Washington University Law Review

Volume 97 | Issue 4

2020

Troll Storms and Tort Liability for Speech Urging Action by Others: A First Amendment Analysis and an Initial Step Toward a Federal Rule

Clay Calvert
University of Florida

TROLL STORMS AND TORT LIABILITY FOR SPEECH URGING ACTION BY OTHERS: A FIRST AMENDMENT ANALYSIS AND AN INITIAL STEP TOWARD A FEDERAL RULE

CLAY CALVERT*

ABSTRACT

This Commentary examines when, consistent with First Amendment principles of free expression, speakers can be held tortiously responsible for the actions of others with whom they have no contractual or employer-employee relationship. It argues that recent lawsuits against Daily Stormer publisher Andrew Anglin for sparking "troll storms" provide a timely analytical springboard into the issue of vicarious tort liability. Furthermore, such liability is particularly problematic when a speaker's message urging action does not fall into an unprotected category of expression, such as incitement or true threats, and thus, were it not for tort law, would be fully protected.

In examining the possibility of vicarious tort liability, this Commentary reviews the U.S. Supreme Court's "authorized, directed, or ratified" test for vicarious liability, which was established more than thirty-five years ago in the pre-Internet-era case of NAACP v. Claiborne Hardware Co. *The Commentary concludes by proposing a framework for vicarious liability when speakers urge action that results in others' tortious conduct.*

* Professor of Law, Brechner Eminent Scholar in Mass Communication, and Director of the Marion B. Brechner First Amendment Project at the University of Florida in Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. The author thanks Olivia Baruch, Jessie Goodman, Joel Kratt, Erin McLoughlin, Carolina Panduro, Michelle Sebastian, Kevya Sims and Emerson Tyler of the University of Florida for their helpful reviews of drafts of this Commentary.

INTRODUCTION

In November 2018, a federal judge in Montana refused to dismiss Tanya Gersh's tort claims against Andrew Anglin for intentional infliction of emotional distress[1] and invasion of privacy[2] in *Gersh v. Anglin*.[3] Anglin, "[o]ne of America's most prominent neo-Nazis,"[4] operates the *Daily Stormer*.[5] It has been described as "the Internet's most notorious neo-Nazi

1. Under the Montana law applicable in *Gersh v. Anglin*, 353 F. Supp. 3d 958 (D. Mont. 2018), "[a]n independent cause of action for negligent or intentional infliction of emotional distress arises under circumstances where 1) serious or severe emotional distress to the plaintiff was 2) the reasonably foreseeable consequence of 3) the defendant's negligent or intentional act or omission." Wages v. First Nat'l Ins. Co. of Am., 79 P.3d 1095, 1098 (Mont. 2003); *see also* Czajkowski v. Meyers, 172 P.3d 94, 100–01 (Mont. 2007) (stating that a cause of action for intentional infliction of emotional distress "arises when a plaintiff suffers serious and severe emotional distress as a reasonably foreseeable consequence of a defendant's intentional act or omission").

Significantly, Montana's definition of intentional infliction of emotional distress (IIED) does not require proof that the defendant's conduct was outrageous. *See* Maloney v. Home & Inv. Ctr., Inc., 994 P.2d 1124, 1134–35 (Mont. 2000) (observing that the element of "outrageousness" was eliminated by the Supreme Court of Montana in *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411 (Mont. 1995)). This contrasts with the *Restatement (Second) of Torts'* definition of IIED, which provides that "[o]ne who by *extreme and outrageous conduct* intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." RESTATEMENT (SECOND) OF TORTS § 46(1) (AM. LAW INST. 1965) (emphasis added). Indeed, IIED typically "consists of four elements: (1) the defendant's conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant's conduct must cause the plaintiff emotional distress and (4) the distress must be severe." Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL'Y 469, 476 (2000).

2. Under the Montana law applicable in *Gersh*, a common law cause of action for invasion of privacy by intrusion "is defined as a 'wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.'" Rucinsky v. Hentchel, 881 P.2d 616, 618 (Mont. 1994) (quoting Sistok v. Nw. Tel. Sys., Inc., 615 P.2d 176, 182 (Mont. 1980)).

3. *Gersh*, 353 F. Supp. 3d at 969–70. The court also refused to dismiss a cause of action based on a Montana anti-intimidation statute. *Id.* at 970–71; *see* MONT. CODE ANN. § 27-1-1503(2) (2019) ("An individual or organization who is attempting to exercise a legally protected right and who is injured, harassed, or aggrieved by a threat or intimidation has a civil cause of action against the person engaging in the threatening or intimidating behavior.").

In July 2019, U.S. Magistrate Judge Jeremiah C. Lynch recommended that default judgment be granted in favor of Tanya Gersh after Andrew Anglin failed to appear at a properly noticed deposition in April 2019. Gersh v. Anglin, No. CV 17-50-M-DLC-JCL, 2019 U.S. Dist. LEXIS 134688, at *2, *6 (D. Mont. July 15, 2019). Magistrate Lynch also recommended that Gersh be awarded $4,042,438 in compensatory damages and $10,000,000 in punitive damages. *Id.* at *6. Furthermore, Lynch recommended "a permanent injunction ordering Anglin to remove from his website the blog posts encouraging his readers to contact Gersh, her family and, especially, her son, including all photographs and images of the family and comment boards associated therewith." *Id.* In August 2019, U.S. District Chief Judge Dana L. Christensen adopted in full Magistrate Lynch's findings and recommendations, remarking that default judgment was "an appropriate sanction for Anglin's absolute refusal to defend." Gersh v. Anglin, No. CV 17-50-M-DLC-JCL, 2019 U.S. Dist. LEXIS 133795, at *2 (D. Mont. Aug. 8, 2019).

4. Matt Pearce, *White Nationalism Faltered, but Gab Was Its Safe Harbor*, L.A. TIMES, Oct. 29, 2018, at A2.

5. *See* Trip Gabriel, *A Bullhorn of Anti-Immigrant Rhetoric, Long Before Trump Started*, N.Y. TIMES, Jan. 11, 2019, at A10 (describing Anglin as "the founder of the neo-Nazi *Daily Stormer*"); *see also* Michael Kunzelman, *Neo-Nazi Who Claims Nigeria as Home Gets Warning from Judge*, PHILA.

website, featuring sections including 'Jewish Problem' and 'Race War.'"[6] The *Daily Stormer*, as this Commentary explains, plays a pivotal role in *Gersh v. Anglin*.

Tanya Gersh, a Jewish real estate agent from Whitefish, Montana,[7] contends that Anglin, a "pale prince of extremism,"[8] lived up to that moniker by sparking a troll storm[9] against her. The trouble began after Gersh and fellow Whitefish resident Sherry Spencer, the mother of alt-right leader Richard Spencer,[10] had a falling out over a possible real estate transaction.[11] The spat drew Anglin's attention after Sherry Spencer, who owns a commercial property,[12] wrote on *Medium* that "Gersh had tried to threaten and extort her into agreeing to sell her building . . . and denouncing her son's views."[13]

Spencer's accusation prompted Anglin in December 2016 to publish on the *Daily Stormer* "Gersh's phone numbers, email addresses, and social media profiles, as well as those of her husband, twelve-year-old son, friends, and colleagues. Anglin asked readers to '[t]ell them you are sickened by

---

TRIB., Dec. 31, 2017, at 5A (noting that Anglin's website "takes its name from Der Stürmer, a newspaper that published Nazi propaganda").

6. Matt Pearce, *Notorious Neo-Nazi Site Was Built with Father's Help*, L.A. TIMES, Nov. 26, 2018, at A2.

7. Kimberly Winston, *Fighting Neo-Nazis with Faith, Peace and Allies*, STATE J.-REG. (Springfield, Ill.), May 13, 2018, at P30.

8. Stephen Koff, *Top Ohio Neo-Nazi Playing Hard to Get – Legal Process Servers Just Can't Find Him*, PLAIN DEALER (Cleveland, Ohio), Dec. 30, 2017, at A1.

9. Troll is slang for "a person who purposefully posts offensive comments in order to antagonize others." Carissa Byrne Hessick, *Towards a Series of Academic Norms for #Lawprof Twitter*, 101 MARQ. L. REV. 903, 921 n.63 (2018); *see* PNINA FICHMAN & MADELYN R. SANFILIPPO, ONLINE TROLLING AND ITS PERPETRATORS: UNDER THE CYBERBRIDGE 6 (2016) (defining "*online trolling* as a repetitive, disruptive online deviant behavior by an individual toward other individuals and groups," noting the "media's misappropriation of the term to describe various acts of online deviance and disobedience," and pointing out the "[l]ack of clarity and agreement about what constitutes a troll" (emphasis in original)).

10. Richard Spencer, the president of the National Policy Institute, is "a prominent white nationalist" who "is credited with coining the term 'alternative right,' or 'alt-right,' almost a decade ago." Anemona Hartocollis, *University of Florida Braces for Appearance by White Nationalist*, N.Y. TIMES, Oct. 18, 2017, at A17. Spencer was "one of the main organizers of the 'Unite the Right' rally" in Charlottesville, Virginia in August 2017 that resulted "in a violent confrontation at the downtown site of the historic Robert E. Lee statue. The chaotic melee led to the death of Heather Heyer in a car-ramming attack and of two State Police officers in a helicopter accident, as well as dozens of injuries." James Loeffler, *The Shadow Over Charlottesville*, WALL ST. J., Aug. 11, 2018, at C4.

