Digital Commons @ LMU and LLS

Loyola Marymount University and Loyola Law School
Digital Commons at Loyola Marymount University and Loyola Law School

Loyola of Los Angeles Entertainment Law Review

Law Reviews

1-1-2000

Catchin' the Heat of the Beat: First Amendment Analysis of Music Claimed to Incite Violent Behavior

Robert Firestre

Kendall T. Jones

Recommended Citation

Robert Firestre and Kendall T. Jones, *Catchin' the Heat of the Beat: First Amendment Analysis of Music Claimed to Incite Violent Behavior*, 20 Loy. L.A. Ent. L. Rev. 1 (2000).
Available at: http://digitalcommons.lmu.edu/elr/vol20/iss1/1

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

CATCHIN' THE HEAT OF THE BEAT: FIRST AMENDMENT ANALYSIS OF MUSIC CLAIMED TO INCITE VIOLENT BEHAVIOR

*Robert Firester and Kendall T. Jones**

Cops on my tail, so I bail till I dodge them,
They finally pull me over and I laugh,
Remember Rodney King
And I blast his punk ass
Now I got a murder case...
...What the [f--k] would you do?
Drop them or let them drop you?
I choose droppin' the cop![1]

I. INTRODUCTION

Songs containing strong anti-police messages, replete with accompanying gunshot and siren noises, blasted through the head of Ronald Ray Howard on the evening of April 11, 1992 as he drove a stolen Chevrolet Blazer through Texas.[2] When Texas State Trooper Bill Davidson pulled Howard over to issue him a ticket for a missing headlight, Howard claimed he

---

*Robert Firester is an Associate Professor of Law at John Marshall Law School, Atlanta, Georgia; J.D., Hofstra University School of Law, 1990, B.S., M.I.T., 1981. Kendall Jones is a practicing attorney in Atlanta, Georgia; J.D., Vanderbilt School of Law, 1995; B.A., University of Virginia, 1989. We thank David B. Meltz, Dean Emeritus at John Marshall Law School and Frank Kralicek, Graduate Assistant and student at John Marshall Law School for their assistance.

1. TUPAC AMARU SHAKUR, *Soulja's Story*, *on* 2PACALYPSE NOW (Jive Records 1992). The album contains half a dozen songs telling stories of violence by and toward police. The album jacket contains the following inscription: "[F--k] all Police, Skinheads, Nazi whatever!!" TUPAC AMARU SHAKUR, 2PACALYPSE NOW (Jive Records 1992).

2. Chuck Philips, *Texas Death Renews Debate Over Violent Rap Lyrics*, L.A. TIMES, Sept. 17, 1992, at A1. Howard's lawyer described Howard to the jury as a "'rap addict who lived, breathed and worshipped' the violent lifestyle portrayed in gangsta rap." Chuck Philips, *Rap Defense Doesn't Stop Death Penalty*, L.A. TIMES, July 15, 1993, at F1 [hereinafter Philips, *Rap Defense*].

"just snapped."[3] He loaded his nine-millimeter pistol and shot and killed Davidson.[4]

In the sentencing phase of Howard's capital murder trial, he blamed "gangsta rap"[5] for influencing his behavior.[6] Although Howard was sentenced to death, many jury members believed the music affected Howard's action.

The alleged influence of Tupac Shakur's music upon Howard had become the basis of a multi-million dollar lawsuit filed by Davidson's widow against Shakur's estate, Shakur's record label Interscope Records, and the label's former parent company, Time Warner.[7] In the complaint, Mrs. Davidson accused Shakur and the companies that marketed Shakur's music of gross negligence in manufacturing and distributing music that incites "imminent lawless action."[8]

Mrs. Davidson's lawsuit raised serious First Amendment questions. Although First Amendment protection of artistic expression is generally recognized, is it absolute? Could gangsta rap fall into the category of "political speech" and thereby receive the highest level of judicial protection? Could a court interpret the very exacting "incitement" doctrine in a way that some "gangsta rap" songs, and other music claimed to incite lawlessness, could lose First Amendment protection? What would be the implications of a court decision that abrogates First Amendment protection for a given song and imposes liability upon the artist and his or her producers for any harm resulting from the song's "incitement?"

This Article attempts to answer these questions.[9] First, this Article defines "political speech" and analyzes the virtually absolute First

---

3. Philips, *Rap Defense*, *supra* note 2, at F1.

4. *Id.*

5. "Gangsta rap" is a popular genre of rap music which reflects the violent, often angry lives of black inner-city youths. *Newsweek* magazine described gangsta rap as "selling images of black-on-black crime to mainstream America." John Leland, *Criminal Records*, NEWSWEEK, Nov. 29, 1993, at 60, 63. *Billboard* magazine referred to conduct associated with gangsta rap as "an antisocial exercise in self-delusion [leading] to the death of conscience, the corruption of the spirit, and ultimately the destruction of the individual and community." *Culture, Violence and the Cult of the Unrepentant Rogue*, BILLBOARD, Dec. 25, 1993, at 5, 108.

6. Howard specifically identified Tupac Shakur's music from his album *2pacalypse Now* as the major impetus for his actions. See Philips, *Rap Defense*, *supra* note 2, at F1.

7. *See* Davidson v. Time Warner, Inc., 25 Media L. Rep. 1705 (S.D. Tex. 1997); *see also* Chuck Philips, *Testing the Limits*, L.A. TIMES, Oct. 13, 1992, at F1.

8. Plaintiff's Complaint at ¶ XI, Davidson v. Time Warner, Inc., No. Civ. A. V-94-006 (D. Tex. Filed Dec. 1, 1993) (complaint on file with *Vanderbilt Law Review*). Mrs. Davidson's lawyer stated, "[i]t is time giant corporations were stopped from shamelessly making money off music designed to incite impressionable young men to shoot and kill cops." Geordie Greig, *American Widow Sues for 'Murder Under the Influence of Rap'*, SUNDAY TIMES (London), Oct. 25, 1992, at 22.

9. This article only deals with music claimed to incite violence, focusing on gangsta rap. It does

Amendment protection traditionally applied to such speech. This Article further explores the ramifications of recent Supreme Court opinions that appear to abrogate the high level of constitutional protection traditionally afforded political speech.

Second, this Article explains how the advocacy-incitement doctrine fits into the construct of First Amendment protection for political speech. It examines the "clear and present danger test" for unlawful incitement and the First Amendment values reflected within such a test. It further explores varying interpretations of the Supreme Court's most recent version of the "clear and present danger" test, as set forth in *Brandenburg v. Ohio.*[10]

Third, this Article reviews past applications of the advocacy-incitement doctrine in cases where plaintiffs claimed to have been victimized by violent acts allegedly incited by some form of entertainment. It reconciles prevailing interpretations of the current *Brandenburg* test with the holdings in those cases. This Article then extracts the crucial factors that assist courts in determining whether speech constitutes unlawful incitement or lawful advocacy.

Fourth, this Article argues many gangsta rap lyrics constitute political speech. However, the application of current interpretations of the clear and present danger test to gangsta rap demonstrates that, based on the facts of a given case and the respective court's interpretation of the standard, a court could arbitrarily hold some gangsta rap songs constitute unlawful incitement. Such a holding would justify civil liability under traditional tort law against the rap artist and producer for any harm resulting from that incitement. This result would be likely if a trial court were to interpret recent Supreme Court holdings as applying a less stringent standard than is traditionally applied to political speech.

Finally, this Article discusses the problems resulting from a finding of liability, including the threat of overinclusive censorship. Altogether, courts must hold steadfast to traditional First Amendment standards in analyzing musical lyrics that constitute political speech in order to preserve the integrity of First Amendment freedom. A traditional analysis requires a return to the strict interpretation of the *Brandenburg* test and vehement judicial protection of radical and anti-establishment speech.

---

not deal with music containing obscenity or profanity. Furthermore, this article chiefly addresses the First Amendment ramifications of finding musicians civilly liable for injuries resulting from alleged incitement to violence. Therefore, while portions of this article may apply to any method of restricting certain categories of music, the entirety only applies to the imposition of civil damages in a given case.

10. 395 U.S. 444 (1969).

II. POLITICAL SPEECH AND THE FIRST AMENDMENT

In First Amendment jurisprudence, courts and scholars have recognized a hierarchy of constitutionally protected speech.[11] At the top of this hierarchy rests "political speech."[12] The cases establish a clear paradigm that provides for absolute protection of any speech supporting or promoting a political position, activity or change, regardless of its specific content.[13] Political speech distinctly includes challenges to the status quo—advocacy of the notion that current societal, governmental, and political practices and policies are misguided or inaccurate. "Political speech" is not limited to literal campaign or governmental rhetoric. Courts have interpreted political speech to encompass any kind of speech that addresses societal values and actually evokes action.[14] Moreover, the First Amendment *especially* protects speech that expresses unpopular ideas and beliefs.[15] The Supreme Court emphasizes

---

11. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565–66 (1991) (suggesting nude dancing performed as expressive conduct lies in the "outer perimeters of the First Amendment"); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1020 (1987) (noting information in a Hustler magazine article would be subject to less than strict scrutiny because the type of protected speech it encompasses merits less than absolute protection); Young v. American Mini Theatres, 427 U.S. 50, 70–71 (1976) (holding adult films may receive a different, lesser classification of protection than afforded other expression); *see also* Sheldon H. Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WIS. L. REV. 221.

12. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (citing Roth v. United States, 354 U.S. 476, 484 (1957)) ("The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"); *see* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Mills v. Alabama, 384 U.S. 214, 219 (1966) ("Suppression of the right . . . to clamor and contend for or against change . . . muzzles one of the very [rights] the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); *see also* Connick v. Myers, 461 U.S. 138, 145 (1983).

13. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." *Id.*; *see also* Hess v. Indiana, 414 U.S. 105, 108 (1973); Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969); McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Ct. App. 1988).

