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# REVITALIZING THE CLEAR-AND-PRESENT-DANGER TEST: TOWARD A PRINCIPLED INTERPRETATION OF THE FIRST AMENDMENT

JEFFREY M. SHAMAN†

THE FREEDOM OF SPEECH CLAUSE OF THE FIRST AMENDMENT is a relatively explicit constitutional provision protecting what is perhaps the most important of all liberties. Free speech, the keystone of democracy, safeguards all other rights from government transgression. The continuing viability of society depends upon the exchange of information and ideas made possible by freedom of speech. Individual self-fulfillment and human integrity are fostered when persons have the freedom to express their thoughts and feelings. Thus, the specific guarantee of freedom of speech in the first amendment protects values of the highest constitutional order.

Although the United States Supreme Court has recognized the importance of freedom of speech, the Court, unfortunately, has never developed a consistent, principled analysis for deciding first amendment cases. In many instances, this deficiency has resulted in a failure to provide freedom of speech with the constitutional protection it deserves. In some cases, the Supreme Court has proclaimed that freedom of speech is a preferred freedom, entitled to the strict constitutional protection provided by the clear-and-present-danger test.[1] Yet in other cases, the Court, ignoring the preferred status of free speech and eschewing the clear-and-present-danger test, has given little or no constitutional protection to speech. In these latter instances, the Court's approach has been to place certain kinds of speech into categories that are afforded less than complete first amendment protection.

This article's major thesis is that the use of a revitalized clear-and-present-danger test, with increased emphasis upon the clarification of the "danger" component, would overcome the problems inherent in the categorization technique, and would substantially increase the pro-

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1. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Bridges v. California, 314 U.S. 252, 262–63 (1941); Herndon v. Lowry, 301 U.S. 242, 258 (1937).



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tection afforded the first amendment right of freedom of speech. After this thesis has been developed, examples will be given of the application of the revitalized clear-and-present-danger analysis to cases involving obscene speech, libelous speech, symbolic speech, and access to speech forums.

## I. THE CATEGORIZATION TECHNIQUE

The Supreme Court's first use of the categorization technique in a free speech context probably occurred in *Chaplinsky v. New Hampshire*,[2] which placed "fighting words" in a category falling outside the scope of constitutional protection.[3] In recent years, the Supreme Court has severely limited the application of *Chaplinsky's* "fighting words" doctrine by distinguishing *Chaplinsky* from factually analogous cases.[4] However, the Court has continued to adopt the categorization technique in dealing with other kinds of speech.

In 1960, Professor Kalven identified the Court's categorizing technique in free speech cases, describing it as a "two-level" interpretation of the first amendment.[5] Since that time, the Court has become increasingly sophisticated in its use of categories. The Court's current approach might be described more accurately as containing multiple levels: the Court has placed some types of speech in separate categories which evoke decreasing levels of constitutional protection. At the bottom level is obscene speech, which educes no constitutional protection at all.[6] One step above, but still at a low level, is commercial speech, which is afforded little, if any, protection.[7] The next category is libelous

2. 315 U.S. 568 (1942).

3. *Id.* at 572–73. For other cases discussing the fighting words doctrine, *see* Feiner v. New York, 340 U.S. 315, 320–21 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1940).

4. For example, in some cases the Court distinguished *Chaplinsky* through the use of the overbreadth doctrine, finding that state statutes prohibited protected speech in addition to the fighting words punishable under *Chaplinsky*. *See* Lewis v. New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972); *cf.* Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that a state cannot forbid advocacy of the use of force unless such advocacy is likely to incite violence).

5. Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 9–11. Kalven identified one level as dealing with those communications having redeeming social utility, with the second level involving those communications having no redeeming social utility. *Id. See also* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 30–35 (1975).

6. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957). For further discussion of the Court's treatment of obscenity, *see* text accompanying notes 19 & 20 *infra*.

7. *See* Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973); Breard v. Alexandria, 341 U.S. 622 (1951); Valentine v. Chrestensen, 316 U.S. 52 (1942). *But see* Virginia State Bd. of Pharmacy v. Citizens Consumer Council, Inc.,

speech, which, depending upon the facts and circumstances of the case, is allotted either full first amendment protection or no protection whatsoever.[8] Another category has been created for "symbolic" speech, treated by the Court as falling within the scope of the first amendment, but entitled to less than full first amendment protection.[9] Finally, the Court may be carving out still another category of speech in those cases dealing with access to a public forum. Although the law regarding access speech situations is still at a developmental stage,[10] this category also appears to evoke only partial protection under the first amendment.

The Supreme Court has utilized the categorization approach in interpreting constitutional provisions other than the free speech clause. For example, at one time the categorization technique was employed to deal with the free exercise of religion clause of the first amendment. In applying the free exercise clause, the Court distinguished between religious beliefs and religious practices, providing full constitutional protection to the former, and virtually none to the latter.[11] The Court never explained why religious practices were entitled to so little protection under the free exercise clause, and later discontinued using the categorization approach in free exercise cases altogether.[12]

A variation of the categorization approach has also been employed by the Court in applying the equal protection clause of the fourteenth amendment. By the 1960's, the Court had developed a two-tier approach to the equal protection clause, whereby full constitutional protection was bestowed in cases involving either a "suspect classification" or "fundamental interest," while virtually no constitutional protection was

425 U.S. 748 (1976), where the Court admitted that commercial speech is protected by the first amendment. For further discussion of this case and its impact upon the commercial speech doctrine, *see* note 25 and accompanying text *infra*.

8. *Compare* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (an official cannot recover damages for libel absent a finding of actual malice), *with* Time, Inc. v. Firestone, 424 U.S. 448 (1976), *and* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (a finding of actual malice is not necessary for recovery in a suit involving the libel of an individual who is neither a public official nor a public figure). For further discussion of the Court's treatment of libel, *see* text accompanying notes 27–32 *infra*.

9. *Compare* Spence v. Washington, 418 U.S. 495 (1974) (defendant's conviction for superimposing a peace symbol on the American flag reversed), *with* United States v. O'Brien, 391 U.S. 367 (1968) (validity of statute prohibiting draft card burning upheld). For further discussion of the Court's treatment of symbolic speech, *see* text accompanying notes 33–38 *infra*.

10. *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). For further discussion of *Lehman* and the Court's treatment of public access cases, *see* text accompanying notes 39–47 *infra*.

11. *See, e.g.,* Reynolds v. United States, 98 U.S. 145, 161–67 (1878).

12. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

provided in all other cases.[13] The two-tier approach to the equal protection clause has been criticized as being both overly rigid[14] and theoretically unsound,[15] and, in recent years, the Court has begun to abandon the two-tier, categorizing technique in equal protection cases.[16]

Whatever constitutional provision is involved, it is submitted that the categorization technique is fundamentally untenable. It is based upon the fiction that certain types of speech are not speech or that certain types of religion are not religion. Each of these categories operates as a legal fiction that denies reality.

The categorization technique, when applied to the freedom of speech clause, is plagued by another serious theoretical difficulty. The basic premise of the categorization technique — that certain kinds of speech deserve less first amendment protection than others — rests upon an appraisal of the merit of the speech. Such an appraisal is directly contrary to the first amendment principle that the merit of speech is to be evaluated not by the government, but by the public, in a free marketplace of ideas.[17]

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13. The two-tier equal protection approach is described in Shapiro v. Thompson, 394 U.S. 618, 658-59 (1969) (Harlan, J., dissenting). *See generally* Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8-10 (1972); Nowak, *Realizing the Standards of Review Under the Equal Protection Guarantee — Prohibited, Neutral, and Permissive Classifications,* 62 GEO. L.J. 1071, 1071-75 (1974); Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause,* 2 HASTINGS CONST. L.Q. 153, 157-60 (1975).

14. *See* Gunther, *supra* note 13, at 8-10. Justice Marshall has, on several occasions, criticized the two-tier equal protection approach as excessively rigid:

> In my view, equal protection analysis of this case is not appreciably advanced by the *a priori* definition of a "right," fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.

Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting) (footnotes omitted); *accord,* Marshall v. United States, 414 U.S. 417, 430-33 (1974) (Marshall, J., dissenting); San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 95 (1973) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting).

15. *See, e.g.,* Shaman, *supra* note 13.

16. *See, e.g.,* Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Jiminez v. Weinberger, 417 U.S. 628 (1974); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Reed v. Reed, 404 U.S. 71 (1971).

17. This principle was eloquently articulated by Justice Holmes as follows:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitu-

Perhaps the most egregious examples of the deficiencies of the categorization technique are found in the Court's treatment of obscenity and commercial speech, which the Court has placed into individual categories that do not receive the benefit of any first amendment protection.[18] This treatment has been premised upon the thesis that obscenity and commercial speech have no value as speech.[19] The validity of this underlying premise appears to be dubious. Obscenity, even "hard core" pornography which is highly offensive to some persons, nevertheless may be entertaining and pleasurable to many others. Obscene speech may express ideas about sexual behavior or provide education about the human body as well as about sexual acts.[20] Thus, obscene speech does have value in several respects.

Similarly, it is not true that commercial speech lacks value. Commercial speech provides information about business transactions which is useful to many people. In our society, which places great emphasis upon commerce and the acquisition of goods, to suggest that commercial information is valueless borders upon the absurd. In *Pittsburgh Press Co. v. Human Relations Commission*,[21] the Supreme Court appeared to admit that the exchange of commercial information is equally as important as the exchange of any other information;[22] nevertheless, the Court declined to hold that commercial speech was entitled to first amendment protection.[23] In its most recent pronouncement on the

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> tion. . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death . . . .

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See generally* Karst, *supra* note 5.

18. *See* notes 6 & 7 and accompanying text *supra.*

19. The idea that certain kinds of speech are not protected by the first amendment because of their content was set forth by Justice Murphy in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). He commented:

> It has been well observed that [lewd and obscene speech, profanity, libelous speech, and "fighting words"] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

*Id.* at 572. Thus, in deciding that obscenity has no "social value as a step to the truth," the Court effectively placed obscene speech outside the scope of first amendment protection. For a critique of this approach, *see* text accompanying notes 20–26 *infra.*

20. After evaluating empirical evidence, the President's Commission on Obscenity and Pornography concluded that "[e]xplicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults. At times, these materials also serve to increase and facilitate constructive communication about sexual matters within marriage." REPORT OF THE PRESIDENT'S COMMISSION ON OBSCENITY AND PORNOGRAPHY 53 (1970).

21. 413 U.S. 376 (1973) (rejecting a first amendment attack upon a local statute prohibiting the listing of job advertisements in sex designated help-wanted columns).

22. *Id.* at 385. The Court recognized that certain types of commercial speech may communicate editorial opinions and, as such, should not be regulated. *Id.*

23. *Id.* at 385. The Court's primary concern in *Pittsburgh Press* was the unlawfulness of sex discrimination in employment coupled with the fact that the segregated

commercial speech doctrine, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[24] the Court finally acknowledged the value of commercial speech, and all but overruled the commercial speech doctrine.[25] Although concluding that commercial speech is protected by the first amendment, the Court qualified its conclusion by observing that it was not ruling that commercial speech may never be regulated.[26]

The categorization approach has also been employed by the Supreme Court in dealing with libelous speech.[27] In *New York Times Co. v. Sullivan*,[28] the Court professed that it was not categorizing libelous speech as falling beyond the scope of constitutional protection.[29] Contrary to what the Court professed, however, its actual treatment of libel in *Sullivan* consisted of categorizing libelous speech that is accompanied by actual malice as falling beyond the bounds of first amendment protection, while affording libelous speech that is not accompanied by actual malice full first amendment protection.[30] More recently, in *Gertz v. Robert Welch, Inc.*,[31] the Court limited the application of the actual malice requirement, thus placing more libelous speech in a nonprotected category. However, the Court in *Gertz* was more honest in its discussion of libel, moving toward, though not completely achieving, a more satisfactory analysis of why libelous speech

layout of the want ads conveyed "the same message as an overtly discriminatory want ad." *Id.* at 388.

24. 425 U.S. 748 (1976).

25. *Id.* In *Virginia State Bd. of Pharmacy,* consumers challenged the validity of a Virginia statute which provided that it was unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. *Id.* at 749–50. In reaching its decision, the Court recognized that the "question [of] whether there is a First Amendment exception for 'commercial speech' is squarely before us." *Id.* at 760–61. The Court fully acknowledged the value of commercial speech, stating:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what products, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

*Id.* at 748.

26. *Id.* at 770.

27. This portion of the article evaluates whether it is justifiable to regulate libel, rather than examining when the actual malice rule, established in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), is properly applied. For a discussion of the actual malice rule, *see* notes 86–90 and accompanying text *infra.*

28. 376 U.S. 254 (1964).

29. *Id.* at 268–69.

30. *Id. See generally* Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy,* 56 CALIF. L. REV. 935, 942–43 (1968).

31. 418 U.S. 323 (1974).

may or may not be regulated. The *Gertz* Court placed greater emphasis upon the harm caused by libel, *i.e.*, the wrongful injury to reputation, as a justification for regulating libelous statements.[32] This approach, if articulated more clearly, is seemingly consistent with other first amendment principles and thus, a more rational basis upon which to justify regulation of libel.

