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The Freedom to Speak and the Freedom to Listen: The Admissibility of the Criminal Defendant's Taste in Entertainment

History is filled with examples of an older generation recoiling at the cultural tastes of the young. Jazz, rock'n'roll, and even the waltz¹ were viewed with horror by elders when these art forms first became popular. During the recent past, emerging popular music, movies, and video games have been held responsible for inspiring everything from minor juvenile delinquency to mass murder—at least in the eyes of some segments of the public and the media.

Legal efforts against the makers and distributors of such entertainment, however, have been held in check by the First Amendment guarantee of freedom of speech.² For the most part, courts have rebuffed attempts to hold writers, artists, producers, and other makers of music, movies, games, or books civilly liable for criminal actions linked to these cultural products. For example, defendants prevailed on summary judgment when the parents of a teenage suicide victim sued rocker Ozzy Osbourne for

* Senior Lecturer, University of Washington School of Law. I am indebted to my former student, Lisa Rickenberg, whose independent study paper inspired this article. Lisa drew my attention to a number of cases discussed here. She was concerned about police targeting of suspects for cultural reasons—because of the music they listened to, or the alternative culture clothing they might be wearing.

¹ See the references to the controversy inspired by the waltz at Lori Heikkila, *Waltz*, at <http://www.centralhome.com/ballroomcountry/waltz.htm> (last visited Jan. 5, 2005); Bob January, *The Waltz*, at <http://www.bobjanuary.com/waltz.htm> (last visited Jan. 5, 2005).

² U.S. CONST. amend. I, cl. 2.

causing their child's death with lyrics about suicide.³ Similarly, the makers of the movie *Natural Born Killers* defeated an attempt to hold them liable for the murder of a teenage girl by boys said to be imitating the film.⁴ Producers and sellers of art and entertainment are not liable for the actions of those who consume their products. For similar reasons, legislative efforts to restrict these producers and sellers have also foundered in the courts.⁵

But courts have not been so solicitous of the First Amendment rights of those who make up the audience for these works. Evidence that the defendant viewed the movie *Natural Born Killers* has been introduced in a number of murder trials. In these and other criminal cases, courts have allowed evidence of the defendant's viewing or listening habits to show motive, intent, state of mind, or to support an aggravating factor at sentencing.⁶ In such cases the Constitution is rarely mentioned, even though the First Amendment has been held to protect consumers as well as the producers of First Amendment speech.⁷ And, while courts reject a causal link between art and crime when artists or the entertainment industry are civil defendants, the assumption of causation seems to underlie the admission of viewing, reading, or listening habits in criminal cases.

Why this seeming inconsistency in the protection of First Amendment rights? Is it an inconsistency? Courts and commentators are probably correct that allowing civil liability for the criminal acts of third persons inspired by one's artistic works would lead to a chilling effect and self-censorship. And, certainly, the First Amendment should not be an absolute bar to relevant evidence in a criminal prosecution. Nevertheless, the difference in treatment of producers and consumers reveals an ambivalence about some of the goods currently available in our "marketplace of ideas." Producers have a right to market anything, but consumers may be blamed for their choices.

Perhaps the difference is less about ambivalence and more

³ *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 188-89 (Ct. App. 1988).

⁴ *Byers v. Edmondson*, 2001-1184, 8-9 (La. App. 1 Cir. 6/5/02), *writ denied*, 2002-1811 (La. 10/4/02), 826 So. 2d 551, 557-58 (La. App. 2002); *see generally* *NATURAL BORN KILLERS* (Warner 1994); and *see infra* notes 64-77 and accompanying text.

⁵ *See infra* Part I.B.

⁶ *See infra* notes 92-107 and accompanying text.

⁷ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976).

about the different legal resources available to producers and criminal defendant consumers. The lawyers for entertainment defendants in civil suits always make strenuous First Amendment arguments, but criminal defense attorneys seem rarely to raise a constitutional objection to evidence of their clients' consumption of First Amendment works. If they object, it is on grounds of relevance, undue prejudice, or for some other evidentiary reason.⁸ The standard for relevance is fairly low, and trial courts are usually given wide discretion to make determinations of relevance and prejudice.⁹ This failure to make the constitutional arguments may be due simply to a lack of awareness or because the law in this area is underdeveloped. It may also be due to the heavy caseloads and low pay of many public defenders—factors which can lead to poor representation of criminal defendants. In our adversarial system, if the constitutional objections are not raised, the courts cannot rule on them.¹⁰ Thus, a difference in the quality of lawyering may be what has led to the different treatment of First Amendment consumers and producers in the courts.

At the very least, lawyers and courts should be aware of this apparent inconsistency and press judges to consider the criminal defendant's First Amendment rights when determining whether to admit evidence about the defendant's taste in movies or music. There is a very real danger that defendants will be prejudiced, even wrongfully convicted, because of jurors' hostility towards certain music, movies, books, or other cultural trappings. And, if some works are admitted as "criminal" or "depraved," courts will begin the slide down the slippery slope of judging the content of

⁸ FED. R. EVID. 401-03 and the state versions of these rules. Occasionally, the evidence is introduced and objected to under FED. R. EVID. 404(b) or its state counterpart.

⁹ Federal Rule of Evidence 401's definition of relevance, upon which most state court rules are based, favors broad admissibility and establishes a low threshold of relevance. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 1 FEDERAL EVIDENCE 391-92 (2d ed. 1994). Review of a relevance determination is often deferential. Peter Nicolas, *De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 SYRACUSE L. REV. 531, 540-42 (2004). Professor Nicolas notes that *de novo* review of a relevancy determination is appropriate where the dispute involves the materiality prong of relevance, but that a more deferential review of the probative worth prong makes sense, especially when a balancing of prejudice under Rule 403 is also involved. *Id.* at 542. The criminal cases under discussion in this article do not make these distinctions. See *infra* Part III.

¹⁰ U.S. v. Lazarus, 425 F.2d 638, 642-44 (9th Cir. 1970).

First Amendment material. In addition, the potential for a chilling effect on listeners' rights under the First Amendment is very real, as consumers may fear that their listening, viewing, or reading habits may make them targets of law enforcement. This fear may be amplified by the knowledge that such habits are now easily tracked through commercial records, such as credit card records or online shopping records. Thus, criminal defense attorneys need to be alert to the constitutional implications of consumption evidence, and there needs to be a clearer, more restrictive framework for the admission of such evidence in criminal trials.

In Part I of this Article, I will establish that the First Amendment protects both consumers and producers of expression, although the scope of consumer protection has not been greatly elaborated. Part II discusses attempts to hold the entertainment industry liable for crimes by third persons, as well as legislative efforts to restrict or ban certain kinds of entertainment or art deemed to cause violence. For the most part, these efforts against producers have failed. Part III then shows how a criminal defendant's viewing, listening, or reading habits may be used as evidence against that defendant, and that the constitutional implications of such evidence are rarely discussed. Part IV looks at the analogous issue of First Amendment associational evidence in criminal cases, showing that while the Supreme Court has established that such evidence may violate the Constitution, the lower courts have collapsed the constitutional question into one of relevance with a loose, discretionary standard of review. Part V discusses whether the apparently disparate treatment of consumers and producers under the First Amendment is really an inconsistency, and examines several counterarguments. Part VI then recommends a change in the approach to admission of evidence of consumption of entertainment or art in criminal trials. The showing of relevancy should be more rigorous, the standard of review should be less deferential, and the harmless-error analysis should be appropriate for a constitutional error.

I

THE FIRST AMENDMENT PROTECTS BOTH
PRODUCERS AND CONSUMERS OF CULTURE

The First Amendment¹¹ protects political and non-political expression, including writing, film, art, and music.¹² First Amendment protection is not weaker if such expression “takes on an unpopular or even dangerous viewpoint.”¹³ This protection applies to both speakers and listeners—or producers and consumers of expression.¹⁴

A. *Producers*

The scope of First Amendment protection for speakers and other producers of cultural expression has been fairly well defined. Although its approach has evolved,¹⁵ the Supreme Court has made clear that the First Amendment protects producers of speech unless that speech falls into certain categories: “‘Fighting words,’ obscenity, defamation, commercial speech, and speech likely to incite imminent lawless action.”¹⁶ This Article is con-

¹¹ The First Amendment to the United States Constitution provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment’s Due Process Clause to apply to state and local government entities and officials. *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

¹² *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (regarding music); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 569 (9th Cir. 1984) (“[M]usical expression, like other forms of entertainment, is a matter of [F]irst [A]mendment concern.”).

¹³ *Torries v. Hebert*, 111 F. Supp. 2d 806, 809-10 (W.D. La. 2000) (enjoining criminal prosecution of skating rink owners for playing “gangster rap” at skating events).

¹⁴ Throughout this Article, I often refer to these two groups as producers and consumers (of First Amendment expression). I sometimes use the terms “speakers” and “listeners.” These terms are meant to include producers and consumers of writing, music, or visual entertainment or art, just as “speech” under the First Amendment includes all artistic or political expression. *Cinevision Corp.*, 745 F.2d at 569 (“[A]ll—political and non-political—musical expression, like other forms of entertainment, is a matter of [F]irst [A]mendment concern.”).

¹⁵ *Compare, e.g.*, *Schenck v. U.S.*, 249 U.S. 47 (1919) (upholding conspiracy conviction for a man who handed out anti-draft leaflets) *and* *Debs v. U.S.*, 249 U.S. 211 (1919) (upholding conviction of socialist candidate who expressed support for those convicted of obstructing military recruitment) *with* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (striking down a statute that punished advocacy of violent means to achieve industrial or political reform).

¹⁶ Karl A. Menninger II, *Cause of Action Against Producer, Artist, Publisher or Author for Violence Incited by a Movie, Song or Book*, 20 CAUSES OF ACTION 2d 1, § 17 (2003). “The freedom of speech has its limits; it does not embrace certain cate-

cerned primarily with speech that could be alleged to inspire violence against third parties, and therefore the exception for incitement is most relevant here.¹⁷

The definition of incitement was laid down in *Brandenburg v. Ohio* as “advocacy [directed] to inciting or producing imminent lawless action and . . . likely to incite or produce such action.”¹⁸ There, the Court reversed the conviction of a Ku Klux Klan member for advocating violence. At the Klan’s invitation, a local television reporter filmed a Ku Klux Klan rally at which members made statements such as, “[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 revengeance taken.”¹⁹ The Court held that, under the circumstances, such a statement amounted to only “abstract teaching” of racist violence. The Court distinguished between “mere advocacy” and advocacy of immediate, specific action.²⁰ “Mere” or “abstract” advocacy is protected speech.²¹

The Court elaborated on the incitement test in *Hess v. Indiana*,²² where it reversed a conviction for disorderly conduct when the circumstances of the defendant’s speech did not show advocacy of imminent lawless action. The defendant had said during

gories of speech, including defamation, incitement, obscenity, and pornography produced with real children.” *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-246 (2002).

¹⁷ Fighting words are defined as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The exception seems intended for speech that is likely to provoke violence against the speaker, rather than third persons. See *Menninger*, *supra* note 16, § 18; *Davidson v. Time Warner, Inc.*, No. Civ.A. V-94-006, 1997 WL 405907 at *18 (S.D. Tex. March 31, 1997). Some litigants have argued that excessively violent works may be obscene, but courts have responded that the obscenity exception to the First Amendment applies only to sexual imagery, not violence. See, e.g., *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002); *Pahler v. Slayer*, No. CV 79356, 2001 WL 1736476 at *3 (Cal. Super. Ct. Oct. 29, 2001); *Byers v. Edmondson*, 2001-1184, 8 (La. App. 1 Cir. 6/5/02), *writ denied*, 2002-1811 (La. 10/4/02), 826 So. 2d 551, 557 (La. App. 2002). The standard of less First Amendment protection applied to commercial speech would only be relevant to this discussion if the speech alleged to cause violence were part of an advertisement. See, e.g., *Sakon v. Pepsico, Inc.*, 553 So. 2d 163 (Fla. 1989) (finding only limited First Amendment protection for defendant when teenage plaintiff sued after being injured while imitating a stunt he saw in a soft drink commercial).

¹⁸ 395 U.S. 444, 447 (1969).

¹⁹ *Brandenburg*, 395 U.S. at 446.

²⁰ *Id.* at 449.

²¹ *Id.*; see also *McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002).

