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FREEDOM OF EXPRESSION AND THE MENTALLY DISORDERED: PHILOSOPHICAL AND CONSTITUTIONAL PERSPECTIVES

Lawrence O. Gostin*

In the serene world of mental illness, modern man no longer communicates with the madman: on one hand, the man of reason delegates the physician to madness, thereby authorizing a relation only through the abstract universality of disease; on the other, the man of madness communicates with society only by the intermediary of an equally abstract reason which is order, physical and moral constraint, the anonymous pressure of the group, the requirements of conformity.

Michel Foucault, *Madness & Civilization*

I. Introduction

Mental illness is usually described as an impaired ability to communicate effectively.¹ Yet the societal response—both historically² and under modern psychiatric practice³—has been to retard, rather than encourage, the acquisition

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1 Lidz, *The Family, Language, and the Transmission of Schizophrenia* in *THE TRANSMISSION OF SCHIZOPHRENIA* 175, 177-84 (D. Rosenthal & S. Kety ed. 1968); Salzinger, Portnov & Feldman, *Verbal Behavior in Schizophrenia*, in *PSYCHOPATHOLOGY OF SCHIZOPHRENIA* 98 (P. Hoch & J. Zubin eds. 1966); H. SULLIVAN, *SCHIZOPHRENIA AS A HUMAN PROCESS* 27-28 (1962); J. RUESCH, *THERAPEUTIC COMMUNICATION* 371 (1961); Birdwhistell, *Contribution of Linguistic-Kinesic Studies to the Understanding of Schizophrenia* in *SCHIZOPHRENIA — AN INTEGRATED APPROACH* 99-123 (A. Auerbach ed. 1959); R. BROWN, *WORDS AND THINGS* 292-98 (1958); J. RUESCH, *DISTURBED COMMUNICATION* 43 (1957); Sullivan, *The Language of Schizophrenia* in *SCHIZOPHRENIA* 4-16 (J. Kasanin ed. 1939).

2 The societal response to madness has traditionally been to isolate and remove the deviant elements from the community. In the sixteenth century, buildings which originally housed lepers became the homes of "incurables and madmen." During the Renaissance, the response was "Stultifera Navis" or "Ship of Fools"; madmen were sent floating out along the serene waves of the Rhineland and the Flemish canals. However archaic these practices might seem to the modern psychiatrist, boats were often set to sail with the most benign of purposes. "Interest in cure and in exclusion coincide." M. FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* 10 (1965). See also D. TUKE, *HISTORY OF THE INSANE IN THE BRITISH ISLES* (1882).

3 In the United States, modern psychiatry institutionalizes nearly half a million persons each year. Note, *Application of the Fifth Amendment Privileges against Self-Incrimination to the Civil Commitment Proceeding*, 1973 DUKE L. J. 729. The number of commitments into mental institutions has been gradually increasing. Developments, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1403 n.19 (1974). The all-encompassing, total character of the institution, characterized by its physical distance from population centers, discourages normal social intercourse with the outside world. See E. GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 4, 7 (1961).

Further, there are the incorporeal barriers to the acquisition of linguistic skills due to the stigma which attaches to the resident upon his entrance into a mental institution. See notes 37-39 *infra* and accompanying text.

Finally, there are the more direct disincentives to the acquisition of communicative skills in the form of restraints on rights to use postal and telephone services, to consult with legal counsel, to interact with the opposite sex, and to make and receive visits. V. VICTOROFF & H. ROSS, *HOSPITALIZING THE MENTALLY ILL IN OHIO* 143 (1969); Brief for National Center for Law and the Handicapped as Amicus Curiae at 18, *Horacek v. Exon*, — F. Supp. — (D. Neb. 1974):

All her [named plaintiff] outgoing mail is censored. The letters she sends to her sister have portions inked out by Beatrice officials. All her incoming mail is opened prior to her receiving it.

...

of linguistic skills. This impediment to normal social intercourse leaves individual interests in free expression ineffectuated; it concerns the legal profession because the government condones and enforces the restriction of first amendment rights in a potentially large segment of the population.⁴ This article will examine the philosophical justification for free communication for the mentally handicapped. It will further suggest a systematic application of the first amendment to the particular problems of the mentally defective.

II. Philosophical Perspectives

Under traditional theory, unlimited expression is indispensable to the advancement of knowledge.⁵ The most rational judgments are attained by allowing plenary access to intellectual marketplace⁶ because in a forensic contest between truth and falsehood the former will eventually prevail.⁷ This model admits all arguments, even of those persons considered less gifted in their thought processes.⁸

Rules for Resident Care 9 (J), II, p. 30. *Handbook for Employees*, Beatrice State Home Revised June, 1973.

I. Individual residents with a past record of writing *inappropriate* news will have their mail screened by the unit social worker.

II. Ward employees should screen out all letters which are scribbled, or otherwise ineligible. *Id.* [Emphasis supplied in brief.]

Georgia Newton, a named plaintiff, was allegedly denied the right to socialize with men (Complaint, p. 5 § 5d), even though she was 26 years old, had been employed and had evidently developed the necessary social skills. *Id.* at 17.

For other instances where the institutionalized person's communications are restricted, see *Stowers v. Wolodko*, 386 Mich. 119, 191 N.W.2d 355 (1971); McEwan, *The Difference Between Civil and Penal Institutions from the Perspective of the Inmate* in L. ORLAND, JUSTICE, PUNISHMENT, TREATMENT 43 (1973); W. BUFORD & L. GOSTIN, PATIENTS' RIGHTS IN NORTH CAROLINA'S MENTAL HEALTH INSTITUTIONS (1973) (obtainable through the North Carolina Department of Mental Hygiene, Library of Congress Catalog Number: 73-87974); AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 155 (rev. ed. S. Brakel & R. Rock 1971); E. GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 31, 41 (1961); Ferleger, *Loosing the Chains: In-Hospital Civil Liberties of Mental Patients*, 13 SANTA CLARA LAWYER 447, 449, 454, 456 (1973); Rollins, *Suggested Revisions of North Carolina's Laws on Involuntary Hospitalization for Mental Illness*, N.C. MED. J. 1019-20 (Dec. 1972); Haggerty, Kane, & Udall, *An Essay on the Legal Rights of the Mentally Retarded*, 6 FAMILY L. Q. 59, 64 (1972).

4 Although there has been a decline in the total resident population of mental institutions in the United States, there were still 275,995 resident patients as of 1972. Developments, *supra* note 3, at 1402-03.

5 See *Dennis v. United States*, 341 U.S. 494, 503 (1951); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); D. FELLMAN, THE LIMITS OF FREEDOM 45-55 (1959); Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 137-38 (1946). See also Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 n.2 (1963); Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 3-4 nn.6-10 (1951).

6 See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943).

7 Z. CHAFEE, *supra* note 5, at 298, quoting BENJAMIN FRANKLIN, AN APOLOGY FOR PRINTERS (1731): "When men differ in opinion, both sides ought equally to have the advantage of being heard by the public; and when truth and error have their fair play, the former is always an overmatch for the latter." See also Milton, *Areopagitica* in ENGLISH REPRINTS (Arber ed. 1869): "Let her and Falsehood grapple; whoever knew truth put to worse, in a free and open encounter?" But see Brett, *Free Speech, Supreme-Court Style: A View from Overseas*, 46 TEX. L. REV. 668, 680-82 (1968).

8 Richardson, *supra* note 5, at 5: "The 'poor and puny anonymities' of a 'creed of ignorance and immaturity' must be accorded the same constitutional protection as the carefully weighed pronouncements of the loyal opposition." A. MEIKLEJOHN, POLITICAL FREEDOM 19-28 (1968); E. MARTIN, LIBERTY 199 (1930): "Assuming that the foolish [the 'neurotic

The utility of an opinion is itself a matter of opinion⁹ and all opinions must remain open to continuous discussion if the truth is to emerge. Censorship weakens the democratic process because it presumes to decide issues for others without allowing them to hear the contrary view.¹⁰ It is only by testing personal judgment against all opposing judgments that an individual can make rational decisions.¹¹

One might object that an individual not in full control of his faculties cannot possibly contribute to the search for truth; only sane men can formulate veracious ideas. This objection, however, implies that one can readily distinguish the sane from the mentally defective,¹² and that the person designated defective cannot contribute to the cause of truth. In Western culture, the psychiatrist finally determines who is mentally defective and, consequently, whose speech will be censored and under what circumstances. The psychiatrist will restrict communication based upon his individual clinical judgment or by acceding to the administrative judgment of the staff of a mental hospital. The restriction is often in large part due to the content of the speech. Ross and Victoroff,¹³ writing in a manual designed primarily for the psychiatric physician, stated:

The paranoid patient may write to newspapers or public officials outside the hospital making unfounded charges against the hospital or against those who admitted him [I]n such situations mental hospitals have traditionally exercised a power of censorship over both incoming and outgoing mail.¹⁴

This silencing of expression is itself an assumption of infallibility¹⁵ since the psychiatrist obviously decides whether the patient's charges are "unfounded." The psychiatrist acts as a censor by suppressing an expression with which he disagrees. So far as the community can ascertain, the only truth is that seen through the eyes of the psychiatrist.

While a psychiatrist may recognize that, despite his extended study of mental illness, he is fallible, he often fails to take any precaution against his own fallibility. He does not realize that to refuse a hearing to an opinion, because he is

and defective'] could be protected by the denial of free speech, truth could not possibly be the gainer thereby, for the pursuit of truth necessarily takes place in the open."

⁹ Mill, *On Liberty* in UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 110-111 (Everyman ed. 1951).

¹⁰ He who knows only his side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion.

Id. at 128-29.

¹¹ See Z. CHAFEE, *supra* note 5, at 561.

¹² It has been argued very effectively that psychiatrists cannot readily identify the sane from the insane. See generally T. SCHEFF, BEING MENTALLY ILL (1966); Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAWYER 379 (1973).

¹³ V. VICTOROFF & H. ROSS, HOSPITALIZING THE MENTALLY ILL IN OHIO xx (1969). But see *Procunier v. Martinez*, 94 S. Ct. 1800 (1974). The Supreme Court reviewed prison regulations which required the censorship of mail written by inmates which "unduly complain" or "magnify grievances." In holding these regulations unconstitutional, the Supreme Court noted that the censorship of unflattering opinions did not serve either the state interest of security, order, or rehabilitation.

¹⁴ V. VICTOROFF & H. ROSS, *supra* note 13, at 143.

¹⁵ See Z. CHAFEE, *supra* note 5, at 520; Mill, *supra* note 9, at 105.

sure that it distorts reality, is to assume his own certainty. The marketplace of ideas remains less competitive insofar as the ideas of "the mentally ill" are judged unworthy of access. Zechariah Chafee summarized the point well:

Whenever we authorize a particular restriction on liberty we ought not to forget that we are entrusting to fallible human beings a power over the minds of others. Benjamin Franklin . . . stated . . . that the desirability of stamping out evil thoughts is obvious, but the question remains whether any human being is good and wise enough to exercise it.¹⁶

The psychiatrist assumes almost plenary power over a class of human beings.¹⁷ He must take care not to abuse the natural right of his patients to communicate: the definition of sanity or truth involves reconciling and combining many viewpoints.¹⁸

Complete liberty of thought and discussion has traditionally been considered beneficial to the social order. Furthermore, the fundamental purpose of the social order is the promotion of each individual's well-being. Therefore, the development of individuality and self-fulfillment is the primary benefit to be derived from freedom of expression.¹⁹ Just as every opinion is useful for the social good, so there is an individual human need to communicate freely and to entertain a unique experiment of living.²⁰

A human being's written or verbal language is the primary reflection of his individuality, and the means by which he displays his self-image and self-

16 Z. CHAFEE, *supra* note 5, at 520.

17 Psychiatry as a field has been defined as a "system of social control." See generally T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* 39-88 (1963).

