1988

Media Liability for Physical Injury Resulting from the Negligent Use of Words

Gerald R. Smith

Media Liability for Physical Injury Resulting from the Negligent Use of Words*

Dr. M. specializes in the treatment of overweight patients. He prescribes a diet consisting solely of celery, water, and a popular brand of vitamin pills. Dr. M. also has published a book advising anyone more than twenty pounds overweight to follow the diet faithfully.

Two persons adopted Dr. M.'s diet. Mary T. did so on Dr. M.'s advice during a visit to his office. Frank J., on the other hand, simply purchased Dr. M.'s book. After following the recommended diet for several weeks, both Mary and Frank died. Autopsies indicated that both died as a result of malnutrition.

Mary and Frank's survivors separately brought suit against Dr. M. Mary's survivors claimed medical malpractice by Dr. M. in prescribing the diet, while Frank's survivors alleged negligent use of words by Dr. M. in publishing the book recommending the diet. At both trials expert testimony established that Dr. M.'s diet failed to meet accepted professional standards and was a direct cause of death. The trial court held Dr. M. liable in both cases.

The appeals court affirmed the medical malpractice verdict in Mary's case. In Frank's case, however, the appeals court agreed with Dr. M.'s assertion that the first amendment protection of the freedom of speech barred recovery for negligent use of words. The court vacated the judgment and remanded for dismissal of the claim.[1]

Although the preceding scenario is fictionalized, courts increasingly have been called on to rule on similar claims alleging

* The *Minnesota Law Review* thanks Professor Donald G. Marshall for his invaluable guidance and assistance throughout the development and writing of this Note.

1. *Cf.* Smith v. Linn, 51 Pa. Commw. 478, 485, 414 A.2d 1106, 1109 (1980) (dismissing product liability claim of survivors of victim who died after following physician's published diet). Several commentators have suggested similar hypothetical situations. *See* Linder, *When Names Are Not News, They're Negligence: Media Liability for Personal Injuries Resulting from the Publication of Accurate Information*, 52 U.M.K.C. L. REV. 421, 442 (1984) (publishing new name and address of former government witness in witness protection program); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 211 (1972) (publishing recipe for nerve gas from gasoline, table salt, and urine).

physical injury caused by the negligent use of words by media[2] defendants.[3] The cases have involved both press[4] and broadcast[5] media. The issues in the cases highlight the tension be-

2. In this Note "media" refers not only to newspapers, radio, television, and other similar entities, but also to magazine and book publishers and other communicators who, in similar circumstances, make their expression available to the public. Although differences in the rights and responsibilities of these forms of media exist, *see, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978) (broadcasters subject to stricter regulation than other media), the same general considerations determine the degree of protection.

3. *See, e.g.*, Herceg v. Hustler Magazine, 814 F.2d 1017, 1018-19 (5th Cir. 1987) (claim that magazine article describing autoerotic asphyxia caused boy's death), *cert. denied*, 108 S. Ct. 1219 (1988); Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199, 200 (S.D. Fla. 1979) (claim that minor's addiction to television violence led to shooting death of elderly neighbor); Weirum v. RKO Gen., 15 Cal. 3d 40, 43-45, 539 P.2d 36, 37-39, 123 Cal. Rptr. 468, 469-71 (1975) (minor negligently forced car off road while rushing to win radio contest); Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 491-92, 178 Cal. Rptr. 888, 890-91 (1981) (claim that television movie scene of "artificial rape" caused group of minors to attack and artificially rape young girl), *cert. denied*, 458 U.S. 1108 (1982); Walt Disney Prods. v. Shannon, 247 Ga. 402, 276 S.E.2d 580, 581 (1981) (child injured while attempting to imitate television demonstration); Hyde v. City of Columbia, 637 S.W.2d 251, 253 (Mo. Ct. App. 1982) (publication of name and address of abduction victim while assailant still at large), *cert. denied*, 459 U.S. 1226 (1983); DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982) (claim that boy hung himself while imitating television stunt); *see infra* notes 93-102, 108-116 and accompanying text.

In a recent case filed in a California district court, the parents of a young boy and the parents of a four-year-old girl are suing the local telephone company. Bishop, *Access of Young to Telephone Pornography Faces Key Challenge in West*, N.Y. Times, Nov. 22, 1987, § 1, at 26, col. 1. The boy reportedly had sexual relations with the girl after dialing a "976" number and listening to the sexually explicit message. *Id.* Subscribers to these numbers provide a recorded message, and callers are billed for each call. *See id.* Aside from the telephone company's claim that it is not responsible for the message or result, *see id.*, the case may raise many of the issues analyzed in this Note. The telephone company and the provider of the message may be considered media within the meaning used here. *See supra* note 2.

A district court recently denied a motion to dismiss by a defendant magazine sued after it published an advertisement for a mercenary. Eiman v. Soldier of Fortune Magazine, Inc., 680 F. Supp. 863 (S.D. Tex. 1988). The mercenary allegedly killed the plaintiff's daughter after answering the ad. *Id.* at 865. The court reasoned that the ad was commercial speech and entitled to less protection. *Id.* In the ensuing trial, the jury awarded the plaintiff a total of $9.4 million in compensatory and punitive damages. Belkin, *Magazine is Ordered to Pay 9.4 Million for Killer's Ad*, N.Y. Times, March 4, 1988, at A12, col. 6.

4. *Herceg*, 814 F.2d at 1018 (magazine); *Hyde*, 637 S.W.2d at 253 (newspaper).

5. *Zamora*, 480 F. Supp. at 200 (television); *Weirum*, 15 Cal. 3d at 43, 539 P.2d at 37-38, 123 Cal. Rptr. at 469-70 (radio); *Olivia N.*, 126 Cal. App. 3d at 490, 178 Cal. Rptr. at 890 (television); *Shannon*, 247 Ga. at 402, 276 S.E.2d at 581 (television); *DeFilippo*, 446 A.2d at 1037 (television).

tween the state interest in protecting the health and safety of individuals[6] and the interest in protecting freedom of speech.[7] Courts have not dealt adequately with this tension and have not resolved satisfactorily the issues arising in these cases.[8]

This Note examines whether compensation for physical injury caused by negligent use of words is permissible or advisable under the first amendment. Part I summarizes the general principles of tort negligence theory and the competing first amendment interests in protecting free speech. Part II analyzes the two approaches that lower courts take in cases involving physical injury caused by negligent use of words. Part III argues that a precisely applied policy allowing recovery in negligence in some cases would not be inconsistent with the first amendment because the requirements of a successful cause of action in negligence will protect the interests of free speech. The Note proposes that courts abandon the two approaches currently taken in such cases and instead apply traditional negligence principles, incorporating first amendment interests into the analysis of the duty element of a negligence claim. The Note concludes that adopting the suggested approach would lead to more just results while providing protection for the interests of free speech.

---

6. *See* Farmer v. United Bhd. of Carpenters & Joiners of Am., Local 25, 430 U.S. 290, 302-03 (1977) (substantial state interest in protecting citizens from physical injury); Davis v. Balson, 461 F. Supp. 842, 870 (N.D. Ohio 1978) ("The state's interest in protecting the safety and welfare of its citizens cannot be challenged."). One court has held that the state interest in protecting the lives and health of its citizens outweighs the due process clause. *See* Mattis v. Schnarr, 547 F.2d 1007, 1018-19 (8th Cir. 1976), *vacated on procedural grounds*, 431 U.S. 171 (1977).

7. U.S. CONST. amend. I; *see* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (protection of speech in preferred position compared to other constitutional protections).

8. *See infra* notes 90-146 and accompanying text. The United States Supreme Court has not yet ruled on a negligence claim involving physical injury that resulted from speech. The Court has denied certiorari in three such cases. *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (magazine article not incitement), *cert. denied*, 108 S. Ct. 1219 (1988); Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981) (first amendment bars negligence claim), *cert. denied*, 458 U.S. 1108 (1982); Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982) (ordering trial on negligence claim), *cert. denied*, 459 U.S. 1226 (1983).

I. NEGLIGENCE THEORY AND THE FIRST AMENDMENT

A. NEGLIGENCE AS A CAUSE OF ACTION

The common law tort of negligence is one means by which states advance their interest in protecting the physical safety of citizens and compensating individuals harmed through the fault of another.[9] Negligence arises from conduct falling below legal standards established to protect others from unreasonable risk of harm.[10] To prevail on a negligence claim, a plaintiff must plead and prove four elements: duty, breach, causation, and injury.[11] Duty consists of the defendant's obligation to conform to a particular standard of conduct,[12] ordinarily that of a reasonable person in like circumstances.[13] Breach occurs when the defendant's conduct falls below the standard and creates a foreseeable and unreasonable risk of harm.[14] A risk is unreasonable if its magnitude outweighs the utility surrounding the actor's conduct.[15] Causation consists of both cause-in-fact and

9. *See supra* note 6; *see also* RESTATEMENT (SECOND) OF TORTS § 282 (1963). *See generally* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS §§ 1-7 (1984) [hereinafter PROSSER & KEETON] (outlining history and policy of tort law, including negligence). The state interest in protecting citizens and compensating for injuries is so important that at least one court has held that the safety of bystanders outweighed a suspected criminal's due process right to life. *See Mattis*, 547 F.2d at 1019.

10. RESTATEMENT (SECOND) OF TORTS § 282 (1963); *see* PROSSER & KEETON, *supra* note 9, § 31 (defining negligence as conduct creating unreasonable risk). Negligence does not necessarily imply lack of due care or an absence of solicitude for others. *Id.*

11. PROSSER & KEETON, *supra* note 9, § 30, at 164-65; *see* RESTATEMENT (SECOND) OF TORTS § 281 (1963).

12. PROSSER & KEETON, *supra* note 9, § 30, at 164; *id.* § 53.

13. *Id.* § 31. Even reasonable people may act in ways that create risk if a goal is worth the risk. *Id.* at 171. Moreover, conduct may be reasonable in one context but not another. *Id.* For example, a reasonable person may rush into a train's path to save a child, but not a hat. *Id.*

14. *See id.* at 169 (negligence is conduct that actor should recognize as creating risk to others).

15. The magnitude of the risk is determined by the legally recognized value of the invaded interest, the probability of invasion, the likely extent of harm, and the number of persons whose interests may be invaded. *See* RESTATEMENT (SECOND) OF TORTS § 293 (1963).

The utility of the conduct is determined by the legally recognized social value of the interest advanced or protected by the act, the probability that the interest will be protected, the probability that less dangerous alternatives will protect the interest, and the cost of the alternatives. *See id.* § 292. Some conduct may be of sufficient social value that courts consider it reasonable even in

proximate cause.[16] Cause-in-fact may be determined by either a "but-for" standard[17] or a less restrictive "substantial factor" standard.[18] Proximate or legal cause limits liability for practical or social policy reasons.[19] For example, passage of time[20] or other attenuating circumstances[21] may preclude recovery. In

---

light of nearly certain serious harm. *See id.* § 292 comment a (operation of railroads and utilities).

The existence of a duty is a legal issue to be determined only by the court. PROSSER & KEETON, *supra* note 9, § 37, at 236-37. Breach of duty is a factual issue for the jury. *Id.* Courts may determine that because of the combination of the utility of the conduct and the risk of harm, the actor has a duty to warn of the dangerous conduct or how to avoid injury. *See* Balder v. Haley, 399 N.W.2d 77, 81 (Minn. 1987).

16. PROSSER & KEETON, *supra* note 9, § 30, at 165.

17. To decide that the conduct was a but-for cause of the harm, the jury must compare what actually occurred with what probably would have occurred absent the allegedly negligent conduct. *Id.* § 41, at 265. But-for causation, therefore, is not precisely determinable because hypothetical facts must be assumed. *See id.*

18. The substantial factor test alleviates the harsh effect of a plaintiff being unable to recover when two competing causes, either sufficient to bring about the harm, combine to create a risk, as, for example, when two speeding cars both strike a pedestrian. *Id.* § 41, at 268. The substantial factor test also eliminates liability for acts with inconsequential effects, as, for example, throwing a lighted match on a forest fire. *Id.* at 267-68.

19. *See* Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting) (proximate cause not logic, but practical public policy; out of sense of justice, series of events not traced past certain point).

20. *See, e.g.*, City of Brady v. Finklea, 400 F.2d 352, 357 (5th Cir. 1968) (time lapse considered); Bradler v. Craig, 274 Cal. App. 2d 466, 468-70, 79 Cal. Rptr. 401, 403 (1969) (house built 18 years before damage).

21. *See In re* Kinsman Transit Co. (*Kinsman I*), 338 F.2d 708, 711-13 (2d Cir. 1964) (ship caused great damage after breaking loose from moorings); *In re* Kinsman Transit Co. (*Kinsman II*), 388 F.2d 821, 825 (2d Cir. 1968) (court refused damages to grain companies because claims too remote). These cases involved a remarkable series of events occurring when the weight of ice against a ship broke it loose from its moorings, sending it drifting downstream. *Kinsman I*, 338 F.2d at 711-13; *Kinsman II*, 388 F.2d at 822-23. In *Kinsman I* the court allowed recovery by plaintiffs whose property was damaged by the string of events, ruling that the exact developments need not be foreseeable. *Kinsman I*, 338 F.2d at 725. In *Kinsman II* the same court denied recovery for storage expenses and replacement costs resulting from the inability to move cargo upriver, finding such damages too tenuous. *Kinsman II*, 388 F.2d at 825.

