Hamilton, which she deposited into her own personal bank account. *Id.* This evidence clearly supported a finding that Hamilton was liable for aiding and abetting Welch in his killing of Halberstam. *Id.* at 487. The first of the three elements is fulfilled as Welch killed Halberstam during the course of a burglary. *Id.* Hamilton was well aware of her role in Welch's continuing criminal enterprise during the time that she provided assistance, thereby, satisfying the second element. *Id.* Finally, with regard to the third element, the court applied the five Restatement factors, and concluded that Hamilton assisted Welch with the knowledge that he had engaged in illegal acquisition of goods. *Id.* For a general discussion of the history of *Halberstam v. Welch* and the impact it has had on accomplice liability see Haag, *supra* note 4, at 1452.

<sup>151</sup> See *Halberstam*, 705 F.2d at 477 (discussing elements of aiding and abetting).

the defendant provided.<sup>152</sup> The Restatement of Torts suggests five factors in making this determination: (1) the nature of the act encouraged; (2) the amount of assistance given by the defendant; (3) the defendant's presence or absence at the time of the tort; (4) the defendant's relation to the other tortfeasor; and (5) the defendant's state of mind.<sup>153</sup>

Rather than closely analyzing the feasibility of the theory as applied to the facts of the case, the Circuit Court in *Rice* erroneously concluded that Paladin Enterprises may be civilly liable in tort on the basis of *Hit Man's* tendency to lead to violence and unlawful activity.<sup>154</sup> The court impermissibly focused on the explicit nature of the instructions contained in *Hit Man*, its lack of legitimate purpose or redeeming social value, and *Hit Man's* tendencies to cause harm.<sup>155</sup> The court concluded that from this, a jury could reasonably infer that Paladin possessed the requisite intent to be subject to liability for aiding and abetting.<sup>156</sup> Allowing liability based on inferences that may be drawn from the negative tendencies of a work alone is in clear contravention of the core value of the First Amendment.<sup>157</sup>

The Supreme Court made clear in *Hess* that "speech does not lose its First Amendment protection merely because it has a 'tendency to

<sup>152</sup> See *Halberstam*, 705 F.2d at 477; see e.g., *Investors Research Corp. v. SEC*, 628 F.2d 168, 178 (D.C. Cir. 1980) (employing similar test in context of securities fraud); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 94 (5th Cir. 1975) (modifying test to require awareness of role in improper activity); *Landy v. Fed. Deposit Ins. Corp.*, 486 F.2d 139, 162-63 (3rd Cir. 1973) (focusing analysis of third party liability on elements of Restatement section 876). *But cf.*, 18 U.S.C.A. § 2 (1999) (establishing different elements required for proof of criminal aiding and abetting).

<sup>153</sup> See *Halberstam*, 705 F.2d at 477; see e.g., *Rael v. Cadena*, 604 P.2d 822, 822-23 (N.M. Ct. App. 1979) (holding that defendant who verbally encouraged assailant is jointly and severally liable for battery); *Cobb v. Indian Springs, Inc.*, 522 S.W.2d 383, 388 (Ark. 1975) (imposing joint liability upon defendant who uttered suggestive words to perpetrator who subsequently caused injury to bystander with automobile).

<sup>154</sup> See *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (noting that speech does not lose its First Amendment protection merely because it is found to have bad tendency); see also *Askelrud*, *supra* note 142, at 381 (recognizing that speech may not be punished merely because of its bad tendency); *Brill*, *supra* note 4, at 992 (arguing approach used by circuit court can be likened to "bad tendency" test articulated in *Debs v. U.S.*, 249 U.S. 211 (1919), which is no longer used as it is impermissible to suppress speech on basis of its tendency); *Molnar*, *supra* note 17, at 1334 (arguing that decision in *Rice* has created new class of unprotected speech, where liability attaches based upon tendency of words used).

<sup>155</sup> See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 252-55 (4th Cir. 1997) (concluding that because of *Hit Man's* tendencies, Paladin may be civilly liable for aiding and abetting).

<sup>156</sup> See *id.* at 255.