14. *See generally* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (stating pornography would normally constitute mere commercial speech, and thus be subject to less constitutional protection than traditional political speech). By suggesting pornography had the power to make the audience *act*, the proponents of a ban against pornographic theaters defeated their own claim by essentially calling the pornography "political speech." *See generally id.*

15. *See, e.g.*, Street v. New York, 394 U.S. 576, 592 (1969) (holding speech does not fall outside First Amendment protection "merely because the ideas are themselves offensive to some of their hearers"); NAACP v. Button, 371 U.S. 415, 445 (1963) (observing the First Amendment protects speech regardless of "the truth, popularity, or social utility of the ideas and beliefs which are offered"); DeJonge v. Oregon, 299 U.S. 353, 365 (1937) (noting radical and even dangerous ideas must be tolerated in a democratic society).

the need to shelter advocacy—particularly advocacy of unpopular or offensive political speech—because such advocacy is the handmaiden of democracy.[16] Without freedom to advocate change, societies cannot progress and representative systems fail to function as planned.[17] The Supreme Court has frequently reiterated the necessity for an "open marketplace of ideas,"[18] that must neither be sacrificed nor compromised by the suppression of anti-government expression.

Despite this compelling doctrine of absolute protection for pure political speech, the Supreme Court has applied a lesser degree of protection to political speech in two cases. In *Burson v. Freeman*[19] and *R.A.V. v. City of St. Paul*,[20] the Court allowed countervailing governmental interests to outweigh First Amendment claims in a manner inconsistent with the traditional absolute protection paradigm.[21] This lesser standard has not yet been fully explored, nor has it been put to a strenuous constitutional test. However, some judges may interpret *Burson* and *R.A.V.* as binding authority for every case involving political speech.

---

16. Cohen v. California, 403 U.S. 15, 24 (1971) (stating "such freedom will ultimately produce a more capable citizenry and more perfect polity . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."). Advocacy of change, for example, fosters "a certain type of citizen (one unafraid of change) necessary for democratic self-governance." *Id.*; *see also* Tom Hentoff, Note, *Speech, Harm and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1467 (1991).

17. Free speech and the ability to challenge the majority is so essential to proper functioning of the democratic, majoritarian system the framers created, that protection of that speech is of the highest systemic concern. Consider this famous dictum of Justice Holmes:

> [M]en have come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

18. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas."); *see also* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

19. 504 U.S. 191 (1992).

20. 505 U.S. 377 (1992).

21. A detailed discussion of the lesser standards utilized in *Burson* and *R.A.V.* is beyond the scope of this article. It is not yet clear that the lesser standard would apply to all cases involving political speech, or even to any case which does not have the specific fact patterns of *Burson* and *R.A.V.* However, the existence of the lesser standard is important to note, because a court might seize upon it as "the new standard," and apply it to a case focusing on gangsta rap. Such a test would likely prove fatal to gangsta rap and any political speech in its genre. *See infra* Part V. For a more detailed analysis of the standards used in *Burson* and *R.A.V.*, *see* George A. Size & Gibana R. Britton, *Is There Hate Speech?:* R.A.V. *and* Mitchell *in the Context of First Amendment Jurisprudence*, 21 OHIO N.U. L. REV. 913 (1995).

III. THE ADVOCACY-INCITEMENT DOCTRINE

Traditional constitutional jurisprudence permits suppression of political speech only when that advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[22] Speech that advocates imminent lawlessness falls outside the protective ambit of the First Amendment because such speech contravenes the systemic values the First Amendment protects.[23] At times, there exists only a fine line between lawful, protected "advocacy" and unlawful, unprotected "incitement."[24] In *Brandenburg v. Ohio*,[25] the Supreme Court attempted to demarcate the defining characteristics of lawful advocacy versus those of unlawful incitement. The court distinguished mere advocacy from incitement that actually prepares and inspires a group or individual to take such action.[26]

A. The Brandenburg *Test*

In order to define speech appropriately labeled "incitement," and thereby deny First Amendment protection, the Court originally developed the "clear and present danger" test.[27] The test's current application under

---

22. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Some scholars have honed this definition, defining incitement as the advocacy of purely political or ideological crimes committed to be imminently. *See, e.g.*, Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1181 (1982).

23. The Supreme Court has justified its creation of narrow exceptions to First Amendment protections including an exception for speech that incites illegal conduct. The speech categorized within the exceptions creates discordant chaos and social disorder without contributing any reciprocal benefit to the marketplace of ideas. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

24. *See* Dennis v. United States, 341 U.S. 494, 572 (1951) (Jackson, J., concurring). Justice Jackson noted "it is not always easy to distinguish teaching or advocacy in the sense of incitement from teaching or advocacy in the sense of exposition or explanation. It is a question of fact in each case." *Id.*

25. 395 U.S. 444 (1969).

26. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (construing Noto v. United States, 367 U.S. 290, 297–98 (1961)). "[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action." *Id.* at 448.

27. The clear and present danger test has had a rocky development. Justice Holmes first mentioned the test in *Schenck v. United States*, 249 U.S. 47, 52 (1919), but the test was apparently an evidentiary test. *See* Frank R. Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41, 42. The Court did not afford the "clear and present danger test" constitutional status until much later, after a series of concurring and dissenting opinions by Justices Holmes and Brandeis. Even then, the test was revised until *Brandenburg*, which represents the last formulation by the Supreme Court in this area. *Id.*

Brandenburg holds two requirements. First, in order to constitute unlawful incitement, the speech must be "*directed to* inciting or producing *imminent* lawless action."[28] Second, the speech must be "*likely to* incite or produce such action."[29] Therefore, when applying the test, a court must determine 1) the speech was explicitly or implicitly designed to encourage the occurrence of the unlawful act; 2) the unlawful act sanctioned by the speech was a likely and foreseeable[30] result of the speech; and 3) the speech was directed to incite, and likely to result in, *imminent* illegal conduct.[31]

B. Interpretation of the Brandenburg *Test*

The Supreme Court has repeatedly revised the test for unlawful advocacy.[32] In addition, the test has borne varying interpretations among First Amendment scholars. Therefore, a brief survey of the prevailing theories is necessary to correctly apply the test.

1. "Directed to" Inciting Unlawful Conduct

At first glance, this requirement of the *Brandenburg* test appears to seek out the speaker's *specific intent* to incite unlawful conduct. However, many courts and scholars agree, the First Amendment protects almost all speech regardless of intent because only speech which presents a *real* threat of *true* harm justifies invocation of the test.[33] Nevertheless, *Brandenburg* does require some showing of intent, whether explicit or implicit, in conjunction

---

28. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasis added).

29. *Id.* (emphasis added).

30. Foreseeability tends to aid the court in determining whether speech would likely result in the violent act advocated. *See generally* Peter D. Csathy, *Takin' The Rap: Should Artists Be Held Accountable for Their Violent Recorded Speech?*, COMM. LAW, Spring 1992, at 7, *available in* WESTLAW, JLR database.

31. The "imminence" requirement has received much attention and varying interpretations. *See infra* notes 61–73 and accompanying text. Although not an "official" requirement of the *Brandenburg* test, the *gravity of the unlawful conduct advocated* often plays a role in determining whether certain speech constitutes incitement. The more grave the danger incited by speech, the higher the state interest is in preventing and suppressing the danger. *See, e.g.*, Whitney v. California, 274 U.S. 357, 377–78 (1927) (Brandeis, J., concurring) ("[E]ven imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious."); *see also* Redish, *supra* note 22, at 1180 (noting that "if the substantive evil involves violence to persons, it is only reasonable that society will be less willing to risk that ultimate consequence than when the 'evil' in question is illegal by walking on the grass."). This article does not specifically address this issue because the conduct allegedly incited by most gangsta rap generally constitutes serious crime.

32. *See supra* note 27 and accompanying text.

33. *Id.*

with the other requirements of the test in order to justify revocation of First Amendment protection.[34]

Intent, based on whether the speech is "directed to" inciting unlawful conduct[35] can be demonstrated in several ways. First, direct, as opposed to indirect, advocacy of the illegal conduct demonstrates intent to incite specific lawless action.[36] Direct advocacy is manifested in the speaker's explicit urging of the listener to commit a certain act.[37] Such an urging raises a presumption that the speaker intended the act to occur.[38] While indirect advocacy may lead someone to commit a crime, the absence of clarity and direction by the speaker generally would not expose such speech to annulment of First Amendment protections. To deny protection to indirect advocacy would sweep aside constitutional boundaries and approach a state of unlawful censorship and subordinate First Amendment values to remote concerns of possible indirect injuries or harms.[39] This is the very essence of censorship.

The requirement that speech be directed to inciting illegal acts can also be demonstrated by a high level of specificity in the speech.[40] Ambiguous speech presents no clear threat of real harm. It therefore warrants full First Amendment protection. The Supreme Court exemplified this point in *Hess v. Indiana*,[41] in which the defendant was charged with incitement for allegedly saying, "We'll take the [f-----g] street later,"[42] while police were attempting to clear the street. The statement was not directed toward any specific individual or group[43] nor directed to any specific time or method of "taking the street." The very ambiguity of the words used defeated the specific intent requirement.[44] The Court accordingly held the ambiguity of the statement sheltered it from any challenge to First Amendment protection.[45]

---

34. *See* Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 947 n.205 (1978).

35. Redish, *supra* note 22, at 1178.

36. *See id.* Martin Redish provides an example that distinguishes direct and indirect advocacy: "[Y]ou should kill that cop" represents direct advocacy, while "that cop harassed me yesterday" reflects a statement of indirect advocacy, either of which could lead to an unlawful act. *Id.*

37. *See id.*

38. *See id.*

39. *Id.*

40. *See* Hess v. Indiana, 414 U.S. 105, 108–109 (1973).

41. *Id.*

42. *Id.* at 107.

43. *See id.*

44. *See* Csathy, *supra* note 30.

45. *See Hess*, 414 U.S. at 109.

