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Shouting Incitement in the Courtroom: An Evolving Theory of Civil Liability Comment.

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Shouting "INCITEMENT!" in the Courtroom: An Evolving Theory of Civil Liability?

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I. INTRODUCTION

Naked and lifeless, fourteen-year-old Troy Daniel Dunaway was found hanging by his neck in the closet of his room.[1] On the floor near his body, an issue of *Hustler Magazine* lay opened to an article entitled "Orgasm of Death," describing the dangerous sexual practice of autoerotic asphyxia[2]—apparently Troy was its latest victim.[3] Troy's mother instituted a wrongful death suit seeking to establish that *Hustler* incited Troy to perform the act that lead to his death.[4] *Hustler* defended on first amendment grounds, but the jury found that *Hustler* was civilly liable for Troy's death.[5] The tragic facts above may attain a reputation as the epochal civil incitement case. An evolving theory employed to ascribe liability to a publisher, civil incitement charges that the contents of a publication proximately caused the plaintiff's physical injury.[6] Although relatively new to the ranks of liability theories, novelty alone should pose no problem to the validity of civil incitement as a cause of action.[7] The obstacle—perhaps barrier—to its viability as an ac-

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1. *See* Brief for Appellee at 3, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)(No. 85-2833)(body discovered August 7, 1981, by brother and neighbor).

2. *See* Milner, *Orgasm of Death*, HUSTLER, Aug. 1981, at 33 (masturbating while depriving brain of oxygen, usually by noose around neck, to intensify orgasm); *see also* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1018 (5th Cir. 1987).

3. *See* Brief for Appellee at 3-5, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)(No. 85-2833)(plaintiff surmising that death resulted from autoerotic asphyxiation). It has been estimated that from 500 to 1000 teenage deaths per year result from autoerotic asphyxiation. *See Let's Call It Suicide*, VANITY FAIR, March 1985, at 54-55. The *Vanity Fair* article states that many of the growing number of teenage hanging deaths are intentionally mislabeled as suicides or homicides to protect the victims' families from the social stigma of autoerotic asphyxia. *See id.* at 54. One-third of the victims of autoerotic asphyxiation are under the age of twenty, although the ages of the reported victims range from nine to seventy-seven years old. *See id.* at 54-55; *see also* Milner, *Orgasm of Death*, HUSTLER, Aug. 1981, at 33 (two per cent of victims of autoerotic asphyxiation are women). The *Hustler* article recounts several instances in which the practitioner of autoerotic asphyxia wound "up in cold storage, with a coroner's tag on [his] big toe." *Id.* at 33-34.

4. *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1019 (5th Cir. 1987)(damages sought for emotional and psychological harm suffered as result of Troy's death).

5. *See id.* (jury award of $69,000 actual and $100,000 punitive for mother; $3,000 actual and $10,000 punitive for minor who discovered body); *see also* Herceg v. Hustler Magazine, Inc., No. H-82-198 (S.D. Tex. 1984)(unpublished trial court judgment; available in Appendix A).

6. *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1019 (5th Cir. 1987)(plaintiffs alleged decedent's reading of magazine article incited him to perform act that led to his death, which was proximate cause of plaintiffs' mental anguish); Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802, 803 (S.D. Tex. 1983)(granting leave to amend complaint to add allegation of incitement).

7. *See* W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS 3 (5th ed. 1984). Prosser and Keeton write that "[n]ew and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the

tionable tort is its clash with the principles of freedom of speech and press embodied within the first amendment.[8]

The first amendment of the United States Constitution commands that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[9] This passage, however, has proved more enigmatic than axiomatic. A parsing of the phrase suggests that the Founders contemplated particular conditions under which speech could be "free,"[10] but never intended to create a shield from behind which any manner of speech could be hurled with impunity.[11] Indeed, one theory asserts that a historical perspective reveals an intention to immunize only political speech.[12] A libertarian viewpoint, however, argues that the protections enunciated are components of a "right of conscience" concept—the belief that a democratic society must be based upon the intellectual and moral autonomy of the individual—thus compelling a literal interpretation of the first amendment.[13]

Although various Justices of the United States Supreme Court have adopted views comparable to either of these theories,[14] the majority of the

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court has struck out boldly to create a new cause of action, where none had been recognized before." *Id.*

8. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). The Court, in *Brandenburg*, recognized "the principle that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*

9. U.S. CONST. amend. I.

10. *See generally* Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107 (1982)(emphasizing different words within the first amendment to illustrate possible interpretations); *see also* Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 935-36 (1968) (arguing that absolutist view of first amendment unworkable).

11. *See, e.g.*, Herndon v. Lowry, 301 U.S. 242, 258-59 (1937)(abuses of liberty of speech and press punishable by state); Near v. Minnesota, 283 U.S. 697, 708 (1931)(state may punish abuse of freedom of speech); Stromberg v. California, 283 U.S. 359, 360 (1931)(right of free speech not absolute).

12. *See generally* Schauer, *Free Speech and Its Philosophical Roots*, in THE FIRST AMENDMENT 132, 132-36 (T. Shumate ed. 1985)(arguing that concept of free speech stemmed from distrust of governmental power). Pre-Constitution philosophers assumed that the function of a democratic government was to perform according to the best interests of the people. Free speech of the populace was necessary to insure that public officials would be closely scrutinized and criticized when acting contrary to the public's interest. *See id.* at 134-35. *But see* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 31 (1971)(speech, although political, can still be proscribed). Advocacy of law violation is not political speech but, instead, an urging to set aside the product of political speech. *See id.*

13. *See* D. RICHARDS, TOLERATION AND THE CONSTITUTION 166-74, 177 (1986)(limiting freedom of speech to political speech threatens decision-making fundamental to democratic society).

14. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 457 (1969)(Douglas, J., concurring) (government lacks authority to invade sanctuary of belief and conscience); New York Times

Court's decisions attempt to inject pragmatism into the first amendment's idealistic phrases by balancing the right of an individual to communicate an idea against the interest of society in controlling that communication.[15] The result of this approach has been the Supreme Court's creation of certain categories of speech which are afforded varying degrees of constitutional protection, such as defamation,[16] obscenity,[17] invasion of privacy,[18] "fighting words,"[19] and "incitement to imminent lawless action."[20] Speech within these categories may be regulated or perhaps even prohibited by the state without offending the first amendment.[21]

Comprehending the elements to prove civil incitement demands a historical review of the constitutional standards that developed from early criminal incitement cases. Additionally, an analysis of the present first amendment standard, as announced in *Brandenburg v. Ohio*,[22] will be undertaken to highlight the policy considerations that must be scrutinized when contemplating a restriction upon speech; this analysis will provide insight into the implications of relaxing the *Brandenburg* standard. Furthermore, an examination of the results obtained in *Herceg v. Hustler Magazine, Inc.*[23] and a

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Co. v. Sullivan, 376 U.S. 254, 293 (1964)(Black, J., concurring)(state completely prohibited from awarding damages against critic of public official); Konigsberg v. State Bar of Cal., 366 U.S. 36, 60-61 (1961)(Black, J., dissenting)(first amendment's command is unequivocal).

15. *See, e.g.*, Konigsberg v. State Bar of Cal., 366 U.S. 36, 49-51 (1961)(valid governmental interest prerequisite to speech suppression); Gitlow v. New York, 268 U.S. 652, 666 (1925) (disturbance of peace or subversion of government not protected by first amendment); Schenck v. United States, 249 U.S. 47, 52 (1919)(suppression of speech dependent on whether it threatens evils that Congress has right to prevent).

16. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 154-55 (1967)(public figure may recover damages for defamatory falsehood); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)(libel must be measured by standards satisfactory to first amendment).

17. *See, e.g.*, Miller v. California, 413 U.S. 15, 23-24 (1973)(first amendment allows carefully limited regulation of obscenity); Ginzburg v. United States, 383 U.S. 463, 468 (1966) (publications that appeal solely to prurient interests are prohibitable); Roth v. United States, 354 U.S. 476, 484 (1957)(obscenity not constitutionally protected speech).

18. *See* Roe v. Wade, 410 U.S. 113, 152 (1973)(although Constitution does not expressly mention privacy right, still protected); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)(privacy most comprehensive and valued right).

19. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)(words spoken directly to addressee, likely to cause breach of peace, not protected). *But see* Cohen v. California, 403 U.S. 15, 20 (1971)(offensive words, not intended as personal insult, protected speech).

20. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)(state may not proscribe advocacy of violence unless "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.").

21. *Compare* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)(prohibiting certain classes of speech raises no constitutional problem) *with* New York Times Co. v. Sullivan, 376 U.S. 255, 269 (1964)(prohibition of speech only permissible by standards satisfactory to first amendment).