With regard to symbolic speech,[33] the Supreme Court has placed it within the ambit of the first amendment, although withholding that amendment's complete protection. In judging restrictions upon symbolic speech, the Court has employed a four-part test which admittedly provides less protection to speech than does the clear-and-present-danger test.[34] The most significant element of the four-part test allows the regulation of symbolic speech if there is a "substantial" governmental interest for regulating the conduct through which the speech is expressed. It would appear to be a slightly less onerous burden for the government, in justifying a regulation of speech, to demonstrate a "substantial" governmental interest than to show clear and present danger. In practice, the government's burden has been even easier to meet than expected because, in applying the test, the Court has not required a showing of a substantial governmental interest, but merely one that is not imaginary or nonexistent, regardless of its lack of importance or substantiality.[35] This judicial interpretation clearly affords little constitutional protection for the expression of ideas within the category of symbolic speech.

32. *Id.* at 341–48. Although the Court in *Gertz* did not explicitly apply the clear-and-present-danger test, it nonetheless treated the wrongful injury to reputation caused by defamation as a clear and present danger which warranted regulation of libelous speech. *Id.*

33. Symbolic speech might be generally defined as the expression of ideas through conduct other than verbalization. *See* G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 1234 (9th ed. 1975).

34. This four-part test is delineated in United States v. O'Brien, 391 U.S. 367, 377 (1968). The *O'Brien* test provides that a government regulation which restricts symbolic speech is justified if: 1) the governmental regulation is within the constitutional power of the government, 2) the regulation furthers an important or substantial governmental interest, 3) the governmental interest is unrelated to the suppression of free expression, and 4) the incidental restriction upon alleged first amendment freedom is no greater than is necessary to the furtherance of the governmental interest. *Id.* at 377.

35. *See id.*; Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 23, where the author discussed the Court's use of the term "substantial":

> The Court [in *O'Brien*] was content to demonstrate that the government's interest . . . is real, that is, not imaginary or nonexistent. But an interest may well be real without being important enough to sustain an arbridgement of speech. . . . *The Court's use of "substantial," therefore, is more appropriately understood in its sense of "having substance" or "not imaginary," rather than the sense of "considerable" or "large."*

*Id.* (footnotes omitted) (emphasis added).

The Supreme Court excluded symbolic speech from full first amendment protection based upon the highly disputable proposition that there is a meaningful difference between symbolic speech and "pure" speech. Pure speech, such as spoken or written words, is itself symbolic behavior that expresses ideas.[36] There are infinitely more ways to express ideas than by words alone; there is nothing special about words that should elevate them above other symbols used to express ideas.[37] As Professor Nimmer has correctly noted, it is the ideas expressed and not the form of expression that must be protected if the goals of the first amendment are to be fulfilled.[38]

Supreme Court decisions involving claims of access to public speech forum are relatively recent and few, and the Court's response to access issues is neither completely developed nor completely clear. However, there is some indication that the Court may resort to the categorization technique in this type of case as well. In one recent access case, *Lehman v. City of Shaker Heights,*[39] a divided Court held that political advertising could be prohibited from placard displays in rapid transit cars even though commercial advertising was routinely accepted.[40] The plurality opinion was based partially upon the ground that, because the placard displays in rapid transit cars were operated by the government as a commercial venture rather than as a speech forum, the government's decision to exclude political advertising was "little different from deciding to impose a 10–, 25–, or 35–cent fare, or

36. "Language is, first of all, a form of behavior. It is not merely a system of symbols, but is the activity of using and interpreting symbols." A. LINDESMITH & A. STRAUSS, SOCIAL PSYCHOLOGY 34 (3d ed. 1968).

37. One commentator has noted:

> A constitutional distinction between speech and conduct is specious. Speech *is* conduct, and actions speak. There is nothing intrinsically sacred about wagging the tongue or wielding a pen; there is nothing intrinsically more sacred about words than other symbols.
>
> . . . The meaningful constitutional distinction is not between speech and conduct, but between conduct that speaks, communicates, and other kinds of conduct. If it is intended as expression, if in fact it communicates, especially if it becomes a common comprehensible form of expression, it is "speech."

Henkin, *The Supreme Court, 1967 Term — Foreward: On Drawing Lines,* 82 HARV. L. REV. 63, 79–80 (1968).

38. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment,* 21 U.C.L.A. L. REV. 29, 33–34 (1973). Profesor Nimmer commented:

> It is not without significance that the Court, in a first amendment context, often uses the word "expression" as the equivalent of speech. Most would agree that it is the freedom to express ideas and feelings, not merely the freedom to engage in verbal locutions, which constitutes the core meaning of the first amendment. Holmes' "free trade in ideas" may not be reduced to mere trade in words. It is the *ideas* expressed, and not just a particular form of expression, that must be protected if the underlying first amendment values are to be realized.

*Id.* (footnotes omitted) (emphasis added).

39. 418 U.S. 298 (1974) (4-1-4 decision).

40. *Id.* at 304.

from changing schedules or the location of bus stops."[41] The plurality then proceeded to uphold the ban against political advertising by applying what might be characterized as a form of minimal scrutiny.[42] In other words, the plurality engaged in yet another application of the categorization technique, depriving this speech category of most constitutional protection.[43]

The *Lehman* case provides further support for the proposition that the categorization approach rests upon a questionable premise. It may be true that placard displays in rapid transit cars are operated primarily as commercial ventures, but such displays also function to a substantial degree as public speech forums. The *Lehman* plurality leaves at least one question unanswered: why is it permissible for the government to exclude some speech from the placard displays, while permitting other speech, merely because the government is engaged in a commercial venture?[44] The plurality's approach in *Lehman*, how-

41. *Id.* (citation omitted).

42. The plurality opinion in *Lehman* suggested that the excluded speech — political advertising — tended to be short term, and, hence, may have been less profitable than commercial advertising. The plurality reasoned that since the rental of placard space was a commercial venture, the government could pick and choose which advertisements would be accepted on the basis of profitability. *Id.* at 303-04. Thus, it was apparent in two respects that the plurality was applying minimal scrutiny in this instance. First, there was no factual support whatsoever for the proposition that political advertising is less profitable than commercial advertising. The plurality violated the first amendment principle that speech may not be regulated upon the mere supposition of facts. *See* note 51 *infra*. Second, assuming arguendo that short term advertising, which yields less profits to the government, could be excluded from rapid transit cars, all short term advertising, and not only political advertising, should be excluded. For the government to prohibit one kind of short term advertising (political advertising) while permitting others violates the first amendment principle that speech should not be regulated according to its ideological content. *See* note 17 and accompanying text *supra*.