²² 414 U.S. 105 (1973).

an anti-war demonstration, after police had moved protesters out of the street, “We’ll take the fucking street later.”²³ Witnesses testified that he “did not appear to be exhorting the crowd to go back into the street, that he was facing the crowd and not the street when he uttered the statement, that his statement did not appear to be addressed to any particular person or group.”²⁴ Citing the *Brandenburg* test, the Court held that the statement was not incitement because it did not advocate immediate action and was not directed to any person or group of persons.²⁵ The Court also stated, “And 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.’”²⁶ Thus, a tendency for speech to cause crime is not enough to overcome First Amendment protection.

The holdings of *Brandenburg* and *Hess* form the basis of most First Amendment rulings in favor of cultural producers whose works are alleged to have caused violence to third parties.²⁷ The scope of First Amendment protection for producers of cultural expression appears to be the same in criminal or civil cases.²⁸

B. Consumers

The Court has recognized that the freedom to communicate ideas, in whatever form, requires a freedom to receive those ideas. It has recognized the rights of “listeners” or consumers of speech, in “[only] a few relatively unusual cases.”²⁹ Thus, the

²³ *Id.* at 107.

²⁴ *Id.*

²⁵ *Id.* at 108-09.

²⁶ *Id.* at 109 (quoting *Hess v. Indiana*, 260 Ind. 427, 429 (1973)).

²⁷ Although *Brandenburg* and *Hess* were criminal cases, the Supreme Court has used the *Brandenburg* formulation to reverse a civil judgment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928-29 (1982).

²⁸ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964). For a discussion questioning this symmetry, see Rodney A. Smolla, *The First Amendment and New Forms of Civil Liability*, 88 VA. L. REV. 919 (2002) (book review).

²⁹ Bernard W. Bell, *Filth, Filtering and the First Amendment: Ruminations on Public Libraries’ Use of Internet Filtering Software*, 53 FED. COMM. L. J. 191, 207 (2001); see also *Kleindienst v. Mandel*, 408 U.S. 753, 767-770 (1972) (upholding denial of visa for communist speaker but recognizing First Amendment rights of those who sought to hear him); *Procunier v. Martinez*, 416 U.S. 396 (1974) (invalidating prison mail censorship as violative of non-prisoner recipient’s rights to receive mail). *Procunier* was substantially overruled in *Thornburgh v. Abbott*, 490 U.S. 401 (1989),

scope of these rights is not as well defined as those of “speakers” or producers of speech. Nevertheless, it is clear that such rights exist.

“Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.”³⁰ In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court recognized the constitutional right of consumers to receive commercial information about drug prices. In that case, consumer groups challenged a Virginia law that prohibited pharmacists from advertising the prices of prescription drugs. The Court found that such advertising was protected commercial speech, and that consumers had a “reciprocal right to receive the advertising.”³¹

The Court in *Virginia State Board* relied in part on *Lamont v. Postmaster General*,³² a 1965 case that recognized the public’s right to receive and read material without government interference or monitoring. There, the Court struck down a statute requiring the post office to destroy unsealed mail determined to be communist political propaganda from foreign countries unless the addressee returned a reply card indicating the desire to receive the mail.³³ The Court found an “unconstitutional abridgment of the addressee’s First Amendment rights.”³⁴

Although the statute at issue in *Lamont* did nothing directly to punish those who requested their mail, the Court noted the law’s

although not for its recognition of addressees’ First Amendment rights. See *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1051-52 (Colo. 2002) (discussing First Amendment rights of booksellers and their customers).

³⁰ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976).

³¹ *Id.* at 757.

³² 381 U.S. 301 (1965).

³³ *Id.* at 306-07.

³⁴ *Id.* at 307. Concurring, Justice Brennan emphasized,

It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

Id. at 308 (Brennan, J., concurring).

inhibition on the free exercise of First Amendment rights. The Court reasoned that the law

is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as “communist political propaganda.”³⁵

In a concurring opinion, Justice Brennan emphasized that even minor intrusions on the recipients’ rights could have a significant effect on the exercise of those rights.³⁶

The Court has given special recognition to the consumer’s First Amendment rights in the context of pornography. In *Stanley v. Georgia*,³⁷ the Court struck down a state obscenity statute that made private possession of obscene material a crime. The Court relied on the “well established” point that the Constitution protects the “right to receive information and ideas, regardless of their social worth.”³⁸ Although *Stanley* has been construed narrowly in later decisions to allow regulation of obscene material outside the home,³⁹ the Court continues to cite it when discussing First Amendment issues.⁴⁰

Lower courts have recognized the First Amendment rights of consumers of expression. *Lamont* was cited to support the

³⁵ *Id.* at 307.

³⁶ Justice Brennan wrote:

[I]llegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon.

Id. at 309-10 (Brennan, J., concurring) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

³⁷ 394 U.S. 557 (1969).

³⁸ *Id.* at 564.

³⁹ *Osborne v. Ohio*, 495 U.S. 103, 108 (1990); *United States v. Orito*, 413 U.S. 139, 141-43 (1973).

⁴⁰ *See, e.g.*, *United States v. Am. Library Ass’n*, 539 U.S. 194, 216 (2003) (Breyer, J., concurring); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 236 (2002).

standing of library patrons challenging library restrictions on Internet access.⁴¹ Standing has also been given to potential recipients of speech to challenge a judicial gag order.⁴² Similarly, striking down a city ordinance limiting access of minors to violent video games, Judge Posner relied in part on the First Amendment rights of minors who might want to play the games.⁴³

Although courts have clearly recognized that the First Amendment protects consumers as well as producers of expression, they have not elaborated greatly on the extent of those rights. The analytical framework worked out for producers or “speakers” is not always appropriate for consumers or “listeners.”⁴⁴ Listeners, for example, might be more interested in access to and choice of information, while speakers might be interested in monopolizing access or overcoming listeners’ reluctance to listen.⁴⁵ Courts have yet to fully define the interests of listeners, especially when not derived from the interests of speakers. This lack of elaboration may be one reason for the unequal treatment of producers and consumers in the courts.

Outside of particular cases, there also seems to be strong sentiment that the First Amendment protects the rights of a listening, viewing, or reading audience. Much of the criticism against parts of the USA PATRIOT Act is based on this conviction. Professor David Cole has argued that the Act, which allows the Justice Department to seize library and bookstore records, has “a substantial chilling effect.”⁴⁶ Similar First Amendment language has been used by prominent civil libertarians and others.⁴⁷ Although

⁴¹ *Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library*, 2 F. Supp. 2d 783, 791, (E.D. Va. 1998).

⁴² See *In re Application of Dow Jones & Co.*, 842 F.2d 603, 607 (2d Cir. 1988); *FOCUS v. Allegheny County Ct. of Com. Pl.*, 75 F.3d 834, 838 (3d Cir. 1996).

⁴³ *American Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001). Judge Posner gave a policy argument in support of those rights: “People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.” *Id.* at 577.

⁴⁴ See Bell, *supra* note 29, at 206 (discussing appropriate analysis of library patrons’ rights to receive information). The author notes in this context the courts’ “failure to recognize that claims of people seeking information might differ from those of speakers, and thus might require a different analysis.” *Id.*

⁴⁵ The National Do Not Call List, for example, pits the interests of telemarketers in speaking to anyone against the interests of telephone subscribers in stopping certain kinds of calls. See *F.T.C. v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850 (10th Cir. 2003).

⁴⁶ Eric Lichtblau, *U.S. Says It Has Not Used New Library Records Law*, N.Y. TIMES, Sept. 19, 2003, at A16.

⁴⁷ Nadine Strossen, referring to the Justice Department’s authority under the PA-

such statements are by no means the law, they show that the notion of First Amendment protection for listeners is not an odd legal technicality in a few court opinions, but an idea that has intuitive appeal to many people.

II

PRODUCERS OF VIOLENT WORKS ARE USUALLY PROTECTED BY THE FIRST AMENDMENT

The First Amendment rights of producers are more fully developed than those of consumers because those rights have been frequently tested in the courts. Over the years, attempts have been made to show a causal link between certain art and crime. There has long been some controversial evidence that violent imagery can cause violence.⁴⁸ Youth music, especially, has been accused of causing crime. Early rock'n'roll, the Beatles, and early metal bands were all associated with crime when first intro-

TRIBUT Act to look at library records, has stated: "That is obviously something that, if it became known to people who use libraries, would have an enormous chilling effect. Who wants to be reading with the government, in essence, looking over your shoulder?" Robert D. Richards, *Nadine Strossen and Freedom of Expression: A Dialogue with the ACLU's Top Card-Carrying Member*, 13 GEO. MASON U. CIV. RTS L.J. 185, 211 (2003). See Alisa Solomon, *Things We Lost in the Fire*, VILLAGE VOICE, Sept. 11, 2002, at 32. See also Association of American Publishers, Freedom to Read Committee, *The Patriot Act and the First Amendment: A Statement from the Freedom to Read Committee of the Association of American Publishers: Why the Book Community Is Concerned*, at <http://www.publishers.org/about/patriotact.pdf> (last visited Jan. 5, 2005) ("[T]he USA PATRIOT Act [Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism Act] . . . passed by Congress in the wake of the horrific events of September 11, 2001, contains provisions that threaten the First Amendment-protected activities of book publishers, booksellers, librarians, and readers."). "If bookstore customers and library patrons believe that government investigators can easily obtain their records, they will stop reading works they fear may expose them to government scrutiny. [The PATRIOT Act] goes a long way to present this chilling effect on our First Amendment rights." Letter from American Association of Publishers President Pat Schroeder to U.S. Senator Feingold (Aug. 6, 2003) available at <http://www.publishers.org/govt/govtarticle.cfm?GovtArticleID=36> (last visited January 5, 2005).

⁴⁸ U.S. DEPT. OF JUSTICE, FINAL REPORT: ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 326 (GPO 1986). The Commission concluded that substantial exposure to sexually violent materials "bears a causal relationship to antisocial acts of sexual violence." That conclusion was criticized, however. See Anthony D'Amato, *A New Political Truth: Exposure to Sexually Violent Materials Causes Sexual Violence*, 31 WM. & MARY L. REV. 575 (1990); Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1178-1180 (1993).

duced.⁴⁹ Rap and metal music have continued to come under attack in recent years, as have some particularly violent video games or movies, such as *Natural Born Killers*. Yet, when legislative bodies have sought to restrict or ban violent cultural products, their efforts have usually been found to run afoul of the First Amendment for failure to show a compelling link between the product and the feared harm: a “mere tendency” to encourage crime is not enough.⁵⁰ Similarly, when crime victims have sought civil redress against artists and producers of music, movies, or games, attempting to show a connection between the cultural/entertainment products and the crime, they have almost always been unsuccessful because of First Amendment concerns. The First Amendment issues have been treated as questions of law.

A. Regulatory Efforts

In *Ashcroft v. Free Speech Coalition*, the Supreme Court rejected Congress’s effort to ban “virtual” child pornography—pornography that was not made by exploiting minors, but which appeared to involve underage children in pornographic scenes. Relying on the *Brandenburg* test, the Court found that Congress had failed to show a real link between such pornography and crimes against minors:

The government may not prohibit speech because it increases the chance an unlawful act will be committed “at some indefinite future time.” The government may suppress speech for advocating the use of force or a violation of law only if “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” There is here no attempt, incitement, solicitation, or conspiracy. The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to en-

⁴⁹ See, e.g., *People v. Manson*, 61 Cal. App. 3d 102, 129 (Ct. App. 1976) (noting Charles Manson’s claim that he was inspired to murder partly by a Beatles song); *Ragan v. City of Seattle*, 364 P.2d 916 (Wash. 1961) (upholding restrictions on jukeboxes in recognition of the disruptive effect of rock-and-roll music); Richard Harrington, *Bedeviling Rumors Heavy-Metal AC/DC Says It’s Not Satanic*, WASH. POST, November 20, 1985, available at 1985 WL 2083677 (noting pressure on AC/DC to cancel tour when it was learned that it was the favorite band of Richard Ramirez, “the Night Stalker”).

⁵⁰ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).

gage in illegal conduct.⁵¹

The Court suggested that even if the government could show that certain speech made crime more likely, the First Amendment would shield such speech if it did not incite crime under the *Brandenburg* test:

The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government “cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.” First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.⁵²

Lower courts have also found a “mere tendency” to inspire violence insufficient to justify restricting or banning violent products, most recently videogames. Judge Posner, writing for the Seventh Circuit Court of Appeals in *American Amusement Machine Association v. Kendrick*, found that a video game trade association was entitled to an injunction against enforcement of a city ordinance limiting access of minors to violent video games.⁵³ The court found that the city had failed to show a compelling basis for the ordinance.

