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### A Panel Discussion: Potential Liability Arising from the Dissemination of Violent Music

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**A PANEL DISCUSSION: POTENTIAL LIABILITY  
ARISING FROM THE DISSEMINATION OF  
VIOLENT MUSIC†**

*F. Jay Dougherty, Moderator\**  
*Rex S. Heinke, Panelist\*\**  
*Frank J. Janecek, Jr., Panelist\*\*\**  
*Zazi Pope, Panelist\*\*\*\**  
*Rodney A. Smolla, Panelist\*\*\*\*\**

**JAY DOUGHERTY:** So . . . Rod Smolla is going to make a nasty phone call to Rex Heinke in which he will lay out the elements of the wrongful death and tort claims that are typically made in these cases . . .

**ROD SMOLLA:** . . . I have been asked to join as co-counsel on the plaintiff's side in this case involving Daniel Roberts. I'm going to tell you that I don't know that much yet. Here's what I know: he's a fifteen-year-old fan of heavy metal music. He's pled guilty to killing a teenage girl in 1998. At his arraignment, he stated that he committed the crime after listening repeatedly to albums by his favorite heavy metal band. The music on the albums repeatedly depicted in graphic detail brutal acts that the singer sought to perform against the listener and various girls and virgins. I thought as a professional courtesy, I would let you know that you are about to receive our complaint . . .

**REX HEINKE:** I appreciate that.

**ROD SMOLLA:** . . . and give you a sense of what the tort cause of action is, and what my thinking is. You'll know it soon enough, so I

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† The following is an edited transcript of a panel discussion held in conjunction with the Fourth Annual Entertainment Law Symposium sponsored by Loyola of Los Angeles Law School on February 22, 2002. This panel based its discussion on a hypothetical situation, a summary of which appears in this Issue. *A Hypothetical: Potential Liability Arising From the Dissemination of Violent Music*, 22 LOY. L.A. ENT. L. REV. 233 (2002) (hypothetical).

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thought I'd be up-front with you. As I struggled with whether to get involved in this case, what I felt was that I was going to have to make up the cause of action as I went along. Because I had gone to a program at Loyola Law School and heard Jonathan Freedman talk,<sup>1</sup> I was very depressed about causation here, and figured you would call him as an expert witness, and that was very depressing to me. I'm also depressed because never before in the history of American law has there ever been a successful case involving facts like this. That's not a good sign. And so my thinking is, is there any cause of action that I can plead that is legally viable—that's sufficiently strenuous in terms of its protection of free speech that it won't be tossed out on First Amendment grounds, but that is also factually plausible, that I, as an attorney, believe that at least based on what we know now, could in fact be borne out after discovery, investigation of the facts, and so on?

You will see this in my complaint, which will be [sent] to you, but here basically is the thought process that I went through. It's utterly impossible for me to think that I have a good case here if I rely on ordinary common law principles of tort. That is to say, if what I have to prove is a straightforward negligence kind of case, with cause-in-fact and proximate cause, I'm almost certainly going to lose, because almost certainly—based on every single judicial decision ever reported—a court is going to say that if that is all it's going to take to win the case, then the First Amendment puts the kybosh on it. We both know that. So even if I could demonstrate that the band and all the other defendants acted unreasonably in putting this music out, even if I could demonstrate that notwithstanding [Freedman's] macro evidence, if you look at this one kid, it looks like this music made him flip out and commit these murders. Even if I could go there, and even if I can get around foreseeability problems on the theory that, although normally this would be a superceding cause—somebody listens to your music and goes out and commits murder, that's a superceding cause—that in this case, the risk that material marketed to children would cause the occasional sick child to flip out and do this was a foreseeable risk, even if I could get around all of that, it's too loose a standard to withstand First Amendment scrutiny.

And I also know that you're going to claim, and I'm sure we'll hear about this in a few minutes, that yes, there's a First Amendment standard

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1. Jonathan L. Freedman, a professor with the Psychology Department at the University of Toronto, made a brief presentation prior to the panel discussion on the causal connection (or lack thereof) between media content and viewer conduct. Professor Freedman writes on this topic in depth in *Media Violence and Its Effect on Aggression: Assessing the Scientific Evidence*, a forthcoming (April 2002) publication from University of Toronto Press.

here, it's the standard of *Brandenburg v. Ohio*,<sup>2</sup> which requires that the material be directed to the incitement of imminent lawless action and likely to produce that action, which means there has to be an intent on the part of the rock group to cause this murder or for murders; it has to be imminent, there has to be temporal imminence of some kind between the production of the music and the death; and there has to be likelihood, which sounds harder to me than the one-out-of-a-million risk, or one-out-of-a-thousand risk, or whatever that I think your clients should have been attuned to, so if that's the standard that I'm saddled with, then I don't belong in this case. I ought not have taken it because if that's the standard, and if it's going to be enforced rigorously, on the facts that I know up to now, I'm not going to be able to meet it.

**REX HEINKE:** You know, you're not like most plaintiffs' lawyers.

**ROD SMOLLA:** I just play one on TV. So this is it. I am going to stop to get your reactions. You will see that I have concocted a cause of action, I've created one, and it is an amalgam of tort principles and First Amendment principles, but not, as you would guess, principles emanating from *Brandenburg v. Ohio*. What I have instead done is borrowed from multiple strains of First Amendment law. First, I have borrowed, not lifted verbatim, but borrowed, from the strain of law emanating from *New York Times v. Sullivan*,<sup>3</sup> which at its core said that in order to establish liability for libel, you must demonstrate in the case of a public plaintiff, that the defendant acted with either knowledge that the publication was false or with reckless disregard for truth or falsity. So I have taken that second phrase and I've refitted it, and my cause of action alleges that your clients acted with reckless indifference to human life. That knowing that some percentage of susceptible children would in fact act out violent actions when exposed to this material, with reckless indifference to that risk, you put the material out anyway. So that's the first aspect of my case. I will say to you, though, that I think even that will lose on First Amendment grounds. And the reason that will lose and the reason it ought to lose, I think, is a matter of social policy.

**REX HEINKE:** Do you mind if I tape this?

**ROD SMOLLA:** No, this is one of those collegial, give each other a warning kind of off-the-record calls that good lawyers will have, to narrow the issues. To wind it up, the reason I didn't stop there is this: you can say that about just about anything. You put out a television show, you write this book, you put out this hip-hop CD, and there is some residual risk that

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2. 395 U.S. 444 (1969).

