

STICKS AND STONES: HOW WORDS CAN HURT

Abstract: In 1969, in *Brandenburg v. Ohio*, the United States Supreme Court held that speech tending to promote lawlessness or advocating illegal activity cannot be restrained by criminal law unless the speech "is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action." The *Brandenburg* standard, which applies to the use of civil as well as criminal sanctions to regulate free speech, reflects the Court's belief that the free competition of ideas, rather than censorship, is the preferred means of eliminating "bad" ideas in the public consciousness. Courts and constitutional scholars alike are in discord over the appropriateness of the First Amendment's protective veil, particularly when it functions to protect materials that instruct on how to perform illegal or harmful activity and negligent publications that contain misinformation, reliance upon which leads to injury. This Note explores the various types of litigation private parties have used in attempting to impose liability on speakers whose speech resulted in such harm.

INTRODUCTION

The First Amendment to the United States Constitution reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."¹ Although this language seems apodictic, since the birth of this country, legislatures have passed statutes that abridge both freedom of speech and the press;² and the United States Supreme Court has made clear that these freedoms are not absolute.³

¹ U.S. CONST. amend. I. The protections of the First Amendment have been incorporated into the Due Process Clause of the Fourteenth Amendment of the United States Constitution. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Thus, the First Amendment also constrains State action abridging an individual's freedoms of speech and press. See, e.g., *id.* at 666.

² See, e.g., Sedition Act, 1 Stat. 596 (1798) (making it unlawful to "counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination" and subjecting those who "write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States" to fines and imprisonment).

³ See, e.g., *Whitney v. California*, 274 U.S. 357, 371 (1927); *Gitlow*, 268 U.S. at 666-67; *Schenck v. United States*, 249 U.S. 47, 52 (1919).

In 1969, in *Brandenburg v. Ohio*, the United States Supreme Court held that speech tending to promote lawlessness or advocating illegal activity cannot be restrained by criminal laws unless the speech "is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action."⁴ This standard reflects the Court's belief in the propriety of maintaining a free marketplace of ideas—that is, censorship is not the preferred means of eliminating the danger of "bad" ideas in the public consciousness; rather, the preference is toward the free competition of ideas to reveal the truth or falsity of any particular idea.⁵ The *Brandenburg* test, therefore, preserves the marketplace by allowing prior restraint of speech only where harmful or illegal conduct will likely follow so immediately after the speech that there is no time for debate to stop the harm.⁶

Furthermore, the *Brandenburg* standard applies equally to attempts to regulate speech through use of civil, as opposed to criminal, sanctions.⁷ This is so because imposing tort liability against a speaker for the harmful results of his speech would constitute state action violative of the First and Fourteenth Amendments.⁸ As the Supreme Court noted in *New York Times Co. v. Sullivan*, "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."⁹ The rationale for the rule against criminal sanctions, however, falls short of justifying an absolute bar against civil sanctions. Indeed, the fact that tortious injury has occurred means that the marketplace has failed to guard against the

⁴ 395 U.S. 444, 447 (1969) (emphasis added).

⁵ This principle was succinctly captured by Thomas Jefferson when he said in his first inaugural address, "[i]f there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." *Whitney*, 274 U.S. at 375 n.3 (Brandeis, J., concurring) (quoting Charles A. Beard, *THE NATION*, July 7, 1926, at 8). See also, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (noting "there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."); *Herceg v. Hustler Magazine*, 814 F.2d 1017, 1019 (5th Cir. 1987) (noting the First Amendment protection of the freedom of speech and of the press is "not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.").

⁶ See *Brandenburg*, 395 U.S. at 447; S. Elizabeth Wilborn Malloy, *Taming Terrorists But Not "Natural Born Killers,"* 27 N. KY. L. REV. 81, 86 (2000).

⁷ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

⁸ See *id.* at 277.

⁹ *Id.* at 277.

harm resulting from bad speech.¹⁰ Applying the First Amendment shield to tort actions is especially pernicious when the speaker intends to cause harm by having speech recipients act in reliance on the speech or by inspiring the audience to act in criminal or tortious ways.¹¹

Courts and constitutional scholars alike are in discord over the appropriateness of the First Amendment's protective veil, particularly when it functions to protect certain speech, such as materials that instruct on how to perform illegal or harmful activity and negligent publications that contain misinformation, reliance upon which leads to injury.¹² This Note explores the various types of litigation private parties have used in attempting to impose liability on speakers whose speech resulted in harm. Part I offers an abbreviated history of free speech and censorship and details the modern standard for evaluating First Amendment cases.¹³ Part II summarizes the variety of actions private parties issue in attempting to impose tort liability on speakers promulgating instructional speech.¹⁴ Part III summarizes scholarship criticizing the use of the *Brandenburg* standard to adjudicate First Amendment issues.¹⁵ Finally, Part IV analyzes the cases summarized in Part II through the lens of the critique summarized in Part III.¹⁶

I. FREE SPEECH AND CENSORSHIP FROM *SCHENCK* TO *BRANDENBURG*

An opinion that corn-dealers are starvers of the poor, . . . ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer Acts of whatever kind, which, without justifiable

¹⁰ See, e.g., *Gertz*, 418 U.S. at 339–40; *Herceg*, 814 F.2d at 1019, 1020–21.

¹¹ See, e.g., *Rice v. Paladin Enter., Inc.*, 128 F.3d 233, 267 (4th Cir. 1997) (sustaining tort action against publisher for harmful effects of publication).

¹² See, e.g., *id.* at 267; *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1038 (9th Cir. 1991) (affirming summary judgment in favor of defendant in tort action against publisher for injury caused by reliance on veracity of contents of publication); see also David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 31 (1994).

¹³ See *infra* notes 17–78 and accompanying text.

¹⁴ See *infra* notes 79–182 and accompanying text.

¹⁵ See *infra* notes 183–201 and accompanying text.

¹⁶ See *infra* notes 202–258 and accompanying text.

cause, do harm to others, may be . . . controlled . . . by the active interference of mankind.¹⁷

The first grand proclamation regarding the proper limits of government-imposed censorship in light of the First Amendment came in 1919, in *Schenck v. United States*.¹⁸ In *Schenck*, the United States Supreme Court unanimously upheld a conviction under the Espionage Act of 1917 for distributing written materials designed to promote insubordination and obstruction of recruiting and enlistment for the United States armed forces.¹⁹ Defendants distributed pamphlets that claimed conscription was a form of slavery or involuntary servitude and, thus, violative of the Thirteenth Amendment.²⁰ The writings used impassioned language to intimate that "conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few" and vehemently urged opposition to the draft.²¹ The Court found that the intended impact of the writings was to incite opposition to and obstruction of the draft.²² Furthermore, the Court noted that the character of any action must be evaluated based on its context.²³ The Court wrote that, despite the First Amendment proscription, Congress may restrain speech if it creates a "clear and present danger" of bringing about some evil that Congress otherwise has a right to prevent.²⁴

The Court essentially reasoned that because Congress was empowered to criminalize and enjoin activities that interfered with the draft—and thus, national defense²⁵—it was likewise empowered to criminalize and enjoin speech calculated to achieve that end.²⁶ Thus, the Court concluded that while during peace-time defendants' activities might have been considered innocuous, defendants' instant anti-draft activities constituted a clear and present danger to the posture

¹⁷ JOHN STUART MILL, ON LIBERTY 53, (Elizabeth Rapaport ed., Hackett Publishing Company, Inc. 1984) (1859).

¹⁸ See 249 U.S. 47, 52 (1919).

¹⁹ See *id.* at 47, 48–49, 52–53.

²⁰ See *id.* at 50–51.

²¹ *Id.* at 51.

²² See *id.* at 51.

²³ See *Schenck*, 249 U.S. at 51–52.

²⁴ See *id.* at 52.

²⁵ See *id.* at 49. At the time of the Act, the United States was at war with the German Empire. See *id.* at 49.

²⁶ See *id.* at 51–52.

of the nation's war effort.²⁷ Accordingly, the Court affirmed their convictions.²⁸

Similarly, in 1923, in *Gitlow v. New York*, the Supreme Court upheld a conviction under New York's criminal anarchy statute arising from the distribution of written materials teaching, advising, and advocating the violent overthrow of the United States government.²⁹ The defendant was a member of the "Left Wing Section" of the Socialist Party and was responsible for printing and distributing its "Manifesto."³⁰ This Manifesto condemned the democratic strategies of "moderate Socialism" and urged that revolution must be achieved by shedding "[t]he old machinery of the state" and by directing the people to "conquer and destroy it."³¹

In evaluating the constitutionality of New York's criminal anarchy statute, the Court wrote:

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action.³²

The Court thus concluded that in the interest of self-preservation, the State may criminalize advocacy that threatens its continuation or essential function.³³ The Court gave great deference to the legislature's determination that advocacy of violent government overthrow posed such a danger to the general welfare that the state may exercise its police powers to quash it.³⁴ At once, the Court recognized that "[t]here was no evidence of any effect resulting from the publication and circulation of the Manifesto," and that the effect of such speech "cannot be accurately foreseen."³⁵ Indeed, the Court recognized that

²⁷ See *Schenck*, 249 U.S. at 51, 52-53.

²⁸ See *id.*

²⁹ See 268 U.S. 652, 654-56, 672 (1925).

³⁰ See *id.* at 655-56.

³¹ See *id.* at 657-59 n.2.

³² *Id.* at 664-65.

³³ See *id.* at 668.

³⁴ See *Gitlow*, 268 U.S. at 668-69.