Some courts have considered proximate cause in terms of foreseeability of harm, thereby subsuming the issue into the duty and breach analysis. *See Palsgraf*, 248 N.Y. at 344, 162 N.E. at 100 ("The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation. . . ."). The plaintiff was standing on a railroad platform waiting for a train. *Id.* at 342, 162 N.E. at 99. Another passenger, some distance away, was rushing to catch a train, and a railroad employee gave him a push to assist him. *Id.* The passenger dropped a package containing explosives which exploded. *Id.* The resulting concussion tipped over a set of scales which hit the plaintiff. *Id.* The court held that the defendant owed the plaintiff no duty because harm to the plaintiff from the

sum, if a causal connection exists between the breach of a duty and a measurable, compensable injury, the defendant may be liable in negligence.[22]

B. THE FIRST AMENDMENT PROTECTIONS OF SPEECH AND THE PRESS

Even if a plaintiff successfully establishes the four elements of negligence,[23] the competing first amendment interest of protecting free expression may bar recovery against a media

---

conduct was not foreseeable. *Id.* at 342, 162 N.E. at 99-100. For a critical analysis of the *Palsgraf* court's description of the facts and reasoning, see J. NOONAN, PERSONS AND MASKS OF THE LAW 111-51 (1976).

Most courts hold that proximate cause is a legal issue for the court to determine. *See, e.g.*, Pan Am. Bank v. Osgood, 383 So. 2d 1095, 1100 (Fla. Dist. Ct. App. 1980) (court determines proximate cause); Atlantic Coast Line R.R. Co. v. Daniels, 8 Ga. App. 775, 779, 70 S.E. 203, 205 (1911) (same). *But see* Cline v. Watkins, 66 Cal. App. 3d 174, 186, 135 Cal. Rptr. 838, 845 (1977) (jury issue). Whether the judge or jury decides proximate cause issues will depend upon how the term is defined. *See* PROSSER & KEETON, *supra* note 9, § 42, at 274-80. The jury will determine proximate cause when defined in terms of foreseeability, but the court will decide proximate cause issues defined as a duty or other policy question. *Id.* These discrepancies reflect the confusion surrounding the term proximate cause. *Id.* § 43, at 273-74.

22. *See supra* note 9 and accompanying text. Traditionally, plaintiffs could not recover if more than one wrongdoer caused the harm, *see* Knell v. Feltman, 174 F.2d 662, 666 (D.C. Cir. 1949) (citing Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799)), or if the plaintiff's negligence was an intervening or concurrent cause, *see* Logullo v. Joannides, 301 F. Supp. 722, 723-24 (D. Del. 1969) (driving on wrong side of road); Brown v. Derry, 10 Wash. App. 459, 460-61, 518 P.2d 251, 252 (1974) (riding on outside of car). Most jurisdictions have alleviated these harsh results through concepts of contribution from joint tortfeasors. *Knell*, 174 F.2d at 666; Gertz v. Campbell, 55 Ill. 2d 84, 87-89, 302 N.E.2d 40, 43-44 (1973). States have also adopted comparative negligence policies when the plaintiff's negligence contributes to the harm. *See generally* PROSSER & KEETON, *supra* note 9, §§ 65-67, at 451-75 (general discussion of contributory negligence, last clear chance, and comparative negligence). Pure comparative negligence systems reduce compensation by whatever percentage of fault is attributed to the plaintiff, while modified comparative negligence allows plaintiffs to recover only if their negligence is not greater than or, in some jurisdictions, only if it is less than that of the defendants. *Id.* § 67, at 471-74. Some states have adopted comparative negligence by statute. *See, e.g.*, ARK. STAT. ANN. § 16-64-122 (1987) (comparative fault provision); COLO. REV. STAT. § 13-21-111 (1987) (comparative negligence as measure of damages); MISS. CODE ANN. § 11-7-15 (1972) (contributory damages no bar to recovery; jury may diminish damages). Others have adopted the policy judicially. *See, e.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 804, 810, 532 P.2d 1226, 1230, 119 Cal. Rptr. 858, 862 (1975) ("all-or-nothing" rule of contributory negligence superseded by a rule which assesses liability in proportion to fault); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973) (recovery proportional to amount of negligence).

23. *See supra* text accompanying note 11.

defendant. The first amendment[24] prohibits governmental action abridging freedom of speech or the press.[25] Determining the limits of first amendment protection requires consideration of the amendment's underlying principles and depends on the approach used to analyze conflicting interests.

1. Underlying Principles of the Protection of Speech

The United States Supreme Court and commentators have identified several interests protected by first amendment freedom of speech. The first amendment provides a check on governmental tyranny by encouraging unrestricted criticism.[26] Such criticism is especially important in a system of democratic self-government.[27] Free speech also insures a "marketplace of ideas,"[28] in which the competition of freely expressed ideas will

24. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

25. Freedom of the press and free speech have different origins. *See* Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 466-67 (1983) (freedom of press protected by state constitutions long before federal bill of rights considered). Freedom of the press includes rights such as media access to courts, public records, and sessions of political bodies not encompassed by free speech. Because this Note concerns the media as communicating entities, rather than as news gathering agencies or as actors in other capacities, the terms free speech, free press, and free expression will be functionally equivalent.

The first amendment applies to the states by incorporation through the fourteenth amendment. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (fourteenth amendment due process clause protects first amendment rights from state impairment).

26. *See* Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (framers amended Constitution because they recognized dangers of tyranny by majority over minority); *see also* Richmond Newspapers v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring in judgment) (first amendment has "*structural* role to play in securing and fostering our republican system of self-government") (emphasis in original); Herbert v. Lando, 441 U.S. 153, 185 (1979) (Brennan, J., dissenting in part) ("And the Amendment shields those who would censure the state or expose its abuses."); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (freedom of speech is the essence of self-government) (citing Garrison v. Louisiana, 379 U.S. 64, 74-75 (1969)).

27. The Supreme Court has often noted that self-government is impossible without the free flow of information and the ability to criticize. *See* cases cited *supra* note 26.

28. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."). The checking value in self-government and the marketplace of ideas concept are sometimes grouped together in the more general principle of enlightenment. *See* M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 1.02, at 10-20, 44-48 (1984).

aid people in determining what is true. In addition, free speech promotes self-fulfillment and self-expression.[29] The interests in maintaining a marketplace of ideas and encouraging self-fulfillment extend to scientific and artistic expression as well as to governmental and political criticism.[30] Finally, free speech serves as a safety valve for society, reducing the possibility of more destructive exhibitions of dissatisfaction.[31] The degree to which a particular instance of speech advances these or other court-identified interests determines the amount of protection that the speech receives.[32]

First amendment protection, however, is not absolute, because competing societal interests may outweigh the interest in protecting free speech.[33] The problem of where and how to draw the line between these competing interests has been difficult,[34] and the Supreme Court has often varied its approach and its placement of the line.[35]

---

29. *See Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) ("[T]he final end of the State [is] to make men free to develop their faculties .... [L]iberty [is] both . . . an end and . . . a means."); *see also* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 n.2 (1980) (first amendment "protects the individual's interest in self-expression"); Cohen v. California, 403 U.S. 15, 24 (1971) (first amendment protections important to individual dignity and choice).

30. *See* 3 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.6, at 15-16 & n.12 (1986).

31. *See Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring) ("[T]he path of safety lies in the opportunity to discuss freely supposed grievances .... Fear of serious injury [to the social order] cannot alone justify suppression of free speech .... Men feared witches and burnt women."); *see also* Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmorr Dairies, 312 U.S. 287, 293 (1941) (free speech averts "force and explosions").

32. *See* 3 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 30, § 20.6, at 13-17. Inherent in the first amendment protections is also the "freedom to hear." *See id.* (first amendment prevents government suppression of certain speech thus allowing citizens to hear criticism and unpopular ideas); *see also* Young v. American Mini Theatres, 427 U.S. 50, 77 (1976) (Powell, J., concurring) ("[T]he central First Amendment concern remains the need to maintain *free access of the public* to the expression.") (emphasis added); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973) (viewers have right of access to social, esthetic, and moral ideas and expression) (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

33. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) (no right to yell "Fire!" in crowded theater); *infra* notes 36-82 and accompanying text.

34. Judge Learned Hand framed the problem eloquently: "What sanctified ritualistic phrase shall fix the place where discussion ends and words may ex cathedra be said to have no power to enlighten?" Letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921), *reprinted in* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 770 (1975).

35. The Court's handling of advocacy or incitement of illegal activity, *see*

2. Limitations on the Freedom of Speech

Courts attempting to resolve the conflict between the interests of free speech and other societal interests generally choose among three approaches. One approach is to declare that the first amendment protections are absolute and to prohibit all government restrictions on speech.[36]

Another approach involves case-by-case, ad hoc balancing of the competing interests.[37] Ad hoc balancing requires consideration of the total circumstances of each case, weighing the plaintiff's interests against those of the defendant.[38] The Supreme Court has adopted and encouraged this approach in various instances.[39]

Finally, a court may adopt a categorical approach in defining the limits of first amendment protection. Recently, the Supreme Court has adopted this approach and discouraged ad hoc balancing.[40] A court employing the categorical approach identifies certain categories of speech as being outside of the first amendment's coverage, and therefore unprotected, because the threatened societal interests outweigh the interest in protecting the particular type of speech.[41] States may regulate un-

---

infra notes 54-58 and accompanying text, and defamation, *see infra* notes 59-78 and accompanying text, illustrate the ongoing difficulties in line drawing.

36. Justice Black professed to hold this view, stating that the first amendment means literally what it says "without any 'ifs' or 'buts' or 'whereases.' " Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting). Nevertheless, Justice Black wrote opinions that would allow some restrictions. For example, in his dissent in Cohen v. California, 403 U.S. 15 (1971), in which the Court refused to allow prosecution for wearing a jacket with an arguably obscene and offensive message, *id.* at 26, Justice Black argued that wearing the message on the jacket was conduct, not speech. *Id.* at 27. Professor Melville Nimmer claims that those holding the absolutist position use conduct as a code word for speech that they find to be undeserving of first amendment protections. M. NIMMER, *supra* note 28, § 2.01, at 7.

37. *See, e.g.*, American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950) (court's duty is to determine which of two conflicting interests demands greater protection).

38. *Cf.* Barenblatt v. United States, 360 U.S. 109, 126 (1959) ("Where First Amendment rights are asserted . . . resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.").

39. *See* cases cited *supra* notes 37-38.

40. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-44, 346 (1974) (ad hoc balancing in first amendment litigation not feasible; unwise to commit task to judges).

41. Societal interests in maintaining peace and order, for example, outweigh the interest of protecting the freedom of speech when the speech is incitement. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (per curiam); *see infra* notes 54-58 and accompanying text.

protected speech through either criminal[42] or civil[43] penalties, if the regulation is precisely defined[44] and narrowly applied.[45] Vague or overbroad regulations violate the Constitution because they may punish protected speech[46] or act as prior restraints[47] through their chilling effect.[48]

Although the Supreme Court has not addressed negligent use of words in physical injury cases, some lower courts have analyzed such cases using the Court's categorical approach. Lower courts have applied principles of incitement,[49] an unprotected category of speech, to negligent use of words cases,[50] and, although not specifically applying defamation law, have relied on language from defamation cases.[51] Defamation and invasion of privacy, both unprotected categories of speech, provide use-

---

42. States may impose criminal sanctions if the speech is incitement. *See infra* notes 54-58 and accompanying text.

43. States may impose civil liability for defamation and invasion of privacy. *See infra* notes 59-82 and accompanying text.

44. An imprecise or vague regulation does not give a clear definition of the regulation's limits. Colautti v. Franklin, 439 U.S. 379, 383 (1979).

45. Courts will strike down regulations that are not narrowly applied because an overbroad regulation may reach speech that the state is not entitled to regulate. NAACP v. Button, 371 U.S. 415, 432 (1963); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

46. Even protected speech may be regulated in some ways. For example, states may restrict time, place, and manner if the restrictions are not directed at suppressing speech, they further an important or substantial governmental interest, and any incidental regulation of speech is no greater than necessary to further the government interest. United States v. O'Brien 391 U.S. 367, 379 (1968). If the governmental regulation impinges upon basic first amendment rights, the burden is on the government to show the absence of less intrusive alternatives. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 658 (1981) (Brennan, J., concurring in part, dissenting in part).