<sup>157</sup> See *Hess*, 414 U.S. at 109 (holding that speech which has tendency to lead to violence is insufficient to deem such speech unprotected under first amendment).

lead to violence."<sup>158</sup> The "bad tendency" test would permit a jury to infer intent, or to suppress speech, based on the mere *tendency* of the speaker's words, especially where a jury finds such words to be morally reprehensible or lacking in redeeming social value.<sup>159</sup> In addition, many works are capable of being put to a bad use, and thus, may arguably have a tendency to do harm.<sup>160</sup> Information obtained from true crime novels and factual news accounts may be used to achieve an unlawful purpose, just as the information contained in *Hit Man* was used.<sup>161</sup> Conceivably, if *Rice* is broadly interpreted by future courts, it could potentially be expanded to reach many kinds of otherwise protected speech.<sup>162</sup>

The circuit court in *Rice* relied on various cases involving aiding

<sup>158</sup> *Hess*, 414 U.S. at 109; see also *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987) (citing *Hess*); *Quinlan and Persels*, *supra* note 8, at 430 n.87 (citing *Hess*).

<sup>159</sup> See *Molnar*, *supra* note 20, at 1370 (discussing implications of "bad tendency" test); see also *Brill*, *supra* note 4, at 992 (recognizing that showing that speech has bad tendency is insufficient to warrant suppression of that speech).

<sup>160</sup> See *Davidson*, *supra* note 4, at 291-92. *Davidson* discusses *The Turner Diaries*, a fictional novel written by William Pierce. *Id.* *The Turner Diaries* was used by Timothy McVeigh in executing the Oklahoma City bombing. However, *Davidson* raises the question, "should one jump from the conclusion that a book such as the *Turner Diaries* may prove a blueprint for mayhem to the conclusion that the book should be banned?" *Id.* *Davidson* recognizes that suppressing this kind of speech may not be the answer to the problem. *Id.* at 293. She notes that even if *The Turner Diaries* was banned, there would be alternative sources to obtain similar information, especially with the increasing use of the Internet. The Internet contains information such as bomb recipes and other potentially dangerous information, however, trying to restrict such information would prove to be a monumental, if not impossible, task. *Id.*

<sup>161</sup> See *Crump*, *supra* note 16, at 27-29 (recognizing that movies, truthful newspaper accounts and even cartoons have capability of leading to violence, yet this alone does not justify their suppression); see also *Davidson*, *supra* note 4, at 240 (asserting "not only fictional works, but even news stories or historical accounts could inspire some persons to murder"); *Dilworth*, *supra* note 20, at 573 (stating "at the heart of legal debate is the difficulty many scholars have in distinguishing between the book *Hitman* and certain movies, fictional literature, and music containing some of the same kinds of information, which, when it falls into the wrong hands, becomes a danger to innocent individuals"); *Vansen*, *supra* note 7, at 629-630 (noting that fictional treatment of crime and even media reports of actual crimes can promote violence); *Symposium, Massaging the Medium: Analyzing and Responding to Media Violence Without Harming the First Amendment*, 4 KAN. J.L. & PUB. POL'Y 17, 17 (1995) (noting "[t]wo surveys of young American male violent felons found that 22-34% had imitated crime techniques they watched on television programs").

<sup>162</sup> See *Davidson*, *supra* note 4, at 302. For instance, *Davidson* considers these incidents: When Mark David Chapman murdered John Lennon, he clutched a copy of *Catcher In the Rye*, by J.D. Salinger. Martin Scorsese's film *Taxi Driver* inspired John Hinckley, who shot President Reagan in an attempt to impress actress Jodie Foster. Barry Loukaitis murdered his algebra teacher and two male students, reportedly inspired by Stephen King's book *Rage*. *Id.* A 14-year old Texas boy decapitated and killed a 13-year old girl, and a young Oklahoma couple shot and paralyzed a 37-year old convenience store clerk; both acts allegedly as a result of Oliver Stone's movie *Natural Born Killers*. *Id.* at 239. This raises the question, should Salinger, Scorsese, King and Stone be held accountable for these occurrences. *Id.* at 302. For a broader discussion of the potential for the *Rice* decision to suppress formerly protected speech see *Molnar*, *supra* note 20, at 1364.

and abetting,<sup>163</sup> including *U.S. v. Barnett*<sup>164</sup> and *U.S. v. Kelley*.<sup>165</sup> While the court analogized *Rice* with the facts of these cases, the amount of awareness and assistance given in these cases was much more than that which existed in *Rice*.<sup>166</sup> In addition, the district court noted that the "plaintiffs provided no authority that would allow the court to apply the holdings in these criminal cases to the facts of the instant case" which was a civil suit.<sup>167</sup> These cases further help to illustrate that the cause of action of aiding and abetting is not appropriate in the context of the media.<sup>168</sup>

