THE DEEP POCKET DILEMMA: SETTING THE PARAMETERS OF TALK SHOW LIABILITY

INTRODUCTION

On March 9, 1995, three days after the *Jenny Jones* show taped a segment entitled "Same Sex Crushes," Jonathan Schmitz shot and killed Scott Amedure, a homosexual man who had revealed his crush on Schmitz during the show.[1] Although Schmitz had not displayed signs of embarrassment during the segment's taping, he later stated that he had expected a female secret admirer, and attributed his behavior to the humiliation caused by Amedure's revelation on national television.[2] The show's producers, however, claimed that they had specifically warned Schmitz that his admirer might be a man.[3] Schmitz had been drinking heavily and smoking marijuana following his appearance on *Jenny Jones*, but did not react violently until he discovered a suggestive note that Amedure had left at his home on the day before the murder.[4] In August 1999, a Michigan court sentenced Schmitz to twenty-five to fifty years in prison for second-degree murder.[5]

The Amedure family, meanwhile, brought a $71.5 million wrongful death action against Warner Brothers, which owns the *Jenny Jones* show, and Telepictures Productions, which produces the show, for their alleged negligence in failing to screen Schmitz for psychological problems.[6] Schmitz, the defendants later learned, suffered from bipolar disorder, alcoholism, and Graves' disease, a thyroid condition that contributed to his violent behavior.[7] Although the jury determined that the murder was not reasonably foreseeable and that the producers were not required to screen

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1 *See* Paul Farhi, *'Jenny Jones' Show Found Negligent in Murder Case*, WASH. POST, May 8, 1999, at A1; *see also 'Jenny Jones' Verdict may be Turning Point, 'The finger is pointed' at exploitation TV*, HOUS. CHRON., May 9, 1999, at A10 [hereinafter *Turning Point*].

2 *See* Farhi, *supra* note 1, at A1; *see also* Justin Hyde, *Killer in 'Jones' Slaying Convicted for 2nd Time*, CHI. SUN-TIMES, Aug. 27, 1999, at 56.

3 *See* Farhi, *supra* note 1, at A1; *see also* Jim Kirk, *Jury Finds TV Show Liable in Slaying*, CHI. TRIB., May 8, 1999, at 1.

4 *See* Hyde, *supra* note 2, at 56; *see also 'Jenny Jones' Killing Case Ends with Another Conviction, Jurors Said Jonathan Schmitz Had Time after the Show to Deal with his Anger Toward Scott Amedure*, ORLANDO SENTINEL, Aug. 27, 1999, at A14; *After the Verdict:* Amedure v. Jenny Jones, et al. – *Killer Television: The Jenny Jones Show* (Court TV broadcast, Apr. 1999) [hereinafter *After the Verdict*].

5 *See* Hyde, *supra* note 2, at 56.

6 *See* Farhi, *supra* note 1, at A1. *See generally* Kirk, *supra* note 3, at 1; *Trash TV on Trial: Was Talk Show an Accomplice to Murder?*, COLUMBUS DISPATCH, May 17, 1999, at 6A; Adam Cohen, *Next on Jenny: Appeal; Can a Talk Show Drive Someone to Murder? A Jury Says Yes – and Journalists Could be the Victims*, TIME, May 17, 1999, at 70.

7 *See* Farhi, *supra* note 1, at A1; *see also After the Verdict*, *supra* note 4.

their guests,[8] it nevertheless awarded twenty-five million dollars in damages to the Amedure family on the ground that the show failed to disclose the nature of the segment to Schmitz.[9] "The court found it 'only logical' to extend the Jones Group's duty further than the business premises because they 'actively created a volatile personal situation into which they invited the injured party to – in essence – an ambush, thereby setting the parties upon a course of conduct ending in tragedy.'"[10] It was the first time that television producers had been held accountable for their guests' conduct.[11] Warner Brothers and Telepictures Productions have filed an appeal,[12] but regardless of the outcome, the case will likely promote litigation against media defendants,[13] and also induce producers to focus on more conventional topics in order to avoid future liability.[14]

The *Jenny Jones* murder case, as it is commonly known, no longer represents the sole instance in which a talk show guest has subsequently killed a fellow guest.[15] Another murder occurred in July 2000, following a segment of *Jerry Springer*, entitled "Secret Mistresses Confronted."[16] The victim, Nancy Campbell-Panitz, appeared on the program in hopes of reconciling with her ex-husband, Ralf Panitz.[17] Instead, Panitz sought to embarrass Campbell-Panitz by revealing that he had remarried, and demanded that she stop harassing him.[18] While the divorced couple moved back into the same house after the show, Campbell-Panitz was found beaten to death on the day that the segment aired on national tele-

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[8] *See After the Verdict*, *supra* note 4.

[9] *See* Farhi, *supra* note 1, at A1; *see also* Keith Bradsher, *Talk Show Ordered to Pay $25 Million after Killing*, N.Y. TIMES, May 8, 1999, at A10.

[10] Richard M. Goehler & Jill Meyer Vollman, *Expansion of Tort Law at the Expense of the First Amendment: Has the* Jones *Court Gone Too Far? Stay Tuned to Find Out*, 27 N. KY. L. REV. 112, 115 (2000) (quoting Amedure v. Schmitz, No. 95-494536 NZ (Mich. Cir. Ct. Feb. 28, 1996)).

[11] *See* Farhi, *supra* note 1, at A1; *see also* Greg Baxton & Brian Lowry, *Jury Orders 'Jenny Jones' to Pay $25 Million*, L.A. TIMES, May 8, 1999, at A1.

[12] *See* Tim Jones, *Talk Show Verdict Speaks to Larger Debate*, CHI. TRIB., May 9, 1999, at 1.

[13] *See* Cohen, *supra* note 6, at 70.

[14] *See* Cynthia Littleton, *Jury Divided on Talk TV, but Industry May Have Reformed Following Murder*, BROADCASTING AND CABLE, Nov. 18, 1996, at 13; *see also* Farhi, *supra* note 1, at A1; Bradsher, *supra* note 9, at A10.

[15] *See* Susanne Ault, *Another Talk Show on Trial? Questions Loom about the Role of 'Springer' in the Campbell-Panitz Murder Case*, BROADCASTING AND CABLE, July 31, 2000, at 10; *see also* Raoul V. Mowatt, *'Springer' is Helping in Death Probe, Guest on Talk Show was Slain in Florida*, CHI. TRIB., July 27, 2000, at 6.

[16] *See* Ault, *supra* note 15, at 10; *see also* Mowatt, *supra* note 15, at 6.

[17] *See* Ault, *supra* note 15, at 10; *see also Murder Warrant Issued for TV 'Springer' Guest*, CHI. TRIB., July 28, 2000, at 20.

[18] *See* Teresa Wiltz & Paul Farhi, *Death Follows Ugly Scene Played Out on 'Springer,'* WASH. POST, July 27, 2000, at C1; *see also* Mowatt, *supra* note 15, at 6.

vision.[19] Records indicated that Ralf Panitz had abused his ex-wife during their fifteen-month marriage, and that Campbell-Panitz had obtained a restraining order on the same day that she was murdered.[20] Panitz was arrested in connection with his ex-wife's murder, and was convicted of second-degree murder in March 2002.[21] It remains uncertain whether Campbell-Panitz's family will seek to hold the show accountable for her death. Regardless of whether her family declines to file a civil suit, this tragedy nevertheless confirms the need to construct the parameters of a talk show's responsibility over its guests.

This Note analyzes, under the framework of tort law and constitutional law, whether talk shows should be held civilly liable when one guest murders another guest following a broadcast. In particular, this Note will focus on whether a talk show acts negligently by creating volatile situations onstage between guests, and will also examine whether a program falls under the protection of the First Amendment, or instead warrants regulation pursuant to the incitement test[22] set forth by the Supreme Court in *Brandenburg v. Ohio*.[23]

Part I of this Note delineates the requirements that a plaintiff must satisfy in order to prevail in a negligence action. Part II discusses the scope of protection afforded to media defendants under the First Amendment, and explains *Brandenburg*'s incitement standard as an exception to that protection. Part III examines recent tort cases brought against media defendants, as well as against the producers and sponsors of entertainment events, which address the requirements for a finding of negligence, and which also examine pertinent constitutional considerations.

Part IV outlines the procedures that talk shows currently employ to recruit, screen, and counsel guests. It will also include reactions by members of the entertainment industry and legal profession to the unprecedented verdict announced in the *Jenny Jones* case. Part V argues that talk shows should not be held civilly liable in light of the unforeseeability of the harm and the existence of an intervening act – a former guest's criminal conduct – which

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19 *See* Allan Johnson, *Liability a Harsh Reality for Talk Shows, 'Springer' Guests Held after Woman's Death*, CHI. TRIB., July 29, 2000, at 1; *see also* Wiltz & Farhi, *supra* note 18, at C1.

20 *See* Johnson, *supra* note 19, at 1; *see also* Wiltz & Farhi, *supra* note 18, at C1.