47. The Supreme Court has characterized the avoidance of prior restraints on speech as the first amendment's most important safeguard. *See* Patterson v. Colorado, 205 U.S. 454, 462 (1907) (main purpose of first amendment to prevent previous restraints). The Court more recently has expanded the scope of the amendment's protection beyond prior restraints. *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101 (1979). Nonetheless, the Court continues to emphasize that avoiding prior restraints is the "chief purpose" of the first amendment. Gannett Co. v. DePasquale, 443 U.S. 368, 393 n.25 (1979). For a more complete discussion of these cases and the prior restraint doctrine, see M. NIMMER, *supra* note 28, § 4.02.

48. Regulations that are overbroad or vague carry the danger that they will act as prior restraint through self-censorship. *Cf.* Village of Hoffman Estate v. The Flipside Hoffman Estates, Inc., 455 U.S. 489, 497-99 (1982) (upholding statute, although vague, because speech will not be deterred).

49. *See infra* notes 54-58 and accompanying text.

50. *See infra* notes 107-23 and accompanying text.

51. *See infra* notes 124-37 and accompanying text.

ful analogues in a discussion of cases involving physical injury caused by negligent use of words[52] and demonstrate the Court's willingness and the need, in some situations, to balance interests on an ad hoc basis.[53]

a. *Incitement*

Recognizing the compelling state interest in maintaining order and public safety, the Supreme Court in *Brandenburg v. Ohio*[54] identified incitement as a category of unprotected speech.[55] Incitement is speech directed toward and likely to produce violent or lawless conduct.[56] Under the *Brandenburg* incitement standard, the speaker must intend to produce the activity[57] and there must be a likelihood of imminent lawless activity.[58]

---

52. *See infra* notes 138-43 and accompanying text.

53. *See infra* notes 61-82 and accompanying text. The Court has identified several other categories of speech as unprotected by the first amendment. Obscenity, although difficult to identify, is unprotected. *See* Miller v. California, 413 U.S. 15 (1973). The Court's opinion in *Miller* summarizes the evolution of this difficult and troubling area of constitutional law. In addition, the first amendment does not protect fighting words. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Since *Chaplinsky* the Court has reversed several convictions for uttering fighting words on the grounds of vagueness or overbreadth. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972). On vagueness and overbreadth, see *supra* notes 42-48 and accompanying text. The *Gooding* and *Lewis* decisions leave open the question whether the fighting words doctrine, which allows regulation of speech likely to cause hostile reaction, is still good law. *See* 3 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 30, § 20.40, at 198.

Commercial speech, although not strictly an unprotected category of speech, does not enjoy the same protection as noncommercial speech. Metromedia v. City of San Diego, 453 U.S. 490, 505-07 (1981) (commercial speech not entitled to stringent protection afforded core speech); Young v. American Mini Theatres, 427 U.S. 50, 69-73 (1976) (same).

54. 395 U.S. 444 (1969) (per curiam). In *Brandenburg* the defendant was convicted of violating the Ohio Criminal Syndicalism Act, which imposed a criminal penalty for advocacy of lawless activity. *Id.* at 444-45. The Court reversed, distinguishing between advocacy and incitement, and held that mere advocacy could not be criminally punished. *Id.* at 447-49. States can punish only acts that constitute incitement by being directed toward and likely to produce lawless activity.

55. *Id.* at 447.

56. *Id.* In Hess v. Indiana, 414 U.S. 105 (1973), the Court refined the *Brandenburg* test to require intent to incite and likelihood of imminent violent or lawless activity. *Id.* at 108-09 (Indiana disorderly conduct statute which led to arrest of antiwar demonstrator violated demonstrator's free speech right; speech was not incitement).

57. *Id.*

58. *Id.* The *Brandenburg* test replaced the clear and present danger standard. *See* Schenck v. United States, 249 U.S. 47, 52 (1919); *see also* Whitney v.

b. *Defamation*

The Supreme Court has also identified defamation as a category of unprotected speech, recognizing the state interest in protecting citizens' reputations.[59] Defamation is the publication of false information damaging to a person's reputation.[60]

The Court, however, has departed from the strict categorical approach in defamation suits. In a line of cases beginning with *New York Times Co. v. Sullivan*,[61] the Court balanced various interests to determine whether the defendants' degree of fault rose to the constitutional level required to impose liability. The weight afforded to the interest of protecting the individual's reputation varied depending on whether the injured person was a public official,[62] public figure,[63] or private figure.[64] The Court also gave differing weight to the interest of protecting speech, depending on whether the speech was of public concern[65] or was private in nature.[66]

Under the Court's approach in defamation cases, the standard of liability depends on the balance of free speech interests and reputational interests. The state interest in protecting speech critical of government and its officials is compelling

California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring). The clear and present danger standard allowed a state to regulate or punish speech when the speech presented the imminent danger that violent or lawless activity would result from it. Dennis v. United States, 341 U.S. 494, 507-10 (1951), which adopted a balancing test, greatly eroded the clear and present danger analysis. *See Brandenburg*, 395 U.S. at 447. *Brandenburg* completed the process. *Id.* Despite *Brandenburg*, some courts continue to use the clear and present danger language. *See, e.g.*, Walt Disney Prods. v. Shannon, 247 Ga. 402, 404, 276 S.E.2d 580, 582 (1981) (broadcast did not present clear and present danger to child).

59. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

60. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

61. 376 U.S. 254 (1964). *New York Times* involved a suit by a Montgomery, Alabama, city commissioner who sued the newspaper and others after an ad was published that contained some inaccuracies. *Id.* Civil rights organizers had placed the ad to gain support for their efforts. *Id.* at 256-57. The Court held that higher standards of fault are required to protect speech critical of public officials in their official capacity. *Id.* at 264.

62. *Id.*

63. Public figures do not hold official positions in government, but are so situated that comments on their public activities are per se matters of public concern. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 154-55 (1967) (university athletic director employed by private corporation is public figure).

64. *See Gertz*, 418 U.S. at 347 (involvement in public issues does not by itself raise individual to level of public figure).

65. *Gertz*, 418 U.S. at 340; *see* Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (issue is whether speech is of public concern).

66. *Firestone*, 424 U.S. at 453-54; *Gertz*, 418 U.S. at 342.

compared to the reputational interest of a public official.[67] Consequently, public official plaintiffs must prove that the defendant acted with actual malice in uttering or publishing a defamatory statement critical of the plaintiffs in their official role.[68] The state's interest in protecting the reputation of public figures is higher than that of protecting public officials' reputations.[69] In cases involving public figures, the standard of liability differs depending on whether the subject matter of the speech was of public concern.[70] Thus, the value of the speech is weighed against the reputational interest of the plaintiffs. If the speech was of public concern, public figure plaintiffs must prove actual malice.[71] If the speech was not of public concern, the standard of fault is negligence.[72]

The state interest in protecting reputation is greatest for private figure plaintiffs.[73] Moreover, the state interest in protecting the speech is lower because speech regarding private figures less significantly implicates the underlying interests of the first amendment.[74] Because of the higher interest in reputation and the lower interest in speech, private figure plaintiffs need only prove that the defendant was negligent in publishing the defamatory statement,[75] even if the general subject matter was of public concern.[76]

Damages in defamation cases may be presumed if the required standard of fault, either actual malice or negligence, is proven.[77] This is true whether the plaintiff is a public official, public figure, or private figure.[78]

---

67. *New York Times*, 376 U.S. at 269-71.

68. *Id.* at 279-80. Actual malice is defined as the making of a statement with the knowledge that it is false or with reckless disregard for its truth or falsity. *Id.* The Court later defined reckless disregard to mean acting with serious doubt as to the truth of the defamatory statement. *See* St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

69. *Gertz*, 418 U.S. at 340.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 343.

74. *Id.*

75. Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749 (1985). Rodney Smolla argues that *Dun & Bradstreet* may open the door for strict liability in cases involving private figure plaintiffs when the speech is not of public concern. R. SMOLLA, LAW OF DEFAMATION § 3.02 (1986).

76. *Gertz*, 418 U.S. at 337.

77. *Dun & Bradstreet*, 472 U.S. at 757-61.

78. *Id.*

c. *Invasion of Privacy*

The Supreme Court has recognized the interest in protecting privacy[79] by classifying the tort of invasion of privacy by publication of private facts as unprotected speech.[80] The tort requires proof of three elements: the facts must be publicly disclosed, they must be truly private facts, and disclosure must be offensive to a reasonable person of normal sensibilities.[81] Determination of these elements necessarily requires case-by-case balancing of first amendment interests against those of the plaintiffs.[82]

---

79. *See* R. SMOLLA, *supra* note 75, § 10.01; Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

80. *Cf.* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487-97 (1975) (statute prohibiting public disclosure of rape victim's name violates first amendment when name already in public records). Invasion of privacy includes three other interrelated torts. *See* R. SMOLLA, *supra* note 75, § 10.01; Prosser, *supra* note 79, at 389. False light invasion of privacy, a tort similar to defamation and requiring almost identical analyses, occurs when speech that does not rise to the level of defamation places the plaintiff in a false light in the eyes of the public. *See, e.g.*, Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974); Time, Inc. v. Hill, 385 U.S. 374 (1967). In *Hill*, the Court disallowed the invasion of privacy claim on the basis that the reported information was of public interest. 385 U.S. at 387-88; *see* R. SMOLLA, *supra* note 75, § 10.02.

Intrusion is an invasion of privacy involving methods of gaining information, such as eavesdropping or window peeping, and thus does not directly implicate the first amendment interests addressed in this Note. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977). For a general discussion of the tort of intrusion, see R. SMOLLA, *supra* note 75, § 10.03.

Appropriation is the invasion of the right of publication and involves exploitation of the plaintiff's name, likeness, or other unique property, usually for commercial gain. *See, e.g.*, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575 (1977) (first amendment does not give television station right to broadcast stuntman's performance).

81. R. SMOLLA, *supra* note 75, § 10.04[1]; *see also Cox Broadcasting*, 420 U.S. at 494-95 (disallowing claim of murdered rape victim's father because published information was public record). The public interest defense in invasion of privacy is much broader than the public concern standard in defamation. *See* R. SMOLLA, *supra* note 75, § 10.04[2][b][ii] and cases cited therein. A defendant in a privacy case may bootstrap itself into the defense, making the subject matter an issue of public interest by its publication, unlike defamation. *Id.* Invasion of privacy defenses turn on the newsworthiness of the published information, as distinguished from the public concern of defamation. *Id.* An item apparently may be newsworthy without rising to the level of public concern that would provide a defense against defamation of a public figure. *Id.* Because publication of facts may make them newsworthy and therefore not truly private, invasion of privacy by publication of private facts, although recognized as unprotected, may be nearly impossible for a plaintiff to prove. *Id.* The history of the tort in recent years indicates that it may no longer be good law. *Id.*

82. *See supra* notes 37-38 and accompanying text. Determination of the private nature of the fact published requires an analysis of the interests ad-

Thus, the Supreme Court has identified incitement, defamation, and invasion of privacy as unprotected categories of speech because the state interests threatened by these types of speech outweigh the first amendment interests. In cases of defamation and invasion of privacy, the Court determines standards of liability by a case-by-case, ad hoc balancing of the particular interests.

C. THE TENSION BETWEEN NEGLIGENCE THEORY AND THE FIRST AMENDMENT

When a plaintiff is physically injured as a result of the negligent use of words, a conflict arises between the interests protected by negligence theory and the interests underlying first amendment protection of speech.[83] When speech damages a plaintiff's reputation or invades the plaintiff's privacy, courts balance the state interest in protecting the individual against the competing first amendment interests.[84] When the speech physically injures the plaintiff, however, courts do not apply a similar analysis.[85]

Lower courts cannot classify negligent use of words as an unprotected category of speech because the determination of negligence requires an ad hoc balancing of the competing interests.[86] Courts determine the existence of a duty only by concluding that the plaintiff's interests outweigh those of the defendant in the particular circumstances of the case.[87] On the other hand, courts determine that speech is incitement, for example, by examining the nature of the speech itself and deciding whether it is included in the unprotected category regardless of the specific interests threatened or the interests of the speaker.[88] The inability to categorize negligent use of

---

vanced by publication. Similarly, determination of whether a reasonable person would be offended requires an ad hoc determination of the particular nature of the speech and the interest invaded.

83. *See supra* notes 9, 26-32 and accompanying text. The state interest in protecting its citizens' health and safety is substantial. *See supra* note 6.

84. *See supra* notes 61-82 and accompanying text.

85. This Note proposes that courts adopt this analysis. *See infra* notes 165-197 and accompanying text.

86. *See supra* notes 12-15 and accompanying text.

87. *Id.*

88. *See supra* notes 54-58 and accompanying text. Both incitement and defamation, *see supra* notes 59-78 and accompanying text, may be identified apart from any analysis of the plaintiffs' interests. The courts use balancing in defamation cases not to decide whether the speech is defamation, but rather to determine whether the required standard of fault exists. If the standard is not

words as unprotected speech, along with the lack of Supreme Court precedent,[89] has led to inconsistent standards in lower court decisions involving physical injury caused by negligent use of words.

