

Infotorts

a new tort in which information harms the plaintiff, including a taxonomy of infotorts, lists of citations to cases in the USA, and discussion of First Amendment issues.

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Introduction

There is a fascinating new kind of tort that has been taking shape in the USA since about 1975, in which information causes harm to someone. It is convenient to refer to these new torts as *infotorts*. I have been collecting and reading infotort cases since November 1996.

Products liability torts were a large part of the law in the USA during the second half of the 20th Century, when manufacturing was the dominant feature of the economy. As society shifts from a manufacturing economy to an economy based on information (e.g., data processing companies, suppliers of databases, etc.), it is reasonable to expect torts to evolve to include infotorts. It is proper to distinguish expression, words, or ideas, each of which is intangible, from products that are tangible. Nonetheless, information can cause harm, and information is often sold like a product or a service.

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem.

See my disclaimer at <http://www.rbs2.com/disclaim.htm> .

I list the cases in chronological order in the citations in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

Freedom of Speech is *not* absolute.

At the moment, the prevailing mood among tort lawyers about infotorts seems to be cautious uneasiness at this not yet clearly delineated cause of action, but willingness to admit that sometimes information can harm people and, under some conditions, the source of the information should be liable for that harm. Information torts have been disfavored, because judges often rule that the First Amendment of the U.S. Constitution protects the right of authors and publishers to print almost anything.

However, the absolutist position that the First Amendment prohibits any infotort is *not* the law in the USA. The law in the USA has long punished:

- inciting imminent unlawful conduct. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (Government may criminalize speech that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).
- insulting words that incite a violent response. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (“... 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.”).

- aiding and abetting crimes. 18 U.S.C. § 2; *Nye v. Nissen*, 336 U.S. 613 (1949).
- speech or writing that is an integral part of the commission of a crime. *Giboney v. Empire Storage*, 336 U.S. 490, 498 (1949). In that case, the U.S. Supreme Court stated: “But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Id.* at 502. Cited with approval in *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). Therefore, handing a bank teller a slip of paper that says “This is a robbery. Give me all your money.” is properly a criminal act, even though it is speech. Similarly, one can not put false numbers on an income tax form, then validly claim that the false information is constitutionally protected speech.
- solicitation of a crime.
- perjury. 18 U.S.C. § 1621; *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).
- defamation (i.e., libel, slander) in certain contexts.
- harassment.
- extortion, blackmail, threats.
- fraudulent or negligent misrepresentations.
- disclosure of government secrets involving “national defense” or nuclear weapons.¹
- false or misleading advertising by companies.
- obscenity.
- and copyright, 17 U.S.C. § 101, et seq.

The U.S. Supreme Court has specifically rejected the notion that freedom of speech is an absolute concept. See, for example:

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has 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. [three footnotes omitted]

Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571-572 (1942). Quoted with approval in *Texas v. Johnson*, 491 U.S. 397, 430 (1989) (Rehnquist, J., dissenting).

¹ Standler, *U.S. Government Restrictions on Scientific Publications*, 31 pp., <http://www.rbs2.com/OFAC.pdf>, 15 June 2004.

And in 1961 the U.S. Supreme Court said:

At the outset we reject the view that freedom of speech and association [citation omitted], as protected by the First and Fourteenth Amendments, are “absolutes,” not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. [FN10]

FN10. That view, which of course cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like, is said to be compelled by the fact that the commands of the First Amendment are stated in unqualified terms: “Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble * * *.” But as Mr. Justice Holmes once said: “(T)he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.” *Gompers v. United States*, 233 U.S. 604, 610, 34 S.Ct. 693, 695, 58 L.Ed. 1115.
Konigsberg v. State Bar of Calif., 366 U.S. 36, 49 (1961).

The real question is “Where should courts allow liability for information?” Authors and publishers need to know a precise answer so they can adjust their conduct accordingly.

Examples of Infotorts

There are a variety of situations in which infotorts have been expressed. It is instructive to consider them all in one essay, rather than consider them in isolated groups, so one can compare and contrast the freedom of speech issues.

1. false credit reports

The leading case is *Dun & Bradstreet v. Greenmoss*, 472 U.S. 749 (1985). In a typical case, there are (a) errors in the database, (b) the plaintiff is denied a loan because of a bad credit report, (c) the plaintiff tries repeatedly to get the errors corrected but the credit agency fails to correct its database, and (d) finally the exasperated plaintiff sues the credit agency. Some plaintiffs have been denied a mortgage for their house for more than one year because a credit agency confused plaintiff's name with the name of some deadbeat. The abuses by credit reporting agencies were so widespread and so egregious that Congress passed the Fair Credit Reporting Act, 15 U.S.C. § 1681.

2. aiding and abetting a crime

It is a crime (i.e., 18 U.S.C. § 2) to encourage, advise, or assist the perpetrator of a crime. See, for example:

- *U.S. v. Featherston*, 461 F.2d 1119 (5th Cir. 1972), *cert. den.*, 409 U.S. 991 (1972) (teaching how to make explosive or incendiary devices).
- *U.S. v. Buttorff*, 572 F.2d 619 (8th Cir. 1978) (instructions for filing false income tax returns).
- *U.S. v. Barnett*, 667 F.2d 835 (9th Cir. 1982) (instructions for manufacturing illicit drug).
- *U.S. v. Raymond*, 78 F.Supp.2d 856 (E.D.Wis. 1999), *aff'd*, 228 F.3d 804 (7th Cir. 2000), *cert. den.*, 533 U.S. 902 (2001) (instructions for violating federal income tax laws).
- *U.S. v. Bell*, 238 F.Supp.2d 696 (M.D.Pa. 2003), *aff'd*, 414 F.3d 474 (3rd Cir. 2005) (tax protester's website).

This is criminal law, *not* tort law. However, it is well established that defendant's violation of a criminal statute can also be a breach of a duty in a tort. Restatement (Second) of Torts, §§ 286, 288 B(1) (1965). Indeed, the Restatement (Second) of Torts, § 876(b) (1977) specifies tort liability for giving "substantial assistance or encouragement" to an actor who harms a victim.

3. false information in non-fiction book or map

There is *no* liability for the author or the publisher of false information in a book, even if the false information harms someone. Only the paper, binding, and ink in a book are *products*. The ideas and expression in the text are *not* a product and are protected by the First Amendment to the U.S. Constitution. See:

- *Cardozo v. True*, 342 So.2d 1053 (Fla.App. 1977), *cert. denied*, 353 So.2d 674 (Fla. 1977) (failure to warn of poisonous ingredients in a cookbook, plaintiff sued bookseller, but neither the author nor the publisher.)
- *Demuth v. Merck & Co.*, 432 F.Supp. 990 (E.D.N.Y. 1977). (error in toxicity of triethylene glycol in a chemical encyclopedia caused loss of plaintiff's customers).
- *Smith v. Linn*, 414 A.2d 1106 (Pa.Cmwlth. 1980) (allegedly dangerous protein diet described in book caused wife's death). *Smith v. Linn*, 48 Pa. D. & C.3d 339 (Pa.Com.Pl. 30 Sep 1988), *aff'd*, 563 A.2d 123 (Pa.Super. 1989), *aff'd without opinion*, 587 A.2d 309 (Pa. 1991). See also a similar case in California: *Cochran v. Linn*, 205 Cal.Rptr. 550 (Cal.App. 2 Dist. 1984).
- *Walter v. Bauer*, 439 N.Y.S.2d 821 (N.Y.Sup.Ct. 1981), *aff'd*, 451 N.Y.S.2d 533 (N.Y.App. 1982) (experiment described in elementary science textbook causes eye injury).