This Note contends that it is not feasible for *Rice*, or any other

<sup>163</sup> See *United States v. Mendelsohn*, 896 F.2d 1183, 1186 (9th Cir. 1990) (holding *Brandenburg* inapplicable to conviction for conspiring to transport and aiding and abetting interstate transportation of wagering paraphernalia, where defendants disseminated computer program that assisted others to record and analyze bets on sporting events); see also *United States v. Fleschner*, 98 F.3d 155, 158-59 (4th Cir. 1996) (holding that defendants who instructed and advised meeting attendees to file unlawful tax returns were not entitled to First Amendment jury instruction on charge of conspiracy to defraud United States of income tax revenue because "the defendants' words and acts were not remote from the commission of the criminal acts"); *United States v. Burtoff*, 572 F.2d 619, 623-24 (8th Cir. 1978) (holding that tax evasion speeches were not subject to *Brandenburg* because they go beyond mere advocacy of tax reform).

<sup>164</sup> 667 F.2d 835 (9th Cir. 1982). In *Barnett*, the defendant published informational manuals which provided detailed information for the production of various illegal drugs. *Id.* at 837. The defendant published an advertisement for the sale of such instructional manuals in *High Times Magazine*. *Id.* at 838. Not only did the instructions explain how to manufacture the drug PCP, it also instructed the reader of a reliable supply house where the necessary chemicals may be purchased, and in addition, provided the reader with the precise address of this supply house. *Id.* 838-39.

<sup>165</sup> 769 F.2d 215 (4th Cir. 1985). In *Kelly*, the defendant was the organizer and leader of a group that embraced the notion that federal income tax is unconstitutional as applied to wages. The defendant was convicted of conspiring to defraud the federal government and of aiding and abetting in the preparation of false W-4 forms. *Id.* Kelly not only provided the members with detailed instructions on how to prepare their income tax forms, but in return for the dues paid by the members, he provided members with W-4 forms for the claiming of exemptions from withholding, and blank copies of refund claim forms. Kelly also informed the members that he held himself in readiness to talk to any employer that declined to honor the claimed withholding exemption form or who threatened to call the claimed exemption to the attention of the Internal Revenue Service. The defendant also promised the group members that if they followed his advice "he would keep them out of trouble." *Id.* The court found that Kelly was aware of his role as part of the criminal operation, and he knowingly provided substantial assistance to identifiable individuals. *Id.*

<sup>166</sup> See Haag, *supra* note 4, at 1457 (arguing that aiding and abetting is not applicable in context of media); see also Molnar, *supra* note 20, at 1352 (criticizing circuit court's speech-act doctrine analysis).

<sup>167</sup> *Rice v. Paladin Enters., Inc.*, 940 F. Supp. 836, 842-43 (D. Md. 1996) (distinguishing *Barnett* and *Burtoff* from facts of *Rice*); see also *Passaic Daily News v. Blair*, 308 A.2d 649, 656 (N.J. 1973) (stating "to borrow... from definitions of aiding and abetting in the criminal field... is entirely inappropriate").

<sup>168</sup> See Haag, *supra* note 4, at 1457 (arguing that Texas should not recognize aiding and abetting in context of media works); see also Molnar, *supra* note 20, at 1352-53 (stating "although the court does consider *Hit Man* a speech-act in the form of aiding and abetting, this conclusion is based on a tenuous application of the facts to a questionable interpretation of the law, and may not even be supported by a case upon which the court relies.").

plaintiff seeking to hold a media defendant liable for injuries allegedly resulting from the defendant's speech, to establish that the media defendant was aware of their role as part of the illegal or tortious activity, or that the media defendant knowingly and substantially assisted the plaintiff in this activity.<sup>169</sup> The U.S. Supreme Court has held that to establish aiding and abetting, it must be shown that the defendant "in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed."<sup>170</sup> This has been interpreted to mean that there must exist

