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Violent Video Games & "Constitutionalized" Negligence

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## VIOLENT VIDEO GAMES & “CONSTITUTIONALIZED” NEGLIGENCE

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INTRODUCTION

The propriety of imposing tort liability for negligent speech has been the subject of controversy since before the First Amendment’s incorporation. The debate over whether and to what extent civil liability may be desirable for unreasonably dangerous speech has intensified in recent years as entertainment media have become more explicitly violent, recent research on children’s brain development has indicated that they are exceptionally vulnerable to media influences, and federal and state legislatures’ attempts to regulate sales of violent video games to children have been struck down consistently on First Amendment grounds. This article reviews the history of negligent speech jurisprudence, analyzes flaws in the prevailing tort and constitutional rules that essentially immunize unreasonably dangerous speech from tort liability, and proposes a “constitutionalized” negligence framework to replace existing rules, based on the Supreme Court’s analytical approach to reconciling defamation and other speech torts with the First Amendment.

The most publicized negligent speech cases involved claims that certain extremely violent media caused children to kill themselves or others. Plaintiffs in such cases have argued that violent video games create unreasonable risks of serious harm to children’s psychological and neurological health, desensitize them to violence, and cause them to commit acts of violence. No plaintiff has recovered damages in such cases. Yet, recent brain scan research provides compelling proof that children and adolescents are acutely vulnerable to media influences, particularly repetitive cognitive associations such as those created by playing video games. The scientific evidence warrants review of existing negligent speech jurisprudence that operates to immunize producers of

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2 The Supreme Court has consistently declined review in negligent violent speech cases. However, on April 26, 2010, the Court granted certiorari in Schwarzenegger v. Entertainment Merchants Association to address the issue of a California regulation prohibiting the sale of certainly extremely violent “morbid” or “deviant” video games to minors under age 18, despite no conflict in the circuit courts, which have consistently struck down such regulations on First Amendment grounds. See Video Software Dealers Association v. Schwarzenegger, 556 F.3d 950, 961-962 (9th Cir. 2009), cert. granted, 130 S. Ct. 2398 (2010).

3 The terms “children” and “minors” are used interchangeably herein, and refer to persons under eighteen years of age. The term “adolescents” refers to minors who are between thirteen and seventeen years of age.
violent video games and other allegedly unreasonably dangerous "speech." This article focuses on the contemporary controversy over the effects of violent video games on children to illustrate that prevailing negligent speech jurisprudence is woefully inadequate to address the complicated issues presented in contemporary negligent media cases and should be reformed.

Any form of punishment for protected speech is bounded by the First Amendment. In New York Times v. Sullivan, the Supreme Court recognized that tort liability constitutes state action and is therefore subject to constitutional scrutiny. Since then, the Court has constitutionalized a variety of tort claims arising from speech and created a balancing framework for reconciling First Amendment values with the state’s interest in punishing and deterring civil misconduct through tort liability, but has never reviewed tort liability for unreasonably dangerous speech based on a theory of negliance. The lower courts have grappled with negligent speech cases for nearly a century and most ultimately settled on a categorical approach to imposing tort liability for speech, as opposed to engaging the Supreme Court’s speech-tort balancing framework. Most courts adopted the Brandenburg incitement test as the evidentiary predicate to finding unreasonably dangerous speech unprotected and therefore subject to tort liability. The Brandenburg test, which requires that the speaker intended to cause a violent or lawless audience reaction and a likelihood of imminent public harm, cannot properly address the nature of the fault or the nature of causation in contemporary negligent speech cases. Due to the inapposite nature of the Brandenburg test as applied to these cases, it has effectively given even grossly negligent producers of life-threatening speech a constitutional right to externalize all social costs of their speech.

Carefully circumscribed tort liability for speech that is clearly unreasonably dangerous and that can be proven to have caused serious injury or death may be socially desirable. The Brandenburg test should be replaced by a theory of liability grounded in negligence law, properly tailored in accordance the Supreme Court’s evidentiary tailoring approach to constitutionalizing defamation and a few other speech torts. While the lower courts’ adoption of the Brandenburg test is understandable, considering important distinctions in causation between the kinds of speech subjected to a balancing test by the Supreme Court and unreasonably dangerous speech, these distinctions do not warrant a complete bar to negligence liability. A carefully tailored prima facie case of negligence could eliminate the danger of chilling free speech and would be superior to the inapposite Brandenburg test.

The Article proceeds in four parts. Part I examines the scientific evidence that violent video games pose serious risks to children and the game producers’ disregard of these risks, briefly reviews tort policy, and suggests that tort immunity for unreasonably dangerous speech has created an imbalance of rights that operates to undermine the goals of tort law and public safety. Part II summarizes the development of negligent speech jurisprudence by reviewing the two strains of the immunity rules lower courts

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4 Lower federal courts have unanimously found that violent video games are fully protected speech. This finding is challenged herein relative to violent video games and children, based primarily on the manner in which the games affect children’s brain functioning without their awareness or informed, competent consent. See, Part IV.A.1.
created based on tort and constitutional doctrine, points out flaws in the analyses, then argues that the prevailing *Brandenburg* test cannot properly address the complicated issues in modern negligent speech cases, and violent video game cases involving children in particular. Part III briefly summarizes the Supreme Court’s balancing approach and evidentiary tailoring method of reconciling tort and constitutional policies relative to defamation and a few other speech torts. Part IV proposes an analytical paradigm for reviewing liability for harm caused by unreasonably dangerous speech derived from the Supreme Court’s speech-tort analytical framework, then illustrates how the test could work relative to violent video games and children.

I. THE DANGERS THAT VIOLENT VIDEO GAMES POSE TO CHILDREN, SOCIAL GOALS OF TORT REGULATION & MANIFESTATIONS OF JURISPRUDENTIAL IMBALANCE

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

This Part reviews the scientific evidence that violent video games pose serious health risks to children, then applies basic assumptions underlying the law of torts to the facts of the video game industry’s “self-regulation.” The Part concludes that tort immunity for unreasonably dangerous speech is unduly favorable to negligent speech producers and that the imbalance of rights is counterproductive to the social goals advanced by tort liability, warranting jurisprudential reform.

A. The Social Risks Created by the Video Game Industry

There is no legitimate dispute over whether consumption of violent media is substantially correlated with violent behavior, particularly among children.\(^6\) The controversy concerns causation theories that explain the correlation. In social science research, the causes of behavior are necessarily theoretical where controlled studies to

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prove causation could harm child subjects.\(^7\) However, experts concur that, to the extent that violent media causes subsequent aggression, it is typically a slow, cumulative, desensitizing cognitive process\(^8\) that can lower a person’s inhibition to violence and cause him to adopt violent behavior as a means of conflict resolution.\(^9\) A related theory posits that aggressive behavior is developed and maintained through “cognitive scripts,” which are “mental routines” stored in memory that guide behavior in social situations resembling situations presented in media, such that exposure to large quantities of violence may “prime” the viewer to recall and execute violent responses to real life conflict.\(^10\)

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\(^7\) It would be unethical to subject children to violent media that is believed to harm them to prove cause and effect, so the known correlation must be explained by causation theories. Email from Elizabeth Gershoff, Associate Professor, Department of Human Development and Family Sciences & Population Research Center, University of Texas (December 17, 2010).

\(^8\) See, e.g., STRAUSBURGER, WILSON & JORDAN, supra note 6 at 175-178 (discussing the prevailing theories of causation that explain the correlation between violent media and violent behavior). Although children are known to mimic behavior immediately, this is distinguishable from the slow, cumulative effects of violent media that are believed to desensitize children to violence systematically, which can lead to lower inhibitions to perpetrated acts of violence. Telephone Interview with Craig Anderson, Professor of Psychology and Director of the Center for the Study of Violence, Iowa State University (June 2, 2010) (notes on file with the author).

\(^9\) Social scientists believe that exposure to violent media causes antisocial behavior in children, and that the media influence children cognitively over a period of time. See, e.g., VICTOR C. STRAUSBURGER, ADOLESCENTS AND THE MEDIA: MEDICAL AND PSYCHOLOGICAL IMPACT 37 (1995) (the research on media violence and its effect on behavior is “compelling and clear,” aggression is a learned behavior, media violence is a “socially significant” cause of violence in society, and young children are particularly vulnerable); MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES, REPORT OF THE FEDERAL TRADE COMMISSION, ii (September, 2000), available at www.ftc.gov/reports/violence/vireport.pdf (most of the research on the impact of media violence on children reveals a “high correlation” between exposure to media violence and aggressive and/or violent behavior). See also STRAUSBURGER, WILSON & JORDAN, supra note 6 at 156-194 (discussing the effects of media violence on children and teenagers, such as its contribution to aggressive behavior). Research demonstrating correlations between viewing violent media and aggressive behavior date back to the mid 1980s. See Edward Donnerstein & Daniel Linz, Mass Media Sexual Violence and Male Viewers: Current Theory and Research, 29 AM. BEHAV. SCI. 601 (1986); Russell G. Geen & Susan L. Thomas, The Immediate Effects of Media Violence on Behavior, 42 J. SOC. ISSUES 7 (1986); L. Rowell Huesmann, Psychological Processes Promoting the Relation Between Exposure to Media Violence and Aggressive Behavior by the Viewer, 42 J. SOC. ISSUES 125 (1986); Brendan G. Rule & Tamara J. Ferguson, The Effects of Media Violence on Attitudes, Emotions, and Cognitions, 42 J. SOC. ISSUES 29 (1986); Charles W. Turner et al., Naturalistic Studies of the Long-Term Effects of Television Violence, 42 J. SOC. ISSUES 51 (1986). See also, Emily Campbell, Comment, Television Violence: Social Science vs. The Law, 10 LOY. ENT. L. J. 413 (1990) (analyzing the social science research).

\(^10\) STRAUSBURGER, WILSON & JORDAN, supra note 6 at 167-168. See also American Academy of Pediatrics, supra note 6 at 1497 (children imitate and adopt behaviors that they are exposed to, and violent video games associate rewards and positive feelings with hurting others, a dangerous association).
Violent video games are distinguishable from other forms of violent media such as television, motion pictures, and music because they are interactive. That is, the players participate in the violence virtually in the “first person,” meaning that the players manipulate hand-held devices to kill other players onscreen while avoiding being killed. Players can connect to the internet and choose team members from all over the world, communicate verbally with audio devices to strategize plays, and learn new ways to maximize “kills,” the ultimate game goal. The Call of Duty game series is among the most popular in the world, and has become “a way of life” for adolescent males in particular. Call of Duty is a “blood-splattered, military battlefield video game” where players move through virtual battlefields shooting at the enemy and getting shot at, and the screen keeps a tally of which team has more kills. The game also keeps individual statistics, such as the number of kills for each player, how many times the player has been shot, and how long he has been playing. Players are ranked worldwide based on their lifetime kills. In sum, acts of violence and efficient killing sprees are the key to winning and are rewarded by game points, access to more effective weapons, and onscreen pop-up accolades.

Children’s exceptional vulnerability to media influences may be explained best by the state of their brain development. Scientific research indicates that children and adolescents are very impressionable and vulnerable to media influence due to their rapid brain growth. Relatively recent magnetic resonance imaging (MRI) studies confirm enormous activity in adolescents’ prefrontal cortex – the area responsible for moral development and executive decision-making and control. The brain growth includes rapid formation of neural connections and schemas that influence adolescents’ perception of the world and appropriate social conduct in conjunction with a “pruning” process that discards weak or undeveloped associations in favor of associations that have been reinforced based on the adolescents’ experiences during this critical period of

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12 See Ken Hoffman, supra note 11.
13 Id.
14 Id.
15 Interview with Ryan Alexander Pollard, eighth grade cadet (and the author’s son), Marine Military Academy (February 25, 2011). For example, milestones such as the number of a particular type of kills pop up on the screen during play, such as “Congratulations, you have shot 100 players in the head.”
16 See, e.g., Sarah-Jayne Blackmore & Suparna Choudhury, Development of the adolescent brain: implications for executive function and social cognition, 47 J. OF CHILDS PSYCHOLOGY & PSYCHIATRY 296, 301 (2006) (discussing implications of brain development for executive functions and social cognition during puberty and adolescence; inhibitory control, processing speed, working memory and decision-making continue to develop during adolescence; during adolescence, what is perceived as important in the social world changes and leaves its imprint on the pruning process). See also infra note 17.
knowledge assimilation, cognitive reorganization, and brain maturation. Repetitive cognitive associations become implicit over time, a normal cognitive process that has a lasting and resilient effect on a person’s judgment and behavior beyond his conscious awareness.

Experts believe that violent video games create cognitive associations between violent actions and positive feelings and rewards, because violent actions undertaken repetitively by video game players are positively reinforced. Very recent brain scan research appears to confirm this: consumption of violent video games have been shown to cause young male subjects to associate violent images such as knife attacks with images that elicit pleasure, such as an image of a smiling baby, associations that are not made by the subjects who were not exposed to a large quantity of violent video games.

See, e.g., Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 ANN. N.Y. ACADEMY SCI. 74, 82-83 (2004) (teenagers’ brains are forming connections and pruning, and a teenager’s experiences have a powerful effect on the structure of his brain); Tomas Paus, Mapping brain maturation and cognitive development during adolescence, 9 TRENDS IN COGNITIVE SCIENCE 60, 64 (2005) (during adolescence, brain maturation continues in the frontoparietal systems and within the superior temporal sulcus; during adolescence, high demands are placed on both the executive systems and the interplay between cognitive and emotion-related processes); Jay N. Giedd, Jonathan Blumenthal & Neal O. Jeffries, F. Xavier Castellanos, Hong Lui, Alex Zijdenbos, Thomas Paus, Alan C. Evans & Judith L. Rapoport, Brain development during childhood and adolescence: a longitudinal MRI study, 2 NATURE NEUROSCIENCE 861, 862-863 (1999) (during adolescence, an overproduction of synapses in teenagers’ brains makes their experiences influential on how their brains develop; this “may herald a critical stage of development when the environment or activities of the teenager may guide selective synapse elimination during adolescence.”); William T. Greenough, James E. Black & Christopher Wallace, Experience and Brain Development, 58 CHILD DEVELOPMENT 539 (1987) (new synapses are produced in teenagers’ brains in response to their experiences, greater experiences lead to more synapse connections, and synapses are generated to provide information to be encoded into the nervous system); Jay N. Giedd, Judith M. Rumsey, F. Xavier Castellanos, Jagath C. Rajapakse, Debra Kayser, A. Catherine Vaituzis, Yolanda C. Vauss, Susan D. Hamburger & Judith L. Rapoport, A quantitative MRI study of the corpus callosum in children and adolescents, 91 DEVELOP. BRAIN RESEARCH 274, 278-279 (1996) (regions of the corpus callosum with higher associations increase throughout adolescence; while some elements of adult cognition are in place around age 12, speed, capacity, and ability on mental tasks, especially those of higher order, can continue well into adulthood); Todd S. Braver, Jessica L. Paxton, Hannah S. Locke & Deanna M. Barch, Flexible neural mechanisms of cognitive control within human prefrontal cortex, 106 PROCEED. NAT. ACADEMY SCI. 7351, 7352-7354 (2009) available at http://www.pnas.org/content/106/18/7351 (temporal dynamics of younger adults fit a proactive control pattern whereas in older adults a reactive control pattern was found).

The new research is consistent with fMRI (functional MRI) studies produced over the past decade that have found that violent video game consumption can alter children’s brain activity patterns and cause them to mimic the patterns of children with “conduct disorder,” i.e., violent and antisocial behavior. These recorded cognitive alterations in children probably result from their developmental vulnerability to altered brain activity patterns, a function of rapid neural development, and a result that would be predicated by cognitive learning theory and Hebb’s Law that, “neurons that fire together wire together.” That is, cognitive associations that are made repetitively become entrenched and resilient to change, particularly among children and adolescents, whose growth process and attendant unstable cognitive matrix render them vulnerable to influence—a vulnerability adults do not share. Similar research on children’s immature brain areas governing morality and executive function and their developmental vulnerability to negative influences and poor choices has persuaded legislators and the Court that capital punishment of minors is unconstitutional.

The American Academy of Pediatrics released a harrowing Policy Statement in November, 2009 warning its members about the health risks posed by children’s use of violent video games, and urging its members to track children’s violent media

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22 See, e.g., Deana A. Pollard, supra note 18 at 917-920.