- *Roman v. City of New York*, 442 N.Y.S.2d 945 (N.Y.Sup. 21 Sep 1981) (Plaintiff had a tubal ligation, then read in a Planned Parenthood booklet that contraception was unnecessary following sterilization. She relied on that statement, used no contraception, became pregnant, and sued Planned Parenthood for the cost of raising her child.)
- *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263 (Ill.App. 1985) (instructions for making tools, injury to plaintiff when tool shattered).
- *Lewin v. McCreight*, 655 F.Supp. 282 (E.D.Mich. 1987) (Plaintiff sued author and publisher for failure to warn of explosion from following instructions in metallurgy book).
- *Jones v. Lippincott Co.*, 694 F.Supp. 1216 (D.Md. 1988) (enema instructions in nursing textbook caused injury to plaintiff).
- *Winter v. Putnam's Sons*, 938 F.2d 1033 (9thCir. 1991) (book on wild mushrooms identified poisonous mushroom as safe to eat, plaintiffs required liver transplants).
- *Sinai v. Mitchell Books*, 19 Media L. Rep. 1800 (N.D.Cal. 26 Dec 1991), *aff'd*, 21 Media L. Rep. 1691, 1993 WL 220260 (9th Cir. 23 June 1993) (Alleged errors in books about automobile emissions systems.)
- *Miller v. Rand McNally*, 595 So.2d 1367 (Ala. 1992)(alleged error in road map)
- *Birmingham v. Fodor's Travel Publications, Inc.*, 833 P.2d 70 (Hawaii 20 Jul 1992) (Travel guide has no duty to warn of dangerous conditions at beach, which injured plaintiff.)
- *Way v. Boy Scouts of America*, 856 S.W.2d 230 (Ct.App.Tex. 1993) (Mother alleged that a supplement on shooting sports in *Boys' Life* magazine, which was published by the Boy Scouts, motivated her son's to experiment with a rifle. Her son died when the rifle accidentally discharged.)
- *Barden v. Harpercollins Publishers, Inc.*, 863 F.Supp. 41 (D.Mass. 24 Aug 1994) (Book listed name of attorney as specialist in child sexual abuse, plaintiff hired attorney, attorney failed to perform services, plaintiff sued publisher of book.).
- *Oxycal Laboratories, Inc. v. Jeffers*, 909 F.Supp. 719 (S.D.Cal. 4 Dec 1995) (Book claimed that plaintiff's vitamin product, ESTER-C, caused cancer).

Note that plaintiffs lost *all* of these cases.

In addition to the cases cited above, there are many reported cases involving alleged bad investment advice contained in magazines, newsletters, or books. In my view, these investment cases contain an additional issue of whether the subscriber or purchaser is also paying for a *service* (i.e., investment advice). Therefore, I have not listed these investment cases here.

The Restatement of Law comments on products liability for contents of books:

Plaintiffs allege that the information was false and misleading, causing harm when actors relied on it. They seek to recover against publishers in strict liability in tort, based on product defect, rather than on negligence or some form of misrepresentation. Although a tangible medium, such as a book, itself clearly a product, delivers the information, the plaintiff's grievance in such cases is with the information, not with the tangible medium. Most courts, expressing concern that imposing strict liability for the dissemination of false and defective information would significantly impinge on free speech have, appropriately, refused to impose strict products liability in these cases.

Restatement Third Torts: Products Liability, § 19, comment *d*, at page 269. (1997)

aeronautical charts

However, it is well-established that aeronautical charts are products, *not* publications, and there may be tort liability for errors in aeronautical charts. See:

- *Reminga v. U.S.*, 448 F.Supp. 445, 460-461 (W.D.Mich. 1978), *aff'd*, 631 F.2d 449 (6thCir. 1980) (U.S. Government negligent in issuing FAA sectional chart with television transmitting antenna in wrong location).
- *Aetna Casualty v. Jeppesen*, 642 F.2d 339 (9thCir. 1981).
- *Saloomey v. Jeppesen*, 707 F.2d 671 (2dCir. 1983).
- *Brocklesby v. U.S.*, 767 F.2d 1288 (9thCir. 1985), *cert. denied*, 474 U.S. 1101 (1986).
- *Fluor Corp. v. Jeppesen & Co.*, 216 Cal.Rptr. 68 (Calif.App. 1985).

I have not seen any convincing reason to distinguish an aeronautical chart from either a road map (e.g., *Miller v. Rand McNally*, *supra*) or a nonfiction book. This inconsistency in American law needs to be resolved.

4. information published in a scholarly journal

There is no liability for information published in a scholarly journal. See *Gordon & Breach v. American Institute of Physics*, 859 F.Supp. 1521, 1540-42 (S.D.N.Y. 1994). In that case, the author's methodology was declared "sound" by a judge. *Gordon & Breach v. American Institute of Physics*, 973 F.Supp. 414, 423-425 (S.D.N.Y. 1997). In this long, complex series of legal proceedings, defendants spent US\$ 1.37×10^6 on attorneys' fees and expenses, but the court refused to order plaintiffs to reimburse defendants for these fees and expenses. *Gordon & Breach v. American Institute of Physics*, 986 F.Supp. 242 (S.D.N.Y. 1997), *aff'd*, 166 F.3d 438 (2dCir. 1999).

Applying strict liability for *any error* in a scientific, engineering, or medical journal could end the publication of research results and do immense damage to technological progress.

However, there may be liability for misrepresentation of a commercial product for an article in a trade journal. *Semco v. Amcast*, 52 F.3d 108 (6thCir. 1995). There are several distinctions between publications in scholarly literature and articles in trade journals:

- Scholarly publications have a motive to share information, but trade journals have a motive to sell products from the authors' companies. Hence, trade journals are "commercial speech", which the U.S. Supreme Court has found to be less protected than other kinds of speech.
- Articles in a scholarly journal are peer-reviewed before they are accepted for publication; a trade journal prints anything the editor wishes. Scholarly journals are primarily supported by dues paid by members of a professional society; trade journals are primarily supported by advertising.
- Articles in a scholarly journal refer to generic names (e.g., sodium chloride) while articles in trade journals commonly refer to trademarks and proprietary names (e.g., "Morton's Salt").

