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Fear, Risk and the First Amendment: Unraveling the Chilling Effect

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FEAR, RISK AND THE FIRST AMENDMENT: UNRAVELING THE "CHILLING EFFECT"†

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I. INTRODUCTION

It has been twenty-six years since the Supreme Court introduced the word "chill" in a first amendment case,[1] and nearly sixteen years since the phrase "chilling effect" made its debut.[2] In that time, the concept of the chilling effect has grown from an emotive argument into a major[3] substantive component of first amendment adjudication. Its use accounts for some very significant advances in free speech theory, and, in fact, the chilling effect doctrine underlies the resolution of many cases in which it is neither expressed nor clearly implied.[4]

The chilling effect concept has been recognized most frequently and articulated most clearly in decisions chiefly concerned with the procedural aspects of free speech adjudication.[5] The possibility that the existence of an unconstitutional state statute might inhibit the exercise of first amendment freedoms was the primary justification for those decisions establishing a more receptive approach to affirmative federal court litigation contesting the validity of such legislation.[6] Similarly, the potential deterrent effect of a vague, or more commonly, an overbroad statute, was seen as reason enough to bend traditional rules of standing—a litigant would be allowed to attack such a statute, even though his own conduct could validly be proscribed by a legislative enactment more narrowly and clearly drafted.[7] The current Su-

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[1] "Such unwarranted inhibition . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

[2] While, of course, all legitimate organizations are the beneficiaries of these protections, they are all the more essential here, where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and "chilling" effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial.
Gibson v. Florida Legis. Investigation Comm., 372 U.S. 539, 556-57 (1963). *See also* Freedman v. Maryland, 380 U.S. 51, 60-61 (1965); Dombrowski v. Pfister, 380 U.S. 479, 487, 494 (1965).

[3] Even by 1967, Mr. Justice Harlan noted that the chilling effect doctrine had become "ubiquitous." Zwickler v. Koota, 389 U.S. 241, 256 n.2 (1967) (Harlan, J., concurring).

[4] *See* note 42 *infra*.

[5] For a discussion and analysis of these cases, see generally Note, The Chilling Effect in Constitutional Law, 69 Colum. L. Rev. 808 (1969); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

[6] The leading case is, of course, Dombrowski v. Pfister, 380 U.S. 479 (1965). *See, e.g.*, Zwickler v. Koota, 389 U.S. 241 (1967). For a general discussion of the Court's work in this area, see generally Maraist, Federal Injunctive Relief Against State Court Proceedings: The Significance of *Dombrowski*, 48 Tex. L. Rev. 535 (1970); Note, *supra* note 5, 69 Colum. L. Rev. 808.

[7] Again, Dombrowski v. Pfister, 380 U.S. 479 (1965), is the seminal case, although traces

preme Court, however, has closed many of the doors to comprehensive and aggressive federal adjudication of first amendment claims previously opened by the above-mentioned procedural mechanisms.[8] And, in so doing, the Court has lessened the importance of the chilling effect as the key to the federal courthouse in free speech cases. Consequently, the procedural aspects of this doctrine, even had they not been adequately dealt with elsewhere,[9] would now provide little reason for extended commentary.

On the other hand, the importance of the substantive use of the chilling effect doctrine remains undiminished by recent events. If anything, its significance has grown as the procedural consequences of "chilling" have been minimized. It is true that the first amendment cases[10] that now appear

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can be found as early as Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940). *See, e.g.,* Gooding v. Wilson, 405 U.S. 518, 520-21 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971); United States v. Robel, 389 U.S. 258, 265-66 (1967); NAACP v. Button, 371 U.S. 415, 432-33 (1963). For commentary dealing with the background, development and impact of the overbreadth doctrine, see generally Torke, The Future of First Amendment Overbreadth, 27 Vand. L. Rev. 289 (1974); Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423 (1974); Note, *supra* note 5, 83 Harv. L. Rev. 844; Note, Overbreadth Review and the Burger Court, 49 N.Y.U.L. Rev. 532 (1974); Comment, The First Amendment Overbreadth Doctrine: A Comparison of Dellinger and Baranski, 65 J. Crim. L. 192 (1974); 45 U. Colo. L. Rev. 361 (1974).

[8] The rejection of the *Dombrowski* principle is attributable to a line of cases commencing with Younger v. Harris, 401 U.S. 37 (1971) (federal court must abstain from enjoining state prosecution under vague or overbroad statute). *See* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Hicks v. Miranda, 422 U.S. 332 (1975); Kugler v. Helfant, 421 U.S. 117 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Perez v. Ledesma, 401 U.S. 82 (1971); Samuels v. Mackell, 401 U.S. 66 (1971). But the *Dombrowski* principle has not completely vanished from the scene. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (thrice-prosecuted Jehovah's Witness entitled to injunction prohibiting enforcement of state statute requiring display of motto "Live Free or Die" on license plate); Steffel v. Thompson, 415 U.S. 452 (1974) (failure to demonstrate "extraordinary circumstances" does not preclude declaratory relief against threatened but non-pending state prosecution for distribution of handbills in violation of trespass statute). *See generally* Bartels, Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that "Interfere" with State Civil Proceedings, 29 Stan. L. Rev. 27 (1976); Fiss, *Dombrowski,* 86 Yale L.J. 1103 (1977); Laycock, Federal Interference with State Prosecutions: The Need for Prospective Relief, 1977 Sup. Ct. Rev. 193; Maraist, Federal Intervention in State Criminal Proceedings: *Dombrowski, Younger* and Beyond, 50 Tex. L. Rev. 1324 (1972); Sedler, *Dombrowski* in the Wake of *Younger:* The View From Without and Within, 1972 Wis. L. Rev. 1; Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1274-1330 (1977); Note, *Younger* Grows Older: Equitable Abstention in Civil Proceedings, 50 N.Y.U.L. Rev. 870 (1975).

Although the vagueness and overbreadth doctrines retain more life than *Dombrowski,* they too are rapidly weakening. *See* Ward v. Illinois, 431 U.S. 767, 773 (1977) ("The statute is not vague as applied to Ward's conduct"); Bates v. State Bar of Ariz., 433 U.S. 350, 380 (1977) (reluctance to apply overbreadth analysis in area of commercial speech); Young v. American Mini Theatres, Inc., 427 U.S. 50, 58-59 (1976) ("For even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents"); Broadrick v. Oklahoma, 413 U.S. 601, 611-15 (1973) (where conduct and not just speech is involved, the overbreadth must be both real and substantial); Laird v. Tatum, 408 U.S. 1, 11 (1972). *See generally* Note, *Young v. American Mini Theatres, Inc.:* Creating Levels of Protected Speech, 4 Hastings Const. L.Q. 321, 327-37 (1977). *See also* Ohralik v. Ohio State Bar Ass'n, 98 S. Ct. 1912, 1922 n.20 (1978).

[9] *See* L. Tribe, American Constitutional Law 710-24 (1978); Note, *supra* note 5, 69 Colum. L. Rev. 808. *See also* the authorities cited at notes 7-8 *supra.*

[10] Chilling effect reasoning has some application to constitutional law outside the first amendment. *See* Note, *supra* note 5, 69 Colum. L. Rev. at 832-40. In addition, the chilling effect

before the courts generally differ in subject matter from the "subversive" cases of the 1950's and early '60's in which chilling effect reasoning was first utilized.[11] Nevertheless, the doctrine has not lost its vitality; it still figures prominently in the resolution of myriad cases across the spectrum of free speech problems. Of greater significance, however, is the fact that the chilling effect concept lies at the core of the Court's so-called "categorization" approach, the definitional balancing technique used to formulate categorical rules differentiating between speech protected by the first amendment and speech subject to governmental restriction and regulation.[12] A close look at the Court's treatment of defamation, obscenity and incitement reveals the critical role that the chilling effect doctrine has played in determining where the lines of privilege marking the boundaries of those categories are to be drawn, and in explaining why the lines must be drawn at those particular points.[13]

This broad effect is by no means surprising, since the chilling effect doctrine is but the logical combination of two simple yet fundamental propositions. First, it must be recognized that all litigation, and indeed the entire legal process, is surrounded by uncertainty. The interplay of human witnesses, jurors, judges and lawyers coupled with the imprecision of "people-made" rules guarantees that there will be little in the realm of litigation of which we can be sure; thus, the ability to predict accurately the outcome of any adversary confrontation is by no means a process in which we can maintain a high degree of confidence.[14] Given this overriding uncertainty, errors of different kinds can occur. In the criminal context, one of the more obvious errors is the wrongful conviction of the innocent; the converse

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doctrine has been employed in areas where no constitutional interests are implicated. Labor law provides the best example. *Id.* at 808 n.2. *See, e.g.*, Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 275 (1965). While the analysis proposed and developed in this article may be successfully applied in a variety of contexts, the focus here is restricted to problems peculiar to the first amendment. All further references to something being "chilled" are directed towards activity arguably protected by the freedoms of speech, press and association.

[11] *See, e.g.*, Gibson v. Florida Legis. Investigation Comm., 372 U.S. 539, 556-57 (1963); Shelton v. Tucker, 364 U.S. 479, 486 (1960); Barenblatt v. United States, 360 U.S. 109, 137-38 (1959) (Black, J., dissenting); Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Sweezy v. New Hampshire, 354 U.S. 234, 246-50 (1957); Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring). *See also* NAACP v. Button, 371 U.S. 415, 433-34 (1963); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama, 357 U.S. 449, 462-63 (1958).

[12] For a brief yet informative discussion of the Court's categorization technique, see generally L. Tribe, *supra* note 9, at 602-08. In addition, see Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482 (1975).

[13] *See* notes 90-204 and accompanying text *infra*.

[14] In this respect, I believe it clear that the origin of the chilling effect doctrine must be attributed to Jerome Frank. His "fact-skepticism," which draws attention to the causes and effects of error and uncertainty in the litigation process, provides the doctrinal predicate for all that is to follow. *See* J. Frank, Courts on Trial (1949); J. Frank, Law and the Modern Mind (1930); Frank, "Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism, 26 N.Y.U.L. Rev. 545 (1951). *See also* Cahn, Fact-Skepticism and Fundamental Law, 33 N.Y.U.L. Rev. 1 (1958).

error is, of course, the wrongful acquittal of the guilty. Similarly, in civil litigation, there can be an erroneous judgment in favor of an undeserving plaintiff, or an erroneous judgment against a plaintiff with a meritorious claim.[15]

Recognition of this potential for error is, however, only the first step. As anyone who has survived an elementary course in statistics or decision theory will recall, it is also necessary to determine which type of error is the more serious or harmful.[16] It is the need for this determination, placed in the context of the first amendment, that leads to the second fundamental proposition underlying the chilling effect doctrine—that an erroneous limitation of speech has, by hypothesis, more social disutility than an erroneous overextension of freedom of speech. The wrongful limitation is, *a priori,* the more serious error. This principle of comparative harm may be expressed by saying that the first amendment represents a "transcendent value"[17] or by defining free speech as the most preferred of the preferred freedoms;[18] at any rate, there emerges in our society a recognition of the preeminence of the first amendment and freedom of speech. But this is more than the basis for a Fourth of July oration; it represents an ordering of values mandated by the existence of the first amendment within a legal system characterized by error and uncertainty.[19]

Simply stated then, the chilling effect doctrine recognizes the fact that the legal system is imperfect and mandates the formulation of legal rules that reflect our preference for errors made in favor of free speech. If these two basic notions are kept in mind, the chilling effect may be seen not as the non-conceptual generalization which it has been called,[20] but rather as a specific substantive doctrine lying at the very heart of the first amendment. After first proposing a definition, this article will attempt to unravel the chilling effect concept by isolating its two major components—the recognition of uncertainty and the principle of comparative harm. The article will then discuss the critical role that the chilling effect doctrine has played in the formulation of the rules of privilege defining the categories of defamation, obscenity and incitement. Further, it will be demonstrated that full appreciation of the chilling effect concept calls for a reevaluation of the first amendment doctrine of prior restraint. Finally, this article will argue that, while it is true that there are behavioral assumptions that provide the basis

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[15] *See In re* Winship, 397 U.S. 358, 370-71 (1970) (Harlan, J., concurring).

[16] The statistician, by convention, calls the more serious error the Type I error, and the less serious the Type II error. In the legal system, the selection and institution of various rules and procedures often reflect a societal evaluation of the comparative frequency and harm of the different possible errors. *See* Kaplan, Decision Theory and the Factfinding Process, 20 Stan. L. Rev. 1065 (1968); Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371 (1970). *See also* notes 72-90 and accompanying text *infra.*

[17] Speiser v. Randall, 357 U.S. 513, 526 (1958).

[18] *See* Cahn, The Firstness of the First Amendment, 65 Yale L.J. 464 (1956); McKay, The Preference for Freedom, 34 N.Y.U.L. Rev. 1182 (1959).

