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Mrs. Palsgraf And The First Amendment

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MRS. PALSGRAF AND THE FIRST AMENDMENT

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Questions of causation lie not only at the heart of much of tort law, but also at the heart of the first amendment. Given that it is far too late in our experiential and scientific day to deny the extent to which communicative acts may cause legally cognizable injuries,[1] much that is important and interesting about the constitutional protection of freedom of speech pertains to the way in which the first amendment treats communicative causes differently from noncommunicative causes.[2] It is *that* difference that I want to explore in this brief paper. My thesis, quite simply, is that the existence of a communicative cause is a necessary but not a sufficient condition for a first amendment-inspired modification of otherwise applicable principles of tort law. Imposing a first amendment overlay on the principles of tort law that would otherwise prevail is justifiable, I will urge, when and only when communications *of a certain sort* are at issue. And as with many other facets of first amendment inquiry, it appears that the most important questions are not about what the first amendment does, but about when the first amendment does whatever it is that it is going to do. Especially with respect to questions of causation and tort law, threshold and theory-laden questions of the coverage of the first amendment are among the most important and intractable that we encounter.[3]

Let me begin with *LeBoeuf v. Goodyear Tire & Rubber Company*.[4] In *LeBoeuf* one of the plaintiffs was a passenger in an automobile driven by Shelby Leleux. At the 5:00 a.m. time of the accident, Leleux was driving between 100 and 105 miles per hour, with a blood alcohol level of .18% resulting from his steady drinking since 9:00 p.m. the previous night. Subsequent examination of the automobile, a new Mercury Cougar with a 460 cubic-inch, 425 horsepower engine, revealed that the separation of a tire tread from the carcass of an HR-78-15 Goodyear custom power radial tire precipitated the accident. When the passenger brought suit against

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1. For an extended discussion of my views about causation, see Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737.

2. I have learned much from Judy Lachman's unpublished work, A Theory of Causation in the Context of Speech-Related Harm, or When Does Speech Cause Harm?. *See also* Lachman, *Reputation and Risktaking*, in THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 229 (E. Dennis & E. Noam eds. 1989).

3. On the distinction between coverage and protection that guides but is not reexplained in this paper, see F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 89-92 (1982); Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285; Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981).

4. 451 F. Supp. 253 (W.D. La. 1978), *aff'd*, 623 F.2d 985 (5th Cir. 1980).

Goodyear and Ford,[5] the two defendants responded, naturally enough, by asserting that the act of driving in excess of 100 miles per hour by a highly intoxicated driver constituted the proximate cause of the accident, and that the existence of this "intervening" misuse of the product relieved them from liability. The United States Court of Appeals for the Fifth Circuit, however, applying Louisiana law, concluded that this case fell within the category of reasonably foreseeable misuse and upheld a verdict for the plaintiffs,[6] thus allowing liability against the manufacturer even though the driver had not used the product in the normal and proper way.

Although not every court would necessarily decide *LeBoeuf* the same way, the decision hardly falls outside of the existing boundaries of contemporary American tort law.[7] By focusing on foreseeability, and by refusing to limit liability to the most temporally immediate negligent causal agent, the court reached a result that has ample support both in the case law and in the voluminous literature on causation and negligence.

Now let me compare a quite different case, one I want to create rather than describe, but one I will create around the facts of *Brandenburg v. Ohio*.[8] In *Brandenburg* the speaker was a Ku Klux Klan leader who delivered an inflammatory speech representing that "revengeance" against Blacks and Jews was likely to occur unless there were drastic changes in governmental policy—changes designed to preserve Brandenburg's view of the appropriate primacy of "the white, Caucasian race." Brandenburg was prosecuted and convicted under the Ohio Criminal Syndicalism statute. The Supreme Court, however, overturned the conviction, holding that a prosecution based on the potential connection between a speech and an ensuing unlawful act inspired by that speech could be maintained only "where . . . advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." This standard persists to this day,[9] and represents the current articulation of the "clear and present danger" principle that has been with us since the early part of the century.[10]

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5. LeBoeuf v. Goodyear Tire & Rubber Co., 623 F.2d 985, 987 (5th Cir. 1980). The driver of the car was killed in the accident, and his mother's wrongful death action was consolidated with the action brought by the passenger.

6. *Id.* at 988-90. The Fifth Circuit determined that the defenses of assumption of risk and contributory negligence were properly rejected by the trial court on the evidence.