5. disparagement of perishable agricultural products

The leading case is *Auvil v. CBS*, 67 F.3d 816 (9thCir. 1995)(affirming summary judgment for defendants who publicized Alar pesticide on apples), *cert. denied*, 116 S.Ct. 1567 (1996). Following this case, several states (e.g., Alabama, Arizona, Florida, Georgia, Idaho, Louisiana, Mississippi, Ohio, Oklahoma, South Dakota, and Texas) passed so-called "veggie libel" statutes.

The most famous case under these statutes is *Texas Beef Group v. Oprah Winfrey*, 11 F.Supp.2d 858 (N.D.Tex. 1998), *aff'd*, 201 F.3d 680 (5thCir. 2000) (televised remarks by Winfrey in April 1996 that allegedly urged her audience to avoid eating beef to avoid the risk of mad-cow disease, plaintiff lost US\$ 6,500,000 in the eleven weeks after Winfrey's broadcast). Plaintiffs in this case alleged four causes of action:

- **veggie libel, under Texas statute.** At the conclusion of plaintiff's case, the judge granted a directed verdict for defendants, because the plaintiffs' product was live cattle, which are *not* perishable as defined in the statute. Further, plaintiffs did not satisfy the statute's requirements that defendants "knowingly" disparaged their product. 11 F.Supp.2d at 863.
- **common law business disparagement.** This was the only count to go to the jury, and the jury found for the defendant.
- **common law defamation.** At the conclusion of plaintiff's case, the judge granted a directed verdict for defendants, because defendants did not mention any of the plaintiffs by name, there are about a million cattlemen in the USA, and — under Texas common law — no damages for defamation can be recovered where plaintiff is a member of a class of more than 740 persons. 11 F.Supp.2d at 864.
- **negligence and negligence per se.** At the conclusion of plaintiff's case, the judge granted a directed verdict for defendants, because these counts were duplicative of the defamation count and were merely "an attempt to avoid the constitutional protections mandated by the First Amendment and the Texas Constitution." 11 F.Supp.2d at 864.

The veggie libel cases pose a difficult problem in balancing (a) benefits to public health by warning people of possible hazards in food from pesticides, genetically altered material, antibiotic residue, infectious material, etc. and (b) major financial loss to farmers and ranchers when a substantial fraction of the public suddenly stops purchasing their product. This problem is particularly difficult to resolve in that science progresses slowly: a definitive study may come tens of years *after* preliminary studies suggest some increased risk. Often the preliminary studies only show a theoretical possibility, or show a risk to laboratory animals when fed large amounts of some chemical, without strong evidence of a substantial risk to human beings from plausible exposures.

6. instructions for how to kill people

An early case was *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989), *cert. den.*, 493 U.S. 1024 (1990). Appellate court reversed \$9.4 million jury verdict for plaintiffs, who sued publisher of advertisement for hit man who killed woman. See also preliminary rulings in *Eimann v. Soldier of Fortune Magazine, Inc.*, 680 F.Supp. 863 (S.D.Tex. 1988). Plaintiff's loss in *Einmann* is in contrast to plaintiffs' wins in the following two cases.

Advertisements for hired murderers are an indirect form of information tort. The leading case is *Braun v. Soldier of Fortune Magazine*, 757 F.Supp. 1325 (M.D.Ala. 1991)(plaintiff wins US\$ 4,375,000), *aff'd*, 968 F.2d 1110 (11thCir. 1992), *cert. denied*, 506 U.S. 1071 (1993).

The long-standing rule in the USA was that there was no liability for books or magazines that printed instructions on how to kill people, because the contents of books were protected speech under the First Amendment to the U.S. Constitution. That rule changed in the landmark case of *Rice v. Paladin*, 128 F.3d 233 (4thCir. 1997).

The facts that produced the *Rice v. Paladin* case are simple:

- Lawrence Horn hired James Perry to kill Horn's ex-wife, quadriplegic son, and his son's nurse, so Horn could obtain a more than one million dollar trust fund for his son.
- Perry was convicted of murder and the conviction was upheld on appeal. *Maryland v. Perry*, 686 A.2d 274 (Md. 1996), *cert. denied*, 520 U.S. 1146 (1997). Perry read the book, *Hit Man*, which was published by Paladin, to obtain instructions for how to commit the murder. Perry used those instructions in committing the murder. *Id.* at 279-280; 940 F.Supp. at 839-840.
- Rice (the sister of Horn's ex-wife) then sued Paladin, the publisher of the book in federal district court. The federal district court granted summary judgment to Paladin, because the book was protected speech. *Rice v. Paladin*, 940 F.Supp 836 (D.Md. 1996).
- Rice then appealed. The significance of this case may be gauged by the fact that 25 different organizations filed *amicus curiae* briefs to the Court of Appeals.
- The U.S. Court of Appeals reversed the summary judgment and the U.S. Supreme Court refused to hear the case. *Rice v. Paladin*, 128 F.3d 233 (4thCir. 1997), *cert. denied*, 523 U.S. 1074, 188 S.Ct. 1515 (1998).
- The Parties settled the case in 1999, before trial began, with Paladin reportedly paying Rice five million dollars.

The Court of Appeals opinion remains as the final court opinion in this case.

The attorneys for Paladin, in a gamble that has been widely criticized by other attorneys, stipulated in response to Paladin's motion for summary judgment that Paladin knew and intended that the book *Hit Man* would be used by criminals. (Paladin's attorneys were apparently convinced that the First Amendment would protect even instructions for criminals and they apparently hoped their anticipated win in this case would discourage future litigation against Paladin.) However, the Court of Appeals stated that "even without these express stipulations of assistance", a jury could reasonably find that Perry was "assisted" and "encouraged" by Paladin. 128 F.3d at 252.

7. liability for entertainment (e.g., television, movie, videogame)

An indirect form of infotort occurs where the defendant (e.g., television network, movie studio, magazine publisher, or videogame) shows an activity that, when mimicked by a third-party, causes harm to the plaintiff. Examples include:

- *Weirum v. RKO*, 539 P.2d 36 (Calif. 1975) (radio station liable for its contest that caused fatal car race). This case is apparently the only one of its kind in which plaintiffs won. It is important to note that the defendant neither violated the law nor encouraged anyone to violate the law. The California Supreme Court did *not* apply the test articulated by the U.S. Supreme Court in *Brandenburg v. Ohio*. Instead the California Supreme Court simply found the defendant liable for foreseeable harm to the plaintiff, because the defendant owed a duty of care to the public. In my opinion, the holding in *Weirum* should be interpreted as an aberration in the law in the U.S.A.
- *Zamora v. CBS*, 480 F.Supp. 199 (S.D.Fla 1979)(plaintiff sued all three major television networks because he was allegedly addicted to violence on television and developed sociopathic behavior, court dismissed suit because it failed to state a cause of action and was barred by the First Amendment).
- *Olivia N. v. NBC*, 178 Cal.Rptr. 888 (Ct.App. 1981), *cert. denied*, 458 U.S. 1108 (1982) (television broadcast of rape with plumber's helper protected by First Amendment).
- *Walt Disney Productions v. Shannon*, 276 S.E.2d 580 (Ga. 1981) (child injured when duplicating sound effect shown on *Mickey Mouse Club* television program, Georgia Supreme Court applied "clear and present danger" test from *Schenck* and affirmed grant of summary judgment for Walt Disney).
- *Bill v. Superior Court*, 187 Cal.Rptr. 625 (Cal.App. 1 Dist. 9 Dec 1982) (Girl was murdered outside theater where violent movie was shown. Held that producers of movie had no liability for her death.).
- *DeFilippo v. NBC*, 446 A.2d 1036 (R.I. 1982) (son died while imitating dangerous stunt on television, broadcast protected by First Amendment).