[19] *See* notes 46-73 and accompanying text *infra.*

[20] Note, *supra* note 5, 69 Colum. L. Rev. at 808.

for chilling effect analysis, the lack of any ability to quantify or test these assumptions does not diminish the significance of the chilling effect as a substantive doctrine. The doctrine flows from the relationship between our recognition of the inevitability of error and our preference for a particular type of error; and it is the existence of this relationship, rather than the scientific accuracy of the predictions of human behavior, which justifies the formulation of substantive rules in this area.

II. The Components of the Chilling Effect

A. *The Chilling Effect Defined*

Hoping that the quick-witted reader will have patience with a somewhat ponderous writer, I propose to start with the simplest ideas in analyzing just what we call a "chilling effect." There is a tendency for the term to be so loosely employed that meticulous dissection and clarification are justified.

The very essence of a chilling effect is an act of deterrence.[21] While one would normally say that *people* are deterred, it seems proper to speak of an *activity* as being chilled. The two concepts go hand in hand, of course, in that an activity is chilled if people are deterred from participating in that activity. Although an individual's decision not to engage in certain behavior may be influenced by a wide range of stimuli, in law the acknowledged basis of deterrence is the fear of punishment—be it by fine, imprisonment, imposition of civil liability, or deprivation of governmental benefit.[22] Thus, it is apparent that an individual may be deterred or an activity chilled by the threatened operation of virtually any penal statute or by the potential application of any civil sanction. Indeed, these regulating rules are designed to have this precise effect. The penalty for homicide is expected to deter people from murdering, thus ideally "chilling" that violent and harmful activity.[23] And, although deterrence is not a universally recognized goal of the law of torts, it is still to be hoped that the imposition of civil liability for damages resulting from the negligent handling of an automobile will deter people from driving carelessly, thus chilling such socially harmful activity. This broad and desirable conception of chilling, however, entails none of the

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[21] Freedman v. Maryland, 380 U.S. 51, 59 (1965); Gibson v. Florida Legis. Investigation Comm., 372 U.S. 539, 556-57 (1963).

[22] The ill-fated right-privilege distinction reflected a general failure to recognize the potential deterrent effect caused by the penalty of withdrawal or denial of governmental benefits. Losing one's job on account of political beliefs is no less a punishment than being fined for holding those beliefs, and the threat of loss of employment is no less effective a deterrent than the threat of a monetary fine. It was predictable that the very same cases that marked the erosion of the right-privilege distinction would also be among the first to emphasize the notion of deterrence. *See* Keyishian v. Board of Regents, 385 U.S. 589, 597-604 (1967); Konigsberg v. State Bar of Calif., 353 U.S. 252, 262, 273 (1957); Slochower v. Board of Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952). For a general discussion, see VanAlstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968); Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

[23] *See generally* W. LaFave & A. Scott, Handbook on Criminal Law 23 (1972).

pejorative connotations of the "chilling effect" concept as it is used in first amendment analysis.[24]

In fact, this comprehensive view of the chilling effect may be applicable where speech, broadly defined, is the regulated activity, but where there exists no constitutional barrier preventing such regulation. Thus, it may be that the fear of punishment generated by federal and state obscenity laws chills the distribution of hard-core pornography. However, since hard-core pornography, as defined in *Miller v. California,*[25] is not deemed to be constitutionally protected,[26] any chilling effect of this nature is permissible, and indeed, the intended result of the regulatory measures involved. Similarly, the existence of a civil damage remedy for injury caused by the malicious publication of defamatory falsehood is expected to deter individuals from publishing such defamatory material. Again, these utterances are unprotected by the first amendment,[27] and thus the possible imposition of civil liability creates another example of what I would term a *benign* chilling effect—an effect caused by the intentional regulation of speech or other activity properly subject to governmental control. Used in this sense, the chilling effect on speech is but a subset of the inhibitory effect created by any regulatory enactment and creates no independent constitutional difficulties.

What we are looking for then is not this *benign* deterrence, but rather some sort of *invidious* chilling of constitutionally protected activity. This can occur not only when activity shielded by the first amendment is implicated, but also when any behavior safeguarded by the Constitution is unduly discouraged. Consider, for example, the fifth amendment privilege against self-incrimination. The evil of permitting the prosecution to comment upon a

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[24] *See* note 10 *supra.*

[25] 413 U.S. 15 (1973).

[26] *See id.;* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Roth v. United States, 354 U.S. 476 (1957).

Throughout this article I assume the validity of the so-called "two-level" theory by which obscenity is deemed unprotected by the first amendment because it is not speech. *See* Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1. I have previously discussed my views on this approach to obscenity. Schauer, Reflections on "Contemporary Community Standards": The Perpetuation of an Irrelevant Concept in the Law of Obscenity, 56 N.C. L. Rev. 1 (1978); Schauer, The Return of Variable Obscenity?, 28 Hastings L.J. 1275 (1977). To inject that controversy into this article would unnecessarily clutter the analysis here offered.

More generally, while I refrain from entering the debate surrounding the question whether categorizing or balancing is the proper judicial method of resolving first amendment questions, *see* Ely, *supra* note 12, there is implicit in this article a preference for the definitional rather than the ad hoc approach. Although much of the analysis proposed in this article, particularly the discussion of the principle of comparative harm, *see* notes 72-90 and accompanying text *infra*, could be successfully applied as a guide to ad hoc balancing, the problems presented by the chilling effect can best be resolved by balancing at the rule-making level. Ad hoc balancing is based necessarily upon the assumption that an ideal balance on the facts of a particular case is possible; however, the inevitability of uncertainty denies this possibility. *See* notes 46-73 and accompanying text *infra*. A categorization or definitional approach is better suited to ensuring the formulation of rules of consistent application that adequately recognize and compensate for both the comparative frequency and severity of the errors that are bound to arise in our legal system.

[27] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-42 (1974).

defendant's failure to take the stand is that such comment is likely to deter the defendant from exercising his right to remain silent.[28] This governmental interference with an activity protected by the Constitution is therefore prohibited.[29] However, the chilling effect is peculiarly a first amendment doctrine,[30] and a comparison of the privilege against self-incrimination with the right of free speech may be instructive in demonstrating just why this is so.

It is possible to view certain activity as receiving constitutional protection as a result of a societal consensus that such activity is positively advantageous and ought to be encouraged; on the other hand, certain behavior may receive constitutional immunity from governmental control only because of the dangers inherent in state intervention. The privilege against self-incrimination can possibly be seen as falling within this latter category. It is not self-incrimination *per se* which is "bad," but rather self-incrimination resulting from the compulsion of the state which is to be feared.[31] If, despite the fifth and fourteenth amendments, all criminal defendants freely took the witness stand, it is not clear that society would be the loser. In any event, we certainly do not try to prevent a defendant from testifying; we only attempt to ensure that his choice is uncoerced. Freedom of speech, however, appears to be a somewhat different type of "right." Free speech is an affirmative value[32]—we are concerned with encouraging speech almost as much as with preventing its restriction by the government.[33] And, although an Hohfeldian analysis would reveal that the freedom to speak implies the freedom not to speak, we promote the former because of the overall societal benefit that is presumed to flow from the uninhibited exercise of first amendment freedoms.[34] If, despite the first amendment, no one was willing to discuss public issues, express new opinions, or exchange ideas and information, society would no doubt suffer.[35] Since deterrence is of greatest

[28] Griffin v. California, 380 U.S. 609, 613-14 (1965).

[29] *Id.*

[30] *See* note 10 *supra*.

[31] Griffin v. California, 380 U.S. 609, 613-14 (1965).

[32] Some support, albeit weak, for the distinction drawn between the interests protected by the first and fifth amendments is provided by the initial reluctance of the Court to characterize the privilege against self-incrimination as "fundamental." *See* Adamson v. California, 332 U.S. 46 (1946).

[33] Our desire to encourage speech may at times conflict with the goal of preventing the restriction of free expression by the government. In these instances the Court has treated the latter as a preferred goal. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). The suggestion made here, that free speech ought to be cultivated, should not be understood as indicating any disagreement with the resolution of those cases. *See* Schauer, *Hudgens v. NLRB* and the Problem of State Action in First Amendment Adjudication, 61 Minn. L. Rev. 433 (1977). For a further discussion of the positive virtues of free speech as opposed to the negative consequences of governmental regulation, see generally note 35 *infra*.

[34] *See* notes 43-46 and accompanying text *infra*.

[35] I do not mean to imply that in every instance speech is to be favored over silence; however, in the long run, a society marked by a proliferation of speech is generally preferable to one typified by a lack of communication. Free speech theorists may possibly be divided into two main groups—those who contend that speech is an affirmative value and those who argue only that government interference with free expression is detrimental.

concern when it is a desirable activity that is being stifled, the potential chilling effect of governmental regulation is most invidious where the underlying constitutionally protected activity is positively advantageous, rather than an activity which, for other reasons, ought to be shielded from state intrusion.[36] The first amendment is not the sole constitutional provision that can be interpreted as granting affirmative rights,[37] and it might be possible to apply chilling effect reasoning to any "positive" guarantee. But when one speaks of chilling, it is generally the first amendment which comes to mind; and, in the interest of precision and to ensure continuity between the case law and the analysis here presented, this article will proceed by discussing the chilling effect doctrine exclusively in the context of that constitutional guarantee.

Simply restricting the "chilling" concept to protected speech, however, does not sufficiently narrow the issue. A statute making criminal the publication of the collected works of Shakespeare, an ordinance prohibiting the advocacy of socialism, or a common-law principle imposing civil liability for the criticism of government officials would each deter individuals from participating in constitutionally protected activity. But we do not need any notion of a chilling effect to tell us that statutes which punish the unpunishable are unconstitutional[38] and the Supreme Court does not need the chilling effect doctrine to so hold.[39] In these instances

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Writers identified with the former view include R. Dworkin, Taking Rights Seriously 197-200 (1977); T. Emerson, The System of Freedom of Expression 6-7 (1970); A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948); J. S. Mill, On Liberty, ch. 2 (1859); Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45 (1974). Works focusing on the dangers of state regulation include W. Bagehot, "The Metaphysical Basis of Toleration," in II Literary Studies 422-36 (3d ed. 1884); J. Locke, A Letter Concerning Toleration (1789); J. Milton, Areopagitica (1644); F. Pollock, "The Theory of Persecution," in Essays in Jurisprudence and Ethics 147-75 (1882); Feinberg, "Limits to the Free Expression of Opinion," in J. Feinberg & H. Gross, Philosophy of Law 135,136 (1975); Hyneman, Free Speech at What Price?, 56 Am. Pol. Sci. Rev. 847 (1962); Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Affairs 204 (1972). Although this latter view, then, is certainly not without support, it seems clear that current first amendment doctrine is based primarily upon a view embracing the positive values of speech. *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Linmark Assocs. Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

[36] Freedom of religion arguably falls within this latter category. Although speech may be thought of as a positive virtue or affirmative good, *see* note 35 *supra*, religion does not appear to occupy a similar position in the constitutional order. Our concern appears to be not with the positive values of religion, but rather with the detrimental impact that results when government intrudes into the spiritual realm.

[37] Consider, for example, the sixth amendment right to counsel or the broad notions of equality embodied in the fourteenth amendment.

[38] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-90 (1959).

[39] In a similar vein it should be noted that the overbreadth doctrine pertains exclusively to the question of standing. If a party attacking a law or defending a prosecution has engaged in constitutionally protected behavior the overbreadth doctrine serves no purpose. 1 N. Dorsen, P. Bender, & B. Neuborne, Emerson, Haber, and Dorsen's Political and Civil Rights in the United States 41 (4th Law School Ed. 1976).

of direct prohibition, the chilling effect adds nothing to the analysis; it is merely a truism to say that a statute which unconstitutionally penalizes protected speech also chills such speech. If the chilling effect is to have any significance as an independent doctrine it must refer only to those examples of deterrence which result from the indirect governmental restriction of protected expression. Therefore, with this essential gloss added, we can set forth a tentative definition: *A chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity.* Thus, if a statute which is directed at hard-core pornography has the actual effect of deterring an individual from publishing the *Decameron* or *Lady Chatterley's Lover,* that effect is properly deemed a chilling effect.[40] Similarly, if a common-law sanction aimed at punishing the publication of defamatory factual falsehood causes the suppression of truth or opinion, chilling effect reasoning is again applicable.[41] The same analysis is also appropriate where a statute designed to curb incitement to riot has the additional effect of inhibiting the advocacy of political change.[42] The danger of this sort of invidious chilling effect lies in the fact that something that "ought" to be expressed is not. Deterred by the fear of punishment, some individuals refrain from saying or publishing that which they lawfully could, and indeed, should. This is to be feared not only because of the harm that flows from the non-exercise of a constitutional right, but also because of general societal loss which results when the freedoms guaranteed by the first amendment are not exercised.[43] That amendment is based on the assumption, perhaps unprovable, that the uninhibited exchange of information,[44] the active search for truth[45] and the open criticism of government[46] are positive virtues. The

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[40] *See, e.g.,* Winters v. New York, 333 U.S. 507, 518-20 (1948), which, although not using chilling effect language, describes the potential overinclusiveness of a vague and overbroad statute.

