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## Constitutionalized Negligence

Deana Pollard Sacks

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# CONSTITUTIONALIZED NEGLIGENCE

DEANA POLLARD SACKS\*

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## INTRODUCTION

The propriety of imposing tort liability for negligent speech has been the subject of controversy since before the First Amendment's incorporation. The debate over whether and to what extent civil liability may be socially desirable for unreasonably dangerous speech has intensified in recent years as entertainment media have become more explicitly violent and widely available. Experts have long concurred that exposure to all forms of violence is a cause of increased societal violence. Recent research on children's brain development indicates that children are exceptionally vulnerable to violent media influences, and numerous risks to society are created by children's exposure to violent video games in particular.

Video games are a unique form of media due to their interactive and repetitive cognitive programming characteristics, which render them a special danger to children. Accordingly, the contemporary controversy over regulating allegedly unreasonably dangerous speech has centered on the harmful effects that violent video games can have on a child's neurological and physiological health, which in turn can manifest in acts

of violence toward others. Numerous state legislatures have responded to the scientific research by regulating the sale of violent video games to children. Lower federal courts have consistently declared such legislative action a First Amendment violation, and during the summer of 2011, the Supreme Court broadly declared that violent video games are fully protected speech and that state sales regulations are subject to strict scrutiny.<sup>1</sup>

The Supreme Court has never reviewed the constitutionality of imposing civil liability for unreasonably dangerous speech. Lower courts have generally rejected tort liability for speech on a theory of negligence. Further, lower courts have unanimously rejected tort liability for injuries allegedly caused by violent video games. The controversial scientific evidence concerning the harrowing potential effects that violent video games can have on children's brains and behavior warrants review of the lower courts' rules immunizing dangerous speech. A constitutionalized<sup>2</sup> form of negligence liability for unreasonably dangerous speech that foreseeably causes actual injury should be considered, and the effects of violent video games on children present the most compelling case for recognizing such liability.

All forms of government regulation of protected speech are bounded by the First Amendment. In *New York Times v. Sullivan*, the Supreme Court recognized that tort liability constitutes state action and is therefore subject to constitutional scrutiny. Historically, the Supreme Court's approach to analyzing the constitutionality of criminal regulation of speech has been different than its approach to analyzing the constitutionality of tort liability for speech. The Court has constitutionalized a variety of tort claims arising from speech and created a balancing framework for reconciling First Amendment values with the state's interest in punishing and deterring injurious speech, as opposed to applying strict scrutiny for criminal regulation of speech.<sup>3</sup> The Supreme Court's recent decision in *Snyder v.*

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1. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011). Lower courts have unanimously found that violent video games are fully protected speech, affirmed by the Supreme Court in *Brown v. Entertainment Merchants Ass'n*. This finding could possibly be challenged relative to violent video games and children, based on experts' conclusions concerning the subliminal and potentially lasting effects that the games have on children's cognitive functioning and lower courts' findings that subliminal "speech" is unprotected by the First Amendment. See *Waller v. Osbourne*, 763 F. Supp. 1144, 1148 (M.D. Ga. 1991); *Vance v. Judas Priest*, Nos. 86-5844, 86-3939, 1990 WL 130920, at \*32 (Nev. Dist. Ct. Aug. 24, 1990). This Article assumes that violent video games are protected speech.

2. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766 (1985) (White, J., concurring) ("*New York Times v. Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander.>").

3. The Court has also applied a form of intermediate scrutiny for commercial speech due to its

*Phelps* immunized from civil liability a narrow class of harassing and invasive speech that was predominantly political in nature, caused primarily emotional upset, and was disseminated through traditional public sidewalk picketing.<sup>4</sup> *Snyder v. Phelps* was specifically limited to its extraordinary facts and does not control the constitutionality of imposing tort liability on a theory of negligence for unreasonably dangerous speech that can be proven to cause tangible injury.

The Supreme Court's recent criminal sales regulation decision in *Brown v. Entertainment Merchants Ass'n*<sup>5</sup> also does not control the issue of negligence liability for actual harm caused by children's consumption of violent video games. Criminal penalties for sales require no proof of actual harm to be enforced and risks chilling speech that does not actually cause harm. Tort liability is inherently more narrowly tailored than criminal regulation by virtue of the proof elements necessary to establish a claim in a particular case, including proof of actual harm to the plaintiff and both factual and proximate causation. Carefully circumscribed negligence liability for speech that is clearly unreasonably dangerous and that can be proven to have caused serious injury or death in an individual case may optimize social values. This Article considers how tort liability for actual harms caused to children (and others) by unreasonably dangerous speech might be conceived and proposes reform. The effect of violent video games on children is used to exemplify the civil liability analysis proposed herein.

Part I of this Article surveys the scientific evidence concerning the neurological and behavioral problems that are known to exist among children who play a lot of violent video games and distinguishes between direct harm to children's brains and the more general risk of increased societal violence. Part II reviews the game producers' apparent fault and tort policy, and concludes that tort immunity for unreasonably dangerous speech has created an imbalance of rights that operates to undermine the goals of tort law and public welfare. Part III reviews the lower courts' negligent speech jurisprudence and summarizes the development of the two strains of immunity rules lower courts created based on tort and constitutional doctrine. Part IV analyzes the Supreme Court's balancing approach to tort liability for speech and distills the Court's general

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profit-driven hardiness and relative invulnerability to chilling. *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 n.6 (1980).

4. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (concerning sidewalk picketing of the Westboro Baptist Church at funerals for fallen service members).

5. 131 S. Ct. 2729 (2011).

evidentiary tailoring method of reconciling tort and constitutional policies relative to defamation and a few other speech-torts. Part V demonstrates that lower courts have departed from the Supreme Court's general speech-tort balancing approach to tort liability for allegedly negligent speech and points out flaws in the lower courts' analyses. Part VI proposes an analytical paradigm for reviewing liability for harm caused by unreasonably dangerous speech derived from the Supreme Court's speech-tort analytical framework, and then illustrates how the test might be applied relative to violent video games and children.

#### I. THE DANGERS THAT VIOLENT VIDEO GAMES POSE TO CHILDREN AND SOCIETY

The Supreme Court of the United States and the American Academy of Pediatrics have reached very different conclusions concerning the social effects of violent media:

The State's evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. . . . They do not prove that violent video games *cause* minors to *act* aggressively . . . .<sup>6</sup>

Exposure to violence in media, including television, movies, music, and video games, represents a significant risk to the health of children and adolescents. Extensive research evidence indicates that media violence can contribute to aggressive behavior, desensitization to violence, nightmares, and fear of being harmed. . . . The evidence is now clear and convincing: media violence is [one] of the causal factors of real-life violence and aggression. . . . The debate should be over.<sup>7</sup>

This Part reviews scientific evidence demonstrating that violent video games pose serious health risks to children and society. This Part distinguishes indirect social harm, i.e., intervening acts of violence that may be caused by exposure to violent media generally and violent video games in particular, from direct neurological harm that can be caused by

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6. *Entm't Merchs. Ass'n*, 131 S. Ct. at 2739 (emphasis in original).

7. American Academy of Pediatrics, *Policy Statement-Media Violence*, 124 PEDIATRICS 1495, 1495-96 (2009).

playing violent video games, particularly among children. The distinction is important to both tort and constitutional analyses.<sup>8</sup>

#### A. *Research on the Indirect Social Effects of Media Violence*

There is no legitimate dispute over whether consumption of all forms of violent media is substantially correlated with violent behavior, particularly among children.<sup>9</sup> The controversy concerns causation theories that explain the correlation. In social science research, the causes of behavior are necessarily theoretical where controlled studies to prove causation could harm child subjects.<sup>10</sup> Experts concur, however, that to the extent that violent media causes subsequent aggression, causation is typically a slow, cumulative, desensitizing cognitive process<sup>11</sup> that can lower a person's inhibition to violence and cause him to adopt violent behavior as a means of conflict resolution.<sup>12</sup> A related theory posits that

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8. In *Brown v. Entertainment Merchants Ass'n*, California originally raised both types of injury to support its authority to regulate the sale of extremely violent "deviant or morbid" video games to children. 131 S. Ct. at 2732. However, California dropped the general social harm basis for the law and ultimately relied exclusively on the direct neurological harm to children. *Id.* at 2738–39; see also *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 961 (9th Cir. 2009). However, the scientific briefs presented to the Supreme Court did not focus exclusively on the direct neurological harm to children, and the Court ultimately conflated the two distinct forms of harm in its opinion. See *Entm't Merchs. Ass'n*, 131 S. Ct. at 2739.

9. See VICTOR C. STRASBURGER, BARBARA J. WILSON & AMY B. JORDAN, CHILDREN, ADOLESCENTS, AND THE MEDIA 175–78 (2d ed. 2009) (discussing the prevailing theories of causation that explain the correlation between violent media and violent behavior); American Academy of Pediatrics, *supra* note 7 (discussing the dangerous effects of violent media on children); DEPT. OF HEALTH & HUMAN SERV., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL (2001), available at <http://www.docstoc.com/docs/34353300/Youth-Violence-A-Report-of-the-Surgeon-General-2001> (reviewing statistics on youth violence and the effects of violent media on youth violence). In one report, 3500 studies reviewed the relationship between media violence and violent behavior, and all but eighteen found a relationship. See Marybeth Hicks, *Reject Violent Video Games*, WASHINGTON TIMES, Nov. 11, 2009, at A22 (citing MARY STROM LARSON, WATCH IT!: WHAT PARENTS NEED TO KNOW TO RAISE MEDIA-SMART KIDS (2009)) (discussing the popularity of first-person shooter games).

10. It would be unethical to subject children to violent media that is believed to harm them to prove cause and effect, so the known correlation must be explained by causation theories. E-mail from Elizabeth Gershoff, Assoc. Professor, Dept. of Human Dev. and Family Scis. & Population Research Ctr., Univ. of Tex., to author (Dec. 17, 2010 4:02 EST) (on file with author).

11. See, e.g., STRASBURGER ET AL., *supra* note 9, at 175–78 (discussing the prevailing theories of causation that explain the correlation between violent media and violent behavior). Although children are known to mimic behavior immediately, this is distinguishable from the slow, cumulative effects of violent media that are believed to desensitize children to violence systematically, which can lead to lower inhibitions to perpetrating acts of violence. See Telephone Interview with Craig Anderson, Professor of Psychol. and Dir. of the Ctr. for the Study of Violence, Iowa State Univ. (June 2, 2010) (notes on file with author).

12. Social scientists believe that exposure to violent media causes antisocial behavior in children, and that the media influence children cognitively over a period of time. See, e.g., VICTOR C.

aggressive behavior is developed and maintained through “cognitive scripts,” which are “mental routines” stored in memory that guide behavior in social situations resembling situations presented in media, such that exposure to large quantities of violence may “prime” the viewer to attribute hostile motives to others in ambiguous situations and to recall and execute violent responses to real-life conflicts.<sup>13</sup>

Recognized experts in developmental psychology concur. The American Academy of Pediatrics released a sobering Policy Statement in November 2009, warning its members about the health risks posed by children’s consumption of violent media, and urging its members to track children’s violent media consumption and to educate parents about the games’ dangerous health effects.<sup>14</sup> The Academy found that consumption

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STRASBURGER, ADOLESCENTS AND THE MEDIA: MEDICAL AND PSYCHOLOGICAL IMPACT 37 (1995) (the research on media violence and its effect on behavior is “compelling and clear,” aggression is a learned behavior, media violence is a “socially significant” cause of violence in society, and young children are particularly vulnerable); FEDERAL TRADE COMM’N, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES ii (2000), available at <http://www.ftc.gov/reports/violence/vioreport.pdf> (most of the research on the impact of media violence on children reveals a “high correlation” between exposure to media violence and aggressive and/or violent behavior); see also STRASBURGER ET AL., *supra* note 9, at 156–74 (discussing the effects of media violence on children and teenagers, such as its contribution to aggressive behavior). Research demonstrating correlations between viewing violent media and aggressive behavior date back to the mid 1980s. See Edward Donnerstein & Daniel Linz, *Mass Media Sexual Violence and Male Viewers: Current Theory and Research*, 29 AM. BEHAV. SCIENTIST 601 (1986); Russell G. Geen & Susan L. Thomas, *The Immediate Effects of Media Violence on Behavior*, 42 J. SOC. ISSUES 7 (1986); L. Rowell Huesmann, *Psychological Processes Promoting the Relation Between Exposure to Media Violence and Aggressive Behavior by the Viewer*, 42 J. SOC. ISSUES 125 (1986); Brendan G. Rule & Tamara J. Ferguson, *The Effects of Media Violence on Attitudes, Emotions, and Cognitions*, 42 J. SOC. ISSUES 29 (1986); Charles W. Turner et al., *Naturalistic Studies of the Long-Term Effects of Television Violence*, 42 J. SOC. ISSUES 51 (1986); see also Emily Campbell, Comment, *Television Violence: Social Science vs. The Law*, 10 LOY. ENT. L.J. 413 (1990) (analyzing the social science research).

13. STRASBURGER ET AL., *supra* note 9, at 167–68; see also American Academy of Pediatrics, *supra* note 7, at 1497–98 (children imitate and adopt behaviors that they are exposed to, and violent video games associate rewards and positive feelings with hurting others, a dangerous association). In addition, playing violent video games has been shown to cause “hostile attribution bias,” meaning that the player’s perception of an ambiguous occurrence, such as being bumped in a hallway, will tend toward viewing the occurrence as motivated by hostility as opposed to an innocent accident, which in turn tends to elicit a hostile response in the player. See Daphne Bavelier et al., *Brains on Video Games*, 12 NATURE REVS. NEUROSCIENCE 763, 765 (2011).

14. Adolescents’ critical period of brain development concerning world view and executive decision making renders them unusually vulnerable to violent media, which prompted The American Academy of Pediatrics to advise pediatricians to inquire about violent media consumption as part of children’s “well visit” procedures, and to educate parents about the serious risks that violent media pose to minors:

The evidence is now clear and convincing: media violence is [one] of the causal factors of real-life violence and aggression. Therefore, pediatricians and parents need to take action. . . .



of violent media can cause a variety of mental health problems for children and adolescents. These health problems include aggressive and violent behavior, bullying, desensitization to violence, fearful worldviews—including “mean world syndrome,” depression, and sleep disturbances.<sup>15</sup> Social scientists also concur that children’s exposure to violent media is a “socially significant” cause of later antisocial attitudes and conduct, which explains the substantial correlation between such exposure and subsequent aggressive and/or antisocial behavior.<sup>16</sup> Interpersonal violence is now a more prevalent health risk for children, adolescents, and young adults “than infectious disease, cancer, or congenital disorders.”<sup>17</sup> A leading suicide researcher is concerned about increases in suicide rates among young Americans that may result from desensitization to violence and pain, which can be produced effectively by playing violent video games.<sup>18</sup>

Violent video games are distinguishable from other forms of violent media such as television, motion pictures, and music because they are interactive and repetitive. That is, the players participate in the violence virtually in the “first-person,” meaning that the players manipulate hand-held devices to kill other players onscreen while they attempt to avoid

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[T]he entertainment industry, the American public, politicians, and parents all have been reluctant to accept these findings and to take action. The debate should be over.

See American Academy of Pediatrics, *supra* note 7, at 1495–96.

15. See *id.* at 1497. The Academy of Pediatrics also found that:

The strength of the association between media violence and aggressive behavior found in meta-analyses is greater than the association between calcium intake and bone mass, lead ingestion and lower IQ, and condom nonuse and sexually acquired HIV infection, and is nearly as strong as the association between cigarette smoking and lung cancer—associations that clinicians accept and on which preventive medicine is based without question.

*Id.* “Mean world syndrome” refers to the perception that the world is a dangerous place and can be cultivated from viewing quantities of violent media. *Id.*

16. See STRASBURGER, *supra* note 12, at 37.

17. American Academy of Pediatrics, *supra* note 7, at 1498; see also YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL, *supra* note 9 (discussing data on youth violence and the effects of violent media).

18. Interview with Thomas Joiner, Professor of Psychol., Fla. State Univ. (June 16, 2010) (notes on file with author). Two processes intersect to cause suicide: (1) desensitization to physical pain, injury or death, and (2) a desire for death. Violent video games are relevant to the first process and constitute a moderately powerful desensitization device to suicide. The most recent suicide data reveal that the highest rate of suicide has dropped from age 65 and older—the longstanding age group with highest suicide rates—to 45–55 year olds. *Id.* In addition, suicide is the fourth leading cause of death among young adults, which could relate to the affect of violent video games on the desensitization process. See, e.g., MEG MEEKER, YOUR KIDS AT RISK: HOW TEEN SEX THREATENS OUR SONS AND DAUGHTERS 67–69 (2007) (attributing the high teen suicide rate in part to teen depression and hopelessness caused by sexually transmitted disease diagnoses); *Healthy Youth!*, CTR. FOR DISEASE CONTROL, <http://www.cdc.gov/HealthyYouth/injury/index.htm#1>. Depression factors into Professor Joiner’s second suicide process. See Interview with Thomas Joiner, Professor of Psychology, Fla. State Univ. (June 16, 2010) (on file with author).

being killed.<sup>19</sup> Players can connect to the internet and choose team members from all over the world, communicate verbally with audio devices to strategize plays, and learn new ways to maximize “kills,” the ultimate game goal. The *Call of Duty* game series is among the most popular in the world and has become “a way of life” for adolescent males in particular.<sup>20</sup> *Call of Duty* is a “blood-splattered, military battlefield video game” where players move through virtual “battlefields shooting at the enemy—and getting shot at,” and the screen displays a record of the number of kills for each team.<sup>21</sup> The game also displays each gamer’s statistics, such as the number of kills for each player, how many times the player has been shot, and how long he has been playing.<sup>22</sup> Players are ranked worldwide based on their lifetime kills, which confers social status among players.<sup>23</sup> In sum, repetitive acts of violence and efficient killing sprees are the key to winning and are rewarded by game points, access to more effective weapons, and onscreen pop-up accolades.<sup>24</sup>

All people are influenced by repetitive cognitive associations, which become implicit over time, a normal cognitive programming process that aids in learning, memory, and efficient mental processing of environmental data.<sup>25</sup> Once formed, implicit cognitive associations have a

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19. See Ken Hoffman, *Call of Duty Video Game Has Become a Way of Life*, HOUSTON CHRON., July 19, 2010, <http://www.chron.com/life/hoffman/article/Hoffman-Call-of-Duty-video-game-has-become-a-way-1699515.php>; Marybeth Hicks, *Reject Violent Video Games*, WASHINGTON TIMES, Nov. 11, 2009, at A22 (discussing the popularity of first-person shooter games); Philip Elmer-DeWitt & John F. Dickerson, *Too Violent for Kids?*, TIME (Sept. 27, 1993), <http://www.time.com/time/magazine/article/0,9171,979298,00.html> (discussing first-person experiences in first-person shooter games).

20. See Hoffman, *supra* note 19.

21. *Id.*

22. *Id.*

23. *Id.*

24. Interview with Ryan Alexander Pollard, eighth-grade cadet (and the author’s son), Marine Military Acad. (Feb. 25, 2011) (notes on file with author). For example, milestones such as the number of a particular type of kills appear on the screen during play, such as: “Congratulations, you have shot 100 players in the head.” *Id.*

25. These are general processes that underlie all types of cognitive learning and social behavior, not just aggression and violence. See Brief for California State Senator Leland Y. Yee, Ph.D, et al. as Amici Curiae Supporting Petitioners, *Schwarzenegger v. Video Software Dealers Ass’n*, 130 S. Ct. 2398 (2010) (No. 08-1448), 2010 WL 2937557 at \*1A (Statement on Video Game Violence); see also e.g., Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (illustrating how implicit biases pertaining to race manifest in judgment and perception of events); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007) (explaining how implicit racial bias affects judges and jurors in “encoding, storing, and recalling relevant case facts”); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case For A Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 917–20 (1999) (explaining how cognitive associations are created and maintained, and applying theory to creation and maintenance of implicit bias).

resilient and lasting effect on a person's perception, judgment, and behavior beyond the person's conscious awareness.<sup>26</sup> Children's and adolescents'<sup>27</sup> exceptional vulnerability to media influences is well-established and may be explained by the state of their brain development. Relatively recent magnetic resonance imaging (MRI) studies confirm enormous activity in adolescents' prefrontal cortex—the area responsible for moral development and executive decision-making and control.<sup>28</sup> The brain growth includes rapid formation of neural connections, cognitive associations, and schemas that influence adolescents' perception of the world and appropriate social conduct in conjunction with a “pruning” process that discards weak or undeveloped associations in favor of associations that have been reinforced based on the adolescents' experiences during this critical period of knowledge assimilation, cognitive reorganization, and brain maturation.<sup>29</sup> Children are known to be

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26. See *supra* note 25; see also JUSTIN D. LEVINSON, DANIELLE M. YOUNG & LAURIE A. RUDMAN, *Implicit Racial Bias, A Social Science Overview*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* (Justin D. Levinson & Robert J. Smith eds., forthcoming 2012).

27. The terms “children” and “minors” are used interchangeably herein, and refer to persons under eighteen years of age. The term “adolescents” refers to minors who are between thirteen and seventeen years of age.

28. See, e.g., Sarah-Jayne Blackmore & Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Social Cognition*, 47 *J. OF CHILD PSYCHOL. & PSYCHIATRY* 296, 301–02 (2006) (discussing implications of brain development for executive functions and social cognition during puberty and adolescence; “inhibitory control, processing speed, working memory and decision-making continue[] to develop during adolescence . . . [D]uring [adolescence], what is perceived as important in the social world . . . changes and leaves its imprint on the pruning process”); see also *infra* note 29.

29. See, e.g., Todd S. Braver et al., *Flexible Neural Mechanisms of Cognitive Control Within Human Prefrontal Cortex*, 106 *PROC. NAT. ACAD. SCI.* 7351 (2009) (“temporal dynamics in younger adults fit a proactive control pattern . . . whereas in older adults a reactive control pattern was found.”); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 *ANNALS N.Y. ACAD. SCI.* 77, 82–83 (2004) (explaining that teenagers' brains are forming connections and pruning, and a teenager's experiences have a powerful effect on the structure of their brain); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 *NATURE NEUROSCIENCE* 861, 862–63 (1999) (during adolescence, an overproduction of synapses in teenagers' brains makes their experiences influential on how their brains develop; this “may herald a critical stage of development when the environment or activities of the teenager may guide selective synapse elimination during adolescence.”); Jay N. Giedd et al., *A Quantitative MRI Study of the Corpus Callosum in Children and Adolescents*, 91 *DEVELOPMENTAL BRAIN RES.* 274, 278–79 (1996) (regions of the corpus callosum with higher associations increase throughout adolescence; while some “elements of adult cognition are in place around age 12, speed, capacity, and ability on mental tasks, especially those of higher order, can continue to improve well into adulthood.”); William T. Greenough, James E. Black & Christopher S. Wallace, *Experience and Brain Development*, 58 *CHILD DEV.* 539, 550 (1987) (new synapses are produced in teenagers' brains in response to their experiences, greater experiences lead to more synapse connections, and synapses are generated to “provide information to be encoded into the nervous system.”); Tomas Paus, *Mapping Brain Maturation and Cognitive Development During Adolescence*, 9 *TRENDS IN COGNITIVE SCI.* 60, 64 (2005) (“[D]uring adolescence, brain maturation continues in the fronto-parietal systems and within

more impressionable due to brain immaturity and instability, and they are at greater risk for being influenced generally.<sup>30</sup> Repetitive associations created by violent video games likely have a deeper and more lasting cognitive effect on children than adults, as adult brains are mature and more resilient to influences and changes to brain processing, such as the creation of cognitive associations.<sup>31</sup>

Violent video games pose the greatest risk to children due to their interactive and repetitive nature.<sup>32</sup> Repetition creates, maintains, and entrenches unconscious cognitive associations, and gamers' instigation of virtual acts of violence necessitates desensitization and acceptance of violence to avoid cognitive dissonance.<sup>33</sup> Experts believe that violent video games create cognitive associations between violent actions and positive feelings and rewards because violent actions undertaken repetitively by video game players are positively reinforced through game points and other accolades, and players enjoy winning.<sup>34</sup> This belief is consistent with cognitive learning theory generally, and very recent brain scan research offers confirming data.<sup>35</sup> In sum, while media violence generally influences children more than adults, violent video games' repetitive and interactive nature makes them particularly effective in programming children to feel, think, and behave aggressively.