11. Complaint for Invasion of Privacy, Intentional Infliction of Emotional Distress, and Violations of the Anti-Intimidation Act at 5–7, Gersh v. Anglin, 353 F. Supp. 3d 958 (D. Mont. 2018) (No. 9:17-CV-00050-DLC-JCL) [hereinafter Gersh Complaint], https://www.splcenter.org/sites/default/files/documents/whitefish_complaint_finalstamped.pdf [https://perma.cc/YV7A-HPWC].

12. *See* Phil Drake & Seaborn Larson, *Neo-Nazi Invoked Racist 'Troll Storm,' Lawsuit Alleges*, USA TODAY, Apr. 19, 2017, at 8A (reporting that Sherry Spencer owns "a mixed-use commercial building" in Whitefish, Montana).

13. Gersh Complaint, *supra* note 11, at 7.

their Jew agenda to attack and harm the mother of someone whom they disagree with.'"[14] One of Anglin's posts, which followed the all-capitalized heading "TAKE ACTION," read, "This is very important. Calling these people up and/or sending them a quick message is very easy. It is very important that we make them feel the kind of pressure they are making us feel."[15] Another implored, "Let's Hit Em Up[.] Are y'all ready for an old fashioned Troll Storm? Because AYO – it's that time, fam."[16]

According to Gersh's complaint, these posts and others by Anglin caused her to receive "hundreds of hateful and threatening anti-Semitic phone calls, voicemails, text messages, emails, letters, social media comments, and false online business reviews."[17] Among the messages Gersh received across different forms of media were:

- "Ratfaced criminals who play with fire tend to get thrown in the oven."[18]
- "We are going to ruin you, you Kike PoS [piece of shit] . . . You will be driven to the brink of suicide . . . We will be there to take pleasure in your pain & eventual end."[19]
- "Worthless fuckin kike."[20]
- "You filthy piece of trash. You are threatening an old lady. You worthless piece of shit. I hope you die, you worthless cunt. You stupid ugly bitch."[21]

This "tsunami of threats,"[22] as Gersh's attorneys at the Southern Poverty Law Center labeled them, included ones of death[23] and "[m]any messages referenced the Holocaust."[24] According to the *Atlantic*, one email bluntly stated, "[a]ll of you deserve a bullet through your skull."[25] Furthermore, Gersh's young son, whom Anglin labeled a "scamming little kike" and a

14. Gersh v. Anglin, 353 F. Supp. 3d 958, 962 (D. Mont. 2018).
15. Gersh Complaint, *supra* note 11, at 20.
16. *Id.* (alteration in original).
17. *Id.* at 2.
18. *Id.* at 4.
19. *Id.* (first and second alteration in original).
20. *Id.*
21. *Id.* at 27.
22. *Id.* at 4.
23. *Id.* at 3.
24. Gersh v. Anglin, 353 F. Supp. 3d 958, 963 (D. Mont. 2018).
25. Luke O'Brien, *The Making of an American Nazi*, ATLANTIC, Dec. 2017, https://www.theatlantic.com/magazine/archive/2017/12/the-making-of-an-american-nazi/544119/ [https://perma.cc/ZQ4M-YCPM].

"creepy little faggot" on the *Daily Stormer*,[26] received hateful messages on his Twitter account.[27]

While clearly implicating free speech issues, *Gersh v. Anglin* is about much more than just hateful and offensive speech, which the United States Supreme Court has made clear is generally protected[28] by the First Amendment.[29] Rather, *Gersh* revolves around what is commonly called doxing.[30] Doxing typically involves "publicly posting private information as a form of revenge or punishment"[31] and occurs "when someone's personal information is shared on the Internet without their consent."[32] Through the lens of doxing, *Gersh* raises an important question that forms the heart of this Commentary—one which is sure to arise often in the digital era: *When, consistent with First Amendment principles of free expression, should a person who urges action be held vicariously liable*[33] *in tort law for*

26. Gersh Complaint, *supra* note 11, at 4.

27. *Id.* For example, one message read, "ask your mommy why she hates white people so much and runs an extortion racket." *Id.*

28. As Justice Samuel Alito recently wrote, "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)); *see also* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

29. The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety-five years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties that cannot be impaired by state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

30. *See* Erwin Chemerinsky, *Tobriner Memorial Lecture: Free Speech on Campus*, 69 HASTINGS L.J. 1339, 1353 (2018) (noting that the harm caused by doxing is somewhat akin to injury that the tort of public disclosure of private facts is designed to address, such as when "very private information is put on the internet about somebody, such as the fact that a person is undocumented or transgender").

31. Brittany Scott, Note, *Waiving Goodbye to First Amendment Protections: First Amendment Waiver by Contract*, 46 HASTINGS CONST. L.Q. 451, 476 (2019).

32. Lisa Bei Li, *Data Privacy in the Cyber Age: Recommendations for Regulating Doxing and Swatting*, 70 FED. COMM. L.J. 317, 318 (2018).

33. Regarding vicarious liability in tort law, Professor Joseph H. King, Jr. explains that:

> [W]hen a victim suffers a tortious injury and the tortfeasor is party to a legally sufficient relationship with another, the victim may have a tort claim against the tortfeasor for his direct liability and against the other for vicarious liability (and occasionally for direct liability as well). Vicarious liability in general has three core requirements: First, there must be a legally sufficient relationship—one that the law recognizes will support the imposition of vicarious liability—between the person who caused the plaintiff's injury (*A*) and the vicariously liable defendant (*B*). Second, *A*, whose conduct caused the plaintiff's injury, must have been acting tortiously. And finally, the tortious conduct by *A*, the tortfeasor, must have occurred within the scope of the legally sufficient relationship with *B*, the person against whom vicarious liability is asserted.

Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 427–28 (2005). Simply put, in vicarious liability situations, "courts treat

the resulting conduct of others who are not acting as his servants in an agency relationship?[34]

This question is especially contentious in cases like *Gersh* where the plaintiff does not assert that the defendant's speech falls into an unprotected category of expression,[35] such as incitement to violence.[36] In other words, if Andrew Anglin's speech is not an incitement to unlawful conduct under the test articulated by the Supreme Court a half-century ago in *Brandenburg v. Ohio*,[37] how can he nonetheless be held responsible for inciting the troll storm against Tanya Gersh? Ultimately, this issue was never fully litigated in *Gersh* because Anglin stopped defending himself and default judgment was entered against him in August 2019.[38]

---

employer and employee as the 'same tortfeasor' for purposes of liability." J.M. Balkin, Essay, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2301 (1999).

34. *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1) (AM. LAW INST. 1958) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."); Randy S. Parlee, *Vicarious Liability for Punitive Damages: Suggested Changes in the Law Through Policy Analysis*, 68 MARQ. L. REV. 27, 30 (1984) ("It is elementary that a master or principal is liable for compensatory damages caused by the wrongful act of a servant or agent acting within the scope of the agency."); Nancy J. Whitmore, *Vicarious Liability and the Private University Student Press*, 11 COMM. L. & POL'Y 255, 259 (2006) ("It is often said an agency relationship consists of three elements: consent by the principal and agent, control by the principal, and action by the agent on the principal's behalf.").

35. The U.S. Supreme Court has identified several categories of expression that receive no First Amendment protection. *See* United States v. Alvarez, 567 U.S. 709, 717 (2012) (identifying the categories of unprotected expression as incitement to violence, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and "speech presenting some grave and imminent threat the government has the power to prevent"); Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.").

36. *See* Gersh v. Anglin, 353 F. Supp. 3d 958, 963 (D. Mont. 2018) (finding that "the speech does not fall into a de facto unprotected category. And in fact Gersh does not contend that Anglin's speech falls within one of the few 'historic and traditional categories of expression long familiar to the bar' for which content-based restrictions on speech are clearly permitted" (quoting *Alvarez*, 567 U.S. at 717)).

37. 395 U.S. 444 (1969) (per curiam). In *Brandenburg*, the Court held:

> [T]he constitutional guarantees of free speech and free press do 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.

Id. at 447. Under this test for incitement to violence or unlawful conduct, speech is unprotected if three elements exist, including: "(1) intent (embodied in the requirement that such speech . . . be 'directed to inciting or producing' lawless action); (2) imminence (embodied in the phrase 'imminent lawless action'); and (3) likelihood (embodied in the phrase 'and is likely to incite or produce such action')." Rodney A. Smolla, *Should the* Brandenburg v. Ohio *Incitement Test Apply in Media Violence Tort Cases?*, 27 N. KY. L. REV. 1, 10 (2000) (quoting *Brandenburg*, 395 U.S. at 446–47).