2. Likelihood of Unlawful Conduct

This requirement has previously received much less attention. As with all aspects of the *Brandenburg* test, the requirement is strongly fact-driven.[46] Although not conclusive, the actual occurrence of a harm similar to that advocated in the speech ordinarily indicates the specific harm was likely to occur. In *NAACP v. Claiborne Hardware Co.*,[47] the speaker called for a boycott of white merchants in an effort to achieve racial equality[48] and threatened any listener who did not join the boycott.[49] The Supreme Court held the speech merited strong First Amendment protection and stressed that directly after the speech was made, no violence actually ensued.[50] Understandably, if lawless action does follow the speech, the fact-finder may more easily conclude the speech would likely incite such behavior.[51] However, this argument may be fatally flawed because it displaces the emphasis of the test. Once a court determines actual lawless action indicates likelihood, the test changes focus—from the expression itself to reaction to the expression.[52] In order to ensure the test properly examines the constitutionality of the language, other factors must be used.

The foreseeability of unlawful conduct incited by otherwise protected speech leads to the likelihood requirement.[53] In *Weirum v. RKO General, Inc.*,[54] a rock radio station with a large teenage following conducted a live radio contest that urged its young listeners to engage in a street race in order to win prizes for being the first to locate a disc jockey who was driving around town.[55] One of the minors, while chasing the disc jockey, negligently

46. Redish, *supra* note 22, at 1184.

47. 458 U.S. 886 (1982).

48. NAACP v. Clairborne Hardware Co., 458 U.S. 886, 899 (1982).

49. The speaker stated, "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902.

50. *See Claiborne*, 458 U.S. at 928. The lawsuit alleged the speech led to several acts of violence and an unlawful boycott. *Id.* However, these acts did not occur at or sufficiently close to the time of the speech to warrant a finding of "incitement." *Id.* Since the speech did not meet the requirements of the *Brandenburg* test, the Court treated it as political speech and stated, "[w]hen such appeals do not incite lawless action, they must be regarded as protected speech." *Id.*

51. The Court stated "[i]f the speech, which included strong language, had been followed by acts of violence, a substantial question would be presented whether [the speaker] could be held liable for the consequences of that unlawful conduct." *Id.* at 928. The Court believed speech advocating bad acts, followed immediately by those acts, would increase the likelihood of finding unlawful incitement. *Id.*

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

53. *See, e.g.*, Csathy, *supra* note 30.

54. 539 P.2d 36 (Cal. 1975).

55. Weirum v. RKO General, 539 P.2d 36, 43 (Cal. 1975).

killed the driver of a vehicle.[56] The California Appellate Court imposed liability and held the sense of urgency conveyed by the broadcaster created an unreasonable risk of harm to its young listeners.[57] The court also held it was foreseeable that an accident would occur as a result.[58] Foreseeability will be measured by the facts and circumstances of each case. For example, if the speaker targets an individual or a group prone to violent behavior and vulnerable to outside influences that might exacerbate such violent proclivity, it may be highly foreseeable that certain speech will likely incite unlawful conduct.

3. Imminence: The Threshold Requirement

Most scholarly writing on the *Brandenburg* test has focused on the imminence requirement.[59] These scholars often criticize courts for never having clearly defined imminence.[60] This criticism has created two separate interpretations of imminence. First, most scholars citing *Brandenburg* and the Brandeis-Holmes concurrence in *Whitney v. California*,[61] narrow imminence to "temporal imminence." In their view, speech only equals unlawful incitement if immediately upon its utterance, the incited unlawful activity ensues. Justice Brandeis justified this very strict requirement as fostering the "open marketplace of ideas"[62] by acknowledging the power of counterspeech[63]—speech reflecting an opposing viewpoint from the speech in question offered to correct the fallacies of the initial speech.[64] If there is time for curative counterspeech between the inciting speech and the unlawful

---

56. *Id.*

57. *Id.* at 47. Although *Weirum* does not mention the *Brandenburg* test, the case has traditionally been discussed in other incitement cases. *See, e.g.*, McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 195 (Ct. App. 1988); Olivia N. v. National Broad. Co., 178 Cal. Rptr. 888 (Ct. App. 1981). Professor David Anderson of the University of Texas School of Law stated *Weirum* would be a viable precedent for the *Davidson* case, discussed *supra* Part I. *See* Janet Elliot, *Slain Trooper's Family Seeks Damages from Rapper*, LEGAL TIMES, July 26, 1993, at 10.

58. *Weirum*, 539 P.2d at 47.

59. *See, e.g.*, Redish, *supra* note 22, at 1180–81. *See generally* Note, *Modern-Day Sirens: Rock Lyrics and the First Amendment*, 63 S. CAL. L. REV. 777 (1990); Tom Hentoff, Note, *Speech, Harm and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453 (1991); Jon C. Wolfe, Comment, *Sex, Violence and Profanity: Rap Music and the First Amendment*, 44 MERCER L. REV. 667 (1993).

60. For an illustration of how courts have treated this requirement differently, *see* Redish, *supra* note 22, at 1166–76, 1180–82.

61. 274 U.S. 357 (1927).

62. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

63. *Id.*

64. *See Whitney*, 274 U.S. at 377. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Id.*

conduct it incites, then the conduct cannot occur imminently. Only when violent acts are so imminent there is no time for response and discussion and thus no chance for the truth to prevail can speech be suppressed.[65] Using this temporal interpretation, the *Brandenburg* test is nearly impossible to meet. Moreover, in virtually every case where it has been applied, the speech has been protected.[66]

Professor Redish has proposed a more flexible interpretation of the imminence requirement. He would use a balancing test, contrasting the state's interests in preventing harm to itself and its citizens with the constitutional interest in protecting freedom of expression.[67] For example, if the state's interests are extraordinarily high and the violence threatened is substantially serious, it is much more likely that such violence will occur. This approach places more weight on the gravity of the potential harm than on the necessity for strict temporal imminence.[68] Imminence thus loses its temporal element and bows to the strength of other factors that indicate a strong likelihood of incitement.[69] Applying Redish's broad balancing procedure, direct and forceful advocacy of a very serious offense can and should be suppressed without a strong showing of imminence.[70] However, in the case of indirect advocacy of a lesser offense, much stronger proof of

---

65. Some scholars, in challenging the viability of this concept, note that the exigencies of any given situation may destroy the effectiveness of this theory. *See* Redish, *supra* note 22, at 1162. "There may be inadequate time or opportunity for response, the 'false' speech may be more persuasively phrased, or the audience may simply not be sufficiently sophisticated or sufficiently interested to ascertain the difference [between the true speech and the false speech]." *Id.*

66. *See* Tom Hentoff, Note, *Speech, Harm and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1457 (1991) (noting between 1937 and 1951, the Supreme Court used the "clear and present danger test" only three times to restrict speech, and the Supreme Court has never invoked the *Brandenburg* formulation to restrict speech); *see also* Peter Alan Block, Note, *Modern-Day Sirens: Rock Lyrics and the First Amendment*, 63 S. CAL. L. REV. 777, 797 n.124 (1990).

67. *See* Redish, *supra* note 22, at 1180.

68. *See id.* at 1180–81. "[R]equiring true imminence in every case is unrealistic and unduly insensitive to society's legitimate interest in self-protection . . . [a] stringent imminence standard unduly restricts authorities' ability to deter criminal conduct." *Id.*

69. *See id.* at 1183, n.98. For example:

> in the area of judicial contempt, it would seem that the words of the clear and present danger formula do not lend themselves to a thorough analysis of all the competing factors. Perhaps a standard which asks whether the speech in question was highly likely to cause severe disruption of the judicial process or to the rights of the litigants to a fair trial would more accurately focus the court's attentions.

Id.

70. *See id.*

imminence is required to suppress the possible offense.[71] This is an interpretation of Learned Hand's test expressed in *Dennis v. United States*.[72]

Redish's approach may be criticized for being so flexible that it compromises the sanctity of First Amendment values. The Framers established the First Amendment to protect unpopular or radical expression from government suppression as long as such expression did not present a clear and present danger.[73] Protection of political speech must remain absolute in order to maintain the inalienable freedoms inherent in the Constitution. Without the open marketplace of ideas and the free exchange of expression, a free society will ultimately fail. Redish directly undermines this constitutional principle by allowing government the power to determine which speech should be suppressed based on its view of societal interests. This is precisely the evil that the constitutional Framers sought to avoid in creating the First Amendment. In order to afford political speech the protection required by the Constitution, a stricter interpretation of imminence is necessary.

Under either interpretation, the outcome in any given case depends heavily on its facts and the propensity of the court. Regardless of whether the court takes a strict or broad approach to the *Brandenburg* test, the test remains quite strenuous. The test is necessarily speech-protective because freedom of speech is so central to the Constitution and to the concept of democracy. To protect the sanctity of that freedom and prevent it from eroding, courts must begin the *Brandenburg* analysis with the strong presumption that political speech merits the highest First Amendment protection. Additionally, to further guarantee the protection of free speech, the burden of proof must lie with the party attempting to revoke First Amendment protection.[74]

IV. HISTORICAL APPLICATION OF INCITEMENT THEORY TO MUSIC AND SIMILAR FORMS OF ENTERTAINMENT

In recent years, several plaintiffs have claimed that music, television and other forms of entertainment have incited violent behavior, directly causing personal injury to themselves or their loved ones.[75] These claims have gained

---

71. *See id.* at 1181–82.

72. Dennis v. United States, 341 U.S. 494, 510 (1951) (citing United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).

73. *See id.* at 520–521.

74. *See* F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 133 (1982).