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the superior temporal sulcus (STS) . . . [D]uring adolescence, high demands are placed not only on the executive systems but also on the interplay between cognitive and emotion-related processes.”).

30. See *infra* note 47 and accompanying text.

31. *Id.*

32. See American Academy of Pediatrics, *supra* note 7, at 1498. Results of three recent studies examining “interactive-media-violence” effects showed greater risk of interactive media than passive viewing of violent media:

[T]hese rapidly growing and ever-more-sophisticated [interactive violent video games] have indicated that the effects of child-initiated virtual violence may be even more profound than those of passive media such as television . . . [As] the child or teenager is “embedded” in the game and uses a “joystick” (handheld controller) that enhances both the experience and aggressive feelings.

*Id.* According to Craig Anderson, whether video games cause more harm to children than passive media is still controversial, although recent studies support the theory that violent video games are more dangerous, and, theoretically, playing interactive “first-person shooter” games likely causes greater harm to children than passively watching violent media. E-mail from Craig Anderson, Dir. of the Ctr. for the Study of Violence, Iowa St. Univ., to author (Mar. 28, 2012, 15:13:55 CDT) (on file with author).

33. See *supra* notes 11–12 and 25.

34. See *supra* note 25.

35. See *infra* Part I.B.

### *B. Research on Video Games' Effects on Brain Functioning*

The repetitive nature of video games renders them an incredible training tool. There is no doubt in the scientific community that video games can teach, train, and program human beings to think differently, process information differently, respond to cues differently, and change a player's understanding, views, and behavior relative to the subject of the game.<sup>36</sup> Video games can enhance many skills, including visuospatial capacity, visual acuity, task switching, speed of processing, and statistical inference, and can enhance low-level vision and visual attention.<sup>37</sup> Additionally, "[b]ecause behavioral changes arise from brain changes, it is also no surprise that performance improvements are paralleled by enduring physical and functional neurological remodeling."<sup>38</sup>

Video games program brains consistent with their content. Researchers have determined that "playing pro-social games led to more 'helping' behavior, whereas playing a violent game led to more 'harming' behavior."<sup>39</sup> Leading researchers in the effects of video games on the mind and behavior concur that "[t]here is no question that the same characteristics that make many games effective teachers of perceptual and cognitive skills can also be harnessed to produce maladaptive effects on brain and behaviour."<sup>40</sup> The evidence that violent video games produce garden-variety antisocial conduct (such as responding to an ambiguous bump in a hallway with aggression) is much stronger than the evidence that violent video games induce criminal or serious physical violence.<sup>41</sup>

Consumption of violent video games has been shown to be correlated with young male subjects associating violent images, such as knife attacks, with images that elicit pleasure universally, such as an image of a smiling baby.<sup>42</sup> These counterintuitive associations were not found among subjects who were not exposed to a large quantity of violent video games.<sup>43</sup> The

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36. See Bavelier et al., *supra* note 13, at 763–65.

37. *Id.* at 763.

38. *Id.*

39. *Id.* at 764.

40. *Id.*

41. *Id.* at 765.

42. See Kira Bailey, Robert West & Craig A. Anderson, *The Influence of Video Games on Social, Cognitive, and Affective Information Processing*, in THE OXFORD HANDBOOK OF SOCIAL NEUROSCIENCE 1001 (Jean Decety & John T. Cacioppo eds., 2011). For more detail on the scientific research concerning children's and adolescents' vulnerability to altered brain activity resulting from playing violent video games, see Deana Pollard Sacks, *California's Interest in Schwarzenegger v. Entertainment Merchants Association* (Jan. 17, 2011) (unpublished manuscript), available at [http://works.bepress.com/deana\\_pollard/10/](http://works.bepress.com/deana_pollard/10/).

43. *Id.*

new research is consistent with functional MRI (fMRI) studies produced over the past decade that have found that violent video game consumption may alter children's brain activity patterns and cause them to mimic the patterns of children with "conduct disorder," i.e., violent and antisocial behavioral problems.<sup>44</sup> These cognitive distinctions among children probably result from their developmental vulnerability to altered brain activity patterns, a function of rapid neural development, and a result predicated by cognitive learning theory and Hebb's Law, which holds that "neurons that fire together wire together."<sup>45</sup> That is, cognitive associations that are made repetitively become entrenched and resilient to change,<sup>46</sup> particularly among children and adolescents whose growth process and attendant unstable cognitive matrix render them vulnerable to influence—a vulnerability adults do not share. Similar research on children's immature brain areas governing morality and executive function, and their developmental vulnerability to negative influences and poor choices, has persuaded legislators and the Supreme Court to determine that capital punishment of minors is unconstitutional.<sup>47</sup>

Scientists at Indiana University School of Medicine published the results of the first longitudinal, experimental brain imaging investigation of video game play in healthy, young adult males on December 2, 2011.<sup>48</sup>

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44. Telephone Interview with Craig Anderson, Dir. of the Ctr. for the Study of Violence, Iowa State Univ. (Dec. 9, 2010). Most of the studies to date concern physical aggression and violent media, although newer research reveals that altered brain activity patterns can result from consumption of violent video games. *See, e.g.*, Press Release, Radiological Soc'y of N. Am., Violent Video Games Trigger Unusual Brain Activity in Aggressive Adolescents (Dec. 2, 2002), available at <http://people.ee.duke.edu/~jshorey/MRIHomepage/violent.html>; Marcus Yam, *Study: Violent Video Games Affect Brains*, DAILYTECH (Dec. 1, 2006 5:17 AM), [http://www.sosparents.org/DailyTech%20-%20Study\\_%20Violent%20Video%20Games%20Affect%20Brains.pdf](http://www.sosparents.org/DailyTech%20-%20Study_%20Violent%20Video%20Games%20Affect%20Brains.pdf); *see also* Bavelier et al., *supra* note 13, at 765–66 (among other things, the "frontostriatal pathway," which mediates both drug addiction and behavioral disorders, is activated by certain video games).

45. *See* Deana Pollard Sacks, *Children's Developmental Vulnerability and the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?*, 40 STETSON L. REV. 777, 779–84 (2011) (discussing cognitive learning theory and "Hebb's Law" relative to children's developmental vulnerability).

46. *See, e.g.*, Pollard, *supra* note 24, at 920.

47. *See* *Roper v. Simmons*, 543 U.S. 551, 564–71 (2005) (recognizing that juveniles' brains and character are not fully developed and that the majority of states prohibit capital punishment of juveniles, concluding that capital punishment for crimes committed under the age of eighteen is unconstitutional); *see also* Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 SCI. MAG. 596, 599 (2004), available at <http://www.deathpenaltyinfo.org/node/1225> ("The brain's frontal lobe, which exercises restraint over impulsive behavior, 'doesn't begin to mature until 17 years of age.'" (quoting neuroscientist Ruben Gur of the University of Pennsylvania in Philadelphia)); Mark Moran, *Adolescent Brain Development Argues Against Teen Executions*, 38 PSYCHIATRIC NEWS 8 (2003) (the instinctual part of the brain develops first, and areas such as the frontal cortex that help to control emotions develop later).

48. Yang Wang et al., *One Week of Video Game Play Alters Prefrontal Activity* (Dec. 2, 2011)

The study concluded that just one week of violent video game play altered prefrontal brain activity.<sup>49</sup> Additional research is underway among media effects and brain research experts to strengthen the causal relationship between violent video game consumption and the creation of dysfunctional cognitive associations.<sup>50</sup> Scientific proof of direct, unhealthy changes to children's brains caused by violent video games will likely be available shortly, as the research is expanding rapidly.

Video games are addictive, especially for children. Research in the last year has demonstrated similar brain activation patterns between "video game addiction" and drug addiction.<sup>51</sup> Parents of violent video game connoisseurs often express concern about the addictive nature of the games.<sup>52</sup> Children and adolescents (as well as some adults) are known to revolve their lives around playing the games, which have been called as addictive as cocaine.<sup>53</sup> Children become entranced in the games, play for hours without a break, and become enraged when they are interrupted.<sup>54</sup>

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(unpublished manuscript) (on file with Dept. of Radiology and Imaging Scis., Dept. of Psychiatry, Ind. Univ. School of Med. and author).

49. *Id.*

50. For example, Kira Bailey of Iowa State University's Center for the Study of Violence is currently conducting an experimental training study that might result in stronger evidence of a causal change in brain function resulting from playing violent video games. See Kira Bailey et al., *The Association Between Chronic Exposure to Video Game Violence and Affective Picture Processing: An ERP Study*, 11 COGNITIVE AFFECT BEHAV. NEUROSCIENCE 259 (2011).

51. See, e.g., Doug Hyun Han et al., *Brain Activity and Desire for Internet Video Game Play*, 52 COMPREHENSIVE PSYCHIATRY 88 (2011); Doug Hyun Han et al., *Bupropion Sustained Release Treatment Decreases Craving for Video Games and Cue-Induced Brain Activity in Patients with Internet Video Game Addiction*, 18 EXPERIMENTAL AND CLINICAL PSYCHOPHARMACOLOGY 297 (2010); Ju-Yu Yen et al., *Psychiatric Symptoms in Adolescents with Internet Addiction: Comparison with Substance Abuse*, 62 PSYCHIATRY & CLINICAL NEUROSCIENCE 9 (2008).

52. The author has personally witnessed these effects and has discussed children's reactions to video game deprivation with numerous parents, including that the reactions mimic addicts' reactions to being deprived of drugs, i.e., panic, anger, irritability and promises of behavioral change to regain access to the video games.

53. Some doctors have concluded that video gaming is "taking over the lives of kids," and may cause a "clinical impulse control disorder," an addiction akin to compulsive gambling. Sherry Rauh, *Video Game Addiction No Fun*, WEBMD, <http://www.webmd.com/mental-health/features/video-game-addiction-no-fun> (last visited May 9, 2012). Dr. Young, for example, likens video game addiction to cocaine addiction in that the video game addict seeks to change the way he feels by escaping into a "fantasy world," as opposed to ingesting a drug. *Id.* This lure of fantasy is most prominent in role-playing video games, as a child can become dominant in the game regardless of his social life in the real world, making the virtual world more appealing than the real world. *Id.* Psychiatrist Michael Brody defined addiction, including addictive behavior, by the following criteria: "1) the person needs more and more of a substance or behavior to keep him going; 2) if the person does not get more of the substance or behavior, he becomes irritable and miserable." *Id.*

54. See Ken Hoffman, *supra* note 19; see also Bavelier et al., *supra* note 13, at 765-66 (the video game player's behaviors indicating addiction, such as "irritable, aggressive, and violent" responses to requests to stop playing the games, are similar to behaviors of substance abuse addicts).

Childcare professionals have begun to advise parents on how to deal with children's video game addiction,<sup>55</sup> which can produce neurological and other health problems for children.<sup>56</sup> In 2007, the American Psychiatric Association issued a statement addressing the problem of children's video game addiction and explained why an official diagnosis of "video game addiction" was proposed in the 2012 draft of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V).<sup>57</sup> Any such addiction is even more concerning for children because Congressional findings indicate that minors become addicted (to drugs) more easily than adults and have more trouble breaking drug addictions.<sup>58</sup> Considering that addiction has mental processing characteristics, children are probably more easily addicted to video games than adults.

In sum, numerous serious risks to mental health can result from exposure to violent video games due to their cognitive programming potential. Children and adolescents are acutely vulnerable to these risks because their brains are still developing.

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55. The American Psychiatric Association issued the following statement on June 25, 2007: Psychiatrists are concerned about the well-being of children who spend so much time with video games that they fail to develop friendships, get appropriate outdoor exercise or suffer in their schoolwork. Certainly a child who spends an excessive amount of time playing video games may be exposed to violence and may be at higher risks for behavioral and other health problems.

*American Psychiatric Association Considers 'Video Game Addiction,'* SCIENCE DAILY (June 25, 2007), <http://www.sciencedaily.com/releases/2007/06/070625133354.htm>.

56. Telephone Interview with Craig Anderson, *supra* note 44.

57. Professor Anderson stated:

Today (June 25, 2007) the APA released the following statement on 'video game addiction': The APA defines mental disorders in the Diagnostic and Statistical Manual of Mental Disorders. Since the current edition, DSM-IV-TR, does not list 'video game addiction,' the APA does not consider 'video game addiction' to be a mental disorder at this time. If the science warrants it, this proposed disorder will be considered for inclusion in DSM-V, which is due to be published in 2012. Revising DSM requires a years-long, rigorous process—one that is transparent and open to suggestions from our colleagues in the medical and mental health communities and the public. All changes to DSM will be based on the latest and best science. To date, the APA has named the chair and co-chair of the DSM-V Task Force—David Kupfer, M.D., and Darrel Regier, M.D., M.P.H., respectively—and is in the process of establishing the full task force, which will have overall responsibility for DSM-V's development.

*Id.*; see also Sherry Rauh, *supra* note 53 (video game addiction is "absolutely" real, a "clinical impulse control disorder."). The DSM-V will be published in May, 2013.

58. See *Morse v. Frederick*, 551 U.S. 393, 407 (2007) (noting that "[d]rug abuse can cause severe and permanent damage to the health and well-being of young people.").



## II. SOCIAL GOALS OF TORT REGULATION & MANIFESTATIONS OF JURISPRUDENTIAL IMBALANCE

[E]xisting understandings of the First Amendment are based on the assumption that, because a price must be paid for free speech, it must be the victims of harmful speech who are to pay it. . . . It ought to be troubling whenever the cost of a general societal benefit must be borne exclusively or disproportionately by a small subset of the beneficiaries.<sup>59</sup>

This Part considers fundamental tort policies in relation to the unique circumstances surrounding the video game industry's power to determine the violence ratings of its own games in conjunction with the industry's known marketing strategies relative to child consumers. This Part concludes that tort immunity for unreasonably dangerous speech is unduly favorable to negligent speech producers and inefficiently shifts all costs of negligent speech onto the public at large. This tort immunity has created an imbalance of rights that is counterproductive to the social goals advanced by tort liability. Jurisprudential reform is warranted.

Tort jurisprudence establishes minimal civic duties to avoid harming others by punishing breaches of such duties with money damages and other remedies. Tort doctrine relies on the "rational actor assumption,"<sup>60</sup> i.e., people seek to maximize their wealth and best interests and respond accordingly to behavioral incentives and disincentives.<sup>61</sup> Economic theory has been a driving force behind tort law's evolution over the last half century and posits that taxing socially harmful behavior through tort liability will encourage members of society to exercise care to avoid harming others, and that externalized costs will be ignored.<sup>62</sup> The greatest reform to tort jurisprudence over the last century has been the advent of strict products liability, and more generally, a focus on enterprise liability as opposed to the fault principle.<sup>63</sup> Contemporary tort policy is

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59. Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322–23 (1992) (arguing that free speech jurisprudence is too deferential to speakers and disregards tort policy).

60. See, e.g., Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115, 123 (1993) (suggesting that "clear, understandable" legal standards are important to encourage people to modify their behavior).

61. This is known as "rational choice theory." See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1055, 1060–66 (2000).

62. See *id.* at 1054; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 951 (1996).

63. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* 969–77 (2000); W. PAGE KEETON ET AL.,

characterized by legal rules that seek to minimize the costs of accidents by shifting the costs of harm to the cheapest cost-avoider and to assure compensation to injured parties.<sup>64</sup> Tort liability sends an important normative message that disregarding the rights and safety of others is socially unacceptable.

The video game industry brings in more than \$16 billion dollars each year, and video game producers are extremely wealthy companies.<sup>65</sup> For example, Activision Blizzard, Inc. owns and publishes the *Call of Duty* series of video games, including *Modern Warfare 2*, which was the best-selling video game in 2009,<sup>66</sup> and sold 4.7 million copies within the first 24 hours of its release—or \$310 million in sales.<sup>67</sup> *Modern Warfare 3* was released on November 8, 2011, and blew away all prior video game sales statistics: 6.5 million copies of the game were sold in the first 24 hours of its release, which constituted an estimated \$400 million in sales; after the

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PROSSER & KEETON ON THE LAW OF TORTS 536 (5th ed. 1984) (“[T]he last hundred years have witnessed the overthrow of the doctrine of ‘never any liability without fault,’ even in the legal sense of a departure from reasonable standards of conduct.”). However, a “critical mass” of scholars oppose strict products liability and the 1998 RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY drops all references to “strict products liability” and retains strict liability relative to product flaws only, requiring negligence to recover for design and warning defects. DOBBS, *THE LAW OF TORTS* at 977. Strict liability arguably rivals the fault principle as a theory of tort liability. See Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1286 (2001) (challenging the Third Restatement’s claim that strict liability is a set of isolated exceptions to the fault principle and arguing that the concept of tort liability grounded in strict liability is as general as the fault principle).

64. See, e.g., Korobkin & Ulen, *supra* note 61, at 1055 (legal academic thought is permeated with, and most influenced by, the concern of law and economics and how actors respond to legal incentives); DOBBS, *supra* note 63, at 975; KEETON ET AL., *supra* note 63, at 20–26.

65. This is according to the NPD Group, a market research firm that tracks point-of-sale data on many industries such as fashion, electronics, and video games from participating retailers and surveys NPD Group’s panel of 2.5 million consumers. Press Release, The NPD Group, Inc., 2011 Total Consumer Spend On All Games Content In The U.S. Estimated Between \$16.3 To \$16.6 Billion (Jan. 12, 2012), [https://www.npd.com/wps/portal/npd/us/news/pressreleases/pr\\_120116/tut/p/c5/04\\_SB8K8xLLM9MSSzPy8xBz9CP0os3g3b1NTS98QY0ML5yBnA09TY8cQF6cgo2APA\\_1I\\_SjjeBc3Sw8PN28TQ4sgSwsDT1d\\_QxfPoAAjC0sj\\_YLsQEUA36R2cQ!!/](https://www.npd.com/wps/portal/npd/us/news/pressreleases/pr_120116/tut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3g3b1NTS98QY0ML5yBnA09TY8cQF6cgo2APA_1I_SjjeBc3Sw8PN28TQ4sgSwsDT1d_QxfPoAAjC0sj_YLsQEUA36R2cQ!!/); see also Barbara Ortutay, *June Video Game Sales Decline Again, NPD Says*, PHYSORG (July 16, 2010), <http://www.physorg.com/news/198473724.html> (despite declines in sales of video games, the industry could still pull in twenty billion in 2010); Daniel Terdiman, *Video Game Sales Explode in Industry’s Best Month Ever*, CNET (Jan. 14, 2010, 4:18 PM PST), [http://news.cnet.com/8301-13772\\_3-10435516-52.html](http://news.cnet.com/8301-13772_3-10435516-52.html) (in 2009, the video game industry “posted total sales of \$19.66 billion”).

66. Press Release, NDP Group, 2009 Video Game Software Sales Across Top Global Markets Experience Declines for Console and Portable Platforms (Feb. 3, 2010), available at [http://www.npd.com/press/releases/press\\_100203a.html](http://www.npd.com/press/releases/press_100203a.html).

67. See Robert Johnson, *Call of Duty: Modern Warfare 2 Destroys Records in First Day Sales Rampage, Pulls in \$310M*, N.Y. DAILY NEWS, Nov. 13, 2009, [http://www.nydailynews.com/money/2009/11/13/2009-11-13\\_video\\_game\\_bltz.html](http://www.nydailynews.com/money/2009/11/13/2009-11-13_video_game_bltz.html); Tom Ingham, *Call Of Duty Series Rops 55 Million Sales*, MCV (Nov. 27, 2009, 1:13 PM), <http://www.mcvuk.com/news/36680/Call-Of-Duty-series-tops-55-million-sales>.

first five days of the game's release, the sales figure rose to \$775 million.<sup>68</sup> Activision<sup>69</sup> has reaped approximately \$3 billion in sales for the *Call of Duty* game series alone and owns other popular video game products, such as the *Tony Hawk*, *Spider-Man*, and *James Bond* series. Activision was one of dozens of merchants that filed amicus curiae briefs in *Brown v. Entertainment Merchants Ass'n*, and has a financial interest in maximizing its profits, including maximizing sales of violent video games to children.

The video game industry "self-regulates" through the Entertainment Software Rating Board.<sup>70</sup> The industry purports to protect children from dangerous content by rating games with "intense violence" as "M" for mature players, based upon their conclusion that "M" games contain "content suitable only for persons ages 17 and older."<sup>71</sup> However, a Federal Trade Commission investigation found in 2000 that the video game industry and other entertainment media engage in "pervasive and aggressive marketing of violent movies, music and electronic games" to children and "routinely target children under 17 as the audience for movies, music and games that their own rating or labeling systems say are inappropriate for children . . . due to their violent content."<sup>72</sup> Ten out of the eleven violent video game producers that were investigated specifically targeted twelve-to-seventeen-year-old boys for their "M" game advertisements to maximize sales and profits.<sup>73</sup>

The attitude that some violent video game producers have shown toward child consumers of "M" games underscores the depth of the disregard for children's safety and well-being. One video game producer's marketing plan even stated:

[W]e recommend approaching the middle segment of this group [6-34 year olds] because: [The game] has an M rating, which 1) may discourage parents from buying the game, and 2) hinder clearance of a commercial airing in shows primarily for children under 12.

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68. Ben Fritz, *Call of Duty: Modern Warfare 3 Grosses \$400 Million on First Day*, L.A. TIMES BLOG (Nov. 11, 2011, 10:38 AM), <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/11/new-call-of-duty-game-sells-400-million-on-first-day.html>; see also Brett Molina, *'Modern Warfare 3' Grosses \$775 Million in First 5 Days*, USA TODAY, Nov. 18, 2011, <http://content.usatoday.com/communities/gamehunters/post/2011/11/call-of-duty-modern-warfare-3-five-day-sales-record/1>.

69. Activision owns the Call of Duty series and merged with Vivendi Games in 2008 to form the "world's largest and most subtle pure-play video game publisher." See *Activision Blizzard*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Activision\\_Blizzard](http://en.wikipedia.org/wiki/Activision_Blizzard) (last visited May 9, 2012).

70. See FEDERAL TRADE COMM'N, *supra* note 12, at 36-44.

71. *Id.* at 38 n.203.

72. *Id.* at i.

73. *Id.* at 44-47. Some retailers, such as Best Buy, have adopted policies to restrict the sale of "M" video games to minors, but government regulations have been struck down consistently.

However, *the younger the audience, the more likely they are to be influenced by TV advertising . . .* Therefore, the recommended media target audience is: Males 12–17—Primary Males 18–34—Secondary.<sup>74</sup>

Although some progress in terms of game producers' responsibility toward children has arguably been made,<sup>75</sup> it appears that, as a whole, protecting children through self-regulation within this enormously wealthy and profit-driven industry is failing.