38. Gersh v. Anglin, No. 17-50-M-DLC-JCL, 2019 U.S. Dist. LEXIS 133795 (D. Mont. Aug. 8, 2019).

Notably, *Gersh* was not the only troll-storm lawsuit against Anglin. Another case involved Taylor Dumpson.[39] In 2017, Dumpson became the first African-American president of the student government at American University.[40] On the day she assumed this role, "bananas with hateful messages were found hanging from nooses"[41] on campus. This incident sparked a review by the Federal Bureau of Investigation.[42]

The racism Dumpson confronted, however, was not confined to campus; it quickly spread online.

Dumpson sued Anglin for, among other causes of action, intentional infliction of emotional distress[43] after he posted her "picture and personal information online and exhorted his followers to harass and bully her, a tactic he has also employed against Jewish and Muslim targets."[44] As with Gersh, Dumpson alleged that "a troll storm ensued."[45] She contended that she "feared for her safety amid the relentless harassment, and was eventually diagnosed with post-traumatic stress disorder."[46]

As was the situation in *Gersh*, Andrew Anglin failed to defend against Taylor Dumpson's lawsuit and default judgment was entered against him in August 2019.[47] In brief, the crucial issue at the heart of this Commentary regarding vicarious tort liability for speech-sparked troll storms was never fully litigated or resolved in either *Gersh* or *Dumpson*.

With this background in mind, Part I of this Commentary examines Chief U.S. District Judge Dana Christensen's analysis of whether Andrew Anglin should be held tortiously responsible for the speech of others who harassed

39. Complaint, Dumpson v. Ade, No. 1:18-CV-01011 (D.D.C. Apr. 30, 2018) [hereinafter Dumpson Complaint], https://www.courthousenews.com/wp-content/uploads/2018/05/DUMPSON-v-Ade.pdf [https://perma.cc/E4NF-W8XL].

40. Sheryl Gay Stolberg, *Nooses on the Fourth of July*, N.Y. TIMES, July 6, 2017, at A2; *see* Press Release, Lawyers' Comm. for Civil Rights Under Law, Landmark Settlement Between Hate Incident Perpetrator and Survivor Announced in Dumpson v. Ade (Dec. 18, 2018), https://lawyerscommittee.org/landmark-settlement-between-hate-incident-perpetrator-and-survivor-announced-in-dumpson-v-ade/ [https://perma.cc/UE56-CGAC] (noting that in March 2017, Dumpson "was elected as American University's first female African American student body president").

41. Sheryl Gay Stolberg & Caitlin Dickerson, *Nooses, Potent Symbols of Hate, Crop Up in Rash of Cases*, N.Y. TIMES, July 6, 2017, at A11.

42. Jacey Fortin, *F.B.I. Helping American University Investigate Bananas Found Hanging from Nooses*, N.Y. TIMES (May 3, 2017), https://www.nytimes.com/2017/05/03/us/bananas-hang-from-black-nooses-and-a-campus-erupts-in-protest.html [https://perma.cc/QX2D-HK5Q].

43. *See* Dumpson Complaint, *supra* note 39, at 58–60 (setting forth the cause of action for intentional infliction of emotional distress).

44. Karen Zraick, *Student Settles with Her Racist Online Harasser*, N.Y. TIMES, Dec. 23, 2018, at A27.

45. Dumpson Complaint, *supra* note 39, at 2.

46. Zraick, *supra* note 44, at A27.

47. Dumpson v. Ade, No. 18-1011, 2019 U.S. Dist. LEXIS 134011, at *1–2 (D.D.C. Aug. 9, 2019).

Tanya Gersh.[48] In the process, it also dissects Anglin's arguments against imposing vicarious liability and explores the vicarious liability standard developed in *NAACP v. Claiborne Hardware Co.*[49] more than thirty-five years ago. Part II then addresses, within a much broader First Amendment framework, the question of vicarious liability in other speech-based cases, as well as a possible dichotomy between ideas and instructions.[50] Finally, Part III concludes by suggesting criteria for courts to use when evaluating vicarious liability issues that arise at the intersection of First Amendment jurisprudence and tort law.[51]

I. GERSH, THE FIRST AMENDMENT & VICARIOUS LIABILITY: EXAMINING JUDGE CHRISTENSEN'S REASONING

To better understand whether Andrew Anglin should, consistent with First Amendment principles of free expression, be held vicariously liable in tort law for the speech of *Daily Stormer* readers who targeted Tanya Gersh, it helps to unpack the issue into two sub-questions:

1. Does the First Amendment give absolute protection to Andrew Anglin from tort liability if his speech does not fall into an unprotected category of expression, such as incitement[52] or true threats?[53]

2. If the First Amendment does not shield Anglin from tort liability, then what is necessary to hold him vicariously liable for the tortious speech of third parties?

Section A addresses the first sub-question. Section B then addresses the second.

48. *See infra* notes 52–123 and accompanying text.

49. 458 U.S. 886 (1982).

50. *See infra* notes 124–179 and accompanying text.

51. *See infra* notes 180–219 and accompanying text.

52. *See supra* note 37 and accompanying text (setting forth the U.S. Supreme Court's current test for incitement to unlawful conduct).

53. *See* Virginia v. Black, 538 U.S. 343, 359 (2003) (observing that "the First Amendment . . . permits a State to ban a 'true threat,'" and providing that such threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" (quoting Watts v. United States, 394 U.S. 705, 708 (1969))); *see generally* Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I🔫U: Considering the Context of Online Threats*, 106 CALIF. L. REV. 1885, 1889–90 (2018) (noting that although the Supreme Court has held that true threats are not protected by the First Amendment, it has not answered "fundamental questions regarding the 'true threats exception' to First Amendment protection, including whether courts should view threats from the vantage of the speaker, a reasonable recipient, a reasonable disinterested reader, or all of the above; and what mens rea the First Amendment requires in threats cases" (footnote omitted)).

A. Tort Liability for Otherwise Protected Speech

Turning to the first sub-question—whether the First Amendment shelters Anglin from all tort liability if his speech does not fall within an unprotected category of expression—Professor David Anderson calls it sometimes "difficult to square the demands of the First Amendment with the methods of tort law."[54] This is particularly true when "the claim arises from the content of speech that would be fully protected by the First Amendment if it were not tortious."[55]

Indeed, that was precisely the situation in *Gersh*; Anglin contended he should not be held tortiously liable because his speech did not fit into a category of speech that is unprotected by the First Amendment.[56] According to attorney Marc Randazza in his brief supporting Anglin's motion to dismiss, "[e]very word uttered by Mr. Anglin in this public dispute is protected by the First Amendment, no matter how many people find those views intolerable."[57] Notably, Judge Christensen, in fact, agreed that Anglin's "speech does not fall into a de facto unprotected category."[58] Concluding that speech may be protected by the First Amendment, however, does not eliminate the possibility that its speaker can be held liable in tort law.

Another federal district court judge recently explained this principle in *Stricklin v. Stefani*.[59] There, Judge Robert Conrad, Jr. refused in December 2018 to dismiss a negligence claim against No Doubt singer Gwen Stefani.[60] During a concert, the singer had urged audience members to move closer to the stage, thereby precipitating a fan's injuries caused by the throngs coming forward.[61] In refusing to dismiss the case, Conrad wrote,

---

54. David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 757 (2004).

55. *Id.* at 758.

56. Gersh v. Anglin, 353 F. Supp. 3d 958, 963 (D. Mont. 2018).

57. Defendant Andrew Anglin's Brief in Support of Motion to Dismiss at 3, Gersh v. Anglin, 353 F. Supp. 3d 958 (D. Mont. 2018) (No. 9:17-CV-00050-DLC-JCL), https://www.courtlistener.com/recap/gov.uscourts.mtd.54518/gov.uscourts.mtd.54518.32.0.pdf [https://perma.cc/NP96-HJRK].

58. *Gersh*, 353 F. Supp. 3d at 963.

59. 358 F. Supp. 3d 516 (W.D.N.C. 2018).

60. *See id.* at 536 ("Plaintiff's negligence claim against Stefani may proceed to trial.").

61. Stefani told the crowd at a July 2016 concert in Charlotte, North Carolina:

> I'm just going to tell you something. I'm just going to talk to the security guards for one second. If anyone wants to come down a little closer so I can see you a little better, just come on down, I don't think anyone's going to care, like just fill it in and like and you know, who cares about your lawn chairs, you can get new ones.