II. NEGLIGENCE, THE FIRST AMENDMENT, AND MEDIA DEFENDANTS IN THE LOWER COURTS

The lower courts have used two approaches to decide whether to allow recovery by a physically injured plaintiff against a media defendant for negligent use of words. Courts applying the harm-oriented approach analyze the issue in terms of negligence and harm,[90] giving only minimal attention to potential first amendment conflicts. Courts applying the categori-

---

met, the speech is still defamatory, but the defendant will not be liable. In negligence, if the interest of the plaintiff does not outweigh that of the defendant, no negligence exists even in the face of severe personal injury. Thus, courts do balance interests in defamation, but for different reasons than in negligence cases.

Some commentators have called the balancing in defamation cases definitional balancing. *See, e.g.*, M. NIMMER, *supra* note 28, § 2.03; Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 673-74 (1983). Nimmer argues that in definitional balancing, the free speech interest generally, not just in the specific speech at issue, is weighed against the plaintiff's interests. *See* M. NIMMER, *supra* note 28, § 2.03. Pierre Schlag says that in definitional balancing, the courts weigh the plaintiff's interest against the category of speech. *See* Schlag, *supra*, at 673-74. Identifying a definitional approach may have some value as a functional approach to the reasoning of courts, but it adds little to policy considerations involved in first amendment and physical injury cases. Regardless of the label attached to a court's approach to defamation cases, it must weigh the specific interest in protecting the speech involved against the plaintiffs' interests. *See supra* notes 59-78 and accompanying text. The converse of Schlag's claim that the categorical approach is absolute once the category has been identified is true if courts disallow regulation when unable to identify a category. *See infra* notes 107-46 and accompanying text.

89. The Court has denied certiorari in three such cases. *See* Herceg v. Hustler Magazine, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1219 (1988); Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981), *cert. denied*, 458 U.S. 1108 (1982); Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983). *See supra* note 8.

90. *See infra* notes 93-104 and accompanying text. This Note uses the term *harm-oriented* to distinguish this approach from the one suggested in text accompanying notes 165-97. The courts using the harm-oriented approach have failed to consider in depth the conflicting interests and have not explained how they balance these interests in enough detail to assure that the elements of negligence were actually met. *See supra* notes 11-22 and accompanying text. The courts largely omit considerations of first amendment interests and the value of the speech in their analysis.

cal approach[91] analyze the issue in terms of unprotected categories of speech,[92] giving only minimal attention to the interest of protecting individuals' health and safety. Neither of these approaches satisfactorily addresses the issues arising in these cases. The harm-oriented approach fails to give proper consideration to first amendment interests. The categorical approach fails to give proper consideration to the state interest, reflected in negligence law, of protecting individuals from and compensating them for physical injury.

A. Deficiencies of the Harm-Oriented Approach

Some courts have allowed plaintiffs to recover damages for physical harm resulting from negligent use of words.[93] Although these courts have mentioned the first amendment protection of free speech, their superficial treatment of the first amendment issue has failed to insure the proper protection of speech in future cases.

In *Weirum v. RKO General*,[94] the defendant radio station sponsored a promotional campaign in which a disc jockey drove around giving clues to his location.[95] Plaintiff's decedent was killed by two drivers attempting to win a prize by reaching the disc jockey first.[96] The court allowed recovery in negligence,

---

91. *See infra* notes 107-16 and accompanying text.

92. *See supra* note 40-53 and accompanying text.

93. One court has denied recovery using primarily a negligence analysis. Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199, 202-06 (S.D. Fla. 1979). The plaintiff in *Zamora* claimed that repeated broadcasts of violent programs caused him to become subliminally intoxicated with and desensitized to violence, leading him to kill his eighty-three-year-old neighbor. *Id.* at 200. Although the court stated that the first amendment barred the claim, it focused mainly on the plaintiff's inability to state a specific breach of duty or to allege a duty at all. *Id.* at 202-06. Imposing liability, the court said, would be "awesome to consider," *id.* at 202, and "give birth to a legal morass," *id.* at 206. Because a successful claim in negligence requires that the plaintiff prove all four elements of the cause of action, *see supra* note 11 and accompanying text, the *Zamora* court properly dismissed the claim. *See Zamora*, 480 F. Supp. at 206.

94. 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975).

95. *Id.* at 44-45, 539 P.2d at 38, 123 Cal. Rptr. at 470. The radio station aimed its programming primarily at teenagers and was seeking to increase its market share with a $40,000 campaign. *Id.* at 43-44, 539 P.2d at 38, 123 Cal. Rptr. at 470.

96. *Id.* at 45, 539 P.2d at 38-39, 123 Cal. Rptr. at 470-71. The drivers, aged 17 and 19, reached speeds of up to 80 miles per hour attempting to beat each other to the disc jockey. *Id.* at 45, 539 P.2d at 38, 123 Cal. Rptr. at 470. The issue of which driver actually forced the victim off the street and into a divider was unresolved. *Id.* One driver stopped to report the accident, but the other paused only briefly before going on to collect the prize of $25. *Id.* at 45, 539

ruling that the first amendment does not sanction the infliction of harm "merely because achieved by word, rather than act."[97] The court indicated neither what the first amendment *does* protect, nor what courts should consider in distinguishing words from acts.[98] Although the result may have been correct, a more complete analysis of the competing interests would have made the court's opinion more convincing and would have provided better guidance to courts in future cases.

In *Hyde v. City of Columbia*[99] the plaintiff sued a newspaper for publishing her name and address after she had escaped from a kidnapper who was still at large.[100] After publication, the kidnapper telephoned the plaintiff and appeared in the area of her home on several occasions.[101] Allowing the negligence claim, the court ruled that the first amendment protects speech only to the extent that the first amendment interests are not outweighed by other interests.[102] The court neither adequately

---

P.2d at 39, 123 Cal. Rptr. at 471. The court found that the accident was a foreseeable result of the defendant's broadcast. *Id.* at 46-47, 539 P.2d at 39-40, 123 Cal. Rptr. at 471-72.

97. *Id.* at 48, 539 P.2d at 40, 123 Cal. Rptr. at 472. The court held the defendant liable after determining that the conduct was a legal cause of the harm. *Id.* The lower court had instructed the jury that a defendant is responsible for the conduct of others when that conduct is directed or influenced by the defendant's business activity. *Id.* at 51, 539 P.2d at 42, 123 Cal. Rptr. at 474.

98. *Cf. supra* note 36. As in Justice Black's dissent in Cohen v. California, 403 U.S. 15, 27 (1971), the court in *Weirum* avoided analyzing the limits of the first amendment but stopped short of summarily labeling the incident as conduct rather than speech. *See Weirum*, 15 Cal. 3d at 48, 539 P.2d at 40, 123 Cal. Rptr. at 472.

99. 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983).

100. *Id.* at 253.

101. *Id.* at 254 & n.2. The plaintiff sought compensation for mental anguish arising from threatened, not actual, physical harm. *Id.* at 253; *see* Linder, *supra* note 1 at 421-26. Nonetheless, analysis of the conflicting interests of personal safety and free speech should be substantially the same as if physical harm had occurred. *See infra* note 142.

102. *Hyde*, 637 S.W.2d at 264-65 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)). The court also stated that newspapers have a duty to foresee the misconduct of third parties. *Id.* at 257 ("In certain situations, the law expects a reasonable actor to anticipate and protect the plaintiff against the intentional or criminal misconduct of a third person . . . ."). Both *Weirum* and *Hyde* involved the possibility of liability against joint tortfeasors. *See supra* notes 94-96, 99-101 and accompanying text. Neither court addressed whether the car drivers and kidnapper should be held jointly liable. *See Hyde*, 637 S.W.2d at 253-65; *Weirum*, 15 Cal. 3d at 41-45, 539 P.2d at 37-40, 123 Cal. Rptr. at 470-72. In addition to analyzing the claim of common law negligence, the *Hyde* court also considered state law in addressing the issue of media access to police files and other records. *Hyde*, 637 S.W.2d at 259-65. The court noted that the plaintiff did not base her claim on either invasion of privacy or libel. *Id.* at 254, 264. If the claim had been based on one of these alternative theories, the court

identified these other interests, nor explained how the other interests outweighed the first amendment in that particular case. As in *Weirum*, the result in *Hyde* may have been correct, but the opinion provides little guidance for future courts.

Thus, the harm-oriented approach has proven inadequate to address the issues arising in cases of physical injury caused by negligent use of words. The lack of articulated justifications for the decisions in *Weirum* and *Hyde* poses the danger that courts may rely on the conclusory statements[103] made in those cases and thereby curtail the first amendment protection of speech.[104]

B. Deficiencies of the Categorical Approach

Courts using the categorical approach to analyze negligent use of words cases adopt a two-step analysis. The courts first address whether the speech falls into the unprotected category of incitement.[105] If the speech is not unprotected, the courts then apply language from defamation cases to determine that civil liability may not be imposed.[106] The courts, however, misapply first amendment principles and Supreme Court precedents in each of these steps, producing anomalous results.

1. Categorizing the Speech

Courts using the categorical approach have uniformly analyzed the speech in terms of incitement, finding in each case that the defendant's speech did not meet the *Brandenburg* test.[107] *Walt Disney Productions v. Shannon*[108] involved an

---

might have found that the speech was unprotected. *See supra* notes 59-82 and accompanying text. The court, however, did not consider first amendment protections in depth.

103. *See supra* note 93; *cf.* Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199, 202 (S.D. Fla. 1979) (judgment of cause by general television violence would provide no recognizable standard for potential defendants). Similar to an unprincipled conclusion of cause, an unprincipled imposition of duty without attention to first amendment protections would provide no reasonable standard to guide potential media defendants. Courts have relied on the rationales of earlier decisions to support their holdings, often ignoring that the earlier cases themselves have misapplied precedent. *See infra* note 133. The repetition of misplaced reliance strengthens the erroneous reasoning. The history of the categorical approach to negligence claims against media defendants provides an example of this. *See infra* notes 131-137 and accompanying text.

104. This Note proposes a standard of analysis to assist courts in resolving the problem. *See infra* notes 165-97 and accompanying text.

105. *See infra* notes 107-16 and accompanying text.

106. *See infra* notes 124-30 and accompanying text.

107. *See supra* notes 54-58 and accompanying text. Incitement is the pre-

eleven-year-old plaintiff who was partially blinded in an attempt to duplicate an experiment portrayed on a children's television program.[109] *Olivia N. v. National Broadcasting Co.*[110] concerned a nine-year-old girl who had been sexually assaulted by a group of youths after they watched and discussed a similar event depicted in a television drama.[111] *DeFilippo v. National Broadcasting Co.*[112] involved a thirteen-year-old boy who hung himself after seeing a program showing a simulated self-hanging, despite the program's warning against duplicating the stunt.[113] *Herceg v. Hustler Magazine*,[114] concerned a fourteen-year-old boy who hung himself after reading an article about

---

ferred category because the harm comes about as a result of someone, either the plaintiff or a third person, acting on the words of the defendant. The goal of incitement regulations is to prevent lawless and violent activity by persons hearing the defendant's words. *See id.* The courts applying *Brandenburg* fail to distinguish between imposing liability for the content of speech and imposing liability for the results of speech. *See infra* notes 120-23, 135 and accompanying text.

108. 247 Ga. 402, 276 S.E.2d 580 (1981).

109. *Id.* at 402, 276 S.E.2d at 581. The demonstration involved reproducing a sound effect by rolling a BB in a large, round balloon. *Id.* The program invited viewers to try the experiment themselves, perhaps misrepresenting the degree of difficulty involved. *Id.* The plaintiff used a piece of lead about twice the size of a BB and a balloon that was long and skinny. *Id.* The balloon burst, impelling the lead into the boy's eye, partially blinding him. The court held that the program was not a clear and present danger, *id.* at 404, 405, 276 S.E.2d at 582, 583 (citing Schenck v. United States, 249 U.S. 47, 52 (1919)), presumably meaning that the program was not incitement. *See supra* note 58 and accompanying text. In support of its conclusion, the court noted that of an estimated sixteen million children who viewed the program, only the plaintiff reported being injured in attempting to duplicate the experiment. *Id.* at 405 n.4, 276 S.E.2d at 583 n.4.

110. 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981), *cert. denied*, 458 U.S. 1108 (1982). The attack on the plaintiff included a sexual attack with a bottle. *Id.* at 491, 178 Cal. Rptr. at 890. The television program depicted an instance of artificial rape in which the victim was assaulted with a plumber's helper. *Id.* at 491-92, 178 Cal. Rptr. at 890-91.

111. *Id.* at 488, 178 Cal. Rptr. at 888. The plaintiff conceded that the defendant did not intend the conduct to occur and that the speech was not incitement. *Id.* at 491 & n.1, 178 Cal. Rptr. at 490 & n.1.

112. 446 A.2d 1036 (R.I. 1982).

113. *Id.* at 1037. After warning viewers not to attempt the stunt themselves, the performer went on to state that he knew a person who "almost broke his neck" attempting to do the trick. *Id.* at 1038. The court held that the defendant was not guilty of incitement in the absence of intent to induce the conduct. *See id.* at 1040, 1041.