21 *See Former Springer Show Guest Guilty in Murder*, L.A. TIMES, Mar. 27, 2002, at A14; *see also* Ziauddin Sardar, *The Rise of the Voyeur, Television's Mediation of Desire*, NEW STATESMAN, Nov. 6, 2000, at 25; David Usborne, *'Jerry Springer' Guest Charged with Murder Charge Puts Heat on Springer Show*, THE INDEP., July 30, 2000, at 20.

22 *See infra* Part II.C.

23 395 U.S. 444 (1967).

breaks the chain of causation between the taping of the segment and the subsequent murder. In addition to this tort analysis, Part V also discusses the constitutional safeguards embedded in the First Amendment that shield talk shows from liability, and further argues that talk shows do not intend to incite imminent acts of violence. Part V concludes by recommending specific precautions that talk shows can implement to avert future liability. Proposed measures include: rigorously screening guests for psychological problems; employing an on-site therapist or social worker to talk with guests both before and after the show; providing guests with outside counseling services; and requiring that guests sign a disclaimer before their appearance on the program.

I. THE FUNDAMENTALS OF A NEGLIGENCE ACTION

In order to establish a cause of action based upon negligence, plaintiffs must prove that: (a) the defendant owed them a duty; (b) the defendant breached this duty; (c) a causal relationship existed between the defendant's conduct and the plaintiff's injury ("proximate cause"); and (d) the defendant's conduct resulted in actual damages.[24] Most relevant to the negligence actions later discussed are the elements of duty and causation.

A. *Duty*

A duty signifies a legally enforceable obligation "to conform to a certain standard of conduct, for the protection of others against unreasonable risks."[25] In determining the existence of a duty, courts generally apply a risk-utility balancing test in which "the risk, foreseeability, and likelihood of injury [is] weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendants."[26] "The actor satisfies the obligation to

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[24] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, 164-65 (5th ed. 1984); *see also* Carolina A. Fornos, Comment, *Inspiring the Audience to Kill: Should the Entertainment Industry Be Held Liable for Intentional Acts of Violence Committed by Viewers, Listeners, or Readers?*, 46 LOY. L. REV. 441, 450 (2000) (explaining that "'[i]n strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damages thereby suffered by the person to whom the duty was owing'") (quoting JOSEPH W. LITTLE & LYRISSA BARNETT LIDSKY, TORTS: THE CIVIL LAW OF REPARATION FOR HARM DONE BY WRONGFUL ACTS 35 (2d ed. 1997)).

[25] KEETON ET AL., *supra* note 24, § 53, at 356.

[26] Way v. Boy Scouts of Am., 856 S.W.2d 230, 234 (Tex. App. 1993); *see also* Eimann v. Soldier of Fortune Mag., 880 F.2d 830, 835 (5th Cir. 1989) (noting that "[a] risk becomes unreasonable when its magnitude outweighs the social utility of the act or omission that creates it"); McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 1003-04 (Cal. Ct. App. 1988) (delineating the factors to be considered in the risk-utility balancing test as "'the foresee-

protect against unreasonable risks when the burden of adequate precautions – examined in light of the challenged action's value – outweighs the probability and gravity of the threatened harm."[27]

Foreseeability represents the principal factor in the risk-utility balancing test.[28] "If one could not reasonably foresee any injury as the result of one's act, or if one's conduct was reasonable in light of what one could anticipate, there would be no negligence, and no liability."[29] While "nearly all human acts carry some recognizable but remote possibility of harm,"[30] liability can only be imposed in those cases where the defendant's conduct brought about a foreseeable consequence.[31] The doctrine of foreseeability often relieves a defendant of liability when a plaintiff's injury results from the criminal actions of a third party.[32] Because "one is not bound to anticipate negligent or unlawful conduct on the part of an-

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ability of harm to the plaintiff, the degree of certainty that plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved'") (quoting Rowland v. Christian, 69 Cal. 2d 108, 113 (Cal. Ct. App. 1968) and Peterson v. San Francisco Community C. Dist., 36 Cal. 3d 799, 806 (Cal. Ct. App. 1984)).

27 *Eimann*, 880 F.2d at 835 (referring to Judge Learned Hand's algebraic formula, as set forth in *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947), which states that "liability turns on whether the burden of adequate precautions, B, is less than the probability of harm, P, multiplied by the gravity of the resulting injury, L").

28 *See Way*, 856 S.W.2d at 234 (stating that "foreseeability is the foremost and dominant consideration"); *see also* Davidson v. Time Warner, Inc., 1997 U.S. Dist. LEXIS 21559, at *31 (S.D. Texas March 31, 1997) ("Foreseeability is the most significant factor when using the risk-utility test."); Weirum v. RKO Gen., Inc., 15 Cal. 3d 40, 46 (Cal. Ct. App. 1975) (stating that "foreseeability of the risk is a primary consideration in establishing the element of duty"); Peek v. Oshman's Sporting Goods, Inc., 768 S.W.2d 841, 847 (Tex. App. 1989) ("Negligence rests primarily upon the existence of reason to anticipate injury and failure to perform the duty arising on account of that anticipation, and if the actor could not have reasonably foreseen the resultant injury, or injuries similar in character, he is not to be held responsible therefor.").

29 KEETON ET AL., *supra* note 24, § 43, at 280; *see also Way*, 856 S.W.2d at 234 (defining foreseeability as "'what one should under the circumstances reasonably anticipate as consequences of his conduct'") (quoting McCullough v. Amstar Corp., 833 S.W.2d 312, 315 (Tex. App. 1992)); *Davidson*, 1997 U.S. Dist. LEXIS 21559 at *31 ("'A danger is foreseeable when the actor, as a person of ordinary intelligence, should have anticipated the dangers that his negligent act created for others.'") (quoting Garza v. United States, 809 F.2d 1170, 1172 (5th Cir. 1987)).

30 *Eimann*, 880 F.2d at 835.

31 *See id.* at 302 (stating that "the defendant is to be held liable if, but only if, the intervening cause is 'foreseeable'").

32 *See, e.g., Peek*, 768 S.W.2d 841 (Tex. App. 1989) (holding that defendant did not breach its duty of care by selling gun to a third party); *Eimann*, 880 F.2d at 830 (holding that the defendant "did not violate the required standard of conduct by publishing an ad that later played a role in criminal activity"); McCollum v. CBS, Inc., 202 Cal. App. 3d 989 (Cal. Ct. App. 1988) (holding that defendants were not liable for producing and distributing a music album that allegedly caused a listener to commit suicide).

other,"[33] "[t]here is no duty to warn against the criminal actions of a third person so as to prevent him from causing physical injury to another, unless some special relationship exists to give rise to such a duty."[34] A special relationship exists where the defendant has a contractual duty to protect the plaintiff, or where the defendant "brings the plaintiff into close association with third parties who are likely to commit crimes."[35]

The defendant may also owe a duty to protect persons from the criminal acts of third parties when those acts take place on the defendant's premises.[36] "By occupying the premises the defendant has the power of control and expulsion over the third party."[37] Thus, a defendant may be held liable in cases where a third party commits a foreseeable criminal act on the defendant's premises.[38]

Whereas duty is a question of law for the court, foreseeability is a question of fact for the jury.[39] It should be carefully noted that "the degree of foreseeability necessary to warrant a finding of a duty" depends upon the burden of preventing the alleged harm; courts will require a higher degree of foreseeability as the burden of preventing the harm increases.[40] Courts will dismiss a negligence action for failure to state a cause of action in situations where the defendant owed no duty to the plaintiff.[41] In the event

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[33] *Peek*, 768 S.W.2d at 846.

[34] Taylor v. Shoney's, Inc., 726 So. 2d 519, 523 (La. Ct. App. 1999); *see also* Bill v. Superior Ct., 137 Cal. App. 3d 1002, 1011 (Cal. Ct. App. 1982) ("'As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct. Such a duty may arise, however, if (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the right to protection.'") (quoting Davidson v. City of Westminster, 32 Cal. 3d 197, 203 (1982)); Barefield v. City of Hous., 846 S.W.2d 399, 403 (Tex. App. 1992) (explaining that "a defendant has no duty to prevent the criminal acts of a third party who does not act under the defendant's supervision or control").

[35] Richard C. Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Material*, 3 FLA. L. REV. 603, 636 (2000).

[36] *See, e.g., Barefield*, 846 S.W.2d at 403 ("A defendant . . . may be subjected to tort liability for another's criminal act if the criminal act occurs on the defendant's premises.").

[37] *Id.*

[38] *See id.* ("A defendant's negligence is not superceded when the criminal conduct of a third party is a foreseeable result of the defendant's negligence. The defendant has a duty to prevent injuries to others if it reasonably appears or should appear to the defendant that others may be injured.").

[39] *See* Weirum v. RKO Gen., Inc., 15 Cal. 3d 40, 46 (Cal. Ct. App. 1975) ("While duty is a question of law, foreseeability is a question of fact for the jury."); *see also Bill*, 137 Cal. App. 3d at 1009 (explaining that foreseeability is a question of fact for the jury).

[40] McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 1004 (Cal. Ct. App. 1988) ("'In cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required.'") (quoting Isaacs v. Huntington Memorial Hosp., 38 Cal. 3d 112, 115 (Cal. Ct. App. 1985)).