Since a tendency to cause crime is not enough to take a work out of First Amendment protection, litigants attempting to overcome the First Amendment would have to show a strong, clear, causal link between a work and subsequent violence.⁵⁴ In several cases the courts have rejected efforts to justify legislation with empirical evidence. Judge Posner wrote in *American Amusement Machine*, “[t]he studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase

⁵¹ *Id.* at 253-54 (internal citations omitted).

⁵² *Id.* at 253 (internal citation omitted).

⁵³ 244 F.3d 572 (7th Cir. 2001). A district court used similar reasoning to enjoin enforcement of a Washington law penalizing distribution of certain video games to minors. *Video Software Dealers Ass’n v. Maleng*, 325 F. Supp 2d 1180 (W.D. Wash. 2004).

⁵⁴ *Ashcroft*, 535 U.S. at 253.

anywhere.”⁵⁵ The court found the video games at issue to be no more violent than television and movies also available to children. Similar reasoning underlies the Eighth Circuit Court of Appeals’ decision in *Interactive Digital Software Association v. St. Louis County*, which invalidated an ordinance that made it unlawful to make graphically violent video games available to minors.⁵⁶ The court found a lack of solid empirical evidence that video games are harmful or cause aggression and stated that a general belief that violent video games are harmful is inadequate to overcome constitutional concerns.⁵⁷ Thus, in the context of speech regulation, the courts are unwilling to assume what many parents, educators, and legislators claim to “know”—that exposure to depictions of violence will lead to violence.

In addressing challenges to legislative efforts to restrict First Amendment expression, the courts treat the issue as a question of law that can be resolved on summary judgment or other pre-trial motion. In both *American Music Machine* and *Interactive Digital Software*, the appellate courts applied strict scrutiny to the challenged legislation in the context of reviewing the denial of an injunction.⁵⁸ The Supreme Court in *Ashcroft v. Free Speech Coalition*, reviewing the reversal of a grant of summary judgment, put a heavy burden on the government to show that the statute at issue affected only work that fell outside First Amendment protection.⁵⁹ In these inquiries, there is no deference to the trial court’s fact-finding expertise or discretion.

B. *Civil Liability for Crimes by Consumers*

For many of the same reasons that legislative efforts have failed, suits by crime victims against cultural producers have failed. When victims of violence have sued entertainment industry defendants alleging their products inspired the crimes, courts have rejected tort claims on state law grounds, generally due to a failure to show duty or causation.⁶⁰ Courts have also relied heav-

⁵⁵ 244 F.3d at 578-79.

⁵⁶ 329 F.3d 954, 956-58 (8th Cir. 2003).

⁵⁷ *Id.* at 958-59; *see also Video Software Dealers Ass’n*, 325 F. Supp. 2d at 1189 (finding no showing that videogames cause violence).

⁵⁸ *Interactive Digital Software Ass’n*, 329 F.3d at 958. The *American Amusement Machine* court did not use the term “strict scrutiny,” but stated that to justify the ordinance under the First Amendment required “compelling grounds” that were not pretextual. 244 F.3d at 576.

⁵⁹ 535 U.S. at 246.

⁶⁰ *See James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002); *Sanders v. Ac-*

ily on the defendants' protection under the First Amendment, and First Amendment concerns usually play a part in the tort law analysis of duty and causation.⁶¹ Courts have been attentive to the likely chilling effect of civil liability on the arts and entertainment industry, potential for self-censorship, and the difficulty of defining "good" and "bad" art.

Attempts to hold artists and/or the entertainment industry liable for the crimes of their viewers or listeners are not new,⁶² but plaintiffs' efforts continue. For example, recent school shootings lead the victims and victim's families to go after the makers and distributors of violent video games and movies.⁶³ A robbery/shooting victim sued the producers, director, and distributors of the movie *Natural Born Killers* after the shooter attributed the killing in large part to the movie.⁶⁴ A mother and the estate of her minor son sued a video game manufacturer for allegedly causing her son's friend to stab him.⁶⁵ The families of murder victims have sued musicians, their producers, and their distributors, alleging that the violent music caused the families' loss.⁶⁶

claim Entertainment, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002); Davidson v. Time Warner, Inc., No. Civ. A V-94-006, 1997 WL 405907 (S.D. Tex. March 31, 1997); McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Ct. App. 1988); Pahler v. Slayer, No. CV 79356, 2001 WL 1736476 (Cal. Super. Ct. Oct. 29, 2001); see also *infra* notes 64-66 and accompanying text.

⁶¹ See *infra* notes 67-77 and accompanying text.

⁶² See, e.g., Carolina A. Fornos, *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 (2000); Alan Stephens, *First Amendment Guaranty of Freedom of Speech or Press as Defense to Liability Stemming from Speech Allegedly Causing Bodily Injury*, 94 A.L.R. FED. 26 (1989).

⁶³ James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002) (affirming dismissal for failure to state a claim in a case arising out of shootings at a high school in Paducah, Kentucky in 1997); Sanders v. Acclaim Entertainment, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002) (granting dismissal for failure to state a claim in a case arising out of the 1999 shootings at Columbine High School in Colorado).

⁶⁴ Byers v. Edmondson, 2001-1184 (La. App. 1 Cir. 6/5/02), writ denied, 2002-1811 (La. 10/4/02), 826 So. 2d 551 (La. Ct. App. 2002) (Byers II). The trial court originally dismissed the claim and on the first appeal, the Louisiana Court of Appeal reversed, holding that the plaintiff had stated a cause of action. *Id.* at 554. However, a summary judgment for the defendants was upheld on the second appeal. *Id.* at 557-58.

⁶⁵ Wilson v. Midway Games, Inc., 198 F. Supp. 2d 167 (D. Conn. 2002) (granting motion to dismiss for failure to state a claim).

⁶⁶ Davidson v. Time Warner, Inc., 1997 WL 405907 (S.D. Tex. March 31, 1997) (granting defendants' motion for summary judgment in a lawsuit against the late rap artist Tupac Shakur and Time Warner, Inc., that claimed Shakur's music had caused the murder of a state trooper); McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Ct. App. 1988) (sustaining order of dismissal of demurrer in a suit alleging that defendant Ozzy Osbourne's music had caused a listener to commit suicide); Pahler v. Slayer,

All of these cases were dismissed at an early stage of proceedings.

These claims, and others, have been rejected for failure to establish the elements of negligence—primarily duty and causation. In most jurisdictions, the elements of common law negligence are duty, breach of duty, causation, and injury.⁶⁷ Allegations of duty fail for lack of foreseeability, a concept bound up in policy considerations.⁶⁸ Because foreseeability is analyzed with the “reasonably prudent person” in mind, the actions of mentally unstable persons or criminals always fall outside of what the defendants could be expected to foresee.⁶⁹ Causation fails for similar reasons and because the criminal act of the viewer or listener is seen as an intervening or superseding cause.⁷⁰

Because analysis of duty and causation involves a balancing of the social costs of imposing liability, courts often mention the potential chilling effect on artistic expression.⁷¹ Concern for a chilling effect is bound up in First Amendment values of free expression. For example, in a lawsuit blaming rap music for the murder of a state trooper, the court commented, “To create a

2001 WL 1736476 (Cal. Super. Ct. Oct. 29, 2001) (sustaining demurrer where parents of a murder victim sued the metal band Slayer, its producers, and distributors for wrongful death).

⁶⁷ Weinberg v. Whatcom County, 241 F.3d 746, 751 (9th Cir. 2001); Jobe v. ATR Marketing, Inc., 87 F.3d 751, 753 (5th Cir. 1996); see also RESTATEMENT (SECOND) OF TORTS § 281 (1965).

⁶⁸ James, 300 F.3d at 691-92 (“The allocation of responsibility for determining this question to the courts, rather than to juries, reveals that the duty inquiry contains an important role for considering the policy consequences of imposing liability on a certain class of situations.”); *McCollum*, 249 Cal. Rptr. at 196 (“Here, a very high degree of foreseeability would be required because of the great burden on society of preventing the kind of ‘harm’ of which plaintiffs complain by restraining or punishing artistic expression.”); *Pahler*, 2001 WL 1736476, at *6 (“Foreseeability has an horizon. It is set by balancing the policy reasons in favor of preventing the harm complained of against the social and other costs attending the burden of imposing liability.”).

⁶⁹ See James, 300 F.3d at 693 (“We find that it is simply too far a leap from shooting characters on a video screen (an activity undertaken by millions) to shooting people in a classroom (an activity undertaken by a handful, at most) for Carneal’s actions to have been reasonably foreseeable to the manufacturers of the media that Carneal played and viewed.”); *McCollum*, 249 Cal. Rptr. at 194 (“No rational person would . . . mistake musical lyrics and poetry for literal commands or directives to immediate action.”).

⁷⁰ James, 300 F.3d at 699-700; *Sanders*, 188 F. Supp. 2d at 1276.

⁷¹ *Sanders v. Acclaim Entertainment, Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002); *McCollum*, 249 Cal. Rptr. at 197; *Davidson*, 1997 WL 405907 at *12.

duty requiring Defendants to police their recordings . . . would result in the sale of only the most bland, least controversial music.”⁷² In the suit blaming Ozzy Osbourne’s music for a suicide, the California Court of Appeals stated,

[I]t is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals. Such a burden would quickly have the effect of reducing and limiting artistic expression to only the broadest standard of taste and acceptance and the lowest level of offense, provocation and controversy.⁷³

This concern for the potential chilling of free expression underlies First Amendment jurisprudence.⁷⁴

Not only is the tort law analysis affected by First Amendment concerns, but the decisions usually also find an independent constitutional basis for dismissal under *Brandenburg*, which created the First Amendment exception for speech that is intended to incite imminent lawless action.⁷⁵ Where the plaintiff’s theory is that repeated exposure to the movie, music, or game has caused the harm, the allegations fail the imminence requirement of *Brandenburg*.⁷⁶ *Brandenburg* excepts speech that is intended to cause violence right away, not speech that might, over time and with repetition *caused by the listener*, lead to violence.⁷⁷ Where the work is alleged to have caused the listener or viewer to imitate the violence depicted, it also fails the *Brandenburg* test.⁷⁸

⁷² *Davidson*, 1997 WL 405907 at *12.

⁷³ *McCollum*, 249 Cal. Rptr. at 197.

⁷⁴ The Court expressed concern for the chilling effect of civil damage awards in *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

⁷⁵ 395 U.S. 444 (1969). *See supra* Part I.A.

⁷⁶ According to the Sixth Circuit,

Even the theory of causation in this case is that persistent exposure to the defendants’ media gradually undermined Carneal’s moral discomfort with violence to the point that he solved his social disputes with a gun. This glacial process of personality development is far from the temporal imminence that we have required to satisfy the *Brandenburg* test.

James v. Meow Media, Inc., 300 F.3d 683, 698 (6th Cir. 2002).

⁷⁷ Recognizing this difference between speech in a particular setting and recorded entertainment that can be consumed repeatedly and under conditions controlled by the consumer, some plaintiffs have sought liability for entertainment products under product liability theories. *See, e.g., id.* at 701; *Wilson v. Midway Games*, 198 F. Supp. 2d 167, 169 (D. Conn. 2002).

⁷⁸ Under *Brandenburg*, speech is not protected under the First Amendment if it is “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.” 395 U.S. at 447. This test was found to be a bar to suit in:

Such a “copycat” allegation will probably never be incitement because no matter how compelling the depiction, the work does not directly exhort the viewer or listener to do anything, and certainly not immediately.⁷⁹ Many cases cite the Supreme Court’s statement in *Hess*, that speech may not be punished on the ground it has a “tendency to lead to violence.”⁸⁰ Some courts have pointed out that violence, death, and the darker side of life have always been a subject of both high and low art.⁸¹

Some plaintiffs have argued that the works causing violence are obscene and therefore not protected speech, but courts have responded that obscenity applies only to sexual imagery, not violence.⁸²

It is difficult to see how any mass-media product intended for mass distribution can ever meet the *Brandenburg* test. First, the speech is directed so broadly that it cannot be said to be intended for specific persons.⁸³ Second, because it is viewed or listened to at different times in the future and under unpredictable condi-

Sanders v. Acclaim Entertainment, Inc., 188 F. Supp. 2d 1264, 1279-80 (D. Colo. 2002); *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193 (Ct. App. 1988); *Olivia N. v. NBC, Inc.*, 178 Cal. Rptr. 888, 892 (Ct. App. 1981); *Wilson*, 198 F. Supp. 2d at 182; *Byers v. Edmonson*, 2001-1184 (La. App. 1 Cir. 6/5/02), *writ denied*, 2002-1811 (La. 10/4/02), 826 So. 2d 551, 556-57 (La. App. 2002); *Davidson v. Time Warner, Inc.*, No. Civ. A. V-94-006, 1997 WL 405907, at *20 (S.D. Tex. Mar. 31, 1997).