22. 395 U.S. 444 (1969).

23. 814 F.2d 1017 (5th Cir. 1987).

comparison to the *Brandenburg* standard will attempt to define the parameters within which incitement should be actionable, if the theory survives at all. Finally, an appeal will be made to retain a highly speech-protective theory regarding incitement.

II. Evolution of Incitement as Constitutionally Unprotected Speech: Conflicting Views of Freedom

A. *Hand's* Masses *Approach*[24]

In 1917, Learned Hand, then a federal district judge for the Southern District of New York, granted an injunction preventing a postmaster from excluding from the mail a monthly periodical that was highly critical of the United States' war efforts during World War I.[25] In *Masses Publishing Co. v. Patten*,[26] Judge Hand crafted a first amendment analysis that permitted suppression of speech only if the speaker's words were a direct incitement to illegal activity.[27] When compared to the standards first molded at the Supreme Court level two years later, the speech-protectiveness of Hand's analysis stands out in bold relief.[28]

Judge Hand urged an approach that relied upon neither the foreseeability of the probable consequences of speech nor the circumstances in which the words were spoken, but upon the nature of the words themselves.[29] The literal meaning of the words marked the starting point for the *Masses* approach; only if the language used exhorted direct incitement could it be prohibited.[30] Judge Hand, however, proved to be far ahead of his contemporaries with regard to the protection of free speech, for *Masses* was reversed

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24. For an enlightening discussion of Judge Hand's early views on the first amendment and his influence on Justice Holmes' theories see generally, Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

25. *See* Masses Publishing Co. v. Patten, 244 F. 535, 536 (S.D.N.Y. 1917).

26. 244 F. 535 (S.D.N.Y. 1917).

27. *See id.* at 536 (objective scrutiny of speaker's words must be standard applied before proscribing speech).

28. *Compare* Schenck v. United States, 249 U.S. 47, 52 (1919)(circumstances determine whether speech protected) *with* Masses Publishing Co. v. Patten, 244 F. 535, 536 (S.D.N.Y. 1917)(only words whose objective meaning causes direct incitement prohibited).

29. *See* Masses Publishing Co. v. Patten, 244 F. 535, 540-41 (S.D.N.Y. 1917)(words of speaker, within their ordinary meaning, must express direct advocacy of evil before prohibitable).

30. *See generally* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 725-29 (1975)(literal meaning of words amounting to direct incitement proscribable). Judge Hand believed that criticism of public officials or existing law was best protected by his objective scrutiny, direct incitement test. *See id.* at 727-28.

on appeal.[31]

B. *Clear and Present Danger*

In *Schenck v. United States*,[32] Justice Holmes penned the phrase "clear and present danger," which for almost four decades would be the rallying point for libertarian thought regarding free speech.[33] Ironically, *Schenck*, and subsequent cases citing *Schenck* as controlling, upheld convictions of vocal dissidents of American war policies during World War I.[34] The clear and present danger test, as first enunciated, was completely circumstance-oriented.[35] Subsequently, however, Justice Holmes' dissent in *Abrams v. United States*[36] modified the clear and present danger standard to include an immediacy element; this addition signified the debut of the danger doctrine

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31. *See* Masses Publishing Co. v. Patten, 246 F. 24, 38-39 (2d Cir. 1917)(reversed issuance of injunction holding that, because words used in endeavor to persuade, immaterial that they did not directly incite).

32. 249 U.S. 47 (1919). In *Schenck*, Justice Holmes stated:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Id. at 52.

33. *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949)(freedom of speech protected from punishment unless "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)(free speech protected from restriction except "to prevent grave and immediate danger to interests which the state may lawfully protect."); Thornhill v. Alabama, 310 U.S. 88, 106 (1940)(legislature not warranted in proscribing speech if danger produced by that speech not imminent).

34. *See* Schenck v. United States, 249 U.S. 47, 53 (1919)(affirming convictions for obstructing recruitment and enlistment of military by distributing pamphlets); *see also, e.g.*, Gilbert v. Minnesota, 252 U.S. 325, 327, 333 (1920)(upholding conviction under Minnesota law prohibiting discouragement of military enlistment for state; "if they conscripted wealth like they conscripted men, this war would not last over forty-eight hours."); Schaefer v. United States, 251 U.S. 468, 478 (1920)(affirming conviction for writing newspaper articles with "sneering headlines" accompanied by allusion and innuendo derisive of America's war efforts); Frohwerk v. United States, 249 U.S. 204, 209 (1919)(affirming conviction for circulation of newspaper containing article criticizing conscription process).

35. *See* Schenck v. United States, 249 U.S. 47, 52 (1919). In *Schenck*, Justice Holmes wrote:

> [T]he character of every act depends upon the circumstances in which it is done . . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.

Id.; *see also* BARRON & DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 12-13 (1979) (*Schenck* focused solely on circumstances in which communication occurred).

36. 250 U.S. 616, 624 (1919)(Holmes, J., dissenting)(only present danger of immediate evil sufficient to proscribe speech).

as a speech-protective, constitutional standard, yet a standard that would thrive only in dissents or concurrences during Holmes' lifetime.[37]

Perhaps the most cogent articulation of the danger doctrine is found in Justice Brandeis' concurrence in *Whitney v. California*.[38] According to Justice Brandeis, a constitutional standard to determine whether freedom of speech has been abridged must consider: "when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial . . . ."[39] Clarity of the danger, Justice Brandeis argued, lies in the distinction between advocacy and incitement.[40] Advocacy, even of a morally reprehensible violation of law, is insufficient to comprise incitement.[41] Incitement occurs when an immediate evil, advocated by an utterance, will occur before a remedy can be effected.[42] However, even the quelling of incitement to immediate evil is not justified unless the evil sought to be averted is prospectively proven to be serious.[43] For Justices Holmes and Brandeis, the clear and present danger standard embodied these principles.[44] The ambiguity in the phrase "clear and present danger," however, produced antipodal results in subsequent cases.[45] Consequently, the Supreme Court's discontent with the implications of "clear and present danger" as a constitutional standard produced the impetus that re-

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37. *See, e.g.*, Whitney v. California, 274 U.S. 357, 372 (1927)(Brandeis, J., concurring) (arguing although standard for conviction should be present danger of imminent serious evil, conviction should be affirmed on procedural grounds); Gitlow v. New York, 268 U.S. 652, 672 (1925)(Holmes, J., dissenting)(arguing every idea is incitement); Pierce v. United States, 252 U.S. 239, 272 (1920)(Brandeis, J., dissenting)(reiterating that convictions for distribution of leaflets critical of World War I should be measured by clear and present danger standard). *See generally* Mendelson, *Clear and Present Danger—From* Schenck *to* Dennis, 52 COLUM. L. REV. 313, 332 (1952)(danger doctrine only mustered support of Justices Holmes and Brandeis during 1920's and only twice thereafter until 1940's).

38. 274 U.S. 357, 372 (1927)(Brandeis, J., concurring)(delineates elements necessary to comprise clear and present danger).

39. *Id.* at 374.

40. *See id.* ("wide difference" between advocacy and attempt).

41. *See id.* at 376 (advocacy without immediacy element not incitement).

42. *See id.* at 377 (further discussion cures fallacious and inaccurate speech).

43. *See id.* (presence of all elements of incitement, without serious evil advocated, cannot justify proscription of speech).

44. *See id.* at 380 (Justice Holmes joined Justice Brandeis' opinion).

45. *Compare* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (rational basis test eschewed and replaced with danger doctrine) *and* Thornhill v. Alabama, 310 U.S. 88, 104 (1940)(expanding danger doctrine to protect speech integrally related to conduct) *with* Terminiello v. Chicago, 337 U.S. 1, 13, 26 (1949)(reversal of conviction for breach of peace as misapplication of clear and present danger test) *and* Dennis v. United States, 341 U.S. 494, 510, 516-17 (1951)(Chief Judge Learned Hand, redefining danger doctrine as "whether the gravity of 'evil,' discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger"; conviction of conspiracy to organize Communist Party affirmed).

sulted in the decision in *Brandenburg v. Ohio*.[46]

C. Brandenburg *Test*

In *Brandenburg v. Ohio*,[47] the Supreme Court announced a new standard to be employed in cases implicating infringement upon free speech; courts must find that "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[48] The *Brandenburg* standard synthesizes Judge Hand's *Masses* approach with the Holmes-Brandeis clear and present danger test.[49] Determining whether speech can be punished under *Brandenburg*, therefore, requires proof that: (1) the words used objectively exhorted incitement;[50] (2) the words used were likely, under the circumstances, to create imminent, lawless action;[51] and (3) the speaker possessed the intent to incite imminent, lawless action.[52] *Brandenburg*, being sensitive to the free speech principles embodied in the first

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46. 395 U.S. 444, 449-50 (Black, J., concurring)(clear and present danger has no place in interpretation of first amendment); *see id.* at 454 (Douglas, J., concurring)("twisted and perverted" application of danger doctrine arouses "great misgivings"). *See generally* Mendelson, *Clear and Present Danger—From* Schenck *to* Dennis, 52 COLUM. L. REV. 313, 331 (1952) (observing that after *Dennis*, as in Justice Holmes' time, danger doctrine assured denial of free speech).

