6-1978

Defamatory Non-Media Speech and First Amendment Methodology

Steven H. Shiffrin
Cornell Law School, shs6@cornell.edu

ARTICLES

DEFAMATORY NON-MEDIA SPEECH AND FIRST AMENDMENT METHODOLOGY

Steven Shiffrin*

INTRODUCTION

In the course of his eloquent commentary[1] upon *New York Times Co. v. Sullivan*,[2] the late Professor Kalven enthused that the Court had written "an opinion that may prove to be the best and most important it has ever produced in the realm of freedom of speech."[3] This excitement was generated not by the Court's rather narrow holding[4] but rather by the hope that *Sullivan* would serve as the opening wedge to dislodge the clear and present danger

* Acting Professor of Law, UCLA. In addition to expressing appreciation for the useful assistance of the editors of the UCLA Law Review, I owe thanks to Ronald Collins, Richard Helmholz, Kenneth Karst, Robert Myers, Melville Nimmer, Gary Schwartz, and Murray Schwartz. Each of them read a draft of this article, offering helpful and often important suggestions. Particularly helpful were the comments of those who do not agree with many of the positions here taken. One of the special pleasures of writing upon and discussing controversial subjects is the experience of robust and wide-open, but friendly debate. This article is scheduled to appear as one of a series of essays in CONSTITUTIONAL GOVERNMENT IN AMERICA (R. Collins ed. 1979).

1. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

2. 376 U.S. 254 (1964).

3. Kalven, *supra* note 1, at 194.

4. The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. at 279-80. The Court also held on the facts that the evidence was insufficient to establish either malice on the part of the defendants or that the statements were made "of and concerning" the plaintiff. *Id.* at 288.

test,[5] to dismantle the "two-level"[6] approach to first amendment analysis (reflected in cases such as *Chaplinsky*,[7] *Beauharnais*,[8] and *Roth*[9]), and instead to rest free speech theory on the idea that the first amendment is centrally concerned with the protection of speech relating to self-government.[10] From that premise, Kalven thought the inclination to protect all speech in the "public domain"[11] would prove to be "overwhelming."[12]

Professor Kalven's hopes have not been realized. It is now clear that a variant of the clear and present danger test is solidly entrenched in a portion of the Court's first amendment theory[13] and that the two-level approach to first amendment analysis is alive and well.[14] Moreover, recent commentary by Justice Stewart[15] and the Court's opinion in *Gertz v. Robert Welch, Inc.*[16] suggest that *Sullivan* may be regarded as having nothing to do with free speech theory. Rather it may be described as a free press case and its principles are to be applied (at least insofar as the scope of first amendment protection is concerned)[17] whether or not the communication is considered to be of public interest or relevant to self-government.[18] Such developments make it appropriate to consider whether media communications should be accorded a greater level of protection than non-media communications, whether defamatory speech unrelated to public issues ("non-pub-

5. Kalven, *supra* note 1, at 213-14.

6. *Id.* at 217-18. The two-level approach assumes that some speech is beneath first amendment protection and that other speech is protected albeit subject to a clear and present danger limitation.

7. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words beneath first amendment protection).

8. Beauharnais v. Illinois, 343 U.S. 250 (1952) (group libel beneath first amendment protection).

9. Roth v. United States, 354 U.S. 476 (1957) (obscenity beneath first amendment protection).

10. Kalven, *supra* note 1, at 208-09.

11. *Id.* at 221. All speech in the public domain or all speech of general or public interest can be equated with all speech relevant to self-government only by defining the term "relevant" so broadly that it can no longer serve as a term of limitation. *See* text accompanying notes 147-57 *infra*.

12. Kalven, *supra* note 1, at 221.

13. *See* Hess v. Indiana, 414 U.S. 105 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969).

14. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

15. Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631 (1975).

16. 418 U.S. 323 (1974).

17. The scope of first amendment protection is to be distinguished from the level of first amendment protection. Questions of scope determine whether a particular type of speech is entitled to any first amendment protection. Under *Gertz*, defamatory media speech is protected, but the level of first amendment protection decreases from malice to some showing of fault when non-public persons are the objects of attack. *Id.* at 347. For a discussion of the distinction between the level and scope of protection, see generally Kalven, *The Reasonable Man And The First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267.

18. 418 U.S. at 345-47.

lic" or "private" speech) is or should be protected under the first amendment, and whether there is a central meaning of the first amendment under prevailing Supreme Court doctrine. These comments should suffice to introduce the three major themes of this paper: First, media communications should be afforded no greater protection than non-media communications; second, defamatory non-public speech has been undervalued in first amendment theory; and third, the attempt to identify a category of speech deemed to be centrally protected under the first amendment is ill advised. Thus, first amendment methodology is explainable not in terms of self-government or absolutism (nor in terms of definitional or ad hoc balancing); instead first amendment methodology is rooted in general balancing principles which sometimes counsel ad hoc approaches and other times dictate rules of general application. Before addressing these contentions directly, it is necessary to discuss Professor Kalven's hopes, Justice Stewart's perspective, and some of the Court's observations with respect to these issues.

I

A. *Kalven's Scenario*

Professor Kalven's fondest hope was that the *Sullivan* decision would prompt the Court to adopt the theory of free speech advocated by Alexander Meiklejohn.[19] Professor Meiklejohn's theory proceeds from the hypothesis that "the principle of the freedom of speech . . . is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."[20] The notion is that the Constitution's commitment to freedom of speech is nothing more than a reflection of our commitment to self-government.[21] Under this approach speech relevant to self-government is absolutely protected under the first amendment;[22] speech not relevant to self-government is beyond its scope[23] and said to be fair game for government regulation so long as due process requirements are respected.[24]

The attractiveness of a politically based interpretation of the first amendment is easily understood, and its pull has drawn favorable commentary from a diverse group of respected commentators[25] as well as from several members of the

19. Kalven, *supra* note 1, at 221.
20. A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1960).
21. *Id.* at 20-27.
22. *Id.* at 37.
23. *Id.* at 79.
24. *Id.*
25. *See, e.g.*, G. ANASTAPLO, THE CONSTITUTIONALIST (1971); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*,

Court.[26] As a strategy of communications protection, it offers the pragmatic prospect of preventing the government from intruding into areas where its potential for bias is particularly acute.[27] As a theory of interpretation, it offers the legalistic neatness of permitting the conclusion that the absolute terms of the first amendment protect absolutely that speech within its scope.[28] It confines the area within which the judiciary may impose subjectively derived values.[29] And, finally, it offers a grand and romantic appeal by conjoining first amendment theory with the basic theory of American government.[30]

Equally understandable were Professor Kalven's high hopes for the *Sullivan* precedent. In ringing terms, *Sullivan* announced that the first amendment represented our "profound national commitment to the principle that debate on *public* issues should be uninhibited, robust, and wide-open . . . ,"[31] and that the "central meaning of the First Amendment"[32] is that prosecutions for libel on government have no " 'place in the American system of jurisprudence.' "[33] These conceptions were reinforced by the concurring opinion of Justice Goldberg who argued that although public speech should be absolutely protected,[34] "purely private defamation"[35] is not protected under the first amendment because it has "little to do with the political ends of a self-governing soci-

30 STAN. L. REV. 299 (1978); Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS CAMDEN L. REV. 41 (1974); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Kalven, note 1 *supra*; Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234 (1966); Comment, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311 (1971). The diversity of views offered by these commentators dramatize the extent to which a politically based approach can lead to radically different degrees of speech protection depending in large part on how the term political is defined.

26. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). For a discussion of the influence of Meiklejohn's views on the Court with particular emphasis on Justices Brennan and Douglas, see Bloustein, *supra* note 25, at 72-77.

27. A. MEIKLEJOHN, *supra* note 20, at 20, 27. This principle may justify greater governmental intrusions with respect to commercial speech and non-public speech than would be tolerable in the political realm.

28. *Id.* at 20.

29. Bork, note 25 *supra*.

30. *See* Garrison v. Louisiana, 379 U.S. 64, 74-75 (1974). On the other hand, there is nothing grand or romantic about supposing that art and literature are protected under the first amendment only to the extent that they have political relevance. Nor is it accurate to suppose that the Founding Fathers had so narrow a perspective. *See* note 157 *infra*.

31. 376 U.S. at 270 (emphasis added).

32. *Id.* at 273.

33. *Id.* at 291-92 (quoting City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N.E. 86, 88 (1923)).

34. 376 U.S. at 298.

35. *Id.* at 301.

ety."[36] To be sure, in holding that knowing or reckless falsehoods concerning public officials were not protected under the first amendment,[37] *Sullivan* did not go as far as Meiklejohn.[38] But with that narrow exception,[39] *Sullivan* offered the prospect of extension well beyond its holding that a public official suing for libel would have to demonstrate knowing or reckless falsity before damages could constitutionally be imposed.

To a large extent that prospect has been realized. In subsequent decisions, the Court has held that *Sullivan* applies to relatively low level public officials,[40] to public figures,[41] and to criminal libel actions.[42] Moreover, the *Sullivan* ruling has been applied by analogy in a variety of other contexts,[43] including false light privacy actions,[44] and the so-called malice exception has

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36. *Id.*

37. *Id.* at 279-80.

38. A. MEIKLEJOHN, *supra* note 20, at 20. Thus the protection for defamatory public speech under *Sullivan* is not absolute. On the other hand, Kalven was apparently prepared to accept the malice exception, at least insofar as calculated falsehoods are concerned. *See* Kalven, *supra* note 17, at 294-95, 304-05. Thus in fundamental philosophy, Kalven was a definitional or general balancer, not a follower of Meiklejohn. *But cf.* Kalven & Steffen, *The Bar Admission Cases: An Unfinished Debate Between Justice Harlan and Justice Black*, 21 LAW IN TRANSITION 155 (1961) (renouncing balancing in favor of Justice Black's view at least as "a matter of rhetoric"). Indeed despite Kalven's appreciation of Meiklejohn's perspective, he, without calling attention to the fact, rejected both of Meiklejohn's major principles. Kalven believed that political expression was not absolutely immune from government abridgment, and he believed that the scope of the first amendment was not confined to political expression. Kalven, *Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 16 [hereinafter cited as *Law of Obscenity*].

39. However narrow the exception might be, its existence demonstrated that the two-level approach to first amendment analysis was not abandoned by the *Sullivan* opinion.

40. Rosenblatt v. Baer, 383 U.S. 75 (1966) (supervisor of a ski resort).

41. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

42. Garrison v. Louisiana, 379 U.S. 64 (1964).

43. Pickering v. Board of Educ., 391 U.S. 563 (1968) (dismissal of teacher for criticizing school board); Linn v. United Plant Guard Workers Local 114, 383 U.S. 53 (1966) (federal labor law). *Linn* was reaffirmed (and extended beyond the NLRA to federal employment) in Old Dominion Branch 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974). Professor Christie has suggested that *Old Dominion* is properly read for the idea that despite *Gertz* certain areas of public interest will require the application of *Sullivan* standards as a constitutional requirement even if the plaintiff is not a public person. Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43, 50-51, 57 n.38, 59, 62 (1976). *Old Dominion*, however, was explicitly decided under the federal labor laws without any occasion to decide first amendment arguments. 418 U.S. at 283 n.15. Nothing in *Gertz* or Time, Inc. v. Firestone, 424 U.S. 448 (1976), indicates the slightest tendency to create special categories of subject matter triggering *Sullivan* standards. Indeed, if anything, *Firestone* suggests that the only significance of categories of subject matter is that *Sullivan* standards may not be constitutionally required when subject matter is not of the quality to permit a controversy to be called a "public" one for purposes of defining a public figure. *See* text accompanying notes 93-101 *infra*.

44. Time, Inc. v. Hill, 385 U.S. 374 (1967). Hill applied the *Sullivan* test to false light privacy cases when the content of the material in question involved "matters of public interest." *Id.* at 387-88. In Cantrell v. Forest City Publishing Co., 419 U.S. 245,

been narrowly construed.[45] Finally, the high point of the Kalven scenario was realized when a plurality of the Court in *Rosenbloom v. Metromedia, Inc.*[46] (with the lower courts following suit)[47] opined that before a plaintiff could collect damages in a defamation action with respect to a communication of "general or public interest," the plaintiff would have to show knowing or reckless falsity whether or not a public official or public figure was involved.[48] Thus Kalven's supposition that "the invitation to follow

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250-51 (1974), the Court left open the question of whether *Hill* has survived *Gertz*. *Gertz* refused to determine what is or is not of general or public interest in the defamation context and held that reputational interests would be inadequately served if a non-public person had to meet *Sullivan* malice standards in the defamation context even if the matter were of public interest. Thus, different standards are required of the same class of plaintiffs, *e.g.*, malice of a false light privacy plaintiff, fault of a defamation plaintiff. It does not inexorably follow that *Hill* is undermined by *Gertz*. First the Court has been willing to distinguish matters of general interest from matters not of general interest in other contexts. Time, Inc. v. Firestone, 424 U.S. 448 (1976). *See* text accompanying notes 93-101 *infra*. *Cf.* Miller v. California, 413 U.S. 15 (1973) (Court willing to determine what is of serious literary, artistic, political or scientific interest) and Cox Broadcasting v. Cohn, 420 U.S. 469, 491 (1975) (Court leaves open question of whether disclosure of embarassing facts tort is constitutional). Second, the Court could refuse to distinguish between newsworthy and non-newsworthy items in a false light privacy context and still maintain a malice standard, since the question of whether the Court should distinguish between newsworthy and non-newsworthy speech is different from the question of the level of protection which should be afforded to the defendant.

As to the different levels of proof required by private plaintiffs, the Court might say as it suggested in *Hill* that since the state interest in reputation is greater than the included interest in avoiding false light invasions of privacy, a lesser showing may be permitted for plaintiffs seeking redress for invasion of the greater interest. 385 U.S. at 391. *But cf.* Time, Inc. v. Firestone, 424 U.S. 448 (1976) (*Gertz* standards applicable in defamation case even if no damage to reputation shown). *Compare* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573 (1977) (maintaining that the interest in permitting recovery for placing the plaintiff in a false light is that of reputation) *with* Gertz v. Robert Welch, Inc., 418 U.S. at 335 n.6 (contending that the statute in *Hill* permitted damages for harm caused by exposure to public attention not for factual inaccuracies) *and* Note, *Defamation, Privacy and the First Amendment*, 1976 DUKE L.J. 1016 (criticizing *Firestone*'s failure to require damage to reputation).

Presumably the most significant distinction is that in *Gertz*, unlike *Hill*, the substance of the statement warned the editor that substantial danger to an individual's interest was implicated. As the Court observed in *Hill*, "negligence would be a most elusive standard . . . when the content of the speech itself affords no warning of prospective harm to another through falsity." 385 U.S. at 389. And *Gertz* specifically has left open the question of which standards should apply in the defamation context when the content of the statement does not by itself warn the editor of the danger. On the other hand, *if* the defendant has actual knowledge of those facts which make the danger apparent, should a different standard apply merely because the content of the statement does not signal the danger? The real question is what the standard should be when neither the content of the statement nor other known facts manifest the danger.