3. 376 U.S. 254 (1964).

somebody might respond to it in some crazy way and engage in some terrible act. If that's all it takes, then once again, we've opened the door to too much liability. So what I have done is say if that is coupled with an intent to market the material to children, when you take the recklessness standard I have borrowed from *New York Times v. Sullivan* and a body of First Amendment case law that is still somewhat in flux and in development but seems to stand for the proposition that normal adult First Amendment standards are somewhat adulterated—that seems like a funny pun—are somewhat compromised when we're dealing with material directed to children, we may allow for a lower, more paternalistic if you will, standard. I'm sure when we get into this, we are going to find all kinds of other things, we will be looking by analogy to obscenity law and other various strands of First Amendment law. But in a nutshell, that's my complaint. It's not the custom *Brandenburg* thing, it's not the low-level negligence thing, it's an intermediate sort of suit, and you can see I've been honest with you. I think I have a shot of proving this. I think I have a shot I can demonstrate this as a matter of evidence, and I think I have a shot of not losing it as a matter of law. So I've tried to calibrate the case at just that cusp where I'm not out of it either on the law or on the facts.

**FRANK JANECEK:** Rex, it's Frank Janecek, I'm Rod's co-counsel. And just so that you have something to say, don't forget the allegations, Rod, that the band members said that they intentionally made their music to make people want to hurt someone, and that is what they are trying to get their fan base to do, that their market is these violent kids. So don't forget those facts.

**JAY DOUGHERTY:** And I might add, even though I'm a neutral party here, that they depicted in graphic detail these brutal acts, presumably describing ways in which they could be done, almost like an instruction manual for how to commit these sorts of acts.

**REX HEINKE:** Anybody else on the phone?

**JAY DOUGHERTY:** We're trying to give Rex some good things to respond to. Rex is going to address the basic tort allegations that mainly Rod has made, and then we will proceed to discuss the more particular unfair competition possibility here.

**REX HEINKE:** I think there is one thing we are probably all going to agree on up here, and that's that the common law tort of wrongful death is simply not going to carry the day in this kind of litigation. The elements of that tort—basically, a wrongful act negligently committed that causes a death—are not going to be enough to carry the day. At least that much I think all of us would agree to, that the common law negligence wrongful death claim simply isn't viable in light of cases like *Brandenburg*. So that

takes us to the additional things Rod was talking about; for example, trying to come up with some twist here, based on other constitutional cases [like] *Sullivan*. It's certainly true that in *New York Times v. Sullivan* the Supreme Court said that the actual malice standard there meant that the defendant published something with knowing falsity or reckless disregard of whether it was false. I don't think *Sullivan* has any application here, because *Sullivan* is all about false speech. And the speech here has nothing to do with falsity; nobody is claiming it's false, they're claiming that it caused somebody to do something, but not that it's false.

In addition, if you look at *Sullivan* and cases about reckless disregard, the Supreme Court defined reckless disregard in *St. Amant v. Thompson*<sup>4</sup> as substantial subjective awareness of falsity. So it really is all about falsity, and all about state of mind about falsity, so I don't think it has anything to do with this. The additional point Rod made about kids obviously has a lot to do with this. Because what you are talking about is whether or not there's some kind of different standard for children, and I think we will be talking about that all day and how it fits in with this. But the flip side of it is that the Supreme Court has repeatedly said that you cannot deprive adults of information that is suitable for adults, simply to protect children. There's a raft of cases going back to *Butler v. Michigan*<sup>5</sup> in the 1950's, where the issue was could you ban books because while they were admittedly suitable for adults, they were not, or the government felt that they were not, suitable for kids, and even the Supreme Court in those cases held in a rather memorable phrase that to do that was to burn the house down to roast the pig, that it was simply too much government restriction on speech for the interest they were trying to protect.

So, I think we will see that. The question about graphic detail and instructions: at some point—and Rod's the expert on this—if the instructions are clear enough, specific enough, and so on, as they were in the *Hit Man* case,<sup>6</sup> there is at least a tiny window there for liability when you have that kind of publication, although it seems to me that was a highly unusual situation and not one that is likely to be repeated any time soon. The defendants there entered into what were fairly amazing sets of stipulations, that they knew the book would be used by people to kill other people, that they intended that, and they knew that would assist people in killing other people. In the typical case where we are talking about a movie or piece of music and so on, there is not going to be anything like that. So

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4. 390 U.S. 727 (1968).

5. 352 U.S. 380 (1957).

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

it seems to me that exception, while it does exist, is an incredibly narrow one—as even the court there recognized—and not likely to have much application here. But I appreciate all of you on the phone giving me these suggestions, and I'll certainly pass them along to my clients so they will be aware that this is coming.

**FRANK JANECEK:** Rex, before you hang up, this is Frank Janecek again. We recognize that the wrongful death claim is obviously going to be a hard one. While most courts let you get by the pleading stage, they typically go against the plaintiff in summary judgment or at trial. And we recognize that is a potentially tough claim to prove until we see what discovery looks like. We've also got another claim, which is an unfair competition law claim. And what the unfair competition law does is it prohibits fraudulent, unlawful, and unfair business practices. It has nothing to do with wrongful death, just the practice of marketing to kids. The wrong isn't that your clients produced and sold these albums. We all agree that's protected and they can do that. But the wrong is that they market these albums to kids and there is a higher protection for kids. Let me spell out for you the claims we are going to assert. Under the unlawful business practice prong, we're going to say that selling albums that have graphic sexual references and descriptions violates the California obscenity statutes and the harmful matters statutes with respect to kids. We think that one's going to get by the First Amendment, no problem, because those statutes have already survived the First Amendment analysis.

Because your clients' albums are really violent, and really contain a vast amount of violence against women, describing rapes, describing torture, violence against women is really what the message is. Social science and the courts have recognized that there is a symbiotic relationship between violence and sex, and that violence can have sexual components. So we think that violence might well fit under the obscenity statutes in California. We're also going to bring an unlawful claim on [California] Penal Code section 272, which is contributing to the delinquency of minors. We will rely on social science talking about violent media, and music in particular, and that there's a correlation between drug use and juvenile delinquency and violence, and that all of those will contribute to the delinquency of minors. And we understand that has to fit under the incitement exception, which we'll probably deal with later.

The last thing we are going to bring under this new statute—actually an old statute but a new theory—we are going to bring an unfair business practice claim. And under the California Unfair Competition Act, there are two types of unfairness: it can be unfair business practices if the social utility of the conduct is outweighed by the gravity of the harm. We think

the utility of marketing to kids is outweighed by the risks that the kids will copy these murders. So we think it fits under the social utility test. And the other test is, it violates public policy. And countless courts have said that there's a public policy of protecting kids from obscene speech and speech that can cause them harm or society harm. So we think we fit both tests. We're going to bring three unfair theories: marketing profanity to minors, because the albums contain countless swear words and you shouldn't market swear words to minors; a claim that violence harms youth and society, I just touched on that one; and an unfair claim saying that your clients put a warning label on the albums saying the albums are inappropriate for minors and yet you market to them, and it's unfair. It's like pornography, you know it when you see it. If you know that the product is not appropriate for a given child or a given market, you shouldn't advertise to that market. So we think each of these theories will pass muster. . . .