18 Compare the following views: J. S. MILL, *PREFACES TO LIBERTY* 41 (Wishy ed. 1959): For if you determine before-hand that opinions shall be promulgated only on one side of the question, in whom will you rest the power of determining which side shall be chosen? The answer is in those who are most enlightened and best qualified to judge. But there are no determinable and universal marks by which wisdom is known. To whom will you give the power of determining what men are the most enlightened?

Z. CHAFEE, *supra* note 5, at 520-21:

It is true that sometimes in our modern society we have to run the risk of abuses in the limitation of various kinds of liberty, because the evils we aim to avoid are so serious However, the risk of human error ought to be weighed in each case; and even when this risk is run it ought to be minimized as far as possible through the selection of persons who by training, habits, social background, are least apt to act mistakenly or unjustly.

E. MARTIN, *supra* note 8, at 200:

A first-rate mind would have nothing to do with such business [censorship]. It is intolerance, not desire for improvement, which commonly menaces freedom of speech. Intolerance and insincerity: I do not believe there was ever a censorship established except to perpetrate a falsehood.

Milton, *supra* note 7, at 54-55:

It cannot be deny'd but that he who is made judge to sit upon the birth, or death of books . . . had need to be a man above the common measure, both studious, learned, and judicious If he be of such worth as he behoovs him, there cannot be a more tedious and unpleasing journey-work, a greater losse of time levied upon his head Seeing therefore those who now possesse the employment, by all evident signs with themselves well ridd of it, and that no man of worth, none that is not a plain unthrif of his own hours is ever likely to succeed them . . . we may easily foresee what kind of licensors we are to expect hereafter, either ignorant, imperious, and remisse, or basely pecuniary.

19 See generally EMERSON, *supra* note 5, at 79-81; MILL, *supra* note 9, at 152-76; RICHARDSON, *supra* note 5, at 4; E. MARTIN, *supra* note 8, at 193-238.

20 MILL, *supra* note 9, at 153.

worth. Freedom to develop and verbally assert one's own beliefs and opinions allows the individual to realize his fullest potential to develop his faculties,²¹ to develop his character,²² and to achieve a measure of positive self-regard.²³ For these reasons, Milton described censorship as the "greatest displeasure and indignity to a free and knowing spirit that can be put upon him."²⁴

This theory of free speech applies with particular force to the "lower orders" of society such as the mentally ill. Societal intolerance along with fear of the deviant life-styles of those classified as mentally ill are the prime causes of the censorship of this social group. Nothing destroys freedom so surely as the spread of intolerance and the presence of fear.²⁵ If liberty is to exist, the community cannot feel shocked or scandalized when custom is not followed; it cannot be aesthetically offended by differing tastes; and it cannot feel threatened by abnormal thought, language, appearance, or behavior.²⁶ Yet, it is as true today²⁷ as it was in Mill's time that

the man, and still more the woman, who can be accused either of doing "what nobody does," or of not doing "what everybody does" is . . . in peril of a commission *de lunaticis*, and of having their property taken from them and given to their relations.²⁸

The value of individuality should be apparent because deep within everyone

21 *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

22 Emerson, *supra* note 5, at 879.

23 See generally C. ROGERS, ON BECOMING A PERSON (1961).

24 Milton, *supra* note 7, at 55.

25 E. MARTIN, *supra* note 8, at 194-95. See also J. LOCKE, A LETTER CONCERNING TOLERATION (M. Montuori, ed. 1963).

26 Human beings fear others with an abnormal appearance. This is illustrated (although often in an exaggerated form) in much of our literature and art. The classic case is the fear of the person with "an insane look in his eye." Compare E. POE, THE TELL TALE HEART (1843) (the fictional portrayal of man's obsessive fear of an old man's glazed, filmy, distorted eye) with Francisco Goya y Lucientes' painting of *The Desperate or the Proverbios* (the artist, in attempting to create a scene which will evoke fear in the viewer, utilizes the classical portrayal of a madman. He paints his characters with a crazed look in their eyes).

27 See generally B. ENNIS, PRISONERS OF PSYCHIATRY (1972); T. SZASZ, THE MANUFACTURE OF MADNESS (1970).

28 Mill, *supra* note 9, at 168-69. Mill's footnote placed at this point in his text is worthy of restatement because of its description of the intolerance of the community to the slightest deviant activity:

There is something both contemptible and frightful in the sort of evidence on which, of late years, any person can be judicially declared unfit . . . : All the minute details of his life are pried into, and whatever is found which, seen through the medium of the perceiving and describing faculties of the lowest of the low, bears an appearance unlike absolute commonplace, is laid before the jury as evidence of insanity, and often with success; the jurors being little, if at all, less vulgar and ignorant than the witnesses; while the judges, with that extraordinary want of knowledge of human nature and life which continually astonishes us in English lawyers, often help to mislead them. These trials speak volumes as to the state of feeling and opinion among the vulgar with regard to human liberty. So far from setting any value on individuality — so far from respecting the right of each individual to act, in things indifferent, as seems good to his own judgment and inclinations, judges and juries cannot even conceive that a person in a state of sanity can desire such freedom. In former days, when it was proposed to burn atheists, charitable people used to suggest putting them in a madhouse instead: it would be nothing surprising now-a-days were we to see this done, and the doers applauding themselves, because, instead of persecuting for religion, they had adopted so humane and Christian a mode of treating these unfortunates, not without a silent satisfaction at their having thereby obtained their deserts.

is a desire to seek differentiation from the nameless crowd. The development of character and individual personality is a primary requisite for human happiness. Individual differences in communication and association are important not only for human dignity, but also for the development of interpersonal skills. No person, especially no institutionalized person, can develop communicative skills without ample opportunity to experiment with thought and language in his own way. Conformity causes only stagnation.²⁹

Free speech is not only necessary in the search for truth but also indispensable to the operation of a democracy.³⁰ It has been labeled "the cornerstone of the structure of self-government" without which "government by the consent of the governed would have perished from the earth."³¹ Self-government, however, requires that the normal political processes be available to all groups, including those whose access to the political system has traditionally been limited.³² The insular or discrete minority, those who have no realistic opportunity to influence their social situation through the democratic process, must be assured freedom of expression: in no other way can they hope to affect the political process so as to elevate their social status.³³

The mentally handicapped as a group fit naturally into the prototype of the insular minority. This is especially true of the nearly one-half million persons labeled "mentally ill" and institutionalized each year.³⁴ The impact that these persons can normally hope to make on the political system is *de minimis*. Institutionalized residents are usually denied the franchise³⁵ and barriers exist to normal social intercourse between them and the majority, which is exclusively authorized to make policy under a system of self-government.

In addition to the temporal barriers imposed by the institution's physical plant,³⁶ there are incorporeal obstacles to meaningful communication between the institutionalized resident and civil society. The resident's disregard for his own self-worth³⁷ impedes his desire to communicate effectively. The involuntary

29 Strangely, mental hospitals are the ultimate breeders of conformity. The institutionalized residents all eat and sleep in unison. They are told when, where and how they are to work and play. In short, every decision that a resident could feasibly make for himself so as to assert his individuality is made for him. It is a small wonder that often upon his exit from the institution he cannot function on a day-to-day basis in the community. See E. GOFFMAN, *supra* note 3, at 4, 5.

30 See generally A. MEIKLEJOHN, *supra* note 8; Emerson, *supra* note 5, at 882-84.

31 A. MEIKLEJOHN, *supra* note 8, at 55.

32 Mill, *supra* note 9, at 143:

On any of the great open questions just enumerated, [opinions favorable to democracy and to aristocracy; to property and to equality, to sociality and individuality] if either of the two opinions has a better claim than the other, not merely to be tolerated, but to be encouraged and countenanced, it is the one which happens at the particular time and place to be in a minority. That is the opinion which, for the time being, represents the neglected interests, the side of human well-being which is in danger of obtaining less than its share.

33 Z. Chafee, *supra* note 5, at 4.

34 Note, *Application of the Fifth Amendment Privilege against Self-Incrimination to the Civil Commitment Proceedings*, 1973 Duke L.J. 729 n.1.

35 See Developments, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1198 n.23 (1974).

36 See E. GOFFMAN, *supra* note 3, at 4.

37 See Wales, *Adjustment to the Total Institution in THE AGE OF MADNESS* 267, 268, 275-77 (T. Szasz, ed. 1973); E. GOFFMAN, *supra* note 3, at 14-35, 131-32, 354-56 (description of the process of "mortification of the self"); Developments, *supra* note 3, at 1200-01. See also C. ROGERS, *ON BECOMING A PERSON* (1961).

admission process, the house rules, and the values imposed by the wider world "press home to the patient that he is, after all, a mental patient who has suffered some kind of a social collapse."³⁸ Thus, the resident senses that his speech cannot contribute to the social well-being. Moreover, every communication that the resident is likely to engage in with civil society will be accompanied by a reminder that this is a communication with a mental patient and therefore may be disregarded.³⁹ The mail that the resident sends is postmarked with the stamp of the mental hospital; the visits from friends and relatives occur within the hospital plant while the resident remains in his or her hospital garb; the buses which transport the resident into the outside world are marked with the hospital emblem. Statements made by the resident under these circumstances may be discounted as mere manifestations of the symptomatology of the patient's mental malady. Finally, the resident's uniquely degraded living situation⁴⁰ and the uniform sedation administered by hospital personnel also inhibit effective interaction with persons outside the institution.

The "mentally ill" are thus clearly an insular minority, devoid of a significant opportunity to change their social status through the democratic process. To this extent, their status undermines our system of self-government, for unless a democracy receives input from all of its disparate interest groups it will remain ineffectual.

III. The Advent of the First Amendment

Free speech protects three types of interests. These are the social interest in the attainment of truth, the individual interest in self-expression in order to maintain human dignity, and the interest of the insular minority in a system of self-government.

The framers of the first amendment were mindful of these values of free expression.⁴¹ They shared the beliefs of Milton⁴² and Locke⁴³ that free expression is the fountainhead of a healthy society and that it should be left unfettered.⁴⁴ They were also cognizant of the various state interests which justified some impediments on freedom of expression. Chief among these interests was the security

38 E. GOFFMAN, *supra* note 3, at 151.

39 *Id.* at 24.

40 See, e.g., Ferleger, *supra* note 14.

41 *To the Inhabitants of the Province of Quebec*, October 24, 1774, in L. LEVY, *LEGACY OF SUPPRESSION 176-77* (1960). In presenting its case before the people of Quebec, the Congress released this statement:

The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officials are shamed or intimidated into more honorable and just modes of conducting affairs. *Id.*

See generally Z. CHAFEE, *HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION 10-17* (1952); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Bradeis, J., concurring).

42 Milton, *supra* note 7.

43 J. LOCKE, *supra* note 25; J. LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (London ed. 1879).

44 See generally L. LEVY, *supra* note 41, at 88-125.

of the colonies.⁴⁵ In fact, the leaders of the colonies muffled expression which offered even the slightest affront to the struggle against England.⁴⁶

It was with this knowledge and within this context that the framers of the first amendment undertook to reconcile these competing interests.⁴⁷ The express language of the first amendment stands as an admonition that they had struck the balance in favor of unfettered expression:⁴⁸ "Congress shall pass no law . . . abridging the freedom of speech or of the press."⁴⁹

Despite the mandate of the literal language of the first amendment,⁵⁰ an analysis of the leading cases decided by the Supreme Court demonstrates that the Court has consistently recognized that freedom of speech and press is not an unlimited, unqualified right, but that the interest in free speech must on occasion be subordinated to other values and considerations.⁵¹

The specific issue in this article is whether the State may constitutionally suppress free expression of the institutionalized resident or other person labeled

45 L. LEVY, *supra* note 41, at 180. Francis Hopkinson, a representative of the Continental Congress, conceived of the circumstances where the State would be justified in suppressing free expression:

[The liberty of the press is one of the most important privileges of government.] But when this privilege is manifestly abused, and the press becomes an engine for sowing the most dangerous dissensions, for spreading false alarms, and undermining the very foundations of government, ought not that government upon the plain principles of self-preservation to silence by its own authority, such a daring violator of its peace, and tear from its bosom the serpent that would sting it to death? *Id.*

46 Mr. Hopkinson concluded that the government would be justified in "silencing a press, whose weekly productions insult the feelings of the people, and are so openly inimical to the American cause." *Id.* at 180-81.