³⁵ See *id.* at 656, 669.

the speech and its intended effect may be temporally very distant, if in fact it ever manifests at all.³⁶ Nonetheless, the Court affirmed defendant's conviction and the constitutionality of the statute because it criminalized speech which had the "natural tendency and probable effect" of bringing out some evil which the State is empowered to prevent.³⁷

Justice Holmes wrote a dissenting opinion in *Gitlow*, in which Justice Brandeis joined, arguing the propriety of the "clear and present" danger standard first established in *Schenck*.³⁸ He first noted that under such a standard the conviction should be reversed because publishing and distributing this Manifesto did not create a clear and present danger.³⁹ Indeed, whatever danger the majority foresaw was, according to Holmes, too remote to justify its prior restraint.⁴⁰ Second, Holmes rebuked the majority's characterization of this speech as more than a theory, but an incitement.⁴¹ He wrote in response that "[e]very idea is an incitement" and without the probability of a present conflagration, each idea should be awarded its opportunity to emote and inspire within the marketplace.⁴²

The Court further relaxed the proscription of the First Amendment in 1926, in *Whitney v. California*, where it upheld a conviction under California's criminal syndicalism statute for forming and maintaining membership in the Communist Labor Party of California (CLP).⁴³ The defendant was charged with helping to form and being a member of the CLP, an organization formed for the purpose of advocating, teaching, aiding and abetting criminal syndicalism.⁴⁴ The defendant maintained that it was not her intent that the CLP "be an instrument of terrorism or violence, and that it was not her purpose

³⁶ See *id.* at 669 ("A single revolutionary spark may kindle a fire that, smouldering [sic] for a time, may burst into a sweeping and destructive conflagration.").

³⁷ See *id.* at 671, 672.

³⁸ See *id.* at 672-73 (Holmes, J., dissenting).

³⁹ See *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

⁴⁰ See *id.* at 673 (Holmes, J., dissenting).

⁴¹ See *id.* at 673 (Holmes, J., dissenting).

⁴² See *id.* ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.") (Holmes, J., dissenting).

⁴³ See 274 U.S. 357, 372 (1927).

⁴⁴ See *id.* at 360. California's criminal syndicalism statute defined criminal syndicalism as "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage . . . or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change." *Id.* at 359-60.

... to violate any known law."⁴⁵ The Court quickly disposed of this contention by noting that defendant's intention was a matter of fact settled by the jury's verdict.⁴⁶ In any event, the Court noted defendant's apparent "acquiescence" to the CLP's charter advocating violence as a means for revolution by her continuing membership.⁴⁷ The Court, relying on the pronouncements of *Gillow* and its predecessors, declared that the State may, in the exercise of its police powers, restrict such speech it thinks *might* pose a danger to the public welfare or threaten overthrow by unlawful means, notwithstanding the First Amendment.⁴⁸ The Court concluded that California's criminal syndicalism statute did not offend the First Amendment and sustained defendant's conviction.⁴⁹

Justice Brandeis, joined by Justice Holmes, concurred in affirming defendant's conviction in *Whitney* strictly because the issue was not properly framed for the Court.⁵⁰ Despite his concurrence in the Court's holding, Brandeis was critical of the majority's deferential standard and argued that it should adhere to the "clear and present danger" standard for evaluating when speech is appropriately the subject of prior restraint.⁵¹ He argued that free speech is essential to the function of a democracy and censorship, running counter to that function, could only be justified in instances of emergency, when "immediate serious violence was to be expected or was advocated"; otherwise, the appropriate method of combating evil speech is by "more speech, not enforced silence."⁵² He further argued that even in instances of emergency, censorship is still not justified unless the harm to society is relatively serious.⁵³ He wrote that the appropriate response to speech tending to lead to social unrest is education and punishment for actual violations of the law.⁵⁴ He argued that California's criminal syndicalism statute was constitutional on its face because it criminalized actions that concern "immediate preservation of the public peace and safety"⁵⁵ This did not mean, however, that

⁴⁵ *Id.* at 366.

⁴⁶ *See id.* at 367.

⁴⁷ *See Whitney*, 274 U.S. at 367-68.

⁴⁸ *See id.* at 371.

⁴⁹ *See id.* at 372.

⁵⁰ *See id.* at 372-80 (Brandeis, J., concurring).

⁵¹ *See id.* (Brandeis, J., concurring).

⁵² *Whitney*, 274 U.S. at 375-77 (Brandeis, J., concurring).

⁵³ *See id.* at 377-78 (Brandeis, J., concurring).

⁵⁴ *See id.* at 378 (Brandeis, J., concurring).

⁵⁵ *Id.* (quoting California Criminal Syndicalism Act § 4) (Brandeis, J., concurring).

the statute was not vulnerable to a constitutional challenge as applied in these circumstances for want of a clear and present danger of serious evil.⁵⁶ Although Brandeis believed it was doubtful that the evidence of the activities in this case presented a "clear and present danger," he concluded that the judgment must be affirmed because this question was not properly before the Court.⁵⁷

Similarly, in 1950, in *Dennis v. United States*, the United States Supreme Court affirmed defendants' convictions for violating the Smith Act⁵⁸ by advocating and teaching the necessity and propriety of a violent government overthrow and by organizing the Communist Party of the United States for this purpose.⁵⁹ Significantly, the plurality decision rekindled the use of the clear and present danger standard from the murk of the majority opinion in *Whitney*.⁶⁰ In so doing, it adopted Chief Judge Learned Hand's interpretation that "[i]n each case [courts] must ask whether the gravity of the 'evil,' discounted by the improbability, justifies such invasion of free speech as is necessary to avoid the danger."⁶¹ The plurality also clarified that the existence of a clear and present danger is a determination of law, not fact, and thus, within the province of judges.⁶² The plurality reasoned that the defendants' actions in posturing the Communist Party to indoctrinate members for the ultimate purpose of overthrowing the government by use of force and violence "as speedily as circumstances permit" posed a clear and present danger that such revolution would take place.⁶³ Thus, it upheld defendants' convictions under the Smith Act, the First Amendment notwithstanding.⁶⁴

After *Dennis*, the Supreme Court began to draw limits on punishing advocacy that was too attenuated from its intended criminal effect. In 1957, in *Yates v. United States*, the United States Supreme Court reversed convictions for advocating and conspiring to advocate the violent overthrow of government in violation of the Smith Act, and or-

⁵⁶ See *id.* at 378 (Brandeis, J., concurring).

⁵⁷ See *Whitney*, 274 U.S. at 378-79 (Brandeis, J., concurring).

⁵⁸ 18 U.S.C. § 2385(a) (1946) (making it unlawful to knowingly advocate, aid and abet or teach the necessity of governmental overthrow by use of force or violence or to organize or help to organize an association of persons designed to teach, advocate or encourage same).

⁵⁹ See 341 U.S. 494, 517 (1951).

⁶⁰ See *id.* at 510.

⁶¹ *Id.* (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d. Cir. 1950)).

⁶² See *Dennis*, 341 U.S. at 513-15.

⁶³ See *id.* at 508-10.

⁶⁴ See *id.* at 517.

dered a new trial.⁶⁵ In *Yates*, the jury convicted defendants due, in part, to an instruction by the trial judge that permitted the jury to convict if they found that defendants taught or advocated the forcible overthrow of the government, even as an abstract principle.⁶⁶ The Court rejected the trial judge's assessment of the law and stated that the teaching of *Dennis* was that the First Amendment permits individuals to advocate the moral necessity of forcible overthrow provided that such advocacy is focused on some future time and does not involve any quality of incitement.⁶⁷ The Court wrote:

The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur.⁶⁸

Thus, the Court noted that advocacy of criminal conduct that is both too attenuated and improbable cannot be constrained in light of the First Amendment.⁶⁹ Accordingly, the Court reversed defendants' convictions and remanded the case for a new trial with proper instructions.⁷⁰

Finally, in 1969, the First Amendment shield afforded to speakers was radically enlarged when, in *Brandenburg v. Ohio*, the United States Supreme Court held that Ohio's criminal syndicalism statute was unconstitutional on the basis that it sought to punish individuals who taught or advocated the moral necessity of violence or criminal conduct as a means of social or political reform as well as those who voluntarily assembled for that purpose.⁷¹ In *Brandenburg*, a Ku Klux Klan (KKK) leader had been fined and sentenced to a prison term of no more than ten years for attending and speaking at a televised KKK

⁶⁵ See 354 U.S. 298, 338 (1957), *overruled on other grounds by* *Burks v. United States*, 437 U.S. 1, 1 (1978).

⁶⁶ See *Yates*, 354 U.S. at 317-18.

⁶⁷ See *id.* at 319-20.

⁶⁸ *Id.* at 321.

⁶⁹ See *id.*

⁷⁰ See *id.* at 338.

⁷¹ See 395 U.S. at 449. The statute punished a person for "advocat(ing) . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl(ing) with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* at 444-45 (1969) (quoting OHIO REV. CODE ANN. § 2923.13).

rally about the potential need for "revengeance" against the President and Congress should they continue their perceived scheme of white oppression.⁷² Approximately a dozen hooded KKK members attended the rally, at which they burned a cross and carried weapons; the speaker, however, did not carry a weapon.⁷³

The Supreme Court's per curiam opinion used the Holmes-Brandeis language but nonetheless represented an interpretive break with the former Justices' clear and present danger standard. The Court in *Brandenburg* effectively overturned a half century of pervasive precedent permitting the prior restraint of speech and ideas deemed destructive of democracy and capitalism, and declared criminal syndicalism statutes of more than twenty States unconstitutional.⁷⁴ The Court concluded that the thrust of the post-*Whitney* decisions militate against proscribing mere advocacy.⁷⁵ Thus, the Court modified the clear and present danger standard outlined in *Dennis* and *Yates* by restricting the temporal element.⁷⁶ In overturning the defendant's conviction in this case, the Court reasoned that the only type of speech that can be subject to prior restraint is that which is "directed to incit[e] or produc[e] imminent lawless action and is likely to incite or produce such action."⁷⁷ This case remains the standard against which virtually all incarnations of private and public censorship are challenged, including tort challenges to instructional speech.⁷⁸

II. *BRANDENBURG* AS APPLIED GENERALLY PROHIBITS RECOVERY AGAINST SPEAKERS IN TORT

In the more than thirty years since the Supreme Court's decision in *Brandenburg v. Ohio*, a number of courts have dealt with common-

⁷² See *id.* at 445, 447.