- *Herceg v. Hustler Magazine*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (Plaintiff's son imitated autoerotic asphyxia described in magazine, son strangled himself, mother brought wrongful death action against magazine, appellate court rules that magazine protected by First Amendment). Incidentally, Plaintiff won in the trial court. Preliminary rulings are reported at *Herceg v. Hustler Magazine, Inc.*, 565 F.Supp. 802 (S.D.Tex. 1983), 583 F.Supp. 1566 (S.D.Tex. 1984).
- *McCullum v. CBS Inc.*, 249 Cal.Rptr. 187 (Ct.App. 1988) (Ozzy Osbourne record that included song "Suicide Solution", which exhorted suicide, found not actionable).
- *Watters v. TSR, Inc.*, 715 F.Supp. 819 (W.D.Ky. May 31, 1989), *aff'd*, 904 F.2d 378 (6th Cir. 1990) (Mother brought wrongful death action against manufacturer of "Dungeons & Dragons" game for allegedly causing suicide of her son.)
- *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989) (dismissed wrongful death action, perpetrator had seen the movie *The Warriors* and perpetrator had quoted a line from the movie while committing the homicide).
- *Waller v. Osbourne*, 763 F.Supp. 1144 (M.D.Ga. 1991), *aff'd without published opinion*, 958 F.2d 1084 (11th Cir. 1992), *cert. denied*, 506 U.S. 916 (1992). (Plaintiffs alleged that their son's suicide occurred after he had repeatedly listened to a cassette tape of the song "Suicide Solution" by Ozzy Osbourne which contained audible and perceptible lyrics that directed Michael Waller to take his own life. Plaintiffs then unsuccessfully alleged that the song contained a subliminal message. Court granted defendant's motion to dismiss for failure to state a claim upon which relief can be granted.)
- *Lewis v. Columbia Pictures*, 1994 WL 758666 (Calif.App. 1994) (no liability for violence in movie *Boyz 'n the Hood*).
- *Davidson v. Time Warner*, 1997 WL 405907 (S.D.Tex. 1997). Bill Davidson, a state trooper, stopped Ronald Howard for a traffic violation. Howard shot and killed Davidson. "Howard claimed that listening to *2Pacalypse Now* caused him to shoot Officer Davidson. The jury apparently did not believe this explanation, because it sentenced Howard to death." *Id.* at *1. The recording contains a vulgar song that describes shooting a policeman. Howard was listening to the recording at the time Officer Davidson stopped Howard. Davidson's widow sued the producer of the recording, alleging that the rap lyrics caused the death of her husband. The Federal District Court granted summary judgment to Defendants.
- *Byers v. Edmondson*, 712 So.2d 681 (La.App. 1998) (reversed summary judgment for defendants who were producers of movie *Natural Born Killers*). Plaintiff's theory was that producers of movie committed an intentional tort: producers *intended* to incite people like Edmondson and Darrus to go on crime spree and shoot people like Byers, only for the thrill. Both the Louisiana Supreme Court and the U.S. Supreme Court refused to review the reversal of summary judgment for the movie defendants. *cert. denied*, 726 So.2d 29 (La. 1998); *cert.*

denied sub nom. Time Warner v. Byers, 526 U.S. 1005, 119 S.Ct. 1143 (1999).

On remand, the judge in the trial court again granted summary judgment to the Defendants.

On 5 June 2002, the Louisiana Court of Appeals affirmed this summary judgment. *Byers v. Edmondson*, 826 So.2d 551 (La.App. 1 Cir. 2002), *cert. den.*, 826 So.2d 1131 (La. 2002).

This one movie has inspired at least nine murderous episodes in real life, see below at page 17.

- *James v. Meow Media*, 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) (no liability for producers of movie, videogames, and Internet websites that allegedly caused Michael Carneal to kill three classmates at school).
- *Wilson v. Midway Games, Inc.*, 198 F.Supp.2d 167 (D.Conn. 27 Mar 2002) (Mother sued videogame manufacturer because the Mortal Kombat game inspired her son's friend — who was “obsessed” with the game — to fatally stab her son.)
- *Sanders v. Acclaim Entertainment*, 188 F.Supp.2d 1264 (D.Colo. 2002) (no liability for movie *The Basketball Diaries* and videogames that allegedly caused Klebold and Harris to kill a teacher [and 12 students] at Columbine High School).

Note that plaintiffs lost *all* of these cases, except *Weirum*, which I characterized as an “aberration”.

A professor of law wrote a thoughtful analysis of the type of case involving “shockingly violent forms of mass entertainment”, and argued that such torts should be permitted.² Kunich's article contains numerous mentions of how judges made errors of facts or law in referring to previous cases, in the judges' apparent haste to grant summary judgment to the producers of movies or television programs. Kunich also argues persuasively that the *Brandenburg* test for incitement is the wrong test to apply in these cases, because *Brandenburg* involves prior restraint of political speech. Not only is prior restraint highly disfavored, but also political speech is especially protected. In contrast, the above-mentioned litigation over entertainment that inspires violent crime involves neither prior restraint nor political speech.

² John Charles Kunich, *Natural Born Copycat Killers and the Law of Shock Torts*, 78 Washington University Law Quarterly 1157 (2000), <http://law.wustl.edu/WULR/78-4/1157Kunich.pdf> .

statutes regulating videogames

Several states and counties have attempted to prohibit the sale/rental to minors of videogames that depict violence, sometimes in a statute that parallels the legal tests for obscenity. *All* of these statutes have been found *unconstitutional* by federal courts:

- *Video Software Dealers Ass'n v. Webster*, 773 F.Supp. 1275 (W.D.Mo. 2 July 1991), *aff'd*, 968 F.2d 684 (8th Cir. 1992) (Missouri state statute prohibiting sale/rental to minors of videogames that depicted violence was held unconstitutional.).
- *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 8 Nov 1993) (Tennessee state statute prohibiting display of materials harmful to minors held unconstitutional. Specifically, the phrase “excess violence” in the statute was void for vagueness.)
- *Eclipse Enterprises Inc. v. Gulotta*, 24 Media L. Rep. 1490 (E.D.N.Y. 6 Oct 1995), *report and recommendation adopted*, 942 F.Supp. 801, 25 Media L. Rep. 1257 (E.D.N.Y. 1996), *aff'd*, 134 F.3d 63, 26 Media L. Rep. 1097 (2nd Cir. 1997) (“Nassau County Local Law ... [—] which prohibits the sale to minors of any trading card that depicts a heinous crime, an element of a heinous crime or a heinous criminal, and is harmful to minors [—] is a content-based prohibition of speech and is neither necessary nor narrowly tailored to meet a compelling state interest.”).
- *American Amusement Mach. Ass'n v. Kendrick*, 115 F.Supp.2d 943 (S.D.Ind. 11 Oct 2000), *rev'd*, 244 F.3d 572 (7th Cir. 2001) (Posner, J.) (“Violence and obscenity are distinct categories of objectionable depiction ...” Enjoined enforcement of city ordinance that limited exposure of minors to videogames that depict violence.), *cert. den.*, 534 U.S. 994 (2001).
- *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 200 F.Supp.2d 1126 (E.D.Mo. Apr 19, 2002), *rev'd*, 329 F.3d 954 (8th Cir. 2003), *rehearing en banc denied* (8th Cir. 9 Jul 2003) (U.S. Court of Appeals invalidated county ordinance prohibiting selling, renting, or making available “graphically violent” videogames to minors because videogames were protected under First Amendment.).
- *Video Software Dealers Ass'n v. Maleng*, 325 F.Supp.2d 1180 (W.D.Wash. 15 July 2004) (Enjoined enforcement of Washington state law, because it was unconstitutionally vague.)
- *Entertainment Software Ass'n v. Granholm*, 404 F.Supp.2d 978 (E.D.Mich. 9 Nov 2005) (granting preliminary injunction against enforcement of Michigan state law), 426 F.Supp.2d 646 (E.D.Mich. 31 Mar 2006) (granting permanent injunction).

- *Entertainment Software Ass'n v. Blagojevich*, 404 F.Supp.2d 1051 (N.D.Ill. 2 Dec 2005), *aff'd*, --- F.3d --- (7th Cir.(Ill.) 27 Nov 2006) (Issued permanent injunction against enforcement of Illinois Violent Video Games Law and Illinois Sexually Explicit Video Games Law).
- *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F.Supp.2d 1034 (N.D.Cal. 21 Dec 2005) (granting preliminary injunction against enforcement of California state law).
- *Entertainment Software Ass'n v. Hatch*, 443 F.Supp.2d 1065 (D.Minn. 31 July 2006) (Granted permanent injunction against Minnesota statute).
- *Entertainment Software Ass'n v. Foti*, 451 F.Supp.2d 823 (M.D.La. 24 Aug 2006) (Granting preliminary injunction against Louisiana statute, quoted below, that criminalized the sale, lease, or rental of video or computer games that appeal to a minor's "morbid interest in violence").
- *Entertainment Merchants Ass'n v. Henry*, 2006 WL 2927884 (W.D.Okla. 11 Oct 2006) (Granting preliminary injunction against Oklahoma statute quoted below).

The Louisiana statute — enjoined in *Entertainment Software Ass'n v. Foti*, 451 F.Supp.2d 823 — contains a finding of fact by the legislature:

§ 1 The legislature finds that children are the most precious resource of this state and that they are worthy of special protection from their government. The laws of Louisiana contain extensive provisions which afford children additional protection by prohibiting them from voting, entering into marriage, purchasing or publicly possessing alcoholic beverages, purchasing tobacco products, participating in gaming activities, entering into contracts, and purchasing harmful materials. The legislature has also enacted wholly distinct provisions for identifying children who are in need of care and establishing a means to provide those children with appropriate services. These laws demonstrate Louisiana's commitment to protect its citizens from physical, psychological, and financial harm during the time in which they are particularly vulnerable due to their age and immaturity. In enacting this Act, the Louisiana Legislature clearly demonstrates the state's compelling governmental interest in protecting children and that it seeks to incorporate the extensive protections otherwise afforded to minors in this state to the area of interactive video and computer games.

§ 2 [Louisiana] R.S. 14:91.14 is hereby enacted to read as follows:

A. An interactive video or computer game shall not be sold, leased, or rented to a minor if the trier of fact determines all of the following:

- (1) The average person, applying contemporary community standards, would find that the video or computer game, taken as a whole, appeals to the minor's morbid interest in violence.
- (2) The game depicts violence in a manner patently offensive to prevailing standards in the adult community with respect to what is suitable for minors.
- (3) The game, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

B. For the purposes of this Section:

- (3) "Minor" means any person under the age of eighteen years.

C. Whoever is found guilty of violating the provisions of this Section shall be fined not less than one hundred dollars nor more than two thousand dollars or imprisoned, with or without hard labor, for not more than one year, or both.

Louisiana Acts of 2006, Nr. 441 (approved and effective 15 June 2006).

The Oklahoma statute — enjoined in *Entertainment Merchants Ass'n v. Henry* — says:

As used in Sections 1040.75 through 1040.77 of this title:

1. "Minor" means any unmarried person under the age of eighteen (18) years;

2. "Harmful to minors" means:

a. that quality of any description, exhibition, presentation or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when the material or performance, taken as a whole, has the following characteristics:

(1) the average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors, and

(2) the average person eighteen (18) years of age or older applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement or sadomasochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors, and

(3) the material or performance lacks serious literary, scientific, medical, artistic, or political value for minors, or

b. any description, exhibition, presentation or representation, in whatever form, of inappropriate violence;

3. "Inappropriate violence" means any description or representation, in an interactive video game or computer software, of violence which, taken as a whole, has the following characteristics:

a. the average person eighteen (18) years of age or older applying contemporary community standards would find that the interactive video game or computer software is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors, and

b. the interactive video game or computer software lacks serious literary, scientific, medical, artistic, or political value for minors based on, but not limited to, the following criteria:

(1) is glamorized or gratuitous,

(2) is graphic violence used to shock or stimulate,

(3) is graphic violence that is not contextually relevant to the material,

(4) is so pervasive that it serves as the thread holding the plot of the material together,

(5) trivializes the serious nature of realistic violence,

(6) does not demonstrate the consequences or effects of realistic violence,

(7) uses brutal weapons designed to inflict the maximum amount of pain and damage,

(8) endorses or glorifies torture or excessive weaponry, or

(9) depicts lead characters who resort to violence freely;

4. "Nudity" means the:

21 Oklahoma Statutes § 1040.75 (effective 1 Nov 2006).

youth violence in USA

Since the mid-1990s, there has been a dramatic increase in violence amongst young people in the USA. The conventional explanation is that young people are learning from television programs and movies that (1) violence is an acceptable solution to problems, and (2) it is acceptable to hurt or kill one's "enemies", because of an indifference to the rights of other people to enjoy life. Not only does this so-called entertainment show that it is ok to kill those who irritate us, but it also shows that killing is the preferred choice of the strong and powerful.