45. St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.").

46. 403 U.S. 29 (1971).

47. *See* sources cited in note 99 *infra*.

48. 403 U.S. at 44. Significantly, however, even the *Rosenbloom* plurality was unwilling to subscribe to a literal following of Meiklejohn's views. The plurality noted

a dialectic progression from public official to governmental policy to public policy to matters in the public domain, like art, seems . . . overwhelming"[49] appeared to be especially apt. But, as shall be discussed later,[50] the ongoing rush to extend the *Sullivan* holding highlighted the basic weakness of the Meiklejohn theory—the dialectic progression once started has no principled stopping place, at least no stopping place consistent with common sense conceptions of the first amendment.

B. *Justice Stewart's Position*

Just when it appeared that Meiklejohn's theory of freedom of speech was well along the road toward judicial acceptance, Justice Stewart dropped a first amendment bombshell. In his seminal 1974 lecture at the Sesquicentennial Convocation of the Yale Law School, he stated that neither *Sullivan* nor any of its progeny had ever suggested that the "constitutional theory of free *speech* gives an *individual* any immunity from liability for libel or slander."[51] Instead, he maintained that *Sullivan* is a free press case exclusively.[52] The conflict between Justice Stewart and Professor Kalven could not be more pronounced. What Kalven regarded as the best and most important opinion in the realm of freedom of speech[53] is described by Justice Stewart as having nothing to do with freedom of speech.[54]

Although Justice Stewart's reading of *Sullivan* can be reconciled with the factual result of the case, it cannot be harmonized with either the language or rationale of the decision. At first glance it is even difficult to square Justice Stewart's position with the facts. The defendants the court held entitled to first amendment protection included not only the New York Times Co., but also four Alabama clergymen who had not been employed by the press in any capacity.[55] The names of these clergymen (and other individuals not named as defendants)[56] had been appended by

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that the first amendment's concern with "public issues" was not confined to "matters bearing broadly on issues of responsible government." *Id.* at 42. Meiklejohn would have protected speech on public issues by contending that such speech necessarily related to issues of responsible government. His conception of and definition of political speech was broader than the plurality's. The difference between the plurality and Meiklejohn, however, is nevertheless fundamental. The plurality's position is that the scope of the first amendment is not confined to political expression. By expanding the scope beyond that proposed by Mieklejohn, resort to balancing of some type becomes almost inevitable.

49. Kalven, *supra* note 1, at 221.
50. *See* text accompanying notes 147-57 *infra.*
51. Stewart, *supra* note 15, at 635 (emphasis in original).
52. *Id.* at 633-35.
53. Kalven, *supra* note 1, at 194.
54. Stewart, *supra* note 15, at 635.
55. 376 U.S. at 256-57.
56. *Id.*

way of endorsement to a political advertisement[57] which was found to be defamatory.[58] Apparently Justice Stewart's view is that the Court reversed the judgment as to the clergymen because they, by publishing in the press, were entitled to receive whatever protections were provided to the press. They were, for purposes of the decision, the press. If the *Sullivan* rule is to be regarded as a press decision exclusively, it makes sense to give the press term at least this expansive a sweep.[59] If the goal is to prevent the states from discouraging the publication of non-malicious (in the *Sullivan* sense) defamatory statements about public officials, that goal can hardly be accomplished by imposing damages against the sources of the statements.[60]

But if Justice Stewart's position does not contradict the result, it surely does violence to the language and underlying philosophy of *New York Times Co. v. Sullivan*. The opinion explicitly states that its holding is based on both the speech and press provisions of the first amendment: "[W]e sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press as applied to the States by the Fourteenth Amendment . . . ."[61] Indeed, the opinion refers throughout to the "freedom of speech and press."[62]

Even more important, however, the rationale of the opinion is rooted in a fundamental respect for the right of the people, not merely the press, to criticize the government. After noting that *Barr v. Matteo*[63] holds that federal officials are absolutely immune from defamation judgments rendered with respect to statements made by them "within the outer perimeter"[64] of their duties,[65] the Court stated that

> [a]nalogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer . . . . As Madison said . . . "the censorial power is in the people over the Government, and not in the Government over the people."[66]

If the Court intended *Sullivan* to be read as a free press case exclusively, it picked a strange way to state its holding and a pecu-

57. *Id.* at 257.
58. *Id.* at 262-63.
59. *But see* Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902 (1974) [hereinafter cited as *First Amendment Protection*].
60. *But cf.* Branzburg v. Hayes, 408 U.S. 664 (1972) (reporter required to disclose sources of material in grand jury context).
61. 376 U.S. at 264 n.4.
62. *Id.* at 264, 265, 268.
63. 360 U.S. 564 (1959).
64. 376 U.S. at 282.
65. *Id.*
66. *Id.*

liar method to justify it. Indeed, far from holding that the clergymen citizen-critics derive immunity from the fact that they have for limited purposes become members of the press,[67] it appears that the press has derived immunity either from the fact that it can be considered a part of the class of citizen-critics[68] or that citizen-critics need a press to acquire information relevant to their decision making.[69] The clarity of the free speech underpinnings of *Sullivan* must lead us to inquire into the circumstances which have led Justice Stewart to so radical a departure from recently settled, but nonetheless basic, principles of first amendment law. What is the case for transforming *Sullivan*'s ringing endorsement of democracy into a muted approval of what might as well be called "mediaocracy"?

C. Gertz *and* Firestone: *Hints from the Court*

Only hints are provided in *Gertz v. Robert Welch, Inc.*,[70] but the indications are that the case for mediaocracy is intertwined with the case for a politically based interpretation of the first

67. The line drawing can be difficult. If a person holds a press conference and the material is not published, does the press clause apply? If the material is published, does the protection extend only to the published version or to the oral conference as well? Are non-media republications after media publication covered by the press clause? *Compare* note 72 *infra with* note 174 *infra.*

68. But notice that corporations are not citizens, at least for purposes of the privileges and immunities clauses of the Constitution. Grosjean v. American Press Co., 297 U.S. 233, 244 (1936). If freedom of speech or press is dependent upon the right to vote as Meiklejohn suggests, *see* text accompanying notes 19-24 *supra*, one is led to the frivolous conclusion that corporations such as the New York Times Co. have no first amendment rights inasmuch as corporations typically cannot vote. *But see* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973). For an excellent discussion of corporate voting rights, see Comment, *Public Officials Represent Acres, Not People*, 7 LOY. L.A.L. REV. 227, 262-66 (1974). Indeed this weakness in Meiklejohn's theory is made apparent by his specific contention that the privileges and immunities clause applies the first amendment to the states, not the due process clause, A. MEIKLEJOHN, *supra* note 20, at 53, a contention made necessary because of his bifurcated approach to speech protection. *See* text accompanying notes 19-24 *supra.* He regrets that the "clause in question protects 'citizens' rather than 'persons,' and, hence, resident aliens are not provided for." A. MEIKLEJOHN, *supra* note 20, at 53. Meiklejohn's solution to this "difficulty" is that "[t]he essential point is not that the alien [and impliedly the New York Times Co.] has a right to speak but that we citizens have a right to hear him." *Id.* Nonetheless, it surely is surprising to learn that the New York Times Co. has no right to freedom of expression but only a right to raise the rights of others. Little did one realize the burden that third party standing rules have shouldered all these years. It could be that Meiklejohn would not apply his principles to the press clause. The same difficulties, however, would apply to non-press corporations.

69. Potential recipients of communications have standing to contest abridgment of speakers' rights. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Kleindienst v. Mandel, 408 U.S. 753 (1972). Presumably a speaker also has standing to assert the rights of his potential audience. *Cf.* Eisenstadt v. Baird, 405 U.S. 438 (1972) (distributor of contraceptives permitted to assert rights of recipients of the distribution).

70. 418 U.S. 323 (1974).

amendment. *Gertz* was decided a few months before Justice Stewart's speech[71] and it contains the Court's first[72] implication that the application of the *Sullivan* rule might depend on the media status of the defendant. *Gertz* constituted the Court's second attempt to determine the applicability of the *Sullivan* principles to a defamation case involving a plaintiff who was neither a public official nor a public figure. As previously mentioned, in the Court's first brush with the issue,[73] *Rosenbloom v. Metromedia, Inc.*,[74] a three justice plurality took the position that a private plaintiff would have to meet the *Sullivan* test in order to recover damages so long as the publication involved a matter of "public or general concern."[75] The underlying spirit of the plurality was crisply stated:

> We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.[76]

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71. *Gertz* was decided on June 25, 1974. *Id.* at 323. Justice Stewart's speech was delivered on November 2, 1974. Stewart, *supra* note 15, at 631.

72. In each of the cases, however, the defendant has either been a media enterprise or a person who has published or broadcast in an instrumentality covered by the press clause. Professor Hill has suggested that Henry v. Collins, 380 U.S. 356 (1965), is an instance in which the *Sullivan* rule has been applied with "no media involvement whatever. . . ." Hill, *Defamation and Privacy*, 76 COLUM. L. REV.1205, 1224 n.91 (1976). There the lower court failed to give a *Sullivan* instruction with respect to several communications. Two were telephone statements to reporters for publication which followed in five newspapers. Henry v. Collins, 253 Miss. 34, 42-44, 158 So. 2d 28, 30-31 (1963). One was a letter written the same day to a deputy sheriff containing the same defamatory statements. *Id.* at 42, 158 So. 2d at 30. The Supreme Court apparently required *Sullivan* standards to be applied to each of the communications. If only media defendants are to be protected, could Henry be tried under different standards for the letter than for the telephone statements (essential to the publications process) and the newspaper publications? Would a rule permitting a defendant to issue statements to the world through the media (and thus to public officials) but not directly to public officials make such sense? If the statement to the sheriff is protected because of the companion media involvement, would defamers be encouraged to rush into print to protect themselves? *See* Davis v. Schuchat, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975) (expressing fear of such a possibility). Are not these difficulties avoided if no distinctions are made on the basis of media involvement?

73. The issue might have been reached in Linn v. United Plant Guard Workers Local 114, 383 U.S. 53 (1966). There an assistant general manager of Pinkerton's National Detective Agency, Inc. filed a defamation suit for statements made in leaflets distributed during a union organizing campaign. The Court adopted *Sullivan* standards "by analogy" as a matter of federal labor policy "rather than under constitutional compulsion." *Id.* at 65. Inasmuch as federal labor law mandated *Sullivan* standards, there was no necessity to determine what constitutional requirements might have been required in the absence of statutory requirements. *Accord,* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 283 n.15. Since *Old Dominion* and *Gertz* were decided on the same day and since *Old Dominion* reaffirms *Linn* (*id.* at 282-83), it is clear that *Linn* survives *Gertz.*

74. 403 U.S. 29 (1971).

75. *Id.* at 44.

76. *Id.* at 43-44.

Thus the *Rosenbloom* plurality stated that the first amendment protects speech involving matters of public or general concern but suggested that it might exclude speech outside those categories.[77]

Gertz rejected the *Rosenbloom* plurality view by refusing to make the applicability of *Sullivan* turn on whether a particular communication was considered by judges to be of "general or public interest"[78] or whether it was considered to provide information "relevant to self-government."[79] The "general or public interest" test was assailed first because it was thought to balance inadequately the competing interests of preserving reputational interests and safeguarding the press.[80] If a communication of "general or public interest" defamed a private plaintiff, to require a *Sullivan* showing was thought to safeguard reputational interests inadequately in view of the fact that public plaintiffs were deemed to have greater access than private plaintiffs to reply in the media[81] and that public persons were deemed to have invited public attention and comment.[82] On the other hand, if a communication were judicially characterized as without "general or public interest," to permit a recovery without a showing of fault by the press and without a demonstration of actual damage was thought to involve inadequate protection for the first amendment interest in a free press.[83] Finally, the Court "doubt[ed] the wisdom"[84] of committing to the "conscience of judges"[85] the task of determining on an ad hoc basis which statements address issues of "public or general interest" and which do not.[86]

Accordingly, the Court held that a *Sullivan* showing would be required of a public official or public figure before damages could be imposed, but that (whether or not the communication was deemed to be of "general or public interest") a private plaintiff could recover "actual"[87] (but not presumed or punitive)[88]

77. *See id.* at 43-44 & n.12.
78. 418 U.S. at 346.
79. *Id.*
80. *Id.*
81. *Id.* at 344.
82. *Id.* at 344-45.
83. *Id.* at 346.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 349. The Court did not address the question of nominal damages or whether a plaintiff could constitutionally clear his or her reputation via a declaratory judgment action without having to show fault or malice on the part of the defendant. *See generally* RESTATEMENT (SECOND) OF TORTS, Special Note On Alternative Remedies to Damages at 295-96 (Tent. Draft No. 20, 1974). Special verdicts can assist in this area except where the defendant can prevail on the fault question via summary judgment. The Court also did not discuss the constitutionality of awarding attorney's fees to prevailing plaintiffs in such actions and perforce did not discuss whether the constitutionality of such an award might depend upon a showing of fault or malice.
88. 418 U.S. at 349.

damages only upon a showing of "fault,"[89] at least in those cases where the substance of the statement made "substantial danger to reputation apparent."[90]

At first glance, it appears that the Court has rejected the Meiklejohn interpretation of the first amendment. The Meiklejohn view of the first amendment requires the conclusion that communications not relevant to public issues be unprotected by the first amendment.[91] Yet *Gertz* plainly states that communications which are deemed to have nothing to do with self-government and which do not relate to public issues fall within the ambit of first amendment protection,[92] *i.e.*, defamation damages cannot be imposed in the absence of a showing of fault whether or not public issues are involved.

The *Gertz* rationale is qualified, however, by the Court's opinion in *Time, Inc. v. Firestone*.[93] There the Court reaffirmed the rejection of the public or general interest test as a means of determining the scope of first amendment protection,[94] but reintroduced a variant of the test for determining the level of protection (*i.e.*, malice versus fault) accorded to the defendant.[95] *Gertz* had stated that "commonly, those classed as public figures have thrust themselves to the forefront of particular *public* controversies in order to influence the resolution of the issues involved."[96] In *Firestone*, the Court elevated this description to a definition and held that a divorce proceeding involving one of the wealthiest families in America and containing testimony concerning the extra-marital sexual activities of the parties did not involve the sort of "public controversy" referred to in *Gertz*.[97]

Thus the Court which in *Gertz* doubted the wisdom of forcing judges to determine on an ad hoc basis what is and is not of

89. The language of the opinion strongly implied that "fault" was equated with negligence. "[P]unitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions." *Id.* at 350. *But see* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (dictum implying that liability could be imposed for truthful statements presumably where malicious in the common law sense, thus suggesting that truth accompanied by malice equals fault). The lower courts have interpreted *Gertz* to mean that the defendant has to have been negligent in failing to recognize that the defamatory statement was false. *See, e.g.*, Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 543 P.2d 1356 (1975); Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975).

90. 418 U.S. at 348 (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967)). This qualification may be significant in the libel per quod and false light privacy contexts. *See* note 44 *supra*.

91. *See* text accompanying notes 19-24 *supra*.