⁷³ See *id.* at 445-46.

⁷⁴ See *id.* at 447, 449 (explicitly overruling *Whitney v. California*, 274 U.S. 357 (1927)).

⁷⁵ *Id.* at 447.

⁷⁶ See *Brandenburg*, 395 U.S. at 448-49. While the Court in *Dennis* and *Yates* was not overtly specific about when the probable consequence of the speech needed to manifest, the Court in *Brandenburg* interpreted these cases as requiring that schemes of prior restraint may only apply to speech likely to cause imminent criminal activity. See *id.* at 448-49, 448 n.2.

⁷⁷ See *id.* at 447.

⁷⁸ See, e.g., *Davidson v. Time Warner, Inc.*, 1997 U.S. Dist. LEXIS 21559, at *63-72 (S.D. Tex. 1997); *Olivia N. v. Nat'l Broad. Co.*, 126 Cal. App. 3d 488, 495 (Cal. Ct. App. 1981).

law tort challenges to instructional speech.⁷⁹ The Supreme Court itself, on the other hand, has remained silent on the issue. Generally speaking, these cases fall into four categories: those involving claims of (1) erroneous instructions; (2) dangerous instructions; (3) active encouragement and facilitation of illegal or dangerous conduct; and (4) passive encouragement or inspiration to engage in illegal or dangerous activity.⁸⁰

A. *Erroneous Instruction—Cases*

As noted, one category of instructional speech that historically has been challenged under common-law tort principles is that involving erroneous instructions.⁸¹ These suits typically involve claims of negligence, misrepresentation or strict products liability, and are brought against the publishers of "how to" books containing errors that, when relied upon by the reader, led to harm.⁸² For example, in 1977, in *Cardozo v. True*, the District Court of Appeal of Florida held that a plaintiff who suffered severe food poisoning as a result of an error in a cookbook's instructions could not sustain an action against the retailer of the cookbook.⁸³ In *True*, a woman followed a recipe in a cookbook she purchased from the defendant book retailer.⁸⁴ In the process of preparing the dish, she tasted one of the ingredients and suffered severe food poisoning.⁸⁵ The plaintiff claimed that the defendant (1) failed to adequately instruct the user not to taste the particular ingredient prior to cooking it; (2) warn that the ingredient was poisonous; and (3) adequately test to ensure safety for human consumption.⁸⁶ Similarly, the plaintiff argued that defendant breached an

⁷⁹ See, e.g., *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 267 (4th Cir. 1997) (sustaining action against publisher for publishing dangerous instructional pamphlet under theory of wrongful death); *Hereceg v. Hustler Magazine*, 814 F.2d 1017, 1025 (5th Cir. 1987) (dismissing action against magazine for publishing dangerous instructional article under theories of negligence, products liability, dangerous instrumentality, and attractive nuisance).

⁸⁰ See Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach*, 34 ARIZ. L. REV. 231, 235 (1992).

⁸¹ See *id.* at 235–38.

⁸² See *id.*

⁸³ See 342 So.2d 1053, 1054–55, 1057 (Fla. Dist. Ct. App. 1977). The court here, however, does not reach the issue of whether a publisher or author may be held liable under the same action, nor whether a retailer with actual knowledge of the dangers contained in the cookbook could be held liable under such an action. See *id.* at 1057.

⁸⁴ See *id.* at 1054.

⁸⁵ See *id.*

⁸⁶ See *id.*

implied warranty of accuracy and fitness for human consumption.⁸⁷ The Court rejected plaintiff's contentions, reasoning that the chilling effect on free speech and expression would be too great if a retailer was liable for the mistakes in its publications.⁸⁸ Additionally, the court held that implied warranties pertain only to the physical properties of the product and not to the thought processes conveyed by the author.⁸⁹ Thus, the court ruled that the First Amendment acted as a complete bar to plaintiffs' recovery because ideas emanating from written words were not part of the "product" for purposes of strict products liability and requiring retailers to warn of possible inaccuracies in a publication would have too great a chilling effect on speech and expression.⁹⁰

Similarly, in 1991, in *Winter v. G.P. Putnam's Sons*, the United States Court of Appeals for the Ninth Circuit held that the publisher of *The Encyclopedia of Mushrooms* could not be held liable for plaintiffs' illness resulting from ingesting poisonous mushrooms that the book mistakenly identified to be safe for human consumption.⁹¹ Plaintiffs, in reliance on the veracity of the information contained in the book, prepared and ate poisonous wild mushrooms and became severely ill—so ill, in fact, that each required a liver transplant.⁹² Plaintiffs sought to impose liability against the publisher under theories of products liability, breach of warranty, negligent misrepresentation and false representations.⁹³ Again, like in *True*, the court reasoned that the defendant publisher could not be held liable under these theories without first finding that either the publisher must guarantee the veracity of information contained in its publications or that it had a duty to investigate their accuracy; the court was unwilling to find either.⁹⁴

B. *Dangerous Instruction—Cases*

The second category of instructional speech that has been challenged under common-law tort principles is that involving dangerous—as opposed to merely erroneous—instructions. The cases typi-

⁸⁷ See *id.*

⁸⁸ See *True*, 342 So. 2d at 1055 (arguing that such a rule would impose a hefty burden on retailers to investigate the veracity and safety of the contents of each of their products).

⁸⁹ See *id.* at 1056.

⁹⁰ See *id.* at 1054–57.

⁹¹ See 938 F.2d 1033, 1037–38 (9th Cir. 1991).

⁹² See *id.* at 1034.

⁹³ See *id.*

⁹⁴ See *id.* at 1035–38.

cally arise when a plaintiff charges a speaker with giving instructions to perform an inherently dangerous activity without adequately warning of the dangers.⁹⁵ For example, in 1987, in the case of *Herceg v. Hustler Magazine*, the United States Court of Appeals for the Fifth Circuit held that the First Amendment protected *Hustler* magazine from tort liability arising from the death of a boy who was allegedly inspired to attempt auto-erotic asphyxiation by an article entitled "Orgasm of Death."⁹⁶ A fourteen-year-old boy accidentally hanged himself attempting the act of auto-erotic asphyxiation as described in the article.⁹⁷ His friend discovered him hanging nude in his closet with the magazine open to the article lying at his feet.⁹⁸

The boy's mother and brother originally sued *Hustler* under theories of negligence, products liability, dangerous instrumentality and attractive nuisance.⁹⁹ The United States District Court for the Southern District of Texas dismissed this initial action, reasoning that the First Amendment barred ordinary tort action against the magazine even though the article attractively portrayed and instructed readers as to how to execute an inherently dangerous—indeed, deadly—activity.¹⁰⁰ The plaintiffs, however, were given leave to amend their complaint and refile under an incitement theory in concert with the *Brandenburg* standard.¹⁰¹ At trial, the jury found that the article, "Orgasm of Death," directly incited the decedent to perform the act of auto-erotic asphyxiation, which ultimately led to his death.¹⁰²

The Fifth Circuit reversed the jury's determination.¹⁰³ As an initial matter, the court questioned whether written material could ever constitute direct incitement under a *Brandenburg* analysis¹⁰⁴ but noted that "[w]hether written material might ever be found to create culpable incitement unprotected by the first amendment is . . . a question

⁹⁵ See Sims, *supra* note 80, at 238–39 (discussing *Walt Disney Prod. v. Shannon*, 276 S.E.2d 580 (Ga. 1981)).

⁹⁶ See 814 F.2d at 1025.

⁹⁷ See *id.* at 1019.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *Herceg*, 814 F.2d at 1019.

¹⁰² See *id.*

¹⁰³ See *id.* at 1023–25.

¹⁰⁴ The phrase "*Brandenburg* analysis" refers to the Court's test in *Brandenburg* for determining whether certain speech is appropriately the subject of prior restraint, that is, whether the speech "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

that we do not now reach."¹⁰⁵ The court went on to conclude that, even assuming *Brandenburg* did cover such written materials, given the self-explanatory nature of the act and the absence of any overt exhortation in the article, it could not, as a matter of law, constitute incitement.¹⁰⁶

In a concurring and dissenting opinion to *Herceg*, one judge asserted that the *Hustler* article was pornography, and thus, not deserving of First Amendment protection.¹⁰⁷ Furthermore, the judge sought to balance the values involved and concluded that, although First Amendment protections are broad, they were never intended to be preeminent to peoples' lives.¹⁰⁸ Although the judge conceded that First Amendment jurisprudence is an exercise in line drawing, she maintained that the burden is on the judges to evaluate seriously where specific speech falls in the hierarchy of First Amendment jurisprudence.¹⁰⁹

C. Active Encouragement and Facilitation—Cases

As alluded to by the court in *Herceg*, the presence or absence of any direct exhortation to commit a dangerous or illegal activity can be significant in assessing whether speech is protected by the First Amendment.¹¹⁰ Indeed, unlike the situation in *Herceg*, active encouragement cases, which typically involve speakers encouraging an audience to commit certain illegal or inherently dangerous acts, are rather consistently found to meet the strict requirements of *Brandenburg*.¹¹¹ Thus, tort liability is often permitted to lie against such speakers.¹¹²

For example, in 1975, in *Weirum v. RKO General, Inc.*, the Supreme Court of California held that a radio station could be held liable for its broadcast, which inspired two listeners to drive recklessly toward an announced location, killing another driver in the process.¹¹³ The plaintiff in *Weirum* brought a wrongful death action against a radio station for its promotion that urged people to drive to the lo-

¹⁰⁵ *Herceg*, 814 F.2d at 1023.