[41] *See* Way v. Boy Scouts of Am., 856 S.W.2d 230, 233 (Tex. App. 1993) ("Before there

that a court concludes that a duty does exist, it will decide whether the defendant breached that duty by comparing the defendant's conduct to that of a reasonable person acting under similar circumstances.[42]

B. *Proximate Cause*

"An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered."[43] The relationship between the defendant's act or omission and the plaintiff's injury is referred to as proximate cause.[44] In order to establish causation, the plaintiff must prove by a preponderance of the evidence that the injury would not have been sustained *but for* the defendant's conduct.[45] The plaintiff therefore bears a heavy burden of proof.[46] "As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability."[47] Whether the defendant's conduct is the cause-in-fact of the plaintiff's injury depends upon the particular circumstances of the case, and is therefore an issue for the jury to decide.[48]

Under the "but for" test, a defendant will be relieved of liability in cases where the plaintiff would have sustained injury regard-

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can be a cause of action for negligence, the court must determine that the defendant had a recognized legal duty or obligation to the plaintiff."); *see also* Peter Alan Block, *Modern-Day Sirens: Rock Lyrics and the First Amendment*, 63 S. CAL. L. REV. 777, 807 (1990) ("Before liability can be imposed, a duty of care must exist.").

42 *See* Fornos, *supra* note 24, at 453 ("To determine whether a duty has been breached, the court must decide whether the defendant's conduct was that of a reasonable person under like circumstances.").

43 KEETON ET AL., *supra* note 24, § 41, at 263.

44 *See id.* ("An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omissions of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called 'proximate cause,' or 'legal cause.'").

45 *See id.* at 269 ("The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.").

46 *See id.* ("A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant."); *see also* David W. Robertson, Symposium, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1794 (1997) ("Whether the defendant was a cause in fact of any harm is a high-threshold inquiry.").

47 KEETON ET AL., *supra* note 24, § 41, at 264.

48 *See* Robertson, *supra* note 46, at 1765 (stating that "[cause in fact] is a question of fact. . . . For that reason, in the ordinary case, it is peculiarly a question for the jury").

less of whether the defendant had acted.[49] In making this determination, courts examine "whether the intervention of the later cause is a significant part of the risk involved in the defendant's conduct, or is so reasonably connected with it that the responsibility should not be terminated."[50] Courts will exonerate the defendant where the intervening cause[51] is unforeseeable.[52] In such a situation, the defendant cannot reasonably anticipate, and therefore guard against, the intervening force.[53] For example, when an independent criminal act breaks the causal link between the defendant's conduct and the plaintiff's injury, the defendant will not be held liable in light of the unforeseeability of the third party's misconduct.[54]

In the context of media violence, plaintiffs bear a particularly heavy burden of proof.[55] "Even if a plaintiff can show a generalized connection between portrayals of sex or violence in the media and violent behavior in the real world, he or she will also have to prove that specific depictions of sex or violence by the defendant have directly caused the injury in question."[56]

When two causes combine to bring about a particular harm, either of which could have alone produced such a result, the "but for" test loses its applicability.[57] Courts instead employ the "sub-

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49 *See* Ausness, *supra* note 35, at 631 ("In most cases, the appropriate test of causation is the 'but for' test, under which the plaintiff must prove that he or she would not have been injured if the action in question had not occurred.").

50 KEETON ET AL., *supra* note 24, § 44, at 302.

51 *See* J. Robert Linneman, Davidson v. Time Warner: *Freedom of Speech . . . But Watch What You Say! The Question of Civil Liability for Negligence in the Mass Media*, 27 N. KY. L. REV. 163, 194 (2000) (defining an intervening cause as "a new force which joins with the defendant's conduct to cause the plaintiff's injury") (citing Dierdiarian v. Felix Contracting Corp., 414 N.E.2d 666, 670 (N.Y. 1980)).

52 *See* KEETON ET AL., *supra* note 24, § 44, at 302 ("It is therefore said that the defendant is to be held liable if, but only if, the intervening cause is 'foreseeable.'"); *see also* Barefield v. City of Hous., 846 S.W.2d 399, 403-04 (Tex. App. 1992) ("Although criminal acts do occur and thus may be foreseeable in the broad sense, the occupier of the premises has no duty to guard against dangers he cannot reasonably foresee in light of ordinary or common experience.").

53 *See* KEETON ET AL., *supra* note 24, § 44, at 312 (stating that "liability must be limited to cover only those intervening causes which lie within the scope of foreseeable risk, or have at least some reasonable connection with it").

54 *See id.*, at 312-13; *see also Barefield*, 846 S.W.2d at 403-04; Gragg v. Wichita State Univ., 261 Kan. 1037, 1056-57 (Kan. 1997); L. Lin Wood & Corey Fleming Hirokawa, *Shot By the Messenger: Rethinking Media Liability for Violence Induced by Extremely Violent Publications and Broadcasts*, 27 N. KY. L. REV. 47, 49 (2000).

55 *See* Ausness, *supra* note 35, at 634.

56 *Id.* at 634.

57 *See* KEETON ET AL., *supra* note 24, § 41, at 266 ("If two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result, some other test is needed."); *see also* Robertson, *supra* note 46, at 1778 ("'When two causes concur to bring about an event, and either cause, operating alone, would have brought about the event absent the other cause, the appropriate test is the 'substantial factor test.'") (quoting Magee v. Coats, 598 So. 2d 1, 5 n.6 (La. 1989)).

stantial factor" test, which examines whether the defendant's actions constitute a substantial factor in causing plaintiff's injury.[58] "The intervening act of a third party which is a normal consequence of a situation created by the actor's negligent conduct is not a superceding cause of harm to another which the actor's conduct is a substantial factor in bringing about."[59] If the jury decides that the defendant's act or omission was a substantial factor in causing the injury, then the defendant will be liable for damages.[60]

II. EXAMINING FIRST AMENDMENT PROTECTION AND THE *BRANDENBERG* INCITEMENT TEST

A. *Freedom of Speech: An Overview*

In determining the initial question of duty, courts will consider whether the First Amendment[61] shields a defendant from tort liability.[62] Courts refuse to grant damages where the defendant's conduct falls within the scope of the First Amendment.[63] The constitutional right to free speech, as set forth in the First Amendment, not only permits the expression of those ideas shared by the majority of the citizenry, but also affords protection to individuals who espouse unpopular, or even dangerous, viewpoints.[64] "'Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[65] Freedom of speech is grounded

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58 *See* KEETON ET AL., *supra* note 24, § 41, at 267; *see also* Ausness, *supra* note 35, at 632; Linneman, *supra* note 51, at 195.

59 Rotz v. City of New York, 143 A.D.2d 301, 306 (N.Y. App. Div. 1988).

60 *See* KEETON ET AL., *supra* note 24, § 41, at 267 ("Whether it [the defendant's conduct] was such a substantial factor is for the jury to determine, unless the issue is so clear that reasonable persons could not differ.").

61 The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the redress of grievances." U.S. CONST. amend. I, § 1.

62 *See* Linneman, *supra* note 51, at 186 ("Where a court attempts to examine the law of negligence separately from the constitutional issues in determining this type of liability, the separation is artificial. The First Amendment operates precisely at this level and is the principal determinant of whether a duty may be imposed on a defendant.").

63 *See* Wood & Hirokawa, *supra* note 54, at 54; *see also* Mike Quinlan & Jim Persels, *It's Not My Fault, the Devil Made Me Do It: Attempting to Impose Liability on Publishers, Producers, and Artists for Injuries Allegedly "Inspired" by Media Speech*, 18 S. ILL. U. L.J. 417, 437 (1994).

64 *See* Block, *supra* note 41, at 791 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974)).

65 Olivia N. v. NBC, Inc., 126 Cal. App. 3d 488, 492 (Cal. Ct. App. 1981) (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)); *see also* Cohen v. California, 403 U.S. 15, 24 (1971).

> The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach

upon the assumption that the benefits which society obtains from the free exchange of ideas outweigh the costs of exposure to reprehensible ideas.[66]

"Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."[67] The public's right, pursuant to the First Amendment, to receive various forms of expression, including entertainment, is of paramount importance.[68] "The First Amendment immunizes the communicative industry from tort liability in order that they may fully explore their creative and intellectual talents without having to fear repercussions."[69] Absent this constitutional protection, artists, producers, and broadcasters would engage in a policy of self-censorship as a means of shielding themselves from liability.[70] This, in turn, "would dampen the vigor and limit the variety of artistic expression."[71]

B. *Classes of Speech Unprotected by the First Amendment*

Freedom of speech, however, is not absolute.[72] In order to maintain content-based restrictions on constitutionally protected speech, the government must demonstrate that the regulations

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> would comport with the premise of individual dignity and choice upon which out political system rests.

Id.

66 *See* Herceg v. Hustler Mag., Inc., 814 F.2d 1017, 1019 (5th Cir. 1987); *see also* Zamora v. CBS, 480 F. Supp. 199, 205 (S.D. Fla. 1979) ("It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.").