75. *See, e.g.*, Watters v. TSR, Inc., 904 F.2d 378 (6th Cir. 1990) (holding the game "Dungeons and Dragons" did not incite a young boy to commit suicide); Herceg v. Hustler Magazine Inc., 814 F.2d 1017, 1027 (5th Cir. 1987) (holding a magazine article describing "autoerotic asphyxiation" did not incite a young man to perform the act); Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991),

little success.[76] Before examining the exemplary cases, we note courts have clearly afforded music general First Amendment protection.[77] Thus, musical lyrics presumptively do not constitute unlawful incitement. Therefore plaintiffs face a substantial burden when attempting to prove incitement. This example explains why very few litigants have succeeded in establishing that entertainment has incited violent behavior.[78]

A. The Suicide Cases

In the past decade, three notable cases arose where plaintiffs blamed heavy metal music for inciting the suicides of their sons. In *McCollum v.*

---

aff'd, 958 F.2d 1084 (11th Cir. 1992) (holding rock musician Ozzy Osbourne's music did not incite a young man to commit suicide); Vance v. Judas Priest, 16 Media L. Rep. 2241 (Nev. Dist. Ct. 1989) (holding the music of the band Judas Priest did not incite suicide); Zamora v. Columbia Broad. Sys., 480 F. Supp. 199 (S.D. Fla. 1979) (holding the television network's violent programming did not incite a boy to shoot his neighbor); McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Ct. App. 1988) (holding the music of Ozzy Osbourne did not incite a young man to commit suicide); Bill v. Superior Court, 187 Cal. Rptr. 625 (Ct. App. 1982) (noting the violent movie *Boulevard Nights* did not incite an audience member to shoot another audience member outside the theatre, and holding the movie producer did not have a duty to protect the plaintiff from audience members who were predisposed to violence); Olivia N. v. National Broad. Co., 178 Cal. Rptr. 888 (Ct. App. 1981) (holding the television movie *Born Innocent* did not incite the plaintiff's assailants to rape her in the manner depicted in the movie); Phillips v. Syufy Enter., 20 Media L. Rep. 1199 (Cal. Super. Ct. 1992) (holding that the movie *Boyz In The Hood* did not constitute incitement); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) (finding the violent gang movie, *The Warriors*, did not incite an audience member to stab a young man); DeFilippo v. National Broad. Co., Inc., 446 A.2d 1036 (R.I. 1982) (holding the First Amendment barred parents' suit against broadcasting company when their child died from imitating a hanging stunt performed on *The Tonight Show* with Johnny Carson).

76. *See supra* note 66.

77. *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."); Vance v. Judas Priest, 16 Media L. Rep. 2241, 2244 (Nev. Dist. Ct. 1989) ("Music, lyrics and videos, and the values which they promote . . . are protected by the First Amendment."); Olivia N. v. National Broad. Co., 141 Cal. Rptr. 511 (1977) ("Material communicated by the public media . . . is generally to be accorded protection under the First Amendment to the Constitution of the United States.").

78. However, in 1998, two courts seemingly became more flexible in allowing claims against movie producers to go forward. In Beasley v. State, 502 S.E.2d 235, 238 (Ga. 1998), the Georgia Supreme Court allowed the movie *Natural Born Killers* (Warner Bros. 1994) to be shown in its entirety to the jury in an attempt to determine Beasley's "bent of mind." Also, in *Byers v. Edmondson*, 712 So. 2d 681 (La. Ct. App. 1998), the Court of Appeal of Louisiana held the victim of an assault stated a viable cause of action against the producers of the movie *Natural Born Killers*. *Id.* at 691. Although the court did not decide the merits of the First Amendment defense by the defendant producers, it held the claims alleged by the plaintiff brought the case into the incitement exception to the First Amendment. *Id.* Additionally, a murder and an attempted murder have been found to have been inspired by the movie *Scream* (Dimension Films 1996). *See* Linda Deutsch, *No Screaming Allowed, Judge Issues a Gag Order*, CHI. SUN-TIMES, July 4, 1999, at 8; *Teen Gets 45 Years for Attacking Couple*, DALLAS MORNING NEWS, Dec. 22, 1998, at 10A.

CBS, Inc.[79] and *Waller v. Osbourne*,[80] plaintiffs claimed that Ozzy Osbourne's song "Suicide Solution"[81] led their respective sons to kill themselves. Each plaintiff claimed along with the overall advocacy of suicide in the song, certain masked lyrics directly encouraged the listener to, "[g]et the gun and try it. Shoot, shoot, shoot."[82] Both courts determined the song did not constitute unlawful incitement.[83] The *Waller* court noted the song was not intended to produce acts of suicide, nor was it likely to cause such acts.[84] The *McCollum* court reached similar findings, holding beyond the alleged subliminal lyrics, no portion of the song constituted any kind of specific command.[85] Neither court felt the "subliminal" message claim carried enough weight to justify a finding of incitement.[86] Furthermore, the *McCollum* court held poetic devises used in music could not cause a rational person to interpret music as a directive such that it would comprise incitement.[87] Additionally, both courts noted the boys had emotional problems and ultimately weakened any plaintiffs' claims that the music, rather than other intervening factors, caused the suicides.[88]

---

79. 249 Cal. Rptr. 187 (1988).

80. 763 F. Supp. 1144 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir. 1992).

81. "Suicide Solution" advocates suicide as a viable option for those involved in excessive alcohol consumption. *McCollum*, 249 Cal. Rptr. at 191 n.5.

82. *Id.*

83. The *McCollum* case was dismissed. *McCollum*, 249 Cal. Rptr. at 198. The *Waller* court granted summary judgment for the defendants. *Waller*, 763 F. Supp. at 1144. Note neither court specifically stated the lyrics constituted political speech. In fact, an excellent argument exists that the advocacy of suicide lacks the kind of urging for political or social change or awareness which generally encompasses political speech. Arguably, the mere fact that the advocacy allegedly invoked the act of suicide elevated the speech to a higher level of protection, which explains the court's application of the incitement doctrine. *See generally* analysis in *American Mini Theatres*, *supra* note 14.

84. *Waller*, 763 F. Supp. at 1151. The court also noted the song was not specifically directed at any person or group of persons, and that no person could rationally infer the song as inciting suicide. *Id.* In applying the *Brandenburg* test, these factors demonstrate intent and likelihood, respectively.

85. *McCollum*, 249 Cal. Rptr. at 194.

86. *See, e.g.*, *Waller*, 763 F. Supp. at 1148–50.

87. *McCollum*, 249 Cal. Rptr. at 194. "No rational person would or could believe [that musical lyrics are anything more than figurative expressions] nor would they mistake musical lyrics and poetry for literal commands or directives to immediate action." *Id.*

88. *Id.* at 189 (describing one of the young men as having "a problem with alcohol abuse as well as serious emotional problems."); *Waller*, 763 F. Supp. at 1145 n.1 (depicting the plaintiffs as "troubled adolescents"). In both cases, the plaintiffs claimed Ozzy Osbourne knew his audience primarily consisted of troubled teens who were "extremely susceptible to the external influence and directions from a cult figure such as Osbourne." *McCollum*, 249 Cal. Rptr. at 190. The plaintiffs argued because Osbourne knew these characteristics of his audience, injuries resulting from directives in his songs were foreseeable. The court held in favor of defendants because the plaintiffs did not prove Osborne's audience consisted primarily of troubled teens and because the song did not contain actual "command[s]." *Id* at 189, 194.

In *Vance v. Judas Priest*,[89] the plaintiffs claimed Judas Priest's song "Better by You, Better Than Me"[90] contained subliminal messages that incited two young men to attempt suicide.[91] Rejecting the plaintiffs' claim, the court ruled that subliminal messages were not entitled to First Amendment protection.[92] In addition, the court held intervening factors, rather than the song itself, caused the deaths.[93]

In these "suicide cases," the claims that subliminal messages primarily caused incitement to suicide severely weakened the plaintiffs' cases. As in *Vance*, the courts have made clear music is generally protected under the First Amendment, and absent direct language encouraging the suicides or other aggravating factors, no finding of incitement is justified.[94]

B. Other Cases Involving Claims of Incitement by the Media

A number of plaintiffs have claimed certain forms of entertainment incite violent acts.[95] Few have made a particularly strong impact in the entertainment and legal worlds. In *Zamora v. Columbia Broadcasting System*,[96] a case presenting one of the first claims that entertainment had incited violent behavior, the plaintiff was a minor who claimed he had become "involuntarily addicted to and 'completely subliminally intoxicated by the extensive viewing of television violence broadcast by the major television networks.'"[97] The plaintiff, who shot and killed an elderly neighbor, claimed the networks' negligent programming incited him to commit murder.[98] However, because the plaintiff did not specify any

89. 16 Media L. Rep. 2241 (Nev. Dist. Ct. 1989).

90. JUDAS PRIEST, *Better by You, Better Than Me*, *on* STAINED CLASS (Columbia 1978).

91. *Vance*, 16 Media L. Rep. at 2244. The two young men had been drinking beer and smoking pot all afternoon. *Id.* Suddenly falling into a fit of violence, they ran out to a church playground with a sawed-off shotgun and each shot himself under the chin. *Id.* One young man died instantly; the other died three years later due to complications. *Id*; *see also*, Chuck Philips, *Trial to Focus on Subliminal Messages in Rock*, L.A. TIMES, July 16, 1990, at F1.

92. *Vance*, 16 Media L. Rep. at 2247–49. In fact, the court held the plaintiffs could neither prove the band had intentionally placed the messages on the album, nor the alleged messages caused the death of the two "troubled young men." *Id.* at 2256.

93. The court noted the two young men had problems with drugs, alcohol, school, family, and work, and in light of these intervening problems, the music was not a "substantial factor" leading to the boys' suicide. *Id.* at 2256–57.

94. *See supra* notes 75 and 77 and accompanying text. Also, in April, 1999, Marilyn Manson cancelled his remaining tour dates because of the high school shooting spree in Littleton, Colorado, on April 20, 1999. Richard L. Eldredge, *Manson Cancellations*, ATLANTA CONST., Apr. 29, 1999, at E2.

95. *See supra* notes 75, 79–80 and accompanying text.

96. 480 F. Supp. 199 (S.D. Fla. 1979).