**JAY DOUGHERTY:** For at least the last few years, maybe it goes back further than that, plaintiffs have tried to find additional ways to pin civil liability on the media. In *James v. Meow Media, Inc.*,<sup>7</sup> dealing with the Paducah killings, they raised RICO (Racketeer Influenced and Corrupt Organizations) Act claims and also strict product liability claims as a way to try to deal with the constitutional limitations on the wrongful death claim, trying to find some other way to find civil liability against these plaintiffs, and one of the most recent approaches to that is the one Frank just mentioned, which was raised in the *Slayer* case<sup>8</sup>. . . .

**REX HEINKE:** Having finally figured out, after much training, how to conference somebody else in on this phone, I would like to have my friend Zazi Pope on the line, if you gentlemen wouldn't mind, because I'm sure she has some thoughts on some of the things Frank just raised.

**ZAZI POPE:** I do have some good news for you, Rex, and bad news for you, Frank. That theory of liability under California Unfair Business Practices [Business and Professions Code] section 17200 might have [worked] up until two days ago. But two days ago, an important decision came down from the California Court of Appeals, dismissing a lawsuit based on . . . the theories you just alleged. That lawsuit, which was called *Citizens for Fair Treatment v. Time Warner Entertainment Co.*,<sup>9</sup> [was inspired by] the FTC [Federal Trade Commission] Report that was released in 2000, which was a report commissioned by [then-]President Clinton in

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7. 90 F. Supp. 2d 798 (W.D. Ky. 2000).

8. *Pahler v. Slayer*, No. CV79356 (Cal. Super. Ct. (San Luis Obispo) Oct. 29, 2001).

9. No. B148565, 2002 Cal. App. LEXIS 1763 (Cal. Ct. App. Feb. 19, 2002).



the wake of the Columbine shootings. He asked the FTC to look at the marketing practices of the entertainment industry—movies, music and videogames. And the report found in essence that movies, music and videogames [with violent content] were being marketed inappropriately to children. . . . A watchdog group called Citizens for Fair Treatment brought a class action lawsuit against the studios, basically turning the FTC Report into a cause of action alleging that the studios violated § 17200, and engaged in unfair and deceptive business practices by marketing [R-rated films and M-rated music and games] to children.

We brought a motion under California's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. The anti-SLAPP statute says that if you're engaged in First Amendment-protected activity—which movies and music are, obviously—then you can require the plaintiffs to produce evidence to support their claim, before you have to engage in any discovery. If they cannot come forward immediately, right after they file the complaint, with evidence to substantiate their claim, you're entitled to have the lawsuit thrown out, and you're entitled to your costs. The [lower court] judge, unfortunately, believed that [movies and music] were not protected by the First Amendment because they are made for profit, and therefore he thought the First Amendment didn't apply, and he rejected our SLAPP motion. The court of appeals, however, reversed. Sorry, Frank, you'll have to come up with another theory.

**FRANK JANECEK:** Zazi, can I ask you a question? Did the court of appeals say it's all right to market materials containing profanity to kids, in light of what *FCC v. Pacifica Foundation*<sup>10</sup> said?

**ZAZI POPE:** No. What the court said was that [the SLAPP statute barred plaintiff's lawsuit because the claims arose from (1) an "act," (2) taken "in furtherance of the studios' First Amendment rights," (3) in connection with a "public issue."] The court [also found that] the plaintiffs failed in their burden to come forward with evidence. I'm not saying that if they had managed to come forward with evidence, we would have [succeeded in having the case thrown out] at the pleading stage, but they didn't come forward with evidence, and that's why the case was thrown out.

**FRANK JANECEK:** But they didn't use the profanity cause of action we're talking about?

**ZAZI POPE:** No.

**REX HEINKE:** Frank and I know a lot about § 17200 and the arguments back and forth because of the *Slayer* case, where that became

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10. 438 U.S. 726 (1978).

the real focus. It started out being primarily focused on wrongful death, but as it evolved, the real emphasis switched to the § 17200 cause of action. Business and Professions Code section 17200 is an interesting statute. It essentially has two provisions relevant here: one, it says that if there's any act that violates any other law, then you have a § 17200 cause of action. And it says alternatively, if the act being challenged is "unfair," then you have a § 17200 cause of action. In our case, the plaintiffs were contending just what Frank outlined. They said that profanity was actionable as such, and we said that profanity can't be actionable as such. I think that one is pretty clear, but maybe Frank still disagrees. But I really don't think that is a serious claim, that because you distribute something that has swear words in it, there's some kind of actionable claim, even if they're being distributed to minors.

Another claim, which was more involved, I think, was a claim that these things were obscene under California law. There, instead of being completely locked into the constitutional arguments, we spent a fair amount of time talking about the scope of California's obscenity law, set forth in Penal Code sections 313 and 313.1. So it wasn't so much a constitutional argument as it was about the scope of those statutes. . . . The plaintiffs kept talking about the term in [§ 313], "harmful matter," and said that what the defendants were doing was harmful matter, and therefore actionable. And what we kept saying was that if you read what "harmful matter" is defined to be, it's matter about sexual conduct. It's not material about violence, it's not material about profanity, it is material about sexual conduct that appeals to the prurient interest. And interestingly enough, it is defined in terms of the average person. So we said that under California law, the test was the average person, not minors. Or to put it differently, we constantly said to Frank, you guys have a lawsuit in search of a law, there's no statute that prohibits what you're complaining about. If you think you are entitled to a remedy, you should go see the legislature and see if they will adopt a statute that prohibits what you are complaining about, but the current statute doesn't do that, because it doesn't focus on minors, it has nothing to do with violence, it's only about sexual conduct and only if it appeals to the prurient interest and is largely measured by adults, not by minors. So, if you think you've got a claim, you have to go and see the legislature, because you are just trying to manufacture one.

The other prong of § 17200 is the unfairness prong, and that is completely nebulous. What's "unfair"? As Frank accurately says, there are cases that say we have to look at the social utility of the conduct and compare it to the disadvantages of the conduct. And we said that in this context, that simply is pure out-and-out censorship. You are saying to a

judge or a jury that you are supposed to decide whether you think that speech is more valuable or less valuable—and that is just censorship. That’s what the First Amendment is designed to prohibit. And in addition, we argued vigorously that under the unfairness prong, any claim would be unconstitutional because it is unconstitutionally vague. There isn’t any content there that defines what the offense is. If you look at it and say, “Is it unfair?” you can’t figure out whether or not there’s a claim, and therefore, it would be unconstitutionally vague. Ultimately, the court agreed, at least in the *Slayer* case.