92. 418 U.S. at 346.

93. 424 U.S. 448 (1976).

94. *Id.* at 454.

95. *Id.* at 454-55.

96. 418 U.S. at 345 (emphasis added).

97. 424 U.S. at 454.

"general or public interest" was perfectly willing in *Firestone* to produce a public figure test which forces judges on an ad hoc basis to determine what is or is not a "public controversy"—all of this without so much as a casual attempt to define "public controversy."[98] Perhaps the Court divines a distinction of constitutional dimension between the terms "public or general interest" and "public controversy." At least there is a distinction of practical importance. The *Firestone* decision apparently does not mean that the presence of a "public controversy" is sufficient to trigger a malice requirement. In addition, the plaintiff must have thrust himself to the forefront of the matter and attempted thereby to have influenced its outcome. It is one thing to make subjective determinations as to the newsworthy[99] character of a communication in some cases affect the level of protection afforded to it. It is quite another to make such ad hoc determinations affect the fact of protection *vel non* in all cases. The *Gertz* and *Firestone* defendants are assured that defamatory communications are entitled to *some* level of first amendment protection whether or not judges deem their communications to be "public" in character. Thus, by holding that determinations concerning the public character of the communication affect the level but not the scope of protection, the Court has assumed the burden of making the kind of difficult ad hoc decisions that it had shunned in *Gertz*, but at least has mitigated the impact of such decisions.

Whether or not the *Firestone* "public controversy" term is to be defined in the same manner as the " public or general interest" phrase (albeit in a discrete context with different consequences), the demise of the Meiklejohn doctrine (which assumes that private or non-public speech is outside the scope of the first amendment) *seems* apparent. After *Gertz* and *Firestone*, a communication held not to be relevant to public issues is nonetheless held to be entitled to a level of first amendment protection.

On the other hand, the *Gertz-Firestone* doctrine appears to preserve the core of Meiklejohn's approach in this sense—at least

98. The most the Court would do was to state that the interest of the public in a matter would not suffice to make the controversy public. *Id.*

99. The experience in applying the general or public interest test in the lower courts has been that almost every media report has been found to be newsworthy or of public interest. Eaton, *The American Law of Defamation through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1398 (1975); Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEXAS L. REV. 199, 206-07 (1976); Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547, 1560-61 n.94 (1972). It could be that since less now hinges on the determination and since *Firestone* exhibits a restrictive approach (albeit undefined), the lower courts will tighten up. For the view that the question should hinge on whether the statements are relevant to self-government (with a narrow, indeed crabbed, view of what constitutes relevance), see Bloustein, note 25 *supra*.

in those cases where the plaintiff has attempted to influence the outcome of a controversy by means of public communication,[100] the extent to which the communication bears upon public issues determines the level of constitutional protection enjoyed by the defendant. Thus, at least in some contexts, speech on public issues is deemed to be entitled to greater first amendment protection than speech which is not.[101]

Moreover it is possible to read *Gertz* in a way which would permit the conclusion that although the Meiklejohn test has been rejected, a politically based interpretation of the first amendment has not. A clue is provided by the Court's attempt to limit its holding to a limited class of defendants interchangeably described at various points to include newspapers, and broadcasters,[102] the press and broadcast media,[103] publishers and broadcasters,[104] the media,[105] the news media,[106] the communications media,[107] and the press.[108] This apparent attempt to distinguish between media and non-media defendants is entirely unexplained.[109] One possi-

100. The *Firestone* majority found it significant that the press conferences held by the plaintiff were not designed to influence the outcome of the controversy. 424 U.S. at 454-55 n.3.

101. Arguably the very distinction between public persons and non-public persons suggests a bias in favor of public issues. But the proffered justification for the distinction in *Gertz* is put in terms of media access and voluntary assumption of risk. It is the content of the test for public figure which reveals the Court's continuing concern for the substantive character of the issues involved.

102. 418 U.S. at 322, 340.

103. *Id.* at 343, 348.

104. *Id.* at 340, 341, 343, 346, 347, 348, 350. Although the term "publishers" is a term of art in defamation law ordinarily embracing all statements (whether by media or non-media speakers) to third persons, it is clear from the framework of the opinion that the term is not used in the common law sense.

105. *Id.* at 340, 342.

106. *Id.* at 341.

107. *Id.* at 341, 345.

108. *Id.* at 342.

109. The speech of Justice Stewart now makes it apparent that the Court's constant use of media language was not inadvertent. The Court clouds the question, however, by referring to the freedoms of speech and press throughout the opinion. 418 U.S. at 325, 341, 342, 349. It apparently views the press as enjoying rights of speech. "[T]he prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedom*s*." *Id.* at 341 (emphasis added). This is not unusual. "The Court has generally viewed the freedom of the press as little more than a particularized form of freedom of speech . . . ." Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971). Presumably if the Court wished to explain *Gertz's* "speech" references in a future case excluding non-media speakers from *Gertz* protections, it would now have to argue that the speech clause favors some defendants over others, an even more difficult task than attempting to argue that the press clause is to be distinguished from the speech clause in the defamation context.

The failure of the Court to discuss the media-non-media distinction could be an instance of judicial reluctance to discuss an issue not properly before it or it could reflect a division of views better suppressed than aired by greater fragmentation of opinions in a case already marked by multiple expressions of views. Justice Stewart's failure to cite *Gertz* in his speech despite its obvious relevance suggests either that it

ble explanation of the Court's strategy may be traced to the influence of Meiklejohn. It may be that the court has refused to adopt the Meiklejohn "public issues" test not because it believes that private speech (*i.e.*, speech unrelated to public issues) is as important as public speech but rather because it doubts its ability to distinguish unerringly between the two. The Court's reluctance to make the *scope* of first amendment protection turn upon ad hoc second guess distinctions between public and private speech is not difficult to appreciate. The judgment, however, that judges are unable to draw a bright line between public and private speech does not require the conclusion that there is no difference between the two. Indeed, the fact that the Court is willing to let the public character of the speech affect in some cases the level of protection afforded (despite its view that ad hoc line-drawing is tenuous and difficult) demonstrates that the Court appreciates the difference.[110] Instead, the Court's rejection of the public or general interest test, insofar as the scope of media protection is covered, may rather signal the belief that the inability to distinguish precisely between private and public speech requires that some private speech be afforded a level of constitutional protection so that public speech be not unnecessarily chilled.

If this be the Court's rationale for doubting the wisdom of committing to judges the task of making delicate distinctions with such absolute consequences, the distinction between media and non-media defendants at least becomes comprehensible. Surely the vast majority of defamatory statements by publishers and broadcasters involve matters of general or public interest. On the other hand, putting aside comments about public officials and public figures, the vast majority of defamatory comments by non-media defendants presumably do not.

Thus, by placing all defamatory media speech within the scope of the first amendment, the Court may believe it has protected relatively little non-public speech. On the other hand, the Court may fear that if *Gertz* were extended to non-media speech, the result would be to protect much speech having nothing to do with public issues, while safeguarding relatively little that does. In the non-media context, the Court may feel that some public speech must go unprotected lest too much non-public speech be

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was written more than five months prior to its delivery or that an agreement not to cite *Gertz* for the distinction was reached and that the Justice feels bound by the agreement even in non-judicial publications. The decision not to cite Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), is a striking example of the Court's desire to avoid fragmentation on an issue not before it. This omission has prevented the Court from reaching (or perhaps discovering) the ultimate doctrinal underpinnings of its approach to the first amendment.

110. *See* note 101 *supra.*

unnecessarily safeguarded. Consistent with this approach, the Court could extend constitutional protection in the non-media context to any defamatory speech about public officials or public figures (on the premise that the speech was relevant to public issues) but could withhold such protection when a non-public person was the object of a defamatory statement.

So understood, *Gertz* implies that debate on public issues will be sufficiently robust and wide-open for first amendment purposes if defamatory non-media speech is constitutionalized only to the extent that it involves public persons. On this premise, *Gertz*'s commitment to a politically based interpretation of the first amendment is qualified by its reluctance to afford unnecessary protection to speech not relevant to public issues.

On the other hand, *Gertz*'s media dictum may reflect something entirely different. It may respect Justice Stewart's view that the media itself is constitutionally special.[111] Under this view, neither *Sullivan* nor *Gertz* would protect defamatory non-media speech. Thus all defamatory non-media speech, even that discussing public officials, would be beyond the scope of the first amendment. Ironically, even this perspective is rooted in a politically centered construction of the first amendment. To flesh out that perspective, we must turn from the Court to the commentators.

II

A. *Media v. Non-media Speakers: Relative Importance*

Although *Gertz* does not discuss the case for a preferred media position, the case has been made.[112] Justice Stewart contends that the primary purpose of the press clause is to insure that there will be "organized, expert scrutiny of government."[113] From this premise he asserts that media speakers should enjoy greater pro-

111. If this be the appropriate perspective, *Gertz* becomes especially difficult to justify. The notion of separation of press from government, *i.e.*, of an independent press is compromised in the extreme when the government at the instance of a defamed individual is permitted to judge not only the truth or falsity of press communications but also the reasonableness of the editorial process and the extent to which the communications involve issues of public controversy. There surely can be no pretense of a "high wall" between press and government.

112. Nimmer, *Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Robertson, note 99 *supra*; Stewart, note 15 *supra*; *First Amendment Protection*, note 59 *supra*. *But see* Hill, note 72 *supra*; Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975); Van Alstyne, *Comment: The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761 (1977); Note, 88 HARV. L. REV. 139, 148, 152 (1974).

113. Stewart, *supra* note 15, at 634. This is also the emphasis of Robertson, *supra* note 99, at 218-20. Ultimately Justice Stewart's and Professor Robertson's views reduce to Professor Nimmer's idea that the press has a unique role to play in the political process.

tection from defamation suits than non-media speakers.[114] Professor Nimmer spells out the case in greater detail.[115] He argues that "the informing and opinion-shaping function of the press is unquestioned. Most would agree that generally speech via the press is much more significant as a contribution to the democratic dialogue than is speech through non-media channels."[116] He argues in the case of non-media speakers that although some functions of free expression are involved—specifically individual self-fulfillment[117] and cathartic release[118]—the democratic dialogue function is relatively unimportant.[119] He contends that in the case of weighing the value of non-media expression against reputation, "[t]he balance *might* shift in favor of reputation if the democratic dialogue press interest is removed, as would be the case in non-media defamatory speech."[120] Still another writer puts it this way: "By comparison, the role of non-media speakers in the broad dissemination of information is relatively insignificant. This does not mean that what non-media speakers have to say is of less importance, but rather that their impact on the general information market will usually not be as great."[121] Or as Professor Nimmer puts it, "we do not know with any precision the impact of mass media communications, but we do know logically, if not statistically, that a communication to five million people is likely to affect public opinion (or the democratic dialogue) more profoundly than speech addressed to a single individual."[122]

But the issue is not whether a communication addressed to five million individuals is more likely to influence public opinion than a communication addressed to one. The issue, if influence is

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114. Stewart, *supra* note 15, at 635.

115. Nimmer, *supra* note 112, at 647-50.

116. *Id.* at 653. *Robertson, supra* note 99, at 218-20, argues that the press plays a unique role in terms of checks and balances in the political process particularly for those power wielders who are not accountable in the election process. The argument fails to recognize the extent to which media influence is dependent upon robust non-media speech. *See* text accompanying notes 124-28 *infra.*

117. Nimmer, *supra* note 112, at 653. See also T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) [hereinafter cited as EMERSON]; Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976). The latter article argues that individual self-expression and participation is the exclusive justification for the first amendment. *But see* Symposium, *The First Amendment and the Right to Know*, 1976 WASH. U.L.Q. 1. Professor Baker's stimulating views deserve a careful response, but one cannot be made here.

118. Nimmer, *supra* note 112, at 653. *See also* EMERSON, *supra* note 117, at 7.

119. Nimmer, *supra* note 112, at 653.

120. *Id.* at 655 (emphasis added). Thus, Nimmer's point is not to argue conclusively that media speakers should be afforded greater protection, but rather that the interest in protecting the press is distinct and that any rules should be formulated only after taking such differences into account.

121. *First Amendment Protection, supra* note 59, at 925.

122. Nimmer, *Speech and Press: A Brief Reply*, 23 UCLA L. REV. 120, 121-22 (1975).

to be the test, is whether the communication to five million people is more influential than the communications of the five million people who discuss that communication[123] at breakfast tables, at work, in taxicabs, in bars, in universities, and elsewhere. One need not minimize the importance of the mass media[124] (particularly its importance as a broad disseminator of new ideas)[125] in order to recognize that the private daily communications of millions of individuals profoundly affect public opinion.[126] Indeed the communications literature clearly supports the conclusion that media influence is mediated by the recipients of the communications.[127] That is, the recipients of mass communications play a critical role

123. Of course, non-media discussions of politics are not confined to subjects discussed in the media. Even if they were, however, the case for greater media protection would not be enhanced. The power of the media as a check on government is dependent on non-media repetitions. Moreover, non-media discussions of media communications also lead to new ideas which in turn are reproduced in the media. Media-non-media interaction thus serves to check government power and to check media excesses. Even if values of self-expression and cathartic release were not of first amendment importance, even if non-media expressions were valued solely by their importance in preserving media power, non-media expression would have to be regarded as having profound first amendment significance.

124. This appears to be the approach taken by Lange, *supra* note 112, at 103, (citing Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV., 1, 18-21 (1973)) (discussing the fact that social scientists have yet to demonstrate that the media is as powerful as commonly perceived). The failure of social scientists to demonstrate the power of the media may say more about the limitations of social science methodology than it does about the media.

125. *See, e.g.*, Klapper, *What We Know About the Effects of Mass Communication: The Brink of Hope*, in COMMUNICATIONS AND PUBLIC OPINION 362, 371 (R. Carlson ed. 1975).

The fact that the press broadly disseminates ideas is sufficient constitutional foundation for the common government practice of permitting the press greater access to newsworthy scenes than is otherwise made available to the general public. The fact that the government is permitted to make such distinctions, however, need not yield the conclusion that it is required to do so. *See* Pell v. Procunier, 417 U.S. 817 (1974).

Moreover no part of this argument undercuts the importance of access to the media in order to have an idea disseminated in the marketplace. Instead, the suggestion is that the power of the media is dependent on non-media communicators. Thus to the extent it is considered important that the media serve as a check on government power, the power of the check depends upon keeping non-media speech "robust and wide-open." At the same time this qualification should not be interpreted to suggest that access to the media is the only way to achieve a hearing for an idea or that the media is so powerful that its ideas are mechanically adopted by the populace.

The media need not be all important or all powerful to support a need for access. At the same time, to show the existence of a need for media access does not necessarily demonstrate that a system of access should be considered constitutional. The Court, of course, has invalidated state-mandated access to newspapers, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), and has suppressed any hopes of expanded access in broadcasting, at least in the absence of additional FCC regulation. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

126. *See, e.g.*, R. MCGEE, SOCIOLOGY: AN INTRODUCTION 176-79 (1977); Brooks, *The Self and Political Role*, in SYMBOLIC INTERACTION 39 (J. Manis & B. Meltzer ed. 1972).