23 See Roper v. Simmons, 543 U.S. 551, 564-571 (2005) (recognizing that juveniles’ brains and character are not fully developed and that the majority of states prohibit capital punishment of juveniles, concluding that capital punishment for crimes committed under the age of 18 is unconstitutional). Mary Beckman, Crime, Culpability, and the Adolescent Brain, 305 SCIENCE MAGAZINE (July 30, 2004) available at http://www.deathpenaltyinfo.org/node/1225 (the brain’s frontal lobe, which exercises restraint over impulsive behavior, does not begin to mature until age 17); Mark Moran, Adolescent Brain Development Argues Against Teen Executions, 38 PSYCHIATRIC NEWS 8 (2003) (the instinctual part of the brain develops first, and areas such as the prefrontal cortex that help to control emotions develop later).
consumption and to educate parents about the games’ negative health effects. The Academy found that the “debate” about the effects of violent media on children “should be over,” as “consistent and significant associations” between violent media consumption and a variety of mental health problems for children and adolescents have been clearly established. These health problems include aggressive and violent behavior, bullying, desensitization to violence, fearful world views including “mean world syndrome,” depression, and sleep disturbances. Social scientists concur that children’s exposure to violent media is a “socially significant” cause of later antisocial attitudes and conduct, that a substantial correlation exists between such exposure and subsequent aggressive and/or antisocial behavior, and that violent video games likely pose the greatest risk to children due to their interactive and repetitive nature. It is a fact that interpersonal violence is now a more prevalent health risk for children, adolescents, and young adults than infectious disease, cancer, or congenital disorders. A leading suicide researcher is concerned about increases in suicide rates among younger Americans that may result from desensitization to violence and pain, which can be caused by playing violent video games.

24 Adolescents’ critical period of brain development concerning world view and executive decision-making render them unusually vulnerable to violent media, which prompted the American Academy of Pediatrics to advise pediatricians to inquire about violent media consumption as part of children’s “well visit” procedures, and to educate parents about the serious risks that violent media pose to minors: “The evidence is now clear and convincing: media violence is 1 of the causal factors of real-life violence and aggression. Therefore, pediatricians and parents need to take action. . . . the entertainment industry, the American public, politicians, and parents all have been reluctant to accept these findings and to take action. The debate should be over.” See American Academy of Pediatricians, supra note 6 at 1495-1496.

25 See American Academy of Pediatricians, supra note 6 at 1497. Indeed, the strength of the associations between consumption of media violence and health problems found in meta-analyses is nearly as strong as the association between cigarette smoking and lung cancer, and greater than the associations between calcium intake and bone mass or condom usage and sexually-acquired HIV infection – associations accepted by the medical community without question. Id.

26 See VICTOR C. STRAUSBURGER, supra note 9 at 37.

27 See American Academy of Pediatrics, supra note 6 at 1498 (results of three recent interactive-media-violence effects showed greater risk of interactive media than passive viewing of violent media: “these rapidly growing and ever-more-sophisticated [interactive violent video games] have indicated that the effects of child-initiated virtual violence may be even more profound than those of passive media such as television . . . [as] the child or teenager is “embedded” in the game and uses a “joystick” (handheld controller) that enhances both the experience and aggressive feelings.”). According to Craig Anderson, whether video games cause more harm to children than passive media is still controversial, although recent studies support the theory that violent video games are more dangerous, and theoretically, playing interactive “first person shooter” games likely cause greater harm to children than passively watching violent media. E mail from Craig Anderson, July 21, 2010 (on file with the author).


29 Interview with Thomas Joiner, Professor of Psychology, Florida State University (June 16, 2010). Two processes intersect to cause suicide: 1) desensitization to physical pain, injury or death, and 2) a desire for death. Violent video games are relevant to the first process and constitute a moderately powerful desensitization device to suicide. The most recent suicide data reveal that the highest rate of suicide has dropped from age 65 and older – the longstanding age
Parents of violent video game connoisseurs often express concern about the “addictive” nature of the games. Children and adolescents (as well as some adults) are known to revolve their lives around playing the games, which have been called as addictive as cocaine: 30 children become entranced in the games, play for hours without a break, and become enraged when they are interrupted. 31 Childcare professionals have begun to advise parents on how to deal with children’s video game addiction, 32 which can produce neurological and other health problems for children. 33 In 2007, the American Psychiatric Association issued a statement addressing the problem of children’s video game addiction and explained that an official diagnosis of “video game addiction” has been proposed for inclusion in the 2012 version of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V). 34 Research in the last year has shown similar

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30 Video gaming is “taking over the lives of kids,” and may cause a “clinical impulse control disorder,” an addiction akin to compulsive gambling. Kimberly Young, Clinical Director for On-Line Addition, as reported by WEBMD, available at http://www.webmd.com/mental-health/features/video-game-addiction-no-fun. Dr. Young likens video game addiction to cocaine addiction in that the video game addict seeks to change the way he feels by escaping into a fantasy world, as opposed to ingesting a drug. The lure of fantasy is most prominent in role-playing video games, as a child can become dominant in the game regardless of his social life in the real world, making the virtual world more appealing than the real world. Psychiatrist Michael Brody defined addiction, including addictive behavior, by the following criteria: 1) the person needs more and more of a substance to keep him going; 2) if the person does not get more of the substance or behavior, he becomes irritable and miserable. Id.

31 See Ken Hoffman, supra note 11.

32 The American Psychiatric Association issued the following statement on June 25, 2007, “Psychiatrists are concerned about the wellbeing of children who spend so much time with video games that they fail to develop friendships, get appropriate outdoor exercise or suffer in their schoolwork. Certainly a child who spends an excessive amount of time playing video games may be exposed to violence and may be at higher risks for behavioral and other health problems.” See American Psychiatric Association Considers “Video Game Addiction,” available at http://www.sciencedaily.com/releases/2007/06/070625133354.htm.

34 “Today (June 25, 2007) the APA released the following statement on ‘video game addiction’: The APA defines mental disorders in the Diagnostic and Statistical Manual of Mental Disorders. Since the current edition, DSM-IV-TR, does not list ‘video game addiction,’ the APA does not consider ‘video game addiction’ to be a mental disorder at this time. If the science warrants it, this proposed disorder will be considered for inclusion in DSM-V, which is due to be published in 2012. Revising DSM requires a years-long, rigorous process – one that is transparent and open to suggestions from our colleagues in the medical and mental health communities and the public. All changes to DSM will be based on the latest and best science. To date, the APA has named the chair and co-chair of the DSM-V Task Force – David Kupfer, M.D., and Darrel Regier, M.D., M.P.H., respectively – and is in the process of establishing the full task force, which will have overall responsibility for DSM-V’s development.” Id. See also Sherry Rauh, Video Game
brain activation patterns between video game addiction and drug addiction.\(^35\) In sum, numerous serious risks to children’s and adolescents’ health can result from their exposure to violence, and in particular, their consumption of violent video games.

B. Tort Law’s Social Goals & Predictable Outcomes

Tort jurisprudence establishes minimal civic duties to avoid harming others by punishing breaches of such duties with money damages and other remedies. Tort doctrine relies on the “rational actor assumption”\(^36\) that people seek to maximize their wealth and best interests and respond accordingly to behavioral incentives and disincentives.\(^37\) Economic theory has been a driving force behind tort law’s evolution over the past half century and posits that taxing socially harmful behavior through tort liability will encourage members of society to exercise care to avoid harming others, and that externalized costs will be ignored.\(^38\) The greatest reform to tort jurisprudence over the past century has been the advent of strict products liability, and more generally, a focus on enterprise liability as opposed to the fault principle.\(^39\) Contemporary tort policy is characterized by legal rules that seek to minimize the costs of accidents by shifting the costs of harm to the cheapest cost-avoider, and to assure
compensation to injured parties.\footnote{See, e.g., Russell B. Korobkin & Thomas S. Ulen, supra note 37 at 1055 (legal academic thought is permeated with, and most influenced by, the concern of law and economics and how actors respond to legal incentives); Dobb, supra note 39 at 975; Prosser & Keeton, supra note 39 at 20-26.} Tort liability sends an important normative message that disregard for the rights and safety of others is socially unacceptable.


However, a Federal Trade Commission investigation found in 2000 that the video game industry and other entertainment media engage in “pervasive and aggressive marketing of violent movies, music and electronic games” to children and “routinely target children under 17 as the audience for movies, music and games that their own rating or labeling systems find inappropriate for children due to their violent content.”48 According to the investigation, ten out of the eleven violent video game producers investigated specifically targeted twelve to seventeen year old boys for their “M” game advertisements, to maximize sales and profits.49

The attitude that violent video game producers display toward child consumers of “M” games underscores the depth of the disregard for children’s safety and wellbeing. A video game producer’s marketing plan states: “[W]e recommend approaching the middle segment of this group [6-34 year olds] because: [The game] has an M rating, which 1) may discourage parents from buying the game, and 2) hinder clearance of a commercial airing in shows primarily for children under 12. However, the younger the audience, the more likely they are to be influenced by TV advertising . . . . Therefore, the recommended media target audience is: Males – 12-17 – Primary Males, 18-34 Secondary.”50 Although some progress in terms of game producers’ responsibility toward children has arguably been made,51 it appears that, as a whole, protecting children through self-regulation within this enormously wealthy and profit-driven industry is failing.

As explained herein below, violent video game producers have been essentially immunized from tort liability based on rules adopted by the lower courts. Basic tort principles such as the rational actor assumption would predict that immunizing violent video game producers from liability for social harms risked by their media would cause them to disregard externalized social costs. The fact that violent media producers have targeted children in advertising because they are known to be easily influenced and manipulated is a predictable outcome of tort immunity based on neoclassical economic analysis: the producers are ignoring externalized costs and exploiting consumer vulnerability because it maximizes their wealth. In essence, some video game producers have maximized their products’ social risks to maximize profits, an indication that the law has not struck an optimal balance of interests between society and video game producers.

A socially optimal speech-tort balance would encourage speakers to exercise some degree of social responsibility to avoid grave public harm resulting from their speech without chilling free speech. An example of how an appropriate threat of liability can

48 See REPORT OF THE FEDERAL TRADE COMMISSION, supra note 46 at i.
49 See REPORT OF THE FEDERAL TRADE COMMISSION, supra note 46 at 44-47. Some retailers, such as Best Buy, have adopted policies to restrict the sale of “M” video games to minors, but government regulations have been struck down consistently.
50 See REPORT OF THE FEDERAL TRADE COMMISSION, supra note 46 at 46 (emphasis added).
optimize public safety without chilling free speech may be found in the subliminal speech cases. In the early 1990s, two federal courts heard cases alleging that subliminal suicide commands embedded in rock music caused adolescents to kill themselves. Both courts held that subliminal messages are unprotected speech and may be subject to tort liability.\textsuperscript{52} Since these decisions, no published opinion has found embedded suicide commands in music, possibly because subliminal suicide commands have been discouraged by the threat of wrongful death lawsuits. And yet, despite the threat of liability for grossly inappropriate and unreasonably dangerous content, music proliferation has hardly been chilled, considering the graphic sexual and violent content of contemporary music. While violent video games are distinguishable from subliminal suicide commands in terms of the intent of the producers, the point remains that a threat of civil liability can create an incentive for media producers not to abuse their free speech rights by creating unreasonable risks of harm to children.

Tort policy and efficient cost-avoidance mitigates toward shifting the costs of unreasonably dangerous speech onto the speech producers, certainly if they are known to be financially capable of spreading the costs, such as video game producers. However, this tort policy conflicts with First Amendment policy that speech does not lose protection due to its profitability, and free speech must be broadly protected.\textsuperscript{53} While striking the ideal speech-tort balance may be difficult, this is not a reason to maintain a socially destructive status quo that disproportionately harms children. As explained in the next Part, an approach to speech-tort liability consistent with the Supreme Court’s speech-tort jurisprudence would be superior to the lower courts’ immunity rules, at least relative to certain types of dangerous media and particularly vulnerable consumers, such as violent video games and children.

II. LOWER COURTS’ NEGLIGENT SPEECH IMMUNITY RULES, JURISPRUDENTIAL FLAWS, AND BRANDENBURG’S INADEQUACY

“The plethora of individual rights which we have in this nation of free men is undoubtedly a source of our strength, but in a sense, is also a source of, or at least the catalyst for, significant lawlessness that pervades our society.”\textsuperscript{54}

The lower courts have virtually barred liability for protected noncommercial speech on a theory of negligence. The courts’ analyses have diverged into two paths, based on tort and constitutional doctrine, although the analyses sometimes overlap. This Part traces the lower courts’ development of tort and constitutional immunity rules to protect negligent speech from tort liability. This Part concludes that the immunity rules cannot


properly address the complicated issues in modern negligent speech cases, and that a constitutionalized negligence paradigm would be preferable.

A. Lower Courts’ Tort Analysis of Negligent Speech Liability

The seminal negligent speech case employed a persuasive risk-utility analysis to find that news publishers owed no duty of care to the public at large for merely negligent publication errors that led to investment losses, and several early courts followed this reasoning. However, later courts relied on earlier cases to find no duty of care in the context of vastly different analytical variables, including the loss of human life. Although ostensibly analyzing tort doctrine, later courts were clearly driven by free speech concerns that seemed to trump fundamentals of tort doctrine. Modern courts often rely on a constitutional analysis to bar liability for unreasonably dangerous speech, which is explained in the next Subpart.

In the seminal case, *Jaillet v. Cushman*, the court rejected liability for negligent investment reporting based on a traditional risk-utility analysis, finding that the value of newsworthy investment reporting outweighed the public risk posed by merely negligent publication errors.\(^{55}\) The court’s economic analysis produced a “no duty” rule because publisher liability for authors’ negligence was infeasible, and publishing companies could become bankrupt if held liable to an infinite number of plaintiffs. Although the First Amendment had not yet been incorporated,\(^ {56} \) the court denied liability to safeguard the public’s interest in the dissemination of newsworthy information. In dicta, the court distinguished categories of untrue speech that are not protected from civil liability, deceit, defamation, and intentional misreporting.\(^ {57} \)

*Jaillet v. Cushman*’s original “no duty” tort rule protecting news publishers from liability based on mere negligence morphed into expansive tort immunity rules to protect book publishers, movie and television producers and directors, board and video game manufacturers, and website owners from a variety of tort claims, even where

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\(^{55}\) In *Jaillet v. Cushman*, the treasurer of Dow, Jones & Company, was sued for incorrectly reporting in its news service a decision of the Supreme Court regarding the taxable status of stock dividends, causing the plaintiff-investor to sell stock in reliance on the false report and to suffer economic losses. 115 Misc. 383, 384, 189 N.Y.S. 743 (1921), *aff’d* 235 N.Y. 511, 139 N.E. 714 (1923).