47. 395 U.S. 444 (1969).

48. *Id.* at 447.

49. *See id.* at 448-49 (failure to distinguish advocacy from incitement abridges speech and press freedoms). *See generally* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754-55 (1975)(arguing that *Brandenburg* based upon Hands' *Masses* approach and danger doctrine); Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1185 (1970)(danger and incitement distinguished to overrule *Whitney*); Comment, Brandenburg v. Ohio*: A Speech Test for All Seasons?*, 43 U. CHI. L. REV. 151, 159 (1975)(*Brandenburg* resulted from combination of incitement test and danger doctrine).

50. *See* Brandenburg v. Ohio 395 U.S. 444, 447 (1969)(advocacy must be directed to inciting or producing unlawful activity); *see also* Hess v. Indiana, 414 U.S. 105, 108 (1973) (Hess's speech was, at best, counsel for moderation, at worst, advocacy of future illegal action); Masses Publishing Co. v. Patten, 244 F. 535, 536 (S.D.N.Y. 1917)(objective scrutiny of speaker's words necessary standard to proscribe speech). *See generally* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 755 (1975)(language of speaker most important consideration of *Brandenburg*).

51. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)(advocacy must be likely to incite or produce immediate unlawful activity). *See generally* Comment, Brandenburg v. Ohio*: A Speech Test for All Seasons?*, 43 U. CHI. L. REV. 151, 160 (1975)(*Brandenburg* requires showing of present danger and incitement).

52. *See* Hess v. Indiana, 414 U.S. 105, 108-09 (1973)(speaker's words not shown to have been intended to produce imminent disorder; "tendency to lead to violence" not sufficient). *Compare* Brandenburg v. Ohio, 395 U.S. 444, 449 n.4 (1969)(distinction between advocacy and incitement necessary) *and* Yates v. United States, 354 U.S. 298, 318 (1957)(advocacy of forcible overthrow of government immune from prosecution) *with* Scales v. United States, 367 U.S.

amendment, yet cognizant of the dangers of unbounded speech, immunizes advocacy, even of violence or violation of law, unless the speech itself is likely to cause impulsive, immediate, lawless action.[53]

III. CIVIL INCITEMENT: ELEMENTS REQUIRED BY *BRANDENBURG*

Prior attempts to hold publishers civilly liable for the physical consequences of their communications have only rarely survived motions for summary judgment,[54] and even less frequently have been submitted to a jury.[55] Although the reasoning of the courts has been less than harmonious, courts have generally held that either the plaintiffs failed to state a cause of action upon which recovery could be granted[56] or the defendants' first amendment defense was dispositive.[57] Urging a successful cause of action sounding in incitement demands conformity to the constitutional standard enunciated in *Brandenburg v. Ohio*.[58] The elements necessary to overcome any constitutional objection to recovery for injury caused by civil incitement are: (1)

203, 228 (1961)(may prosecute active Communist member with guilty knowledge and intent to overthrow government by violence).

53. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)(advocacy must incite and be likely to produce imminent lawless action); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982). The Court stated, in *Claiborne Hardware*, that "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." *Id.*

54. *See* DeFilippo v. National Broadcasting Co., 446 A.2d 1036, 1038 (R.I. 1982)(trial court granted motion for summary judgment). The plaintiffs, in *DeFilippo*, brought suit on four theories: negligence, failure to warn, products liability, and trespass. The suit resulted from the death of the plaintiff's thirteen-year-old son by hanging after watching a hanging stunt on "The Tonight Show." *See id.*; *accord* Olivia N. v. National Broadcasting Co., 178 Cal. Rptr. 888, 890 n.1 (Ct. App. 1982)(trial court, after denying motion for summary judgment, granted nonsuit after plaintiffs conceded incitement could not be proven). The plaintiffs' counsel in *Olivia N.* conceded the incitement argument in his opening statement and sought instead to argue negligence and recklessness. *See id.*

55. *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1019 (5th Cir. 1987)(plaintiffs prevail in trial court on incitement theory); *see also* Weirum v. RKO Gen., Inc., 539 P.2d 36, 43 (Cal. 1975)(radio station broadcasting live giveaway contest civilly liable for death occurring when listeners forced decedent off road while racing to win prize). The court based the radio station's liability upon a negligence theory. *See id.*

56. *See* Olivia N. v. National Broadcasting Co., 178 Cal. Rptr. 888, 890 (Ct. App. 1981) (affirming grant of nonsuit where plaintiff abjured proof of incitement in opening statement).

57. *See* Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199, 207 (S.D. Fla. 1979) (dismissing case on first amendment grounds where plaintiff urged that minor, who killed elderly neighbor, became desensitized to violence by television).

58. 395 U.S. 444, 447 (1969). *Compare* Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802, 803 (S.D. Tex. 1983)(first motion to dismiss)(holding negligent publication, strict liability nor attractive nuisance sufficient to withstand summary judgment) *with* Herceg v. Hustler Magazine, Inc., 583 F. Supp. 1566, 1567 (S.D. Tex. 1984)(second motion to dismiss)(incitement allegation sufficient to raise factual question).

advocacy; (2) imminent action; (3) lawless action; (4) intent; and (5) likelihood of occurrence.[59]

A. *Advocacy*

1. Direct Advocacy

Direct advocacy must be established by a two-fold, objective standard: (1) the language, standing alone, is an exhortation to imminent, lawless action;[60] and (2) the circumstances are such that the words might reasonably have that effect.[61] The simple act of expressly urging an idea or action, even violent or illegal action, without more, cannot be constitutionally punished.[62]

2. Implicit Advocacy

The failure of the *Brandenburg* standard to address problems created by the subtleties of the English language becomes apparent by contemplating the oft-cited speech of Shakespeare's Marc Antony.[63] Uncertainty exists over whether subliminal suggestion or implicit advocacy comprises speech "directed to inciting" unlawful activity.[64] The *Brandenburg* Court intimates, by failing to address the question of whether liability for the consequences of indirect advocacy of unlawful conduct can be imposed, that it does not.[65]

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59. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)(advocacy susceptible to regulation must be "directed to inciting or producing imminent lawless action and likely to incite or produce such action.").

60. *See* Hess v. Indiana, 414 U.S. 105, 109 (1973)(intent to advocate imminent lawless action must be gleaned from "import of language"). *See generally* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 728-29 (1975)(constitutional focus upon literal meaning of words).

61. *See* Hess v. Indiana, 414 U.S. 105, 109 (1973)(imminent disorder, not simple tendency to that effect, necessary to punish speech); *see also* Whitney v. California, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring)(impending danger can suppress speech only where evidence of immediate action exists).

62. *See* Whitney v. California, 274 U.S. 357, 376 (Brandeis, J., dissenting)(advocacy of morally reprehensible evil short of incitement not prohibitable).

63. Marc Antony's funeral oration surreptitiously advocated violence. *See* Shakespeare's JULIUS CAESAR, Act III, scene ii.

64. *Compare* Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199, 203, 207 (S.D. Fla. 1979)(dismissing complaint alleging minor's actions in killing neighbor result of "subliminal intoxication") *with* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1019 (5th Cir. 1987) (trial court allowing recovery for implicit incitement).

65. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982)(substantial question of liability would be presented if violence followed speech); *see also* Watts v. United States, 394 U.S. 705, 706 (1969)(verbal threat made on President's life protected speech).

B. *Imminent Action*

"Imminence" inherently encompasses the concepts of spacial and temporal proximity.[66] Urging action in the future, while standing at the location where the event is to occur, cannot result in liability.[67] Conversely, advocating immediate action when it is physically impossible for the event to occur at that time, or even within a reasonable time, is also insufficient for liability.[68] Although a specific exhortation that action occur at a particular moment is not necessary, the conclusion must be reached that action was impending—that the event would occur before curative measures could be taken.[69]

C. *Lawless Action*

Dispute exists over whether "lawless" designates a synonym for "illegal" or intimates that a less stringent definition would be tolerated.[70] Cases since *Brandenburg* appear to use "lawless," "unlawful," and "illegal" interchangeably,[71] although early cases referred to prohibiting "substantive evils" which were merely required to be within legislative authority to proscribe.[72] "Lawless action," logically, does not mandate that the imminent action advocated

66. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982)(emotional advocacy not comprising incitement to action protected); *see also* Whitney v. California, 274 U.S. 357, 374 (1927)(Brandeis, J., concurring)(remoteness of danger one factor in determining whether incitement impending).