114. 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1219 (1988). In an earlier trial, the court dismissed the negligence claim, but allowed amendment of the complaint to include the incitement claim. Herceg v. Hustler Magazine, 565 F. Supp. 802 (1983). The court relied on Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199 (S.D. Fla. 1979), and on *Olivia N.*, 126 Cal. App. 3d 488,

auto-erotic asphyxia, despite the magazine's warnings not to attempt the act.[115] In each of these four cases, the court held that the speech involved did not meet the *Brandenburg* incitement test because the defendants did not intend for the injurious conduct to occur.[116]

The courts' application of the *Brandenburg*[117] incitement test to cases alleging physical injury caused by negligent use of words ignores the distinction between the interests *Brandenburg* protected and the interests of the plaintiffs in negligence cases. In *Brandenburg*, the Supreme Court categorized incitement as unprotected speech because it determined that the state interest in maintaining order in incitement situations outweighed the interest in free speech.[118] Negligence theory, on the other hand, balances the conduct's utility against the magnitude of the risk that it creates.[119] In holding that the speech complained of in these negligence cases was not incitement, the courts have said little about the state interest of protecting health and safety and fail to examine the differences between this interest and the interests at stake in traditional incitement cases.

The incitement analysis also fails to distinguish between regulating speech as speech and imposing liability for the results of speech. Under *Brandenburg* a defendant may be criminally penalized when the state can show the speaker's intent to incite and the likelihood of resulting lawless activity at the time of the speech,[120] even if the activity does not materialize.[121]

---

178 Cal. Rptr. 888 (1981), *cert. denied*, 458 U.S. 1108 (1988), and *DeFilippo*, 466 A.2d 1036 (R.I. 1982). *See supra* notes 93, 110-13 and accompanying text.

115. *Herceg*, 814 F.2d at 1018-19. Auto-erotic asphyxia involves hanging oneself while masturbating. *Id.* at 1018. The loss of oxygen to the brain allegedly heightens the sensation. *Id.* According to the article, the practice is somewhat common, with as many as one thousand teenagers dying each year while attempting the feat. *Id.* The article was introduced as giving information on the pleasures of unusual and taboo sexual practices. *Id.* The magazine stated that it presented the article to increase readers' awareness of alternative sexual practices and to lessen their inhibitions. *Id.* An editor's note warned that the practice was dangerous and recommended that readers not attempt the act or to do so only if "you're anxious to wind up in cold storage, with a coroner's tag on your big toe." *Id.* at 1018-19.

116. *See supra* notes 108-15 and accompanying text.

117. *See supra* notes 54-58 and accompanying text; notes 108-16 and accompanying text.

118. *Brandenburg*, 395 U.S. 444, 447 (1969) (per curiam); *see supra* notes 54-58 and accompanying text.

119. *See supra* notes 12-15 and accompanying text.

120. *Brandenburg*, 395 U.S. at 447-49.

121. *See id.* at 450, 454-55 (Douglas, J., concurring). Justice Douglas con-

The defendant is penalized for the expression itself, not the resulting harm. In contrast, a negligence claim requires a measurable, foreseeable injury resulting from the defendant's conduct.[122] The entire *Brandenburg* analysis is, therefore, inappropriate because it focuses on the defendant's intent and on the likelihood of lawless activity rather than on the total circumstances of the case and the elements of duty, breach, causation, and injury.[123]

2. Holding No Liability for Protected Speech

After determining that the speech in question does not fit into a recognized category of unprotected speech, courts have held that liability cannot be imposed on protected speech. In reaching that conclusion, the courts in the four cases discussed above[124] misapplied language from the defamation case of *New York Times Co. v. Sullivan*.[125] These courts did not directly apply principles of defamation law, but merely inappropriately used language from the case to support their reasoning.[126]

---

curred in the judgment reversing the conviction but wrote separately because he believed that the test enunciated by the Court left too much of the clear and present danger test intact and allowed governments to punish speech as speech apart from the acts the speech actually causes. *Id.* Justice Black joined in Justice Douglas's opinion. *Id.* at 449. After Hess v. Indiana, 414 U.S. 105 (1973), *see supra* note 56 and accompanying text, the emphasis is on the speaker's intent and the imminence of the likely unlawful action, both measured by an objective standard. *See* R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 30, § 20.15, at 63-65.

122. *See supra* note 11 and accompanying text.

123. *See supra* notes 11-22 and accompanying text.

124. *See supra* notes 108-15 and accompanying text.

125. 376 U.S. 254 (1964); *see supra* note 61 and accompanying text.

126. *See* Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 494, 178 Cal. Rptr. 888, 892 (1981) ("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." (quoting New York Times v. Sullivan, 376 U.S. at 277)), *cert. denied*, 458 U.S. 1108 (1982); *see also* Walt Disney Prods. v. Shannon, 247 Ga. 402, 403-04 n.1, 276 S.E.2d 580, 582 n.1 (1981) (same *New York Times* quote, although stating earlier that *New York Times* was inapposite to case); *cf.* Herceg v. Hustler Magazine, 814 F.2d 1017, 1023 (1987) (same quote), *cert. denied*, 108 S.Ct. 1219 (1988). A spirited concurrence in *Herceg* argued that the plaintiffs should have been allowed to proceed on a negligence theory. *Herceg*, 814 F.2d at 1025 (Jones, J., concurring in part and dissenting in part). The opinion concurred only because the plaintiff failed to cross-appeal on the dismissal of the negligence claim and the only issue before the court was whether the article constituted incitement. *Id.* The concurring opinion is highly emotional and aims most of its vigor at pornographic publications. *See id.* at 1025-26. It is not clear whether the concurring judge would allow recovery in negligence against a nonpornographic publication.

Based on the Supreme Court's statement in *New York Times* that the civil penalties sought in that case would result in self-imposed prior restraints,[127] the courts have concluded that civil penalties against media defendants for physical injuries to private individuals are also impermissible.[128] In relying on the *New York Times* language, however, the courts have ignored the fact that the *New York Times* Court was concerned with avoiding prior restraints on speech critical of *public officials*.[129] Moreover, in quoting the language, the courts inappropriately omitted the *New York Times* reference to the specific circumstances in that case.[130]

Courts considering liability for physical injury caused by negligent use of words have also misused the *New York Times* principle that states cannot achieve by civil liability what they cannot by criminal sanctions.[131] Courts have applied this principle to bar recovery for negligent but protected speech because states cannot criminalize such speech.[132] Again, the courts have overlooked the specific application of this principle by the

127. 376 U.S. at 277.

128. *See supra* note 126 and accompanying text.

129. *New York Times* involved a public official who allegedly had been defamed. 376 U.S. at 256. In the negligence cases considered in this Note, private plaintiffs suffered physical injury. *See supra* notes 94-96, 99-101, 107-15. *New York Times* and its progeny established different standards for private and public plaintiffs in defamation. *See supra* notes 61-78 and accompanying text. The courts addressing negligent use of words claims have not considered the public official and private figure distinction or the dignitary invasion and physical injury differences. The interest in protecting the safety of a private individual should be given at least as much weight as the interest in protecting that individual's reputation. *See supra* notes 9, 59 and accompanying text.

130. *See, e.g., Olivia N.*, 126 Cal. App. 3d at 494, 178 Cal. Rptr. at 892 (" 'The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.' " (quoting *New York Times*, 376 U.S. at 277)). The words omitted at the ellipsis are "such as that invoked by the Alabama courts here." *New York Times*, 376 U.S. at 277. The Court in *New York Times* was concerned about a specific incident—an outrageous attempt to stop the criticism of government officials during the struggle for equal rights for blacks by awarding damages one thousand times greater than the maximum criminal fine. *Id.* The lower court awarded these damages with no proof of actual damage to the plaintiff. *Id.* Certainly, actions like those of the Alabama courts would threaten the protections of the first amendment because criticism of government officials is at the core of the underlying policies of free speech. *See supra* notes 26-27 and accompanying text. For another court to quote the Supreme Court's statement out of context, turning it into a constitutional principle, does not rationally advance the inquiry into the limits of free speech. Such conclusory misapplications of principles adequately protect neither plaintiffs' nor defendants' rights.

131. *New York Times*, 376 U.S. at 277.

132. *See supra* notes 42-48 and accompanying text.

Supreme Court in *New York Times*. There, the Court was concerned that states would attempt to use civil liability to censor political speech.[133] In *New York Times*, the Court was not addressing the issue of liability on the results of speech.[134] Furthermore, the Court apparently has left open the question of whether civil liability may be based on the results of protected speech.[135]

---

133. *See supra* notes 47-48 and accompanying text. The Supreme Court in *New York Times* feared that huge damage awards in the lower courts would lead to prior restraints that otherwise could not be imposed by criminal sanctions. *New York Times*, 376 U.S. at 277. The Court's statements must be viewed in the context of the factual situation. Fear that the award would lead to prior restraint through self-censorship and the statement that states cannot achieve by civil libel law what they cannot achieve by criminal sanction both relate to the necessity of allowing free and open criticism of official action by public officials. *New York Times*, 376 U.S. at 277, 279; *see supra* notes 26-27 and accompanying text. Courts have treated this network of concerns as distinct concepts and used each to reinforce the other and support their dismissal of negligence claims. This treatment has blurred further the factual situation that the Supreme Court was addressing in *New York Times*. *See Olivia N.*, 126 Cal. App. 3d at 494, 178 Cal. Rptr. at 892 (treating fear of prior restraint and fear of using civil law as substitute for criminal sanctions as separate concepts). In DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982), *see supra* notes 112-113 and accompanying text, the court in dismissing the plaintiff's claim relied on *Olivia N.*'s use of *New York Times*. *See DeFilippo*, 446 A.2d at 1040. The court in Herceg v. Hustler Magazine, 565 F. Supp. 802 (S.D. Tex. 1983) relied on both *Olivia N.* and *DeFilippo*. *See Herceg*, 565 F. Supp. at 804.

In each of these cases, the factual situations and the issues differed from those in *New York Times*. *See supra* note 129 and accompanying text. The courts made no effort to determine whether these factual differences should raise distinct legal issues. Courts should ask, for example, whether the fact that plaintiffs might prove actual, rather than presumed, damages should alter the first amendment analysis. The line of cases, each relying on the preceding, allows the misapplication of *New York Times* to become stronger and more firmly ingrained.

134. *See supra* note 61 and accompanying text.

135. *See, e.g.*, NAACP v. Claiborne Hardware, 458 U.S. 886 (1982). In *Claiborne* the plaintiff sued the NAACP and others for damages resulting from a black boycott. *Id.* at 928. The suit alleged that several speeches, one by Charles Evers, led to incidents of violence and an unlawful boycott. *Id.* The Court found that Evers's speech was not incitement as defined by *Brandenburg* and must be regarded as protected speech. *Id.* at 928-29. In dictum the Court stated: "In the course of those [speeches], strong language was used. If that language had been followed by acts of violence, a *substantial question would be presented* whether Evers could be held liable for the *consequences* of that unlawful conduct." *Id.* at 928 (emphasis added). At least two interpretations of the Court's cryptic statement are possible. First, the Court could be implying that had violence occurred, the speech would then meet the *Brandenburg* requirements and be deemed incitement and, therefore, unprotected speech. The problem with this interpretation is that *Brandenburg* is an objective test and the status of the speech as protected or unprotected is determined

To give proper consideration to claims of physical injury caused by speech, courts must acknowledge that negligence claims seek to impose liability on the results and not on the content or category of speech.[136] While citing and misapplying language from *New York Times*, the courts ignore the analogy to defamation law, which balances the specific interests to be protected in each case.[137]

3. The Anomalous Results of the Categorical Approach

The categorical approach, identifying speech as either protected or unprotected and barring civil liability for protected speech, does not consider adequately the state interest in protecting individuals from physical harm.[138] This leads to the anomalous result of barring the claims of physically injured plaintiffs while allowing the claims of plaintiffs suffering the dignitary injuries of damaged reputation, shame, or embarrassment as a result of defamation or invasion of privacy. Thus, under the categorical approach, the first amendment bars recovery when a victim is blinded,[139] sexually assaulted,[140] or

---

at the time of utterance, not by ensuing events. The likelihood, not the actuality, of lawless action is the standard. *See supra* notes 54-58, 121 and accompanying text. Thus, whether unlawful action actually occurs is irrelevant to whether the speech is protected. Furthermore, the Court did not frame the question as whether liability could be imposed for the speech, but rather as whether liability could flow from the *consequences* of any ensuing lawless conduct. *Claiborne*, 418 U.S. at 928. This leads to the second interpretation of the dictum—that courts may impose liability for the consequences arising out of speech, even if the speech itself is protected.