**FRANK JANECEK:** I don’t want to shed much light on the constitutional parameters of the unfair conduct, because what the court ultimately told us, I think incorrectly, was that the unfair conduct was required to be tied to a particular statute, and to me, that makes the unlawful and the unfair [prongs] the same cause of action, when the case law is clear that it’s unlawful *or* unfair. So he never told me that I was right or wrong or that you were right or wrong. But I do think on the profanity, that there is a valid cause of action out there. If you look at *Pacifica*, which was the [case about] George Carlin’s seven words you can’t broadcast, what the court said was that when kids are in the audience, you can’t say those words. You can say them, but not when they are in the audience, and they put in some time restrictions. They channeled it during a period of time when kids weren’t around. And in that case, the court said, “Sellers of printed and recorded matter and exhibitors of motion pictures and live performances, may be required to shut their doors to children, but such a requirement has no effect on adults’ access.” So I think that if you can tailor an injunction or if you can tailor a statute or regulation that allows adults to purchase materials that are rife with swear words—and we’re not talking about “damns” or “darns,” we’re talking about pretty graphic swear words, and a lot of them—that there is no restriction. It’s not harming the First Amendment to say that you can’t sell that material to kids without parental consent. So I think that is still a cause of action someone can bring.

**JAY DOUGHERTY:** One of the songs that particularly offended the judge in the *Slayer* case is called “Sex, Murder, Art,” showing I guess that there is violence and obscenity mixing in together, although the judge said it was primarily about violence, not about sexual conduct. I tried to download that one last night off the peer-to-peer computer filing service. There were a lot of Slayer tunes available but not that one, so I guess that is not especially popular. Virtually anything you can find on the computer systems—but unless they are putting that one under a different title, that one wasn’t available, you have to look elsewhere to get that one. If we

have talked about the basic elements of the § 17200 claim, then we'd like to move on to discuss the constitutional limitations to all of these types of claims. In the classic case dealing with wrongful death actions and aiding and abetting types of actions, the classic constitutional defense arises under the *Brandenburg* case, requiring the elements that Rex recited earlier. But Zazi is going to outline that defense for us again, as it became extremely important in dealing with the *Natural Born Killers* case<sup>11</sup> and then Rod will talk about that defense as it applied in the *Hit Man* case.

**ZAZI POPE:** I'm sure you're all familiar with *Brandenburg*, but just to recap: before liability can be imposed for [harm or damage allegedly caused by] speech, it has to pass the *Brandenburg* test, namely, "Is the speech intended and likely to incite imminent lawless activity?" There are three prongs. The first is the intent to incite, [which includes both] objective and subjective components. The subjective component, obviously, is, "Did the speaker specifically intend for his or her audience to go out and commit an unlawful act immediately?" And then there is an objective component. Up until the *Hit Man* case, which Rod will talk about, courts weren't really disturbed by the allegation in the complaint that the producers of this material intended for lawless activity to result. They could look at the speech objectively and conclude that the speech itself was not susceptible to an inference that this lawless activity was supposed to result. And specifically in *McCollum v. CBS, Inc.*,<sup>12</sup> which was the Ozzie Osbourne suicide solution case, the court heard the songs and said that there was nothing in the songs themselves that purported to order anyone to do any concrete action at any specific time, much less immediately. And the court also said that the song lyrics, as a matter of law, don't constitute incitement because they're not intended to be read literally and everybody would reasonably understand that the words are symbolic, and not calls to action.

The other important thing to remember on the intent to incite prong is that there is a difference between glorification and incitement. In a lot of these cases, the plaintiffs [try to obscure the distinction. They] can't allege that the actor turns to the camera and says, "OK, you go out and shoot someone." [So instead they allege that the moviemakers should still be held liable because] they glorify violence, make it attractive and appealing. That was one of their arguments in the *Natural Born Killers* case. [In that movie] you've got Woody Harrelson from "Cheers," [who is] very appealing and attractive and you make him into a serial killer and you let

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11. *Byers v. Edmondson*, 712 So.2d 681 (La. Ct. App. 1998).

12. 249 Cal. Rptr. 187 (Ct. App. 1988).

him get away with it, unlike [most of the movies Freedman referred to, where] the bad guys never get away with it. In *Natural Born Killers*, one of the reasons why the violence was so disturbing to people was because the killers got away with it. . . . But the law is very clear that the speech has to incite, that glorification isn't enough, that there has to be a call to immediate action. So that's the intent to incite.

The second prong is imminence. Again, the law is very, very clear. Even if the speech advocates some illegal act, if it's directed towards some indefinite time in the future, it doesn't meet the imminence test. The imminence test is that the expression is so imperative and concrete, that the person really doesn't have an opportunity for rational deliberation and discussion and doesn't have an opportunity to have somebody talk him out of doing it. They see it and there is a visceral, physical response and they are compelled to go out and commit the act. So if there is a gap of time between when the person is listening to the music or watching the movie and when the act occurs, the cases are very clear that that doesn't meet the imminence prong. And as Rod said, cases have universally held—whether it's in the TV area (*Zamora v. CBS, Inc.*<sup>13</sup> or *DeFilippo v. NBC, Inc.*<sup>14</sup>), the movie area (the *Boyz in the Hood* case<sup>15</sup> or the *Warriors* case<sup>16</sup>), or the music area (the *McCullum* case and other cases)—that none of these cases can satisfy the imminence prong because of the spatial and temporal and physical gap between the speech itself and the listener's conduct.

The third prong is the likelihood of lawless activity. This is very important, because people tend to confuse the likelihood prong of *Brandenburg* with causation under classic tort principles, and what we are talking about when we say "likelihood" is not an issue of fact or causation in the classic sense, because the courts have very clearly said that if the reaction is unreasonable or irrational, if somebody in the audience is very sick or disturbed or taking drugs, as was the case in *Natural Born Killers*, . . . even if it's foreseeable that somebody will do something crazy, that doesn't make it likely. The response has to be not only foreseeable, but the response of a reasonable person. And that, I think, is the distinction between the overwhelming body of cases where no liability has been found and the one case where liability was found, that was *Weirum v. RKO General, Inc.*<sup>17</sup> from several years ago. [That case

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13. 480 F. Supp. 199 (S.D. Fla. 1979).

14. 446 A.2d 1036 (R.I. 1982).

15. *State v. Barker*, No. 95APA09-1209, 1996 Ohio App. LEXIS 1861 (Ohio Ct. App. May 9, 1996).

16. *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989).

17. 539 P.2d 36 (Cal. 1975).

revolved around] a radio promotion, and the radio announcer said, “OK, kids, DJ Bob is on the Pacific Coast Highway and you guys get in your car and drive to Pacific Coast Highway, and the first one to find him gets a hundred bucks.” That was the gist of it. And so there was this promotion to encourage people to get in their cars and drive as fast as they could to the PCH and find this disc jockey and win a bunch of money. And of course, the kids did that, and there was a car accident, and somebody was injured or killed and there was a lawsuit.