7. *See, e.g.*, Back v. Wilkes Corp., 375 Mass. 633, 641, 378 N.E.2d 964, 969-70 (1978); Beatty v. Schramny, Inc., 188 N.J. Super. 587, 592, 458 A.2d 127, 129 (App. Div. 1983). *See generally* W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 197-203, 303-06 (5th ed. 1984); M. SHAPO, THE LAW OF PRODUCTS LIABILITY ¶¶ 21.01 et seq. (1987).

8. 395 U.S. 444 (1969) (per curiam).

9. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), *reh'g denied*, 459 U.S. 898 (1982).

10. *Brandenburg* is commonly taken to combine the more speech-protective components of Noto v. United States, 367 U.S. 290 (1961), Scales v. United States, 367 U.S. 203 (1961), Yates v. United States, 354 U.S. 298 (1957), Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring), Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J.,

Now suppose that one of Brandenburg's listeners, convinced of the wisdom of Brandenburg's message but believing that immediate action was necessary, proceeded to commit a battery on some Black or Jew. And suppose also that the victim of the battery discovers that Brandenburg's pockets were deeper than those of the actual wielder of the axe handle, and accordingly she sues Brandenburg for having negligently caused her injury. Acknowledging (for the sake of argument, or for lack of proof) that Brandenburg had no more desired her injury than Goodyear or Ford had desired that of the passenger in *LeBoeuf*, she still maintains that the actual perpetrator of the battery had engaged in a foreseeable misuse of Brandenburg's message in exactly the same way that the driver in *LeBoeuf* had engaged in a foreseeable misuse of Goodyear's tires. If she can establish the causal connection between the speaker's speech and the battery, similar to the causal connection established in *LeBoeuf* between Goodyear and the disintegration of the tire at 100 miles per hour, she maintains, then she should be allowed to recover. Consequently, she offers proof from the assailant himself that but for Brandenburg's speech, the assailant would never have thought of battering her.[11]

Both accepted wisdom and a fair reading of *Brandenburg* indicate that the first amendment would not permit the imposition of liability in these circumstances.[12] Given that the difference between tort liability and criminal punishment is normally of no first amendment significance,[13] to attach

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dissenting), Schenck v. United States, 249 U.S. 47 (1919), and Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917) (L. Hand, J.), *rev'd*, 246 F. 24 (1917). *See generally* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

11. The statement in the text is hardly fanciful, for it is exactly this kind of proof, usually in the form of an identity between a published description and the act performed, that undergirds a number of recent cases. *See, e.g.*, Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802 (S.D. Tex. 1983), *motion to dismiss denied*, 583 F. Supp. 1566 (S.D. Tex. 1984), *rev'd*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (deceased teenager found hanged next to copy of *Hustler Magazine* article describing practice of autoerotic asphyxiation); Olivia N. v. National Broadcasting Sys., 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981), *cert. denied*, 458 U.S. 1108 (1982) (rape committed in exactly the same manner as one described on television show); Walt Disney Productions, Inc. v. Shannon, 247 Ga. 402, 276 S.E.2d 580 (1981) (child testified to following instructions on television show regarding how to create a sound effect with a BB and a balloon).

12. All of the cases cited *supra* note 11 relied on *Brandenburg* to deny liability. *See generally* Diamond & Primm, *Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries: From the Mickey Mouse Club to Hustler Magazine*, 10 HASTINGS COMM/ENT L.J. 969 (1988); Kopech, *Shouting "INCITEMENT!" in the Courtroom: An Evolving Theory of Civil Liability?*, 19 ST. MARY'S L.J. 173 (1987).

13. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See also* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), *reh'g denied*, 475 U.S. 1132 (1986) (evaluating civil remedy under same standards applicable to criminal prosecution). Although the existing law on this point is moderately clear, there exists little articulated justification for treating a state's provision of a tort remedy, especially between nongovernmental parties, in exactly the same way that the first amendment treats a criminal prosecution or any other restricting action performed by governmental officials. *See* Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761 (1986).

liability in these circumstances would be impermissible, in part because Brandenburg's speech did not explicitly incite the action that occurred, in part because the ensuing battery was not "imminent,"[14] and perhaps in part because the tort standard of foreseeability allows a lower probability of occurrence than allowed by the *Brandenburg* idea of "likelihood."

Thus it appears that the bite of the first amendment consists of the way in which the very same showing of cause in fact and reasonable foreseeability that would be sufficient for normal tort purposes is insufficient where the link in the causal chain that is the subject of liability is an act of communication, as in *Brandenburg*. Although both the driver in *LeBoeuf* and the assailant in my modified version of *Brandenburg* are clearly liable, the first amendment, and only the first amendment, appears to explain why Goodyear and Ford are liable in the first case but Brandenburg is not liable in the second.