97. Zamora v. Columbia Broad. Sys., 480 F. Supp. 199, 200 (S.D. Fla. 1979).

98. *Id.*

particular program or any precise call to action, the court rejected the claim.[99] Moreover, the court noted because of the exacting scrutiny required in cases challenging protected speech,[100] it court could not justify a finding of general incitement on what it viewed as an ambiguous claim.[101] Furthermore, the court reasoned the violent tendencies of a few viewers cannot rationalize a general suppression of protected expression.[102]

Another case, *Olivia N. v. National Broadcasting Co.*[103] presented a less ambiguous claim than *Zamora.* In that case, a young girl was gang-raped with a beer bottle by four girls who allegedly got the idea from a similar scene in a television movie.[104] Both the court and the parties agreed the movie did not contain the requisite call to action required for a successful incitement claim—it merely depicted a scene without specifically encouraging its replication.[105] Consequently, the suit was dismissed.[106]

In *Herceg v. Hustler Magazine, Inc.*,[107] the plaintiff's son accidentally killed himself while performing "auto-erotic asphyxiation" as described in a copy of *Hustler* magazine.[108] The plaintiff claimed the unnecessary detail in the magazine incited her son to perform the act that resulted in his death.[109] The court rejected the plaintiff's claim, however, finding the article was merely descriptive, and as such constituted neither advocacy nor incitement.[110] The court further suggested incitement theory was improper as a cause of action, and the less stringent scrutiny of the compelling interest test may have been more appropriate.[111]

---

99. *Id.* at 204.

100. *See supra* note 64 and accompanying text.

101. *Zamora*, 480 F. Supp. at 206. "The imposition of such a generally undefined and undefinable duty would be an unconstitutional exercise by this Court . . . [t]he First Amendment casts a 'heavy burden' on those who seek to censor." *Id.*

102. *Zamora*, 480 F. Supp. at 205. "There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression." *Id.*

103. 178 Cal. Rptr. 888 (Ct. App. 1981).

104. Olivia N. v. National Broad. Co., 178 Cal. Rptr. 888, 890–91 (Ct. App. 1981).

105. In fact, in his opening statement, the plaintiff's attorney conceded that no incitement existed. *Id.* at 890 n.1. On this basis, upon motion by defendants, the court immediately dismissed the case. *Id.* at 890.

106. *Id.* at 497.

107. 814 F.2d 1017 (5th Cir. 1987).

108. Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1018 (5th Cir. 1987).

109. *Id.* at 1023.

110. *Herceg*, 814 F.2d at 1022–23. Furthermore, the court noted the article contained numerous warnings against attempting to perform the practice for risk of death. *Id.* at 1018–19.

111. *Herceg*, 814 F.2d at 1020, 1023. The compelling interest test applies to content-based restrictions of protected speech. Generally, it is not the appropriate test for alleged or proposed

Only in *Weirum v. RKO General, Inc.*[112] have any plaintiffs succeeded on a modified claim of incitement.[113] In *Weirum*, the court noted risk of injury resulting from the broadcaster's specific directive was entirely foreseeable.[114] The court reasoned because the broadcast was live, the unlawful conduct did occur imminently within the definition of any interpretation of the *Brandenburg* test.[115]

The aforementioned jurisprudence reflects the fact that courts do not easily nor lightly reach a finding of incitement. These cases demonstrate courts will determine whether a certain claim presents unlawful incitement under the standards of the *Brandenburg* test by considering the following factors: (1) specificity of the language and the clarity of the directive;[116] (2) existence of a command to the audience rather than merely a description;[117] (3) temporal imminence of conduct following the speech, made clearer upon the existence of live speech rather than recorded;[118] and (4) intervening factors which supercede the effect of the speech.[119] Even where the courts have not expressly applied *Brandenburg*, these factors directly translate into the underlying components of that test.[120] In order to preserve the integrity of First Amendment protections, courts have avoided flexible interpretations of these factors. The protection provided by the First Amendment is so central

violations of traditional political speech. The *Herceg* court determined *Hustler's* article, though generally protected, did not constitute political speech and was therefore most appropriately subject to the compelling interest test. *See id.* However, recent Supreme Court cases appear to afford political speech less protection. In those cases, the Court analyzed the restrictions on speech under something akin to the compelling interest test. *See supra* notes 19–21 and accompanying text. In the absence of or in conjunction with the advocacy-incitement dichotomy, especially in light of recent Supreme Court decisions, the compelling interest test may apply to restrict music allegedly inciting violent behavior. The better lawyer will prepare arguments under both tests. This Article only refers to the Supreme Court's application of this less strict standard and the consequences of such an application to "gangsta rap" issues. For a complete discussion of the compelling interest doctrine and its application, see *Reno v. Flores*, 507 U.S. 292, 302 (1993). *See also* Planned Parenthood v. Casey, 505 U.S. 833, 871–74 (1992); Carey v. Population Serv. Int'l, 431 U.S. 678, 686 (1976).

112. 539 P.2d 36 (Cal. 1975)

113. Weirum v. RKO General, Inc., 539 P.2d 36 (Cal. 1975). *See supra* notes 56–59 and accompanying text.

114. *Weirum*, 539 P.2d at 40. The broadcasters seemingly recognized the dangers and the reckless driving that the announcement might incite, as they warned their adult listeners to "get your kids out of the street." *Id.* at 38.

115. Although *Weirum* did not apply the *Brandenburg* test, it is often cited to in incitement cases involving the finding of foreseeability. *See supra* note 57 and accompanying text.

116. *See Zamora*, 480 F. Supp. at 202.

117. *See Olivia N.*, 178 Cal. Rptr. 888; *see also Herceg*, 814 F.2d 1017.

118. *See Weirum*, 539 P.2d at 40.

119. *See supra* Part III.B.

120. *See id.*

to the viability of the Constitution and the open marketplace of ideas[121] that a challenge to its protective ambit would be met with the court's most exacting scrutiny.[122]

V. THE CLEAR AND PRESENT DANGER TEST APPLIED TO GANGSTA RAP

Gangsta rap music—which often describes violent scenes of murder, rape, drug abuse and other aspects of inner-city life—has in recent years come under fire for inciting young people to perform the violent acts described in its lyrics.[123] The Ozzy Osbourne and Judas Priest cases,[124] though based on claims of incitement from music lyrics, cannot serve as precedent for gangsta rap analysis. Instead, those cases grapple extensively with subliminal messages—an issue not applicable to the gangsta rap claims. Therefore, a more refined analysis of *Brandenburg* is required, using the factors established in the cited cases. Because the *Brandenburg* test only identifies political speech as being exempt from First Amendment protection, it must first be determined whether gangsta rap constitutes political speech.

A. Gangsta Rap as Political Speech

There is a strong argument that gangsta rap is a form of political expression.[125] Gangsta rap often describes serious social problems in an effort to increase public awareness and to protest the status quo. Common themes include drug abuse, teen pregnancy, gang violence, police brutality and the hardships of ghetto life. Rap artists sing with an eye towards black solidarity

---

121. *See supra* notes 17–18 and accompanying text.

122. The United States Supreme Court has often referred to the first amendment protection owed political speech as "exacting scrutiny." *See, e.g.*, Buckley v. American Constitutional Law Found., 525 U.S. 1, 16 (1999); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) (referring to "highest scrutiny").

123. Critics of gangsta rap look to "cut down the violent, misogynistic and racist lyrics in vogue in the genre." Richard Harrington, *For Rap, Some Arresting Developments*, WASH. POST, Dec. 29, 1993, at C7. The recent attacks on Ice-T, a rap artist, are representative of the censure of gangsta rap. On July 28, 1992, Ice T allowed Time Warner, his producer, to pull a controversial, anti-police rap song from release in order to avoid the threat of lawsuits and boycotts against Time Warner. Gil Griffin, *The Censorship Thing*, BILLBOARD, Nov. 28, 1992, at R4. In 1993, Time Warner refused to release Ice-T's "Home Invasion" for similar reasons, a move which prompted Ice-T to leave Time Warner for another label. Harrington, *Arresting Developments*, WASH. POST, Dec. 29, 1993, at C7. All major record labels have formed lyric review committees, many of which have pulled controversial violent songs from rap records in order to prevent the risk of liability. Gil Griffin, *The Censorship Thing*, BILLBOARD, Nov. 28, 1992, at R4.

124. *See supra* notes 86 and 89.

125. *See supra* notes 12–14 and accompanying text.

and societal change.[126] Many gangsta rap artists claim by shedding light on current desperate conditions, they can encourage peace among inner-city groups, and ultimately, social and governmental redress.[127] Thus, if gangsta rappers use violent language to increase awareness and advocate social change—even if the words chosen are offensive or gratuitous[128]—the speech falls within this protected category of political speech.[129] Gangsta rappers would be wise to cloak themselves in the highly protective blanket of advocacy, thereby subjecting any challenge to their First Amendment protected speech to extraordinarily strict judicial scrutiny.

B. Applying the Clear and Present Danger Test

If lyrics constitute "political speech," a proper analysis must ask whether these otherwise protected lyrics fall outside the protective scope of the First Amendment because they incite unlawful conduct.[130] Assuming the song

---

126. *See* Comment, *Sex, Violence, and Profanity: Rap Music and the First Amendment*, 44 MERCER L. REV. 667, 674 (1993) (noting much of rap music advocates black separatism and working within the current governmental structure to effectuate change).

127. For example, rapper Snoop Doggy Dogg speaks reverently of the day Los Angeles gangs called a truce (April 29, 1992): "[e]verybody was together. That's what my music's going for—to stop you banging for a second. Listen to my music and get on another vibe." Leland, *supra* note 5, at 64.

128. Courts have repeatedly stated unpopular or offensive speech merits First Amendment protection of the highest class in order to preserve the open marketplace of ideas. *See supra* note 15.