There is evidence that repeated playing of some violent videogames can train people to shoot accurately, even if they have never fired a pistol or rifle in real life.³

Movies, records, and electronic games that contain violence (and contain warnings to parents that the content may be unsuitable for children) are nonetheless advertised to children under the age of 17 years. In other words, the entertainment industry does not heed their own warnings.

movies that inspire murderers

On 1 Dec 1997, Michael Carneal, age 14 y, killed three classmates at school in West Paducah, Kentucky and injured five others, one of whom is permanently paralyzed from the waist down. During interrogation after the shooting, Carneal claimed to have been influenced by the movie *The Basketball Diaries*, in which the protagonist dreams of taking a shotgun to school, breaking down a classroom door, and shooting classmates, while other students cheer. The parents of the three dead students unsuccessfully sued the producer of *The Basketball Diaries*, as well as various videogame manufacturers, in the *James v. Meow Media*, case cited above, on page 12. For related litigation against 53 individuals who allegedly assisted Carneal, see *James v. Wilson*, 95 S.W.3d 875 (Ky.App. 2002).

On 20 April 1999, Hitler's 110th birthday, Eric Harris, 17 y old, and Dylan Klebold, 18 y old, carried two shotguns, a rifle, a pistol, and more than 30 bombs into Columbine High School in Littleton, Colorado and killed 13 people and wounded 23 people (16 of whom were hospitalized for more than two days), before the two perpetrators committed suicide. In the days after this massacre, there were anecdotal reports that Harris and Klebold had watched the movie *Natural Born Killers* many times, that they played the "Doom" videogame for hours and hours. Harris and Klebold were apparently also influenced by the movie *The Basketball Diaries*, in which the character conceals a shotgun under his trenchcoat, just as Harris and Klebold did. The widow of the murdered teacher unsuccessfully sued the producer of *The Basketball Diaries*, in the *Sanders v. Acclaim Entertainment* case, cited above, at page 12.

³ See, e.g., Col. David Grossman's website, <http://www.killology.com/> . Col. Grossman is an expert on training soldiers how to kill.

Incidentally, Harris' web site on AOL quoted lyrics from a song by a German rock music group *Kein Mitleid für die Mehrheit (KMFDM)*, which is translated “No Pity for the Majority”. Harris also posted on AOL a discussion of how to make pipe bombs, which raises the possibility that he learned how to make pipe bombs from reading the Internet. With respect to the lyrics for rock songs, and the words “Ich bin ein Ausländer.” (I am a foreigner.), both of which were on Harris’ website, great literature has included poems and stories about isolation, loneliness, alienation, Weltschmerz, and Angst (e.g., some set to music by Schubert around the year 1820) for centuries without causing massacres. However, I see a difference between the modern rock songs and classic music: some rock songs seem to advocate violence, whereas the classic music only expresses a person's unhappiness — without mentioning killing anyone.

Incidentally, Harris and Klebold were arrested and convicted for stealing electronic equipment from an automobile in 1998 and part of their sentence was to attend an “anger-management class”, a class that they “successfully completed” (according to the local criminal justice system) prior to committing the massacre. It is clear that society — parents, schools, criminal justice system — is *unable* to deal with the problem of youth violence.

NBK

It appears that a tiny fraction of movies is associated with inspiring multiple incidents of violent crime. One movie, *Natural Born Killers* (NBK), has been reported to have inspired several murderers to imitate the characters in these movies. NBK depicts a three-month crime spree in which 52 people are murdered. In this movie, the murder victims are randomly chosen — none of the victims provoked their murders — and the victims are killed only for the thrill it gives to their murderers.

My searches of the Westlaw ALLCASES database on 21 Sep 2002 and 25 Nov 2006 for the phrase “Natural Born Killers” returned the following cases in which murderers were influenced by characters in that movie, which was released in 1994:

1. *Beasley v. Georgia*, 502 S.E.2d 235 (Ga. 1998) (Beasley watched NBK "19 or 20 times", committed a murder, Beasley sentenced to life in prison without the possibility of parole). See also *Walsh v. Georgia*, 499 S.E.2d 332 (Ga. 1998).
2. *New Mexico v. Begay*, 964 P.2d 102 (N.M. 1998) (Begay "frequently watched" NBK, committed a murder, sentenced to life in prison).
3. *Ohio v. Getsy*, 702 N.E.2d 866 (Ohio 1998) (Getsy watched NBK, committed a murder, Getsy sentenced to death).
4. *Washington v. Loukaitis*, 1999 WL 1044203 (Wash.App. 1999) (14-y-old Loukaitis killed three people, sentenced to life in prison without possibility of parole, NBK was one of his favorite movies).

5. *Tennessee v. Howell* 34 S.W.3d 484 (Tenn.Crim.App. 2000) (Howell "wanted to emulate" NBK, committed murder, Howell sentenced to life in prison without possibility of parole).
6. *Massachusetts v. O'Brien*, 736 N.E.2d 841 (Mass. 2000) (O'Brien had a "fascination" with NBK, committed murder).
7. *North Carolina v. White*, 565 S.E.2d 55 (N.C. 2002) (White "fascinated" with NBK, committed murder, White sentenced to death).
8. *Louisiana v. Taylor*, 838 So.2d 729 (La. 2003) ("defendant's favorite movie" was NBK, defendant sentenced to death for murder).
9. *California v. Noordman*, 2006 WL 2374765 (Cal.App. 4 Dist. 17 Aug 17 2006), unpublished/noncitable, review filed (Sep 25, 2006) ("[Defendant and accomplice] both liked and frequently watched the movie, 'Natural Born Killers.' They had memorized lines from it and wore snake rings like the rings worn by the main characters, who were serial killers.").

A common feature of several of these cases is that the defendant called himself by the name of a fictional character in NBK. At trial, the defendant's viewing of NBK is mentioned to show premeditation of the defendant.

Note: The above list of court cases mentioning NBK as an inspiration for murder is *not* a complete list of all murders in the USA that were inspired by NBK, for the following reasons:

1. This Westlaw database contains only appellate court opinions. Therefore, cases in which the defendant did not appeal (e.g., defendant pled guilty and accepted his sentence) do not appear in this database.
2. Some murderers who were influenced by NBK may appeal their conviction, but the appellate court might not mention the NBK movie, because it is not relevant to the few legal issues that were appealed.
3. Some unreported appellate court decisions do not appear in the Westlaw database.
4. It usually takes several years from the time of the murder to the first appellate opinion from that murderer's conviction. Therefore, murders in recent years have not yet produced an appellate opinion.
5. And there may be murderers who were influenced by NBK, but who were not apprehended by the police, and therefore never tried in court.

There are unsubstantiated reports by journalists and commentators that "more than 100" real-life homicides have been inspired by NBK. For example, a professor of English and Journalism at Ferrum College, wrote:

Since its 1994 release, "Natural Born Killers" has been linked to over 100 copycat incidents.

That's a lot of violence to dismiss in the name of free expression.

Lana Whited, "The movies Made Me Do It," *Roanoke Times* (30 March 2001)

<http://www3.roanoke.com/columnists/whited/218.html> .

Whited shows that film to her class and she notes that her own repeated viewing of this movie has desensitized her to the violence shown in the movie: it no longer shocks her the way it initially did.