I think what really concerned the court in that case and what compelled it not to apply the traditional *Brandenburg* principles, was that the court felt that it was not only foreseeable, but that it was very likely, not that someone would do some crazy, wacky thing, but that someone would do exactly what the radio announcer was telling people to do: get in their car and try to find this disc jockey. So the lawless activity can’t be an act committed by [an irrational or deeply disturbed] person, it has to be a natural reaction flowing logically from what you are actually asking people to do. And this is a point the court very eloquently made in another case Time Warner was involved in, *Davidson v. Time Warner*,<sup>18</sup> involving Tupac Shakur’s rap song, “Cop Killer.” It’s a song about killing cops; someone was listening to that song and when a policeman pulled him over, he killed the policeman. There was a lawsuit based on that song and the court said it was not going to find that this was likely, because it’s impossible to predict how or to what people are going to react, and we can’t “dumb down” our culture to cater to the most vulnerable and psychotic people; otherwise, [our culture would be robbed of everything that’s interesting or provocative in it.]

Look at the things that have inspired people throughout history: the Branch Davidians were inspired by the Book of Revelations, Charles Manson was inspired by The Beatles, the guy who killed John Lennon was inspired by J.D. Salinger’s *The Catcher in the Rye*, the guy who shot Ronald Reagan was inspired by *Taxi Driver*. If you’re going to say that anything that could inspire some crazy person to commit a violent act is going to be subject to liability, our culture would cease to have any meaning. So the courts have said they are not going to deem, as a matter of law, foreseeable or likely these very rare, unfortunate [and random acts of violence that occur, even if these acts are somehow linked to a movie, song or other work of art.]

Now, *Natural Born Killers* is a movie that came out in 1995, directed by Oliver Stone. It concerns two young people, played by Juliette Lewis

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18. 25 Media L. Rep. 1705 (S.D. Tex. 1997).

and Woody Harrelson, who go on a massive cross-country killing spree. They are the victims of a horrible upbringing, including incest and abuse; they kill lots and lots of people and they become folk heroes. . . . And the point that Oliver Stone was trying to make, [which unfortunately was lost on a number of people], is that we live in a culture obsessed by violence: we turn our killers into heroes, and our institutions are sick and corrupt—whether it's the family, the prison system, or the media—and in the end, the killers go to jail, but then they break out and they ride off into the sunset. So some people were very disturbed by the film[, though it was also the subject of a great deal of critical acclaim.] There were some copycat incidents, [including a shooting] in Louisiana. Two teenagers from Oklahoma had rented *Natural Born Killers*—and a bunch of other movies, by the way, including Disney's *Fantasia*—and had spent a lot of time in a remote cabin, and taken huge amounts of LSD. They decided to go on a cross-country trip to find the Grateful Dead. They never found the Grateful Dead, but they ran out of money, they committed some robberies, and when they got to Louisiana, they went to a convenience store, and the girl, Sarah Edmondson, went into the store, and shot the woman who was working in the store[, Patsy Byers]. Sarah's testimony was, "I wasn't influenced by the movie, but my boyfriend loved the movie and he made me shoot Patsy Byers." [Byers' family filed a lawsuit against Edmondson and her boyfriend, Ben Darras, and also against Oliver Stone and Warner Bros.]

We thought, based on the huge body of law that we've discussed, so supportive of movies, books, magazines, [and so clear in establishing] that you can't have liability for copycat crimes, that it was a pretty slam-drunk motion to dismiss and, indeed, we were able to persuade the court to dismiss the case. But the court's decision was reversed by the Louisiana Court of Appeals.<sup>19</sup> And the reason why I think it was reversed was because of the *Hit Man* case, which involved [a how-to] manual for contract killers. . . . And I think what alarmed the court in that case were the stipulations that were referred to, that the publishers of the book intended for this lawless activity, these murders to happen, and so the court said that this isn't about *Brandenburg*, it's about aiding and abetting criminal conduct. And what the *Hit Man* case has empowered or enabled plaintiffs' lawyers and judges to do now is to disregard or to give less emphasis to the objective prong of the intent-to-incite aspect of *Brandenburg*. Now they are not merely going to look at the speech itself or the movie itself. If a plaintiff's lawyer alleges in the complaint that [the

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19. 712 So. 2d 681 (1st Cir. 1998).

filmmakers intended to incite the unlawful conduct], that [allegation alone] is going to make it impossible for us to get out on a motion to dismiss. We're no longer going to be able to say, "Look at the movie, you can conclude as matter of law that there was no intent to incite." The court is going to say, "No, they've alleged that this was Oliver Stone's intent, and they probably can't prove it, but they get the opportunity to prove it."

What that means for media defendants like us, is that we have to go through a period of protracted, expensive, and burdensome discovery, and people like Oliver Stone have to be deposed and asked very intrusive and personal questions about different things that influenced them to make the creative choices that they did. You can say on one hand, well, does it really matter whether you get out on summary judgment, or on a motion to dismiss? But it does matter, not only because of the cost and the burdens involved, but also because the process itself has a very chilling effect on free speech. Filmmakers like Oliver Stone are asked often to speak out on a variety of issues. You might not agree with them, but they have a lot of interesting things to say, and throughout the many years that these cases go on—the *Natural Born Killers* case is still going on, by the way, because even though we won summary judgment after the discovery process, the plaintiffs appealed and it's on appeal again right now. . . . Artists like Oliver Stone feel constrained and are advised by their lawyers to be very careful about what they say and even the projects they choose to get involved with, because of the lawsuits and because of how certain things they might say might be used against them. I think that's an unfortunate offshoot of *Paladin*, and it's particularly unfortunate because the court was so clear in that case to say, look, this doesn't apply to the traditional copycat area, this is not like the case where you're blaming a movie or a record [for inciting lawless activity]. The court of appeals in Louisiana saw it differently, however. They focused on the allegation of subjective intent in the plaintiffs' complaint, and said that's enough to get discovery.

**ROD SMOLLA:** It might be helpful to talk a little bit about how we convinced the court in the *Hit Man* case to not apply the *Brandenburg* test, because that's part of what's at play in the hypothetical here, and then to see if the kind of arguments that worked there would work in this hypothetical. They might not, they might, but we can see if we can bridge the gap. I think that, when we were in the midst of the *Hit Man* case, I personally was very intimidated by *Brandenburg*; that is to say, I just thought that if *Brandenburg* were applied, we would for sure lose. And I was a little bit troubled by the causation question and Freedman's great introduction today ended with an interesting observation that we actually seized on, in a sense. And it was this: in the *Hit Man* case, if I say to you,



“Did this book, this murder training manual cause these three people to die?” in the way lawyers normally know cause, but-for causation, you probably would say, “No.” I would say, “No,” because they were going to die anyway. There was a crazy guy out here in Hollywood, from Motown records, who was determined to kill his own family for money, and he was going to hire somebody to do it. He would have found a person who would have done it, somehow. It just happened that this particular killer from Detroit read this particular book and followed its instructions, to some degree at least, to do the killing. So in one sense, there is not even causation.