67. *See* Hess v. Indiana, 414 U.S. 105, 108 (1973)(advocacy of future illegal action insufficient to impose liability); Schenck v. United States, 249 U.S. 47, 52 (1919)(only words that create immediate panic punishable).

68. *Compare* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)(words provoking immediate violence unprotected) *with* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982)(advocate free to stimulate audience with emotional appeals that do not incite to immediate lawlessness).

69. *See* Whitney v. California, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring)(danger clear and present only where occurrence imminent before full discussion); *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)(first amendment requires "open and robust" debate on public issues).

70. *See* Brief for Appellee at 15-16, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)(No. 85-2833)(suggesting that "unruly" behavior might suffice to impose liability).

71. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 919-20 (1982)(speaks of "unlawful aims and goals" as "illegal aims")(citing Healy v. James, 408 U.S. 169, 186 (1972)).

72. *See* Schenck v. United States, 249 U.S. 47, 52 (1919)(Congress empowered to suppress speech only if clear and present danger of "substantive evils" created by speaker's words); *see also, e.g.*, Pierce v. United States, 252 U.S. 239, 251 (1920)(hampering government's war efforts validly proscribed); Frohwerk v. United States, 249 U.S. 204, 206 (1919)(Founders never contempleted prohibition of criminal conspiracy within Congress' jurisdiction to be unconstitutional interference with speech); Debs v. United States, 249 U.S. 211, 216-17 (1919)(proposition that defendant may be criminally punished for words "tending to obstruct" conscription process "too well established and too manifestly good sense to need citation of the books.").

be a violation of a penal code, for tortious conduct is "lawless" as well.[73]

D. *Intent*

Although the contrary has been argued,[74] the *Brandenburg* standard requires proof of intent.[75] Intent indicates a purpose on the part of the actor to procure the consequences of his act, but extends as well to the consequences that the actor knows are substantially certain to follow.[76] Knowledge and appreciation of a risk, however, may be negligence, or even recklessness, but cannot constitute intentional behavior so long as the risk is even slightly less than a substantial certainty.[77] Substantial certainty exists when the danger ceases to be merely a foreseeable risk that a reasonable man would avoid and, in the mind of the actor, becomes a nearly unavoidable consequence of his act.[78] An inference must be drawn from circumstantial evidence, therefore, that the state of mind of the actor and a reasonable man under identical circumstances would be the same.[79] However, a presumption

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73. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 891 n.7 (1982)(indicating that trial court held defendants liable under malicious interference with business theory). State tort law apparently suffices under *Brandenburg*'s "lawless action" wording. *See id.*

74. *See* Note, *Tort Liability of the Media for Audience Acts of Violence: A Constitutional Analysis*, 52 S. CAL. L. REV. 529, 562 & n.189 (1979)(arguing that *Masses*' objective standard language negates subjective intent requirement). This note argues that *Masses* would allow a negligence standard for incitement. *See id. But see* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 722 (1975)(*Brandenburg* combines best features of *Masses* approach and danger doctrine). The language of *Masses* fashioned an incitement standard that focused upon the objective content rather than effect of speech; the "reasonable man" language was a reflection of this approach. *See id.* at 728.

75. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)(advocacy must be "directed to inciting or producing" illegal action); *see also, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982)(mandating specific intent necessary to impose liability on member of group that possesses illegal goals); Hess v. Indiana, 414 U.S. 105, 109 (1973)(no liability without evidence that words intended to produce illegal action); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1024 (5th Cir. 1987)(mere negligence cannot form basis of liability for incitement).

76. *See* RESTATEMENT (SECOND) OF TORTS § 8a (1965); *see also* W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS 35 (5th ed. 1984).

77. *See* RESTATEMENT (SECOND) OF TORTS § 8a comment b (1965). An actor's conduct loses the characteristic of intentional behavior as the probability of the consequences decreases. *See id.*; *see also* W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS 36 (5th ed. 1984)(consciousness of causing an appreciable risk less than substantial certainty not intent).

78. *See* RESTATEMENT (SECOND) OF TORTS § 8a illus. 1 (1965)(bomb thrown into office with two people creates substantial certainty of killing both); *see also* W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS 36 (5th ed. 1984)(courts draw line of substantial certainty where danger loses speculative quality).

79. *See* W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS 36 (5th ed. 1984)(jury may draw inference of intent from circumstances if properly instructed).

that the actor intended the natural and probable consequences of his acts is impermissible.[80]

E. *Likelihood of Occurrence*

The "likely to incite" element neither negates nor diminishes any of the preceding elements.[81] Sagacity dictates that the inclusion of the phrase is more than a curious redundancy by the *Brandenburg* Court. Distinguishable from imminence, which consolidates the concepts of proximity of time and of place, the likelihood element addresses the necessity of finding a high probability that the feared action will actually come to fruition before prohibition of the speech is justified.[82] Thus, the inclusion of the likelihood element, rather than being merely repetitious, emphasizes the importance of concluding that the speech sought to be thwarted represents a legitimate danger.[83]

IV. PRACTICAL APPLICATION OF THE *BRANDENBURG* STANDARD: *HERCEG V. HUSTLER MAGAZINE, INC.*

Herceg v. Hustler Magazine, Inc.,[84] because it accomplished the feat of reaching the jury, provides significant guidance for crafting a case upon a civil incitement theory.[85] Tracking the approaches utilized in *Herceg* may clarify the procedures necessary to successfully plead, and defend against, incitement.

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80. *See* Sandstrom v. Montana, 442 U.S. 510, 524 (1979)(jury instruction that actor presumes natural consequences of his actions represents unconstitutional presumption); *see also* W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS 36 (5th ed. 1984) (natural and probable consequence instruction plainly incorrect).

81. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). The *Brandenburg* Court stated that the state may not "proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*

82. *See* Gooding v. Wilson, 405 U.S. 518, 528 (1972)(overturning conviction for disorderly conduct where defendant threatened policeman who attempted to disperse demonstrators); *see also* Comment, Brandenburg v. Ohio: *A Test for All Seasons?*, 43 U. CHI. L. REV. 151, 162 n.47 (1975)(arguing that although *Gooding* was analyzed in terms of fighting words, Georgia's disorderly conduct statute may have been constitutional with addition of likelihood element).

83. *See* Leary v. United States, 431 F.2d 85, 89 (5th Cir. 1970)(case remanded for trial judge to reconsider denial of bail in light of *Brandenburg* standard after defendant advocated violation of law).

84. 814 F.2d 1017 (5th Cir. 1987).

85. *See* Herceg v. Hustler Magazine, Inc., 583 F. Supp. 1566, 1567 (S.D. Tex. 1984) (motion to dismiss amended complaint)(plaintiffs adequately pled incitement).

A. *The Plaintiffs' Strategy*

1. The Pleadings

The plaintiffs in *Herceg* originally asserted the theories of negligent publication and strict product liability.[86] The innovative argument employed to allege negligence was that the act of publishing the article, which was an "attractive nuisance" or "dangerous instrumentality," imposed a duty of social responsibility upon *Hustler* for which it could be held liable.[87] The trial court found that only publishers performing a public function have a duty with respect to the contents of their publications.[88] The court also held that existing case law could not support an allegation that the contents of a magazine was a product and, therefore, was assailable under neither a strict product liability nor implied warranty theory.[89] In a subsequent order, the trial judge, finding "no basis in law or at equity" for such claims, dismissed the allegations.[90] However, an allegation of civil incitement, added after the first motion to dismiss for failure to state a claim was granted,[91] survived two subsequent motions to dismiss.[92] Although the denials of these two motions depended greatly upon procedural matters, the court found the factual issues raised by the plaintiffs' pleadings and attachments sufficient to impel the case to trial.[93]

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86. *See* Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802, 802-03 (S.D. Tex. 1983) (strict liability and negligent publication pled).

87. *See id.* at 803 (case law dealing with attractive nuisance and dangerous instrumentality inapplicable to contents of publication).

88. *See id.* (*Hustler* not appointed to perform public function, therefore, no duty); *see also* DeBardelekben Marine Corp. v. United States, 451 F.2d 140, 149 (5th Cir. 1971)(duty on government to supply accurate charts to mariners because of traditional and statutory role).