Id. at 522–23. Plaintiff Lisa Keri Striklin claimed "she was terrified as she saw the crowd moving forward behind her." *Id.* at 523. She asserted that she was "trampled and forcibly pushed into a wall" and, in turn, suffered "a lateral tibial plateau fracture to her left leg." *Id.*

> Stefani asserts that because her statements do not fall into one of the exceptions to the First Amendment, she cannot be held liable in tort. The Court agrees that Stefani's statements do not fall squarely within one of the previously recognized categorical exemptions to First Amendment protection. However, the Court disagrees that the First Amendment immunizes all other speech falling outside these categories, including negligent speech which results in bodily injury to others.[62]

For Judge Conrad in *Stricklin*, the relevant inquiry for deciding if Stefani could be held tortiously liable for her words was "to examine [her] statements and surrounding circumstances and weigh how those statements either further or hinder the principles and purposes undergirding the First Amendment. In all First Amendment cases, this is the central inquiry."[63]

Judge Christensen in *Gersh* took a similar approach. He reasoned that whether Andrew Anglin could be held responsible in tort law for his speech depended largely on whether it was about a matter of private interest or public concern, with speech falling into the former category—private speech—not being immune from liability.[64]

This consideration comports with the U.S. Supreme Court's determination in *Snyder v. Phelps*[65] that the speech of members of the Westboro Baptist Church was sheltered from tort liability because it dealt with matters of public concern.[66] As Chief Justice John Roberts wrote for the *Snyder* majority, "[w]hether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case."[67]

In *Gersh*, Judge Christensen concluded the plaintiff "made a plausible claim that Anglin's speech involved a matter of strictly private concern."[68] The judge reasoned here that:

> Anglin launched a campaign of unrelated personal attacks on a Whitefish realtor, her husband, and their son because of a perceived conflict between Gersh and the mother of Anglin's friend, another

62. *Id.* at 526.
63. *Id.* at 527.
64. Gersh v. Anglin, 353 F. Supp. 3d 958, 964–67 (D. Mont. 2018).
65. 562 U.S. 443 (2011).
66. *Id.* at 458–59. The majority concluded that the speech of the members of the Westboro Baptist Church addressed "matters of public import," including "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy." *Id.* at 454.
67. *Id.* at 451.
68. *Gersh*, 353 F. Supp. 3d at 965.

> white supremacist. Although Anglin drew heavily on his readers' hatred and fear of ethnic Jews, rousing their political sympathies, there is more than a colorable claim that he did so strictly to further his campaign to harass Gersh.[69]

Anglin had averred that "Gersh injected herself into a matter of public concern by discussing the sale of Sherry Spencer's building with Spencer."[70] The sale was arguably a matter of public concern because Sherry Spencer faced "boycotts related to her son's notoriety."[71] Additionally, Anglin contended his words were about a public issue because "his speech about Gersh was both 'in support of Richard Spencer's speech in support of President Trump' and 'related to the growth of white nationalism in Whitefish, and the community's response thereto.'"[72]

These public-concern arguments failed to convince Judge Christensen, at least at the motion-to-dismiss phase under the Federal Rules of Civil Procedure.[73] He found that:

> [C]onstruing the allegations in the Complaint as true, Anglin exploited the prejudices widely held among his readers to specifically target one individual. Moreover, the Court concludes that, at this stage of the litigation, it cannot agree with Anglin that his speech was indisputably tethered to Gersh's conduct in engaging in a matter of public controversy.[74]

In summary, Judge Christensen concluded that although Andrew Anglin's speech did not fit within a category of expression unprotected by the First Amendment, it nonetheless was subject to tort liability because it did not clearly address a matter of public concern. More broadly, in both *Gersh* and *Stricklin*, federal district courts in 2018 concluded that the First Amendment did not shield from tort liability speakers who urged others to take action despite their words not rising to the level of an unprotected incitement.

This result in *Gersh* led Judge Christensen to address the second sub-question noted at the start of this part of the Commentary: If the First Amendment does not shield Anglin from tort liability, then what—

69. *Id.* at 966.
70. *Id.*
71. *Id.* at 963.
72. *Id.* at 966.
73. *See* FED. R. CIV. P. 12(b)(6) (providing a defense for "failure to state a claim upon which relief can be granted").
74. *Gersh*, 353 F. Supp. 3d at 967.

consistent with First Amendment principles—is necessary to hold him vicariously liable for the tortious speech acts of third parties?

B. Vicarious Liability for the Tortious Speech of Others

On the issue of vicarious liability, Judge Christensen again focused on the fact that "Anglin was not speaking on a matter of public concern."[75] Christensen thus determined Anglin's speech was not "within the core of the First Amendment."[76] This meant, in brief, that vicarious liability was at least possible in *Gersh*. To determine whether, in fact, it should be imposed on Anglin, the judge turned to the U.S. Supreme Court's 1982 ruling in *NAACP v. Claiborne Hardware Co.*[77] Christensen concluded, as explained below, that *Claiborne Hardware* "advance[d] Gersh's theory"[78] regarding vicarious liability.

Claiborne Hardware centered on the boycott of white merchants by black citizens in Claiborne County, Mississippi, in the 1960s.[79] In response to the boycott, Claiborne Hardware Co. and several other boycotted businesses sued "to recover losses caused by the boycott and to enjoin future boycott activity."[80] A key First Amendment issue was whether those who spoke in favor of the boycott should be held liable to the targeted white merchants because their speech "was used to further the aims of the boycott."[81] It is worth noting that some of this speech allegedly threatened various forms of retaliation against black citizens who failed to join the boycott.[82]

The Supreme Court acknowledged that the speech at issue involved the exercise of protected First Amendment rights.[83] Yet, it also noted that a "[g]overnmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances."[84] In brief, *Claiborne Hardware* pitted the government's "broad power to regulate economic activity"[85]—the Court noted on this point that

75. *Id.* at 968.
76. *Id.*
77. 458 U.S. 886 (1982).
78. *Gersh*, 353 F. Supp. 3d at 968.
79. *Claiborne Hardware*, 458 U.S. at 889–90.
80. *Id.* at 889.
81. *Id.* at 909.
82. *See id.* at 909–10 (noting that "names of boycott violators were read aloud at meetings at the First Baptist Church and published in a local black newspaper. Petitioners admittedly sought to persuade others to join the boycott through social pressure and the 'threat' of social ostracism").
83. *Id.* at 911–12.
84. *Id.* at 912; *see generally* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996) (providing a comprehensive review of the meaning and importance of incidental burdens in federal constitutional law).
85. *Claiborne Hardware*, 458 U.S. at 913.

boycotts "may have a disruptive effect on local economic conditions"[86]—against the First Amendment freedoms of speech, peaceable assembly, and petition.[87]

The vicarious liability issue thus pivoted on whether the defendants—those who called for the boycott—should be held responsible for the conduct of the actual boycotters whose actions, in failing to patronize the plaintiffs' businesses, caused those businesses economic harm. Delivering the Court's opinion, Justice John Paul Stevens stressed that "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages."[88] In other words, because the defendants engaged in protected speech—assembly and petition activities while calling for the boycott—their liability for damages wrought by the boycotters needed to be restrained due to the First Amendment.

Examining the vicarious liability issue, the Court focused on the speech of defendant Charles Evers.[89] Evers was field secretary of the National Association for the Advancement of Colored People in Mississippi.[90] He drew special attention because he allegedly "threatened violence on a number of occasions against boycott breakers."[91] In one instance, he purportedly proclaimed: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[92]

The Court rejected imposing liability on Evers.[93] Justice Stevens explained that "[t]o the extent that Evers caused respondents to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his 'threats' of vilification or social ostracism, Evers' conduct is constitutionally protected and beyond the reach of a damages award."[94] The Court zeroed in on the fact that Evers' pro-boycott speeches "predominantly contained highly charged political rhetoric lying at the core of the First Amendment."[95]

86. *Id.* at 912.
87. *See id.* ("Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens.").
88. *Id.* at 916–17.
89. *See id.* at 902, 926–30 (mentioning and examining Evers's speech and the possibility that he be held vicariously liable for it).
90. *Id.* at 890.
91. *Id.* at 898 (quoting Supplemental Respondent's Brief at 13).
92. *Id.* at 902.
93. *Id.* at 926.
94. *Id.*
95. *Id.* at 926–27.

Justice Stevens suggested, however, that Evers might nonetheless be held "liable for the unlawful conduct of others"[96] if either: 1) "he *authorized, directed, or ratified* specific tortious activity,"[97] or 2) if his speech constituted an unlawful incitement to violence under *Brandenburg*[98] and such "unlawful conduct . . . in fact followed within a reasonable period."[99] As to the latter possibility, the Court concluded that Evers's speech did not amount to unprotected incitement per *Brandenburg*.[100] It emphasized that "mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment."[101]

As to the former theory for vicarious liability, the Court also rejected culpability for Evers.[102] It reasoned:

> If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence. But any such theory fails for the simple reason that there is no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence.[103]

Put differently, the Court searched for outside or extrinsic evidence—evidence beyond the words in Evers's speeches—that he authorized, directed, or ratified acts of violence against those who failed to boycott white merchants. It found such evidence lacking, thereby precluding the possibility that Evers was liable for others' allegedly unlawful acts.

The Court similarly examined whether the NAACP, which helped to organize the boycott, could be found liable for the unlawful conduct of others, including NAACP members who were not acting in an agency capacity.[104] Here, the Court determined that "[t]o impose liability without a finding that the NAACP *authorized*—either actually or apparently—or *ratified* unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment."[105] In short, the

96. *Id.* at 927.
97. *Id.* (emphasis added).
98. *See supra* note 37 and accompanying text (addressing the *Brandenburg* incitement test).
99. *Claiborne Hardware*, 458 U.S. at 927.
100. *Id.* at 928. The Court explained that although Evers used "emotionally charged rhetoric" and "strong language," "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." *Id.*
101. *Id.* at 927.
102. *Id.* at 929.
103. *Id.*
104. *Id.* at 930–32.
105. *Id.* at 931 (emphasis added).

