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Recalibrating the Cost of Harm Advocacy: Getting beyond Brandenburg

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RECALIBRATING THE COST OF HARM ADVOCACY: GETTING BEYOND *BRANDENBURG*

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> [T]he suggestion that the first amendment ties our hands in dealing with . . . revolutionaries . . . is an unintended intimation of that most frightening of constitutional conceptions: the Constitution as a suicide pact.[1]

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1. Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 7 (1986).

> Nowadays the First Amendment is the First Refuge of Scoundrels.[2]

INTRODUCTION

Freedom of speech is not absolute. With the possible exception of Associate Justice Hugo Black,[3] the Justices of the Supreme Court of the United States have noted frequently that freedom of speech does not protect an unlimited class of speech-related activities.[4] Perhaps most famously, Justice Holmes explained that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."[5] Consistent with this view, the Supreme Court has sustained, against free speech objections, civil liability sounding in tort and contract, and upheld regulations prohibiting fraud, sexual harassment, and conspiracy.[6]

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2. STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 102 (1994) (attributing the quote to "S. Johnson & S. Fish").

3. Justice Hugo Black was an absolutist and felt that the First Amendment should be interpreted literally to prevent any government infringement on a citizen's freedom of speech. As Justice Black put the matter:

> The First Amendment is truly the heart of the Bill of Rights. The Framers balanced its freedoms of religion, speech, press, assembly and petition against the needs of a powerful central government, and decided that in those freedoms lies this nation's only true security. They were not afraid for men to be free. We should not be.

Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 881 (1960); *see also* Donald L. Beschle, *An Absolutism that Works: Reviving the Original "Clear and Present Danger" Test*, 1983 S. ILL. U. L.J. 127, 129-31 (explaining that Black was an absolutist in pure speech cases and applied a "balancing approach" for cases involving conduct); Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 432 (1967) (summarizing Justice Black's basic First Amendment philosophy as "[f]reedom of speech is indivisible; unless we protect it for all, we will have it for none. . . . The choice for freedom of speech is a choice made once and for all by the Founding Fathers and is not subject to reassessment in light of current anxieties"); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 695-98 (1963) (observing that the Court's decisions in the early 1950s, and their balancing of social interests, pushed Black further and further, until he finally took an "absolute" view of the First Amendment).

4. *See* Reich, *supra* note 3, at 695-98.

5. Schenck v. United States, 249 U.S. 47, 52 (1919).

6. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 667-72 (1991) (holding that the First Amendment does not bar the application of ordinary principles of state contract and promissory estoppel law in a suit against newspaper for breaching

Indeed, consistent with the First Amendment, the government may virtually regulate out of existence certain kinds of expressive materials, such as obscenity,[7] and certain kinds of expressive conduct, such as nude dancing[8] or the burning of draft registration cards.[9] If one begins to consider in a systematic fashion the recognized exceptions, the free speech protection afforded by the First Amendment might begin to seem rather meager. A cynical person might submit that the First Amendment's protections are limited largely to prohibiting government censorship based on viewpoint and the creation of prior restraints. Of course, one might decry this state of affairs and urge a more expansive interpretation of the Free Speech and Assembly Clauses.[10] The fact would remain that the federal courts have

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a promise of confidentiality and printing a source's name); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986) (upholding the plaintiff's claim of a hostile work environment under Title VII); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 568 (1985) (upholding a copyright infringement action against *The Nation* magazine for printing excerpts from President Gerald Ford's memoirs, and holding that the First Amendment did not shield the magazine from the normal principles of copyright liability); Snepp v. United States, 444 U.S. 507, 515-16 (1980) (per curiam) (upholding a constructive trust on defendants' book royalties for book published in violation of preclearance agreement with CIA); Goldstein v. California, 412 U.S. 546, 571 (1973) (upholding California's "record piracy" law, noting that "[n]o restraint has been placed on the use of an idea or concept").

7. *See, e.g.*, Miller v. California, 413 U.S. 15, 24 (1973) (reaffirming the unprotected status of obscenity). The word "obscene" is a term of art, denoting material that the average person, applying contemporary community standards, would find appeals, on the whole, to the prurient interest; that depicts, in a patently offensive manner, sexual conduct; and that, taken as a whole, lacks serious literary, artistic, political, and scientific merit. *See id.* at 23-24. All three elements of this obscenity definition must be satisfied in order for a publication to lose First Amendment protection. *See id.* at 24.

8. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 560-61 (1991) (holding that a state may prohibit nude dancing in bars even though such dancing constitutes expressive conduct).

9. *See* United States v. O'Brien, 391 U.S. 367, 372 (1968) (upholding the application of a law prohibiting the destruction of draft cards to an individual who burned his card as part of an antiwar protest).

10. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985) ("Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful."), *aff'd*, 475 U.S. 1001 (1986). *See generally* Eugene Volokh, *Freedom of Speech, Permissive Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996) [Volokh, *Freedom of Speech*]; Eugene

sustained a panoply of speech restrictions when necessary to protect important government interests.

Undoubtedly, free speech imposes social costs on the community.[11] At its most basic, the use of public property for speech activity often precludes the property from being used for other, perhaps more usual, purposes. If a group of protesters stages a rally in the town square, those who wish to use the square for quiet contemplation are simply out of luck. Relatedly, if a pamphleteer distributes tracts that the uncaring public cavalierly tosses upon the sidewalk, the community is forced to absorb the cost of visual blight or additional street sweepers. Generally, the Supreme Court has prohibited government from redistributing the cost of speech activities to those engaged in a particular speech activity.[12] This is especially so when the costs are related directly to the local community's antipathy toward the speaker's message.[13]

Volokh, *What Speech Does 'Hostile Work Environment' Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997). *But see* Aguilar v. Avis Rent-A-Car Sys., Inc., 980 P.2d 846, 849 (Cal. 1999) (upholding court ruling that enjoined manager from using any derogatory racial or ethnic epithets directed at or descriptive of Latino employees).

11. *See* FISH, *supra* note 2, at 115 ("I am not making a recommendation but declaring what I take to be an unavoidable truth. That truth is not that freedom of speech should be abridged but that freedom of speech is a conceptual impossibility because the condition of speech's [sic] being free in the first place is unrealizable."). For an excellent discussion of the need to rethink whether victims of speech-related harms should be required to "pay the price" of free speech, see Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322 (1992) ("[E]xisting understandings of the First Amendment presuppose that legal toleration of speech-related harm is the currency with which we as a society pay for First Amendment protection.").

12. *See* Forsyth County v. Nationalist Movement, 505 U.S. 123, 133-36 (1992) (holding that a local government could not impose costs associated with public antipathy towards a speaker's message because doing so would effectively ratify a "heckler's veto"). *But cf.* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768-76 (1994) (upholding substantial portions of an injunction enjoining the picketing of abortion clinics and residences of clinic personnel because of the effects of such speech activity on clinic patients and personnel); Medlin v. Palmer, 874 F.2d 1085, 1089-90 (5th Cir. 1989) (upholding a content-neutral ordinance as a "reasonable restriction" that prevented the use of loudspeakers because the time, place, and manner restriction served an important governmental interest of protecting patients in hospitals from unwarranted intrusions into privacy).

13. *See* Schenck v. Pro-Choice Network, 519 U.S. 357, 373 (1997) ("'As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous speech in order to provide adequate breathing space to

No reasonable person would quibble with these rules. The federal courts should not countenance a "heckler's veto." That said, it does not require great imagination to conjure up a host of perfectly constitutional restrictions of free speech. Indeed, this Article already has sketched a number of scenarios in which government is permitted to tax the costs of the speech activity against the speaker.[14] If a moviegoer falsely shouts "fire" in a crowded theater, she is exposed to liability for the consequential damages resulting from the stampede for the door, including the injuries suffered by fellow patrons, lost revenue on the part of the theater owner, and perhaps even the costs associated with the dispatch of the local fire company.[15] Unlike the itinerant street minister,[16] the tortfeasor shouting "fire" in a crowded theater is liable for the full social costs of her speech activity. Obviously then, the fact that someone engages in speech activity or expressive conduct does not automatically insulate them from liability for the social harms caused by their speech activity or expressive conduct.[17] The question is more subtle: Sometimes the costs are imposed on the speaker, and other times they are not.

This squarely presents the question of whether and when the government may assign the social costs of speech activities

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the freedoms protected by the First Amendment.'" (quoting Boos v. Barry, 485 U.S. 312, 322 (1988))); *Forsyth County*, 505 U.S. at 132; Texas v. Johnson, 491 U.S. 397, 414 (1989) ("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Cole v. Richardson, 405 U.S. 676, 688-89 (1972) ("The First Amendment . . . leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us." (quoting Yates v. United States, 354 U.S. 298, 344 (1957))); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.").

14. *See supra* notes 6, 11 and accompanying text.

15. *See supra* note 5 and accompanying text.

16. *But see* Northeast Ohio Coalition for the Homeless v. City of Cleveland, 105 F.3d 1107, 1109-10 (6th Cir. 1997) (upholding a license fee for street peddlers under the First Amendment because it was limited to defray expenses incurred in furtherance of a legitimate state interest).

17. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) ("[T]he character of every act depends on the circumstances in which it is done.").

against speakers. Someone falsely shouting "fire" in a crowded theater can be made to pay, whereas the street minister cannot. Where do other cases fall and why? Between these two points lies a continuum. Can the state tax the costs of hate speech against speakers? The answer appears to be "no," at least not directly.[18] Suppose that a "gangsta" rapper advocates the murder of members of the local police force as a necessary incident of producing a social revolution, the product of which would be a more egalitarian society?[19] From a rather traditional point of

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18. *See Forsyth County*, 505 U.S. at 132; *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 391-93 (1992) (explaining that viewpoint-based speech restrictions are impermissible even when the underlying speech activity is itself outside the scope of the First Amendment); Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 115 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."); Hess v. Indiana, 414 U.S. 105, 108 (1973) ("'[T]he ability of government . . . to shut off discourse solely to protect others from hearing it'" is permitted only "'upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.'" (quoting Cohen v. California, 403 U.S. 15, 21 (1971))).

19. *See* TUPAC AMARU SHAKUR, *Soulja's Story*, *on* 2PACALYPSE NOW ("Cops on my tail . . . , They finally pull me over and I laugh, Remember Rodney King, And I blast on his punk ass . . . "). This album contained six songs discussing killing police officers. It resulted in at least one lawsuit after an individual killed an officer while listening to the album. *See* Davidson v. Time Warner, 25 Media L. Rep. (BNA) 1705, 1712-14 (S.D. Tex. 1997) (dismissing negligence claims against the rapper Tupac Shakur and Time Warner that alleged his album *2pacalypse Now* incited the murder of a police officer). In addition, this album and other gansta rap albums became major campaign issues for some politicians. *See* Chris Morris, *Quayle's 2Pac/Interscope Attacks Puts New Heat on Time Warner*, BILLBOARD, Oct. 3, 1992, at 5, *available in* 1992 WL 11646482 (quoting then Vice President Quayle describing the album as "an irresponsible corporate act" and stating that the record should never have been published). For a discussion of the attempt to censor music, see generally Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741 (1992) (providing a detailed overview of censorship in the United States); David R. Dow, *The Moral Failure of the Clear and Present Danger Test*, 6 WM. & MARY BILL RTS. J. 733 (1998) (describing and critiquing the application of the clear and present danger test to the First Amendment); Leola Johnson, *Silencing Gangsta Rap: Class and Race Agenda in the Campaign Against Hard Core Rap Lyrics*, 3 TEMP. POL. & CIV. RTS. L. REV. 25 (1994) (identifying the racial and political basis of the campaign against "gangsta rap" music). For examples of civil suits arguing that other forms of music caused harm, see generally Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991) (involving a suit for wrongful death filed by the parents of a boy who committed suicide after repeatedly listening to the music of heavy metal singer Ozzy Osbourne), *aff'd without opinion*, 958 F.2d 1084 (11th Cir. 1992); McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Ct. App. 1988) (involv-

view, the answer to this question should also be "no." Perhaps the answer should be somewhat less absolute.

If the hypothetical rapper merely advocates the killing of police officers in the abstract, settled case law would suggest that the speech is protected.[20] Absent a "clear and present danger" of an "imminent" risk of assassination, the state could not criminalize the speech.[21] Suppose, however, that the rapper is a bit less abstract, that she advocates the killing of a specific police officer, for example, Officer Mark Furhman. Does the case become more difficult? At least arguably, it should. As one moves from the mere abstract advocacy of a particular kind of legal wrong toward the advocacy of a specific crime, the risk of social harm increases. As one moves farther away from impassioned calls to proletarian revolution and closer to the direct advocacy of particular social harms, against specific persons, the potential cost of the speech activity increases precipitously, although the contribution of the speech to the project of democratic deliberation remains, at best, constant.[22]

A further slight modification of the hypothetical makes the point a bit more vividly. Suppose the rapper not only advocates the assassination of Mark Furhman, but also reports his home address, telephone number, car make and model, and license

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ing a suit similar to *Waller*); Judas Priest v. Second Judicial Dist. Court, 760 P.2d 137 (Nev. 1988) (involving a suit filed against members of Judas Priest claiming that the album *Stained Class* had caused the suicidal actions of two young men).

20. *See infra* notes 147-57 and accompanying text. For an excellent and thorough analysis of potential constitutional principles that may apply to speech that causes criminal activity, see KENT GREENAWALT, SPEECH, CRIMES, & THE USES OF LANGUAGE (1989).

21. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (ruling that the right to free speech 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"); *see also* Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam) (explaining that mere exhortation to engage in lawless illegal activities are not proscribable in the absence of a clear and present danger of imminent lawlessness); Watts v. United States, 394 U.S. 705, 707-08 (1969) (per curiam) (explaining that although a law prohibiting threats to take the life of the President is constitutional on its face, the government must prove that the language used demonstrated that the individual truly intended to act on his threat).

22. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT 22-27 (1948).

plate number. She even includes his favorite restaurants and bars, and the times at which he usually can be found in a particular place. The hypothetical begins to look more and more like the solicitation of a crime, rather than the expression of an abstract political idea. One can frame the issue even more starkly: suppose the rapper also provides detailed instructions on how to obtain an unregistered pistol and ammunition. The rap song now advocates the death of a particular police officer, provides accurate details about his whereabouts and personal habits, in addition to detailed advice on where to obtain an illegal weapon. These facts arguably place the hypothetical case much closer to shouting "fire" in a crowded theater than to peacefully distributing leaflets in the town square.

The hypothetical rapper is advocating the murder of a specific individual and providing crucial information to facilitate the assassination. If someone uses this information to kill Mark Furhman, may the rapper disclaim any legal responsibility for the crime based on a First Amendment defense? This problem extends beyond the hypothetical rapper. Recently, many racist and anti-Semitic hate groups and other fringe organizations have provided information in books and over the internet on dedicated web sites on how to build bombs, pollute water supplies, and build weapons.[23] The time has come to ask whether the social costs of such "Harm Advocacy"[24] must be taxed against

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23. *See, e.g.*, Pam Belluck, *Hate Groups Seeking Broader Reach*, N.Y. TIMES, July 7, 1999, at A16 (discussing hate groups using the internet to attract new followers); Michel Marriot, *Rising Tide: Sites Born of Hate*, N.Y. TIMES, Mar. 18, 1999, at G4 (stating that an increasing number of hate groups have turned to the internet in the hope of attracting new recruits); Jared Sandberg, *Spinning a Web of Hate*, NEWSWEEK, July 19, 1999, at 28 (noting the easy accessibility and inexpense of the web to various hate groups, and stating that more than 2000 hate group websites are now under observation by various civil liberties organizations). *See generally* Joseph P. Shapiro, *Extremism in America: An Epidemic of Fear and Loathing*, U.S. NEWS & WORLD REP., May 8, 1995, at 37, 39 (stating that many hate groups are reported to be communicating information on the internet about conspiracies and formulas for building bombs); Nathaniel Sheppard, Jr., *Hate Groups Embrace Cyberspace as Weapon*, CHI. TRIB., Dec. 12, 1995, *available in* 1995 WL 13110157 (stating that hate groups are using the internet as an affordable and quick method for spreading information).

24. This Article suggests the creation of a new category of speech, dubbed Harm Advocacy. This category would encompass the narrow spectrum of expression that both advocates and facilitates illegal or tortious activities against others. To satisfy the requirements of Harm Advocacy speech, the plaintiff would need to prove that

individual victims and the community at large. At least in some circumstances, the courts should be able to impose the cost of this Harm Advocacy on the speaker, provided that the rules used to assign such costs do not unduly chill otherwise protected expression.

Of course, if the government were to attempt to impose liability for this sort of speech activity, it would be essential to ensure that the mens rea requirement, the causation requirement, and the evidentiary burden of proof are sufficient to provide adequate breathing room for routine works of art. Tom Clancy, Stephen King, Agatha Christie, and Patricia Cornwell write books featuring grossly antisocial behavior.[25] Nevertheless, these fictionalized works do not constitute Harm Advocacy and should not be suppressed.[26] It is, of course, possible that someone might read a novel by Clancy, King, Christie, or Cornwell and decide to enact the fictionalized behaviors.[27] That said, this Article does

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the author of the speech either knew or acted with reckless disregard of the possibility that recipients of the speech might act on the author's detailed suggestions on how to commit a particular unlawful act and that the speech at issue cause, or be a substantial factor, in the commission of a criminal act. For a further discussion of Harm Advocacy, see *infra* notes 239-60 and accompanying text.

25. *See, e.g.*, RICHARD BACHMAN, RAGE (1977) (writing under the pen name Richard Bachman, Stephen King tells the story of a student who goes to class and shoots his teacher and fellow classmates); AGATHA CHRISTIE, MURDER ON THE ORIENT EXPRESS (1933) (discussing an elaborate murder by a group of individuals on a train); TOM CLANCY, DEBT OF HONOR (1994) (discussing a plot to blow up the United States capitol building during the State of the Union address); PATRICIA CORNWELL, BLACK NOTICE (1999) (describing in detail the commission of a brutal murder).

26. *See infra* notes 261-68 and accompanying text. The First Amendment guarantee of free speech extends to all artistic and literary expression—including pictures, movies, and books. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment . . . fall within the First Amendment guarantee."); *see also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 77 (1976) (Powell, J., concurring) ("[T]he central concern of the First Amendment . . . is that there be a free flow from creator to audience of whatever message a film or book might convey."); Superior Films v. Department of Educ., 346 U.S. 587, 589 (1954) (Douglas, J., concurring) ("[T]he First Amendment draws no distinction between the various methods of communicating ideas.").

27. For example, Stephen King's *Rage* has been cited as a potential causal factor in several incidents of school violence. *Rage* involves a disturbed student who brings a gun to school and kills two of his teachers before taking a class hostage. After taking the class hostage, the student convinces his classmates to beat the school bully. In 1989, police discovered a copy of the book in a student's bedroom after he

not advocate the imposition of unlimited liability for authors and songwriters; such an approach would be antithetical to the core functions of the First Amendment.[28] Writers such as Clancy, King, Christie, and Cornwell are not soliciting crimes; their goal is to entertain.[29] The hypothetical rapper, on the other hand, seems to be standing much closer to the line.

This Article explores the possibility of shifting the cost of antisocial acts to artists, writers, and musicians when individuals decide to act on a creative artist's suggestions or, in some cases, detailed directions. The Article concludes that, at least in some limited circumstances, the First Amendment should not preclude the imposition of civil liability for those who write and distribute speech that both advocates and facilitates harm to others and proposes the creation of a new category of unprotected speech activity called Harm Advocacy.

The contemporary First Amendment speech categories do not address adequately the social costs associated with speech intended to facilitate antisocial behavior. When addressing the damage from speech that advocates harm, the federal courts routinely have applied the *Brandenburg v. Ohio* test, a test designed to protect political speech and the abstract advocacy of violence or revolution.[30] *Brandenburg* held that speech cannot be

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had held a class of students hostage for nine hours at gunpoint. In 1996, officials again found a copy of the book in a student's bedroom after he had killed four people at his junior high school. *See* Alex Fryre, *School Violence Pervades Films, Books and Music*, SEATTLE TIMES, Apr. 25, 1999, at A1, *available in* 1999 WL 6268987 (discussing several violent school events that allegedly were copied from books and music depicting teenage angst). As set forth in this Article, the Harm Advocacy theory would not support the imposition of liability on Stephen King. *See infra* text and accompanying notes 261-308.

28. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 46 (1988) (dismissing, on free speech grounds, a suit against *Hustler* magazine for intentional infliction of emotional distress based on a lewd caricature of Jerry Falwell).

29. Under current First Amendment analysis, however, these authors may someday find themselves in court. *See* Byers v. Edmonson, 712 So. 2d 681, 686-87, 690-92 (La. Ct. App. 1998) (reinstating negligence and intentional tort claims based on Oliver Stone's film *Natural Born Killers* and relying heavily on a recent interpretation of *Brandenburg* by the Fourth Circuit in *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998)). For a full discussion of *Rice*, see *infra* notes 162-88 and accompanying text.

30. 395 U.S. 444 (1969) (per curiam).

the basis for civil or criminal sanctions unless it both advocates lawless conduct and poses a grave risk of actually inciting imminent harm.[31] Because instructional books, songs, and movies generally require time for an individual to digest, such materials generally will not meet *Brandenburg*'s imminence requirement—a requirement that demands that the speech cause an individual to act without rational thought.[32] That is to say, *Brandenburg* addresses speech activity designed to persuade someone to commit an unlawful act, not speech designed to facilitate the commission of an unlawful act by a person who has already decided to act.[33]

Applying *Brandenburg*, courts generally have held Harm Advocacy to be constitutionally protected expression, thereby denying any effective remedy to injured plaintiffs.[34] To address speech that does not produce imminent harm but nevertheless advocates harm in a fashion that directly facilitates the realization of the harm, perhaps at some later time, courts should develop a new category of speech that more appropriately weighs society's interest in protecting its citizens from socially harmful

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31. *See id.* at 447. In *Brandenburg*, the Court conferred extremely broad protection on political dissent and required that the government meet three different criteria to regulate such speech. First, the speaker must promote not just any lawless action, but "imminent" lawless action. *See id.* Second, the imminent lawless action must be highly "likely" to occur. *See id.* Third, the speaker must intend to produce imminent lawless action. *See id.* (stating that the speech must be "directed to inciting or producing imminent lawless action . . . ").

32. *See id.* ("[C]onstitutional 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."); *see also* Noto v. United States, 367 U.S. 290, 297-98 (1961) ("[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.").

33. *See Brandenburg*, 395 U.S. at 449 (finding mere advocacy and teaching of political violence to be constitutionally protected).

34. *See, e.g.*, Communist Party v. Whitcomb, 414 U.S. 441, 448 (1974) (citing *Brandenburg* as standing for the proposition that the First Amendment generally protects the mere advocacy of violence or lawless action at some indefinite time in the future); Hess v. Indiana, 414 U.S. 105, 108-09 (1973) (upholding a protestor's First Amendment right to use language directed against police officers that the police characterized as either "fighting words" or an incitement to lawlessness as protected speech at an antiwar demonstration).

activities against the First Amendment's protection of free expression.