67 Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981); *see also* McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 998 (Cal. Ct. App. 1988) ("'Material communicated by the public media . . . [including artistic expressions such as the music and lyrics here involved], is generally to be accorded protection under the First Amendment to the Constitution of the United States.'") (quoting *Olivia N.*, 74 Cal. App. 3d at 387).

68 *See Zamora*, 480 F. Supp. at 205; *see also McCollum*, 202 Cal. App. 3d at 999 ("'The central First Amendment concern remains the need to maintain free access of the public to the expression.'") (quoting Young v. Am. Mini Theatres, 427 U.S. 50, 77 (1976)).

69 Quinlan & Persels, *supra* note 63, at 437.

70 *See* DeFilippo v. NBC, Inc., 446 A.2d 1036, 1041 (R.I. 1982) ("To permit plaintiffs to recover on the basis of one minor's actions would invariably lead to self-censorship by broadcasters in order to remove any matter that may be emulated and lead to a law suit."); *see also McCollum*, 202 Cal. App. 3d at 1003 ("The deterrent effect of subjecting the music and recording industry to such liability because of their programming choices would lead to self-censorship which would dampen the vigor and limit the variety of artistic expression.").

71 *McCollum*, 202 Cal. App. 3d at 1003; *see also* Olivia N. v. NBC, Inc., 126 Cal. App. 3d 488, 494 (Cal. Ct. App 1981) ("Television networks would become significantly more inhibited in the selection of controversial materials if liability were to be imposed on a simple negligence theory.").

72 *See DeFilippo*, 446 A.2d at 1041; *see also* Byers v. Edmondson, 712 So. 2d 681, 689 (La. App. 1998).

seek to further a compelling state interest, and that the means are narrowly tailored to achieve that asserted purpose.[73] The government may also regulate or prohibit the following categories of "low value speech" as long as it has a rational basis for doing so: (1) fighting words; (2) defamation; (3) obscenity; (4) profanity; (5) speech or writing used to commit acts in violation of a criminal statute; (6) child pornography; and (7) speech that is intended to incite imminent unlawful action, and likely to produce such action.[74] This last category of low value speech, as promulgated in *Brandenburg v. Ohio*,[75] is most relevant to the inquiry at hand.

C. Brandenburg *and the Incitement Test*

Brandenburg, a Ku Klux Klan leader, invited a local television reporter to attend a local Klan rally.[76] During the event, Brandenburg made derogatory remarks about African-Americans and Jews, and at one point stated that "'[i]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengence taken.'"[77] Brandenburg was subsequently convicted under the Ohio criminal syndicalism statute for "'[a]dvocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform[,]'" and for "'[v]oluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.'"[78] The Supreme Court held that Brandenburg's words constituted mere advocacy of violence rather than incitement of immediate lawless activity, and were therefore protected by the First Amendment.[79] According to the Court:

> 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

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[73] *See* Block, *supra* note 41, at 805; *see also* Gregory Akselrud, Comment, *Hit Man: The Fourth Circuit's Mistake in* Rice v. Paladin Enters., Inc., 19 LOY. L.A. ENT. L.J. 375, 379 (1999) (quoting Herceg v. Hustler Mag., Inc., 814 F.2d 1017, 1020 (5th Cir. 1987)); Ausness, *supra* note 35, at 639 (stating that "government cannot regulate core speech on the basic subject matter or viewpoint unless it shows that the regulation in question is necessary to serve a compelling governmental interest").

[74] *See McCollum*, 202 Cal. App. 3d at 999-1000; *see also DeFilippo*, 446 A.2d at 1041; Ausness, *supra* note 35, at 640-41.

[75] 395 U.S. 444 (1967).

[76] *See id.* at 445.

[77] *Id.* at 446.

[78] *Id. at* 444-45 (quoting OHIO REV. CODE ANN. § 2923.13).

[79] *See id.* at 447-48.

> to inciting or producing imminent lawless action and is likely to incite or produce such action.[80]

The Court consequently declared the Ohio syndicalism statute unconstitutional for punishing constitutionally protected speech.[81] Pursuant to the Brandenburg test:

> [T]he government may not suppress speech which inspires violence unless it can show that the speaker explicitly advocates some sort of unlawful action, that the speaker intended to incite or produce such action, that there was a high likelihood that such unlawful action would occur, and that the occurrence of such action was imminent.[82]

Defendants will not be entitled to First Amendment protection, and will thus be subject to tort liability, in cases where the court determines that they intended to incite imminent unlawful activity.[83] But the abstract advocacy of unlawful conduct, as the *Brandenburg* Court emphasized, does not remove the defendant's speech from First Amendment protection.[84]

D. *Applying the Incitement Test to Media Defendants*

In tort actions in which media defendants have asserted the constitutional right to free speech, courts have regularly employed the *Brandenburg* incitement test to determine whether the defendants' conduct fell within the scope of the First Amendment, or instead constituted low-value speech.[85] Because plaintiffs must demonstrate that the defendant specifically intended to incite imminent unlawful activity, they rarely recover damages in light of the difficulty of establishing intent.[86] Intent "requires a subjective de-

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[80] *Id.* at 447.

[81] *See id.* at 448-49.

[82] Ausness, supra note 35, at 653; *see also* Akselrud, *supra* note 73, at 382-83.

> It is important to recognize that Brandenburg and its progeny developed a two-part test for examining the advocacy of unlawful conduct. First, a court must consider whether the speech was directed to incite or produce imminent lawless action as opposed to mere abstract advocacy, not directed at producing any type of immediate activity. Second, a court must consider likelihood by determining whether the test as a whole forbids protection of any speech that is directed to inciting or producing imminent lawless action and is likely to produce such action.

Id.

[83] *See Brandenburg*, 395 U.S. at 447.

[84] *See id. at* 448 ("'The mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.'") (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).

[85] *See* Ausness, *supra* note 35, at 653.

[86] *See* Wood & Hirokawa, *supra* note 54, at 55 (stating that "plaintiffs can rarely show that defendants actually intended to incite violence").

sire on the part of the defendant to cause violence or knowledge that violence was substantially certain to result. The mere possibility, or even the probability, that some violent acts might occur will not satisfy this requirement."[87] In addition, the plaintiffs must identify the particular words or acts that incited imminent lawless activity. Media defendants can effectively shield themselves from liability by asserting that an individual's unlawful conduct was not caused by one specific television program or movie, but was instead the result of her continuous exposure to violent material.[88]

E. *In the Aftermath of* Brandenburg: Hess v. Indiana

The *Brandenburg* incitement standard was subsequently reaffirmed in *Hess v. Indiana*.[89] This case stemmed from an antiwar demonstration on the campus of Indiana University, during which Hess was arrested, and subsequently convicted, pursuant to Indiana's disorderly conduct statute.[90] The lower courts determined that Hess had intended to incite immediate disorder, and that his speech thus fell outside the scope of the First Amendment.[91] The Supreme Court, however, upheld the appellant's right to free speech on the ground that his remarks were not directed at an identifiable individual or group, and were not intended to incite, or likely to produce, imminent unlawful action.[92] The fact that his words had a tendency to incite violence, the Court held, did not warrant the imposition of criminal punishment.[93]

III. Analysis of Tort Actions Brought Against Media Defendants, As Well As Against the Producers and Sponsors of Entertainment Events

Courts have consistently absolved media defendants, as well as the producers and sponsors of entertainment events, of liability in negligence actions. In assessing whether these defendants should be held responsible for the plaintiffs' injuries, courts have demon-

87 Ausness, *supra* note 35, at 659-60 ("The imminence requirement would be difficult to satisfy in situations where a viewer is subjected to violent material over a long period of time rather than responding immediately to a specific stimulus.").

88 *See id.*

89 414 U.S. 105 (1973).

90 *See id.* at 107 (explaining that the arresting officer overheard Hess yell, "We'll take the fucking streets later," or "We'll take the fucking streets again").

91 *See id.* at 108.

92 *See id.* at 107-08.

93 *See id.* at 109 ("[S]ince 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.'").

strated a disinclination to impose liability in the absence of a duty or an intention to incite. While extensive case law has been formulated on this issue over the past three decades, this Note primarily focuses on the more recent cases.