127. *See, e.g.*, M. BURGOON, APPROACHING SPEECH COMMUNICATION 295-97

in the dissemination and interpretation of information provided by the media, and those non-media recipients are vitally important in affecting the formation of political attitudes and beliefs.[128] In addition, the evidence is persuasive that political attitudes and beliefs are formed not merely by media communications but by prior experience,[129] by communications in family groups,[130] work groups,[131] social groups,[132] and peer groups in general.[133] If the media were deterred from publishing defamatory comments,[134] there is no question that the democratic dialogue would suffer. But there should equally be no questioning the fact that if millions of individuals were deterred from making such statements outside the media, the democratic dialogue would similarly suffer. Simultaneously, and perhaps even more importantly, the free speech values of individual self-expression and cathartic release would be seriously undercut. To the extent that the media should not be censored, therefore, neither should the "citizen-critic." Indeed, it is at least arguable that the values of individual self-expression and cathartic release apply with greater force in the non-media context than in the media context.[135] To that extent, the case for non-media protection is even stronger than the case for media protection.

There is, however, a more telling factor which superficially appears to support preferred treatment for the media. It could well be that media speakers are more likely to be deterred by defamation law from making defamatory comments than are non-media speakers. Media speakers are comparatively more likely to be aware of the libel laws (*i.e.*, have continuing access to legal advice), comparatively more likely to have financial resources sufficient to make them attractive defamation defendants, and comparatively more likely to cause the kind of damage which would encourage law suits in response.[136] Thus, it is at least argu-

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(1974); Avery, *Communication and the Media*, in MESSAGES: A READER IN HUMAN COMMUNICATION 279, 289-91 (J. Civikly ed. 2d ed. 1977).

128. *See* sources cited in note 127 *supra*.

129. *See, e.g.*, Klapper, *The Social Effects of Mass Communication*, in THE SCIENCE OF HUMAN COMMUNICATION 65, 66-69 (W. Schramm ed. 1963) [hereinafter cited as HUMAN COMMUNICATION].

130. *See, e.g.*, Davies, *Psychological Characteristics of Beatle Mania*, in SOCIOLOGY: THEORIES IN CONFLICT 231, 232 (R. Denisoff ed. 1972).

131. *See, e.g.*, L. WESTON, THE STUDY OF SOCIETY 311 (1977); Lazarsfeld & Menzel, *Mass Media and Personal Influence*, in HUMAN COMMUNICATION, *supra* note 129, at 94, 103.

132. *See* sources cited in note 126 *supra*.

133. *See* sources cited in note 126 *supra*.

134. It bears emphasis that a defamatory comment is no less defamatory when it is true.

135. *Compare* Nimmer, *supra* note 112, at 654 *and* Nimmer, note 122 *supra*, at 121-22 *with* Lange, *supra* note 112, at 103-04.

136. *See* note 140 *infra*.

able that defamation law is more likely to chill media communications than non-media communications and that the damaging impact of defamation laws on first amendment values in the media context is correspondingly more acute.

On the other hand, it is also arguable that those non-media defendants with the financial resources to make a civil action against them supportable, who might also cause sufficient damage to make a civil action against them attractive, are also armed with sufficient knowledge of the consequences to give them pause before making defamatory statements. With respect to those with little resources causing little damage, the nature of the legal standards governing liability makes little difference. Establishing a case against a defendant when substantial damages are not involved or when a judgment is not collectible is not the kind of exercise with which many plaintiffs (or attorneys) desire to be associated. Insofar as non-media defendants are involved, those most likely to become the targets of defamation suits are those who are most likely to be deterred by the prospect of recoveries against them. Thus, the argument that media defendants are more likely to be chilled than non-media defendants, while not without force,[137] is not as imposing a consideration as might initially be supposed.

Assuming *arguendo* that the comparative chilling effect is greater with respect to media defendants than non-media defendants, it is not at all clear that first amendment consequences should be automatically triggered. The idea that first amendment protections should be consciously divvied out in more generous doses to those with knowledge, wealth, and capacity to cause damage[138] is indefensible. Particularly disquieting is the idea that those with greater capacity to cause damage should be afforded special protection. Such a perspective would not only bespeak a disrespect for the interest in reputation, but it would also reflect an indifference to the growing public concern with the "vast accumulations"[139] of power in the "modern media empires."[140] Indeed, it

137. To the extent that the law cannot deter defamatory non-media comments, there is a basis for argument that it operates so selectively as to be unfair. If people commonly criticize others, there is a basis for arguing that compensation should be afforded only in aggravated cases.

138. Indeed such a view would appear to flatly contradict fundamental first amendment precepts. *See generally* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

139. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 250 (1974).

140. *Id.* This factor exposes the weakness of another argument used to support preferred treatment for the media in the defamation context. The argument is that generally public statements via the media may be countered with more speech, but the fact of non-media communication may not be known until too late. Nimmer, *supra* note 112, at 656. In the print media, of course, there is no right of access. More important even if some access were provided (one hopes the Miami Herald's treatment of Tornillo is atypical), the assumption that an opportunity to reply would suffice to undo the harm is questionable. Gertz v. Robert Welch, Inc., 418 U.S. at 344

would be ironic if the premises of Alexander Meiklejohn which were rooted in a respect for democratic decision making would ever be employed to service an elitist institutional result, *i.e.*, some citizens (those associated with the press) being more free to discuss politics than other citizen-critics (the people). It would be anomalous, for example, if non-media speakers could be penalized for repeating statements made by the media[141] while the media would be immune. The possibility that such results would breed contempt for the democratic process is one which should give considerable pause before principles of "mediaocracy" are grafted on to the first amendment.

Affording non-media defendants less first amendment protection than media defendants would deter non-media contributions to the democratic dialogue (and thus would weaken the media's contribution),[142] would favor those with greater capacity to cause damage and with greater ability to compensate for that damage (by spreading the risk),[143] would require difficult determinations as to which communications would and would not merit the label "press" or "media,"[144] would strain basic principles of first amendment equality, and would diminish respect for the democratic process.

B. *Political Speech*

Sullivan standards should be required of public officials or public figures whether or not the defendant fits into the media category. Justice Stewart to the contrary, the idea that citizen-critics should be free to criticize the actions of those in the public eye is one which should not be ignored. On the other hand, *Gertz* implies that at least when no public person plaintiff is involved, me-

n.9. Undoing the damage of a communication addressed to millions is simply more difficult than mitigating the efforts of communications addressed to a few. Indeed the opportunity to reply in a face to face situation (as is typical in the non-media context) with the opportunity to respond to negative feedback or questions appears far more likely to minimize the harm than a situation which demands resorting to the necessarily impersonal media channels. In short, if capacity to cause damage is the test, media defendants deserve less protection, not more.

141. The common law standard is strict liability. Repetition of media statements is not privileged. RESTATEMENT (SECOND) OF TORTS § 578, Comment b (Tent. Draft No. 20, 1974).

142. *See* text accompanying notes 122-128 *supra.*

143. *But see* note 174 *infra.*

144. *See* notes 67, 72 *supra*; note 174 *infra.* It is possible that relevant differences might require such definitions in other constitutional contexts. Nonetheless, any definition would produce some vagueness and the toleration of vagueness in one context need not dictate its toleration in other contexts. Moreover, in the defamation context, it would be necessary to decide not only who the members of the press are but also to decide which communications addressed to them were so associated with the editorial process as to deserve press protection. The latter question would not even have to be addressed in a prison access context, for example, and is presumably controlled by different principles in a reporter's privilege context.

dia defendants will be accorded constitutional protection and non-media defendants will not. The Court is unwilling to permit the rigors of the common law to impact on speech likely to be of general or public interest (media speech) but is apparently willing to tolerate the rigors of the common law with respect to speech unlikely to relate to issues of public importance (non-media speech not involving public persons) and is apparently unwilling to attempt on a general basis to determine which speech relates to issues of public importance and which does not.[145]

Although the Court's unwillingness to distinguish between public and non-public speech is defensible, the underlying assumption that defamatory non-public speech is unworthy of some degree of constitutional protection deserves to be questioned.[146] As initially set forth, the Meiklejohn theory of the first amendment protects too little; as modified, it protects too much. Initially, Meiklejohn declared that the first amendment applied "only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest."[147] So considered, the theory was capable of being interpreted to preclude first amendment protection for most literary, philosophical, and scientific writing.[148] Simply put, if a first amendment theory designed to provide absolute protection for political speech can do so only by excluding protection for Shakespeare, Aristotle, and Einstein, something is seriously amiss.[149]

In later writings, Meiklejohn sought to plug this hole by asserting that philosophy, science, art, and literature were areas from which the voter derived "knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment

145. *But see* note 44 *supra*; text accompanying notes 98-101 *supra*.

146. *But see* note 158 *infra*.

147. A. MEIKLEJOHN, *supra* note 20, at 79.

148. Indeed the theory was so interpreted the year after Meiklejohn's first discussion of his theory appeared. Chafee, Book Review, 62 HARV. L. REV. 891, 896 (1949). The criticisms contained in Chafee's review (largely repeated here) have never been effectively answered.

149. *Id.* at 896. The fact that a theory premised on absolute and exclusive protection for political speech is unworkable does not mean that distinctions between political or ideological speech and commercial speech, for example, are necessarily unworkable. This article does not propose to analyze the first amendment relationships among, or relative first amendment values of, political speech, commercial speech, literature, private speech, etc. It is important, however, that such an analysis be made. A recent student comment puts it well: "[P]ractically speaking, assigning a single weight to all types of speech means that the wider the area of coverage, the lower the level of protection." Comment, *Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157, 181 (1977). *But cf.* Karst, note 138 *supra* (arguing that the making of distinctions between kinds of speech in the absence of compelling reasons violates fundamental first amendment principles of equality).

which, so far as possible, a ballot should express."[150] But the idea that literature's claim to first amendment protection depends upon its relevance to political life simply does not ring true.[151] The notion that the classics of literature cannot be suppressed solely because of their relevance to voter decision making bears all the earmarks of pure fiction. Indeed, if the classics of literature are all to be characterized as political speech, it is hard to see how any speech could be called non-political.[152] Specifically, in making decisions voters are called upon to make evaluations of the character of candidates for political office.[153] As a practical matter, assessments of human personality by most voters are rarely based on sensitivity to human values derived from literature,[154] but are surely based in large part upon experiences with others in private life and on values formed through communications about other individuals in private life.[155] The impact of private speech on individuals' assessments of human personality and politicians surely dwarfs the impact made by art, literature, or science. If art and literature are protectable on the theory that they have political impact, private speech is protectable *a fortiori*. In short, once the door is opened, it becomes difficult to close. Either a politically based theory excludes speech such as literature which virtually everyone[156] (including the "founding fathers")[157] agrees is deserv-

150. Meiklejohn, *The First Amendment is an Absolute,* 1961 SUP. CT. REV. 245, 256.

151. On this point Kalven parted with Meiklejohn. *Law of Obscenity, supra* note 38, at 16 (citing Chafee, *supra* note 148, at 897).

152. Chafee, *supra* note 148, at 900.

153. This is, of course, not the exclusive basis for voter decision making, but that it is a significant variable is a proposition few would deny. *See generally* M. BURGOON, APPROACHING SPEECH COMMUNICATION 25-54 (1974); J. MCCROSKEY & L. WHEELESS, INTRODUCTION TO HUMAN COMMUNICATION 350 (1976); D. NIMMO & R. SAVAGE, CANDIDATES AND THEIR IMAGES (1976) [hereinafter cited as NIMMO & SAVAGE]; Anderson & Clevenger, *A Summary of Experimental Research in Ethos,* 30 SPEECH MONOGRAPHS 59 (1973).

154. *See* NIMMO & SAVAGE note 153 *supra.*

155. *See, e.g.*, T. CLEVENGER, AUDIENCE ANALYSIS (1971); G. MILLER & M. BURGOON, NEW TECHNIQUES OF PERSUASION (1973); P. ZIMBARDO & E. EBBESEN, INFLUENCING ATTITUDES AND CHANGING BEHAVIOR (1970).

156. There are exceptions. G. ANASTAPLO, note 25 *supra*; Bork, note 25 *supra.* Professor BeVier argues that literature is protected only if it contains "at least arguably, implicit political messages." BeVier, *supra* note 25, at 357. Presumably on this theory literature would be protected in some places but not in others and messages non-political at some times would become political at other times. At least the Court's responsibility to assess the political seriousness of obscene material is confined to patently offensive and prurient matter. The Court's position has been emphatically stated: "[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection." Abood v. Detroit Bd. of Educ., 97 S. Ct. 1782, 1797 (1977).

157. The best evidence of this intent is the address of the Continental Congress in 1774 to the people of Quebec in which it is stated that the purpose of freedom of press is "besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiment on the administration of Government, its ready commu-

ing of protection, or, by making adjustments to include such speech, it makes it impossible to justify a stopping point. In the absence of a stopping point, the Meiklejohn position simply unravels. Beginning with the proposition that political speech must be absolutely protected and moving to the proposition that all speech has political relevance yields the necessary conclusion that all speech must be absolutely protected. The distinction between public and private speech, so carefully developed, thus evaporates in the absence of a defensible stopping point.

C. *Non-Political Defamatory Speech*

Literature's claim to first amendment protection need not depend upon its relevance to voter decision making. Protection for literature advances marketplace values and values of self-expression entirely independent of any political relevance. Similarly private defamatory speech (*i.e.*, speech deemed to be unrelated to matters of general or public interest) should be entitled to some degree of constitutional protection whether or not it has political relevance.

Ordinarily considerable deference to conclusions derived from the common law process is appropriate, but the common law affords demonstrably insufficient protection for private defamation[158] and the considerations that have guided its development

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nication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honorable and just modes of conducting affairs." G. ANASTAPLO, *supra* note 25, at 537 n.100 (quoting 1 J. OF THE CONTINENTAL CONGRESS, 1774-1789, at 108 (1904)). Anastaplo, who argues that except for prior restraints, *id.* at 537 n.100, the founding fathers intended to confine the first amendment protections to political speech, *id.* at 123, has his greatest difficulty with this passage. He submits that even this letter "puts the emphasis on the 'political' " which, of course, does nothing to support the view that the first amendment is exclusively political insofar as subsequent restraints are concerned. He further suggests that perhaps the letter means that art is advanced because of the general political freedoms, a suggestion which overlooks the use of the word "besides." Finally, he suggests that art is advanced by its protection from prior restraints. This is better, but it points up the principal weakness in the historical argument: It is one thing to show that the founding fathers focused on political speech; it is quite another to show that they intended political speech to be protected exclusively. Nor is it surprising that expressions of animosity to the regulation of literature did not dominate the scene. Attempts to censor literature on obscenity grounds, for example, did not become significant until the nineteenth century. *Law of Obscenity, supra* note 38, at 2.