Court rejected the theory of "guilt by association"[106] and, instead, required evidence of authorization or ratification for the NAACP to be held liable. Such evidence against it was, just as it was for Charles Evers, absent.[107]

In *Gersh*, Judge Christensen used *Claiborne Hardware* against Andrew Anglin in two ways. First, the judge emphasized that while the speech in *Claiborne Hardware* largely dealt with a matter of public concern—racial discrimination—and thus merited heightened First Amendment protection, Anglin's speech lacked such legitimacy.[108] Christensen explained that:

> Anglin was not speaking on a matter of public concern. The First Amendment is considerably more concerned with a concerted action to address racial discrimination than it is with the ethnic background and contact information of a realtor who was arguably involved in a real estate dispute with the mother of Richard Spencer.[109]

In other words, *Claiborne Hardware* and *Gersh* are factually distinct, with the speech in the former case more deserving of First Amendment protection against vicarious liability. Additionally, Christensen pointed out that while the unlawful conduct of neck breaking allegedly advocated in *Claiborne Hardware* did not occur, the called-for conduct actually transpired in *Gersh*.[110]

Perhaps more significant than drawing such factual distinctions, Christensen applied *Claiborne Hardware*'s test that speakers may be liable for the tortious activity of others if they "authorized, directed, or ratified"[111] it. Specifically, Christensen called the *Claiborne Hardware* standard "a mirror"[112] of "Montana's substantial assistance test."[113] That test allows recovery of damages "from a defendant for the tortious conduct of another when the defendant 'knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.'" [114] Bridging the two tests, Christensen wrote that "liability may follow when an individual 'authorized' or 'directed' 'specific

106. *Id.* at 932.
107. *See id.* ("The chancellor's findings are not adequate to support the judgment against the NAACP.").
108. *See* Gersh v. Anglin, 353 F. Supp. 3d 958, 968 (D. Mont. 2018).
109. *Id.*
110. *Id.*
111. *Claiborne Hardware*, 458 U.S. at 927.
112. *Gersh*, 353 F. Supp. 3d at 969.
113. *Id.*
114. *Id.* (quoting Sloan v. Fauque, 784 P.2d 895, 896 (Mont. 1989)).

tortious activity'—the 'breach of duty' required to satisfy the substantial assistance test under Montana law."[115]

Applying this standard, the judge held that, at least at the motion-to-dismiss stage, Tanya Gersh could proceed with her claim that Anglin was liable for the speech of his readers.[116] Critical to this outcome was his determination that:

> Anglin expressly summoned a troll storm, publishing personal and professional contact information for the Gersh family, and offering samples of the types of anti-Semitic and misogynistic messages his readers should leave. He oversaw a discussion board on his website, in which he interacted with readers who posted comments about their trolling tactics.[117]

According to Christensen, the objective indicators that Anglin allegedly had, to use *Claiborne Hardware*'s phrasing, "authorized, directed, or ratified specific tortious activity"[118] of his readers were that he:

- provided readers with the addresses and numbers necessary to make direct, personal contact with Tanya Gersh;
- drafted and made available to readers examples of the messages they should send to Gersh; and
- interacted online with readers who trolled Gersh.[119]

Therefore, the conduct of "at least some of Anglin's followers"[120] in bombarding Tanya Gersh with unwanted messages was imputable to Anglin and, in turn, supported causes of action against him for invasion of privacy and intentional infliction of emotional distress.[121] As noted earlier, neither the vicarious liability nor the tort issues were fully litigated because Anglin stopped defending against the lawsuit and default judgment was entered against him.[122]

The next part explores the subject of vicarious liablity in greater detail from a macro-level perspective, stretching beyond the factual confines of *Gersh v. Anglin*. Specifically, it examines the difference between ideas and

115. *Id.* (citations omitted) (first quoting *Claiborne Hardware*, 458 U.S. at 927; then quoting *Sloan*, 784 P.2d at 896).
116. *Id.*
117. *Id.*
118. *Claiborne Hardware*, 458 U.S. at 927.
119. *See Gersh*, 353 F. Supp. 3d at 969.
120. *Id.* at 970.
121. *Id.* at 969–71. The merits of the underlying tort claims are beyond the scope of this Commentary, which concentrates on the test for vicarious liability for defendant-speakers in non-agency situations in light of First Amendment principles.
122. *See supra* note 38 and accompanying text.

instructions, as well as a values-based approach for triggering heightened First Amendment protection,[123] as possible analytical keys for deciding if vicarious liability should be imposed on speakers who urge others to take actions that tortiously harm plaintiffs.

II. A CLOSER EXAMINATION OF VICARIOUS LIABILITY: FIRST AMENDMENT PRINCIPLES AND OTHER CASES

A starting point for critiquing Judge Christensen's analysis of vicarious liability in *Gersh* is to reflect back on Justice Oliver Wendell Holmes's dissent nearly ninety-five years ago in *Gitlow v. New York*.[124] In considering whether Benjamin Gitlow had committed the offense of criminal anarchy for disseminating a document called "The Left Wing Manifesto," Holmes contended that:

> Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.[125]

This language, as Justice Thurgood Marshall observed in 1970, is "often quoted but at least as often disregarded."[126] It arguably suggests, by its "unqualified language,"[127] that any statement—more precisely, any idea—carries the potential to spark some form of action by someone somewhere[128] and that, in turn, "the very proposition that incitement differ[s] from other kinds of speech [i]s illusory."[129]

123. *See infra* notes 137–179.

124. 268 U.S. 652 (1925).

125. *Id.* at 673 (Holmes, J., dissenting).

126. Norton v. Discipline Comm. of E. Tenn. State Univ., 399 U.S. 906, 908 (1970) (Marshall, J., dissenting).

127. G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391, 454 (1992). The notion of "unqualified," as the author of this Commentary understands it, refers to the view that every idea—not just some or a few—is an incitement. *Id.*

128. In addressing the meaning of this quotation, Professor David R. Dow observes that "[t]here is nothing worth saying that might not cause some listener to take action, action that may well be unlawful. A listener who hears a Byron poem may become a radical environmentalist, inspired to assassinate political leaders whom the listener perceives as hostile to the environment . . . ." David R. Dow, *The Moral Failure of the Clear and Present Danger Test*, 6 WM. & MARY BILL RTS. J. 733, 742–43 (1998).

129. John M. Kang, *Prove Yourselves: Oliver Wendell Holmes and the Obsessions of Manliness*, 118 W. VA. L. REV. 1067, 1072–73 (2016).

Today, however, a distinction is drawn. Only an idea that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"[130] constitutes an incitement not protected by the First Amendment. Furthermore, as noted earlier, speech that supposedly triggers the tortious actions of others may, in fact, not rise to the level of unprotected incitement under *Brandenburg*, as was the situation in *Gersh*.[131]

The difficulty with imposing vicarious liability for speech urging action in non-employer-employee settings is that "we can never be sure what actually is the trigger"[132] of someone else's conduct. Put differently, and to use the Supreme Court's phrase in *Brown v. Entertainment Merchants Ass'n*,[133] it is extremely difficult to prove "a direct causal link"[134] between the defendant-speaker's words and the subsequent tortious conduct of others who saw or heard them. That is a key problem because, as Professor Joseph Russomanno writes, "[a]t the heart of any concern about speech is its possible effect." [135] Deploying a test for vicarious liability, such as *Claiborne Hardware*'s "authorized, directed, or ratified"[136] standard that was embraced in *Gersh*, therefore serves as a rough proxy for when it is legally sufficient to hold that a defendant's speech caused—and thus the defendant should be held responsible for—the tortious speech or conduct of others with whom he or she has no agency relationship.

Although Justice Holmes's assertion that every idea is an incitement fails to provide a clear analytical guide for vicarious tort liability, it is nonetheless useful in another way. Specifically, it centers on ideas—the notion that every idea is an incitement. Ideas, however, might be contrasted with instructions. In other words, perhaps there is a meaningful difference between ***ideas***—the idea of attacking Tanya Gersh through hateful, anti-Semetic messages—and ***instructions***—providing direct contact information and sample scripts for how one can and should communicate with Tanya Gersh—that are integral for tortious conduct.

Although this is not a clean dichotomy, courts have imposed liability on

130. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

131. *See supra* note 58 and accompanying text.

132. Dow, *supra* note 128, at 743.

133. 564 U.S. 786 (2011).

134. *Id.* at 799. The direct-causal-link standard was applied again by the Court in *United States v. Alvarez*, 567 U.S. 709 (2012). The Court in *Alvarez* wrote that "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented." *Id.* at 725; *see generally* Clay Calvert & Matthew D. Bunker, *An "Actual Problem" in First Amendment Jurisprudence? Examining the Immediate Impact of* Brown*'s Proof-of-Causation Doctrine on Free Speech and Its Compatibility with the Marketplace Theory*, 35 HASTINGS COMM. & ENT. L.J. 391 (2013) (providing an analysis of the direct-causal-link standard and some of the problems with its implementation).