\(^{56}\) The First Amendment was incorporated into the Fourteenth Amendment four years later. *Gitlow v. New York*, 268 U.S. 652 (1925). However, constitutional limitations to speech tort liability have been recognized relative to libel as far back as 1802, and early commentators treated civil liability the same as criminal punishment relative to constitutional speech and press protection. See Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 Iowa L. Rev. 249 (2010).

speech foreseeably caused serious injury or death. Imposing negligence liability on booksellers was rejected early on as an unjustified form of strict liability, considering that booksellers cannot possibly “evaluate the thought processes of the many authors and publishers of the hundreds and often thousands of books which the merchant offers for sale,” and to hold booksellers liable “would severely restrict the flow of the ideas they distribute.” Some early courts recognized that authors are cheaper cost-avoiders, 

58 See, e.g., MacKown v. Illinois Pub. & Printing Co., 289 Ill. App. 59 (1937) (no duty rule extended to negligent medical advice contained in newspaper, relying on Jaillet v. Cushman); Smith v. Linn, 48 Pa. D. & C. 3d 339 (Pa.Com.Pl. 1988) (no duty rule extended to negligent diet book that caused death of dieter, relying on Jaillet v. Cushman); First Equity Corp. of Florida v. Standard & Poor’s Corp., 869 F.2d 175 (2d Cir. 1989) (no duty rule extended to negligent investment advice contained in purchased investment news letter, relying on Jaillet v. Cushman); MacKown v. Illinois Publishing & Printing Co., 289 Ill. App. 59, 6 N.E.2d 526, 530 (1937) (“negligent words are not actionable unless they are uttered directly with knowledge or notice that they will be acted on, to one to whom the speaker is bound by some relation of duty, arising out of public calling, contract, or otherwise, to act with care if he acts at all,” quoting Courteen Seed Co. v. Hong Kong & S.B. Corp. 245 N.Y. 377, 381 (1927)); Sexton v. American News Co., 133 F. Supp. 591 (N.D. Fla. 1955) (newspaper not liable for unintentional defamatory publication); Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933) (newspaper not liable for mere reproduction of allegedly defamatory content without proof of fault); Yudas v. Mudge, 129 N.J. Super 201, 322 A.2d 824 (Ct.App.Div.1974) (Popular Mechanics Magazine held not liable for injuries caused by defective fireworks that were advertised in the magazine, since publisher did not guarantee, warrant, or endorse the product in their section for paid advertisements); Demuth Development Corp. v. Merck & Co., 432 F. Supp. 990 (E.D.N.Y. 1977) (publisher of Merck Index which contained information about the toxicity of drugs and chemicals owed no duty of care to plaintiff manufacturer of drug that was incorrectly labeled as toxic, causing sales losses); Pittman v. Dow Jones & Co., Inc., 662 F. Supp 921, 923 (E.D. La. 1987) (“no duty in tort exists for a newspaper publisher to investigate its advertisers for the correctness of the ads placed in the publication . . .”); Walter’s v. Seventeen Magazine, 195 Cal.App.3d 1119, 241 Cal. Rptr. 101 (1987) (magazine not liable to a minor who suffered Toxic Shock Syndrome from using Playtex tampons which were advertised in the magazine); Birmingham v. Fodor’s Travel Publications, Inc., 73 Haw. 359, 833 P.2d 70 (1992) (publisher of travel guides who neither authored the guide nor expressly guaranteed its accuracy had no duty to warn of inaccuracies in content regarding safety of beaches); Suarez v. Underwood, 103 Misc. 2d 445, 426 N.Y.S. 2d 208 (1980) (newspaper not liable for allegedly false advertisement in absence of proof of scienter on the part of the newspaper). The Jaillet v. Cushman rule required privity between the publisher and the plaintiff to sustain a claim, but this has been modified to require a “special relationship,” considering that privity requirements have relaxed generally. See Daniel v. Dow Jones & Company, Inc., 137 Misc. 2d 94, 97, 520 N.Y.S. 2d 334 (1987) (“The ‘special relationship’ limitation on liability for negligent statements remains despite the weakening of the rule of privity,” citing Jaillet).

such that any duty of care to avoid negligent content should be imposed on authors, not publishers. However, later courts conflated authors, publishers, producers, distributors, advertisers and others in vertical privity with authors, and immunized them to further “an uninhibited exchange of ideas” under express or implicit risk-utility analyses without addressing the fact that some of these producers’ control over content

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That is, authors were not afforded the same immunity as publishers for dangerous mistakes in content because authors are in a better position to investigate and foresee harms caused by the materials they create. A few early courts dismissed negligent publication cases against publishers but not authors. See, e.g., Alm v. Van Nostrand Reinhold Co., Inc., 134 Ill. App. 3d 716, 717 (1985) (complaint dismissed as to the publisher but not author). Cardozo v. True, 342 So. 2d 1053 (complaint dismissed as to the publisher but not author). However, where the publisher gives negligent investment advice, courts have found no duty despite the fact that the publisher controls content. See, e.g., First Equity Corporation of Florida v. Standard & Poor’s Corporation, 869 F. 2d 175, 176-177 (2nd Cir. 1989) ("[e]ven the most careful preparation will not avoid all errors. The potential for meritless or even fraudulent claims is high, and the cost of even successful defenses may be prohibitive if publishers are exposed . . . "); Gutter v. Dow Jones, Inc., 22 Ohio St. 3d 286, 490 N.E. 2d 898 (1986) (publisher of Wall Street Journal not liable to subscriber for non-defamatory negligent misrepresentation regarding a securities investment). As one court explained, author liability “will depend on the nature of the publication, on the intended audience, on causation in fact, and on the foreseeability of damage.” Jones v. L.B. Lippincott, 694 F. Supp. 1216, 1216 (D. Md. 1988) citing Demuth Development Corp. v. Merck & Co., Inc., 432 F. Supp. 990 (E.D.N.Y.1977). A Michigan federal court noted that a publisher could become the cheapest cost-avoider if the publisher contributed content to a book, since the “burden of determining whether the content was accurate would be less.” Lewin v. McCreight, 655 F. Supp. 282, 284 (E.D. Mich. 1987). The Lewin court noted that if the publisher or its employee authored part of the book or if the risk of harm was plainly foreseeable and sufficiently severe, such as a book entitled “How To Make Your Own Parachute,” the publisher may bear greater responsibility to assure the accuracy of content. Id.

Yuhas v. Mudge, 129 N.J. Super. at 209-210 (“To impose the suggested broad legal duty on publishers of nationally circulated magazines, newspapers and other publications, would not only be impractical and unrealistic, but would have a staggering adverse effect on the commercial world and our economic system” [and would] “open the doors to liability in an indeterminate amount for an indeterminate time to an indeterminate class.); Smith v. Linn, 48 Pa. D&C 3d 339, 351-352, 1988 WL 156664 (Pa. Com. Pl. 1988) (“While acknowledging that certain ideas may be dangerous, unpopular or even harmful, the benefits to society in allowing an uninhibited exchange of ideas . . . far outweigh the ills such ideas might bear. . . . The fear of liability would eventually chill to a trickle the free flow of information so cherished by our society and protected by our constitution.”).
greatly reduced their avoidance costs, and they have enormously deep pockets and the capacity to spread the costs of harm, which should affect the feasibility analysis.\textsuperscript{62}

\textit{Jaillet v. Cushman’s} no duty rule was extended to cases alleging wrongful death, despite the fact that the gravity of injury risked is normally a primary variable in risk-utility analysis.\textsuperscript{63} In some cases, serious injury or death was a clearly foreseeable risk to the publisher, but no duty was imposed based on a balancing approach that centered on free speech concerns. For example, in \textit{Winter v. G. P. Putnam Sons}, an Encyclopedia of Mushrooms book negligently characterized extremely poisonous mushrooms as safe to eat, which caused two wild mushroom hunters to eat the mushrooms, and necessitated liver transplants for both.\textsuperscript{64} Despite the obvious risk of death, the court found no duty of care: “Were we tempted to create [a duty of care], the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs.”\textsuperscript{65}

Some courts found no duty of care by focusing on a lack of foreseeability. For example, in \textit{Watters v. TSR, Inc.},\textsuperscript{66} the Sixth Circuit held that the children’s game Dungeons & Dragons\textsuperscript{67} did not create a foreseeable risk of suicide for children who played the game, in part because the child’s suicide was not foreseeable to his own mother.\textsuperscript{68} In the same vein, in \textit{Way v. Boy Scouts of America}, the court extended the no duty tort rule to a shooting sports supplement contained in a boys’ magazine that in fact caused the death of a twelve year old boy.\textsuperscript{69} The court concluded that the boy’s conduct in playing with an old rifle immediately after reading the supplement was not foreseeable.\textsuperscript{70} Therefore, neither a duty to warn nor a duty to refrain from publishing the supplement was owed to the reading public.\textsuperscript{71}

\textsuperscript{62} For example, Activision owns and publishes the Call of Duty video game series and presumably is the cheapest cost-avoider because it controls design and content and has access to the most information concerning the games, including dangers posed by the games. \textit{See supra} notes 41–45 and accompanying text.

\textsuperscript{63} Judge Learned Hand’s risk-utility balancing test weighs three variables to determine whether a duty has been breached: 1) the probability of the harm; 2) the gravity of the harm; 3) the burden of taking precautions. \textit{See United States v. Carroll Towing Co.}, 159 F.2d 169 (2d. Cir. 1947).

\textsuperscript{64} 938 F. 2d 1033 (9th Cir. 1991).

\textsuperscript{65} \textit{Id.} at 1037. \textit{See also, e.g., First Equity Corporation of Florida v. Standard & Poor’s Corporation}, 670 F. Supp 115, 117 (S.D.N.Y. 1987), \textit{aff’d.}, 869 F.2d 175 (2nd Cir. 1989) (unlimited liability for negligent mistakes in published materials would have a “staggering deterrent effect on the dissemination of printed material.”).

\textsuperscript{66} 904 F. 2d 378 (6th Cir. 1990).

\textsuperscript{67} Dungeons and Dragons is a fantasy role-playing game in which players assume a character identity to carry out war adventures, and is widely recognized as the beginning of the role-playing game industry. \textit{See http://www.wizards.com/default.asp?x=dnd/whatisdnd}.

\textsuperscript{68} 904 F.2d at 381. The court said that even if a duty was breached, suicide is “highly extraordinary” and generally constitutes a superseding cause. \textit{Id.} at 383. The victim was at least 16 years of age, as he shot himself in his car. Telephone with Mark Edwards, Watters’s attorney of record, Pudacah, Kentucky (February 8, 2011).

\textsuperscript{69} 856 S.W. 2d 230 (Tex. App. Dallas 1993).

\textsuperscript{70} Common sense would indicate otherwise, as children are known to want to try things they see on television or read about right away. Children’s relative inability to foresee danger is one of the reasons that children are not bound by the general duty of due care in tort law, but rather, are expected only to exercise the same degree of care as children of like age, intelligence, and
More recently, lawsuits have been filed alleging that adolescents’ considerable consumption of violent media triggered their subsequent killing sprees. In two high school mass-shooting cases, victims of adolescent-perpetrated mass murder sued producers of violent video games and The Basketball Diaries as well as Internet websites for negligence, strict products liability and/or RICO violations. Again, experience. While a risk-utility analysis may warrant a no duty rule, it seems contrived to find no foreseeability in a case such as this. Indeed, the fact that the supplement contained warnings of the dangers of unsupervised use of firearms would seem to establish foreseeability.

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

Most courts have found that publications cannot be “defective” for strict products liability purposes, as products liability law is “geared to the tangible world,” not intangible ideas. See Winter v. G. P. Putnam’s Sons, 938 F.2d. 1033, 1034 (9th Cir. 1991). Accordingly, courts have determined that strict liability protects consumers from harms caused by defective tangible properties of books and other publications, such as defective binding, but does not protect consumers from negligent content. See, e.g., Cardozo v. True, 342 So. 2d 1053, 1056 (1977) (printing and binding are tangible properties of books that are subject to product warranties, but intangible properties such as thoughts and ideas expressed in books are not tangible, and are not subject to product warranties); Herceg v. Hustler, 565 F. Supp. 802 (S.D. Tx. 1983) (pornographic magazine is not a “product”); citing Cardozo v. True; Way v. Boy Scouts of America, 856 S.W. 2d 230 (1993) (sports shooting supplement is not a “product”); James v. Meow Media, Inc., 90 F.Supp.2d 798, 810 (W.D. Ky. 2000) (products liability does not apply to violent video games and other media that allegedly caused teenage homicidal shooting spree at high school); Sanders v. Acclaim Entertainment, 188 F.Supp.2d 1264, 1277-1279 (D. Co. 2002) (products liability does not apply to violent video games and other media that allegedly caused teenage homicidal shooting spree at high school); Davidson v. Time Warner, Inc., 1997 WL 405907 at *12 (musical recordings are not products because they lack physical properties); Jones v. L.B. Lippincott, 694 F. Supp. 1216-1217 (1988) (Section 402A has not been extended to the dissemination of ideas or knowledge in books, and to do so would chill free expression).

In James v. Meow Media, Inc, fourteen-year-old Michael Carneal took six guns to Heath High School on December 1, 1997, and waited for a daily prayer session to end, then shot and killed 3 female members of the prayer group, and wounded 5 others. 90 F. Supp. 2d 798 (W.D. Ky. 2000), aff’d, 300 F. 3d 683 (6th Cir. 2002), cert. den., 537 U.S. 1159 (2003). Police seized Michael’s computer and found that he had consumed large quantities of pornographic, sexually violent, and violent materials. Among other things, plaintiffs alleged that the movie, The Basketball Diaries, was a cause of harm because it depicts a student who graphically massacres his classmates with a shotgun, and the expert psychologist testified that Carneal was “profoundly influenced by his exposure to the above violent/pornographic media . . . which tends to glorify violence . . .” Id. at 800. Similarly, in Sanders v. Acclaim Entertainment, a case arising out of the Columbine High School tragedy, the court found no duty owed by producers of violent media
foreseeability analysis blocked the claims. The plaintiffs argued that defendants knew or should have known that violent video games trained children to be effective killers and that copycat violence could result from minors’ consumption of their violent media, which created a foreseeable and unreasonable risk of harm to the public and an attendant duty of care. However, the courts assumed that preexisting mental instability was the true cause of the crimes, notwithstanding expert testimony that violent media can cause minors to become violent and no doubt teach them skills to maximize killing spree casualties. The courts held that creators and publishers of potentially dangerous speech have no duty to foresee the mental condition of “troubled” (child and adolescent) consumers before marketing their media.

Courts rejected tort liability even in cases in which it was undisputed that producers and theatre owners in fact foresaw youth violence immediately following gang movies in the proximity of the theatres that showed the films and nonetheless continued to show them, which led to additional youth casualties. These courts seemed to adopt the idea based on a four factor risk-utility analysis, and characterized the teenage killers’ behavior as an “idiosyncratic reaction” that was not sufficiently foreseeable to create a duty of care. The factors are: 1) foreseeability of the injury; 2) the social utility of defendants’ conduct or product; 3) the magnitude of the burden of guarding against the injury; and 4) the consequences of placing the burden on the defendant. In this case, the survivor of a teacher who was shot and killed during the shooting spree at Columbine High School sued violent video game makers and movie producers for damages under a variety of tort theories, including negligence and strict products liability. Plaintiffs claimed that violent videos, and particularly the high school mass-murder scene from The Basketball Diaries, influenced the two students inexplicably to gun down a teacher and classmates in cold blood. Students’ use of violent video games probably prepared them to kill efficiently and effectively.
that behaviors of emotionally troubled adolescents cannot be attributed to film distributors, and the only way to protect society at large from the effects of violent speech would be to “police” speech to the point where only the most bland and least controversial speech would be produced.\textsuperscript{78} In these and other cases, free speech concerns clearly trumped tort principles, and negligence liability was rejected entirely as opposed to reconciling competing tort and constitutional policies.

A few courts have allowed liability for speech or published “products” based purely on a tort analysis with little or no mention of the First Amendment. For example, in \textit{Hanberry v. Hearst Corporation}, a California court of appeals found a magazine publisher liable for endorsing a dangerous product with its “Consumer Guaranty,” which aligned the publisher with the product manufacturer and created a duty of care toward consumers.\textsuperscript{79} In 1975, the California Supreme Court imposed negligence liability on a radio broadcaster for promotional speech that encouraged teenage drivers to race to various locations on city streets to receive prizes in real time, resulting in another motorist’s death, but that case was not followed and was later characterized as an incitement case.\textsuperscript{80} Other courts have held that mass-produced and marketed navigation maps are “products” subject to strict liability where factually verifiable data such as the location of mountains were negligently not depicted on the maps, leading to plane crashes and casualties.\textsuperscript{81} None of these cases analyzed First Amendment limits to previously in Boston and California and that Paramount executives released the film during spring vacation week to maximize attendance by high school aged kids. Two youths had been killed near theatres showing The Warriors in Palm Springs and Oxnard, California. The court held that Paramount owed a duty of care to the public, but that the movie did not fall within an exception to the First Amendment’s protection because the movie did not “purport to order or command anyone to any concrete action at any specific time, much less immediately,” so it could not be characterized as “incitement” even if it in fact have a tendency to lead to violence. \textit{Id. at 631, quoting McCollum v. Columbia Broadcasting Systems, Inc., 202 Cal. App.3d 989, 1001 (1988)} (Ozzy Osbourne and his agents did not owe a duty of care to music listeners who committed suicide).


\textsuperscript{79} \textit{See} Hanberry v. Hearst Corporation, 276 Cal. App. 2d 680, 684 (1969) (Good Housekeeping Magazine went beyond the role of mere publisher by giving a defective product its “Consumer Guaranty” seal of approval, thereby creating a duty of care to consumers of the endorsed product). The First Amendment was not mentioned.

\textsuperscript{80} \textit{Weirum v. R.K.O. General, Inc., 15 Cal.3d 40, 539 P.2d 36,123 Cal.Rptr. 468 (1975).} Regarding the First Amendment, the court stated simply, “The First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act.” \textit{Id. at 48. See also, e.g., Smith v. Linn, 48 Pa. D&C.3d 339, 349 (1988)} (“The Weirum decision . . . seems to suggest the radio station’s activity constituted incitement, thus falling outside of the First Amendment’s protection.”).