47 Z. CHAFEE, *supra* note 5, at 31:

The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion . . . Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom.

48 The first philosopher to read the First Amendment literally was Alexander Meiklejohn; the first Supreme Court Justice was Hugo Black. A. MEIKLEJOHN, *supra* note 8; Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 879 (1960):

Of course the decision to provide a constitutional safeguard for a particular right, such as . . . the right of free speech protection of the First [Amendment], involves a balancing of conflicting interests . . . I believe, however, that the Framers themselves did this balancing when they wrote the Constitution and the Bill of Rights.

49 U.S. CONST. amend. I.

50 The language of the first amendment, although it appears clear on its face, has been criticized as ambiguous. See *Dennis v. United States*, 341 U.S. 494, 523 (1951) (Frankfurter, J., concurring); Emerson, *supra* note 5; Chafee, *Book Review*, 62 HARV. L. REV. 891, 897-98 (1949). The absolute nature of the amendment's command would have been clearer had the amendment read: "Congress shall pass no law abridging speech" Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962). See Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1432-50 (1962). Note, *The Speech and Press Clause of the First Amendment as Ordinary Language*, 87 HARV. L. REV. 374, 382-89 (1973). It is similarly unclear whether the framers of the Constitution intended the first amendment to outlaw seditious libel. Compare Z. CHAFEE, *supra* note 5, at 18-22 with L. LEVY *supra* note 41.

51 E.g., *Konigsberg v. State Bar*, 366 U.S. 36, 49 (1961); *Barenblatt v. United States*, 360 U.S. 109, 126-27 (1959); *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953); *Dennis v. United States*, 341 U.S. 494, 503 (1951); *Breard v. Alexandria*, 341 U.S. 622, 642 n.33 (1951); *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 398 (1950); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942); *Gompers v. United States*, 233 U.S. 604, 610 (1914).

"mentally ill." In order to examine this legal question, several levels of constitutional analysis will be undertaken.

IV. Application of the First Amendment: A First Level Analysis

Under the theoretical framework of constitutional free expression, the first amendment protects speech as a "preferred liberty"⁵² but does not protect conduct.⁵³ In some cases, however, conduct expresses an idea: the action then becomes utterance and engenders a degree of first amendment protection.⁵⁴ The reverse is also true: certain well-defined and limited categories of speech, because of the natural and probable effect of the utterance, become synonymous with conduct.⁵⁵ The very utterance of the words leads almost immediately to retaliatory violence or direct injury to the listener's sensibilities. As with most actions these words do not form an essential part in the exposition of ideas,⁵⁶ and are consequently left unprotected by the first amendment.⁵⁷

Included within the narrowly limited class of words which theoretically receives no constitutional protection are "obscenities"⁵⁸ and "fighting words."⁵⁹ Therefore, the first level of constitutional free speech analysis must be an examination of whether the expression can be categorized as an "obscenity" or a "fighting word."⁶⁰

52 See generally *Kovacs v. Cooper*, 336 U.S. 77, 90-96 (1949) (Frankfurter, J., concurring); M. SHAPIRO, *FREEDOM OF SPEECH* 108-21 (1966); McKay, *The Preference for Freedom*, 34 N.Y.U.L. Rev. 1182 (1959).

53 *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940):

Thus, the [First] Amendment embraces two concepts — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

54 See, e.g., *Street v. New York*, 394 U.S. 576 (1969); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968).

55 Mr. Justice Holmes stated this opinion long ago in *Schenck v. United States*, 249 U.S. 47, 52 (1919):

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.

The principle is as ancient as the English common law itself. 4 W. BLACKSTONE, *COMMENTARIES* *150:

Besides actual breaches of the peace, any thing that tends to provoke or excite others to break it, is an offence of the same denomination. Therefore, *challenges to fight*, either by word or letter, or to be the bearer of such challenge, are punishable by fine and imprisonment, according to the circumstances of the offence.

56 See generally Z. CHAFEE, *supra* note 5, at 149-52; Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1, 21-22 (1964).

57 *Hess v. Indiana*, 414 U.S. 105, 107 (1973); *Miller v. California*, 413 U.S. 15, 20 (1973); *Cohen v. California*, 403 U.S. 15, 19-28 (1971); *Konigsberg v. State Bar*, 366 U.S. 36, 50 (1961); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). But note that the line between speech as "pure speech" and speech which is so akin to "action" that it is left unprotected by the first amendment is finely drawn. *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

58 *Miller v. California*, 413 U.S. 15, 23 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973); *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972); *United States v. Reidel*, 402 U.S. 351, 354 (1971); *Roth v. United States*, 354 U.S. 476, 485 (1957).

59 See notes 65-67 *infra* and accompanying text.

60 Libelous expression was commonly considered within the narrowly limited class of utterances which did not receive constitutional protection. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 268 n.6 (1964). However, in light of *New York Times v. Sullivan* and its progeny, it can hardly be said that "libelous" expression is granted no constitutional protection (unless one adopts the legal fiction that *New York Times v. Sullivan* merely altered the test of what expression will be considered libelous).

The guidelines for the factual determination of an "obscenity" have had a "tortured" history in the Supreme Court.⁶¹ The latest guidelines come from the companion cases of *Miller v. California*⁶² and *Paris Adult Theatre I v. Slaton*.⁶³ The test should by now be familiar: (1) "Whether the 'average person applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest"; (2) whether the work patently depicts sexual conduct; and (3) whether the work as a whole lacks serious social value.⁶⁴

The test for "fighting words," as enunciated in *Chaplinsky v. New Hampshire*,⁶⁵ is whether the words are likely to provoke an immediate violent reaction in an average listener. Subsequent cases indicate that the category of "fighting words" is particularly limited.⁶⁶ The words must be employed in a personally provocative fashion, clearly directed toward the person of the listener. They cannot be merely general, undirected abusive or opprobrious remarks.⁶⁷ Undifferentiated apprehension of a violent reaction will not place the expression within the category of "fighting words."

Often the expressions of the mentally handicapped cause considerable annoyance to passersby, friends, and family members. The speech of the mentally ill sometimes sounds bizarre,⁶⁸ profane,⁶⁹ or pretentious.⁷⁰ The linguistic patterns of the schizophrenic have been described as dissociative, autistic, impersonal, and remote.⁷¹ Such language may initially appear to be of the kind contemplated in *Paris Adult Theatre I* or *Chaplinsky*. However, an application of the principles suggested above illustrates that the annoyance or intolerance of the listener is, without more, an insufficient constitutional justification for the abridgement of a speaker's communication.⁷²

First, it cannot be plausibly maintained that the bizarre, neologistic use of words, even in a superficially profane manner, is legally obscene. In order to classify an expression as obscene, it must suggest an erotic image.⁷³ The dissocia-

61 See generally *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

62 413 U.S. 15 (1973).

63 413 U.S. 49 (1973).

64 *Miller v. California*, 413 U.S. 15, 24-25 (1973).

65 315 U.S. 568, 573 (1942). See *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940).

66 See *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973); *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Cohen v. California*, 403 U.S. 15 (1971); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970). See also Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 1 (1974); Note, "Offensive Speech" and the First Amendment, 53 B. U.L. REV. 834 (1973).

67 *Gooding v. Wilson*, 405 U.S. 518, 524-25 (1972).

68 J. RUESCH, THERAPEUTIC COMMUNICATION 371 (1961).

69 See, e.g., E. BLEULER, DEMENTIA PRAECOX 153 (1950).

70 *Id.* at 157.

71 See J. RUESCH, *supra* note 68, at 371; E. BLEULER, *supra* note 69, at 147, 157; J. RUESCH, DISTURBED COMMUNICATION 44 (1957).

72 The first amendment will not yield to the "sensibilities of passers-by who might be shocked," *Street v. New York*, 394 U.S. 576, 591 (1969), nor to the "public inconvenience, annoyance, or unrest," *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), nor the "squeamish" intolerances of the public, *Cohen v. California*, 403 U.S. 15, 25 (1971). See *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

73 *Cohen v. California*, 403 U.S. 15, 20 (1971).

tive use of words such as "penis-murderer"⁷⁴ is not intended to be profane,⁷⁵ nor is it normally heard as profane by the average listener. The language is more directly perceived as simply bizarre. Certainly it does not transmit an erotic message.

Second, the tense, impersonal or pretentious⁷⁶ tone of some schizophrenic language does not turn such speech into "fighting words." Unless a specific listener could reasonably regard the speaker's words as personally insulting, the *Chaplinsky* doctrine does not apply.⁷⁷ In most instances, the undifferentiated use of schizophrenic language is not specifically directed at the person of the listener. There is no real danger that the words will provoke immediate violence.

Under a first level constitutional analysis, most speech which may psychiatrically be classified as bizarre, pretentious or disoriented is not outside the protection of the first amendment.

V. Reconciliation of the Competing Interests: A Second Level Analysis

Under a variety of different formulae, the Supreme Court has asked whether in particular circumstances the State may justifiably restrict unfettered expression;⁷⁸ whether in such cases the State interest is in preventing a danger of a substantial magnitude;⁷⁹ and finally, whether the permissible restriction on free expression is only as stringent as necessary under the special circumstances of the controversy.⁸⁰ This necessarily involves a balancing of the competing interests on a case-by-case basis,⁸¹ and may subject the parties to the particular predilections of the different justices.⁸²

The generic term "balancing" describes the process by which the Court compares the individual and societal interests in free expression with the social interest sought by the governmental action restricting free expression. Although the Supreme Court has failed to develop a single comprehensive, coherent first amendment theory,⁸³ it has utilized several tests for the reconciliation of these

74 E. BLEULER, *supra* note 69, at 153.

75 *Id.*; Rutzick, *supra* note 66, at 2.

76 See J. RUESCH, *DISTURBED COMMUNICATION* 44 (1957).

77 Gooding v. Wilson, 405 U.S. 518, 524-25 (1972).

78 Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

79 See notes 91-95 *infra* and accompanying text.

80 See notes 119-35 *infra* and accompanying text.

81 The Supreme Court has expressly sanctioned the use of a balancing test on numerous occasions. See *United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, AFL-CIO, 413 U.S. 548, 564 (1973), *quoting* *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Brandenburg v. Hayes*, 408 U.S. 665, 716-17 n.6 (1972) (Douglas, J., dissenting); *Konigsberg v. State Bar*, 366 U.S. 36, 50-51 (1961); *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) and cases cited therein; *Uphaus v. Wyman*, 360 U.S. 72 (1959); *Barenblatt v. United States*, 360 U.S. 109, 126-27 (1959); *Watkins v. United States*, 354 U.S. 178, 198 (1957); *Niemotko v. Maryland*, 340 U.S. 268, 275-89 (1951) (Frankfurter, J., concurring); *Dennis v. United States*, 341 U.S. 494, 524-25 (1951) (Frankfurter, J., concurring); *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 409 (1950); *United Public Workers of America, CIO v. Mitchell*, 330 U.S. 75, 95-96 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940); *Schneider v. State*, 308 U.S. 147 (1939). See also *Note, Civil Disabilities and the First Amendment*, 78 YALE L.J. 842, n.4 (1969); M. SHAPIRO, *FREEDOM OF SPEECH* 76-107 (1966).

82 See Emerson, *supra* note 5, at 912-14; Frantz, *supra* note 50, at 1441-42.

83 See generally T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

competing interests.⁸⁴ These include: "bad tendency,"⁸⁵ "*ad hoc* balancing,"⁸⁶ "gravity of the evil,"⁸⁷ "clear and present danger,"⁸⁸ "incitement,"⁸⁹ and "com-

84 See generally Emerson, *supra* note 5, at 908-16. The different formulae used from time to time by the Supreme Court are set out in footnotes 85-90 *infra*. They are presented approximately in the order in which each grants the legislature a presumption of validity in its regulation of free expression: the "bad tendency" test grants the legislature maximum deference and "compelling state interest" places a heavy burden on the government in order to justify its regulation.