A. *Tort Actions Unsuccessfully Brought Against Media Defendants*

James v. Meow Media, Inc.,[94] is one recent case in which media defendants were absolved of liability for a consumer's criminal conduct.[95] After fourteen-year-old Michael Carneal fatally shot three Kentucky high school students, the decedents' parents filed a negligence action against the producers and distributors of *The Basketball Diaries*,[96] a violent movie that allegedly provoked the shooting spree, as well as the creators and distributors of violent video games and Internet materials.[97]

The plaintiffs argued, in part, that the defendants breached their duty of care in that they "[k]new or should have known that copycat violence would result from the use of their products and materials[,]" and that they "[k]new or should have known that their products and materials created an unreasonable risk of harm because minors would be influenced by the effect of their products and materials and then would cause harm."[98]

The district court, however, ruled that because the shooting spree was not reasonably foreseeable, the defendants owed no duty upon which liability could be imposed.[99] The court recognized that the imposition of liability would require media defendants "to ascertain the mental condition of consumers before marketing their materials."[100] It further held that Carneal's criminal activity constituted an unforeseeable intervening act that broke the chain of causation between the defendants' dissemination of their products and the students' deaths.[101] The court consequently dismissed the plaintiffs' suit.[102]

Another recent case, *Davidson v. Time Warner, Inc.*,[103] stems

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94 90 F. Supp. 2d 798 (W.D. Ky. 2000).
95 *See id.*
96 THE BASKETBALL DIARIES (New Line Cinema 1995).
97 *See James*, 90 F. Supp. 2d at 798.
98 *Id.* at 801-02.
99 *See id.* at 803 ("It was clearly unreasonable to expect Defendants to have foreseen Plaintiffs' injuries from Michael Carneal's actions. Because the injuries were unforeseeable, Defendants did not owe a duty of care upon which liability can be imposed.").
100 *Id.* at 804.
101 *See id.* at 808.
102 *See id.* at 806. While the civil action was dismissed, Michael Carneal was found guilty of second-degree murder and sentenced to twenty-five years in prison. *See id.* at 800.
103 1997 U.S. Dist. LEXIS 21559 (S.D. Tex. Mar. 31, 1997).

from the murder of Bill Davidson, a Texas State Trooper, by Ronald Howard, a gang member who had been listening to Tupac Shakur's rap album, *2Pacalypse Now*,[104] immediately before the time of the shooting.[105] Davidson's family subsequently filed a negligence action against Shakur and the producers and distributors of the album.[106] In their complaint, the plaintiffs alleged that the defendants produced violent music that proximately caused the officer's death, and further contended that the music was not protected under the First Amendment.[107]

The defendants, the district court concluded, owed no duty to the deceased in light of the fact that the homicide was unforeseeable.[108] "Considering the murder of Officer Davidson was an irrational and illegal act, Defendants [were] not bound to foresee and plan against such conduct."[109] In the absence of a legal duty, the court refused to impose liability upon the defendants.[110] Prior to Officer Davidson's murder, there had been no other reported instance of violence supposedly provoked by Shakur's album.[111] While Howard claimed that the music had inspired him to kill,[112] the record indicated that Howard had been driving a stolen vehicle at the time Davidson stopped him for an unrelated traffic violation, and that he committed the murder to avoid his arrest.[113]

In addition, the court reasoned that while the probability of harm was low, the burden of preventing the harm was high.[114] "To create a duty requiring Defendants to police their recordings would be enormously expensive and would result in the sale of only the most bland, least controversial music."[115] This, in turn, would "prevent listeners from accessing important social commentary."[116] As per the constitutional argument, the court ruled that the music, although violent, was constitutionally protected on the ground that Shakur did not intend to incite imminent illegal con-

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104 TUPAC SHAKUR, *Crooked Ass Nigga, on* 2PACALYPSE NOW (Amaru/Jive 1998). At least one song, "Crooked Ass Nigga," contains lyrics that describe the commission of violence against police officers. *See id.*

105 *See Davidson*, 1997 U.S. Dist. LEXIS 21559, at *4.

106 *See id.* at *3-4.

107 *See id.* at *6.

108 *See id.* at *40.

109 *Id.* at *41.

110 *See id.*

111 *See id.* at *42.

112 *See id.* at *4.

113 *See id.* at *40.

114 *See id.* at *37.

115 *Id.*

116 *Id.* at *71.

duct.[117] The homicide was instead the result of Howard's unforeseeable and unreasonable response to Shakur's music.[118]

In *McCollum v. CBS, Inc.*,[119] John McCollum, a nineteen-year-old male with a history of alcohol abuse and mental problems, committed suicide after repeatedly listening to Ozzy Osbourne's album,[120] *Blizzard of Oz*.[121] McCollum's parents subsequently brought suit against Osbourne, as well as against the producers and distributors of Osbourne's album.[122] The plaintiffs alleged that a special relationship existed between Osbourne and his listeners,[123] and that:

> The defendants knew, or should have known, that it was foreseeable that the music . . . would influence the emotions and behavior of individual listeners such as John who, because of their emotional instability, were peculiarly susceptible to such music . . . and that such individuals might be influenced to act in a manner destructive to their person or body.[124]

They further contended that Osbourne incited their son to commit suicide, and that listening to the music proximately caused his premature death.[125]

The Court of Appeals of California, however, held that the defendants owed no duty to the deceased, on the ground that John's suicide constituted an unforeseeable risk.[126] His suicide was the irrational response of an emotionally unstable individual that the defendants could not have reasonably anticipated.[127] The appellate court also ruled that the music was not intended to incite immediate suicidal acts, and therefore fell within the scope of the First Amendment.[128]

The United States District Court for the Middle District of Georgia later reaffirmed the *McCollum* decision in *Waller v. Osbourne*.[129] In this case, the plaintiffs brought a wrongful death action against Ozzy Osbourne and the producers and distributors of

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117 *See id.* at *65.
118 *See id.* at *69.
119 202 Cal. App. 3d 989 (Cal. Ct. App. 1988).
120 *See id.* at 994-95.
121 OZZY OSBOURNE, BLIZZARD OF OZ (Jet 1980).
122 *See McCollum*, 202 Cal. App. 3d at 993-94.
123 *See id.* at 996.
124 *Id.* at 997.
125 *See id.* at 997.
126 *See id.* at 1005.
127 *See id.*
128 *See id.* at 1000-01 ("It is not enough that John's suicide may have been the result of an unreasonable reaction to the music; it must have been a specifically intended consequence.").
129 763 F. Supp. 1144 (M.D. Ga. 1991).

his album, *Blizzard of Oz*. They alleged that one of Osbourne's songs, *Suicide Solution*,[130] contained subliminal messages that incited their teenage son to commit suicide.[131] Consistent with the *McCollum* holding, the *Waller* court ruled that the music was not intended to cause imminent acts of suicide.[132] It consequently granted the defendants' motion for summary judgment on the ground that the music was protected under the First Amendment.[133]

B. *Civil Suits in which the Producers and Sponsors of Entertainment Events Were Relieved of Liability*

In addition to reviewing civil actions involving media defendants, courts have also addressed whether producers and sponsors of entertainment events should be held liable when spectators sustain injuries as a result of the criminal acts of a third party. The producers and sponsors of such events have repeatedly been relieved of liability on the ground that they could not have reasonably foreseen, and therefore guarded against, the risk.

In *Barefield v. City of Houston*,[134] the appellants, who were leaving a rock concert at the Sam Houston Coliseum, sustained injuries when they were attacked by a group of teenagers outside the Coliseum.[135] Subsequently, the plaintiffs filed a tort action against the producers of the concert, the security company hired to safeguard the premises, and the City of Houston.[136] The complaint alleged that the defendants acted negligently based on the assumption that they "[k]new or should have known of the unreasonably dangerous condition, i.e., the potential for criminal activity, and failed to correct the condition or warn appellants."[137]

The Texas Court of Appeals, however, absolved the producers and the security company of liability because the criminal acts occurred outside of the premises controlled by the defendants.[138] The appellate court further held that the defendants could not have reasonably anticipated the criminal assault.[139] The court con-

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130 OZZY OSBOURNE, *Suicide Solution*, *on* BLIZZARD OF OZ (Jet 1980).
131 *See Waller*, 763 F. Supp. at 1145.
132 *See id.* at 1151 (holding that "there is no evidence that defendants' music was intended to produce acts of suicide, and likely to cause imminent acts of suicide; nor could one rationally infer such a meaning from the lyrics").
133 *See id.*
134 846 S.W.2d 399 (Tex. App. 1992).
135 *See id.* at 401-02.
136 *See id.* at 401.
137 *Id.* at 402.
138 *See id.* at 403.
139 *See id.* at 403-04.

cluded that the defendants did not owe the appellants a duty of care, and affirmed the defendants' motion for summary judgment.[140] The court explained, "the general knowledge of criminal activity in the Houston downtown area is not enough to raise a fact issue that the confrontation between appellants and the group of attackers was foreseeable."[141]

Similarly, in *Gragg v. Wichita State University*,[142] the heirs of Barbara Gragg, who was shot and killed following a fireworks display at Wichita State University, brought a wrongful death and survival action against the University, its athletic corporation, and the corporate sponsors of the event.[143] They alleged that "[t]he defendants failed to provide adequate security for the event, failed to install adequate lighting on the campus, and failed to warn of the potential for crime on or near the campus."[144]

The Supreme Court of Kansas, recognizing that the shooting was unforeseeable, held that the defendants owed no legal duty to protect Gragg from the criminal acts of a third party.[145] In the court's analysis, it paid particular attention to the fact that there had been no other shootings or violent assaults before or after the yearly fireworks display prior to this incident.[146] As in *Barefield*, the *Gragg* court affirmed the defendants' motion for summary judgment.[147]

C. *Incitement of Violence Liability*

The rare instances in which courts have held media defendants liable for a plaintiff's injuries can be easily distinguished from the *Jenny Jones* case. In these exceptional cases, the defendants specifically *intended* to incite imminent criminal conduct. For example, in *Rice v. Paladin Enterprises*,[148] James Perry murdered Mildred Horn, her eight-year-old quadriplegic son, Trevor, and Trevor's nurse, Janice Saunders.[149] Lawrence Horn, Mildred Horn's ex-husband, had hired Perry to murder his family so that he could receive the $2 million that Trevor had been awarded in a medical malpractice settlement.[150] Perry, in preparing for and executing the triple