¹⁰⁶ *See id.* at 1023-25.

¹⁰⁷ *See id.* at 1025-26 (Jones, J., concurring and dissenting).

¹⁰⁸ *See id.* at 1026 (Jones, J., concurring and dissenting).

¹⁰⁹ *See id.* at 1027 (Jones, J., concurring and dissenting).

¹¹⁰ *See Herceg*, 814 F.2d at 1023-25.

¹¹¹ *See, e.g., Weirum v. RKO Gen., Inc.*, 539 P.2d 36, 46 (Cal. 1975).

¹¹² *See id.* at 51.

¹¹³ *See id.* at 43-45.

cation of a disc jockey to receive a prize.¹¹⁴ Two listeners, incited to reach the disc jockey, drove recklessly toward his location and in the process drove another vehicle off the road, killing the driver.¹¹⁵ The Supreme Court of California affirmed the jury's determination that the defendant radio station was liable under a negligence theory for the "foreseeable results of a broadcast which created an undue risk of harm" ¹¹⁶

Weirum hardly made mention of the First Amendment except to note that it does not erect a barrier to liability.¹¹⁷ Later cases, however, have interpreted *Weirum* to be a case of "true" incitement, in harmony with *Brandenburg*.¹¹⁸ This interpretation highlights the fact that the disc jockey's directives were in close temporal proximity to the reckless driving that caused decedent's death.¹¹⁹ In addition, because the disc jockey issued repeated live exhortations to listeners urging them to act in an inherently dangerous manner, the foreseeability of such action on the part of listeners was high.¹²⁰

The distribution of information, previously unknown to a speech recipient, and integral to executing harmful or illegal conduct, is often a component of active encouragement cases; there are, however, examples of pure facilitation cases.¹²¹ For example, in 1982, in *Hyde v. City of Columbia*, the Missouri Court of Appeals held that a crime victim who suffered subsequent harassment by her attacker could sue two newspapers for publishing her identity and address.¹²² In this case, the victim's attacker was able to identify and locate her from the publication of her name and address.¹²³ The court found that the name and address of the plaintiff/victim was not a matter of public record as it was information pertaining to an ongoing investigation

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ *Weirum*, 539 P.2d at 48.

¹¹⁷ See *id.* ("Defendant's contention that the giveaway contest must be afforded the deference due society's interest in the First Amendment is clearly without merit The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.")

¹¹⁸ See e.g., *Shannon*, 276 S.E.2d at 582 n.2; *Olivia N. v. Nat'l Broad. Co.*, 126 Cal. App. 3d 488, 496 (Cal. Ct. App. 1981); see also Terri R. Day, *Publications That Incite, Solicit, or Instruct: Publisher Responsibility or Caveat Emptor?*, 36 SANTA CLARA L. REV. 73, 77 n.27, 77-78 (1995).

¹¹⁹ See Day, *supra* note 118, at 77-78.

¹²⁰ See *id.*

¹²¹ See, e.g., *Hyde v. City of Columbia*, 637 S.W.2d 251, 273 (Mo. Ct. App. 1982); see also Sims, *supra* note 80, at 249-54.

¹²² See 637 S.W.2d at 253, 273.

¹²³ See *id.* at 253.

and, indeed, the policy of the jurisdiction is to suppress such information from public disclosure.¹²⁴ Additionally, the court reasoned that publishing the identity and location of a crime victim where the criminal is still at large was not of sufficient public concern to warrant First Amendment protection.¹²⁵ Thus, the court held that a negligence action could be brought against the two local newspapers.¹²⁶

Other facilitation cases have involved suits against publications for matching up criminal conspirators.¹²⁷ For example, in 1989, in *Eimann v. Soldier of Fortune Magazine, Inc.*, the United States Court of Appeals for the Fifth Circuit held that *Soldier of Fortune* magazine cannot be held liable under a negligence theory for publishing an ambiguous advertisement that led to a hired killing.¹²⁸ In *Eimann*, a man learned of the services of a mercenary via an ambiguous advertisement in *Soldier of Fortune* magazine and then hired this individual to kill his wife.¹²⁹ The victim's survivors filed a wrongful death action against the publication for negligently publishing the advertisement.¹³⁰ In rejecting plaintiffs' claim, the court investigated the intent of the publisher and the reasonable implication of the advertisement as understood by the ordinary reader in context.¹³¹ The court also weighed the probability of harm resulting from the ad against the burden of preventing it—a burden that would presumably impose a duty to investigate each advertisement.¹³² In other words, the court performed a standard risk-utility negligence analysis on publishing this ad to determine whether a duty existed to quash this type of ambiguous advertisement.¹³³

Conspicuously, although the Fifth Circuit in *Eimann* held that there was no duty to investigate facially innocuous ads, it did not dis-

¹²⁴ See *id.* at 269. But see *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-97 (1975) (holding that a right to be free from publicity does not preclude a newspaper from publishing truthful information that is otherwise available to the public). For further discussion of *Cox*, see John J. Watkins, *The Privacy Tort: An Arkansas Guide*, 1993 ARK. L. NOTES 91, 97 (1993).

¹²⁵ See *Hyde*, 637 S.W.2d at 253, 269, 273.

¹²⁶ See *id.* at 273.

¹²⁷ See, e.g., *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992); *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989).

¹²⁸ See *id.* at 838.

¹²⁹ *Id.* at 831-32. The ad read: "EX-MARINES—67-69 "Nam Vets, Ex-[Drill Instructor], weapons specialist—jungle warfare, pilot, [multi-engine planes], high risk assignments, U.S. or overseas." *Id.* at 831.

¹³⁰ See *id.* at 832.

¹³¹ See *id.* at 836-37.

¹³² See *id.* at 837-38.

¹³³ See *Eimann*, 880 F.2d at 837-38.

cuss whether the First Amendment absolves a publisher of liability for the negligent publication of advertisements reasonably understood to be unambiguous solicitations for illegal conduct.¹³⁴ This left open the question whether the First Amendment would bar suit if a reasonable reader had understood the ad as soliciting illegal mercenary work.¹³⁵

The United States Court of Appeals for the Eleventh Circuit took up this question in 1992, in *Braun v. Soldier of Fortune Magazine, Inc.*, where the court held that a different advertisement in *Soldier of Fortune* magazine was an *unambiguous* solicitation for illegal work.¹³⁶ On this basis, the court further held that *Soldier of Fortune* magazine could be liable in a wrongful death action for facilitating the connection between criminal conspirators.¹³⁷ The court in *Braun* attempted to strike a balance between the First Amendment rights of publishers and the state's interest in protecting the public by imposing liability on publishers only where their advertisements contain "a clearly identifiable unreasonable risk, that the offer in the ad is one to commit a serious violent crime."¹³⁸ According to the court, any consequent duty to investigate would be *de minimis*.¹³⁹

As stated above, rather than being instances of either pure encouragement or pure facilitation, most cases in this category are more accurately described as a mixture of both.¹⁴⁰ Indeed, in 1997, in *Rice v. Paladin Enterprises, Inc.*, the United States Court of Appeals for the Fourth Circuit held that the First Amendment was not a bar to plaintiffs' wrongful death suit against the publisher of a pamphlet that both inspired and enabled a man to proceed on a path of killing for hire.¹⁴¹ In *Rice*, the survivors of three murder victims sued the publisher of a pamphlet that provided detailed instructions on how to solicit, plan, execute and cover-up murders for hire.¹⁴² For purposes of summary judgment, the defendant-publisher stipulated that it knew and intended the pamphlet to be used by people to become or

¹³⁴ See *id.* at 833-38.

¹³⁵ See *id.*

¹³⁶ See 968 F.2d at 1122. The advertisement read as follows: "GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete [sic] and very private. Body guard, courier, and other special skills. All jobs considered." *Id.* at 1112.

¹³⁷ See *id.* at 1112, 1122.

¹³⁸ *Id.* at 1118.

¹³⁹ See *id.* at 1119; see also Day, *supra* note 118, at 91.

¹⁴⁰ See, e.g., *Rice*, 128 F.3d 233.

¹⁴¹ See *id.* at 267.

¹⁴² See *id.* at 241. Redacted portions of the original text of "Hit Man" are laid out in the opinion for edification. See *id.* at 235-39.

hire contract killers.¹⁴³ The defendant then asked the court to declare that nonetheless, as a matter of law, the First Amendment acted as a complete bar to plaintiffs' wrongful death action.¹⁴⁴

Whereas the United States District Court for the District of Maryland granted defendant's motion for summary judgment, the Fourth Circuit rejected the notion that the First Amendment shielded defendant from liability in a wrongful death action where their publication aided and abetted the actual killer.¹⁴⁵ The court stated that the type of publication at issue in the case, although not sufficient to satisfy the stringent requirements of *Brandenburg*, was nonetheless offensive to the preservation of an ordered society.¹⁴⁶ Therefore, according to the court, because the publication was integral in effectuating activity that could lawfully be suppressed, the publisher could be equally liable for its part in the conspiracy.¹⁴⁷

D. *Passive Encouragement—Cases*

In contrast to active encouragement and facilitation cases, cases brought against speakers under a theory of passive encouragement or inspiration of tortious conduct—that is, cases where speech recipients imitate the harmful or illegal acts described or depicted by the speaker—are rarely sustained.¹⁴⁸ For example, in 1982, in *Olivia N. v. National Broadcasting Co.*, the First District of the California Court of Appeals held that a television station could not be held liable for an artificial rape, allegedly inspired by a scene in a movie it had broadcast, because the movie did not constitute incitement under the *Brandenburg* standard.¹⁴⁹ In *Olivia*, the plaintiff sued a television network for negligently airing the television movie "Born Innocent."¹⁵⁰ The plaintiff, a minor child who was gang raped by four minor girls using a bottle, alleged that a scene in the film depicting a similar violent artificial rape inspired her attackers to imitate this conduct.¹⁵¹ The crux of the plaintiff's claim was that the network was negligent for

¹⁴³ See *id.* at 241.