Part I of this Article reviews the First Amendment and the relatively limited scope of its protections, refuting the argument that any limitation on free speech ipso facto constitutes an infringement of the First Amendment. Part II discusses the *Brandenburg* test and its potential application to situations involving speech that advocates socially harmful activity. Part III argues that this approach is poorly suited to deal with the problems inherent in such harm-promoting speech. By accommodating only considerations that arise from the imminence of the harm, and not the nature of the speech itself, the courts have not permitted individuals to recover in tort for harm proximately caused by such speech and intended by the speaker to cause such harm. Part IV suggests the creation of a new category of speech: Harm Advocacy speech. This category would include speech that advocates, in detailed terms, the commission of a criminal or grossly antisocial act (i.e., speech that closely approximates, but might not quite constitute, the crime of solicitation). Recognition of this new category of speech would permit courts to better analyze the conflict between society's need to protect its citizens from violence and the First Amendment value of free expression and democratic deliberation. In addition, Part IV presents potential objections to the recognition of Harm Advocacy as a category of unprotected speech activity, and concludes that although recognition of the new Harm Advocacy speech category would permit government to regulate slightly more speech than before, doing so would actually protect a greater amount of speech than the courts' current ad hoc use of the *Brandenburg* test.[35]

35. In addition, because of the increasing violence allegedly related to popular culture, including movies such as *Natural Born Killers*, *Pulp Fiction*, and songs such as those by Marilyn Manson, Congress has determined that some censorship of these items would be wise. Our proposal would limit the need for any congressional activity, which we believe would allow for greater freedom of expression in the arts community while still protecting individuals from Harm Advocacy speech.

I. FREEDOM OF SPEECH IS NOT ABSOLUTE

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[36] In turn, the Fourteenth Amendment's Due Process Clause incorporates a free speech guarantee identical to the First Amendment's guarantee.[37] The text, although important, does not on its face resolve specific free speech questions; the precise scope of "the freedom of speech" is something that reviewing courts must resolve on a case-by-case basis.[38]

A. Federal Courts Do Not Treat Speech as Absolutely Protected

Reviewing courts charged with deciding free speech claims have made clear that although the Free Speech Clause protects certain forms of expression in order to advance particular social goals, such as facilitating democratic self-governance, it does not protect all speech as a matter of course.[39] As noted previously,

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36. U.S. CONST. amend. I. The First Amendment is made applicable to the states through the Fourteenth Amendment. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215 (1995); Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

37. *See* Near v. Minnesota, 283 U.S. 697, 723 (1931); Gitlow v. New York, 268 U.S. 652, 666 (1925). The Fourteenth Amendment states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1; *see also* Toni M. Massaro, *Reviving Hugo Black? The Court's "Jot for Jot" Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1115-19 (1998) (describing the incorporation process and Justice Hugo Black's "jot for jot" approach to the incorporation of the Bill of Rights against the states, and noting strands of Justice Black's reasoning in recent Supreme Court decisions severely limiting the availability of substantive due process claims for unenumerated rights).

38. *See* WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 21 (1984).

39. *See, e.g.*, United States v. Dinwiddie, 76 F.3d 913, 922 n.5 (8th Cir. 1996) (explaining that the *Brandenburg* test does not protect speech that directly threatens another person); Hill v. City of Houston, 789 F.2d 1103, 1121 (5th Cir. 1986) (explaining that the First Amendment does not protect criminal conduct "not aimed at communicating ideas or information," even if it takes a verbal form).

no one, not even Justice Black, has seriously advocated a truly absolutist theory of the Free Speech Clause.[40] "Free speech" is free precisely because a court will classify it as such; whereas proscribable speech enjoys that status precisely because a reviewing court would so classify the material at issue.[41] In this sense, it is simply not possible to maintain a viable theory of the First Amendment that is content-neutral: the content of speech prefigures its status as protected or proscribable.

This does not mean that free speech is an empty concept or that judges simply make up free speech law as they go along. Rather, it means that decisions about how to classify speech are contestable, and that disagreement about the scope of the free speech guarantee does not imply a failure to respect the First Amendment. Thus, existing Supreme Court case law permits a great deal of speech regulation when the speech causes cogniza-

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40. *See supra* note 3 and accompanying text. In rejecting a First Amendment challenge to an injunction forbidding unionized distributors from picketing to force an illegal business arrangement, Justice Black wrote for the Supreme Court in *Giboney v. Empire Storage & Ice Co.*:

> It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now . . . . It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

336 U.S. 490, 498, 502 (1949) (citations omitted).

41.

> [W]hen a court invalidates legislation because it infringes on protected speech, it is not because the speech in question is without consequences but because the consequences have been discounted in relation to a good that is judged to outweigh them. Despite what they say, courts are never in the business of protecting speech per se, "mere" speech (a nonexistent animal); rather, . . . in relation to a value—the health of the republic, the vigor of the economy, the maintenance of the status quo, the undoing of the status quo—that is the true, if unacknowledged, object of their protection.

FISH, *supra* note 2, at 106.

ble and well-recognized social harms,[42] and this state of affairs should not be particularly surprising.

B. Most Theories of Free Speech Do Not Protect Speech Absolutely

In deciding particular cases, the federal courts rely on a variety of theories that help to explain or justify the protection of speech activity.[43] In other words, the federal courts bring to bear some overarching theory of free speech before deciding to grant or deny relief on First Amendment grounds.

The Supreme Court and numerous constitutional scholars have relied on several different theories to identify the important interests that the First Amendment protects. These theories include the idea that free speech merits protection because it helps to facilitate democratic deliberation,[44] a marketplace of ideas paradigm positing that free speech is necessary in order to permit the pursuit of truth,[45] libertarian theories tying free

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42. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 751 (1978) (upholding an FCC decision prohibiting radio station from broadcasting comedian George Carlin's "Seven Dirty Words" monologue because the agency deemed the routine "indecent" as to a potential audience of minors).

43. *See infra* notes 67-105 and accompanying text; *see also* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 18-65 (1992) (describing and critiquing the Supreme Court's various approaches to evaluating free speech claims).

44. *See* MEIKLEJOHN, *supra* note 22, at 26 ("Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good."); VAN ALSTYNE, *supra* note 38, at 41-42 (describing the First Amendment's protection of speech activities as a series of concentric circles, each further away from a "core" of political speech); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987) (arguing that the market "might be an effective institution for producing cheap and varied consumer goods and for providing essential services . . . but not for producing the kind of debate that constantly renews the capacity of a people for self-determination"); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (stating that the First Amendment has a "*structural* role to play in securing and fostering our republican system of self-government"); Roth v. United States, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (explaining that the First Amendment's purpose is facilitating the project of democratic self-government).

45. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in

speech to self-realization or personal autonomy,[46] and more practically oriented theories that justify free speech as a kind of social safety valve that permits disgruntled political minorities to vent without resorting to acts of violence.[47] The degree to which a particular instance of speech advances these or other

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which truth will ultimately prevail . . . ."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); *see also* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 1.02, at 1-20, 1-48 (1984) (stating that the checking value in self-government and the marketplace of ideas concept sometimes are grouped together in the more general principle of enlightenment); 3 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.6, at 15-16 & n.12 (1986). *But see* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 129 (1987) (arguing that women are silenced and denied equal access to modes of expression); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 36-37 (concluding that the market place theory's assumption of equal access is no longer defensible).

46. *See* MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 11-14 (1984) (making a strong argument that the ultimate purpose of the First Amendment is to enhance "individual self-realization," including individual self-fulfillment as well as autonomy in making decisions about one's own destiny); *see also* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 n.2 (1980) (explaining that the First Amendment "protects the individual's interests in self-expression"); First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 n.12 (1978) ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion . . . ."); Cohen v. California, 403 U.S. 15, 24 (1971) (declaring the First Amendment's protections important to individual dignity and choice); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . ."); Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1525 (1997) (arguing that the First Amendment allows for the "reconciliation of individual and collective autonomy"); Thomas M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 521 (1979) (discussing "participant interests" in freedom of expression).

47. *See Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring) ("[T]he path of safety lies in the opportunity to discuss freely supposed grievances. . . . Fear of serious injury [to the social order] cannot alone justify suppression of free speech . . . . Men feared witches and burnt women."); *see also* Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941) (stating that free speech averts "force and explosions"); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7 (1970) (stating that freedom of expression allows conflict to take place without destroying society); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 949 (1978) ("There is cathartic value in having speakers who might otherwise become dangerous release their tensions through verbal violence rather than physical violence.").

court-identified interests should and usually does determine the amount of protection the speech receives.[48]

All of these free speech theories share the common characteristic that speech activity enjoys constitutional protection only insofar as it advances the underlying objectives of the First Amendment. Moreover, all of these theories are "designed to guard against the danger that the government is only pretending to be concerned about noise, litter, offensiveness, or a hostile audience reaction but in fact is reacting to the feared persuasiveness of the speech that it seeks to suppress."[49]

Notwithstanding the prevalence of free speech theories relying on the content of the speech to determine the appropriate scope of First Amendment protection, some scholars and jurists have interpreted the First Amendment's Free Speech Clause as representing a kind of absolute value that cannot be compromised.[50]

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48. *See* 3 ROTUNDA ET AL., *supra* note 45, § 20.6, at 13-17 (arguing that inherent in the First Amendment protections is also the freedom to hear, because the First Amendment prevents government suppression of certain speech, thus allowing citizens to hear criticism and unpopular ideas); *see also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 77 (1976) (Powell, J., concurring) ("[T]he central First Amendment concern remains the need to maintain free access of the public to the expression."); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973) (stating that viewers have the right of access to social, aesthetic, and moral ideas and expression) (citing *Red Lion*, 395 U.S. at 390). The Supreme Court's deference to legislative enactments designed to protect children from sexually explicit speech provide an interesting counterexample. *See* FCC v. Pacifica Found., 438 U.S. 726, 728 (1978); *see also* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 755-56 (1996) (explaining that the methods used to restrict access of children to offensive speech in the broadcast industry are constitutional, if narrowly tailored to meet that goal). The Supreme Court has not imposed consistently a least restrictive means requirement when the government seeks to suppress the dissemination of sexually explicit, but nonobscene, programming. One cannot help but wonder if this reflects the Supreme Court's tacit agreement with Congress that such speech is distasteful and objectionable, rather than a principled response to a pressing social problem.

49. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 338 (1991); *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 134 (1993) ("Government is rightly distrusted when it is regulating speech that might harm its own interests; and when the speech at issue is political, its own interests are almost always at stake."). *See generally* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992) (arguing that the government has no business seeking to control the minds of its citizens).

50. As noted above, Justice Black professed to hold this view, stating that the First Amendment means literally what it says "without any 'ifs' or 'buts' or 'whereases.'" Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting).

These scholars take the position that free speech and the values it represents are a preferred freedom, a constitutional value that is a kind of first among equals.[51] From this perspective, free speech values cannot be compromised in order to serve other important values, even constitutional values, no matter how socially or politically desirable.[52]

Nevertheless, Justice Black both authored and joined majority opinions that would allow some restrictions. For example, Justice Black joined Justice Blackmun's dissent in *Cohen v. California*, 403 U.S. 15 (1971), a case in which the Court refused to allow a criminal conviction to stand for wearing a jacket bearing an offensive expletive in a public courthouse. *See id.* at 26. The dissenting Justices argued that wearing the jacket with the expletive constituted conduct, not speech. *See id.* at 27-28 (Blackmun, Burger, Black, JJ., dissenting). Professor Melville Nimmer claims that those holding the absolutist position use conduct as a code word for speech that they find to be undeserving of First Amendment protections. *See* NIMMER, *supra* note 45, § 2.01, at 2-7; *see also* Kinsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 550 (1991) (noting that because Title VII permits some statements about race or sex and disapproves of others, it violates the principle that the government may not prohibit the expression of an idea because it finds it offensive); Robert W. Gall, *The University as an Industrial Plant: How a Workplace Theory of Discriminatory Harassment Creates a "Hostile Environment" for Free Speech in America's Universities*, LAW & CONTEMP. PROBS., Autumn 1997, at 203, 210-11 (arguing that colleges and universities should not import the hostile environment theory into their speech codes because of the threat it poses to the free speech rights of faculty and students); Steven G. Gey, *The Case Against Post-Modern Censorship Theory*, 145 U. PA. L. REV. 193, 194 (1996) (arguing that efforts to balance speech rights against other values nevertheless constitutes censorship); William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, LAW & CONTEMP. PROBS., Summer 1990, at 79, 87 (arguing that the job of the university faculty is to "test and propose revisions in the prevailing wisdom," which can be achieved only through academic freedom based on the First Amendment); Volokh, *Freedom of Speech*, *supra* note 10, at 2417-18 (arguing that content-based restrictions on fully protected speech should be invalidated); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1793 (1992) [hereinafter Volokh, *Workplace Harassment*] (arguing that the hostile work environment theory imposes impermissible content and viewpoint-based restrictions on workplace speech).

51. *See, e.g.*, NIMMER, *supra* note 45, § 2.02, at 2-9, -10 (arguing against ad hoc balancing of constitutional interests because of the danger that free speech may be restricted); Gey, *supra* note 50, at 193-94 (criticizing "progressive constitutional scholars" who would attack the absolute protection of free speech and the First Amendment in the interests of promoting racial and gender equality); Volokh, *Workplace Harassment*, *supra* note 50, at 1793 (arguing that certain sexual harassment causes of action intended to promote gender equality under Title VII impermissibly violate the First Amendment freedom of speech guarantee).

52. *See* Gey, *supra* note 50, at 195-96.

Most recently, these scholars have questioned campus speech codes and the recognition of hostile work environment claims under Title VII, arguing that these regulations act to censor and prohibit free speech in the workplace and on college campuses, and therefore should be deemed unconstitutional.[53] Based on the First Amendment values mentioned above, their basic argument is that the value of free speech trumps society's efforts to achieve racial and sexual equality. They assert that the constitutional protection accorded to the freedom of speech logically follows from the fact that the benefits society reaps from the free flow and exchange of ideas outweigh any costs society incurs by receiving hurtful or even affirmatively dangerous ideas.[54]

It is difficult to understand why free speech concerns should always and routinely take precedence over society's efforts to eliminate various forms of discrimination. When weighing the social values implicated by permitting greater access to jobs on

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53. *See, e.g.*, Browne, *supra* note 50, at 481 (arguing that certain applications of Title VII violate the First Amendment in the workplace); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 493-94 (maintaining "that equality will be served most effectively by continuing to apply traditional, speech-protective precepts to racist speech, because a robust freedom of speech ultimately is necessary to combat racial discrimination"); Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009, 1011-12 (1996) (arguing that trying to achieve Title VII's broad rule of workplace equality by applying the hostile environment theory of discrimination in the workplace threatens the First Amendment freedoms of workers and employers); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563, 574-79 (1995) (arguing that some balancing of interests may be necessary in First Amendment cases, and further arguing that any balancing should be closely cabined by adherence to formal rules); Nicholas Wolfson, *Free Speech Theory and Hateful Words*, 60 U. CIN. L. REV. 1, 7 (1991) (advocating a strong First Amendment position regarding hate speech regulation to limit power of censorship). *But see* CATHARINE A. MACKINNON, ONLY WORDS 45-48 (1993); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Jessica M. Karner, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CAL. L. REV. 637 (1995); Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech On Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461 (1995).

54. *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992) (allowing a restriction on political speech in order to serve the "compelling interest" of allowing voters to be free from polling place intimidation); *infra* notes 67-73 and accompanying text.

an equal basis to all members of society and the right to display vile pornography in the workplace, it hardly seems unreasonable to conclude that an individual's right to work should displace another individual's right to expression.[55] Similarly, informing a young college student that he cannot wear a T-shirt bearing a sexist message in the library does not seem to seriously threaten core speech values. Such a conclusion seems eminently reasonable if, as a society, we value the ability of all students, male and female, to have an equal opportunity to receive an education and to use the university's library. After all, as legal scholars like Professors Richard Delgado and Mari Matsuda have noted, equality is a constitutional value too, reflected in the text of both the Thirteenth and Fourteenth Amendments.[56] As a matter of logic and text, equality of gender and race stems from the Fourteenth Amendment, a later-in-time provision that modifies earlier constitutional provisions, presumably including the First Amendment.[57]

Despite the existence of a dedicated corps of free speech absolutists, most constitutional theorists agree that the government must be permitted to limit some forms of speech.[58] "[T]he First

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55. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 208-13 (1979); *see also* Aguilar v. Avis Rent-A-Car Sys., Inc., 980 P.2d 846 (Cal. 1999) (holding an injunction that enjoined a manager from making racist remarks constitutional). *See, e.g.*, Meritor Sav. Bank FSB v. Vinson, 477 U.S 57, 73 (1986) (holding that Title VII creates a cause of action based on the maintenance of a hostile work environment).

56. *See, e.g.*, Delgado, *supra* note 53; Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Matsuda, *supra* note 53; *see also* Bridges v. California, 314 U.S. 252, 282 (1941) (Frankfurter, J., dissenting) ("Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights.").

57. *See* Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 151-55 (1992). *See generally* LEONARD W. LEVY, LEGACY OF SUPPRESSION 176-248 (1960) (discussing the framing of the First Amendment and its original intentions—the creation of a free press).

Other examples also exist. For example, we value the right of all individuals to vote. If an individual set up a display offensive to women in front of a voting booth, clearly his right to expression would not trump the right of the women who use that voting booth to vote.

58. *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 20-21 (1975); Scanlon, *supra* note 46, at 520-21; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981) (attempting to define the limits of the free speech guarantee); Paul

Amendment does not guarantee an absolute right to anyone to express their views any place, at any time, and in any way they want."[59] Indeed, even the Framers of the Bill of Rights probably envisioned some limits to the right of free expression.[60] This is not to say that not all statements are speech,[61] but rather that not all statements are protected speech.[62]

B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 203-07 (1982) (noting that the approach reflected in the Court's free speech opinions posits some hierarchy of values entitled to constitutional protection); *see also* Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281, 283 (1995) (stating that the freedom of speech never has received absolute protection from the Court); Posner, *supra* note 1, at 7 (arguing that the Framers of the First Amendment would not have wanted to "tie the hands of government" from stopping the spread of "worthless and vicious ideas").

59. Olivieri v. Ward, 801 F.2d 602, 605 (2d Cir. 1986) (citing Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 647 (1981)); *see* Barenblatt v. United States, 360 U.S. 109, 126 (1959) ("Where First Amendment rights are asserted . . . resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) (holding that content-neutral regulation of noise level at a concert is a reasonable time, place, and manner restriction on speech).

60. Certainly the contemporaneous actions of Congress support such an inference. In 1798, Congress passed the Alien and Sedition Act, a law establishing content-based restrictions on core political speech. *See* Sedition Act, ch. 74, 1 Stat. 596 (1798); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798) (current version at 50 U.S.C. § 21-23 (1999)); Alien Act, ch. 58, 1 Stat. 570 (1798); Naturalization Act, ch. 54, 1 Stat. 566 (1798). The Act was a wartime measure to deport threatening aliens and silence attacks on the government. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 273-75 (1964); ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 1, 29 (1920); LEVY, *supra* note 57, at 197-200; *see also* Frohwerk v. United States, 249 U.S. 204, 206 (1919) ("We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1165 n.25 (1982) ("There can be little doubt that whatever the framers intended, it was not absolute protection.").

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> It is not true that "fighting words" have at most a "*de minimis*" expressive content or that their content is *in all respects* "worthless and undeserving of constitutional protection" . . . . We have not said that they constitute "*no* part of the expression of ideas," but only that they constitute "no *essential* part of any exposition of ideas."

R.A.V. v. City of St. Paul, 505 U.S. 377, 384-85 (1992) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

62. *See id.*

Even the relative absolutists would permit the criminalization of fraud, although such fraud involves speech activity.[63] Likewise, few would suggest that laws criminalizing threats against the life of the President violate the Free Speech Clause, or that the First Amendment protects your right to "joke" with airport security about explosive materials in your luggage.[64] As Professor Stanley Fish has explained, any plausible theory of free speech requires significant line drawing.[65] Whether the line drawing constitutes a principled or political exercise is largely in the eyes of the beholder.[66]

C. The First Amendment Is Not Absolute

Although the First Amendment's protection of pure advocacy is quite robust, it permits viewpoint-neutral speech regulations[67]

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63. *See* Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1344 (1998).

64. *See id.* at 1380. *See generally* United States v. Hicks, 980 F.2d 963 (5th Cir. 1992) (upholding a statute regulating airline passenger speech); People v. Rubin, 96 Cal. App. 3d 968 (Ct. App. 1979) (holding that an offer of $500 to anyone "who kills, maims or seriously injures a member of the American Nazi Party" made at a press conference in connection with a protest of a Nazi march was not protected by the First Amendment).

65. *See* FISH, *supra* note 2, at 102-19.

66. *See id.*

67. *See, e.g.*, City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (distinguishing viewpoint versus content-neutral regulation); *cf.* United States v. Aguilar, 515 U.S. 593, 605 (1995) (rejecting the defendant's interpretation of the First Amendment in part because "the statute here in question does not impose such a restriction [on the disclosure of wiretap authorizations] generally, but only upon those who disclose wiretap information 'in order to obstruct, impede, or prevent' the [wiretap] interception"); Haig v. Agee, 453 U.S. 280, 308-09 (1981) (upholding the Secretary of State's revocation of the defendant's passport based on a federal statute because "[the defendant's] disclosures, among other things, have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel"); United States v. Featherston, 461 F.2d 1119, 1122 (5th Cir. 1972) (rejecting a First Amendment challenge to a federal statute criminalizing the teaching or demonstration of the making of any explosive device after construing the statute to require "intent or knowledge that the information disseminated would be used in the furtherance of a civil disorder"); National Mobilization Comm. to End the War in Vietnam v. Foran, 411 F.2d 934, 937-38 (7th Cir. 1969) (holding that the plaintiff's attacks on the 1968 Civil Disorders and Riot Provisions of the Criminal Code, 18 U.S.C. §§ 231, 232, 2101, and 2102, did not present a substantial First Amendment question because the "statute expressly excludes oral or written advocacy of ideas or expressions of belief not involving violence").

and prohibitions to achieve important social goals when the social risks posed by the speech clearly exceed the benefits potentially associated with it.[68] As the Supreme Court explained in *Chaplinsky v. New Hampshire*:[69]

> 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.[70]

Rather than adopting an absolute approach to defining the limits of constitutionally protected speech, courts instead have adopted a series of category-based balancing tests.[71] Determining whether speech receives First Amendment protection involves a

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68. For example, the First Amendment even permits limitations on the freedom of the press. *See* Howard Kurtz, *Cincinnati Ex-Reporter Pleads Guilty*, WASH. POST, Sept. 25, 1998, at A3 (discussing plea taken by *Cincinnati Enquirer* reporter after admitting that he stole voice-mail messages from Chiquita when writing an article that asserted that "Chiquita secretly controls banana companies in Latin America . . . that employees were involved in a bribery scheme, and that Chiquita ships have been used to smuggle cocaine") [hereinafter Kurtz, *Guilty*]; *see also* John Nolan, *Newspaper Apologizes to Chiquita; to Pay $10M*, BOSTON GLOBE, June 29, 1998, at A10 (discussing the *Cincinnati Enquirer* Chiquita story and discussing ethics in journalism). Although some press people were upset that the *Enquirer* paid the settlement so quickly, no one argued that the reporter's behavior was proper or could not be sanctioned due to the First Amendment's protection of the freedom of the press. *See* Howard Kurtz, *Outbreak of Fiction is Alarming News*, WASH. POST, June 29, 1998, at B1 (decrying the Chiquita story and settlement and urging greater accuracy in media reporting).

69. 315 U.S. 568 (1942).

70. *Id.* at 571-72. For an excellent review of the First Amendment protections afforded various types of speech, see William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107 (1982).

71. *See* Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 342 (1995) (positing that categorization is inherent in how humans think and communicate); Van Alstyne, *supra* note 70, at 139-42; Amar, *supra* note 57, at 127-28. *But see* Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 731-39 (1983).

risk-benefit analysis in which federal courts determine what risks the community must shoulder to secure the considerable benefits of free speech in a democratic society[72] and, conversely, what risks are not worth taking.[73] In a variety of criminal cases, the courts have not hesitated to reject a First Amendment defense even when oral or written communications are the principal aspect of the crime.[74] In the civil context, implicit balances

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72. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 338-40 (1974) (discussing the importance of protecting political advocacy even at the risk of protecting some erroneous statements which are inevitable to free debate); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969) ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."); *see also* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1019 (5th Cir. 1987) ("The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.").