As explained below, violent video game producers have essentially been immunized from tort liability based on rules adopted by lower courts. That is, a constitutional right to externalize all social costs of their speech has been conferred to producers of potentially life-threatening speech by these lower courts. Basic tort principles, such as the rational actor assumption, predict that violent media producers will disregard the external social harms caused by their media if they are immunized from liability for those harms. The fact that violent media producers have targeted children in advertising because they are known to be easily influenced and manipulated is a predictable outcome of tort immunity based on neoclassical economic analysis: the producers are ignoring externalized costs and exploiting consumer vulnerability because it maximizes their wealth. In essence, some video game producers have maximized their products' potential social risks to maximize profits, an indication that the law has not struck an optimal balance of interests between society and violent video game producers.

A socially optimal speech-tort balance would encourage producers of potentially dangerous speech to exercise some degree of social responsibility to avoid grave public harm resulting from their speech without chilling free speech. An example of how an appropriate threat of liability can optimize public safety without chilling free speech may be exemplified by the subliminal speech cases. In the early 1990s, two federal courts heard cases alleging that subliminal suicide commands embedded in rock music caused adolescents to kill themselves.<sup>76</sup> Both courts held that subliminal messages are unprotected speech because they influence people

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74. *Id.* at 46 (emphasis added).

75. *See, e.g.*, FEDERAL TRADE COMM'N, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FIFTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING, AND ELECTRONIC GAME INDUSTRIES* i (Apr. 2007), available at <http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf>.

76. *Waller v. Osbourne*, 763 F. Supp 1144, 1148 (M.D. Ga. 1991); *Vance v. Judas Priest*, Nos. 86-5844, 86-3939, 1990 WL 130920 (Nev. Dist. Ct. Aug. 24, 1990).

without their conscious awareness and circumvent assumptions underlying the “marketplace of ideas.”<sup>77</sup> Accordingly, both courts held that subliminal speech is subject to tort liability. Since these decisions, no published opinion has found embedded suicide commands in music, possibly because subliminal suicide commands have been discouraged by the threat of wrongful death lawsuits. And yet, despite the threat of liability for unreasonably dangerous subliminal content, music proliferation has hardly been chilled, considering the graphic sexual and violent content of contemporary music. While violent video games may be distinguishable from subliminal suicide commands in terms of the intent of the producers, the point remains that a threat of civil liability can create an incentive for media producers to exercise some degree of care to avoid creating unreasonable risks of harm to children and society.

Tort policy and efficient cost-avoidance mitigate toward shifting the actual costs of cognizable injury that can be proven to be caused by unreasonably dangerous speech onto the speech producers, certainly if they are known to be financially capable of absorbing and spreading the costs, such as violent video game producers. However, this tort policy conflicts with First Amendment policies that speech does not lose protection due to its profitability and that free speech must be broadly protected.<sup>78</sup> While striking the ideal speech-tort balance may be difficult, this is not a reason to maintain a socially destructive status quo that disproportionately harms children. As explained in Part V, an approach to speech-tort liability consistent with the Supreme Court’s speech-tort jurisprudence would be superior to the lower courts’ immunity rules, at least relative to certain types of dangerous media and particularly vulnerable consumers, such as extremely violent video games and children.

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77. See *Waller*, 763 F. Supp. at 1148 (subliminal messages are akin to false and misleading speech and “worthy of little, if any, [F]irst [A]mendment constitutional protection.”); *Judas Priest*, 1990 WL 130920 at \*25 (subliminal suicide commands are unprotected speech because they operate beyond conscious awareness and do not enter the marketplace of ideas).

78. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 789 (1985) (Brennan, J., dissenting) (“Time and again we have made clear that speech loses none of its constitutional protection ‘even though it is carried in a form that is ‘sold’ for profit.”) (quoting *Va. Pharm. Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976); see also *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011) (wherein a five-member majority of the Court struck down criminal regulation of violent video game sales broadly).

### III. LOWER COURTS' NEGLIGENT SPEECH IMMUNITY RULES

The plethora of individual rights which we have in this nation of free men is undoubtedly a source of our strength, but in a sense, is also a source of, or at least the catalyst for, significant lawlessness that pervades our society.<sup>79</sup>

Lower courts have been grappling with negligent speech cases for nearly a century, and have virtually barred liability for protected dangerous speech on a theory of negligence. Some courts engaged tort doctrine to reject liability, but seemed most influenced by free speech concerns, and most courts ultimately settled on a categorical approach for imposing tort liability on speech, as opposed to engaging the Supreme Court's general speech-tort balancing framework. Most courts adopted the *Brandenburg* incitement test as an evidentiary predicate to finding unreasonably dangerous speech unprotected and therefore subject to tort liability. This Part traces the lower courts' development of the tort and constitutional immunity rules relative to negligent speech. This Part concludes that current negligent speech jurisprudence is neither coherent nor optimal, and that a constitutionalized negligence paradigm would be better.

#### A. Lower Courts' Tort Analysis of Negligent Speech Liability

The seminal negligent speech case, *Jaillet v. Cushman*, employed a persuasive risk-utility analysis to find that news publishers owed no duty of care to the public at large for merely negligent publication errors that led to investment losses,<sup>80</sup> and several early courts followed this reasoning.<sup>81</sup> However, later courts relied on earlier cases to find that no duty of care existed in the context of vastly different analytical variables, including the loss of human life.<sup>82</sup> Although ostensibly analyzing tort doctrine, later courts were clearly driven by free speech concerns that trumped fundamentals of tort doctrine. Modern courts often rely on a

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79. *Norwood v. Soldier of Fortune Magazine*, 651 F. Supp. 1397, 1402 (W.D. Ark. 1987).

80. *Jaillet v. Cashman*, 115 Misc. 383, 384 (N.Y. Sup. Ct. 1921), *aff'd*, 235 N.Y. 511 (N.Y. 1923).

81. *See, e.g., MacKown v. Ill. Publ'g & Printing Co.*, 6 N.E.2d 526, 530 (Ill. App. Ct. 1937) (extending no duty rule to negligent medical advice published in newspaper, relying on *Jaillet v. Cashman*).

82. *See infra* note 77.

constitutional analysis to bar liability for unreasonably dangerous speech, which is explained in the next Subpart.

In *Jaillet v. Cashman*, the court rejected liability for negligent investment reporting based on a traditional risk-utility analysis, finding that the value of newsworthy investment reporting outweighed the public risk posed by merely negligent publication errors.<sup>83</sup> The court's economic analysis produced a "no-duty" rule because publisher liability for authors' negligence was infeasible, and publishing companies could become bankrupt if held liable to an infinite number of plaintiffs. Although the First Amendment had not yet been incorporated,<sup>84</sup> the court denied liability to safeguard the public's interest in the dissemination of newsworthy information. In dicta, the court distinguished categories of untrue speech that are not protected from civil liability, deceit, defamation, and intentional misreporting.<sup>85</sup>

*Jaillet v. Cashman*'s original no-duty tort rule, which protected news publishers from liability based on mere negligence, morphed into expansive tort immunity rules to protect book publishers, movie and television producers and directors, board and video game manufacturers, and Web site owners from a variety of tort claims, even where speech foreseeably caused serious injury or death and the plaintiffs alleged *intentional* torts.<sup>86</sup> Imposing negligence liability on booksellers was

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83. In *Jaillet v. Cashman*, the treasurer of Dow Jones & Company was sued for incorrectly reporting in its news service a decision of the Supreme Court regarding the taxable status of stock dividends, causing the plaintiff-investor to sell stock in reliance on the false report and to suffer economic losses. *Jaillet*, 115 Misc. at 383.

84. The First Amendment was incorporated into the Fourteenth Amendment four years later. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925). However, constitutional limitations to speech-tort liability have been recognized relative to libel as far back as 1802, and early commentators treated civil liability the same as criminal punishment relative to constitutional speech and press protection. See Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 251 (2010).

85. *Jaillet*, 115 Misc. at 384 (noting that "the law does not attempt to impose liability for a violation of that duty unless it constitutes a breach of contract obligation or trust, or amounts to a deceit, libel or slander."); accord *First Equity Corp. of Fla. v. Standard & Poor's Co.*, 670 F. Supp. 115, 118–19 (S.D.N.Y. 1987), *aff'd*, 869 F.2d 175, (2d Cir. 1989) (proof of a publisher's intent to misreport financial data would sustain a tort action); *Suarez v. Underwood*, 103 Misc. 2d 445, (N.Y. Sup. Ct. 1980), *aff'd*, 449 N.Y.S.2d 438 (1981) ("actual malice" standard applied to newspaper's false advertisement).

86. See, e.g., *First Equity Corp. of Fla. v. Standard & Poor's Co.*, 869 F.2d 175, (2d Cir. 1989) ("no duty" rule extended to negligent investment advice contained in purchased investment news letter, relying on *Jaillet v. Cashman*); *MacKown v. Ill. Publ'g & Printing Co.*, 6 N.E.2d 526, 530 (Ill. App. Ct. 1937) ("no duty" rule extended to negligent medical advice contained in newspaper, relying on *Jaillet v. Cashman*); *Smith v. Linn*, 48 Pa. D. & C.3d 339, 351–52 (C.P. Montgomery Cnty. 1988) ("no duty" rule extended to negligent diet book that caused death of dieter, relying on *Jaillet v. Cashman*); see also *Pittman v. Dow Jones & Co., Inc.*, 662 F. Supp. 921, 923 (E.D. La. 1987) ("no duty in tort exists for a newspaper publisher to investigate its advertisers for the correctness of the ads

rejected early on as an unjustified form of strict liability, considering that booksellers cannot possibly “evaluate the thought processes of the many authors and publishers of the hundreds and often thousands of books which the merchant offers for sale,” and to hold booksellers liable “would severely restrict the flow of the ideas they distribute.”<sup>87</sup> Some early courts recognized that authors are cheaper cost-avoiders, such that any duty of

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placed in the publication . . .”); *Demuth Dev. Corp. v. Merck & Co., Inc.*, 432 F. Supp. 990, 991, 995 (E.D.N.Y. 1977) (publisher of *The Merck Index*, which contained information about the toxicity of drugs and chemicals, owed no duty of care to plaintiff manufacturer of drug that was incorrectly labeled as toxic, causing sales losses); *Sexton v. The Am. News Co.*, 133 F. Supp. 591 (N.D. Fla. 1955) (newspaper not liable for unintentional defamatory publication); *Walters v. Seventeen Magazine*, 241 Cal. Rptr. 101, 102–03 (Cal. Ct. App. 1987) (magazine not liable to a minor who suffered “toxic shock syndrome” from using Playtex tampons which were advertised in the magazine); *Layne v. Tribune Co.*, 146 So. 234, 236 (Fla. 1933) (newspaper not liable for mere reproduction of allegedly defamatory content without proof of fault); *Birmingham v. Fodor’s Travel Publ’ns, Inc.*, 833 P.2d 70, 75, 82 (Haw. 1992) (publisher of travel guides who neither authored the guide nor expressly guaranteed its accuracy had no duty to warn of inaccuracies in content regarding safety of beaches); *MacKown*, 6 N.E.2d at 530 (“negligent words are not actionable unless they are uttered directly, with knowledge or notice that they will be acted on, to one to whom the speaker is bound by some relation of duty, arising out of public calling, contract or otherwise, to act with care if he acts at all.” (quoting *Courteen Seed Co. v. Hong Kong & S.B. Co.* 245 N.Y. 377, 381 (N.Y. 1927))); *Yudas v. Mudge*, 322 A.2d 824, 825 (N.J. Super. Ct. 1974) (*Popular Mechanics Magazine* held not liable for injuries caused by defective fireworks that were advertised in the magazine, since publisher did not “guarantee, warrant, or endorse” the product in their section for paid advertisements); *Suarez v. Underwood*, 426 N.Y.S. 2d 208, 211 (N.Y. Sup. Ct. 1980) (newspaper not liable for alleged false advertisement in absence of proof of scienter on the part of the newspaper). The *Jaillet v. Cashman* rule required privity between the publisher and the plaintiff to sustain a claim, but this has been modified to require a “special relationship,” considering that privity requirements have relaxed generally. See *Daniel v. Dow Jones & Co.*, 520 N.Y.S.2d 334 (N.Y. Civ. Ct. 1987) (“The ‘special relationship’ limitation on liability for negligent statements remains despite the weakening of the rule of privity.”).

87. *Cardozo v. True*, 342 So. 2d 1053, 1056–57 (Fla. Dist. Ct. App. 1977) (denying liability against the seller of a recipe book that failed to warn that an ingredient—the Dasheen plant, also known as “elephant’s ears”—was poisonous if consumed raw, to avoid imposing strict liability on booksellers); see also *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1034, 1037 (9th Cir. 1991) (no liability for publication *Encyclopedia of Mushrooms* that described poisonous mushrooms as safe to eat, causing plaintiffs’ liver transplants); *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216 (D. Md. 1988) (publisher of nursing book containing dangerous medical treatment advice held not liable for negligent publication); *Lewin v. McCreight & Davis Publ’ns*, 655 F. Supp. 282, 283 (E.D. Mich. 1987) (publisher of “how to” book, *The Complete Metalsmith*, held not liable for allegedly negligent mixing instructions that caused an explosion); *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1264, 1267 (Ill. App. Ct. 1985) (liability denied where injured woodcarver sued publisher of a woodcarving “how to” book for negligent misrepresentation); *Smith v. Linn*, 48 Pa. D. & C.3d 339, 351 (C.P. Montgomery Cnty. 1988) (publisher of allegedly dangerous diet book that caused decedent’s death did not have a duty to the general public, engaging a First Amendment cost-benefit analysis concerning the value of disseminating ideas). But see, e.g., *Herceg v. Hustler*, 565 F. Supp. 802, 804 n.1 (S.D. Tex. 1983) (citing *Carter v. Rand McNally & Co.*, No. 76-1864-F (D. Mass. Sept. 4, 1980) (publisher of science book settled for \$1.1 Million in suit alleging negligent laboratory instructions that caused harm to a minor when the instructions caused a methyl alcohol explosion)); *Kercsmar v. Pen Argyl Area Sch. Dist.*, 1 Pa. D. & C.3d 1 (C.P. Northampton Cnty. 1976) (school textbook deemed “goods” for U.C.C. purposes, and allegation of defect in instructions contained in text of book sufficiently plead a breach of implied warranty).



care to avoid negligent content should be imposed on authors, not publishers.<sup>88</sup> Later courts, however, conflated authors, publishers, producers, distributors, advertisers and others in vertical privity with authors, and immunized them to further “an uninhibited exchange of ideas”<sup>89</sup> under express or implicit risk-utility analyses without addressing the fact that some of these producers’ control over content greatly reduced their avoidance costs or the fact that they have enormously deep pockets and the capacity to spread the costs of harm, which should affect the feasibility analysis.<sup>90</sup>

*Jaillet v. Cashman*’s no-duty rule was also extended to cases alleging wrongful death, despite the fact that the gravity of injury risked is normally a primary variable in risk-utility analysis.<sup>91</sup> In some cases,

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88. That is, authors were not afforded the same immunity as publishers for dangerous mistakes in content because authors were in a better position to investigate and foresee harms caused by the materials that they created. A few early courts dismissed negligent publication cases against publishers but not authors. *See, e.g., Alm*, 480 N.E.2d at 1263 (complaint dismissed as to the publisher but not author). *But see Cardozo*, 342 So. 2d at 1054 (complaint dismissed as to the author but not bookseller). However, where the publisher gives negligent investment advice, courts have found no duty despite the fact that the publisher controls content. *See, e.g., First Equity*, 869 F.2d at 176–77 (“Even the most careful preparation will not avoid all errors. The potential for meritless or even fraudulent claims is high, and the cost of even successful defenses may be prohibitive if publishers are to be exposed . . . .”); *Gutter v. Dow Jones, Inc.*, 490 N.E.2d 898, 901 (Ohio 1986) (publisher of Wall Street Journal not liable to subscriber for non-defamatory negligent misrepresentation regarding a securities investment). As one court explained, author liability “will depend on the nature of the publication, on the intended audience, on causation in fact, and on the foreseeability of damage.” *L.B. Lippincott*, 694 F. Supp. at 1216 (citing *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990 (E.D.N.Y. 1977)). A Michigan federal court noted that a publisher could become the cheapest cost-avoider if the publisher contributed content to a book, since the “burden of determining whether the content was accurate would be less.” *Lewin*, 655 F. Supp. at 284. The *Lewin* court noted that if the publisher or its employees authored part of the book or if the risk of harm was plainly foreseeable and sufficiently severe, such as a book entitled “How To Make Your Own Parachute,” the publisher may bear greater responsibility to assure the accuracy of content. *Id.*

89. *Smith*, 48 Pa. D. & C.3d at 351. The court in *Smith* stated:

While acknowledging that certain ideas may be dangerous, unpopular or even harmful, the benefits to society in allowing an uninhibited exchange of ideas . . . far outweigh the ills such ideas might bear. . . . The fear of liability would eventually chill to a trickle the free flow of information so cherished by our society and protected by our constitution.

*Id.*; *see also Yudas*, 322 A.2d at 825 (citations omitted) (“To impose the suggested broad legal duty upon publishers of nationally circulated magazines, newspapers and other publications, would not only be impractical and unrealistic, but would have a staggering adverse effect on the commercial world and our economic system” and would “open the doors to ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class.’”).

90. For example, Activision owns and publishes the *Call of Duty* video game series and presumably is the cheapest cost-avoider because it controls design and content and has access to the most information concerning the games, including dangers posed by the games. *See supra* notes 65–69 and accompanying text.

91. Judge Learned Hand’s risk-utility balancing test weighed three variables to determine whether a duty has been breached: (1) the probability of the harm; (2) the gravity of the harm; (3) the

serious injury or death was a clearly foreseeable risk to the publisher, but no duty was imposed based on a balancing approach that centered on free speech concerns. For example, in *Winter v. G. P. Putnam's Sons*, an Encyclopedia of Mushrooms book negligently characterized extremely poisonous mushrooms as safe to eat, which caused two wild mushroom hunters to eat the mushrooms, necessitating liver transplants for both.<sup>92</sup> Despite the obvious risk of death, the court found no duty of care: "Were we tempted to create [a duty of care], the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs."<sup>93</sup>

Some courts found no duty of care by focusing on a lack of foreseeability, which is required by negligence law. For example, in *Watters v. TSR, Inc.*,<sup>94</sup> the Sixth Circuit held that the children's game *Dungeons & Dragons*<sup>95</sup> did not create a foreseeable risk of suicide for children who played the game, in part because the child's suicide was not foreseeable to his own mother.<sup>96</sup> In the same vein, in *Way v. Boy Scouts of America*, the court extended the no duty tort rule to a shooting sports supplement contained in a boys' magazine that in fact caused the death of a twelve-year-old boy.<sup>97</sup> The court concluded that the boy's conduct in playing with an old rifle immediately after reading the supplement was not foreseeable.<sup>98</sup> Therefore, neither a duty to warn nor a duty to refrain from

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burden of taking "adequate precautions." See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

92. 938 F.2d 1033, 1034 (9th Cir. 1991).

93. *Id.* at 1037; see also, e.g., *First Equity Corp. of Fla. v. Standard & Poor's Corp.*, 670 F. Supp. 115, 117 (S.D.N.Y. 1987) ("unlimited liability" for negligent mistakes in published materials would have a "staggering deterrent effect on the dissemination of printed material.')

94. 904 F.2d 378 (6th Cir. 1990).

95. *Dungeons and Dragons* is a fantasy role-playing game in which players assume a character identity to carry out war adventures, and is widely recognized as the beginning of the role-playing game industry. See *What Is D&D?*, WIZARDS OF THE COAST, <http://www.wizards.com/default.asp?x=dnd/whatisdnd> (last visited May 9, 2012).

96. 904 F.2d at 381. The court said that even if a duty was breached, suicide is "highly extraordinary" and generally constitutes a superseding cause. *Id.* at 383. The victim was at least sixteen years of age, as he shot himself in his car. *Id.* at 379; see also Telephone Interview with Mark Edwards, Sheila Watters's attorney of record, Paducah, Ky. (Feb. 8, 2011).

97. 856 S.W.2d 230, 237 (Tex. App. 1993).

98. *Id.* at 235-36. Common sense would indicate otherwise, as children are known to want to try things they see on television or read about right away. Children's relative inability to foresee danger is one of the reasons that children are not bound by the general duty of due care in tort law, but rather are expected only to exercise the same degree of care as children of like age, intelligence, and experience. While a risk-utility analysis may warrant a no duty rule, it seems contrived to find no foreseeability in a case such as this. Indeed, the fact that the supplement contained warnings of the dangers of unsupervised use of firearms would seem to establish foreseeability.

publishing the supplement was owed to the reading public.<sup>99</sup>

More recently, lawsuits have been filed alleging that adolescents' considerable consumption of violent media triggered their subsequent killing sprees. In two high school mass-shooting cases, victims of adolescent-perpetrated mass murder sued producers of violent video games and *The Basketball Diaries* as well as Internet Web sites for negligence, strict products liability,<sup>100</sup> and RICO violations.<sup>101</sup> Again,

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99. *Id.* at 237. The court engaged Judge Learned Hand's risk-utility test and weighed risk, foreseeability and likelihood of injury against social utility, the costs of preventing injury or harm, and the economics of placing the burden on the defendant, but stated that foreseeability is the "foremost and dominant" consideration, and disregarded the gravity of the risk or cost allocation based on the cost burden. *Id.* at 234. The court found that plaintiff's behavior in locating and playing with the old rifle was not foreseeable. "These circumstances of Rocky's death, however, are at odds with the risks foreseeably created by the message conveyed by the supplement. Photographs on the cover of the supplement emphasize supervision and use of firearms in a structured environment." *Id.* at 236. The *Way* court also said that risks associated with unsupervised and unsafe use of firearms by children is a factor that increases the social utility of the supplement because "the information contained in the supplement promoted safe and responsible use of firearms, and was reasonably calculated to lessen the possibility of accidental death caused by a child's use of firearms." *Id.*

100. Most courts have found that publications cannot be "defective" for strict products liability purposes, as "products liability law is geared to the tangible world," not intangible ideas. *See Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991). Accordingly, courts have determined that strict liability protects consumers from harms caused by defective tangible properties of books and other publications, such as defective binding, but does not protect consumers from negligent content. *See, e.g., Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1277-79 (D. Colo. 2002) (products liability does not apply to violent video games and other media that allegedly caused teenage homicidal shooting spree at high school); *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, 810 (W.D. Ky. 2000) (products liability does not apply to violent video games and other media that allegedly caused teenage homicidal shooting spree at high school); *Davidson v. Time Warner, Inc.*, No. V-94-006, 1997 WL 405907, at \*14 (S.D. Tex. Mar. 31, 1997) (musical recordings are not products because they lack "physical properties"); *Jones v. L.B. Lippincott Co.*, 694 F. Supp. 1216, 1217 (D. Md. 1988) (Section 402A has not been extended to the dissemination of ideas or knowledge in books, and to do so would chill free expression); *Cardozo v. True*, 342 So. 2d 1053, 1056 (Fla. Dist. Ct. App. 1977) (printing and binding are tangible properties of books that are subject to product warranties, but intangible properties such as thoughts and ideas expressed in books are not tangible, and are not subject to product warranties); *Herceg v. Hustler*, 565 F. Supp. 802, 803 (S.D. Tex. 1983) (pornographic magazine is not a "product") (citing *Cardozo*, 342 So. 2d at 1056-67); *Way v. Boy Scouts of Am.*, 856 S.W.2d 230 (Tex. App. 1993) (sports shooting supplement is not a "product").