Although the "profitability" rationale is a prime example of the Court's "minimal scrutiny" approach, the Court in *Lehman* also applied a form of minimal scrutiny to the other legislative objectives advanced by the city as justification for limiting access to its transit system's advertising space. These other objectives were minimizing the risk of imposition upon a streetcar's captive audience, and minimizing abuse, favoritism, and administrative problems. 418 U.S. at 304. Justice Brennan, disagreeing with the plurality's analytical approach, stated:

> To insure that subject matter or content is not the sole basis for discrimination among forum users, all selective exclusions from a public forum must be closely scrutinized and countenanced only in cases where the government makes a clear showing that its action was taken pursuant to neutral "time, place, and manner" regulations, narrowly tailored to protect the government's substantial interest in preserving the viability and utility of the forum itself.

*Id.* at 316-17 (Brennan, J., dissenting). Justice Brennan thereafter concluded that the city failed to satisfy this heavy burden. *Id.* at 317-22.

43. Professor Karst has observed that "the comparison [in the *Lehman* plurality] between forbidding political advertising and setting bus fares forbodes the development of yet another branch of the discredited [categorization technique]." Karst, *supra* note 5, at 35.

44. The *Lehman* plurality raised another problem by its suggestion that it is more justifiable to exclude speech from nontraditional first amendment forums than

ever, does not represent the thinking of a majority of the Court.[45] In a later access case, *Southeastern Promotions, Ltd. v. Conrad,*[46] the Court did not use the categorization technique, but provided full constitutional protection to the speech. *Conrad,* in which the Court struck down a censorship scheme for a municipal auditorium,[47] is basically inconsistent with *Lehman,* and therefore suggests that the method employed in access cases may not devolve into the categorization approach.

Whether dealing with obscenity, commercial speech, libel, symbolic speech, or access speech, the Court's use of the categorization technique without theoretical justification has resulted in unprincipled decision-making. When the Court wishes to uphold a regulation of speech that would be unjustifiable under established first amendment principles, the Court eschews the principles by categorizing the speech as "non-speech." This disregard for theory has produced decisions that, though superficially consistent, are essentially inconsistent and unprincipled, and that do not afford all forms of speech their proper protection as essential constitutional rights.

## II. Reexamination of the Clear-and-Present-Danger Test

It is my belief that the Court's devolution into the categorization technique in free speech cases has resulted primarily from the Court's failure to develop a probing interpretation of the clear-and-present-danger test. Specifically, the Court has not examined the problem of delineating the kind of danger which will justify restrictions upon speech.[48] It is true that in a few relatively older cases the Court struck down restrictions upon speech by reasoning that the danger assertedly

from traditional first amendment forums. 418 U.S. at 302–03. This highly questionable conclusion raises complex problems of distinguishing between traditional and nontraditional forums.

45. The *Lehman* plurality opinion was written by Justice Blackmun, with Chief Justice Burger and Justices White and Rehnquist joining in the plurality. Justice Douglas wrote a separate concurrence. Justices Brennan, Stewart, Marshall, and Powell dissented.

46. 420 U.S. 546 (1975).

47. *Id.* at 552. In *Conrad,* petitioner applied for the use of a privately owned theater under long term lease to the city for the production of the musical "Hair." *Id.* at 547. Respondents, members of a municipal board, rejected the application. *Id.* at 547–48. This rejection was based upon the board members' judgment of the musical's content. *Id.* at 554. The Supreme Court held that this "rejection of petitioner's application to use the public forum accomplished a prior restraint under a system lacking in constitutionally required minimal procedural safeguards." *Id.* at 552. Consequently, respondents' actions were found to violate the first amendment. *Id.* at 562.

48. *See* Rogat, *The Judge as Spectator,* 31 U. Chi. L. Rev. 213 (1964), where the author stated: "[t]he important questions may well be which 'evils' a legislature may prohibit, or the extent to which government, in pursuing legitimate ends, may impede the exercise of constitutionally protected rights." *Id.* at 217.

caused by the speech was not sufficiently serious to warrant the restriction.[49] Unfortunately, the Court deserted this sort of analysis while it was still in an embryonic stage. Since then, except for an occasional passing remark to the effect that "grave" danger must exist for speech to be regulated,[50] the Court has generally avoided meaningful consideration of exactly what type of danger will warrant restrictions upon speech. In applying the clear-and-present-danger test, the Court has frequently concerned itself with the meaning of "clear and present,"[51] but has not focused upon what is meant by "danger." No body of case law has been developed to interpret the nature and degree of danger that must exist to justify a restriction upon freedom of speech. By failing to examine adequately the danger component of the clear-and-present-danger test, the Court has forced itself into the corner of the highly unsatisfactory categorization technique.

Perhaps the Court has avoided serious consideration of the danger aspect of the clear-and-present-danger test because it feared that the test would not allow government restrictions upon speech that the Court felt should be permissible. Whatever the Court's motivation for failing to probe sufficiently the clear-and-present-danger test, the case law concerning freedom of speech has become a maze of confusion and inconsistency.

To rectify this situation, the Court should abandon the categorization technique in first amendment cases, and focus instead upon the nature and degree of danger that will justify regulation of speech. The clear-and-present-danger test should be applied in *all* speech cases, with the concentration upon not only whether the danger is clear and present, but also whether the danger is sufficiently grave to sustain the speech regulation in question. As will be demonstrated in the ensuing discussion, this approach is theoretically valid and would produce some consistency in the decisions, affording speech the protection it deserves.

49. *See, e.g.,* Marsh v. Alabama, 326 U.S. 501 (1946); Schneider v. State, 308 U.S. 147 (1939). In *Schneider,* the Court held unconstitutional several municipal ordinances which prohibited the distribution of literature on a public street. The Court found that one of the purposes suggested as a rationale for the ordinances, the prevention of litter, was insufficient justification. *Id.* at 162–63. In other words, the danger of such speech was not sufficiently grave to warrant the restriction. For further discussion of the *Schneider* case, *see* text accompanying note 74 *infra.*

50. *See, e.g.,* Dennis v. United States, 341 U.S. 494, 510 (1951). The Court in *Dennis* formulated the test as "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 868, *quoting* United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).

51. It must be factually shown, rather than merely speculated, that imminent danger is likely to occur. *See, e.g.,* Healy v. James, 408 U.S. 169, 188–90 (1972); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969); Tinker v. Des Moines School Dist., 393 U.S. 503, 509 (1969); Williams v. Rhodes, 393 U.S. 23, 30 (1968); United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 225 (1967).