\textsuperscript{81} \textit{See, e.g., Halstead v. United States, 535 F. Supp. 782, 791 (1982)} (map that contained an inaccurate depiction of landing site was a “product” under Section 402A because pilots rely on the maps and plane crashes and human death are a foreseeable result of inaccurate depictions), citing K Mart et al v. Midcon Realty Group of Conn., et al, 489 F. Supp 813, 818 (D. Conn. 1980) and Comments c and f of the \textit{Restatement (Second) of Torts, Sec. 402A (1965)}. The Second Circuit affirmed, finding that the chart producer, Jeppesen, “undertook a special
speech liability, and the products liability analysis has been limited to navigation maps. Other than these few disjointed exceptions, courts have not allowed negligence liability for protected speech.

In sum, lower courts' speech-tort jurisprudence grounded in tort doctrine virtually bars tort liability for negligent speech and has effectively immunized producers of violent entertainment media, including violent video games. While the seminal news publisher case seems sensible based on a risk-utility analysis, the high school shooting cases seem different, at least relative to the video game defendants, considering their incredible wealth, the nature of the video games’ effects on teenage brains, and the level of foreseeability and culpability of the defendants in targeting pre-teens and teenagers for games that they recognize as inappropriate for them. Factors such as foreseeability and feasibility should weigh into a tort analysis, but the tort rulings rendered the difficult constitutional analysis unnecessary. During the same period, other courts engaged a constitutional analysis grounded in Chaplinsky v. New Hampshire’s categorical approach, which similarly effectively barred tort liability for unreasonably dangerous speech.

B. Lower Courts’ Constitutional Analysis of Negligent Speech Liability

In analyzing tort liability for unreasonably dangerous speech that allegedly caused serious injury or death, many lower courts engaged a constitutional analysis instead of a tort analysis. However, instead of modeling their analysis after the Supreme Court’s speech-tort precedent, these courts relied on the Court’s categorical approach to

relationship, as seller, to insure that consumers will not be injured by the use of the charts; Jeppesen is entitled – and encouraged – to treat the burden of accidental injury as a cost of production ... [t]his special responsibility lies upon Jeppesen in its role as designer, seller, and manufacturer.” Saloomey v. Jeppesen & Co., 707 F.2d 671, 676-677 (2nd Cir. 1983) (citations omitted). Other courts followed this reasoning relative to maps and charts, based on strict products liability’s purpose of safeguarding the public from risks posed by mass-produced items and its cost-spreading function. See Fluor Corporation v. Jeppesen & Co., 170 Cal.App.3d 468, 475, 216 Cal. Rptr. 68 (1985) (Jeppesen was strictly liable for an airplane crash where its chart failed to designate a hill that the plane struck during a night landing; the concept that strict liability principles apply only to products’ “physical properties” was “clearly erroneous”); Brocklesby v. United States, 767 F.2d 1288, 1295-1297 (9th Cir. 1985) (defective chart causing plane crash is a defective product for purposes of analysis under Section 402A, and no fault is required to impose liability), citing Comment c to Section 402 A (manufacturers of mass-produced products are the cheapest cost-avoiders, can afford the costs, and should consider the costs of accidents a cost of doing business). None of these cases addressed the First Amendment.

82 In Brocklesby v. U.S., Jeppesen raised the First Amendment defense for the first time on appeal, and so the court did not consider it. 767 F.2d at 1295, n.9. See also supra notes 79-80.

83 See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY Sec. 19 (1998) (a “product” is “tangible personal property.”) See also id., Comment d.

84 See, e.g., James v. Meow Media, 90 F. Supp. 2d at 818, citing Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) (constitutional analysis is unnecessary if a case can be resolved on tort grounds); Watters v. TSR, Inc., 904 F.2d 378 (6th Cir. 1990) (since Kentucky tort law resolved the liability issue, constitutional issues should not be addressed).
criminal punishment of speech, which requires a finding that the speech falls within a category of unprotected speech before it may be punished.

In *Chaplinsky v. New Hampshire*, the Court identified categories of speech that are unprotected by the First Amendment, and therefore subject to criminal punishment, to wit: the lewd and obscene, the profane, the libelous, and the insulting or “fighting words,” such as the “offensive” or “derisive” words that led to Mr. Chaplinsky’s criminal conviction. The Court strengthened considerably protection for the type of live political speech at issue in *Chaplinsky v. New Hampshire* in *Brandenburg v. Ohio*, in which the Court adopted a stringent “incitement” test to render political or ideological speech highly protected from government punishment absent proof of the speaker’s intent to risk public safety and a likelihood of imminent public harm. Yet, the Supreme Court has never adopted a categorical approach to tort regulation of speech and has never reviewed liability for violence-provoking speech based on a theory of negligence. Rather, in the tort context, the Court has balanced free speech rights against the values furthered by tort liability and both denied liability for untrue, defamatory political speech and allowed liability for publishing presumably true political memoirs, depending on a number of policy considerations. The Court considers a number of factors in the speech-tort balance, then constitutionalizes tort liability for speech by raising the prima facie elements of torts depending on the outcome of the factors, to meet First Amendment limits to punishing speech.

Within a few years of *Brandenburg*, the first lawsuits alleging that violent media negligently caused harm to children were filed. The lower courts adopted a *Chaplinsky*-based categorical approach to negligent speech tort cases during the period that the Supreme Court was constitutionalizing defamation and other speech torts. As to

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85 315 U.S. 568 (1942).
86 “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Id. at 571-572.
87 The Brandenburg test requires intent: the First Amendment does “not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curium). Brandenburg essentially reformulated Schenk’s “clear and present” danger test to require speech to “incite” imminent lawlessness to lose First Amendment protection from criminal sanctions. Brandenburg’s incitement test was tightened in *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326 (1973), which reversed a disorderly conduct conviction and raised the bar to establishing incitement.
88 See *New York Times v. Sullivan* (false statements of fact were shielded from defamation liability to give “breathing space” for criticism of public officials).
89 See *Harper & Row v. Nation* (tort liability allowed for misappropriation of former President Gerald Ford’s Watergate memoirs).
90 In *New York Times v. Sullivan*, the Court began what became a series of cases constitutionalizing torts to reconcile liability for speech with First Amendment limits on punishing speech. *See infra* Part III.
negligent speech, lower courts followed the Supreme Court’s criminal precedent, and required a predicate finding that the allegedly negligent speech falls within an unprotected category of speech before considering tort liability. Today, the nearly unanimous lower court rule is to subject allegedly unreasonably dangerous speech to Brandenburg’s incitement test as a predicate to imposing tort liability.

In one of the earliest federal lawsuits alleging negligent broadcasting, Zamora v. Columbia Broadcasting System, et al., a minor who shot and killed his 83-year-old neighbor sued the major television broadcasters for damages, claiming that from ages 5 to 15, he was “impermissibly stimulated, incited, and instigated” to commit violent crimes he viewed on television.\(^91\) The Florida court held that the Constitution fully protects speech from negligence liability unless the speech falls within a category of unprotected speech, based on the public’s right to receive “suitable political, aesthetic, moral and other ideas” through broadcasting.\(^92\) The court recognized the categories of unprotected speech identified in Chaplinsky v. New Hampshire, then dismissed the case upon a finding that the speech did not fit within an unprotected category.\(^93\)

A few years later, a California appellate court decided Olivia N. v. National Broadcasting Company, Inc.\(^94\) The evidence established that a nine-year-old girl’s rapists had recently seen the movie “Born Innocent” and conspired to reenact an artificial rape scene from the movie, and that NBC knew that depicting crimes against children can lead to “copycat” crimes against children. Although the copycat crime may have been foreseeable, the court held that the broadcast did not constitute “incitement,”\(^95\) and the First Amendment precluded tort liability on a “simple negligence” theory.\(^96\)

Soon after Olivia N., the Fifth Circuit handed down Herceg v. Hustler Magazine, Inc.\(^97\) In this case, Hustler Magazine was sued for negligence and strict liability after publishing “Orgasm of Death,” an “inflammatory” article that described in detail how to experience “autoerotic asphyxiation,” which led to the accidental hanging death of a fourteen-year-old Texas boy when he tried it at home. The jury found incitement and awarded damages,\(^98\) but the Fifth Circuit reversed over a strong dissent, finding that,

\(^91\) 480 F. Supp. 199 (S.D. Fla. 1979). Plaintiffs claimed that violent broadcasts caused him to become desensitized to violence, to develop a sociopathic personality, and to become a danger to himself and others. Id. at 200-201.
\(^92\) Id. at 205, quoting Red Lion Broadcasting Co., v. F.C.C., 395 U.S. 367, 390 (1969).
\(^93\) Id. at 204-207.
\(^95\) Id. at 494. It seems clear that NBC did not advocate or intend to cause harm and was, at most, negligent in deciding to broadcast the film.
\(^96\) Twice the court referred to the impropriety of allowing liability on a “simple negligence theory.” Id. at 494, 497. See also, e.g., DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982) (television broadcaster not liable to parents of a child who died while performing a stunt he had seen on television).
\(^97\) The jury had awarded $9.4 million in damages.
\(^98\) The jury had awarded $9.4 million in damages.
Despite clear cause-in-fact and foreseeability, the article did not “incite” the boys’ sexual behavior as a matter of law, and therefore, Hustler was immune from civil liability.

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

Similar to the development of the tort-based immunity rules, the early constitutional cases seem more defensible than the high school shooting cases. Zamora v. Columbia Broadcasting System et al, for example, had enormous causation issues that rendered liability against the broadcaster a true threat to broadcasting prerogative. The film at issue in Olivia N. v. National Broadcasting Company, Inc. brought considerable public awareness to the gross abuses taking place in homes for troubled adolescents, and educational programming surely must be a primary free speech concern, which seems to outweigh the risk of copycat crimes. Herceg v. Hustler seems different, as it involved a step-by-step sex article on how to achieve an orgasmic high in a very dangerous manner, with an attendant very high level of foreseeability and much more direct causation. The high school shooting cases also seem different, as some of the “speech”

\[99\] The magazine, opened to the page of “Orgasm of Death,” was lying near the feet of the dead boy, who had obviously been following the instructions in the magazine when he hanged himself to death. The fact that the danger was foreseeable is established by the title itself, although the court seemed to think that the numerous warnings contained in the article undermined plaintiffs’ argument that the article incited, or even advocated, trying the sex act at home. Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802 at 1021-1024.

\[100\] Id. at 1020-1024. Judge Edith H. Jones filed a strong opinion dissenting from the majority’s categorical approach, arguing that the pornographic and commercial nature of the publication rendered it worthy of less strict First Amendment protection under Supreme Court precedent. Herceg v. Hustler, 814 F. 2d at 1028 (Jones, J., concurring and dissenting). Judge Jones wrote, “Hustler is a profitable commercial enterprise trading on its prurient appeal to a small portion of the population. It deliberately borders on technical obscenity, which would be fully unprotected . . .” Id.


\[102\] Id. at 1281. The court seemed confused about the distinction between “strict scrutiny” as the test for challenges to legislative deprivations of constitutional rights and the balancing test the Court has been utilized in speech tort cases. The court seemed to assume that the Brandenburg incitement test constitutes “strict scrutiny” in negligence cases whereas actual malice constitutes “strict scrutiny” in defamation cases.
consisted of mass-marketed games that teach effective and organized killing skills and reward acts of aggression just like the acts perpetrated by the (very effective and organized) teenage killers – a far cry from the type of live political speech at issue in Chaplinsky or Brandenburg. Nonetheless, lower courts have lumped very different types of negligent speech cases together and have applied the Brandenburg incitement test to nearly all cases in which negligent speech allegedly caused serious injury or death.

Some plaintiffs attempted to circumvent the Brandenburg incitement test by bringing intentional claims. However, courts continued to immunize even speech that was found to have a “tendency to lead to violence,” unless the speech falls within an unprotected category, regardless of intent.103 For example, after viewing the violent film Natural Born Killers, a Louisiana court held that it did not constitute “incitement,” despite providing the idea for the copycat crime that rendered the plaintiff a paraplegic so “the intent of the [movie producer and director was] not material.”

Other plaintiffs have argued that the nature of the negligent speech – such as commercial or pornographic speech – should relax constitutional review of negligent speech liability, and a few courts agreed and created balancing tests to constitutionalize negligence liability for less-than-fully-protected speech. Federal courts have allowed liability against a magazine publisher that negligently advertised “gun-for-hire” services by “constitutionalizing” the prima facie case of negligence relative to the advertisements (which the court characterized as commercial speech) and found that they created an obvious “clear and present” danger of death, not just ordinary foreseeability.105 One federal court adopted a variable standard for children’s television

104 Byers v. Edmondson, 826 So.2d at 556-557 (emphasis added). The images in the film Natural Born Killers “place this film in the realm of fantasy” that inspired “copycat” behavior, but do not constitute “incitement.” Id. at 556-557.
105 See, e.g., Norwood v. Soldier of Fortune Magazine, Inc., 651 F. Supp 1397 (W.D. Ark. 1987). In Norwood, the commercial nature of “gun-for-hire” advertisements rendered them subject to regulation that may not be constitutionally permissible relative to “ideological communication” such as political speech. Id. at 1399-1400 (citations omitted). The court distinguished New York Times v. Sullivan, based on the political nature of the editorial “advertisement” in that case, and characterized the murder contract advertisement at issue in Norwood as “at best, ‘commercial speech’” and “a far cry from the type of responsible public debate which the United States Supreme Court obviously intends to foster by cases such as New York Times.” Id. at 1398, 1401, respectively. Cf. Einmann v. Soldier of Fortune Magazine, 880 F.2d 830 (5th Cir. 1989) (reversing a jury verdict for $9.4 million against the magazine, finding no breach of duty as a matter of law for a gun-for-hire advertisement under risk-utility and foreseeability analyses); Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir.1992), cert. den. 506 U.S. 1071, 113 S.Ct. 1028 (1993) (gun-for-hire advertisement created a reasonably foreseeable risk of death by gun injury on its face under Georgia law). The 11th Circuit rejected the magazine’s First Amendment immunity defense, finding that New York Times v. Sullivan requires a balancing test, not a categorical approach, and the advertisement was far from “core, non-commercial speech.” Id. at 1116-1117 (citations omitted). The district court had instructed the jury that they must find that the advertisement created a “clear and present danger” to find the defendant liable, a modified negligence instruction that raised the burden of proof to meet constitutional scrutiny.
programming by rejecting the incitement test in favor of the more lenient clear and present danger test for programming aimed at children. However, a variable standard for violent media in accordance with *Ginsberg v. New York*’s variable obscenity doctrine has been rejected consistently by lower courts, and is currently under Supreme Court review in the context of a video game sales regulation in *Schwarzenegger v. Entertainment Merchants Association.*

Some courts have recognized new categories of unprotected speech or transported other categories of unprotected speech from the criminal context to the negligent speech context, to allow tort liability against the most culpable producers of dangerous speech where “incitement” could not be established. For example, two federal courts have recognized subliminal suicide commands in rock music as a new category of unprotected speech, and the Fourth Circuit circumvented *Brandenburg*’s imminence doctrine.

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106 See *Walt Disney Productions v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981). The Mickey Mouse Club program was allegedly negligent by illustrating on television how to make the sound effect of a tire coming off of a car by placing BB pellets inside of a balloon and inviting the viewing audience (children) to follow along from home. Plaintiff, a child, was partially blinded when he followed along from home, his balloon popped, and a BB pellet struck him in the eye. The court held that despite a foreseeable risk of injury, the First Amendment “mandated” summary judgment for defendant, since the speech at issue failed to meet the “clear and present danger” test. *Id.* at 404, citing *Schenck v. United States*, 249 U.S. 47, 52 (1919).