[41] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 277-79 (1964).

[42] Recent incitement cases have not relied expressly upon the chilling effect doctrine as a basis for decision; instead, in vindicating the speakers, these cases have generally held that the particular words spoken were protected advocacy rather than unprotected incitement. *See* Hess v. Indiana, 414 U.S. 105 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Watts v. United States, 394 U.S. 705 (1969). However, it is not unreasonable to suggest that the very stringent application of the incitement concept evidenced by these decisions is itself designed to create the same margin for error that is embodied in the chilling effect doctrine. *See* notes 180-204 and accompanying text *infra.*

[43] Perhaps the clearest argument for recognition of the overall social value of individual speech was made by Roscoe Pound. 3 R. Pound, Jurisprudence 63-67, 313-17 (1959). For further discussion, see generally note 35 *supra.*

[44] *See* Bates v. State Bar of Ariz., 433 U.S. 350, 372-77 (1977); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85, 96-97 (1977); Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763-65, 769-70 (1976); Bigelow v. Virginia, 421 U.S. 809, 829 (1975).

[45] Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[46] Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964); New York Times Co. v. Sullivan, 376 U.S. 254, 269-71 (1964).

chilling effect doctrine is simply the logical corollary to the view that the suppression of protected speech is a particularly harmful and undesirable situation.

B. *The Chilling Effect Unraveled*

1. Fear, Risk and Uncertainty

The definition of the chilling effect suggested above assumed that individuals will frequently be deterred by governmental regulation not intended to cover their contemplated activities. But why would anyone be deterred from engaging in conduct A by a statute or ordinance prohibiting only conduct B? The answer must be that these individuals fear punishment or other detriment in spite of the lawful nature of their contemplated behavior. But again, why should people fear punishment under a regulation which does not even apply to them? The rather complex answer to this question goes a long way towards explaining the major principles underlying the chilling effect doctrine.

In an ideal world, there would be neither error nor uncertainty in the legal process. Regulatory statutes would be applied so as to punish all who violated their strictures and none who did not. The fact-finding apparatus would in all instances identify with certainty and clarity the true state of affairs, and the governing law would be accurately declared and properly applied to the facts so found. Moreover, this process would involve no social costs; society would not be burdened in any way by punishing the guilty or penalizing those civilly liable, and the innocent would suffer no detriment in securing acquittal or vindication. As a result of the foregoing accuracy and precision, the mechanics of the legal process would be wholly predictable and understandable. Any individual could instantly and effortlessly ascertain whether his contemplated conduct would be a violation of a given enactment; violators would be assured of conviction, while the innocent would be guaranteed acquittal.

One need not be overly skeptical to appreciate the difference between this model and reality. To the extent that the model does not reflect the actual operation of the legal system, there is injected into the legal process both error and the uncertainty which flows from the recognition of this imperfection. It is, broadly speaking, this possibility of error and the consequent uncertainty which create the chilling effect. There are, however, various types of error and uncertainty; and one of the major deficiencies in explication and application of the chilling effect doctrine has been the failure to recognize that there are differences in the causes of the chilling effect, differences of kind as well as degree, which may often justify different legal results.

The most obvious departure from the utopian legal system just described is that the machinery of the law often makes mistakes. The facts may be incorrectly determined as a result of being "found" only through

interpretation of evidence presented in court.[47] The trier-of-fact was not actually present when the events in dispute took place, and the gap in time and place, which must be filled with the testimony of witnesses having human foibles and undisclosed or unknown biases, inevitably leads to a possibility of error. In addition, there is always the chance that the personal prejudices of the judge or jury and the adversary zeal of the litigants and lawyers may overtly or covertly work a distortion of the factfinding process. And even in the event that the facts are accurately determined, there remains the possibility that the law will be erroneously declared or improperly applied to those facts. As a result, there is an inherent uncertainty surrounding the outcome of litigation which makes it impossible to predict that outcome with a high degree of confidence.[48] Thus, individuals who "know" that their conduct is not proscribed by the regulating rule must, if rational, consider the possibility that a court will find otherwise. This possibility may be translated into a fear—a fear that lawful conduct may nonetheless be punished because of the fallibility inherent in the legal process.

The degree of this fear will vary according to a number of factors, and may be likened to the product of the probability of an erroneous verdict times the harm produced by such a verdict. In the present context, the probability component refers to the likelihood of the erroneous imposition of legal sanctions on conduct protected by the first amendment; there are a variety of elements which may influence just how great this likelihood of error will be. Certainly, as the legal concepts become more complex, the probability of error is increased. In the area of free speech, the legal principles seem particularly difficult to enunciate, understand and apply. The various standards are often far from precise,[49] there are particularly elusive questions of intent (or knowledge)[50] and effect,[51] and many determinations by judge and jury involve mixed questions of law and fact.[52] In addition, the peculiar problems of vagueness which persis-

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[47] Frank, *supra* note 14, at 546-47. *See* note 14 *supra*.

[48] Frank, *supra* note 14, at 548 ("litigation-uncertainty"—"decision-unpredictability"). *See also* Cline v. Frink Dairy Co., 274 U.S. 445, 465 (1927).

[49] Consider, for example, the "inevitably obscure" standards defining obscenity. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73-114 (Brennan, J., dissenting). Consider also the subtle distinction between public figures and private individuals in defamation law. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 45-48 (1971) (opinion of Brennan, J.).

[50] There are difficult questions of scienter in obscenity law, *see* Smith v. California, 361 U.S. 147, 154-55 (1959), actual knowledge of falsity in defamation law, *see* New York Times Co. v. Sullivan, 376 U.S. 254, 278-88 (1964), and communicative intent in symbolic speech cases, *see, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977).

[51] Consider the expression "fighting words" as it is employed by the Court in Lewis v. City of New Orleans, 415 U.S. 130, 132-34 (1974), Gooding v. Wilson, 405 U.S. 518, 525-28 (1972), and Chaplinsky v. New Hampshire, 315 U.S. 568, 571-74 (1942), as well as the entire concept of "clear and present danger." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562-63 (1976); Watts v. United States, 394 U.S. 705, 707-08 (1969) (per curiam); Schenck v. United States, 249 U.S. 47, 52 (1919).

[52] Virtually all the problems mentioned in notes 49 to 51 *supra* fall within this category.

tently arise in the first amendment area contribute significantly to the probability of erroneous legal determinations.[53] Moreover, the complexity of the very concept of free speech, coupled with the public's natural resistance to unpopular or offensive ideas and opinions, provides a clear but immeasurable degree of additional built-in error in first amendment cases.[54] By far, the most difficult questions will arise where the challenged expression falls close to the line separating protected and unprotected speech.[55] Thus, it is this "marginal" conduct that is most likely to be erroneously adjudged unlawful,[56] and consequently the degree of fear will be greatest where such borderline activities are involved.

One component of the fear product is, thus, the probability of the erroneous imposition of legal sanctions. As previously mentioned, the other component is the magnitude of the harm resulting from such a wrongful finding of guilt or liability. The most obvious measure of this harm is the harshness of the penalty. The severity of the potential punishment magnifies the danger, and hence the fear, of an erroneous judi-

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[53] Vague regulatory rules make it difficult, if not impossible, for courts to be accurate and consistent, and thus increase the probability of error in the adjudication process. In addition, judicial findings made under vague statutes need naturally be less precise. The broad findings reported from below then make appellate review particularly difficult. Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 80 (1960). To the extent that vagueness so increases the possibility of error in the adjudicatory process and lessens the opportunity for correcting such error on appeal, there is a heightening of the inherent uncertainty surrounding litigation and an increase in the likelihood of undue deterrence.

The relatively light treatment given to the vagueness doctrine in this article is due primarily to the fact that it has been so successfully analyzed before. For an excellent discussion, see Amsterdam, *supra*. Much of the present article, as it is subsequently developed, can be viewed as an extension of Amsterdam's "buffer zone" and "clearance space" insights to a broader range of first amendment issues. On vagueness generally, see Comment, Recent Supreme Court Developments of the Vagueness Doctrine: Four Cases Involving the Vagueness Attack on Statutes During the 1972-1973 Term, 7 Conn. L. Rev. 94 (1974).

[54] "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Professor Emerson presents a persuasive argument that free speech is neither a simple nor a popularly accepted concept; he contends that it is suppression and conformity that come naturally, not tolerance, diversity and change. Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 887-91 (1963). To the extent that these characteristics are manifested in those who administer or serve in the legal process, the chances of error are increased; and these additional errors are likely to be errors of underprotection. This is especially true where the speech at issue is critical of the government. There is perhaps an inherent and unavoidable conflict of interest involved in entrusting some aspects of the protection of the right to criticize those in power to the very people who have the most to lose by such criticism. As Ronald Dworkin has pointed out, "decisions about rights against the majority are not issues that in fairness ought to be left to the majority." R. Dworkin, *supra* note 35, at 142.

[55] In some areas, such as obscenity, that which is closest to the line is, of all that is protected, least worthy of protection. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 69-71 (1976). But where it is political speech that is at issue, that which is closest to the area of non-protection may be that which is both most effective and most important. *See* text accompanying notes 194 & 195 *infra*.

[56] *See* Speiser v. Randall, 357 U.S. 513, 526 (1958).

cial determination. In addition to the "objective" harshness of a particular penalty—the length of a prison term or the amount of a fine—the type of punishment itself may also influence the perceived severity of an incorrect legal judgment. The possibility of imprisonment coupled with the stigma and disabilities which accompany a criminal conviction will most often lead an individual to view the criminal penalty as more harmful than a civil sanction.[57] Therefore, that individual's fear of an erroneous verdict will increase where the potential penalty is criminal, even if the probability of an incorrect legal determination remains constant. Similarly, if the actor is a corporation and there is no possibility of individual criminal liability for corporate officials, a large civil judgment will most likely be viewed as more serious than a criminal conviction carrying only a minimal fine.[58] In this case, the degree of harm for a given probability of error is highest when civil liability is erroneously imposed, and hence greater fear is generated by the potential civil sanction. Finally, the degree of harm will be increased by the actual or perceived extra-judicial effects of the erroneous legal judgment. If the sole penalty for being found a subversive is loss of employment, there is a certain quantum of possible harm and a commensurate degree of fear. If, however, that finding also results in loss of personal friendships, injury to reputation,[59] damage to social standing and forfeiture of future employment opportunity, then the magnitude of the potential harm is significantly increased, with a proportionate increase in the degree of fear.

The fear thus generated by the uncertainty and fallibility of our legal system will not have the same effect in all cases. Our concern is with the possibility that an individual will be deterred from engaging in a protected speech-related activity; and while the likelihood of such deterrence is shaped by the quantity of fear, it also varies with other factors as well. One of these factors is the benefit of the contemplated conduct. If a business decision is involved it may be possible to quantify the potential benefit by reducing it to a dollar amount—a commercial publisher may be able to weigh expected gains against expected losses with some degree of precision.[60]

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[57] *See* Amsterdam, Note, *supra* note 53, at 69 n.16.

[58] New York Times Co. v. Sullivan, 376 U.S. 254, 277-78 (1964).

[59] *See* Wieman v. Updegraff, 344 U.S. 183, 190-91 (1952): "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community the stain is a deep one; indeed it has become a badge of infamy." The "penalty" aspects of loss of reputation are suggested by some of the procedural due process cases. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) ("Where a person's name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential"). *But see* Paul v. Davis, 424 U.S. 693 (1976); Bishop v. Wood, 426 U.S. 341, 348-49 (1976).

[60] This will be particularly true when revenues are produced discretely from a particular publication. The gains expected to result from the distribution of a book or motion picture, for example, can be measured more accurately than the potential profit expected to flow from the publication of a single article in a newspaper or magazine.

On the other hand, it is impossible to quantify the benefit perceived by an individual contemplating engaging in speech-related activity when that individual is personally committed to the transmission of a particular message; nevertheless, it must be recognized that as the perceived benefit increases, the likelihood that a given quantum of fear will act as a deterrent decreases, all other things being equal. If we acknowledge that fact and opinion are often conveyed by individuals with a profit motive rather than a personal stake in the dissemination of specific ideas,[61] it becomes clear that expression may be easily chilled—a simple attack on the pocketbook will often be sufficient.