¹⁴⁴ See *id.* at 241–42.

¹⁴⁵ See *Rice*, 128 F.3d at 242–43.

¹⁴⁶ See *id.* at 243.

¹⁴⁷ See *id.* at 266–67.

¹⁴⁸ See, e.g., *Davidson v. Time Warner, Inc.*, 1997 U.S. Dist. LEXIS 21559, at *1 (S.D. Tex. 1997); *Olivia*, 126 Cal. App. 3d at 488.

¹⁴⁹ See *id.* at 494–95, 497. As used by the court, this term connotes the act of vaginal penetration by use of an instrument. See *id.* at 492.

¹⁵⁰ See *id.* at 491.

¹⁵¹ See *id.* at 491–92.

broadcasting the violent film at a time when children and adolescents could watch it because children and adolescents are peculiarly impressionable and likely to imitate violent acts depicted on television.¹⁵² Furthermore, the plaintiff claimed that in order to secure the widest possible audience, the network negligently broadcasted the film without any warnings regarding its violent content.¹⁵³ Perhaps in error, the plaintiff conceded that the broadcast, although violent, did not advocate or encourage violent behavior and, therefore, did not constitute incitement under *Brandenburg*.¹⁵⁴ On this basis, the court rejected plaintiff's claims noting that, "television networks would become significantly more inhibited in the selection of controversial materials if liability were to be imposed on a simple negligence theory."¹⁵⁵ The court further distinguished *Weirum* on the basis that the action resulting from the radio broadcasts in *Weirum* were actively elicited whereas the broadcast in the instant case was not.¹⁵⁶ The court concluded that since the "viewers of 'Born Innocent' acted on the stimulus of the broadcast rather than in response to encouragement of such conduct," *Weirum* was not controlling in the instant suit.¹⁵⁷ Having determined that imposing civil liability on the broadcaster would essentially be a content-based restriction on speech and would have a chilling effect similar to a system of prior restraint, the court affirmed the dismissal of the action.¹⁵⁸

Similarly, in 1997, in *Davidson v. Time Warner, Inc.*, the United States District Court for the Southern District of Texas held that a music label could not be held liable for the shooting of a police officer allegedly inspired by the music on a rap album because the messages on the album did not constitute incitement under a *Brandenburg* analysis.¹⁵⁹ In *Davidson*, a police officer was shot to death by a man he had stopped for a traffic violation.¹⁶⁰ The officer's survivors filed suit against the producers and distributors of the rap album "2Pacalypse Now" alleging that the album inspired the shooter to kill the decedent.¹⁶¹ In their attempt to lift the First Amendment shield, the plain-

¹⁵² See *id.* at 492.

¹⁵³ See *Olivia*, 126 Cal. App. 3d at 492.

¹⁵⁴ See *id.* at 494-95.

¹⁵⁵ *Id.* at 494.

¹⁵⁶ See *id.* at 496.

¹⁵⁷ *Id.*

¹⁵⁸ See *Olivia*, 126 Cal. App. 3d at 497.

¹⁵⁹ See 1997 U.S. Dist. LEXIS 21559, at *71-72.

¹⁶⁰ See *id.* at *4.

¹⁶¹ See *id.* at *4-6.

tiffs set forth a number of claims, all of which, if proven, would constitute exceptions to the protection of the First Amendment.¹⁶² The plaintiffs claimed that the album contained fighting words, was obscene, defamed nonspecific peace officers like the decedent, and tended to incite imminent illegal conduct, including the shooting of a police officer.¹⁶³

The court first evaluated the merits of the case under *Eimann* by weighing the risks of the speech against the burdens imposed by self-censorship—the natural result of tort liability.¹⁶⁴ Although recognizing the Fifth Circuit's implicit instruction in *Eimann* that advertisements that are overt in their message to solicit or elicit criminal conduct are not protected speech, the court nevertheless distinguished the instant case.¹⁶⁵ The court stated that the probability that a listener would act on the album's message—i.e., shoot people, including police officers—is substantially less than the probability that mercenaries and patrons would connect via advertisements to perform illegal acts.¹⁶⁶ The court further asserted that the costs of self-censorship are very high to the defendant as well as to the public because the inevitable result is production of only the blandest, least controversial music.¹⁶⁷ Furthermore, the court found that because shooting the officer was an irrational and illegal act, it was not inevitable or even probable, and thus, the defendants were not legally obligated to foresee it.¹⁶⁸ Finally, the court painstakingly rebuked plaintiffs' contentions that

¹⁶² See *id.* at *6.

¹⁶³ See *id.* at *6. As to the claim that the album tends to incite imminent illegal conduct, the court took notice of the following lyrics from the album:

Now I could be a crooked nigga too When I'm rollin with my crew
Watch what crooked niggas do
I got a nine millimeter Glock pistol
I'm ready to get with you at the trip of the whistle
So make your move and act like you wanna flip
I fired 13 shots and popped another clip
My brain locks, my Glock's like a f—kin mop,
The more I shot, the more mothaf—ka's dropped
And even cops got shot when they rolled up.

Id. at *4 n.4.

¹⁶⁴ See *Davidson*, 1997 U.S. Dist. LEXIS 21559, at *36–38.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.* In bolstering this argument, the court cites the fact that at least seven illegal connections were made through Soldier of Fortune advertisements whereas this is the only incident of incitement claimed vis-à-vis this album after more than 400,000 were sold. See *id.* at *37.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at *41–42.

the album falls under any of the pre-existing carved-out categories of communications that are deemed unworthy of First Amendment protection—i.e., obscenity, defamation and fighting words.¹⁶⁹ The court ultimately granted defendants' motion for summary judgment finding that a tort action cannot lie against the producers.¹⁷⁰

The issues in *Davidson* are relevant to a pending lawsuit in Massachusetts filed by the surviving parents of Jeffrey Curley. In 1997, Jeffrey Curley, a ten-year-old boy, was abducted, molested, mutilated, and murdered by two men, one of whom was a member of the North American Man-Boy Love Association (NAMBLA).¹⁷¹ Plaintiffs allege that hundreds of pages of NAMBLA publications were found in the possession of the murderers¹⁷² and that they accessed NAMBLA's website at the Boston Public Library just before endeavoring to abduct, molest, mutilate, and murder Jeffrey Curley.¹⁷³ In their wrongful death action against NAMBLA, plaintiffs claim that certain of its web-based and print publications "promoted, advocated, conspired, and urged the general public to rape young male children and provided information to assist the general public in obtaining child pornography and pedophile related materials."¹⁷⁴

¹⁶⁹ See *Davidson*, 1997 U.S. Dist. LEXIS 21559, at *51–72. For example, the court noted that to qualify speech as obscene, it must contain "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals" *Id.* at *53 (quoting *Miller v. California*, 413 U.S. 15, 25 (1973)). At once, the court denounced the album's use of "expletives and depictions of violence," and noted that "overall the album is extremely repulsive" while holding that because the "2Pacalypse Now" lyrics were not of a sexually explicit nature, but rather, mainly appeal to the prurient interest in violence, they could not, as a matter of law, qualify as obscenity. *See id.* at *51, 53. Furthermore, the court found that the "2Pacalypse Now" lyrics cannot qualify as defamatory language, inter alia, because the target of defamation was non-specific. *See id.* at *56–57. Finally, the court noted that in order for utterances to qualify as "fighting words," they must be "personally abusive epithets" hurled at the actor, and the reaction to the utterance must be both reflexive and directed back at the speaker. *See id.* at *59–60. Because the actor was neither acting reflexively nor were the utterances directed toward any single person, they could not qualify as fighting words. *See id.* at *59–60, *63.

¹⁷⁰ *See id.* at *71–72.

¹⁷¹ See Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted at 4, *Curley, et. al. v. North American Man Boy Love Association, et. al.*, (No. 00CV10956 GAO) [hereinafter "Curley Motion to Dismiss"]; Cheryl Wetzstein, *Court Gets Pedophile Group E-mail; Slain Boy's Parents Suing for Damages*, WASH. TIMES, Oct. 24, 2000, at A8.

¹⁷² See Ralph Ranalli, *ACLU Asks Judge to Throw Out Curley Suit Against NAMBLA*, BOSTON GLOBE, Dec. 12, 2000, at B3.

¹⁷³ See Siobhan Morrissey, *Unsavory Speech: A Pedophile Murder Case Drags the First Amendment Back Into Court*, 87 A.B.A. J. 20 (Jan. 2001).

¹⁷⁴ Curley Motion to Dismiss, *supra* note 171, at 4.