158. The argument here is confined to defamation. It should be noticed, however, that the Court has developed doctrines that protect speech wholly unrelated to matters of general or public interest. The "fighting words" cases have normally involved matters of general or public interest (assuming the character of an individual policeman is such a matter), but the constitutional limitation on the states' ability to limit such expression does not depend upon its subject matter. Moreover, the Court has applied the first amendment in the context of labor disputes independent of whether or not they are considered to be of general or public interest. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969). Indeed the Court in discussing such cases has recognized that "[i]n some circumstances speech of an entirely private and economic

bear little relevance for modern times. Indeed, the judgment is virtually unanimous that, as Prosser puts it, "[t]here is a great deal of the common law of defamation which makes no sense."[159] The law of defamation makes sense, if at all, only when one understands that history, not logic, has controlled its development.[160] The common law of defamation is that a defamatory statement is presumed to be false, presumed to be malicious, and (with significant exceptions) presumed to have caused damage.[161] One branch of that law, the modern law of libel, owes its lineage to the Star Chamber whose hostility to principles of freedom of speech need not be detailed. The provisions affording strict liability to defamatory utterances were developed (in addition to protecting the government from criticism) as a means of providing an alternative to duelling. Although the desire to preserve public order is one value worthy of consideration in forming a law of defamation, it is in modern times hardly the only value[162] and surely nowhere near as pressing today as it was in sixteenth century England.

The modern law of slander as an action for damages owes its lineage to the English common law courts.[163] Slander involving criminal accusations, occupational insults, assertions of loathsome

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character enjoys the protection of the First Amendment." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763 n.17 (1976). Finally, it should be observed that the touchstone of the two-level approach has been whether truth was advanced by the communication, not whether the communication was of political, general or public interest. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). This is not to suggest that speech on public issues is not accorded a high place in the first amendment hierarchy by the Court. *See* text accompanying notes 93-110 *supra*. *See also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 61 (1976) (plurality); Bond v. Floyd, 385 U.S. 116, 136 (1966).

159. W. PROSSER, THE LAW OF TORTS 739 (4th ed. 1971) [hereinafter cited as PROSSER].

160. The historical antecedents to the law of libel and slander briefly summarized here have been frequently recounted. *See, e.g.*, 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 205-12 (2d ed. 1922); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 454-72 (4th ed. 1948) [hereinafter cited as PLUCKNETT]; 1 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 273-95 (1906); Carr, *The English Law of Defamation, Pts. 1 & 2*, 18 L.Q. REV. 255, 388 (1902); Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99; Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962); Veeder, *The History of the Law of Defamation*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 446 (1909). The brief summary of defamation history which follows relies upon the sources cited in this note. Each of them recounts the same basic material, but Plucknett's is perhaps the most helpful account.

161. Kalven, *supra* note 1, at 196-97.

162. Obviously reputation is the primary value of concern today; nonetheless the value of preserving order should not be entirely discounted. The cathartic value of lawsuits is important, and the need for a forum to clear one's name (even if the defendant published without malice or negligence) can be justified in part on that principle. *See* note 87 *supra*. If one focuses on the desirability of affording an individual a forum to clear his name, the absurdity of making special damages an element of liability (via libel per quod or failure to meet the slander categories) becomes apparent.

163. The ecclesiastical courts had punished slander but had not tendered a damage remedy.

disease, and claims of unchastity for women[164] were deemed to be actionable without proof of special damage. Other defamatory statements were not considered to be per se damaging, but instead necessitated proof of "special" damage. These categories were developed not by an assessment of the needs of the substantive law, but by historical accident. The law developed by a process of accommodating the jurisdiction of the common law courts with that of the ecclesiastical courts. The common law courts had jurisdiction over crime—hence accusations of crime were first claimed as proper subjects of common law jurisdiction—and over the propriety of confinement[165] for loathsome disease—hence accusations of loathsome disease were thought to be a proper area of common law power. Occupational slander was said to involve the temporal and not the spiritual. Finally, slander causing special damage was similarly said to involve the temporal sufficiently that spiritual jurisdiction could be foreclosed.

With the decline of the ecclesiastical courts, the opportunity for reevaluation of the law of slander might have been seized. But the common law courts were flooded with slander cases, and the judges realized that by narrowly construing the categories from which damages were presumed and by creating strict standards of special damage, the propensity to bring slander cases could be mitigated. Thus, the law of slander with its indefensible[166] categories and requirements of pecuniary damage was maintained and nurtured. It need hardly be said that a body of law created out of consideration for now forgotten doctrines of judicial jurisdiction and maintained because of seventeenth century necessities of judicial administration deserves little deference as a guidepost to the appropriate accomodation between the values of freedom of speech and protection of reputation.

Individuals are told by the common law (subject to ambiguous and limited[167] "privilege"[168] exceptions) that if they make a

164. The unchastity for women category was added by statute with the passage of the Slander of Women Act in 1891.

165. This explanation, however, is not entirely satisfactory. It serves to explain the treatment of accusations of leprosy but may be less helpful in explaining the treatment afforded to accusations of syphilis, Veeder, *supra* note 160, at 461 n.3, and smallpox, Donnelly, *supra* note 160, at 111-12.

166. The point is not so much that categories were created but that they became frozen, *i.e.*, no other categories could be added. *See, e.g.*, PROSSER, *supra* note 159, at 760-61. Moreover, the categories themselves were narrowly interpreted in a way that discouraged actions. *See, e.g.*, PLUCKNETT, *supra* note 160, at 465-66; F. POLLOCK, LAW OF TORTS 180-81 (15th ed. 1951); PROSSER, *supra* note 159, at 754-60. Finally, it is virtually unanimous that the distinctions between libel and slander are historical accidents. *See, e.g.*, sources cited in note 160 *supra*. As to the special damage requirement, see, *e.g.*, Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733, 755-56 (1966).

167. Most conspicuous in this respect is the confinement of the protection of interests of a third person to situations in which a request is made for information or,

statement critical of another which turns out to be wrong, they are liable even if the statement were honestly made and even if the statement were made with substantial support.[169] Moreover, individuals are warned by this law that if they tell someone that someone else has made a disparaging statement about another, they will be liable if the defamatory statement turns out to be wrong.[170] The message of the common law is clear: Do not make statements which are critical of others; do not tell others that individuals have committed crimes or that individuals are incompetent in their occupations; and do not inform individuals that others have made such statements.

If individuals in society did not need to be informed about those with whom they interact, those rules might be appropriate. But individuals functioning in an interdependent society need to be informed about those with whom they interact (even when information comes from non-family members or from those without other special relationships).[171] They need this information at least as much as they need to know of the character of public officials and public figures and at least as much as they need to know of the facts underlying the writing of the latest Broadway play.[172] *Gertz* recognizes that the United States is an increasingly interdependent society where individuals need the opportunity to critically examine the reputation of others. There is no basis for

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in the absence of a request, a family or other special relationship. Even a request for information may not be dispositive. Indeed, "[t]he mere desire to 'serve' a friend, or the public generally, is not enough." F. HARPER & F. JAMES, THE LAW OF TORTS 446 (1956) [hereinafter cited as HARPER & JAMES]. As Prosser states, "It has proved, however, unusually difficult to draw any line as to what is improper." PROSSER, *supra* note 159, at 788. Note that the effect of constitutional protection would not be to protect defamation absolutely but rather (if *Gertz* standards were applied) to safeguard statements non-negligently made. If *Gertz* were not applied, would it not be "anomolous . . . to deny the same measure of protection as is accorded to the press for its own publication of trivia"? Hill, *supra* note 72, at 1227.

168. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 583-612 (Tent. Draft No. 20, 1974); HARPER & JAMES, *supra* note 167, at 419-63 (1956); PROSSER, *supra* note 159, at 776-96.

169. *See, e.g.*, RESTATMENT (SECOND) OF TORTS § 580B, Comment b at 26-27 (Tent. Draft No. 21, 1975); Kalven, *supra* note 1, at 196. It is arguable that the common law slander case holdings are consistent with a negligence theory on the presumption that the facts in such cases involved conduct which was at least negligent. That question will not be explored here. The assumption herein is that the traditional perception of the common law has been correct.

170. *See, e.g.*, Kalven, *supra* note 1, at 196.

171. *See* note 167 *supra.*

172. *See* note 44 *supra.* The Court recognized in *Virginia Pharmacy* that commercial speech which was not itself of general or public interest could be so considered because of the importance that decisions regarding the value of products be made efficiently. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). To the extent that it is necessary to press speech into a general or public interest category, the same macrocosmic judgment can be made with respect to the importance of people having access to information about those with whom they interact.

suggesting that this need is of greater constitutional importance when the subject is of "general" interest.

This is not to say that reputations need not be protected in modern law. It is to say that reputations should not be overprotected. If negligence[173] is an appropriate standard to govern media statements about non-public persons, it is an appropriate standard to regulate such statements by non-media speakers. Indeed, given the greater capacity of the media to cause damage and the capacity of most[174] media defendants to spread the risk, it can be argued (though in the final analysis not persuasively)[175] that media defendants should be held to a higher standard of care than non-media defendants. Whether negligence or some more protective standard should be employed in the media and non-media contexts will not be pursued here. Suffice it to say that strict liability is patently insufficient and that the supposition that only defamatory statements relating to matters of public interest are of sufficient importance to generate constitutional protection is indefensible.

III. First Amendment Methodology

A. *The Problem*

If politics is the wrong starting place for first amendment analysis, it is natural to ask what starting place is right. If the first amendment prohibits government from imposing sanctions with respect to some speech on public issues (but not all such speech) and with respect to some speech not related to public issues (but not all such speech), it is appropriate to inquire into the methodology which the Court uses to conclude that some speech can be abridged and other speech cannot. Kalven thought that a theory identifying political speech as centrally protected would provide the Court with a methodology which could support a comprehensible and comprehensive first amendment theory.[176] In the absence of such an approach, Kalven argued that the Court's general

173. *See* note 89 *supra*. The question of how the conditional privilege should be affected by an extension of *Gertz* to non-media defendants will not be explored here. *See* Restatement (Second) of Torts, Special Note at 46-48 (Tent. Draft No. 21, 1975).

174. The difficulty, of course, is that the press clause embraces everyone from the leafleteers with access to a mimeograph machine to the vast communication conglomerates. For example, if Professor Nimmer's suggestion that press publications be equated with the term publications in the copyright sense were accepted, *see* Nimmer, *supra* note 112, at 652, the press would include many who could not fairly be said to have the capacity to spread the risk. For a perceptive treatment of the difficulties of defining the media term, see Lange, *supra* note 112, at 99-107. For a persuasive argument that the capacity to spread the risk does not preclude self-censorship, see Anderson, *Libel and Press Self-Censorship*, 52 Tex. L. Rev. 422 (1975).

175. *See* note 174 *supra*.

176. Kalven, *supra* note 1, at 208, 221.

approach to first amendment questions was in disrepair.[177] The central focus of Kalven's concern was the Court's now-you-see-it-now-you-don't use of the clear and present danger test.[178] In some contexts, the Court would hold that speech was protected unless it presented a clear and present danger of a substantive evil with which government was legitimately concerned.[179] In other situations, the Court held that speech was beneath first amendment protection (because it lacked social utility) and that no necessity to involve the clear and present danger test was thereby implicated.[180] Kalven's major indictment of this two-level approach was that the Court had failed to delineate with any precision standards for determining which speech was socially useful and which speech was not.[181] Instead the Court had relied on the historical point that categories of speech such as libel and obscenity had long been regarded as worthless[182] and, therefore, had presumed their lack of worth.[183] If the Court had adopted a public speech approach, the clear and present danger test and the special logic of the two-level approach (designed to avoid that test) would have died together.[184]

Kalven's hopes, however, were doomed from the outset,[185] for *Sullivan* itself resorted to the special logic of the two-level theory.[186] Calculated falsehoods about public officials were deemed to be outside the scope of first amendment protection.[187] They were, as Justice Brennan was later to point out, deemed to be without social value.[188] Indeed, not only did *Sullivan* maintain a two-level analysis, *Sullivan* and now *Gertz* make it clear that in the Kalven sense[189] the Court has adopted a three-level approach

177. *Law of Obscenity*, note 38 *supra*.
178. *Id.* at 9-16.
179. *Id.*
180. *Id.*
181. *Id.* at 12.
182. *Id.* at 9.
183. *Id.* The same attack (but much more detailed) in the obscenity context against the *Roth* opinion has been made by the most articulate spokesman for the view that obscenity should not be afforded constitutional protection. H. CLOR, OBSCENITY AND PUBLIC MORALITY (1969). One of the special failures of Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), is that it does not cite the work which contains the best defense of its position.
184. Kalven, *supra* note 1, at 218.
185. For an early recognition that *Sullivan* did not presage the abandonment of clear and present danger concepts, see Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 UCLA L. REV. 1, 8-9 (1965).
186. *See* note 39 *supra*.
187. *See* note 4 *supra*.
188. Garrison v. Louisiana, 379 U.S. 64, 75 (1964); Brennan, *supra* note 26, at 18-19 ("The underpinning of that qualification is the 'redeeming social value' test.").
189. *See* text accompanying notes 179-80 *supra*. It is not here suggested that the Court thinks in these terms or that first amendment analysis is best advanced or described in tripartite terminology.

to first amendment analysis. That is: (1) some speech is protected provided it does not present a clear and present danger of a substantive evil; (2) some speech is excluded from first amendment protection even if it does not present a clear and present danger; and (3) some speech is protected even if it does present a clear and present danger of a substantive evil with which government is legitimately concerned.

To illustrate the three-level approach, it is, of course, necessary to consult three lines of cases. First, in the context of advocacy of criminal conduct[190] (and in other areas)[191] the Court holds that such speech is protected unless it presents what amounts to a clear and present danger.[192] Second, in the context of obscenity, the Court holds in part that such speech (although it refuses to apply the label "speech") can be prohibited because it has "a tendency to exert a corrupting and debasing impact leading to antisocial behavior"[193]—surely a far cry from clear and present danger.

Third, although *Gertz* does not use the words "clear and present danger," it clearly recognizes that false defamatory speech presents a clear and present danger of a substantive evil with which government is legitimately concerned.[194] That is, *Gertz* reaffirms that the states have a legitimate interest is safeguarding reputation and that false defamatory speech unfairly threatens that interest. Indeed, it specifically holds that plaintiffs can recover damages for loss of reputation (as well as other damages)[195] arising from the publication of knowing or reckless falsehoods and in some cases merely negligent falsehoods. Moreover, *Gertz*

190. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

191. *See, e.g.*, Wood v. Georgia, 370 U.S. 375 (1962) (criminal contempt for publications critical of courts and judges). Moreover, the fighting words cases have apparently settled into a clear and present danger mold. *See* Gooding v. Wilson, 405 U.S. 518 (1972); Karst, *supra* note 138, at 31. Presumably a knowledge, if not an intent, requirement is also necessary. The difficult question is identifying the nature of the danger which is sufficient to divorce the speech from first amendment protection. In Lucas v. Arkansas, 423 U.S. 807 (1975), merely by dismissing a case for want of a substantial federal question, the Court held (if Hicks v. Miranda, 422 U.S. 332 (1975), is to be taken seriously) that a statute which sanctions language calculated *to arouse to anger* or to cause a breach of the peace or assault is not overbroad. *See* Lucas v. State, 257 Ark. 726, 727, 520 S.W.2d 224, 225 (1975). The Court's enigmatic action must surely trouble those who have thought that Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949), expressed basic first amendment law: "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

192. *Brandenburg* does not use the term but includes the concept. *See* notes 204-06 & accompanying test *infra*. The new language may be designed to avoid the insensitive applications of the test in decisions such as Debs v. United States, 249 U.S. 211 (1919).

193. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973).

194. 418 U.S. at 341-43, 344 n.9.

195. Indeed *Firestone* holds that plaintiffs may recover actual damages without a showing of harm to reputation. *See* note 44 *supra*.

candidly admits that false defamatory utterances create a "clear and present danger" (although again it does not use the phrase) of harm to the legitimate reputation of defamed individuals[196] even in circumstances where there are opportunities to reply. There is special first amendment significance in this concession, and we shall return to the point later. Meanwhile, it is crucial to understand that despite *Gertz*'s recognition that false defamatory speech presents a clear and present danger to reputation (a substantive evil with which government can be legitimately concerned), it holds that some false defamatory speech creating such danger (non-malicious attacks on public persons and non-negligent attacks on non-public persons) is entitled to strategic first amendment protection nonetheless.

These three lines of cases, then, demand comparison. Cases such as *Brandenburg v. Ohio*[197] (advocacy of criminal action) demonstrate that the clear and present danger doctrine is not dead. Cases such as *Paris Adult Theatre I v. Slaton*[198] (obscenity) demonstrate that the absence of a clear and present danger provides no guarantee of first amendment protection, and *Gertz* (not to mention *Sullivan*)[199] demonstrates that the presence of a clear and present danger provides no guarantee that the state can abridge the speech involved. Moreover, as previously discussed, *Gertz* (not to mention *Brandenburg*) teaches us that some speech on public issues is not protected and some speech which does not relate to public issues is protected. Obviously neither Holmes nor Meiklejohn has won. First amendment adjudication cannot be explained in terms of clear and present danger nor in terms of any distinction between public and non-public speech. Moreover, the task of explaining first amendment methodology is complicated by the Court's historic unwillingness to explain why it is that clear and present danger principles are sometimes trotted out and sometimes left in the stable.[200]

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196. 418 U.S. at 342-43, 344 n.9.

197. 395 U.S. 444 (1969).

198. 413 U.S. 49 (1973).

199. It could be argued that *Sullivan* presumes that public officials, given their access to the media, can rebut false charges and always preserve their reputations, but such a reading is hard to sustain. *See* 376 U.S. at 272-73.

200. Thus, Justice Brennan in discussing the Court's first amendment theory suggested implicitly that it had none. Instead it had a number of different tests which it used in different contexts. Brennan, *supra* note 26, at 11. Thus, Professor Emerson complains that:

> The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases. At various times the Court has employed the bad tendency test, the clear and present danger test, an incitement test, and different forms of the ad hoc balancing test.

EMERSON, *supra* note 117, at 15.

B. *Reconciliation*

If the Court should ever attempt to put these cases side by side, it would have to admit that it employs an elaborate general balancing technique[201] to determine whether speech shall enjoy first amendment protection. There is nothing new or particularly scandalous about this. This has been the Court's approach all along. What is disquieting is the Court's failure to make its methodology public and its consequent failure to elaborate with any precision the factors it has identified as crucial in formulating conclusions as to the scope and level of protection afforded to various categories of speech.

Gertz is a refreshing departure from the norm, for it makes clear (at least in the defamation area) that the Court is balancing, and, even more important, *Gertz* lays out in some detail which interests are being balanced with what weights and why.

Gertz announces that reputation is being balanced against free press values,[202] and that the extent to which the defamed individual has invited comment and the extent to which channels of response are available to the defamed individual are factors to be considered in striking the balance. The Court maintains that to protect reputation absolutely would wreak significant damage to the structure of communications—that the media would be deterred from transmitting socially useful information, *i.e.*, *true* defamatory speech.[203] Thus, even though defamatory communications threaten to undermine the reputations of individuals, such consequences are outweighed by the detrimental impact on first amendment values that would be affected by blanket imposition of common law libel principles. Clear and present danger is rejected as a standard because in the defamation context its use would unacceptably compromise first amendment values.

On the other hand, in *Brandenburg v. Ohio*, the Court has ruled that a variant of the clear and present danger test safeguards the relevant values in another context. In *Brandenburg*, the Court reapproached the question of the standards which should govern

201. Thus the Court after balancing the relevant factors will sometimes formulate rules of general application in specific contexts. *See* Gertz v. Robert Welch, Inc., 418 U.S. at 343 (rejecting ad hoc balancing in the defamation context as unpredictable). In other circumstances, the Court will decide that ad hoc balancing is necessary. This does not mean the Court is bereft of theory. It rather suggests that the Court has been unwilling to place one value invariably above others and further suggests that the set of values involved in free speech cases is sufficiently complex that different factual situations necessitate the formulation of different standards and different approaches.

202. *Id.* at 340-43.

203. *Id.* at 339-42. Thus the Court recognizes that truthful defamatory speech is valuable. Note that defamatory speech can be true or false. RESTATEMENT (SECOND) OF TORTS § 559 (Tent. Draft No. 20, 1974).

when an individual attempts to persuade others to the use of force or to other violations of the criminal laws. The Court held that such speech is protected unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[204]

To be sure, the *Brandenburg* test is not clear and present danger pure and simple; it is clear and present danger plus. Not only must the speech be likely to create imminent lawless action, it must be directed to that end,[205] and (though this is much less clear)[206] the language itself must explicitly call for the action. This

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204. 395 U.S. at 447.

205. In the early cases, Holmes & Brandeis were apparently willing to *substitute* intent for a showing of danger. Abrams v. United States, 250 U.S. 616, 627-28 (1919) (Holmes & Brandeis, JJ., dissenting) ("[T]he United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger. . . . It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion . . . ."); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis & Holmes, JJ., concurring) ("That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled."). In *Schenck*, at least a showing of danger was necessary and apparently both intent *and* danger were required. Schenck v. United States, 249 U.S. 47, 52 (1919). *Accord*, Debs v. United States, 249 U.S. 211, 215 (1919). If there were any doubt, *Brandenburg* settles that both danger and intent are required. An individual may not be criminally sanctioned for speech which creates a danger that is not intended. Query whether an intent requirement exists in a hostile audience context. In any event, the intent requirement is not a very helpful protection in this context because intent may easily be inferred from the creation of danger. *See* Schenck v. United States, 249 U.S. at 51. This is especially the case if *Brandenburg* adopts an incitement standard. *See* note 206 *infra*. For the contention that an intent requirement is irrelevant to first amendment analysis, see Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163, 1169 n.26 (1970) (contending that intent is always irrelevant because when abridgements take non-criminal forms no one cares whether the material sought to be contained is intended to cause the damage alleged). But merely because an intent requirement need not be required for injunctive purposes does not render it always irrelevant for first amendment purposes. A speaker may be willing to run a risk of having an injunction issued but unwilling to face the risk of criminal sanction, thus producing a chilling effect. *See* Smith v. California, 361 U.S. 147 (1959); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

206. Several leading commentators assume that *Brandenburg* adopts an incitement requirement, *i.e.*, the words themselves must explicitly call for action. EMERSON, *supra* note 117, at 157; Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754 (1975); Linde, *supra* note 205, at 1185; Comment, Brandenburg v. Ohio: *A Speech Test for All Seasons?*, 43 U. CHI. L. REV. 151, 159-60 (1975). The conclusion is apparently based on this line from *Brandenburg*: "Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy, not distinguished from incitement to imminent lawless action." 395 U.S. at 448-49. *See also id.* at 449 n.4. The difficulty with attaching significance to this ambiguous statement is that the term "incitement" is used in the alternative in the Court's statement of its test. Thus, advocacy of imminent lawless action is protected unless it is directed to inciting *or* producing imminent lawless action and is likely to incite *or* produce imminent lawless action. Thus, even assuming that the use of the word incitement refers to express use of language, as opposed to the nature of results (an interpretation which is strained in light of the Court's wording of the test), incite-

latter requirement is apparently considered necessary lest majoritarian sentiments be employed to circumscribe unpopular speech.[207] By contrast, speech is protected in *Gertz* even if reputation is endangered with intent to bring about the danger and even if the defamatory language explicitly urges that others should think less of the defamed individual.

Seemingly a number of factors account for the use of the less protective standard in *Brandenburg*. The use of the clear and present danger test appears primarily influenced by an assessment of the worth of the speech being abridged. Advocacy of law violation is not the type of speech which one would at first glance expect a Court to support.[208] Indeed the application of the clear and present danger test is demonstrative that the marketplace of ideas concept is not the motivating animus.[209] The marketplace concept has

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ment is not necessary to divorce the speech from first amendment protection. It is enough that the speech is directed to producing imminent lawless action and is likely to produce such action. This is not to say that it would not be wise for the Court to adopt such an incitement requirement. Cases such as *Schenck* and *Debs* (particularly *Debs*) illustrate the extent to which inflamed factfinders can lightly infer danger even without language calling for illegal action. Nonetheless *Brandenburg* is at best unclear as to whether the requirement has been adopted. Nor does Hess v. Indiana, 414 U.S. 105 (1973), resolve the difficulty. *But see* Comment, *supra*, at 160-62. In *Hess*, the Court looked at the circumstances and the language to find that the speaker did not intend to produce imminent lawless action and that his speech was not likely to produce such action. 414 U.S. at 108-09. Indeed the language of the Court in Hess, if it points in any direction, strongly suggests that the words merely must be intended to produce such action rather than explicitly calling for it: "[S]ince there was no evidence, *or* rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had a 'tendency to lead to violence.' " *Id.* at 109 (emphasis added).

Finally it is unclear as to whether Yates v. United States, 354 U.S. 298 (1957), survives *Brandenburg*. Specifically, how does the *Brandenburg* test apply to conspiracy charges? Does not persuading a person to perform imminent overt acts in furtherance of a conspiracy to overthrow the government at some unspecified future time amount to persuading one to imminent lawless action? If not, what does the Court mean when it approvingly cites Noto v. United States, 367 U.S. 290, 297-98 (1961), for the proposition that preparing a group for violent action and "steeling" it toward such action is not protected? If the Court intended to overrule *Yates* and *Noto*, would it do so cryptically and without analysis in a per curiam opinion while approvingly citing both cases?

207. *Cf.* Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917) (adopting incitement standard to limit discretion). *See also* Gunther, note 206 *supra*.

208. For a stimulating argument that advocacy of law violation must be permitted because citizens in some circumstances have the right to disobey the state and that autonomous individuals must be afforded information to be able to arrive at an independent judgment, see Scanlon, *A Theory of Freedom of Expression*, 1 PHILOSOPHY & PUB. AFF. 204 (1972). The argument, however, surely is unpersuasive with respect to garden variety solicitations of murder.

209. This is not the conventional view, but it seems dispositive that the test is applied whether or not there has already been time to answer the arguments given. Suppose a debate in which after full opportunity for discussion of opposing views the audience was persuaded to go kill someone and did. Would the speaker be immune from criminal sanctions?

often been described as the principal function of the first amendment.[210] As the Court explained in *Red Lion Broadcasting Co. v. FCC*,[211] "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."[212] But in the context of advocacy of criminal law violations, the Court is not willing to rely on the marketplace. The advocacy of criminal law violations is protected unless it becomes effective advocacy; if it becomes effective, criminal sanctions can be imposed. Quite clearly, the Court has ruled that the advocacy of criminal violations is a bad idea and that if the marketplace is responsive, the marketplace is wrong.

On the other hand, other limited marketplace values are respected. Although the Court is unwilling to attach value to the idea that violence should be employed, there is marketplace value in knowing that some members of the body politic are so concerned about particular government practices that violence is considered as an alternative, and there is marketplace value in knowing the premises which lead them to such conclusions.

Moreover, other important first amendment values are implicated. There is cathartic value in having speakers who might otherwise become dangerous release their tensions through verbal violence rather than physical violence.[213] Moreover there are pragmatic lessons at work, *i.e.*, that unnecessary government repression of such speech is likely to foster political instability. As Justice Brandeis put it, "fear breeds repression; . . . repression breeds hate; . . . hate menaces stable government."[214]

The importance of each of these first amendment functions is considered to be so substantial that the Court is willing to risk the possibilities of arbitrary administration that ad hoc assessments of danger necessarily invite. Particularized assessments of danger are thus considered preferable to a general rule excluding advocacy of law violation from first amendment protection. On the other hand, the potential for a chilling effect on such communications, necessarily fostered by the vagaries of individualized fact finding, is not considered dispositive because the values of public order and protection of lives and property are considered to outweigh

210. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Mills v. Alabama, 384 U.S. 214 (1966); New York Times Co. v. Sullivan, 376 U.S. 255 (1964); Associated Press v. United States, 326 U.S. 1 (1945). Occasionally the Court has mentioned other values. *See* Police Dep't v. Mosley, 408 U.S. 92, 96 (1972); CBS v. Democratic Nat'l Comm., 412 U.S. 94, 192-94 (1973) (Brennan, J., dissenting).

211. 395 U.S. 367 (1969).

212. *Id.* at 390. *But see* Baker, *supra* note 117, at 5-6.

213. *See* sources cited in note 118 *supra*.

214. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis & Holmes, JJ., concurring).

the freedom to express ideas of limited marketplace and cathartic value.

It is perhaps instructive to recognize that the line of cases from *Schenck* to *Brandenburg* has involved a political component in that either the overthrow of the government or interference with military action was the alleged object of the advocacy. It is likely that this socio-political component (with its attendant first amendment values) has influenced both the rhetoric of the opinions and the substance of the test developed. How different it might be if the factual context were to involve advocacy of murder in a non-socio-political context. One suspects that little rhetoric about the marketplace of ideas or other first amendment values would be employed and that the serious and explicit advocacy of murder in a concrete way would suffice to divorce the speech from first amendment protection even in the absence of a specific showing of likelihood. The Court might well be persuaded that the State could not "reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale."[215] The distinction illustrates the point that the use of the clear and present danger test has been arrived at only after a balancing of factors such as the nature of the evil and the necessity for the regulation against the impact that the specific speech abridgment portends for first amendment values.

Similarly in the obscenity context, the Court's determination as to the scope of first amendment protection hinges on an assessment of the evils with which the state is concerned, the extent to which regulation of the speech is necessary to further the state's interests, and the impact of such abridgment of first amendment values. Central to the Court's weighing process in the obscenity context is the judgment that excessively (a subjective determination) candid descriptions of sexual activity are of low value in the first amendment hierarchy. The Court has concluded that obscene utterances 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."[216] Because of the low value placed upon this class of utterances, the Court is willing to accept legislative judgments that anti-social behavior is threatened even in circumstances when the danger is neither clear nor present.