136. Courts have also cited cases that prohibit the imposition of liability based on the content of speech. *See Olivia N.*, 126 Cal. App. 3d at 492, 178 Cal. Rptr. at 891 (states cannot regulate speech based on its content or message) (citing Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972)); *DeFilippo*, 446 A.2d at 1042 (same). *Mosley* involved a regulation barring all peaceful picketing except labor picketing. *Mosley*, 408 U.S. at 92-93. The Court, concerned about misplaced time, place, and manner regulations, noted that such regulation is allowed, but not if it is applied in a discriminatory manner based on the content or message of the speech. *Mosley*, 408 U.S. at 99; *see supra* note 46. The courts citing *Mosley* have failed to distinguish the circumstances of that case and the issue that the Court was addressing. Forbidding discriminatory regulation that uses speech content as a criterion for time, place, and manner restrictions is not relevant to the imposition of liability based on the results of speech.

137. *See infra* notes 139-43 and accompanying text.

138. *See supra* note 9 and accompanying text.

139. *See* Walt Disney Prods. v. Shannon, 247 Ga. 402, 276 S.E. 2d 580 (1981); *see supra* notes 108-09 and accompanying text.

140. *See* Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981), *cert. denied*, 458 U.S. 1108 (1982); *supra* notes 110-11 and accompanying text.

killed[141] as a result of protected speech, but allows recovery for defamation when a plaintiff is called a communist.[142] Allowing defamed plaintiffs to recover damages without proving actual harm[143] compounds the contradiction.

This Note's opening scenario[144] demonstrates another anomalous result of disallowing recovery for negligent use of words. Both hypothetical plaintiffs suffered the same injury resulting from essentially the same cause. While one plaintiff recovered under a medical malpractice theory, however, the first amendment barred the other plaintiff's claim of negligent use of words. The differing results are explicable only by misguided application of first amendment principles. Courts have not stated convincingly why an actor will be excused from lia-

141. *See* Herceg v. Hustler Magazine, 814 F.2d 1017 (1987), *cert. denied*, S. Ct. 1219 (1988); DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982); *supra* notes 112-15 and accompanying text.

142. Gertz v. Robert Welch, Inc., 680 F.2d 527, 531 (7th Cir. 1982) (awarding plaintiff $400,000 on remand), *cert. denied*, 459 U.S. 1226 (1983). The position taken here is not that the plaintiffs necessarily should be compensated. Other considerations may determine that recovery is not available. *See infra* notes 165-97 and accompanying text. A more consistent approach to first amendment problems, however, will reduce the occurrence of anomalous results.

One reason why courts are more willing to compensate defamation plaintiffs, as compared to those claiming in negligence, may be that defamation has been recognized in common law for a longer time. *See* PROSSER & KEETON, *supra* note 9, § 28, at 160 (negligence recognized as cause of action only since early nineteenth century); R. SMOLLA, *supra* note 75, § 1.02 (tracing history of defamation to its widespread recognition by late sixteenth century). Negligence law, however, grew from trespass and trespass on the case, causes of action at least as old as defamation. PROSSER & KEETON, *supra* note 9, at 161.

Hyde, in which the defendant published the plaintiff's name and address after a kidnapping, illustrates potentially inconsistent results based on slightly differing facts. Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983). A suit for invasion of privacy might have been successful if the plaintiff had been able to establish that the information was not newsworthy. *Cf. supra* notes 87-88 and accompanying text. A court applying a strict categorical approach would probably dismiss the suit, however, if the kidnapper returned and killed the plaintiff and her survivors sued in negligence. *Cf. supra* notes 107-16 and accompanying text (courts using categorical approach dismiss suit if speech not incitement). Publishing the address would not be incitement because the publisher would not intend the harmful conduct to occur and the likelihood of harmful activity would be questionable, so the *Brandenburg* test would not be satisfied. *See supra* notes 54-58 and accompanying text.

143. *See supra* notes 77-78 and accompanying text.

144. *See supra* text accompanying note 1. The intent element of *Brandenburg* could be assumed because the defendant's book strongly encouraged following the diet. That conduct, however, is not the type of lawless or violent action that courts attempt to eliminate through application of *Brandenburg*. *See supra* notes 54-58 and accompanying text.

bility for injury resulting from words but held liable when the same injury results from analogous actions.[145]

Protection of speech remains an important goal for courts. Nevertheless, protection of other societal interests, especially health and safety, may outweigh the interests in protecting a specific instance of speech.[146] The courts' failure to consider the totality of the circumstances, the interests to be protected, and the significant differences in the issues raised in negligent use of words cases and other first amendment cases results in rationales for denying recovery that are less than convincing.

III. A SUGGESTED POLICY OF NEGLIGENCE FOR MEDIA DEFENDANTS

The preceding criticisms of the analyses and the results in negligent use of words cases do not resolve the questions whether courts should impose liability in negligence against media defendants and whether such liability is possible without endangering free speech protections. The underlying policy of negligence theory to protect individuals from unreasonable risks of harm,[147] and the imposition of liability for invasion of dignitary interests in defamation and invasion of privacy without unduly burdening first amendment protection,[148] provide a policy basis for establishing a standard of negligence for media defendants.[149] Carefully applied traditional negligence theory,

145. *Cf.* Weirum v. RKO Gen., 15 Cal. 3d 40, 48, 539 P.2d 36, 40, 123 Cal. Rptr. 468, 472 (first amendment does not sanction infliction of injuries merely because achieved by words rather than actions).

146. *See infra* notes 165-88 and accompanying text; *cf. supra* notes 9-15 and accompanying text. In balancing the competing interests, the issue should be whether the utility of the actor's speech-related conduct, as measured by first amendment policy considerations, outweighs the magnitude of the risk that it creates for a third person. This returns the analysis to whether a duty should be imposed on the speaker.

147. *See supra* notes 9-10 and accompanying text. Tort law generally and negligence law specifically seek to redress individual injury to provide an equitable placement of loss. Several considerations influence the determination of where to place the loss. Assessing fault, deterring future wrongdoing when possible, providing clear standards of conduct, shifting loss to the one best able to bear it, and avoiding the disrupting effects of self-help all are policy considerations that have combined to produce current negligence law. *See generally* PROSSER & KEETON, *supra* note 9, § 3, at 15-20; *id.* § 30, at 164-68.

148. *See supra* notes 59-82 and accompanying text.

149. Depriving injured parties of the means to recover for the losses they have suffered might also be a violation of due process. The fifth and fourteenth amendments to the Constitution require due process before the state may deprive an individual of life, liberty, or property. U.S. CONST. amends. V, XIV. Not allowing a plaintiff to proceed with a negligence claim removes this

balancing the interests of plaintiffs and defendants on a case-by-case, ad hoc basis, will provide for the imposition of liability

---

constitutional procedural safeguard. A plaintiff is thus deprived of his physical well-being without being allowed access to the process by which he could receive just compensation. In discussing cases of improper use of private information, such as broadcasting a performer's act, Professor Tribe notes that, at some point, the state is depriving the victim of liberty or property without due process if it provides no legal remedy. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-4, at 650 (1978).

Some commentaries have suggested various standards that courts might use to impose liability in cases of physical injury caused by speech. One suggestion is that courts adopt a standard of "stringent negligence" in cases of imitative violence, which would require the plaintiff to prove with clear and convincing evidence that the defendant acted with knowledge, intent, or in reckless disregard of potential harm. *See* Note, *Tort Law—TeleViolence: Should Broadcasters Be Liable?*, 6 W. NEW ENG. L. REV. 897, 911-15 (1984). This stringent negligence standard combines the *Brandenburg* incitement test and the actual malice test of *New York Times*. The practical applicability of such a test is questionable because a plaintiff could rarely, if ever, prove this degree of culpability by a media defendant.

Another possible solution would be for courts to modify *Brandenburg* so that "directed to inciting," *Brandenburg*, 395 U.S. at 447, means that the incitement is found in the speaker's words themselves and the speaker's intent is irrelevant. *See* Note, *Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis*, 52 S. CAL. L. REV. 529, 562-63 (1979). The problem with this approach is that it admittedly returns to the clear and present danger standard, *see id.* at 562, under which a good deal of speech was inappropriately suppressed. *See supra* note 58. The suggestion also ignores the Supreme Court's clarification after *Brandenburg* that "directed at inciting" means intending to incite. *See* Hess v. Indiana 414 U.S. 105 (1973); *supra* note 56. *Brandenburg* is inapposite to the analysis of negligence in free speech matters. *See supra* notes 120-23 and accompanying text.

Yet another suggestion is that courts approach the problem in terms of misrepresentation. *See* Note, *Tort Liability for Nonlibelous Negligent Statements: First Amendment Considerations*, 93 YALE L.J. 744, 752-58 (1984). This approach would involve a two-pronged analysis asking if the defendant intended that the act be imitated and if adequate warning was given. *Id.* The intent element would preclude claims in many of the cases including those like Weirum v. RKO Gen., 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975), *see supra* notes 94-98 and accompanying text; Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488 (1975), 178 Cal. Rptr. 888 (1981), *cert. denied*, 458 U.S. 1108 (1982), *see supra* notes 110-11 and accompanying text; Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983), *see supra* notes 99-102 and accompanying text; and probably DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982), *see supra* notes 112-13 and accompanying text, in which the defendant not only had no intention that the act be duplicated, but in all likelihood specifically intended that it *not* be copied. Thus, none of the three suggested approaches would reach all of the cases, because each applies at most only to cases of imitative violence. The question is whether negligence law in its more traditional forms can reach cases of media conduct in which intent, knowledge, and the other requirements of these suggested approaches cannot be proven.

in appropriate circumstances without threatening the protections of free speech.

A. THE ARGUMENT FOR AD HOC BALANCING

The Supreme Court has expressed reluctance to allow lower courts to undertake ad hoc balancing, questioning whether ad hoc resolution of competing interests is feasible and doubting the wisdom of committing the task to judges.[150] The Court has been concerned that ad hoc balancing would subject media defendants to judicial second-guessing,[151] would not provide predictability and certainty,[152] and would require constant supervision by the Court.[153]

In recent cases, however, the Court has set guidelines that not only allow, but require, lower courts to engage in ad hoc analyses of competing interests. Defamation[154] and invasion of privacy[155] cases require courts to determine whether speech is of public concern,[156] a determination that can only be achieved on a case-by-case basis and that is, in essence, a determination of the value and utility of the speech.[157] Further, Justice Powell has stated that "speech on matters of purely *private concern is of less First Amendment concern.*"[158] Justice Marshall, one

150. Gertz v. Robert Welch, Inc., 418 U.S. 323, 343, 346 (1974) (balancing is unpredictable; not wise to commit task to conscience of judges).

151. *See, e.g.*, Rosenbloom v. Metromedia, 403 U.S. 29, 63 (1971) (Harlan, J., dissenting) (ad hoc balancing would lead to second-guessing of newsworthiness of each item printed).

152. *See, e.g., Gertz*, 418 U.S. at 343; *Rosenbloom*, 403 U.S. at 81 (Marshall, J., dissenting).

153. *See, e.g., Rosenbloom*, 403 U.S. at 81 (Marshall, J. dissenting).

154. *See supra* notes 59-78 and accompanying text.

155. *See supra* notes 79-82 and accompanying text.

156. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (in libel suit following magazine article about plaintiff's divorce, issue was whether speech is of public concern).

157. The determination that speech is of public concern is a determination of its value and can only be accomplished by an ad hoc balancing of the speech and the interests involved. *See id.* at 487 (Marshall, J., dissenting) ("The meaning that the Court attributes to the term 'public controversy' used in *Gertz* resurrects the precise difficulties that I thought *Gertz* was designed to avoid."). The difficulties Justice Marshall refers to are ad hoc balancing and determination of the value of speech. *See supra* notes 150-53 and accompanying text.

158. Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 759 (1985) (emphasis added) (false credit report did not require showing of actual malice). Justices Rehnquist and O'Connor joined Justice Powell in this plurality decision. *Id.* The effect of *Dun & Bradstreet* has been to return defamation of private individuals to its common law status, removing constitutional barriers. *See* Smolla, *Let the Author Beware: The Rejuvenation of the American Law of*

of the most persistent voices against ad hoc balancing in first amendment cases,[159] has said that "[u]ndoubtedly, ad hoc balancing may be *appropriate in some circumstances that involve First Amendment problems.*"[160] Thus, in defamation cases involving private figure plaintiffs and thus a negligence standard of care,[161] courts necessarily balance the value of the speech against the plaintiff's interest.[162]

Most claims of physical injury from negligent use of words will involve speech that does not invoke the type of public concern warranting the highest degree of first amendment protection.[163] Additionally, the plaintiff is likely to be a private figure.[164] Given the state interest in protecting individuals from and compensating them for physical injury and the pri-

---

Libel, 132 U. PA. L. REV. 1, 78-93 (1983). In addition to the three Justices of the plurality, Chief Justice Burger and Justice White, in concurring opinions, suggested reexamining and perhaps overruling the constitutional barriers established by New York Times v. Sullivan, 376 U.S. 254 (1964), in cases of defamation of public officials. *Dun & Bradstreet*, 472 U.S. at 764 (Burger, C.J., concurring); *id.* at 766-74 (White, J., concurring). Thus, at the time of the *Dun & Bradstreet* opinion, a minimum of five Justices felt comfortable with a negligence standard, at least in cases involving private figures defamed by speech that is not of public concern. *Cf.* Smolla, *supra*, at 1, 78-93 (suggesting return to common law defamation principles to define first amendment limits). Smolla also pointed out that in those defamation cases involving private figures, in which the standard of fault is negligence, courts necessarily balance the utility of the speech against the plaintiff's interests:

> What the Supreme Court did not realize, and what many lower courts continue to fail to realize, is that the traditional formula for determining negligence liability cannot be meaningfully employed in action for defamation without plugging in some measure of the social utility of the subject matter of the defamatory communications.