In addition, another factor bearing upon the likelihood of deterrence must be mentioned: individual risk-aversion. Assuming a given degree of fear, and a given quantum of benefit, certain individuals will in fact be deterred while others will not. Thus, the varying degree of risk-aversion in individuals will cause differing amounts of deterrence in situations where all other factors are the same.[62]

The above discussion assumed that individuals contemplating action "know" that their proposed conduct is lawful, but fear that the legal system will come to a different, and erroneous, conclusion. More often, however, these individuals are troubled not only by the possibility of an erroneous legal determination, but also by the uncertainty in their own minds as to whether their intended behavior is protected. This uncertainty too can arise from a number of causes; perhaps the most important is that it is often difficult to determine whether the contemplated conduct is covered by a regulating rule. Herein lies the chief vice of vagueness.[63] If the terms of a statute or the concepts underlying a common-law principle are so amorphous as to create no crystalized view of what precise conduct is being regulated, an individual may be quite unsure whether his intended behavior is proscribed until after he has acted.[64] Indeed, some legal concepts and language may be so incapable of precise definition and application that any real degree of certainty is unattainable. Therefore, when a vague regulatory rule is added to the factors previously mentioned, the amount of overall uncertainty is in-

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[61] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964).

In Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976), the Court suggested that the profit motive may diminish the chilling effect. This analysis is, however, incomplete. It is impossible to determine the extent of the chilling effect without considering both benefits and risks. Whether commercial advertising is susceptible of chilling depends upon the severity of the penalties for false or misleading advertising and the frequency of their imposition.

[62] For those who are enamored of formulae, the foregoing may be summarized as follows: Deterrence = risk aversion ((probability of punishment × extent of punishment) − expected benefit).

[63] *See* Cline v. Frink Dairy Co., 274 U.S. 445, 465 (1927). *See generally* L. Tribe, *supra* note 9, at 645, 710-24.

[64] This problem may be particularly acute in the area of obscenity, *see* notes 147-54 and accompanying text *infra*.

creased, with a corresponding increase in fear; the ultimate result is a heightened probability of deterrence.[65]

Vagueness refers to the inherent imprecision of the regulatory rule which makes both determination and prediction extremely difficult.[66] But even a very specific and precise rule may create some degree of uncertainty if it is too "costly" or inconvenient for an individual to make the theoretically possible determination demanded by such a rule.

Consider, for example, a law imposing sanctions on a bookseller for the possession of obscene material.[67] The difficulty is not that the merchant is theoretically unable to discover the nature of all the publications in his store, but rather, that as a practical matter, it is nearly impossible for him to do so. The burden imposed by such a statute, particularly on a seller with an enormous inventory, is simply too great. Thus, if punishment may be inflicted without proof of scienter, a bookseller will be thrust into a state of uncertainty. This uncertainty will create a fear, a fear ultimately resulting in the chilling of protected activity.[68]

A law requiring a newspaper to be an insurer of the truth of every factual statement appearing in each edition gives rise to a similar danger. It is conceivable that every fact could be checked to its original source in an effort to guarantee accuracy to the limits of human power. But this is obviously a practical and economic impossibility, and consequently some uncertainty as to the truth of published statements will remain. Therefore, to impose sanctions for the publication of erroneous factual material is to create some degree of fear and deterrence, a result of the uncertainty

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[65] Vagueness really has a twofold effect: it increases the probability of an erroneous declaration or application of law, *see* note 53 *supra*, and, at the same time, heightens the difficulty of the speaker in accurately determining whether his proposed conduct is covered by the rule or regulation in question.

Actually, there is a further danger—the "leakage" that a vague statute permits throughout the enforcement process. Excessive vagueness grants too great a discretion to enforcement officers and administrative tribunals. Not only is this excess discretion often non-reviewable, but it also increases the likelihood that non-judicial sanctions will be imposed on protected speech, *see* Marcus v. Search Warrants, 367 U.S. 717, 732-33 (1961); Kunz v. New York, 340 U.S. 290 (1951)—whether through frequent harassment by law enforcement officers, frequent threats by administrative bodies, or frequent prosecution brought without expectation of success. Each of these actions, even though resulting in eventual vindication, imposes a cost or a punishment on an individual contemplating speech, thereby increasing the likelihood of deterrence. *See* text accompanying notes 46 & 47 *supra*. The chilling effect results from fear which is a product of risk. To the extent that any factor, including vagueness, increases the risk, it also increases the chilling effect and thus produces the excess caution that comprises a threat to first amendment principles.

[66] Vagueness should not be confused with ambiguity. An ambiguous rule may be precisely drafted, but its language may leave doubt as to which of several possible meanings is intended. *See* W. Twining & D. Miers, How To Do Things With Rules 118-24 (1976); J. Wilson, Language & The Pursuit of Truth 36-46 (1967).

[67] *See, e.g.*, Smith v. California, 361 U.S. 147, 151-54 (1959); notes 160-67 and accompanying text *infra*.

[68] Similarly, the penalization of organizational membership without knowledge as to the organization's subversive goals and means may require such detailed checking prior to joining that freedom of association will be chilled. Sweezy v. New Hampshire, 354 U.S. 234, 246-47 (1957) (opinion of Warren, C.J.); Wieman v. Updegraff, 344 U.S. 183, 190 (1952).

caused by the impracticability of making a theoretically possible determination.[69]

In concluding this section it is necessary to describe one final factor that significantly contributes to the overall fear and the ultimate likelihood of deterrence: the costs involved in securing a successful judicial determination. Our model of the "perfect" legal system assumed that the innocent would be acquitted with no cost to the individual. But obviously this is not the case. Even if it is hypothesized that the results in court are always "correct," a defendant must, nevertheless, shoulder the financial burden of litigation,[70] expend a considerable amount of time in preparing and maintaining a defense and absorb the extrajudicial harm that flows from the popular conception that one who is charged, even if acquitted, is not entirely free from culpability.[71] Thus, there is a heavy price to pay for simply being in a position to have to explain, or defend. These costs of securing vindication create a fear of the entire process, with a commensurate increase in the degree of deterrence; even those with perfect knowledge of the ultimate outcome of litigation will be deterred from engaging in protected activity if it will be necessary for them to demonstrate publicly the lawfulness of that conduct.[72]

Before leaving this section, I would like to stress one point which I hope was implicit in the foregoing discussion. As long as we are still some distance from the model of the "utopian" legal system presented earlier, there will *always* be a chilling effect. It is an unavoidable concomitant of the uncertainty and costs of the legal process, and the variability of individual risk-aversion. Any regulation will deter someone somewhere

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[69] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); L. Tribe, *supra* note 9, at 639-40 n.7. Where factual assertions can be easily verified, there will be no danger of deterrence in requiring a publisher to guarantee the truth of his statements. Commercial speech perhaps provides the clearest example. Consider Justice Stewart's concurring comments in Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, 425 U.S. 748, 777-78 (1976):

> In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commerical expression. There is, therefore, little need to sanction "some falsehood in order to protect speech that matters." [Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).]

[70] *See* Time, Inc. v. Firestone, 424 U.S. 448, 475 n.3 (1976) (Brennan, J., dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

[71] *See* Sweezy v. New Hampshire, 354 U.S. 234, 248 (1957).

[72] A similar result may follow from an overly elaborate licensing scheme; a prospective publisher or speaker may be deterred by the expense of securing the necessary determination whether it is permissible to proceed. Thus, although chilling effect reasoning is generally applicable to subsequent punishment cases, it may also be effectively employed to analyze the deterrent impact of the rules and procedures governing a prior restraint scheme. *See generally* Freedman v. Maryland, 380 U.S. 51 (1965); Emerson, The Doctrine of Prior Restraint, 20 L. & Contemp. Prob. 648, 655-60 (1955). Indeed, a full appreciation of the chilling effect doctrine substantially undercuts our special abhorrence of prior restraints. *See* notes 203-21 and accompanying text *infra*.

from engaging in conduct that the regulation does not purport to control. Obviously, the number of individuals deterred will depend upon the magnitude and combination of all the factors here described; but it must be recognized that any rule will produce some excess deterrence and thus, some chilling effect. Therefore, to say that a regulation is unconstitutional because it has a chilling effect on protected activity is to say virtually nothing at all. What we must look for is some way of determining under what circumstances the inevitable chilling effect becomes great enough to require judicial invalidation of legislative enactments, or to justify the creation of substantive rules that recognize and account for the invidious chill. Although it is no doubt impossible to identify the triggering point with mathematical precision, it is hoped that the above discussion has introduced and isolated the factors and variables essential to an understanding of the problem, if not to its ultimate resolution.

2. The Principle of Comparative Harm

It was noted in the introduction to this article that the simple recognition of the inherent uncertainty surrounding our legal system is only the first step toward gaining an understanding of the substantive content of the chilling effect doctrine. Once it is admitted that errors will be made, it is still necessary to determine which of the various possible errors is the more harmful. In the present context it was posited that a wrongful limitation of speech is *a priori* more serious than the erroneous overextension of free speech.[73] With the inevitability of error thus admitted, and the preference for one type of error thus expressed, the final step is the formulation of legal rules which account for the inevitable by favoring the preferred. No discussion of this component of the chilling effect doctrine can start anywhere but with *Speiser v. Randall.*[74] This case, too often ignored by the casebooks and literature, accounts for a major segment of first amendment theory and should stand among the most important constitutional cases of modern times.

The facts of *Speiser* are relatively simple. California granted a property tax exemption to veterans of World War II, with a requirement that applicants for the exemption sign an oath stating: "I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign Government against the United States in event of hostilities."[75] This oath was part of a larger procedural scheme whereby the applicant was charged with the burden of demonstratng eligibility for the exemption by proving that he was not a person who advocated such violent overthrow.[76] Assuming that the exemption might be denied per-

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[73] *See* notes 15-19 and accompanying text *supra;* notes 88 & 119 *infra.*
[74] 357 U.S. 513 (1958).
[75] *Id.* at 515.
[76] *Id.* at 521-22.

sons engaging in the proscribed speech,[77] Mr. Justice Brennan,[78] speaking for the Court, nonetheless found the allocation of the burden of proof constitutionally impermissible. He noted:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. . . . Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.[79]

Justice Brennan's reference to the criminal process highlights the significance of *Speiser*. In a criminal trial there is, as in all litigation, the possibility of an erroneous result[80]—a guilty defendant may be mistakenly acquitted or an innocent defendant wrongfully convicted. If everything in the criminal process were evenly balanced, if neither the prosecution nor defense were given any kind of advantage, there is no reason to believe that one type of error would occur more frequently than another; we would have as many innocent people locked behind bars as we had criminals running loose in the streets.[81] But society's values are not so evenly balanced. The wrongful conviction of the innocent is seen as a more serious error than the wrongful acquittal of the guilty.[82] The Blackstonian maxim that "it is better that ten guilty persons escape, than that one innocent suffer,"[83] is but an expression of the differing degrees of social tolerance for the two possible errors.[84] This societal preference for

[77] *Id.* at 519-20. This assumption may have been proper at the time, *see* Dennis v. United States, 341 U.S. 494, 501-11 (1951), but would clearly be unjustified today, *see* Brandenburg v. Ohio, 395 U.S. 444, 447-49 (1961) (per curiam). *Speiser*, significant as it is, may well have been decided as it was in an effort to avoid adjudicating the substantive validity of the oath.

[78] I find it noteworthy that not only *Speiser*, but virtually all of the other opinions employing chilling effect analysis were authored by Mr. Justice Brennan. His recognition in *Speiser* of uncertainty and the comparative harm of various errors seems to have profoundly affected his thinking about first amendment issues. The chilling effect doctrine in the Supreme Court, both substantively and procedurally, is clearly the work of Mr. Justice Brennan. It is significant that virtually every opinion in a first amendment case written by Mr. Justice Brennan since 1958 has contained a reference or citation to *Speiser*.

[79] 357 U.S. at 525-26.

[80] *See* notes 47-48 and accompanying text *supra*.

[81] To say that there would be an equal number is an admitted oversimplification, since it ignores the fact that those who are in fact guilty are more likely to be charged and prosecuted. But the extent to which guilty persons are charged is itself dependent upon the arresting officer's perception of the difficulty of obtaining a conviction.

[82] *See* Kaplan, *supra* note 16, at 1076-77. *See also* Birmingham, Remarks on 'Probability' in Law: Mostly, a Casenote and a Book Review, 12 Ga. L. Rev. 535 (1978).

[83] IV W. Blackstone, Commentaries *358.

[84] Others would have aimed for a different ratio. *See* J. Fortescue, Commendation of the Laws of England 45 (F. Grigor trans. 1917) (20 to 1); 2 M. Hale, Pleas of the Crown *289 (5 to 1); W. Paley, Moral and Political Philosophy, in Works 27, 142 (1831) (20 to 1); 1 T. Starkie, A Practical Treatise on the Law of Evidence 506 (4th Am. ed. 1832) (99 to 1). *See*

a particular type of error is reflected at the rule-making level—in a criminal trial the prosecution must shoulder the burden of proof, guilt must be established beyond a reasonable doubt, the accused is guaranteed a privilege against self-incrimination and so on. All this serves to weight the process heavily in favor of the defendant. Ideally, we convict only those who are *clearly* guilty on the evidence; at the same time, those who are only *probably* guilty are likely to be acquitted. The net result is that many who are in fact guilty are acquitted, but few who are truly innocent are convicted. It is like trawling with a coarse net—you catch all the big fish, but many of the small ones slip away.