⁷⁹ *Byers*, 826 So. 2d at 556-57, *quoting* *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 266 (4th Cir. 1997); *Pahler v. Slayer*, No. CV 79356, 2001 WL 1736476, at *4. See also the discussion in Smolla, *supra* note 28, at 934-38 (questioning the applicability of *Brandenburg* to civil actions against the entertainment industry).

⁸⁰ *Hess v. Indiana*, 414 U.S. 105, 109 (1973), cited in *James*, 300 F.3d at 698 (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), citing *Hess*); *Zamara v. CBS*, 480 F. Supp. 199, 206 (D. Fla. 1979) (dismissing claim that violent television programming gradually desensitized killer to violence and led to murder); *Pahler*, 2001 WL 1736476, at *6; *Byers*, 826 So. 2d at 556; *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1071 (Mass. 1989) (dismissing suit which blamed violent movie for inspiring son’s killers); *Davidson*, 1997 WL 405907, at *21.

⁸¹ *Sanders v. Acclaim Entertainment, Inc.*, 188 F. Supp. 2d 1264, 1274 (2002), *citing* *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001); *McCullum v. CBS*, 249 Cal. Rptr. 187, 190 n.4 (Ct. App. 1988) (giving examples from Shakespeare, Tolstoy, Sylvia Plath, Arthur Miller and other authors).

⁸² *James*, 300 F.3d at 698; *Pahler*, 2001 WL 1736476, at *3; *Byers*, 826 So. 2d at 557; *Davidson*, 1997 WL 405907, at *17. The plaintiff in *Davidson* further argued that Tupac Shakur’s lyrics fell within the fighting words exception to the First Amendment, but this argument failed as well. *Davidson*, 1997 WL 405907, at *18.

⁸³ *Hess*, 414 U.S. at 108-109 (“Since the uncontroverted evidence showed that Hess’ statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action.”). *Hess* suggests that to be incitement, speech must be directed to specific persons with the intention that they act imminently. Menninger, *supra* note 16, § 22.

tions, the speech itself is not likely to incite imminent lawless action. In *Hess*, for example, the court relied on the particular circumstances of the speech, as well as its particular content, to find that it was not incitement.⁸⁴ Some have argued that it is therefore inapplicable to media defendants in these kinds of cases.⁸⁵

In one case, however, a publisher was held liable for a speech distributed widely through a book.⁸⁶ The book was a “hit man” instruction book that a murderer used in soliciting, planning for, and committing the murder. The court found this book was not abstract advocacy, but advice to commit a specific criminal act. The publisher was in fact aiding and abetting the crime, though only with words.⁸⁷ The direct how-to instructions of this book are in contrast to the fictional representations of movies or video games, or the ambiguous exhortations of songs. The hit man book case is the exception that proves the rule of non-liability for producers of cultural works.

III

CONSUMERS OF VIOLENT MOVIES, MUSIC, OR BOOKS MAY HAVE THEIR CONSUMPTION HABITS USED AGAINST THEM IN CRIMINAL TRIALS

While the First Amendment protects producers of books, movies, and music from civil liability, it has not protected the consumers of those products from having their taste used against them in support of criminal convictions.⁸⁸ In the majority of re-

⁸⁴ *Hess*, 414 U.S. at 107.

⁸⁵ See Clay Calvert, *Media Liability For Violent Conduct: One Year Later*, 23 LOY. L.A. ENT. L. REV. 247, 254 (2003) (discussing Prof. Rodney Smolla’s efforts to get around the *Brandenburg* obstacle for plaintiffs); Smolla, *supra* note 28; *Potential Liability Arising from the Dissemination of Violent Music*, 22 LOY. L.A. ENT. L. REV. 237 (2002) (panel discussion) (discussing alternatives to traditional negligence or wrongful death actions); see also *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987) (rejecting a lesser standard than the *Brandenburg* incitement test for non-political speech alleged to have caused physical harm).

⁸⁶ *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997). The *Rice* court relied on an earlier decision rejecting First Amendment protection for the publisher of instructions on how to make illegal drugs. *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982).

⁸⁷ *Rice*, 128 F.3d at 242.

⁸⁸ The First Amendment does, however, protect consumers when they are threatened with sanction for the exercise of their First Amendment right per se. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *Stanley v. Georgia*, 394 U.S. 557 (1969).

ported cases in which a criminal defendant's viewing, listening, or reading habits are introduced, the First Amendment is not even raised.⁸⁹ The prosecutor is permitted to introduce evidence designed to show the defendant's "state of mind," "motive," or "plan," and the defendant usually argues the evidence should be kept out as irrelevant or unduly prejudicial under the evidence rules.⁹⁰ Such challenges then usually fail on appeal, because of the wide discretion given to trial courts on evidentiary matters.⁹¹ The threshold for a showing of relevance is very low: relevant evidence is that having "any tendency" to make the existence of a material fact more likely or less likely.⁹² Relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury,"⁹³ but the balancing of unfair prejudice and probative value is generally discretionary with the trial court and not a question of law.

The film *Natural Born Killers* provides several good examples. The producers of this movie successfully defended against a civil suit by crime victims' families.⁹⁴ Yet a fascination with, or just a taste for, the movie has been used against criminal defendants in a number of cases.

The New Mexico Supreme Court, in *State v. Begay*, affirmed a first-degree murder conviction where the state told the jury in its opening statement that "evidence would show that Defendant liked the film, *Natural Born Killers*, had seen it numerous times, and had announced his desire to 'pull a fatality.'"⁹⁵ The state argued that this evidence supported a finding of premeditation

⁸⁹ "Reported" cases here include unpublished cases that have been made available on Westlaw or Lexis. A review of such cases is necessarily one-sided. It will not include cases where the defendant was successful in keeping out such evidence at trial—if such cases exist—unless the defendant was convicted, appealed, and the state then cross-appealed on the evidentiary issue. For the most part, the databases of reported cases will yield cases where the convicted defendant appealed an unfavorable ruling on the issue.

⁹⁰ See FED. R. EVID. 401, 403.

⁹¹ Courts frequently say that whether to admit evidence is within the discretion of the trial court, but in fact many evidentiary decisions involve questions of law, questions of fact, and elements of discretion—each of which should be and often are reviewed under a different standard. See Nicolas, *supra* note 9, at 532-34.

⁹² FED. R. EVID. 401.

⁹³ FED. R. EVID. 403.

⁹⁴ See Menninger, *supra* note 16, at 17.

⁹⁵ *State v. Begay*, 964 P.2d 102, 106 (N.M. 1998).

and that the killing was done simply for fun.⁹⁶ These arguments were repeated in closing argument. On appeal, the defendant did not raise the First Amendment, but argued that the prosecutor's and the judge's remarks about the film⁹⁷ "improperly introduced inflammatory and prejudicial evidence, and deprived him of a fair trial."⁹⁸ These objections were not raised at trial, and it appears appellate counsel was arguing that the error was so fundamental that reversal was nevertheless required, but the reviewing court was unmoved.⁹⁹ For unpreserved claims of error, the court placed a heavy burden on the defendant to show plain or fundamental error, which the court found was not met.

Similarly, other prosecutors have used the defendant's association with the movie to suggest that the movie was the inspiration for the charged crimes. In *State v. Taylor*, a Louisiana murder case, the state used the defendant's remarks about "his favorite movie," *Natural Born Killers*, to show state of mind, motive, and intent.¹⁰⁰ A friend of the defendant testified that the defendant had "critiqued the bank robbery featured in the film and discussed how" he would have done it.¹⁰¹ The state supreme court found that the statements were relevant and suggested that, because they were contested at trial, any prejudice was minimized.¹⁰² The same movie was also linked to the defendant's state of mind in a Massachusetts murder case, *Commonwealth v. O'Brien*.¹⁰³ The court admitted evidence of a newspaper article found in the defendant's bedroom.¹⁰⁴ The article described another murder that had been inspired by the movie, and quoted the killers' description of their fascination with the movie.¹⁰⁵ The Massachusetts Supreme Court upheld the trial court's reasoning, and added, "The article also could have explained what otherwise might appear to be a random act of violence. Whether to admit such an article is a matter committed to the sound discre-

⁹⁶ *Id.* at 107.

⁹⁷ In ruling on an objection, the trial judge stated that the movie "glorifies violence and depicts criminal drug use." *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 106-108. The court also rejected arguments that the prosecutor "testified" when he described the contents of the movie during argument. *Id.* at 107-09.

¹⁰⁰ 838 So. 2d 729, 746 (La. 2003).

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ 736 N.E.2d 841, 852 (Mass. 2000).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

tion of the trial judge. Absent a showing of palpable error, we do not disturb that ruling.”¹⁰⁶

In *State v. Loukaitis*, a Washington murder prosecution where the defendant pleaded insanity, the court upheld admission of evidence that *Natural Born Killers* was one of his favorite movies, and that he told witnesses he would like to go on a killing spree like the one in the movie.¹⁰⁷ The defendant had failed to object at trial, and also used the evidence in his own insanity defense.¹⁰⁸

The defendant’s fascination with the movie was found admissible in the penalty phase of *State v. White*, a North Carolina capital murder case.¹⁰⁹ The state supreme court found that objection to the evidence had been waived and suggested that the evidence was relevant to aggravating and mitigating circumstances in any event.¹¹⁰

In *Beasley v. State*, a Georgia murder and robbery case, the court not only admitted evidence that the defendant had watched the movie twenty times, but showed the movie in its entirety to the jury.¹¹¹ Witnesses testified that the defendant wanted to be like the characters in the movie and sometimes used their names. The Georgia Supreme Court held that the evidence was relevant to show that the defendant was “encouraged by the movie to commit a violent murder,” and “to show [the defendant’s] bent of mind.”¹¹² A dissenting judge agreed that evidence of the defendant’s fascination with the movie was relevant, but argued that the court went too far in showing the gruesome movie to the jury.¹¹³ The dissent would have held that the prejudicial value of the film outweighed its relevance, and criticized the majority’s rationale that the film was relevant to the defendant’s “bent of mind”:

Based on this broad reasoning, any book, movie, record, or television program that includes a crime similar to the one with which an accused is charged would be relevant to show that individual’s bent toward criminal activity. Under this ex-

¹⁰⁶ *Id.* (internal citations omitted).

¹⁰⁷ *State v. Loukaitis*, No. 17007-1-III, 1999 WL 1044203, at *9-10 (Wash. Ct. App. Nov. 16, 1999). The court also admitted evidence that the defendant liked Stephen King books and that he wrote “dark” and “scary” poetry. *Id.*

¹⁰⁸ *Id.* at *10.

¹⁰⁹ 565 S.E.2d 55, 62 (N.C. 2002).

¹¹⁰ *Id.*

¹¹¹ 502 S.E.2d 235, 238 (Ga. 1998).