85 The bad tendency test was presented by Justice Sanford in *Gitlow v. New York*, 268 U.S. 652 (1925). Its rationale has since been repudiated. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). As presented in *Gitlow* the test afforded the legislature maximum deference in its regulation of free expression. Any utterance which had a tendency, or which the legislature could reasonably believe had a tendency, to lead to a substantial evil could be proscribed. The rationale for the test as stated by Justice Sanford was that "a single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration." 268 U.S. at 669.

86 It has been suggested that every test the Supreme Court has offered for the resolution of first amendment issues has involved some sort of reconciliation or balancing of the competing interests in the case. As Professor Freund put it, often the Court's business is the balancing of rights against rights, P. FREUND, *Constitutional Dilemmas*, in *ON LAW AND JUSTICE* 23, 35-36 (1968). What sets "*ad hoc*" balancing apart from other tests is that it involves an unstructured as opposed to a formal weighing of all the competing interests involved in a case. Cf. Brett, *Free Speech, Supreme-Court Style: A View from Overseas* 46 TEX. L. REV. 668, 673 (1968). While other tests accord a particular weight to the freedom of expression — e.g., the "bad tendency" allows the free speech interest a small weight and "compelling state interest" allows it a large weight — "*ad hoc* balancing" simply collects and compares all of the interests, with the value of each interest left undefined and unstructured. See Emerson, *supra* note 5, at 912-14.

It is normally assumed that "*ad hoc* balancing" had its first appearance in *Schneider v. State*, 308 U.S. 147, 161 (1939). See Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1425 (1962). Justice Frankfurter used the test to consistently defer to any reasonable legislative judgment:

It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech

Can we then say that the judgment Congress exercised was denied it by the Constitution?

Dennis v. United States, 341 U.S. 494, 550-51 (1951) (Frankfurter, J., concurring). See *Niemotko v. Maryland*, 340 U.S. 268, 275-76 (1951) (Frankfurter, J., concurring). On the other hand, Justice Black assumed the test granted maximum support for the value of freedom of expression. *Konigsberg v. State Bar*, 366 U.S. 36, 68, 70 (Black, J., dissenting):

[The balancing concept] was first accepted as a method for insuring the complete protection of First Amendment freedoms even against purely incidental or inadvertent consequences [and later it was misapplied to] governmental action that is aimed at speech and depends for its application upon the content of speech.

Earlier Justice Black had joined in one opinion, *Schneider v. State* 308 U.S. 147 (1939), and written another opinion, *Marsh v. Alabama*, 326 U.S. 501 (1946), both of which adopted a balancing approach.

Other commentators have similarly criticized "*ad hoc* balancing" because it is too capricious to be consistent rule of law. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 116-18, 171-18 (1970); Emerson, *supra* note 5, at 912-14; Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Tests*, 76 HARV. L. REV. 755 (1963). See also Meiklejohn, *The First Amendment as an Absolute*, 1961 S. CT. REV. 245; Meiklejohn, *The Balancing of Self-Preservation against Political Freedom*, 49 CAL. L. REV. 4 (1961); Meiklejohn, *The Barenblatt Opinion*, 27 U. CHI. L. REV. 329 (1960); Meiklejohn, *What Does the First Amendment Mean?* 20 U. CHI. L. REV. 461 (1953). For a review of the philosophy, cases and authority of "*ad hoc* balancing" through 1962, see Frantz, *supra* note 50, and Emerson, *supra* note 5, at 912 n.37. The most recent Supreme Court adherence to an "*ad hoc* balancing" process was in *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.* 412 U.S. 94, 102 (1973): "Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty." See also Note, *The Speech and Press Clause of the First Amendment as Ordinary Language*, 87 HARV. L. REV. 374, 375-82 (1973).

87 The "gravity of the evil" test is an interpretation of the "clear and present danger" formula presented in note 88 *infra*. It was originated by Judge Learned Hand and introduced by Chief Justice Vinson in *Dennis v. United States*, 341 U.S. 494, 510 (1951): "In each case

PELLING state interest."⁹⁰ All of these formulae utilize the balancing process inasmuch as each concerns the relative importance of the various interests and their

[courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

88 The "clear and present danger" formulation first introduced by Justice Holmes in *Schenck v. United States*, 249 U.S. 47 (1919) has a scope of such enormity that its doctrinal reaches need not be fully presented. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Scales v. United States*, 367 U.S. 203 (1961); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919). See also Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 S. Ct. Rev. 41; McKay, *The Preference for Freedom*, 34 N.Y.U.L. Rev. 1182, 1203-12 (1959); Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313 (1952). The best explanation of the doctrine of "clear and present danger" was presented in a concurrence by Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 372 (1927). The test is premised on the belief that free speech and assembly are rights which are fundamental but not in their nature absolute. Their exercise is subject to restriction in order to protect the state from serious injury. Thus, free expression can be impeded only where it:

would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent . . . There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.

274 U.S. at 373, 376.

The more recent cases adhering to the clear and present danger doctrine include *Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

89 The incitement test is somewhat akin to the distinction between the regulation of expression and the regulation of action. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION*, 404 (1970): the former is permitted and the latter is proscribed. See *Konigsberg v. State Bar*, 366 U.S. 36, 56, 64 (1961) (Black, J., dissenting); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 499 (1949). Speech can be impeded only where the communication is so "close, direct, effective, and instantaneous in its impact that it is a part of the action." T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION*, 404 (1970). See *Bond v. Floyd*, 385 U.S. 116, 134 (1966); *Cox v. Louisiana*, 379 U.S. 536, 544-55 (1965); *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963); *Kingsley Internat'l Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684 (1959); *Herndon v. Lowry*, 301 U.S. 242, 259-61 (1937). In the "incitement test," the government cannot proscribe mere advocacy, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), but can only regulate that activity which crosses the bounds of persuasion and actually promotes, prepares or steels a group into illegal action. *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973); *Cohen v. California*, 403 U.S. 15 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Noto v. United States*, 367 U.S. 290, 297-98 (1961); *Feiner v. New York*, 340 U.S. 315, 321 (1951); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

90 It is often said that when a governmental regulation directly or incidentally restricts the "preferred liberty" of freedom of expression the state must demonstrate a "compelling interest" in order to justify its action. Despite the fact that there seems to be some authority for this proposition, *DeGregory v. Attorney Gen. of New Hampshire*, 383 U.S. 825, 829 (1966), citing *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963); *N.A.A.C.P. v. Button*, 371 U.S. 415, 439 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 463 (1958), citing *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring), it is entirely incongruent with the applicable first amendment case law. The government has successfully regulated free expression in several areas, and this is especially so where the government regulation places only an incidental burden on the freedom of expression. See *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 397 (1950). For example: (1) The court has upheld regulations which incidentally burdened the freedom of the press despite the fact that there was no finding that the government had a "compelling interest." The press cannot knowingly damage private reputation without paying damages. *Gertz v. Welch*, 94 S. Ct. 2997 (1974); *Old Dominion Branch, Nat'l Ass'n of Letter Carriers v. Austin*, 94 S. Ct. 2770 (1974); *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Greenbelt Corp. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). A newspaper can be punished for contempt in appropriate circumstances. *Craig v. Harney*, 331 U.S. 367, 377-78 (1947). Journalists can be compelled to disclose their sources to investigating bodies. *Brandenburg v. Hayes*, 408 U.S. 665 (1972). The press is not exempt from the National Labor Relations Act, *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-93 (1946); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937), or the antitrust laws, *Associated Press v. United States*, 326 U.S. 1 (1945). Newspapers can be subject to

particular impact on the controversy. The only perceptible variance among these formulae is the degree to which each affords the governmental regulation a presumption of constitutionality. Each formula correspondingly attributes a unique weight, force, or value to freedom of expression.

Regardless of the applicable test, two factors are always probative in the disposition of a first amendment controversy. The first is the substantiality of the State interest. This includes the gravity of the evil which the State seeks to avoid and the probability of its occurrence. The second is the scope of the regulation itself, the extent to which the governmental regulation infringes the individual's right to free expression. This includes the manner of the regulation's application as well as the specific effect on free expression engendered by the state's action.

A. Substantiality of the State Interest

A governmental action suppressing speech must be supported by more than a merely "reasonable" interest in order to overcome the burden placed on the State by the first amendment.⁹¹ A government regulation is likely to receive priority over first amendment claims if the State offers a cogent justification for the regulation unrelated to the suppression of free expression.⁹² However, even

general taxation. *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). The press can be prohibited from printing employment advertisements which refer to sex in employment headings. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973). (2) The court has upheld regulation of the time, place or manner of utterance without requiring the state to demonstrate a "compelling interest." The individual can be required to procure a permit, which is issued without unfair discrimination, before parading on public streets. *Cox v. New Hampshire*, 312 U.S. 569 (1941). The individual can be punished for speaking through "any device . . . which emits . . . loud and raucous noises. . . ." *Kovacs v. Cooper*, 336 U.S. 77, 78, (1949). The individual can be forbidden to protest in a jail. *Adderley v. Florida*, 385 U.S. 39 (1966). The individual can be punished for making excessive noise near school buildings. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). All of these cases involve instances where the government placed a burden on the exercise of free expression. The Court consistently upheld the regulation without requiring the State to justify its action with a compelling interest.

91 That freedom of expression is a cherished value in the constitutional history of the Supreme Court is by now clear. See, e.g., *Thomas v. Collins*, 323 U.S. 516, 529 (1945); *Bridges v. California*, 314 U.S. 252, 262, 263 (1941); *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). Yet there is still some controversy about whether there is a shift from a general presumption of constitutionality to a specific presumption of unconstitutionality when the challenged government action impinges upon free expression. See generally C. BLACK, JR., *THE PEOPLE AND THE COURT* 217-21 (1960).

92 See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). Among the State interests which have, on occasion, been conceded priority over individual welfare claims are: (1) the maintenance of municipal tranquility and local law and order. E.g., *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970); *Adderley v. Florida*, 385 U.S. 39 (1966); *Feiner v. New York*, 340 U.S. 315 (1951); *Kovacs v. Cooper* 336 U.S. 77 (1949); *Cox v. New Hampshire*, 312 U.S. 569 (1941). (2) the public's need to possess information. E.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Cole v. Richardson*, 405 U.S. 676 (1972); *Law Students Civil Rights Research Council, Inc., v. Wadmond*, 401 U.S. 154 (1971); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959); *McGrain v. Daugherty*, 273 U.S. 135 (1927). (3) efficient administration of government functions. E.g., *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *United States v. O'Brien*, 391 U.S. 367 (1968); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). (4) upholding standards of decency and morality of the community. See cases cited *supra* note 58. *Accord*, *Kaplan v. California*, 413 U.S. 115 (1973); *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123 (1973); *United States v. Orito*, 413 U.S. 139 (1973); *Heller v. New York*, 413 U.S.

the most substantial State interest will yield in appropriate circumstances.⁹³ It is therefore not instructive to attempt to state the precise quality of the governmental interest needed by adopting such phrases as "compelling," "paramount," or "subordinating."⁹⁴ The Supreme Court uses these terms more to signal the outcome of the case than to provide an explanation of the criteria used in making the decision. Once the infringement on individual liberties is considered so extensive that the State will need a "compelling interest" in order to justify its action, the controversy is all but decided.⁹⁵

State action restricting an institutionalized resident's freedom of expression might potentially be justified by any of three governmental interests. First, there is the interest in protecting society from any physical danger which may result from the utterance or association. This interest will weigh heavily in the first amendment balance and will usually prevail over the varied individual interests in free expression. However, the government can only rarely offer this interest as a justification for restricting communication in a mental hospital. It has been established that mental patients are not more dangerous than the population at large.⁹⁶ Such a governmental interest can be offered only on an individualized basis and must be based upon evidence which establishes that the communication will create a clear and imminent probability of harm to other persons.