89. *See* Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802, 803 (S.D. Tex. 1983)(motion to dismiss for failure to state claim)(no case law support for defective product claim against magazine); *see also* Cardozo v. True, 342 So.2d 1053, 1056-57 (Fla. Dist. Ct. App. 1977)(strict liability for magazine limited to physical property of magazine).

90. *See* Herceg v. Hustler Magazine, Inc., No. H-82-198 (S.D. Tex. March 29, 1985) (unpublished trial court order at 6)(striking products liability and attractive nuisance claims).

91. *See* Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802, 805 (S.D. Tex. 1983)(motion to dismiss for failure to state claim; motion granted with leave to amend to add incitement allegation).

92. *See* Herceg v. Hustler Magazine, Inc., No. H-82-198 (S.D. Tex. March 29, 1985) (unpublished trial court order at 6)(striking products liability and attractive nuisance theories; incitement allegation allowed); Herceg v. Hustler Magazine, Inc., 583 F. Supp. 1566, 1567 (S.D. Tex. 1984)(motion to dismiss amended complaint; motion denied, incitement adequately pled).

93. *See* Herceg v. Hustler Magazine, Inc., No. H-82-198 (S.D. Tex. March 29, 1985) (unpublished trial court order at 6)(defendant ordinarily entitled to judgment as matter of law; incitement allegation insufficient to satisfy *Brandenburg*). Also important to the success of plaintiffs' pleadings was a motion to offer plaintiffs' expert as a witness at the summary judgment hearing. This was granted in a separate, unpublished order on the same day. Therefore,

2. The Argument

The plaintiffs' basic arguments to the jury were: (1) *Hustler* intentionally published "Orgasm of Death";[94] (2) it was foreseeable to *Hustler* that children, including the decedent, might obtain and read a copy of the article;[95] (3) by advocating, implicitly, the practice of autoerotic asphyxia, the article violated sections 22.04 and 22.05 of the Texas Penal Code;[96] (4) such advocacy was likely to incite or produce imminent lawless action by Troy;[97] and (5) such advocacy was the proximate cause of Troy's death.[98]

The element of intent was established, contended the plaintiffs, from the fact that *Hustler* intentionally selected the article for publication and had marketing surveys available that indicated the accessibility of the magazine to minors; in fact, indicating that some of the magazine's subscribers were minors.[99] The enticing language of the article,[100] coupled with an adoles-

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based on the plaintiffs' pleadings, attachments and evidence, a trial was ordered on the incitement allegation. *See id.*

94. *See* Reply Brief of Appellant at 7-8 n.2, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)(No. 85-2833)(plaintiffs argued to trial judge that *Hustler Magazine* intended that its readers attempt autoerotic asphyxia).

95. *See* Brief of Appellant at 5, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)(No. 85-2833)(plaintiffs introduced advertising executive who had reviewed research material of *Hustler*'s readers' profile). Plaintiffs' witness testified that some of *Hustler*'s readers were less than eighteen years old. *See id.*

96. *See* Herceg v. Hustler Magazine, Inc., No. H-82-198 (S.D. Tex. October 31, 1985) (unpublished trial court judgment; provided in Appendix A)(Special Interrogatory Nos. 1-3, 5, 6); *see also* TEX. PENAL CODE ANN. § 22.04(a) (Vernon 1986)("A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct that causes serious bodily injury . . . to a child who is 14 years of age or younger."); TEX. PENAL CODE ANN. § 22.05(a) (Vernon 1986)("A person commits an offense if he recklessly engages in conduct that places another in imminent danger of serious bodily injury.").

97. *See* Herceg v. Hustler Magazine, Inc., No. H-82-198 (S.D. Tex. October 31, 1985) (unpublished trial court judgment; provided in Appendix A)(Special Interrogatories Nos. 3, 7).

98. *See id.* (Special Interrogatory No. 8).

99. *See* Brief of Appellant at 5, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)(No. 85-2833)(plaintiffs' advertising executive expert reviewed *Hustler*'s readers' profile and offered the opinion that some readers were minors); *see also* Herceg v. Hustler Magazine, Inc., No. H-82-198 (S.D. Tex. March 29, 1985)(Plaintiffs' Response to Defendant *Hustler*'s Motion for Summary Judgment at 4-5)(stating *Hustler*'s known minor subscribers approximately one percent).

100. *See* Brief for Appellee at 9-10, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)(No. 85-2833)(plaintiffs lift phrases such as "a 'high' accompanied by giddiness, light-headedness and exhilaration" to argue implicit advocacy of autoerotic asphyxia). The plaintiffs also argued that the article labeled those who would shy away from the practice as cowards, thereby goading young readers to attempt the act. *See id.* at 10; *see also* Milner, *Orgasm of Death*, HUSTLER, Aug. 1981, at 33-34 (describing autoerotic asphyxia). The article described the process of autoerotic asphyxia as follows:

> Typically, the practitioner rigs up a noose—often a rope or belt—and cuts off his air supply at the height of sexual excitement. The brain, deprived of oxygen, experiences a

cent's natural propensity to experiment, argued the plaintiffs, produced an imminent danger to the minor readers.[101] The implicit advocacy of the practice, with knowledge that the harm to practitioners of the act was substantially certain, was touted as an intentional violation of sections 22.04 and 22.05 of the Texas Penal Code.[102] Thus, according to the plaintiffs, because Troy's death apparently occurred immediately after reading the article, publication of "Orgasm of Death" was "advocacy of the use of force or of law violation . . . directed to inciting or producing imminent lawless action."[103]

B. *The Defendant's Strategy*

When ruling upon one of *Hustler*'s motions to dismiss, the trial judge in *Herceg* determined that a trial was necessary if, under light cast most favorably upon the plaintiffs' case, fact issues could be fashioned from a division of the *Brandenburg* standard into three questions: "(1) Did the subject matter of the speech in question entail advocacy of the use of force to violate the law?; (2) If so, was the advocacy directed to inciting or producing imminent lawless action?; and (3) If so, who [sic] is the advocacy likely to incite or

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> 'high' accompanied by giddiness, light-headedness and exhilaration. Often the practitioner will pass out for a few minutes, then revive. Sometimes, though, he never comes out of it!

Id.

101. *See* Brief for Appellee at 9-10, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)(No. 85-2833)(arguing article was dynamite in hands of deceased). The series "Sexplay," in which the article was published, stated in its heading that the avowed purpose of articles published in that series was to "ultimately . . . make you a much better lover." This negated, argued the plaintiffs, any effect the warnings contained within the article may have had. *See id.* at 10. *But see* Brief of Appellant at 18-20, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)(No. 85-2833)(highlighting numerous instances within article announcing death results from autoerotic asphyxia). The article began with an editor's note that contained the warning:

> *Hustler* emphasizes the often-fatal dangers of the practice of "autoerotic asphyxia," and recommends that readers seeking unique forms of sexual release DO NOT ATTEMPT this method. The facts are presented here solely for an educational purpose.

See id. at 19; *see also* Milner, *Orgasm of Death*, HUSTLER, Aug. 1981, at 33-34. The article provided further cautionary language:

> Indeed, here lies the real danger of the practice. While it may seem a cheap and easy way of getting "kicks," it is a serious—and often-fatal—mistake to believe that asphyxia can be controlled.

Id. at 34.

102. *See* Herceg v. Hustler Magazine, Inc., No. H-82-198 (S.D. Tex. October 31, 1985) (unpublished trial court judgment; available in Appendix A)(Special Interrogatories Nos. 1-2, 5-6). The Special Interrogatories, when read together, ask the jury whether the article entailed advocacy, whether the advocacy was directed to inciting Troy to imminent lawless action, and whether such advocacy was the proximate cause of Troy's death. The jury answered "yes" to each issue. *See id.*

103. *See id.* (available in Appendix A).

produce such imminent lawless action?"[104]

From a defendant's perspective, objection must be raised to each question, urging instead an exploded view of the issues necessary to create civilly actionable incitement.[105] The first question does not distinguish between the need to show advocacy and the requirement that the advocacy be of lawless activity.[106] The second question aggregates "directed to inciting or producing imminent lawless action" without divorcing the intent element from the imminence element.[107] The third question misplaces the emphasis of the likelihood element by emphasizing solely the need to identify the ultimate actor rather than focusing upon the objective legitimacy of the allegations as well.[108] The defendant's strongest posture,[109] in terms of obtaining sum-

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104. Herceg v. Hustler Magazine, Inc., 583 F. Supp. 1566, 1567 n.1 (S.D. Tex. 1984) (motion to dismiss original complaint)(stating civilly actionable incitement dependent upon resolution of three questions); *see also* Herceg v. Hustler Magazine, Inc., No. H-82-198 (S.D. Tex. March 29, 1985)(unpublished trial court order at 6)(denying summary judgment on incitement allegation; noting that same three questions need be answered on motion for summary judgment); *id.* (unpublished trial court instructions to jury; available in Appendix B) (instructing jury that same three questions determine liability at trial).