¹¹² *Id.*

¹¹³ *Id.* at 241 (Fletcher, J., dissenting).

pansive test, reading the works of Nobel Prize winning authors like Toni Morrison and William Faulkner can become evidence that an accused had a “bent of mind” to commit murder. Because this rationale is simplistic and overreaching, I find it unpersuasive as a basis for allowing the jury to view the movie.¹¹⁴

It is interesting that in all these cases, the basis for admission of evidence of the movie, or the defendant’s fascination with it, seems to be an assumption of a causal link between the movie and crime—a link that has been rejected in the suits by crime victims against producers of the movie. When the courts speak of bent or state of mind, or motive, they are suggesting that the defendant’s state of mind is caused by the film, or that the defendant is motivated by or “encouraged” by the film to commit a crime. There is the strong suggestion in the decisions that similarities between the crime charged and the crimes depicted in the movie show where the defendant got the idea for his actions.¹¹⁵

Using similar reasoning, courts have allowed musical taste to be used against criminal defendants.¹¹⁶ In *State v. Hayward*, an Oregon murder prosecution, the state introduced evidence that the defendants worshipped Satan and listened to “death metal” music.¹¹⁷ One witness testified that the crimes were to honor the death metal bands Deicide and Cannibal Corpse.¹¹⁸ One defendant was said to have emitted a “death metal growl” just before he attacked and that the growl sounded like one on a Cannibal Corpse compact disc.¹¹⁹ The state supreme court upheld the admission of the “death metal” evidence to show motive—that the crimes were “more than simply a robbery gone awry.”¹²⁰ In *Skinner v. State*, a Missouri case, the defendant used the names of two death metal bands, Mercyful Fate and Evil Slayer, in sign-

¹¹⁴ *Id.* at 244 (Fletcher, J., dissenting).

¹¹⁵ *See id.* at 238 (holding the jury could infer that the movie encouraged the crime); *Commonwealth v. O’Brien*, 736 N.E.2d 841, 842 (Mass. 2000) (noting similarities between murder in newspaper article and the crime charged, and similarities in the pleasure taken in killing by the defendant and the killers in the article, who also enjoyed the movie).

¹¹⁶ *State v. Hayward*, 963 P.2d 667, 674 (Or. 1998) (upholding admission of evidence of defendant’s interest in death metal music and Satanism); *Skinner v. State*, 784 S.W.2d 873, 876 (Mo. Ct. App. 1990) (upholding admission of evidence of use of heavy metal band names, Evil Slayer and Mercyful Fate, in defendant’s letters).

¹¹⁷ *Hayward*, 963 P.2d at 674.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 675.

ing letters.¹²¹ The appellate court rejected an ineffective assistance of counsel argument based on the defense attorney's failure to adequately challenge the prosecution's use of these names.

Rap music, especially "gangster" or "gangsta" rap, also makes an appearance.¹²² In *Bailey v. State*, a Mississippi case, the defendant appealed a murder conviction, arguing, among other things, that it was error to admit a cassette tape found in his car.¹²³ The tape, made by a group called the Mississippi Mafia, was titled *Another Mississippi Murder*. Its cover showed three males holding automatic weapons.¹²⁴ The defendant argued it was also error to permit the prosecutor to use the tape to argue in closing: "Ladies and gentlemen, in going through the evidence of the case and looking at something that was in this defendant's possession, it speaks true as to this defendant's attitude. This isn't nothing but another Mississippi murder."¹²⁵ The appellate court found that objections to the tape and the prosecutor's remarks were waived and/or harmless.¹²⁶ Any error in the admission of rap lyrics was also found harmless in *People v. Richardson*, an unpublished California case.¹²⁷ The defendant there was a rap artist, and the state cross-examined a defense witness about the music the defendant listened to, thereby bringing in lyrics that referred to violent and criminal acts.¹²⁸

In another unpublished California case, *People v. Scott*, the court found admission of rap lyrics to be harmless error, but made clear that error had occurred.¹²⁹ The lyrics had been found in the defendant's room one year before the murder with which he was charged, and the state could not prove that the lyrics were the defendant's and not written by another rap artist who had been sleeping in his room at the time.

¹²¹ *Skinner*, 784 S.W.2d at 875-76.

¹²² In an Indiana case, a murder defendant tried to use violent rap music lyrics in his own defense, to blame his actions in part on the music. *Rascoe v. State*, 736 N.E.2d 246, 247-48 (2000).

¹²³ *Bailey v. State*, 785 So. 2d 1071 (Miss. Ct. App. 2000).

¹²⁴ *Id.* at 1075.

¹²⁵ *Id.* at 1075.

¹²⁶ *Id.* at 1076.

¹²⁷ *People v. Richardson*, No. F032406, 2001 WL 1297500 (Cal. Ct. App. Oct. 24, 2001).

¹²⁸ *Id.* at *14-15.

¹²⁹ *People v. Scott*, No. A088396, 2001 WL 1663224, at *11 (Cal. Ct. App. Dec. 31, 2001).

The present case involves a set of song lyrics, which—whatever one may feel about their quality as literature—are the result of the creative process. We start down a wavering path when we begin to judge people’s actions by the content of the literature they keep about them. Had Shakespeare been charged with regicide, we doubt *Macbeth* would be admissible evidence. In any case appellant did not write the lyrics and there was no evidence that he had even read them.¹³⁰

The court nowhere mentioned the First Amendment, however, and found the error to be harmless given the remaining evidence.¹³¹

Thus, objections to evidence of movie, musical, or other cultural taste in state criminal trials have been based on unfair prejudice or lack of relevance. The reviewing courts have given the trial courts broad leeway to allow such evidence to be used against the defendants.¹³² Most of the state court decisions do not state the standard of review, but, in practice, their review is deferential.¹³³

While the state cases discussed above generally do not mention the defendant’s constitutional right to consume entertainment, in *Dressler v. McCaughtry*,¹³⁴ the Seventh Circuit Court of Appeals rejected a rare First Amendment challenge to the introduction of defendant’s violent and pornographic materials in a murder prosecution, a challenge it deemed “borderline frivolous at best.”¹³⁵ The evidence included videotapes and pictures of intentionally violent and homosexual sexual acts, including photographs and videotapes of actual mutilation and murder.¹³⁶ Descriptions of the evidence in the court of appeals opinion as well as in the state

¹³⁰ *Id.* at *11.

¹³¹ The court found the error harmless even though the jury had deliberated for five days. The reviewing court found it was “not . . . a close case.” *Id.*

¹³² This may be true even where the evidence is of the defendant’s own expression, and not consumption of others’ expression. Thus, where the state introduced photographs of a defendant’s tattoos, the court acknowledged First Amendment considerations, but found that the limits of the constitutional protection were defined by relevance. *State v. Kendrick*, 736 P.2d 1079, 1083 (Wash. Ct. App. 1987). Because relevance was in turn committed to the sound discretion of the trial court, the limits of constitutional protection became discretionary as well. *See id.* at 1083-84.

¹³³ One case mentions the abuse of discretion standard of review in passing. *Scott*, 2001 WL 1663224, at *9.

¹³⁴ *Dressler v. McCaughtry*, 238 F.3d 908 (7th Cir. 2001).

¹³⁵ *Id.* at 912.

¹³⁶ *Id.* at 910.

court appeal¹³⁷ make it difficult to tell exactly what the materials were, but they appear to have included pornography as well as purely violent images. Much of this evidence was admitted to support the state's theory of "homosexual overkill."¹³⁸ The crime charged was an exceptionally gruesome murder followed by mutilation, and the federal appeals court stated: "The fact that [the defendant] maintained a collection of videos and pictures depicting intentional violence is probative of the State's claim that he had an obsession with that subject. A person obsessed with violence is more likely to commit murder, and therefore the videos and photographs are relevant."¹³⁹ Thus, the court seemed to accept that the ideas or acts depicted in materials a defendant reads or views could be imputed to the defendant. The court also found that the mere use of this evidence did not affect the defendant's First Amendment rights because he was not punished for their possession, and the potential chilling effect of the evidentiary rulings was "overstate[d]."¹⁴⁰ The court rejected the First Amendment argument and upheld the trial court's finding of relevance.¹⁴¹

Subsequent cases have cautioned that the *Dressler* court's reasoning should not be taken too far. In *United States v. Rogers*,¹⁴² the Seventh Circuit Court of Appeals upheld the admission of portions of a how-to manual for explosives and firearms, *The Anarchist's Cookbook*, found in the defendant's possession. Nevertheless, the court noted the judge's

obligation to keep the prosecutor from suggesting that [the defendant] should be convicted because he owned seditious literature, that anyone who would read a book called *The Anarchist's Cookbook* must hold his legal obligations in contempt, or that possession of the book implied that [the defendant] wanted to become a sniper.¹⁴³

Although the court cited *Dressler*, the First Amendment did not figure in the decision.¹⁴⁴

¹³⁷ State v. Dressler, 514 N.W.2d 53 (unpublished table decision) No. 92-2049-CR, 1993 WL 469759 (Wis. Ct. App. Nov 17, 1993).

¹³⁸ *Id.* at *2.

¹³⁹ *Dressler*, 238 F.3d at 914.

¹⁴⁰ *Id.* at 915.

¹⁴¹ *Id.* at 914-15.

¹⁴² *United States v. Rogers*, 270 F.3d 1076 (7th Cir. 2001).

¹⁴³ *Id.* at 1081.

¹⁴⁴ *See id.* The admission of instructional or how-to information in the defendant's possession has been addressed often. Where the defendant's knowledge or

A. Pornography

Pornography may or may not contain elements of violence; therefore, pornography as a separate category is outside the scope of this Article, which is concerned with violent entertainment or art. Nevertheless, cases addressing evidence of the criminal defendant's possession of pornography as support for conviction on another crime raise issues similar to those raised by the admission of evidence of consumption of violent entertainment. Does the introduction of such evidence chill First Amendment rights? Is such evidence probative of a material fact at issue? A look at the reasoning in some of these cases is instructive.

Pornography, unlike other art or entertainment products, seems to enjoy a special status because it has been addressed by the Supreme Court. In *Stanley v. Georgia*, the Supreme Court held that the First Amendment protected private possession of pornography in the home.¹⁴⁵ In a later case, the Court stated, "[A] person's inclinations and 'fantasies . . . are his own and beyond the reach of government.'" ¹⁴⁶ In light of this precedent, the Second Circuit Court of Appeals reversed a conviction for knowing receipt of child pornography where the government had introduced evidence that the defendant also possessed adult videotapes that did not involve minors.¹⁴⁷ The court stated, "[O]ne must be mindful . . . that, even as to erotic material, a person's possession of some of this material for non-commercial use may well be entitled to protection under the [F]irst [A]mendment."¹⁴⁸ However, the technical basis for the court's ruling was lack of relevance and overwhelming prejudicial effect under the rules of evidence.¹⁴⁹ In another receipt of child pornography case, the Eighth Circuit Court of Appeals found that the trial court had erred in admitting evidence that the defendant had possessed another child pornography tape when that posses-

intent is material, such evidence may be admitted. See *United States v. Walters*, 351 F.3d 159, 165-69 (5th Cir. 2003) (holding that possession of *THE ANARCHIST'S COOKBOOK* was relevant to show defendant's knowledge when charged with bomb-making, and discussing similar cases).

¹⁴⁵ See *infra* note 177.

¹⁴⁶ *Jacobson v. United States*, 503 U.S. 540, 551-52 (1992) (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973)).

¹⁴⁷ *United States v. Harvey*, 991 F.2d 981, 997 (2d Cir. 1993).

¹⁴⁸ *Id.* at 995.

¹⁴⁹ *Id.* at 996.

sion was legal at the time.¹⁵⁰ But the appellate court found the error to be harmless in light of the remaining evidence.

One interesting case is *People of the Territory of Guam v. Shymanovitz*, where the court reversed convictions for multiple counts of sexual abuse of children because of the introduction of evidence that the defendant possessed adult gay pornography.¹⁵¹ The court did not mention the First Amendment rights of the defendant, but instead found that the evidence lacked any probative value, and was substantially prejudicial.¹⁵² The court reversed for errors under the evidence rules for relevance, unfair prejudice, and prior acts.¹⁵³ “The mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described and thus fails to meet the test of relevancy under Rule 401.”¹⁵⁴ Although it did not rely on the Constitution, the court’s comments reflect concerns that also underlie the First Amendment:

Criminal activity is a wildly popular subject of fiction and non-fiction writing—ranging from the *National Enquirer* to *Les Miserables* to *In Cold Blood*. Any defendant with a modest library of just a few books and magazines would undoubtedly possess reading material containing descriptions of numerous acts of criminal conduct. Under the government’s theory, the case against an accused child molester would be stronger if he owned a copy of Nabokov’s *Lolita*, and any murder defendant would be unfortunate to have in his possession a collection of Agatha Christie mysteries or even James Bond stories. Woe, particularly, to the son accused of patricide or incest who has a copy of *Oedipus Rex* at his bedside. In this case the government offered into evidence the text of two out of the dozens of articles from the four “Stroke” magazines and none of the articles from the “Playboy” or “After Midnight” magazines. Undoubtedly there was other reading material in Shymanovitz’ residence that was discovered but neither seized nor introduced into evidence. To allow prosecutors to parade before the jury snippets from a defendant’s library—the text of two magazine articles and descriptions of four magazines—would compel *all* persons to choose the contents of their libraries with considerable care; for it is the innocent, and not just the guilty, who are sometimes the subject of good-faith

¹⁵⁰ *United States v. LaChapelle*, 969 F.2d 632, 638 (8th Cir. 1992).