But let us return from criminology and ichthyology and continue our discussion of the first amendment. By placing the burden of proof upon the state in *Speiser,* the Court, in effect, forced California to grant the tax exemption to a number of persons who do in all probability advocate violent or unlawful subversion. These are the "guilty" who escape not because they are blameless, but because the state is unable to muster sufficient proof to carry its burden. On the other hand, the effect of the California procedure, under which the applicant shouldered the burden, is to disqualify from the exemption some individuals who do not advocate subversion, but who cannot or will not meet the requirement of proving otherwise. These are the "innocent," wrongfully punished. Thus, errors will be made under either procedure. However, the California mechanism minimizes the erroneous granting of the exemption in exchange for a consequential increase in the number of non-subversive veterans who are denied their deserved benefits. What makes this allocation of the burden of proof impermissible is the fact that the first amendment makes the wrongful denial the more serious error *by definition*—an erroneous punishment of free speech and belief is by constitutional stipulation more harmful than the erroneous granting of a tax exemption to a subversive. There is greater "social disutility"[85] in suppressing protected speech than in awarding a state tax exemption to a "fifth columnist," just as there is greater "social disutility" in wrongfully punishing the innocent than in

generally G. Williams, The Proof of Guilt 186-90 (3d ed. 1963); Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L.J. 165, 182-86 (1969); Birmingham, A Model of Criminal Process: Game Theory and Law, 56 Cornell L. Rev. 58, 65 (1970); Dershowitz, Preventive Detention: Social Threat, 6 Trial, No. 1, at 22-26 (1969-70); *supra* note 16. *Compare* the above sources *with* Tribe, *supra* note 16, at 385-90. Implicit in the numerical variations above is a differing view of the relative utility of convicting the guilty as compared to the disutility of convicting the innocent. In other words, the various ratios reflect the writers' evaluation of the comparative harm of the two possible errors.

The most specific application of this "mathematical" jurisprudence in the case law is Mr. Justice Harlan's concurrence in *In re* Winship, 397 U.S. 358, 368-75 (1970). This concurrence and Mr. Justice Brennan's opinion for the Court placed heavy reliance on *Speiser.* However, the impact of *Winship* has diminished significantly, and with it the importance of the "mathematical" aspect of the case as a critical factor in criminal due process analysis. *See* Patterson v. New York, 432 U.S. 197 (1977); The Supreme Court, 1976 Term, 91 Harv. L. Rev. 1, 98 (1977).

[85] *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). *See* note 119 *infra.*

mistakenly acquitting the guilty.[86] The "transcendent value"[87] of speech receives the same priority that Blackstone gave to individual liberty.[88]

The principle of comparative harm is, thus, simply a product of the recognition of the inevitability of error in the litigation process; the principle forces us to confront the imperfection of our legal system by demanding that we identify those errors which we view as most harmful. In the context of free speech adjudication, the recognized preeminence of the first amendment causes us to acknowledge that the "greater" harm flows from an erroneous denial of first amendment protection. This acknowledgement leads to a substantive result like that in *Speiser*. Recognition that such a result is an essential by-product of the principle of comparative harm affords a fuller understanding of the conceptual underpinnings of the chilling effect doctrine. To the extent that the allocation of the burden of proof, or the existence of any legal rule, tends to increase the risk of an erroneous judgment against speech, there is a proportionate increase in the fear of such a judgment—the degree of fear, and hence, the likelihood of deterrence follow the actual degree of risk. Recognizing this, Justice Brennan commented in *Speiser*:

> The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied . . . provide but shifting sands on which the litigant must maintain his position.[89]

By choosing rules that minimize the risk of an erroneous judgment, we lessen the fear generated by that risk, and thereby reduce the extent to which people are deterred from engaging in protected speech-related activity. This is the essence of the chilling effect doctrine.

But it must be remembered that, as there are two types of error, there are two possible chilling effects. By placing the burden of proof on the

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[86] *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

[87] Speiser v. Randall, 357 U.S. at 526.

[88] In one sense, *Speiser* is an easy case. The harm flowing from a wrongful denial of the exemption is a harm to an individual interest established by the Bill of Rights as one of overriding importance—it is an injury to an interest that must be protected even at the expense of the public. An erroneous grant of the exemption, on the other hand, injures the general public interest, with no damage to individual rights. In cases such as this, the question of comparative harm is rather readily resolved. An analogous situation arises in the criminal process model, where the imprisonment of the innocent is a deprivation of an individual right, while the release of the guilty harms the general public. What makes the free press-fair trial controversy so complex is the fact that an individual constitutional interest sits on both sides of the balance; it is not so readily apparent which error is comparatively the more harmful. On this issue, see my exchange with Professor Dworkin in The New York Review of Books, Dec. 7, 1978, at 39-41.

[89] Speiser v. Randall, 357 U.S. at 525-26.

state in *Speiser,* the Court increased the risk that California would erroneously grant tax exemptions to undeserving subversives. It is conceivable that a fear of such erroneous determinations might deter governmental bodies confronted with the *Speiser* rule from granting such tax exemptions at all, thus causing, in a sense, a chilling of that activity. Yet no one speaks of the chilling effect in this situation; chilling effect reasoning is meaningful only in the context of a preferred value. The chilling effect doctrine reflects the view that the harm caused by the chilling of free speech (or other protected activity) is comparatively greater than the harm resulting from the chilling of the other activities involved. And, the logical and necessary mandate of the chilling effect doctrine is that legal rules be formulated so as to allocate the risk of error away from the preferred value, thereby minimizing the occurrence of those errors which we deem the most harmful. The Supreme Court recognized its obligation to follow this mandate in *Speiser v. Randall.* A close look at the areas of defamation, obscenity and incitement reveals that a similar, though often unexpressed, recognition was present there as well.

III. The Chilling Effect Doctrine Applied

A. *Defamation*

In *New York Times Co. v. Sullivan,*[90] the Supreme Court resolved the conflict between the profound national interest in the uninhibited debate of public issues and the interest of the individual in being free from defamatory assault by carving out a constitutional privilege that protects good faith critics of government officials.[91] Recognizing that a rule requiring the critic to guarantee the truth of all his statements might dampen the vigor and limit the variety of public debate,[92] the Court held: "The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[93] In addition, the Court held that the constitutional standard requires that the plaintiff demonstrate such actual malice with "convincing clarity."[94] By analyzing the *New York Times* decision in light of the discussion presented in the first portion of this article, one realizes the critical role played by the chilling effect doctrine in the resolution of the case. The doctrine, recognizing inevitable uncertainty and embracing the principle of comparative harm, was instrumental in determining where the line of privilege defining the cate-

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[90] 376 U.S. 254 (1964).

[91] *See generally* L. Tribe, *supra* note 9, at 631-38; Kalven, The *New York Times* Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191.

[92] New York Times Co. v. Sullivan, 376 U.S. at 279.

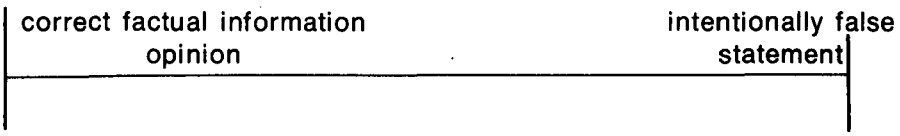
[93] *Id.* at 279-80.

[94] *Id.* at 285-86.

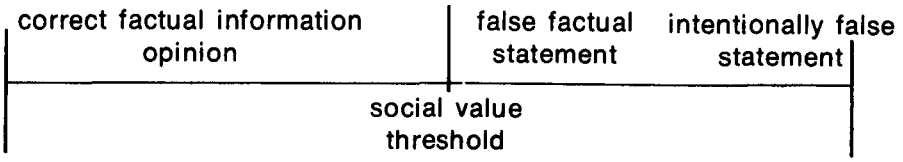
gory of punishable defamation was drawn and in guiding the Court in the formulation of the subsidiary rule governing the burden of proof as well.

The use of a chart may be helpful in demonstrating the substantive role played by the chilling effect doctrine in the formulation of the *Times* rule. At one end of this chart we designate an area representing opinion[95] and correct factual information. At the opposite end of the spectrum we mark an area for the intentionally false statement, an utterance clearly "no essential part of any exposition of ideas."[96]

Thus, we begin with:



The Supreme Court has noted that "there is no constitutional value in false statements of fact,"[97] whether such falsehoods are intentionally stated or simply carelessly made.[98] A new line, therefore must be added, separating not only the intentional, but, in fact, all falsehood from the area encompassing speech that does contain some measure of social value. Our chart now takes on this form:



In the ideal world, with our utopian model of the legal process fully operative, the legal line dividing the punishable and the unpunishable should match exactly the boundary drawn on our chart. A glance at the *New York Times* rule, however, reveals that this is not the case. The *Times* decision extends constitutional protection to an entire class of defamatory falsehood—that uttered without actual malice. Thus, the final version of our chart, with the *New York Times* line of privilege added, looks like this:[99]

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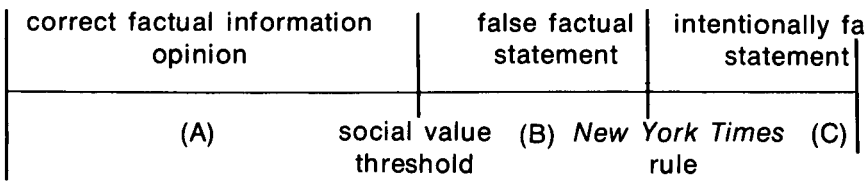
[95] "Because 'there is no such thing as a false idea,' Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974), statements of opinion, even if expressed in pejorative terms, are protected by the first amendment." L. Tribe, *supra* note 9, at 635 n.22.

[96] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[97] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

[98] *Id. See also* Justice White's concurrence in Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971). He noted: "Misinformation has no merit in itself; standing alone it is as antithetical to the purposes of the First Amendment as the calculated lie . . . . Its substance contributes nothing to intelligent decisionmaking by citizens or officials; it achieves nothing but gratuitous injury." *Id.* at 301 (citation omitted).

[99] If the plaintiff is a private individual, the structure of the chart would remain the same,



It is immediately apparent that Area B speech receives constitutional protection, even though the Court has candidly admitted that such speech has no independent constitutional value. An explanation for this "over-protection" can be found in the principles underlying the chilling effect doctrine. The imperfection of our legal system forces us to protect Area B material not because it is intrinsically worth protecting, but in order to ensure that Area A material is not mistakenly penalized. The mandate of *Speiser* requires us to create a "margin for error" or a buffer zone to guarantee that individuals who do "steer far [wide] of the unlawful zone"[100] are in fact rarely deterred from engaging in Area A activity. Professor Tribe has isolated some of the factors which explain the Court's readiness to afford a measure of "strategic" protection to non-malicious defamatory falsehoods. He notes:

> [A] great danger of self-censorship arises from the fear of guessing wrong—the fear that the trier of fact, proceeding by formal processes of proof and refutation, will after the event reject the individual's judgment of truth. This fear is exacerbated by the danger that a jury will not fairly find the facts in cases involving unpopular speakers or unorthodox ideas. And there is simply the cost of litigating a defamation suit, even where the publisher is relatively confident that a court somewhere will ultimately vindicate his judgment.[101]

But beyond these reasons, there is an additional factor that goes a long way toward explaining the rationale of the *New York Times* rule. In the *Times* decision, Justice Brennan stressed that the failure of the New York Times to check through all its files in order to verify the truth of the statements contained in the allegedly defamatory advertisement could not be used to support a finding of malice.[102] The Court was unwilling to endorse a requirement that forced a publisher to absorb the costs of making that theoretically possible determination.[103] The essence of the *Times* rule, then, is that no newspaper can realistically be expected to bear the burden of verifying all the factual statements appearing in each of its editions. The impracticability of forcing a publisher to become a guaran-

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with the substitution of "negligently false facts" in area C. *See generally* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[100] Speiser v. Randall, 357 U.S. 513, 525-26 (1958). For an early reference to margin of error, see Pennekamp v. Florida, 328 U.S. 331, 371-72 (1946) (Rutledge, J., concurring).

[101] L. Tribe, *supra* note 9, at 634.