The beauty of the aiding-and-abetting theory that we evoked was that it killed two birds with one stone, in a way. It dealt with the First Amendment issue, arguably. It invited the court to think differently about the First Amendment issue, and it avoided the causation problem, because in aiding-and-abetting cases, as a society, we never require but-for causation, because it’s always going to be the case that the aider-and-abettor is going to be able to say, “Well, he would have gotten the gun from somebody else if he hadn’t gotten the gun from me,” or “Somebody else would have driven the getaway car if I hadn’t driven it.” But the moral judgment of society is, yes, but you did help. You did provide the gun, you did provide the instructions to break into the safe or whatever it was, you did provide the encryption code that allowed you to break the copyright and traffic in illegally obtained copyrighted materials. Therefore, you are morally responsible. So it avoided the causation problem in a way that was appealing to us. But I still hold the view that you can’t just come up with a clever cause of action, whether it’s in the California code or it’s a tort theory, and act as if that somehow solves your First Amendment problem. It’s not what you call it. The First Amendment is there and whatever you call it, you still have to contend with whatever First Amendment doctrines there are.

So what I struggled with for a long time was, can I convince the court that it is incoherent to apply the incitement test of *Brandenburg* to this kind of legal problem, to this kind of factual problem? And in just talking to the court in briefs and oral arguments and so on in working through theories and developing them, there really seemed to be a fundamental difference between the evil that was at the heart of our suit and the evil in a typical incitement case. In a typical incitement case, we are talking about causation in the sense that the notion is, I say things and it makes you want to do something. The whole panel today has been talking about our generalized suspicion that that exists with movies, CDs, and so on. It seems too loose a connection. But in our case, it really wasn’t that. And

this was the brilliant insight—not my brilliant insight, but the brilliant insight of the law, if you will—in the aiding and abetting theory, because it wasn't causation in that sense, it was causation in a different sense: it was enabling, it was facilitating, it was that this speech didn't persuade you to go out and be a hit man, it gave you the instruments to do so. It gave you the technical knowledge, and more dangerously, it gave you the psychological empowerment.

I know from the oral argument exchanges and subsequent discussions that what really affected the court was the lethal combination of technical training—some of it stupid, some of it mundane, “don't forget to wear gloves,” “don't forget to not use your credit cards”—and the psychological exhortations. And what I came up with in the argument was, your honor, if you want to train an assassin, the technical side of it is not your biggest problem. If you want to train someone to fly a plane into the World Trade Center, you want to train someone to kill someone for money, the technical “this is how you fly the plane, this is how you shoot the gun,” is a [small] piece of it. [The harder part] is the making you think this is a good thing, that it is honorable or holy, it's the making you think that you can do it, that you are macho, big, or superior for doing it. *Hit Man* is a pretty well-written book, actually; it's fairly literary, and it's very powerful because of this mélange of, “It's a good thing to be a hit man, it's an honorable thing, it's part of society, and here's what it takes to do it.” And now when you take the mundane parts of it, which we were mocked for in the litigation—“Come on, anybody can figure that stuff out”—that's what you need when you are about to commit a terrorist act, or about to kill someone, you need that reminder list, you need that calming you down, even pilots have that sort of a checklist. It was that peculiar combination that seemed to make it different—morally different, different in terms of the First Amendment matrix that you ought to apply—that I think won the day in that case.

Now take a look at this hypo: this hypo doesn't have that same quality to it, for me. It's the difference between something put out to train and something put out to entertain. In the *Hit Man* case, to talk about [*Brandenburg's*] objective factor, an objective person could read that book and without any stipulations, without any discovery, say, “I believe, objectively, the intent here is to teach you to kill people and make you want to do it.” So we met that worry under *Brandenburg*, ironically. So that is why, to me, you would have to somehow stretch the hypo we have. Either stretch it by stretching the law or by stretching the facts. For example, I have a wiretap that somebody had gotten off a cell phone that was illegally

given to me under *Bartnicki v. Vopper*,<sup>20</sup> but I'm clean because I received it in a brown paper bag. [It contains] the following conversation. The head of the band says, "You know, somebody might listen to these lyrics and flip out and go out and kill somebody." And the other band member says, "Yeah, wouldn't that be great, we'll sell more CDs." Wow. That would be a smoking gun. If I had that, maybe that would push me in under the *Rice* umbrella. Then I at least would have the intent quality coupled with the graphicness, although the graphicness is still dicey.

**ZAZI POPE:** And under *Brandenburg*, that's still a problem, because that was one thing plaintiffs alleged in the *Natural Born Killers* case. "Look, Warner Bros., you knew that this film was going to appeal to young males who were itching to commit crimes, etc., it was foreseeable to you that people would go out and do these kinds of things." And the court was very clear[: ]It doesn't matter if it was foreseeable, [there's no liability] unless you specifically intended for this to happen. Even if you thought it might, that's not enough.

**ROD SMOLLA:** Let me ask you, in my little scenario, when the other band member says, "Yeah, wouldn't that be great, we'll sell more CDs," have I met your standard or not? Or does he have to say, "No, I am subjectively directing this speech at the incitement of an imminent lawless act?"

**ZAZI POPE:** It becomes circumstantial evidence.

**ROD SMOLLA:** Well, there might be the intent.

**ZAZI POPE:** And it would be tougher to get summary judgment.

**FRANK JANECEK:** We actually had that in *Slayer*. Not the wiretap, but the band members gave interviews to *Guitar World* magazine and said basically, "We write our music because we want people to hurt someone, we know our fans will do what we tell them to, and this is what we want them to do: go out and kill people." And there is that intent on the band member.

**ZAZI POPE:** This is the smoking gun the plaintiffs thought they had in the *Natural Born Killers* case: Oliver Stone gave an interview to the *New York Times* and he said, "This woman came up to me after the movie and she said, 'Wow, what a powerful movie. That movie made me feel like going out and killing someone.'" That's obviously many steps removed, but I think that the reason why the law has to be so clear on this is that people are naturally going to have these strong responses[, especially to powerful and provocative works of art]. That's what movies are designed to do: make you feel, make you think, get you in touch with your feelings,

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20. 532 U.S. 514 (2001).

including the feelings of anger and aggression that we all have. [But feeling and thinking are a far cry from actually doing.]

**ROD SMOLLA:** And an artist might make that point rhetorically but it's not genuine, it's not true subjective intent that they want somebody to kill somebody. So I think that would be a problem. The other little word I snuck in there is that the band members are saying "kids." They are saying that kids might do this. The other question is, would we be more relaxed on that causation element when the intent is not only that it will happen, but that we are talking about kids?

**JAY DOUGHERTY:** Rod, do you think that the author of *Hit Man* really intended for people to use the book to commit contract killings? I know it was stipulated. The stipulations were rather amazing in that case.