107 Some plaintiffs’ lawyers and scholars have argued that “socially repugnant” violent speech constitutes “obscenity” and is therefore unprotected, but lower courts have rejected a “violence-based notion of obscenity” in accordance with the variable obscenity doctrine announced in *Ginsberg v. New York*, 390 U.S. 629 (1968). *See, e.g.*, *Byers v. Edmondson*, 826 So.2d 551, 557 (La. Ct. App. 1st Cir. 2002), writ den. 826 So. 2d 1131 (La. 2002) (rejecting a “violence-based notion of obscenity”); *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002) (declining to extend its obscenity jurisprudence to violent, as opposed to sexually explicit, material); *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950, 961 (9th Cir. 2009) *cert granted* 130 S. Ct. 2398 (2010) (California “is asking us to boldly go where no court has gone before. We decline the State’s invitation to extend the reach of Ginsberg and thereby redefine the concept of obscenity under the First Amendment.” listing circuit courts that also rejected a violence-based notion of obscenity.) *See also*, KEVIN W. SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* 146-163 (2003) (discussing cases and scholarly commentary about the propriety of extending the variable obscenity doctrine to violent media).

requirement in *Rice v. Paladin* by classifying a professional assassin instruction manual admittedly intended to aid and abet murder as a “speech act.” However, other than a few ad hoc exceptions, a constitutional right to externalize all social costs of foreseeably dangerous speech is the prevailing rule, and no court has allowed a finding of incitement in an unreasonably dangerous or violent speech case.

C. The Inapposite Nature of Brandenburg’s Incitement Test

The *Brandenburg* incitement test is inapposite relative to violent media, and particularly violent video games. The incitement test requires intent to cause lawlessness and contemporaneous or immediate causation. It should be discarded relative to violent media for two reasons based on its two elements. First, producers of violent media are generally profit-driven corporations whose directors and artists presumably do not intend to advocate lawless audience reactions. To the contrary, violent audience reactions to their media almost certainly are not in their best interests because such reactions may create bad publicity and hurt public relations and profits. Applying *Brandenburg*’s intent requirement to producers of violent media is senseless because the fault, if any, lies in producers’ disregard of the risks posed by their media, or even conscious abuse of the current law to maximize profits, but not intent to cause public harm. This type of fault is addressed by the law of negligence. Liability for harms caused by violent media should center on a constitutional application of negligence liability, not transportation of the inapposite incitement test to a context factually and theoretically divorced from its origination.

In which is “sneaks into the brain,” without the listener’s knowledge or informed consent and is therefore akin to deceptive advertising, which also influences consumers unfairly. The *Waller v. Osbourne* court explained the scientific differences between subliminal messages and preconscious suggestion, the latter of which allows the listener to consider the content of the speech. A California court recently found “cyberbullying” to be unprotected speech, consistent with “true threats” jurisprudence. See Tonya Roth, *Cyberbullying Held not Protected Speech in CA Civil Suit*, FINDLAW (March 23, 2010), available at http://blogs.findlaw.com/injured/2010/03/ca-court-cyberbullying-is-not-protected-speech.html; Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1038 (9th Cir. 2002) (“true threats” of bodily harm are not protected speech).

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

*See supra Part I.B. See, also e.g., S. Elizabeth Wilborn Malloy & J. Krotoszynski, Jr., *Recalibrating The Costs Of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159 (2000) (arguing that the Brandenburg test applied to harmful speech cases is inappropriate when the speech poses significant public danger); Steven J. Weingarten, *Tort Liability For Nonlibelous Negligent Statements: First Amendment Considerations*, 93 YALE L.J. 744, 747-749 (1984) (arguing that Brandenburg should not apply to non-libelous negligent speech, as negligence liability rests on unreasonably dangerous conduct, not advocacy or intent). *See also* Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650 (2009) (reviewing various approaches to speech tort liability and suggesting an approach centered on government power).
Second, the incitement test’s requirement of a likelihood of “imminent” harm fails to
address fairly the copycat crimes that can result directly, but not immediately, from
violent media, is directly contrary to the scientific evidence that explains the correlation
between consumption of violent media and subsequent acts of aggression, and cannot
possibly address serious injuries to children’s psychological and neurological health
that can be caused by violent video games.111 Lapses of time between negligent conduct
and foreseeable intervening causes do not destroy causation according to established
tort doctrine, and constitutional tests should be sensible and at least somewhat
efficacious. The causation aspect of the incitement test is perverse as applied to most or
all violent media cases because it demands proof of causation that is diametrically
inconsistent with scientific knowledge concerning the etiology of violent media’s
effects on the brain and subsequent antisocial conduct. The test should be abandoned
relative to violent media, at least as to children, who are most vulnerable to the
cognitive programming effects of violent media.

The lower courts’ transportation of the Brandenburg test into the tort context where
violent media allegedly caused violent behavior is understandable considering the
similar audience-reaction aspect of the speech. However, the test is irrelevant to the
intent and causation issues presented in modern violent media cases and has created a
socially undesirable imbalance favoring producers of potentially harmful speech to the
detriment of society and children in particular. The normative effect has been to
courage harmful speech production and irresponsible marketing, manifested in part
by producers targeting children in advertisements for the very products that they
found inappropriate and potentially harmful to children.112 Lower courts have responded to
the current jurisprudential imbalance by carving out exceptions in extreme cases of
irresponsible and dangerous publications, resulting in a piecemeal jurisprudential
matrix that is both unpredictable and analytically incoherent. An analytical approach
that is more consistent with scientific knowledge of causation and the nature of the fault
is both conceivable and desirable. A properly tailored negligence paradigm could strike
a better liability balance and avoid chilling speech while also encouraging social
responsibility.

III. EVIDENTIARY FRAMEWORK FOR CONSTITUTIONALIZING TORTS

“To enforce freedom of speech in disregard of the rights of others would be
harsh and arbitrary in itself.”113

The Supreme Court’s divided opinions in speech tort cases underscore the difficulty in
balancing the conflict of interests presented by tort liability for speech.114 This Part

111 See supra Part I.A.
112 See supra Part I.B.
114 Per Justice Brennan, speech tort jurisprudence has “produced a diversity of considered
opinions, none of which speak for the Court.” Dun & Bradstreet, Inc. v. Greenmoss Builders,
Inc., 472 US. 749, 775 (1985) (Brennan, J., dissenting). See also, Gertz v. Welch, 418 U.S. 323
(1974) (plurality opinion with four dissenting justices); Dun & Bradstreet, Inc. v. Greenmoss
Builders, Inc., 472 U.S. 749 (1985) (plurality opinion with four dissenting justices); Zacchini v.
briefly reviews the Court’s opinions concerning tort liability for speech generally for
the purpose of identifying the policy considerations that have animated the Court’s
speech tort jurisprudence and the methods by which the Court has reconciled tort and
constitutional policies. The Court has stressed its “narrow” holdings in some of these
opinions, indicating that reconciling free speech and tort liability is a very fact-intensive
and case-specific endeavor. Nonetheless, the Court’s evidentiary tailoring method of
constitutionalizing speech torts in various cases is instructive on how courts could
constitutionalize the tort of negligence relative to unreasonably dangerous speech.


In New York Times v. Sullivan, the Supreme Court first recognized that the First
Amendment limits a state’s police power to award tort damages for defamation – a
category of speech previously assumed to be unprotected by the First Amendment. The
lawsuit arose from statements made by the newspaper that inferentially criticized a
public safety commissioner’s official conduct and contained some false statements of
fact. The Court specifically rejected a categorical approach to the issue of whether
defamatory false statements of fact constitute unprotected speech, finding that speech
cannot claim “talismanic immunity from constitutional limitations merely because it is
labeled as ‘libel.’” The Court also rejected Sullivan’s attempt to categorize the paid
advertisement as “commercial” speech, finding that the speech was political in
nature. The Court explained that political speech must be fiercely protected and given
“breathing space” to avoid chilling robust debate concerning self-government. Since
erroneous statements are “inevitable in free debate,” the Constitution requires
protection of insignificant false statements of fact to protect core political speech.

Scripps, 433 U.S. 5562 (1977) (four justices dissented in two dissenting opinions); Time, Inc. v.
Hill, 385 U.S. 374 (1967) (three justices dissented and one justice dissented in part); Harper &
Row v. Nation Enterprises, 471 U.S. 539 (1985) (three justices dissented); Philadelphia

See, e.g., Barnicki v. Vopper, 532 U.S. 514, 535-536 (2001) (Breyer, J., concurring); Snyder

115 See id. at 258-259 & 740 (Appendix).
116 376 US. 254 (1964).
117 For example, the newspaper advertisement stated that: Martin Luther King, Jr. had been
arrested seven times, when he had really been arrested four times; the Alabama state College
Campus dining hall had been padlocked to starve the students into submission when in fact the
hall was never padlocked; and that the police were guilty of “ringing” the campus with “loads of
police armed with shotguns and tear-gas” in connection with a peaceful demonstration, when the
police were not called to the campus in connection with the demonstration at all. See id. at 258-
259 & 740 (Appendix).
118 Id. at 269.
119 Id. at 270-271.
120 “[T]he rule is that ‘we examine for ourselves the statements in issue and the circumstances
under which they were made to see . . . whether they are of a character which the principles of the
First Amendment . . . protect.” Id. at 285-286, quoting Pennekamp v. Florida, 328 U.S. 331, 335,
66 S. Ct. 1029, 1031, 90 L.Ed. 1295 (1946). The Court focused on the political nature of the
speech, which it deemed core First Amendment speech. Id. at 296-297.
121 Id. at 271-272.
mandating constitutional limits to states’ police power to punish even *untrue* statements contained in political speech.\footnote{122}{Id. at 280-281. The Court recognized that the fear of civil liability may be “markedly more inhibiting than the fear of prosecution under a criminal statute.” *Id.* at 277. In this case, the jury awarded 1000 times the maximum criminal penalty in the civil trial, *i.e.*, $500,000.00. *Id.* at 277.}

The Court concluded that the First Amendment requires evidentiary modifications to a prima facie case of defamation arising from speech critical of the government and created a narrowly-tailored prima facie case of political speech defamation to meet constitutional scrutiny. The Court raised the level of fault necessary to establish the claim from negligence or strict liability\footnote{123}{The common law of England allowed strict liability for libel. *See*, e.g., Cassidy v. Daily Mirror Newspapers, Limited, 2 K.B. 331, 69 A.L.R. 720 (1929) (wife established liability against newspaper based on its accurate report of her husband’s statements that implied that he was not married to wife, with whom he cohabited).} to “actual malice,” meaning defendant actually knew that the speech was false or published it with reckless disregard concerning its truth or falsity.\footnote{124}{*Id.* at 281-283.} The actual malice standard shifted the burden of proof that the speech was false onto the plaintiff, instead of the common law rule that truth is a defense.\footnote{125}{*Id.* at 278-280.} The Court also raised the level of proof required to establish fault from the general tort burden of a preponderance of evidence to a heightened burden of clear and convincing evidence.\footnote{126}{*Id.* at 285-286 (the constitutional standard demands “convincing clarity”).} Ultimately, the Court held that even untrue and defamatory speech that was historically unprotected must be shielded from tort liability to safeguard core political speech in the absence of clear evidence of the speaker’s substantial fault. At the same time, the Court recognized that political speech is not immune from defamation liability.\footnote{127}{Since the evidence proved mere negligence, it was “constitutionally insufficient” level of fault to impose liability for political speech. *Id.* at 288. Justices Black, Douglas, and Goldberg would have recognized an “absolute, unconditional constitutional right” to criticize public officials. *Id.* at 293 (Black, J., concurring). *See also* id. at 304 (Goldberg, J., concurring).}

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

Supreme Court cases subsequent to *New York Times v. Sullivan* similarly resolved the conflict between First Amendment speech protection and the states’ and individuals’ interest in tort liability by balancing the interests involved and often modifying elements of tort claims to render them sufficiently protective of speech to meet First Amendment limits to punishing speech.\footnote{128}{Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757 (1985) (“We must . . . balance the State’s interest . . . against the First Amendment . . .”).} The Court’s decisions created three levels of evidentiary tailoring in defamation cases,\footnote{129}{*Id.* at 304 (Goldberg, J., concurring).} applied the actual malice standard to public figures’ emotional distress claims, and identified three dominant policy considerations to determine how to reconcile free speech with tort liability. First, private persons generally receive more state law protection from dignitary or emotional harm than...
public figures because they are more vulnerable to injury. Second, whether the speech is of public concern or truly private is the most critical factor in determining its level of constitutional protection. Third, the state has a higher interest in protecting some interests through tort liability than others, with emotional or dignitary harm representing the nadir of the state’s protective interest in punishing speech.\textsuperscript{130}

1. Narrow Tailoring of Tort Claim Elements for Speech That Causes Dignitary or Emotional Harm to Public Figures & Broad Protection For Accurate Publication of Public Records and Public Forum Political Speech That Causes Dignitary or Emotional Harm

Shortly after New York Times v. Sullivan, the Court clarified that the level of constitutional tailoring necessary to constitutionalize a claim for defamation turns on the plaintiff’s status as a public figure or a private individual and extended the actual malice standard to all “public figures.”\textsuperscript{131} Public figures presumably have less need for, and are less deserving of, state protection from defamatory speech, warranting their higher actual malice burden of proof to establish a claim. For one thing, public figures presumably have access to the media for purposes of counter-speech, and can therefore engage in “self-help” to protect their reputation.\textsuperscript{132} In addition, public figures take affirmative action to inject themselves into the public spotlight with “exceedingly rare” exception, and thereby assume the risk\textsuperscript{133} of public criticism and even “sharp attacks”

\textsuperscript{130} See, e.g., Deana Pollard Sacks, Snyder v. Phelps, the Supreme Court’s Speech-Tort Jurisprudence, and Normative Considerations, 120 YALE L.J. ONLINE 193 (2010) (illustrating these three factors relative to a private individual’s claims for invasion of privacy and intentional infliction of emotional distress arising from picketing and an online “epic” concerning his son). The Court in Snyder v. Phelps indicated that the nature of the speech was the dominant factor, but carefully limited its holding and declined to review the defendants’ online “epic” derogating the plaintiff’s family, which presumably would be less protected than the picketing. See infra notes 160-163 and accompanying text. See also, Deana Pollard Sacks, Snyder v. Phelps: A Prediction Based on Oral Arguments and the Supreme Court’s Established Speech-Tort Jurisprudence, 2010 CARDozo L. REV. DE NOVO 418 (analyzing the Court’s statements and questions during oral argument that indicated they would engage in “line-drawing” as in other speech tort cases, and that they distinguished the picketing from the online epic, the latter of which seemed to warrant less constitutional protection).

\textsuperscript{131} See Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (privately-employed state university coach accused of game-fixing); Associated Press v. Walker, 388 U.S. 130 (1967) (former army general accused of leading an angry crowd to obstruct federal marshalls who were facilitating desegregation at the University of Mississippi). In Gertz v. Welch, 418 U.S. 323 (1974), the Court defined two types of public figures. All purpose public figures are person who have achieved “pervasive fame or notoriety,” whereas limited public figures inject themselves into a particular public controversy and thereby become a public figure for a limited range of issues. Gertz v. Welch, 418 U.S. at 351-352. The Court later clarified that being extremely wealthy and going through a high profile divorce does not render the divorcing parties public figures, despite wife holding press conferences regarding the divorce. Similarly the fact that divorce proceedings are judicial in nature does not render divorcing parties “public figures” despite broad public interest in the judicial proceedings. See Firestone, 424 U.S. 448, 452-457 (1976).

\textsuperscript{132} Gertz v. Welch, 418 U.S. at 344 (“self-help” means accessing the media to contradict the lie).

\textsuperscript{133} Id. at 344-345 (a public official “runs the risk of closer public scrutiny” than a private defamation plaintiff). See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. at
on their character and integrity.\textsuperscript{134} The actual malice standard was extended to a public figure’s intentional infliction of emotional distress claim in \textit{Hustler v. Falwell},\textsuperscript{135} and almost certainly applies to public figures’ false light invasion of privacy\textsuperscript{136} claims as well.\textsuperscript{137} In \textit{Bartnicki v. Vopper}, the Court held that “privacy concerns give way when balanced against the interest in publishing matters of public importance,” and rejected altogether a privacy claim against a radio station that broadcast an ostensibly private cell phone conversation that had been intercepted illegally by an unknown third party.\textsuperscript{138} The parties to the conversation were characterized as “limited public figures” because they were public school union negotiators and the speech was a matter of public concern, warranting a very high level of constitutional protection.\textsuperscript{139} It was undisputed that the taped conversation was accurate, so the Court had no reason to

\textsuperscript{134} New York Times v. Sullivan, 376 U.S. at 270.