This all seems commonplace, and indeed explains the results in a number of widely discussed cases, such as *Olivia N. v. NBC*[15] and *Herceg v. Hustler Magazine*.[16] In both of these cases the nature of the proximate act, the rape in *Olivia N.* and the autoerotic asphyxiation in *Herceg*, was sufficiently similar to the act described in the publication and sufficiently unlikely to have been inspired by any other source that the threshold question of cause in fact was satisfied. But like my hypothetical variation on *Brandenburg*, in both cases the absence of explicit incitement,[17] imminence, and whatever *Brandenburg* means by likelihood was sufficient to eliminate liability for the publications at issue, however much the facts and the proof appear structurally similar to the facts that rendered the analogous Goodyear Tire and Rubber Company liable in *LeBoeuf*.

But now let me complicate things. Suppose that a manufacturer of chainsaws enclosed accompanying instructions explaining, *inter alia*, how to remove the numerous safety devices and operate the chainsaw without them, but explaining also that these devices were to be removed only by a trained mechanic for testing purposes after a repair. Suppose further that it is easier and faster to operate a chainsaw without the safety devices, and that most regular users of chainsaws are aware of this fact. Now suppose also that some consumer removes the safety devices, causing personal injury to both himself and a bystander.[18] The consumer and the bystander sue the chainsaw

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14. On imminence, see Hess v. Indiana, 414 U.S. 105 (1973).

15. 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981), *cert. denied*, 458 U.S. 1108 (1987).

16. 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

17. Unlike *Olivia N.*, the communication in *Herceg* involved a specific warning not to engage in the practice. Herceg v. Hustler Magazine, 814 F.2d 1017, 1018 (8th Cir. 1987). *Quaere* whether the warning increased or decreased the likelihood that a fourteen year old male would commit the act.

18. The presence of the injured third party, whether the victim of the rape in *Olivia N.*, the victim of the battery in my hypothetical variant on *Brandenburg*, or the bystander here, removes potential contributory negligence complications and thus focuses more cleanly on the causation issue. In this respect, it is true *a fortiori* that an injured bystander or other driver would have been able to recover in *LeBoeuf*.

manufacturer, citing the *LeBoeuf* line of cases. Moreover, they prove that but for the instructions the safety devices would never have been removed, and that but for the removal of the safety devices the accident would never have occurred. They argue foreseeable misuse, supporting foreseeability with proof of the general patterns of chainsaw usage. The chainsaw manufacturer, however, responds by citing *Brandenburg*, *Olivia N.*, and *Herceg* for the proposition that the relevant link in the causal chain, the instruction booklet, was an act of communication protected by the first amendment just like Brandenburg's speech, NBC's television show, and Hustler's publication of its magazine. Accordingly, the manufacturer argues that speaker liability may be imposed only if the *Brandenburg* standards are met. Because the chainsaw manufacturer as publisher and distributor of the instructions (that is, as speaker) neither desired nor urged the injury, and because the imminence and likelihood were no greater than in *Olivia N.* and *Herceg*, the manufacturer argues that this variety of "secondary" liability (the bystander could of course sue the chainsaw operator, just as Olivia N. could sue the rapist) cannot be imposed consistent with the first amendment.[19]

Our first reaction is one of disbelief. We raise our eyebrows and snicker, but then we realize that the defendant is serious. The chainsaw manufacturer is not kidding! What do we say? Assuming the identical probability, consequences, and foreseeability in fact in this case as in my modified *Brandenburg* case, and assuming the same proof of causation in fact, what explains the difference? Both involve the same proof of causation and foreseeability, both involve the same amount of negligence in a "reasonable man" sense, and both involve negligence in the course of a communicative act. What explains the difference?

One approach, of course, is to say that there *is* no difference. The chainsaw manufacturer has got us. If communication is all that important, then we ought to factor that importance into the creation of liability rules, which means two things. First, determining causation is an attributive process that involves finding causation with respect to some but not other logically equivalent causal agents on the basis of a variety of policy considerations;[20] it is appropriate, therefore, to factor the value of communication

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19. Actually, the issue of likelihood is more complicated than I suggest in the text. Given the number of copies of *Hustler* that are published, and given the number that end up in the hands of male adolescents (a fact that presumably could be proved at trial), it is possibly "likely" *ex ante* that *an* autoerotic death was going to occur, although not likely that any particular death (that is, to a particular person reading a particular copy of the magazine) was going to occur. The same reasoning presumably would apply to my hypothetical chainsaw instructions. To the best of my knowledge, there are no judicial opinions dealing with this complication of the *Brandenburg* likelihood test.