¹⁵¹ 157 F.3d 1154 (9th Cir. 1998).

¹⁵² *Id.* at 1159-60.

¹⁵³ FED. R. EVID. 401, 403, 404(b).

¹⁵⁴ *People of the Territory of Guam v. Shymanovitz*, 157 F.3d 1154, 1158 (9th Cir. 1998). The court applied the abuse of discretion standard of review. *Id.* at 1160.

prosecutions.¹⁵⁵

The *Shymanovitz* decision can partly be explained by the prosecution's egregious attempt to prejudice the defendant in the jury's eyes for his homosexuality, a sexual preference that has nothing to do with child abuse.¹⁵⁶ Nevertheless, it is a rare example of the court reversing the introduction of consumption evidence for lack of relevance to the elements of the crime. The court's reasoning is certainly applicable to other situations where the state attempts to use a criminal defendant's taste in entertainment against him or her.¹⁵⁷

IV

ANALOGOUS ASSOCIATIONAL EVIDENCE IN CRIMINAL TRIALS

While the First Amendment does not figure in the *Natural Born Killers* cases or most of the other cases noted in the previous section, it has been strenuously asserted in other related criminal evidentiary arguments. An analogous constitutional and evidentiary problem is raised when evidence of a criminal defendant's associations or beliefs is introduced against him or her. Court decisions in this area are helpful in analyzing the problem of evidence of First Amendment consumption. These freedom of association cases suggest that irrelevant evidence of First Amendment activity in a criminal case can violate the defendant's constitutional rights. However, many of these cases also reduce the constitutional issue to one of relevance, with no heightened standard or scrutiny for First Amendment evidence.

The Supreme Court has held that evidence of prison gang membership may be relevant and admissible in criminal cases, but that where there is not a clear showing of relevance, admission of such evidence violates the First Amendment.¹⁵⁸ In *United States v. Abel*,¹⁵⁹ the Court upheld the admission of evidence that the defendant and a defense witness belonged to a prison gang

¹⁵⁵ *Id.* at 1159.

¹⁵⁶ *See also* *State v. Lee*, 525 N.W.2d 179, 184 (Neb. 1994) (holding evidence of defendant's possession of homosexual pornography irrelevant to charge of child rape); *State v. Tizard*, 897 S.W.2d 732, 735 (Tenn. Crim. App. 1994) (holding evidence of defendant's possessing homosexual pornography irrelevant to charges of sexual battery).

¹⁵⁷ *United States v. Abel*, 469 U.S. 45, 56 (1984).

¹⁵⁸ *Dawson v. Delaware*, 503 U.S. 159, 165 (1992).

¹⁵⁹ 469 U.S. at 56.

that required its members to lie, cheat, and kill to protect each other, holding that such evidence was probative of the witness' bias. Because the evidence was offered only to impeach the witness, the Court noted that its introduction would not sanction the witness or the defendant for an association.¹⁶⁰ "Whatever First Amendment associational rights an inmate may have to join a prison group, those rights were not implicated."¹⁶¹ Because no punishment of the exercise of a constitutional right was involved, the Court suggested that the required showing of relevance need not be so rigorous: "For purposes of the law of evidence the jury may be permitted to draw an inference of subscription to the tenets of the organization from membership alone, even though such an inference would not be sufficient to convict beyond a reasonable doubt in a criminal prosecution under the Smith Act."¹⁶² The Court seemed to consider only the First Amendment rights of the witness, not whether the impeachment evidence might also in effect tarnish the defendant in the jury's eyes for belonging to the same gang. Thus, the *Abel* Court seems to suggest that evidence of associational activity does not violate the First Amendment.

Some years later, however, the Court ruled that admission of evidence of gang membership at sentencing could violate the First Amendment. In *Dawson v. Delaware*,¹⁶³ the Supreme Court found a death penalty defendant's First Amendment rights had been violated when the government introduced, at the penalty phase, evidence that he belonged to the Aryan Brotherhood. The Court noted, however, that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."¹⁶⁴ The Court rejected the defendant's "broad submission" to the contrary.¹⁶⁵ The error in *Dawson*, however, was that the prosecution had agreed to a stipulation that briefly described the racist beliefs of the Aryan Brotherhood, but never showed the rele-

¹⁶⁰ *Id.* at 53.

¹⁶¹ *Id.* at 53 n.2 (internal citation omitted).

¹⁶² *Id.* at 52-53 (distinguishing earlier cases that "dealt with the constitutional requirements for convicting persons under the Smith Act and state syndicalism laws for belonging to organizations which espoused illegal aims and engaged in illegal conduct").

¹⁶³ 503 U.S. at 159.

¹⁶⁴ *Id.* at 165.

¹⁶⁵ *Id.*

vance of that stipulation to the crime. The stipulation thus invited the jury to draw an inference, “[b]ut the inference which the jury was invited to draw in this case tended to prove nothing more than the abstract beliefs of the Delaware chapter.”¹⁶⁶ Because abstract beliefs are constitutionally protected, the Court held that Dawson’s First Amendment rights were violated.

The *Dawson* Court reconciled its holding with the earlier *Abel* opinion, and seemed to hinge the constitutional question on relevance. The Court stated, for example, that had the state produced evidence that the gang “is associated with drugs and violent escape attempts at prisons, and that [it advocated] the murder of fellow inmates . . . we would have a much different case.”¹⁶⁷ The Court added that if the state had “presented evidence showing more than mere abstract beliefs on Dawson’s part,” it might have avoided such a problem.¹⁶⁸

The Court was quite clear, however, that the First Amendment prohibited the evidence that was introduced. The Court stated that the First Amendment not only prohibits defining the exercise of a constitutional right as a crime, but it also prevents the state from using a person’s associations in other ways against that person,¹⁶⁹ including as evidence at sentencing. This is an important point for the argument over use of speech “consumption” as evidence in a criminal trial. Under the *Dawson* Court’s reasoning, a defendant’s First Amendment rights might be violated if irrelevant consumption evidence is admitted in a criminal trial.

Lower courts have used *Dawson* primarily to uphold the admission of gang membership or other First Amendment evidence, such as the defendant’s own expression, finding that the government met the required showing of relevance.¹⁷⁰ In the few

¹⁶⁶ *Id.* at 166.

¹⁶⁷ *Id.* at 165.

¹⁶⁸ *Id.* at 167.

¹⁶⁹ As other examples of prohibited uses of such evidence, the Court cited denial of bar membership based on communist party membership and the required collection of membership lists from associations. *Id.* at 168 (citing *Schwartz v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232 (1957); *Bates v. Little Rock*, 361 U.S. 516 (1960)).

¹⁷⁰ *See, e.g.*, *Kapadia v. Tally*, 229 F.3d 641 (7th Cir. 2000) (holding that the trial court properly considered at sentencing defendant’s post-conviction anti-Semitic remarks where the remarks were relevant to show motive and future dangerousness); *United States v. Beasley*, 72 F.3d 1518, 1530 (11th Cir. 1996) (holding that the trial court properly admitted evidence of religious beliefs, religious practices, and racist beliefs as relevant to the crime); *United States v. Easter*, 66 F.3d 1018, 1020 (9th Cir. 1995) (holding that evidence of defendant’s gang membership was admissible as relevant to identity); *People v. Smith*, 68 P.3d 302 (Cal. 2003) (holding that it was not

cases where the courts find error, it is usually harmless.¹⁷¹ Because the issue turns on relevance, courts review the issue under the discretionary evidentiary standard of review, rather than a more rigorous constitutional standard.¹⁷² One court stated, “[B]ecause we already have determined that the evidence in question was relevant, we need not determine whether the defendant’s statement constituted protected speech. Even if it did, the statement was still admissible because it was relevant.”¹⁷³ Thus, the constitutional nature of the defendants’ arguments does not affect the evidentiary analysis or the degree of scrutiny by the appellate courts. The constitutional challenge is reduced to one of simple relevance.

A few defendants have cited *Dawson* in challenging the admission of First Amendment “consumption evidence,” although it is not characterized as such. In a California case, *People v. Rogers*,¹⁷⁴ the defendant in a drug possession case argued that his attorney was constitutionally ineffective for failing to object to evidence that he had a book titled *Recreational Drugs* on his nightstand. The court found the book relevant to the issue of possession and that any objection would have been “unavail-

error to admit evidence of defendant’s racist remarks made during commission of crime); *People v. Ramos*, 938 P.2d 950 (Cal. 1997) (holding that defendant’s diary entries were relevant to show his racial antipathy toward persons, groups, and institutions); *People v. Shatner*, 673 N.E.2d 258, 268 (Ill. 1996) (holding that even if there was error in admitting gang membership evidence, it was harmless beyond a reasonable doubt, and that evidence of defendant’s religious beliefs was relevant because tied to the charged murder); *State v. Fanus*, 79 P.3d 847, 864 (Or. 2003) (holding that evidence of defendant’s prior racist expressions was relevant at sentencing to future dangerousness).

¹⁷¹ See, e.g., *Wainwright v. Lockhart*, 80 F.3d 1226, 1232 (8th Cir. 1996) (holding on appeal from grant of habeas corpus that while it was error to admit evidence of gang membership, the error did not make the death sentencing proceeding fundamentally unfair); see also *Ochoa v. State*, 963 P.2d 583, 597 (Okla. Crim. App. 1998) (“While we find the use of gang evidence in the first stage of trial to be error, Ochoa has failed to show that the error was sufficiently prejudicial. Accordingly, relief is denied.”).

¹⁷² E.g., *Beasley*, 72 F.3d at 1524 (applying abuse of discretion standard); see also *United States v. Easter*, 66 F.3d at 1020 (same); *State v. Rizzo*, 833 A.2d 363, 445, (Conn. 2003) (same). Many decisions are not explicit about the standard of review, but the standard appears deferential. One exception is *People v. Shatner*, 673 N.E.2d 258, 268 (Ill. 1996), which applied a constitutional standard of harmless error: “harmless beyond a reasonable doubt.”

¹⁷³ *Rizzo*, 833 A.2d at 446.

¹⁷⁴ *People v. Rogers*, No. A094545, 2002 WL 31082206 (Cal. Ct. App. Sept. 18, 2002).

ing.”¹⁷⁵ In a Connecticut case, *State v. Rizzo*,¹⁷⁶ the defendant was sentenced to death and challenged the admission at sentencing of a portion of his statement. That portion stated that he was “really interested in serial killings” and that he had read and watched videos about them.¹⁷⁷ It went on to say that his favorite book was about Jeffrey Dahmer, the well-known serial killer, and that he also possessed videos and other books about Dahmer.¹⁷⁸ The appellate court upheld the admission of this portion of his statement, finding that it was relevant to establish “the requisite intent to satisfy the aggravating factor, that is, it supported the reasonable inference that, when he killed the victim, he intended to accomplish more than the victim’s death; he intended to cause the victim psychological or physical pain, suffering or torture.”¹⁷⁹ Having found the evidence relevant, the court found no need to discuss whether the speech was protected.¹⁸⁰ The court did not discuss whether the statement also implicated the defendant’s rights as a consumer of speech.

Thus, even under *Dawson*, lower courts treat the claim of constitutional error like any evidentiary argument, turning it into one of relevance and trial court discretion. The constitutional nature of the objection adds little to the analysis in the end. Even in the rare case where the reviewing court finds error, a harmless-error showing is easily made by the state. Yet this approach is not necessarily correct even under *Dawson*. Justice Blackmun commented in his *Dawson* concurrence that the court of appeals on remand should consider whether a harmless-error analysis was even appropriate: “Because of the potential chilling effect that consideration of First Amendment activity at sentencing might have, there is a substantial argument that harmless-error analysis is not appropriate for the type of error before us today.”¹⁸¹

¹⁷⁵ *Id.* at *11.

¹⁷⁶ 833 A.2d at 363.

¹⁷⁷ *Id.* at 382 n.13.