73. Although the First Amendment protects most messages, some messages are considered to be more valuable and more worthy of protection. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 384-85 (1992). *But see Herceg*, 814 F.2d at 1019 (holding that a magazine was not liable for the death of a boy who tried to practice autoerotic asphyxia after reading an article in the magazine); Berger v. Battaglia, 779 F.2d 992, 999 (4th Cir. 1985) (noting that entertainment is less worthy of protection than political speech).

74. The Court recently reaffirmed:

> Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech. . . . [W]hile a solicitation to enter into an agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may properly be prohibited.

Brown v. Hartlage, 456 U.S. 45, 55 (1982); *see also* NOW v. Operation Rescue, 37 F.3d 646, 656 (D.C. Cir. 1994) ("That 'aiding and abetting' of an illegal act may be carried out through speech is no bar to its illegality."); United States v. Freeman, 761 F.2d 549, 551-52 (9th Cir. 1985) (sustaining convictions for the aiding and abetting of tax fraud and noting that "the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself. In those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone" (citations

are constantly being struck concerning the importance of protecting an individual's reputation, the benefits of consumer protection laws, and truthful advertising.[75]

For example, statutes exist that prohibit telemarketing fraud,[76] making jokes about bombs at airports,[77] and threatening the President's life.[78] These statutes do not violate the First Amendment, because our society has balanced the social harm of such speech against its potential social value and determined that such speech does not contribute sufficient information or ideas to outweigh its potential for causing harm.[79] In the case of threats against the President, the Executive Branch could not function effectively if the President worried constantly about his safety.[80] Moreover, and perhaps most importantly, this sort of speech activity does not promote any of the First Amendment's

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omitted)); People v. Rubin, 96 Cal. App. 3d 968 (Ct. App. 1979) (noting that the controlling factors for determining whether speech arguably constituting solicitation of a crime is protected by the First Amendment are words themselves and the attendant circumstances of the use of those words); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 837 (2d ed. 1988) ("[T]he law need not treat differently the crime of one man who sells a bomb to terrorists and that of another who publishes an instructional manual for terrorists on how to build their own bombs out of old Volkswagen parts.").

75. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (concluding that the victim of a negligently erroneous credit report might recover presumed and punitive damages from the publisher absent a showing of "actual malice" without violating the First Amendment because the defamatory statements did not deal with matters of public concern); New York Times Co. v. Sullivan, 376 U.S. 254, 264 (1964) (stating that although libelous speech may be protected by the First Amendment, the state may regulate such speech within certain constitutionally established boundaries).

76. *See* Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-84, 112 Stat. 520 (codified at 18 U.S.C. § 2326 (Supp. 1999)).

77. *See* 18 U.S.C. § 35 (Supp. 1999).

78. *See id.* § 871 (1994 & Supp. 1999).

79. *See* Whitney v. California, 274 U.S. 357, 371 (1927) ("[A] State in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public welfare . . . .").

80. *See* Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam) ("The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence."); *see also* Morrison v. Olson, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) ("We should say here that the President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law, and that the inexorable command of Article II is clear and definite: the executive power must be vested in the President of the United States.").

underlying values. Threats against the life of the President do not add anything meaningful to the marketplace of ideas, nor do they promote democratic self-governance or self-expression.[81] In the United States, political disagreements are settled at the ballot box, not with bullets. To the extent such speech activity advances autonomy values, the cost it imposes on the psychological and physical well-being of the President far outweigh the value inherent in a would-be prankster's sophomoric antics.

Even in the area of political speech, the government may impose viewpoint-neutral restrictions if the speech activity incites violence or contains a falsehood.[82] If a small group of Serbian radicals wished to show their displeasure over NATO's and the United States's recent bombing of their country, they could shower New York with leaflets discussing the bombing. If, however, they deliberately inserted lies about President Clinton into the pamphlet, the courts would permit the President to sue for and, if he satisfied his burden of proof, win bankrupting damages.[83] Thus, our society does not always force the victim of speech activity to bear its costs, even if this means putting a publisher out of business.[84] The face of the laws seldom reflects this balancing exercise; nevertheless, the balance is implicit and incorporates an assumption that such restrictions on speech activity are both constitutional and desirable.[85] Accordingly, to

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81. *See supra* notes 39-42 and accompanying text.

82. *See* Milkovich v. Lorain J. Co., 497 U.S. 1, 12-23 (1990); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

83. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342, 347-48, 352 (1974) (holding that the state's interest in preventing reputational harm was sufficient to permit tort recovery under some circumstances); New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (same); *see also* Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983) (discussing the availability of unlimited damages in defamation actions).

84. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 575-79 (1977) (holding that the First Amendment did not protect the defendants from liability under the common law tort of "appropriation" or "right of publicity" when the news media filmed the plaintiff's "human cannonball" act at a county fair and broadcast the act without the plaintiff's permission); *see also* Kurtz, *Guilty*, *supra* note 68, at A3 (discussing a reporter's prosecution and guilty plea for stealing voice-mail messages from the target of a newspaper investigation).

85. Under current First Amendment jurisprudence, the government may even shut down the market for services that society finds to be completely undesirable and harmful. *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 108-11 (1990) (finding that *Stanley*

speak of an "absolute" First Amendment is not only nonsensical,[86] but also meaningless.[87] The values are contestable and need to be debated.

D. Balancing Free Speech Against Competing Social Values

In order to balance properly the conflicting community interests and maintain the protection of free speech, contemporary

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v. Georgia, which permits pornography in the home, did not apply to child pornography); New York v. Ferber, 458 U.S. 747, 753, 774 (1982) (upholding state regulations that prohibited the distribution of films depicting minors performing sexual acts because safeguarding the physical and psychological well-being of a minor was a compelling state interest). In these cases, the Supreme Court took child pornography outside the First Amendment, determining that its social costs would not be taxed against those who cannot protect themselves. This philosophy extends to additional aspects of the media. *See* FCC v. Pacifica Found., 438 U.S. 726, 731-32 (1978) (upholding an FCC order banning "indecent" speech from the air waves during the time when children would be in the audience).

86. *See* Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2087 (1991) ("There was a sense in the body politic that the First Amendment is not simply a technical legal rule, . . . but rather an organizing principle of society, central to our self-understanding as a nation and foundational to a vast network of highly cherished social practices and institutions.").

87. In an attempt to explain why many people cling to the absolutist notion of the First Amendment, Stanley Fish bluntly states:

> The answer, I think is that people cling to First Amendment pieties because they do not wish to [face] what they correctly take to be the alternative. That alternative is *politics*, the realization (at which I have already hinted) that decisions about what is and is not protected in the realm of expression will rest not on principle or firm doctrine but on the ability of some persons to interpret—recharacterize or rewrite—principle and doctrine in ways that lead to the protection of speech they want heard and the regulation of speech that they want silenced. (That is how George Bush can argue *for* flag-burning statutes and *against* campus hate-speech codes.). When the First Amendment is successfully invoked, the result is not a victory for free speech in the face of a challenge from politics but a *political victory* won by the party that has managed to wrap its agenda in the mantel of free speech.

FISH, *supra* note 2, at 110; *see* Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, LAW & CONTEMP. PROBS., Summer 1990, at 195, 223-24 (arguing that one's view of the mission of a college or university has an impact on the validity of speech restrictions in asking: "Might not the university say that part of its legitimate mission is to teach students how to contend vigorously within the marketplace of ideas while nevertheless observing certain norms of civility? Might not the university claim that part of its mission is to encourage the triumph of the rational and contemplative sides of the intellect over passion and prejudice?" (footnote omitted)).

federal courts have adopted a categorical approach in defining the limits of First Amendment protection.[88] A court employing the categorical approach classifies speech incident to an analysis of any First Amendment claim.[89] The reviewing court's classification then prefigures the burden on the government to sustain the restriction. Certain forms of speech activity enjoy particularly strong constitutional protection (e.g., core political speech), whereas other categories of speech (e.g., obscenity, child pornography) do not enjoy any First Amendment protection per se, although the government may not engage in viewpoint discrimination when suppressing otherwise impermissible forms of expression.[90]

The unprotected categories of speech are unprotected precisely because the threatened social harms associated with the speech outweigh any potentially offsetting social value associated with the particular type of speech.[91] In other words, the content of

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88. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992). Another approach involves a case-by-case, ad hoc balancing of the competing interests. *See, e.g.*, American Comm. Ass'n v. Douds, 339 U.S. 382, 399 (1950) (stating that a court's duty is to determine which of two conflicting interests demands greater protection). Ad hoc balancing requires consideration of the total circumstances of each case, weighing the plaintiff's interests against those of the defendant. The Supreme Court has discouraged ad hoc balancing. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-44 (1974) (declaring that ad hoc balancing in First Amendment litigation is not feasible and that it would be unwise to commit the task to judges).

89. *Cf.* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 780-81 (1996) (Kennedy, J., concurring in part, dissenting in part) (stating that the existing First Amendment doctrine supports placing the speech at issue into settled categories as part of the constitutional analysis).

90. *See R.A.V.*, 505 U.S. at 390-94 (invalidating St. Paul, Minnesota's hate crime ordinance as unconstitutionally prohibiting otherwise impermissible speech activity solely on the basis of the content and viewpoint of the speaker).

91. *See id.* at 383 (citing Chaplinsky v. New Hampshire, 345 U.S. 568, 572 (1942)); *see also* Miller v. California, 413 U.S. 15, 23-25 (1973) (elucidating the elements that the Court requires to find speech unprotected because it is "obscene"). Thus, obscene speech might possess *some* artistic, literary, social, or scientific value and still be proscribed; a work is nonobscene only if, "taken as a whole" it provides "serious" artistic, literary, or scientific value. *See id.* at 24. To allow speech possessing any social value to enjoy an absolute legal privilege would lead to chaos. A fraudulent offer featuring a sonnet by Shakespeare would escape the law's reach, just as a threat to the President's life, accompanied by a bold, evocative graphic, would enjoy protection. The fact that there is some potential hypothetical value in speech activity does not prevent the speech activity from being placed in a proscribable category. *See id.* Societal interests in maintaining peace and order, for example,

some speech may be regulated because the potential benefit to the community pales in comparison to the risks the community faces if would-be speakers freely disseminate such speech.[92]

Federal courts have established at least five identifiable categories of speech that pose a sufficient risk to society such that regulation by the government of speech based on content, but *not* viewpoint, may be constitutionally permissible. These exceptions are for fighting words,[93] obscenity,[94] defamation,[95] commercial speech,[96] and speech likely to incite imminent lawless action.[97] Courts have settled upon the last of these exceptions when deciding cases involving forms of Harm Advocacy.[98]

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outweigh the interest of protecting the freedom of speech when the speech incites imminent lawlessness. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969) (per curiam).

92. *See supra* notes 39-42 and accompanying text.

93. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572-74 (1942) (noting that Chaplinsky had called a local policeman a "God damned racketeer" and a "damned Fascist" after a traffic officer had stopped Chaplinsky from handing out leaflets to a restless crowd). Fighting words are those words that by their very utterance will provoke a reasonable person to immediate rage and violence. *See id.* at 572.

94. *See Miller*, 413 U.S. at 18-19; Roth v. United States, 354 U.S. 476, 481-83 (1957). The obscenity exception is probably best known for the difficulties associated with defining it. This difficulty was perhaps best illustrated by Justice Stewart's blithe assurances that, "I know it when I see it . . . ." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

95. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 267 (1964); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952). Causes of action for defamation include slander, libel, and various invasion of privacy torts. *See* RODNEY A. SMOLLA, LAW OF DEFAMATION *passim* (1996).

96. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 454-56 (1978). Unlike the speech prohibited by the other exceptions, speech made for commercial purposes is not inherently bad. *See id.* at 455. Such speech, however, is not protected automatically. *See id.* at 456; *see also* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980) (holding that truthful commercial speech may be regulated only if the government interest is substantial, the regulation directly advances the government's interests, and the regulation is no more extensive than is necessary to serve that interest).

97. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969).

98. *See infra* notes 224-38 and accompanying text.

> Were the First Amendment to offer protection even in these circumstances, one could publish, by traditional means or even on the internet, the necessary plans and instructions for assassinating the President, for poisoning a city's water supply, for blowing up a skyscraper or public building, or for similar acts of terror and mass destruction, with the specific, indeed even the admitted, purpose of assisting such crimes—all with

States may regulate unprotected speech through either criminal[99] or civil penalties,[100] if the regulation precisely defines[101] the proscribed speech, the regulation is narrowly tailored to avoid the substantial evil associated with the category of speech at issue, and the regulations are viewpoint neutral.[102] Vague or overbroad regulations violate the Constitution because they punish protected speech[103] or act effectively as prior restraints[104] through their chilling effect.[105]

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impunity.

Rice v. Paladin Enters., Inc., 128 F.3d 233, 248 (4th Cir. 1997); *see also* Scales v. United States, 367 U.S. 203, 250-51 (1961) (commenting that if the defendant taught how to kill a man with a pencil as advocacy, that speech could be constitutionally proscribed).

99. States may impose criminal sanctions if the speech is incitement. *See infra* notes 182-88 and accompanying text.

100. *Cf.* Cohen v. Cowles Media Co., 501 U.S. 663, 668-72 (1991) (finding in a civil promissory estoppel case that the First Amendment does not bar liability for a newspaper's publication of a confidential source's name); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555-60 (1985) (rejecting a First Amendment defense to copyright infringement action against a magazine for printing unauthorized presidential memoir excerpts).

101. *See* NAACP v. Button, 371 U.S. 415, 432 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression.").

102. Courts will strike down regulations that are not narrowly drafted because an overbroad regulation may reach speech that the state is not entitled to regulate. *See id.* at 432-33; Cantwell v. Connecticut, 310 U.S. 296, 311 (1940).

103. Even protected speech may be regulated in some ways. For example, states may restrict the time, place, and manner of speech if the restrictions are not directed at suppressing speech, they further an important or substantial governmental interest, and any incidental regulation of speech is no greater than necessary to further the governmental interest. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968). If the governmental regulation impinges upon basic First Amendment rights, the burden is on the government to show the absence of less intrusive alternatives. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 658 (1981) (Brennan, J., concurring in part, dissenting in part).

104. The Supreme Court has characterized the avoidance of prior restraints on speech as the First Amendment's most important safeguard. *See* Patterson v. Colorado, 205 U.S. 454, 462 (1907) (stating that the main purpose of the First Amendment is to prevent "previous restraints"). More recently, the Court has expanded the scope of the Amendment's protection beyond prior restraints. *See* Smith v. Daily Mail Publ'g. Co., 443 U.S. 97, 101 (1979). Nonetheless, the Court continues to emphasize that avoiding prior restraints is the "chief purpose" of the First Amendment. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 393 n.25 (1979). For a more complete discussion of these cases and the prior restraint doctrine, see NIMMER, *supra* note 45, § 4.02, at 4-17.

105. Regulations that are overbroad or vague carry the danger that they will act as

E. The Rise of Harm Advocacy

The relatively new series of instructional books and manuals available on the market, which contain explicit instructions to would-be criminals, as well as noncriminal readers, on how to commit a crime, provide a significant example of the danger inherent in some kinds of speech.[106] For instance, why do courts permit books concerning how to commit a murder and how to build a bomb to be published without their authors incurring potential civil or criminal liability? The question is even more difficult when those products are put to their intended uses, causing serious social harm.

Consider, for example, a book providing detailed instructions on how to construct, place, and detonate an explosive device in a public place. When a publisher prints and distributes such a book, it intends to cause harm or is at least grossly indifferent to the prospect of harm. Under the common law of torts, the victims of a resulting harm could recover damages, either for an intentional tort or negligence assuming that they could show that the book caused their injuries.[107] The First Amendment,

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a prior restraint through self-censorship. *Cf.* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497-500 (1982) (upholding an ordinance, though arguably vague and overbroad, because "[t]his ordinance simply regulates business behavior" and the commercial marketing of drug paraphernalia).

106. Many "how to" manuals are now easily available to the public. For a listing of some of the many manuals that the public may purchase concerning how to commit various crimes, see Amitai Etzioni, *Is Information on How to Make a Bomb More Harmful than Porn?*, CHI. TRIB., Aug. 24, 1995, at 31, *available in* 1995 WL 6239239 (listing numerous books available through mail order, including the following: *Ragnar's Guide to Home and Recreational Use of High Explosives*, *The Big Book of Mischief*, and *The Terrorist Handbook*).

107. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed., 1984) (discussing the elements of negligence). For example, if a negligent physical act causes injury, the tortfeasor, absent a defense, is usually liable. If, however, that same injury is the result of some form of speech, the First Amendment may insulate the tortfeasor from liability. *See, e.g.*, Cardozo v. True, 342 So. 2d 1053, 1056-57 (Fla. Dist. Ct. App. 1977) (finding that the plaintiff, injured as a result of a cookbook's inadequate warnings regarding poisonous ingredients used in recipe, could not recover for breach of implied warranty because the protections of the Uniform Commercial Code did not extend to "the thoughts and ideas conveyed" by the cookbook). The First Amendment applies because common law tort liability is a form of state action. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, what-

however, has been deployed to block the imposition of tort liability.[108] Because a victim's ability to recover remains doubtful under current law, a would-be publisher of such a tome faces very little deterrent to publishing and disseminating the book.

As a matter of economic logic, no good reason exists for requiring the victim of a bombing to shoulder the social costs of the hypothetical book. As noted above, in the absence of the First Amendment, the question of establishing liability would be relatively easy. But for the First Amendment, tort law would allow the victims to recover for the social harms associated with the book.

The question that begs to be asked—and answered—is why *should* the First Amendment preclude the application of traditional tort principles on these facts? How does a book providing detailed instructions on how to commit an act of terrorism meaningfully advance the project of democratic self-governance? Indeed, such information is light-years removed from the good faith criticism of public officials that lies at the heart of *New York Times Co. v. Sullivan*[109] and its progeny. It makes sense to protect democratic deliberation from the silencing actions brought by public officials or public figures against the press. Protecting good faith criticism—or parody—of public officials and public figures well-serves core concerns of the First Amendment. Facilitating the building and detonation of terrorist devices, however, does not.[110]

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ever the form, whether such power has in fact been exercised."). Although this Article argues that the First Amendment should not bar liability for Harm Advocacy speech, it does not suggest that it is completely inapplicable. *Cf.* W. Tarver Roundtree, Jr., *Constitutional Law*, 33 MERCER L. REV. 51, 63 (1981) (arguing that cases such as *Walt Disney Productions, Inc. v. Shannon*, 275 S.E.2d 580 (1981), in which the plaintiff was injured after imitating conduct from the television program *The Mickey Mouse Club*, should be resolved under tort law rather than the First Amendment); Donald Wallis, *"Negligent Publishing": Implications for University Publishers*, 9 J.C. & U.L. 209, 225 (1982) (arguing that in spite of the holding in the *Disney* case in favor of the publishers, the publishers should realize that the First Amendment's protections may not be available to them in the future).

108. *See infra* notes 139-61 and accompanying text.

109. 376 U.S. 254 (1964); *see also* Schauer, *supra* note 11, at 1325-26 (arguing that "once we uncouple the freedom of speech from the compensation (literally or figuratively) of the victim we will see that goals often thought mutually exclusive can be at least somewhat compatible" (footnote omitted)).

110. It is important to note also that imposing liability for Harm Advocacy is en-

Because plaintiffs can recover damages for certain speech activities—that is, fraud, solicitation, and defamation—it is surprising that courts have not acted under their common law powers to regulate speech that advocates or facilitates the commission of harms to others. If the First Amendment permits defendants guilty of knowing or reckless misconduct to be held liable in tort for millions of dollars in damages when their publications cause injury to reputation, as in the *Sullivan* line of cases involving defamation, then the First Amendment also should be understood to permit parallel liability in tort when publications cause serious physical injuries or death.

Nevertheless, many courts confronted with cases involving Harm Advocacy have concluded that such speech enjoys strong First Amendment protection.[111] The problem with imposing liability involves the absence of a direct temporal link between publication of the Harm Advocacy and a subsequent harmful act, as well as judicial doubts about the causal connection between works facilitating harmful acts and the acts themselves.[112]

II. THE *BRANDENBURG* TEST AND HARM ADVOCACY

The principal difficulty associated with the recognition of Harm Advocacy—the potential absence of a temporal link—stems from a misapplication of the Supreme Court's holding in *Brandenburg v. Ohio*.[113] As explained more thoroughly below, *Brandenburg*, properly understood, does not address speech that attempts to facilitate or assist lawless action, but rather governs abstract exhortations to lawless action that might incite a sufficiently susceptible person to action.[114] Thus,

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tirely viewpoint neutral: the aims or objectives of the publisher are irrelevant to the question of imposing liability for the social harm resulting from the speech.

111. *See infra* notes 139-61 and accompanying text.

112. *See infra* notes 113-15 and accompanying text.

113. 395 U.S. 444 (1969) (per curiam).

114. *See id.* at 447; *see also* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1024-25 (5th Cir. 1987) (holding that a magazine article on autoerotic asphyxiation did not incite an adolescent to perform the act that led to his death because the article included several warnings and the imposition of civil liability would violate the First Amendment); McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 1001 (Ct. App. 1988) ("[T]here is nothing in [the] songs which could be characterized as a command to an immediate suicidal act."); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067,

Brandenburg speaks only to the specific subject of speech advocating harm, and not to the entire category of speech that this Article denominates Harm Advocacy.

The absence of a causal link between Harm Advocacy and actual incidents of harm relates to doubts about the wisdom of ascribing a cause-effect relationship to "mere speech" or imposing liability for actions that an author or musician might not have intended or foreseen, or both. These are valid concerns—the imposition of tort liability on a weak evidentiary standard of causation would have a profound chilling effect on the arts.[115] These concerns can be overcome by requiring proof of subjective intent and a sufficiently demanding evidentiary standard of proof for establishing the author's or musician's subjective intent as well as by requiring significant proof of causation. If an author or musician seeks to facilitate a harmful act and succeeds in these efforts, the First Amendment should not provide a shield from liability.

A. *The* Brandenburg *Clear and Present Danger/Imminence Test*

The Supreme Court announced the current general test for advocacy of lawless action in *Brandenburg*.[116] Clarence Brandenburg was a leader of the Ku Klux Klan (KKK) who had invited the local press to attend a KKK rally.[117] At the rally, he gave a somewhat incoherent speech in which he proclaimed that the KKK was "not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[118] As a result of his speech, the defendant was convicted for advocating criminal activity in violation of Ohio law.[119]

1071 (Mass. 1989) (holding that a film depicting gang life did not constitute unprotected incitement because, "[a]lthough . . . rife with violent scenes, it [did] not at any point exhort, urge, entreat, solicit, or . . . encourage unlawful or violent activity . . . ").

115. *See infra* notes 273-96 and accompanying text.

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

117. *See id.* at 445.

118. *Id.* at 446.

119. *See id.* at 444-45. The statute at issue in that case prohibited:

> "[A]dvocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing

In reversing the defendant's conviction, the Supreme Court revised the "clear and present danger" test.[120] The Court recognized that the then predominant clear and present danger test allowed the government to suppress undesirable political views simply by invoking the speech's "tendency to lead to violence."[121] To ensure greater protection of political speech and less opportunity for government pretext, the *Brandenburg* Court focused on whether the speech at issue presented a temporally imminent danger:

> [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.[122]

> industrial or political reform" and . . . "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

Id. (quoting OHIO REV. CODE ANN. § 2923.13 (repealed 1974)).