<sup>169</sup> See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 241 n.2 (4 Cir. 1997). The court stated that at all relevant times, defendants had no specific knowledge (1) that either Perry or Horn planned to commit a crime; (2) that Perry and Horn had entered into a conspiracy for the purpose of committing a crime; and (3) that Perry had been retained by Horn to murder Mildred Horn, Trevor Horn, or Janice Saunders. *Id.* Analyzing the facts of *Rice*, under a *Halberstam* analysis, as mentioned above, Paladin Enterprises was generally not aware of their role as part of an overall illegal or tortious activity at the time that the book was written and published. *Id.* Each of the books was published in 1982, however, Perry and Horn did not begin plotting the murders until February of 1992, ten years later. *Id.* at 239. With regard to the third element, Paladin Enterprises did not knowingly and substantially assist Perry in his murder of the three decedents. *Id.* Considering the Restatement factors, the second factor is not likely to be satisfied, as the amount of assistance given by Paladin is arguably not substantial. While the book provides the reader with instruction for the commission of murder, nothing in the book says "go out and commit murder now." Instead, the book seems to say, "if you want to be a hit man, this is what you need to do." See *Rice*, 940 F. Supp. at 847. Moreover, nothing in *Hit Man* can be characterized as a command to murder the three particular victims in *Rice*. *Id.* With respect to the third factor, Paladin was clearly not present at the time the murders were committed. See *Rice*, 128 F.3d at 241 n.2. Turning to the fourth factor, Paladin's relationship with Perry was nothing more than an arm's length transaction. *Id.* Perry merely purchased the book from Paladin through a mail order catalogue; the relationship between the parties went no further. *Id.* Lastly, the fifth factor arguably weighs in favor of Paladin. Paladin stipulated that it intended the manual to be used by would-be criminals, but the circuit court believed that even without such stipulations, the requisite intent could be inferred from the fact that the murders committed by Perry closely paralleled the instructions contained in *Hit Man*. *Id.* at 251.

Not only are such inferences inadequate to establish liability, it is arguable that Paladin did not desire the outcome in *Rice* to be the result of its publication. See Radwan, *supra* note 28, at 69, "Paladin probably only intended to do what most businesses do: make a profit." *Id.* In addition, Paladin stipulated that its marketing strategy was intended to attract criminals and would-be criminals in order to maximize sales of its publications to the public, including authors who desire information for the purpose of writing books about crime and criminals, law enforcement officers and agencies who desire information concerning the means and methods of committing crimes, persons who enjoy reading accounts of crimes and the means of committing them, and criminologists and others who study criminal methods and mentality. See *Rice* 128 F.3d at 241 n.2. Additionally, the advertisement in Paladin's mail order catalogue contains the disclaimer "for academic study only." See *Rice*, 940 F. Supp. at 848. The book itself also contains the disclaimer "for information purposes only." *Id.* The district court noted that this does not indicate a tendency to incite violence. *Id.*

<sup>170</sup> See *United States v. Buttorff*, 572 F.2d 619, 623 (8th Cir. 1978) (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)); see also *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (stating same where defendants perpetrated fraud against United States government); *United States v. Peoni*, 100 F.2d 401, 402 (2nd Cir. 1938) (stating same where defendant supplied counterfeit currency to perpetrator with knowledge it would enter stream of commerce).

some affirmative participation by the defendant.<sup>171</sup> Absent the requisite affirmative and active involvement, Paladin's publication cannot be deemed to constitute aiding and abetting.<sup>172</sup> These requirements were not satisfied in *Rice*, and they would presumably not be present in any other case involving the media.

#### D. Courts Should Adhere to a *Brandenburg* Analysis

It has been argued the *Rice* decision has suggested that *Brandenburg* is limited to cases involving political or social speech, and would therefore, not apply to media works that allegedly incite illegal or dangerous activity.<sup>173</sup> Several commentators have argued that the *Brandenburg* test presents an exceedingly difficult standard to meet.<sup>174</sup> These critics have argued that courts should relax the *Brandenburg* standard, and apply a balancing approach to these cases.<sup>175</sup> This Note contends that courts should adhere to a bright

<sup>171</sup> See *Buttorff*, 572 F.2d at 623 (recognizing that aider must encourage perpetrator through some affirmative action); see, e.g., *United States v. Wiebold*, 507 F.2d 932, 933-34 (8th Cir. 1974) (stating same where defendant supplied perpetrator with drugs); *United States v. Thomas*, 469 F.2d 145, 147 (8th Cir. 1972) (stating same where defendants were present during armed robbery).