Defendants have filed a motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted.¹⁷⁵ This motion is still pending before the United States District Court for the District of Massachusetts.¹⁷⁶ Defendants contest that NAMBLA materials constitute advocacy of this kind, instead averring that these materials condemn sex abuse and coercive sexual relations.¹⁷⁷ Furthermore, defendants maintain that although NAMBLA opposes age-of-consent laws and provides pornographic material, NAMBLA does not urge, advocate, or condone raping young male children.¹⁷⁸ Defendants alternatively maintain that even if such advocacy can be gleaned from these web and print materials, plaintiffs' action is nonetheless barred by the First Amendment under *Brandenburg*.¹⁷⁹ First, they claim that because plaintiffs do not allege that the alleged advocacy was directed to any particular person, but rather to the public at large, the speech cannot be "directed to inciting or producing imminent lawless action."¹⁸⁰ Defendants argue that aiming speech to a particular individual is necessary in order to constitute advocacy.¹⁸¹ Second, defendants argue that any conduct arguably advocated by defendants' publications was not imminent—in other words, Jeffrey Curley's death was not the likely result of defendants' publications.¹⁸²

III. SCHOLARLY CRITICISM OF *BRANDENBURG* STANDARD

Because of the restrictiveness of the *Brandenburg v. Ohio* standard, courts have been forced to hold that the First Amendment insulates speakers from tort liability for harm arguably flowing from their

¹⁷⁵ See *id.* at 2. Plaintiffs subsequently moved the court to permit them to amend their complaint to include charges against NAMBLA under the Racketeer Influenced and Corrupt Organizations Act (RICO). This motion is also still pending in the District Court. See J. M. Lawrence, *ACLU Terms NAMBLA Suit a "Witch Hunt,"* BOSTON HERALD, July 18, 2001, at 28; J. M. Lawrence, *Curleys Add 20 Members of NAMBLA to Federal Suit,* BOSTON HERALD, Sept. 27, 2001, at 26 [hereinafter Lawrence, *Curleys Add 20*].

¹⁷⁶ Curley Motion to Dismiss, *supra* note 171, at 2; Lawrence, *Curleys Add 20*, *supra* note 175, at 26.

¹⁷⁷ Curley Motion to Dismiss, *supra* note 171, at 7–8.

¹⁷⁸ See *id.* at 7–8 n.1. Defendants further challenge plaintiffs' contention that any specific materials advocate or urge the general public to rape young boys. See *id.* at 6. They note that plaintiffs' point only to the "totality of the child sex environment" defendants allegedly perpetuate, and not any specific materials or statements in order to justify this contention. See *id.* at 6.

¹⁷⁹ See Curley Motion to Dismiss, *supra* note 171, at 9–16.

¹⁸⁰ See *id.* at 11 (quoting *Brandenburg*, 395 U.S. at 447).

¹⁸¹ See *id.* at 12.

¹⁸² See *id.*

speech.¹⁸⁵ Dissatisfied with this outcome, some scholars have argued that the imminence requirement of *Brandenburg* gives greater First Amendment protection to these potential tortfeasors than is appropriate.¹⁸⁴ As one such scholar has argued, "the state has an important interest in safeguarding persons from physical harm. To deny recovery in these cases lessens [speakers'] incentive[s] to remove from the marketplace material that is dangerous and leads unwitting users to injure themselves, their property, or others."¹⁸⁵ Thus, although some courts are afraid of the chilling effect that such sanctions would have on speech, many scholars are calling for state action in the form of tort liability to effect the responsible exercise of First Amendment freedoms.¹⁸⁶

In urging for tort liability, scholars recognize that the First Amendment does not immunize publishers for negligence in other areas of law.¹⁸⁷ There are a variety of categories of speech that currently do not warrant First Amendment protection. Among these are: (1) defamatory and libelous speech;¹⁸⁸ (2) obscene speech;¹⁸⁹ (3) fighting words;¹⁹⁰ (4) speech that directly incites illegal conduct;¹⁹¹ and (5) other such "utterances that have no appreciable value as speech and that have a direct propensity to cause serious harm."¹⁹² This is not to say that such speech does not implicate the First Amendment; rather, courts have explicitly or implicitly valued certain forms of speech over others.¹⁹³ In deriving categories of diminished

¹⁸⁵ See *supra* notes 79-182 and accompanying text.

¹⁸⁴ See, e.g., Sims, *supra* note 80, at 262 ("The *Brandenburg* test is . . . overly-protective as applied to some, and conceptually inappropriate as applied to the majority, of the media physical injury cases."); Malloy, *supra* note 6, at 105-10; Day, *supra* note 118, at 73-76.

¹⁸⁵ Day, *supra* note 118, at 76.

¹⁸⁶ See, e.g., *id.* at 75-76.

¹⁸⁷ See *id.* at 90-91 (referring to negligence standard for publisher liability for libel as established in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). Professor Day clarified that the types of speech addressed by his article do not fall into the category of "of public concern," which is the core meaning of the First Amendment and ought to be the central tenet of its protection. See *id.* at 75-76.

¹⁸⁸ See *Gertz*, 418 U.S. at 351-52.

¹⁸⁹ See *Miller v. California*, 413 U.S. 15, 23-24 (1973).

¹⁹⁰ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-74 (1942).

¹⁹¹ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹⁹² See *Crump*, *supra* note 12, at 30; see also *Weirum v. RKO Gen., Inc.*, 539 P.2d 36, 48 (Cal. 1975).

¹⁹³ See *Chaplinsky*, 315 U.S. at 571-72 (noting that there are such categories of speech that "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"). This is most evident when comparing the Court's treatment of and standards for evaluating libel of private persons versus public figures.

protection, courts have, in essence, weighed the societal value of each type of speech against the actual or potential harm derived from it.¹⁹⁴ The above-mentioned categories do not survive the weighing process, i.e., their value to society is too low in light of the potential for harm.¹⁹⁵

Various other scholars have suggested that a balancing test should be employed for other categories of speech. Such a balancing test might equate violence with obscenity and evaluate it as a prurient interest.¹⁹⁶ One such scholar, Professor David Crump, has derived a balancing test that enumerates a number of factors for judges or juries to consider in the First Amendment calculus.¹⁹⁷ Among these are:

the express words or symbols uttered; . . . the context, including the medium, the audience, and the surrounding communications; . . . the predictability and anticipated seriousness of unlawful results, *and whether they actually occurred*; . . . the extent of the speaker's knowledge or reckless disregard of the likelihood of violent results; . . . the inclusion of disclaimers; and . . . the existence or nonexistence of serious literary, artistic, political, or scientific value.¹⁹⁸

According to Crump, such a contextual evaluation of various forms of expression, which are alleged to cause harm or injury, is essential in weeding out protected from unprotected speech.¹⁹⁹ When a speaker intends to emote an audience and when that audience is likely to be emoted by the speech as well as by the particular medium used—such as music, television, or pornography—Crump maintains that liability for *actual harm* resulting from the speech should be placed on the speaker in addition to the actual perpetrator.²⁰⁰ Simply put, Crump argues that a common sense determination should be

Compare *Gertz*, 418 U.S. at 351–52 (finding that reporting on private figures unimportant in scheme of First Amendment values justifying limitation by sustaining libel and defamation actions) with *New York Times Co. v. Sullivan*, 376 U.S. 254, 283–84, 292 (1964) (holding that reporting on public figures too important to values embodied in First Amendment, namely self-government, to justify chilling effect of libel or defamation action).

¹⁹⁴ See, e.g., *Gertz*, 418 U.S. at 339–40; *Miller*, 413 U.S. at 21–23; *Chaplinsky*, 315 U.S. at 571–72.

¹⁹⁵ See, e.g., *Gertz*, 418 U.S. at 339–40; *Miller*, 413 U.S. at 21–23; *Chaplinsky*, 315 U.S. at 571–72.

¹⁹⁶ See Crump, *supra* note 12, at 31.

¹⁹⁷ See *id.* at 51.

¹⁹⁸ *Id.* at 51 (emphasis added).

¹⁹⁹ See *id.* at 76–79.

²⁰⁰ See *id.*

used that accounts for the totality of the circumstances presented in each case, not the least of which should be the potential impact on permissible and desirable First Amendment discourse.²⁰¹

IV. ANALYSIS

The stringent standard established by the *Brandenburg v. Ohio* Court represents a backlash, in theory if not in form, against decades of precedent²⁰² and dozens of state and federal laws, which in practice criminalized relatively non-threatening criminal advocacy.²⁰³ The *Brandenburg* standard clearly descends from the "clear and present" danger standard first iterated by Justice Holmes in *Schenck v. United States*²⁰⁴ and later expounded upon by Justices Holmes and Brandeis in *Gitlow v. New York* and *Whitney v. California*.²⁰⁵ Justices Holmes and Brandeis used the language of incitement and imminence of illegal conduct while at the same time noting that the presence of these conditions will be found by a fact-specific judicial inquiry and prior restraint is justified where they are found.²⁰⁶ Thus, although the *Brandenburg* standard, by word, employs the Holmes-Brandeis interpretation of the clear and present danger standard, courts applying *Brandenburg* to various tort actions challenging speech have not considered the nature or purpose of the standard—that is, that speech *can* be restrained where it is evident that danger is likely and imminent.²⁰⁷ Thus, by disallowing tort actions to lie for *actual* harm resulting from speech and expressive conduct, courts have expanded the First Amendment shield to speakers in a manner unintended by Justices Holmes and Brandeis.²⁰⁸

Indeed, the two types of speech recognized by courts in applying *Brandenburg*—teaching or advocating the moral propriety of non-specific illegal conduct on the one hand, and advocating that which is intended and is likely to effect imminent illegal conduct on the

²⁰¹ See Crump, *supra* note 14, at 51–52.

²⁰² See, e.g., *Dennis v. United States*, 341 U.S. 494, 517 (1951); *Whitney v. California*, 274 U.S. 357, 372 (1927); *Gitlow v. New York*, 268 U.S. 652, 672 (1925); *Schenck v. United States*, 249 U.S. 47, 53 (1919).

²⁰³ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

²⁰⁴ See *Schenck*, 249 U.S. at 51–53.

²⁰⁵ See *Whitney*, 274 U.S. at 372–80 (Brandeis, J., concurring); *Gitlow*, 268 U.S. at 672–73 (Holmes, J., dissenting).