Second, there is the State's interest in the effective administration of the

483 (1973), *Roaden v. Kentucky*, 413 U.S. 496, (1973); *Alexander v. Virginia*, 413 U.S. 836 (1973); *United States v. Reidel*, 402 U.S. 351 (1971); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971). (5) national security. See cases cited note 93 *infra*. (6) protection of citizenry against damages to reputation, and invasion of privacy. See cases cited at note 90 *supra*.

93 Chief Justice Vinson in *Dennis v. United States*, 341 U.S. 494, 509 (1951) called the state interest in national security "the ultimate value of any society." The foundation cases in this area are *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919). All of these cases were decided in 1919 and all affirmed criminal judgments under the Espionage Act in the face of first amendment claims. These cases demonstrate Vinson's point that internal security is a powerful state interest. Yet the fact that even the highest of state interests will yield given the proper circumstances has been illustrated by later cases. Thus, post-World War I decisions do not defer so easily the state interest in national security. *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Yates v. United States*, 354 U.S. 298 (1957); *DeJonge v. Oregon*, 299 U.S. 353 (1937); *Herndon v. Lowry*, 301 U.S. 242 (1937); *Fiske v. Kansas*, 274 U.S. 380 (1927). But see *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Dennis v. United States*, 341 U.S. 494 (1951) (It is possible to explain these "peacetime" cases by noting that they were both decided during the communist scare period of the 1950's).

94 *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

95 In cases where the Court verbalizes the "compelling state interest" test, the government invariably loses. See, e.g., *DeGregory v. Attorney Gen. of New Hampshire*, 383 U.S. 825, 829 (1966), citing *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963); *N.A.A.C.P. v. Button*, 371 U.S. 415, 439 (1963); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 463 (1958), citing *Sweezy v. New Hampshire*, 354 U.S. 234, 254 (1957) (Frankfurter, J., concurring). The precedent has been set in equal protection decisions. Where the Court requires the State to justify its classification by demonstrating a "compelling interest" the government will almost invariably lose the case. In the field of equal protection, the State has rarely demonstrated a "compelling interest." But see *Roe v. Wade*, 410 U.S. 113 (1973) (abortions after viability may be constitutionally regulated by the State despite the mother's "fundamental" interest in privacy); *Korematsu v. United States*, 323 U.S. 214 (1944) (persons of Japanese ancestry excluded from a West Coast military area despite their "fundamental" right to be free from discrimination on the basis of national origin).

96 Roth, Dayley, & Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes*, 13 SANTA CLARA LAWYER 400 (1973); Shaffer, *Introduction—Symposium: Mental Illness, the Law and Civil Liberties*, 13 SANTA CLARA LAWYER 369, 371 (1973).

institution itself. Because the constitutional basis for the incarceration of a mental patient lies in a concern for his own well-being,⁹⁷ there is little constitutional warrant for restricting his rights to suit mere administrative convenience. It is possible that indirect time, place, and manner restraints on communication might be upheld under the shibboleth of institutional convenience,⁹⁸ but normally the governmental interest in administrative convenience will be insufficient to authorize a restriction of the institutionalized resident's free expression.

Finally, there is the State's interest in promoting the well-being of the resident himself. In order to understand the quality of this interest, it is necessary to evaluate the therapeutic justification both for the allowance and the restriction of free communication.

1. The Therapeutic Justification for Encouraging Free Expression

The concept of "normalization"⁹⁹ dictates that a resident should not be restricted in the opportunity for free expression and association. To expeditiously return the liberty the State has taken from the resident, the institution must keep intact all of the normal behaviors vital to a functioning citizen. This is necessary to prevent the resident from becoming "institutionalized"—overly dependent on the hospital "way of life."¹⁰⁰ The resident should not grow unaccustomed to exercising communicative skills because these skills are vital to the individual's successful readjustment to the community. Normal communication with others is a recognized therapeutic need of the institutionalized resident.¹⁰¹ Furthermore, communication

keeps the resident in contact with the outside world, helps to hold in check some of the morbidity and hopelessness produced by . . . [institutional life] . . . , stimulates his more natural and human impulses and otherwise may make contributions to better mental health.¹⁰²

97 AMERICAN BAR FOUNDATION, *supra* note 3, at 36, 72-76.

98 See *Saxbe v. Washington Post Co.*, 94 S. Ct. 2811 (1974) (upholding prison regulations which proscribed personal interviews between newsmen and individually designated prisoners, because of the limited scope of the prison policy); *Pell v. Procunier*, 94 S. Ct. 2800 (1974).

99 Defined as a set of principles derived from the belief that mental health institutions should primarily serve as the agents for a resident's rehabilitation to society, that is, each institution should allow the individual to live as normally as possible. The principle of normalization has been given constitutional sanction. *Wyatt v. Stickney*, 344 F. Supp. 387 (M. D. Ala. 1972); *Wyatt v. Stickney*, 344 F. Supp. 373 (M. D. Ala. 1972), and statutory sanction in CAL. WELFARE AND INSTITUTIONS CODE §§ 5001, 5115, 5200 (West 1972).

100 Even though the hospital may have "normalized" the resident's precommitment deviant behavior, the individual cannot leave the hospital because he or she has grown accustomed to and dependent upon institutional life. See E. GOFFMAN, *supra* note 3, at 3-73 ("mass movement" and other "totalistic" features of institutions foster dependence and impair ability to make small independent decisions). See also H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 499, 503 (3d ed. 1959) (becoming unaccustomed to exercising communicative skills in prison is a nonnormalized behavior which can have adverse consequences when the prisoner is released).

101 T. LANGER & S. MICHAEL, *LIFE, STRESS AND MENTAL HEALTH* 128 (1963) ("[s]ocial isolation is a symptom of mental disturbance as well as a causal factor"); See AMERICAN CORRECTIONAL ASS'N, *MANUAL OF STANDARDS* 400 (1959); *Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 45 (1961).

102 H. BARNES & N. TEETERS, *supra* note 100, at 492.

At the same time, the individual perceives countervailing ideas¹⁰³ and becomes better informed on such matters as governmental issues (thereby enabling an intelligent use of the franchise¹⁰⁴) and patients' rights¹⁰⁵ which are helpful in the resident's habilitation.¹⁰⁶

2. The Therapeutic Justification for Restricting Free Expression

It has been argued that restrictions on communication are necessary for a resident's well-being¹⁰⁷ and therefore justified under the state's *parens patriae* power.¹⁰⁸ Arguably, such restrictions could be constitutionally justified as serving the rational state interest of providing care for the mentally disabled. The hospital might rationally justify restrictions on first amendment freedoms through its medical prerogatives, the so-called medical model.¹⁰⁹ The most prevalent use of the medical model to restrict communication rights is "milieu" therapy. In this model the hospital manipulates the resident's environment to modify deviant behavior or personality traits.¹¹⁰ This therapeutic notion can be used to isolate the resident from a "toxic" environment by restricting communication between the resident and this environment.¹¹¹ Similarly, the resident's judgment might be so impaired as to necessitate restrictions on communication. The paradigmatic example is the manic depressive reactive in a hypomanic stage. Such a person is irrepressible and often unconventional in speech and manner. He is narcissistic, childishly proud, glib of tongue, genial of hand, extravagant with money, full of pranks, imprudent, and openly hostile and aggressive.¹¹²

During this hypomanic phase the individual may write numerous letters. "No sooner, perhaps, has he posted a letter than he decides that the mail is too slow for his urgent business so he dispatches a telegram to his correspondent."¹¹³

103 Note, *The Right of Expression in Prison*, 40 S. CAL. L. REV. 407, 419 (1967).

104 In several states, institutionalization does not automatically divest the resident of the right to vote. See, e.g., N. M. STAT. ANN. § 34-2-15A (3) (Supp. 1973); MO. ANN. STAT. § 202.847.1 (3) (Vernon 1972); UTAH CODE ANN. § 64-7-48(1) (c) (1968); N. C. GEN. STAT. § 122-55 (1963).

105 Rollins, *Suggested Revisions of North Carolina's Laws on Involuntary Hospitalization for Mental Illness*, N. C. MED. J. 1019, 1020 (Dec. 1972): "Patients in state mental hospitals are deprived of rights not by law, but because they are unaware of their rights."

106 See note 101 *supra* and accompanying text.

107 AMERICAN BAR FOUNDATION, *supra* note 3, at 155. Although modern medicolegal opinion rejects the notion that residents are incapable of exercising their rights "this is not to say that in modern times mental patients should retain all their personal rights. Effective treatment in many instances necessitates withdrawal of certain patient rights". *Id.*

108 One of the legal theories for civil commitment is the *parens patriae* power of the state. AMERICAN BAR FOUNDATION, *supra* note 3, at 36. *Parens patriae* is a right of sovereignty and imposes a duty on the sovereign to care for persons who, because afflicted with some disability, are unable to act in their own best interests. See generally Developments, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207-22 (1974).

109 *Hearings on Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2d Sess., at 413 (1970):

The medical model essentially is that behavioral variances are analogous to disease in the physical body. The implication is a distinct discontinuity in the continuum of behavioral differences which can be objectively discerned, measured and labeled pathological.

110 Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616, 621-22 (1972).

111 *Id.*

112 L. KOLO, *MODERN CLINICAL PSYCHIATRY* 369-70 (1973).

113 *Id.* at 370.

Should the hospital, acting in the resident's best interest, censor his mail or telephone communications in order to prevent the resident from: (1) impairing his integrity and credibility in the community? (2) writing away for a subscription to a magazine he cannot afford? (3) writing threatening letters to a family member or government official? (4) receiving contraband in the mail?

"The hypomanic is often erotic and, if a man, may indulge in sexual excess, while a previously chaste and modest young woman may become sexually promiscuous," often making indecent and obscene proposals.¹¹⁴ The manic depressive in a hypomanic stage is also overreactive to the extent of violent motor excitement. In the hospital, the resident may tear his or her clothing and destroy objects.¹¹⁵ Acting in the individual's best interests, as well as in the interest of other residents and of outside visitors, should the hospital allow the resident to: (1) interact with the opposite sex? (2) interact with other residents generally? (3) interact with visitors? (4) make visits outside of the hospital? (5) interact with legal counsel?

Given the additional psychiatric fact that on recovery from a manic stage the individual perceives his or her past behavior as unpleasant and is sorry for such behavior,¹¹⁶ should the law uphold hospital restrictions on free expression and association in these instances?¹¹⁷

The first amendment may allow restrictions on communication when necessary to insure the mental and physical well-being of the resident. The hospital thus may prevent the communications illustrated in the questions posed above. In such cases, the State has identified a substantial interest in restricting first amendment liberties. However, to sustain such restrictions the hospital administrator must isolate a specific resident, such as a hypomanic, and give a rational and verifiable reason for restricting first amendment rights in a particular case. Moreover, since the mechanism used to restrict free expression in mental hospitals may often be categorized as a prior restraint, certain procedural requirements must be satisfied before the restriction will be upheld.¹¹⁸

B. *Extent of the Restriction*

Although the State interest is a crucial factor in a "second level" constitutional free speech analysis, it is of no greater importance than the legal machinery used to implement that goal. It is the implementation of the goals which effectuates the precise restriction on first amendment liberties.

This legal machinery can be categorized under three overlapping headings: indirect, direct, and prior restraints. Categorization under one of these headings

114 *Id.* at 370.

115 *Id.* at 371.

116 *Id.* at 372.

117 See generally *id.* at 376-77. Case study: m.m. was in and out of a state mental hospital for years. During manic phases she signed leases on strange apartments, bought furniture, went into debt, pawned her rings, wrote checks without finances, purchased fifty-seven hats, instituted divorce proceedings, smoked excessively and swore loudly (contrary to usual habits), and made advances to the physician. In the last year m.m. has lost her manic symptomatology and has been making an excellent home and community adjustment as a housewife and mother. If possible should the hospital have suppressed her actions while she was in a manic phase?