\textsuperscript{135} See Hustler Magazine v. Falwell, 485 U.S. 46 (1988). Falwell’s claims of libel and intentional infliction of emotional distress were both subjected to the actual malice standard, the Court emphasizing Falwell’s public status and the value of derogatory parody and satire in political commentary. \textit{Id.} at 53. To hold otherwise would allow a public figure to circumvent the actual malice standard by re-casting the grievance as a claim for emotional distress, which would create an “end around First Amendment strictures.” See Smithfield Foods, Inc. v. United Food and Commercial Workers, 585 F.Supp.2d 815, 818-821 (E.D. Va. 2008) (explaining Supreme Court decisions applying the actual malice standard to non-dignitary torts); \textit{See also} Food Lion, Inc. v. Capital Cities/ABC, Inc. 194 F.3d 505, 522-523 (4th Cir. 1999) (actual malice standard applied to grocer’s claim for reputation damages).

\textsuperscript{136} The tort of invasion of privacy includes four separate causes of action: intrusive invasions, public disclosure of private facts, false light, and commercial appropriation. \textit{See} Dobbs \textit{supra} note 39 at 1198. The elements of false light invasion of privacy are so similar to defamation that some states, such as Texas, reject the claim as redundant and unnecessary. More generally, since the injury caused by the first three are reputation injury, humiliation, and embarrassment, they would likely be treated with less deference relative to the First Amendment than commercial appropriation, which protects the financial interests of the plaintiff. \textit{See}, e.g., Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562 (1977) (the state has a greater interest in protected proprietary interests than emotions or reputation); \textit{See infra} Part III.B.3.

\textsuperscript{137} In Time, Inc. v. Hill, 385 U.S. 374 (1967), Time Magazine substantially misreported the facts concerning a private family’s kidnapping ordeal. The Court extended the actual malice standard to the private family members, who brought a false light invasion of privacy claim against the magazine. However, most scholars believe that this aspect of Time, Inc. v. Hill was overruled in Gertz v. Welch, where the Court clarified that the status of the plaintiff as a public figure or private individual has a large effect on the level of tailoring in a defamation claim, and today a case like Time, Inc. v. Hill would be governed by evidentiary standard set forth in Gertz v. Welch. \textit{See} Erwin Chemerinsky, \textit{Constitutional Law Principles and Policies} 1056 (3d. ed. 2006) (the actual malice standard clearly would not apply to the facts of Time, Inc. v. Hill after Gertz v. Welch).


\textsuperscript{139} \textit{Id.} at 549, citing Gertz v. Welch, 418 U.S. at 351 (distinguishing full-purpose public figures from “limited” purpose public figures). “In this case, privacy concerns give way when balanced against the interest in publishing matters of public importance. . . . One of the costs associated with participation in public affairs is an attendant loss of privacy.” \textit{Id.} at 536.
discuss the actual malice standard, but the Court’s decision essentially converges with its reasoning in *Hustler v. Falwell* in terms of denying liability for emotional or dignitary claims as to public figures or limited public figures where speech of public concern cannot be characterized as “false.”

The Court has also recognized a very high level of constitutional protection from tort liability arising from privacy statutes prohibiting accurate publication of private facts about private individuals contained in public records. Engaging traditional strict scrutiny, the Court has determined that accurate publication of official government-generated information contained in public records is broadly protected from tort liability regardless of how personal or embarrassing the facts may be, including publishing rape victims’ identifying information. Any other outcome would essentially impose strict liability against newspapers for accurately republishing the content of public records.

Most recently, in *Snyder v. Phelps*, the Court found that political speech communicated by means of picketing on a public sidewalk could not form the basis for emotional or dignitary tort claims where the speech could not be proven untrue and there was no personal animus directed at the plaintiff, even though the plaintiff was not a public figure. In *Snyder v. Phelps*, church members whose mantra is “God Hates Fags” and who purport to believe that God punishes the United States for its tolerance of homosexuality picketed the funeral of a fallen marine with grossly distasteful signs such as “Thank God For Dead Soldiers” and “You’re Going to Hell,” causing the marine’s father to suffer severe emotional distress. A jury awarded the father millions of dollars for emotional distress, invasion of privacy, and punitive damages, but the Court determined that the verdict could not stand on the picketing alone. The Court demonstrated more concern about punishing speech that was political in nature and disseminated via traditional grass-roots “self-government” than the plaintiff’s status as a public figure or private individual, even though some signs seemed to target the

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

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


143 52 U.S. ___ (2011). The Court highlighted the public forum location of the picketing, and stressed the narrowness of its holding. *Id.* at ___. See also *infra* note 160.

144 For more details on the procedural history and facts of *Snyder v. Phelps*, see Deana Pollard Sacks, *supra* note 130.

145 *Snyder v. Phelps*, 562 U.S. at ___. (p.6).
plaintiff’s family personally because, as a whole, their “dominant theme” was political speech.\textsuperscript{146} In addition, unlike defamatory speech, the “offensive” speech at issue could not be proven true or false, and a jury’s discretion concerning “outrageousness” could become an “instrument of suppression of . . . vehement, caustic, and sometimes unpleasant expression.”\textsuperscript{147} Without the built-in verifiable element of falsity, the risk of chilling political speech was too high, and that risk overcame consideration of plaintiff’s level of vulnerability. The privacy statute cases and \textit{Snyder v. Phelps} clarify that the public nature of the speech is the most critical factor in determining its level of constitutional protection, even where the plaintiff is not characterized as a “public figure,” at least where the injury claimed is emotional or dignitary, the speech cannot be characterized as “untrue,” and, on balance, the facts weigh against punishing the speech.\textsuperscript{148}

2. Intermediate Tailoring For Private Individuals’ Defamation Claims Arising From Public Concern Speech & The Import of \textit{Snyder v. Phelps} Relative to Private Individuals

The free speech-tort liability balance is recalibrated where defamatory speech of “public concern” harms private individuals, because they are “more vulnerable to injury, and the state interest in protecting them is correspondingly greater.”\textsuperscript{149} In \textit{Gertz v. Welch}, the Court considered liability for libel arising from a newspaper story that defamed Robert Welch, a respected attorney with strong community ties.\textsuperscript{150} The Court rejected the defendant’s attempt to characterize Gertz as a “public figure,” despite the fact that he had authored books and was active in community affairs, because he had not acquired sufficient fame.\textsuperscript{151} The Court later characterized the news story about Gertz’s involvement in a high profile wrongful death case against a police officer as “at the heart of the First Amendment’s protection,”\textsuperscript{152} but clarified that the “need to avoid self-censorship by the news media is . . . not the only societal value at issue,” and a proper “accommodation” of the competing state interest to protect a private individual’s reputation warrants a less stringent constitutional test than actual malice.\textsuperscript{153}

\textsuperscript{146} \textit{Id.} at ___ (p. 8).
\textsuperscript{147} \textit{Id.} at ___ (p. 12)
\textsuperscript{148} \textit{See Snyder v. Phelps, 562 U.S.} ___, ___ (2011) (Breyer, J., concurring) (on balance, the speech cannot be punished because to do so would not “proportionately” advance the state’s interest in protecting individuals against emotional harm).
\textsuperscript{150} 418 U.S. 323 (1974).
\textsuperscript{151} Elmer Gertz had not “thrust himself into the vortex of this public issue.” \textit{Id.} at 352. Among other things, the John Birch Society’s newspaper, \textit{American Opinion}, asserted as a fact that Gertz “framed” the guilty police officer (Nuccio) as part of a Communist campaign to discredit local police departments for the purpose of establishing a federal (Communist) police force capable of supporting a Communist dictatorship. The article referred to Gertz as a “Leninist,” a “Communist-fronter,” and falsely implied that Gertz had a criminal record so large that it took “a big, Irish cop to lift.” \textit{Id.} at 325-326. None of these allegations were established as true.
\textsuperscript{153} \textit{Gertz v. Welch}, 418 U.S. at 348-349.
Accordingly, where a private individual is defamed by speech of public concern, the Court re-tailored the prima facie case of public figure defamation created in New York Times v. Sullivan by: 1) reducing proof of fault from actual malice to negligence;\(^{154}\) 2) allowing recovery of actual damages upon proof of fault by a preponderance of evidence;\(^{155}\) and 3) shifting the burden of proving truth back to the defendant.\(^{156}\) Although the Court later shifted this burden back to the plaintiff, at least where the defendant is the media.\(^{157}\) In an apparent attempt to avoid chilling speech, the Court added an element of “actual damages” to a private individual-public concern plaintiff’s prima facie case of defamation, an element that had never been required to establish defamation, but which has always been an element of negligence.\(^{158}\)

Some courts assumed that the same constitutional standard applies to private individuals’ claims for other dignitary or emotional harm arising from public concern speech,\(^{159}\) but Snyder v. Phelps undermines this assumption, at least in circumstances that fall within its “narrow” political-picketing-speech holding.\(^{160}\) The Snyder v. Phelps Court focused exclusively on the nature of the speech,\(^{161}\) which it characterized as a grass-roots effort to effectuate the type of social and political change that lies at the heart of the First Amendment’s protection of speech, and therefore must not be

\(^{154}\) Id. at 342, 347. The Court left the contours of the lesser fault standard up to the states, but most states adopted negligence as the fault standard post-Gertz.

\(^{155}\) See id. at 349-350. The actual malice standard of proof was retained relative to presumed and punitive damages. Id.

\(^{156}\) This results from rejecting the actual malice standard. Id. at 342-343.

\(^{157}\) See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). Although Hepps involved a media defendant, it is reasonable to conclude that the burden of proving falsity shifts to the plaintiff in all private person/public concern cases. See, e.g., Dun & Bradstreet at 783-784 (Brennan, J., dissenting) (explaining that the rights of the media are no greater than the rights of anyone else speaking out on public issues, so the same speech tort rules should apply to all defendants); Milkovich v. Lorain Journal Co., 497 U.S. 1, 24 n.2 (a fundamental First Amendment principle is that the worth of speech does not depend on the identity of the speaker, expressing concern over the Court’s apparent distinction between media and non-media defendants).

\(^{158}\) Id. at 349-350 (“state remedies for defamatory falsehood [should] reach no farther than is necessary to protect the legitimate interest involved.”).

\(^{159}\) See, e.g., Herring v. Adkins, 150 Ohio Misc. 2d 13, 19 n. 3 (2008) (“Federal law states that when determining whether speech is protected, courts must apply the same standards to all torts that applied in defamation cases.”).

\(^{160}\) The Court stressed the fact-based narrowness of its holding, and the opinion should be viewed as limited to its extraordinary facts. 562 U.S. ____, ____ (2011) (p. 14). The facts of Snyder v. Phelps are indeed unique. The Court specifically found that the defendants’ motive was to garner attention for their political/religious messages, that they did not violate local laws in conducting their picketing activities on a public sidewalk, and that they did not target the plaintiff for attack per se, but rather, capitalized on his son’s untimely death to disseminate their message at his funeral, as they had been doing for many years through similar funeral picketing activities. Id. at (p. 8-11).

\(^{161}\) “Whether the First Amendment prohibits [tort liability for speech] turns largely on whether that speech is of public or private concern, as determined by all of the circumstances of the case.” Id. at (p.5). The Court explained that, in deciding the nature of the speech, “content, form, and context” must be considered and, while no factor is dispositive, the overall nature of the speech drives the constitutional analysis. Id. at (p. 7-8)
suppressed no matter how crass and despicable its delivery may have been. The place of the political speech was central to the opinion, and it was entitled to “special protection” because it was disseminated in a public place through traditional means on a matter of public concern. All of the circumstances, taken together, overshadowed any concern about plaintiff’s level of vulnerability in reaching the liability conclusion. Notably, the Court declined to address the online “epic” that targeted plaintiff’s family specifically for abuse and which surely deserved a lesser level of constitutional protection.

Snyder v. Phelps does not alter the fact that the vulnerability of persons harmed by speech affects its level of constitutional protection in many circumstances. Gertz v. Welch and other Supreme Court precedent indicate that the potential for speech to harm vulnerable persons, such as children, influences its level of constitutional protection.

Therefore, the vulnerability of the plaintiff should usually be considered, along with the nature of the speech at risk for chilling and all other facts bearing on the balance between free speech and the state’s interest in protecting individuals from civil misconduct, at least where injury does not arise from political speech.

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

The Court sanctioned a much more relaxed evidentiary burden of proof in defamation cases where both the plaintiff and the subject matter of the speech are private. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., a credit reporting agency that negligently misreported Greenmoss’s assets and liabilities to several of Greenmoss’s potential business associates raised the First Amendment as a defense to Greenmoss’s negligence claim, and argued that proof of actual malice was required to impose tort liability in the absence of proof of actual damages, i.e., the Gertz standard. The Court rejected the argument, explaining that the First Amendment concern at issue was “less important” than the public interest crime story at issue in Gertz v. Welch, because the communications concerning credit worthiness were purely private in

162 Id. at (p.12)
163 See id. at ___ (Breyer, J., concurring) (the opinion is restricted to the picketing activity and does not analyze television broadcasting or internet postings); Id. at ___ (p. 8-9) (Alito, J., dissenting) (the epic addressed the private Snyder family directly, and this attack was not speech on a public concern). The Justices made numerous statements during oral arguments that indicated their view that some “line-drawing” would be in order relative to liability for the epic similar speech in other factual contexts. See Deana Pollard Sacks, Snyder v. Phelps: A Prediction Based on Oral Arguments and the Supreme Court’s Speech-Tort Jurisprudence, 210 CARD. L. REV. DE NOVO 418, 428, no. 74 (2010).
164 See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968) (adopting a variable level of protection for sexually explicit speech depending on the age of the consumer); F.C.C. v. Fox, 129 S. Ct. 1800 (2009) (relying on the number of children in a television audience to determine whether indecent speech should be protected; upholding change in F.C.C. policy that removed “safe harbor” for single-word expletives).
166 A seventeen year old employee had mistakenly attributed a bankruptcy of a former employee of Greenmoss to the company itself. Id. at 752.
nature, and therefore of “reduced constitutional value.” The Court highlighted the commercial nature of the speech, which was “solely motivated by the desire for profit,” as well as its objective verifiability, and characterized the speech as “hardy and unlikely to be deterred” by tort liability. Therefore, awards of presumed and even punitive damages for defamation are constitutional upon proof of ordinary negligence by a preponderance of evidence in purely private matters, at least when the speech has indicia of “hardiness.” The Court clarified that the Constitution requires proof of some fault to support defamation liability, rendering common law strict liability for defamation unconstitutional, but otherwise deferred to state law.

The Court has opined that states have a heightened interest in protecting property rights, and has essentially deferred to state tort regulation of speech where the plaintiff claims proprietary harm or actual damages as opposed to purely dignitary or emotional harm, regardless of whether the plaintiff is a public figure or the speech is political in nature. In Zacchini v. Scripps-Howard Broadcasting Co., plaintiff claimed that his proprietary human cannonball stunt had been misappropriated by a television station that videotaped and broadcast his stunt on the evening news without his consent. The Court held that when the state seeks to protect the plaintiff’s property interests, as opposed to merely “feelings or reputation,” the actual malice standard does not apply. Unlike the dignitary concern at issue in New York Times v. Sullivan, the state’s interest here was “analogous to the goals of patent and copyright law,” and protecting the fruits of one’s ideas through tort liability furthers the First Amendment policy of encouraging creative ingenuity. Similarly, misappropriation of a former president’s

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167 Id. at 758, 761, respectively.  
168 Id. at 762. See also id. at 788 n. 13 (Brennan, J. dissenting) (explaining that the states have more latitude to regulate commercial speech because of its “greater objectivity and hardiness.”) (Emphasis added). Where speech is objectively verifiable, the risk of chilling is presumably reduced, since liability is predictable and avoidable. See, e.g., Christopher P. Guzelian, Scientific Speech, 93 IOWA L. REV. 881 (arguing that objectively verifiable speech is entitled to less First Amendment protection).  
169 Id. at 762.  
170 Id. at 761. The changes made to Gertz v. Welch’s intermediate level of scrutiny were: 1) the burden of proof was reduced to preponderance of evidence; 2) presumed damages were allowed without proving actual damages; and 3) punitive damages were allowed upon proof of negligence only. Note, however, that state laws often require a showing of a malicious state of mind/ill will toward plaintiff or intentional fraud for recovery of punitive damages, and some require proof of such by clear and convincing evidence. See, e.g., CAL. CIV. CODE Sec. 3294; DOBBS, supra note 39 at 1064-1069.  
171 See Gertz v. Welch, 418 U.S. at 347 (states should not impose defamation liability without fault). English common law allowed for strict liability for defamation, but many of the states already required negligence to sustain a defamation claim, requiring no modifications to the common law prima facie case. See Cassidy v. Daily Mirror Newspapers, Ltd., 2 K.B. 331 (1929) (libel claim sustained on strict liability principles); DOBBS, supra note 35 at 1117-1121.  
173 Id. at 569.  
174 Id. at 573.  
175 Id. at 573-576.  
176 Id. The Court also distinguished Zacchini from Time, Inc. v. Hill based on the regulatory consequences of the remedy sought. Unlike liability for public dissemination of private facts,
political speech is actionable in tort, despite the political nature of the (presumably) true speech and the plaintiff’s public figure status. Thus, in Harper & Row v. Nation Enterprises, the Court held that First Amendment values are enhanced by protecting proprietary manuscripts, in part because Gerald Ford suffered substantial out-of-pocket losses when The Nation Magazine published a stolen copy of his “memoirs” concerning the Watergate crisis, warranting a tort remedy for misappropriation of his intellectual property.