105. The elemental approach requires that advocacy, intent, imminent action, lawless action, and likelihood of occurrence be explored separately to satisfy the *Brandenburg* standard. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982)(speech protected when advocacy does not incite lawless action); Hess v. Indiana, 414 U.S. 105, 109 (1973). In *Hess*, the Court noted that "since there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the state on the ground that they had a 'tendency to lead to violence.' " *Id.*

106. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927-28 (1982)(advocacy of force or violence protected by first amendment unless inciting lawless action); Whitney v. California, 274 U.S. 357, 376 (1927)(Brandeis, J., concurring)(advocacy short of immediate incitement protected by first amendment).

107. *See* Noto v. United States, 367 U.S. 290, 297-98 (1961)(teaching moral propriety or necessity of violence and force distinguished from physical and mental preparation for such action); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982)(citing *Noto* with approval); Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969)(citing *Noto* with approval).

108. *See* Herceg v. Hustler Magazine, Inc., 583 F. Supp. 1566, 1567 n.1 (S.D. Tex. 1984) (posing question of "who is the advocacy likely to incite . . . ?" as element of civilly actionable incitement).

109. An alternative argument not presented by the defense in *Herceg* is that the decedent consented to the consequences of the act. Consent will bar recovery for an intentional tort. *See* W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS 112 (5th ed. 1984). Consent can be manifested by conduct. *See id.* at 113. However, consent can be rendered ineffective if: (1) the person lacked capacity; (2) consent was coerced; (3) consent was obtained through mistake as to the nature and quality of the invasion to be incurred by the conduct; or (4) the conduct was of the kind to which valid consent cannot be given. *See id.* at 114. Capacity of a minor exists when the capability of the child is equal to that of the ordinary adult to appreciate the risks and benefits of conduct. *See id.* at 115.

mary judgment[110] or a favorable jury verdict,[111] is to dissect the *Brandenburg* standard into separate components, either negating or creating distinct fact issues, as the situation dictates.[112]

C. *Considerations on Appeal*

The rule is firmly established that appellate courts perform an independent examination of the facts to determine, by a clear and convincing standard, whether the challenged speech is protected by the first amendment.[113] The navigational doctrine used by the appellate courts in their review is that "above all else, the first amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[114] The civil nature of the case does not depreciate the standard of review.[115] Therefore, a defendant who unsuccessfully argues constitutional standards to a jury may reiterate his defensive theory to the appellate court.[116]

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110. *See* FED. R. CIV. P. 41(c), (d) (summary judgment possible on entire claim or any portion thereof); TEX. R. CIV. P. 166-A(a) (partial summary judgment available).

111. *See* Herceg v. Hustler Magazine, Inc., No. H-82-198 (S.D. Tex. October 31, 1985) (unpublished jury instructions; available in Appendix B)(presents incitement to jury on court's three questions); *id.* (unpublished trial court judgment; available in Appendix A)(Special Interrogatories presented without respect to separate elements of incitement).

112. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927-28 (1982)(first amendment protects advocacy of force or violence unless inciting imminent lawless action); Hess v. Indiana, 414 U.S. 105, 108-09 (1973)(indicating advocacy, intent, likelihood, imminence, lawless action necessary for incitement).

113. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915-16 n.50 (1982) (elaboration of constitutional principles and review of evidence proper); New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964)(independent review of entire record necessary to protect first amendment principles); Pennekamp v. Florida, 328 U.S. 331, 335 (1946)(Court examines statements and circumstances to determine if protected); *see also* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1021 (5th Cir. 1987)(court performed independent review of record).

114. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972). *See generally* Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 233-36 (1982)(arguing Constitution forbids discrimination of speech content).

115. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 n.51 (1982)(civil lawsuit between private parties equal to state action for first amendment analysis); New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964)(announcing civil action equivalent to state action under first amendment austerity).

116. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 n.51 (1982)(first amendment question requires independent review of evidence); New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964)(independent examination of evidence by appellate court compelled in first amendment case); Edwards v. South Carolina, 372 U.S. 229, 235 (1962)(independent review of record necessary on first amendment challenge).

V. THEORETICAL APPLICATION OF THE *BRANDENBURG* STANDARD: *HERCEG V. HUSTLER MAGAZINE, INC.*

Civil incitement, to be constitutionally defensible, cannot justify the punishment of speech unless the speech advocates violation of law, is directed to inciting, and is likely to produce imminent lawless activity.[117] The plaintiffs' argument in *Herceg* required the jury to draw a series of inferences based upon the mere publication of the article in order to satisfy *Brandenburg*.[118] First, an inference of implicit advocacy of autoerotic asphyxia from the language of the article was required; second, implicit advocacy of autoerotic asphyxia also implicitly advocated violation of the law or, at least, tortious conduct; third, the implicit advocacy of tortious conduct, thus derived, presented an imminent danger of immediate occurrence; and fourth, the imminent danger thereby presented was likely to occur.[119]

The danger inherent in any prohibition of advocacy arises from the congruence of the concepts of implicit or subliminal advocacy and ideas.[120] Traversing the threshold between vehement promotion of socially unacceptable ideas and action upon those ideas, distinguishes advocacy from incitement.[121] The resulting lawless action, and not the idea promoted, is what is sought to be prevented.[122] Ideas, no matter how radical or farcical, within a

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117. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927-28 (1982)(advocacy, not inciting lawless action, protected by first amendment); *see also* Hess v. Indiana, 414 U.S. 105, 109-10 (1973)(intent to produce imminent disorder required to punish speech).

118. *Compare* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)(standard of liability: advocacy inciting imminent lawless action and likely to produce such action) *with* Herceg v. Hustler Magazine, Inc., No. H-82-198 (S.D. Tex. October 31, 1985)(unpublished trial court judgment; available in Appendix A)(phrasing Special Interrogatories in *Brandenburg* language).

119. *See* Herceg v. Hustler Magazine, Inc., No. H-82-198 (S.D. Tex. October 31, 1985) (unpublished trial court judgment; available in Appendix A)(Special Interrogatories presented question of whether advocacy to violate statute existed and whether such advocacy was proximate cause of death).

120. *See* Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972)(idea, subject matter, and content of speech outside power of government to regulate); *see also* American Booksellers Assoc. v. Hudnut, 771 F.2d 323, 327-28 (7th Cir. 1985)(ideas beyond scope of government regulation); State *ex rel* Pizza v. Tom, 428 N.E.2d 878, 880 (Ohio Com. Pl. 1981)(governmental restriction of speech because of message, ideas, belief, content, popularity, or social utility proscribed by first amendment).

121. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)(Douglas, J., concurring) (depth of conviction determines quality of advocacy); Whitney v. California, 274 U.S. 357, 376-77 (1927)(Brandeis, J., concurring)(difference between incitement and mere advocacy dictates whether speech protected or unprotected); Gitlow v. New York, 268 U.S. 652, 672-73 (1925)(Holmes, J., dissenting)(enthusiasm for result differentiates opinion from incitement).

122. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982)(first amendment protects speech when advocacy does not incite lawless action); Hess v. Indiana, 414 U.S. 105, 109 (1973)(words must be likely to produce imminent lawless action before state can forbid).

nation founded upon a constitution that views free speech as vital to its fabric, cannot and should not be constrained through government power.[123]

Conceding, arguendo, the constitutionality of restrictions upon implicit advocacy of force or violence to violate law, thereby accepting the plaintiffs' argument that the article advocated violation of a statute, exposes for scrutiny the question of imminence. If the proximity of time and place required by imminence is viewed from the perspective of the reader of written material, then the plaintiffs may have established imminence.[124] If, however, this element must be viewed from the perspective of the writer, imminence could very rarely manifest itself in written material.[125] The longevity of written material, especially considering the evolving nuances of the English language, argues strongly for acceptance of the latter perspective.

A finding favorable to the plaintiff on each of the above arguments would still preclude satisfaction of the *Brandenburg* standard unless the likelihood element has been met.[126] Likelihood cannot be proven without showing that

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123. *See, e.g.*, Baumgartner v. United States, 322 U.S. 665, 673-74 (1944)(freedom of speech entails right to disseminate informed, responsible criticism as well as brazen foolishness); Bridges v. California, 314 U.S. 252, 270 (1941)(speaking one's mind, regardless of whether in good taste, American privilege); United States v. Associated Press, 52 F. Supp. 362, 392 (S.D.N.Y. 1943)(right conclusions gathered from multitude of tongues presupposition of first amendment).