<sup>172</sup> See *Rice*, 940 F. Supp. at 842 (noting absence of any reported decision suggesting that Maryland extend tort of aiding and abetting to circumstances of this case); see also Haag, *supra* note 4, at 1460-61 (arguing that media defendant will almost never provide "substantial assistance" necessary to impose liability under theory of aiding and abetting); Molnar, *supra* note 20, at 1352 (stating circuit court's determination that Paladin's actions constituted aiding and abetting was based on tenuous application of facts to questionable interpretation of law).

<sup>173</sup> See *Coursey*, *supra* note 20, at 898 (analyzing decision of circuit court), see also Haag, *supra* note 4, at 1449 (addressing impact of decision in *Rice*); Molnar, *supra* note 20, at 1353 (addressing non-application of *Brandenburg*).

<sup>174</sup> See *Vansen*, *supra* note 7, at 610 (proposing reworking of *Brandenburg* standard); see also *Herceg v. Hustler Magazine*, 814 F.2d 1017, 1025 (5th Cir. 1987) (Jones, J., concurring and dissenting) (discussing inadequacy of *Brandenburg* test); *Crump*, *supra* note 16, at 54 (suggesting case-by-case analysis); *Sims*, *supra* note 5, at 282-92 (explaining two-tiered balancing test); *Smith*, *supra* note 7, at 1195 (arguing for application of traditional negligence theory).

<sup>175</sup> See, e.g. *Sims*, *supra* note 5, at 282-92. Professor *Sims* proposes a two-tiered balancing test involving a preliminary inquiry as to whether the speech is categorically unprotected. See *id.* at 282. If the speech falls into one of the unprotected categories, it will not be afforded First Amendment protection. *Id.* After this preliminary inquiry, the court will address the first tier of the balancing test to determine whether the subject speech will retain its presumption of First Amendment protection. *Id.* This next step involves an assessment of several different factors. *Id.* The first factor is whether a specific potential plaintiff was identifiable in advance of the speech. See *id.* at 283. The second asks if the defendant knew of, or should have foreseen the danger. See *id.* at 284. The third examines the gravity of the danger involved. See *id.* The fourth factor evaluates how the speech recipient was led to engage in the activity dangerous to himself or to others. See *id.* at 285. The fifth factor asks if the danger was obvious to the speech recipient. See *id.* at 286. An additional consideration is whether the media defendant participated in the origination of the speech in question, or if it was only a "neutral disseminator of the speech" of others. See *id.* If the speech has survived the first level of inquiry, the court then addresses the second tier. See *id.* at 288. At this level, the court weighs

line *Brandenburg* analysis. That is, in cases involving physical injuries that allegedly arise from media works, if the speech in question does not meet the *Brandenburg* test, the speech must be deemed protected and liability shall not be imposed.<sup>176</sup>

While the circuit court in *Rice* seems to suggest that *Brandenburg* is only applicable to speech “part and parcel of political or social discourse”, this Note asserts that this proposition contravenes the interests protected by the First Amendment. Political speech may arguably be at “the core of the First Amendment.”<sup>177</sup> However, the Supreme Court, generally, has not differentiated between categories of protected speech to determine levels or degrees of constitutional protection.<sup>178</sup> “Such an endeavor 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.”<sup>179</sup> First, adherence to a strict *Brandenburg* approach would be most consistent with public policy considerations which dictate that one should be held personally

two considerations. *See id.* at 288-92. The first consideration is whether the speech categorized according to its content, has generally been regarded as protectable speech. *See id.* at 288. The second consideration evaluates how invasive or chilling the imposition of liability would be to the functional role of the media in the future. *See id.* at 291. *See also* *Herceg v. Hustler Magazine*, 814 F.2d 1017, 1025 (5th Cir. 1987) (Jones, J., concurring and dissenting). In her concurring and dissenting opinion, Judge Jones suggested that a balancing approach, rather than the *Brandenburg* test, should be used in cases involving media liability. *See id.* at 1029. Her analysis begins with an examination of the publication, where the court would determine where the speech lies in the hierarchy of First Amendment jurisprudence. *See id.* at 1026. This involves an assessment of whether the speech in question is a bona fide competitor in the “marketplace of ideas.” *See id.* Judge Jones contends that the First Amendment analysis is an exercise in line drawing between the legitimate interest of society to regulate itself and the paramount necessity of robust uninhibited debate. *See id.* at 1027. She suggests the balancing approach used in *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). Judge Jones applied this analysis in *Herceg*, arguing that *Hustler* deserved limited protection because it is an obscene and commercial publication, which did not require special protection to ensure robust debate of public issues. *See id.* at 1029. She concluded that a state regulation would be appropriate if the means were narrowly tailored to prevent a specific harm and were not broader than necessary to accomplish the purpose. *See id.*