120. The Supreme Court of the United States first articulated the clear and present danger test in *Schenck v. United States*, 249 U.S. 47 (1919): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil that Congress has a right to prevent." *Id.* at 51; *see also* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (stating that speech cannot be restricted under the clear and present danger test unless it "would produce or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent . . ."), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

The traditional clear and present danger test was relied upon to uphold government suppression of political speech on a number of occasions. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 516-17 (1951) (upholding conviction of members of Communist Party, which advocated a violent overthrow of the federal government); *Whitney*, 274 U.S. at 371-72 (upholding conviction of member of state Communist Labor Party, which advocated criminal syndicalism); Debs v. United States, 249 U.S. 211, 214-16 (1919) (predicating the conviction for criminal attempt upon the defendant's advocacy of a criminal act); Frohwerk v. United States, 249 U.S. 204, 206 (1919) (upholding conviction for "conspiracy to obstruct recruiting by words of persuasion" as violating the Espionage Act of 1917).

121. Hess v. Indiana, 414 U.S. 105, 109 (1973) (per curiam); *see Brandenburg*, 395 U.S. at 447. This concern relates back to cases applying the clear and present danger test in a relatively weak form. *See, e.g., Dennis*, 341 U.S. at 507-08. Justice Douglas so feared a "bad tendencies" understanding of the clear and present danger test that he rejected the test entirely as being too unreliable in affording protection to core political speech. *See Brandenburg*, 395 U.S. at 454 (Douglas, J., concurring).

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

The Court emphasized that "'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.'"[123] Thus, under *Brandenburg*, advocacy of violence can be prohibited only when a speaker (1) advocates imminent illegal conduct; (2) intends to incite either the use of force or illegal conduct; and (3) is highly likely to incite such conduct.[124] The Court did not find that the words spoken by the Klansman satisfied this test; therefore, the Ohio statute that purported to punish such speech was itself unconstitutional.[125]

Since *Brandenburg*, the imminence requirement has become the central focus of the test.[126] For instance, in *Hess v. Indiana*,[127] the Court reversed the conviction of an antiwar demonstrator who yelled, "[w]e'll take the fucking street later (or again)."[128] The Court held that this language amounted at most to the "advocacy of illegal action at some indefinite future time."[129] Because the evidence showed that Hess's statement was simply an emotional exclamation rather than a potentially effective exhortation to action directed specifically at a particular group of persons, and because no evidence existed that his statement was intended and likely to produce imminent disorder, the statement enjoyed constitutional protection.[130]

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123. *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).
124. *See id.* at 447.
125. *See id.* at 448.
126. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982); Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam); Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).
127. 414 U.S. 105 (1973).
128. *Id.* at 107. Hess made the statement at an antiwar rally while the protesters were dispersing. *See id.* The speech clearly advocated an illegal action. *See id.* at 108. The Court, however, held that although the statement advocated an illegal action, it advocated such an action at an undefined future date. *See id.* It was not an action to be taken in the near future, and thus did not meet the imminence requirement. *See id.* at 108-09.
129. *Id.* at 108.
130. *See id.* at 107-08. *But cf.* People v. Rubin, 96 Cal. App. 3d 968 (Ct. App. 1979) (finding that the offer of $500 to "kill, maim, or seriously injure[]" members of the Nazi party was a solicitation to murder based on the words and the surrounding circumstances).

Similarly, in *NAACP v. Claiborne Hardware Co.*,[131] the Supreme Court set aside an award of damages based on a NAACP boycott of white merchants.[132] In the course of the boycott, one NAACP official had proclaimed in a public speech that "if we catch any of you going in any of them racist stores, we're gonna break your damn neck."[133] The Court acknowledged the speaker in question used strong language, but concluded that essentially the speech was an impassioned plea for support of the boycott.[134] Nevertheless, if actual outbreaks of violence had followed, the Court suggested that a substantial question would exist regarding whether the speaker could be held liable for the resulting damages.[135] Because the only outbreaks of violence took place weeks or months later, the Court held that no liability could attach.[136] Advocates must be free to make spontaneous emotional appeals without carefully weighing their words, and such appeals constitute protected speech when they do not immediately incite lawless action.[137]

One should note that *none* of these cases involve efforts to teach listeners how to commit specific illegal acts against particular persons or groups. Neither the Klan, the antiwar protestor, nor the NAACP was conducting a seminar in how to make and successfully toss a Molotov cocktail. When speech activity is hyperbolic and advocates some ambiguous lawless action and at an indefinite time in the future, it presents very little real risk to the community. In the vast majority of cases, the social cost of such speech activity is de minimis.[138]

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131. 458 U.S. 886 (1982).
132. *See id.* at 902.
133. *Id.*
134. *See id.* at 928.
135. *See id.*
136. *See id.* at 932.
137. In addition, the Court noted that the speaker tempered his impassioned rhetoric with the following remarks:

> I am not going to lay out in the bushes and shoot no white folks. That's wrong. I am not gonna go out here and bomb none of them's home. . . . That's not right . . . . Be courteous now. Don't mistreat nobody. Tell them in a nice forceful way, the curfew is going to be on until they do what we ask them.

Id. at 939-40.
138. Of course, the effects of hate speech can be very real to members of targeted

B. The Implications of Brandenburg *for Harm Advocacy*

The *Brandenburg* test quite appropriately makes it difficult for the government to restrict or suppress political speech. That said, it does not establish an absolute bar to government regulation of speech activity.[139] Rather, it creates a strong presumption that the First Amendment protects the mere advocacy of lawlessness.[140] Although the *Brandenburg* test clearly recognizes the government's compelling interest in safeguarding the safety of citizens, it generally rejects the government's invocation of this interest when the speech in question involves dissident political views.[141] Thus, the requirement that the alleged lawlessness

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communities. *See, e.g.*, MARI MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993). The First Amendment's free speech guarantee generally has afforded speakers immunity from liability for psychological harm, even when a speaker deliberately sets out to bring about such harm. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988); Collin v. Smith, 578 F.2d 1197, 1206, 1210 (7th Cir. 1978); *cf.* Beauharnais v. Illinois, 343 U.S. 250 (1952) (holding that protection of liberty as defined by the Due Process Clause does not prevent punishment of criminal libel directed at certain groups). For democratic deliberation to occur, some measure of psychological harm to members of the community must be accepted as a necessary consequence of the project of self-governance. Legal scholars have hotly contested whether the Supreme Court has struck an appropriate balance on the question of how much psychological harm must be tolerated. *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY AND THE NEW FIRST AMENDMENT 10-11 (1997); MACKINNON, *supra* note 53, at 10-41 (arguing that pornography or sexually explicit materials should not fall within the protective bounds of the First Amendment); *cf.* Steven G. Gey, *Postmodern Censorship Revisited: A Reply to Richard Delgado*, 146 U. PA. L. REV. 1077, 1082-84 (1998) (arguing against the creation of a "hate speech" category of unprotected speech). For present purposes, this Article assumes that the First Amendment precludes relief for harms of the sort described in *Beauharnais*, *Smith*, and *Falwell*. These harms, although real, are not the result of Harm Advocacy and therefore lie beyond the scope of this Article.

139. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1969).

140. *See id.*

141. *See* STEVEN H. SHIFFRIN, DISSENT, INJUSTICE AND THE MEANINGS OF AMERICA 10-31 (1999) (arguing that dissent constitutes the First Amendment's central purpose and that the courts should interpret the Free Speech Clause to encourage and facilitate dissent). Another possible explanation is that incitement to imminent lawlessness, like fighting words, induces listeners to react impulsively. Under this theory, regulating such speech therefore would not implicate the listener's autonomy. *See* Strauss, *supra* note 49, at 338-40, 366-68 (arguing that government regulation of speech that persuades rational decision makers to act violates individual autonomy and the First Amendment, but that regulation of speech that induces ill-considered actions is not a deprivation of autonomy).

take place or be likely to take place almost immediately after the delivery of the speech ensures that the danger is in fact not speculative and that the government's interest in preventing the violence is not pretextual.

Conversely, if speech aims to facilitate a particular lawless act against a discrete victim or group of victims, the government's claim of concern sounds far more plausible on its face. Suppressing unpopular political minorities is one thing, preventing the bombing of federal buildings or abortion clinics is quite another. In the context of abstract political speech by unpopular political minorities, *Brandenburg*'s imminence test makes a great deal of sense. Purely speculative harms are insufficient grounds for censorship. When the nature of the speech itself creates a palpable danger, however, the government is less concerned with censorship and more concerned with the viewpoint neutral cadence of the public safety.[142] Indeed, two landmark Supreme Court cases suggest that *Brandenburg* should not be stretched to confer blanket protection on Harm Advocacy.[143]

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142. *See* New York Times Co. v. United States, 403 U.S. 713, 734 (1971) (White, J., concurring) (finding that language on publishing troop transport information is not protected by the First Amendment and may indeed be subject to a prior restraint); *see also* United States v. Progressive, Inc., 467 F. Supp. 990, 992 (W.D. Wis. 1979) (granting a temporary injunction against *Progressive* magazine to prohibit publication of an article containing material on how the H-bomb worked). For a further discussion of the *Progressive* case, see generally Erwin Knoll, *National Security: The Ultimate Threat to the First Amendment*, 66 MINN. L. REV. 161 (1981); L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55 (1990).

143. *See supra* text accompanying notes 144-56; *see also* Scales v. United States, 367 U.S. 203, 250-51 (1961) (commenting that if the defendant was taught how to kill a man with a pencil, the speaker's advocacy has crossed the line from the abstract to the concrete and may be proscribed); Dennis v. United States, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting) ("If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage . . . I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror . . . should be beyond the pale. . . ."); Cass R. Sunstein, *Is Violent Speech a Right?*, AM. PROSPECT, Summer 1995, at 35 (arguing that "narrow restrictions on speech that expressly advocates illegal, murderous violence in messages to mass audiences probably should not be taken to offend the First Amendment").

1. *New York Times Co. v. United States*

In *New York Times Co. v. United States*,[144] also known as the *Pentagon Papers Case*, a majority of the Justices made clear that the First Amendment allowed the publication of military secrets, at least when publication of the information probably would not put service people in immediate harm.[145] Concurring opinions in the *Pentagon Papers Case* point the way toward the recognition of Harm Advocacy as an unprotected subject of speech activity.[146] Justice Brennan reaffirmed explicitly that "'[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.'"[147]

2. *New York Times Co. v. Sullivan*

In *New York Times Co. v. Sullivan*,[148] the Supreme Court severely limited the right of individuals to sue publishers in the event a publication is defamatory.[149] In order to recover damages, a would-be public figure or public officer plaintiff must show that the media defendant acted with "actual malice," that is, knowledge of falsity or reckless indifference to truth or falsity.[150] Although the Court recognized that the imposition of tort liability based on a defendant's speech constitutes state action,[151] and

144. 403 U.S. 713.

145. *See id.*

146. *See id.* at 726-27 (Brennan, J., concurring) (explaining that expression is unprotected when it "must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety [of the military]"); *id.* at 730 (Stewart, J., concurring) (stating that in order for the government to prevent publication, it would have to show that publication would "surely result in direct, immediate, and irreparable damage"); *id.* at 732 (White, J., concurring) (alteration in original) (recognizing that publication could be enjoined if the government had shown "grave and irreparable danger").

147. *Id.* at 726 (Brennan, J., concurring) (alteration in original) (quoting Near v. Minnesota, 283 U.S. 697, 716 (1931)).

148. 376 U.S. 254 (1964).

149. *See id.* at 265 ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."). In *Sullivan*, the Supreme Court held that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel," because the fear of civil liability might "be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.* at 277.

150. *See id.* at 283-92.

151. *See id.*; *see also* Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (noting

that the imposition of liability may have a chilling effect on the exercise of free speech,[152] the Court permitted recovery when actual malice exists because of society's interest in protecting individuals' reputation from harm, even when individuals voluntarily place themselves in the public spotlight.[153]

In *Sullivan*, the Supreme Court effectively constitutionalized state tort law to prohibit the imposition of civil liability for good faith criticism of public officials.[154] In subsequent cases, however, the Supreme Court has made clear that false speech, as such, does not enjoy any special First Amendment protection in its own right.[155] Careful consideration of *Sullivan* and its progeny[156]

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the "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news").

152. *See Sullivan*, 376 U.S. at 300 (Goldberg, J., concurring). To achieve protection of free speech, the Court imposed on public officials a heavy burden of proving actual malice to make it difficult to reach, much less persuade, a jury. If such public officials could be persuaded not to sue, the media would be spared the cost of defending questionable claims and the corresponding pressure to tone down or even disregard provocative stories that might spawn litigation. Some commentators believe that the *Sullivan* standard is not sufficiently protective of the press and have suggested that such libel cases be barred or made even more difficult to pursue. *See, e.g.*, David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 435-36 (1975) (discussing why the *Sullivan* standard failed to achieve the goal of reducing defense costs); Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603 (1983) (urging absolute immunity should apply at least for published criticism of the official conduct of public officials); William W. Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution,"* 25 WM. & MARY L. REV. 793, 798-809 (1984) (supporting limitations on damage awards in libel cases brought by public officials and public figures).

153. *See Sullivan*, 376 U.S. at 283-92.

154. The Court did not decide whether tort liability, in general, is the kind of abridgement of speech that requires First Amendment scrutiny. *See* David A. Anderson, *Torts, Speech and Contracts*, 75 TEX. L. REV. 1499, 1505 (1997).

155. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

156. *See id.* at 347 (holding that when the subject of a libelous statement is a private figure, the defendant's conduct must be at least negligent in order for liability to be imposed); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (holding that a public figure must demonstrate that the defendant exercised "highly unreasonable conduct" such that it constitutes an "extreme departure from the standards of investigation and reporting ordinarily adhered to" to recover damages for a defamatory falsehood).

demonstrates that the Free Speech Clause of the First Amendment displaces traditional common law tort principles only when necessary to protect democratic deliberation.[157] Because Harm Advocacy does not advance the process of democratic deliberation, it should be deemed outside the scope of the *Sullivan* rule.

C. Harm Advocacy, the First Amendment, and the Lower Federal Courts

Based on the *Sullivan* holding that tort remedies are available to plaintiffs harmed by certain types of speech, numerous plaintiffs have tried to hold publishers liable for their works when those works incite violence or lawlessness, and thereby cause harm.[158] Few have prevailed.[159] One major reason is that a ma-

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157. *See Sullivan*, 376 U.S. at 270 (asserting "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

158. *See, e.g.*, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (reversing a jury's award of damages in a wrongful death action against a magazine publisher for an adolescent's death allegedly caused by an article that described the practice of autoerotic asphyxia); Zamora v. CBS, Inc., 480 F. Supp. 199 (S.D. Fla. 1979) (granting a motion to dismiss in a suit involving a fifteen-year-old against television networks for violent programming that allegedly caused him to commit criminal acts); McCollum v. CBS, Inc., 202 Cal. App. 3d 989 (Ct. App. 1988) (granting a motion to dismiss in a wrongful death suit against an Ozzy Ozbourne record that included the song *Suicide Solution*, which exhorted suicide); Olivia N. v. NBC, 126 Cal. App. 3d 488 (Ct. App. 1981) (granting a judgment of nonsuit at a negligence trial when the plaintiff conceded that the defendant did not intend its film, *Born Innocent*, to incite the unlawful behavior that injured the plaintiff and that the speech was not incitement under the law); Disney Prods., Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981) (granting summary judgment in a suit by the parents of a child partially blinded during an attempt to perform a balloon trick demonstrated on a Disney television program); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) (granting summary judgment in a wrongful death action by a father of a boy slain by someone who had just seen the film *The Warriors*, which depicted scenes of gang violence, despite the fact that the perpetrator uttered a line from the film while committing the homicide); DeFilippo v. NBC, 446 A.2d 1036, 1040 (R.I. 1982) (granting summary judgment in a wrongful death suit brought by the parents of a deceased minor against NBC after their son hanged himself while imitating a hanging stunt he observed on *The Tonight Show*).

159. *See, e.g.*, Rice v. Paladin Enters., Inc., 128 F.3d 233 (4th Cir. 1997) (permitting a wrongful death suit against the publisher of *Hit Man* under *Brandenburg*'s incitement standard); Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir. 1992) (applying the commercial speech doctrine to an advertisement in *Soldier of Fortune* magazine that offered a "GUN FOR HIRE. . . . All jobs considered" and

jority of the lower federal courts have applied the *Brandenburg* test when determining whether a publisher or author who advocates criminal acts should be liable for resulting harm.[160] Applying the *Brandenburg* test, courts have refused to hold publishers liable because the incitement was not explicit, warnings were included, or no "clear and present danger" of imminent injury existed.[161] Although the *Brandenburg* test properly protects political speech advocating the overthrow of the government or other abstract promotion of lawlessness, it has proven to be overprotective of nonpolitical speech that directly facilitates physical harm against others.

The Supreme Court has not addressed the standard applicable to nonpolitical Harm Advocacy speech. Nevertheless, two relatively recent decisions by United States Circuit Courts of Appeals have established two very different approaches to claims that Harm Advocacy enjoys broad First Amendment protection.

1. Rice v. Paladin Enterprises, Inc.

Rice v. Paladin Enterprises, Inc.[162] is one of the few cases holding that the First Amendment does not pose a bar to a finding of civil liability against a publisher.[163] The *Rice* case arose out of the brutal murders committed by James Perry, a contract killer.[164] In preparation for these murders, Perry closely followed

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permitting a wrongful death suit to proceed); Norwood v. Soldier of Fortune Magazine, Inc., 651 F. Supp. 1397 (W.D. Ark. 1987) (same); Weirum v. RKO Gen., Inc., 539 P.2d 36 (Cal. 1975) (allowing a wrongful death suit against a radio station where a promotional contest repeatedly urged and encouraged driving in a dangerous manner to intercept a disk jockey driving around in a marked car to collect a cash prize); *see also* Schauer, *supra* note 11, at 1343-48 (arguing that victim compensation for speech-related harms and the protection of free speech are not incompatible goals).

160. *See infra* notes 161-223 and accompanying text.

161. *See infra* notes 161-223 and accompanying text.

162. 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998). For an interesting discussion of the background to *Rice*, see RODNEY A. SMOLLA, DELIBERATE INTENT 6-72 (1999).

163. *See Rice*, 128 F.3d at 255-65.

164. *See id.* at 239. Lawrence Horn hired Perry to kill his ex-wife and eight-year-old quadriplegic son in order to obtain the $2 million awarded to his son in a lawsuit for the accident that caused his son's paralysis. *See id.* Perry murdered Mildred Horn, her son Trevor, and Trevor's private duty nurse by shooting the two women through the eyes and strangling the helpless boy. *See id.* Perry received the death

the directions contained in *Hit Man: A Technical Manual for Independent Contractors*[165] and the second volume of *How to Make Disposable Silencers*,[166] publications of Paladin Enterprises, Inc. (Paladin).[167] On discovering the pivotal role that these books played in the execution of this crime, the victims' families sued Paladin[168] for tortious aiding and abetting.[169]

Applying the standard set forth in *Brandenburg*,[170] the district court granted Paladin's motion for summary judgment, holding

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sentence. *See* Perry v. Maryland, 686 A.2d 274, 276 (Md. 1996).

165. REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS (Paladin Press 1983). The author of the book is actually a woman who has remained unidentified. *See* SMOLLA, *supra* note 162, at 229-35.

166. 2 HOW TO MAKE DISPOSABLE SILENCERS (Paladin Press 1983).

167. *See Rice*, 128 F.3d at 239-41. For example, Perry meticulously followed the books' directions and advice about how to solicit for prospective clients in need of murder-for-hire services, how to handle and use an AR-7 rifle and drill out the serial number, how to construct a silencer and shoot at an optimal distance "to insure quick and sure death," how to disassemble the weapon and change its rifling to prevent its ballistics from matching the bullets left behind in the victims, how to make the crime scene look like a burglary, how to dispose of the weapon and any stolen goods in pieces along the roadway, and how to use a rental car to get away from the crime scene undetected. *Rice*, 128 F.3d at 240 (quoting FERAL, *supra* note 165). If Perry had followed the *Hit Man* instructions a little more closely, he may not have ended up in his current predicament. Despite the precautions Perry took to avoid detection, police placed him in Rockville the day of the murders because he checked into a motel near the scene using his real name and address. *See* SMOLLA, *supra* note 162, at 23.

168. The families sued Paladin and its president, Peter Lund. *See* Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 838 (D. Md. 1996). More than 20 amici curiae filed briefs at the trial and the appellate level. These amici included media corporations, the ACLU, the Association of American Publishers, the Newspaper Association of America, and the Society of Professional Journalists. *See Rice*, 128 F.3d at 233; 940 F. Supp. at 838.

169. *See Rice*, 940 F. Supp. at 838. The plaintiffs also sought damages based on theories of negligence and strict liability. *See id.* The complaint alleged that Paladin aided and abetted Perry in the commission of these murders through the publication of its books with their explicit instructions on how to commit and cover-up a contract murder. *See id.* Neither the district court nor the court of appeals addressed these arguments.

170. The district court in *Rice* found that three elements must be met under the *Brandenburg* test to prohibit Paladin's publication of the manuals. *See id.* at 845-46. First, the manuals must have been intended to incite lawless action; second, the books must have been intended to produce imminent lawless action; third, and last, the books must have been likely to produce imminent lawless action. *See id.* Finding that none of these requirements had been met, the court concluded that Paladin's speech could not be regulated or prohibited by state tort law. *See id.* at 847-48.

that the First Amendment barred recovery of damages. The district court found that the Paladin publications did not meet *Brandenburg*'s stringent imminence requirement, as the murders occurred at least a year after Perry purchased the manuals.[171] In addition, the district court found that the books although "reprehensible and devoid of any significant redeeming social value,"[172] did not constitute incitement or a call to action,[173] and that Paladin did not intend for Perry to commit murder.[174] In granting Paladin's motion for summary judgment, the court concluded that "[i]t is simply not acceptable to a free and democratic society to limit and restrict creativity in order to avoid dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals."[175]

The United States Court of Appeals for the Fourth Circuit reversed and remanded.[176] In an opinion written by Judge Mi-

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171. *See id.* at 847.

172. *Id.* at 849.

173. *See id.* at 847 ("Nothing in the book says 'go out and commit murder now!'").

174. *See id.* Paladin stipulated that its intent and its marketing strategy were to attract and assist criminals and would-be criminals who desired information and instructions on how to commit crimes. *See id.* The court, however, found it relevant that Paladin's catalogues and its books included prominent warnings such as "for academic study only" and a warning stating that certain laws made illegal the possession of particular kinds of guns and accessories as well as stating that it is illegal to manufacture a silencer without a government license. The warning provided:

> WARNING: IT IS AGAINST THE LAW TO manufacture a silencer without an appropriate license from the federal government. There are state and local laws prohibiting the possession of weapons and their accessories in many areas. Severe penalties are prescribed for violations of these laws. Neither the author nor the publisher assumes responsibility for the use or misuse of information contained in this book. For informational purposes only!

Id. at 838-39, 848.

175. *Id.* at 848-49 (stating specifically that the court declined to create a new category of unprotected speech).

176. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 267 (4th Cir. 1997). The court explained:

> Paladin's astonishing stipulations, coupled with the extraordinary comprehensiveness, detail, and clarity of *Hit Man*'s instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction, the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and

chael Luttig, the panel agreed that the *Brandenburg* standard applied, but held that the First Amendment was not a bar to finding Paladin civilly liable as an aider and abetter of Perry's triple contract murder.[177] The appellate court held that the district court had misread *Brandenburg*[178] by failing to recognize that speech that "is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated . . . ."[179] The Fourth Circuit emphasized that Paladin's speech, because it was so detailed and methodical in its explanations and instructions on how to plan, commit, and cover-up the crime of murder, was not abstract speech and therefore received no First Amendment protection.[180]

Throughout the opinion, the court repeatedly cited the "astonishing" stipulations by Paladin that it knew criminals would use its publication.[181] In the court's opinion, these stipulations

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> teaching of murder, render this case unique in the law. In at least these circumstances, we are confident that the First Amendment does not erect the absolute bar to the imposition of civil liability for which Paladin Press and *amici* contend.

Id.

177. *See id.* at 255-65.

178. *See id.* at 264 ("[W]e cannot fault the district court for its confusion over the opinion in that case. The short *per curiam* opinion in *Brandenburg* is, by any measure, elliptical.").

179. *Id.* at 243. In support of this, the court looked to two Supreme Court decisions. In *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), the Supreme Court rejected "a First Amendment challenge to an injunction forbidding unionized distributors from picketing to force an illegal business arrangement." *Rice*, 128 F.3d at 243 (citing *Giboney*). The court next cited *Brown v. Hartlage*, 456 U.S. 45 (1982), as a recent example of the Supreme Court's decision not to allow a First Amendment defense simply because the illegal activity takes the form of words. *See Rice*, 128 F.3d at 243-44.

180. *See Rice*, 128 F.3d at 256 ("*Hit Man* is, pure and simple, a step-by-step murder manual, a training book for assassins."). The court further stated that:

> [T]he quintessential speech act of providing step-by-step instructions for murder . . . so comprehensive and detailed that it is as if the instructor were literally present with the would-be murderer not only in preparation and planning, but in the actual commission of, and follow-up to, the murder [has] not even a hint that the aid was provided in the form of speech that might constitute abstract advocacy.

Id. at 249.

181. *Id.* at 241-42 & n.2, 248, 252-53, 256, 266-67 (reviewing Paladin's stipulations that it intended and had knowledge that criminals would use *Hit Man* to commit murder and that it had engaged in a marketing strategy to attract and assist indi-

proved a level of intent readily satisfying the requirements of Maryland's civil aiding and abetting statute and the First Amendment.[182]

Applying a narrow line of criminal cases[183] holding that the First Amendment does not shield the defendants just because they used speech to commit crimes, the Fourth Circuit concluded that the First Amendment posed no bar to civil liability as well.[184] The court reviewed several cases involving tax protesters who not only urged violations of the Internal Revenue Code, but also helped people complete false returns.[185] It also noted a Ninth Circuit case in which the federal government successfully prosecuted the publisher of drug-manufacturing instructions for aiding and abetting, citing with approval the Ninth Circuit's holding that the First Amendment "does not provide publishers a defense as a matter of law to charges of aiding and abetting a crime. . . ."[186] Although the Fourth Circuit acknowledged that

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viduals in the pursuit of this information). Even without these stipulations, the court concluded that a reasonable jury could find that Paladin possessed the requisite intent under Maryland law as well as any heightened First Amendment standard. *See id.* at 248.

182. *See id.* at 250-65. The Fourth Circuit found that the manuals' only communicative value was the illegitimate one of training persons how to murder and to engage in the business of murder for hire. *See id.* at 262-63, 267.

183. *See, e.g.*, United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990) (holding *Brandenburg* inapplicable to a conviction for conspiring to transport and aiding and abetting the interstate transportation of wagering paraphernalia, where defendants disseminated a computer program that assisted others in recording and analyzing bets on sporting events because the program was "too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection"); United States v. Barnett, 667 F.2d 835, 842-43 (9th Cir. 1982) (holding that the First Amendment does not provide publishers a defense as a matter of law to charges of aiding and abetting a crime through the publication and distribution of instructions on how to make illegal drugs); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978) (holding that tax evasion speeches were not subject to *Brandenburg* because, although they did not "incite the type of imminent lawless activity referred to in criminal syndicalism cases," they did "go beyond mere advocacy of tax reform"). *But see* United States v. Freeman, 761 F.2d 549, 551-52 (9th Cir. 1985) (holding that general statements regarding the unfairness of tax laws, as opposed to teaching how to avoid tax laws, may constitute protected speech).

184. *See Rice*, 128 F.3d at 243-47.

185. *See id.* at 245-46 (citing United States v. Kelley, 769 F.2d 215, 217 (4th Cir. 1985) (holding that the First Amendment offered no protection to speech that was not abstract in its criticism of tax law, but instead urged people to file false tax returns, with the expectation that this advice would be heeded)).

186. *Id.* at 244 (citing United States v. Barnett, 667 F.2d 835 (9th Cir. 1982)). In

considerably less authority exists on the subject of whether the government may subject such speech to civil penalties or make it subject to private causes of action,[187] the court assumed that it could do so because the government could prosecute the same speech criminally without running afoul of the First Amendment.[188]

Barnett, the defendant was the publisher of an instruction manual on how to manufacture the illegal drug known as PCP. *See Barnett*, 667 F.2d at 838-39. Another person obtained the defendant's instruction manual and was caught in the act of manufacturing the illegal drugs. *See id.* at 838. The federal government prosecuted the defendant for aiding and abetting the manufacture of PCP. *See id.* at 837. The defendant argued that evidence seized at the crime scene should be suppressed because the defendant had a First Amendment right to print the manual. *See id.* The court explained that:

> To the extent, however, that Barnett appears to contend that he is immune from search or prosecution because he uses the printed word in encouraging and counseling others in the commission of a crime, we hold expressly that the First Amendment does not provide a defense as a matter of law to such conduct.

Id. at 843.

187. *Cf.* Cohen v. Cowles Media Co., 501 U.S. 663, 672 (1991) (finding, in a civil promissory estoppel case, that the First Amendment does not bar liability for a newspaper's publication of a confidential source's name); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559-60 (1985) (rejecting a First Amendment defense to a copyright infringement action against a magazine for unauthorized printing of presidential memoir excerpts); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 565-69 (1977) (holding that the First Amendment does not bar liability for the common law tort of unlawful appropriation of "right to publicity" where a television station broadcasted a "human cannonball" act in its entirety without plaintiff's authorization). *Compare* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (applying the same "actual malice" standard to both criminal libel prosecutions and private defamation actions), *with* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (requiring public officials to prove actual malice in civil defamation actions).

188. *See Rice*, 128 F.3d at 247. The court then identified two possible qualifications to this conclusion. *See id.* at 247-50. The first involved a "heightened intent requirement" to prevent the punishment or abolishment of innocent and lawfully useful speech. *Id.* at 247. The court determined that any such heightened intent requirement is satisfied by "those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment," that is, those with "specific intent." *Id.* at 248. The second qualification was that the First Amendment imposed similar limitations on the imposition of civil liability for abstract advocacy as it would for the imposition of criminal punishment for the same type of speech. *See id.* at 248-49. Because the court firmly believed that Paladin's speech was "so comprehensive and detailed" in its narration and instruction on murder that the speech could not be considered abstract advocacy under any set of facts, the question of qualifying the limits of liability simply was not presented. *Id.* at 249.

The Fourth Circuit's decision seems largely correct on the facts at bar; the First Amendment should not protect an intentional effort to facilitate a crime. For whatever reasons, Paladin's officers stipulated that this was their intent in publishing the two books at issue. Somewhat less convincing, however, is the court's attempt to fit *Brandenburg* to these facts. *Brandenburg*'s imminence requirement mandates difficult, almost theological, intellectual acrobatics in order to reach Harm Advocacy. It would make more sense to simply find *Brandenburg* inapplicable to the kind of speech activity at issue in *Rice*.

2. *Herceg v. Hustler Magazine, Inc.*

In *Herceg v. Hustler Magazine*,[189] the United States Court of Appeals for the Fifth Circuit held that a publisher could not be held civilly liable for materials that provide instructions on how to perform a dangerous sex act.[190] In *Herceg*, Diane Herceg sued *Hustler* magazine after her 14-year-old son, Troy, was found nude and hanging by his neck in a closet.[191] At his feet was a copy of the magazine opened to an article entitled *Orgasm of Death*.[192] The article described in detail the practice of autoerotic asphyxiation, which "entails masturbation while 'hanging' oneself in order to temporarily cut off the blood supply to the brain at the moment of orgasm."[193] Herceg claimed that the magazine induced her son to attempt the deadly technique, and she won a $182,000 jury award against *Hustler*.[194]

Reversing the judgment, the Fifth Circuit held that the *Hustler* article constituted protected speech under *Brandenburg*.[195]

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189. 814 F.2d 1017 (5th Cir. 1987).

190. *See id.* at 1021.

191. *See id.* at 1017.

192. *See id.* at 1019.

193. *Id.* at 1018. The article was part of an ongoing series exploring the pleasures and dangers of unusual sexual practices. *See id.* The purpose of the series was "to increase [readers'] sexual knowledge, to lessen [their] inhibitions and—ultimately—to make [them] much better lover[s]." *Id.*

194. *See id.* at 1019. The plaintiffs presented no evidence that *Hustler* wanted people to try this behavior. Also, no evidence existed that *Hustler* attempted to reach a 14-year-old audience.

195. *See id.* at 1021. The district court dismissed the plaintiffs' first complaint

The plaintiffs argued that the article went into unnecessary detail about how one accomplishes autoerotic asphyxiation.[196] Although the court, in an opinion written by Judge Alvin B. Rubin, found it conceivable that the amount of detail contained in the challenged speech might in some cases be relevant in determining whether incitement exists, the court found that the level of detail in this instance was insufficient to permit the imposition of liability consistent with the First Amendment.[197] The court expressed doubt that a magazine article that merely described a harmful act could ever constitute an incitement in the sense of being "directed to inciting or producing *imminent* lawless action and . . . *likely* to produce such action," the definition used by the Supreme Court in *Brandenburg*.[198]

The court held that under *Brandenburg*, the plaintiffs would have to prove that autoerotic asphyxiation is a lawless act, that the magazine advocated this act, that the article went beyond "mere advocacy" and amounted to incitement, and that the incitement was directed to imminent action.[199] The court noted

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alleging claims of strict liability and negligent publication, contending that the article was either an attractive nuisance for which *Hustler* magazine had a duty of social responsibility, or that the article was a dangerous instrumentality or a defective product. *See* Herceg v. Hustler Mag., Inc., 565 F. Supp. 802 (S.D. Tex. 1983), *rev'd*, 814 F.2d 1017 (5th Cir. 1987). The district court granted the plaintiffs leave to amend suggesting that an incitement theory might be maintainable. *See id.* at 1019. The case went to trial on an incitement theory, and the plaintiffs won. *See Herceg*, 814 F.2d at 1019. The court explained that "[t]he crucial element to lowering the first amendment shield [under an incitement theory] is the imminence of the threatened evil. . . . [N]o fair reading of [the article] can make its content advocacy, let alone incitement to engage in the practice." *Id.* at 1022-23. In addition, the court further noted that "[i]ncitement cases usually concern a state effort to punish the arousal of a crowd to commit a criminal action." *Id.* at 1023.

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

197. *See id.* Autoerotic asphyxiation is evidently not a complicated practice, observed the court, and the article included details of how, given human physiology, it is a threat to life and poses a serious danger of harm. *See id.*

198. *Id.* at 1022.

199. *See id.* The court found it unnecessary to reach the question of whether written material might ever be found to create culpable incitement unprotected by the First Amendment, but it observed generally that the constitutional protection accorded to the freedom of speech and of the press "is not based on the naive belief that speech can do no harm, but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas." *Id.* at 1019. Moreover, the court made note of the

that the extent of danger created by a publication is potentially relevant to determining the state's power to sanction the publisher for the harm that ensues, but explained that the First Amendment's protection of speech activity does not disappear simply because the publication of an idea creates a potential hazard.[200] According to the court, whether the magazine article in this case insinuated a dangerous idea into young Troy Herceg's head was but one factor in determining whether the state could impose damages for the consequences.[201] Judge Rubin explained that the danger posed by unclear or diminished standards of First Amendment protection might both inhibit the expression of protected ideas by other speakers and constrict the right of the public to receive those ideas.[202] Thus, under *Brandenburg,* the article enjoyed First Amendment protection.[203]

Despite the fact that the *Hustler* publication involved nonpolitical speech, the court was not persuaded to apply a less stringent standard than the *Brandenburg* test.[204] Although acknowledging that political speech is at the core of the First Amendment, according to two of the three judges on the panel, such an approach "would not only be hopelessly complicated but would

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editor's comments that warned readers of the "often-fatal dangers . . . of 'auto-erotic asphyxia,'" not to attempt it, and that the facts were being presented solely for educational purposes. *Id.* at 1018-19 (stating that the two-page article warned readers "at least ten different times" of the dangers incident to the practice).

200. *See id.* at 1020; *see also* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("Eloquence may set fire to reason.").

201. *See Herceg*, 814 F.2d at 1020.

202. *See id.*

203. At least arguably, the *Herceg* court failed to ask the correct question. It should have asked whether *Hustler* subjectively intended minors to engage in the described dangerous sexual practice. The answer plainly is no. *Hustler* may not even be legally sold to 14-year-olds. It is also doubtful that *Hustler* wishes to kill off its subscribers. The article is in poor taste and gross, but it is not Harm Advocacy. The *Rice* case is different in this regard. In depositions, Paladin agreed that it intended to bring about the harm at issue. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 241 (4th Cir. 1997). Although these cases involve completely different facts, the results in both cases are the socially correct result. However, both results reflect rather aggressive (and shameless) manipulations of the *Brandenburg* test.

204. *See Herceg*, 814 F.2d at 1024 (holding that because the imminence of the threatened harm serves as the crucial factor that justifies withholding First Amendment protection from speech, even if an article paints in glowing terms the pleasures supposedly achieved by autoerotic asphyxia, no fair reading of it would transform the speech into an incitement to action).

raise substantial concern that the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality."[205] Concerned about the potential problems with enforcing a vague standard, the court eschewed an approach that would determine, postpublication, "that an article discussing a dangerous idea negligently helped bring about a real injury" simply because the published "idea can be identified as bad."[206]

In a separate concurring opinion, Judge Edith Jones agreed with the panel majority's decision to reverse only because the plaintiffs did not appeal the district court's dismissal of their negligence claims.[207] Judge Jones characterized the *Hustler* article as pornography, bordering on obscenity, and, therefore, found no First Amendment barriers to a negligence claim.[208] Her analysis began with an examination of the publication.[209]

Disagreeing with the majority's characterization of the task at hand, Judge Jones argued that First Amendment analysis is an exercise in line drawing that requires judges to determine where specific speech falls in the hierarchy of First Amendment jurisprudence.[210] Even if the First Amendment generally protects

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205. *Id.*

206. *Id.* As Judge Alvin B. Rubin wrote for a divided panel:

> Under our Constitution, as the Supreme Court has reminded us "there is no such thing as a false idea. However, [sic] pernicious an opinion may seem we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. ". . . If the shield of the first amendment can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as "bad," all free speech becomes threatened. An article discussing the nature and danger of "crack" usage—or of hang-gliding—might lead to liability just as easily.

Id. at 1019, 1024 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974)).

207. *See id.* at 1025 (Jones, J., concurring and dissenting).

208. *See id.* at 1028.

209. *See id.* at 1026.

210. *See id.* at 1027. Judge Jones argued:

> First Amendment analysis is an exercise in line-drawing between the legitimate interests of society to regulate itself and the paramount necessity of encouraging the robust and uninhibited flow of debate which is the life-blood of government by the people. That some of the lines are blurred or irregular does not, however, prove the majority's proposition that it would be hopelessly complicated to delineate between protected and unprotected speech in this case.

speech activity, the government's interest in preventing the harm associated with the speech activity must be balanced against the free speech values at stake.[211] The second part of her analysis entailed an examination of the reasons for protecting the challenged speech under the First Amendment against the particular publisher's claim to unlimited constitutional protection.[212] Judge Jones noted that *Hustler* magazine constituted a commercial enterprise.[213] Therefore, she concluded that the im-

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Id.

211. *See id.* at 1027-29; *see also* Dennis v. United States, 183 F.2d 201, 212-14 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). Judge Jones suggested looking to defamation cases in which recovery of damages is permitted, under less than an actual malice standard, as "an analogous framework." *Herceg*, 814 F.2d at 1028 (Jones, J., concurring and dissenting). She cited *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985), in which the Supreme Court balanced the state interest in that case against the First Amendment interest at stake. *See Herceg*, 814 F.2d at 1028 (Jones, J., concurring and dissenting). For Judge Jones, speech must relate to a matter of public concern before it merits serious First Amendment protection and the test of content, form and context articulated in *Connick v. Myers*, 461 U.S. 138, 147-49 (1983), can be employed to determine whether the speech at issue is a matter of public concern. *See Herceg*, 814 F.2d at 1028 (Jones, J., concurring and dissenting). Although Judge Jones suggested that matters of private concern should not go unprotected, she notes that the Supreme Court in *Dun & Bradstreet* found that protecting such speech does not outweigh the achievement of important state interests. *See id.*

212. *See Herceg*, 814 F.2d at 1028-29 (Jones, J., concurring and dissenting).

213. *See id.* at 1028. Because commercial speech historically has received less protection than other forms of expressive activity, it may be subjected to a higher degree of government regulation. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455 (1978) ("We . . . have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."); Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1118-19 (11th Cir. 1992) (applying the commercial speech doctrine to sustain a wrongful death suit against *Soldier of Fortune* arising from an explicit gun for hire advertisement by a professional mercenary who promised discretion and privacy for "special jobs"); Norwood v. Soldier of Fortune Magazine, Inc., 651 F. Supp. 1397, 1400 (W.D. Ark. 1987) (applying the commercial speech doctrine and permitting a jury damage award because the plaintiff "is not attempting to have defendant enjoined from exercising its right to run advertisements" such as the one in question). The courts in these cases upheld actions for damages against *Soldier of Fortune* for deaths resulting from the magazine's "gun for hire" advertisements. The defendants in these cases tried unsuccessfully to use the First Amendment as a defense. In these cases, the defendants appeared to lose because the courts determined that the speech involved was commercial speech, which is afforded limited First Amendment protection. *See Braun*, 968 F.2d at 1117; *Norwood*, 651 F. Supp. at 1398. *But see* Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830, 835 (5th Cir. 1989) (holding that to impose

position of tort liability would have no chilling effect on *Hustler* so long as a market for such literature continues to exist.[214] In this way, Judge Jones likened *Hustler* magazine to commercial speech in which state regulation by means of tort recovery is appropriate when "tailored to specific harm and not broader than necessary to accomplish its purpose."[215]

The *Herceg* majority reached the correct result, but on the wrong theory. Extending *Brandenburg* to reach Harm Advocacy provides more protection than such speech merits under the First Amendment. If a publisher knowingly seeks to facilitate conduct that the legislature may constitutionally proscribe, the speech at issue should itself be proscribable. This is not because the greater power of prohibiting conduct also encompasses the lesser power of proscribing speech.[216] Rather, it is because speech that facilitates criminal conduct is itself proscribable—just as conspiracies and solicitations may be criminalized

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liability merely because an advertisement could reasonably be interpreted as an offer to engage in illegal activity would require a publisher the burdensome task of rejecting all ambiguous ads). Recently, the Supreme Court appears to have moved toward treating commercial speech similarly to other forms of protected speech. *See* Greater New Orleans Broad. Ass'n, Inc. v. United States, 119 S. Ct. 1923, 1930-35 (1999) (providing protection for gambling advertisements and noting that the government must demonstrate that the harms it seeks to prevent when regulating commercial speech are real and that its regulations will alleviate them to a material degree); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428-31 (1993) (striking down city's regulation of newsracks because it was not content neutral and did not qualify as a valid time, place and manner restriction of protected speech); *see also* William Van Alstyne, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 UCLA L. REV. 1635, 1640 (1996); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 651-52 (1990) (arguing for the same level of protection for all categories of speech). This Article does not argue for the application of the commercial speech doctrine to Harm Advocacy speech, and does not rely on these cases to support the regulation of Harm Advocacy speech.

214. *See Herceg*, 814 F.2d at 1029 (Jones, J., concurring and dissenting).

215. *Id.* (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)).

216. *Cf.* Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 346 (1986) (holding that the power to ban gambling includes the power to ban gambling advertisements). The Supreme Court has rejected this aspect of Chief Justice Rehnquist's opinion in *Posadas*. *See, e.g.*, Greater New Orleans Broad., 119 S. Ct. at 1929-30 (rejecting the *Posadas* analysis); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 508-11 (1996) (rejecting dictum in *Posadas* that the greater power of regulating conduct includes the "lower" power of regulating speech that promotes the conduct).

and punished, speech akin to a conspiracy or solicitation can be punished. Moreover, the proscription is not the product of antipathy toward the speaker's ideological motivations, but rather a prudent preventive measure to protect the public from harm.[217]

If the majority's opinion is overprotective of Harm Advocacy, Judge Jones's opinion reflects a rather severe disconnect with basic First Amendment principles. *Hustler* magazine is neither intended for nor legally distributed to fourteen-year-olds; as a general matter, the state may not reduce the adult population to material suitable only for children.[218] Also, the government may not attempt to police the boundaries of correct sexual attitudes.[219] In this regard, Judge Jones's personal antipathy for the source of the materials in question appears to have clouded her legal reasoning.[220]

Her application of the commercial speech doctrine is also problematic. Under her approach, the editorial pages of the *New York Times* and *Washington Post* would constitute commercial speech, a conclusion with little support in Supreme Court precedent.[221] Although the subjective intent of the speaker does seem

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217. For example, under the Harm Advocacy approach, it does not matter whether it is Mother Theresa's nuns who publish a manual on how to build bombs, the World Church of the Creator, or the Black Panthers. All would be responsible for actions taken as a result of their publication if the requisite intent and procedural burdens were met.

218. *See* Butler v. Michigan, 352 U.S. 380 (1957) (reversing the conviction of a man who attempted to sell a book to a police officer that was deemed to lead to the corruption of youth); *see also* Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 127-28 (1989) (explaining that adults' free speech rights may not be restricted to that which is appropriate for children); Pinkus v. United States, 436 U.S. 293, 297-98 (1978) (explaining that children are not to be included as part of the "community" to determine whether a work is obscene).

219. *See* Kingsley Int'l Pictures Corp. v. Regents of S.U.N.Y., 360 U.S. 684, 688-89 (1959) (rejecting the New York Education Department's denial of a license for the public exhibition of a film version of D.H. Lawrence's *Lady Chatterly's Lover*).

220. *See generally* Ronald J. Krotoszynski, Jr., Cohen v. California*: "Inconsequential" Cases and Larger Principles*, 74 TEX. L. REV. 1251, 1253-54 (1996) (explaining how judges sometimes allow their emotional reactions to the facts of a given case to affect adversely the quality of their legal reasoning); Jessalyn Hershinger, *Safety Restrictions on Violent Expression: The Impropriety of Extending Obscenity Analysis*, 46 VAND. L. REV. 473, 488 (1993) (arguing that the overriding question of the protection of a work alleged to be "obscene" depends on who defines obscenity).