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140 *See id.* at 404.
141 *Id.* at 403.
142 261 Kan. 1037 (Kan. 1997).
143 *See id.* at 1039.
144 *Id.*
145 *See id.* at 1057.
146 *See id.* at 1043.
147 *See id.* at 1062.
148 128 F.3d 233 (4th Cir. 1997).
149 *See id.* at 239.
150 *See id.*

homicide, carefully followed the instructions provided in a step-by-step technical manual for contract killers.[151] The decedents' relatives and representatives filed a wrongful death action against Paladin Enterprises, the publisher of the manual, alleging that Paladin had aided and abetted Perry in executing the triple homicide.[152] Unlike the defendants in the cases previously discussed, Paladin actually stipulated that it had *intended* to attract and assist criminals who sought information on how to properly commit a contract killing.[153] Paladin contended, however, that it was protected under the First Amendment.[154] The *Rice* court nevertheless rejected this argument on the ground that "[s]peech – even speech by the press – that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment."[155] In fact, the detailed, concrete instructions contained in the manual represented "[t]he antithesis of speech protected under *Brandenburg*."[156] Since Paladin specifically intended that its manual be employed to carry out contract killings, the *Rice* court concluded that Paladin could be held civilly liable for the triple homicide.[157]

In another case, *Byers v. Edmondson*,[158] Sarah Edmonson and Benjamin Darrus, while emulating the characters portrayed in the movie *Natural Born Killers*,[159] seriously wounded Patsy Byers during an armed robbery.[160] Byers subsequently brought a negligence and intentional tort action against the producers, directors, and distributors of the movie.[161] She alleged that the defendants were liable on the ground that they knew or should have known that the movie would inspire viewers such as Edmonson and Darrus to commit violent crimes.[162]

The Louisiana Court of Appeals held that the intentional tort claim could proceed to trial because Byers had alleged facts sufficient to establish a cause of action.[163] The suit was not barred by the First Amendment, in light of the fact that the defendants intended to incite immediate lawless activity.[164] However, the *Byers*

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151 *See id.*
152 *See id.* at 241.
153 *See id.* at 241.
154 *See id.* at 242.
155 *Id.*
156 *Id.* at 249.
157 *See id.*
158 712 So. 2d 681 (La. App. 1998).
159 NATURAL BORN KILLERS (Warner Bros. 1994).
160 *See* 712 So. 2d at 683.
161 *See id.*
162 *See id.* at 684.
163 *See id.* at 687-88.
164 *See id.* at 691 ("It is only by accepting the allegations in Byers' petition as true that we

court affirmed the dismissal of the negligence action on the ground that "[a] defendant does not owe a duty to protect a person from the criminal acts of third parties absent a special relationship which obligates the defendant to protect the plaintiff from such harm."[165] In the absence of a special relationship between Byers and the defendants, the court declined to impose a duty of care.[166]

IV. PROCEDURES EMPLOYED TO RECRUIT, SCREEN, AND COUNSEL GUESTS, AND REACTIONS TO THE *JENNY JONES* VERDICT

These tort actions provide a framework for understanding the scope of a talk show's legal responsibility toward its guests. In light of the courts' repeated unwillingness to impose liability upon media defendants that did not specifically intend to incite unlawful activity,[167] television executives, lawyers, and constitutional experts strongly criticized the *Jenny Jones* verdict.[168] Before discussing these reactions, however, it is imperative to set forth the procedures which talk shows currently employ to recruit, screen, and counsel their guests.

A. *Recruiting Guests*

Talk shows rely on various devices to recruit a panel of guests that will hold the audience's attention for a one-hour segment.[169] The applicant pool includes:

> viewers who call in response to an announced theme; those who read an ad for prospective guests in the classified section of local

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conclude that the film falls into the imminent lawless activity exception to the First Amendment.").

165 *Id.* at 687.

166 *See id.*

167 *See, e.g.*, James v. Meow Media, Inc., 90 F. Supp. 2d 798 (W.D. Ky. 2000) (holding that the media defendants could not be held liable for a high school shooting on the ground that the injuries were unforeseeable); Davidson v. Time Warner, Inc., 1997 U.S. Dist. LEXIS 21559 (S.D. Tex. Mar. 31, 1997) (refusing to impose liability upon defendants who produced and distributed a rap album on the ground that defendants did not intend to incite imminent unlawful conduct, and that the third party's actions were unforeseeable); McCollum v. CBS, Inc., 202 Cal. App. 3d 989 (Cal. Ct. App. 1988) (holding that defendants were not liable for producing and distributing a music album that allegedly caused a listener to commit suicide); Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991) (refusing to impose liability upon defendants for producing and distributing a music album on the ground that "there [was] no evidence that defendants' music was intended to produce acts of suicide, and likely to cause imminent acts of suicide, nor could one rationally infer such a meaning from the lyrics").

168 *See, e.g.*, Farhi, *supra* note 1, at A1; Braxton & Lowry, *supra* note 11, at A1; Bradsher, *supra* note 9, at A10; Grant, *supra* note 168, at 28.

169 *See* Stuart Fischoff, *Confessions of a TV talk show shrink, negative aspects of talk shows*, PSYCHOL. TODAY, Sept. 1995, at 38.

> newspapers; those who list themselves in publications devoted to specific oddities of human behavior. Or the bookers call psychotherapists or other personal-service specialists and ask them to bring their patients on as guests for particular theme shows.[170]

In addition, talk shows search the Internet for exciting guests and stories, and also invite viewers who have written emotional letters to the host to appear on the show.[171] Producers further entice guests by paying for their airfare, hotels, and daily expenses.[172] Individuals enthusiastically participate on the panels in order to meet their favorite host in person, and to experience luxuries such as first-class transportation and hotel accommodations that they otherwise could not afford.[173]

B. *Screening Guests*

Once the recruiting process is completed, most talk shows interview prospective guests before they appear on a particular segment, and require the panelists to sign waivers verifying the truthfulness of their stories.[174] Guests must also provide birth certificates, marriage records, police records, and other legal documentation to authenticate their claims.[175] Furthermore, a majority of talk shows, including *Sally Jesse Raphael*, *Maury Povich*, and *Jerry Springer*, screen their guests for psychological problems prior to the show.[176]

In the aftermath of the *Jenny Jones* tragedy, programs such as *Sally Jesse Raphael* continue to invite surprise guests, but inform panelists of the possibility of embarrassing onstage revelations.[177] Meanwhile, guests who participate on *Jerry Springer* must sign waivers that set forth all possible topics that might be addressed on the segment.[178] In order to appear on *Jerry Springer*, "[t]he potential panelist must check off on each scenario, saying they would not be overly upset if a specific revelation or situation were to occur."[179] In the aftermath of the *Jenny Jones* incident, talk shows have imple-

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170 *Id.*
171 *See* Marilyn Stasio, *When talk shows become horror shows*, COSMOPOLITAN, Oct. 1995, at 250, 251-52.
172 *See id.* at 252.
173 *See* Fischoff, *supra* note 169, at 38.
174 *See* Donna Petrozzello, *'Jenny' Trial Prompts Debate on Guest Screening*, DAILY NEWS, Apr. 6, 1999, at 93; *see also* Stasio, *supra* note 171, at 251.
175 *See* Stasio, *supra* note 171, at 251.
176 *See* Petrozzello, *supra* note 174, at 93.
177 *See* Cynthia Littleton, *supra* note 14, at 13.
178 *See* Braxton & Lowry, *supra* note 11, at A1.
179 *Id.*

mented these screening mechanisms as additional precautions designed to avoid future liability.[180]

C. *Counseling Guests*

In addition to screening their panelists for psychological problems, most talk shows also provide psychiatric counseling for their guests.[181] "In no way do the talk shows want you to think there's any truth in the old industry joke 'Pick 'em up in a limo, send 'em home in a cab.'"[182] The *Montel Williams Show*, for example, adopted an "after-care" counseling program in which guests can discuss their problems with a therapist following the show.[183] *Sally Jesse Raphael* employs an on-site therapist to counsel troubled guests.[184]

Jamie Huysman, a clinical social worker and addiction counselor who appeared as an expert on *The Geraldo Rivera Show*, went so far as to create the AfterCare Program, which is dedicated to assisting former talk show guests cope with their psychological problems.[185] Participating talk shows refer their guests to the AfterCare Program, which in turn provides free counseling services.[186] Furthermore, Huysman's staff "[t]rains producers to screen potential guests for signs that it might be detrimental for them to go on TV[,]" and "[f]ollows the progress after the show of each guest and family members deemed potentially troubled."[187] Since its creation in 1991, the AfterCare Program has assisted approximately two hundred guests on *The Geraldo Rivera Show*, and about fifty guests on the *Leeza* show.[188] Certain talk shows such as *Jerry Springer*, however, have not taken advantage of the AfterCare Program.[189]

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180 *Compare id.*, *and* Petrozzello, *supra* note 174, at 93 (describing various procedures employed to screen guests), *with* Stasio, *supra* note 171, *and* Fischoff, *supra* note 169 (explaining that talk shows do not screen their guests and that panelists are often surprised by onstage revelations).