<sup>176</sup> *See* Day, *supra* note 8, at 73 (noting that if speech does not fall into one of unprotected categories, liability is barred); *see also* Askelrud, *supra* note 142, at 393 (noting that speech not constituting incitement is protected); Prettyman and Hook, *supra* note 5, at 372 (stating if programming doesn’t rise to level of incitement, such speech is fully protected and may not be abridged by tort liability); Quinlan and Persels, *supra* note 8, 435 (recognizing that speech not satisfying *Brandenburg* requirements should be afforded First Amendment protection).

<sup>177</sup> *N.A.A.C.P. v. Claiborne Hardware, Co.*, 458 U.S. 886, 926-27 (1982).

<sup>178</sup> *See* *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1024 (1987) (arguing that *Brandenburg* is not limited to political speech).

<sup>179</sup> *Herceg*, 814 F.2d at 1024. The court went on to state that “if the shield of the First Amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as ‘bad,’ all free speech becomes threatened.” *Id.*



accountable for their reprehensible and illegal conduct.<sup>180</sup> The murders committed by James Perry were of his own volition, and may, perhaps, have been committed with or without the information contained in Paladin's *Hit Man*.<sup>181</sup> Furthermore, courts should not impose liability on the media merely because their works are capable of being put to an illegal purpose.<sup>182</sup> Nor should the media bear the burden of paying for the irrational acts of criminals.<sup>183</sup>

<sup>180</sup> See *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (stating "[o]ur whole constitutional heritage rebels at the thought of giving the government power to control men's minds"); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring) (stating "those who won our independence believed that the final end of the state was to make men free to develop their faculties"); see also Brill, *supra* note 4, at 1024 (recognizing that "speaker liability for imitative harms undermines notions of free will and individual autonomy which are central to both First Amendment jurisprudence and criminal law"); Don Scheid, *Constructing a Theory of Punishment, Desert and the Distribution of Punishments*, 10 CAN. J.L. & JURIS. 441, 471 (discussing "responsibility of the individual"). See generally Askelrud, *supra* note 142, at 378 (noting "libertarian theorists view people as independent and rational decision makers with the right to control their own thoughts and beliefs without government interference").

<sup>181</sup> See Dilworth, *supra* note 20, at 591 (recognizing argument that *Hit Man* was not cause of murders and did not incite Perry because persons like Perry are predisposed to commit such crimes); see also Davidson, *supra* note 4, at 291-92, 292 n.361 (noting that there are many books capable of being put to same purpose as *Hit Man* including *The Anarchists Cookbook*, *Death by Deception: Advanced Improvised Booby Traps, Disruptive Terrorism*, and *The Turner Diaries*).

<sup>182</sup> See, e.g., Davidson, *supra* note 4, at 291-92. Davidson discusses *The Turner Diaries*, a fictional novel written by William Pierce. *The Turner Diaries* was used by Timothy McVeigh in executing the Oklahoma City bombing. However, Davidson raises the question, "should one jump from the conclusion that a book such as *The Turner Diaries* may prove a blueprint for mayhem to the conclusion that the book should be banned?". *Id.* Davidson recognizes that suppressing this kind of speech may not be the answer to the problem. *Id.* at 293. She notes that even if *The Turner Diaries* was banned, there are alternative sources to obtain similar information, especially with the increasing use of the Internet. *Id.* The Internet contains information such as bomb recipes and other potentially dangerous information, however, trying to restrict such information would prove to be a monumental, if not impossible, task. *Id.* The "average person including judge and juror undoubtedly recognizes that an enlightened society must accept certain risks that result from innovative, challenging programming". See Prettyman & Hook, *supra* note 5, at 380. Prettyman and Hook assert that judges and juries are reluctant to find liability or award damages when someone imitates violent scenarios. *Id.*