221. *See* Bolger v. Young Drugs Prods. Corp., 463 U.S. 60, 64-69 (1983) (explaining that the mere fact that informational pamphlets are mailed by a commercial enter-

to drive close questions on whether to characterize speech as "commercial" or "noncommercial," the article at issue in *Herceg* does not present a difficult question on this score. Moreover, even if the article does constitute commercial speech, it still enjoys substantial First Amendment protection.[222] In sum, Judge Jones's concurrence is a bizarre piece of work that adds little insight into addressing the problem of Harm Advocacy, beyond perhaps demonstrating the potential dangers and pitfalls associated with ad hoc adjudication of free speech claims.[223]

III. THE DANGERS AND THE INADEQUACY OF THE *BRANDENBURG* TEST AS APPLIED TO HARM ADVOCACY

Recent events have underscored the need to develop a new approach to speech that advocates harm to others. Investigators in the Oklahoma City bombing prosecution discovered that one of the bombers, Timothy McVeigh, had a "how to" book by Paladin as well as *The Turner Diaries* in his possession.[224] Earlier this year, a federal jury found that the operators of a web site that threatened physical harm to many abortion providers and listed their names and addresses was liable under the Free Access to Clinic Entrances Act (FACE).[225] Moreover, the Anti-

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prise does not automatically make them commercial speech, but finding that, in context, the particular pamphlets at issue constituted commercial speech because the sender intended to induce sales of its contraceptive products and also included promotional materials for its products with the informational pamphlets); *see also* Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 1996 DUKE L.J. 1193, 1211-32 (explaining the importance of context, including the speaker's subjective intent, in determining whether particular speech is commercial or noncommercial in nature).

222. *See* Greater New Orleans Broad. Ass'n v. United States, 119 S. Ct. 1923, 1930-35 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 495-97 (1996).

223. At least one commentator, however, sees Judge Jones's ad hoc adjudication of Harm Advocacy speech claims as preferable to the almost absolute protection provided by the *Brandenburg* test. *See* Terri R. Day, *Publications that Incite, Solicit or Instruct: Publisher Responsibility or Caveat Emptor?*, 36 SANTA CLARA L. REV. 73, 85-86 (1995) (arguing that courts should apply a balancing test when speech falls outside of defined categories and noting approval for Judge Jones's dissent in the *Herceg* case).

224. *See* James Bone, *Murder Manual Firm Pays Out*, TIMES (London), May 25, 1999, at 11 (discussing Timothy McVeigh's ownership of a Paladin bomb-making book).

225. *See* Planned Parenthood v. American Coalition of Life Activists, 41 F. Supp.

Defamation League and the Southern Poverty Law Center have noted a marked increase in hate groups on the internet calling for violent revolution against the government and advocating physical violence against the members of various minority groups.[226]

2d 1130, 1154-56 (D. Or. 1999) (granting an injunction under FACE prohibiting the publication of defendant's website and posters with the intent to threaten the abortion providers and declaring that the court "totally reject[s] the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech in order to dissuade the plaintiffs from providing abortion services"). In the Racketeer Influenced and Corrupt Practices (RICO) claim, Planned Parenthood and four doctors who perform abortions brought suit against 14 individuals and 2 organizations alleging that they had threatened abortion providers through a series of posters and a website, "the Nuremberg files." *See id.* at 1131-33. One of the posters lists by name a "Deadly Dozen" of doctors and highlights an indictment from the Nuremberg Trials declaring the Nazis who forced abortions on East European and Jewish women were war criminals. *See id.* at 1131-32. On the website, the antiabortion organization had a wanted list of 225 doctors and abortion supporters, providing their addresses, photos, license plate numbers, and, in at least one case, the names of their children and the schools they attend. *See id.* at 1132-33. Doctors who have been killed by alleged pro-lifers were crossed off of the wanted list. *See id.* at 1133. Those who merely were wounded were shaded in gray. *See id.* On February 2 1999, a federal jury awarded Planned Parenthood, and the other plaintiffs $109 million in damages. *See* James C. Goodale, *Can Planned Parenthood Silence a Pro Life Website?*, N.Y.L.J., Apr. 2, 1999, at 3. Appealing the verdict, the defendants claimed that they were protected by the First Amendment because they made no explicit threats. *See* Richard Raysman & Peter Brown, *Extreme Speech on the Internet*, N.Y.L.J., June 8, 1999, at 3. For an overview of the verdict and the surrounding controversy, see Goodale, *supra*, at 3 (discussing the potential harm to the media resulting from the verdict in the Nuremberg Files case); Roxanne Guillory, *Abortion Rights Supporters Challenge Opponents' Dangerous, Deadly Tactics*, NATIONAL NOW TIMES, Apr. 1, 1999, *available in* 1999 WL 16986169 (presenting the arguments for restricting the anti-abortion speech against the abortion providers).

226. *See* SOUTHERN POVERTY LAW CENTER, YOUTH AT THE EDGE (2000) (discussing the inroads that organized hate groups are making among white youth in economically depressed communities); ANTI-DEFAMATION LEAGUE, EXPLOSION OF HATE: THE GROWING DANGER OF THE NATIONAL ALLIANCE (1988) (reporting on growth of hate groups in the United States and on their increasing use of the internet to attract followers); *Hate Groups on the Rise; Internet Major Factor, Research Finds*, JET, Mar. 22, 1999, at 19, *available in* 1999 WL 9747422 (reporting the statement of Mark Potok of the Southern Poverty Law Center that "[t]he Internet is allowing the White supremacy movement to reach places it has never reached before—middle and upper middle class, college-bound teens"); Raymond W. Smith, *Civility Without Censorship: The Ethics of the Internet—Cyberhate*, 65 VITAL SPEECHES 196 (Jan. 15, 1999) (reporting the statement of the chairman of Bell Atlantic that civil rights groups need to think of new ways to meet the increasing threat from cyberhate on the internet); *We Love the Net, But We Hate You*, NEW MEDIA AGE, July 1, 1999, at 17 (discussing

In response to the threat from hate groups and the easily accessible material providing directions on how to commit various violent acts, some politicians and commentators have called for government censorship of such speech. The Department of Justice, concerned about the proliferation of bomb-making instructions on the internet, filed a brief in support of the plaintiffs in the *Rice* case, arguing that *Brandenburg* should not apply to protect this speech, and that even if it does, "imminent," as used in *Brandenburg*, does not really mean "imminent."[227] Moreover, Representative Henry Hyde, Chairman of the House Judiciary Committee, proposed "The Child Safety and Youth Violence Prevention Act of 1999" that recommended banning "obscenely violent materials to minors."[228] In addition, a Louisi-

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recent report by the Anti-Defamation League stating that hate groups are stepping up their use of the internet to target young recruits).

227. DEPARTMENT OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION 26 (1997) (Feb. 10, 2000) <http://www.usdog.gov/criminal/cybercrime/bombmakinginfo.html> ("[W]here it is foreseeable that the publication will be used for criminal purposes; . . . the *Brandenburg* requirement that the facilitated crime be imminent should be of little, if any, relevance."). The Department's position is somewhat bewildering: If "imminent" does not have a strong temporal connotation, one is hard pressed to make sense of the *Brandenburg* opinion—or, for that matter, subsequent opinions such as *Hess* and *Claiborne*. One commonly cited dictionary defines "imminent" as meaning "likely to happen without delay," "impending," and "threatening." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 909 (2d 1983). The Department's position—not unlike the *Rice* opinion itself—ignores the core meaning of "imminent" in order to find the *Brandenburg* test satisfied. The problem with this approach is that watering down or eliminating the imminence requirement opens the door to a "bad tendency" interpretation of the clear and present danger test—an approach that sanctions relatively broad censorship of unpopular political minorities. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951).

228. H.R. 2037, 106th Cong. (1999) (prohibiting the sale of "extremely sexual or violent material that is not protected by the First Amendment" to minors and imposing felony investigations and possible jail terms on retailers of such material if they sold, loaned, or exhibited sexually explicit or violent material to minors); *see also* Bill Holland, *House Defeats Cultural Legislation*, BILLBOARD, June 26, 1999, *available in* 1999 WL 10040337 (noting the defeat of Representative Hyde's proposal and discussing the other statutes still pending to regulate violence on the internet, television, and movies); Robert MacMillan, *Sen. Hatch Joins Anti-Online Violence Crusade*, NEWSBYTES, May 5, 1999, *available in* 1999 WL 5122026 (discussing proposals by Senator Hatch to implement more safeguards to protect children from damaging thoughts and images in popular media, particularly those received over the internet); Eric Pianin & Juliet Eilperin, *House GOP to Split Bill on Violence: Tactic May Weaken Gun Curbs, Allow Focus on Hollywood*, WASH. POST, June 15, 1999, at A1

ana appellate court recently applied the *Rice* holding to a case involving the movie *Natural Born Killers* and permitted the case to proceed over the defendant's motion to dismiss.[229]

Federal courts' current application of the *Brandenburg* test to speech that advocates harm does not strike the proper balance when the speech at issue advocates lawless behavior in a manner that does not necessarily cause any imminent danger, but nevertheless poses a grave risk of directly facilitating grossly antisocial behavior.[230] For example, in *Rice*, the Fourth Circuit had to engage in severe manipulations of the *Brandenburg* test to establish liability for books that clearly are far removed from the type of speech at issue in *Brandenburg*.[231] The *Rice* court did

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(discussing the Hyde Amendment to the Juvenile Crime Bill, which proposed tough new restrictions on the entertainment industry as a method to control the new wave of violence among school-aged children and prevent their access to sexual and violent materials). For a further discussion of the similarity between obscenity and violence, see KEVIN SAUNDERS, VIOLENCE AS OBSCENITY (1999) (arguing that violence is at least as obscene as sex and therefore should face similar prohibitions). A recent article shows just how easily bomb-making materials can be located on the internet. *See* Cheryl White, *My Son Built a Bomb*, LADIES HOME J., Mar. 1, 1997, at 36 (discussing a son's access to an internet site concerning how to build a bomb and his resulting injuries after he attempted to build and detonate it).

229. *See* Byers v. Edmondson, 712 So. 2d 681 (La. Ct. App. 1998) (holding that the victims of a convenience store shooting could sue the producers of the film *Natural Born Killers*, including Warner Brothers and Oliver Stone, on the grounds that the perpetrators of the shooting had gone on a crime and shooting spree after seeing the movie). The suit alleged that the producer of the film knew and intended that the film would inspire persons to engage in such crimes and violence. *See id.* at 684-85. The film's producers sought to have the case dismissed on First Amendment grounds citing the many "copycat" cases in which television and film producers had successfully defeated such suits. *See id.* at 686-87. The appellate court, however, held the suit could go forward because the plaintiffs alleged that the producer knew and intended that the conduct depicted in the movie would be emulated. *See id.* at 687-88. The Louisiana court relied heavily on *Rice* as authority for its ruling. *See id.* at 690-92.

230. A "how to" guide might not motivate a person to commit a crime, unlike a fiery speech (e.g., "on to the Bastile!"). Properly understood, *Brandenburg*'s imminence requirement relates to the probable persuasiveness of the speech. Harm Advocacy, on the other hand, is not necessarily meant to persuade, it is meant to assist or facilitate. The temporal relationship between the distributor of Harm Advocacy and harm occurring could be quite attenuated. If courts continue to apply *Brandenburg* to Harm Advocacy, they either will have to manipulate the imminence requirement or find the speech protected. The former presents an unacceptable risk to unpopular political speech that includes abstract calls to arms, the latter imposes unduly high costs on the victims of Harm Advocacy.

231. *See* Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 844-48 (D. Md. 1996),

not even try, and possibly could not, explain how a book purchased and read more than one year prior to the date when a reader followed its instructions could be viewed as inciting "imminent" lawless action.[232] Because the *Brandenburg* test was stretched in this manner, publishers and authors now fear that federal courts have opened the floodgates of liability for works of fiction.[233] Moreover, hyperbolic political speech also seems to be in danger of losing its protected status.

Clearly, such misapplication of the *Brandenburg* test undermines the protection the First Amendment should provide to abstract political speech and could easily chill artistic and literary speech. Yet, the imposition of liability on the facts at issue in *Rice* seems appropriate because "society's interest in compensating injured parties [and] the freedom of speech guaranteed by the First Amendment"[234] should not be incompatible goals.

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rev'd, 128 F.3d 233 (4th Cir. 1997).

232. To satisfy the "imminence" element of the *Brandenburg* test, one must show that speech causes (or incites) an unthinking, immediate, and lawless action. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam). Only in these situations is the government permitted to regulate incitement to illegal action because few other options are available to prevent the lawless action, as there is no time for reasoned debate. Professor Martin Redish has lodged an interesting and salient objection to the imminence requirement:

> My theoretical objection to the *Brandenburg*-style "imminence" requirement is that it harks back to the "marketplace of ideas" rationale for protecting unlawful advocacy. For it assumed that so long as there is sufficient time for rebuttal and reasoned consideration, we can rest assured that "truth" will best "falsity." Only when danger is so "imminent" that there is not time for response and discussion should suppression be upheld. As noted above, however, there is simply no basis for the conclusion that the opportunity for reasoned response will always defuse unlawful advocacy. Requiring imminence in every case in the belief that if it is not present the advocacy will never lead to harm is theoretically unjustifiable.

Redish, *supra* note 60, at 1181. For a further critique of the *Brandenburg* imminence requirement as applied to "how to" manuals, see GREENAWALT, *supra* note 20, at 115.

233. *See* David G. Savage, *Did Hired Killer Go by the Book?*, L.A. TIMES, May 7, 1997, at A1 (explaining the impact of the "Hit Man" case on all forms of media, including authors of murder-mysteries).

234. *Rice*, 940 F. Supp. at 840. On May 21, 1999, the *Rice* case settled. Paladin's insurance company agreed to a multimillion dollar compensation payment to the families. *See* Calvin Reid, *Paladin Press Pays Millions to Settle "Hit Man" Case*, PUB. WKLY, May 31, 1999, at 22, *available in* LEXIS News Group File, All. Paladin

The *Herceg* court's reasoning is similarly unsatisfactory. The Fifth Circuit correctly held that, under the *Brandenburg* test, *Hustler* could not be held liable for the actions of an unforeseen, unsolicited minor copycat. The court's failure to examine the content of the specific speech involved, however, led it to embrace a potentially overprotective standard for Harm Advocacy. Government regulation of the narrow category of speech that concerns detailed instructions on how to commit criminal or tortious acts ought to be considered presumptively constitutional. Like other "well-defined and narrowly limited classes of speech"[235] that are not accorded First Amendment protection, such as obscenity and incitement to imminent lawless action,[236] this category of speech only minimally implicates the values at the heart of the First Amendment.

Because Harm Advocacy speech usually consists of highly technical instructional details, it has little, if any, expressive value, and because it not only advocates, but also directly facilitates the commission of crimes and intentional torts, it has little if any, politically or socially redeeming value. As a category of speech, therefore, it is particularly dangerous and not particularly valuable. More importantly, like other categories of unprotected speech, this category is likely to result in severe harms to innocent third parties.[237] The state clearly has a very strong interest

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also agreed to take the *Hit Man* book off the market. *See* SMOLLA, *supra* note 162, at 272.

235. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (upholding a zoning ordinance regulating the location of adult movie theaters, and endorsing the principle that "it is manifest that society's interest in protecting [non-obscene, sexually explicit speech] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . "); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (upholding a conviction for uttering "fighting words" to a law enforcement officer); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) ("[T]his Court has 'long recognized that not all speech is of equal First Amendment importance.'"); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 49 (1986) (upholding a zoning ordinance similar to that in *Young*); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 246-49 (1982) (noting that the Court has never embraced a rule of absolute content neutrality because that would deny the government the power to distinguish speech falling within the ambit of the First Amendment from that falling without).

236. *See Brandenburg*, 395 U.S. at 448-49 (permitting government regulation of speech directed at inciting imminent violence and likely to produce such violence).

237. *See* Redish, *supra* note 60, at 1176 ("If a speaker so intends, advocacy which

in safeguarding the lives of its citizens.[238] In the general calculus of competing interests, the government's interest in protecting the lives and limbs of its citizens outweighs whatever slight social value inheres in such speech. Additionally, the risk that the government will suppress unpopular viewpoints or cultural minorities is, at best, remote.

IV. TOWARDS A THEORY OF CIVIL LIABILITY FOR HARM ADVOCACY

A. The Need for a New Exception for Harm Advocacy

To better balance society's interest in protecting its citizens from criminal activities, federal courts should create a new category of speech falling outside the protection of the Free Speech Clause.[239] This speech category would encompass the narrow

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does not 'directly' urge unlawful conduct may nevertheless be 'directed' to bringing about such conduct."). *But see* Hess v. Indiana, 414 U.S. 105, 111 (1973) (holding that "[w]e'll take the fucking street later" is not advocating imminent lawlessness because action on the suggestion would probably not occur for an indefinite period of time and might never occur).

238. *See, e.g.*, Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979) (noting that the state may not punish publication of lawfully obtained truthful information "absent a need to further a state interest of the highest order"); Branzburg v. Hayes, 408 U.S. 665, 700 (1972) (noting that the government has a compelling interest in securing the safety of the persons and property of citizens); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1028-29 (5th Cir. 1987) (Jones, J., concurring and dissenting) ("The interest in protecting life is recognized specifically for first amendment purposes and, analytically, can be no less important than the interest in reputation. . . . [P]rotect[ing] society from loss of life and limb, [is] a legitimate, indeed compelling, state interest.").

239. *See* Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 739 (suggesting that any "approach to criminal prohibitions that gives adequate protection to speech must be categorical" (citing Melville B. Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 939-42 (1968))). Professor Greenawalt suggests categorizing speech by the type of utterance: "ordinary expressions of fact and value" warranting a high level of protection, "utterances that are strongly situation altering, which are unprotected; and action-inducing encouragements" warranting an intermediate level of protection. *Id.* at 741. The level of protection afforded the speech varies with the type of utterance, whether it was said in public or private, and whether it is ideological. *See id.* at 741. As Professor Greenawalt recognizes, however, some purely factual utterances are worth regulating, such as speech concerning how to make a bomb or the location of troops. *See id.*; *see also* David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the*

spectrum of expression that both advocates and facilitates illegal or tortious activities against others: Harm Advocacy speech. To establish that speech activity constitutes Harm Advocacy, the plaintiff would need to show that the author of the speech either knew or acted with reckless disregard as to whether recipients of the speech might act on that author's detailed suggestions on how to commit a particular unlawful or tortious act and that the speech at issue actually caused or was a substantial factor in the commission of a criminal act or intentional tort.[240] Additionally, courts should require a reasonably protective evidentiary standard of proof for establishing the intent of the author, that is a would-be plaintiff should be required to meet a clear and convincing evidence burden of proof; a lesser evidentiary standard would have an unduly chilling effect on authors and musicians. Thus, a would-be plaintiff not only must establish foreknowledge of the potential for the speech to cause harm, but must do so convincingly. Authors and musicians should receive more than a mere benefit of the doubt. If an injured would-be plaintiff can meet the necessary intent, causation, and evidentiary requirements, then her tort action could proceed through the court system.

Restricting Harm Advocacy speech still might implicate certain First Amendment values like speaker and listener autonomy,

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Brandenburg *Test*, 29 GA. L. REV. 1, 48 (1994) ("It was precisely because *Brandenburg* used the 'categorical' or 'unprotected utterance' approach that it improved protection for the freedom of speech over the excessively loose balancing in cases such as *Dennis*." (footnote omitted)); Frederick Schauer, *Mrs. Palsgraf and the First Amendment*, 47 WASH. & LEE L. REV. 161, 164-66 (1990) [hereinafter Schauer, *Mrs. Palsgraf*] (arguing that instructional speech falls outside the First Amendment protections). *See generally* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 307 (1981) (recognizing that until "judges, prosecutors, and legislators become familiar with the full import and complexity of first amendment theory, ... general categories are the most important way we have of incorporating the constitutionally mandated preference for free speech values into a legal system populated by human beings of less than perfect ability and less than perfect insight").

240. This standard is quite similar to the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). Just as the author of false speech should be taxed with its costs when she knows of its falsity, or acts with reckless indifference to its falsity, so too an author who knows or should know that particular speech will facilitate or assist in the commission of a criminal act should be responsible for damage associated with those putting the information to its intended purpose.

but the state's interest in protecting the lives of citizens outweighs whatever value inheres in permitting access to detailed information about criminal methods.[241] The adoption of this new category would implicate none of the major concerns of *Brandenburg* and its progeny. Moreover, little danger exists that the state's invocation of harm or lawlessness would be a pretext for quashing political dissent. As with the imminence standard in *Brandenburg*, this category would require that the government's reason for restricting speech activity actually relate to protecting citizens from real—not imagined—harms, and not the suppression of open and robust public debate.

Harm Advocacy simply constitutes speech once-removed from a crime.[242] For example, suppose that an unscrupulous person called elderly persons seeking to sell them time-share arrangements in Florida, but misrepresented material terms and conditions such that the solicitation constituted criminal fraud.[243] Conveying the fraudulent offer entails speech activity, but no serious person would suggest that the fraud enjoys protection under the Free Speech Clause merely because speech is a necessary component of the crime.[244]

Now, suppose that an expert scam artist, tiring of doing his own dirty work, pens a monograph entitled *How to Scam the*

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241. *See, e.g.*, GREENAWALT, *supra* note 20, at 115 (arguing that "considerations of autonomy matter, and the autonomy of speaker and of audience are reasons to permit encouragement to crime, but they are reasons to be considered in relation to other reasons, not absolutely decisive counters in favor of liberty"). *But see* Shaman, *supra* note 71, at 299-300, 340-41 (arguing that speech should be regulated based on the harm that it causes, not because of its value to society).

242. For example, the *Restatement (Second) of Torts*, under a concert of action principle, recognizes a doctrine similar to criminal aiding and abetting. *See* RESTATEMENT (SECOND) OF TORTS § 876 (1977). An actor is liable for harm resulting to a third person from the tortious conduct of another "if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other . . . " *Id.* § 876(b). The concept of tortious aiding and abetting has arisen frequently in the evaluation of secondary liability for securities law violations, principally in the area of fraud. *See* Greenawalt, *supra* note 239, at 655-56; Theresa J. Pulley Radwan, *How Imminent Is Imminent?: The Imminent Danger Test Applied to Murder Manuals*, 8 SETON HALL CONST. L.J. 47, 60-64 (1997) (arguing that although publishers cannot be held criminally liable, they should be held civilly liable based on their intent).

243. *See* 18 U.S.C.A. § 2326 (Supp. 1999) (telemarketing fraud statute).

244. *See supra* notes 139-43 and accompanying text (discussing criminal liability based on speech activities); *see also* GREENAWALT, *supra* note 20, at 115.

Elderly for Fun And Profit. The book does nothing more than provide detailed directions for operating a telemarketing scam targeting vulnerable elderly persons, and provides a convenient appendix giving a list of communities with high concentrations of potential victims. The author of such a tome does not intend to participate directly in the commission of the crime, but does intend to facilitate or assist in the commission of fraud by others and the book, properly deployed, could constitute a substantial factor in causing someone to be defrauded. The author undoubtedly would claim that the book constitutes protected speech, but such a claim is meritless. In First Amendment terms, the book, taken as a whole, contributes nothing of value to the marketplace of ideas; the book does not possess any serious redeeming political, literary, scientific, economic, or philosophical value. It neither facilitates democratic deliberation, nor informs consumers about lawful products or services. *The book is, quite simply, utterly without any social value.* Under these circumstances, it is difficult to see why the state should be constitutionally powerless to suppress such speech, for suppressing such speech would not bring about any of the harms that the Free Speech Clause of the First Amendment seeks to forestall.[245]

Brandenburg is not an appropriate vehicle for analyzing Harm Advocacy because *Brandenburg* arises on facts involving core political speech.[246] The First Amendment protects political advocacy most strongly, for such advocacy lies at the center of the free speech guarantee.[247] Moreover, the speech at issue in *Brandenburg* does not constitute Harm Advocacy. To be sure,

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245. *See* Boos v. Barry, 485 U.S. 312, 318 (1988) (holding that the central importance of the First Amendment is to protect "speech on public issues"); Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring) (arguing that free speech is necessary to ensure governmental accountability to the people, and that it is protected by the First Amendment to prohibit government tyranny); G. Sidney Buchanan, *Toward a Unified Theory of Governmental Power to Regulate Protected Speech*, 18 CONN. L. REV. 531, 533 (1986) (stating that speech on public issues is "at the core of protected speech").