181 *See* Stasio, *supra* note 171, at 250; *see also* Littleton, *supra* note 14, at 13.

182 Stasio, *supra* note 171, at 250.

183 *See* Petrozzello, *supra* note 174, at 93.

184 *See* Braxton & Lowry, *supra* note 11, at A1.

185 *See* Rachel La Corte, *When Camera Shuts Off, Counselor Picks Up Where Talk Shows Ends*, CHI. TRIB., May 20, 1999, at 2.

186 *See id.*

187 *Id.*

188 *See id.*

189 *See id.*

D. *Reactions to the* Jenny Jones *Verdict*

1. Opposition to the Verdict

In the *Jenny Jones* case, the Amedure family alleged, in part, that the show did not properly screen its guests for psychological problems, and therefore acted negligently.[190] While the jury rejected this argument,[191] it nevertheless awarded the plaintiffs a twenty-five million dollar verdict on the ground that the show created a volatile situation by failing to inform Jonathan Schmitz that the segment addressed same-sex crushes.[192] The verdict, which diverged from previous tort actions involving media defendants,[193] was strongly denounced by many members of the entertainment industry and the legal profession.[194]

Recognizing that it would place an onerous burden on talk shows, those in, or associated with, the television industry promptly attacked the verdict.[195] According to Jim Paratore, President of Telepictures Productions, which produces the *Jenny Jones* show, the decision is "'[g]oing to have a chilling effect on everyone . . . . [Television executives] are put on notice that you better screen the mental backgrounds of the participants and be responsible for their behavior after the show, whether it's three days, three months or three years.'"[196] Former talk-show host Phil Donahue agreed, stating that that the verdict "'[c]omes very close to saying that producers have a responsibility to administer a sanity test for all prospective guests.'"[197] An anonymous producer further commented that extensive screening would not have prevented Jonathan Schmitz from committing murder:[198] "'If he was gonna murder, he was gonna murder. No one particular thing can change a docile person into a murderer, whether it's going on a talk show or going into a bar. That guy was definitely disturbed to begin with.'"[199]

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190 *See* Farhi, *supra* note 1, at A1; *see also* Kirk, *supra* note 3, at 1; *see also* Cohen, *supra* note 6, at 70.

191 *See After the Verdict*, *supra* note 4.

192 *See* Farhi, *supra* note 1, at A1; *see also* Bradsher, *supra* note 9, at A10.

193 *See, e.g.*, James v. Meow Media, Inc., 90 F. Supp. 2d 798 (W.D. Ky. 2000); Davidson v. Time Warner, Inc., 1997 U.S. Dist. LEXIS 21559 (S.D. Tex. Mar. 31, 1997); Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991); McCollum v. CBS, Inc., 202 Cal. App. 3d 989 (Cal. Ct. App. 1988).

194 *See, e.g.*, Farhi, *supra* note 1, at A1; Braxton & Lowry, *supra* note 11, at A1; Bradsher, *supra* note 9, at A10; Grant, *supra* note 168, at 28.

195 *See, e.g.*, Farhi, *supra* note 1, at A1; Braxton & Lowry, *supra* note 11, at A1; Stasio, *supra* note 171, at 250.

196 Braxton & Lowry, *supra* note 11, at A1.

197 *Turning Point*, *supra* note 1, at A10.

198 *See* Stasio, *supra* note 171, at 251.

199 *Id.*

Opponents of the decision also criticized the jury for using the opportunity to express its general disapproval toward the entertainment industry.[200] As Robert Lichter of the Center for Media and Public Affairs, a not-for-profit organization that studies media content, stated, "'[w]henever juries get a chance, they say [to the news and entertainment industries], 'We don't like you, we don't like what you're doing, and we want to make you pay for it.''"[201] Similarly, Jim Paratore believed that rather than addressing the particular facts of the case, Geoffrey Fieger, the Amedures' attorney, persuaded the jury "'to send a message to talk shows.'"[202] Executives such as Paratore and Larry Little, president of Big Ticket Productions, which produces *Judge Judy* and *Judge Joe Brown*, expressed concern that the verdict would have a chilling effect on any television show that incorporates an element of surprise.[203]

While talk shows have been attacked for their offensive content, members of the industry have disclaimed responsibility.[204] Lora Wiley, a freelance writer who helped organize *Jerry Springer* and also worked for the *Geraldo Rivera Show*, contends that public criticism toward talk shows is misplaced, and instead blames the guests and audience members.[205] In the past, both Jerry Springer and Sally Jesse Raphael have also denied charges that they exploit their guests' vulnerabilities in order to boost ratings.[206]

Likewise, many lawyers and constitutional experts rebuked the verdict, arguing that it turned the First Amendment on its head and undermined the concept of personal responsibility.[207] As Floyd Abrams, a leading constitutional lawyer, emphasized, "'I think that the public is entitled to watch these shows if it wishes and that these shows are protected [by the First Amendment]."[208] Eugene Volokh, a professor of constitutional law at the University of California at Los Angeles, also believed that the case should have been dismissed in light of the guarantees afforded to the media by the First Amendment.[209] Both Floyd Abrams and Zizi Pope, an attorney for Warner Brothers, feared that the decision would foster

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200 *See, e.g.*, Farhi, *supra* note 1, at A1; Braxton & Lowry, *supra* note 11, at A1.

201 Farhi, *supra* note 1, at A1.

202 Braxton & Lowry, *supra* note 11, at A1.

203 *See id.*

204 *See, e.g.*, Stasio, *supra* note 171; Braxton & Lowry, *supra* note 11, at A1.

205 *See* Stasio, *supra* note 171, at 252.

206 *See* Braxton & Lowry, *supra* note 11, at A1.

207 *See, e.g.*, Bradsher, *supra* note 9, at A10; *Turning Point*, *supra* note 1, at A10; Farhi, *supra* note 1, at A1; Grant, *supra* note 168, at 28.

208 Bradsher, *supra* note 9, at A10.

209 *See Turning Point*, *supra* note 1, at A10.

self-censorship.[210] Robert O'Neil, director of the Thomas Jefferson Center for the Protection of Free Expression, agreed, noting that "'[t]he current trend toward imposing, or at least opening the potential to impose, civil liability against the media and entertainment producers is dangerous . . . simply because the potential for litigation is almost certain to chill the exercise of creativity even within protected areas.'"[211]

Meanwhile, others in the legal profession denounced the verdict as an attack against the entire entertainment industry.[212] According to Robert Rotunda, a law professor at the University of Illinois in Champaign, "'[t]he media are considered wealthy, having deep pockets. People are looking around and saying 'Somebody should pay for this.''"[213] Zizi Pope reiterated this very point: "'The media has become an unfortunate scapegoat . . . . It's convenient to blame the media instead of accepting personal responsibility.'"[214]

2. Support for the Verdict

Opposition to the verdict, however, was not unanimous.[215] "Critics of daytime talk shows hailed the hefty verdict as a stinging rebuke to trash television."[216] In particular, proponents of the decision asserted that it would encourage talk shows to assume responsibility for their actions.[217] Tom Shales, a media critic from the *Washington Post*, noted that these programs intentionally sought "to provoke hostility and 'titillate viewers with the prospect of violence.'"[218] Geoffrey Fieger further alleged that the *Jenny Jones* show willingly endangered its guests' welfare in order to improve ratings. According to Fieger, the show "'[s]olicited a victim . . . picked a murderer and provided a motive. They did everything in this case except pull the trigger.'"[219] At trial, he urged the jury to "'be a voice of justice for us all against an industry full of empty souls and absent consciences.'"[220] In order to avoid future charges of negligence, Fieger endorsed the need for talk shows to screen their

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210 *See* Farhi, *supra* note 1, at A1.
211 Grant, *supra* note 168, at 28.
212 *See, e.g.*, Jones, *supra* note 12, at 1; Farhi, *supra* note 1, at A1.
213 Jones, *supra* note 12, at 1.
214 Farhi, *supra* note 1, at A1.
215 *See, e.g.*, Cohen, *supra* note 6, at 70; Stasio, *supra* note 171, at 250; *Turning Point*, *supra* note 1, at A10; Farhi, *supra* note 1, at A1; Bradsher, *supra* note 9, at A10.
216 Cohen, *supra* note 6, at 70.
217 *See, e.g.*, Braxton & Lowry, *supra* note 11, at A1; Jones, *supra* note 12, at 1.
218 Stasio, *supra* note 171, at 250.
219 *Turning Point*, *supra* note 1, at A10.
220 Farhi, *supra* note 1, at A1.

guests for emotional problems, and to provide subsequent psychological counseling.[221] Vicki Abt, a Penn State-Ogontz sociologist and author of *Coming After Oprah: Cultural Fallout in the Age of the TV Talk Show*, similarly stressed that the tragedy could have been prevented had the show properly screened its panelists.[222]

Politicians and academicians also provided favorable commentary on the verdict.[223] A spokesman for Senator Joseph Lieberman, a prominent critic of the entertainment industry, stated that, "'the real point here is that behavior, and in this case irresponsible behavior, has consequences . . . . Maybe this decision will cause the media to think twice before continuing with this exploitative behavior. Shame has not been enough to affect their conduct, but maybe a decision that will address their bottom line will.'"[224] Ken Bode, Dean of Northwestern University's Medill School of Journalism, defended the verdict on similar grounds: "'[I]f the way to get [talk shows'] attention is the checkbook, perhaps that will restore some propriety . . . . Sometimes you can't accomplish what needs to be accomplished, other than through the courthouse.'"[225] Former Education Secretary William J. Bennett, meanwhile, supported the verdict as an effective means for the public to express its disgust with the entertainment industry.[226] In light of these conflicting perspectives over the *Jenny Jones* verdict, the question as to whether talk shows should be held civilly liable, when one guest murders another guest following the show, remains unsettled.