Id. at 82. Thus, in the case of a defamed private individual, courts must weigh the utility of the speech in the balance.

159. For example, see Justice Marshall's dissents in *Firestone*, 424 U.S. at 488 (arguing against ad hoc balancing); Rosenbloom v. Metromedia, 403 U.S. 29, 81 (1971) (same); and the dissent of Justice Brennan in *Dun & Bradstreet*, 472 U.S. at 774, in which Justice Marshall joined (same).

160. *Rosenbloom*, 403 U.S. at 81 (Marshall, J., dissenting) (emphasis added).

161. *See supra* notes 73-76 and accompanying text.

162. *See supra* note 158 and accompanying text.

163. In this Note's proposal, public concern would be part of the balancing process. *See infra* notes 168-77 and accompanying text.

164. Given the state interest in its citizens' physical well-being, the interest at stake in these cases is of paramount importance. *See supra* note 6 and accompanying text. The issue is not whether ad hoc balancing is plausible, *see* Gertz v. Robert Welch,. Inc., 418 U.S. 323, 343 (1974) (case-by-case scrutiny of every libel case not feasible), but whether any other analysis is just. Conceivably, a physical injury could result from speech involving a public official. For example, an official might commit suicide after disclosure of improper activities. In such cases, courts properly would apply a malice standard when a report is false and should also carefully scrutinize the issue of foreseeability.

vate nature of both the speech and the plaintiffs, the "circumstances" in which ad hoc balancing is appropriate should include personal injury caused by negligent speech.

B. SUGGESTED GUIDELINES FOR THE COURTS IN BALANCING INTERESTS

Courts should apply traditional negligence theory, utilizing the elements of duty, breach, causation, and injury,[165] in deciding liability for physical injury caused by negligent use of words. Courts should incorporate first amendment interests into the negligence analysis, particularly in terms of the duty element.[166]

In determining whether the defendant owes a duty to the plaintiff, first amendment policy should be part of the analysis. Courts should balance the utility of the media conduct with respect to free speech[167] against the magnitude of the foreseeable risk of physical injury created by the speech.[168] In making this assessment, courts should consider the interests underlying the protection of speech and the degree to which the particular expression advances those interests.[169] Courts should determine the utility of the speech by asking whether the speech fosters the free criticism of government,[170] adds to the marketplace of ideas,[171] advances self-expression,[172] or provides a safety valve for societal fears.[173] Courts should consider these interests, along with others they might identify, on a case-by-case basis

165. *See supra* notes 9-22 and accompanying text.

166. Separating the analysis or ignoring either first amendment or negligence principles, as the courts have done, *see supra* notes 90-137 and accompanying text, makes balancing the interests impossible. The courts start with a presumption favoring either the negligence theory or the first amendment principles and fail to address the specific interests to be protected in the factual situations. *See supra* notes 94-104, 117-23; *cf.* Smolla, *supra* note 158, at 71-93 (suggesting return to common law defamation principles to define first amendment limits).

167. *Cf. supra* notes 26-32 and accompanying text (interests served by free speech).

168. *See supra* notes 12-15 and accompanying text.

169. *See supra* notes 26-32 and accompanying text. A careful analysis of the speech's utility in advancing these interests will preclude conclusory judgments either for or against imposition of duty. Courts may find some other rationale for protecting speech in addition to those discussed, but they should carefully articulate and defend any newly identified rationale for protecting speech.

170. *See supra* notes 26-27 and accompanying text.

171. *See supra* note 28 and accompanying text.

172. *See supra* notes 29-30 and accompanying text.

173. *See supra* note 31 and accompanying text.

within the total circumstances of the expression and the injury.[174] This utility analysis would be similar to, and no more difficult than, the determination whether speech is of public concern[175] or, as in privacy cases, whether the subject matter is newsworthy.[176] After determining utility, courts should balance it against the magnitude of the foreseeable risk of injury to decide whether a duty exists.[177] Breach of duty and the existence of a compensable injury[178] should present no special difficulties in these cases.

Thus, applying this analysis to a case like *Weirum*,[179] in which the speech at issue urged drivers to find a wandering disc jockey,[180] a court could determine that the speech had little, if any, value in advancing criticism of the political process, adding to the marketplace of ideas, advancing self-expression, or serving as a societal safety valve.[181] The court would then weigh this low value of speech against the magnitude of the foreseeable risk created.[182] Because the station aimed the program at teenagers,[183] the station should have foreseen the risk of harm. Automobile accidents obviously involve the possibility of great harm, making the risk of high magnitude. Balancing these factors, a court could reasonably impose a duty.[184]

---

174. *See supra* notes 12-15 and accompanying text.

175. *See supra* text accompanying notes 70-72.

176. *See supra* notes 81-82 and accompanying text. For example, determining public concern and newsworthiness requires courts to assess the parties' specific interests as well as the general public's "right to hear." *See supra* note 32. These issues might be particularly important in cases of political speech and in entertainment.

177. Foreseeability of possbile harm, not the speaker's intent or the likelihood of occurrence, should determine the magnitude of the risk. *See supra* notes 10-14 and accompanying text. The number of persons actually injured would be relevant perhaps to a determination of foreseeability, *cf. supra* note 109, but would not be the only factor.

178. *See supra* notes 11-22 and accompanying text. Proof of injury would require the same elements as proof of injury in any negligence suit.

179. Weirum v. RKO Gen., 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975); *see supra* notes 94-98 and accompanying text.

180. *Weirum*, 15 Cal. 3d at 44-45, 539 P.2d at 38, 123 Cal. Rptr. at 470.

181. The newsworthiness of the information, *see supra* notes 81-82, and the reader's right to know, *see supra* note 32, would be a part of the analysis to determine the value of the speech.

182. *See supra* notes 12-15 and accompanying text. The question would be whether a reasonable person would have foreseen the risk of an automobile accident occurring from the speech.

183. *Weirum*, 15 Cal. 3d at 43, 539 P.2d at 38, 123 Cal. Rptr. at 470.

184. The *Weirum* decision suggested that speech for personal gain may merit less protection. 15 Cal. 3d at 48, 539 P.2d at 40-41, 123 Cal. Rptr. at 472-73; *cf. supra* note 53 (commercial speech merits less protection). This resem-

A court deciding a case such as *Olivia N.*,[185] in which imitative violence followed a fictional depiction of sexual assault, should consider the high value of fiction in terms of self-expression.[186] The court should also consider whether a reasonable person would foresee the risk of imitation of the fictional violence.[187] Considering the high value of the speech, relative to that in *Weirum*, and the questionable foreseeability, a court might find no duty.[188]

Causation of harm[189] could be difficult to prove, particu-

---

bles an evaluation of speech as a public concern, but the analysis of first amendment concerns was overly brief and conclusory. *See supra* notes 94-98 and accompanying text.

185. Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981), *cert. denied*, 458 U.S. 1108 (1982); *see supra* notes 110-11 and accompanying text.

186. *Cf.* Smolla, *supra* note 158, at 87 ("Fiction is a critical component in a robust and open culture."); *supra* notes 29-30, 32 and accompanying text.

187. *See supra* notes 12-15 and accompanying text; *cf. supra* note 182 and accompanying text.

188. The balancing in this case presents more potential difficulties than in other cases. The right to hear, *see supra* note 32 and accompanying text, and the high degree of protection that society accords fiction, *see supra* note 186 and accompanying text, indicate the strong utility of entertainment speech. The foreseeability of an occurrence such as happened in this case is questionable and a court might well decide that no duty exists. Similarly, a plaintiff in such a case may be unable to assert an identifiable duty and breach. *Cf.* Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199, 201-03 (S.D. Fla. 1979); *see supra* note 103 and accompanying text. Because the court in *Olivia N.* rejected the plaintiff's first amendment claim, some of the facts needed to assess the existence of a duty are not in the opinion. The duration and explicitness of the televised episode, for example, would be helpful in assessing foreseeability.

Other cases would receive similar analysis. Of special interest are cases in which violence follows demonstrations of or information regarding similar violence. *See, e.g.*, Herceg v. Hustler Magazine, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1219 (1988); *see supra* notes 114-15 and accompanying text. In a case like *Herceg*, in which injury resulted from following instructions on auto-erotic asphyxia, the utility of the speech, measured by first amendment values, is low compared to the magnitude of the foreseeable risk. The resolution of the issue in a case like this would turn on whether the defendant gave proper warning. The question for the jury is the adequacy of the defendant's warning, especially considering the allegedly widespread harm arising from the practice. In DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982), *see supra* notes 112-13 and accompanying text, the court discussed the defendant's warning, *id.* at 1041, but did not consider the warning's adequacy. Cases of imitative violence in which no warning was given, *e.g.*, Walt Disney Prods. v. Shannon, 247 Ga. 402, 276 S.E.2d 580 (1981), pose two questions for resolution. A jury would have to determine the foreseeability of a duplication of the trick and then determine whether a warning should have been given.

189. *See supra* notes 16-21 and accompanying text.

larly in cases of imitative violence.[190] Cause-in-fact in such cases may continue to be one of the major barriers to recovery,[191] but should not preclude the plaintiff's right to present the claim.[192] For example, causation may be more difficult to assess in a case such as *Olivia N.*,[193] in which injury results from imitation of a depiction of general conduct offered as entertainment, than in cases such as *Shannon*[194] or *Herceg*,[195] in which injury results from specific instruction on performance of the conduct. Expert testimony may be some help to juries in

190. The problem in some cases of imitative violence would be the ability to assess the degree to which the defendant's conduct influenced an already predisposed person to duplicate the act. In a case such as *Herceg*, 814 F.2d 1017, *see supra* notes 114-15 and accompanying text, the determination of cause would require the jury to consider whether the article was a but-for cause, *see supra* note 17 and accompanying text, or a substantial factor, *see supra* note 18 and accompanying text. The defendant could possibly establish that the information was readily available, the victim was seeking it, and it was only chance that it happened to be the defendant's article the victim found. Defendant might argue, therefore, that the article had no substantial effect, like throwing a lighted match onto a forest fire. *See supra* note 18.

The problem of more than one cause would also be an issue in some cases. If the defendant could establish the plaintiff's predisposition, the assessment of fault would be altered. Juries would have to investigate the possibility of contributory negligence in those cases. In the case of more than one publication contributing to the harm, joint liability would be considered. *See supra* note 22.

191. Whether the publication or broadcast is either a but-for cause or a substantial factor, *see supra* notes 17-18 and accompanying text, may be particularly difficult to determine in some contexts, especially for what may be termed generic crimes. For example, in *Olivia N.* defendants possibly could present evidence that the perpetrators of the crime already possessed the tendency and ability to commit the crime and would have assaulted the victim whether or not the program had been broadcast. The only possible connection with the broadcast, defendants could argue, is the possibility that it gave the attackers the idea for the specific method of the crime.

The *Herceg* case, 814 F.2d 1017, *see supra* notes 114-15 and accompanying text, provides another example. If the victim had already possessed some knowledge of auto-erotic asphyxia and purchased the magazine only to obtain the details, available also from other sources, the determination of whether the article was a cause-in-fact, either as a but-for cause or a substantial factor, would be difficult. The questions can, however, reasonably be left to juries, which are not uncommonly called on to decide difficult cases.

192. *See supra* note 149 (denial of forum for plaintiff's claim may violate due process). Many courts have granted defendants' motions for dismissal. A better approach would be to allow trial on the merits. A court legitimately could find that the plaintiff had failed to meet the burden of proving the elements of negligence.

193. 126 Cal. App. 3d 488, 178 Cal. Rptr. 888; *see supra* notes 110-11 and accompanying text.

194. *Shannon*, 247 Ga. 402, 276 S.E.2d 580; *see supra* notes 108-09 and accompanying text.

195. *Herceg*, 814 F.2d 1017; *see supra* notes 114-15 and accompanying text.

determining cause-in-fact.[196]

This Note's suggested approach provides guidance for courts analyzing the competing interests in cases of physical injury caused by negligent use of words. Rather than relying on conclusory judgments or misapplication of first amendment principles,[197] courts following the suggested approach would focus on the specific facts and issues of the cases presented and arrive at more sound conclusions.