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

247. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982) (holding that speech protesting racial discrimination constitutes political speech lying at the core of the First Amendment); Carey v. Brown, 447 U.S. 455, 467 (1980) (holding that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values"); *supra* notes 30-33 and accompanying text.

the Klan wished ill-will towards certain members of the community and advocated a radical program of state-imposed apartheid.[248] The speakers even made generalized threats against those whom they despised ("revengeance").[249] The speakers did not provide any direction on how to go about committing assault or murder; nothing in the speech at issue would facilitate directly the commission of a social harm that the legislature has the power to prohibit.[250] In such circumstances, speech can be regulated only when the generalized threats and calls to action are likely to bring about an immediate breach of the peace; in other words, to persuade listeners to act immediately and unlawfully.[251] Harm Advocacy does not refer to speech merely advocating harm to others or speech that attempts to persuade an audience that harm to others is desirable in the abstract; rather, it refers to speech that directly facilitates harm to others.

For example, Harm Advocacy speech would not include speech that abstractly advocates ideas that some would view as harmful, for instance, Theodore Kaczynski's "Tract Against Modernity."[252] In this essay, the author sets forth a theoretical commitment to revolution against modern technology. If people read his tract and determine that he is correct and resolve to take up Old Order Amish existences,[253] some might view this outcome as harmful to society because of the resulting loss of efficiency and productivity. Nevertheless, the First Amendment's Free Speech

248. *See Brandenburg*, 395 U.S. at 445-57.

249. *See id.* at 446.

250. *See* SMOLLA, *supra* note 162, at 131 ("If in *Brandenburg* itself the record had demonstrated that the leaders of the Ku Klux Klan rally did more than burn crosses and spout racist venom, but actually distributed material such as maps, diagrams, chemical formulas for bombs, travel arrangements, instruction on weapons selection, and specific killing techniques surely that would have crossed the line from mere abstract advocacy to specific training and preparation.").

251. *See* Hess v. Indiana, 414 U.S. 105, 107-08 (1973) (per curiam) (holding that the statement "[w]e'll take the fucking street later," is *not* an incitement to imminent lawlessness because "it amounted to nothing more that advocacy of illegal action" at some indefinite time in the future).

252. *See Unabomber's Manifesto* (visited Mar. 2, 2000) <http://www.soci.niu.edu/~critcrim/uni/uni.txt>; *see also* Frank Bruni, *With a Family Discovery, a Manhunt Comes to an End*, N.Y. TIMES, Apr. 4, 1995, at B1 (identifying Theodore Kaczynski as the Unabomber, an individual who had mailed bombs to individuals engaged in high tech employment and who mysteriously evaded law enforcement officials for decades).

253. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

Clause clearly protects such speech.[254] Political advocacy might lead to disruptive change: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community," the First Amendment requires "that they should be given their chance and have their way."[255] "Eloquence may set fire to reason"[256] and the nation might go astray. The First Amendment requires the community to bear the cost of political change, including speech activity essential to the process of democratic deliberation.

On the other hand, if Theodore Kaczynski instead were to publish a book providing specific instructions on how to make small bombs and plant them anonymously, and someone followed his instructions and injured another person, the speech would be quite different in nature and the government should be able to deter it through tort law. This speech arguably constitutes Harm Advocacy speech, rather than political speech. It is speech that both advocates and facilitates social harms, that is, solicitation of illegal acts that cause physical harm to others, the author intends that his work serve such a purpose, and the work could serve as a substantial factor in causing such harm. On the other hand, democratic deliberation does not benefit from a pamphlet about how to build bombs. The absence of rules has led to the underdeterrence of Harm Advocacy, a situation that cries out for change.

Harm Advocacy is akin to a loaded gun or a bottle of poison.[257] It is malum in se, bad in itself. This is not a function of its ideological or social content, but rather stems from its relationship

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254. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 508 (1969) (holding that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression").

255. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

256. *Id.* (Holmes, J., dissenting).

257. *See* SMOLLA, *supra* note 162, at 39. One of the plaintiff's lawyers in *Rice v. Paladin Enterprises, Inc.*, described his reaction to reading *Hit Man* as follows:

> I didn't even want to *touch* the damn book. I couldn't leave it on the night table—I had to take it back to my office in the house and lock it in my briefcase. It didn't even seem like it was a book at all, really. It was more like someone had sent me a loaded pistol, or a vial of poison. The physical *thing* had a stench of evil to it.

Id.

to a social harm that the legislature has the constitutional authority to prevent or punish. Speech that does nothing more than facilitate a socially harmful act should not enjoy any First Amendment protection.[258]

Just as obscene speech is "outside" the free speech guarantee of the First Amendment, so too Harm Advocacy stands outside the realm of protected speech.[259] Simply put, there is no reason to impose the cost of such speech on the general public given the utter lack of any countervailing social benefit. This is the calculus that underlies the Supreme Court's refusal to afford obscenity or child pornography First Amendment protection.[260] The same rationale should apply to the category of speech denominated as Harm Advocacy.

B. The Limited Nature of Harm Advocacy Doctrine

It bears noting that Harm Advocacy is a very limited subset of speech activity.[261] It should not encompass any work that, taken as a whole, possesses serious artistic, literary, scientific, political, or philosophical value. Moreover, it should not encompass speech activity that the author does not intend to facilitate social harm or which, objectively analyzed, could not realistically be viewed as a substantial factor in causing harm.[262] Because of

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258. Of course, the legislature could not pick or choose from among the motivations that lead a speaker to engage in Harm Advocacy. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 388-96 (1992). That said, a general law proscribing Harm Advocacy should not be deemed constitutionally infirm.

259. *See supra* notes 234-36 and accompanying text.

260. *See R.A.V.*, 505 U.S. at 383-86.

261. In *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), the Fourth Circuit noted that its holding should not worry other publishers because,

> In only the rarest case, as here where the publisher has stipulated in almost taunting defiance that it intended to assist murderers and other criminals, will there be evidence extraneous to the speech itself that would support a finding of the requisite intent.

Id. at 265. The court further explained "surely few will, as Paladin has, 'stand up and proclaim to the world that because they are publishers they have a unique constitutional right to aid and abet murder.'" *Id.* at 265-66. *But see* Byers v. Edmondson, 712 So. 2d 681 (La. App. 1998) (holding that victims of a convenience store shooting could sue the producers of *Natural Born Killers*, including Warner Brothers and Oliver Stone).

262. *See supra* notes 239-60 and accompanying text.

the potential chilling effect that recognition of Harm Advocacy as a subcategory of speech activity might have on legitimate speech activity—just as obscenity undoubtedly chills certain forms of erotic speech—the burden should be on the government, or plaintiff,[263] to establish that particular speech activity constitutes Harm Advocacy, including both objective evidence of the subjective intent of the author[264] and proof of causation.[265]

The author of a book constituting Harm Advocacy might argue that it assists law enforcement in identifying the modus operandi of a thief; a "how to" manual might have some value for law enforcement, much as a guide to magic demonstrates how to accomplish a particular illusion through smoke and mirrors. This argument is not utterly without merit, but it seems inconsistent with the Supreme Court's approach to both obscenity and child pornography. That some hypothesized social benefit might be associated with otherwise harmful speech is not usually a sufficient condition to render the speech protected, particularly when the speech activity directly caused obvious social harms.

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263. Under *Sullivan* and its progeny, the Supreme Court has required that libel law conform to the constitutional requirements of free speech by increasing the liability standards and by shifting the burdens of proof and the presumptions from the defendants to the plaintiffs. *See, e.g.*, Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986) (shifting the burden of proving falsity on matter of public concern in speech cases involving private figures from defendant to the plaintiff); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (requiring a public official to demonstrate that a defendant acted with "actual malice" in order to recover damages for a defamatory falsehood related to the official's duties). Likewise, under a Harm Advocacy approach, once the plaintiff presented a tort claim, the defendant would assert a First Amendment defense, at which point the plaintiff would be required to bear the burden of proof to show that the defendant published its article, book or movie with the purpose or knowledge that it would harm others. For a fuller discussion of the intent requirement under Harm Advocacy, see *infra* notes 273-83 and accompanying text.

264. Subjective intent is no stranger to the law. Criminal laws require prosecutors to establish the element of subjective intent all the time, the crime of murder in the first degree being perhaps the most obvious. The intent of the defendant is also significant in tax law. The fact that intent may be difficult to prove does not preclude its inclusion in the creation of a new subcategory of unprotected speech activity. In the First Amendment area, "pandering" cases already rely on subjective intent, as do commercial speech cases. *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983); Ginzburg v. United States, 383 U.S. 463 (1966).

265. *See infra* notes 284-96 and accompanying text.

Thus, although it might be the case that married couples might learn a new trick or two from an obscene film, this potential pedagogic value does not remove the film from the unprotected status of obscenity; that nude depictions of children might have artistic merit or scientific value does not lead to First Amendment protection.[266] Speech is not protected simply because it is speech. Rather, speech is protected because it furthers, in some articulable way, the underlying objectives of the First Amendment.[267] As defined in this Article, Harm Advocacy does not merit protection because it does not serve any meaningful First Amendment values.[268]

C. The Importance and Nature of Intent in Limiting the Scope of Harm Advocacy

Some might object that the recognition of Harm Advocacy would unduly chill speech or lead down a slippery slope to generalized programs of government censorship.[269] The element of intent should forestall this parade of horribles. Indeed, recognition of Harm Advocacy should actually *increase* the universe of protected speech and would eliminate the uncertainty currently inherent in post-*Rice* law.

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266. *See* New York v. Ferber, 458 U.S. 747, 778 (1982) (Stevens, J., concurring).

267. *Cf.* Miller v. California, 413 U.S. 15, 24 (1973) (distinguishing obscene from nonobscene material in part on the basis of "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value"); Kois v. Wisconsin, 408 U.S. 229, 231 (1972) ("A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication."); Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353, 136-71 (5th Cir. 1980) (holding that court must treat magazines in question as separate work to be taken as a whole, and should not examine each separate article or pictorial representation to determine its First Amendment protection).

268. *See* Randall P. Bezanson, *The Quality of First Amendment Speech*, 20 HASTINGS COMM. & ENT. L.J. 275 (1988) (arguing that the Supreme Court has been reviewing implicitly the quality of speech when deciding what level of protection it should receive and that the Court should acknowledge this). *But see* Shaman, *supra* note 71, at 295 (arguing for a harm-based theory of regulation of speech).

269. *See* Redish, *supra* note 60, at 1178 ("Only a danger of true harm justifies curtailing the flow of free and open discourse. Continued substitution of a finding of intent for a showing of a genuine threat to society would cause people to censor their thoughts and words."). Professor Redish expresses concern that a court or jury will substitute a finding of the speaker's intent to bring about unlawful conduct for a showing of danger that the harm would actually come about. *See id.*

Although the content of the speech is important in establishing the intent necessary to determine whether speech constitutes Harm Advocacy, a reviewing court also must consider the context[270] in which the author disseminated the speech.[271] When a publisher distributes materials that are highly specific in detailing how to commit a crime, it is difficult to imagine that the publisher did not intend or know that such a crime indeed might be committed.[272] When one combines a sufficiently demanding

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270. *See Ferber*, 458 U.S. at 778 (Stevens, J., concurring) ("The question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context."). Moreover, in the defamation context, proof of actual malice generally consists of the prepublication information possessed by the defendant, the nature and quality of its sources, and the subjective intent of the defendant. *See* Herbert v. Lando, 441 U.S. 153, 169-75 (1979) (holding that inquiry into the publication process to prove malice is permissible under First Amendment). Similarly, in the Harm Advocacy context, the plaintiff would set forth information concerning not only the intent of the author, but how the author marketed the publication to the public and to whom it marketed the publication. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 266 (4th Cir. 1997) (noting that Paladin had marketed and sold *Hit Man* in a manner to appeal to criminals); *see also* Crump, *supra* note 239, at 6 (arguing for a reinterpretation of the *Brandenburg* test that focuses on the meanings of language as well as its context).

271. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50, 66 (1976) ("[T]he line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say."); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915-16 n. 50 (1982) ("[T]he question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated' . . . . In cases where that line must be drawn, the 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.'" (citations omitted)). As the Fifth Circuit recognized in *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987), "it is conceivable that, in some instances, the amount of detail contained in challenged speech may be relevant in determining whether incitement exists . . . ." *Id.* at 1023. The *Herceg* court, however, rejected the argument that the amount of detail in the article describing autoerotic asphyxiation was sufficient to constitute incitement under the circumstances. *See id.*

272. *See, e.g.*, Watts v. United States, 394 U.S. 705 (1969) (considering both the content of Watt's words as well as the circumstances surrounding Watt's speech, including such factors as Watt's speech taking place at political rally, the nature of the threat being conditional, and the crowd responding with laughter, to support holding that his speech deserved protection); *see also* McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 1000-01 (Ct. App. 1988) (analyzing the songwriter's intent under a rational inference test, taking into account both the content and the context of the lyrics). *See generally* Anne K. Hilker, Note, *Tort Liability of the Media for Audience*

level of intent with the likelihood of occurrence and the gravity of the harm requirements, it becomes reasonable for the law to tax the social costs of Harm Advocacy speech against the speaker.

1. Defining Intent

Degrees of intent, or mens rea, are perhaps most comprehensively considered in the context of criminal law, where they are divided into various categories, from purposeful through negligent.[273] The distinction between each level is critical, for different crimes require different levels of intent.[274] For Harm Advocacy

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Acts of Violence: A Constitutional Analysis, 52 S. CAL. L. REV. 529, 556-57 (1979) (examining the potential for media liability for audience violence).

273. *See* MODEL PENAL CODE § 2.02(a) (1985). The most specific form of intent required often is referred to as "purposeful" intent. An act is done purposely, as defined by the Model Penal Code, when "it is [the actor's] conscious object to engage in conduct of that nature or to cause such a result; and . . . he is aware of the existence of such circumstances or he believes or hopes that they exist." *Id.* The final two standards of intent, recklessness and negligence, are more lenient levels of culpability not involving an intent for the harm to occur or a knowledge that it is likely to occur. *See id.* Rather, they involve awareness of a potential risk. Given the high value that society places on free speech, it would be difficult to accept a lenient intent standard, such as negligence or recklessness, in prohibiting speech. Indeed, the fear created by such low standards for imposing liability could lead to the incidental suppression of valuable speech by people who wish to avoid potential liability for their messages. *But see* Weirum v RKO Gen., Inc. 539 P.2d 36, 40-42 (Cal. 1975) (imposing liability on a broadcaster under what was essentially a negligence standard for urging listeners to act in an inherently dangerous manner); Lars Noah, *Authors, Publishers, and Products Liability: Remedies for Defective Information in Books*, 77 OR. L. REV. 1195, 1205-27 (1998) (arguing that in some circumstances, publishers and authors should be held strictly liable for errors in their works). Thus, this Article advocates a relatively high evidentiary standard—clear and convincing evidence of the defendant's subjective intent—when imposing civil liability for the effects of Harm Advocacy. *See, e.g.*, Alexander v. United States, 509 U.S. 544, 554-58 (1993) (holding that RICO provisions are not overbroad and do not have a chilling effect); Redish, *supra* note 60, at 1165 (discussing possibility that people would censor innocent speech in order to avoid possible prosecution for advocacy of illegal act). *But see* Gerald R. Smith, Note, *Media Liability for Physical Injury Resulting from the Negligent Use of Words*, 72 MINN. L. REV. 1193, 1219-32 (1988) (urging that courts adopt traditional negligence approach when evaluating physical injury caused by speech).

274. *See* MODEL PENAL CODE § 2.02(2). Harm Advocacy speech is much like solicitation as defined by the Model Penal Code: "A person is guilty of solicitation to commit a crime if . . . he commands, encourages, or requests another person to engage in specific conduct that would constitute such crime . . . ." *Id.* § 5.02. For example, in the *Rice* case, the *Hit Man* book was essentially an open solicitation to

speech, the publisher must know that others who plan to commit illegal acts will use his speech. The Model Penal Code defines knowing actions as those in which the actor "is aware that his conduct is of that nature or that such circumstances exist; and . . . he is aware that it is practically certain that his conduct will cause such a result."[275] At the time of publication or broadcast, the publisher must specifically desire to cause the resulting harm and must hope that circumstances can be created such that the harm will ensue or prove grossly indifferent to the known risk of the harm associated with the work at issue.[276] Under this level of intent, the issue begins to blur with the factual issue of the likelihood of harm that will result.[277]

To determine a publisher's intent, courts should apply well-known principles of defamation law.[278] Under current First

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individuals interested in pursuing a life of crime. *See also* Greenawalt, *supra* note 239, at 657-70 (discussing the danger to society from those who solicit criminal acts and the variety of intent requirements under the Model Penal Code and state laws).

275. MODEL PENAL CODE § 2.02(2)(b).

276. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (defining actual malice as action "with knowledge that it was false or with reckless disregard of whether it was false or not"). In *Sullivan*, the Court eschewed the common law's understanding of presumed malice as a proxy for the defendant's intent to harm the plaintiff. Thus, evidence of the *Times*'s failure to retract and the Alabama court's conclusion of "bad faith" from testimony at trial was irrelevant because such evidence did not reflect on the defendant's attitude toward truth "at the time of the publication." *Id.* at 286. Similarly, the presence in the *Times*'s files of information contradicting the accuracy of the advertisement did not prove that the people responsible for the publication of the advertisement knew it contained some relatively minor false assertions. This approach demonstrates that, for the Supreme Court, malice is a function of the defendant's attitude toward the truth of the publication rather than of the defendant's awareness of the effect of the publication on the plaintiff's reputation.

277. In other words, the greater the likelihood of harm, the more likely that the publisher knew of the results. *See* Greenawalt, *supra* note 239, at 657 (stating that "[t]he person who urges another to commit a criminal act has a criminal intent and has manifested a certain degree of dangerousness"). Thus, the analysis is similar for both the factual issue (likelihood of harm) and the legal issue (knowledge). *See* United States v. Ecker, 543 F.2d 178, 190 n.42 (D.C. 1976).

278. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (holding that recovery of presumed or punitive damages in defamation suits by private individuals must be based on a showing of knowledge of falsity or reckless disregard for the truth, although actual damages may be recovered on a lesser showing of fault); *Sullivan*, 376 U.S. at 268 (holding that public officials must show actual malice in order to recover for defamatory statements).

Amendment principles, courts already have experience determining the subjective intent of the author to identify the level of First Amendment protection.[279] The commercial speech doctrine requires that courts ascertain the intent of a work's author in order to classify properly the speech.[280] For example, Andy Warhol's soup cans do not constitute commercial speech, but rather are a form of artistic expression.[281] On the other hand, the distinctive and attractive label and original advertising campaign to promote Campbell's soups, designed and executed by acclaimed American artist Norman Rockwell, constitute commercial speech because of the subjective intent of the company in distributing Rockwell's art.[282] Hence the characterization of the speech as "commercial" or "noncommercial" depends on the speaker's intent in disseminating the message.[283]

2. *The Causation Requirement*

The requirement that a plaintiff establish causation provides another significant limitation on the potential scope of the Harm Advocacy doctrine. In order to recover in tort, a plaintiff must prove that the defendant's behavior actually played a significant role in bringing about the harm that injured the plaintiff. In tort law, causation consists of both cause-in-fact and proximate cause.[284] Cause-in-fact may be determined by either a "but-for"

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279. *See, e.g.*, Bose Corp. v. Consumers Union, 466 U.S. 485, 505 (1984) (stating that the court conducts an independent review of the record to determine the nature of the speech in question); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 688-89 (1959) (characterizing movie's portrayal of adultery as advocacy in determining whether such portrayals fall within First Amendment definition of protected speech); Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 844 (D. Md. 1995) (explaining that the court must analyze the character of the words used in order to determine the First Amendment status of the speech activity), *rev'd on other grounds*, 128 F.3d 233, 267 (4th Cir. 1997).

280. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (holding unconstitutional a sweeping prohibition of unsolicited contraceptive advertisements); Valentine v. Chrestensen, 316 U.S. 52 (1942) (holding that a ban on only commercial leaflets in downtown streets does not infringe upon free speech when one side of the leaflet is commercial speech and the other side is a protest against governmental action, when the protest was added with the intent of evading the city ordinance).

281. *See* Krotoszynski, *supra* note 221, at 1217.

282. *See id.*

283. *See id.* at 1211-26.

284. *See* DAN B. DOBBS, THE LAW OF TORTS, § 114 (2000) (discussing the elements

standard[285] or a less restrictive "substantial factor" standard.[286] Proximate or legal cause determines the appropriate scope of the defendant's liability on practical or social policy grounds.[287] Ap-

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of a negligence cause of action, including cause-in-fact and proximate cause).

285. "Under the but-for test, the defendant's conduct is a cause in fact of the plaintiff's harm if, but-for the defendant's conduct, that harm would not have occurred." *Id.* § 168, at 409. To decide whether the conduct was a but-for cause of the harm, the jury must compare what actually occurred with what probably would have occurred absent the allegedly bad conduct. *See id.* at 409-410.

286. The RESTATEMENT (SECOND) OF TORTS § 432 (1965) provides:

> (1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.
>
> (2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about.

RESTATEMENT (SECOND) OF TORTS § 432. The substantial factor test alleviates the harsh effect of a plaintiff being unable to recover when two competing causes, either sufficient to bring about the harm, combine to create a risk, as, for example, when two speeding cars both strike a pedestrian. *See* DOBBS, *supra* note 284, § 171, at 415 (noting further that courts rely on the substantial factor test or no causal test at all "when causal issues are embarrassing.") The substantial factor test also eliminates liability for acts with inconsequential effects, as, for example, throwing a lighted match on a forest fire. *See id.* at 415. Legal scholars have hotly debated the precise scope of the substantial factor test. *Compare* David W. Robertson, *The Common Sense of Cause In Fact*, 75 TEX. L. REV. 1765, 1776 (1997) (arguing that the substantial factor test has been expanded to include cases where causation is difficult and not just to cases where two causes result in one injury), *with* Richard Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001 (1988) (arguing that the causation element should be satisfied if an event is a necessary element of a set of events sufficient to produce the harm).

287. *See* DOBBS, *supra* note 284, § 180, at 443 ("The central goal of the proximate cause requirement is to limit the defendant's liability to the kinds of harms he risked by his negligent conduct."); Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."); *see also* Schauer, *Mrs. Palsgraf*, *supra* note 239, at 166 (arguing that not all communicative acts implicate First Amendment concerns, and that when such concerns are absent, tort actions should be permitted). For example, the passage of time or other attenuating circumstances may preclude recovery. *See, e.g.*, City of Brady v. Finklea, 400 F.2d 352, 357 (5th Cir. 1968) (explaining that a time lapse may be considered as a factor relating to proximate cause). *But see* Stephenson v. Air Prods. & Chems., Inc., 252 N.E.2d 366, 370-73 (Ill. App. Ct. 1969) (holding that as a result of injury caused by the defendant, the plaintiff suffered a second injury five years later); *see also In re* Kinsman Transit Co. (Kinsman

plying causation standards—and more specifically—cause-in-fact standards to Harm Advocacy will make it unlikely that a plaintiff will prevail against a defendant unless strong evidence establishes a causal connection between the speech and the injury.