20. *See* Lachman, *supra* note 2; Schauer, *supra* note 1, at 737. *See generally* Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975); Landes & Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109 (1983); Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463 (1980).

into that determination, thus finding that only the user of the chainsaw and not the creator of the instructions for its [mis]use is causally responsible for any ensuing injuries. And second, even if some cases exist in which there may be no ascertainable responsible agent, that is but one more manifestation of the fact that the first amendment often and properly protects harmful speech despite the harm it may cause. The results in the *Skokie* cases,[21] in *Hudnut v. American Booksellers Association, Inc.*,[22] and in *Brandenburg* itself, as well as the results in cases like *Olivia N.* and *Herceg*, are ample testimony to the way in which the first amendment's importance is manifested in its immunization of a great deal of harmful speech from criminal or civil liability.

Yet this argument for not imposing liability on the chainsaw manufacturer (assuming the otherwise applicable tort principles would create such liability) simply will not do. One need not be an ardent antifoundationalist to accept the fact that if some principles generate results so at odds with our basic understanding about, for example, the principle of freedom of speech, and so contrary to results that we are willing to tolerate, then it is time to reevaluate or refine the principle. This is little more than Rawlsian reflective equilibrium in action.

Thus if something tells us that there is a difference between Brandenburg's free speech claim and that of the chainsaw manufacturer, then we must attempt another approach. We might try to draw analogies with commercial speech doctrine and propose that although there is no mandate for placing the chainsaw instructions totally outside the ambit of the first amendment, various differences, both "commonsense" and theoretical, indicate that the degree of first amendment protection in the two cases ought to be dramatically different.[23]

We could also make a claim (one more congenial to me as well as to the existing case law), that the chainsaw case quite simply has nothing to do with what the first amendment is all about, because the type of communication has no relation to any purpose the first amendment purports to serve. We would say not that instructions are less protected by the first amendment (which would mean that *every* instruction case still must be tested against a first amendment-inspired set of doctrinal rules) but that they are not covered at all.

Although I have a preference for the second approach, I will not rehearse here arguments I have made for it over the first.[24] Because whether we adopt the first or the second, we are still distinguishing between the cases based on our understanding of what is central to the first amendment, and by contrast what is peripheral. But what are the bases for that

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21. National Socialist Party v. Skokie, 432 U.S. 43 (1977); Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

22. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

23. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

24. *See supra* note 3.

distinction? Clearly, answering this question is necessary, and encompasses the totality of questions relating to first amendment high theory. I cannot answer or even address those questions here, but I can point in several directions.

One direction is to draw a distinction between something called the "media" and other forms of communication. This distinction, with some basis in the relevant tort law[25] and some (to me not irrelevant) basis in the text of the first amendment,[26] would distinguish otherwise identical communications depending on whether they appeared in some item we think of as the media or whether they surface in some other manner. This distinction would be premised on something special about the media as a category, even if like all categories this one is both under- and over-inclusive. But this approach is in tension with some of the tort cases, in particular the decisions holding advertisements to be indistinguishable from instructions for tort purposes.[27] In addition, the approach is in tension with the Supreme Court's unwillingness to draw this kind of line. For example, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[28] the Court faced the structurally similar question of how to distinguish communications having little to do with the first amendment (credit reports) from those in which the first amendment is more centrally implicated, and the Court eschewed a media/nonmedia distinction in favor of a distinction between matters of public concern and matters of purely private concern.

Alternatively (and with some overlap), we are forced to draw some of the implicit but rarely discussed distinctions that Kent Greenawalt has explored in the relationship between the first amendment and the criminal law.[29] First, there is a distinction between the ideological and the self-interested. Some communications are directed to social, cultural, economic, political, moral, religious, or similar values, with the intention of contributing to a discussion of or decisions with respect to change in or retention of those values. By contrast, other communications relate to the self-interest, or private interest of only the speaker and hearer. Here we might draw, in the criminal law, a distinction between "You ought to blow up the draft board to help end an immoral war" and "You ought to blow up the bank, take the money, and retire to the South of France." If the distinction explains at least part of the rarely discussed tensions between a great deal

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25. *See* Diamond & Primm, *supra* note 12, at 969.