101. In *James v. Meow Media*, fourteen-year-old Michael Carneal took six guns to Heath High School on December 1, 1997, and waited for a daily prayer session to end, then shot and killed three female members of the prayer group, and wounded five others. 90 F. Supp. 2d at 800, *aff'd*, 300 F.3d 683 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003). Police seized Michael's computer and found that he had consumed large quantities of pornographic, sexually violent, and violent materials. *Id.* Among other things, plaintiffs alleged that the movie, *The Basketball Diaries*, was a cause of harm because it depicts a student who "graphically massacres his classmates with a shotgun," and the expert psychologist testified that Carneal was "profoundly influenced by his exposure to the above violent/pornographic media . . . which tends to glorify violence." *Id.* Similarly, in *Sanders v. Acclaim Entm't*, a case arising out of the Columbine High School tragedy, the court found no duty owed by producers of violent media based on a four factor risk-utility analysis, and characterized the teenage killers' behavior as an "idiosyncratic reaction" that was not sufficiently foreseeable to create a duty of care. 188 F. Supp. at 1271-72. The factors are: "(1) foreseeability of the injury or harm that occurred;

foreseeability analysis blocked the claims. The plaintiffs argued that defendants knew or should have known that violent video games trained children to be effective killers and that copycat violence could result from minors' consumption of their violent media, which created a foreseeable and unreasonable risk of harm to the public and an attendant duty of care.<sup>102</sup> However, the courts assumed that preexisting mental instability was the true cause of the crimes,<sup>103</sup> notwithstanding expert testimony that violent media can cause minors to become violent and no doubt teaches them skills to maximize killing spree casualties.<sup>104</sup> The courts held that creators and publishers of potentially dangerous speech have no duty to foresee the mental condition of "troubled" (child and adolescent) consumers before marketing their media.<sup>105</sup>

Courts rejected tort liability even in cases in which it was undisputed that producers and theatre owners in fact foresaw youth violence immediately following gang movies in the proximity of the theatres that showed the films and nonetheless continued to show them, which led to additional youth casualties.<sup>106</sup> These courts seemed to adopt the idea that

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2) the social utility of Defendants' conduct; 3) the magnitude of the burden of guarding against the injury or harm; and 4) the consequences of placing the burden on the Defendants." *Id.* at 1271. In this case, the survivor of a teacher who was shot and killed during the shooting spree at Columbine High School sued violent video game makers and movie producers for damages under a variety of tort theories, including negligence and strict products liability. *Id.* at 1268–69. Plaintiffs claimed that violent videos, and particularly the high school mass-murder scene from *The Basketball Diaries*, influenced the two students inexplicably to gun down a teacher and classmates in cold blood. *Id.* Students' use of violent video games probably prepared them to kill efficiently and effectively. *See id.* at 1273.

102. *See, e.g., Meow Media*, 90 F. Supp. 2d at 801–02.

103. *See id.* at 805–06. The Sixth Circuit in *Meow Media* specifically found that the "glacial process of [violent] personality development is far from the temporal imminence that we have required to satisfy the *Brandenburg* test." 300 F.3d 683, 698 (6th Cir. 2002). The court was referring to social science reports that children exposed to violent media develop violent tendencies and/or become desensitized to violence in a slow and gradual way. *See supra* Part I.A.

104. If the casualties at Columbine High School would not have been killed but for the murderers' efficiency in killing, gained through training provided by violent video games, cause-in-fact exists. This is a jury question that probably requires expert witness testimony.

105. *See Meow Media*, 90 F. Supp. 2d at 803–04 (citing *Watters v. T.S.R., Inc.*, 904 F.2d 378 (6th Cir. 1990)). Despite implicitly accepting causation between exposure to violence and suicidal or homicidal reactions, particularly among children and youth, some courts chose to characterize the persons reacting with violence as "emotionally troubled," "mentally fragile," or otherwise aberrational, such that their violent reactions were not foreseeable even if in fact "caused" by violent media. *See Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990) (children's game did not create foreseeable risk of suicide for children who were "mentally fragile"); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1072 (Mass. 1989) (citing *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 197 (Cal. Ct. App. 1988)) (holding that producing a violent gang movie did not create a duty of care to prevent aggressive responses of "emotionally troubled individuals").

106. *See, e.g., Bill v. Super. Ct.*, 187 Cal. Rptr. 625, 633 (Cal. Ct. App. 1983) (finding no liability against a film producer for a shooting that occurred near the theatre that showed the movie, despite

behaviors of emotionally troubled adolescents cannot be attributed to film distributors, and the only way to protect society from the effects of violent speech would be to “police” speech to the point where only the most bland and least controversial speech would be produced.<sup>107</sup> In these and other cases, free speech concerns clearly trumped tort principles, and negligence liability was rejected entirely as opposed to reconciling competing tort and constitutional policies.

A few courts have allowed negligence-based liability for speech or published “products” based purely on a tort analysis with little or no mention of the First Amendment. For example, in *Hanberry v. Hearst Corp.*, a California court of appeals found a magazine publisher liable for endorsing a dangerous product with its “Consumer Guaranty,” which aligned the publisher with the product manufacturer and created a duty of care toward consumers.<sup>108</sup> In 1975, the California Supreme Court imposed negligence liability on a radio broadcaster for promotional speech that encouraged teenage drivers to race to various locations on city streets to receive prizes, resulting in a motorist’s death.<sup>109</sup> That case was not followed and was later characterized as an incitement case.<sup>110</sup> Other courts have held that mass-produced and marketed navigation maps are

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foreseeability); *Yakubowicz*, 536 N.E.2d at 1071–72 (holding that producing a violent gang movie did not create a duty of care to prevent aggressive responses of “emotionally troubled persons”). In *Yakubowicz*, plaintiff established that the movie’s producers and distributors had actual knowledge that the movie caused violent audience reactions previously in Boston and California and that Paramount executives released the film during spring vacation week to maximize attendance by high-school-aged kids. *Yakubowicz*, 536 N.E.2d at 1069. Two youths had been killed near theatres showing “The Warriors” in Palm Springs and Oxnard, California. *Id.* The court held that Paramount owed a duty of care to the public, but that the movie did not fall within an exception to the First Amendment’s protection because the movie did not “purport to order or command anyone to any concrete action at any specific time, much less immediately,” so it could not be characterized as “incitement” even if it in fact have a tendency to lead to violence. *Id.* at 1071 (quoting *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193 (Cal. Ct. App. 1988) (finding that Ozzy Osbourne and his agents did not owe a duty of care to music listeners who committed suicide)).

107. See *Davidson v. Time Warner, Inc.*, No. V-94-006, 1997 WL 405907, at \*12–13 (S.D. Tex. Mar. 31, 1997) (music lyrics describing shooting a cop did not create a foreseeable risk of a criminal actually shooting a cop in a similar manner) (citing *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193 (Cal. Ct. App. 1988)).

108. See *Hanberry v. Hearst Corp.*, 81 Cal. Rptr. 519, 521–22 (Cal. Ct. App. 1969) (*Good Housekeeping* magazine went beyond the role of mere publisher by giving a defective product its “Consumer Guaranty” seal of approval, thereby creating a duty of care to consumers of the endorsed product). In *Hanberry*, the First Amendment was not mentioned.

109. *Weirum et al. v. R.K.O. Gen., Inc.*, 539 P.2d 36 (Cal. 1975).

110. *Id.* Regarding the First Amendment, the court stated simply that “[t]he First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.” *Id.* at 40; see also, e.g., *Smith v. Linn*, 48 Pa. D. & C.3d 339, 349 (C.P. Montgomery Cnty. 1988) (“The *Weirum* decision . . . seems to suggest the radio station’s activity constituted incitement, thus falling outside First Amendment protection.”).

“products” subject to strict liability where factually verifiable data, such as the location of mountains, were negligently not depicted on the maps, leading to plane crashes and casualties.<sup>111</sup> None of these cases analyzed First Amendment limits to speech liability,<sup>112</sup> and the products liability analysis has been limited to navigation maps.<sup>113</sup> A murder instruction manual was found to be a criminal “speech act,” and therefore unprotected speech subject to tort liability.<sup>114</sup> Murder-for-hire advertisements have subjected a magazine publisher to a constitutionalized form of negligence liability, as they are commercial in nature, less protected, and quite foreseeably led to murder.<sup>115</sup> Other than these few disjointed exceptions, courts have not allowed negligence liability for protected speech.

In sum, lower courts’ speech-tort jurisprudence grounded in tort doctrine virtually bars tort liability for negligent speech and has effectively immunized producers of violent entertainment media, including violent video games. While *Jaillet v. Cashman* seems correct based on a risk-utility analysis, the high school shooting cases seem different, at least relative to the video game defendants, considering their incredible wealth,

111. *See, e.g.*, *Halstead v. United States*, 535 F. Supp. 782, 791 (D. Conn. 1982) (map that contained an inaccurate depiction of landing site was a “product” under Section 402A because pilots rely on the maps and plane crashes and human death are a foreseeable result of inaccurate depictions) (citing *KMart v. Midcon Realty Group of Conn.*, 489 F. Supp. 813, 818 (D. Conn. 1980) and *RESTATEMENT (SECOND) OF TORTS* § 402A cmts. c, f (1965)). The Second Circuit affirmed, finding that the chart producer, Jeppesen:

[U]ndertook a special responsibility, as seller, to insure that consumers will not be injured by the use of the charts; Jeppesen is entitled—and encouraged—to treat the burden of accidental injury as a cost of production . . . . This special responsibility lies upon Jeppesen in its role as designer, seller and manufacturer.

*Salomey v. Jeppesen & Co.*, 707 F.2d 671, 677 (2d Cir. 1983) (citations omitted). Other courts followed this reasoning relative to maps and charts, based on strict products liability’s purpose of safeguarding the public from risks posed by mass-produced items and its cost-spreading function. *See Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68, 71 (Cal. Ct. App. 1985) (Jeppesen was strictly liable for an airplane crash where its chart failed to designate a hill that the plane struck during a night landing; the concept that strict liability principles apply only to products’ “physical properties” was “clearly erroneous”); *see also Brocklesby v. United States*, 767 F.2d 1288, 1295–97 (9th Cir. 1985) (defective chart causing plane crash was a defective product for purposes of analysis under Section 402A, and no fault was required to impose liability) (citing *RESTATEMENT (SECOND) OF TORTS* § 402A cmt. c (1965) (noting that manufacturers of mass-produced products are the cheapest cost-avoiders, can afford the costs, and should consider the costs of accidents a cost of doing business)). None of these cases addressed the First Amendment.

112. In *Brocklesby*, Jeppesen raised the First Amendment defense for the first time on appeal, so the court did not consider it. 767 F.2d at 1295 n.9; *see also supra* notes 92–93.

113. *See, e.g.*, *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY* § 19 (1998) (“a product is tangible personal property distributed commercially for use or consumption.”); *see also id.* at cmt. d (discussing “intangible personal property”).

114. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997).

115. *See, e.g.*, *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992).

the nature of the video games' effects on children's brains, and the level of foreseeability and culpability of the defendants in targeting pre-teens and teenagers for games that they recognize as inappropriate for them. Factors such as foreseeability of intervening crimes and feasibility should weigh into a tort analysis, but by dismissing the cases on tort principles, courts have avoided the more difficult constitutional analysis.<sup>116</sup>

*B. Lower Courts' Constitutional Analysis of Negligent Speech Liability*

During the same period that some courts dismissed negligence speech cases under a tort analysis, many courts engaged a constitutional analysis grounded in *Chaplinsky v. New Hampshire*'s categorical approach to criminal regulation of allegedly dangerous, subversive, or anger-provoking speech. That is, instead of engaging the Supreme Court's speech-tort balancing framework, these courts relied on the Court's criminal categorical approach to punishing political or ideological speech, which requires a finding that the speech falls within a category of unprotected speech before it may be punished. Today, the nearly unanimous lower court rule subjects allegedly unreasonably dangerous speech of all sorts, including mass-produced video games, to *Brandenburg*'s incitement test as a predicate to imposing tort liability.

In *Chaplinsky v. New Hampshire*,<sup>117</sup> the Court identified categories of speech that are unprotected by the First Amendment and therefore subject to criminal punishment, *to wit*: the lewd and obscene, the profane, the libelous, and the insulting or "fighting words," such as the "offensive" or "derisive" words that led to Mr. Chaplinsky's criminal conviction.<sup>118</sup> In *Brandenburg v. Ohio*, the Court considerably strengthened protection for the type of live political speech at issue in *Chaplinsky v. New Hampshire*. The *Brandenburg* Court adopted a stringent "incitement" test to render

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116. *See, e.g.*, *Watters v. TSR, Inc.*, 904 F.2d 378, 380 (6th Cir. 1990) (since Kentucky tort law resolved the liability issue, constitutional issues should not be addressed); *James v. Meow Media*, 90 F. Supp. 2d 798, 818 (W.D. Ky. 2000) (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936)) (finding constitutional analysis unnecessary if a case can be resolved on tort grounds)).

117. 315 U.S. 568 (1942).

118. The *Chaplinsky* Court reasoned:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such 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.

*Id.* at 571–72.

political or ideological speech highly protected from government punishment absent proof of the speaker's intent to risk public safety and a likelihood of imminent public harm.<sup>119</sup>

Within a few years of *Brandenburg*, the first lawsuits alleging that violent media negligently caused harm to children were filed. The lower courts adopted a *Chaplinsky*-based categorical approach to negligent speech-tort cases, relying on incitement analysis. During this same period, the Court began to recognize that state tort law punishing defamation is state action and subject to First Amendment restrictions. In the seminal defamation case, *New York Times v. Sullivan*, the Court balanced free speech rights against the values furthered by tort liability and denied liability for untrue, defamatory political speech.<sup>120</sup> Yet, the Court has allowed tort liability for publishing presumably true political memoirs, depending on a number of policy considerations.<sup>121</sup> As explained in Part IV, the Court generally balances a number of factors when considering tort liability for speech, then constitutionalizes tort liability for speech by raising the burden of proof necessary to establish a prima facie tort case to reconcile tort liability with the First Amendment.<sup>122</sup>

Ten years after *Brandenburg* was decided, one of the earliest federal lawsuits alleging negligent broadcasting was filed. In *Zamora v. CBS*, a minor who shot and killed his eighty-three-year-old neighbor sued the major television broadcasters for damages, claiming that from ages five to fifteen, he was “impermissibly stimulated, incited and instigated” to commit violent crimes he viewed on television.<sup>123</sup> The Florida court held

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119. The *Brandenburg* test requires *intent*. The First Amendment does “not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy 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) (per curiam). *Brandenburg* essentially reformulated *Schenk*'s “clear and present” danger test to require speech to “incite” imminent lawlessness to lose First Amendment protection from criminal sanctions. *Id.* at 449. *Brandenburg*'s incitement test was tightened in *Hess v. Indiana*, which reversed a disorderly conduct conviction and raised the bar to establishing incitement. 414 U.S. 105, 109 (1973); *see also* *Brown v. Entn't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (upon finding that violence has never been a category of unprotected speech, the majority applied strict scrutiny to a sales regulation of violent video games and struck down the sales regulation).

120. *See* *New York Times v. Sullivan*, 376 U.S. 254, 271–72 (1964) (false statements of fact were shielded from defamation liability to give “breathing space” for criticism of public officials).

121. *See* *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985) (tort liability allowed for misappropriation of former President Gerald Ford's Watergate memoirs).

122. In *New York Times v. Sullivan*, the Court began what became a series of cases constitutionalizing torts to reconcile liability for speech with First Amendment limit so punishing speech. *See infra* Part IV.

123. 480 F. Supp. 199, 200 (S.D. Fla. 1979). Plaintiffs claimed that violent broadcasts caused him to become desensitized to violence, to develop a sociopathic personality, and to become a “danger to



that the Constitution fully protects speech from negligence liability unless the speech falls within a category of unprotected speech, based on the public's right to receive "suitable access to political, esthetic, moral and other ideas" through broadcasting.<sup>124</sup> The court reviewed the existing categories of unprotected speech identified in *Chaplinsky*, then dismissed the case upon a finding that the speech did not fit within a recognized category of unprotected speech.<sup>125</sup>

A few years later, a California appellate court decided *Olivia N. v. NBC*.<sup>126</sup> The evidence established that a nine-year-old girl's rapists had recently seen the movie *Born Innocent* and conspired to reenact an artificial rape scene from the movie, and that NBC knew that depicting crimes against children could lead to "copycat" crimes against children.<sup>127</sup> Although the copycat crime was foreseeable, the court held that the broadcast did not constitute "incitement,"<sup>128</sup> and the First Amendment precluded tort liability on a "simple negligence" theory.<sup>129</sup>

Soon after *Olivia N.*, the Fifth Circuit handed down *Herceg v. Hustler Magazine, Inc.*<sup>130</sup> In this case, the teenage decedent's family sued Hustler Magazine for negligence and strict liability after it published "Orgasm of Death," an "inflammatory" article that described in detail how to experience "autoerotic asphyxiation," and which led to the accidental hanging death of a fourteen-year-old Texas boy when he tried it at home. The jury found incitement and awarded damages,<sup>131</sup> but the Fifth Circuit reversed over a strong dissent, finding that, despite clear cause-in-fact and foreseeability,<sup>132</sup> the article did not "incite" the boy's sexual behavior as a

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himself and others." *Id.* at 200–01.

124. *Id.* at 205 (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969)).

125. *Id.* at 204–07.

126. 178 Cal. Rptr. 888 (Cal. Ct. App. 1982), *cert. denied*, 458 U.S. 1108 (1982).

127. *Id.* at 891.

128. *Id.* at 892. It seems clear that NBC did not advocate or intend to cause harm and was, at most, negligent in deciding to broadcast the film.

129. *Id.* Twice the court referred to the impropriety of allowing liability on a "simple negligence theory." *Id.* at 892, 894; *see also, e.g., DeFilippo v. NBC*, 446 A.2d 1036 (R.I. 1982) (television broadcaster not liable to parents of a child who died while performing a stunt he had seen on television).

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

131. The jury awarded \$182,000 in damages.

132. The magazine, opened to the page of "Orgasm of Death," was lying near the feet of the dead boy, who had obviously been following the instructions in the magazine when he hanged himself to death. The fact that the danger was foreseeable is established by the title itself, although the court seemed to think that the numerous warnings contained in the article undermined plaintiffs' argument that the article incited, or even advocated, trying the sex act at home. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1018 (5th Cir. 1987).

matter of law, and therefore, *Hustler* was immune from civil liability.<sup>133</sup>

In the 1980s and 1990s, numerous extremely violent movies, songs, games, and other mass-produced speech products entered the stream of commerce, perhaps a predictable result of early courts' tort and constitutional immunity rules. Numerous lawsuits followed. In the legal proceedings following the Columbine High School tragedy, a federal court addressed the First Amendment's protection of violent media, stating that "works of imagination . . . significantly contribute[] to social utility . . . . [V]iolence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low," warranting full First Amendment protection for violent media.<sup>134</sup> In response to plaintiffs' argument that greater government regulation is appropriate to safeguard impressionable minors from violent influences, the court held that the *Brandenburg* incitement test applies to speech that harms minor plaintiffs just as it applies to adults.<sup>135</sup>

Similar to the development of the tort-based immunity rules, the early constitutional cases seem more defensible than the high school shooting cases. *Zamora v. CBS*, for example, had enormous causation issues that rendered liability against the broadcaster a true threat to broadcasting prerogative. The film at issue in *Olivia N. v. NBC* brought considerable public awareness to the gross abuses taking place in homes for troubled adolescents, and educational programming surely must be a primary free speech concern, which seems to outweigh the risk of copycat crimes. *Herceg v. Hustler* seems different, as it involved a step-by-step sex article on how to achieve an orgasmic high in a very dangerous manner, rendering foreseeability clear and causation direct.<sup>136</sup> The high school

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133. *Id.* at 1024–25. Judge Edith H. Jones filed a strong dissenting opinion from the majority's categorical approach, arguing that the pornographic and commercial nature of the publication rendered it worthy of less strict First Amendment protection under Supreme Court precedent. *Id.* at 1028. Judge Jones wrote that "Hustler is a profitable commercial enterprise trading on its prurient appeal to a small portion of the population. It deliberately borders on technical obscenity, which would be wholly unprotected . . ." *Id.*

134. *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1273–74 (D. Colo. 2002) (quoting in part *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001)).

135. *Id.* at 1281. The court seemed confused about the distinction between "strict scrutiny" as the test for challenges to legislative deprivations of constitutional rights and the balancing test the Court had utilized in speech-tort cases. The court seemed to assume that the *Brandenburg* incitement test constitutes "strict scrutiny" in negligence cases whereas actual malice constitutes "strict scrutiny" in defamation cases.

136. The boy was found hanging dead with a copy of the magazine beneath his feet, opened to the page explaining how to achieve a dangerous orgasm in an article titled, "Orgasm of Death." See *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1019 (5th Cir. 1987).

shooting cases also seem different, as some of the “speech” consisted of mass-marketed games that teach effective and organized killing skills and reward acts of aggression just like the acts perpetrated by the effectively trained teenage killers—a far cry from the type of live political speech at issue in *Chaplinsky* or *Brandenburg*. Nonetheless, lower courts have lumped very different types of negligent speech cases together and applied the *Brandenburg* incitement test to nearly all cases in which negligent speech allegedly caused serious injury or death.

Some plaintiffs attempted to circumvent the *Brandenburg* incitement test by bringing intentional tort claims.<sup>137</sup> However, courts continued to immunize speech that was found to have a “tendency to lead to violence,” unless the speech fell within an unprotected category, *regardless* of intent.<sup>138</sup> For example, after viewing the violent film *Natural Born Killers*, a Louisiana appellate court held that it did not constitute “incitement”—despite providing the idea for the copycat crime that rendered the plaintiff a paraplegic—so “the intent of the [movie producer and director was] *not material*.”<sup>139</sup>

Other plaintiffs have argued that the nature of the negligent speech—such as commercial or pornographic speech—should relax constitutional review of negligent speech liability, and a few courts agreed and created balancing tests to constitutionalize negligence liability for less-than-fully-protected speech. For example, one federal court found liability against a magazine publisher that negligently advertised “gun-for-hire” services by constitutionalizing the *prima facie* case of negligence relative to the advertisements (which the court characterized as commercial speech) and held that they created an obvious “clear and present” danger of death, as opposed to ordinary foreseeability of death.<sup>140</sup> Similarly, a Georgia court

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137. *See, e.g.*, *Byers v. Edmondson*, 826 So. 2d 551, 556 (La. Ct. App. 2002).

138. *Id.* (citing *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973)).