V. Conclusion and Recommendations

A. *Applying the Risk-utility Balancing Test to Talk Shows*

Despite the unprecedented verdict announced in the *Jenny Jones* trial, prior case law overwhelmingly demonstrates that talk shows should be absolved of liability when one guest later murders another guest.[227] Pursuant to the risk-utility balancing test employed in negligence actions, the burden of guarding against the injury significantly outweighs the risk of harm.

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221 *See* Bradsher, *supra* note 9, at A10.

222 *See Turning Point*, *supra* note 1, at A10.

223 *See, e.g.*, Braxton & Lowry, *supra* note 11; Jones, *supra* note 12, at 1; Bradsher, *supra* note 9, at A10.

224 Braxton & Lowry, *supra* note 11, at A1.

225 Jones, *supra* note 12, at 1.

226 *See* Bradsher, *supra* note 9, at A10.

227 *See, e.g.*, James v. Meow Media, Inc., 90 F. Supp. 2d 798 (W.D. Ky. 2000); Davidson v. Time Warner, Inc., 1997 U.S. Dist. LEXIS 21559 (S.D. Tex. Mar. 31, 1997); Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991); McCollum v. CBS, Inc., 202 Cal. App. 3d 989 (Cal. Ct. App. 1988).

1. Risk of Harm

As per the likelihood of harm, the murder of one panelist by a fellow panelist is not reasonably foreseeable. Foreseeability, as mentioned earlier, represents the primary factor in the balancing test.[228] While talk shows tape segments on a regular basis, there have only been two reported cases of talk show murders. Talk shows cannot be expected to guard against this remote possibility of harm. Ergo, they owe no legal duty to their guests after the show. Furthermore, one is not bound to anticipate the criminal conduct of a third party in the absence of a special relationship.[229] Although talk shows have a legal obligation to ensure their guests' well-being on the premises, this duty ends once the panelists return home.

2. Burden of Preventing the Harm

The burden of preventing the harm, on the other hand, would be substantial. Imposing a duty of care upon talk shows might critically undermine the right to free speech. Talk shows would likely adopt a policy of self-censorship to shield themselves from liability. Because these programs would only address the least controversial topics, the public would consequently be denied access to a free marketplace of ideas. The imposition of a duty would also prove fiscally harmful, in that former guests might initiate expensive civil lawsuits against talk shows on a more frequent basis.

3. Constitutional Considerations

In addition, the risk-benefit analysis also implicates important constitutional issues. Talk shows, as a form of entertainment, fall within the scope of the First Amendment.[230] The constitutional guarantee of free speech enables these programs to address controversial topics, and to invite guests who espouse unpopular or dangerous viewpoints, without having to fear the repercussions. Talk shows offer a forum for groups located at the outer fringes of society that lack access to the mainstream media to voice their opinions. Society, in turn, benefits from the free exchange of ideas. In the absence of the protections afforded by the First Amendment, talk shows would likely focus on more conventional issues in order to shield themselves from liability.

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228 *See* Way v. Boy Scouts of Am., 856 S.W.2d 230, 234 (Tex. App. 1993).

229 *See* Taylor v. Shoney's, Inc., 726 So. 2d 519, 523 (La. Ct. App. 1999); *see also* Bill v. Superior Ct., 137 Cal. App. 3d 1002, 1011 (Cal. Ct. App. 1982); Barefield v. City of Hous., 846 S.W.2d 399, 403 (Tex. App. 1992).

230 *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

Although talk shows repeatedly address sensational topics, their content cannot be classified as low value speech. Of particular relevance to this inquiry is the incitement test, as originally formulated in *Brandenburg v. Ohio.*[231] Despite criticism that talk shows actively create a volatile onstage situation, talk shows do not intend to incite imminent unlawful action. Nor is there a high likelihood that one guest will subsequently murder a fellow guest. Segments are instead designed to capture the viewers' attention, even if that requires shocking the conscience.

B. *Lack of Proximate Cause*

Assuming *arguendo* that talk shows do owe a duty of care, plaintiffs will nevertheless be unable to prove, by a preponderance of the evidence, that the show's actions were the proximate cause of the murder.[232] The criminal conduct of a third party breaks the causal link between the taping of the segment and the guest's subsequent death. The third party's unlawful actions represent an unforeseeable intervening force. Rather than placing blame on the talk show, courts should instead enforce the principle of personal responsibility. Murder is often the irrational response of an emotionally unstable guest who cannot cope in a volatile environment. Talk shows cannot reasonably anticipate how such panelists will react, despite their efforts to screen guests for psychological problems prior to taping.

C. *Analysis of the* Jenny Jones *Case*

In light of existing case law, the *Jenny Jones* case was wrongly decided, and should therefore be overturned on appeal. The jury lacked sufficient legal grounds for imposing civil liability upon the *Jenny Jones* show. Although proper screening mechanisms might have revealed Jonathan Schmitz's extensive psychological problems, Schmitz should alone be held responsible for Scott Amedure's premature death. His criminal actions represent an unforeseeable intervening act against which the *Jenny Jones* show could not have reasonably anticipated. After all, this was the very first instance in which one guest murdered a fellow guest following the show. Producers had no reason to expect that Schmitz would react violently to Amedure's revelation, particularly in light of the fact that he had displayed no signs of embarrassment during the taping.

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231 395 U.S. 444 (1967).

232 *See* KEETON ET AL., *supra* note 24, § 41, at 263.

It should be carefully noted that Jonathan Schmitz had been drinking heavily and smoking marijuana prior to the murder, and that Amedure had left a suggestive note at Schmitz's residence after the segment had been taped. These events undeniably broke the chain of causation between the show's conduct and Amedure's death. In addition, Schmitz voluntarily appeared on the program, and could have reasonably anticipated that intimate secrets might be revealed, regardless of whether or not the producers accurately disclosed the nature of the segment. By placing blame on the *Jenny Jones* show, the jury undermined the concept of personal responsibility.

Rather than assessing the specific facts of the case, the jury instead exploited the opportunity to send a message not only to talk shows, but to the entire entertainment industry. Recognizing that the defendants had deep pockets, jurors rendered a costly verdict in order to deter the media from continuing to produce sexually explicit and violent material. By doing so, however, the jury turned the First Amendment on its head. The verdict will likely encourage self-censorship and open a Pandora's box of litigation against media defendants.

D. *Proposals*

In order to avoid future tragedies, talk shows must take the initiative by implementing additional safeguards to ensure their guests' emotional well-being. First and foremost, talk shows must rigorously screen all guests for psychological problems. In lieu of expending the majority of their resources on confirming the veracity of panelists' stories, these programs should instead establish a comprehensive set of procedures to determine whether potential guests are emotionally stable. The *Jenny Jones* tragedy might have been easily avoided had the show required all panelists to undergo extensive psychological screening prior to taping.

In addition to rigorous screening, talk shows should employ an on-site therapist or social worker to counsel guests both before and after the segment. A licensed professional can properly assess whether potential guests have the emotional stability to convey their personal stories on national television, and can also recommend appropriate treatments. The employment of an on-site therapist or social worker can therefore serve as an additional precaution to prevent distraught guests from resorting to the use of violence.

Talk shows should also offer free outside counseling to panel-

ists once they return home. Complex personal problems cannot be fully resolved in a one-hour time span. Guests are often in need of continued counseling with a therapist who can provide advice on a regular basis. Mental health professionals should rely upon the AfterCare program as a model for designing additional programs dedicated to helping former talk show guests cope with their problems. In order to maximize the effectiveness of these outreach programs, however, talk shows must recognize the importance of outside counseling, and inform guests of the available resources. In light of the adverse effects caused by public disclosure of private facts, producers should strongly recommend that guests take advantage of free counseling services.

To further shield themselves from liability, talk shows should require panelists to sign a disclaimer prior to taping. Such a disclaimer would explicitly and unambiguously state that the guests had read the agreement, and had waived any right to seek damages after their appearance. After all, guests voluntarily appear on these talk shows, cognizant of the fact that they may be humiliated on national television by intimate revelations. They nevertheless discount these risks in order to enjoy their fifteen minutes in the spotlight, not to mention the luxuries of free airfare and first-class hotel accommodations. In this context, a disclaimer would effectively shift accountability, and thereby preclude the viability of future lawsuits against talk shows.

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