C. MAINTAINING THE PROTECTIONS OF THE FIRST AMENDMENT

This Note's suggested approach gives proper consideration to first amendment interests by introducing these interests into the analysis of the duty element of negligence.[198] Requiring courts to consider first amendment interests in determining the existence of a duty poses no special problems because courts already determine when speech is in an unprotected category and the circumstances under which it may be regulated.[199] The suggested approach also furthers first amendment interests be-

196. As is often the case when determination of an issue depends on expert testimony, the evidence may be contradictory. *Compare* 1 NATIONAL INSTITUTE OF MENTAL HEALTH, TELEVISION AND BEHAVIOR: TEN YEARS OF SCIENTIFIC PROGRESS AND IMPLICATIONS FOR THE EIGHTIES 6 (1982) (reporting general consensus among researchers on causal connection between television and acts of violence) *with* Walsh, *Wide World of Reports*, 220 SCI. 804 (1983) (reporting television networks' critique of NIMH study). The *Herceg* and *Olivia N.* examples, discussed *supra* note 191, could be instances when the court would, as a policy matter, find no proximate cause because the circumstances were too attenuated, *see supra* notes 19-21 and accompanying text. *See also infra* text accompanying notes 213-15. Additionally, courts or juries would need to consider whether other causes or joint tortfeasors were determining factors in the harm. *See supra* note 22. Further, courts and juries would weigh the plaintiff's culpability carefully in self-injury cases. The degree of comparative negligence attributable to the plaintiff's action, *see supra* note 22 and accompanying text, would be a question of fact for the jury to determine.

197. *See supra* notes 107-37 and accompanying text.

198. *See supra* notes 12-15 and accompanying text. This proposed approach conceivably could be assessed as creating a new category of unprotected speech—speech that creates an unreasonable risk of injury. Avoiding the categorical difficulties is important so that automatic rejection or granting of compensation, as has happened in past cases, does not continue. Identifying speech as a category, either protected or unprotected, distracts analysis from the more important issues of the specific case. Furthermore, negligent speech could not be a category of unprotected speech because negligence, unlike defamation and incitement, is determined only by analysis of duty and breach. *See supra* notes 86-88 and accompanying text.

199. *See supra* notes 40-82 and accompanying text. In defamation cases courts already have the responsibility of determining the value of speech. *See supra* notes 61-76.

cause, unlike the categorical approach, it protects speech *as* speech.[200] The categorical approach allows regulation of speech according to its nature.[201] The suggested approach, on the other hand, imposes liability for the results of speech. Punishing speech itself presents a greater danger to the first amendment than allowing liability in negligence for the harm resulting from the speech.[202]

A potential criticism of allowing liability for negligent use of words is that no standards can be articulated that would give

---

200. *See supra* notes 54-58, 120-21 and accompanying text.

201. *See supra* notes 49-60, 88, 120-21 and accompanying text. The question not answered by the courts is what does protection mean. *Brandenburg* allows the punishment of speech as speech, which appears to be exactly what the first amendment is supposed to protect against. The real meaning of the first amendment may anticipate the imposition of liability for harm caused by speech while prohibiting the prior regulation of speech. Theodore Schroeder, a founder of and attorney for the Free Speech League stated:

> By freedom of speech I do not mean the right to agree with the majority, but the right to say with impunity anything and everything which any one chooses to say, and to speak it with impunity so long as no actual material injury results to any one, and when it results then to *punish only for the contribution to that material injury and not for the mere speech as such.*

T. SCHROEDER, FREE SPEECH FOR RADICALS 20 (1916) (emphasis added); *see also* 13 PAPERS OF THOMAS JEFFERSON 442 (J. Boyd ed. 1956) (declaration that government will never restrain press from printing anything it pleases will not take away potential liability).

These ideas are reflected in Justice Douglas's concurring opinion in *Brandenburg*. *See* Brandenburg v. Ohio, 395 U.S. 444, 450-57 (1969) (Douglas, J., concurring). Justice Douglas believed that no liability could be imposed on the speech itself under the first amendment. *Id.* at 456-57. Under the proposed standard, courts would not impose liability for the words, but for the material injury that results. The plaintiff's burden of stating and proving the four elements of negligence, *see supra* notes 11-22 and accompanying text, would preclude liability on words.

202. Courts have consistently failed to make the distinction between punishing or regulating speech as speech and imposing liability for harm caused by speech. *Cf. Herceg*, 814 F.2d at 1025-30 (Jones, J., concurring in part and dissenting in part) ("[T]ort liability would result after-the-fact, not as a prior restraint, and would be based on harm directly caused by the publication in issue."). In their attempts to protect first amendment interests, the courts applying the categorical approach adopt a position that not only denies the interests of injured parties, but also denies real power to the first amendment. Justice Stewart has stated:

> No doubt the courts would be required to make some delicate judgments in working out this accommodation. But that, after all, is the function of courts of law. Better such judgments, however difficult, than the *simplistic and stultifying absolutism adopted by the Court in denying any force to the First Amendment in these cases.*

Branzburg v. Hayes, 408 U.S. 665, 745-46 (1972) (Stewart, J., dissenting) (emphasis added).

potential defendants guidance in planning their conduct.[203] The lack of guidance would have a chilling effect on media speech, resulting in prior restraints as a result of self-censorship.[204] All negligence cases, however, involve case-by-case analyses of the particular facts[205] and are subject to the criticism that they provide inadequate guidance to potential defendants. Nonetheless, bridge builders, automobile drivers, pilots, and others whose activities inherently create risk continue to function.[206] Moreover, the negligence requirement of foreseeability of harm provides guidance not only to potential defendants in planning their actions[207] but also to potential media defendants in planning their speech.[208] For example, the requirement of foreseeability would guide the media in determining whether to give warnings against duplicating depicted

203. *See* M. NIMMER, *supra* note 28, § 2.02, at 10 (1984).

204. *See, e.g., Olivia N.*, 126 Cal. App. 3d at 494, 178 Cal. Rptr. at 892 (fear of damages may be more inhibiting than fear of prosecution under criminal statute) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964)).

205. *See supra* notes 11-22 and accompanying text.

206. The mere fact that cars are driven, bridges are built, planes are flown, and all the other occurrences of daily activity take place is evidence that fear of negligence liability does not paralyze activity. Media defendants should be no less able to foresee and protect against risk than any other potential defendant. Without the balancing of the value of the conduct and the interests to be protected, any imposition of liability would tend to reduce activity, whether the activity be that of the media or anyone else. The protections offered by balancing the interests, *see supra* notes 12-15 and accompanying text, however, acknowledge that the utility of some activity outweighs the risks created. The same balancing will work for media defendants, particularly considering that the risk must be foreseeable by a reasonable person.

207. *See supra* notes 12-15 and accompanying text. The requirement that a risk be foreseeable by a reasonable person gives guidance to potential defendants and allows them to tailor their actions to conform to the legal standards. If the risk is not foreseeable, the actor will be excused from liability because he had no duty or because the action was not a proximate or legal cause of the harm. *See supra* note 21.

208. Media defendants, like any other group or class of defendants, would be called upon merely to recognize that their actions may lead to harm and determine what, if any, protective measures are necessary or possible. Because of the strong implications of the first amendment, liability in many instances would not be allowed because no duty could be found. In cases such as *Herceg*, *see supra* notes 114-15 and accompanying text, *DeFilippo*, *see supra* notes 112-13 and accompanying text, and *Shannon*, *see supra* notes 108-09 and accompanying text, the media could easily give warnings of the dangers involved. Juries would have the responsibility of determining the adequacy of the warnings. *See supra* note 188. Cases like *Olivia N.*, *see supra* notes 110-11 and accompanying text, would probably continue to be dismissed because the utility of the conduct in terms of the first amendment outweighs the risk. *See supra* notes 185-88 and accompanying text.

conduct.[209] Imposing liability would have the salutary effect of encouraging the media to include such warnings.

Chilling effects on actions in general, however, are of less concern than chilling effects on speech because of the special place that speech occupies among constitutional protections.[210] Nevertheless, in defamation cases courts apply negligence standards[211] without significantly chilling speech. The proposed negligence standard for speech merely would require the media to exercise ordinary care with respect to the foreseeable risks of physical injury just as the media must exercise ordinary care with respect to the truth of their statements.[212]

Furthermore, in cases in which a duty analysis might not be successful in protecting against imposition of liability that improperly would chill other speech, the courts could rely on proximate cause[213] to protect future speech. For example, in a case such as *Olivia N.*,[214] a court might decide that a duty exists, but that liability would chill creative speech. The court would then conclude that, as a policy matter, the proximate cause element had not been satisfied. In applying proximate cause principles, courts should carefully analyze the potential for actual chilling effects, rather than rely on unsupported allegations that liability would chill speech.[215]

---

209. *See supra* note 177 and accompanying text.

210. *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (first amendment occupies preferred place).

211. *See supra* notes 59-78 and accompanying text. Courts apply negligence standards whether they so state, or even recognize, that they are doing so. *See supra* note 158.

212. *See supra* notes 59-78 and accompanying text.

213. *See supra* notes 19-21 and accompanying text.

214. 126 Cal. App. 3d 488, 178 Cal. Rptr. 888; *see supra* notes 110-11 and accompanying text.

215. *See* PROSSER & KEETON, *supra* note 9, § 30, at 165-69. Courts should specifically state how and why liability would chill speech and carefully distinguish the facts from similar cases.

Another potential problem in imposing negligence liability on the media is the extended liability exposure possible when publications or broadcasts, especially in the modern world of video recorders, lie dormant for some time before any harm is caused. This was one of the concerns when the strict policies of product liability law were developing, especially in light of the fact that statutes of limitations do not begin to run until injury occurs or is discovered. *Id.* at 165-66. Thus, defendants could be held liable for injuries arising years after the manufacture or sale of their product, or in the present question, after their publication or broadcast. Product liability law has solved this problem, to some extent at least, through the adoption of "statutes of repose," which, although constitutionally questionable, limit liability to a fixed period after production or sale. *See id.* at 168. Similar standards could be adopted for potential media defendants to protect them from potential time bombs. Alterna-

Courts engaging in needed change of the law often must adopt principles that are not delineated easily at first. Although flexibility may create difficulties in applying new rules, it allows courts to avoid mistakes resulting from application of rigid but unsound rules.[216] This Note's suggested approach will allow courts to analyze duty carefully, on a case-by-case basis to avoid the unsupported imposition of liability that has occurred under some courts' prior analyses.[217] Courts also should apply the suggested standards more carefully than some courts have applied traditional categorical principles to disallow recovery by plaintiffs physically injured as the result of negligent use of words.[218] The past imprecision of the courts, resulting from unwillingness to distinguish the cases factually and balance the competing interests, should not continue to bar injured plaintiffs from receiving just compensation for physical injury resulting from another's negligent use of words.

CONCLUSION

Courts in recent years have faced an increasing number of suits brought by physically injured plaintiffs alleging negligent use of words by media defendants. These plaintiffs have gone largely uncompensated because of courts' excessive concern for protecting freedom of speech. Applying the categorical analysis of identifying protected and unprotected speech under the first amendment, courts have refused to impose civil liability for protected but negligent speech. A few courts have allowed

---

tively, courts could invoke the concept of proximate cause to avoid imposing liability after the passage of a reasonable time. *See supra* notes 19-21 and accompanying text.

216. For example, recognition of new torts often meets the criticism that no standards exist for potential defendants. *See* Hubbard v. United Press Int'l, 330 N.W.2d 428, 437-39 (Minn. 1983) (adopting intentional infliction of emotional distress as independent tort and rejecting concerns that potential defendants would have no guidance, that frivolous claims would result, and that judicial process would be abused); *see also supra* note 103.

217. *See supra* notes 93-104 and accompanying text. To shift from conclusory judgments against recovery to conclusory judgments allowing recovery would be more damaging than the present tendency. The first amendment protections may not extend to all of the cases discussed in this Note, but free speech deserves strong protection, and only a case-by-case analysis and attention to the specific factual situations will protect free speech and at the same time afford plaintiffs a reasonable expectation of protection from or compensation for harm.

218. *See supra* notes 107-46 and accompanying text. The conclusory judgments of the courts applying the categorical approach rob the first amendment of any real force. *See supra* note 217.

plaintiffs to recover in negligence but have not adequately analyzed first amendment issues.

A better approach would be to apply traditional negligence principles to these cases of physical injury caused by negligent use of words and to bring the first amendment interests into this analysis. Courts should focus on the foreseeable risks and actual harm arising from the speech and the utility of the speech rather than on the category of the speech. To determine whether the defendant owed a duty to the plaintiff, courts should determine the utility of the speech on a case-by-case basis by reference to the values underlying the first amendment and then should weigh the utility of the speech against the magnitude of the foreseeable risk created. Courts should also carefully examine the issue of causation and apply principles of proximate cause to limit liability when an immediate potential exists for a chilling effect on speech. Approaching negligent use of words cases in this manner would lead to more just results, allowing plaintiffs to recover in narrowly prescribed circumstances, while at the same time providing proper protection of free speech.

Gerald R. Smith