139. *Id.* (emphasis added). The images in the film *Natural Born Killers* “place this film in the realm of fantasy” that inspired “copycat” behavior, but do not constitute “incitement.” *Id.*

140. *See, e.g.*, *Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F. Supp. 1397 (W.D. Ark. 1987). In *Norwood*, the commercial nature of “gun for hire” advertisements subjected them to constitutionally permissible regulation that would not be the case for “ideological communication[s]” such as political speech. *Id.* at 1399–1400 (citations omitted). The court distinguished *New York Times v. Sullivan*, based on the political nature of the editorial “advertisement” in that case, and characterized the murder contract advertisement at issue in *Norwood* as “at best, ‘commercial speech’” and “a far cry from the type of responsible public debate which the United States Supreme Court obviously intends to foster by cases such as *New York Times*.” *Id.* at 1398, 1401. *Compare* *Eimann v. Soldier of Fortune Magazine*, 880 F.2d 830 (5th Cir. 1989) (reversing a jury verdict for \$9.4 million against the magazine, finding no breach of duty as a matter of law for a gun-for-hire advertisement under risk-utility and foreseeability analyses), *with* *Norwood*, 651 F. Supp. 1397, *and* *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993) (holding that under Georgia

adopted a variable standard for children's television programming by rejecting the incitement test in favor of the more lenient "clear and present danger" test for programming aimed at children.<sup>141</sup> However, a variable standard for criminal regulation of violent media in accordance with *Ginsberg v. New York's* "variable obscenity" doctrine<sup>142</sup> was expressly rejected by a majority of the Supreme Court in June 2011 in *Brown v. Entertainment Merchants Ass'n*,<sup>143</sup> where the Court held that violent media, unlike sexually explicit media, is fully protected speech.<sup>144</sup>

Some courts have recognized new categories of unprotected speech or transferred other categories of unprotected speech from the criminal context to the negligent speech context, to allow tort liability against the

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law, the magazine's "gun-for hire" advertisement, on its face, created a reasonably foreseeable risk of death by gun injury). The Eleventh Circuit rejected the magazine's First Amendment immunity defense, finding that *New York Times v. Sullivan* required a balancing test, not a categorical approach, and the advertisement was far from "core, non-commercial speech." *Id.* at 1118 (citations omitted). The district court had instructed the jury that they must find that the advertisement created a "clear and present danger" to find the defendant liable, a modified negligence instruction that raised the burden of proof to meet constitutional scrutiny. *Id.* at 1116 n.4, 1119. The Eleventh Circuit found that since the advertisement itself warned of a "substantial danger" of harm to the public, the instructions given by the district court properly reflect the "modified" negligence standard announced in *Gertz v. Welch*. *Id.* at 1118-19. Requiring obvious proof of a lethal public threat rendered the publisher the cheapest cost-avoider and satisfied First Amendment demands. *Id.* at 1114. The court stated that "[s]imply put, liability depends upon whether the burden on the defendant of adopting adequate precautions is less than the probability of harm from the defendant's unmodified conduct multiplied by the gravity of the injury that might result from the defendant's unmodified conduct." *Id.* at 1115 (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947)).

141. See *Walt Disney Prod. v. Shannon*, 276 S.E.2d 580 (Ga. 1981). The "Mickey Mouse Club" program was allegedly negligent by illustrating on television how to make the sound effect of a tire coming off of a car by placing BB pellets inside of a balloon and inviting the viewing audience (children) to follow along from home. *Id.* at 581. Plaintiff, a child, was partially blinded when he followed along from home, his balloon popped, and a BB pellet struck him in the eye. *Id.* The court held that despite a foreseeable risk of injury, the First Amendment "mandated" summary judgment for defendant, since the speech at issue failed to meet the "clear and present danger" test. *Id.* at 583 (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

142. *Ginsberg v. New York*, 390 U.S. 629, 636 n.4 (1968).

143. 131 S. Ct. 2729 (2011). Some plaintiffs' lawyers and scholars have argued that "socially repugnant" violent speech constitutes "obscenity" and is therefore unprotected, but lower courts have rejected a "violence-based notion of obscenity" in accordance with the "variable obscenity" doctrine announced in *Ginsberg v. New York*. See, e.g., *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 961 (9th Cir. 2009), cert. granted, 130 S. Ct. 2398 (2010) (California "is asking us to boldly go where no court has gone before. We decline the State's entreaty to extend the reach of *Ginsberg* and thereby redefine the concept of obscenity under the First Amendment," listing circuit courts that also rejected a violence-based notion of obscenity.); *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002) (declining to extend its obscenity jurisprudence to violent, as opposed to sexually explicit, material); *Byers*, 826 So. 2d at 557, writ denied, 826 So. 2d 1131 (La. 2002) (rejecting a "violence-based notion of obscenity."); see also KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 146-63 (2003) (discussing cases and scholarly commentary about the propriety of extending the variable obscenity doctrine to violent media).

144. *Id.* at 2739.

most culpable producers of dangerous speech where “incitement” could not be established. For example, two federal courts have recognized subliminal suicide commands in rock music as a new category of unprotected speech,<sup>145</sup> and the Fourth Circuit circumvented *Brandenburg*’s imminence requirement in *Rice v. Paladin Enterprises* by classifying a professional assassin instruction manual admittedly *intended* to aid and abet murder as a “speech act.”<sup>146</sup> However, other than a few ad hoc exceptions, a constitutional right to externalize all social costs of foreseeably dangerous speech is the prevailing rule, and no court has allowed a finding of incitement in an unreasonably dangerous speech case.

The normative effect of immunizing dangerous speech from tort liability has been to encourage harmful speech production and irresponsible marketing, manifested in part by producers targeting children in advertisements for the very products that they found inappropriate and potentially harmful to children.<sup>147</sup> Lower courts have responded to the current jurisprudential imbalance by carving out exceptions in extreme cases of irresponsible and dangerous publications, resulting in a piecemeal jurisprudential matrix that is analytically incoherent. An analytical approach that is more consistent with scientific knowledge of causation and the nature of the fault is both conceivable and desirable. A properly

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145. In 1990 and 1991, a state court in Nevada and a federal court in Georgia analyzed whether subliminal messages were entitled to First Amendment protection. Both courts found that subliminal messages were unprotected speech. *See Waller v. Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991), *aff’d*, 958 F.2d 1084 (11th Cir. 1992), *reh’g denied*, 964 F.2d 1148 (11th Cir. 1992), *cert. denied*, 506 U.S. 916 (1992); *Vance v. Judas Priest*, Nos. 86-5844, 86-3939, 1990 WL 130920, at \*25 (Nev. Dist. Ct. Aug. 24, 1990). The *Osbourne* court went into some detail to explain why subliminal speech is unprotected by the First Amendment based on the way in which it “sneaks into the brain,” without the listener’s knowledge. *Osbourne*, 763 F. Supp. at 1149. The *Judas Priest* court found that subliminal speech is unprotected because individuals are subjected to the messages “without [their] knowledge and consent,” and thus subliminal speech is akin to deceptive advertising, which also influences consumers unfairly. *Judas Priest*, 1990 WL 130920, at \*7, \*32. The *Osbourne* court explained the scientific differences between subliminal messages and “preconscious suggestion,” the latter of which allows the listener to consider the content of the speech. *See Osbourne*, 763 F. Supp. at 1146–47. A California court recently found “cyberbullying” to be unprotected speech, consistent with “true threats” jurisprudence. *See Tonya Roth, Cyberbullying Held Not Protected Speech in CA Civil Suit*, FINDLAW (Mar. 23, 2010, 11:45 AM), <http://blogs.findlaw.com/injured/2010/03/ca-court-cyber-bullying-is-not-protected-speech.html>; *see also Planned Parenthood of the Columbia/Willamette, Inc. v. American Coal. of Life Activists*, 290 F.3d 1058, 1070 (9th Cir. 2002) (finding that “true threats” of bodily harm are not protected speech).

146. *See Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 246–47 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). The court relied on a line of cases finding that written instructions on how to commit crimes such as tax evasion and illegal drug manufacturing were unprotected speech despite a lack of imminence between the speech and the crimes. *Id.* at 248.

147. *See supra* Part II.

tailored negligence paradigm would strike a liability balance that avoids chilling speech while also encouraging social responsibility.

#### IV. EVIDENTIARY FRAMEWORK FOR CONSTITUTIONALIZING TORTS

To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself.<sup>148</sup>

The Supreme Court's divided opinions in speech-tort cases underscore the difficulty in balancing the conflict of interests presented by tort liability for speech.<sup>149</sup> This Part briefly reviews the Court's opinions concerning tort liability for speech generally for the purpose of identifying the policy considerations that have animated the Court's speech-tort jurisprudence and the methods by which the Court has reconciled tort and constitutional policies. The Court has stressed its "narrow" holdings in some of these opinions, indicating that reconciling free speech and tort liability is a very fact-intensive and case-specific endeavor.<sup>150</sup> Nonetheless, the Court's evidentiary tailoring method of constitutionalizing speech-torts in various cases is instructive on how courts could constitutionalize the tort of negligence relative to unreasonably dangerous speech.

##### A. *New York Times v. Sullivan*

In *New York Times v. Sullivan*,<sup>151</sup> the Supreme Court first recognized that the First Amendment limits a state's police power to award tort damages for defamation—a category of speech previously assumed to be unprotected by the First Amendment. The lawsuit arose from statements made by the newspaper that inferentially criticized a public safety commissioner's official conduct and contained some false statements of

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148. *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949).

149. Per Justice Brennan, speech-tort jurisprudence has "produced a diversity of considered opinions, none of which speak for the Court." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 775 (1985) (Brennan, J., dissenting); see also *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 780 (1986) (four justices dissented); *Harper & Row, Publishers, Inc. et al. v. Nation Enter. et al.*, 471 U.S. 539, 579 (1985) (three justices dissented); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (four justices dissented in two dissenting opinions); *Gertz v. Welch*, 418 U.S. 323 (1974) (four justices filed dissenting opinions); *Time, Inc. v. Hill*, 385 U.S. 374, 402, 411 (1967) (three justices dissented and one justice dissented in part).

150. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011); *Bartnicki v. Vopper*, 532 U.S. 514, 535–36 (2001) (Breyer, J., concurring).

151. 376 U.S. 254, 283–84 (1964).

fact.<sup>152</sup> The Court specifically rejected a categorical approach to the issue of whether defamatory false statements of fact constitute unprotected speech, finding that speech cannot claim “talismanic immunity from constitutional limitations” merely because it is labeled as “libel.”<sup>153</sup> The Court also rejected Sullivan’s attempt to categorize the paid advertisement as “commercial speech,”<sup>154</sup> finding that the speech was political in nature.<sup>155</sup> The Court explained that political speech must be fiercely protected and given “breathing space” to avoid chilling robust debate concerning self-government.<sup>156</sup> Since erroneous statements are “inevitable in free debate,” the Constitution requires protection of insignificant false statements of fact to protect core political speech, mandating constitutional limits to states’ police power to punish even *untrue* statements contained in political speech.<sup>157</sup>

The Court concluded that the First Amendment requires evidentiary modifications to a *prima facie* case of defamation arising from speech critical of the government and created a narrowly tailored *prima facie* case of political speech defamation to meet constitutional scrutiny. The Court raised the level of fault necessary to establish the claim from negligence or strict liability<sup>158</sup> to “actual malice,” meaning the defendant actually knew that the speech was false or published it with reckless disregard concerning its veracity.<sup>159</sup> The actual malice standard shifted the burden of proof that the speech was false onto the plaintiff, instead of the common

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152. For example, the newspaper advertisement stated that Martin Luther King, Jr. had been arrested seven times, when he had really been arrested four times; the Alabama State College Campus dining hall had been padlocked to starve the students into submission when in fact the hall was never padlocked; and that the police were guilty of “ringing” the campus with “loads of police armed with shotguns and tear-gas” in connection with a peaceful demonstration, when the police were not called to the campus in connection with the demonstration at all. *See id.* at 257–59 & 305 (App.).

153. *Id.* at 269.

154. *Id.* at 265–66.

155. The Court stated: “[T]he rule is that we ‘examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect[s].’” *Id.* at 285 (quoting *Pennekamp v. Fla.*, 328 U.S. 331, 335 (1946)). The Court focused on the political nature of the speech, which it deemed a core tenet of First Amendment protection. *Id.* at 296–97.

156. *Id.* at 272.

157. *Id.* at 280–81. The Court recognized that the fear of civil liability “may be markedly more inhibiting than the fear of prosecution under a criminal statute.” *Id.* at 277. In this case, the jury awarded 1,000 times the maximum criminal penalty in the civil trial, i.e., \$500,000. *Id.* at 277–78.

158. The common law of England allowed strict liability for libel. *See, e.g.*, *Cassidy v. Daily Mirror Newspapers, Ltd.* (1929) 2 A.C. 331 (K.B.) at 55 (Eng.) (wife established liability against newspaper based on its accurate report of her husband’s statements that implied that he was not married to wife, with whom he cohabited).

159. 376 U.S. at 281–83.

law rule that truth was a defense.<sup>160</sup> The Court also raised the level of proof required to establish fault from the general tort burden of a “preponderance of evidence” to a heightened burden of “clear and convincing evidence.”<sup>161</sup> Ultimately, the Court held that even untrue and defamatory speech that was historically unprotected must be shielded from tort liability to safeguard core political speech in the absence of clear evidence of the speaker’s substantial fault. Nonetheless, the Court recognized that political speech is not immune from defamation liability.<sup>162</sup>

*B. Supreme Court Speech-Tort Precedent: The Evidentiary Tailoring Method*

Supreme Court cases subsequent to *New York Times v. Sullivan* used an interest-balancing approach to resolve the conflict between the First Amendment interest in protecting speech and states’ and individuals’ interest in tort liability. In these cases, the Court often modified the elements of tort claims to render them sufficiently protective of speech to meet First Amendment scrutiny.<sup>163</sup> The Court’s decisions created three levels of evidentiary tailoring in defamation cases,<sup>164</sup> applied the actual malice standard to public figures’ emotional distress claims, and identified three dominant policy considerations to determine how to reconcile free speech with tort liability.

First, private citizens generally receive more state law protection from dignitary or emotional harm than public figures because private individuals are more vulnerable to injury and have not assumed the risks that attend fame. Second, whether the speech is “of public concern” or of a “truly private nature” is the most critical factor in determining its level of constitutional protection. Third, the state has a greater interest in using tort

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160. *Id.* at 271, 278–79.

161. *Id.* at 285–86 (the constitutional standard demands “convincing clarity”); *see also* *Gertz v. Welch*, 418 U.S. 323, 342 (1974) (clarifying that the standard is “clear and convincing proof”).

162. Since the evidence proved mere negligence, it was “constitutionally insufficient” level of fault to impose liability for political speech. *Sullivan*, 376 U.S. at 288. Justices Black and Douglas would have recognized an “absolute, unconditional constitutional right” to criticize public officials. *Id.* at 293 (Black & Douglas, JJ., concurring); *see also id.* at 294 (Goldberg & Douglas, JJ., concurring) (finding an “absolute, unconditional privilege”).

163. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985) (“We must . . . balance the State’s interest . . . against the First Amendment.”).

164. *Id.* at 779 (Brennan, J., dissenting).



liability to protect some values over others, with emotional or dignitary harm representing the nadir of the state's interest in punishing speech.<sup>165</sup>

*1. Narrow Tailoring of Tort Claim Elements for Speech That Causes Dignitary or Emotional Harm to Public Figures & Broad Protection For Accurate Republication of Public Records and Public Forum Political Speech That Cannot Be Characterized as "False"*

Shortly after *New York Times v. Sullivan*, the Court clarified that the level of constitutional tailoring necessary to constitutionalize a claim for defamation turns in part on the plaintiff's status as a public figure or a private individual and extended the actual malice standard to all "public figures."<sup>166</sup> Public figures presumably have less need for, and are less deserving of, state protection from defamatory speech, warranting their higher actual malice burden of proof to establish a claim. Public figures take affirmative action to inject themselves into the public spotlight with

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165. See, e.g., Deana Pollard Sacks, *Snyder v. Phelps, the Supreme Court's Speech-Tort Jurisprudence, and Normative Considerations*, 120 YALE L.J. ONLINE 193, 210–13 (2010), available at <http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/snyder-v.-phelps,-the-supreme-court%27s-speech%11tort-jurisprudence,-and-normative-considerations/> (illustrating these three factors relative to a private individual's claims for invasion of privacy and intentional infliction of emotional distress arising from picketing and an online "epic" concerning his son). The Court in *Snyder v. Phelps* indicated that the nature of the speech was the dominant factor, but carefully limited its holding and declined to review the defendants' online "epic" derogating the plaintiff's family, which presumably would be less protected than the picketing. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1214 n.1 (2011); see also Deana Pollard Sacks, *Snyder v. Phelps: A Prediction Based on Oral Arguments and the Supreme Court's Established Speech-Tort Jurisprudence*, 2010 CARDOZO L. REV. 418, 428–29 (analyzing the Court's statements and questions during oral argument that indicated they would engage in "line-drawing" as in other speech-tort cases, and that they distinguished the picketing from the online "epic," the latter of which seemed to warrant less constitutional protection).

166. See *Assoc. Press v. Walker*, 388 U.S. 130, 140 (1967) (former Army general accused of leading an angry crowd to obstruct federal marshalls who were facilitating desegregation at the University of Mississippi); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 135–36 (1967) (former head coach of the University of Georgia football team accused of game-fixing). In *Gertz v. Robert Welch, Inc.*, the Court defined two types of public figures. 418 U.S. 323, 342 (1974) (noting that "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to [their] reputation"). "All purpose" public figures are persons who have achieved "pervasive fame or notoriety," whereas limited public figures inject themselves into a particular public controversy and thereby become a public figure for a limited range of issues. *Id.* at 351. The Court later clarified that being extremely wealthy and going through a high profile divorce does not render the divorcing parties public figures, despite the wife holding press conferences regarding the divorce. *Id.* at 377–78 n.10 (White, J., dissenting) (citing *Firestone v. Time, Inc.*, 271 So. 2d 745 (Fla. 1972)). Similarly the fact that divorce proceedings are judicial in nature does not render divorcing parties "public figures" despite broad public interest in the judicial proceedings. *Id.* at 378–79 (White, J., dissenting); see also *Time, Inc. v. Firestone*, 424 U.S. 448, 455 (1976).

“exceedingly rare” exception, and thereby assume the risk<sup>167</sup> of public criticism and even “sharp attacks” on their character and integrity.<sup>168</sup> In addition, the fame that accompanies public figure status provides access to the media for purposes of counter-speech, and public figures can therefore engage in “self-help” to protect their reputation.<sup>169</sup>

The actual malice standard, including the plaintiff’s burden of establishing factual falsity, was extended to a public figure’s intentional infliction of emotional distress claim in *Hustler v. Falwell*,<sup>170</sup> and almost certainly applies to public figures’ false light invasion of privacy<sup>171</sup> claims as well.<sup>172</sup> In *Bartnicki v. Vopper*, the Court rejected altogether a privacy claim against a radio station that broadcast an intended private cell phone conversation that had been intercepted illegally by an unknown third party,

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167. *Gertz*, 418 U.S. at 344–45 (a public official “runs the risk of closer public scrutiny” than a private defamation plaintiff); see also *Dun & Bradstreet*, 472 U.S. at 756 (explaining that “private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements”). Assumption of the risk is a defense to negligence and strict liability that provides that if the plaintiff voluntarily agreed to accept the consequences of a known risk, then the defendant is relieved from liability for injury resulting from that risk. See DOBBS, *supra* note 63, at 534, 962, 1175.

168. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

169. *Gertz*, 418 U.S. at 344 (stating that “self-help” means accessing the media to “contradict the lie”).

170. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Falwell’s claims of libel and intentional infliction of emotional distress were both subjected to the actual malice standard, the Court emphasized Falwell’s public status and the value of derogatory parody and satire in political commentary. *Id.* at 52–53. To hold otherwise would allow a public figure to circumvent the actual malice standard by re-casting the grievance as a claim for emotional distress, which would create an “end around First Amendment strictures.” See *Smithfield Foods, Inc. v. United Food and Commercial Workers Int’l Union*, 585 F. Supp. 2d 815, 818–20 (E.D. Va. 2008) (explaining Supreme Court decisions applying the actual malice standard to non-dignitary torts); see also *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522–23 (4th Cir. 1999) (actual malice standard applied to grocer’s claim for reputation damages).

171. The tort of invasion of privacy includes four separate causes of action: intrusive invasions, public disclosure of private facts, false light, and commercial appropriation. See DOBBS, *supra* note 63, at 1198. The elements of false light invasion of privacy are so similar to defamation that some states, such as Texas, reject the claim as redundant and unnecessary. More generally, since the injuries caused by the first three are reputation injury, humiliation, and embarrassment, they would likely be treated with less deference relative to the First Amendment than commercial appropriation, which protects the financial interests of the plaintiff. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (the state has a greater interest in protected proprietary interests than emotions or reputation); *infra* Part IV.B.3.

172. In *Time, Inc. v. Hill*, *LIFE Magazine* substantially misreported the facts concerning a private family’s kidnapping ordeal. 385 U.S. 374, 377–78 (1967). The Court extended the “actual malice” standard to the private family members, who brought a false light invasion of privacy claim against the magazine. *Id.* at 378–79. However, most scholars believe that this aspect of *Time* was overruled in *Gertz v. Welch*, where the Court clarified that the status of the plaintiff as a public figure or private individual has a large effect on the level of tailoring in a defamation claim, and today a case like *Time* would be governed by the evidentiary standard set forth in *Gertz v. Welch*. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1056 (3d. ed. 2006) (noting that after *Gertz v. Welch*, the “actual malice” standard “no longer would apply” under the facts of *Time, Inc.*).

stating that “privacy concerns give way when balanced against the interest in publishing matters of public importance.”<sup>173</sup> The parties to the cell phone conversation were characterized as “limited public figures” because they were public school union negotiators and the speech was a matter of public concern, warranting a very high level of constitutional protection.<sup>174</sup> It was undisputed that the taped conversation was accurate, so the Court had no reason to discuss the actual malice standard. Still, the Court’s decision essentially converges with its reasoning in *Hustler v. Falwell* in terms of denying liability for emotional or dignitary claims as to public figures or limited public figures where speech of public concern cannot be characterized as “false.”

The Supreme Court recently dealt with a very controversial speech-tort case in *Snyder v. Phelps*, where, again, the injurious speech was incapable of being characterized as “false,” rendering chilling concerns palpable, and motivating the Court to deny tort liability.<sup>175</sup> In *Snyder v. Phelps*, the Court found that political speech communicated by means of picketing on a public sidewalk could not form the basis for emotional or dignitary tort liability where the speech could not be proven untrue and there was no personal animus directed at the plaintiff, even though the plaintiff was not a public figure.<sup>176</sup> In this case, church members whose mantra was “God Hates Fags” and who purported to believe that God punishes the United States for its tolerance of homosexuality picketed the funeral of a fallen marine with highly offensive signs aimed at the marine, causing his father to suffer severe emotional distress.<sup>177</sup> A jury awarded the father nearly eleven million dollars for emotional distress, invasion of privacy, and punitive damages, but the Court determined that the verdict could not stand on the picketing alone.<sup>178</sup> The Court demonstrated more concern

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173. *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001).

174. *Id.* at 539–40 (distinguishing full-purpose public figures from “limited” purpose public figures) (citing *Gertz*, 418 U.S. at 351). The Court stated: “In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance. . . . One of the costs associated with participation in public affairs is an attendant loss of privacy.” *Id.* at 534.

175. 131 S. Ct. 1207 (2011).

176. *Id.* at 1216–17. The Court highlighted the “public forum” location of the picketing, and stressed the narrowness of its holding. *Id.* at 1218–20.

177. For details on the facts of *Snyder v. Phelps*, see *Snyder v. Phelps, the Supreme Court’s Speech-Tort Jurisprudence, and Normative Considerations*, *supra* note 165.