Moreover, this approach would not be excessively dogmatic; it would provide enough leeway for individual justices to reach different conclusions in the application of the clear-and-present-danger test in cases where reasonable persons might differ.

The objection might be raised that the suggested approach, by evaluating the kind of danger that will permit speech regulation, would transform the first amendment's protection of speech into a balancing test. Reference to a balancing test invokes visions of the long-standing debate between the first amendment "absolutists" and "balancers."[52] Those visions, viewed with the wisdom of hindsight, illustrate that even though the "absolutist" position may have been extreme, the "balancers" failed to give speech the requisite protection.

However, it is submitted that the suggested approach is not subject to the same failings found in the "balancing" test[53] especially if the judiciary adheres to other established first amendment principles. First, the merit of the speech would not be weighed. It would be impermissible to evaluate the content of the speech, and in all cases, it would be presumed that the speech in question has a high value. Indeed, the very foundation of the first amendment is the belief that speech itself is highly valuable.[54] Thus, under the proposed approach, only the gravity of the danger asserted as justification for regulating speech would be weighed, and only a very grave danger would suffice. If this approach can be characterized as a balancing test, certainly the balance is initially weighted against any restriction of speech, since any impingement upon freedom of speech must overcome a handicap before being upheld as constitutional.

Secondly, the clear-and-present component of the test would remain a rigid requirement in the analysis. Thus, even if a particular danger were deemed grave enough to justify regulation of speech, that danger would have to be both imminent and likely to occur in order for the regulation to be sustained.[55] Perhaps most importantly, strict adherence to the rule that freedom of speech may not be regulated upon mere speculation or hypothetical facts should provide a further limit

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52. A representative sample of the debate may be found in W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAWS CASE: — COMMENTS — QUESTIONS 776–87 (4th ed. 1975). For a prime example of the debate's judicial manifestations, *compare* the opinion of Justice Harlan in Konigsberg v. State Bar of California, 366 U.S. 36 (1961), *with* the opinion of Justice Black in Barenblatt v. United States, 360 U.S. 109 (1959).

53. *See* Barenblatt v. United States, 360 U.S. 109 (1959).

54. *See* Whitney v. California, 274 U.S. 357, 375–78 (1927) (Brandeis, J., concurring).

55. *See* note 51 and accompanying text *supra*.

to the analysis.[56] Compelling evidence, showing that the grave danger alleged to be caused by the speech is in fact "clear and present," should be required.

The suggested approach would also clarify the principle that speech may not be regulated solely in the belief that its content is of little or no value.[57] As Professor Karst has recently noted, the essence of the first amendment is the principle of equal liberty of expression, which means that under the Constitution all ideas are entitled to equal respect and security from the government.[58] This principle should operate as a barrier against government censorship of speech content.[59] As Professor Karst explained: "A showing of high probability of serious harm might justify regulation of a particular kind of speech content, but the [categorization technique] evades the question of justification by placing certain types of speech outside the scope of the first amendment."[60] The relinquishment of the categorization approach in favor of the clear-and-present-danger test in all speech cases would be an important step toward eliminating ideological censorship by the government.

## III. APPLICATION OF THE REVITALIZED CLEAR-AND-PRESENT-DANGER TEST

### A. *Obscenity*

Consistent use of the clear-and-present-danger test in speech cases would not result in the abrogation of all government restrictions upon speech, but it would provide speech with deservedly expanded protection in some areas. For example, obscene or pornographic speech, when readmitted to the scope of first amendment protection, could only be regulated if shown to cause a clear and present danger. It may be claimed that obscene materials cause several dangers; however, each of these alleged dangers would have to be evaluated to determine the validity of obscenity regulations. Given the present state of knowledge about obscenity and pornography, its regulation cannot properly be justified on the ground that it causes criminal or antisocial sexual behavior.[61]

56. Healy v. James, 408 U.S. 169, 185-86 (1972); Tinker v. Des Moines School Dist., 393 U.S. 503, 509 (1969).

57. *See* note 19 *supra*.

58. *See* Karst, *supra* note 5.

59. *Id.* at 29-35.

60. *Id.* at 31.

61. After studying voluminous empirical data, the President's Commission on Obscenity and Pornography concluded that there "is no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or

In *Paris Adult Theatre I v. Slaton,*[62] a 1973 decision reconsidering the theoretical basis for regulating obscenity, the Supreme Court decided that, even in the face of evidence to the contrary, a legislature could legitimately act upon the assumption that pornography causes antisocial behavior.[63] Chief Justice Burger's opinion for the majority stated that the legislature's action was constitutional because "it is not for [the courts] to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself."[64] The unacknowledged premise of the Chief Justice's opinion is that obscene speech is not speech; otherwise, regulating obscenity would constitute a situation where "legislation impinges upon rights protected by the Constitution itself."[65] Justice Burger's syllogism permits the legislature to abridge a constitutional right in the guise of preventing antisocial behavior, when in fact there is not only "empirical uncertainty" that antisocial behavior is caused by pornography, but also strong evidence that it is not so caused.[66]

Although one might well criticize the reasoning of the Chief Justice in *Paris Adult Theatre,* such criticism does not imply that regulation of obscenity is never constitutionally permissible. Pornography may give rise to other dangers which would warrant its regulation. For example, protection of the right to privacy in one's home may be a sufficient reason to prohibit the mailing of obscene materials to persons who have indicated their unwillingness to receive such materials.[67] The right of parents to control the upbringing of

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criminal behavior among youth or adults." REPORT OF THE PRESIDENT'S COMMISSION ON OBSCENITY AND PORNOGRAPHY 27 (1970).

62. 413 U.S. 49 (1973).

63. *Id.* at 60–61.

64. *Id.* at 60.

65. *Id.*

66. *See* note 61 *supra.*

67. *See* Rowan v. Post Office Dep't, 397 U.S. 728 (1970). In *Rowan,* appellants challenged the constitutionality of a statute providing that persons who had received advertisements offering for sale matter which the addressee believed to be erotically arousing or sexually stimulating may request a post office order barring the vendor from sending further advertisements. *Id.* at 729. The appellants alleged that they had received several prohibitory orders pursuant to the statute and contended, *inter alia,* that the provision violated the first amendment. *Id.* at 729–31. The court upheld the provision, holding that a vendor does not have a constitutional right to send unwanted material into the home of another. *Id.* at 738. The court weighed the right "to be let alone" against the countervailing right to communicate, and concluded that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736–37. The court further noted that "[n]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit. . . ." *Id.* at 737.

their children[68] may warrant regulating the sale of pornographic materials to children without their parents' consent.