The balancing factors produced by the Supreme Court’s speech-tort precedent help to determine the appropriate level of constitutional scrutiny where tort liability is challenged on First Amendment grounds. Generally, the Court has raised the prima facie evidentiary burdens to “reconcile” tort liability with the First Amendment, but at times the Court has rejected dignitary or emotional claims altogether when they arise from political speech that is not objectively false, as in Barnicki v. Vopper and Snyder v. Phelps. Nonetheless, the Court has clearly taken a balancing approach to the conflict of rights presented by tort liability for speech and has identified fundamental policy considerations to consider when analyzing the constitutionality of liability for speech.

C. Making Sense of the Lower Courts’ Constitutional Analysis of Tort Liability for Violent Media

which would operate to “minimize publication” of the public interest information, Zacchini’s right of publicity did not seek to enjoin the broadcast, but rather sought compensation for it. Id. at 573-574.

471 U.S. 539 (1985). Gerald Ford entered into a book publishing contract with Harper & Row to publish his “memoirs” concerning the Watergate crisis, which resulted in another contract with Time Magazine to publish excerpts of the book prior to its release. Just prior to Time’s expected publication date, The Nation, a political magazine, obtained a stolen copy of Ford’s manuscript and published it. The Nation’s publication caused Time to cancel its agreement with Ford, resulting in substantial damages to Ford. Id. at 542-543.

178 Id. at 558 (“copyright supplies the economic incentive to create and disseminate ideas”). The Court has also ruled that publishing the name of a confidential source of political news in breach of a confidentiality agreement is not immune from civil liability. See Cohen v. Cowles Media Company, 501 U.S. 663, 111 S. Ct. 2513 (1991). In Cohen, the Court allowed a source of political speech directly related to an election to maintain an action for actual damages including lost wages against the news publisher, which violated a promise to keep the source’s name confidential, breach of which caused him to lose his job. Cohen was not a speech tort case, however, raising a state action issue, since a private confidentiality agreement – not state tort regulation – created the liability for speech. Some scholars have argued that where legal obligations are defined by the parties, as opposed to the government, the First Amendment does not apply. See Daniel J. Solove & Neil M. Richards, Rethinking Free Speech and Civil Liability, 109 COLUM. L. REV. 1650, 1685-1697 (2009) (distinguishing “duty-defining” government power such as tort liability from “non-duty-defining” power where legal duties are negotiated by private parties; Eugene Volokh, Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You, 52 STAN. L. REV. 1049, 1057 (2000) (arguing that it is proper to let speakers contract away their rights). Cf. Alan Garfield, Promises of Silence: Contract Law and Freedom of Speech, 83 CORNELL L. REV. 261, 363-364 (1998) (arguing that Cohen is incoherent, and both tort and contract actions that punish speech should be subject to constitutional scrutiny).
The lower courts’ departure from the Supreme Court’s evidentiary tailoring method of constitutionalizing defamation and other speech tort liability in the negligent speech cases likely results from the fact that negligent speech is different from, and more prone to chilling than, the types of speech for which the Supreme Court has sanctioned tort liability. The central difference is causation. Causation was a non-issue in all of the Supreme Court speech tort cases in which tort liability was allowed, because they shared the common characteristic of direct injury based on verifiable facts, that is, whether the speech was factually false or in fact misappropriated.179 The factually verifiable nature of the speech causing direct injury that the Court has found subject to tort liability operates to avoid the chilling effect of tort liability, since liability is more predictable and avoidable.

To the contrary, the violent and dangerous speech cases involved human reactions to speech that, while perhaps foreseeable, were not capable of factual verification before the speech was published, similar to the speech involved in Brandenburg v. Ohio. Violent media is more like art or opinion than fact, and cannot be characterized as “misappropriated,” “untrue,” or even “wrongful” as a factual matter, distinguishing it from defamation or misappropriation.180 To the extent that violent media causes harm, any “wrongfulness” of the speech necessarily turns on the foreseeability and likelihood of its harmful influence on the audience. In Chaplinsky v. New Hampshire, Brandenburg v. Ohio, and other criminal speech cases, the loss of speech protection similarly depended upon its foreseeable influence on the audience, making incitement the closest analogy to address the confounding causation issues presented in contemporary violent or dangerous speech cases.

The extent to which violent or dangerous speech may be punished with civil liability necessarily turns on causation and public policy analyses concerning the media’s propensity to influence the audience, the likelihood and gravity of public risk, and whether the risks are sufficiently foreseeable to warrant punishment. These difficult

179 Once the determination was made that speech was factually false or misappropriated, there was no issue of causation, as false defamatory speech is presumed to injure reputation, and misappropriated speech disturbs the speech producer’s proprietary interests per se. The exception is Hustler v. Falwell, where the parody was verifiably false. However, the Court applied the actual malice standard because Jerry Falwell is clearly a public figure who speaks out on political and religious issues, and to allow him to recover damages based on a lower standard of proof would create a jurisprudential loophole that would undermine the speech protection recognized in New York Times v. Sullivan. In addition, the jury in Hustler v. Falwell had found that the parody was not defamatory because it could not be taken seriously.

180 For example, in 2003, the Eighth Circuit found the scientific evidence that violent video games lead to aggression in children insufficient to meet constitutional scrutiny in reviewing a statute that limited sales or rentals of violent video games to minors, as the government “failed to present the substantial supporting evidence of harm that is required before an ordinance that threatens protected speech may be upheld . . . “. Interactive Digital Software Association v. St. Louis County, Mo., 329 F.3d 954, 958-959 (8th Cir. 2003). In other contexts, however, courts have not required “substantial” empirical evidence to establish causation. See In re Ephedra Prod. Liab. Litig., 393 F. Supp.2d 181, 190, 194 (S.D.N.Y. 2005) (non-definitive scientific evidence can be used to establish causation, and “[i]nconclusive science is not the same as junk science.”)
causation issues inherent in negligence analysis make striking the ideal balance in violent or dangerous speech cases much more challenging than the speech tort cases in which the Supreme Court sanctioned liability. However, a carefully circumscribed, narrowly-tailored negligence liability paradigm could more effectively and fairly allocate financial responsibility for social harms caused by violent or dangerous speech than the incitement test. The Supreme Court’s speech-tort precedent provides an analytical framework for “constitutionalizing” the tort of negligence to meet First Amendment demands.

IV. CONSTITUTIONAL NEGLIGENCE

“The need to protect self-censorship . . . is, however, not the only societal value at issue. . . . [s]ome tension necessarily exists between a need for vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . . we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment.”

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

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

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

1. The Nature of the Speech

The Supreme Court has “long recognized that not all speech is of equal First Amendment importance” and that political speech occupies the “highest rung of the hierarchy of First Amendment values” in speech-tort cases as in other areas of constitutional law. Speech characteristics that have animated various courts’ speech tort decisions include: whether the speech is political or ideological advocacy, or concerns public affairs such that it is “more than self-expression” and “the essence of self-

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181 Gertz v. Welch, 418 U.S. at 341, 342, and 349, respectively.
government," or genuinely “newsworthy” as opposed to purely private or confidential, \(^{184}\) whether the speech is a “far cry from the type of responsible public debate which the United States Supreme Court intends to foster by cases such as *New York Times v. Sullivan,*\(^ {184}\)” such as commercial speech or speech that is commercial in nature and therefore “hardy” and resilient to chilling; \(^{186}\) whether the speech affects consumers without their conscious awareness or consent to receive the speech, such as subliminal speech that “sneaks into the brain” without the listener’s conscious knowledge or informed consent; \(^{187}\) or otherwise contributes to market failures such as by deceiving the public, \(^{188}\) rendering it not only unworthy of heightened First Amendment protection, but quite possibly counterproductive to First Amendment values; \(^{189}\) whether the speech whether the speech can be characterized as an

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\(^{187}\) Waller v. Osbourne, 763 F. Supp. 1144, 1149 (M.D. Ga. 1991), aff’d, 958 F.2d 1084 (11th Cir. 1992) (subliminal messages “sneak” into the brain, are akin to false and misleading speech, and are therefore worthy of little, if any, First Amendment protection).

\(^{188}\) “False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.” Hustler v. Falwell, 485 U.S. 46, 52 (1988), *citing* Gertz v. Welch at 340, 344 n. 9. *See also,* e.g., McNeil-PPC, Inc. v. Pfizer, Inc., 351 F. Supp. 2d 226, 249 (S.D.N.Y. 2005) (in lawsuit brought by dental floss manufacturers claiming that Listerine’s ad that it was “as effective as flossing at preventing gingivitis” was fraudulent; judge commissioned scientific survey to determine the advertisement’s propensity to cause consumers to buy Listerine in lieu of dental floss). Chris Guzelian suggests an “evidence-based” analysis regarding scientific evidence, that is, a critical systematic review of the best available scientific evidence that reveal whether speech is “knowably” true or false. *See* Christopher P. Guzelian, *Scientific Speech,* 93 IOWA L. REV. 881 (2008).

\(^{189}\) In Vance v. Judas Priest, 1990 WL 130920, the court found that subliminal messages do not advance the major theories underlying the First Amendment – marketplace of ideas, self-government, and self-actualization – because they do not provoke robust debate or advance the free flow of ideas. Subliminal communication was defined as the projection of messages by light or sound so quickly or faintly that they are received by the listener below the level of conscious awareness. *Id.* at *5. Subliminal messages are the “antithesis” of First Amendment values because they influence and manipulate the behavior of the listener without his knowledge or consent, rendering it unprotected speech. *Id.* at *25. The court also found that the First Amendment includes a privacy right to avoid unwanted speech. *Id.* at *25-27, *citing* Kovacs v. Cooper, 336 U.S. 77, 69 S. Ct. 448, 454 (1949) (“The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners”) and Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S. Ct. 2714 (1974) (streetcar audiences are “captive” audiences and therefore, streetcars are not a public forum). This is particularly true of speech that “bombards” people, because this can be a powerful weapon to control others’ minds. *Id.* at *28-29, *citing* Griswold v. Connecticut, 381 US 479 (1965). “The freedom to exercise one’s thoughts is essential to the exercise of other constitutional rights. If an individual is not protected in his thoughts and behavior, the right of privacy becomes meaningless . . . when an individual is subjected to subliminal messages without his knowledge and consent, his privacy rights outweigh any free speech rights of the person or entity publishing the subliminal message.” *Id.* at *32.
information “defect” due to objectively verifiable inaccuracies that risk human life,190 whether the speech constitutes a “true threat” per se,191 and whether the speech directly aids the commission of a crime, rendering it verbal crime, or a “speech act,” as opposed to speech entitled to full First Amendment protection.192 Whether the speech is “pure” is an aspect of speech analysis in other contexts that is relevant to characterizing the nature of violent video games.193

The nature of violent video games is complicated and mixed. The games are commercially mass-produced and marketed, and extremely profitable “speech” that seem quite obviously “hardy” and not amenable to chilling, but they are not “commercial” speech per se,194 and profitability alone does not cause speech to lose constitutional protection.195 The games contain political messages, military strategy, historical reenactments, and a myriad of artistic expressions and value judgments that generally receive strict constitutional protection.196 However, they are not “pure” political speech such as the live advocacy at issue in Brandenburg v. Ohio or the Vietnam protest armbands worn by schoolchildren in Tinker v. Des Moines.197 Video games do not merely communicate ideas, but require repetitive conduct – virtual acts of violence – to “receive” the “speech,” and involve physical and psychological responses in children in particular that have nothing to do with persuasion of ideas or conscious


191 See Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (true threats are unprotected speech).

192 See, e.g., Rice v. Paladin, 128 F.3d 233 (4th Cir. 1997).


194 Commercial speech subject to greater state regulatory power has been defined as advertisements that do no more than propose a commercial transaction. See Pittsburg Press Co. v. Pittsburg Comm’n on Human Relations, 413 U.S. 376, 385 (1973). However, the credit report at issue in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. did not propose a commercial transaction, but the Court considered its commercial nature in finding that it was “hardy” and unlikely to be deterred by tort liability. See supra notes 168-169 and accompanying text.

195 See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. at 789 (Brennan, J., dissenting) (“Time and again we have made clear that speech loses none of its constitutional protection even though it is carried in a form that is sold for profit”), quoting Virginia Pharm. Bd. V. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

196 For example, despite their graphic violence, the enormously popular Call of Duty games present elaborate war scenarios and require deductive reasoning, strategy, and teamwork to survive, which may teach important lessons in history, weaponry, interpersonal cooperation, communication skills, logic and vocabulary.

197 393 U.S. 503, 505 (1969) (school children had a First Amendment right to wear black armbands to school to protest the Vietnam war, as the armbands were “pure [political] speech.”).
choice in accepting or rejecting ideas. 198 If the armbands in Tinker v. Des Moines risked serious health consequences to the children that wore them, they might be analogous in terms of the nature of the speech. 199 But then, had the armbands been determined to risk children’s health, the case almost surely would have gone the other way. 200

Violent video games’ cognitive-programming properties render them akin to subliminal speech, which lower courts have found to be entirely unprotected by the First Amendment, because the speech bypasses marketplace assumptions of conscious, free choice that theoretically support an unregulated marketplace of ideas. 201 This is particularly true as to children, considering their vulnerable developmental state and incompetence to assume the psychological risks of playing the games. 202 Yet, importantly, violent video games cannot be characterized as verifiably “false,” “deceptive” or “misappropriated,” rendering their regulation less predictable and more vulnerable to chilling, and warranting greater First Amendment protection than speech that is wrongful per se as a factual matter.

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

199 For example, if the armbands in Tinker contained toxic material or were so tight that they cut off the children’s circulation, the school would have a basis for regulating them unrelated to content.

200 Surely avoiding physical harm to children is at least as important as avoiding disruption of the school environment. See Tinker v. Des Moines, 393 U.S. at 505-506.

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

202 The nature of violent video games is per se different as to adults, as they are less vulnerable to the potentially harmful, unconscious cognitive influences and in any event are competent to assume the risks. See supra Part I.A. Indeed, adult consumers’ more stable cognitive matrix renders the effects of violent video games more akin to “preconscious suggestion” than true subliminal speech, at least where they are aware of the risks of consuming violence. See Waller v. Osbourne, 763 F. Supp. 1144, 1149 (M.D. Ga. 1991) (distinguishing “preconscious suggestion,” where a listener is aware of the words or message, from “subliminal” speech, which operates beyond the conscious awareness of the listener). This is particularly true in light of the high-profile lawsuits alleging that violent media caused murderous audience reactions.
This factor is obviously quite complicated, as video games are a unique form of “speech.” Violent video games are not pure political speech or central to self-government, have commercial aspects and are not vulnerable to chilling, and require repetitive conduct that is distinguishable from ideological content per se. On the other hand, violence has never been deemed “low value” speech, and the games certainly express ideas. Violent video games do not seem to warrant a spot on the “highest rung” of the First Amendment hierarchy of speech, but they may warrant some protection. Considering the repetitive conduct inherent in video games and attendant unconscious programming aspect of the games that pose the greatest risk of harm, the nature of violent video games may turn substantially on who is using the games, the subject of the second factor.

2. The Vulnerability of the Plaintiff

The vulnerability of the harmful speech victims and their need for state law protection should be considered in accordance with the Supreme Court’s policy favoring greater state law protection commensurate with the injured party’s level of vulnerability. Public figure versus private individual status is obviously not relevant to violent media analysis because the plaintiff’s access to counter-speech and assumption of the risk of character attacks are irrelevant. However, plaintiffs’ vulnerability to harm caused by speech should still be considered relevant to the state’s level of interest in protecting them. Courts should review all factors that bear on victims’ ability to protect themselves, including: whether the victims are disproportionately or exclusively children and adolescents, considering their developmental vulnerability to speech influences and recognized general need for protection; whether the speech interferes with the recipient’s fairly informed choices, such as where the speech fails to warn of known risks or deceives the consumer; and whether the speech monopolizes the market or contributes to market failures that render the speech recipient less able to choose fairly among competing ideas.