178. The *Snyder v. Phelps* Court declined to consider the more difficult issue of whether Mr. Snyder could recover in tort for the online “epic” the “church” created and published that was grossly invasive and focused on his deceased son, and which quite foreseeably would cause Mr. Snyder extreme emotional distress and even physical injury (exacerbated prior condition in his case). 131 S. Ct. at 1214 n.1. For more details on the procedural history and facts of *Snyder v. Phelps*, see *Snyder v.*

about punishing speech that was political in nature and disseminated via traditional grass-roots “self-government” than the plaintiff’s status as a public figure or private individual because, as a whole, the “dominant theme” of the picketing was political speech.<sup>179</sup> In addition, a jury’s discretion concerning the “outrageous” element of a claim for intentional infliction of emotional distress could become an “instrument for the suppression of . . . ‘vehement, caustic, and sometimes unpleasant’ expression”—the very expression most at risk for chilling.<sup>180</sup> Without the built-in verifiable element of factual falsity, the risk of chilling political speech was too high, and that risk overcame any real consideration concerning the plaintiff’s level of vulnerability.

The Court has also recognized a very high level of constitutional protection for accurate republication of private facts about private individuals contained in government-generated public records. Applying strict scrutiny to state privacy statutes that conferred liability for such republication,<sup>181</sup> the Court determined that accurate republication of information contained in public criminal records is fully protected from tort liability regardless of how personal or embarrassing the facts may be, including publishing rape victims’ identifying information.<sup>182</sup> Any other outcome would essentially impose strict liability against newspapers for accurately republishing the contents of criminal public records.<sup>183</sup>

The privacy statute cases and *Snyder v. Phelps* clarify that the public nature of the speech is the most critical factor in determining its level of

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Phelps, *the Supreme Court’s Speech-Tort Jurisprudence, and Normative Considerations*, *supra* note 165.

179. 131 S. Ct. at 1215–17.

180. *Id.* at 1219 (citing *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 510 (1984)).

181. The tort liability created by the state privacy statutes was framed as a legislative deprivation of fundamental First Amendment rights, and therefore received strict scrutiny review. The statutes essentially created strict liability for accurately publishing the contents of public records.

182. *See, e.g.*, *The Fla. Star v. B.J.F.*, 491 U.S. 524, 536 (1989) (Florida statute that prohibited publishing the names of rape victims, *inter alia*, was held to violate the First Amendment because the state had less restrictive means to keep rape victims’ names confidential and failed to employ them); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975) (rape and murder victim’s name was broadcasted in violation of a Georgia privacy statute, but since information was derived from public court records, the First Amendment shielded network from tort liability); *see also* *Bowley v. City of Uniontown Police Dept.*, 404 F.3d 783, 786 (3d Cir. 2005) (First Amendment shielded newspaper from civil liability for publishing truthful information about a juvenile obtained from police report which violated a Pennsylvania statute prohibiting the disclosure of juvenile records).

183. *See also, e.g.*, *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103–04 (1979) (holding that West Virginia statute criminalizing publication of the name of any youth charged as a juvenile offender violated the First Amendment); *Okla. Publ’g Co. v. Dist. Ct.*, 430 U.S. 308, 311–12 (1977) (*per curiam*) (holding that pretrial order restraining publication of the name or photograph of an 11-year-old boy in relation to a pending juvenile proceeding involving murder violated the First Amendment).

constitutional protection. This factor trumps plaintiffs' private status, at least where the injury claimed is emotional or dignitary in nature, the speech relates to self-government, and the speech either cannot be characterized as factually false or was previously recorded in government-generated public databases.<sup>184</sup>

2. *Intermediate Tailoring For Private Individuals' Defamation Claims Arising From Public Concern Speech & The Import of Snyder v. Phelps Relative to Private Individuals*

The free speech-tort liability balance is recalibrated where defamatory speech of "public concern" harms *private* individuals, because they are "more vulnerable to injury, and the state interest in protecting them is correspondingly greater."<sup>185</sup> In *Gertz v. Robert Welch, Inc.*, the Court considered liability for libel arising from a factually untrue and grossly derogatory newspaper story that defamed Elmer Gertz, a respected attorney with strong community ties who brought a wrongful death action on behalf of the family of a young man who was shot and killed by a police officer.<sup>186</sup> The Court rejected the defendant's attempt to characterize Gertz as a "public figure," despite the fact that he had authored books and was active in community affairs, because he had not acquired the requisite level of fame.<sup>187</sup> The Court later characterized the news story about Gertz's involvement in a high profile wrongful death case against a police officer as "at the heart of the First Amendment's

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184. Justice Breyer would engage a more balanced approach to speech regulation than the other Members of the Court. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1221–22 (2011) (Breyer, J., concurring) (noting that on balance, the speech cannot be punished because to do so would not "proportionately advanc[e] the State's interest in protecting its citizens against severe emotional harm."); see also *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2766 (2011) (Breyer, J., dissenting). Justice Breyer stated:

I would evaluate the degree to which the statute injures speech-related interests, the nature of the potentially-justifying 'compelling interests,' the degree to which the statute furthers that interest, the nature and effectiveness of possible alternatives, and, in light of this evaluation, whether, overall, 'the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide.'

*Id.*

185. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

186. *Id.* at 325.

187. *Id.* at 351–52. Elmer Gertz had not "thrust himself into the vortex of this public issue." *Id.* at 352. Among other things, the John Birch Society's newspaper, *American Opinion*, asserted as a fact that Gertz "framed" the guilty police officer (Nuccio) as part of a Communist campaign to discredit local police departments for the purpose of establishing a federal (Communist) police force capable of supporting a Communist dictatorship. *Id.* at 325–26. The article referred to Gertz as a "Leninist," a "Communist-frontier," and falsely implied that Gertz had a criminal record so large that it took "a big Irish cop to lift." *Id.* at 326. None of these allegations were established as true. *Id.* at 326–27.

protection,”<sup>188</sup> but clarified that the “need to avoid self-censorship by the news media is . . . not the only societal value at issue,”<sup>189</sup> and a “proper accommodation” of the competing state interest to protect a private individual’s reputation warrants a less stringent constitutional test than actual malice.<sup>190</sup>

Accordingly, where a private individual is defamed by speech of public concern, the Court revised the prima facie case of public figure defamation created in *New York Times v. Sullivan* by: (1) reducing proof of fault from actual malice to negligence;<sup>191</sup> (2) allowing recovery of actual damages upon proof of fault by a preponderance of evidence;<sup>192</sup> and (3) shifting the burden of proving truth back to the defendant,<sup>193</sup> although the Court later shifted this burden back to the plaintiff, at least where the defendant was the media.<sup>194</sup> In an apparent attempt to avoid chilling speech, the Court added an element of “actual damages” to a “private individual-public concern” plaintiff’s prima facie case of defamation, an element that had never been required to establish defamation, but which has always been an element of negligence.<sup>195</sup>

Some courts assumed that the same constitutional standard applies to private individuals’ claims for other dignitary or emotional harm arising from public concern speech,<sup>196</sup> but *Snyder v. Phelps* undermined this assumption, at least relative to speech that cannot be characterized as

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188. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

189. *Gertz*, 418 U.S. at 341.

190. *Id.* at 342.

191. *Id.* at 347–48, 350. The Court left the contours of the lesser fault standard up to the states. *Id.* at 347. Most states, however, have adopted negligence as the fault standard post-*Gertz*.

192. *See id.* at 349–50. The actual malice standard of proof was retained relative to presumed and punitive damages. *Id.* at 349.

193. *Id.* at 347 n.10. This results from rejecting the actual malice standard. *Id.* at 342–43.

194. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). Although *Hepps* involved a media defendant, it is reasonable to conclude that the burden of proving falsity shifts to the plaintiff in all private person/public concern cases. *Id.* at 776; *see also, e.g., Dun & Bradstreet*, 472 U.S. at 783–84 (Brennan, J., dissenting) (explaining that the rights of the media are no greater than the rights of anyone else speaking out on public issues, so the same speech-tort rules should apply to all defendants); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 24 n.2 (1990) (Brennan, J., dissenting) (noting that a “fundamental First Amendment principle that ‘[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, expressing concern over the Court’s apparent distinction between media and non-media defendants (quoting *Hepps*, 475 U.S. at 780 (Brennan, J., concurring))).

195. *Gertz*, 418 U.S. at 349 (“[S]tate remedies for defamatory falsehood [should] reach no farther than is necessary to protect the legitimate interest involved.”).

196. *See, e.g., Herring v. Adkins*, 150 Ohio Misc. 2d 13, 19 n.3 (C.P. Clermont Cnty. 2008) (“[F]ederal law states that when determining whether speech is protected, courts must apply the same standard to all torts as that applied in defamation cases.”).

untrue in circumstances that fall within its “narrow” political-picketing-speech holding.<sup>197</sup> The *Snyder v. Phelps* Court focused almost exclusively on the *nature* of the speech<sup>198</sup> and how it was disseminated.<sup>199</sup> All of the circumstances of that case concerning the content and context of the speech overshadowed any concern about the plaintiff’s level of vulnerability in reaching the liability conclusion. Notably, the Court declined to address the online “epic” that targeted plaintiff’s family specifically for abuse and which surely deserved a lesser level of constitutional protection.<sup>200</sup> It is fair to assume that Justices Breyer and Alito were correct and that the plaintiff’s private status remained relevant to the speech-tort balance in situations distinguishable from the “grass roots” political speech considered in *Snyder v. Phelps*, such as the online “epic” not considered by the Court.<sup>201</sup>

Accordingly, the vulnerability of persons harmed by speech should affect its level of constitutional protection in many circumstances. *Gertz v. Robert Welch, Inc.* and other Supreme Court precedent indicate that the potential for speech to harm vulnerable persons affects the state’s interest in punishing the speech and the attendant level of evidentiary tailoring to constitutionalize a tort claim.<sup>202</sup>

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197. See 131 S. Ct. 1207 (2011). The Court stressed the fact-based narrowness of its holding, and the opinion should be viewed as limited to its extraordinary facts. *Id.* at 1220. The facts of *Snyder v. Phelps* are indeed unique. The Court specifically found that the defendants’ motive was to garner attention for their political/religious messages, that they did not violate local laws in conducting their picketing activities on a public sidewalk, and that they did not target the plaintiff for attack per se, but rather, capitalized on his son’s untimely death to disseminate their message at his funeral, as they had been doing for many years through similar funeral picketing activities. *Id.* at 1214, 1218.

198. The Court stated that “[w]hether the First Amendment prohibits [tort liability for speech] turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case.” *Id.* at 1215. The Court explained that, in deciding the nature of the speech, “content, form, and context” must be considered and, while no factor is dispositive, the overall nature of the speech drives the constitutional analysis. *Id.* at 1216.

199. The *place* of the political speech was central to the opinion, and it was “entitled to special protection” because it was disseminated in a public place through traditional means on matters of public concern. *Id.* at 1218.

200. *Id.* at 1214.

201. See *id.* at 1221 (Breyer, J., concurring) (the opinion is restricted to the picketing activity and does not analyze television broadcasting or internet postings); see also *id.* at 1226–27 (Alito, J., dissenting) (arguing that the epic addressed the *private* Snyder family directly, and this attack was not speech on a public concern). The Justices made numerous statements during oral arguments that indicated their view that some “line-drawing” would be in order relative to liability for the epic or similar speech in other factual contexts. See *Snyder v. Phelps: A Prediction Based on Oral Arguments and the Supreme Court’s Established Speech-Tort Jurisprudence*, *supra* note 165, at 428 n.74.

202. See 418 U.S. 323, 349–50 (1973); see also, e.g., *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1812–13 (2009) (relying on the number of children in a television audience to determine whether indecent speech should be protected; upholding change in FCC policy that removed “safe

### 3. *Minimal Tailoring and Deference to State Law Where the Speech is Purely Private or Causes Proprietary Harm*

The Court adopted a much more relaxed evidentiary burden of proof in defamation cases where both the plaintiff and the subject matter of the speech were private. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>203</sup> a credit reporting agency that negligently misreported Greenmoss's assets and liabilities to several of Greenmoss's potential business associates<sup>204</sup> raised the First Amendment as a defense to Greenmoss's negligence claim, and argued that proof of actual malice was required to impose tort liability in the absence of proof of actual damages, i.e., the *Gertz* standard.<sup>205</sup> The Court rejected that argument and reasoned that the First Amendment concern at issue was "less important" than the public interest crime story at issue in *Gertz v. Welch*, because the communications concerning credit worthiness were purely private in nature, and therefore of "reduced constitutional value."<sup>206</sup> The Court highlighted the commercial nature of the speech, which was "solely motivated by the desire for profit," as well as its "objective verifiability,"<sup>207</sup> and characterized the speech as "hardy and unlikely to be deterred" by tort liability.<sup>208</sup> Therefore, awards of presumed and even punitive damages for defamation are constitutional upon proof of ordinary negligence by a preponderance of evidence in purely private matters, at least when the speech has indicia of "hardiness."<sup>209</sup> The Court clarified that the Constitution requires proof of some fault to support defamation

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harbor" for single-word expletives); *Ginsberg v. New York*, 390 U.S. 629 (1968) (adopting a variable level of protection for sexually explicit speech depending on the age of the consumer).

203. 472 U.S. 749 (1985).

204. *Id.* at 751. A seventeen-year-old employee had mistakenly attributed a bankruptcy claim of a former Greenmoss employee to the company itself. *Id.* at 752.

205. *Id.* at 752.

206. *Id.* at 758, 761.

207. *Id.* at 762; *see also id.* at 788 n.13 (Brennan, J. dissenting) (explaining that the states have more latitude to regulate commercial speech because of its "greater objectivity and hardiness") (emphasis added). Where speech is objectively verifiable, the risk of chilling is presumably reduced, since liability is predictable and avoidable. *See, e.g.*, Christopher P. Guzelian, *Scientific Speech*, 93 IOWA L. REV. 881 (2008) (arguing that objectively verifiable speech is entitled to less First Amendment protection).

208. *Dun & Bradstreet*, 472 U.S. at 762.

209. *Id.* at 761. The changes made to *Gertz v. Welch*'s intermediate level of scrutiny were: (1) the burden of proof was reduced to preponderance of evidence; (2) presumed damages were allowed without proving actual damages; and (3) punitive damages were allowed upon proof of negligence only. Note, however, that state laws often require a showing of a malicious state of mind/ill will towards the plaintiff or intentional fraud for recovery of punitive damages, and some require proof of by clear and convincing evidence. *See, e.g.*, CAL. CIV. CODE § 3294(a) (West 1997); *see also* DOBBS, *supra* note 63, at 1064–69.



liability, rendering common law strict liability for defamation unconstitutional, but otherwise deferred to state law.<sup>210</sup>

The Court has shown more deference to state tort law where the plaintiff suffered actual harm, as opposed to intangible, dignitary, or emotional harm. The Court has opined that states have a heightened interest in protecting property rights, and has found liability for monetary or proprietary losses regardless of whether the plaintiff is a public figure, the speech is political in nature, or the speech is amenable to characterization as true or false. The Court has not considered the relative state interest in tort liability to protect against bodily harm or death.

In *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>211</sup> the plaintiff, a stunt performer, claimed that his proprietary human cannonball stunt had been misappropriated by a television station that videotaped and broadcasted his stunt on the evening news without his consent.<sup>212</sup> A closely divided Court held that when the state seeks to protect the plaintiff's property interests, as opposed to merely "feelings or reputation," the actual malice standard does not apply.<sup>213</sup> Unlike the dignitary concern at issue in *New York Times v. Sullivan*, the state's interest here was "analogous to the goals of patent and copyright law,"<sup>214</sup> and protecting the fruits of one's ideas through tort liability furthers the First Amendment policy of encouraging creative ingenuity.<sup>215</sup> Similarly, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>216</sup> the Court held that misappropriation of a former president's political speech is actionable

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210. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–48 (1974) (states should not impose defamation liability without fault). English common law allowed for strict liability for defamation, but many of the states already required negligence to sustain a defamation claim, requiring no modifications to the common law prima facie case. See, e.g., *Cassidy v. Daily Mirror Newspapers, Ltd.*, [1929] 2 A.C. 331 (K.B.) at 54 (Eng.) (libel claim sustained on strict liability principles); see also DOBBS, *supra* note 63, at 1117–21.

211. 433 U.S. 562 (1977).

212. *Id.* at 569.

213. *Id.* at 573.

214. *Id.*

215. *Id.* The Court also distinguished *Zacchini* from *Time, Inc. v. Hill* based on the regulatory consequences of the remedy sought. *Id.* at 577–78. Unlike liability for public dissemination of private facts, which would operate to "minimize publication" of the public interest information, *Zacchini*'s right of publicity did not seek to enjoin the broadcast, but rather sought compensation for it. *Id.* at 573–74.

216. 471 U.S. 539 (1985). Gerald Ford entered into a book-publishing contract with Harper & Row to publish his "memoirs" concerning the Watergate crisis, which resulted in another contract with *Time Magazine* to publish excerpts of the book prior to its release. *Id.* Just prior to *Time*'s expected publication date, *The Nation*, a political magazine, obtained a stolen copy of Ford's manuscript and published it. *Id.* *The Nation*'s publication caused *Time* to cancel its agreement with Ford, resulting in substantial damages to Ford. *Id.* at 542–43.

in tort. The Court found that First Amendment principles were enhanced by protecting proprietary manuscripts,<sup>217</sup> in part because President Gerald Ford suffered substantial out-of-pocket losses when *The Nation Magazine* misappropriated and published a stolen copy of his intellectual property.

The balancing factors produced by the Supreme Court's speech-tort precedent have helped determine the appropriate level of constitutional scrutiny when tort liability is challenged on First Amendment grounds. Generally, the Court has raised the prima facie evidentiary burdens to "reconcile" tort liability with the First Amendment, but at times the Court rejected dignitary or emotional claims altogether when they arose from political speech that related directly to self-government and either could not be characterized as objectively false or was an accurate republication of government-generated public records. Nonetheless, the Court's speech-tort precedent, taken as a whole, created analytical factors and policy considerations that are valuable in resolving the conflict of rights presented by tort liability for speech.

#### V. THE CASE FOR REFORMATION

The lower courts' departure from the Supreme Court's evidentiary tailoring method of constitutionalizing defamation and other speech-tort liability in the negligent speech cases likely resulted from the fact that negligent speech is different than, and more prone to chilling than, the types of speech for which the Supreme Court has approved tort liability. The central difference is proof of causation. Causation was a non-issue in all of the Supreme Court speech-tort cases in which tort liability was

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217. *Id.* at 558 ("[C]opyright supplies the economic incentive to create and disseminate ideas."). The Court has also ruled that publishing the name of a confidential source of political news in breach of a confidentiality agreement was not immune from civil liability. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). In *Cohen*, the Court allowed a source of political speech directly related to an election to maintain an action for actual damages, including lost wages, against a news publisher which violated a promise to keep the source's name confidential; the breach caused him to lose his job. *Id.* at 671. *Cohen* was not a speech-tort case, however, raising a state action issue, since a private confidentiality agreement—not state tort regulation—created the liability for speech. *Id.* at 668–69. Some scholars have argued that where legal obligations are defined by the parties, as opposed to the government, the First Amendment does not apply. *See Daniel J. Solove & Neil M. Richards, Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1685–97 (2009) (distinguishing "duty-defining" government power such as tort liability from "non-duty-defining" power where legal duties are negotiated by private parties); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1057 (2000) (arguing that it is "proper to let speakers contract away their rights"). *But see* Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 363–64 (1998) (arguing that *Cohen* is incoherent, and both tort and contract actions that punish speech should be subject to constitutional scrutiny).

allowed, because the speech in those cases share the common characteristic of direct injury based on verifiable facts, that is, whether the speech was factually false and defamatory or in fact misappropriated.<sup>218</sup> The factually verifiable nature of the speech causing direct injury that the Court has found subject to tort liability operates to avoid the chilling effect of tort liability, since liability is more predictable and avoidable.

To the contrary, the violent and dangerous speech cases in which the lower courts denied liability involved indirect injury resulting from intervening causes, i.e., human reactions to speech, that were allegedly instigated by the dangerous speech. In these cases, the speech itself was indeterminate and incapable of a factual determination concerning its wrongfulness because it did not directly cause harm. Like the speech involved in *Brandenburg v. Ohio*, injury depended upon the *effect* of the speech on the audience's *conduct*. This renders the speech more prone to chilling, as speakers cannot predict all reactions to their speech and possible resulting harm, and may decline to speak in the first place to avoid the risk of punishment. Therefore, to adequately protect indeterminate speech that allegedly harms foreseeably but indirectly by instigating intervening human reactions, lower courts sought to erect appropriate First Amendment barriers to liability for this type of "instigating" speech. *Brandenburg's* incitement test was the closest analogy in the case law at the time the seminal violent media cases arose, considering the similar intervening human causes. However, the incitement test is entirely inapposite and cannot address the causation issues presented by modern negligent speech cases. A negligence-based analysis would be better.

#### A. *The Inapposite Nature of the Incitement Test*

The incitement test is inapposite relative to the social risks presented by contemporary violent media, and in particular, the effects of violent video games on children. The incitement test requires that the speaker

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218. Once the determination was made that speech was factually false or misappropriated, there was no issue of causation, as false defamatory speech is presumed to injure reputation, and misappropriated speech disturbs the speech producer's proprietary interests per se. The exception is *Hustler v. Falwell*, where the parody was verifiably false. 485 U.S. 46 (1988). The Court, however, applied the actual malice standard because Jerry Falwell was clearly a public figure who spoke out on political and religious issues, and to allow him to recover damages based on a lower standard of proof would have created a jurisprudential loophole undermining the speech protection recognized in *New York Times v. Sullivan*. *Id.* at 51. In addition, the jury in *Hustler v. Falwell* had found that the parody was not defamatory because it could not "reasonably be understood as describing actual facts about [Fallwell] or actual events in which [he] participated." *Id.* at 49.

*intend* to cause lawlessness and contemporaneous or *imminent* social harm, and arose in the context of live political advocacy that potentially agitated the audience and incited immediate riots or other serious public risk. The test should be discarded relative to violent media for two reasons based on its two elements.

First, producers of violent media are generally profit-driven corporations whose directors and artists presumably do not intend to advocate lawless audience reactions. To the contrary, violent audience reactions to their media almost certainly are not in their best interests because such reactions may create bad publicity and hurt public relations and profits. Applying *Brandenburg*'s intent requirement to producers of violent media is senseless because the fault, if any, lies in producers' *disregard* of the risks posed by their media, or even conscious *abuse* of the current law to maximize profits, but not *intent* to cause public harm.<sup>219</sup> This type of fault is addressed by the law of negligence.<sup>220</sup> Liability for harms caused by violent media should revolve around a constitutional application of negligence liability, not transportation of the inapposite incitement test to a context factually and theoretically divorced from its origination.

Second, the incitement test's requirement of a likelihood of "imminent" harm automatically excludes both types of direct and indirect risks posed by violent video games. Copycat crimes or other acts of aggression associated with consumption of violent media involve intervening human causes that are rarely, if ever, imminent. Indeed, a requirement of imminence is directly contrary to the scientific evidence that explains the correlation between consumption of violent media and subsequent acts of aggression. As explained in Part I, the cognitive desensitization process and creation of cognitive scripts that can result from violent media and lead to acts of aggression is slow and cumulative, not immediate or imminent. The incitement test is fundamentally at odds with the slow and

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219. See *supra* Part II; see also, e.g., S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating The Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1243–44 (2000) (arguing that the *Brandenburg* test that applied to harmful speech cases is inappropriate when the speech "poses a significant public danger"); Steven J. Weingarten, *Tort Liability For Nonlibelous Negligent Statements: First Amendment Considerations*, 93 YALE L.J. 744, 747–49 (1984) (arguing that *Brandenburg* should not apply to nonlibelous negligent speech, as negligence liability rests on unreasonably dangerous conduct, not advocacy or intent); see also Solove & Richards, *supra* note 217, at 1686 (reviewing various approaches to speech-tort liability and suggesting an approach centered on government power).