135. Joseph Russomanno, *Cause and Effect: The Free Speech Transformation as Scientific Revolution*, 20 COMM. L. & POL'Y 213, 215 (2015).

136. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982).

speakers for the tortious actions of others in instruction scenarios. For example, the Supreme Court of California in *Weirum v. RKO General, Inc.*[137] in 1975 held that the First Amendment did not shield a Los Angeles radio station from tort liability after a teenage listener "negligently forced a car off the highway, killing its sole occupant."[138] At the time of the accident, the listener was trying to win a cash-prize radio contest that required locating a disc jockey who was driving around and providing tips on his whereabouts.[139] For instance, at one point the disc jockey said:

> The Real Don Steele is in the Valley near the intersection of Topanga and Roscoe Boulevard, right by the Loew's Holiday Theater—you know where that is at, and he's standing there with a little money he would like to give away to the first person to arrive and tell him what type car I helped Robert W. Morgan give away yesterday morning at KHJ.[140]

The Supreme Court of California had little problem finding the radio station owed a duty of care to the deceased individual because it was reasonably foreseeable an accident might be caused by those listening to the disc jockey.[141] Much as Andrew Anglin repeatedly urged his readers to contact Tanya Gersh,[142] the radio station engaged in "repeated importuning"[143] to locate the disc jockey, thereby amounting to "no commonplace invitation."[144] And much like Andrew Anglin's followers on the *Daily Stormer* might have been particularly susceptible to following his instructions if they shared Anglin's apparent belief system about Jews, the Supreme Court of California in *Weirum* paid special attention to the fact that the "extensive teenage audience"[145] of the radio station was especially likely to be influenced by the disc jockey.[146]

137. 539 P.2d 36 (Cal. 1975).
138. *Id.* at 37, 40.
139. *Id.* at 38–39.
140. *Id.* at 38.
141. *See id.* at 40.
142. *See supra* notes 14–16 and accompanying text.
143. *Weirum*, 539 P.2d at 41.
144. *Id.*
145. *Id.* at 37.
146. The Court noted, for instance, that the "tragic events unfolded in the middle of a Los Angeles summer, a time when young people were free from the constraints of school and responsive to relief from vacation tedium." *Id.* at 40. It added that "[m]oney and a small measure of momentary notoriety awaited the swiftest response. It was foreseeable that defendant's youthful listeners, finding the prize had eluded them at one location, would race to arrive first at the next site and in their haste would disregard the demands of highway safety." *Id.*

In rejecting the station's First Amendment argument, the Supreme Court of California called it "clearly without merit."[147] According to the court, "[t]he issue here is civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent. The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act."[148] In brief, the radio station was held vicariously liable for the negligent actions of a third-party listener with whom it lacked an agency or employer-employee relationship.[149]

If actively and repeatedly encouraging and urging a specific action, accompanied by instructions about where to find a car, can result in such vicarious tort liability for the speaker in *Weirum*,[150] then perhaps this paves a path for holding Andrew Anglin accountable for repeatedly urging the allegedly tortious actions committed by his readers and for providing the email and social media addresses for doing so. Although Judge Christensen in *Gersh* did not reference or cite *Weirum*, its logic should not be overlooked.

The December 2018 decision in *Stricklin v. Stefani*[151] described earlier[152] provides another example of an instructions case resulting in tort liability for a speaker who triggered others' actions. In *Stricklin*, the plaintiff alleged being "trampled and forcibly pushed into a wall"[153] *not* by defendant Gwen Stefani, but instead by *third parties* who followed Stefani's invitation to move closer to the stage.[154] Thus, just as in *Gersh v. Anglin* and *Weirum v. RKO General*, the plaintiff attempted to hold the defendant-speaker tortiously liable for the acts of others who directly harmed the plaintiff.

Judge Robert Conrad, Jr. in *Stricklin* cited *Weirum* favorably in holding Gwen Stefani liable for negligence.[155] As he described it, Stefani gave "concert directions"[156] when she "invited the audience to come forward."[157] Linking *Weirum* and *Stricklin*, the judge wrote,

147. *Id.*
148. *Id.*
149. The court called it "of no consequence that the harm to decedent was inflicted by third parties acting negligently." *Id.*
150. As a California appellate court in a later case stressed about the facts of *Weirum*, "[t]he *Weirum* broadcasts actively and repeatedly encouraged listeners to speed to announced locations. Liability was imposed on the broadcaster for urging listeners to act in an inherently dangerous manner." Olivia N. v. Nat'l Broad. Co., 178 Cal. Rptr. 888, 894 (Cal. Ct. App. 1981).
151. 358 F. Supp. 3d 516 (W.D.N.C. 2018).
152. *See supra* notes 59–63 and accompanying text.
153. *Stricklin*, 358 F. Supp. 3d at 523.
154. *Id.*
155. *Id.* at 529.
156. *Id.*
157. *Id.*

> [T]he issue is civil accountability for the foreseeable results of Stefani's in-person invitation to patrons to move toward the stage, which created an undue risk of harm to Plaintiff and other patrons. The *Weirum* case involved the transmission of a contemporaneous invitation to listeners and a clear call to action. In fact, Plaintiff's case is even stronger on the foreseeability prong because Stefani's announcement was made to listeners in her immediate presence rather than through a medium such as the radio or television.[158]

The last part of his analysis raises another issue about vicarious liability: *Should it make a legal difference if the third parties who allegedly followed the defendant-speaker's words were physically present and in immediate proximity to the speaker when the words were uttered?* If such contemporaneous physical and temporal presence militates for imposing vicarious liability, then this works against holding a speaker such as Andrew Anglin liable. Physical presence between speaker and audience, as well as temporal contemporaneousness between the utterance of speech and its receipt, is lacking in *Gersh*.

Furthermore, unlike in *Stricklin* where acting on the speaker's words was almost immediately necessary if one wanted a closer seat, there was no immediate need to act upon reading Anglin's Internet-posted words if one wanted to harass Tanya Gersh. Readers of Anglin's words had time to rationally reflect on and to consider them carefully and deliberately before deciding whether to act on them.[159] This arguably militates against holding Anglin vicariously liable because it suggests the third-party actors had greater control over their actions.

In addition to the above explanation, Judge Conrad also made it clear that imposing vicarious liability on Gwen Stefani was permissible because her speech did not further an important First Amendment value such as "the exposition of ideas, search for truth, and the vitality of a society."[160] Instead, he determined her words "actually disserve society by creating the potential for disorder and danger."[161] Because Stefani's speech did not advance "the

158. *Id.*

159. The belief that individuals can reflect upon speech before acting or speaking was noted recently by the U.S. Supreme Court. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) ("A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, *after reflection*, speak and listen once more." (emphasis added)).

160. *See Stricklin*, 358 F. Supp. 3d at 527. Judge Conrad reasoned that "Stefani's statement was intended to prompt action; it was not intended to further the marketplace of ideas or to aid in 'the common quest for truth and the vitality of society as a whole.'" *Id.* at 528 (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 503–04 (1984)).

161. *Id.* at 527.

principles and purposes undergirding the First Amendment,"[162] holding her responsible for the acts of others did not raise a constitutional concern.

This tack tracks former Yale Law School Dean Robert Post's position that "First Amendment coverage is triggered by those forms of social interaction that realize First Amendment values."[163] This, in turn, recalls considerations of high and low value speech espoused by the Supreme Court in *Chaplinsky v. New Hampshire*[164] and the related proposition that low-value categories of speech receive either no First Amendment protection or "can be regulated on the basis of their content without having to satisfy strict scrutiny."[165] As Post writes, "[d]ifferent kinds of speech embody different constitutional values, and each kind of speech should receive constitutional protections appropriate to the value it embodies."[166]

Furthermore, a values-based approach for determining when something raises true First Amendment concerns resonates in dissents in both the 2018 U.S. Supreme Court cases of *National Institute of Family and Life Advocates v. Becerra*[167] and *Janus v. American Federation of State, County, and Municipal Employees*.[168] In *Becerra*, Justice Stephen Breyer authored a dissent joined by fellow liberal-leaning justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan.[169] He suggested that heightened First Amendment review applies only in cases when certain "widely accepted First Amendment goals" [170] are served and when "the *true value* of protecting freedom of speech"[171] is at stake.

In *Janus*, Justice Kagan penned a dissent for the same bloc of justices.[172] She opined that the First Amendment was meant "to protect democratic governance"[173] and that, in turn, heightened First Amendment concerns are

162. *Id.* at 530.

163. Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 716 (2000).

164. 315 U.S. 568 (1942). In *Chaplinksy*, the Court declared that some categories of speech serve "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 572; *see also* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983) (noting that "[t]he 'low' value theory first appeared in the famous dictum of *Chaplinsky v. New Hampshire*").

165. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2171 (2015).

166. Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 181–82 (2015).

167. 138 S. Ct. 2361 (2018).

168. 138 S. Ct. 2448 (2018).

169. *Becerra*, 138 S. Ct. at 2379 (Breyer, J., dissenting).

170. *Id.* at 2382.

171. *Id.* at 2383 (emphasis added). In *Becerra*, Justice Breyer suggested that such values include protecting unpopular ideas from suppression and safeguarding the marketplace of ideas to facilitate the search for truth. *Id.* at 2382.