118 See notes 139-71 *infra* and accompanying text.

possesses no independent significance unless the categories expose regulations which differ in their relative severity. Indirect restraints are generally less restrictive than direct restraints because the former merely condition the exercise of free expression while the latter affirmatively punish it. Prior restraints are usually considered maximally restrictive of free expression because such regulations seek to prevent the expression from ever occurring.

These categories are discussed below in the inverse order of their restrictive effect on first amendment liberties. They do not provide a talismanic test in first amendment controversies but emphasize the need for a pragmatic assessment of the effect of legal machinery on first amendment freedoms.

1. Indirect Restraints

The regulation may only *incidentally* burden freedom of expression. This "indirect, conditional [or] partial"¹¹⁹ infringement of individual liberties does not prohibit speech but does place certain requirements on the speaker which must be met as a condition of speaking.¹²⁰ The regulation does not affect the

119 It was at one time presumed that where the infringement on first amendment liberties was "indirect, conditional, or partial," that an *ad hoc* balancing test would be applied, and where the abridgement was "direct," a classificatory approach such as "clear and present danger" would be applied. *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 396-97, 399 (1950). Although this may no longer be completely accurate, see Note, *Civil Disabilities and the First Amendment*, 78 YALE L.J. 842, 844-46 nn.12-16 (1969), the cases do demonstrate that where the legal machinery places a small incidental burden on the freedom of expression (as opposed to the usually more substantial burden presented by a direct infringement) the right of free speech will yield—barring other circumstances such as unreasonableness, *Hague v. CIO*, 307 U.S. 496, 515-16 (1939), or arbitrariness, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), of the regulation—if the government interest is substantial. *Konigsberg v. State Bar*, 366 U.S. 36, 50-55 (1961); *Am. Communications Ass'n v. Douds*, 339 U.S. 382, 397-99 (1950).

120 Examples of conditions which may be attached as an incidental burden on exercising first amendment rights are: (1) the requirement of filing "non-communist" affidavits with the National Labor Relations Board as a condition subsequent to exercising first amendment rights. *Am. Communications Ass'n v. Douds*, 339 U.S. 382 (1950); (2) the requirement of presenting a balanced media coverage as a condition of broadcasting. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); (3) the requirement of procuring a license as a condition precedent to parading, *Cox v. New Hampshire*, 312 U.S. 569 (1941), or holding a public meeting, *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Davis v. Massachusetts*, 167 U.S. 43 (1897). It must be emphasized that in these cases the license was merely a matter of form. It was used simply to provide public authorities with notice that public expression was about to occur. The permit was not within the discretion of the licensing authority except to the extent that the official may perform the ministerial task of allocating scarce public resources. See Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482 (1970). To this extent, the license can be treated as an incidental burden on free expression regardless of the fact that the cases cited may also be classified as a prior restraint. In instances where the licensor is endowed with discretion, the case takes on the more familiar form of the "classic" prior restraint and therefore is scrutinized under a stricter form of judicial review. See notes 139-71 *infra*; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Hague v. CIO*, 307 U.S. 496 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

In other instances the line between "indirect" condition and prior restraint is still less finely drawn. Consider the example of a state tax on a newspaper. The regulation is an example of an "indirect" government action which places a condition upon the exercise of first amendment rights. The newspaper need only pay the tax—therefore bearing its indirect burden—and then it may go to press. There is no restraint on the content of the publication. Yet, the tax may also be viewed as a condition *precedent* to publication. It may be called a "previous restraint," because the regulation impedes the communication process prior to its occurrence. See *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936).

content of speech¹²¹ but rather effectuates some other governmental objective by means incidentally affecting speech. Because no direct prohibition of speech occurs, it is normally the least restrictive means through which the government may implement its goal.¹²²

Legal machinery placing merely an incidental burden on freedom of expression, when found in combination with a substantial State interest, normally presents a compelling case for validation of the State enactment.¹²³ The courts have realized that the first amendment does not guarantee that everyone shall speak at will, but that everything worth saying shall be said.¹²⁴ The government may restrict an applicant to a limited number of public resources. For example, freedom of expression does not include a contest—at the expense of the unwilling listener—to determine who can speak loudest;¹²⁵ it does not hold out to all persons with opinions an unlimited opportunity to address gatherings on the street;¹²⁶ and it does not imply a license to speak at any time in any forum, public or private.¹²⁷ The government may impede free expression by regulating the “time, place, duration or manner” of speech because the legal machinery imposes a *de minimis* burden on the individual’s first amendment liberties.¹²⁸ Such impositions of free expression may be justified by numerous valid governmental interests.¹²⁹

121 The Supreme Court has issued broad disclaimers that it is in the business of censoring the content of speech. *Chicago Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972): “[A]bove 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.” *Accord*, *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Cohen v. California*, 403 U.S. 15, 24 (1971).

122 Just because a regulation is considered “indirect,” is not to say that it is always less restrictive. There are certain “incidental” burdens which can have a profound chilling effect on first amendment rights. When this is so, these cases must be treated similarly to cases which present a “direct” infringement on first amendment rights. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 601-02 (1967); *United States v. Robel*, 389 U.S. 258, 265 (1967); *Elfrandt v. Russell*, 384 U.S. 11, 16-19 (1966).

123 *See* note 119 *supra*.

124 A. MEIKLEJOHN, *POLITICAL FREEDOM* 26 (1960). *See also* Meiklejohn, *The First Amendment Is an Absolute*, 1961 S. Ct. Rev. 245, 261-62.

125 *See* *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Saia v. New York*, 334 U.S. 558 (1948). *See generally* *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Cohen v. California*, 403 U.S. 15, 21 (1971); *Rowan v. Post Office Dep’t*, 397 U.S. 728 (1970); *Black, He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953).

126 *See* *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Kunz v. New York*, 340 U.S. 290 (1951); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949); *Hague v. CIO*, 307 U.S. 496 (1939); *Davis v. Massachusetts*, 167 U.S. 43 (1897).

127 *See* *Cameron v. Johnson*, 390 U.S. 611, 615-16 (1968); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 536, 559 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951); *Schneider v. State*, 308 U.S. 147, 160-61 (1939). *See also* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 S. Ct. Rev. 1.

128 *Cox v. Louisiana*, 379 U.S. 536, 558 (1965). *Accord*, *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152-53 (1969); *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941); *Cantwell v. Connecticut*, 310 U.S. 296, 306-07 (1940); *Hague v. CIO*, 307 U.S. 496, 515-16 (1939). *See* *Saxbe v. Washington Post Co.*, 94 S. Ct. 2811 (1974); *Pell v. Procunier*, 94 S. Ct. 2800 (1974); *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

129 Among the state interests conceded priority over the limited individual interest in free expression are the safety, comfort, and convenience of the local citizenry. *E.g.*, *Cox v. New Hampshire*, 312 U.S. 569 (1941). *But see* *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951) (Frankfurter, J., concurring); *Schneider v. State*, 308 U.S. 147 (1939) (state interest in keeping public streets neat and clean is insufficient to justify an ordinance which prohibits persons from handing out literature to people willing to receive it); *Lovell v. Griffin*, 303 U.S.

Even in the area of indirect restraints, however, the government may not place an unreasonable burden on the exercise of free speech: "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."¹³⁰ The government cannot prohibit a quiet and peaceful protest within the confines of a library¹³¹ or a public meeting in the streets and parks;¹³² but it can proscribe public demonstrations near courthouses¹³³ or prisons.¹³⁴ The difference is that libraries, streets, and parks are locations which "have immemorably been held in trust for the use of the public" and have been locations for the interchange of ideas,¹³⁵ while courthouses and prisons exist solely for the administration of criminal justice.

2. Direct Restraints

The second manner in which a governmental regulation can raise first amendment questions is by punishing the speaker because of the mere fact of the utterance. This "direct" infringement of freedom of expression is usually more suppressive of individual liberties because it controls the content of speech. The classic example of a "direct" abridgement of free expression is the government's attempt to promote internal security by imposing a subsequent punishment on those who communicate subversive utterances.¹³⁶ As the cases suggest,¹³⁷ where

444 (1938) (state interest in keeping the streets clean was insufficient to outweigh even the minimal effect on free speech engendered by requiring the issuance of a permit as a condition precedent to the distribution of literature). *See generally* R. O'NEIL, *FREE SPEECH* 48-64 (1966).

130 *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). *See* *Old Dominion Branch, Nat'l Ass'n of Letter Carriers v. Austin*, AFL-CIO, 94 S. Ct. 2770 (1974).

131 *Brown v. Louisiana*, 383 U.S. 131 (1966).

132 *Hague v. CIO*, 307 U.S. 496 (1939).

133 *Cameron v. Johnson*, 390 U.S. 611 (1968).

134 *Adderley v. Florida*, 385 U.S. 39 (1966).

135 *Hague v. CIO*, 307 U.S. 496, 515-16 (1939).

136 *See, e.g.*, *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957); *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

137 Examples of other state regulations which "directly" infringe upon the freedom of expression are the regulation of libelous statements, *Gertz v. Welch*, 94 S. Ct. 2997 (1974); *Old Dominion Branch, Nat'l Ass'n of Letter Carriers v. Austin*, 94 S. Ct. 2770 (1974); *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Associated Press v. Walker*, 388 U.S. 130 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964); and the regulation of inciteful speech, *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973); *Hess v. Indiana*, 414 U.S. 105 (1973); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Feiner v. New York*, 340 U.S. 315 (1951); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). In both instances the regulation may be classified as "direct" because the explicit purpose of the statute is to punish the speaker because of the message carried by his words.

Often, it is difficult to differentiate between a direct and an indirect restraint. For example, in *Miami Herald Publishing Co. v. Tornillo*, 94 S. Ct. 2831 (1974), the Supreme Court reviewed Florida's "right of reply" statute which grants a political candidate a right to space to answer criticism and attacks on his record by a newspaper. It might be said that "the statute . . . has not prevented the *Miami Herald* from saying anything it wished." *Id.* at 2839. Thus, the statute might have been construed as an indirect restraint because it has neither prevented nor punished expression. In this regard, the statute is akin to the mere burdens placed as a condition subsequent to communication as in *Pittsburgh Press Co. v. Comm'n on Human Relations*, 413 U.S. 376 (1973) (burden on press to change its format and run "sexless" advertising) or *Branzburg v. Hayes*, 408 U.S. 665 (1972) (burden on reporter who must disclose his sources) or *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (chilling effect of the potentiality of paying a substantial amount in damages in a libel action). However, in

the government imposes a direct suppression of free speech the Supreme Court tends to apply a classificatory test such as "clear and present danger," as opposed to the use of the ad hoc balancing approach for "indirect" abridgements of free speech.¹³⁸

3. Prior Restraints

The final means by which governmental authorities can raise a first amendment controversy is by devising a legal machinery which imposes a prior restraint on free expression. In a prior restraint, the "line where legitimate suppression begins is fixed chronologically at the time of the publication."¹³⁹ The government restricts free communication in advance of the actual expression and thus prevents the communication before its occurrence. This is usually accomplished through the use of an injunction,¹⁴⁰ a permit system,¹⁴¹ or a licensing tax.¹⁴² By contrast, a "direct" restraint imposes a *subsequent* punishment because of the content of the expression.

To the extent a prior restraint prevents the very exercise of free expression it is maximally suppressive of first amendment liberties.¹⁴³ Exceptions to this rule, however, are apparent. The threat of an onerous punishment imposed subsequent to a communication will as effectively preclude free expression as a court order enjoining future utterance. The simple requirement of procuring a license, the issuance of which is automatic, will not suppress first amendment liberties as greatly as a severe penalty imposed subsequent to the communication.¹⁴⁴ Strict reliance on the form of the restraint—ignoring its precise effect upon communica-

Tornillo the Court rejected this argument and invalidated the statute. The Court viewed the statute as a direct restraint on the right of free press: "the Florida statute exacts a penalty on the basis of the content of a newspaper." 94 S. Ct. at 2839.