[102] New York Times Co. v. Sullivan, 376 U.S. at 287. The Court thought it sufficient that the Times had relied upon the reputation of those individuals who had submitted the advertisement. *Id.*

[103] *See* notes 65-69 and accompanying text *supra.*

tor of truth adds considerably to the uncertainty already inherent in the legal system. This additional uncertainty causes a proportionate increase in a publisher's fear of the litigation process, a fear translated into increased deterrence, in this context a heightened degree of self-censorship. The *New York Times* requirement of actual malice eliminates the additional uncertainty occasioned by the sheer magnitude of the task of having to check all the facts involved.[104] In so doing, the *Times* rule reduces the degree of self-censorship or chilling, but at a price. As noted, factual errors are deemed to have no *independent* constitutional value;[105] thus every factual falsehood permissibly published, every "Area B" statement "allowed" by the *New York Times* standard, represents an "escape" of the "guilty."[106] Recognizing our imperfect system of imperfect knowledge, recalling the principle of comparative harm, and acknowledging our obligation to follow the mandate of *Speiser v. Randall,* we find that the method of prevention of overcautious self-censorship must be the tolerance of undercautious regulation.[107] To avoid the chilling effect, we must prohibit the imposition of sanctions in instances where ideally they would be permitted.

This result of "strategic protection"[108] is enhanced by the additional requirement imposed by the *New York Times* case—that actual malice be proved with convincing clarity.[109] This requirement, like the assignment of the burden of proof in *Speiser* and the existence of protective procedures in a criminal trial, is but a skewed allocation of the chance of error.[110] The ultimate result of the convincing clarity requirement is that some plaintiffs who ought to be compensated, even under the *New York Times* rule, will not recover; their injury goes unredressed not because they are undeserving, but because they are unable to prove the actual

[104] It is possible that this "magnitude of the effort" chilling could provide a principled distinction in some instances between the legal standards governing press defamation and those governing private defamation. The press must consider the costs of establishing and maintaining a formalized procedure for verifying numerous facts on a daily basis, a problem that does not confront those not in the communications business. This question remains open after Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *See generally* Hill, Defamation and Privacy Under the First Amendment, 76 Colum. L. Rev. 1205, 1223-27, 1285-91 (1976); Shiffrin, Defamatory Non-Media Speech and First Amendment Methodology, 25 U.C.L.A. L. Rev. 915 (1978); Note, First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants, 47 So. Cal. L. Rev. 902 (1974); Note, Problems in Defining the Institutional Status of the Press, 11 U. Rich. L. Rev. 177 (1976).

[105] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 301 (1971) (White, J., concurring). *See* note 98 *supra.*

[106] *See* note 114 *infra.*

[107] *See* Kalven, *supra* note 91, at 213.

[108] Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

[109] 376 U.S. at 285-86. *See generally* Monitor Patriot Co. v. Roy, 401 U.S. 265, 275 (1971) (holding use of "preponderance of the evidence" standard constitutional error). For a general discussion, see Eaton, The American Law of Defamation Through *Gertz v. Robert Welch, Inc.* and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1370-75, 1381-86 (1975). Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), is still of interest on the burden of proof issue, particularly because of Justice Brennan's reliance on the rationale of *In re* Winship. *Id.* at 50.

[110] *See* text accompanying notes 80-84 *supra.*

malice that in fact exists.[111] Forcing the plaintiff to shoulder a heavy burden of proof decreases the risk of erroneous determinations against speech. The publisher's fear of such determinations is thus diminished, with an accompanying decrease in the amount of self-censorship.[112] In this manner, the overall chilling of protected speech is reduced.

But there is, of course, a price to be paid. The "convincing clarity"[113] standard, and indeed the entire rule of the *New York Times* case, ensures that publishers are rarely penalized erroneously, but not without the cost of wrongfully depriving deserving plaintiffs of their expected remedies.[114] The *New York Times* decision is, at bottom, a finding that an erroneous penalization of a publisher is more harmful than a mistaken denial of a remedy for an injury to reputation.[115] Indeed, some individuals, perceiving the difficulties created by the *New York Times* rule[116] and realizing the increased possibility of erroneous judgments against deserving plaintiffs, may be deterred from risking their "good names" at all; to the extent that this occurs, there is arguably a chilling effect on the entry of individuals into public life.[117] But there is no "transcendent" value in the existence of public figures and no "preferred" position in our con-

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[111] *See* St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

[112] Obviously, the very existence of any libel laws will produce some self-censorship. The question is how much of this chilling effect should be tolerated. *See generally* Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422 (1975). It is perhaps instructive to point out that we could ensure against the punishment of the innocent by punishing none of the guilty.

[113] *See* note 109 *supra*.

[114] Perhaps the classic example of the "costs" of the *New York Times* rule is presented in Ocala Star-Banner v. Damron, 401 U.S. 295 (1971). There is little doubt that the plaintiff Leonard Damron was wrongfully injured by the publication in question. Damron, then mayor of Crystal River, Florida, lost his bid for reelection two weeks after the appearance of the erroneous publication. The issue thus became the societal costs, in first amendment terms, of granting him a remedy.

[115] The low comparative weight given to reputation has not been ignored by the Court. *See* Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) ("The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press"). *See also* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47-48 (1971).

[116] These potential plaintiffs include not only public officials, but also public figures. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). For the parameters of the public official concept, see Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Rosenblatt v. Baer, 383 U.S. 75 (1966). For the definition of public figure, see Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-45 (1974).

[117] In England, where the law of defamation is especially strict, commentators have rejected the principles of *New York Times* on this very basis, arguing that the chilling of entry into public life is either more likely or more serious than the chilling of the press. R. McEwen & P. Lewis, Gatley on Libel and Slander 223 n.56 (7th ed. 1974) (acceptance of *New York Times* rule "would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation"); T. Weir, A Casebook on Tort 425 (3d ed. 1974) (acknowledging that differences between American and English law are based on differences in how the two countries view the comparative value of free speech and good reputation). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 400 (1974) (White, J., dissenting) ("It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems").

stitutional order for reputation.[118] Thus, it is the deterrence of newspaper publishers and the consequent chilling of first amendment activity which *ex hypothesi* is more harmful.[119] Taken to the extent of its logic, this would mean that a constitutionally favored interest, such as free speech, would inevitably occupy a position of absolute priority over a value not so favored, such as reputation. But clearly, this is not the case; if it were there would simply be no defamation laws at all. The *New York Times* decision represents a balancing of competing interests, a balancing performed at the rule-making level. And acknowledgement of the inevitability of error and the priority of one type of error mandates that any such balancing process be heavily weighted in favor of the constitutional interest.

Recognition of the *New York Times* balance and its reflection in the Court's creation of a buffer zone of strategic protection affords a starting base for an analysis of two lines of cases suggesting procedural modifications of defamation law. First, there are those decisions urging that summary judgment be liberally granted in defamation cases;[120] second, there are various opinions indicating that something more than minimum contacts may be necessary in order to subject an out-of-state publisher to long-arm jurisdiction.[121] These decisions are premised upon the belief that the expense of litigation, and indeed its very pendency, perhaps in a distant forum from which little revenue is earned, will operate to chill the

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[118] *See* note 115 *supra*. *But see* note 117 *supra*.

[119] Perhaps one of the disadvantages of the first amendment is that it compels us virtually *always* to say that the wrongful suppression of speech is the more harmful error. As with all rules, it achieves consistency and predictability at the expense of flexibility and justice in the particular case. For a comment on the first amendment by a prominent English jurist, see the opinion of Lord Scarman in Senior v. Holdsworth *ex parte* Independent Television News Ltd., [1975] 2 W.L.R. 987, at 1000 (C.A.).

[120] *See, e.g.*, Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 864-65 (5th Cir. 1970); Thompson v. Evening Star Newspaper Co., 394 F.2d 774 (D.C. Cir.), *cert. denied*, 393 U.S. 884 (1968); Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967); Meeropool v. Nizer, 381 F. Supp. 29, 32 (S.D.N.Y. 1974), *aff'd* 505 F.2d 232 (2d Cir. 1974) *and* 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). *See generally* L. Tribe, *supra* note 9, at 642-43. For additional sympathetic commentary, see Anderson, *supra* note 112, at 435-38; Rendleman, Chapters of the Civil Jury, 65 Ky. L.J. 769, 778-87 (1977).

[121] *See, e.g.*, Founding Church of Scientology v. Verlag, 536 F.2d 429 (D.C. Cir. 1976); New York Times Co. v. Connor, 365 F.2d 567 (5th Cir. 1966); Buckley v. New York Times Co., 338 F.2d 470 (5th Cir. 1964); Walker v. Savell, 335 F.2d 536 (5th Cir. 1964). The principle has been weakened slightly in some recent cases. *See, e.g.*, Edwards v. Associated Press, 512 F.2d 258, 266-68 (5th Cir. 1975); Rebozo v. Washington Post Co., 515 F.2d 1208 (5th Cir. 1975); Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967); Sipple v. Des Moines Register & Tribune Co., 82 Cal. App. 3d 143, 147 Cal. Rptr. 59 (1978). Some courts have rejected the concept completely. *See, e.g.*, Anselmi v. Denver Post, Inc., 552 F.2d 316 (10th Cir.), *cert. denied*, 432 U.S. 911 (1977); David v. National Lampoon, Inc., 432 F. Supp. 1097 (D.S.C. 1977). *See also* Buckley v. New York Post Corp., 373 F.2d 175 (2d Cir. 1967) (opinion of Friendly, J.). *See generally* Carrington & Martin, Substantive Interests and the Jurisdiction of State Courts, 66 Mich. L. Rev. 227 (1967); Comment, Long-Arm Jurisdiction Over Publishers: To Chill a Mocking Word, 67 Colum. L. Rev. 342 (1967); Comment, Constitutional Limitations to Long Arm Jurisdiction in Newspaper Libel Cases, 34 U. Chi. L. Rev. 436 (1967).

distribution of nationally circulated publications.[122] The cases are clearly correct in their prediction of a chilling effect; however, these decisions seem to have underestimated the extent to which *New York Times* and its progeny have already accounted for that effect.

The chart previously introduced in this discussion of defamation and the text accompanying it indicated that the *New York Times* standard protects for strategic reasons that which ideally ought not be protected.[123] Factual falsity falling within Area B is protected not for its independent value, but to guard against the mistaken penalization of Area A material. The *New York Times* rule, standing on the foundations of the chilling effect doctrine, has created a buffer zone, a margin for error. If this zone is sufficiently wide,[124] then additional procedural support, often provided at the expense of *Erie* principles,[125] is unnecessary.

Consider, particularly, the summary judgment cases.[126] If the merits of the controversy involve such close issues that summary judgment might not be granted under traditional principles, then the disputed material must fall no further to the left than Area B on our chart. The imposition of a moderate penalty—the cost of litigation—is not inconsistent with *New*

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[122] The Fifth Circuit has applied this reasoning more to regional publishers sued outside of their region than to national publishers. *See, e.g.*, Curtis Publishing Co. v. Golino, 383 F.2d 586 (5th Cir. 1967).

[123] The same sort of strategic protection is afforded, albeit to a lesser extent, by the standard developed to deal with the problem of defamation of private individuals in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding state libel laws imposing liability without fault to be violative of first amendment).

[124] It could be argued that the distortion of reality caused by the imperfect nature of the legal system makes it impossible to know whether the buffer zone is wide enough. But, as with all legal rules, there is no reason to believe that an *a posteriori* evaluation of the results under a rule cannot provide a basis for evaluating the success of a rule. Adjustments are inevitable, and it is a fallacy to reject a concept merely because it is imprecise. Edmund Burke once said, "Though no man can draw a stroke between the confines of night and day, still light and darkness are on the whole tolerably distinguishable." A. Flew, Thinking About Thinking 104 (1975) (quoting Burke). Once we recognize that we are balancing the *frequency* of errors of two kinds, two conclusions follow. First, it is an invalid argument to say that there is "too much" free speech because of a particular instance in which the freedom has been granted in an undeserving case. Such abuses are inherent in granting meaningful protection to free expression. They are built in to the system. Only the identification of an unacceptable frequency of such errors is truly relevant. This leads to the second conclusion, that there is nothing inherently wrong with tests and standards that are changed or adjusted. The relatively continuous modifications in the tests of obscenity, constitutionally protected defamation and "clear and present danger," for example, may be only part of the continuous "fine tuning" process that is required in order to arrive at an acceptable balance between the severity and frequency of two types of errors.

[125] Erie R.R. v. Tompkins, 304 U.S. 64 (1938). The underlying premise of the defamation cases, most clearly explained in *Gertz*, is that the constitutional standards represent a balance between first amendment interests in the protection of the press and the state's right to protect reputation. To the extent that federal courts in diversity cases make "procedural" rulings of this sort, they are adding to the weight on the constitutional side and thus subtracting from the state's substantive authority which is purportedly protected by the balance struck.

[126] *See* note 120 *supra*. *See also* Time, Inc. v. McLaney, 406 F.2d 564, 566 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969) (interlocutory appeals should be more freely allowed in libel cases).