The extent to which the Court's determination depends upon an evaluation of the speech involved is dramatized by the nature of the interests which the Court finds legitimate. The Court

215. Gitlow v. New York, 268 U.S. 652, 669 (1925).

216. Paris Adult Theatre I v. Slaton, 413 U.S. at 61 n.12 (quoting Roth v. United States, 354 U.S. at 485 (quoting Chaplinsky v. New Hampshire, 315 U.S. at 572)).

stresses that the very existence of obscenity "intrudes upon us all,"[217] that it impinges on the privacy of others. This is nothing more than a recognition that obscenity is offensive to many, presumably most, in society. The same, for example, might be said of socialist speech; however, if "offensiveness" were the test, majority rule would replace the first amendment. In other contexts, the Court has recognized that the propensity of particular speech to evoke strong negative reactions (at least in the absence of speech which is likely to cause uncontrollable violence in response[218] or in the absence of speech thrust upon unwilling listeners)[219] is an inappropriate basis for abridgment.[220] The fact that safeguarding against "offensiveness" is considered to be a legitimate interest in the obscenity context is an indication of how little the Court thinks of the speech involved.

Contributing to the low value placed on obscene communications is the implicit determination that the cathartic function of the first amendment and the fear that repression will breed social disorder are considerations less acute in the obscenity context than in the advocacy of violence context. And the marketplace concept is avoided by the subjective judgment that ideas which do matter are not involved. Indeed the Court goes so far as to suggest that "ideas" are not involved.[221] Here again, the potential of a chilling effect is implicated—those who would "steer clear of the danger zone" may be deterred from publishing material which would otherwise be protected. But this possibility is weighed against the dangers sought to be minimized by the state[222] and against the "fact" (also subjectively determined) that the state could not accomplish its objective by less intrusive means.[223] The chilling effect is thus regarded as insubstantial.[224]

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217. Paris Adult Theatre I v. Slaton, 413 U.S. at 59.

218. *See* note 191 *supra.*

219. Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970). *But see* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Cohen v. California, 403 U.S. 15 (1971).

220. Erznoznik v. City of Jacksonville, 422 U.S. at 209-10.

221. *See* text accompanying note 216 *supra.* This argument proves too much. It provides no basis for distinguishing imaginative literature not describing sexual conduct. *See Law of Obscenity*, note 38 *supra.*

222. To the extent one accepts the aesthetic sensibilities interest (*i.e.*, avoiding offensiveness) obscenity presents a clear and present danger. The extent to which balancing is required in a vagueness determination is well explained by Justice Brennan's dissent in *Paris Adult Theatre.*

223. It was on this principle that the Court in Miller v. California, 413 U.S. 15 (1973), abandoned the prevailing obscenity test to provide a less difficult burden for prosecutors.

224. Again the importance of the speech plays a role as the plurality admitted in Young v. American Mini Theatres, Inc., 427 U.S. 50, 61 (1976).

C. *Court Limits On The Marketplace Model*

There is an outright hostility to the marketplace model in *Brandenburg*, in the obscenity cases, and in *Gertz* that deserves attention. In such cases, the Court approves the legislative judgment that some ideas should not be in the marketplace. But the marketplace theory is based on the assumption that it is safer to leave determinations of value and truth to the marketplace than to permit government impositions of necessarily subjective determinations of truth or falsehood. It would be an error to suggest, however, that the marketplace model does not influence first amendment decisionmaking. Rather part of the task for the Court in first amendment methodology is to determine when the marketplace model is appropriate and when it is not, *i.e.*, when it is permissible for governmentally imposed determinations of truth or falsity to substitute for the judgment of the marketplace.[225]

Indeed, *Gertz*, a case which protects defamatory speech in order to protect the marketplace of ideas, is a prime example of the Court's struggle to determine when the marketplace theory should be qualified. From *Sullivan* to *Gertz*, the Court has explained that it is vital that the press not be deterred from putting defamatory ideas in the marketplace. Yet it is equally important in this context to recognize that in certain respects the Court has substantially modified the marketplace approach. In *Rosenbloom*, Justice Brennan had declared that even when prominent public figures are involved, "[i]t is the rare case when the denial overtakes the original charge."[226] This analysis was accepted by the *Gertz* majority: "Of course, an opportunity for rebuttal seldom suffices to undo [the] harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie."[227]

The acceptance of this philosophy, quietly introduced in footnote nine, has seemingly left the first amendment in a peculiar spot. *Gertz* holds that the first amendment offers some protection for defamatory utterances presumably so that our Constitution can continue "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . ."[228] And yet the Court recognizes that "an opportunity for rebuttal seldom suffices to undo [the] harm of defamatory falsehood,"[229] *i.e.*, truth does not

225. Of course, marketplace considerations may go beyond determining truth or falsity. The permissible scope of the antitrust laws, the copyright laws, the securities laws, and acts designed to protect government secrets can be limited by the first amendment particularly insofar as they inappropriately limit the access of ideas to the communications market.

226. 403 U.S. at 46.

227. 418 U.S. at 344 n.9.

228. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

229. 418 U.S. at 344 n.9.

emerge in the marketplace of ideas. Is the Court trapped in an obvious contradiction?

Perhaps *Gertz* should be read to say this: We recognize that by affording constitutional protection for defamation some false beliefs will prevail in the marketplace of ideas, but if we fail to provide constitutional protection, too many important ideas will never get into the marketplace. On balance, a level of constitutional protection for defamation advances the societal interest in learning the truth.

This is not the marketplace theory as traditionally conceived, and it is not the perspective of the first amendment depicted in *Sullivan*. As traditionally conceived, the marketplace theory presumed that truth would ultimately prevail in the marketplace, that false statements could not withstand competition.[230] *Gertz* rejects that assumption, but offers speech protection despite its belief that some falsehoods will ultimately prevail. *Sullivan* stated the broad (indeed overbroad) view that "constitutional protection does not turn upon 'the *truth*, popularity, or social utility of the ideas and beliefs which are offered.' "[231] And in *Garrison v. Louisiana* the Court proclaimed that "honest utterance, *even if inaccurate*, may further the fruitful exercise of the right of free speech."[232]

In a sweeping (albeit not unprecedented)[233] foray, however, *Gertz* has turned the traditional constitutional perspective upside down by announcing that, "[t]here is no constitutional value in false statements of fact"[234] and that "the erroneous statement of

230. Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting); J. MILTON, AREOPAGITICA 58 (Jebb ed. 1918). A more restrained marketplace conception is that the marketplace is the best testing ground for truth, although truth will not always prevail. Notice that even this weaker (but more sensible) version of the marketplace theory is still further weakened by *Gertz*. If footnote nine of *Gertz* is accepted, we are reduced to the proposition that in truth's best testing ground, truth can rarely catch up with a lie. It is perhaps instructive to observe that *Gertz*'s distrust of the marketplace notion is matched by the legal system's rules of evidence. Although many rules of evidence are designed to avoid the presentation of irrelevant time-consuming material, the legal system routinely keeps some prejudicial evidence from jurors, not because it is irrelevant and time consuming, but because the system endorses the view that truth will emerge in the marketplace only if censorship is employed. The point is not that the legal system is wrong, but that our commitment to the marketplace analogy is by no means unqualified and that an important first amendment inquiry is to determine the circumstances in which government intervention is preferable to an unfettered intellectual marketplace. That inquiry, of course, must also give weight to other first amendment values such as self-expression.

231. 376 U.S. at 271 (quoting NAACP v. Button, 371 U.S. 415, 445 (1963)) (emphasis added).

232. 379 U.S. at 75 (emphasis added).

233. Passing comments to the effect that false communications do not serve first amendment ends were made in Time, Inc. v. Pape, 401 U.S. 279, 292 (1971), and St. Amant v. Thompson, 390 U.S. 727, 732 (1968). Unlike *Gertz*, neither urged the principle as a starting place for first amendment analysis.

234. 418 U.S. at 340.

fact is not worthy of constitutional protection."[235]

This is dangerous doctrine. It begins with the presumption that false speech is unprotected and looks to determine if other factors are present which necessitate protection nonetheless. This begs the basic first amendment question: When can government perceptions of truth or falsity be imposed upon the individual? Moreover, it demeans the interests of self-expression and cathartic release. In the final analysis, however, the *Gertz* formulation may make no difference. By recognizing that some false speech must be protected in order to prevent true speech from being driven out of the marketplace, *Gertz* arrives at the same results which would be reached if it were assumed that speech is protected whether true or false unless other important interests predominate.

Nonetheless, starting points can influence decisions, and *Gertz*'s departure is to be regretted. Nor is anything of substance salvaged by *Gertz*'s companion pronouncement that "[u]nder the First Amendment there is no such thing as a false idea."[236] This statement will undoubtedly send commentators, litigants, and the lower courts scurrying to make the unmakeable distinction between facts and ideas[237] on the one hand, and will set the same parties to wondering how to classify obscene statements in the *Gertz* lexicon. They are ordinarily not false statements of fact, and we are told that they are not ideas. Even if we know them when we see them, we will not know what to call them.

Presumably all the Court intended to accomplish by its fact-idea dichotomy was to assure that damages could not be imposed for the publication of generalized critical opinions about individuals.[238] In the case of non-public persons, it is not at all clear that such a doctrine invariably strikes the appropriate balance between reputation and speech. But if any advance is registered by elevating this libel-based distinction to a favored spot in the general first amendment hierarchy, it is indeed subtle. It is hard to determine how such a doctrine can possibly assist the Court in balancing the relevant interests in first amendment cases.

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235. *Id.* Contrast the *Sullivan* view as taken from Mill: "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' " 376 U.S. at 279 n.19. On the significance of *Sullivan*'s treatment of falsity, see Kalven, *supra* note 1, at 210-13.

236. 418 U.S. at 339.

237. *See, e.g.*, Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962).

238. For an application of the distinction in the labor context by analogy, see Old Dominion Branch 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. at 283-87. It is perhaps instructive to note that Justice Powell, the author of the opinion which sets the distinction in constitutional concrete, disagrees with the Court's application of the distinction.

D. *Balancing*

It should be clear at this point that no single principle underlies first amendment methodology. Occasionally the Court will broadly proclaim, as it did in *Police Department v. Mosley* that, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[239] But any assessment of the legal regulation of communication must begin with the recognition that government does have power to restrict expression because of its content. There is no gainsaying the fact that perjury, blackmail, fighting words, defamation, advocacy of criminal law violations, obscenity, fraud, commercially deceptive advertisements are instances of expression. They are subject to sanction because their content[240] poses dangers to interests of societal concern. Indeed, a principal task of first amendment adjudication is to determine when content can be abridged.[241] That task necessitates a determination of: (1) the nature of the interest sought to be furthered by the state; (2) the extent to which the state must abridge the particular speech in order to further that interest; (3) the extent to which the abridgment will further the state interest; and (4) the impact of that abridgment on free speech values; *i.e.*, (a) the extent to which the content involved can make a contribution to the marketplace of ideas; (b) the extent to which government intervention can be tailored to prevent the arbitrary imposition of subjective values; (c) the extent to which the speech is necessary to further values of self-expression or cathartic release; and (d) the extent to which governmental abridgments can avoid substantial chilling effects on protected speech. An explication of the role which each of these factors has played in first amendment decisions will not be made here. To some extent, such analysis is not even possible because the Court has failed to reveal the extent to which a balancing of the free speech interest against the state interest has influenced the outcome.[242] Nonetheless, there are signs that the

239. 408 U.S. at 95.

240. In each case it is what is said that provides the basis for the imposition of sanctions. Some use the term *content* in a special sense, *i.e.*, the government cannot outlaw particular ideas. The term *content* is not here used in that special way.

241. First amendment considerations, of course, also require the Court to determine the limits which may be placed on the time, place, and manner of expression.

242. Vagueness cases are perhaps typical. The Court often finds cases vague or not vague without express recognition of the extent to which such considerations are implicated. Again Justice Brennan's dissenting opinion in *Paris Adult Theatre* is refreshing in that it explicitly identifies the relevant factors in the obscenity context. The dissenting conservative judges in the fighting words cases have long been arguing for a balancing test in the overbreadth context. The Court in the fighting words cases has clearly balanced but in the opposite direction, straining to find overbreadth while reluctant to identify the real motivating factors. To put it kindly, the result is that the Court's approach to the question of when parties have standing to raise a facial attack

Court will pay more attention to the variety of factors involved. For this, we have *Sullivan* to thank.

Although *Sullivan* did not presage the collapse of the two-level system of first amendment methodology, it has forced the Court to reconsider the reasons why speech is and is not protected. By ruling that first amendment protection cannot be foreclosed by mere labels and by refusing to let the vagaries of history stifle first amendment development, *Sullivan*, as Kalven hoped, has made it impossible for the Court to categorically preclude speech from protection by reference to the shibboleth that it has always been that way. Thus it is no accident that the underpinnings of the commercial speech exclusion have finally been subjected to searching inquiry,[243] and the scope of that exclusion drastically confined. Indeed, the commercial speech exception is no longer so described. Commercial speech is now entitled to first amendment protection albeit to a lesser degree than political speech.[244] For example, commercially deceptive communications are considered to be entirely unprotected by the first amendment[245] even though politically deceptive communications are afforded strategic protection.[246] This distinction is based on the judgment that commercial advertising is more easily verifiable by its disseminator[247] and less likely to be chilled by regulation.[248]

As the Court put it in the *Virginia Pharmacy* case, "the greater objectivity and hardiness of commercial speech . . . may

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on vagueness grounds and when they have standing to raise a facial attack on overbreadth grounds is in a state of general confusion. On vagueness, *compare* Coates v. City of Cincinnati, 402 U.S. 611 (1971) *with* Broadrick v. Oklahoma, 413 U.S. 601 (1973), Parker v. Levy, 417 U.S. 733 (1974) *and* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). On overbreadth, *compare* Broadrick v. Oklahoma, 413 U.S. 601 (1973) *with* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) *and* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). For a recent but flawed attempt to delineate relevant factors in the commercial speech context, see Bates v. State Bar of Arizona, 97 S. Ct. 2691, 2707-08 (1977). *See* notes 251-52 *infra*. At some point, the Court will not only decide which test or tests it wishes to apply in this area, but will become more explicit about the relevant factors. One suspects that the fighting words cases have been an important stumbling block to clarity. There, disguised (but arguably right-minded) decisions on the merits are apparently viewed as more palatable than ringing approbations of the right to curse your local policeman.

243. *See, e.g.*, Bates v. State Bar of Arizona, 97 S. Ct. 2691 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

244. Bates v. State Bar of Arizona, 97 S. Ct. at 2708-09; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 771 n.24.

245. Bates v. State Bar of Arizona, 97 S. Ct. at 2708-09; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 711 n.24. False speech in the Court's lexicon starts outside the first amendment and also does not get balanced in. True, but misleading, speech presumably starts inside, but is balanced out.

246. Bates v. State Bar of Arizona, 97 S. Ct. at 2708-09; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 711 n.24.

247. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 711 n.24.