<sup>183</sup> See *McCollum v. CBS*, 202 Cal. App. 3d 989, 1006 (1988) (stating "it is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. . .[s]uch a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense"); see also *Watters v. TSR*, 904 F.2d 378, 381 (6th Cir. 1990) (stating that "defendant cannot be faulted. . .for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player. The only way of ensuring that the game could never reach a 'mentally fragile' individual would be to refrain from selling it at all"); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989) (quoting *McCollum*); Davidson, *supra* note 4, at 303-04 (discussing problem of holding artists liable for what "nut" does in reaction to artist's work); Prettyman & Hook, *supra* note 5, at 380 (stating that "the result of imposing upon television and movie producers the duty of avoiding any scene that could possibly

Application of a balancing approach to cases involving free speech, as suggested by some commentators, would severely impair the First Amendment rights of the media.<sup>184</sup> An ad hoc approach would leave a defendant's First Amendment rights subject to the whim of a judge or jury.<sup>185</sup> Such an approach would give courts an excessive degree of discretion to censor works they may simply deem offensive or socially abhorrent.<sup>186</sup> This is exemplified in the circuit court's decision in *Rice*, where the court placed an unwarranted amount of weight on *Hit Man's* alleged lack of redeeming social value and supposed "bad tendency" to do harm.<sup>187</sup> "The Fourth Circuit's decision, is unfortunately, the first step backwards to a time when speech was permissible only if the majority permitted it."<sup>188</sup> The First Amendment does not allow courts to adjudicate according to personal belief or opinion, nor does it permit the court to suppress speech merely because it is regarded by the court to be vile or repugnant.<sup>189</sup> "'If there is any fixed star in our constitutional constellation,' it is that the government may not 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"<sup>190</sup> *Brandenburg*

trigger violent reaction in few individuals would be a timidity and blandness in programming that few are prepared to accept").

<sup>184</sup> See Quinlan and Persels, *supra* note 8, at 436 (discussing need for application of *Brandenburg*); see also Brill, *supra* note 4, at 1025 (arguing in support of *Brandenburg* standard in imitative cases); Molnar, *supra* note 20, at 1368-69 (discussing disadvantages of balancing approach); Sims, *supra* note 5, at 274 (recognizing problem of negligence tort actions against media due to potential for unlimited class of plaintiffs and potential for unlimited liability).

<sup>185</sup> See Quinlan and Persels, *supra* note 8, at 436 (arguing that allowing judges and juries to decide whether media defendants may be held liable in damages would result in *de facto* censorship); see also Brill, *supra* note 4, at 1015 (discussing *ad hoc* analysis). See generally Smith, *supra* note 7, at 1201 (discussing case-by-case approach).

<sup>186</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (discussing principle that there is no such thing as false idea); see also *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 688-89 (1959) (arguing that First Amendment does not only protect conventional ideas of majoritarian morality); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1019 (5th Cir. 1987) (stating "the benefits gained from the free and open exchange of ideas outweighs the costs endured by receiving harmful or reproachable thoughts").

<sup>187</sup> See *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (noting that speech may be suppressed on basis of "bad tendency"); see also *Herceg*, 814 F.2d at 1024 (citing *Hess*); Brill, *supra* note 4, at 992 (recognizing that showing speech has "bad tendency" is insufficient to warrant suppression of that speech); Molnar, *supra* note 20, at 1370 (discussing implications of "bad tendency" test); Quinlan and Persels, *supra* note 8, at 430 n.87 (citing *Hess*).

<sup>188</sup> Molnar, *supra* note 20, at 1370.

<sup>189</sup> See *Gertz*, 418 U.S. at 339-40 (stating "however pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas"); see also *Herceg*, 814 F.2d at 1020 (citing *Gertz*); Brill, *supra* note 4, at 1026 (noting that there is no such thing as false idea).