Words and ideas can be influential and persuasive. People learn from ideas, come to believe them, and take actions on the basis of the ideas they accept. In this sense, ideas cause action in a "but for" or "substantial factor" manner. Whether the publication or broadcast is either a but-for cause or a substantial factor may be particularly difficult to determine in some contexts, especially for what may be termed generic crimes or copycat crimes. In these cases, cause-in-fact will serve as protection against suits in which the defendant's publication or broadcast merely influenced an already predisposed person to duplicate the act.[288] Thus, causation will be more difficult to assess in a case such as *Yakubowicz v. Paramount Pictures Corp.*,[289] in which injury results from imitation of a depiction of general conduct (gang violence offered as entertainment), than in cases such as *Rice*[290] or *Herceg*[291] in which injury results from specific instructions on performance of the conduct. In such instances,

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Transit Co. (Kinsman I), 338 F.2d 708, 711-13 (2d Cir. 1964) (finding proximate cause when a ship caused great damages after breaking loose from moorings); *In re* Kinsman Transit Co. (Kinsman II), 388 F.2d 821, 825 (2d Cir. 1968) (refusing to award damages to grain companies because claims were too remote).

288. In a case such as *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988), a wrongful death suit against the Ozzy Ozbourne record that included the song *Suicide Solution*, which exhorted suicide, the determination of cause-in-fact would require the jury to consider whether the material was a but-for cause or a substantial factor. The defendant could possibly establish that the information about suicide was readily available, the victim was seeking it, and it was only fortuity that the victim relied on the defendant's material rather than another source. Defendant might argue, therefore, that the record had no substantial effect, like throwing a cup of water into a flooded river. *See supra* note 286.

289. 536 N.E.2d 1067 (Mass. 1989) (granting summary judgment in a wrongful death action by the father of a boy slain by someone who had just seen the film *The Warriors*, which depicted scenes of gang violence, despite the fact that the perpetrator uttered a line from the film while committing the homicide).

290. 128 F.3d 233 (4th Cir. 1997).

291. 814 F.2d 1017 (5th Cir. 1987). *See* Schauer, *Mrs. Palsgraf*, *supra* note 239, at 166 (arguing that pure instructional speech should not receive First Amendment protection); Schauer, *supra* note 11, at 1345 (arguing that in the *Herceg* case, "there was probably sufficient probable cause, reasonable for[e]seeability, and negligence to permit recovery under existing tort law").

expert testimony on the influence of speech on human behavior may assist the court in determining cause-in-fact.[292]

That is not to say, however, that causation will always be lacking in Harm Advocacy suits. For example, in *Rice*, the police officers located a Paladin catalog advertising *Hit Man* among the hired killer's belongings, and later discovered that the killer had ordered the book.[293] In addition, the prosecutor could show the many factual similarities between the killings and the detailed instructions provided in the manual.[294] Likewise in *Herceg*, the *Hustler* magazine article was found at the boy's feet after he had attempted to engage in autoerotic asphyxia.[295] In such cases, the causal inference is direct, not circumstantial, and the defendant's publication may be viewed as cause-in-fact of the individual's injury. Even so, the fact remains that the nature of the materials alone (no matter how irresponsible), would not be sufficient to establish liability in the absence of proof (direct or inferential) that the materials constituted a "substantial factor"[296] in bringing about the events causing harm to the plaintiff. In this fashion, then, proof of causation provides another important check on the potential scope of liability for Harm Advocacy.

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292. There is a great debate over the effectiveness of speech—and whether mere speech is capable of causing violent harmful behavior. *See, e.g.*, UNIVERSITY OF CAL., SANTA BARBARA ET AL., 2 NATIONAL TELEVISION VIOLENCE STUDY (Center for Communication & Social Policy & University of California, Santa Barbara eds., 1998); Haejung Paik & George Comstock, *The Effects of Television Violence on Antisocial Behavior: A Meta-Analysis*, 21 COMM. RES. 516 (1994). If speech does not cause changes in behavior, there can be no proximate cause relationship. As is often the case when determination of an issue depends on expert testimony, the evidence may be contradictory. *Compare* 1 NATIONAL INSTITUTE OF MENTAL HEALTH, TELEVISION AND BEHAVIOR: TEN YEARS OF SCIENTIFIC PROGRESS AND IMPLICATIONS FOR THE EIGHTIES 6 (1982) (reporting general consensus among researchers on causal connection between television and acts of violence), *with* John Walsh, *Wide World of Reports*, 220 SCI. 804 (1983), *available in* 1983 WL 2005028 (reporting television networks' critique of NIMH study).

293. *See* Perry v. State, 344 Md. 204, 215 (Ct. App. 1996); *see also* SMOLLA, *supra* note 162, at 65-67 (discussing the prosecution's use of *Hit Man* manual in James Perry's (the hired hit man's) criminal trial and noting that the manual relieved Perry of having to do any independent thinking in planning the murders).

294. *See Rice*, 128 F.3d at 239-41 (listing page after page of similarities between the murder and *Hit Man*).

295. *See Herceg*, 814 F.2d at 1018.

296. *See supra* note 286.

3. *The Clear and Convincing Evidence Standard*

The intent and causation requirements will be strengthened, of course, by the higher evidentiary burden described earlier.[297] In numerous contexts, including defamation, the Supreme Court has stated that the First Amendment entitles the defendant to a clear and convincing evidence standard on basic elements of the plaintiff's prima facie case.[298] For example, the public figure or public official plaintiff must establish reckless falsehood by the clear and convincing evidence standard.[299] Establishing clear and convincing evidence that an author intended to bring about social harm substantially limits the potential bite of Harm Advocacy. Moreover, the Supreme Court has noted that the First Amendment entitles a speaker to an independent examination of a court or jury determination that the speech is subject to regulation.[300]

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297. *See supra* note 286; *supra* notes 239-43 and accompanying text.

298. *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (holding that under Rule 56 of the Federal Rules of Civil Procedure, a public figure libel plaintiff moving for summary judgment must produce clear and convincing evidence of actual malice); Bose v. Consumers' Union, 466 U.S. 485, 501 (1983) (stating that trial and appellate judges may not simply offer instructions and leave to juries the resolution of constitutional fact); New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964) (holding that state defamation law violated the First and Fourteenth Amendments unless it required all public official plaintiffs to establish with "convincing clarity" that defendants had acted with actual malice).

299. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). *Compare id.* at 348-50 (restricting defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to actual damages), *with* Garrison v. Louisiana, 379 U.S. 64, 67 (1964) (imposing same requirements in prosecution for criminal libel as for civil libel), *and In re* Winship, 397 U.S. 358 (1970) (requiring proof beyond a reasonable doubt to satisfy due process in criminal cases).

300. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56-57 (1988) (applying the independent review standard to deny the plaintiff recovery for a claim of intentional infliction of emotional distress); *Anderson*, 477 U.S. at 252 ("[W]here the First Amendment mandates a 'clear and convincing' [evidence] standard, the trial judge in disposing of a directed verdict motion should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity."); Time, Inc. v. Hill, 385 U.S. 374, 394-96 (1967) (striking the jury's award to the plaintiff in an invasion of privacy case on the ground that the jury had not been charged regarding the actual malice standard); Freedman v. Maryland, 380 U.S. 51, 59-61 (1965) (applying independent review to obscenity case law).

4. Most Creative Works Do Not Meet the Intent Requirement

Harm Advocacy does not run afoul of the Supreme Court's decision in *Simon & Schuster v. New York Crimes Board*,[301] which held that autobiographical works involving criminal activity enjoy substantial First Amendment protection.[302] Merely describing a criminal act, whether in a work of fiction[303] or nonfiction does not per se constitute Harm Advocacy. The element of intent drives this result.[304] In the "copycat" context, it rarely will be the case that a broadcaster or publisher actually intends, through its description or depiction of antisocial conduct, to facilitate similar acts by others.[305] A literary work presenting crime would not constitute Harm Advocacy unless the author intended to facilitate copycats and the work, objectively viewed, facilitated future criminal activity.[306] Additionally, not only will a political, informational, educational, entertainment, or other

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301. 502 U.S. 105 (1991) (holding that New York's "Son of Sam" law violated the First Amendment because it singled out speech on crime for unfavorable treatment).

302. *See id.* at 123.

303. *See, e.g.*, TRUMAN CAPOTE, IN COLD BLOOD (1965).

304. *See* Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) ("The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."); *cf.* Noto v. United States, 367 U.S. 290, 299 (1961) (holding that the defendant must be judged upon the evidence presented at his own trial, not on the evidence in another trial or on the tenets of the Communist party).

305. Of course, with few, if any, exceptions, the speech that gives rise to the copycat crime will not directly and affirmatively promote the harmful conduct, even if, in some circumstances, it incidentally glamorizes and thereby indirectly promotes such conduct.

306. Many cases have been brought involving violent movies and television programs that were alleged to have caused physical injury or death. The programs involved in these cases featured graphic depictions of violence that plaintiffs alleged the defendants initiated. *See, e.g.*, Zamora v. CBS, Inc., 480 F. Supp. 199 (S.D. Fla. 1979); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989). For example, in *Yakubowicz*, a father, whose son was killed by a minor who had attended a showing of the film *The Warriors*, brought a wrongful death action against the distributor of the movie, Paramount Pictures. *See id.* at 1068. The court, ruling for the defendants on a motion for summary judgment, explained: "Although the film is rife with violent scenes, it does not at any point exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers. It does not create the likelihood of inciting or producing 'imminent lawless action' that would strip the film of First Amendment protection." *Id.* at 1071 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

wholly legitimate purpose for the description or depiction be demonstrably apparent, but the description or depiction of the criminality will be of such a character that an inference of impermissible intent on the part of the producer or publisher would be unwarranted as a matter of law. For almost any broadcast, book, movie, or song that one can imagine, an inference of unlawful motive from the description or depiction of particular criminal conduct therein would almost never be reasonable, for not only will there be, and demonstrably so, a legitimate and lawful purpose for these communications, but the contexts in which the descriptions or depictions appear will themselves negate a finding of purpose on the part of the author, producer, or publisher *to assist others in their undertaking of the described or depicted conduct.*[307] Almost all works in the crime genre would pass this test with ease.[308]

Likewise, news reporting, no matter how explicit in nature, will almost never constitute Harm Advocacy. In context, it will be self-evident that news reporting does not directly assist or facilitate socially harmful conduct and, even in circumstances when it arguably does, the reporter's and publisher's intent in distributing the information would not be to aid or facilitate potential copycats.

5. The Contemporary Federal Courts Can Properly Administer the Harm Advocacy Doctrine

Under the current First Amendment analysis, courts must identify the type of speech involved in a given case and then

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307. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 243 (4th Cir. 1997) (noting that the author's specific purpose to assist and encourage the commission of a crime is important to a finding of criminal and civil liability).

308. *See, e.g.*, JOHN GRISHAM, THE RUNAWAY JURY (1996). In this novel, Grisham presents a litany of crimes, most notably including jury tampering, extortion, and breaking and entering. Grisham's intent in penning *The Runaway Jury*, objectively viewed, was not to facilitate jury tampering or other criminal activity. Moreover, the book is not a particularly useful tool in accomplishing these objectives, unless the would-be criminal is rather desperate to get caught. By way of contrast, a monograph entitled "How to Intimidate a Juror" with descriptions of how to make a juror fearful and, hence, receptive to a client's position, would constitute Harm Advocacy if the author intended to assist or facilitate jury tampering and the material, objectively viewed, was a substantial causative factor in accomplishing this goal.

determine the level of protection that the speech merits.[309] This content-specific approach arguably increases judicial discretion, and thus increases the likelihood of unfair or arbitrary results.[310] Recognition of a new category of unprotected speech activity called Harm Advocacy will require that courts determine the precise nature of the speech at issue and establish a "tolerable" level of instruction.[311] A judge's particular sensitivities may well determine the level of First Amendment protection a publisher's speech receives. Accordingly, the implementation of this approach will result in some publishers believing that their speech rights have been denied or circumscribed unfairly.

In the Harm Advocacy context, however, judicial discretion should not lead to significantly increased government censorship. The approach proposed in this Article creates an additional speech category in the hierarchy of speech rights.[312] Judges can utilize this new speech category to evaluate claims from plaintiffs injured by Harm Advocacy speech, preventing further misapplication of the *Brandenburg* test.[313] The alternative appears to be continued reliance on *Brandenburg*, a test ill-suited to Harm Advocacy. Continued reliance on *Brandenburg* probably would lead to greater uncertainty about the protected status of a

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309. *See supra* notes 88-105 and accompanying text.

310. *See* Lawrence C. George, *King Solomon's Judgment: Expressing Principles of Discretion and Feedback in Legal Rules and Reasoning*, 30 HASTINGS L.J. 1549, 1559-66, 1573-75 (1979); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1524, 1538-39 (1991).

311. For example, the recent situation involving the World Church of the Creator, a racist organization that owns and operates a sophisticated website designed to attract members, comes close to the line, but neither advocates violence against minorities nor attempts to instruct visitors on how to accomplish acts of violence against minorities. *See* John Cloud, *Is Hate on the Rise?*, TIME, July 19, 1999, at 33.

312. *See generally* VAN ALSTYNE, *supra* note 38, at 21-49 (describing and distinguishing the various categories of speech activity carved out by the Supreme Court).

313. *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449-52 (1985) (arguing that context is an important element of contemporary First Amendment analysis); Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1424, 1438 (1995) (arguing that consideration of context is essential to applying the First Amendment properly); S. Elizabeth Wilborn, *Teaching the New Three Rs: Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 151-54 (1995) (arguing that the failure of courts to consider the context of student speech has led to underprotection of that speech).

larger universe of speech activity than the approach advocated in this Article.[314] Thus, application of a more content and context-specific analysis would not greatly increase the category of unprotected speech, but instead, would provide a higher degree of protection for speech that does *not* constitute Harm Advocacy.[315] Although this task is not an easy one, and creates the possibility of an arbitrary characterization of speech (and perhaps an improper denial of First Amendment protection in individual cases), the benefits of providing greater protection to artistic expressive activity more than compensate for this opportunity cost.[316]

Courts applying existing First Amendment jurisprudence applicable to other forms of speech—commercial speech or obscenity for instance—exercise a similar kind of discretion when deciding how to classify particular kinds of speech.[317] If anything, the existing *Brandenburg* standard is more troublesome, because it overprotects certain types of speech, potentially causing confusion about how much speech ultimately will be protected once the reviewing court finishes its temporal manipulations.[318]

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314. *See infra* notes 261-68 and accompanying text.

315. *See* Greenawalt, *supra* note 239, at 739 n.364 (stating that although categorical balancing does not eliminate judicial uncertainty about borderline cases, "it does constrain and focus the range of choice, affording more predictability about many cases, and gives judges a basis for invalidation other than a determination that the political branches have not wisely balanced competing interests on a particular occasion"). Professor Freund also stated:

> No matter how rapidly we utter the phrase "clear and present danger," or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms, which the judge must disentangle.

PAUL A. FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1951).

316. As Professor Ely argues, "One doesn't have to be much of a lawyer to recognize that even the clearest verbal formula can be manipulated. But it's a very bad lawyer who supposes that manipulability and infinite manipulability are the same thing." JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 112 (1980).

317. *See* VAN ALSTYNE, *supra* note 38, at 47-49.

318. Of course, this test only establishes a presumption that instructional speech about how to commit violent felonies is unprotected. When instructional speech has significant political value, the presumption may be overcome. For example, the speech in *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), involving the publication of an article about building hydrogen bombs, might have warranted more First Amendment protection than was actually extended to it be-

The Harm Advocacy approach would not necessarily provide a different result from the use of the *Brandenburg* standard in some cases. For example, under this approach, a court probably would reach the same result in the *Rice* case with respect to the "how to commit a murder" guidance.[319] The facts at issue in *Rice* satisfied the intent and probable effect (or causation) components of the Harm Advocacy test. Even though the same result would obtain on the facts at issue in *Rice*, the use of the Harm Advocacy test would lead to less uncertainty regarding facts less extreme than in *Rice*, thereby providing a greater margin of protection for artistic, literary, and musical expression.

D. Harm Advocacy Is Viewpoint Neutral

A number of academics have suggested that content-specific First Amendment tests might lead to viewpoint discrimination.[320] For example, Professor Tribe warns that "all attempts to create content-based subcategories entail at least some risk that government will in fact be discriminating against disfavored points of view."[321]

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cause its principal purpose was to "alert the people of this country to the false illusion of security created by the government's futile efforts at secrecy." *Id.* at 994. This case, however, is distinguishable from *Rice* not just in terms of the political nature of the messages. Unlike *Rice*, *Progressive* was a prior-restraint case, and therefore required the government to prove the likelihood of direct, immediate, and irreparable injury to national security. *See id.* at 1000. Furthermore, the *Progressive* court found that the article in question did not "provide a 'do-it yourself' guide for the hydrogen bomb." *Id.* at 993.

319. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 235-39 (4th Cir. 1997).

320. *See, e.g.*, Archibald Cox, *The Supreme Court 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 28 (1980) (noting that courts should not attempt to differentiate the value of particular messages); Karst, *supra* note 58, at 20-21 (arguing that treating all forms of speech equally is central to the First Amendment).

321. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-18 (2d ed. 1988) (commenting further that "[a] hierarchy of ever-proliferating intermediate categories requires the Court to assign relative values to different classes of expression, a task that is all but impossible to reconcile with 'the basic theory of the First Amendment'"). Judge Jones's dissent in *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987), presents one potential example of viewpoint discrimination. Judge Jones argued that states should be allowed, under certain circumstances, to impose liability on pornographers for harm directly caused by the pornography. *See id.* at 1025-30.

The content-specific approach advocated in this Article does not sanction subjective decisions by judges based on ideological factors.[322] An important distinction exists between viewpoint discrimination and content discrimination.[323] Viewpoint discrimination involves the government choosing one side of an issue, promoting this position, and prohibiting discussion of alternative points of view. Government attempts at viewpoint discrimination are particularly evil because they prevent a full, fair, and open debate on a given issue.[324]

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322. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that to justify a restriction of symbolic speech, the state interest need be no more than "substantial" or "important," but also requiring that the state interest be wholly unrelated to suppression of the speaker's viewpoint). In *O'Brien*, the Court upheld a regulation prohibiting the destruction of draft cards because the regulation was aimed at eradicating a certain behavior regardless of the motivation or speech content. *See id.* The *O'Brien* analysis demonstrates that regulations can prohibit conduct, while not violating viewpoint neutrality requirements of the First Amendment. Likewise, Harm Advocacy is aimed at punishing conduct, not speech.

323. A number of scholars who favor a hierarchical approach to free speech protection have attempted to limit the criticism against content-based regulation to viewpoint discrimination. Under their theories, distinctions based on the subject matter or form of speech would not trigger close judicial scrutiny, absent evidence that the government was taking sides by favoring one viewpoint over another. *See, e.g.*, Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 735 (1980) (noting that viewpoint-based discrimination is clearly more troublesome than subject-matter discrimination); Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 111 (1978) (arguing that all viewpoints must compete equally in the marketplace of ideas). *But see* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 128 (1981) (arguing that there appear to be no good rationales for treating content-neutral regulations differently from content-based regulations).

324. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 510-11 (1969) (holding that a public school prohibition against wearing black armbands to protest American involvement in Vietnam, in absence of a prohibition against wearing other controversial political symbols, was an unconstitutional viewpoint restriction); Collin v. Smith, 578 F.2d 1197, 1202 (7th Cir. 1978) ("'[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" (quoting Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972))); MEIKLEJOHN, *supra* note 22, at 26-27; Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.").

A content-specific approach to interpreting the First Amendment, however, does not have the effect of limiting the scope or ferocity of debate.[325] All viewpoints may compete equally in the marketplace of ideas.[326] Thus, content analysis involves the application of a hierarchy of speech values based on the nature—but not the viewpoint—of the speech activity in question, as part of a judicial effort to ensure that speech receives the appropriate level of First Amendment protection.[327] As a practical matter, this means that varying levels of scrutiny must be applied to different kinds of speech.[328] A content-specific approach does not necessarily imply viewpoint discrimination; reviewing courts should accord all speech within a particular category the same measure of protection.

CONCLUSION

When speech poses a significant public danger, the social value of that speech may not be sufficient to overcome the danger. Indeed, the state has a strong interest in preventing speech that will cause a crime, particularly those crimes involving serious bodily injury or death. Because of the value that society places on the freedom of speech, however, the tests developed to avoid government censorship of the speech activities of unpopular minorities properly place a high burden on the government to justify imposing liability for the consequences of speech activity. Nevertheless, a high burden in theory should not prove to be an insurmountable burden in practice.[329]

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325. *Cf.* Kozinski & Banner, *supra* note 213, at 627 (arguing for a unitary approach to the First Amendment's Free Speech Clause in which all speech activity would receive equal degrees of protection).

326. *See* Stone, *supra* note 323, at 108.

327. *See id.*

328. *See* Redish, *supra* note 323, at 120.

329.

> Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.

Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)); *see also* Anderson v. Liberty Lobby, Inc., 477

Recent events demonstrate conclusively the need for government to impose some of the costs of Harm Advocacy on those who propagate it. The victims of those who use directions intended to facilitate harm should not be denied a meaningful remedy on the theory that the First Amendment privileges the scribblings of a de facto accomplice before the fact. When cases arise that meet reasonably speech-protective standards of liability, courts must be willing and able to impose liability.

The goal of this Article is not to provide a complete and self-contained program for dealing with Harm Advocacy speech. Rather, it presents a theory that potentially provides guidance to judges and legislators struggling to address the social harms caused by Harm Advocacy in a fashion consistent with the First Amendment. Simply put, legal responses to Harm Advocacy that impose accountability for the consequences of such speech activity can be squared with First Amendment principles. Application of traditional tort principles under an evidentiary standard shaped by First Amendment concerns provides one means of responding to Harm Advocacy. Undoubtedly there are other potential responses to Harm Advocacy—responses that would be equally constitutional.[330] The purpose of this Article has been to identify a new category of speech activity especially deserving of government regulation and to offer a theory under which such regulation could be squared with traditional free speech values. Plainly, full implementation of the Harm Advocacy doctrine will require additional scholarly and judicial attention.

For example, it might be appropriate to permit the government to seek the suppression of Harm Advocacy after its distribution, but before it actually facilitates a concrete harm. Similarly, prior restraints against the initial publication or distribution of Harm Advocacy might be justifiable.[331] Permitting tort relief is an entirely reactive approach, limited to compensating the victims of Harm Advocacy after-the-fact. One could reasonably ask whether more aggressive responses to Harm Advocacy are either necessary or constitutionally appropriate.

U.S. 242, 252 (1986) (noting that a plaintiff still may succeed even under the clear and convincing evidence standard).

330. *See supra* notes 36-105 and accompanying text.

331. *See* New York Times Co. v. United States, 403 U.S. 713, 731 (1971) (White, J., concurring).

In *Gertz*, Justice Powell observed that "[u]nder the First Amendment there is no such thing as a false idea."[332] Harm Advocacy is not the presentation of a false idea, but rather an integral part of a tort. Just as the First Amendment does not privilege absolutely the publication of known falsehoods,[333] the federal courts should not construe it to prevent the imposition of liability for speech that intentionally facilitates harm to others.

As Justice Holmes admonished in *Schenck*, "the character of every act depends upon the circumstances in which it is done."[334] The imposition of civil liability for Harm Advocacy simply takes into account the character of a new and particularly problematic form of expression. Just as "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic,"[335] the most stringent protection of free speech should not protect the author of a book on how to commit arson.

332. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).
333. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 267 (1964).
334. Schenck v. United States, 249 U.S. 47, 52 (1919).
335. *Id.*