248. *Id.*

make it less necessary to tolerate inaccurate statements for fear of silencing the speaker."[249] There are echoes of *Gertz* here,[250] specifically its statement that false statements of fact are unprotected. Again, however regrettable the *Gertz* language may be, the phrasing or starting point need not and should not dictate or influence the conclusion. It analytically should make little difference that false statements of fact initially are considered unprotected so long as the impact of governmental abridgments on free speech values are carefully considered and so long as the initial consideration does not operate as a presumption. Nor should it make any difference that the result is ultimately described as an exclusion or as a rule. It makes little difference whether the speech abridged is finally described as never having been within the first amendment's protection or having been initially within its protection but in the final analysis balanced out *if* (and the *if* is crucial) it is understood that the process employed to determine the rule or the exclusion must include a balancing of the relevant values with appropriate respect for the first amendment functions involved. On the other hand, the *Gertz* false statements of fact doctrine hardly seems to foster respect for relevant first amendment functions. A judiciary aware that it is balancing protected speech out of the first amendment is far more likely to give speech the protection it deserves.

In any event, whatever the merits of the Court's general judgments about the objectivity[251] and hardiness[252] of commercial speech, however incomplete the Court's abbreviated discussion may have been, and however disquieting the *Gertz* gloss may be,

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249. *Id.*

250. Indeed the Court, citing *Gertz*, also states that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." *Id.* at 771. The Court also cites Konigsberg v. State Bar of California, 366 U.S. 36, 49 & n.10 (1961) for that proposition; however *Konigsberg* merely lists various exceptions to first amendment protection; it does not discuss the relationship of false speech to first amendment values.

251. The assumption that knowledge about products is to some unspecified degree (always? unusually?) verifiable by its disseminator is questionable. Consider, for example, the massive number of studies concerning one illegal product, marijuana, and the degree of debate about its effects. It would appear that manufacturers may often be unsure about the effects of their products, and it well could be that in numerous circumstances scientists in universities know more about the products' effects than the disseminators. The result of the Court's assumption about the disseminator's ability to verify, of course, is to protect non-disseminator's statements about products while not protecting the same statements by disseminators. There may be good grounds for making such a distinction, but it is doubtful that the comparative ability to verify should be the relevant focus.

252. The assumption that because disseminators have dollars at stake they will continue advertising is beside the point. The question is whether they will be chilled from making statements about their products which are controversial or which could be contested. Clearly the inclination of the manufacturer will be to stay out of litigation and to opt instead for mindless jingles and the like.

the Court is obviously committed to the justification of first amendment exclusions by more than historical reference. Indeed the Court in *Bigelow v. Virginia* recognized that "regardless of the particular label asserted by the State . . . a court may not escape the task of assessing the First Amendment interest at stake and *weighing* it against the public interest allegedly served by the regulation."[253] Language such as this must serve as the point of departure for first amendment decision making, not the sweeping broadside of *Mosley*. In short, any attempt to locate the central meaning of the first amendment is bound to be unavailing.

E. *Absolutist Approaches*

First amendment methodology is thus grounded in a paradox. Government must be restrained from imposing its views of truth by outlawing contrary communications. But the government itself makes the determination as to when this principle is to be abandoned.

The statement of the paradox exposes the obvious danger. If the state may abridge speech when it feels it is desirable to do so, the first amendment is reduced to nothing more than an admonition.[254] Some, notably Justice Black, have argued that the solution to the difficulty is to abolish the paradox by prohibiting the abridgment of any speech at all.[255] This absolutist approach to first amendment analysis is not without value. It emphasizes fidelity to the language of the first amendment and drastically confines the possibilities of subjective imposition of values by the government. To be sure, not all first amendment questions with respect to content regulation are automatically answered by this approach. It is still necessary to distinguish speech (which may not be abridged) from conduct (which may). But even though some important gray areas remain, it must be conceded that the "no law" approach provides easy answers to difficult questions and would do much to insure that the government could not silence the unpopular. Although the absolutist approach has value, it comes at too great a cost. It seemingly requires the conclusion that perjury, blackmail, knowing defamatory falsehoods, advocacy of murder and the like be absolutely protected. Some would rectify

253. 421 U.S. at 826 (emphasis added).

254. Dennis v. United States, 341 U.S. 494, 580 (1951) (Black, J., dissenting).

255. *See, e.g.*, Konigsberg v. State Bar of California, 366 U.S. 36, 60-71 (1971) (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 140-44 (1959) (Black, J., dissenting); Dennis v. United States, 341 U.S. 494, 580 (1951) (Black, J., dissenting); American Communications Ass'n v. Douds, 339 U.S. 382, 445-53 (1950) (Black, J., dissenting). On the other hand, it is at least arguable that Justice Black's rhetoric of absolutism ultimately reduces to a form of definitional balancing. Black, *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, 222 HARPER'S MAGAZINE 63, 68 (1961).

this disability by tinkering with the line between speech or "expression" and conduct.

Professor Emerson, for example, maintains that " '[a]ction' can be controlled, subject to other constitutional requirements but not by controlling expression."[256] He insists that "expression must be protected against government curtailment at all points, even where the results of expression may appear to be in conflict with other social interests that the government is charged with safeguarding."[257] These principles, however, are quickly breached. Professor Emerson proceeds to delineate numerous areas in which action can be controlled by regulating expression and in which expression may be abridged because of its results. For example, he would permit the abridgment of speech involving "instructions" as to criminal action (on the ground that it has gone beyond persuasion to conduct),[258] solicitation to criminal action when the communication is "close, direct, effective, and instantaneous in its impact" (on the ground that it has become part of the action),[259] "obscene" communications "forced" upon persons against their will (on the ground that the harm is "direct, immediate, and not controllable by regulating subsequent action" and that it is like a physical assault and therefore classifiable as action),[260] defamation causing injury to a person's feelings (on the ground that the harm is "direct and instantaneous, and not remediable by longer-range social processes that can prevent subsequent damage"),[261] and communications that invade the inner core of the personality by depicting matters of a wholly personal and intimate nature (on the ground that constitutionally protected areas of privacy "block out the rules governing the system of free expression").[262]

These permissible abridgments, purportedly based on distinctions between expression and action, bear a familiar ring. Most are based on a revitalization of clear and present danger principles, albeit in more stringent speech protective terms. These distinctions, on close scrutiny, do not turn on the question of whether expression is being regulated, but rather with the question of whether the results of the expression are sufficiently direct and harmful. Solicitation is expression; it is permissibly abridged in Emerson's scheme, because (despite protestations to the contrary) the "results of the expression may appear to be in conflict with other interests the government is charged with safeguarding."[263]

256. EMERSON, *supra* note 117, at 17.
257. *Id.* at 17.
258. *Id.* at 75.
259. *Id.* at 404.
260. *Id.* at 496.
261. *Id.* at 543.
262. *Id.* at 562.
263. *See* text accompanying note 257 *supra.*

Other abridgments approved by Professor Emerson are more obvious instances of balancing. Professor Emerson would permit some privacy actions abridging speech revealing embarassing details of an individual's life, not because such speech is not expression, but rather because the interests in privacy are believed to outweigh rights of expression in limited contexts.[264]

When as thoughtful a scholar as Professor Emerson slips into doctrines he denounces (*e.g.*, clear and present danger[265] and balancing),[266] there are grounds to conclude that a distinction between expression and action is not a workable basis upon which to base a general theory.

Nonetheless the approach is instructive in that it suggests that a major principle in the hierarchy of first amendment values is that rules should be formulated on a sufficiently general basis that discretion to impose ad hoc arbitrary judgments be narrowly confined. Emerson would promote this principle by focusing on the line between expression and action; others would promote this principle by focusing on the concept of definition.

Professors Frantz[267] and Nimmer,[268] for example, would have the Court focus on the definition of "freedom of speech." Categories of speech would be either included or excluded from first amendment protection depending on how the various values are weighed, but once included the speech would be absolutely protected. It is necessary to understand that the term "definition" is used in a special sense. In *Gertz*, for example, the problem is to determine the level of abstraction at which definitions are required. If, for example, the question is defined to be whether defamation is included or excluded from the phrase "freedom of speech," the whole structure of *Gertz* must topple. It would not be possible to distinguish between the scope of the first amendment and the level of protection it affords. Instead, *Gertz*, in the lexicon of definitional balancing, "defines" at a lower level of abstraction. Negligent defamation of non-public persons is not "freedom of speech," but negligent, non-malicious defamation of public persons is. These "definitions" clearly necessitate individualized ad hoc judgments. The definition of public official may be relatively[269] free of gray areas, but the definition of public figures is disturbingly opaque and difficult to apply, particularly after *Firestone*. In addition, the concept of negligence is notoriously

264. *But see* EMERSON, *supra* note 117, at 549.
265. *See, e.g., id.* at 74-75.
266. *See, e.g., id.* at 718.
267. Frantz, *The First Amendment in the Balance,* 71 YALE L.J. 1424 (1962).
268. Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).
269. *See* Rosenblatt v. Baer, 383 U.S. 75 (1966).

vague in the press context. This does not demonstrate that the definitions are wrong. It does demonstrate that the requirement of "definition" provides no assurance of freedom from subjective ad hoc determinations because the content of the definition can require value-laden applications. Examples could be multiplied. Obscenity is *defined* out of the "freedom of speech" rubric, but subjective ad hoc determinations are obviously required to apply the Court's definition.[270] *Brandenburg* similarly defines what is and is not protected, but the content of the definition requires individualized fact finding with the danger of arbitrariness that such discretion necessarily implicates. The concept of definition, therefore, also does not appear to afford any realistic restraints against judicial imposition of values on an ad hoc basis.

There are important lessons to be learned from the definitional balancers, however. It is of prime importance in first amendment methodology that rules be formulated with an eye to reducing the opportunities for subjective imposition of values on an ad hoc basis. This principle, however, cannot be absolute. For example in the context of advocacy of violence, an absolute exclusion from first amendment protection would undermine other important first amendment values; absolute protection of such speech would endanger important state interests; a middle ground with its attendant dangers of arbitrary administration appears to be the safest course when all of the functions of the first amendment are considered.

CONCLUSION

It is fashionable to assert that no first amendment theory can explain the Supreme Court's treatment of free speech questions.[271] The burden of this article has been to demonstrate that such criticism is erroneous. Failures of articulation by the Court do not demonstrate the absence of guiding methodology. The unwillingness of the Court to give exclusive emphasis to a particular value (*e.g.,* self-expression) or a single vision (*e.g.,* the marketplace analogy) or a single test (*e.g.,* clear and present danger) or a single principle (*e.g.,* expression versus action or public speech versus private speech) does not expose theoretical failure. Indeed the wisdom of first amendment jurisprudence is its recognition that the interests promoted by the first amendment are numerous and that government abridgments of speech impact on those interests in different ways. The definitional balancers understand this. The weakness of definitional balancing is its assumption that when regulation of content is involved, ad hoc balancing is always

270. Miller v. California, 413 U.S. 15 (1973).
271. *See* note 200 *supra.*

wrong.[272] Instead, the Court has pursued a general balancing approach which leaves the Court the option to decide when an accommodation of values requires general rules and when specific factual contexts necessitate ad hoc decision making. Thus, the Court will sometimes use a clear and present danger test and sometimes not; it will sometimes formulate general rules and sometimes not. This does not demonstrate confusion. Instead it reveals that different mixtures of values require different rules in different contexts.

Thus, the decision as to whether *Gertz*'s protections should be extended to non-media speech requires no revolution in methodology. It requires a weighing of the values served by the common law (*e.g.,* advancement of reputation, privacy, and preservation of order) against the values served by the first amendment (*e.g.,* furtherance of self-expression, cathartic values, and the rights of listeners to acquire information) and an appreciation of the difficulties of applying alternative standards (*e.g.,* whether fault can be defined with sufficient precision in the non-media context to avoid unacceptable chilling effects or unacceptably arbitrary decision making). The accommodation of those interests may produce a rejection of strict liability and a substitution of some level of first amendment protection for the non-media speaker (*e.g.,* fault, gross negligence, or *New York Times* malice). But whatever the results and however the outcome is phrased, the decision will be arrived at by the methodology of general balancing.

There is danger in this methodology, of course. But the potential for abuse does not justify the conclusion that the first amendment is an empty slogan. There are mitigating factors which lead to restraint. Federalism, separation of powers, the existence of an independent judiciary, the propensity to create rules of general application, and a tradition of respect for the functions of the first amendment are powerful restraints. But no one would suggest they guarantee the absence of abuse. The Court, for example, has recently gone so far as to suggest that even truthful press accounts relating to a criminal trial may be subjected to a prior restraint if the " gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[273] The reemployment of the

272. Alternatively, definitional balancers could concede that ad hoc balancing might be appropriate in particular contexts (*e.g.*, reporter's privilege cases), but argue that the first amendment risks inherent in affording courts the authority to decide when ad hoc balancing will or will not be used are too great. If definitional balancing offered realistic constraints on judicial decision making, this argument would have force.

273. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)).

Dennis[274] standard is sufficient reminder of the ill uses to which a balancing formula can be put. Moreover the various opinions in *Young v. American Mini Theatres*[275] and *Lehman v. City of Shaker Heights*[276] are grim evidence that we need not look back very far to recognize that a balancing approach can produce exotic opinions[277] and arbitrary results.[278] Unless we are to hold that blackmail, perjury, fraud, the advocacy of murder and the like are to be constitutionally protected, however, we appear committed to the notion that the first amendment is not an absolute and that exceptions to the scope of first amendment protection must be derived by an accommodation of values. Any first amendment theory can be manipulated to achieve unacceptable results. Strategic protection for first amendment values, however, cannot be achieved through artificial methodologies or exaggerated exaltation of individual principles. The best protection for first amendment freedoms depends not on sonorous slogans[279] but on the judiciary's wise appreciation of the valuable functions the first amendment is designed to promote.

Professor Kalven's hope that *Sullivan* would send the Court down the Meiklejohnian path has only been partially fulfilled. But his expectation that *Sullivan* would impel the Court to a reconsideration of general first amendment doctrine may yet be realized. *Sullivan* presented the opening wedge to dislodge historical reference and cavalier dictum as the starting points for first amendment doctrine. It has forced the Court to articulate the factors which lead it to adopt different tests in different contexts. In that sense, the *Sullivan* opinion may yet prove to be "the best and most important . . . ever produced in the realm of freedom of speech."[280]

274. Dennis v. United States, 342 U.S. 494 (1951). On the particular theoretical difficulties with the use of the test in the *Nebraska* case, see Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977).

275. 427 U.S. 50 (1976).

276. 418 U.S. 298 (1974).

277. As to *Young*, see Friedman, *Zoning "Adult" Movies: The Potential Impact of Young v. American Mini Theaters* [sic], 28 HASTINGS L.J. 1293 (1977). *But see* Clor, *Public Morality and Free Expression: The Judicial Search for Principles of Reconcilation*, 28 HASTINGS L.J. 1305 (1977).

278. As to *Lehman*, see Karst, *supra* note 138, at 35.

279. *See* Dennis v. United States, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring). Nothing here, of course, supports Justice Frankfurter's theory of the degree of deference which should be afforded to legislative judgments.

280. Kalven, *supra* note 1, at 194.