The above examples shows the unusual propensity of one movie to inspire violent crimes by people who imitate scenes from this movie. In other words, it is foreseeable that such movies with scenes of gratuitous violence will inspire real-life violence. Such foreseeability is an essential element in holding the producers, who profit from these movies, legally liable for the violent crimes inspired by their movies. And, even if real-life violence was not foreseeable at the time the movie was made, the real-life violence subsequently inspired by the movie should motivate the producers to stop distributing the movie, to avoid future murders, analogous to a manufacturer recalling a defective product.

8. professional malpractice

All of the above instances involve the wide dissemination of information, for example, by publication. The legal situation is different when a person gives a professional opinion (i.e., information) to his/her client, as in a physician-patient, attorney-client, or accountant-client relationship. Generally, there is privity of contract between the parties in these cases, so that the information was created specifically for the plaintiff. Some cases have also found liability for a professional opinion that was relied on to the detriment of a third party, when the defendant either knew, or could reasonably foresee, that the third party would rely on the information.

This is not the place to review the abundant law on professional malpractice. I only want to note the relationship between the emerging law of infotorts and the well-established law of professional malpractice. For more on negligent misrepresentation by professionals, see:

- *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441 (N.Y. 1931);
- *Craig v. Everett M. Brooks Co.*, 222 N.E.2d 752 (Mass. 1967);
- *Rozny v. Marnul*, 250 N.E.2d 656 (Ill. 1969);
- Restatement Second of Torts, § 552 (1977).

Hierarchy of speech

The U.S. Supreme Court has recognized a hierarchy of speech, according to its content. Political speech gets the highest level of protection. Commercial speech gets a lower level of protection, and can be regulated by the government.⁴ Obscenity gets an even lower level of protection, and can be suppressed if three conditions are met.⁵

In a number of opinions, the U.S. Supreme Court has indicated a hierarchy of speech, with some topics of speech receiving less protection than other topics. In 1985, the U.S. Supreme Court declared:

We have long recognized that not all speech is of equal First Amendment importance. [FN5] It is speech on " 'matters of public concern' " that is "at the heart of the First Amendment's protection." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 98 S.Ct. 1407, 1415, 55 L.Ed.2d 707 (1978), citing *Thornhill v. Alabama*, 310 U.S. 88, 101, 60 S.Ct. 736, 743, 84 L.Ed. 1093 (1940). As we stated in *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983), this "special concern [for speech on public issues] is no mystery":

[FN5] This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. Obscene speech and "fighting words" long have been accorded no protection. *Roth v. United States*, 354 U.S. 476, 483, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942); cf. *Harisiades v. Shaughnessy*, 342 U.S. 580, 591-592, 72 S.Ct. 512, 519-520, 96 L.Ed. 586 (1952) (advocating violent overthrow of the Government is unprotected speech); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357 (1931) (publication of troopship sailings during wartime may be enjoined). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia*

⁴ *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980); *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

⁵ In the landmark 1973 *Miller* case, the U.S. Supreme Court wrote:

The basic guidelines for the trier of fact [in determining whether material is legally obscene] must be:

- (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, [408 U.S. 229, 230 (1972) (per curiam)], quoting *Roth v. United States*, [354 U.S. 476, 489 (1957)];
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*, [383 U.S. 413, 419 (1966)]; that concept has never commanded the adherence of more than three Justices at one time.

Miller v. California, 413 U.S. 15, 24-25 (1973).

Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-772, 96 S.Ct. 1817, 1830-1831, 48 L.Ed.2d 346 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, 436 U.S., at 456, 98 S.Ct., at 1918; *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 562-563, 100 S.Ct. 2343, 2349, 2350, 65 L.Ed.2d 341 (1980).

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples ... of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees." 436 U.S., at 456, 98 S.Ct., at 1918 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown v. Hartlage*, 456 U.S. 45, 52-53, 102 S.Ct. 1523, 1528, 71 L.Ed.2d 732 (1982); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279, n. 19, 84 S.Ct. 710, 725, n. 19, 11 L.Ed.2d 686 (1964); *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, and public school teachers--all of whom speak for a living--is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas v. Collins*, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945); see also *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44, 91 S.Ct. 1811, 1820, 29 L.Ed.2d 296 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern").

"The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v. United States*, 354 U.S. 476, 484 [77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498] (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 [84 S.Ct. 710, 720, 11 L.Ed.2d 686] (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison v. Louisiana*, 379 U.S. 64, 74-75, [85 S.Ct. 209, 215-216, 13 L.Ed.2d 125] (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the ' "highest rung of the hierarchy of First Amendment values," ' and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, [102 S.Ct. 3409, 3425, 73 L.Ed.2d 1215] (1982); *Carey v. Brown*, 447 U.S. 455, 467 [100 S.Ct. 2286, 2293, 65 L.Ed.2d 263] (1980)."

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-759 (1985).

In 1992, Justice Stevens wrote:

Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.

R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment).

I suggest that the U.S. Supreme Court should expand its hierarchy of speech, with two new categories for “nonfiction speech” and “fictional speech/entertainment that inspires violence”. The following list is organized with higher levels of constitutional protection at the top, and lower levels of protection at the bottom.

1. political speech
2. nonfiction speech (e.g., news; scientific, medical, engineering material; history)
3. commercial speech
4. obscenity
5. fighting words, inciting imminent unlawful conduct
6. fictional speech (e.g., “entertainment”) that inspires violence (e.g., rape, murder, etc.)

This proposal is not a weakening of the First Amendment, but only a recognition of long-standing law that freedom of speech is *not* absolute, as explained above, beginning at page 2.

I suggest that there be liability for nonfiction speech only if the author committed fraud in the work described in the speech.

Need to avoid obscenity debacle

Beginning in the late 1950s and continuing through the 1970s, the U.S. Supreme Court struggled with many obscenity cases without ever successfully defining obscenity. The anti-obscenity zeal was intended to protect public morality — i.e., impose a censor’s morals on everyone. As a result, there were many criminal prosecutions resulting from display — or offering for sale — of books, magazines, or movies to some adults who wanted to have fun in ways that other people did not approve.

Probably the most famous test for obscenity is Justice Potter Stewart’s “I know it when I see it” test that was in his concurring opinion in *Jacobellis*. This so-called test is legally inadequate and was never adopted by the U.S. Supreme Court, but it honestly reveals the real standard used by censors and judges in obscenity cases.

It is possible to read the Court's opinion in *Roth v. United States* and *Alberts v. California*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, in a variety of ways. In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth and Alberts*, [footnote omitted] that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. [footnote omitted] I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Jacobellis v. State of Ohio, 378 U.S. 184, 179 (1964) (Stewart, J., concurring).

Two subsequent dissenting opinion at the U.S. Supreme Court show the problems of regulating obscenity.