129. As discussed, the California Court of Appeals stated music, in general, cannot be construed as advocacy because it contains figurative expressions and is not meant to be taken literally. McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 194 (1988). However, this essay argues gangsta rap is meant to be taken literally, in order to effect awareness and change. Therefore gangsta rap may be considered "advocacy" regardless of the *McCollum* dicta. Gangsta rap seeks to expose the literal and often depressing truth about inner city life. Rappers use no poetic devices because they intend to portray reality. *See, e.g.*, Janine McAdams, *Credibility and Commerciality*, BILLBOARD, Nov. 23, 1991, at R1 (stating even though some rap artists paint pictures of "a harsh and violent world their popularity is based in the basic realism of [the] street life they present"). Ronald Howard, sentenced to death for the murder of Bill Davidson, stated:

> Where I come from people hate the police . . . They harass you for nothing . . . just because you're a young black male, like Tupac says. But I never really thought about fighting back until I heard [N.W.A's] 'F--- Tha' Police.' It was like 'Yeah, why should I just stand there and take that [expletive]?' To me, rap never glorified violence. It just told the truth.

Chuck Philips, *Rap Defense Doesn't Stop Death Penalty*, L.A. TIMES, July 15, 1993, at F4–5. Many young listeners join in Howard's sentiments. *See, e.g.*, Leland, *supra* note 5, at 63 (regarding the music of Snoop Doggy Dogg, one fan said, "[Snoop] tells it like it's supposed to be told").

130. Obviously, not every song will fall into the category of "political speech." That analysis will first require a showing that the song is protected speech; a point reiterated in the caselaw. *See supra* notes 11–13 and accompanying text. As long as the song does not fit into the few specified exceptions to First Amendment protection, the analysis will continue. For a list of

lyrics are clearly protected by the First Amendment and do not constitute incitement, the burden then shifts to those who would make such lyrics actionable.[131]

1. Is the Music Directed to Inciting Violent Acts?

Most rap songs do not contain explicit calls to action; rather, they serve as descriptions of inner-city life. The Supreme Court's direct commands prong requires a strong indication that the speaker intended the act encouraged in the song to be carried out.[132] However, most rappers would argue their songs are not directed toward inciting any violence. To the contrary, most of these artists would aver that peace and unification is their ultimate goal.[133] Of course, it may be difficult to reconcile this goal with the fact that many of the rappers themselves have participated in the very violence they claim to disavow.[134]

Moreover, some rap music contains either explicit directives or language of such specificity as to meet the incitement prong of the *Brandenburg* test. For example, in a song by rapper Ice Cube, he commands his listeners to burn down Korean-owned grocery stores in retaliation for the killing of Latisha Harlins by a Korean store owner.[135] The lyrics specify the target (Korean grocery store owners), the method of violence (arson) and the specific motive (avenging the death of a young black girl). Consequently, a court may find this song meets the first requirement of the *Brandenburg* test because the level

exceptions, see *supra* notes 19–20 and accompanying text. Because restrictions on song lyrics are inherently content-based, the compelling interest test will likely be applied. Unfortunately, thorough coverage of the compelling interest test and its applicability to gangsta rap is beyond the scope of this Article. However, it certainly may be applicable, and worthy of further exploration and discussion.

131. *See* Redish, *supra* note 22, at 1182. ("[The *Brandenburg* test] engages in the presumption that free speech should generally prevail over any attempts to silence it").

132. *See* discussion *supra* Part II.

133. *See supra* note 127 and accompanying text.

134. Many rappers have histories that include the acts of violence and illegal conduct which they rap about. For example, Tupac Shakur was charged with forcibly sodomizing and sexually abusing a young woman and with allegedly shooting two off-duty police officers after a traffic argument in Atlanta. Leland, *supra* note 5, at 62. In November 1994, Shakur was shot five times during a robbery in the lobby of a Manhattan recording studio, and survived. Ginia Bellafante, *Thug Life Imitates Art*, TIME, Dec. 12, 1994, at 101. But on September 7, 1996, Shakur was gunned down and killed after attending a professional boxing match in Las Vegas. Patrick Rogers, *Prophecy Fulfilled: Rap Gangsta Tupac Shakur Died As His Lyrics Suggested He Might*, PEOPLE MAG., Sept. 30, 1996, at 79. Also, rapper Snoop Doggy Dogg was charged with murder and released on one million dollars bail. *Id.* Rapper Dr. Dre, settled a lawsuit for assaulting television hostess Dee Barnes. *Id.*

135. *See* Csathy, *supra* note 30.

of specificity is so high as to indicate Ice Cube's intent that Korean-owned grocery stores actually be set aflame.

Other rap songs specifically identify individuals that the lyricists believe should be killed. In another Ice Cube song, the rapper directs his former N.W.A. rapmates to kill their Jewish manager, Jerry Heller.[136] A video for the rap group Public Enemy depicts the suppositious assassination of former Arizona Governor Evan Mecham, who vetoed that state's legislatively recognized observance of the Martin Luther King holiday.[137] The court's interpretation of these lyrics may ultimately determine such a case.

An argument can be made that while Ozzy Osbourne addresses, even advocates, suicide as a positive alternative,[138] and while *Hustler* magazine details a potentially fatal method of seeking physical pleasure,[139] gangsta rap is actually "preparing a group for violent action and steeling it to such action."[140] On its *Fear of a Black Planet*[141] album, Public Enemy calls upon its listeners to "Fight the Power"[142] in order to achieve true racial equality, and sings of a need for a "Revolutionary Generation"[143] to make a stand and fight for what they deserve. However, this sounds more like psychological preparation or political agitation than a command to commit specific unlawful acts.

Whether the language in gangsta rap lyrics meets the first prong of the *Brandenburg* test hinges on determining whether the song contains specific directives, or is a mere statement urging the targeted listeners to prepare themselves for the bitter hardships of reality. Depending upon the facts of any given case a court could decide either way. Assessing the language in the

---

136. *See* Csathy, *supra* note 30. Jerry Heller claims to have received death threats as a result of the song, which are as follows:

> Get rid of that devil, real simple
> Put a bullet in his temple
> Cause you can't be a nigger for life crew
> With a white Jew tellin' you what to do.

Id.

137. *Id.*

138. *McCullom*, 249 Cal. Rptr. at 190–191. ("The lyrics sung by Osbourne may well express a philosophical that suicide is an acceptable alternative to a life that has become unendurable—an idea which new, however unorthodox, has a long intellectual tradition.").

139. Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1018, 1022 (5th Cir. 1987).

140. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).

141. PUBLIC ENEMY, FEAR OF A BLACK PLANET (Def Jam Records 1990).

142. PUBLIC ENEMY, *Fight the Power, on* FEAR OF A BLACK PLANET (Def Jam Records 1990).

143. PUBLIC ENEMY, *Revolutionary Generation, on* FEAR OF A BLACK PLANET (Def Jam Records 1990).

Ronald Ray Howard case,[144] however, the true lack of any specific directives would likely lead a court to find the first prong of *Brandenburg* could not be met.

2. What is the Likelihood That the Music Will Incite Violence?

The actual occurrence of the harm advocated in a song can present strong evidence that the song was likely to incite violence.[145] In the Ronald Ray Howard case, a police officer was shot by a young man listening to a song that promoted murdering a police officer to avoid being pulled over.[146] The court found the likelihood prong of the *Brandenburg* test was not met.[147] Defendants could present a substantial obstacle to satisfying this requirement by proving intervening causes led to the incident. Such a finding relegates the importance of the music to one of many factors rather than the primary motivator.[148] In the language of traditional tort theory, the lyrics would not be the proximate cause of the death.

In the event that no harm has occurred, or if the court seeks additional evidence the speech would likely result in harm, the plaintiff must show a high degree of foreseeability of harm.[149] Plaintiffs may attempt to prove foreseeability and deliberate intent to incite by showing the specific music in question is targeted toward an audience whose members are vulnerable to incitement.[150] These plaintiffs may also claim gangsta rap specifically targets

---

144. *See supra* Part I.

145. *See supra* Part III.B.2.

146. *See supra* Part I.

147. Davidson v. Time Warner, Inc., No. Civ. A. V-94-006, 1997 WL 405907, at *20 (S.D. Tex. Mar. 31, 1997). "While the Davidsons may have shown that Shakur intended to produce imminent lawless conduct, the Davidson's cannot show that Howard's violent conduct was an imminent and likely result of listening to Shakur's songs." *Id.* Further, the opinion stated "although the court cannot recommend 2PACALYPSE NOW to anyone, it will not strip Shakur's free speech rights based on the evidence presented by the Davidsons." *Id.* at 22.

148. It is important to reiterate that the likelihood requirement should ultimately measure whether the music was likely to incite or produce imminent unlawful action, even before any such incident occurred. The occurrence of harm is simply a factor in this determination, and not conclusive to a finding of likelihood.

149. *See Claiborne Hardware Co.*, 458 U.S. at 899–902, 928. *See also* text accompanying notes 50–51.

150. *See McCollum*, 249 Cal. Rptr. at 190 ("Osbourne in his music sought to appeal to an audience which included troubled adolescents and young adults who were having a difficult time during this transition period of their life; plaintiffs allege that this specific target group was extremely susceptible to the external influence and directions from a cult figure such as Osbourne who had become a role model and leader for many of them."); *see also* Plaintiff's Complaint at ¶¶ X, XI, Davidson v. Time Warner, Inc., No. Civ. A. V-94-006 (D. Tex. Filed Dec. 1, 1993) (complaint on file with *Vanderbilt Law Review*) ("The language and music on [Shakur's] tape was directed specifically at young black males and particularly young black males confronted by police.

black inner city youths and gang members who are especially susceptible to outside suggestive influences.[151]

Supporters of regulations argue in light of the pre-existing proclivities of this target market, certain gangsta rap songs are the impetus necessary to urge these audience members into the violent behavior reflected in many of the songs.[152] Moreover, those who take such a stance further contend rappers, knowing their audience, are aware of the inciting effect of their music.[153] Therefore, they would argue any ensuing violence is foreseeable to the artist and the producer. The fact that the rappers as role models to this target audience, set poor examples with their own criminal records, strengthens this argument.[154]

The foreseeability argument ultimately fails because the circumstances surrounding the alleged target market are always at issue.[155] The societal difficulties portrayed in rap songs are not caused by rap music.[156] Rather, rappers reflect what they see in the world around them and many do so to facilitate change and to improve those conditions, not to make them worse. This situation is similar to the proverbial chicken-and-egg dilemma, to which we must ask: which came first, the violent atmosphere or the music which portrays that violent atmosphere? The former is most likely the correct answer. Although it would be difficult to prove otherwise, many people argue the opposite. *Newsweek* writer John Leland remarked that urban violence and its attendant problems are "outside [rap] music, not within."[157] Rappers and their producers can nevertheless argue convincingly they only foresaw positive changes as a result of their music.[158] Due to intervening causes and a

---

Young black males are instructed by the language and the music to take immediate, violent, illegal action against police officers. The language and music was directed to and intended to incite immediate lawless action on the part of those to whom the message was directed.").