138 See Note, *Civil Disabilities and the First Amendment*, 78 YALE L.J. 842, 845 (1969).

139 Z. CHAFEE, *supra* note 5, at 9.

140 *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Carroll v. Princess Anne*, 393 U.S. 175 (1968); *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968); *Walker v. City of Birmingham*, 388 U.S. 307 (1967); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Near v. Minnesota*, 283 U.S. 697 (1931); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973). Ex parte seizures of obscene materials are closely related to injunctions: both are effectuated under judicial authority. See *Heller v. New York*, 413 U.S. 483 (1973); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrant*, 367 U.S. 717 (1961). Cf. *Roaden v. Kentucky*, 413 U.S. 496 (1973); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971); *Lee Art Theater, Inc. v. Virginia*, 392 U.S. 636 (1968).

141 *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961); *Kingsley Internat'l Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684 (1959); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Largent v. Texas*, 318 U.S. 418 (1943); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Hague v. CIO*, 307 U.S. 496 (1939); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938).

142 *Follett v. McCormick*, 321 U.S. 573 (1944); *Jones v. Opelika*, 319 U.S. 103 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

143 Emerson, *The Doctrine of Prior Restraint*, 20 LAW. & CONTEMP. PROB. 648, 656-57 (1955).

144 See generally Note, *Previous Restraints upon Freedom of Speech*, 31 COLUM. L. REV. 1148 (1931).

tion—is a substitution of dogma for reason.¹⁴⁵ Nonetheless, courts have treated the two differently.¹⁴⁶ When legal machinery imposes a prior restraint, the scope of constitutionally permissible punishment subsequent to the utterance becomes immaterial. Even if the communication incurs a subsequent penalty, it may not be proscribed in advance by a prior restraint¹⁴⁷ save in exceptional cases.¹⁴⁸

The Supreme Court's hostility toward prior restraints appears in its holdings that such restraints are presumptively unconstitutional,¹⁴⁹ by its determinations placing the burden of proof upon the government,¹⁵⁰ and in its use of outcome determinative analyses.¹⁵¹ The rationale for such a judicial attitude goes

145 See Note, *Prior Restraint—A Test of Invalidity in Free Speech Cases?* 49 COLUM. L. REV. 1001 (1949).

146 The cases which utilize the doctrine of prior restraint, when they attempt to justify the doctrine at all, do so by a reference to historical abhorrence of prior restraints. *Carroll v. Princess Anne*, 393 U.S. 175, 181 n.5 (1968); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504 (1952); *Niemotko v. Maryland*, 340 U.S. 268, 276 (1951) (Frankfurter, J., concurring); *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946); *Schneider v. State*, 308 U.S. 147 (1946); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938); *Grosjean v. American Press Co.*, 297 U.S. 233, 245-49 (1936); *Near v. Minnesota*, 283 U.S. 697 (1931). The particular legal machinery of prior restraint has its roots firmly planted within the jurisprudential system under which we now operate. It can be immediately traced to 1643 where an order of Parliament specified:

[T]hat no Book etc. shall from henceforth be printed or put to sale, unless the same be first approved of and licensed by such person or persons as both or either of the said Houses shall appoint for the licensing of the same.

J. MILTON, *AREOPAGITICA* 1 (Freedman ed. 1972). John Milton offered the dispositive critique of the order of Parliament in his *Areopagitica* but the struggle in England directed against censorship was not waged by him alone. *Near v. Minnesota*, 283 U.S. 697, 713 (1931). The culmination of the struggle is illustrated by Blackstone's exposition of the state of English Law. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." 4 W. BLACKSTONE COMMENTARIES § 151-52. In the United States, Blackstone has been criticized not so much because of his special emphasis on protections against previous restraints but because that protection should not be deemed to exhaust the liberties granted by the right of free expression. *Near v. Minnesota*, 283 U.S. 697, 714-15 (1931). The state of American law is this. The chief, but not exclusive, purpose of the first amendment guarantee is to prevent previous restraints upon the exercise of free expression. Freedom from restraints is not absolutely guaranteed, but by the same token, protection against prior restraints does not exhaust the rights guaranteed by the first amendment.

T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1970):

A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism, the dynamics of the system drive toward excess, as the history of all censorship shows.

See Emerson, *supra* note 143, at 656-60. See generally Milton, *supra* note 7.

147 See *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971); *Kunz v. New York*, 340 U.S. 290, 294-95 (1951); *Near v. Minnesota*, 283 U.S. 697, 715 (1931).

148 *Near v. Minnesota*, 283 U.S. 697, 716 (1931), implied that prior restraints would be upheld only in "exceptional cases." Mr. Chief Justice Hughes gave as examples certain obstructions of war-making powers, obscenity and incitement to violence. He gave no reason why he chose these to illustrate the principle, and for this reason the exceptional case notion is unconstructive. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1970); Emerson, *supra* note 143, at 660-61; *Saia v. New York*, 334 U.S. 558, 563 (1948) and cases cited therein.

149 *Heller v. New York*, 413 U.S. 483, 491 (1973); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Freedman v. Maryland*, 380 U.S. 51, 57 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-72 (1963), and cases cited; *Joyner v. Whiting*, 477 F.2d 456, 462 (4th Cir. 1973). See *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973).

150 *Heller v. New York*, 413 U.S. 483, 491 (1973); *Healy v. James*, 408 U.S. 169 (1972); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Joyner v. Whiting*, 477 F.2d 456, 462 (4th Cir. 1973).

151 Of the numerous cases cited in notes 140-42 *supra*, which reflect the three major forms

to the foundations of Western jurisprudence, which is built upon a blending of coequal powers. The pervasive fear engendered by a system of censorship stems from a distrust of the unilateral authority of the censor.¹⁵² The writings of the great political philosophers such as Milton¹⁵³ and Mill,¹⁵⁴ and more recently, Chafee¹⁵⁵ and Emerson,¹⁵⁶ bear witness to the anxieties provoked by the spectre of the censor.

The internal workings of the "prior restraint" doctrine reflect this distrust of the censor. Inferior administrative officials derive their power to act from the precise will of an elected body; grants of power must be based upon narrow criteria strictly related to a valid legislative purpose and upon definite and explicit legislative standards which leave the public official with only ministerial authority.¹⁵⁷

of prior restraints, in only the following cases did the government regulation prevail. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957) (focusing on the effect of the government regulation, the court held that it was tantamount to a subsequent punishment and therefore need not be analyzed under the higher standard of a prior restraint); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961) (the capacity for evil was so great that it may be controlled by a prior restraint); *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (defendants convicted for failure to move to dissolve an injunction or apply for a permit). The same regulation was later invalidated in *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (In both *Poulos* and *Cox*, permit systems were upheld only because the licensors were without discretionary authority); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971) (The only way this prior restraint could be upheld was for the Supreme Court to strictly construe the statute so as to assume strict procedural safeguards in congruence with the *Freedman* principle, see notes 159-64 *infra* and accompanying text); *Heller v. New York*, 413 U.S. 483 (1973) (The court did not consider that this was a prior restraint at all because there was no final restraint upon freedom of expression). See *Pittsburgh Press Co. v. Comm'n on Human Relations*, 413 U.S. 376 (1973) (The Court upheld an ordinance proscribing sex designated employment columns in newspapers. Because the ordinance was "based on a continuing course of repetitive conduct" the Court did not consider it to be a prior restraint); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178 (1948) (Because of the exigencies of preventing the use of the mails for the perpetration of fraud, the Court upheld a prior restraint).

152 *Lovell v. Griffin*, 303 U.S. 444, 451 (1938). See *Freedman v. Maryland*, 380 U.S. 51, 57 (1965).

153 J. MILTON, *AREOPAGITICA* 23 (Everyman ed. 1927):

The State shall be my governors, but not my critics; they may be mistaken in the choice of a licenser, as easily as this licenser may be mistaken in an author. . . . For though a licenser should happen to be judicious more than ordinary, which will be a great jeopardy of the next succession, yet his very office and his commission enjoins him to leap nothing but what is vulgarly received already.

154 J. S. MILL, *A Letter from the Morning Chronicle of January 28, 1823*, in PREFACE TO *LIBERTY* 41 (B. Wishy ed. 1959):

For if you determine beforehand that opinions shall be promulgated only on one side of the question, in whom will rest the power of determining which side shall be chosen? The answer is, on those who are most enlightened and best qualified to judge. But there are no determinable and universal marks by which wisdom is to be known. To whom will you give the power of determining what men are the most enlightened?

155 Z. CHAFEE, *supra* note 5, at 29: "The censor is the most dangerous of all the enemies of liberty of the press, and ought not to exist in this country unless made necessary by extraordinary perils." *Id.* at 520.

156 Emerson, *supra* note 143, at 658: No adequate study seems to have been made of the psychology of licensors, censors, security officials, and their kind, but common experience is sufficient to show that their attitudes, drives, emotions, and impulses all tend to carry them to excesses. This is particularly true in the realm of obscenity, but it occurs in all areas where officials are driven by fear or other emotion to suppress free communication.

157 See *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Superior Films, Inc. v. Dep't of Ed.*, 346 U.S. 587 (1954); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); *Kunz v. New York*, 340 U.S. 290, 294 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Tucker v. Texas*, 326 U.S. 517 (1946); *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1946); *Largent v. Texas*, 318 U.S. 418 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Hague v. CIO*, 307 U.S. 496, 516 (1939).

The courts will never allow the censor to supervise the tastes of the reading or listening public.¹⁵⁸

Judicial distrust of the censor lingers even after he has been legally stripped of discretionary authority. The Supreme Court insists upon a rapid and inexpensive review by an independent judicial body subsequent to an adverse ruling by the licensor.¹⁵⁹ This recognition that a right of procedural due process is implicit within the first amendment imposes three requirements. First, the State has both the burden of initiating a separate and independent review of its adverse decisions and the burden of proving that the expression is unprotected by the first amendment.¹⁶⁰ This necessitates an adversary procedure—with the usual elements of procedural due process—before a judicial, not an administrative, tribunal.¹⁶¹ It requires the court to make a fresh determination of the merits of the controversy unencumbered by the legal judgments of the licensing authorities. In many cases this may require that the judicial body hear the case *de novo*, and there is some argument that it may require a jury trial.¹⁶² Second, the prior restraint cannot be administered so as to place an anticipatory chill upon first amendment rights by giving finality to the censor's decision. Therefore, any final restraint on first amendment liberties prior to judicial review must be limited to the preservation of the status quo and to the "shortest period compatible with sound judicial resolution."¹⁶³ Third, a prompt final judicial resolution must be assured.¹⁶⁴

By its recognition of a due process component within the first amendment, the Supreme Court may appear unduly insensitive to the needs of the State to implement its varied legitimate interests. Governmental authorities might forego an attempt to prevent a substantial evil rather than resort to a judicial injunctive procedure each time it denies a license. Nevertheless, procedural justice in a court of law is central to the history of American freedom. Procedures lacking

158 *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 156 (1946).

159 *Carroll v. Princess Anne*, 393 U.S. 175 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965). See *Heller v. New York*, 413 U.S. 483, 489 (1973); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Blount v. Rizzi*, 400 U.S. 410, 417 (1971); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367 (1971); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 159 (1969) (Harlan, J., concurring); *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 n.22 (1968); *Lee Art Theater v. Virginia*, 392 U.S. 636 (1968); *A Quantity of Books v. Kansas*, 378 U.S. 205, 208-13 (1964); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Marcus v. Search Warrant*, 367 U.S. 717, 729-38 (1964); *Collin v. Chicago Park Dist.*, 460 F.2d 746 (7th Cir. 1972). See also Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518 (1970); Note, *The Right to an Adversary Hearing on the Issue of Obscenity Prior to the Seizure of Furtively Distributed Films*, 69 MICH. L. REV. 913 (1971). Many writers have suggested instances where an adversary hearing would be mandatory prior to a final restraint by a censor. Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 532-51 (1970); Note, *Seizure of Allegedly Obscene Films*, 15 S.D.L. REV. 399 (1970). Note, *The Right to an Adversary Hearing on the Issue of Obscenity Prior to the Seizure of Furtively Distributed Films*, 69 MICH. L. REV. 913, 922-23 (1971). However, the force of these arguments has been considerably weakened by the recent case of *Heller v. New York*, 413 U.S. 483 (1973), where the notion of a right to an adversary hearing prior to a final restraint by the censor was repudiated.