¹⁷⁸ *Id.* at 445 n.74.

¹⁷⁹ *Id.* at 446.

¹⁸⁰ *Id.*

¹⁸¹ *Dawson v. Delaware*, 503 U.S. 159, 169 (1992) (Blackmun, J., concurring).

V

IS THE DIFFERENT TREATMENT OF FIRST AMENDMENT
CONSUMERS AND PRODUCERS JUSTIFIED?

The foregoing parts show that producers of art and entertainment escape civil liability and regulation while consumers of their products may have their consumption used against them in a criminal trial. Is this difference in First Amendment protection really a difference, and, if so, is it justified?

One might argue that the comparison is not apt—that civil suits against producers do not parallel the use of consumption evidence in criminal trials. In the former type of case, the protected First Amendment activity *is* the tort or the prohibited activity, while in the latter cases the protected activity is merely *evidence* in a criminal trial.¹⁸²

To be sure, these are very different situations. Where the First Amendment activity is defined as a tort or crime, the constitutional violation is obvious. Where evidence of constitutional activity is used against a criminal defendant, there may be a violation only if the evidence is irrelevant, which depends on its materiality and probative value. The burdens with respect to the constitutional issues thus also differ: a civil plaintiff attempting to overcome First Amendment objections to the lawsuit must show that the allegations meet the stringent requirements of the *Brandenburg* incitement test, while the state's burden as the proponent of evidence in a criminal trial is merely to show that the evidence has "any tendency" to make the existence of a material fact more or less likely to be true.¹⁸³

Yet, the comparison is still valid between civil suits against producers and evidentiary rulings in criminal cases against consumers. While the comparisons between civil suits and criminal trials here are not formally apposite, there is still a striking inconsistency in the judicial reasoning underlying the opinions. In civil suits against producers, or when legislators attempt to limit producers, courts will not find a causal connection between the speech and crime. Yet, courts are quick to find that such a connection justifies the admission of consumption habits in criminal

¹⁸² Where consumption itself is threatened with punishment, and not just used as evidence, the court is more likely to recognize the First Amendment rights of the consumer. *See, e.g., Stanley v. Georgia*, 394 U.S. 557 (1969); *see also Balagun v. N.J. Dep't of Corrs.*, 824 A.2d 1109, 1112 (N.J. Super. A.D. 2003).

¹⁸³ FED. R. EVID. 401.

cases. Also, while one can argue that using consumption habits as *evidence* in a criminal trial is not the same as punishing or sanctioning such consumption,¹⁸⁴ in fact it can be. If the jury is invited to infer guilt, or an aggravating circumstance for sentencing, from the mere exercise of a constitutional right, then the exercise of that right is being punished. Such was the rationale of the Supreme Court in *Dawson*.¹⁸⁵ There may be times when the violation seems less significant, as when there is substantial additional evidence of guilt or when the prejudicial value of the disputed evidence is minimal. There may also be times when the violation is great, when the admission of consumption evidence may be responsible for a conviction.

One might also argue that the criminal cases are not inconsistent with the civil cases because, in fact, the criminal cases do not assume a causal connection between protected speech and crime. When the criminal courts, the argument goes, allow evidence of movie or music consumption to show motive, intent, or state of mind, they are not assuming causation, but that the defendant's entertainment selections *reflect* his mental state. Thus, the evidence is not admitted to show that the entertainment products caused the crime, but only to show what was on the defendant's mind. The appellate cases reviewed do not support such an argument. At best they are silent on the distinction between causation and reflection, and much of the language supports an inference of causation.¹⁸⁶ Yet, even if this argument is correct, a

¹⁸⁴ The Seventh Circuit Court of Appeals made a similar distinction when it rejected a First Amendment challenge to evidence of the defendant's collection of videotapes and photographs:

The fundamental flaw in [the defendant's] First Amendment argument, and the major distinguishing factor in the string of broad First Amendment cases he relies upon, is that he was not convicted of possessing, distributing, or looking at the videos and pictures in question. Although they may have helped convict [the defendant] of murder, he never explains how his right to possess or look at them was affected by their use as evidence against him. And [the defendant] dramatically overstates the potential chilling effect of the evidentiary use of these materials, as they formed only one link in the long chain of evidence that proved his guilt. Innocent citizens, who presumably would not face a mountain of other circumstantial evidence of their guilt, need not fear a murder prosecution based on the mere possession of lawful videotapes and photographs.

Dressler v. McCaughtry, 238 F.3d 908, 915 (7th Cir. 2001) (internal citations omitted).

¹⁸⁵ 503 U.S. at 168.

¹⁸⁶ When the evidence is admitted to show "motive," this could mean that the movie or music "motivated" the defendant, or merely that it reflects a pre-existing

gaping relevance problem remains: millions watch, read, or listen to the same products without committing crimes. Absent a clear statement by the defendant, or other corroboration, how can any reliable connection be shown between state of mind and choice of entertainment in a particular case?

Aside from these relevancy issues, there are questions about how policy considerations apply in the two kinds of cases. One example is consideration of potential chilling effects on free speech rights. One might argue that less protection need be afforded consumption rights in a criminal trial because the potential chilling effect on the exercise of constitutional rights is less there than when producers are faced with civil liability or regulatory restriction. The chilling effect of civil damage awards or regulation is well-recognized.¹⁸⁷ How does the admission of evidence of consumption habits in a criminal trial chill rights? One might argue that civil liability is a direct and real threat to those making movies or music, but most fans probably do not consider committing crimes, and, therefore, might not be intimidated by the possibility that their consumption could be used against them if they should be accused of violating the law. Yet, what of those consumers who do not plan to commit crimes, but are afraid of being accused unjustly? These consumers might worry that their choices of entertainment or art will make them suspect. In *Dawson*, Justice Blackmun's concurrence recognized the argument that even the use of evidence of prison gang membership at sentencing could chill constitutional rights of association.¹⁸⁸

A related chilling-effect argument was rejected by a unanimous Supreme Court in *Wisconsin v. Mitchell*.¹⁸⁹ In *Mitchell*, the Court upheld the constitutionality of sentence enhancements based on racial motivation and found arguments about the chilling effect of such a statutory scheme "attenuated" and "speculative,"¹⁹⁰ explaining that:

We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later com-

motive. The same distinction may exist where the evidence is admitted to show intent, premeditation, or state of mind. Court decisions do not clearly address this distinction.

¹⁸⁷ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).

¹⁸⁸ 503 U.S. at 169 (Blackmun, J., concurring).

¹⁸⁹ 508 U.S. 476, 488-89 (1993).

¹⁹⁰ *Id.*

mits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim’s protected status, thus qualifying him for penalty enhancement This is simply too speculative a hypothesis.¹⁹¹

The distinction, however, is that in *Mitchell* the defendant was not to be punished for his beliefs alone, or for abstract beliefs, but for acting unlawfully on them.¹⁹² The beliefs were not used to imply guilt, but to enhance punishment where those beliefs had led to crime. Where evidence of consumption habits is introduced to imply guilt, the potential for chilling is less speculative. One must conjure up a vision of citizens worried that their choices of music or entertainment will be used to make them suspects in unsolved crimes, or as worthy of state monitoring. Especially as monitoring of consumer habits increases, citizens might worry about the records they leave on websites, with credit card companies, and elsewhere, setting forth their tastes in music, movies, and books. That such fears might be engendered even by criminal evidence rulings is not so far-fetched.¹⁹³ Such rulings tell the public that certain music or entertainment can get you in trouble. Such rulings might also embolden law enforcement to target as suspect those who consume certain entertainment products.

VI

RIGHTING THE BALANCE: HOW TO PROTECT CRIMINAL DEFENDANTS’ RIGHTS AS CONSUMERS OF FIRST AMENDMENT SPEECH

If in fact there is an untenable difference in the protection of producers and consumers of expression under the First Amend-

¹⁹¹ *Id.*

¹⁹² *Id.* at 483-86.

¹⁹³ See *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (noting that citizens would be reluctant to let the government know they were reading material deemed to be communist propaganda). As noted in Part III, *supra*, the court in *People of the Territory of Guam v. Shymanovitz* stated:

To allow prosecutors to parade before the jury snippets from a defendant’s library—the text of two magazine articles and descriptions of four magazines—would compel *all* persons to choose the contents of their libraries with considerable care; for it is the innocent, and not just the guilty, who are sometimes the subject of good-faith prosecutions.

157 F.3d 1154, 1159 (9th Cir. 1998). On the other hand, the Seventh Circuit Court of Appeals discounted the chilling effect of evidentiary rulings. See *supra* notes 134-44 and accompanying text.

ment, what changes should be made? Should protection of producers be lessened or protection of consumers' rights be strengthened? Given the near unanimity of courts in dismissing civil suits against producers, a move toward producer liability seems both unlikely and undesirable for the policy reasons stated in opinions rejecting such suits. The more realistic, and more desirable, change would be to strengthen the protection of consumers of expression when the state seeks to use their consumption against them in a criminal trial. Such a change could be accomplished by requiring a more rigorous showing of relevance.

The First Amendment does not erect a barrier to the admission of relevant evidence,¹⁹⁴ but neither should it be completely trodden underfoot whenever the state seeks to introduce evidence of a defendant's taste in books, movies, or music. Where such evidence is likely to be extremely prejudicial, as it will always be when the state seeks to tie violent entertainment to the crime, courts should require more than a mere similarity between the crimes depicted and the crime charged. In addition, reviewing courts should not give trial courts broad discretion to determine whether the defendant's constitutional rights are affected; constitutional issues should be reviewed *de novo* as questions of law. Finally, courts should engage in harmless-error analysis cautiously.

Where First Amendment rights are involved, the state or other party seeking to overcome those rights usually has a heavy burden of justification.¹⁹⁵ A showing of relevance, on the other hand, requires only a showing that the proffered evidence has "*any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."¹⁹⁶ This definition involves two prongs, materiality and probative worth.¹⁹⁷ Materiality means that the evidence goes to the existence of a fact of consequence to the elements or defenses of the action. The probative worth prong, "any tendency," sets the bar very low.¹⁹⁸

¹⁹⁴ Dawson v. Delaware, 503 U.S. 159, 165 (1992).

¹⁹⁵ See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Brandenburg v. Ohio, 395 U.S. 444 (1969).

¹⁹⁶ FED. R. EVID. 401 (emphasis added). Most states have adopted a version of the Federal Rules of Evidence.

¹⁹⁷ Nicolas, *supra* note 9, at 540-41.

¹⁹⁸ *Id.* at 541.

If the constitutional issue is collapsed into an ordinary evidentiary determination of relevance, giving the trial court wide discretion to determine relevance and resulting in a deferential standard of review, the defendant consumer's constitutional rights are not adequately safeguarded.

It is true that when evidence is challenged under *Dawson*, lower courts have collapsed this issue so that the constitutional question is treated as an evidentiary one.¹⁹⁹ But, even if this loose standard is appropriate under *Dawson* for freedom of association arguments, the relevance of First Amendment consumption habits is much harder to prove, or at least should be, than the relevance of one's associations, or even one's own beliefs or statements. While we usually join groups because of some agreement with their purpose or views, we often read, listen to, or view materials we do not agree with or wish to emulate. Any asserted connection is too tenuous. Curiosity may drive us to try different materials, or we may hear or see things as part of socializing with others whose tastes are slightly different than ours. The popularity of murder mysteries, across several forms of media, show that many law-abiding citizens like to read or watch depictions of crimes that they will never commit. Prosecutors may be tempted to think that what one reads or listens to signifies one's beliefs, but it just is not so. Allowing courts to use magic words such as "state of mind" or "motive" papers over this lack of connection.

Because of the constitutional rights at stake—and because there can be no assumption of a connection between reading, watching, or listening habits and crime—before courts admit evidence of a criminal defendant's cultural consumption, there should be a significant showing of relevance, such as the defendant's own statement linking the consumption to the crime.²⁰⁰ A

¹⁹⁹ See *supra* Part IV.