151. *But see* Leland, *supra* note 5 at 64 (noting some reports, however, show white record buyers represent "the largest segment of the rap audience" and alleging the demands of the white rap audience are the driving force behind "the increasing prevalence of violent and misogynist imagery").

152. Former Senator Carol Moseley-Braun (D-Ill) stated, "[w]e're talking about drive-by shooting, murder and drug-related crimes that have reached a level of heinousness, and it is being reflected or incited by this 'gangsta' rap music." ST. LOUIS POST-DISPATCH, Dec. 19, 1993, at 9.

153. *See* Plaintiff's Complaint at ¶¶ X, XI, Davidson v. Time Warner, Inc., No. Civ. A. V-94-006 (D. Tex. Filed Dec. 1, 1993) (complaint on file with *Vanderbilt Law Review*); *supra* Part V.B.1.

154. *See* discussion *supra* note 134.

155. *See* Leland, *supra* note 5 and accompanying text.

156. *See generally* Leland, *supra* note 5.

157. *See* Leland, *supra* note 5, at 64.

158. Michael Saunders, *Rising With a Bullet: Rap and Guns*, BOSTON GLOBE, Oct. 25, 1993, at 36.

difficult burden of proof, plaintiffs may be hard-pressed to prove foreseeability in many incitement claims.[159]

C. Did the Music Incite Imminent Unlawful Behavior?

If a court interprets the imminence requirement in the classic *Brandenburg* sense, then no claim that recorded music has incited violent behavior can succeed. Such a strict interpretation would require temporal imminence[160] and live rather than recorded speech.[161] According to some commentators, the *Brandenburg* test was specifically created to prevent harm caused by live speech made in effort to arouse a crowd to commit criminal acts.[162] Almost every case involving music allegedly inciting violence has involved recorded music as opposed to live performances.[163] Recorded songs cannot produce temporal imminence because by the time the listener hears the words, the speaker and the song lyrics are remote from one another.[164]

Claims that gangsta rap incites third parties to perform violent acts fall short of meeting courts' narrow interpretation of the imminence requirement. The speaker's ability to control the listener is diminished by the fact that with taped music, the listener retains all control over whether and when to hear the music and how often to repeat the message.[165] A court employing this traditional narrow definition would likely find it difficult to conclude that any unlawful conduct that occurs following exposure to recorded music meets the

---

159. This Article does not discuss how much evidence of foreseeability, by way of studies and the like, could enable a plaintiff to overcome this barrier. That is a finding for the court to make in individual cases.

160. *See supra* notes 53–56 and accompanying text.

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

162. *See Herceg*, 814 F.2d at 1023.

163. One exception is *Matarazzo v. Aerosmith Productions*, No. 86 Civ. 8815, 1989 WL 140322 (S.D.N.Y. Nov. 16, 1989), involving a plaintiff who claimed to have been struck in the nose by an unknown audience member while at an Aerosmith concert. Matarazzo's sued Aerosmith and its producers for "attracting such 'crazies' to the concert by promoting and selling records and tapes of the group's music." *Id.* at *1. Before trial, the Matarazzo's released Warner Brothers from the case and Warner Brothers moved that Rule 11 sanctions be filed against the plaintiffs. *Id.* The district court denied the motion, stating that because the caselaw regarding attempts to hold producers liable for inciting lawlessness is so new and unsettled, it was not clear that the plaintiffs had "absolutely no chance of success." *Id.* at *3.

164. There are numerous arguments on both sides of the "live/taped" debate. Proponents of regulations argue taped speech is perhaps more dangerous than live speech for two reasons: 1) it can reach far more people and 2) it is designed for repeated exposure, which, arguably, can work a listener into a frenzy and spur them to action as well as a live performance. *See* Csathy, *supra* note 30, at 3. Opponents point out a listener of recorded music has to take so many affirmative steps (buying the album and playing it repeatedly) that the speaker is arguably removed from the equation.

165. *See* Csathy, *supra* note 30, at 3.

imminence requirement. Conversely, plaintiffs bringing a claim of incitement due to exposure to live music would have a substantially stronger claim. However, the plaintiff must still meet the requirements for the other prongs of *Brandenburg*.

A court employing Professor Redish's broader interpretation of the imminence requirement could find the requirement is met in some circumstances. This flexible interpretation enables a court to balance the various facts in a case with the interests involved, allaying the need for a strong showing of imminence and placing particular weight on the interest of protected First Amendment freedoms.[166] Even using this flexible method, First Amendment protection must carry significant weight in the balance.[167] Only when armed with substantial compelling factors could a court conclude speech constitutes unlawful incitement and should therefore be denied First Amendment protection.[168] Because this flexible approach requires a case-by-case analysis, no definitive determination can apprise whether gangsta rap would survive under such a model. However, a case with enough significant factors could exist and a court, using the flexible approach, might determine a song constitutes unlawful incitement. This determination might lead a court to impose liability.

VI. THE IMPOSITION OF LIABILITY: PROBLEMS AND SOLUTION

The last section of this Article assumes that some court *could* hear a case in which the song lyrics and circumstances in question meet the *Brandenburg* test.[169] Major record labels have already begun to prepare for a wave of claims alleging the music they produce has incited violent acts.[170] A few courts may find the music at issue has incited unlawful conduct because,

166. *See generally* Whitney v. California, 274 U.S. 357 (1927).

167. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969); *see also* Redish, *supra* note 22, at 1182.

168. *See generally Brandenburg*, 395 U.S. at 444.

169. Csathy, *supra* note 30, at 5. Though seemingly remote, "highly-visible and controversial violent messages sell. And that is enough to ensure that those kinds of 'inciting' recorded messages will only multiply in number, thereby keeping both music stores and attorneys busy for months and years to come." *Id.*

170. Record companies have created or upgraded their lyric review committees. They have also pulled songs, even albums and groups, which may substantially increase their risk of liability beyond the foreseeable profit gained from the album sales. *See* Griffin, *supra* note 123. In September, 1995, Time Warner sold its 50% share in Interscope because of the controversy surrounding gangsta rap. *See* Jeffrey Trachtenberg, *Time Warner Sells Its Stake in Label Criticized for Rap*, WALL ST. J., Sept. 28, 1995, at B9.

except for a small handful of more or less similar cases, there is no conclusive precedent to preclude such a finding.[171]

A. Concerns Regarding the Imposition of Liability

Individuals that oppose liability or other restrictions on music and entertainment list several problems that may arise should a court find particular lyrics constitute incitement and justify liability. First, there exists a valid concern that such a finding would equal impermissible censorship and lead to self-censorship of otherwise protected speech.[172] When a court determines that a song constitutes unlawful incitement and imposes damages upon the artist and producers, that song will most likely be pulled from the market in order to avoid further claims and capitalization of profits gained from sales of the song.[173] Although not court-ordered,[174] such songs would ultimately be censored. This kind of censorship is already occurring.[175] Record companies, in an attempt to preempt liability claims, already reject songs and groups that may expose them to a high risk of litigation.[176]

---

171. Stanford Law Professor Marc Franklin noted, in reference to caselaw regarding entertainment claimed to incite violence, "[t]here's no Supreme Court precedent here, and each state's got its own shot at this thing. If you try any lawsuit in a controversial area these days, with people getting maimed or killed, you're going to find a couple of courts somewhere around the country [that will hear it]." Terry Pristin & David Fox, *Pop Culture. Violence. Copycats. Blame?*, L.A. TIMES, Oct. 23, 1993, at F8.

172. *See, e.g.*, Redish, *supra* note 22, at 1178 (contending advocacy of illegal conduct should only be suppressed if it presents "a danger of true harm" so as to avoid self-censorship); *see also* Seth Goodchild, *Twisted Sister, Washington Wives, and the First Amendment: The Movement to Clamp Down on Rock Music*, 3 ENT. & SPORTS L.J. 131, 169 (1986) (asserting that album rating and labeling systems would likely lead to self-censorship of artists and therefore compromise their protected artistic freedoms).

173. Griffin, *supra* note 123, at R4. As Dave Funkelstein, director of Hollywood Basic Records, stated, "[t]he bigwigs at major [record] labels tend to not want to stick their necks out. The bottom line with them is making money." *Id.*

174. Although not fully covered in this essay , a court-ordered prohibition of a single song, based on the court's finding that the song constitutes unlawful incitement, would likely be constitutional. If a court properly finds the song unlawfully incites violent acts, the court removes the song from the protective ambit of the First Amendment, and can censor it at will. On the other hand, a general government prohibition of a certain type of song likely exceeds constitutional boundaries, because a finding of incitement is very fact-specific and cannot broadly sweep in an entire genre.

175. *Culture, Violence and the Cult of the Unrepentant Rogue*, BILLBOARD, Dec. 25, 1993, at 5. *Billboard* editors encouraged the industry to self-censor the more degrading, offensive works. The editors warned, "[e]ither we resolve individually as the record-selling and record-buying public to turn away from the propagation of the hatefully self-destructive material currently threatening to overshadow the more meaningful segments of the marketplace, or we will reap the consequences of what we've sown." *Id.*

176. *See* Griffin, *supra* note 123 at C7 (where a number of labels refused to release certain recordings).