220. The cognitive programming effects could also be analyzed as an invasion of privacy. See, e.g., *Vance v. Judas Priest*, Nos. 86-5844, 86-3939, 1990 WL 130920, at \*10 (Nev. Dist. Ct. Aug. 24, 1990).

cumulative manner in which violent media can cause acts of human aggression. In addition, aggression is known to result from many confounding social forces, making it difficult to trace the aggression directly to the violent media, even in copycat scenarios. It is jurisprudentially unsound to require proof of causation that is directly contrary to the scientific data concerning causation. The incitement test cannot possibly address the problematic causation issues presented by acts of violence allegedly caused by consumption of violent media.

The incitement test also cannot possibly address the potential serious injuries to children's neurological health that may be caused directly as a result of playing violent video games, because no intervening "lawlessness," imminent or otherwise, is involved in the cognitive-programming process, which is also cumulative as opposed to imminent. In the cases brought to date, crimes against third parties were ultimately caused by the child's intervening copycat crime or other act of aggression allegedly caused by a child's reaction to violent media. But neurological harm may be caused directly by consumption of violent video games and can lead to psychological and psychiatric disorders, addiction, and other health problems unrelated to any acts of aggression or other intervening causes.<sup>221</sup> That is, harm can result to a child gamer even where no third party is harmed by the gamer's reaction to the media. The direct injury to a child gamer may manifest in innumerable ways unrelated to intervening causes, such as depression, anxiety, and accompanying physical health problems.<sup>222</sup> This direct harm to children's neurological health must be distinguished from the indirect harm resulting from subsequent acts of aggression allegedly caused by violent media for both tort and constitutional analyses.<sup>223</sup> Neither type of harm can be addressed properly by the incitement test.

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221. It is possible that parental negligence (in the case of minors) or contributory negligence is an intervening cause in some cases in which a game player suffers psychological or psychiatric harm. That is, if the gamer's personality begins to change and a reasonable person should have seen the change and related it to playing the video games, then continuing to play the games (or allowing a child to continue to play the games) is negligent conduct.

222. Some cases may involve intervening negligence of parents, or even the game player himself, such as where a parent or the player becomes aware that the player is becoming aggressive or is showing signs of maladaptive behavior (manifestations of neurological injury) and fails to take reasonable corrective action, such as by limiting game play time. Whether negligent intervening acts supersede the original defendant's fault depends on the facts, including whether the intervening negligence was foreseeable. Particularly in the case of a child, the game player may become addicted before the parents reasonably were able to identify the addiction/brain functioning problem.

223. Enduring neurological injury that may be caused by excessive use of violent video games is certainly related to later acts of aggression in some people, but it is also related to other direct harms

The incitement test should be abandoned. In *Brown v. Entertainment Merchants Ass'n*, the Court did not rely on the incitement test in analyzing the constitutionality of criminal sales regulations of violent video games to minors, but rather, focused on whether causation was sufficiently proven to support a state's compelling interest in regulating such sales (and also found the California regulation to be vague).<sup>224</sup> The Court's causation analysis in *Brown v. Entertainment Merchants Ass'n* supports the proposition that the incitement test is not the proper test for analyzing the constitutionality of regulating violent video games.<sup>225</sup>

### *B. The Case for a Negligence-Based Analytical Paradigm*

Reconciling First Amendment protection of violent video games with the social values furthered by tort liability should engage a constitutional application of negligence theory. Negligence theory most aptly addresses the known facts about violent media producers' fault and the relationship between violent media and unreasonable risks to children and society. Negligence law is flexible and can address the difficult causation problems. Proximate cause jurisprudence limits liability despite cause-in-fact and actual harm where social policy so dictates, which can include First Amendment policies. At the same time, lapses of time between negligent conduct and resulting injury do not necessarily destroy causation, even where foreseeable criminal intervening acts ultimately cause injury, i.e., imminence is not required. Legal rules should bear a relationship to factual realities concerning fault and causation, as opposed to resting on *Brandenburg*-type intent and causation that have been established as inaccurate. Constitutionalizing the elements of negligence has the potential to reduce social risks while protecting free speech adequately, and would be superior to the inapposite incitement test.

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for the game player, which do not involve intervening acts of aggression, such as depression and other health problems.

224. 131 S. Ct. 2729, 2743 (2011).

225. The *Brown v. Entm't Merchs. Ass'n* majority did not require the state to prove incitement to regulate the sales of the games, but rather focused on problems concerning causation (as well as overbreadth and underinclusiveness)—indicating that incitement is not the proper test in this area of law. 131 S. Ct. at 2733–34. The Court also implicitly rejected the incitement test for determining whether potentially harmful student speech can be punished in *Morse v. Frederick*. See *Children's Developmental Vulnerability and the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?*, *supra* note 45, at 786–87 n.62 (the dissent disagreed). *Morse v. Frederick* was a student speech case, which warrants less stringent First Amendment protection generally and may explain this decision. 551 U.S. 393 (2007).

The inherent flexibility of negligence law renders it amenable to tailoring, depending on the outcome of the balancing factors, whether injury is direct or indirect, and other policy considerations. The extent to which violent or dangerous speech that causes a violent reaction and actual harm may be punished with civil liability necessarily turns on causation and public policy analyses concerning the media's propensity to influence the audience, the likelihood and gravity of public risk, and whether the risks are sufficiently foreseeable to warrant punishment. A carefully tailored negligence liability paradigm could more effectively and fairly allocate financial responsibility for social harms caused by violent or dangerous speech than the incitement test.

## VI. CONSTITUTIONALIZED NEGLIGENCE

The need to avoid self-censorship . . . is, however, not the only societal value at issue. . . . Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . . [W]e are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment.<sup>226</sup>

This Part proposes a two-part test for constitutionalizing the tort of negligence for unreasonably dangerous speech that can be proven to cause serious injury. The proposed balancing test determines the proper level of evidentiary tailoring necessary to meet First Amendment demands, and is followed by ideas for tailoring prima facie cases of constitutional negligence.

### *A. A Balancing Test to Determine the Level of Evidentiary Tailoring for Negligence Claims Arising From Unreasonably Dangerous Speech*

The Supreme Court's speech-tort precedent has produced three dominant balancing factors to determine the proper level of evidentiary tailoring to constitutionalize tort liability for speech: (1) the nature of the speech, (2) the vulnerability of the plaintiff, and (3) the state's interest in punishing the speech. The three factors are weighed to determine the level of evidentiary tailoring necessary to constitutionalize the prima facie case of negligence, and are illustrated herein relative to violent video games and children.

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226. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341–42, 349 (1974).

### 1. *The Nature of the Speech*

The Supreme Court has “long recognized that not all speech is of equal First Amendment importance”<sup>227</sup> and that political speech occupies the “highest rung of the hierarchy of First Amendment values”<sup>228</sup> in speech-tort cases as in other areas of constitutional law. Speech characteristics that have animated courts’ speech-tort decisions include: whether the speech is political or ideological advocacy, or concerns public affairs such that it is “more than self-expression” and “the essence of self-government,”<sup>229</sup> or genuinely “newsworthy” as opposed to purely private or confidential,<sup>230</sup> whether the speech is “a far cry from the type of responsible public debate which the United States Supreme Court obviously intends to foster by cases such as *New York Times v. Sullivan*,”<sup>231</sup> such as commercial speech or speech that is commercial in nature and therefore “hardy” and resilient to chilling;<sup>232</sup> whether the speech affects consumers without their conscious awareness or consent to receive the speech, which undermines assumptions of conscious free choice that theoretically support an unregulated marketplace of ideas,<sup>233</sup> such as subliminal speech that “sneaks into the brain” and bypasses intellectual processes without the listener’s conscious knowledge or informed consent<sup>234</sup> or otherwise contributes to market failures such as deceiving the public,<sup>235</sup> rendering it

227. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 756, 758 (1985).

228. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

229. *Id.* at 1215 (quoting *Garrison v. La.*, 379 U.S. 64, 75 (1964)).

230. *Id.* at 1221 (Breyer, J. concurring); see also *Dun & Bradstreet*, 472 U.S. at 751.

231. *Norwood v. Soldier of Fortune Magazine*, 651 F. Supp. 1397, 1401 (W.D. Ark. 1987).

232. See *id.* at 762; *supra* notes 187–88; see also *supra* note 219.

233. The marketplace of ideas justification for an unregulated speech market has been criticized and undermined considerably by scholars such as Stanley Ingber, Frederick Schauer, and Derek E. Bambauer, *inter alios*. These scholars reject the efficacy of an unregulated “marketplace of ideas” to produce truth, and argue that First Amendment jurisprudence is too deferential to speakers. See, e.g., Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649 (2006) (cognitive psychology research undermines the concept that an unregulated market produces accurate information or truth); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984) (exposing fallacies in the notion of a free marketplace of ideas and explaining its persistence in First Amendment jurisprudence); Frederick Schauer, *Is it Better to Be Safe than Sorry?: Free Speech and the Precautionary Principle*, 36 PEPP. L. REV. 301, 305 (2009) (current law assumes that the “catastrophic occurrence” to be prevented is the “large-scale restriction of speech,” and “requires us to accept the uncertain risk of a catastrophe [such as a terrorist attack] rather than restrict speech that might cause it.”).

234. *Waller v. Osbourne*, 763 F. Supp. 1144, 1149 (M.D. Ga. 1991) (subliminal messages are akin to false and misleading speech, and are therefore “worthy of little, if any, [F]irst [A]mendment constitutional protection”).

235. “False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot



not only unworthy of heightened First Amendment protection, but possibly counterproductive to First Amendment values;<sup>236</sup> whether the speech can be characterized as an information “defect” due to objectively verifiable inaccuracies that risk human life;<sup>237</sup> whether the speech constitutes a “true threat” per se;<sup>238</sup> and whether the speech directly aids the commission of a crime, rendering it an unprotected verbal crime, or a “speech act.”<sup>239</sup> Whether the speech is of “low” value, such as pornography,<sup>240</sup> or is of “pure” speech may also be relevant to

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easily be repaired by counterspeech, however persuasive or effective.” *Hustler v. Falwell*, 485 U.S. 46, 52 (1988) (citing *Gertz v. Welch*, 418 U.S. 323,340, 344 n.9 (1974)); *see also, e.g., McNeil-PPC, Inc. v. Pfizer, Inc.*, 351 F. Supp. 2d 226, 231, 249 (S.D.N.Y. 2005) (in a lawsuit brought by dental floss manufacturers claiming that Listerine’s advertisement that it was “as effective as floss” at preventing gingivitis was fraudulent, judge commissioned scientific survey to determine the advertisement’s propensity to cause consumers to buy Listerine in lieu of dental floss). Christopher Guzelian suggests an “evidence-based” analysis regarding scientific evidence, that is, a critical systematic review of the best available scientific evidence that reveals whether speech is “knowably” true or false. *See* Christopher P. Guzelian, *supra* note 207, at 886.

236. In *Vance v. Judas Priest*, the court found that subliminal messages do not advance the major theories underlying the First Amendment: the “marketplace of ideas,” self-government, and self-realization—because they do not provoke robust debate or advance the free flow of ideas. *Vance v. Judas Priest*, Nos. 86-5844, 86-3939, 1990 WL 130920, at \*23–25 (Nev. Dist. Ct. Aug. 24, 1990). Subliminal communication was defined as “the projection of messages by light or sound so quickly or faintly that they are received by the listener below the level of conscious awareness.” *Id.* at \*5. Subliminal messages are the “antithesis” of First Amendment values because they influence and manipulate the behavior of the listener without his knowledge or consent, rendering it unprotected speech. *Id.* at \*25. The court also found that the First Amendment includes a privacy right to avoid unwanted speech. *Id.* at \*29. The court stated that “[t]he right of free speech is guaranteed every citizen that he may reach the minds of willing listeners.” *Id.* at 27 (quoting *Kovacs v. Cooper*, 336 U.S. 77 (1949)). Further, the court noted the facts from *Lehman v. City of Shaker Heights*, where that court found that streetcar audiences were “captive” audiences and therefore, streetcars were not a “First Amendment forum” for subliminal messages. *Id.* (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). This is particularly true of speech that “bombards” people, because this can be a powerful weapon to control others’ minds. *Id.* at \*28 (citing *Griswold v. Conn.*, 381 U.S. 479 (1965)). The *Judas Priest* court ultimately concluded:

The freedom to exercise one’s thoughts is essential to the exercise of other constitutional rights. If an individual is not protected in his thoughts and behavior, the right of privacy becomes meaningless . . . . [W]hen an individual is subjected to subliminal messages without his knowledge and consent, his privacy rights outweigh any free speech rights of the person or entity publishing the subliminal message.

*Id.* at \*32.

237. *See, e.g., Salomey v. Jeppeson & Co.*, 707 F.2d 671, 677 (2d Cir. 1983) (mass-published navigation maps are “products” for strict liability purposes). One scholar suggests speech liability based on “predictable negligence.” *See* Christopher P. Guzelian, *True and False Speech*, 51 B.C. L. REV. 669, 670 (2010) (suggesting a standard of “predictable” negligence to replace actual malice and strict liability); *see also supra* note 99.

238. *See* Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1070 (9th Cir. 2002) (true threats are unprotected speech).

239. *See, e.g., Rice v. Paladin Enters., Inc.* 128 F.3d 233 (4th Cir. 1997).

240. “Low value” sexual speech, for example, is subject to zoning laws based on its secondary effects, while political speech presumably could not be so regulated. *See* *Young v. Am. Mini Theaters*,

characterizing the nature of violent media such as video games.<sup>241</sup>

The nature of violent video games is complicated and mixed, and the analysis of this factor necessarily turns in part on the nature of the injury alleged—the third factor discussed herein. Video games are a unique form of “speech” that includes educational content, intellectual ideas, and subliminal, cognitive programming characteristics.<sup>242</sup> The games contain political messages, military strategy, historical reenactments, accurate depictions of foreign lands and landmarks, and a myriad of artistic expressions and value judgments that generally receive strict constitutional protection.<sup>243</sup> Video games are commercially mass-produced and marketed, and extremely profitable “speech” that seem quite obviously “hardy” and not amenable to chilling, but they are not “commercial” speech per se,<sup>244</sup> and profitability alone does not cause speech to lose constitutional protection.<sup>245</sup> Violent video games cannot be characterized as verifiably “false,” “deceptive,” or “misappropriated,” rendering their regulation less predictable and more vulnerable to chilling, and warranting greater First Amendment protection than speech that is wrongful as an

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Inc., 427 U.S. 50, 62, 71 n.34 (1976) (sexual materials are low value speech and the location of their dissemination is subject to zoning ordinances to control unhealthy secondary effects associated with their location).

241. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (“pure” speech is entitled to comprehensive First Amendment protection); *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) (“[P]ure speech, must be interpreted with the commands of the First Amendment clearly in mind.”); John P. Collins, Jr., *Speaking in Code*, 106 YALE L.J. 2691, 2691–92 (1997) (distinguishing the most protected “pure” speech from *O’Brien*-type “expressive conduct” and “pure conduct,” arguing that computer source code is “pure conduct”).

242. The Court in *Brown v. Entertainment Merchants Ass’n* clarified that violent speech is fully protected because it does not fall within a recognized category of less protected or unprotected speech. 131 S. Ct. 2729, 2733 (2011). The majority did not distinguish the violent content of the games from their subliminal, cognitive-programming aspects, the latter of which clearly distinguishes video games from books such as *Grimms’ Fairy Tales*, which the majority cited as an example of the historical protection of violent speech. *Id.* at 2736.

243. For example, despite their graphic violence, the enormously popular *Call of Duty* games present elaborate war scenarios and require deductive reasoning, strategy, and teamwork to survive, which may teach important lessons in history, weaponry, interpersonal cooperation, communication skills, logic and vocabulary. The *Brown v. Entertainment Merchants Ass’n* Court likened the “interactive” nature of video games to “choose-your-own-adventure stories,” but this analogy fails to grasp the importance of repetition in the cognitive association creation process. 131 S. Ct. at 2737–38.

244. Commercial speech subject to greater state regulatory power has been defined as advertisements that “[do] no more than propose a commercial transaction.” See *Pitt. Press Co. v. Pitt. Comm’n on Human Relations et al.*, 413 U.S. 376, 385 (1973). However, the credit report at issue in *Dun & Bradstreet* did not propose a commercial transaction, but the Court considered its commercial nature in finding that it was “hardy” and unlikely to be deterred by tort liability. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985).

245. See *id.* at 789 (Brennan, J., dissenting) (“Time and again we have made clear that speech loses none of its constitutional protection ‘even though it is carried in a form that is ‘sold’ for profit.’” (quoting *Va. Pharm. Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976))).

objective factual matter. The complicated features of violent video games, the subjectivity involved in distinguishing politics from entertainment, and especially the fact that violent media do not fit within an existing category of unprotected or less protected speech motivated the Supreme Court to find that violent video games are fully protected speech, criminal regulation of which is subject to strict scrutiny.<sup>246</sup>

The indeterminate nature of the speech at issue in *Snyder v. Phelps* that caused emotional upset and infringement of personal autonomy was an important reason why tort liability was denied for the crass and personalized homophobic picketing at issue. Generally, violent media, like homophobic rhetoric, is more like art or opinion than fact, and cannot be characterized as “misappropriated,” “untrue,” or even “wrongful” as a factual matter, distinguishing it from defamation or misappropriation.<sup>247</sup> To the extent that violent media cause harm indirectly based on its influence on speech recipients, any “wrongfulness” of the speech necessarily turns on the foreseeability and scientific likelihood of its harmful influence on the audience, which is an inherently subjective conclusion warranting heightened speech protection.

The nature of the injury is intertwined with the nature of violent video game speech. Video games’ cognitive programming characteristics can lead to unhealthy changes in gamers’ brain activity patterns, and where this sort of injury is alleged, the nature of the game should include the scientific data that supports the alleged injury. If the nature of the injury is characterized as programming children without their conscious awareness or valid consent, the relevant content of the games are akin to subliminal speech, which lower courts have found to be unprotected speech. In *Vance v. Judas Priest*,<sup>248</sup> the court found that subliminal messages do not advance

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246. *Entm’t Merchs. Ass’n*, 131 S. Ct. at 2736–38 (likening violent video games to other types of traditional violent entertainment, such as *Grimms’ Fairy Tales*).

247. It was the absence of clear proof of causation that violent video games cause harm to children or society that motivated the Court to strike down California’s sales regulation in *Brown v. Entertainment Merchants Ass’n*. See *id.* at 2739 (noting that “ambiguous proof will not suffice”). Lower courts have consistently reached the same causation conclusion relative to video games. For example, in 2003, the Eighth Circuit found the scientific evidence that violent video games lead to aggression in children insufficient to meet constitutional scrutiny in reviewing a statute that limited sales or rentals of violent video games to minors, as the government “failed to present the ‘substantial supporting evidence’ of harm that is required before an ordinance that threatens protected speech can be upheld.” *Interactive Digital Software Ass’n v. St. Louis Cnty., Mo.*, 329 F.3d 954, 959 (8th Cir. 2003). In other contexts, however, courts have not required “substantial” empirical evidence to establish causation. See *In re Ephedra Prod. Liab. Litig.*, 393 F. Supp. 2d 181, 190, 194 (S.D.N.Y. 2005) (noting that non-definitive scientific evidence can be used to establish causation, and “[i]nconclusive science is not the same as junk science”).

248. *Vance v. Judas Priest*, Nos. 86-5844, 86-3939, 1990 WL 130920 (Nev. Dist. Ct. Aug. 24,

the major theories underlying the First Amendment—marketplace of ideas, self-government, and self-actualization—because subliminal messages do not provoke robust debate or advance the free flow of ideas, and indeed constitute the “antithesis” of these values because they influence and manipulate the behavior of the listener without his knowledge or consent.<sup>249</sup> Subliminal communications infringe upon freedom of thought and mind that the First Amendment seeks to protect and are not really speech at all.<sup>250</sup> The *Brandenburg* standard did not apply, because subliminal messages affect the brain differently than advocacy or incitement.<sup>251</sup> The court also found that the First Amendment protects individuals to be free from intrusive speech,<sup>252</sup> particularly if they are “bombarded” with it,<sup>253</sup> because speech is a “powerful weapon” to control others’ minds.<sup>254</sup> The court concluded:

The freedom to exercise one’s thoughts is essential to the exercise of other constitutional rights. If an individual is not protected in his thoughts and behavior, the right of privacy becomes meaningless . . . . [W]hen an individual is subjected to subliminal messages without his knowledge and consent, his privacy rights outweigh any free speech rights of the person or entity publishing the subliminal message.<sup>255</sup>

The following year, a Georgia federal court decided *Waller v. Osbourne*,<sup>256</sup> another case in which subliminal commands in rock music allegedly caused teen suicide. The court followed the Nevada District

1990).

249. *Id.* at \*25.

250. *Id.*; see also, e.g., David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335–46 (1991) (arguing that speech that advocates ideas through reasoning should be the most protected under the First Amendment).

251. See *Judas Priest*, 1990 WL 130920 at \*22; see also *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, 809–11 (W.D. Ky. 2000) (plaintiffs argued for strict liability based on a failure to warn of subliminal messages contained in the violent media, but the court found that subliminal messages were not “products” without analyzing whether subliminal messages were unprotected speech).

252. The right of free speech includes a right to avoid unwanted speech. See *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (“[T]he right of free speech is guaranteed every citizen that he may reach the minds of willing listeners.”); *Judas Priest*, 1990 WL 130920 at \*25–27 (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)) (streetcar audiences are “captive” audiences and therefore, streetcars were not a “First Amendment forum[s]”).

253. *Judas Priest*, 1990 WL at \*28.

254. *Id.* at \*29 (citing *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451 (1952)).

255. *Id.* at \*32. The Court found that in order for liability to attach to producers of subliminal messages that allegedly cause harmful consequences on the part of listeners, intent is a necessary element, making an analogy to invasion of privacy. *Id.* at \*10. Ultimately, the court found no intent, and no liability. *Id.* at \*21.

256. 763 F. Supp. 1144 (M.D. Ga. 1991).

Court's reasoning in *Vance v. Priest* and found that subliminal messages contained in otherwise protected speech rendered it unprotected or much less protected in accordance with its similarity to false and misleading commercial speech and other forms of speech "extremely limited in their social value," relegating such speech "to a class worthy of little, if any, first amendment constitutional protection."<sup>257</sup>

The cognitive-programming effect of video games occurs automatically without the gamer's knowledge or informed consent. This makes this aspect of video games similar to subliminal speech in terms of bypassing marketplace assumptions. While the gamer consciously chooses to play the game, this type of consent should not encompass consent to the creation of unhealthy unconscious associations and attendant negative health consequences, particularly as to children. As Justice Alito recognized in his concurring opinion in *Brown v. Entertainment Merchants Ass'n*, "[t]here are reasons to suspect that the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or television show,"<sup>258</sup> and "the Court is far too quick to dismiss the possibility that the experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before."<sup>259</sup> Accordingly, where the nature of the injury results directly from unconscious programming, this affects the analysis of the nature of the speech itself.