203 “Low value” sexual speech, for example, is subject to zoning laws based on its secondary effects, while political speech presumably could not be so regulated. Young v. American Mini-Theaters, Inc., 427 U.S. 50 (1976) (sexual materials are low value speech and the location of their dissemination is subject to zoning ordinances to control unhealthy secondary effects associated with their location).

204 See supra Part I.A.

205 See, e.g., New York v. Ferber, 458 U.S. 747, 757-758 (1982) (states have a compelling interest in safeguarding children from physical and psychological harm). Early philosophers such as Plato and Aristotle believed that children are impressionable and should be protected from harmful speech. See Alan E. Garfield, Protecting Children From Speech, 57 Fla. L. Rev. 565, 566 & n. 2 (2005) (suggesting an analytical framework for deciding issues of “child-protection censorship”). See also Kevin Saunders, Saving Our Children from the First Amendment 2-3 (2003) (child-protection censorship is compatible with First Amendment values); Kevin Saunders, The Cost Of Errors in the Debate Over Media Harm to Children, 3 Mich. St. L. Rev. 771, 773, nn. 10-13 (2005) (arguing that the risks to children posed by violent media are too high a price to pay, since children won’t be harmed much if at all by denying them access to violent media, i.e., the loss of speech is minimal, and it is of questionable value).

206 An Arizona federal court found that the First Amendment seeks particularly to protect marginalized and insular minority viewpoints, such that there is less a need to protect majoritarian speech or speech that “monopolizes” the market, and that antitrust-based speech
This factor mitigates toward deference to state law protection of children. The scientific research concerning the special vulnerability of children bring an entirely new dimension to First Amendment analysis. As explained in Part I, children and adolescents are psychologically quite vulnerable to media influences compared to adults. Children are not competent to assume the risks or to consent to altering their brain activity patterns long-term for the same reason that they are not competent to drop out of elementary school or consent to sexual relations. Parents are not necessarily entitled to give substituted consent to potentially serious harms on behalf of their children. The Supreme Court has recognized the states’ compelling interest in protecting children’s psychological wellbeing until they reach the age of majority, and such state interest may trump the parent’s right to control the children’s upbringing to the extent that the parents’ choices seriously risk the child’s wellbeing. The aggressive marketing of violent video games to children because they are the “more likely . . . to be influenced” by advertising renders them particularly vulnerable and creates a more compelling state interest in protecting them. This is particularly true considering the addictive qualities of violent video games, which are well-documented, especially as to children.

This factor may operate to create different levels of prima facie case tailoring for the same media depending on whether the injured claimant is a child or an adult in the same way that Ginsberg v. New York’s variable obscenity doctrine operates to create different constitutional rules depending on the age of the pornography consumer, and the evidentiary requirements for defamation vary depending on the vulnerability of the plaintiff. That is, even if negligence liability for injury caused by violent video games liability has been imposed where speech is false or misleading. See Heary Bros. Lightning Prot. Do., v. Lightning Prot. Inst., 287 F. Supp. 2d 1039, 1048 (D. Az. 2003).

Speech that monopolizes the market or capitalizes on human weaknesses such as cognitive errors and the availability heuristic should be entitled to less First Amendment protection because the speech undermines the search for truth that a free market presupposes results from market competition. See, e.g., Baumbauer, supra note 195 at 660-661 (cognitive research undermines the theory of the marketplace of ideas); Jeffrey Evans Stake, Are We Buyers Or Hosts? A Memetic Approach to the First Amendment, 52 ALA. L. REV. 1213, 1214, 1220 (2001) (“ideas do not sit passively like products in an ordinary market,” and some are “aggressive” and “over-achieving” and can “replicate like viruses,” and can cause great injury to humans, rendering an unregulated marketplace of ideas insufficient to protect people from harmful ideas). See also Joseph Blocher, Institutions in the Marketplace of Ideas, 57 DUKE L. J. 821 (2008) (“speech institutions” that play a cost-reducing role in the marketplace of ideas, such as schools and universities, should be given more First Amendment deference).

See, e.g., Prince v. Massachusetts, 321 U.S. 158, 166-167 (1944) (upholding Massachusetts’ laws restricting child labor against parents’ religious freedom challenge, finding that parents’ authority is not absolute and can be restricted constitutionally if doing so is in the interests of a child's welfare).

See supra note 50 and accompanying text.

Where the victim is harmed by a child, as in the Columbine High School case, the child analysis should apply if the harm that the dangerous media caused to the child in turn caused the harm to the ultimate victim.
is subject to strict tailoring as to adults, it should be subject to intermediate or even minimal tailoring as to minors.²¹²

3. The State’s Interest in Punishing Speech

The nature of the interest that the state seeks to protect through tort regulation should be reviewed as part of any constitutional speech-tort balancing test. Supreme Court precedent clarifies that emotional and reputation harm are less worthy of state law protection than property interests. Established tort policy values serious bodily harm or death over competing property interests and considers the breadth and severity of the public risk as part of any risk-utility analysis.²¹³ The Supreme Court has recognized that the states have a compelling interest to protect children’s physical and psychological well-being.²¹⁴

The state’s interest in preserving life should be considered more compelling than its interest in protecting reputation, emotions, or even proprietary interests, and more deference to state law would be in order. However, the complicated and confounding causation issues concerning the effects of violent video games render it inadvisable to relax evidentiary requirements based on correlations and theories of causation, because the whole point of raising evidentiary burdens is to protect speech from punishment where wrongful intent, causation, and injury are insufficiently proven. That is, it could unduly risk free speech to relax tort claims’ prima facie requirements based on correlations without clear proof of direct causation because uncertainty about liability lies at the heart of chilling concerns. Therefore, at this time, this factor alone should not be used to reduce First Amendment limits to negligence liability arising from violent video games. The other factors, however, mitigate toward either intermediate or minimal tailoring of the negligence prima facie case where it is sufficiently proven that a child’s consumption of violent video games caused serious injury to the child or others.

B. Constitutionalized Negligence: Suggestions for Prima Facie Cases

A common law prima facie case of negligence has five elements that must be pled and proven by a preponderance of evidence to establish liability: duty, breach, cause in fact, injury, and proximate cause.²¹⁵

²¹² The Roberts Court may be relatively receptive to allowing some government regulation of speech believed to harm children. See Deana Pollard Sacks, Children’s Developmental Vulnerability and the Roberts Court’s Child-Protective Jurisprudence: An Emerging Trend? ___ STET. L. REV. ___ (2011).

²¹³ See, e.g., Brown v. Martinez, 361 P.2d 152 (N.M. 1961) (use of deadly force against watermelon thieves on defendant’s property held actionable in tort because human life is more important than property rights). In addition, the Supreme Court recognized in Gertz v. Welch that “[t]he protection of private personality, like the protection of life itself, is left primarily to the States under the Ninth and Tenth Amendments.” Gertz v. Welch, 418 U.S. at 341, quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (emphasis added). See also Herceg v. Hustler, 814 F.2d 1017, 1025-1026 (5th Cir. 1987) (Jones, J., concurring in the decision and dissenting in part) (“no federal court has held that death is a legitimate price to pay for freedom of speech.”).

proximate cause, and damages or injury. Evidentiary modifications to the prima facie case must be made to constitutionalize negligent speech tort liability in the same way that the Court has constitutionalized the elements of other torts to meet First Amendment demands.

1. Narrow Tailoring

The prima facie case evidentiary burdens must be raised significantly to meet First Amendment demands relative to fully protected speech that warrant narrow tailoring. The evidentiary burdens should be raised in accordance with *New York Times v. Sullivan* and its progeny, with special care paid to the causation elements.

The negligence intent counterpart to actual malice in defamation law is actual knowledge of the danger posed by the speech and conscious indifference to the safety of foreseeable victims. The evidentiary burdens to establish the elements of duty and breach must be elevated beyond ordinary negligence or even gross negligence to require proof of reckless, wilful and wanton behavior\(^\text{215}\) or substantial certainty\(^\text{216}\) to meet First Amendment demands under a strict tailoring approach. For example, if it were proven that a publisher of unreasonably dangerous speech knew of the speech risks and blantly disregarded such risks to maximize profits, such as by targeting advertisements to children who are particularly vulnerable to injury, such facts might meet the intent burden of proof proposed herein.\(^\text{217}\) Proof of fault (duty and breach) should be raised from a preponderance of evidence to clear and convincing evidence to offer enhanced speech protection in accordance with *New York Times v. Sullivan*.\(^\text{218}\)

“But for” factual causation should be required to establish the link between the unreasonably dangerous speech and the injury, to limit liability for highly protected speech to those harms that would not have occurred in the absence of the speech. For example, where a person copycats a scenario that he was exposed to in violent media, this may or may not suffice to show that “but for” the media, the crime would not have been committed, depending on all of the facts. Where multiple defendants are involved, such as where a person is influenced and harmed by multiple violent media, proof of

\(^{215}\) This level of fault requires a showing that defendant “was conscious of the risk or had specific reason to know about it and proceeded without concern for the safety of others.” See DOBBS, *supra* note 39 at 351. This differs from gross negligence in that it requires proof of a mental element that is not necessarily required to prove gross negligence. *Id.* See infra note 222.

\(^{216}\) See *Garratt v. Dailey*, 46 Wash.2d 197, 279 P.2d 1091 (Wash. 1955) (a child who pulled a chair out from under someone who was about to sit down could be held to have intended the harm under “substantial certainty” analysis despite no proof that the child pulled the chair out for the purpose of causing harm). Substantial certainty level fault lies somewhere between purposeful intent to harm and recklessness and establishes intent for tort analysis where the defendant may not have had a purpose to bring about the harm, but knew to a substantial certainty that his actions would produce the harm. See DOBBS, *supra* note 39 at 48.

\(^{217}\) Some violent video game producers’ marketing behavior toward children for videos they deem inappropriate for children could meet this level of intent. See *supra* Part I.B.

\(^{218}\) A court could even require the criminal burden of proof of beyond a reasonable doubt. At least one state has applied the criminal burden of proof to limited issues of civil liability, such as punitive damages. See *COLO. REV. STAT. Sec. 13-25-127; DOBBS, supra* note 39 at 1069.
causation is more complicated. In those circumstances, the individual defendants’ contribution to the ultimate harm could be proven through alternatives to “but for” causation, such as through substantial factor causation, which allows liability against defendants who are not the sole cause of injury. Alternative cause in fact analysis may be necessary, considering the confounding factors that influence individuals’ behavior, and comports with modern tort policy that a cause be substantial, not the sole cause, to impose tort liability.219 Concerns about confounding factors warrant raising the evidentiary burden for factual causation to a clear and convincing standard.

Foreseeability of harm is the cornerstone of modern proximate cause analysis, and since intervening criminal acts are usually the ultimate cause of harm in unreasonably dangerous speech cases, foreseeability of such acts should be proven by clear and convincing evidence. Courts could also require proof of substantial injury, such as serious bodily harm or death, to further limit tort liability for fully protected speech. Under this approach, property damage, economic losses, or emotional harm could be per se insufficient to state a prima facie case, so that tort liability reaches no further than necessary to protect the most vital state interests, consistent with the Gertz v. Welch Court’s added element of actual damages. Disallowing punitive damages is another possible way of limiting tort liability to protect speech.220

Applying this test may result in a high level of dismissals in actions against publishers and producers of fully-protected dangerous speech, but the First Amendment demands no less for such speech.221 Strict tailoring of the prima facie case still addresses the difficult causation issues in a manner superior to the inapposite Brandenburg test and recognizes a balance of rights that may send a normative message to publishers of unreasonably dangerous speech that they are not entirely immune from tort liability.

2. Intermediate Tailoring

In Gertz v. Welch, a fault level of ordinary negligence met intermediate tailoring, to accommodate competing speech-tort interests. However, considering that the effects of violent or dangerous speech are not as objectively verifiable as false statements of fact, the fault burden of proof should be raised accordingly. Requiring proof of gross

219 See, e.g., Spann v. Shaqualak Lumber Co., 990 So.2d 186 (Miss. 2008) (emissions from lumber company causing a dense fog contributed to car collision, rendering company liable along with drivers who may also be liable); Landers v. East Texas Salt Water Disposal Co., 248 S.W.2d 731 (Tex. 1952) (where tortious acts of two or more wrongdoers join to produce an indivisible injury, all wrongdoers are jointly and severally liable).


221 See, e.g., Video Entertainment Software Association v. Blagojevich, 404 F. Supp. 2d 1051, 1059-1067 (N.D. Ill. 2005) (reviewing scientific data on the effects of violent media and concluding that causation was insufficiently established). If the evidence that violent media causes violent behavior is as inconclusive as the courts have found, then raising the evidentiary burden for causation should address First Amendment concerns adequately. Courts could still dismiss lawsuits upon a finding of inadequate causation as a matter of law.
negligence\textsuperscript{222} by clear and convincing evidence adequately protects speech subject to intermediate tailoring. This accords with the Eleventh Circuit’s reasoning that intermediate tailoring of a negligence prima facie case is met upon proof that the defendant disregarded a “clear and present” danger in publishing speech, and also accords with the Georgia Supreme Court’s “clear and present danger” standard for children’s programming.\textsuperscript{223}

Factual causation could be established through substantial factor causation where “but for” causation cannot be proven. That is, unlike narrow tailoring, the link between the speech and the injury could be proven by substantial factor causation only,\textsuperscript{224} even where there is no multiple defendant problem, such as where social forces interacted with the media, resulting in injury. As with narrow tailoring, proximate causation should be established by clear and convincing evidence, and substantial personal injury could be required to further protect speech. Certain negligent speech cases, such as \textit{Herceg v. Hustler}, \textit{Sanders v. Acclaim Entertainment}, and \textit{James v. Meow Media, Inc.} might have survived constitutional scrutiny under this level of tailoring.

3. Minimal Tailoring

Relaxed scrutiny is basically the common law prima facie case of negligence, which sufficiently protected First Amendment values in \textit{Dun & Bradstreet v. Green moss}. However, the artistic and relatively indeterminate nature of injuries caused by violent or other dangerous speech render it more vulnerable to chilling, warranting heightened evidentiary burdens to the prima facie case. Proof of negligence, cause-in-fact, and proximate cause should be proven by clear and convincing evidence to safeguard speech of a nature warranting less constitutional protection, considering the confounding causation problems inherent in speech’s causative influence. Numerous negligent speech cases that caused serious harm to children could have survived this level of constitutional tailoring.

\section*{Conclusion}

Prevailing negligent speech tort jurisprudence essentially immunizes speech that may create serious risks to the public, and children in particular, and fails to create an optimal balance of interests. The jurisprudential basis is freedom of speech, but speech that causes harm is not really “free,” and tort immunity for such speech does not change this fact. It merely shifts the costs of harm from the speech producers to the public at large and may increase the sum total of social harm. A better approach is possible.

\textsuperscript{222} Gross negligence is defined as a “high . . . degree of negligence” or “conduct that is appreciably more risky, or less beneficial, than conduct qualifying as ordinary negligence,” \textit{Dobbs, supra} note 39 at 351.

\textsuperscript{223} See \textit{supra} notes 79 and 107, and accompanying text. It was the federal district court for the Middle District of Alabama that created the “clear and present danger” test to raise the evidentiary requirements to meet an intermediate level of scrutiny in \textit{Braun v. Soldier of Fortune Magazine, Inc.}, which the Eleventh Circuit affirmed. See 968 F. 2d at 1116, note 4.

\textsuperscript{224} That is, unlike the strict tailoring approach suggested herein, it would be sufficient to establish that the media played a substantial role in bringing about the injury even if other factors also caused the injury.
Constitutional and tort policies should be reconciled to optimize the balance of rights and enhance public safety while staying true to First Amendment values. In the case of unreasonably dangerous speech, this might be accomplished by constitutionalizing the tort of negligence to allow limited liability for dangerous speech that foreseeably causes serious injury under a heightened evidentiary analysis. Such an approach could produce optimal care among producers of unreasonably dangerous speech, while protecting speech consistent with constitutional guaranties.