The Court has worked hard to define obscenity and concededly has failed. In *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, it ruled that “(o)bscene material is material which deals with sex in a manner appealing to prurient interest.” *Id.*, at

487, 77 S.Ct., at 1310. Obscenity, it was said, was rejected by the First Amendment because it is “utterly without redeeming social importance.” *Id.*, at 484, 77 S.Ct., at 1308. The presence of a “prurient interest” was to be determined by “contemporary community standards.” *Id.*, at 489, 77 S.Ct., at 1311. That test, it has been said, could not be determined by one standard here and another standard there, *Jacobellis v. Ohio*, 378 U.S. 184, 194, 84 S.Ct. 1676, 1682, 12 L.Ed.2d 793, but ‘on the basis of a national standard.’ *Id.*, at 195, 84 S.Ct., at 1682. My brother Stewart in *Jacobellis* commented that the difficulty of the Court in giving content to obscenity was that it was “faced with the task of trying to define what may be indefinable.” *Id.*, at 197, 84 S.Ct., at 1683.

Miller v. California, 413 U.S. 15, 37-38 (1973) (Douglas, J., dissenting).

In another case decided the same day as *Miller*, Justice Brennan wrote an eloquent dissenting opinion that shows the problems with trying to prohibit obscenity:

This case requires the Court to confront once again the vexing problem of reconciling state efforts to suppress sexually oriented expression with the protections of the First Amendment, as applied to the States through the Fourteenth Amendment. No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards. I am convinced that the approach initiated 16 years ago in *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73-74 (1973) (Brennan, J., dissenting).

Our experience with the *Roth* approach has certainly taught us that the outright suppression of obscenity cannot be reconciled with the fundamental principles of the First and Fourteenth Amendments. For we have failed to formulate a standard that sharply distinguishes protected from unprotected speech, and out of necessity, we have resorted to the *Redrup* [386 U.S. 767 (1967)] approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decisions. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion.

Of course, the vagueness problem would be largely of our own creation if it stemmed primarily from our failure to reach a consensus on any one standard. But after 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as “prurient interest,” “patent offensiveness,” “serious literary value,” and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we “know it when (we) see it,” *Jacobellis v. Ohio*, supra, 378 U.S., at 197, 84 S.Ct., at 1683 (Stewart, J., concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.

Paris Adult Theatre, 413 U.S. at 83-84 (Brennan, J., dissenting).

In addition to problems that arise when any criminal statute fails to afford fair notice of what it forbids, a vague statute in the areas of speech and press creates a second level of difficulty. We have indicated that ‘stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be

required to act at his peril here, because the free dissemination of ideas may be the loser.' [FN10] *Smith v. California*, 361 U.S. 147, 151, 80 S.Ct., 215, 217, 4 L.Ed.2d 205 (1959). That proposition draws its strength from our recognition that "(t)he fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar . . ." *Roth*, supra, 354 U.S., at 488, 77 S.Ct., at 1311. [footnote omitted]

FN10. In this regard, the problems of vagueness and overbreadth are, plainly, closely intertwined. See *NAACP v. Button*, 371 U.S. 415, 432-- 433, 83 S.Ct. 328, 337—338, 9 L.Ed.2d 405 (1963); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv.L.Rev. 844, 845 (1970). Cf. infra, [93 S.Ct.] at 2652--2653.

Paris Adult Theatre, 413 U.S. at 88 (Brennan, J., dissenting).

The problems of fair notice and chilling protected speech are very grave standing alone. But it does not detract from their importance to recognize that a vague statute in this area creates a third, although admittedly more subtle, set of problems. These problems concern the institutional stress that inevitably results where the line separating protected from unprotected speech is excessively vague. In *Roth* we conceded that 'there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls . . . ' 354 U.S., at 491—492, 77 S.Ct., at 1313. Our subsequent experience demonstrates that almost every case is "marginal." And since the "margin" marks the point of separation between protected and unprotected speech, we are left with a system in which almost every obscenity case presents a constitutional question of exceptional difficulty. "The suppression of a particular writing or other tangible form of expression is . . . an individual matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for itself whether the attacked expression is suppressable within constitutional standards." *Roth*, supra, 354 U.S., at 497, 77 S.Ct., at 1315 (separate opinion of Harlan, J.).

Paris Adult Theatre, 413 U.S. at 91 (Brennan, J., dissenting).

As a result of our failure to define standards with predictable application to any given piece of material, there is no probability of regularity in obscenity decisions by state and lower federal courts. That is not to say that these courts have performed badly in this area or paid insufficient attention to the principles we have established. The problem is, rather, that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so. The number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court.

Paris Adult Theatre, 413 U.S. at 92 (Brennan, J., dissenting).

If we are to stop protecting all fictional entertainment as speech, we must learn from this legal history of obscenity and try to define precisely what is objectionable in such entertainment. Unlike the obscenity cases, where the key test is whether we are personally offended by the alleged obscenity, the key test in entertainment cases should be whether the perpetrators of violent crime(s) were *inspired* by the entertainment to commit crimes or to commit crimes in a particularly gruesome manner. In other words, in the absence of this entertainment, or the absence of similar entertainment, the crime would not have occurred. The jury should look for evidence of emulation, such as the perpetrator(s) of the crime either (1) reciting lines from the movie during the commission of the crime or (2) calling real people by names of fictional characters in the entertainment. The jury might also consider whether the perpetrator(s) watched the entertainment once or many times, with more responsibility to the entertainment when there was repeated

viewing by the perpetrator(s). Again, the emphasis should be on the effect of the entertainment on the perpetrator(s), and *not* whether the jury is offended by the entertainment.

I suggest that violent entertainment (e.g., movies, videogames, etc.) be regulated *not* by prohibition through statute or injunction, but by making their producers and distributors financially liable in tort for the harms caused by this so-called entertainment. This means that a judge and jury would consider each case individually, instead of a broad prohibition in a statute.

Conclusion

Notice that in some of these infotorts the information is harmful because it is false (e.g., credit reports, information in book or map, disparagement of agricultural products), while in other infotorts the information is harmful because it is true (e.g., instructions for criminal activity, advertisements for people to kill spouses). The torts involving false information are related to defamation or breach of warranty for fitness of ordinary purpose. The torts involving true information are mostly related to criminal law, in which a crime must occur before the law can react.

The most successful kind of infotorts are those that have a basis in statute (e.g., regulation of credit reports, tort liability for aiding and abetting crimes). At the present time, there is no liability for most other infotorts.

Litigation under a contract theory (e.g., breach of warranty) can result in a refund of plaintiff's purchase price for the information, which is generally trivial (e.g., cost of a book or map), plus plaintiff's consequential damages, but *not* punitive damages, under Restatement (Second) Contracts §§ 347, 349, 355 (1981).

Some of the privacy torts (e.g., unreasonable publicity given to a person's private life, publicity placing person in false light) involve publication of information that harms the plaintiff. As a practical matter, such offenses are more likely to be successfully remedied as privacy torts, than as information torts.

I predict that the current absolute First Amendment protection for movies or videogames that inspire violent crimes will be broken in the context of young people who commit a murder spree, perhaps at their school. In this way, society will finally begin to take legal action against what is causing the recent increase in violence.

This essay is posted at: www.rbs2.com/infotort.pdf

My most recent searches for court cases on this topic were in Sep 2002 and Nov 2006.

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