If the nature of the games is characterized as influencing the audience and instigating acts of aggression that cause third party harm, they cannot be distinguished from any other type of violent media such as a violent film—other than by virtue of their effectiveness, which relates back to their cognitive programming potential. The games' potential to influence the audience based on content alone, as opposed to content and programming potential, render them akin to pure speech, warranting the strictest constitutional protection. However, dual direct and indirect risks

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257. *Id.* at 1148.

258. 131 S. Ct. 2729, 2742 (Alito, J., concurring).

259. *Id.* at 2748. The cognitive programming potential of video games was not addressed by the majority, which dismissed the idea that video games may be different in kind than books or movies, asserting that "interaction" is "nothing new," and that player participation in "violent action" is "more a matter of degree than of kind." *Id.* at 2737–38. The scientific research on the special effects of video games in terms of learning, programming cognitively, and modifying brain activity patterns through interactive repetition undermines the *Entertainment Merchants Ass'n* majority's view on this point and clarifies that there are distinct potential harms: cognitive programming beyond the gamer's awareness and the related potential problem of subsequent antisocial and aggressive conduct.

presented by violent video games distinguish them from true “pure” speech such as the live advocacy at issue in *Brandenburg v. Ohio* or the Vietnam protest armbands worn by schoolchildren in *Tinker v. Des Moines*.<sup>260</sup> If the armbands in *Tinker* had risked serious health consequences to the children that wore them, they might be analogous in terms of the nature of the speech.<sup>261</sup>

There is no escaping the fact that violent video games do not merely communicate ideas intellectually that can influence behavior. The games require repetitive conduct—virtual acts of violence—to receive the speech, and this aspect of the games generate physical and psychological responses in children in particular that have nothing to do with persuasion of intellectual ideas or conscious choice in accepting or rejecting ideas.<sup>262</sup> At the very least, the cognitive programming potential inherent in violent video games renders them impure speech, at least as to gamers who are reasonably unaware that they are being programmed or who lack competency to consent to such programming. It is therefore not possible to analyze fully the nature of the speech without also considering the level of the player’s vulnerability to altered brain activity (and attendant possible behavioral reactions to it) and the nature of the state’s interest in regulating the speech.<sup>263</sup>

## 2. *The Vulnerability of the Plaintiff*

The vulnerability of harmful speech victims and their need for state law protection should be considered in accordance with the Supreme Court’s

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260. 393 U.S. 503, 505 (1969) (school children had a First Amendment right to wear black armbands to school to protest the Vietnam War, as the armbands were “pure [political] speech”).

261. However, had the armbands been determined to risk children’s health, the case almost surely would have gone the other way. Surely avoiding physical harm to children is at least as important as avoiding disruption of the school environment. *See id.* at 514.

262. *See, e.g.*, U.S. v. O’Brien, 391 U.S. 367 (1968). O’Brien’s decision to speak out by burning his draft card was considered speech mixed with conduct. *Id.* at 376–77. In the case of violent video games, the children are receiving speech that requires conduct, as opposed to speaking out via conduct, but there is no reason to analyze the *nature* of the speech as “pure” or mixed differently just because its conduct aspects relate to its reception as opposed to its dissemination.

263. The nature of violent video games is *per se* different as to adults, as they are less vulnerable to the potentially harmful, unconscious cognitive influences and in any event are competent to assume the risks. *See supra* Part I.A. Indeed, adult consumers’ more stable cognitive matrix renders the effects of violent video games more akin to “preconscious suggestion” than true subliminal speech, at least where they are aware of the risks of consuming violence. *See Waller v. Osbourne*, 763 F. Supp. 1144, 1147, 1149 (M.D. Ga. 1991) (distinguishing “preconscious suggestion,” where a listener is aware of the words or message but might not understand them, from “subliminal” speech, which operates beyond the “conscious awareness” of the listener). This is particularly true in light of the high-profile lawsuits alleging that violent media caused murderous audience reactions.

policy favoring greater state law protection commensurate with the injured party's level of vulnerability. Public figure versus private individual status in the defamation and privacy claim context is obviously not relevant to violent media analysis because the plaintiff's access to counter-speech and assumption of the risk of character attacks are irrelevant. However, plaintiffs' vulnerability to harm caused by speech should still be considered relevant to the state's level of interest in protecting them.

Courts should review all factors that bear on victims' ability to protect themselves, including: whether the victims are disproportionately or exclusively children and adolescents, considering their developmental vulnerability to speech influences<sup>264</sup> and recognized general need for government protection;<sup>265</sup> whether the speech interferes with the recipient's fairly informed choices, such as where the speech is subliminal or fails to warn of known risks or deceives the consumer; and whether the speech monopolizes the market<sup>266</sup> or contributes to market failures that render the speech recipient less able to choose fairly among competing ideas.<sup>267</sup>

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264. See *supra* Part I.

265. See, e.g., *N.Y. v. Ferber*, 458 U.S. 747, 757–58 (1982) (states have a compelling interest in safeguarding children from physical and psychological harm). Early philosophers such as Plato and Aristotle believed that children are impressionable and should be protected from harmful speech. See Alan E. Garfield, *Protecting Children From Speech*, 57 FLA. L. REV. 565, 566 n.2, 622 (2005) (suggesting an analytical framework for deciding issues of “child-protection censorship”); see also SAUNDERS, *supra* note 143, at 2–3 (child-protection censorship is compatible with First Amendment values); Kevin Saunders, *The Cost of Errors in the Debate Over Media Harm to Children*, 2005 MICH. ST. L. REV. 771 (2005) (arguing that the risks to children posed by violent media are too high a price to pay, since children will not be harmed much, if at all, by denying them access to violent media, i.e., the loss of speech is minimal, and it is of questionable value).

266. The District Court for the District of Arizona found that the First Amendment seeks to protect marginalized and insular minority viewpoints, such that there is less need to protect majoritarian speech or speech that “monopolizes” the market, and that antitrust-based speech liability has been imposed where speech is “false or misleading.” See *Heary Bros. Lightning Prot. Co. v. Lightning Prot. Inst.*, 287 F. Supp. 2d 1038, 1048 (D. Ariz. 2003).

267. Speech that monopolizes the market or capitalizes on human weaknesses such as cognitive errors and the availability heuristic should be entitled to less First Amendment protection because the speech undermines the search for truth that a free market presupposes results from market competition. See, e.g., Bambauer, *supra* note 233, at 696–703 (cognitive research undermines the theory of the marketplace of ideas); Jeffrey Evans Stake, *Are We Buyers Or Hosts? A Memetic Approach to the First Amendment*, 52 ALA. L. REV. 1213, 1214, 1220, 1243 (2001) (“ideas do not sit passively like products in an ordinary market,” and some are “aggressive” and “over-achieving” and can replicate like “viruses,” and can cause great injury to humans, rendering an unregulated marketplace of ideas insufficient to protect people from harmful ideas); see also Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 822 (2008) (“speech institutions” that play a cost-reducing role in the marketplace of ideas, “such as schools and universities,” should be given more First Amendment deference).

The scientific research concerning the developmental vulnerability of children should affect the speech-tort balance, and this factor mitigates toward some deference to state law protection of children. As explained in Part I, children and adolescents are acutely vulnerable to media influences compared to adults, and are particularly vulnerable to adopting maladaptive cognitive associations. The Supreme Court has specifically embraced the research on children's developmental vulnerability relative to their lesser culpability and greater likelihood of rehabilitation in criminal matters,<sup>268</sup> as well as their more impressionable nature, greater propensity to form addictions, and diminished ability to recover from addiction.<sup>269</sup> Children are undeniably physiologically more vulnerable to influences than adults and are not competent to assume the risks or to consent to altering their brain activity patterns long-term for the same reason that they are not competent to drop out of elementary school or consent to sexual relations: they lack the maturity and experience to appreciate the consequences of their choices. The aggressive marketing of violent video games to children because they are "more likely . . . to be influenced" by advertising<sup>270</sup> renders them particularly vulnerable as targets of profit-driven companies that capitalize on their known vulnerability, which increases the state's interest in protecting them. The state's interest is particularly strong considering the addictive qualities of violent video games, which are well documented, especially as to children.<sup>271</sup>

This factor may operate to create different levels of prima facie case tailoring for the same media depending on whether the injured claimant is a child or adult<sup>272</sup> in the same way that the evidentiary requirements for defamation vary in recognition of differing levels of the plaintiff's vulnerability. Variable tailoring would not contravene the *Brown v. Entertainment Merchants Ass'n* Court's rejection of a variable standard for criminal regulation of sales of violent video games to children because criminal regulation of speech has historically been subjected to a different test altogether—one that does not consider actual harm to a particular child as this balancing approach to tort liability for speech does. Negligence analysis is a case-by-case review of the facts, and this factor

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268. See, e.g., *Graham v. Fla.*, 130 S. Ct. 2011, 2026 (2010).

269. See *Morse v. Frederick*, 551 U.S. 393, 407 (2007).

270. See *supra* note 74 and accompanying text.

271. See *supra* notes 51–58 and accompanying text.

272. Where an adult victim is harmed by a child, as in the Columbine High School case, the child analysis should apply if the harm that the dangerous media caused to the child in turn caused the harm to the ultimate victim.



would be grounded in actual, proven harm in an individual case. Tort regulation is inherently narrowly tailored and does not pose overbreadth or underinclusiveness problems because the plaintiff must prove actual damages and causation. Proof of actual injury should lessen chilling concerns and in any event justifies shifting the burden of the actual costs to the speech producer as opposed to children or society at large. Therefore, even if negligence liability for injury caused by violent video games is subject to strict tailoring as to adults, it should be subject to a less strict level of tailoring relative to children, particularly where the injury alleged directly results from altered brain activity patterns caused by playing video games.

### 3. *The State's Interest in Punishing Speech/The Nature of the Injury*

The nature of the interest that the state seeks to protect through tort regulation should be reviewed as part of any constitutional speech-tort balancing test. Supreme Court precedent clarifies that emotional and reputational harm are less worthy of state law protection than property interests.<sup>273</sup> Established tort policy values serious bodily harm or death over competing property interests and considers the breadth and severity of the public risk as part of any risk-utility analysis.<sup>274</sup>

The nature of the injury allegedly caused by violent video games should be separated into different categories depending on whether the games allegedly caused direct injury to a child's brain or indirect injury through intervening acts of aggression allegedly traceable to the games' influence on behavior. The Supreme Court has recognized that the states have a compelling interest in protecting children's physical and psychological well-being,<sup>275</sup> even to protect children from poor parenting choices.<sup>276</sup> If a child claims neurological or other injury arising directly

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273. See *supra* Part IV.

274. See, e.g., *Brown v. Martinez*, 361 P.2d 152, 155 (N.M. 1961) (use of deadly force against watermelon thieves on defendant's property held actionable in tort because human life is more important than property rights). In addition, the Supreme Court recognized in *Gertz v. Welch* that "[t]he protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments." *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 341 (1974) (emphasis added) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)); see also *Herceg v. Hustler*, 814 F.2d 1017, 1025–26 (5th Cir. 1987) (Jones, J., concurring in the decision and dissenting in part) ("[N]o federal court has held that death is a legitimate price to pay for freedom of speech.").

275. *N.Y. v. Ferber*, 458 U.S. 747, 757–58 (1982).

276. See, e.g., *Prince v. Mass.*, 321 U.S. 158, 166–67 (1944) (upholding Massachusetts' laws restricting child labor against parents' religious freedom challenge, finding that parents' authority is not absolute and can be restricted constitutionally if doing so is in the interests of a child's welfare).

from the games' cognitive programming effect or addictive characteristics, there may be no intervening cause, which eliminates the most difficult proximate cause issue. To the extent that there is injury to a child's cognitive or neurological health, the state clearly has a compelling interest that should operate to lower the level of tailoring necessary to constitutionalize a tort claim.

In relation to the types of harm that have been alleged in most tort cases brought against producers of unreasonably dangerous speech to date—serious injury or death to third parties resulting from intervening acts of the speech recipients—the state's interest in preserving life is generally considered more compelling than its interest in protecting reputation, emotions, or even proprietary interests.<sup>277</sup> Arguably, more deference to state law is appropriate. However, the complicated and confounding causation issues concerning the effects of violent video games on players' behavior render it inadvisable to relax evidentiary requirements based on the nature of the injury, because to do so would undermine the constitutional mandate to raise evidentiary burdens to protect speech from punishment where wrongful intent, causation, and injury are indeterminate. That is, it could unduly risk free speech to relax tort claims' prima facie requirements based on correlations without clear proof of direct causation because uncertainty about liability lies at the heart of chilling concerns. The *Brown v. Entertainment Merchants Ass'n* majority was not persuaded by the scientific proof that violent video games *cause* acts of aggression by gamers due to confounding intervening causes of aggression generally, and it therefore applied strict scrutiny to violent video game sales regulation. Accordingly, when the nature of the injury stems from the effect of the games on the gamers' behavior, strict tailoring is appropriate.<sup>278</sup>

#### *B. Constitutionalized Negligence: Suggestions for Prima Facie Cases*

A common law prima facie case of negligence has five elements that must be pled and proven by a preponderance of evidence to establish liability: duty, breach, cause-in-fact, proximate cause, and damages or injury.<sup>279</sup> Evidentiary modifications to the prima facie case should be made

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277. See *supra* note 259.

278. Note, however, that it may be difficult to distinguish direct harm to neurological functioning from indirect harm caused by a player's reaction to the games. For example, desensitization to violence and the ability to commit acts of violence are intimately related.

279. See, e.g., *Selvage v. Gainey Transp. Serv., Inc.*, 859 So. 2d 813, 815 (La. Ct. App. 2003).

to constitutionalize negligent speech-tort liability similar to the way in which the Supreme Court has constitutionalized the elements of other torts to meet First Amendment scrutiny.

### 1. *Narrow Tailoring*

The prima facie case evidentiary burdens must be raised significantly to meet First Amendment demands relative to fully protected speech that warrants narrow tailoring to constitutionalize negligence liability. The evidentiary burdens should be raised in accordance with *New York Times v. Sullivan* and its progeny, with the most rigorous evidentiary burdens concerning causation to account for the indeterminate nature of violent video game speech where intervening causes are present—a special causation problem not present in *New York Times v. Sullivan*.

The negligent intent counterpart to actual malice in defamation law is actual knowledge of the danger posed by the speech and conscious indifference to the safety of foreseeable victims. The evidentiary burdens to establish the elements of duty and breach must be elevated beyond ordinary negligence or even gross negligence to require proof of reckless, willful and wanton behavior,<sup>280</sup> or substantial certainty<sup>281</sup> that the behavior will occur to meet First Amendment demands under a strict tailoring approach. For example, if it were proven that a publisher of unreasonably dangerous speech knew of the speech risks and blatantly disregarded such risks to maximize profits, such as by targeting advertisements to children who are particularly vulnerable to injury, such facts might meet the intent burden of proof proposed herein.<sup>282</sup> Proof of fault (duty and breach) should be raised from a preponderance of evidence to clear and convincing evidence to maximize speech protection.<sup>283</sup>

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280. This level of fault requires a showing that defendant “was conscious of the risk or had specific reason to know about it and proceeded without concern for the safety of others.” DOBBS, *supra* note 63, at 351 (footnotes omitted). This differs from gross negligence in that it requires proof of a mental element that is not necessarily required to prove gross negligence. *Id.*; *see also infra* note 289.

281. *See Garratt v. Dailey*, 279 P.2d 1091, 1094–95 (Wash. 1955) (a child who pulled a chair out from under someone who was about to sit down could be held to have intended the harm under “substantial certainty” analysis despite no proof that the child pulled the chair out for the purpose of causing harm). The level of fault for “substantial certainty” lies somewhere between purposeful intent to harm and recklessness and establishes intent for tort analysis where the defendant may not have had a purpose to bring about the harm, but knew to a substantial certainty that his actions would produce the harm. *See DOBBS, supra* note 63, at 48.

282. Some violent video game producers’ marketing behavior toward children for videos they deem inappropriate for children could meet this level of intent. *See supra* Part II.

283. A court could even require the criminal burden of proof of beyond a reasonable doubt. At least one state has applied the criminal burden of proof to limited issues of civil liability, such as

“But for” factual causation should be required to establish the link between the unreasonably dangerous speech and the injury, to limit liability to those harms that would not have occurred in the absence of the speech. For example, where a person copycats precisely a scenario that they were exposed to in violent media, this could suffice to show that “but for” the media, the crime would not have been committed, depending on all of the facts. Where multiple defendants are involved, such as where a person is influenced and harmed by multiple violent media, proof of causation is more complicated. In those circumstances, the individual defendant’s contribution to the ultimate harm could be proven through alternatives to “but for” causation, such as through substantial factor causation, which allows liability against defendants who are not the sole cause of injury but contributed to it substantially.<sup>284</sup> Alternative cause-in-fact analysis may be necessary, considering the confounding factors that influence an individual’s behavior, and comports with modern tort policy that a cause be substantial, not the sole cause, to impose tort liability.<sup>285</sup> Concerns about confounding factors warrant raising the evidentiary burden for factual causation to a clear and convincing standard.

Foreseeability of harm is the cornerstone of modern proximate cause analysis, and since intervening criminal acts are usually the ultimate cause of harm in unreasonably dangerous speech cases, foreseeability of such acts should be proven by clear and convincing evidence. Courts could also require proof of substantial injury, such as serious bodily harm or death, to further limit tort liability for fully protected speech. Under this approach, property damage, economic losses, or emotional harm could be per se insufficient to state a prima facie case, so that tort liability reaches no further than necessary to protect the most vital state interests, consistent with the *Gertz v. Welch* Court’s added element of actual damages.<sup>286</sup> Disallowing punitive damages is another possible way of limiting tort liability to protect speech.<sup>287</sup>

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punitive damages. See COLO. REV. STAT. ANN. § 13-25-127(2) (West 2005 & Supp. 2011); DOBBS, *supra* note 63, at 1069.

284. See, e.g., *Landers v. E. Tex. Salt Water Disposal*, 248 S.W.2d 731 (Tex. 1952).

285. See, e.g., *Spann v. Shuqualak Lumber Co.*, 990 So. 2d 186, 190 (Miss. 2008) (emissions from lumber company causing a dense fog contributed to car collision, rendering the company potentially liable along with drivers who may also be liable); *Landers*, 248 S.W.2d at 734 (where tortious acts of two or more wrongdoers join to produce an indivisible injury, all wrongdoers are deemed jointly and severally liable).

286. 418 U.S. 323, 349–50 (1973).

287. Justice Breyer suggested this during oral arguments in *Snyder v. Phelps*. See *Snyder v. Phelps: A Prediction Based on Oral Arguments and the Supreme Court’s Established Speech-Tort Jurisprudence*, *supra* note 165, at 428 n.74.

Applying this test may result in a high level of dismissals in actions against publishers and producers of fully protected dangerous speech, but the First Amendment demands no less for such speech.<sup>288</sup> Strict tailoring of the prima facie case still addresses the difficult causation issues in a manner superior to the inapposite *Brandenburg* test and recognizes a balance of rights that may send a normative message to publishers of unreasonably dangerous speech that they are not entirely immune from tort liability.

## 2. *Intermediate Tailoring*

In *Gertz v. Welch*, a fault level of ordinary negligence met intermediate tailoring, to accommodate competing speech-tort interests. However, in cases where the ultimate injury results from intervening causes, the fault burden of proof should be raised to account for the indeterminate nature of the speech. Requiring proof of gross negligence<sup>289</sup> by clear and convincing evidence more adequately protects speech subject to intermediate tailoring. This proposed analysis accords with the Eleventh Circuit's reasoning that intermediate tailoring of a negligence prima facie case is met upon proof that the defendant disregarded a "clear and present" danger in publishing a gun-for-hire advertisement, and also accords with the Georgia Supreme Court's "clear and present danger" standard for children's dangerous television programming.<sup>290</sup>

Factual causation could be established through substantial factor causation where "but for" causation cannot be proven. That is, unlike narrow tailoring, the link between the speech and the injury could be proven by substantial factor causation only,<sup>291</sup> even where there is no

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288. See, e.g., *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1059–67 (N.D. Ill. 2005) (reviewing scientific data on the effects of violent media and concluding that causation was insufficiently established). If the evidence that violent media causes violent behavior is as inconclusive as the courts have found, then raising the evidentiary burden for causation should address First Amendment concerns adequately. Courts could still dismiss lawsuits upon a finding of inadequate causation as a matter of law.

289. Gross negligence is defined as a "high . . . degree of negligence" or "conduct that is appreciably more risky, or less beneficial, than conduct qualifying as ordinary negligence." DOBBS, *supra* note 63, at 350–51.

290. See *supra* notes 140–41 and accompanying text. It was the District Court for the Middle District of Alabama that created the "clear and present danger" test to raise the evidentiary requirements to meet an intermediate level of scrutiny in *Braun v. Soldier of Fortune Magazine, Inc.*, which the Eleventh Circuit affirmed. See 968 F.2d 1110, 1116 n.4 (11th Cir. 1992).

291. Unlike the strict tailoring approach suggested herein, it would be sufficient to establish that the media played a substantial role in bringing about the injury even if other factors also caused the injury.

multiple defendant problem, such as where social forces interacted with the media, resulting in injury. As with narrow tailoring, proximate causation should be established by clear and convincing evidence, and substantial personal injury could be required to further protect speech. Certain negligent speech cases, such as *Herceg v. Hustler* might have survived constitutional scrutiny under this level of tailoring for negligence liability.

### 3. Minimal Tailoring

Where speech does not occupy the highest rung of constitutional protection (such as pornography or commercial speech) and harms vulnerable persons (such as children), minimal tailoring to establish a prima facie case of negligence may be appropriate.<sup>292</sup> Minimal tailoring may be appropriate also in relation to direct neurological injury to children caused by playing violent video games. Relaxed scrutiny in speech-tort precedent is basically the common law prima facie case of negligence, which sufficiently protected First Amendment values in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* However, the mixed nature of violent video games renders them more vulnerable to chilling than false statements of fact, warranting heightened evidentiary burdens to the prima facie case. Proof of negligence, cause-in-fact, and proximate cause should be proven by clear and convincing evidence to safeguard speech of a nature warranting less-than-full constitutional protection.

## CONCLUSION

The prevailing negligent speech-tort jurisprudence essentially immunizes speech that may create serious risks to the public, and to children in particular. The jurisprudential basis is free speech, but speech that causes actual harm imposes costs to society. Tort immunity for such speech does not change this fact. Rather, it shifts the costs of harm from the speech producers to the public at large and may increase the sum total of social harm. Current negligent speech rules do not strike the optimal balance of interests, and a better approach is possible. Constitutional and tort policies should be reconciled to optimize the balance of free speech

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292. Indeed, this is precisely what Edith Jones of the Fifth Circuit argued in dissent in *Herceg v. Hustler*, e.g., that the sexually explicit speech produced for commercial gain should not receive full First Amendment protection where it caused a child's death. See *Herceg v. Hustler*, 814 F.2d 1017, 1028 (5th Cir. 1987).

rights with social interests, and such reconciliation could enhance public safety while staying true to First Amendment values. This might be accomplished by constitutionalizing the tort of negligence to allow limited liability for dangerous speech that foreseeably causes serious injury or death. Such an approach could produce optimal care among producers of unreasonably dangerous speech, while protecting speech consistent with constitutional guaranties.