²⁰⁶ See, e.g., *Whitney*, 274 U.S. at 366–67 (Brandeis, J., concurring); *Gitlow*, 268 U.S. at 672–73 (Holmes, J., dissenting).

²⁰⁷ See *Whitney*, 274 U.S. at 371–72; *Gitlow*, 268 U.S. at 670–71; *Schenck*, 249 U.S. at 52.

²⁰⁸ See *Whitney*, 274 U.S. at 371–72; *Gitlow*, 268 U.S. at 670–71; *Schenck*, 249 U.S. at 52.

other—merely represent the end points on a spectrum. Instead of recognizing this, courts have segregated the universe of verbal and written communication into two forms of speech: that which is directed to and likely to produce imminent lawless conduct and that which does not.²⁰⁹ The first of these forms is subject to prior restraint, while the latter is not.²¹⁰ This compartmentalization is too simplistic; as such, it provides an ineffective guide for evaluating schemes of prior restraint and retrospective tort liability as applied to, for example, advocacy of specific illegal conduct that has a high probability of effectuating its intended impact but is lacking in a component of temporal immediacy.²¹¹ Moreover, modern courts have mistakenly applied the *Brandenburg* standard in other speech contexts where speech-as-an-idea is virtually indistinguishable from speech-as-a-product, such as with instruction manuals²¹² and recipe books.²¹³

A. Erroneous Instruction—Analysis

This latter point is illustrated by erroneous instruction cases, for example, where courts have denied liability based on strict products liability or warranty of quality theories in part because the “product” warranted includes only the physical properties of the publication, not the ideas contained therein that arguably cause tortious injury.²¹⁴ Indeed, the court in *Cardozo v. True* wrote that “ideas” hold a privileged position in our society and those who distribute these ideas fulfill an essential function.²¹⁵ Without citing any further support, however, the court concluded that to impose liability without fault on said distributors would severely restrict the free flow of information.²¹⁶

²⁰⁹ See, e.g., *Brandenburg*, 395 U.S. at 448–49; *Herceg v. Hustler Magazine*, 814 F.2d 1017, 1022 (5th Cir. 1987).

²¹⁰ See *Brandenburg*, 395 U.S. at 448.

²¹¹ See generally *Malloy*, *supra* note 6; *Day*, *supra* note 118.

²¹² See, e.g., *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997) (evaluating First Amendment protection of pamphlet on how to hire a hit man).

²¹³ See, e.g., *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991) (evaluating First Amendment protection of book instructing on how to find and prepare mushrooms for consumption).

²¹⁴ See, e.g., *Cardozo v. True*, 342 So. 2d 1053, 1056–57 (Fla. Dist. Ct. App. 1977).

²¹⁵ See *id.*

²¹⁶ See *id.* This distinction is not unlike the idea/expression dichotomy propounded in copyright law. Copyright protection is permitted on the particular expression of a work (e.g., the original selection and arrangement of words in a book) but copyright protection is not permitted on the ideas exhibited in a work (e.g., the theme of a novel). See Copyrights, 17 U.S.C. § 102(b) (1996); *Baker v. Selden*, 101 U.S. 99, 107 (1879). Its corollary concept is that of merger; that is, where an idea can be expressed in a small and limited

This argument is nothing more than a smoke screen erected to absolve a distributor of liability for the danger imposed by its products. In cases such as these, the product is an instruction manual—the instructions “as ideas” are not severable from the product purchased.²¹⁷

Consider, for example, the dismissal of two claims against the authors of a self-help book intended to help victims of child sexual abuse.²¹⁸ The authors of “The Courage to Heal Workbook” were sued by two readers who alleged that by following the advice in the book they conjured false memories of child sexual abuse.²¹⁹ The plaintiffs were charged with, *inter alia*, negligence and false advertising.²²⁰ The suits were dismissed with prejudice by the Superior Court of California.²²¹ It is anomalous that authorship of a self-help book does not create a duty to the consuming public whereas direct therapy to an individual consumer—where the same ideas and methods are used—would inhere such a duty and for which a therapist could be liable under a negligent advice standard.²²² The purpose of publishing and distributing such instructional materials is that they be followed and relied upon. Even if a duty to investigate the accuracy and veracity of instructions would have a chilling effect on speech, the question remains whether a mere warning issued to consumers to assist them in protecting themselves would be likewise chilling.²²³ This proposition, however, has not won favor from courts considering the issue.²²⁴ Of

number of ways, copyright will not protect the expression because extending such protection is the same as extending a monopoly to the idea itself. *See Kregos v. Associated Press*, 937 F.2d 700, 707 (2d Cir. 1991). Like most concepts in law, however, the idea/expression dichotomy is malleable. Courts have used this concept as a tool to either find or limit liability of alleged infringers depending on the reasonableness of extending a monopoly to the purported copyright holder. Compare *Baker*, 101 U.S. at 107 (holding that blank accounting table not properly the subject of copyright insofar as table is one of few expressions of idea of bookkeeping system, thus, merger applies) with *Kregos*, 937 F.2d at 706–07 (upholding copyright in baseball prediction form based on pitcher statistics despite probable application of merger doctrine because not as important to prevent monopoly on method of determining outcomes of baseball games as on method of diagnosing disease, for example).

²¹⁷ See Day, *supra* note 118, at 95–98.

²¹⁸ See *id.* at 98.

²¹⁹ See *Judge Throws Out Another Lawsuit Brought Against Authors of the Courage to Heal*, BUSINESS WIRE, Sept. 29, 1994.

²²⁰ See *id.*

²²¹ See *id.*

²²² See Day, *supra* note 118, at 98.

²²³ But see Crump, *supra* note 12, at 66–67 (noting that the inclusion of disclaimers should absolve a speaker of liability in proportion to the prevalence, conspicuity, the tendency of the disclaimer to warn of danger, and the intent of the speaker to so warn).

²²⁴ See *Winter*, 938 F.2d at 1036 n.6.

course, the precise issue of whether such liability would flow to an author propounding a work containing erroneous instructions remains untested.

Furthermore, considering the merits of a strict products liability analysis, the contention in *True* that the *retailer* would be indirectly responsible to investigate the veracity of the contents of each of its books is an unsatisfying justification for absolving it of liability. Indeed, under a standard products liability theory, a retailer *would* be liable. Most likely, the manufacturer, however, would *ultimately* be responsible derivatively for any fines levied against the retailer.²²⁵ Thus, visiting liability upon a retailer would not impose a duty to investigate upon it—any chilling effect would be the result of *publishers* censoring publications that pose a potential danger to its audience.²²⁶ As a result, erroneous instruction, and the needless harm resulting from reliance upon it, would be eliminated from the marketplace with marginal, if any, impact on the free flow of ideas or the diminution of politically, artistically, or socially valuable speech. Finally, there is no reason to conclude, as did the court in *Winter*, that a duty to investigate is a necessary consequence of imposing liability on a publisher or retailer.²²⁷ Instead, a simple disclaimer on the cover indicating that the contents have not been rigorously tested for safety and veracity would probably suffice to cure this informational defect in the product thereby bolstering the marketplace theory because the consumer would be better educated and not duped under the guise of First Amendment freedoms.²²⁸ In the end, imposing the threat of liability for erroneous instructive materials would promote greater accuracy and responsibility on the part of publishers.

B. *Dangerous Instruction—Analysis*

With respect to dangerous instruction cases such as *Herceg v. Hustler Magazine*, courts have held that in the absence of overt exhorta-

²²⁵ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1998) ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."); RESTATEMENT (SECOND) OF TORTS § 886B cmt. c (1979) ("If a manufacturer supplies a defective product to a retailer, who sells it to a customer, who recovers from the retailer for an injury incurred, the retailer may recover in indemnity against the manufacturer or he may maintain an action in negligence or for strict products liability.").

²²⁶ See RESTATEMENT (SECOND) OF TORTS § 886 cmt. c (1979).

²²⁷ But see *Winter*, 938 F.2d at 1037.

²²⁸ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a.

tion to action, such speech necessarily fails to constitute incitement within the meaning of *Brandenburg*.²²⁹ The justifiability of this result in the *Herceg* case is questionable because the actual and psychological messages of the article conflict when put in context. The facts indicate that the publisher prominently warned readers "at least ten different times that the practice is dangerous, self-destructive and deadly" and that readers should not attempt its practice.²³⁰ This warning, however, might not have been sufficient in inoculating the inherent dangers in the article given the fact that it was placed within the context of a masturbatory aid (*Hustler* magazine itself) and within a series of articles entitled "Sexplay" designed to "increase [readers'] sexual knowledge, to lessen [their] inhibitions and—ultimately—to make [them] much better lover[s]."²³¹

Moreover, it may be the case that fourteen-year-old boys are not capable of differentiating between the dangers exemplified in the "pervasive" warnings and the enticing description of pleasure derived from the practice. Had plaintiffs been permitted to examine this aspect at trial, they might have shown that *Hustler* was grossly negligent in publishing an article that it knew, or reasonably should have known, would fall into the hands of adolescents not able to appreciate the dangers of this practice, given its enticing context, regardless of the warnings. Furthermore, the court did not consider the motivations of the publisher in distributing this article—i.e., whether it was indeed meant for "educational purposes" only, whether *Hustler* intended people to perform this act, or whether *Hustler* knew or reasonably should have known that people would do so.²³² Such findings of fact would have been helpful in calibrating the culpability of the publisher in publishing instructions on how to perform this inherently dangerous activity.²³³

The Fifth Circuit's contention in *Herceg* that the instruction component of the article cannot be the sole basis for liability is somewhat compelling. After all, to know what auto-erotic asphyxiation is is to know roughly how to perform it.²³⁴ However, the court also seems

²²⁹ See *Herceg*, 814 F.2d at 1022–23.