One possible rationale for constraining the distribution of pornography, suggested by Chief Justice Burger's opinion in *Paris Adult Theatre,* is the protection of the "total community environment [and] the tone of commerce in the great city centers."[69] In other words, the Chief Justice appeared to suggest that pornographic movie theaters and book stores could be prohibited through some sort of zoning regulation in order to foster a particular atmosphere or aesthetic condition in a community. The Court relied upon the same rationale in *Young v. American Mini Theatres, Inc.,*[70] in which the justices upheld a zoning ordinance prohibiting the operation of "adult" movie theaters or bookstores within 1000 feet of each other or within 500 feet of a residential area.

Whether or not the protection of community environment is a legitimate basis for regulating pornography raises complex questions that are not examined in either *Paris Adult Theatre* or *Young.*[71] Perhaps threats to the aesthetic character of a community do present a sufficiently grave danger to call for restrictions upon freedom of expression.[72] However, while the architectural style of theaters and book stores may be a proper subject for zoning laws, a serious question exists as to whether zoning regulations can legitimately reach the content of either movies shown in theaters or books sold in stores. Pornography regulations enacted to engender a particular community environment also raise a problem concerning discrimination against speech, as to whether a zoning regulation adopted for aesthetic purposes is valid if it singles out pornographic theatres and book stores. These questions illustrate that the Court's pronouncements on obscenity and community environment merely skim the surface of a complicated problem requiring a more profound analysis.

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68. *See generally* Wisconsin v. Yoder, 406 U.S. 205, 213-14, 233 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 518 (1925); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

69. 413 U.S. 49, 58.

70. 96 S. Ct. 2440, 2450-53 (1976).

71. A related problem is to what extent zoning regulations may be used to restrict pornography displays and advertisements.

72. *Cf.* Berman v. Parker, 348 U.S. 26 (1954) (upholding a public land development project upon the ground that it was a legitimate exercise of the police power to determine that a community should be "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled").

B. *Commercial Speech*

In cases dealing with commercial speech, abandonment of the categorization technique and reinstitution of the clear-and-present-danger test would render irrelevant the fact that speech is commercial. The issue in a case like *Valentine v. Chrestensen,*[73] for example, would become whether the litter caused by the distribution of handbills, commercial or otherwise, presents danger sufficient to warrant the prohibition of handbills. In deciding this issue, no distinction based upon the content of the handbills could be drawn: either all handbills could be prohibited or none could be prohibited. In *Schneider v. State,*[74] decided three years prior to *Valentine,* the Supreme Court struck down several ordinances, prohibiting the distribution of handbills, which had formerly been used to prosecute persons for distributing political and religious literature. Although noting that its decision did not necessarily apply to "commercial solicitation and canvassing,"[75] the Court did squarely rule that the prevention of littering was an "insufficient" reason to justify the prohibition of handbilling,[76] adding that littering could be prevented by punishing those who actually throw paper on the street.[77] Assuming that one agrees that the prevention of littering is an insufficient reason to ban handbilling, that reasoning should apply to commercial handbills with the same force as it applies to any other literature.

When analyzed in terms of the gravity of danger, the question arising in a case such as *Breard v. Alexandria*[78] is whether invasion of the right to privacy in one's home presents a sufficient danger to allow prohibition of door-to-door solicitation. Again, the fact that the speech — the solicitation — is commercial in nature would be completely irrelevant. Similarly, in *Pittsburgh Press Co. v. Human Relations Commission,*[79] the content of the speech would be deemed irrelevant. Instead, the issue to be decided would be whether an advertisement proposing an unlawful commercial activity — discrimination in employment practices — presented a grave enough danger to allow prohibition of the advertisement.

With the Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,*[80] the commercial speech

73. 316 U.S. 52 (1942).
74. 508 U.S. 147 (1939); *see* note 49 *supra.*
75. *Id.* at 165.
76. *Id.* at 162–63.
77. *Id.* at 162.
78. 341 U.S. 622 (1951).
79. 413 U.S. 376 (1973).
80. 425 U.S. 748 (1976).

doctrine has been greatly limited, if not completely eliminated.[81] However, the Court refrained from stating that commercial speech might never be regulated.[82] Application of the clear-and-present-danger test on a consistent basis would prevent any such regulation from discriminating against commercial speech.

### C. *Libel*

In its opinion in *Gertz v. Robert Welch, Inc.*,[83] the Supreme Court identified an evil caused by libelous speech — wrongful injury to reputation — that could be considered a danger sufficiently grave so as to justify regulation of libel.[84] If a majority of the present Court believes that this evil constitutes a danger warranting penalties for libelous speech,[85] the Court should further articulate that premise.

The Supreme Court's opinion in *Gertz* is pregnant with possibilities, flowing from the Court's recognition of the interest in protecting individuals from wrongful injury to their reputation. From this step, the Court proceeded to partially repudiate the actual malice rule by limiting its application.[86] Following its own reasoning in the *Gertz* opinion may lead the Court to a further repudiation of the actual malice rule in favor of the adoption of other more satisfactory rules for dealing with libel. The actual malice rule has always been of questionable validity since the mere presence of actual malice has nothing to do with either the falsity of the speech or the injury caused to a person's reputation. An untruthful statement, highly injurious to an individual's reputation, can be made in perfect innocence. The degree to which a person's reputation is harmed by a false statement remains the same, regardless of whether the statement is made unintentionally or knowingly. Indeed, the actual malice rule violates a principle of constitu-

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81. *Id.; see* note 21 and accompanying text *supra.*

82. *Id.* at 1830.

83. 418 U.S. 323 (1974); *see* notes 31 & 32 and accompanying text *supra.*

84. The Court stated that "[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." 418 U.S. at 341.

85. There is a majority only if one includes Justice Blackmun. In Justice Blackmun's concurrence in *Gertz,* he indicated that he was not entirely in agreement with the Court's opinion and he would not have joined the majority if his vote had not been needed for a majority. 418 U.S. at 353–54. However, Justice Blackmun did join the majority in Time, Inc. v. Firestone, 424 U.S. 448 (1976), which followed the *Gertz* test.

86. According to the actual malice rule, recovery in a libel action is conditioned upon a showing that the libelous statement was made with knowledge that it was false or with reckless disregard of the possibility that it might be false. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964). In *Gertz,* the Court held that actual malice need not be shown in cases involving private individuals, as distinguished from public figures, to recover actual damage in a libel case. 418 U.S. at 345–49.

tional law by not being reasonably related to the purpose it was designed to accomplish[87] — protection of reputation from false disparagement.