124. *See* Brief for Appellees at 14-15, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)(No. 85-2833)(arguing decedent read article immediately before attempting act, therefore, imminence satisfied). The plaintiffs argued that *Brandenburg*'s primary concern is whether speech is likely to or actually does produce immediate action. *See id.* at 15. *But see* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 925-26 & n.68 (1982)(although violence did occur, business loss damages not recoverable despite plaintiffs' accusations that loss caused by defendant's fiery speeches and threats of vilification); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975)(disapproving of first amendment interpretations that would allow majority rule to determine acceptable speech). The *Erznoznik* Court stated:

> [M]uch that we encounter offends our esthetic, if not our political and moral sensibilities. Nonetheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather . . . the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."

Id. at 210-12 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

125. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975)(majority rule cannot determine acceptability of speech). In *Erznoznik*, the Court declared that "[t]he plain, if at times disquieting, truth is that in our pluralistic society, [we are] constantly proliferating new and ingenious forms of expression . . . ." *Id.*; *see also* Masses Publishing Co. v. Patten, 244 F. 535, 540-41 (S.D.N.Y. 1917)(literal meaning of words expressing advocacy of evil scrutinized before proscription permissible). *See generally* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 725-29 (1975)(ordinary words of speaker must express direct advocacy of evil before punishable).

126. *See* Cohen v. California, 403 U.S. 15, 18 (1971)(without showing of likelihood to incite disruption of draft, wearing jacket with vulgar epithet protected speech); *see also* Yates

the action advocated was feasible and the ultimate action foreseeable.[127] The plaintiffs in *Herceg* attempted to meet the burden of foreseeability of the ultimate actor by showing that Troy was among a class of potential actors numbering more than 600,000.[128] Evidence of feasibility of the act occurring was attributed by the plaintiffs to a teenager's natural propensity to experiment.[129] The resolution of such issues requires more compelling evidence.[130]

Assuming all of the above inferences are supportable, including the viability of the argument that the regulation of implicit advocacy is not constitutionally repugnant, the plaintiffs still did not establish incitement, for they failed to prove a resulting tort.[131] Undoubtedly, a boy's death resulted from autoerotic asphyxia, but it was a self-inflicted death.[132] Death by one's own hand is not an actionable tort in Texas[133] and cannot be prosecuted under

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v. United States, 354 U.S. 298, 322 (1957)(likelihood of action spawned by speech necessary to prevent speech).

127. *See* Cohen v. California, 403 U.S. 15, 20 (1971)(no one actually or likely to be insulted by words on jacket); Cantwell v. Connecticut, 310 U.S. 296, 309 (1940)(speech must be directed to hearer).

128. *See* Herceg v. Hustler Magazine, Inc., No. H-82-198 (S.D. Tex. October 1, 1984) (Plaintiffs' Response to Defendant *Hustler*'s Motion for Summary Judgment at 4)(unpublished motion; arguing *Hustler* knew that article would be readily available to over 643,000 children).

129. *See* Brief for Appellees at 2-3, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)(No. 85-2833)(arguing decedent ignored warning "as children are prone to do.").

130. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)(imposing tort liability when first amendment implicated requires "precision of regulation"); Carroll v. Princess Anne, 393 U.S. 175, 184 (1968)(precise regulation necessary when imposing tort liability upon speech implicating first amendment); NAACP v. Button, 371 U.S. 415, 438 (1963) (grounds upon which tort liability that implicates first amendment can be imposed restricted).

131. *Cf.* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 926-29 (1982)(damages to plaintiffs' businesses not shown to result from defendant's speech). The Court, in *Claiborne Hardware,* found that damages did occur, but that neither the plaintiffs' economic losses nor the violence that caused such losses was proven to have resulted from petitioner's highly charged political rhetoric. *See id.* at 926-27. *But cf.* W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS 324 (5th ed. 1984)(conspiratorial agreement may impose liability on conspirator, although not one who performs tortious act). Professors Prosser and Keeton note disagreement concerning whether encouragement of an active tortfeasor may be considered a conspiratorial agreement, thereby imposing liability upon the passive tortfeasor for conspiracy and the resulting tort. *See id.* What is the result where, for example, the agreement has been reached to assist in tortious conduct but a tortious act has not yet been committed? Similarly perplexing is the situation in which no clear conspiracy was ever reached but the resulting tort already has occurred. The authors reach the conclusion that the extent of the conspiratorial agreement weighs heavily in determining liability in either case. *See id.*

132. *See* Brief for Appellee at 3, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987)(No. 85-2833)(decedent's death result of autoerotic asphyxiation).

133. *See generally* W. PROSSER & W. KEETON, HANDBOOK ON THE LAW OF TORTS 940-61 (5th ed. 1984)(common law and some states today still deny recovery on plaintiff's tort claim once he dies). Some jurisdictions have only recently recognized survival actions and

the statutes cited by the plaintiffs, for sections 22.04 and 22.05 of the Texas Penal Code proscribe conduct which inflicts injury upon another.[134] Although speech can be treated as conduct for some purposes, logic and constitutionality are lacking in punishing an implicit idea as overt conduct.[135]

VI. THE FIFTH CIRCUIT'S DISPOSITION OF *HERCEG V. HUSTLER MAGAZINE, INC.*: THE DISSOLUTION OF CIVIL INCITEMENT?

The United States Court of Appeals for the Fifth Circuit evoked the speech-protective rationale elucidated above,[136] and expressed doubt that the first amendment would permit, under any circumstances, civil penalties for the type of indirect advocacy allegedly present in "Orgasm of Death,"[137] and reversed the district court's judgment.[138] Finding it unnecessary to decide whether autoerotic asphyxia is illegal under Texas law, or whether

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independent causes of action for the decedent's heirs and family. *See id.* at 945. No jurisdiction appears to recognize self-inflicted death as actionable by the decedent. *See id.*

134. *See* TEX. PENAL CODE ANN. § 22.04(a) (Vernon 1986)(requiring conduct committed intentionally, knowingly, recklessly, or with criminal negligence causing injury to child); *id.* § 1.07(a)(1) (meaning of "act" includes speech); *see also* TEX. GOV'T CODE ANN. § 311.021(1) (Vernon 1987)(provides for compliance by all Texas statutes with United States Constitution). *Compare* Cohen v. California, 403 U.S. 15, 18 (1971)(words upon jacket pure speech which state cannot suppress) *with* Stromberg v. California, 283 U.S. 359, 364 (1931) (words only incidentally related to conduct, otherwise regulable by state, may be restricted).

135. *See* Brandenburg v. Ohio, 395 U.S. 444, 454-57 (1969)(Douglas, J., concurring)(referring to Justice Holmes' classic example of incitement, shouting fire in theater, as speech brigaded with action). Speech that is inseparable from punishable acts may be prosecuted. *See id.* at 456-57. When speech can be separated from action, however, the first amendment grants immunity from prosecution. *See id.* at 457. The "government has no power to invade the sanctuary of belief and conscience." *Id.*

136. *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1022 (5th Cir. 1987). The elements necessary for the plaintiffs to prove incitement were: (1) autoerotic asphyxiation is a lawless act; (2) *Hustler* advocated this act; (3) *Hustler*'s publication went even beyond "mere advocacy" and amounted to incitement; and (4) the incitement was directed to imminent action. *See id.* The court recognized that imminence is a crucial element, which must be found, before the first amendment shield would be lowered. *See id. But see id.* at 1029 (Jones, J., concurring and dissenting)(placing *Hustler* on same analytical plane with *Brandenburg* unwarranted). Circuit Judge Jones reads the majority's opinion as implicitly rejecting the *Brandenburg* standard rather than rejecting the notion that incitement could ever be civilly actionable. *See id.* at 1030.

137. *See id.* at 1023 (incitement theory rooted in concern for crowd behavior). Circuit Judge Rubin, for the majority, reiterated the view of incitement, that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steering it to such action." *Id.* (citing Noto v. United States, 367 U.S. 290, 297-98 (1961)).

138. *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1021, 1025 (5th Cir. 1987) (liability cannot be imposed upon *Hustler* on incitement theory without impermissibly infringing upon first amendment).