172. *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting).

173. *Id.* at 2502.

not raised by "workaday economic and regulatory policy."[174] Kagan concluded that judges should not be "weaponizing the First Amendment . . . to intervene in economic and regulatory policy."[175] Viewed collectively, both the dissents in *Becerra* and *Janus* suggest that heightened First Amendment concerns for safeguarding speech only arise when the speech at issue serves certain values.

In a nutshell, Judge Conrad's logic in *Stricklin* that imposing vicarious liability on Gwen Stefani was permissible because her speech did "not further the exposition of ideas, search for truth, and the vitality of a society"[176] tracks a values-based approach for potential First Amendment protection that reverberates all the way from *Chaplinsky* through and including the 2018 dissents in *Becerra* and *Janus*. As applied to vicarious liability cases such as *Gersh*, *Weirum*, and *Stricklin*, a values-based methodology suggests a court has greater power to impose such responsibility on a speaker for the actions of third parties if the speech in question:

> **1**) is not about a matter of public concern—a consideration Judge Christensen examined in *Gersh*,[177] and
>
> **2**) does not serve a core First Amendment value such as discovery of truth in the marketplace of ideas[178] or facilitating self-governance in a democratic society.[179]

With this deeper analysis of possible approaches to vicarious liability in mind, the Commentary next concludes by suggesting a framework for courts to use in future cases when a speaker's words urging action allegedly

---

174. *Id.* at 2501.

175. *Id.* In other words, Justice Kagan believes First Amendment safeguards apply with full force when speech affecting democratic self-governance is at stake, but not when speech is regulated only incidentally by laws that serve larger economic policy interests.

176. Stricklin v. Stefani, 358 F. Supp. 3d 516, 527 (W.D.N.C. 2018).

177. *See supra* notes 64–74 and accompanying text.

178. The marketplace of ideas theory is "one of the most powerful images of free speech, both for legal thinkers and for laypersons." MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 2 (2001). It is premised on the belief that free expression "contributes to the promotion of truth." Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 998 (2003).

179. The U.S. Supreme Court observed more than a half-century ago:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

Mills v. Alabama, 384 U.S. 214, 218–19 (1966); *see also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948) (suggesting that the ultimate aim of free speech "is the voting of wise decisions," and contending that voters "must be made as wise as possible").

cause the tortious conduct of others with whom the speaker lacks an agency relationship.

CONCLUSION: TOWARD A FEDERAL RULE

When First Amendment and tort law principles collide, the U.S. Supreme Court has, in some instances, created specific rules limiting the reach of state tort law.[180] Most notably, in *New York Times Co. v. Sullivan*,[181] the Court adopted what it called "a federal rule" to address the appropriate fault standard in libel cases brought by public officials regarding their official conduct.[182] The Court held in *Sullivan* that such plaintiffs cannot recover unless they prove that the allegedly defamatory "statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[183] In essence, the *Sullivan* Court began the "constitutionalization of tort law,"[184] making it clear that "private law rules restricting speech were subject to constitutional restrictions."[185] In the process, the Court "radically limited the scope of defamation law in the United States."[186]

Although the federal rule of actual malice is now openly questioned by Justice Clarence Thomas,[187] the Court has also applied it as a mandated First

180. First Amendment principles are allowed to cabin and confine tort rules because "under the Supremacy Clause, federal constitutional law trumps contrary state tort law." Thomas B. Colby, *The Constitutionalization of Torts?*, 65 DEPAUL L. REV. 357, 357 (2016).

181. 376 U.S. 254 (1964).

182. *Id.* at 279.

183. *Id.* at 279–80.

184. Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145, 1149 (1996).

185. Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1902 (2010).

186. Ronald J. Krotoszynski, Jr., *The Polysemy of Privacy*, 88 IND. L.J. 881, 885 (2013).

187. Justice Thomas in February 2019 called *Sullivan*'s adoption of the actual malice rule and later Supreme Court decisions that extended its application to other scenarios "policy-driven decisions masquerading as constitutional law." McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari). Thomas's concern, particularly as it involves stretching actual malice's application from the realm of public-official plaintiffs to the domain of public-figure plaintiffs, is that "[n]one of these decisions made a sustained effort to ground their holdings in the Constitution's original meaning." *Id.* at 677–78. As Thomas put it, "[t]here are sound reasons to question whether either the First or Fourteenth Amendment, as originally understood, encompasses an actual-malice standard for public figures or otherwise displaces vast swaths of state defamation law." *Id.* at 680. Thomas concluded that:

> We did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified. The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm. We should reconsider our jurisprudence in this area.

Id. at 682.

Amendment rule in IIED tort cases[188] involving satirical speech that causes harm. Specifically, the Court ruled in *Hustler Magazine, Inc. v. Falwell*[189] that:

> [P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.[190]

Furthermore, as described earlier,[191] the Supreme Court in *Snyder v. Phelps*[192] appeared to adopt another federal rule—that speech addressing matters of public concern[193] while conveyed "on public property, in a peaceful manner"[194] is shielded from tort liability. As Chief Justice John Roberts wrote for the majority, "Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment."[195]

The issue now becomes, in light of cases such as *Gersh* and *Dumpson* involving Internet-triggered troll storms, whether the Supreme Court should adopt a new federal rule for vicarious tort liability when a speaker urges others to commit acts later deemed tortious but the speaker's words do not fall into a category of speech unprotected by the First Amendment. This Commentary advocates supplementing the *Claiborne Hardware* test, which asks whether a speaker-defendant "authorized, directed, or ratified specific tortious activity,"[196] because it was developed well before the advent of the Internet and when Andrew Anglin became "the trollmaster of the alt-right."[197]

Importantly, the narrow focus here—exactly as it is in the cases of *Gersh*, *Dumpson*, *Stricklin*, and *Weirum*—is liability premised on an individual speaker's words urging others to take action. These types of cases stand in contrast to a distinct line of copycat and how-to disputes—ones *not* at issue

188. *See supra* note 1 and accompanying text (addressing the elements of IIED).
189. 485 U.S. 46 (1988).
190. *Id.* at 56.
191. *See supra* notes 65–67 and accompanying text.
192. 562 U.S. 443 (2011).
193. *See id.* at 451 ("Whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case.").
194. *Id.* at 460.
195. *Id.* at 458.
196. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982).
197. O'Brien, *supra* note 25.

in this Commentary—involving tort liability for the producers and publishers of speech products such as movies,[198] video games,[199] instructional books,[200] educational articles,[201] and musical albums[202] for allegedly causing violence and death.[203]

What, then, should courts do when it comes to vicarious liability in scenarios where a speaker urges others with whom he or she lacks an agency relationship to engage in conduct later deemed tortious? The approach offered below is merely one potential method for addressing this question. It builds from cases and principles addressed earlier in this Commentary. This proffered tack, in turn, is simply a starting point for prospective consideration by scholars and jurists at a time when troll-storm cases such as *Gersh v. Anglin* and *Dumpson v. Ade* percolate through the court system.

At bottom, every case involving potential vicarious liability for speech urging action must involve a fact-intensive inquiry into precisely *what* was said and the *circumstances* under which it was said. The "what was said" facet, this Commentary concludes, is pivotal for initially determining if the First Amendment should provide any form of protection from vicarious liability for a person's speech that supposedly causes others to commit torts.

In particular, adopting a First Amendment rule limiting vicarious liability seems most important when the speech relates to a matter of public

198. *See, e.g.*, Byers v. Edmondson, 826 So. 2d 551 (La. Ct. App. 2002) (rejecting tort liability against the director and producers of the film *Natural Born Killers* stemming from the actions of individuals who watched that film and supposedly were inspired by it to shoot the plaintiff); Olivia N. v. Nat'l Broad. Co., 178 Cal. Rptr. 888, 891 (Cal. Ct. App. 1981) (rejecting tort liability in a case in which the plaintiff, a nine-year-old girl, "was attacked and forcibly 'artificially raped' with a bottle by minors at a San Francisco beach" who had watched the movie *Born Innocent* on an NBC-affiliated television station and allegedly imitated something they saw in it).

199. *See, e.g.*, James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002) (rejecting the imposition of tort liability on the producers of several violent video games that allegedly caused fourteen-year-old Michael Carneal to shoot, wound, and kill several individuals at Heath High School in Paducah, Kentucky).

200. *See, e.g.*, Rice v. Paladin Enters., 128 F.3d 233 (4th Cir. 1997) (holding that the First Amendment did not bar imposing civil liability on the publisher of a book called *Hit Man: A Technical Manual for Independent Contractors* after a reader of it murdered three people).

201. *See, e.g.*, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1018 (5th Cir. 1987) (rejecting tort liability against the publisher of a magazine based on the death of a fourteen-year-old boy who read an article entitled "Orgasm of Death" that described the practice of autoerotic asphyxia and then died while attempting to perform that act despite the article's statement that the facts it presented were "solely for an educational purpose").

202. *See, e.g.*, McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Cal. Ct. App. 1988) (rejecting tort liability in a case involving a nineteen-year-old man who committed suicide while listening to a musical album recorded by singer John "Ozzy" Osbourne).