²⁰⁰ For example, in *Byers v. Edmondson*, 2001-1184 (La. App. 1 Cir. 6/5/02), *writ denied*, 2002-1811 (La. 10/4/02), 826 So. 2d 551 (La. Ct. App. 2002), the shooter spoke about the influence of the movie on the crime. Similar corroboration of relevance might be found in evidence that the defendants modeled themselves on the work, but there must be something more than evidence that the defendant liked the particular work. Many people like grisly movies or books. Thus the defendant's statement in *State v. Rizzo*, 833 A.2d 363, 445 (Conn. 2003), that he was very interested in books and movies about Jeffrey Dahmer should probably not be sufficient to show a connection between his taste and the crime charged. But the defendant's statement that, like the heroes of *Natural Born Killers*, he'd like to "pull a fatality," might be sufficient. See *State v. Begay*, 964 P.2d 102, 106 (N.M. 1998).

mere similarity between the crime charged and the fictional or depicted crime should not be enough. Even a striking similarity may not be enough with very popular works, for the fact that the defendant listened to, watched, or read the work will not sufficiently distinguish him or her from millions of other citizens. Thus, there should be some other corroboration or link between the work and the crime.

Perhaps courts should develop something like the *Brandenburg* incitement test for consumers. Under that test for producers or speakers, the mere tendency of the work to cause crime is not enough to remove it from First Amendment protection; its creator must be shown to have intended it to incite imminent lawless action.²⁰¹ If this test were modified for consumers of expression, the mere tendency of the work to cause crime should not make its consumption relevant in a criminal trial. There must be some clear evidence that the defendant viewed, listened to, or read the work for inspiration, encouragement, or as a source of ideas. The fact that the defendant enjoyed the work is not enough; many of us enjoy works about violence without then emulating them.²⁰²

What if the defendant's consumption habits are truly extreme? That is, what if rather than owning or viewing a few violent, popular works, the defendant has an extensive collection of very violent materials?²⁰³ At some point, the extreme nature or sheer volume of the defendant's habits or tastes might justify a finding of relevance even without other corroboration. In such a case, the question of what is truly extreme and linked to crime may be a proper subject of expert testimony.²⁰⁴

The foregoing discussion deals mostly with the probative worth prong of relevancy—whether the defendant's viewing, reading, or listening habits can be probative of the perpetrator's identity, a criminal mental state, or other element of the crime or defense. However, relevancy also has a materiality prong which requires

²⁰¹ 395 U.S. 444, 447 (1969).

²⁰² This is true whether the evidence is offered to prove the defendant committed the criminal act (to show identity) or to show an aggravating circumstance or to increase the degree of the crime by showing, for example, premeditation. The fact that the defendant committed the act does not mean that his reading, viewing, or listening habits elevated his mental state.

²⁰³ Such may have been the case in *Dressler v. McCaughtry*, 238 F.3d 908, 910 (7th Cir. 2001), where the defendant had an extensive collection of videotapes and photographs of intentionally violent acts as well as of actual murder and mutilation.

²⁰⁴ See FED. R. EVID. 703.

that the fact sought to be proved or disproved is material to the action.²⁰⁵ If knowledge is an element of the crime, for example, or, if the defendant seeks to show lack of knowledge, then evidence that the defendant obtained knowledge through a book or movie could well be relevant.²⁰⁶ However, such evidence may not be offered simply to show the defendant's propensity for violence. Propensity is not a material fact.²⁰⁷

A court's decision whether to admit consumption evidence should also involve weighing its probative worth against the danger of unfair prejudice under Federal Rule of Evidence 403.²⁰⁸ While this weighing is not part of the First Amendment inquiry, which requires only that the evidence be relevant, it is an important evidentiary point and vital to ensuring a fair trial. A more rigorous showing of relevance should ensure that the probative worth is not substantially outweighed by the danger of unfair prejudice. Attorneys should ask for, and courts should perform, a separate weighing. Some books, movies, or music will be more prejudicial than others, and there are usually a variety of ways to present the evidence that will either maximize or minimize its impact on the jury.²⁰⁹

Not only should the requirement of relevance for such evidence be rigorous, but the standard of review should not be so

²⁰⁵ See Nicolas, *supra* note 9; see also FED. R. EVID. 401.

²⁰⁶ See *United States v. Walters*, 351 F.3d 159 (5th Cir. 2003) (finding evidence that defendant had access to *THE ANARCHIST'S COOKBOOK* relevant to show knowledge of bomb-making technique).

²⁰⁷ "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." FED. R. EVID. 404(a). However, "[e]vidence of other crimes, wrongs, or acts" may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." FED. R. EVID. 404(b). Sometimes consumption evidence is offered as "prior acts" evidence under Federal Rule of Evidence 404(b) or its state equivalent. Courts differ as to whether rule 404(b) even applies to this type of evidence. Compare *Dressler*, 238 F.3d at 913-14 (holding that possession of pornography and violent materials is a "prior act" under Federal Rule of Evidence 404(b)) with *People of the Territory of Guam v. Shymanovitz*, 157 F.3d 1154, 1159-60 (9th Cir. 1998) (holding that evidence of defendant's books and magazines is not evidence of an "act" under rule 404 (b)).

²⁰⁸ FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

²⁰⁹ One important question is whether to admit the movie, book, or song itself, or whether to restrict the state to describing the work. See *Beasley v. State*, 502 S.E.2d 235, 238 (Ga. 1998); see also *supra* note 93 and accompanying text. If the latter course is followed, the content and extent of that description become issues.

deferential to the trial court. As a general rule, evidentiary decisions are committed to the sound discretion of the trial court, especially those aspects that involve the trial court's fact-finding expertise.²¹⁰ But, where a constitutional right is involved, the decision to admit evidence should be reviewed independently.²¹¹ If this reasoning is applied to the issue of First Amendment consumption evidence, reviewing courts should independently review the factual record to see whether a finding of relevance is really supported, and whether there is corroborating evidence of a connection between the defendant's consumption of entertainment and the crime charged. Certainly, reviewing courts should defer to the trial court's determinations of credibility and its purely factual findings.²¹² But, as to the significance of those facts, and whether they support an inference of motive, intent, or state of mind, the appellate courts should conduct an independent review.²¹³ Because the determination of relevance of con-

²¹⁰ See STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 11.01 (2d ed. 1992). Professor Nicolas argues, however, that although many courts recite that the admission or rejection of evidence is discretionary, in practice the standard of review for evidentiary issues incorporates the traditional tripartite standard of *de novo*, clear error, and abuse of discretion. Nicolas, *supra* note 9, at 534-36. To the extent a relevancy determination involves questions of law, some courts will apply a *de novo* standard of review. *Id.* at 541.

²¹¹ This was formerly the Supreme Court's approach to evidentiary errors alleged under the confrontation clause of the Sixth Amendment:

[A]s with other fact-intensive, mixed questions of constitutional law . . . "[i]ndependent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles" governing the factual circumstances necessary to satisfy the protections of the Bill of Rights. We, of course, accept the Virginia courts' determination that Mark's statements were reliable for purposes of state hearsay law, and, as should any appellate court, we review the presence or absence of historical facts for clear error. But the surrounding circumstances relevant to a Sixth Amendment admissibility determination do not include the declarant's in-court demeanor (otherwise the declarant would be testifying) or any other factor uniquely suited to the province of trial courts. For these reasons, when deciding whether the admission of a declarant's out-of-court statements violates the Confrontation Clause, courts should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause.

Lily v. Virginia, 527 U.S. 116, 136-37 (1999) (plurality opinion) (internal citation omitted). The Court has since completely changed the framework for Confrontation Clause analysis of out-of-court statements. *Crawford v. Washington*, 541 U.S. 36 (2004).

²¹² See CHILDRESS & DAVIS, *supra* note 211, § 11.04.

²¹³ See *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (holding that when reviewing reasonable suspicion or probable cause determination, court should review the determination of historical facts for clear error, but independently review the ultimate determination).

sumption evidence ultimately determines whether the consumer's First Amendment rights have been violated, the finding of relevance should be reviewed independently.

Such an approach is supported by the Supreme Court's review of other issues involving the First Amendment.²¹⁴ "The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review."²¹⁵ The reviewing court will conduct an independent review of trial court determinations of "obscenity," "actual malice," and other findings of constitutional significance: "[T]he rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'"²¹⁶ Similarly, where a finding of relevance establishes the extent of First Amendment protection, the reviewing court should conduct an independent appellate review of that finding. Such an approach will also aid in the development of a consistent body of law with respect to First Amendment consumer evidence.²¹⁷

Finally, as part of reviewing errors on appeal, courts should apply a harmless-error standard appropriate for constitutional errors: harmless beyond a reasonable doubt.²¹⁸ As Justice Blackmun noted in *Dawson*, there is an argument against applying any harmless error analysis to this kind of error.²¹⁹ Such an argument is unlikely to prevail today; harmless error analysis, especially for constitutional errors deemed trial errors rather than structural, is well-established.²²⁰ But, if such an analysis is to be used, it should be done cautiously; simply referring to the evidence remaining as overwhelming tends to discount the prejudicial effect the erroneously admitted evidence may have had.²²¹ A better inquiry is whether the state can prove "beyond a rea-

²¹⁴ *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 500 (1984).

²¹⁵ *Bose*, 466 U.S. at 508 n.27.

²¹⁶ *Id.* at 508 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)).

²¹⁷ See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001).

²¹⁸ See *Chapman v. California*, 386 U.S. 18, 24 (1967).

²¹⁹ *Dawson v. Delaware*, 503 U.S. 159, 169 (1992) (Blackmun, J., concurring).

²²⁰ See *Neder v. United States*, 527 U.S. 1, 8 (1999); *Arizona v. Fulminante*, 499 U.S. 279 (1991).

²²¹ See *Chapman*, 386 U.S. at 23; *Williams v. Commonwealth*, 528 S.E.2d 166, 169 (Va. Ct. App. 2000).

sonable doubt that the [erroneous admission of evidence] did not contribute to the verdict obtained.”²²² Such an inquiry allows the reviewing court to carefully consider the prejudicial nature of the improper evidence. Many of the decisions reviewed in Part III of this Article are quite cursory in their harmless-error analyses. Appellate defense attorneys should do their best to ensure a more thorough harmless-error review.

As a practical matter, it is up to defense attorneys to raise the constitutional challenge to consumption evidence, to argue for a rigorous showing of relevance, and to urge a less deferential standard of review. In our adversarial system, courts will not do the work of the advocate.

Arguably, the real reason for the difference between the treatment of producers and consumers is poor lawyering. Any comparison between the treatment of producers' rights in the civil context and that of consumers' rights in criminal trials must take account of the disparity in legal resources between the typical entertainment defendant and the typical criminal defendant. Entertainment defendants are chosen in part for their deep pockets, and the number and kind of defense attorneys listed in the decisions reflect that wealth. The majority of criminal defendants are indigent, represented by appointed counsel who are very often overworked and underpaid. The lengthy discussions of the First Amendment in suits against producers are probably due to extensive briefing of the issues, while the First Amendment is rarely raised in the first place by criminal defendants challenging consumption evidence. This disparity of resources is an unfortunate reality, and may explain in part why the law has developed as it has. Certainly, better lawyering, beginning with timely and accurate objections, could go far toward changing the outcome with respect to consumption evidence in criminal trials. It is the author's hope that this Article will help to alert defense counsel to the First Amendment issues at stake.

Lawyers and courts need to take seriously the issue of consumers' rights under the First Amendment for several reasons. First, there is the untenable disparity in how producers and consumers of cultural products are treated, even though the Constitution protects both producers and consumers of expression. Second, there is the very real danger of wrongful convictions based on inflammatory music, films, and other media. Where criminal de-

²²² *Chapman*, 386 U.S. at 24.

defendants come from backgrounds different from that of their jurors, this cultural divide can often be widened by violent imagery or words in works the defendant has consumed. DNA testing in old cases has shown that wrongful convictions occur.²²³ DNA evidence is not always available, however, so the danger of wrongful conviction remains very real. This danger should not be increased with inflammatory, irrelevant evidence of the defendant's taste in music, movies, or books.

Last, we should be concerned about the potential chilling effect on the exercise of our constitutional right to read, watch, or listen to what we wish. The criminal trial of a man accused of murder may seem far away from our own trip to the video store or library. But, as our consumption habits are increasingly tracked, both by government and private entities, each of us leaves a record that could be mined for different purposes. A loose approach to relevance in the criminal context opens the door to using the information in other contexts, and could begin to make us all more fearful of creating a record of looking at, listening to, or reading the wrong kind of material.

²²³ See The Innocence Project at the Benjamin N. Cardozo School of Law, at <http://www.innocenceproject.org> (last visited Jan. 5, 2005).