²³⁰ See *id.* at 1019.

²³¹ *Id.* at 1018.

²³² See *id.* at 1018–25.

²³³ Admittedly, under this analysis, *Hustler* might be strictly liable for all tortious injury resulting from their instructional article. Given the nature of the publication and context of the article, there may be no way to effectively warn the reader of the dangers of auto-erotic asphyxiation.

²³⁴ See 814 F.2d at 1023

afraid to adopt a standard less protective of speech than *Brandenburg* because application of such a standard would be inherently more complex.²³⁵ This position is illegitimate because the court does not explain how such an analysis would differ from standard negligence evaluation of speech falling within unprotected speech categories such as defamation, libel, and fighting words.²³⁶

As distinct from the erroneous instruction cases, investigation into the intent of the speaker is necessary to find liability in dangerous instruction cases. Thus, like active encouragement cases, discussed below, where the speaker intends harmful or illegal action to ensue from his work, the fact that he does not use the language of direct incitement should not inoculate him from liability.²³⁷ Furthermore, in considering such cases, courts should evaluate the likelihood that the intended or inevitable audience might act on dangerous instructions, and the fact that such action has indeed taken place and caused injury.²³⁸ When such speech is thus intended to incite lawless or dangerous conduct, immediately or at some future time, and that conduct actually occurs, the speaker should be answerable for the known, probable, or intended ramifications of his speech.²³⁹ Ultimately, liability would result in greater responsibility in publishing dangerous materials; and by permitting investigation into the intentions of the speakers, only such dangerous speech as is promulgated by those with pernicious, reckless, or foul intentions would be eliminated from the marketplace.

C. Active Encouragement and Facilitation—Analysis

Active encouragement is perhaps the most noxious form of speech arguably still protected by the First Amendment. It is so closely intertwined with action that although it does not fit within the current construct set forth by the Court in *Brandenburg*, it nonetheless does not warrant any First Amendment protection. Indeed, rather than referring to *Brandenburg*, *Weirum v. RKO General, Inc.* should serve as the guide to examining exhortative speech.²⁴⁰ It is simply irrelevant that the exhortation occurs through a medium, such as publication or broadcast, where its attenuation does not serve to change the charac-

²³⁵ See *id.* at 1024.

²³⁶ See Day, *supra* note 118, at 84–85.

²³⁷ See Crump, *supra* note 12, at 55–56.

²³⁸ See *id.* at 57–63.

²³⁹ But see *Brandenburg*, 395 U.S. at 447.

²⁴⁰ See 539 P.2d 36, 48 (Cal. 1975).

ter of the speech.²⁴¹ Mill's highly fancied quote noted above,²⁴² is often invoked to amplify the argument that publication is less dangerous than direct verbal exhortation.²⁴³ This passage is more correctly read as standing for the proposition that the denunciation of a political or social regime in the abstract is fundamentally different in character than advocacy and instruction of specific illegal conduct; in fact, this passage is meant to be descriptive of how conduct and speech can be either distinct or commingled, and thus, censorship of action-like speech is justified despite the de facto infringement on liberty.²⁴⁴ It is permissible, therefore, to advocate the legality of murder or lobby for the abolition of age of consent laws, but advocating and explicitly instructing on the manner in which to avoid or pervert the law justifiably opens one up to liability. If one feels just in advocating the abrogation of the law, then let the just man martyr himself and pay for the injury he causes either in prison or in pecuniary penalties. Such is the price for civil disobedience.

Moreover, although generally speaking the written word is less likely to promote immediate action than the verbal word spoken to those acutely receptive to the advocacy, written communication may nonetheless carry the same impact. If, for example, the audience of a publication is peculiarly receptive to the ideas contained within that publication and are poised to act on those ideas, it is reasonable to assume that written exhortation will result in action in accordance with the ideas set forth in much the same way verbal exhortation would if it were transmitted to an equally poised crowd.²⁴⁵ Thus, it might not have been inappropriate to hold *Hustler* liable for the accidental asphyxiation of the young boy where the known audience of such a publication was poised to behave in a risqué sexual manner and the publication made auto-erotic asphyxiation seductively taboo.²⁴⁶

The *Rice v. Paladin Enterprises, Inc.* form of facilitation, publishing an instructional guide on how to become a hit-man, represents the nexus of specific intent to injure and incitement or exhortation to

²⁴¹ See *id.*

²⁴² See MILL, *supra* note 17, at 53.

²⁴³ See, e.g., *Hecceg*, 814 F.2d at 1018-19, 1023.

²⁴⁴ See MILL, *supra* note 17, at 53.

²⁴⁵ See *id.*

²⁴⁶ See *Hecceg*, 814 F.2d at 1025.

dangerous or illegal conduct.²⁴⁷ Advocacy of criminal conduct should not be permitted under the First Amendment merely because of the belief that where there is time to combat bad speech with good speech the bad speech must not be subject to censorship.²⁴⁸ To so conclude is to ignore the fact that this type of speech is itself injurious because no amount of combative speech can remove its impact once it is injected in the marketplace.

With respect to facilitation and inspiration cases in general, again, evaluating the intent of the speaker should be considered in determining whether the First Amendment should impose a barrier to tort liability.²⁴⁹ For example, publishing advertisements that the publisher has reason to believe are matching up criminal conspirators and deliberately turning a blind eye to this consequence, is tantamount to aiding and abetting the commission of criminal conduct.²⁵⁰ As Professor Terri Day noted, even the *Braun v. Soldier of Fortune Magazine, Inc.* standard—imposing liability on publishers only where advertisements contain “a clearly identifiable unreasonable risk, that the offer in the ad is one to commit a serious violent crime”²⁵¹—is too liberal in its treatment of negligent publication suits in light of First Amendment principles and is thus unnecessarily protective of publishers.²⁵²

Furthermore, it is of particular importance in inspiration cases to assess whether the speech is or is intended to be of serious artistic, political, social, or scientific value—in other words, its value in the marketplace of ideas.²⁵³ The presence of these qualities should weigh heavily in favor of First Amendment protection given the lack of direct exhortation or, intent to exhort dangerous or illegal action as

²⁴⁷ However, it arguably lacks the immediacy element required by *Brandenburg*. See *Rice*, 128 F.2d at 267.

²⁴⁸ Cf. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) (“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.”) (emphasis added).

²⁴⁹ See *Crump*, *supra* note 12, at 63–65.

²⁵⁰ See *Rice*, 128 F.2d at 242–43.

²⁵¹ 968 F.2d 1110, 1118 (11th Cir. 1992).

²⁵² See *Day*, *supra* note 118, at 91. Professor Day first noted that “clearly illegal advertisements” are not protected by the First Amendment. See *id.* at 104–05. Second, imposing liability for publishing ambiguous ads that lead to injury would only require publishers to reject or edit those ads. See *id.* at 91. Because this is already part of the publication process, Professor Day argued that holding publishers to this standard would impose no additional burden. See *id.* at 91.

²⁵³ *Crump*, *supra* note 12, at 67–69; see also *Miller*, 413 U.S. at 23–24.

well as the improbability of such actions inspired by such speech—after all, it is this type of speech that lies at the heart of the First Amendment's protection.²⁵⁴ Under such an analysis, "2Pacalypse Now" would properly be understood as artistic expression, not an attempt to *hypnotize* listeners into somnambulistic, murderous conduct,²⁵⁵ not *advocating* illegal or dangerous conduct,²⁵⁶ not giving its audience the means to execute such conduct,²⁵⁷ and not the solicitation of imitation.²⁵⁸

CONCLUSION

The propriety of immunizing speakers from the tortious affects of their speech is questionable. Surely the First Amendment poses an immense barrier to any scheme of restraint, even if the only restraining force is promoting self-censorship and responsibility in publication. The *Brandenburg* standard is ill-suited, however, to evaluate instances where speech is recklessly, negligently, or intentionally promulgated and postured so as to cause *actual harm*. Indeed, the *Brandenburg* standard was designed to protect speakers whose speech was thought to pose danger, but whose danger had not yet manifested. This Note has examined a variety of cases in which harm *has manifested* and yet reckless, negligent, or malicious publication went unrestrained because the Supreme Court has not established a distinct standard for what are clearly distinct cases. Just as the Court did with the *Brandenburg* case, it may be time for the Court to depart from decades of precedent and reevaluate the merits of applying *Brandenburg* to claims of tortious injury arising from dangerous, erroneous, exhortative, or facilitating speech.

ARIELLE D. KANE

²⁵⁴ See *Crump*, *supra* note 12, at 67–69; see also *United States v. Dennis*, 183 F.2d 201, 212 (2d. Cir. 1950).

²⁵⁵ See *Vance v. Judas Priest*, 1990 WL 130920, at *4 (Nev. Dist. Ct., Aug. 24, 1990). Interestingly, the Second Judicial District for the District Court of Nevada had occasion to adjudicate the liability of a music artist whose music was found to contain hypnotizing, subliminal messages. In 1990, in *Vance v. Judas Priest*, the court held that the a music label could not be held liable for inadvertently constructed subliminal messages. See *id.* at *21–22. In *Vance*, plaintiffs claimed that Judas Priest's music alleged to exhort the suicides of two young men. See *id.* at *21–22. The court concluded, as a general matter, that subliminal messages are not protected by the umbrella of the First Amendment. See *id.* at *23. Nonetheless, the court denied liability because it found that the messages present in the music were actually inadvertent sound effects. See *id.* at *9–10.

²⁵⁶ See *Brandenburg*, 395 U.S. at 447.

²⁵⁷ See *Rice*, 128 F.3d at 242.

²⁵⁸ See *Olivia N. v. Nat'l Broad. Co.*, 126 Cal. App. 3d 488, 496 (Cal. Ct. App. 1981).