Brandenburg is restricted to criminal activity,[139] the court stated that an objective reading of the article could not reveal advocacy, much less incitement to engage in autoerotic asphyxia.[140] The court held, therefore, that the *Brandenburg* analysis readily afforded first amendment protection to the article.[141] Additionally, because *Brandenburg* would preclude imposition of criminal liability for the publication of such an article, the court held that civil liability for damages resulting from its publication was constitutionally impermissible as well.[142]

The fifth circuit inquired further, however, and questioned the expediency of attempting to fashion from *Brandenburg* a theory upon which to predicate civil liability for physical harm allegedly caused by the publication of written material.[143] The question posed by the court ostensibly referenced the suitability of a theory, originally founded upon a concern for crowd control, to impose liability upon a written publication for harm resulting from the actions of a single reader.[144] Although expressly declining to decide the issue of whether incitement, punishable either civilly or criminally, can ever be the consequence of a written publication, the court implied that it cannot.[145]

VII. CONCLUSION

Proponents of civil incitement as a viable cause of action seek to provide a

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139. *See id.* at 1022.

140. *See id.* at 1022-23 (even if article described autoerotic asphyxia in favorable terms, advocacy, and certainly incitement, was lacking). *But see id.* at 1026 (Jones, J., concurring and dissenting)(facts of case justify vindication for loss of Troy's life).

141. *See id.* at 1023 ("Orgasm of Death" protected by *Brandenburg* standard). *But see id.* at 1026-28 (Jones, J., concurring and dissenting)(*Hustler* not deserving of full constitutional protection). The thrust of the argument presented by Circuit Judge Jones is ostensibly that *Hustler*, because it is "pornographic, whether or not technically obscene," as well as published for profit, is entitled to a lesser degree of constitutional protection. *Id.*

142. *See id.* (incitement analogized to libel law). The fifth circuit asserted the proposition that what is beyond the power of the state to punish through its criminal laws is also constitutionally prohibited from punishment by civil damages. *See id.* (quoting New York Times v. Sullivan, 376 U.S. 254, 277 (1964)).

143. *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1023 (5th Cir. 1987)(incitement founded upon concern of crowd behavior, not censorship of written material).

144. *See id.*; Noto v. United States, 367 U.S. 290, 297-98 (1961)(quoting John Stuart Mill, ON LIBERTY)(opinions advocating violence should circulate unmolested through press, but incur punishment when delivered to angry crowd in situation likely to result in unlawful action).

145. *See* Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1023 (5th Cir. 1987). The court, after citing cases for the proposition that incitement should be reserved for oral advocacy of violence delivered to instill action of an angry crowd, declined to address the issue of whether written material may create culpable incitement. *See id.* The court also expressly rejected the contention that liability for incitement could ever be premised upon mere negligence. *See id.* at 1024.

method to compensate plaintiffs who have been injured by genuinely dangerous speech. Strictly speaking, civil incitement is not tortious conduct, but rather a theory of liability upon which to establish the causal link between the defendant's speech and the resulting harm that was directly caused by another's actions. Proving this causal link, however, requires proof of each of five separate elements derived from *Brandenburg v. Ohio,* and its progeny. Direct advocacy of force or violence to violate law must be the prerequisite to finding incitement. Additionally, the publisher must possess the intent to inflict harm and, consequently, direct his advocacy to a relatively discernible class of hearers. The action advocated, furthermore, must be imminent and likely to occur—two related but distinguishable concepts. Proof of these elements alone establishes incitement, which is not now and should never be an independently actionable tort. The plaintiff's failure to present evidence that his injury was the result of an actionable tort, which in turn was the result of the defendant's incitement, should always preclude recovery. If the theory survives its attempted engrafting into tort law, the arduousness of establishing the requisite elements of incitement may significantly limit the number of successful plaintiffs. However, a standard with such austerity represents the proper reverence for the principles of the first amendment.

VIII. APPENDICES

A. *Appendix A: Judgment and Special Interrogatories of Trial Court in* Herceg v. Hustler Magazine, Inc.

JUDGMENT

On the 31st day of October, 1985, this Court considered the motion of the plaintiffs, DIANE HERCEG and ANDY V., to enter judgment against defendant, HUSTLER MAGAZINE, INC., in accordance with the findings of the jury, as follows:

SPECIAL INTERROGATORY NO. 1

Do you find from a preponderance of the evidence that the article in question entailed the advocacy of the use of force to violate § 22.04 of the Texas Penal Code?

Answer: "Yes."

SPECIAL INTERROGATORY NO. 2

Do you find from a preponderance of the evidence that such advocacy was directed to inciting or producing imminent lawless action in violation of § 22.04 of the Texas Penal Code?

Answer: "Yes."

SPECIAL INTERROGATORY NO. 3

Do you find from a preponderance of the evidence that such advocacy was likely to incite or produce such imminent lawless action by Troy Daniel Dunaway?

Answer: "Yes."

SPECIAL INTERROGATORY NO. 4

Do you find from a preponderance of the evidence that such advocacy was a proximate cause of the death of Troy Daniel Dunaway?

Answer: "Yes."

SPECIAL INTERROGATORY NO. 5

Do you find from a preponderance of the evidence that the article in question entailed the advocacy of the use of force to violate § 22.05 of the Texas Penal Code?

Answer: "Yes."

SPECIAL INTERROGATORY NO. 6

Do you find from a preponderance of the evidence that such advocacy was directed to inciting or producing imminent lawless action in violation of § 22.05 of the Texas Penal Code?

Answer: "Yes."

SPECIAL INTERROGATORY NO. 7

Do you find from a preponderance of the evidence that such advocacy was likely to incite or produce such imminent lawless action by Troy Daniel Dunaway?

Answer: "Yes."

SPECIAL INTERROGATORY NO. 8

Do you find from a preponderance of the evidence that such advocacy was a proximate cause of the death of Troy Daniel Dunaway?

Answer: "Yes."

SPECIAL INTERROGATORY NO. 9

Do you find from a preponderance of the evidence that Troy Daniel Dunaway read the article in question?

Answer: "Yes."

SPECIAL INTERROGATORY NO. 10

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Diane Herceg for her injuries which you find she sustained as a result of the death of her son, Troy Daniel Dunaway?

Answer: "$69,000.00."

SPECIAL INTERROGATORY NO. 11

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Andy V. for his injuries which you find he sustained as a result of the incident in question?

Answer: "$3,000.00."

SPECIAL INTERROGATORY NO. 12

What sum of money, if any, do you find from a preponderance of the evidence should be assessed against *Hustler Magazine, Inc.* as exemplary or punitive damages?

Answer (Diane Herceg): "$100,000.00"

Answer (Andy V.): "$10,000.00."

This Court has examined the jury's answers to special interrogatories and finds that judgment must be entered in favor of the plaintiffs and against the defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff DIANE HERCEG have judgment against defendant HUSTLER MAGAZINE, INC. in the amount of $169,000.00 (ONE HUNDRED SIXTY-NINE THOUSAND DOLLARS AND NO CENTS) and that plaintiff ANDY V. have judgment against defendant HUSTLER MAGAZINE, INC. in the amount of $13,000.00 (THIRTEEN THOUSAND DOLLARS AND NO CENTS).

B. *Appendix B: Selected Jury Instructions in* Herceg v. Hustler Magazine, Inc.

[Pertinent portion of trial judge's instructions to the jury.]

In this case, the Plaintiffs' claim that the Defendant's August, 1981 "Orgasm of Death" publication incited the death alleged, and that such incitement was a proximate cause of the injuries and damages sustained by Plaintiffs.

In order to prevail on this claim, the Plaintiffs must prove by a preponderance of the evidence:

1. That the Defendant's publication was civilly actionable "incitement;" and,
2. That such "incitement" was a "proximate cause" of the damages sustained by the Plaintiffs.

Determining whether civilly actionable "incitement" has occurred demands resolution of three separate questions:

1. Did the subject matter of the speech in question entail advocacy of the use of force to violate the law?; and,
2. If so, was the advocacy directed to inciting or producing imminent lawless action?; and
3. If so, who [sic] is the advocacy likely to incite or produce such imminent lawless action?

"Proximate cause" means the cause which is a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

You are instructed that under Texas Penal Code § 22.04 injury to a child, an entity commits an offense if it intentionally, knowingly, recklessly, or with criminal negligence, by act or omission engages in conduct that causes to a child who is fourteen years of age or younger serious bodily injury, serious physical or mental deficiency or impairment, disfigurement or deformity or bodily injury.

Under Texas Penal Code § 22.05 an entity commits an offense if it recklessly engages in conduct that places another in imminent danger of serious bodily injury.

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss of impairment of the function of any bodily member or organ.

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

You are further instructed that an entity commits an offense if knowing that its material is harmful and knowing the person is a minor, it sells, distributes, exhibits or possesses for sale, distribution, or exhibition to a minor harmful material.

"Minor" means an individual younger than 17 years.

"Harmful material" means material whose dominant theme taken as a whole:

(a) appeals to the prurient interest of a minor, in sex, nudity, or excretion;

(b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and,

(c) is utterly without redeeming social value for minors.