Moreover, knowledge of this potential liability can lead musicians to curb their artistic instincts toward lyrics that are more controversial. Instead, artists will favor lyrics that will be acceptable and promotable to record companies and retail stores.[177] In order to retain artistic freedom, many rappers are seeking lower budget, independent labels that still seek to empower the voice of change presented by rappers, regardless of the risk.

These intra-industry restrictions on largely protected speech already exist. A finding of unlawful incitement by a court would only compel the industry and the artists to further their self-censoring practices. Nevertheless, any government practice or policy which encourages or promotes self-censorship of protected speech undermines the basic tenets of the First Amendment.[178]

The result of self-censorship is that open marketplace of ideas suffers because a form of dissent vanishes from the marketplace. Musicians and producers censoring the more controversial lyrics are likely to remove those ideas from the market, stifling any opportunity for society to test those ideas for truth or value.[179] As a result of self-censorship, the marketplace of ideas will no longer be open and societal enrichment will suffer.[180]

Dissent has enabled revolutionaries to increase awareness of societal problems and to effect change.[181] Gangsta rappers seek to enlighten their listeners and the public to the harsh realities of ghetto life and urban violence ultimately hoping to encourage unity and peace.[182] If—as a result of potential liability—offensive and disagreeable ideas are censored before reaching the marketplace, society loses a valuable voice of dissent.[183] Censoring gangsta

177. *See* Eric Boehlert, *Meet the New Boss*, ROLLING STONE, July 10, 1997, at 30. In 1996, the retail chain WalMart began requiring artists to change both lyrics and album covers on controversial material before the store would allow the albums to be sold. Bands such as Butthole Surfers, 311, Foxy Brown and Beck have agreed to change the names of their songs and album covers in order to get their records on the WalMart shelves. If such alterations occur, a small sticker is attached to the album's bar code that reads "EDITED" that most purchasers are not even aware exists. *Id.*

178. *See* American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950) ("Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes."); *see also* Lamont v. Postmaster General, 381 U.S. 301, 309 (1965) (Brennan, J., concurring) ("[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government.").

179. *See American Communications Ass'n.*, 339 U.S. at 402–03.

180. *Id.*

181. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985) ("Free speech has been on balance an ally of those seeking change . . . . Without a strong guarantee of freedom of speech, there is no effective right to challenge [the status quo].")

182. *See supra* Parts V–V.A.

183. *See American Booksellers Ass'n, Inc.*, 771 F.2d at 332.

rap lyrics may be only the first step towards removing all speech which questions the status quo. As a result, this censorship will preserve the status quo and create a barrier to societal change.

A second major concern is that a court which makes a finding of incitement may not be able to establish workable precedent.[184] Because of current uncertainties regarding claims of incitement caused by entertainment,[185] a court opinion that does not establish a clear framework for analysis and discernible standards for industry use will only lend to the frustration.[186] In order to set forth clear standards for liability, a court would need to detail fully how it applied which version of the *Brandenburg* test, or some other test, and how it justified its decision in light of the imminence requirement.[187] Lack of clarity in any aspect of a court decision that imposes liability for gangsta rap found to incite violent behavior will only foster confusion and encourage further self-censorship.

B. A Proposed Solution: Guidelines for Analysis

The music industry needs a lucid set of guidelines for the legal analysis of music claimed to incite violent behavior for three primary reasons. First, *Brandenburg*—strictly construed—does not serve its alleged purpose in gangsta rap cases. The test exists in order to shield political expression from challenge and to exempt inherently dangerous speech from First Amendment protection.[188] Therefore, some gangsta rap music may be deemed unprotected. Regardless, because of *Brandenburg*'s imminence requirement, no recorded music could constitute unprotected incitement.[189] However, such a result does not comport with the values upon which the original test was founded.[190] Courts should adopt a variation of the clear and present danger and *Brandenburg* tests to reflect the uncompromised importance of political expression while acknowledging that some recorded music falls outside the constitutional boundaries of protection.

---

184. *See* Zamora v. Columbia Broad. Sys., 480 F. Supp. 199, 202 (S.D. Fla. 1979). In rejecting the plaintiffs' claim that generalized violent television programming incited their son to shoot a neighbor, the court stated that a "recognition of the 'cause' claimed by the plaintiffs would provide no recognizable standard for the television industry to follow." *Id.*

185. *See supra* Part IV.

186. *See Zamora*, 480 F. Supp. at 202.

187. *Brandenburg*, 395 U.S. at 447.

188. *See supra* Parts II–III.A.

189. *See supra* Part III.B.1.

190. *See supra* notes 27–31 and accompanying text.

Second, consistently recognized and applied guidelines will create cultivated, intelligible precedent for future judicial application.[191] Third, such guidelines will provide a constitutional framework within which artists and producers can make decisions. Artists and producers will have some ability to predict exactly which lyrics could expose them to liability and which will not, thereby substantially preventing overbroad self-censorship.

1. The Proposed Guidelines

In order to hold artists and producers liable for harms resulting from dangerous song lyrics, the lyrics should be required to constitute unlawful incitement, and to meet all of the following requirements:

1) Language: The lyrics must include explicit language including a direct call to action,[192] and advocacy of a particular type of unlawful conduct targeted toward a specific person or group of persons.

2) Real Threat of Harm: A real threat of harm must be a likely consequence of the song and must be evidenced by an actual occurrence of harm similar to that advocated in the song, or by threatened or attempted harm similar to that advocated in the song. If a threatened or attempted act occurs, it must have had a substantial probability of success. The party seeking a finding of incitement must prove this threat of harm by clear and convincing evidence.[193]

3) Balance of Interests: Any redeeming social value of the song lyrics, combined with the weight of presumed First Amendment protection of the lyrics, will be weighed against the state's interest in preventing the harm claimed. This balancing necessarily begins with the presumption that the lyrics should be protected against a finding of incitement.[194]

4) Proof Requirement: The party seeking to prove incitement must establish, by clear and convincing evidence, that a causal link existed between the song lyrics and the attempted or threatened harm. Such a link could be

---

191. Specific analytical frameworks such as that offered in this Article may also become the basis for proposed legislation. However, such legislation should be avoided because the *Brandenburg* test and the guidelines proposed herein are so fact-driven in application that any sweeping legislation would prove inappropriate and likely unconstitutional.

192. *Zamora*, 480 F. Supp. at 204.

193. Although this requirement seems to fall into the paradigm of claims that focus more on the consequence of the speech than on the speech itself, it actually accomplishes two goals. First, it reconfirms the generally recognized standing requirement that actual harm be shown. This prevents groups, such as concerned parents or citizens from bringing unfounded cases against relatively harmless songs based solely on their offensive content. Second, it helps establish the likelihood requirement, in conjunction with the proof requirements set forth in the guidelines, and it helps ensure a case will be decided based on the individual facts of the case presented.

194. *See supra* notes 74–77.

proven by establishing the harm would not have occurred but for the impetus provided in the song and intervening causes did not supersede the song lyrics as the primary motivator of the actor.

5) Gravity of Harm: Only those songs which advocate serious harm to nonculpable third parties will be subjected to this test.

These guidelines are to be construed strictly based on the plain language of the requirements. This test is deliberately narrow to preserve the integrity of the First Amendment.

2. Analysis of the Proposed Guidelines

The above guidelines enable an analysis similar to the flexible interpretation of the *Brandenburg* test, in that it allows for a lesser showing of imminence.[195] However, this leniency is offset by requiring the plaintiff to prove all other factors by clear and convincing evidence, subject to strict judicial scrutiny. Thus, a court can use these guidelines to find incitement when the evidence points to a determination that the song lyrics lie outside First Amendment protection even though the *Brandenburg*-defined imminence[196] does not clearly exist.[197]

These guidelines distinguish a minute group of rap songs that may prove exempt from First Amendment protections based on the facts of a specific case. This type of test benefits all parties concerned. First, for proponents of restrictions, it establishes an actual, applicable test that defines what kinds of songs are exposed to liability claims. The test recognizes some songs, though very few, may be worthy of a finding of incitement, rather than making the sweeping assertion that every song is protected, regardless of the circumstances.

Second, for artists and producers, the guidelines clearly described will not be protected by courts under the First Amendment.[198] Self-censorship will be reduced to a bare minimum if these rules are applied.

Finally, because the guidelines only restrict language presenting more of a threat and a danger than a social good and because they encourage a

---

195. *See supra* Part III.B.3.

196. *Brandenburg*, 395 U.S. at 447.

197. This article may be criticized for compromising artistic integrity by presenting a test that is less than absolutely protective of speech by eliminating the need to prove imminence. However, this test represents a pragmatic approach for courts presented with a case in which incitement is most likely present. This test is a viable alternative for *Brandenburg* and is equally speech-protective, because the causal link proof requirement essentially replaces the imminence requirement and is as difficult to prove as the imminence requirement.

198. Aggravating factors are outlined in guidelines 2–5. *See supra* Part VI.B.1.

substantial decline in self-censorship, they preserve and perhaps even foster the open marketplace of ideas.

VII. CONCLUSION

Political expression generally merits absolute First Amendment protection, absent a showing of the intent and likelihood of imminent lawless action.[199] Traditionally, music—whether clearly political or not—does not constitute the kind of speech which incites violent acts. This is either because it does not contain the kind of direct command required by *Brandenburg*, or because any reaction to the music could not be considered imminent in the classic sense.[200] However, the legal tides are turning. The current fashion of blaming music like gangsta rap for violent behavior has legal scholars, courts and plaintiffs reconsidering the applicability of the *Brandenburg* test.[201] In order to preserve the integrity of the First Amendment and the open marketplace of ideas upon which the freedom of speech is founded, no erosion of *Brandenburg* can be tolerated.

---

199. *See supra* note 22 and accompanying text.

200. *Brandenburg*, 395 U.S. at 447.

201. *See* discussion *supra* Part III.B.1.