In *Gertz*, the Court justified the actual malice rule as applied to libel of public figures on the grounds, *inter alia*, that public figures accept the risk of libel when they enter public affairs, and that they have greater access to the media to counteract false statements than do private persons.[88] If this rationale is supportable, it may well justify the conclusion that there is no actionable danger — no wrongful injury to reputation — when an untruthful statement is directed at a public figure. This reasoning does not imply, however, that the actual malice rule should apply to libel of public figures but not libel of private persons. In the absence of wrongful injury to the reputation of a public figure; libel actions should be impermissible whether or not actual malice exists.

The actual malice rule might be replaced by other standards suggested, but not adopted, in the *Gertz* case. First of all, the Court should rule that recovery of damages for libel per se,[89] whether concerning a private individual or a public figure, is constitutionally impermissible, even if accompanied by actual malice. If, as the Court stated in *Gertz*, the justification for regulating libel is the harm wrongfully caused to reputation, that justification exists only when the harm has in fact occurred.[90] In the absence of a showing that wrongful injury to reputation has occurred, presumed damages operate as an unwarranted penalty upon speech. Similarly, punitive damages, even when actual malice is present, should be constitutionally impermissible for libel claims, because punitive damages operate only as a penalty upon speech and do not compensate the plaintiff for the suffered injury to reputation.[91] In *Gertz*, the Court did not fully explore the ramifications of its reasoning, which strongly implied that, since wrongful injury to reputation is the only justification for regulating libel, presumed and punitive damages should not be permitted. Perhaps through the forthright use of the clear-and-present-danger test in libel cases, the Court could complete the thought process it initiated in *Gertz*, forsaking the

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87. *See, e.g., Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1077–87 (1969).

88. 418 U.S. at 344.

89. Under tort concepts, where libel per se is alleged, mere proof of the defamation itself is sufficient to establish the existence of some damages, and no proof of actual harm is necessary. W. PROSSER, LAW OF TORTS 754 (4th ed. 1971).

90. 418 U.S. at 341.

91. *See id.* at 350. It might be parenthetically noted that the practical effect of such a ruling may be negligible, since juries may tend merely to increase the amount of compensatory damages.

Shaman: Revitalizing the Clear-and-Present-Danger Test: Toward a Principl



actual malice standard altogether and instead prohibiting presumed and punitive damages in all libel cases.

### D. *Symbolic Speech*

In the abstract, application of the clear-and-present-danger test to regulation of symbolic speech would not generate decisions significantly different from those which the Supreme Court has produced under the test it currently purports to follow.[92] Requiring a showing of a grave danger to support the regulation does not impose a much greater burden than requiring a showing of a substantial governmental interest for the regulation. In practice, however, the Supreme Court has tended to diminish the meaning of a substantial governmental interest;[93] thus, in actuality, adoption of a revitalized clear-and-present-danger test would effectuate a greater change than is evident from the abstractions currently employed in cases dealing with symbolic speech.

This change, moreover, would be advantageous. In the first place, the analysis would be a more honest one; the vitiated interpretation presently given to the expression "substantial governmental interest" would be repudiated. In the second place, symbolic speech would be treated as any other kind of speech. If the clear-and-present-danger test had been the prevailiing criterion in, for example, *United States v. O'Brien,*[94] the Court's conclusion there that the burning of a draft card could be criminalized in order to promote administrative efficiency would probably have been avoided.[95] Burning a draft card or any other material in a manner that is a fire hazard may properly be regulated under a statute designed to prevent fire; certainly fire is a serious danger, permitting some restriction of speech. However, the threat to administrative efficiency posed by destroying a draft card is hardly the quality of danger warranting regulation of speech.[96]

One critical challenge might be that a court which was willing to find a "substantial" governmental interest in administrative efficiency would be equally willing to conclude that a threat to the same administrative efficiency is a "grave" danger. This conclusion does not necessarily follow from the Court's reasoning. If the Court in *O'Brien* had been unable to use the categorization technique to devalue symbolic

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92. *See* notes 34 & 35 and accompanying text *supra.*

93. *See* United States v. O'Brien, 391 U.S. 367 (1968) (substantial governmental interest was administrative convenience). For a discussion of the use of the term "substantial" in the context of the *O'Brien* case, *see* note 35 *supra.*

94. 391 U.S. 367 (1968).

95. *Id.* at 377–78.

96. *See* Velvel, *Freedom of Speech and the Draft Card Burning Cases,* 16 U. KAN. L. REV. 149, 162–66 (1968).

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speech, but had commenced instead with the proposition that symbolic speech should be treated no differently than other forms of speech, it is strongly suggested that a different result would have obtained using the clear-and-present-danger test. The clear-and-present-danger test, applied within the context of the principles upon which it is founded, is less susceptible to unrealistic diminishing than is the substantial governmental interest test. Although the clear-and-present-danger standard is flexible, its flexibility is not unlimited.[97] The regulation of symbolic speech, as well as other forms of speech, may be justified by a variety of serious dangers, but administrative efficiency is not among these dangers.

### E. *Access to Speech Forums*

The suggestion that the clear-and-present-danger test should be applied in the newer cases involving access to speech forums should not be startling, because in a somewhat older variety of access cases the test was accepted routinely. In past cases, the Supreme Court applied the clear-and-present-danger test to uphold the rights of individuals to obtain access to exercise their freedom of speech at public facilities such as sidewalks and streets,[98] government grounds,[99] and public buildings.[100] Although the term "access" might not have been popularized early enough to be applied to those cases,[101] the issues presented in these cases were access issues. Accordingly, there is ample precedent for the use of the clear-and-present-danger test in the newer access cases.

Using such a test, the crucial question that remains in a case such as *Lehman v. City of Shaker Heights*[102] would be whether a sufficiently serious danger exists to justify the rejection of certain kinds of advertising on rapid transit placards when general advertising is permitted. For instance, if it were factually demonstrated that short term advertising is less profitable than long term advertising, and in reliance upon this fact, a municipality were to adopt a policy excluding short term advertising in rapid transit cars, the query would be whether this

97. For a discussion of the limits on the clear-and-present-danger test, *see* text accompanying notes 52–56 *supra.*

98. *See* Cantwell v. Connecticut, 310 U.S. 296, 308–11 (1940). *See generally* Coates v. Cincinnati, 402 U.S. 611 (1971); Cox v. Louisiana, 379 U.S. 536 (1965).

99. *See* Edwards v. South Carolina, 372 U.S. 229, 237 (1963).

100. *See* Cohen v. California, 403 U.S. 15 (1971); Brown v. Louisiana, 383 U.S. 131 (1966).