26. I refer here to the Press Clause, recognizing that the argument for treating this clause as having independent significance has gotten nowhere in the Supreme Court. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 795 (1978) (Burger, C.J., concurring).

27. *See, e.g.*, Hon v. Stroh Brewery Co., 835 F.2d 510, 514-15 (3d Cir. 1987); Weirum v. RKO Gen., Inc., 15 Cal. 3d 40, 48, 539 P.2d 36, 40, 123 Cal. Rptr. 468, 472 (1975).

28. 472 U.S. 749 (1985).

29. K. GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989); Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989); Greenawalt, *Speech and Crime*, AM. B. FOUND. RES. J. 645 (1980); Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081 (1983).

of first amendment doctrine and the well-settled aspects of the criminal law, then maybe the distinction is equally applicable to questions about the extent to which the first amendment will intrude into areas of tort law traditionally untouched by free speech concerns.

Second, there might be a distinction between the public and the private. Here that distinction refers only to the difference between what is simultaneously broadcast to a large audience, whether by a speech, the mass media, or a basement-printed brochure, and what is communicated person-to-person and essentially face-to-face. Like any of these distinctions, this one is not self-standing. No one would suggest that the first amendment does not protect a political conversation between two people, or a request to support a religious cause. Still, when we think about those factors that mark the archetypal free speech setting, the attempt to persuade or to inform large audiences stands in the foreground of our understanding.

Third, there is a distinction between argument and information. The issue, which surrounds discussion of the *Progressive* case[30] and the constitutionality of the Intelligence Identities Protection Act[31] as well as the lesser degree of protection afforded commercial speech, can hardly be dispositive, because it is obvious that conveying information is a very large part of what the first amendment is all about. Still, insofar as factual information is commonly verifiable in a way that normative argument is not, a distinction between conveying factual, verifiable information and engaging in explicitly normative argument is potentially relevant at the margins of first amendment coverage.

Finally, and perhaps most importantly, there are inescapable determinations that the first amendment is about certain topics and not about others—that some forms of communication are central to a proper understanding of the first amendment and others are peripheral. Like any question about coverage, this question cannot be answered or even addressed without embracing the full range of both free speech and constitutional theory. That is, we must first determine *where* to find the necessary account of what the first amendment is all about. Depending on one's constitutional theory, that determination might require looking to text, to original intent, to public policy, or to something else. And if the constitutional theory is anything other than an extremely narrow conception of original intent, then the determination necessarily requires an examination of the policies and principles that underlay the very idea of free speech. To say that this examination cannot be accomplished here is an understatement, but pointing out the way in which those decisions are necessarily on the agenda is a large part of my message.

The result of these inquiries will not be any simple three-part test to determine when the presence of a communicative act will implicate the first amendment and when it will not. As with many distinctions, they are easier

30. United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).
31. 50 U.S.C. § 421 (1982 & Supp. 1989).

to see at the poles than to apply to close cases in the middle.[32] At the very least, I mean to suggest that when an act of communication is directed at a private transaction and not at social change, when it is delivered face to face or individually rather than to the world at large, when it seeks to convey information and not argument, *and* when it pertains only to topics well beyond the range of topics perceived to involve the values of the first amendment, then with the convergence of all four of these factors there does not seem to be any reason to convert what would otherwise be a pure tort action into anything else. Conversely, when the communication involved is aimed at issues of public concern, is directed to a large audience, has normative content, *and* pertains to the kinds of speech that the first amendment intends to protect, then the fact that an action nominally sounds in traditional tort language is no mandate for concluding that the first amendment does not provide the driving engine in the analysis. Many cases will of course fall in between, and in those cases the presence or absence of the described factors together with the degree to which each is present will be determinative in assessing whether or not the case is a first amendment case.

My message is thus a simple one. The presence or absence of an act of communication is both too under-inclusive and too over-inclusive of true first amendment concerns to act as an effective surrogate for the presence of those concerns. Although there is no reason to expect or desire that the under- and over-inclusiveness can be totally eliminated,[33] a recognition of the fact that the first amendment is about both more than and less than communication *simpliciter* is the first step toward recognizing that although in some tort cases *Brandenburg* must be the lodestar, in others we will continue to rely on the lessons we have learned from Mrs. Palsgraf.

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32. *See* Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

33. To eliminate the under-inclusiveness and over-inclusiveness of the category "speech," measured vis-a-vis the justifications *for* freedom of speech, would be to eliminate the idea of freedom of speech entirely. Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989).