York Times; at worst Area B material, which is strategically but not ideally protected speech, will be chilled. Traditional summary judgment principles are sufficient to ensure the protection of Area A materials.[127]

There is a serious fallacy in assuming that procedural modifications accounting for free speech interests are necessarily positive adjustments required by the priority of first amendment values. The fallacy lies in ignoring the fact that any rule itself embodies a balancing of interests, a balancing that ideally has already accounted for the existing procedural structure. The adjustment of a procedural mechanism to compensate for first amendment interests is double-counting—the initial substantive rule has, ideally, already made that accommodation. The Supreme Court could have chosen to protect freedom of speech to a greater extent than it already has. It could have eliminated defamation actions entirely, required the application of the "actual malice" standard to all defamation actions,[128] or demanded that plaintiffs prove every element of their case beyond a reasonable doubt.[129] But the adoption of such rules would, under present thinking, have given insufficient weight to the countervailing interests in reputation. The principles established in *New York Times,* adjusted in *Gertz v. Robert Welch, Inc.*[130] and embellished in *Time, Inc. v. Firestone*[131] represent what the current Court deems the proper accommodation. When a procedural rule is modified or a jurisdictional standard altered in an attempt to pay deference to first amendment interests, the ultimate result is no less than a reworking of the Supreme Court's balance. It would seem that such innovation must be left to the Supreme Court, which forged the original balance.

If the reader will excuse a brief digression, I would like to demonstrate that the procedural modifications endorsed by the Court of Appeals for the Ninth Circuit in *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*[132] provide an example of a lower

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[127] The same analysis would appear to answer those cases urging a more stringent jurisdictional threshold than the traditional "minimum contacts" standard. *See* note 121 *supra*. However, there may be an important distinction. Newspapers and magazines contain a wide variety of articles and advertisements, published in an inseparable mass. A publisher faced with the expense of having to defend libel charges stemming from the circulation of Area B material in a distant forum providing him with little revenue, may decide to forego publication there entirely. Thus, the chilling of Area B material for a particular locality caused by the minimal jurisdictional standard may effectively result in the chilling of Area A material as well. For this reason, a more demanding jurisdictional threshold is, arguably, justified.

[128] *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plurality opinion), *subsequently rejected in* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[129] *See* notes 109-13 and accompanying text *supra*.

[130] 418 U.S. 323 (1974).

[131] 424 U.S. 448 (1976). *See generally* Ashdown, *Gertz* and *Firestone:* A Study in Constitutional Policy-Making, 61 Minn. L. Rev. 645 (1977).

[132] 542 F.2d 1076 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977). *See generally* Note, Protecting First Amendment Rights of Defendants by Limiting Plaintiffs' Access to the Courts: Procedural Approaches to *Noerr* and *Sullivan,* 62 Minn. L. Rev. 681 (1978); Note, *Franchise Realty v. Culinary Workers:* "Chilling" the Sham Exception, 72 Nw. U. L. Rev. 407 (1978).

court's tampering with a previously established accommodation of interests; this court felt obliged to act because of the recognized "sensitivity of First Amendment guarantees to the threat of harassing litigation."[133] *Franchise Realty* involved the applicability of the so-called *Noerr-Pennington* doctrine[134] which affords a first amendment based immunity from the Sherman Antitrust Act for concerted efforts aimed at influencing public officials, even if such joint efforts are intended ultimately to eliminate competition.[135] In *Franchise Realty,* the plaintiffs contended that the defendants' concerted lobbying efforts fell within the "sham" exception to *Noerr-Pennington*—the immunity is forfeited where the joint action, "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. . . ."[136] The Ninth Circuit held that a plaintiff alleging such a "sham" is required to frame his complaint with greater specificity than that usually required under the liberal notice pleading envisioned by the Federal Rules of Civil Procedure. In dismissing the complaint, the court explained that "where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required."[137]

The court was, of course, correct in concluding that such a chilling effect would result. Some individuals might refrain from engaging in concerted lobbying efforts for fear that their lawful conduct might be held unlawful, or out of a desire to avoid the expense, trouble and uncertainty of having to demonstrate that legality in court. But the Supreme Court, recognizing the potential deterrent effect of the "sham" exception, could have granted an absolute *Noerr-Pennington* immunity embracing no exceptions at all; the Court might have opted to afford a measure of strategic protection to some "shams" in order to ensure that *no*

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[133] 542 F.2d at 1082.

[134] Eastern R.R. Pres. Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); UMW v. Pennington, 381 U.S. 657 (1965). *See generally* Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the *Noerr-Pennington* Doctrine, 45 U. Chi. L. Rev. 80 (1978).

[135] UMW v. Pennington, 381 U.S. 657, 670 (1965). Although *Noerr* and *Pennington* could have been based upon free speech principles, the decisions were in fact grounded in the first amendment right "to petition the Government for a redress of grievances," an area of generally unexplored constitutional doctrine.

[136] Eastern R.R. Pres. Conf. v. Noerr Motor Freight, 365 U.S. 127, 144 (1961). The "sham" exception was first suggested by Justice Black writing in *Noerr. Id.* at 144. More recent elaboration of the doctrine has come primarily from two cases: California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) and Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). *See generally* Fischel, *supra* note 134, at 106-10; Handler, Twenty-Five Years of Antitrust, 73 Colum. L. Rev. 415, 430-39 (1973); Note, Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process, 86 Harv. L. Rev. 715 (1973).

[137] Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d at 1082-83.

legitimate first amendment petitioning would be chilled. By not creating a buffer zone or a margin for error, the Court presumably was willing to accept some chilling of protected activity. In accommodating the competing concerns the Court may have recognized the strong governmental interest reflected in the antitrust laws or may have accorded a low weight to the first amendment interest in protecting speech activities of a commercial nature.[138] In setting up procedural barriers to pleading and proving a "sham," the Ninth Circuit's *Franchise Realty* opinion has, in fact, recast the Supreme Court's balancing of the interests involved. No doubt the circuit court was correct in its analysis and assessment of the potential for chilling created by the "sham" exception and the liberal pleading requirements of the Federal Rules of Civil Procedure; but, the ultimate result of the *Franchise Realty* case is, at bottom, no less than a partial overruling of the very decisions that formulated the sham exception initially.[139]

B. *Obscenity*

A look at the Supreme Court's work in the realm of obscenity reveals the significant role that the chilling effect doctrine has played in guiding the Court in its enunciation of legal rules and standards controlling in this area. An analysis similar to that previously proposed for defamation demonstrates that the chilling effect doctrine was a key factor aiding the Court in its determination of where to draw the line separating punishable obscenity from protected speech; in addition, chilling effect reasoning was utilized by the Court in its formulation of subsidiary rules implementing obscenity adjudication.

With the reader's indulgence, I would again like to employ a chart as an aid in this analysis; in this context the chart represents a continuum of "social value"[140] for verbal or pictorial material. At one end of this chart we find *Hamlet,* for example, and at the other, a sixty-minute motion picture entitled "Boy and Sheep," depicting a continuous closeup of the two principals engaged in their favorite pastoral pastime, the film devoid of dialogue or artistic embellishment. That seems about as far as I am willing to go on the pages of this journal.[141] Thus, we begin with:

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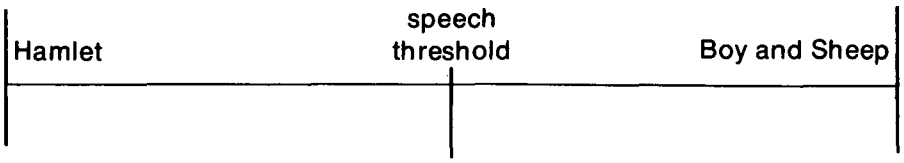
[138] Of course, commercial speech is now deemed to fall within the protection of the first amendment. *See* cases cited at note 44 *supra*. But a close reading of the commercial speech cases reveals that the extent of the protection granted is still substantially less than that granted most other types of speech. *See* Schauer, Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter, 64 Va. L. Rev. 263, 294-300 (1978).

[139] This is not to suggest that a state court could not decide to rework a particular balance of constitutional and non-constitutional interests, so long as the court did not formulate a new balance less protective of federal constitutional interests. *See* 86 Harv. L. Rev. 1592 (1973).

[140] Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

[141] More accurately, it is about as far as the editors are willing to go. A somewhat more graphic description was included in the original manuscript.

Now, the essential theory of the Supreme Court's opinion in *Roth v. United States*[142] is that at some point along this continuum of decreasing worth no ideas are being expressed; certain utterances are simply not considered speech. Therefore, our chart now takes on this form:



Assuming that accepted constitutional doctrine prohibits the imposition of sanctions based upon the content of speech,[143] everything falling to the left of the speech threshold stands equal in the eyes of the law and receives full first amendment protection.[144] Everything to the right remains theoretically unprotected. If our ideal legal system were a reality, the actual line of constitutional privilege would be congruent with the theoretical speech threshold. But it must be recognized that the determination of what is or is not speech, is, like any judicial determination, subject to some degree of error; and, it should be recalled that the likelihood of a mistaken evaluation increases as we draw closer to the dividing line.[145] This recognition of inevitable imperfection coupled with the principle of comparative harm requires that we create a margin for error, and following *Speiser* and *New York Times,* the margin ought to be in favor of speech. In other words, the test for obscenity should lie somewhere to the right of the ideal speech threshold. Thus:

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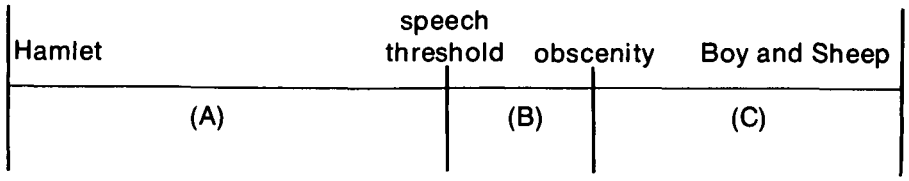
[142] 354 U.S. 476 (1957).

[143] *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Police Dep't v. Mosley, 408 U.S. 92 (1972); Schacht v. United States, 398 U.S. 58 (1970). *But see* FCC v. Pacifica Found., 98 S. Ct. 3026 (1978) (plurality opinion); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion). *See generally* Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20 (1975).

[144] *But see* FCC v. Pacifica Found., 98 S. Ct. 3026 (1978) (upholding FCC regulation of "indecent" radio broadcasts, although such broadcasts admittedly not obscene); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upholding zoning ordinance directed solely at theatres exhibiting films of a sexually explicit nature). These decisions are clearly exceptions to the general rule preventing government regulation based upon the content of speech. It is possible to fit the plurality opinion in *Young* into the analysis suggested in this article. *See* note 147 *infra. Pacifica,* though purporting to use a *Young* type analysis, is simply wrong. *Id.*

[145] Speiser v. Randall, 357 U.S. 513, 526 (1958). *See* notes 54-56 and accompanying text *supra*.



Under this formulation, a buffer zone[146] is created to counteract the fallibility of the legal process, to account for the potential hostility and prejudice of jurors and to compensate for the inherent difficulty of determining what is obscene.[147]

This final consideration—the intrinsic ambiguity of the governing principle of obscenity—is responsible in large part for the creation of a chilling effect in this area. It will be recalled that in the *New York Times* case the Court never doubted the theoretical capability of a publisher to ascertain the truth of the factual assertions contained in any edition; rather, it was the cost of securing that truth which was deemed to be impermissibly high.[148] In the realm of obscenity, however, a different

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[146] Amsterdam, Note, *supra* note 53, at 75 & n.40 (noting that doctrine of unconstitutional indefiniteness has been used to create an insulating buffer zone).

[147] In Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the Supreme Court upheld various city zoning ordinances that regulated the location of motion picture theaters exhibiting sexually explicit "adult" films. The ordinances prohibited the location of any adult theater within 1000 feet of any two other regulated uses or within 500 feet of a residential area. *Id.* at 52. Although I do not agree with the plurality opinion, it is possible to explain the *Young* decision in terms of the analysis proposed in this article. The "speech" subject to regulation in *Young* can be viewed as falling within Area B on the chart just introduced above. Since such speech is deemed to have little or no independent constitutional value, the danger of its regulation lies only in the possibility that Area A speech may be mistakenly penalized. While this is, of course, a legitimate concern, the type of ordinances involved in *Young* present little likelihood of such an occurrence. As the Court noted:

> The ordinances are not challenged on the ground that they impose a limit on the total number of adult theaters which may operate in the city of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as an entity, the market for this commodity is essentially unrestrained.

Id. at 62.

Thus, the risk created by the Court's willingness to regulate Area B material *in this case* is somewhat negated by the nature of the regulation involved. A reasonable restriction limiting the location of theaters disseminating Area B material is unlikely to have a severe impact upon the availability of Area A material.