101. The seminal article which brought the term "access" into popular use was Barron, *Access to the Press — A New First Amendment Right,* 80 HARV. L. REV. 1641 (1967).

102. 418 U.S. 298 (1974); *see* notes 39–47 and accompanying text *supra.*

exclusion of speech would be defensible on the ground that loss of profits is a serious danger.

A related and extremely intriguing problem is suggested by Justice Rehnquist's dissenting opinion in *Southeastern Promotions, Ltd. v. Conrad,*[103] where he asks:

> May an opera house limit its productions to operas, or must it also show rock musicals? May a municipal theater devote an entire season to Shakespeare, or is it required to book any potential producer on a first come first served basis?[104]

Assuming that one variety of show is as profitable as another variety, the loss of profits argument that could be made in the rapid transit situation could not be raised in the municipal theater situation. However, the situation may present other dangers which arguably would be sufficiently grave to allow rock musicals to be excluded from a municipal theater. One might argue in favor of such restrictions that the function of a municipal theater is to provide entertainment and education for theatergoers, and that this function is frustrated if the theater officials cannot choose those productions which, in their informed opinions, are most entertaining and educational. Would, however, a different situation be presented if the officials refused to schedule plays that were critical of the government or were anti-religious on the grounds that such plays were not the most entertaining or educational? Alternatively, suppose that the officials booked all Republican speakers for an entire season's lecture series, while refusing to allow Democratic speakers because the officials believed that the former gave more educational lectures than the latter. Certainly, the sort of ideological censorship present in these two hypotheticals violates the very heart of the first amendment.[105] If this is so, the question arises of whether an entire season of Shakespeare is any less ideological than an entire season of Republicans.

Admittedly, the officials who manage municipal theaters should be granted some deference by the courts, especially if they have some expertise; however, they should not be granted absolute discretion to control the content of speech in public theaters. Application of the

103. 420 U.S. 546, 570–74 (Rehnquist, J., dissenting).

104. *Id.* at 572–73.

105. The Court noted, in Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), that "to justify prohibition of a particular expression of opinion, [a state] must be able to show that its action was caused by something more than *a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.*" *Id.* at 509 (emphasis added); *cf.* Schacht v. United States, 398 U.S. 58, 63 (1970) (actor enjoys right to criticize Government openly during dramatic performance).

clear-and-present-danger test in this area would ensure that government officials do not abuse their power.

The use of the clear-and-present-danger test would not necessarily result in access for speech in all cases where access to public facilities is sought. Some of the older access cases demonstrate that some dangers of sufficient gravity justify prohibiting access for speech at public facilities.[106] On the other hand, the clear-and-present-danger test would ensure access for speech when such access would not result in serious harm.

### F. *Other Speech*

Use of a revitalized clear-and-present-danger test would clarify other areas of uncertainty concerning the extent of constitutional protection that exists for speech. For instance, the case of *Tinker v. Des Moines School District*,[107] in which the Supreme Court struck down a high school regulation prohibiting students from wearing black armbands in school to protest the war in Vietnam, illustrates some of the problems.[108] The Court ruled that the regulation was unconstitutional because it discriminated against speech on the basis of its ideological content,[109] and because there was no factual support for the contention of school officials that the wearing of the armbands would disrupt classroom work or other school activities.[110] However, the Court did state that the wearing of armbands by students could be prohibited if there were sufficient evidence to show that it would "materially disrupt classwork."[111] Although this statement can be dismissed as dictum, it nevertheless suggests the significant question of whether "material disruption" of classroom activities is a sufficiently grave danger to warrant prohibition of armbands in class. Certainly, arguments could be advanced on both sides of this proposition.[112] In the *Tinker* case itself, the Court reasoned that while the expression of new or unpopular ideas often causes some kind of disturbance, it is this sort of hazardous freedom that is the basis of our national strength, independence, and

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106. *See, e.g.,* Adderly v. Florida, 385 U.S. 39 (1966) (danger is interference with the lawful use of jailhouse grounds); Cox v. Louisiana, 379 U.S. 559 (1965) (danger is interference with the administration of justice); Avins v. Rutgers, State University of N.J., 385 F.2d 151 (3d Cir. 1967) (danger is interference with the use of a state publication to accomplish its goal of fostering education).

107. 393 U.S. 503 (1969).

108. *Id.* at 514. The Court characterized the wearing of a black armband as "akin to 'pure speech'" and, therefore, entitled to full first amendment protection. *Id.* at 508.

109. *Id.* at 510–11.

110. *Id.* at 511, 513–14.

111. *Id.* at 513.

112. It might be strongly contended that classrooms should be able to accommodate both the expression of ideas and some of the disruption it may cause.

vigor.[113] However, the Court expressed no opinion on whether the danger of disruption in the classroom justifies the curtailing of freedom of speech. Questions such as that raised in *Tinker*[114] could be finally resolved if the Supreme Court would focus upon the danger component of the clear-and-present-danger test. Hopefully, in the future, when faced with cases that revolve around the nature and degree of danger caused by speech, the Court will begin to build a body of case law which will aid in determining the gravity of danger that is necessary to allow curtailment of free speech.

## IV. CONCLUSION

The *sine qua non* of the first amendment is the prohibition of ideological censorship by the government. This prohibition means that the government may not restrict speech on the basis of its ideological content; the one and only justification for curtailing speech lies in the danger it causes. More than fifty years ago, Justice Brandeis wrote that even imminent danger does not justify curtailment of free speech unless the danger is a grave one.[115] In addition, this grave danger must be imminent, and relatively certain to occur. If these requirements are not satisfied, the first amendment will exist on paper but not in practice.

The present Supreme Court would be well advised to follow the guidance of Justice Brandeis. By repudiating the categorization technique and adopting a revitalized clear-and-present-danger test, the Court would take an important step toward fulfilling the promise of the first amendment.

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113. 393 U.S. at 508-09.

114. A similar question is suggested by the facts in Healy v. James, 408 U.S. 169 (1972). In *Healy,* a state college refused to give official recognition to a student group which sought to form a local chapter of Students for a Democratic Society. One of the reasons given for the rejection was that the group would be a disruptive force at the college. The Court recognized that the rejection would be warranted if the group "posed a substantial threat of material disruption . . . ." *Id.* at 189. However, the Court concluded that there was no evidence that the group would act as a disruptive force and held that the denial of recognition was unconstitutional. *Id.* at 190-91, 94.

115. Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring). Justice Brandeis stated that "[t]he fact that speech is likely to result in some violence . . . is not enough to justify its suppression. There must be the probability of serious injury to the State." *Id.*