<sup>190</sup> Brill, *supra* note 4, at 1027 (quoting *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

would provide a framework which would guard against such unbridled discretion.<sup>191</sup>

Second, the *Brandenburg* test would best preserve the values represented by the First Amendment.<sup>192</sup> The ability to predict when speech may be subject to liability is critical to the media's interest in free speech.<sup>193</sup> Furthermore, it is a cornerstone of the First Amendment, that the state may not impose liability where speech is deemed to be protected.<sup>194</sup> "The ability to predict when speech will be subject to liability is crucial to the maintenance of free speech."<sup>195</sup> A less restrictive test than *Brandenburg* would lead to self censorship and have inevitable chilling effects on media speech.<sup>196</sup>

### CONCLUSION

The freedom of speech is one of our most sacred liberties. Justice

<sup>191</sup> See Crump, *supra* note 16, at 46 (noting that case-by-case analysis leaves judges without clear guidelines); see also *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (holding that proper guidance of government personnel who enforce law is more significant concern raised by vague standards); Brill, *supra* note 4, at 1025 (arguing in support of *Brandenburg* standard in imitative cases); see also Molnar, *supra* note 20, at 1368-69 (discussing disadvantages of balancing approach); Quinlan and Persels, *supra* note 8, at 436 (discussing need for application of *Brandenburg*); Sims, *supra* note 5, at 274 (recognizing problem of negligence tort actions against media due to potential for unlimited class of plaintiffs and potential for unlimited liability).

<sup>192</sup> See Haag, *supra* note 4, at 1470 (discussing sacred rights protected by First Amendment); see also Brill, *supra* note 4, at 989 (arguing that courts should not relax *Brandenburg* standard); Quinlan & Persels, *supra* note 8, at 435 (arguing that courts should adhere to bright line First Amendment defense). *But see* Frederick Schauer, *Mrs. Palsgraf and the First Amendment*, 47 WASH. & LEE L. REV. 161, 163-67 (1990) (criticizing strict application of *Brandenburg* test).

<sup>193</sup> See *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 658 (1981) (stating if governmental regulation impinges upon basic First Amendment rights, burden is on government to show absence of less intrusive alternatives); *United States v. O'Brien*, 391 U.S. 367, 379 (1968) (noting that any incidental regulation of speech must be no greater than necessary to further government interest); Brill, *supra* note 4, at 1016 (stating that without predictability, there may be chilling effects on speech); Smith, *supra* note 7, at 1228-29 (noting that lack of guidance would have chilling effect on media speech).

<sup>194</sup> See *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964) (stating "[w]hat a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law"); see also Day, *supra* note 8, at 74 (recognizing that it is bedrock principle of First Amendment that state may not punish protected speech, directly or indirectly, whether by criminal penalty or civil liability); Smith, *supra* note 7, at 1201-02 (noting that if speech is found to be unprotected, state may regulate it through either criminal or civil penalties).

<sup>195</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 780 n.5 (1985) (Brennan, J., dissenting) (criticizing unpredictable nature of "public concern" test); see also Brill, *supra* note 4, at 1039.

<sup>196</sup> See *Gannett Co. v. DePasquale*, 443 U.S. 368, 393 n.25 (1979) (noting that avoiding prior restraint is "chief purpose" of First Amendment); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (stating main purpose of First Amendment is to prevent prior restraints); Smith, *supra* note 7, at 1201-02 (stating that vague or overbroad regulations violate Constitution through their chilling effect).

Marshall once said “[i]f the First Amendment means anything, it means that a state has no business telling [one]. . . what books [they] may read or what films [they] may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control [people’s] minds.”<sup>197</sup> The First Amendment protects speech that evokes anger, hatred and disgust. It has protected speech as repulsive as the burning of the American flag.<sup>198</sup> Many of the cases discussed in this Note are tragic and inevitably appeal to our emotions. Intuitively there is a desire to place blame and punish speech which appears to be the cause of harm, especially where such speech is characterized as being vile or repugnant. However, upon closer analysis, such punishment in most cases is contrary to the well settled values of First Amendment jurisprudence. The benefits that flow from the free and open exchange of ideas far outweigh the damage caused by disseminating harmful or reproachable thoughts.<sup>199</sup> The mere fact that certain speech has a potential to cause harm is simply not sufficient to suppress such speech. To be guided by such a principle would have far reaching consequences that the First Amendment simply does not permit. Courts addressing cases like those discussed here must bear in mind that the purpose of this freedom is not to protect the speech we welcome, but rather to protect the speech we choose to hate.

*Justine Wellstood*

<sup>197</sup> *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

<sup>198</sup> *See Texas v. Johnson*, 491 U.S. 397, 402 (1989) (holding defendant’s conviction for burning of American flag inconsistent with First Amendment).

<sup>199</sup> *See Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1019 (5th Cir. 1987).