203. Courts in this line of copycat and how-to cases typically adopt the *Brandenburg* incitement test when considering tort liability. *See* Juliet Dee, *Basketball Diaries, Natural Born Killers and School Shootings: Should There Be Limits on Speech Which Triggers Copycat Violence?*, 77 DENV. U. L. REV. 713, 715 (2000) (noting that in most of these scenarios, "courts have refused to consider whether the media were 'negligent,' ruling instead that unless the media were guilty of 'incitement' as defined by First Amendment law, the media could not be held liable for the harm or injury despite the fact that the harm mimics the medium's content").

concern. The Supreme Court was particularly concerned with shielding such expression from tort liability in *Snyder*,[204] *Sullivan*,[205] and *Falwell*.[206] Additionally, and as suggested by Judge Conrad's analysis in *Stricklin*,[207] if the speech serves a value that the First Amendment privileges, such as truth discovery or advancing democratic self-governance, then a federal rule providing at least some protection from vicarious liability for the acts of others seems justified. Thus, as a threshold matter under this proposed approach, First Amendment safeguards from vicarious liability come into play only when a defendant's speech urging action: 1) directly relates[208] to a matter of public concern, or 2) significantly serves[209] an important First Amendment value.[210] This constitutes step one.

The next consideration in such cases where this threshold standard is satisfied is whether the First Amendment should afford defendant-speakers absolute protection from vicarious liability for torts committed by others. The danger with such an absolute-protection approach, however, is that a speaker may purposefully blend into his overall message words that directly relate to a matter of public concern or that significantly serve a First Amendment value as a mere pretext or ploy for triggering constitutional

204. *See supra* notes 65–67, 192–195 and accompanying text (discussing *Snyder v. Phelps*).

205. *See supra* notes 181–186 (discussing *New York Times Co. v. Sullivan*). The Court in *Sullivan* noted "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

206. *See supra* notes 189–190 (discussing *Hustler Magazine, Inc. v. Falwell*). In *Falwell*, the Court emphasized that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988).

207. *See supra* notes 160–162.

208. The phrase "directly relates" is strategically chosen because it prevents speech that is merely tangentially or peripherally related to a matter of public concern from receiving First Amendment protection in the face of tort liability. In other words, in attempting to strike a balance between tort interests in compensating individuals for harm and First Amendment interests of protecting speech, this is designed to mitigate the danger of a speaker receiving First Amendment protection simply by loosely relating his or her speech urging action to a larger issue of public concern.

209. The phrase "significantly serves" is strategically chosen because it prevents speech that barely or minimally serves a traditional First Amendment value from receiving First Amendment protection in the face of tort liability. An analogy in current First Amendment jurisprudence to such a requirement is the third prong of the Supreme Court's test for obscenity under *Miller v. California*, 413 U.S. 15, 24 (1973). The third prong protects speech if it has "*serious* literary, artistic, political, or scientific value." *Id.* (emphasis added).

210. In cases involving speech that does not directly relate to a matter of public concern and that does not significantly serve a traditional First Amendment value, the general rules of the underlying tort would simply apply. For example, in the IIED cause of action against Andrew Anglin in *Gersh v. Anglin*, a court would simply apply the traditional elements of the IIED tort to Anglin's behavior. In most states, under the traditional four elements of the IIED tort described earlier in note 1, this would entail asking whether: 1) urging a troll storm of the kind called for by Anglin was extreme and outrageous behavior; 2) Anglin urged the troll storm with either the intention of causing Gersh to suffer emotional distress or with reckless disregard of doing so; 3) Tanya Gersh suffered emotional distress as a result of the troll storm that ensued; and 4) the distress that Gersh suffered was severe.

protection. A message may be a wily hybrid of speech affecting a matter of public concern and urging others to act against a specific individual. These mixed-message scenarios demand closer scrutiny rather than a blanket rule precluding vicarious liability. Therefore, rather than ending the vicarious liability analysis after the first step and giving absolute protection to speech that directly relates to a matter of public concern or that significantly serves an important First Amendment value, a second step is essential.

That second proposed step, this Commentary argues, is for a court to decide if there is clear and convincing evidence either that the speaker-defendant, per the Supreme Court's extant approach in *Claiborne Hardware*, "authorized, directed, or ratified specific tortious activity"[211] or, per the discussion in Part II regarding instructions,[212] repeatedly urged within a short period of time others to take specific and immediate action toward an identifiable individual while also providing detailed instructions facilitating how to do so. If either part of this disjunctive second step is found by a court to exist, then the First Amendment will not prevent the imposition of vicarious tort liability. If, however, neither part is held to exist, then the First Amendment shields a speaker who urges others to tortious action from vicarious liability for the others' misdeeds.

In unpacking this second step, the requirement that there must be clear and convincing evidence—something greater than a mere preponderance of the evidence[213]—to satisfy this part of the test comports with the federal rule of actual malice adopted in *Sullivan*. In *Sullivan*, the Court held that actual malice must be proved by "convincing clarity."[214] Clear and convincing evidence is synonymous today with convincing clarity.[215]

Ramping up the evidentiary requirement here is also designed to balance out the requirement in the threshold step that the defendant-speaker's words must not merely relate to a matter of public concern or serve a traditional

211. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982).

212. *See supra* notes 132–158 and accompanying text.

213. *See* Callahan v. Westinghouse Broad. Co., 363 N.E.2d 240, 242 (Mass. 1977) (noting that "[c]lear and convincing proof involves a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases"); Weber v. Anderson, 269 N.W.2d 892, 895 (Minn. 1978) (opining that the clear and convincing standard "means exactly what is suggested by the ordinary meanings of the terms making up the phrase. Satisfaction of this standard requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt. Clear and convincing proof will be shown where the truth of the facts asserted is 'highly probable'").

214. New York Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964).

215. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 30 (1971) (asserting that "*New York Times* held that in a civil libel action by a public official against a newspaper those guarantees required *clear and convincing proof* that a defamatory falsehood alleged as libel was" published with actual malice (emphasis added)); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 773 (1986) (noting that the "clear and convincing" standard is a reformulation of "convincing clarity").

First Amendment value, but that they must do so *directly* [216] and *significantly*. [217] In other words, the heightened clear-and-convincing evidence standard on the second part of the proposed framework for vicarious liability tilts in favor of protecting First Amendment speech interests. In contrast, the heightened "directly relates"[218] and "significantly serves"[219] requirements on the threshold step lean in favor of serving the tort law interest in compensating plaintiffs for harm.

The first prong of this disjunctive test was already established in *Claiborne Hardware* and thus requires no elaboration here. The second prong, however, is new and consequently needs fleshing out. In particular, the second prong, although not developed exclusively to address troll storm scenarios, was created with such situations in mind. It has several elements. They are explained below in an initial effort to give meaning to the terms used in the phrase "*repeatedly urged within a short period of time others to take specific and immediate action toward an identifiable individual while also providing detailed instructions facilitating how to do so*."

First, this prong only applies to repeated urgings. This requires, at minimum, the communication of at least two messages by the speaker-defendant. This is designed to be free-speech friendly because it shields from vicarious tort liability a defendant who communicates only one message. The urgings, in turn, must be more than mere suggestions of possible action or equivocal musings about the potential for action. They must, instead, clearly encourage and advocate that readers engage in the conduct.

Second, this prong requires that the communication of those messages occur within a short period of time. Rather than specify a precise cut-off period, such as within forty-eight hours, this is purposefully left flexible to provide a judge with discretion to consider the totality of the circumstances.

Third, this prong mandates that the messages call for others to take specific and immediate action. This means both that the action called for must be described specifically and with particularity, and that the speaker urges it to take place immediately. The term "immediately" allows a judge some flexibility here compared to "instantaneously," but clearly the inclusion in a message of phrases such as "act now" or "don't wait" militate in favor of finding the message urged immediate action.

Fourth, the message must urge action against an identifiable individual. In other words, had Andrew Anglin's message said something akin to

216. *See supra* note 208 and accompanying text.
217. *See supra* note 209 and accompanying text.
218. *See supra* note 208.
219. *See supra* note 209.

"harass Jews," it would not satisfy this requirement. Either directly *naming* a specific person or *describing* a specific person (but without naming her) in such precise detail that a reasonable reader of the messages would know who she is, however, would satisfy it.

Fifth and finally, the second prong requires that the messages provide detailed instructions for facilitating the urged-for conduct. As in *Gersh*, providing addresses—social media or otherwise—and phone numbers for contacting the identifiable individual, along with suggestions or templates for what should be said to that individual, are relevant factors here in troll scenarios. Judges have discretion here to decide whether or not sufficient action-facilitating information has been provided to satisfy this criterion. There is not, in other words, a pre-defined quantity of what constitutes sufficient information.

In summary, the proposed framework addresses the question of vicarious liability for speakers who urge actions by others that are allegedly tortious. It is merely an initial effort to provide one such possibility that attempts to balance tort law and the First Amendment freedom of speech, as cases akin to *Gersh v. Anglin* and *Dumpson v. Ade* are sure to arise in the near future.