**ROD SMOLLA:** I should say this, in terms of the power of the *Hit Man* case as precedent. The court is very clear in saying that, notwithstanding the stipulations, even if they did not exist in this case, there should not have been summary judgment, there were triable issues of fact. It said that the contents of the book by itself, the four corners of the book by itself, created a triable issue of fact on intent. That's an often-overlooked paragraph in that opinion. . . . There was a tort disclaimer on the front of the book that says, "For information purposes only"—kind of an ambiguous disclaimer—"The things described in this book are illegal. For information purposes only." That's the disclaimer. And I said in oral arguments that the disclaimer, if anything, is a kind of wink-and-a-nod disclaimer, it's almost as if it's conspiratorial. It invites you to think that the real intent is to go out and do this. In the *Hit Man* opinion, the court of appeal said it was a factor probative of the existence of intent. So you see that even without the stipulations in that case, the court said that there were triable issues of fact. I'm sure the publisher had multiple intents: I'm sure that the number one intent was to sell books, but I believe that this publisher intends—not just intended back then, but continues to intend today—to be the source that people turn to if they want training in murder and terrorism techniques. I honestly believe that. And it's not that that's a big market . . .

**JAY DOUGHERTY:** But it's a growing one.

**ROD SMOLLA:** Thank heaven, it's probably not. But the fact that that is the market and that is a genuine part of their intent in what they do feeds the rest of the prurient interest—and I'm using "prurient" metaphorically here—that people enjoy, almost like a form of pornography, possessing that book and knowing it's the real thing, it's a real terrorist manual. All the other people buying it are enjoying the fact that they are holding the genuine article. But what makes it so titillating is that

everybody knows that every once in awhile, this will fall into the hands of people who are really going to do things. This is melodramatic. I will tell you if you download from the U.S. Justice Department's web site [www.usdoj.gov] the book of Afghan Jihad, the Al-Qaeda training manual, it is exactly the structure of the *Hit Man* book. It is the same literary technique. Much of the actual material I am certain was taken from Paladin's publication, other publications like that, and government sources. It's that same lethal combination of how this is a good thing to go out and be a terrorist, the psychology you need to be a good terrorist—"be calm, be under control, be focused"—and the technical training. The technical training is often fairly simple.

**JAY DOUGHERTY:** By the way, *Hit Man* is available on the web; although it was taken off the market by agreement, it was not enjoined. I looked last night and it's available for downloading off the web in its entirety. You can also see massive excerpts in the judicial opinion, and the movie "Deliberate Intent" also reproduces some juicy parts of it. Is it true that it was written by a woman under a pseudonym?

**ROD SMOLLA:** Yes.

**JAY DOUGHERTY:** And I also heard that it was delivered as a novel to the publisher. But the publishers thought, "I don't know if it will sell as a novel, it's not that good, let's turn it into a how-to manual." Maybe that's apocryphal?

**ROD SMOLLA:** No, that's true. That was revealed and that was actually very damning in terms of the publisher's intent.

**JAY DOUGHERTY:** Rod's comment about "prurient" and the way he used it now is a good segue into our final topic. Indianapolis passed a statute intending to limit minors' access to violent video arcade games, and in a recent case<sup>21</sup> Judge Posner preliminarily enjoined the enforcement of the statute. But he raised a very interesting possibility, that perhaps the only legal or policy justification for going after violence in media is not only the idea that it will cause bad behavior. We go after obscenity not because it causes bad behavior, but rather because it's an image that society doesn't approve of and doesn't think is appropriate. And certain types of violent portrayals can be viewed in the same way, not looked at as something that can cause bad behavior, but something that we find so highly offensive that even the First Amendment doesn't protect it. I would think that is a scary possibility to First Amendment lawyers, that *Brandenburg* and incitement law wouldn't apply, but rather it would be a matter of whether or not it would appeal to the prurient interest, whether

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21. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

it's patently obscene, whether one can say that certain types of violence are obscene and that when looked at as a whole there is no serious literary and artistic value. Is that an approach that plaintiffs and government may use to further regulate violence in the media?

**FRANK JANECEK:** Well, as a plaintiff's lawyer, I don't know how common that cause of action is going to be. But I think that the law would clearly allow it. Every court, even the ones that go against the plaintiff, has said that the government has a compelling interest to protect kids from offensive material. They don't limit it to sex, excretory matters are also offensive, and if you really go back to what obscenity is, it really stems from *Roth v. United States*,<sup>22</sup> which defined obscenity, then got transformed through *Miller v. California*.<sup>23</sup> What *Roth* said in determining that sex or prurient interest was obscene under the First Amendment—it had nothing to do with kids, just what's obscene—was that sex was never intended by the Framers to be protected speech. If you look at the early obscenity laws, sex was often linked with violence. I found about fifteen cases where there was a statute that prohibited lewd behavior and the depictions of violence, bloodshed, and gore.

There was always a link back when the Framers were looking at this, or back when the first statutes were coming about, so violence should fit right within that "offensiveness" category. And the other reason why there is a good argument that violence should be treated no differently than sex, depending on the severity of the graphicness—and I don't know if this is social science or more physical science—is that the courts have recognized that one reason why you can prohibit kids from seeing pornography, for example, is not because of the communication of the content, or the message it is sending, but because it has a physiological or an instinctive reaction with kids that takes out the message or the communication aspect of it. Scientists have also found that violence has physiological or instinctive types of reaction with adolescents. So when you look at why pornography, which is protected speech, can't be sold or given to kids without parental consent, the same rationale should apply for violence. I think it is more likely to be through regulation than case law. We had a big fight with Rex and the rest of his group—and this is one of the questions the court didn't get to—can an unfair competition claim under California law survive a vagueness test? Do defendants really know essentially what is prohibited and what is not? I don't know what the ultimate answer would have been, but I think it probably can. But when you get a

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22. 354 U.S. 476 (1957).

23. 413 U.S. 15 (1973).

regulation in writing and it's in front of you, then courts can dissect whether or not violence should be eliminated or prohibited or channeled away from kids.

**JAY DOUGHERTY:** Zazi, do you want to comment further on this?

**ZAZI POPE:** I think that this theory is very problematic. There are many cases that have held that violence does not satisfy the obscenity exception. This was another theory put forward in the *Natural Born Killers* case, and we argued under *Miller v. California* that the definition of obscenity is that it appeals to prurient interests, it depicts sexual conduct in a patently offensive way, and it lacks serious artistic, literary, political, or scientific value. And I suppose you could conceive of something that is pure violent images and nothing else, but clearly in the case of *Natural Born Killers* and ninety-nine percent of the other works we would be talking about, there is always some artistic or literary value. On that prong alone it wouldn't satisfy the obscenity test; and on the first two, if it's not a sexual act depicted in an offensive way, then it does not constitute obscenity, so I think that you have to overcome [*Miller* and many other] cases before you [could make the case that violence satisfies the obscenity exception.]

**FRANK JANECEK:** Well, I disagree with that legal concept, because there are several courts that have said that obscenity is not limited to sex or prurient interest, excretory matters are obscene or harmful matter with respect to minors and they can still be protected but can be channeled away from minors.