160 *E.g.*, *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

161 In Monaghan's article on first amendment due process he has an interesting discussion on the merits of a judicial procedure over an administrative hearing. *Supra* note 159, at 520.

162 *Id.* at 525-32.

163 *E.g.*, *Freedman v. Maryland*, 380 U.S. 51, 58, 59 (1965).

164 *Id.* at 59.

the necessary sensitivity to freedom of expression will chill first amendment rights just as effectively as oppressive substantive rules. For example, when officials seize allegedly obscene movie films pursuant to an *ex parte* order¹⁶⁵ or when movie censors require time-consuming procedures in order to procure a license or obtain judicial review,¹⁶⁶ the exhibitor will suffer financial loss and the public will be precluded from viewing the film until these procedures have run their course. The licensor of public speeches may similarly impede first amendment rights by requiring lengthy procedures in license procurement and judicial review.¹⁶⁷ As Mr. Justice Harlan aptly observed: "timing is the essence of politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly if it is to be considered at all."¹⁶⁸ In every case, timing is the essence of effective expression. At every moment that a person is precluded from speaking solely by the order of an inferior administrative official, constitutional rights are compromised.¹⁶⁹

C. *Application to the Institutionalized Resident*

It is important to differentiate among the various forms of restrictions on communication which exist in mental institutions. First, there are the indirect restraints which suggest less severe first amendment problems. In this regard, reasonable limitations on the hours, location, and form of visitation by friends or relatives will likely be upheld, provided rational interests are promoted by the regulation. Similarly, the requirement of a pass, the issuance of which is automatic, for visitation by the resident outside the institution will not present significant first amendment problems.

The institution will occasionally punish the resident because of the mere fact of an utterance. This punishment will take the form of isolation, restriction to closed wards, or deprivation of certain privileges.¹⁷⁰ This is clearly a direct restraint and will be upheld only if the restriction on communication is necessary to prevent a clear and imminent danger to the resident or another person.

Finally, there is the prior restraint utilized by the hospital psychiatrist in disallowing mail, telephone, and visitation rights.¹⁷¹ Here the psychiatrist acts as a censor; on his unilateral authority, an individual's expressions are suppressed in advance of their actual occurrence. The psychiatrist must be made to comply with judicial principles governing prior restraints. Legislative standards precisely

165 See *Roaden v. Kentucky*, 413 U.S. 496 (1973); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

166 See *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965).

167 See *Collin v. Chicago Park Dist.*, 460 F.2d 746 (7th Cir. 1972).

168 *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring).

169 See *New York Times Co. v. United States*, 403 U.S. 713, 715 (1971) (Black, J., concurring).

170 See generally E. Goffman, *supra* note 3, at 60-70; Ferleger, *supra* note 14, at 458-63.

171 Cf. *Alberti v. Cruise*, 383 F.2d 268 (4th Cir. 1967) (In an action for malicious prosecution and defamation of character the lower court enjoined the plaintiff from speaking or writing to defendant or members of his family. "We think this . . . order is clearly a prior restraint upon Mrs. Alberti's rights of freedom of speech guaranteed by the First Amendment." *Id.* at 272.)

delineating permissible restriction of free expression must be promulgated to set limits on psychiatric power. Moreover, in the rare case where the psychiatrist must restrict the free expression of an individual patient, there should be a separate and independent judicial review of the decision.

VI. The Overbreadth Doctrine and Its Application to the Institutionalized Resident: A Third Level Analysis

A restriction on free communication which furthers an important interest of the mental institution, such as public safety or rehabilitation, will nevertheless be invalidated if its sweep is unnecessarily broad.¹⁷² Although the interest may be legitimate, and indeed substantial,¹⁷³ the means must be calculated so as to effectuate only the precise governmental purpose.¹⁷⁴ A state hospital—working from concrete standards of public safety or rehabilitation—may control the communicative behavior of an individual resident in a specific instance. For example, a hospital administrator may point to a hypomanic and give a rational reason for restricting first amendment rights in that particular case. However, a regulation which proscribes unprotected communication is facially invalid if, by reason of its scope, it might also curtail privileged utterance.¹⁷⁵ If from a regulation

172 For the analogy to prisoner's rights, see *Procunier v. Martinez*, 94 S. Ct. 1800 (1974). The censorship of prison mail is justified only if (1) the regulation furthers an important interest unrelated to the suppression of expression, i.e., security, order, or rehabilitation, and (2) the limits on first amendment freedoms are no greater than necessary or essential to the protection of the particular governmental interest involved.

173 *United States v. Robel*, 389 U.S. 258 (1967) (The government interest in reducing the threat of sabotage in defense plants was not insubstantial. Yet the means chosen to implement that government purpose was held unconstitutional as overbroad). But see *Colten v. Kentucky*, 407 U.S. 104, 111 (1972) (The Court suggested that where the individual's interest in expression is minuscule compared to the particular public interest in preventing such expression or conduct at that time and place, an overbreadth argument will fail.)

174 *Schneider v. Smith*, 390 U.S. 17, 24 (1968); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963). See *Parker v. Levy*, 94 S. Ct. 2547 (1974); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 601 (1973); *Gooding v. Wilson*, 405 U.S. 518 (1972); *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Shelton v. Tucker*, 364 U.S. 479, 488-89 (1960), and cases cited therein; *Tally v. California*, 362 U.S. 60 (1960); *Lovell v. Griffin*, 303 U.S. 444 (1938). See also Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1145-51 (1972); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *Civil Disabilities and the First Amendment*, 78 YALE L.J. 842 (1969); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969); Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254, 267-93 (1964).

175 *Jus tertii* standing concepts usually apply in the area of constitutional law. A person charged with the violation of a state regulation cannot assert the constitutional rights of another. So long as the state regulation is constitutionally applied to the person charged, he cannot be heard to say that the regulation, as applied to others, is unconstitutional. *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973), and cases cited therein. However, in the area of the first amendment, the courts have allowed the individual charged to assert the unconstitutionality of the regulation as applied to situations not before the court. E.g., *Gooding v. Wilson*, 405 U.S. 518, 521 (1972), and cases cited therein; *N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963), and cases cited therein. The policy behind this judicial decision is inextricably bound to the preferred status of the first amendment and the fear that overbroad restrictions will pose a "chilling effect" on privileged, as well as unprotected communication. *Gooding v. Wilson*, 405 U.S. 518, 521 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611, 619-20 (1971) (White, J., dissenting); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852-58 (1970). Recently, the Court has moved slightly from this position in the first amendment area. Instead of requiring strict "precision of legislation," *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963), it now only requires that the government enactment refrain from "substantial" overbreadth. *Parker v. Levy*, 94 S. Ct. 2547 (1974):

justifiable in a single case the administrator formulates a uniform policy of first amendment restriction,¹⁷⁶ the regulation runs afoul of the Constitution. Such a general restrictive policy represents a lowest common denominator theory of mental hospital administration.¹⁷⁷ Under this theory, the hospital restricts freedoms to the extent necessary for the well-being of its lowest functioning resident. These restrictions form a general hospital policy applicable to all residents even if they can exercise and benefit from greater freedoms. For example, if one resident is harmed by delusional information sent in a letter by the resident's paranoiac mother, the hospital not only reads and censors all future letters sent to him (by his mother or anyone else), but also reads and censors every letter sent to every resident as a general hospital policy.

When the government restricts communication it must do so within narrow, objective, and definite standards, limiting its scope to those individuals whom the policy must necessarily reach in order to achieve its purposes. A hospital policy promulgated from a lowest common denominator framework does not strictly correspond with the interests the State seeks to promote by its regulation. Such a policy may be necessary to promote the rehabilitation of some residents, but the restrictions also apply to others for whom they serve no habilitative purpose. Moreover, a reasonable alternative exists to the lowest common denominator policy. Any restriction necessary because of a clear and imminent danger to the health of the resident can be justified in writing by the chief medical officer of the hospital unit on the individual's hospital record.¹⁷⁸ Mere entry into the hospital should not dilute first amendment rights.

VII. Conclusion

In examining the right of the incarcerated mentally ill to communicate, judicial attention has thus far focused on the statutory aspects of the right.¹⁷⁹ The

Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the "remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . ."

Id. at 2563.

176 See Muller, *Involuntary Hospitalization*, 9 COMPREHENSIVE PSYCHIATRY 187 (1968) (Indignant protests arise when a former mental patient commits a crime. The result is a restrictive custody policy even though it is not strictly necessary for the welfare of the public).

177 Defined as a minimum trait or characteristic shared by all members of a group. Placed in the context of mental hospital administration, rules are geared to lowest level of communicative skill which is common to all residents. Therefore, if one person is hypomanic and as a result cannot have free expression and association, the hospital allows no one to exercise their rights of expression and association.

178 This alternative is in some ways similar to the Draft Act. A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL. § 21, Public Health Publication No. 51 (rev. ed. 1952):

Right to communications and visitation . . . (a) Subject to the general rules and regulations of the hospital and except to the extent that the head of the hospital determines that it is necessary for the medical welfare of the patient to impose these restrictions, every patient shall be entitled (1) to communicate by sealed mail or otherwise with persons, including official agencies, inside or outside the hospital

179 Courts have focused on the statutory rights to free communication or habeas corpus and not the first amendment right of free expression. See *Stowers v. Wolodsko*, 386 Mich. 119, 191 N.W.2d 355 (1971); *Phagen v. Miller*, 65 Misc. 2d 163, 317 N.Y.S.2d 128 (Sup. Ct. 1970) (The Court had the opportunity to review a New York statute which limited a patient

basis for many of these enactments is that communication is necessary to expose cases of wrongful hospitalization. The statutory guarantee of correspondence and visitation is thus often limited to named public officials or attorneys.¹⁸⁰ Simultaneously, where courts have vindicated the right to communicate, they have limited their inquiry to the federal or state constitutional right of habeas corpus.¹⁸¹ This statutory and constitutional treatment of the resident's right to communicate is unnecessarily limited in scope. It protects the resident's right to communicate with his attorney or with officers of the state but does not protect against more pervasive restrictions such as limitations of expression and association with friends and relatives, as well as between residents of the opposite sex. A less restricted reading of the first amendment would insure meaningful communication on a broader front; it has been interpreted in other areas with an adaptability and a sensitivity which should be extended to the problems encountered in mental institutions.

upon admission to communicating only once with any person within the state. The Court saw no violation of the First Amendment in light of the statutory allowance of unfettered correspondence with public officials and the New York Mental Health Information Service); *Stowers v. Ardmore Acres Hospital*, 19 Mich. App. 115, 172 N.W.2d 497 (1969); *Hoff v. State*, 279 N.Y. 490, 18 N.E.2d 671 (1939); *People v. Worthing*, 167 Misc. 702, 4 N.Y.S.2d 630 (1938); *In re Weightman's Estate*, 126 Pa. Super. 221, 190 A. 552 (1937); *Hanson v. Biddle*, 84 Kan. 877, 115 P. 639 (1911). Note, *The Rights of the Mentally Ill During Incarceration: The Developing Law*, 25 U. FLA. L. REV. 494, 507-12 (1973); Comment, *The Committed Mentally Ill and Their Right to Communicate*, 7 WAKE FOREST L. REV. 297 (1971); Note, *Compulsory Commitment: The Rights of the Incarcerated Mentally Ill*, 1969 DUKE L.J. 677, 702-06.

180 AMERICAN BAR FOUNDATION, *supra* note 3, at 156.

181 *Stowers v. Wolodzko*, 386 Mich. 119, 191 N.W.2d 355, 363-64 (1971); *Hoff v. State*, 279 N.Y. 490, 18 N.E.2d 671, 672 (1939); *People v. Worthing*, 167 Misc. 702, 4 N.Y.S.2d 630 (1938); *In re Weightman's Estate*, 126 Pa. Super. 221, 190 A. 552, 555 (1937).