**ZAZI POPE:** But I'm talking about violence. There are many, many cases that have specifically held that violence is not obscene.

**FRANK JANECEK:** I haven't seen many of them. But I have seen many more cases—and I'll just use language from one of them—that states have every right to regulate minors' access to violent materials. It's a compelling state interest and as long as it's narrowly tailored, it's an allowable regulation. The question is then whether it's narrowly tailored and defined specifically enough. The law is eminently clear that states have the power to regulate that type of speech.

**ZAZI POPE:** But that is something that I think the industry takes seriously. The FTC in its report acknowledged that [any governmental attempts to regulate the studios' conduct in this area would be fraught with constitutional problems, and that] self-regulation was the key to this whole problem. That is why the studios, in response to the FTC Report, came up with a bunch of initiatives and guidelines in order to address the concerns raised in the report, and one of them was to commit to be more much careful in how R-rated material was marketed to kids. But you're always

going to have the problem that there is no way to [isolate children from this material], because you can put an ad for an R-rated movie on at 9:00 p.m. or 10:00 p.m., when you hope that most kids are in bed, but there are always going to be . . . children watching, and you can't deprive the rest of the audience of their First Amendment rights to be exposed to this material.

**FRANK JANECEK:** Under that rationale, then, the pornography statute should be struck down because there is no way to keep pornography from kids, either—that's like putting the cart before the horse. I understand that the FTC said that, but the counsel for the 1989 Congress that looked at violence determined the opposite. Their legal opinion was that if it's narrowly tailored, government has a sufficient interest to regulate it and no one has done it, but there are countervailing and persuasive views.

**REX HEINKE:** It's interesting that when we litigated this in the *Slayer* case, we didn't find a single law in California that prohibited the dissemination of speech about violence. There may be some in other jurisdictions, we didn't look, but if you really think about it, it's surprising how little case law there is. There is *American Amusement Machine Ass'n* and one or two other cases out there, but there are virtually no laws in the United States or, as far as I've been able to tell, anywhere, with these couple of exceptions, that attempted to prohibit the dissemination of speech about violence. The Supreme Court has never expressly ruled on that and Posner's decision is very interesting. It's not very legal, it's almost an essay. If you read it, there's virtually no law in it, it's ruminations about what the law might be, about what the issues might be.

But it raises issues that haven't been debated in quite a while. For example, really, why is it that we prohibit obscene speech, or whatever speech that falls into this category that's obscene? If you go back and look at the Supreme Court cases that initially allowed government to regulate that kind of speech, it's very *a priori*: "It's obscene, therefore the government can regulate it," without any real explanation as to what the governmental interest is. Is it because it causes people to act in ways that are socially unacceptable, is that the governmental interest? Is it simply because it's so offensive, that the government can regulate it? That's contrary to the most notions of the First Amendment. That the government can regulate speech because it offends seems to be something to which the Supreme Court in other contexts has repeatedly said "No, that is not an adequate rationale."

So if you get into this whole debate about whether you can regulate violence, that is, speech about violence, then I think you have to go back to the first principles, which hasn't been done for a long time, to try to figure out what the governmental interest is here. Is it simply offensiveness, is it



that it causes people to act in an inappropriate fashion? I think there is another significant problem here that is also true in all obscenity cases, which is the definitional problem. I love to hear that all these peoples have these studies of violence, but when you start talking to people about what they need and what they are using as their criteria to define violent speech, it quickly degenerates to the point that there is no real commonality. I think that the courts would have an extraordinarily difficult time figuring out a workable, viable definition of speech about violence that is a category that we could all know. Now, when Zazi and I get a call from our clients asking, "Can I say this?," I think it would be impossible to figure out whether or not it's lawful, because violence is everywhere, if you look in TV programs, movies, and books. And most of the time, most of us would say it's acceptable.

Look at Saturday morning cartoons: a lot of it is about violence. And I don't think people think that's serious. But I don't know what workable definition you could come up with, that says those are fine, most people would agree that's not a problem, but says that some other category over here is absolutely unacceptable and the government can prohibit it. It will make lawyers wealthy if the government wants to regulate that, because we will have endless years of litigation that will make litigation about obscenity look like a minor sideshow.

**JAY DOUGHERTY:** Rod, do you have a final comment?

**ROD SMOLLA:** Rex was talking about going back to first principles, and perhaps the best distillation of that is in an old First Amendment case, one which I don't like, which is *Chaplinsky v. New Hampshire*,<sup>24</sup> a very anti-First Amendment result. Nevertheless, it's a case often used by the media defense bar and by the plaintiffs, and you will see why. You can teach all of First Amendment law with these two sentences and the tension in these sentences. "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." Very casual sentence. And now this is the famous list: "These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words . . ." Now, the next part of this sentence is magnificent "[fighting words are] those, which by their very utterance, inflict injury." Wow. "Those which by their very utterance inflict injury or tend to incite an immediate breach of peace." Now the Supreme Court gives the philosophy: "It has been well observed that such utterances are no essential part of any exposition of ideas and they're of such slight social value as a

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24. 315 U.S. 568 (1942).

step to truth, that any benefit that may be derived from them is clearly outweighed by the social interest in order or morality.”

That’s powerful stuff. Now since that was written, a large part of our First Amendment law has been a rejection of what is contained in those passages. I would characterize that rejection as encapsulating everything after that dash, and the word “or” is the pivot. We have rejected in First Amendment law, for the most part, the idea that there is any such thing as words which, by their very utterance, inflict injury. That you can’t say there are words which by their very nature are so evil, you can’t say it, it’s taboo. So *Cohen v. California*<sup>25</sup> says that you can’t throw a person in jail for saying the words, “Fuck the draft.” You can’t throw somebody in jail for the offensive portrayal of Jerry Falwell. You can burn the American flag, you can burn a cross in a black family’s yard. What you instead have to do is show some sort of connection to an injury.

The *Brandenburg* test is actually the second half of the “or.” And what we are talking about in a way is, are we as a society still going to preserve one or two pockets where we’re willing to say that the words themselves, or the images themselves, are so bad that we can regulate that and hold people liable for that? Obscenity remains one of the few areas. That’s what Justice Posner is telling us unofficially. He says it’s a weak case that obscenity causes people to go out and commit anti-social acts. The debate is, is it possible to confine a concept of violence to its presentation to a narrow audience such as children, and to say that in the combination of ingredients the very utterance [is prohibited]? We do that with our kids, some of us, we cover their ears. It must be because of some instinct that the very exposure to this is bad for them in some way. I honestly don’t know the answers, but I think in some way that is the first principle, that kind of division that permeates all of this.

**FRANK JANECEK:** And that is where it’s going to be. You can define it or you can make it narrow. But it’s going to be a problem to define it.

**JAY DOUGHERTY:** That may be where the debate in the near future lies. Thank you very, very much.

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25. 403 U.S. 15 (1971).