However, there is a different and serious danger. Once the Court permits any regulation of Area B material, a real possibility exists that in a subsequent case a purported restriction of B material will, in fact, be a mistaken regulation of Area A work. Indeed, the recent decision in FCC v. Pacifica Found., 98 S. Ct. 3026 (1978), upholding regulation of indecent and vulgar radio broadcasts of an admittedly non-obscene nature, represents just such a case. Although utilizing a *Young* type analysis, the Court in *Pacifica* erroneously equated the Area B content of the films regulated in *Young* with the "indecent" but nonetheless Area A material involved in the *Pacifica* broadcast. Such confusion is likely to be avoided if government regulation remains focused solely upon the control of Area C material; if there is no regulation of Area B material there is virtually no risk that Area A material will be reached. Thus, perhaps *Young* is incorrect only because it increases the likelihood that decisions like *Pacifica* will be made. That latter case, on the other hand, is simply wrong.

[148] *See* notes 101-04 and accompanying text *supra*.

problem obtains. Justice Brennan has chided the Court for its "failure to define [obscenity] standards with predictable application to any given piece of material";[149] indeed, he noted that any such standard would be "inevitably obscure."[150] Herein lies the problem. A legal principle so difficult of precise definition and proper application is bound to increase the uncertainty inherent in the legal process. Unlike our *New York Times* publisher, a handler of "adult" material will often be unable, even in theory, to make a definite determination as to the legal status of the materials that he places on the market. As one Justice commented: "The problem is . . . that one cannot say with certainty that material is obscene, until at least five members of [the] Court . . . have pronounced it so."[151] Thus, the difficulty is not that the cost of making a theoretically possible determination is prohibitive, but rather, that the desired degree of certainty may, in fact, be unattainable at all.[152]

The "inevitably obscure" standards which define obscenity do more than simply raise the level of uncertainty in an individual's own mind as to the lawfulness of his contemplated conduct. In addition, these standards, and the difficulty of their application by judge or juror, increase the likelihood of error in the litigation process itself. Thus, a "merchant of materials for the mature" remains uncertain prior to taking action and after such action has been challenged; he entertains doubts concerning both the legality of his proposed conduct and the probability that such conduct will receive an error-free judicial evaluation.

Returning to our chart, we find, then, that more than any other single factor, the inherent elusiveness of the concept of obscenity necessitates the creation of a margin for error to ensure the protection of speech falling to the left of the speech threshold. In the same manner that non-malicious factual falsehood received "strategic" protection in *New York Times,* Area B material here is safeguarded—protection is offered not because of the intrinsic worth of such material, but in order to guarantee that utterances that deserve the shield of the first amendment remain unscathed. If the legal test for obscenity incorporates sufficient precautions against the chilling of Area A material, it is again "double-counting"[153] to contend that regulations prohibiting obscenity are impermissibly broad simply because the vagueness of the concept leaves Area B material exposed to a potential chill.

A glance at the Court's current definition of obscenity, enunciated in

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[149] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting).

[150] *Id. See also* L. Tribe, *supra* note 9, at 669 n.79 (citing authorities).

[151] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting).

[152] One film distributor attempted to alleviate this uncertainty by requesting a declaratory judgment that the film it proposed to distribute was not obscene. Noting that no prosecution had yet been threatened, the Massachusetts Supreme Judicial Court denied the request, finding no "actual controversy." Bunker Hill Distributing, Inc. v. District Atty., 78 Mass. Adv. Sh. 2248 (1978). Questions of justiciability aside, such a procedure has obvious advantages. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55 & n.4 (1973).

[153] *See* text accompanying notes 128-32 *supra.*

the case of *Miller v. California,*[154] lends support to the validity of the foregoing analysis.[155] The Court, as a preliminary matter, limited the permissible scope of obscenity regulation to works depicting or describing sexual conduct and stressed that such conduct "must be *specifically* defined by the applicable state law."[156] This specificity requirement, which in its application has generally exceeded normal vagueness standards, reflects the Court's attempt to raise barriers impeding governmental efforts to have material adjudged obscene. Moreover, the formulation of the specific definition of obscenity in *Miller* incorporates three distinct tests which must be satisfied by the prosecution before a work will be condemned as falling outside the shelter of the first amendment.[157] Finally, the Court's *caveat* that only "hard-core" pornography will be subject to governmental regulation[158] further indicates the Court's intention to create something of a "buffer zone" in Area B.[159] However, the recent erosion of the heightened specificity requirement,[160] the frequent willingness of the Court to consider for protection only works of "serious" value, and the possibility that "contemporary community standards"[161] may reflect a low tolerance for material of a sexual nature all serve to move the line of constitutional protection further to the left on our chart. By thus diminishing the margin for error, the risk of actually catching or just chilling Area A material is increased. Obviously, placing the *Miller* line at a particular point on the chart reflects a subjective judgment. But a proper analysis must at least recognize the existence of an Area B—to ignore it is to miss the point entirely.

In *New York Times,* it will be remembered, the Court reinforced the buffer zone created by the "actual malice" requirement by demanding

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[154] 413 U.S. 15 (1973).

[155] The necessity of having to decide Jenkins v. Georgia, 418 U.S. 153 (1974) (reversing conviction for distribution of film "Carnal Knowledge"), indicates that the *Miller* test *simpliciter* was insufficient protection, since "Carnal Knowledge" falls clearly within Area A. There is, however, some question whether the early misinterpretations of the *Miller* test, most particularly the local standards concept, were due to the decision itself, or the manner in which it was reported to the public by the press.

[156] Miller v. California, 413 U.S. 15, 23-24 (1973) (emphasis added). *See generally* F. Schauer, The Law of Obscenity 154-68 (1976).

[157] The Court held:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. at 24.

[158] *Id.* at 27. Since Jenkins v. Georgia, 418 U.S. 153 (1974), there have been few prosecutions or convictions in this country for the possession or distribution of material that is not extremely explicit. *Cf.* Jacobellis v. Ohio, 378 U.S. 184, 197 (1963) (Stewart, J., concurring) (concluding that laws in this area are constitutionally limited to hard-core pornography). *See generally* F. Schauer, *supra* note 156, at 109-13.

[159] *See* notes 145-47 and accompanying text *supra.*

[160] Ward v. Illinois, 431 U.S. 767 (1977).

[161] Miller v. California, 413 U.S. at 24.

that a plaintiff prove such malice with "convincing clarity."[162] In the area of obscenity, the Court has similarly increased the protection inherent in the basic speech category by framing an important subsidiary rule implementing obscenity adjudication. In *Smith v. California,*[163] the Court, for the first time, imposed a scienter requirement in criminal obscenity prosecutions.[164] Although later decisions have indicated that the government need not prove that a defendant realized that a particular work was legally obscene,[165] *Smith* does require that the defendant be shown to have been aware of the nature and character of the materials.[166] The true basis for the Court's insistence that a scienter requirement be imposed is the recognition of the burden that would be thrust upon a bookseller subject to a strict liability standard. Just as a publisher in the *New York Times* situation cannot be expected to make the theoretically possible determination of the absolute truth of his published statements, a bookseller like Mr. Smith, subject to prosecution for the possession of obscene material, cannot be expected to become personally familiar with every work contained in his possibly enormous inventory. Even assuming that the standard of obscenity has some core meaning ascertainable by the average merchant of adult publications, it is nonetheless impermissible to subject that merchant to criminal liability for his unknowing possession of proscribed material. The possibility that such liability might be imposed, coupled with the impracticality of requiring a bookseller to ascertain the contents of every book held out for sale would no doubt increase a bookseller's uncertainty as to his potential vulnerability to a legal attack. This heightened uncertainty would cause an increase in that bookseller's overall fear of the legal system, leading naturally to an excess degree of caution on his part.[167] The imposition of a scienter requirement reduces this uncertainty, alleviates this fear and hopefully diminishes the likelihood that protected activity will be chilled.

Not unexpectedly, this additional protection, supplementing the constitutional buffer already created by the definition of obscenity itself, has its price. Professor Tribe's comment, that "[i]n the world of *New York Times v. Sullivan,* ignorance is bliss,"[168] is equally applicable in the realm of obscenity. The ultimate effect of the *Smith* decision is that some books that are in fact legally obscene remain untouchable. The added burden of the scienter requirement serves the same purpose as did the raising of the

[162] See notes 107-13 and accompanying text *supra.*

[163] 361 U.S. 147 (1959).

[164] *See generally* F. Schauer, *supra* note 156, at 222-26.

[165] Hamling v. United States, 418 U.S. 87, 119-24 (1974); Mishkin v. New York, 383 U.S. 502, 510-11 (1966).

[166] *See* note 164; L. Tribe, *supra* note 9, at 665.

[167] *See* Smith v. California, 361 U.S. 147, 153 (1959). Justice Brennan feared that a bookseller would restrict his sales to those materials that he had personally inspected. Note that the Court in *Smith* distinguished the food and drug laws, where there seems little harm in excess caution. *Id.* at 152. To the extent that there is a harm to financial interests as a result of this excess caution, it is certainly not a harm of a constitutional dimension.

[168] L. Tribe, *supra* note 9, at 638.

plaintiff's burden of proof in *New York Times*; here, however, rather than increasing the necessary quantum of proof, the Court has introduced an additional factor to be proved, and the introduction of this factor will allow certain material clearly within the grasp of the *Miller* test to "escape." Unable to prove the required "scienter," the prosecution will fail in cases where it ideally should not; and in some instances, the government may decide to forego prosecution altogether. While the absence of a scienter requirement chills the distribution of protected materials because of the excess caution occasioned by practical uncertainty, the imposition of such a requirement chills the effective regulation of some unprotected and therefore unlawful material. But the principle of comparative harm, flavored by the existence of the first amendment, demands that scienter be proved; this is so even though the existence of that requirement protects the undeserving and in spite of the fact that the elimination of such a requirement might be constitutionally countenanced in the absence of the superior value.[169]

It has been suggested that the incorporation of local community standards into the constitutional definition of obscenity[170] may increase the uncertainty inherent in the legal process in much the same manner as did the lack of a scienter requirement. It is not that the dealer of adult material is theoretically unable to determine the variety of obscenity standards existing nationwide, but rather that the impracticability of making such a determination throws the dealer into a perpetual state of fear. He may be deterred from distributing what is in fact protected material by his doubt as to how that material will be evaluated in a particular locale; at the very least, the distributor will most likely bow to the strong pressure to conform to the "lowest common denominator of sexual acceptability."[171] In this manner, many works which would receive protection, perhaps even in a majority of forums, remain uncirculated. In addition, it has been urged that the conviction of a publisher under the local community standards of, say, Nebraska may in actuality drive that publisher out of business and effectively bar his distribution of material that would receive protection under the local standards of say, Oregon.[172]

The above arguments are, at first glance, rather appealing and fit nicely into an analysis of the chilling effect doctrine. Assuming that there are an incredible number of different local standards,[173] and that the variations

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[169] *See* note 167 *supra*.

[170] Miller v. California, 413 U.S. 15 (1973). *See* Smith v. United States, 431 U.S. 291 (1977); Jenkins v. Georgia, 418 U.S. 153 (1974). *See generally* F. Schauer, *supra* note 156, at 116-35.

[171] L. Tribe, *supra* note 9, at 665.

[172] This argument has appeared recently in connection with several trials involving national distributors of sexually explicit magazines and motion pictures. There are no reported opinions, but for factual accounts, see Morgan, United States Versus the Princes of Porn, N.Y. Times, Mar. 6, 1977, § 6 (Magazine), at 16; Neville, Has the First Amendment Met Its Match?, N.Y. Times, Mar. 6, 1977, § 6 (Magazine), at 18; First Amendment Hustle, Nation, Jan. 29, 1977, at 99 (discussing trial of Hustler Magazine publishers).

[173] *See* Schauer, Obscenity and the Conflict of Laws, 77 W. Va. L. Rev. 377, 387 (1975).

in these standards actually affect the outcome of obscenity litigation,[174] one may rationally predict an increased uncertainty on the part of a nationwide distributor or publisher whose inability accurately to ascertain the myriad variations in local law would ultimately create a heightened sense of caution with the resultant chilling of protected activity. I have elsewhere argued that community standards, whether local or national, may be functionally and theoretically irrelevant in obscenity litigation;[175] but if these standards are to be applied, it does not necessarily follow that chilling effect reasoning is any more applicable in this context than it is to obscenity law in general.[176] Given that obscenity may be regulated,[177] there is always the possibility in our federal system that conduct lawful in one jurisdiction may be penalized in another.[178] The chilling effect doctrine is relevant to the local standards concept only to the extent that the variation in legal standards increases the degree of uncertainty already inherent in the legal process. If "local standards" were synonymous with "statewide standards," a publisher would be forced to identify and acquaint himself with fifty different regulatory norms; this would not seem an excessive burden to impose upon a publisher or distributor operating on a national scale. But, if, as some have suggested, "each jury, in each town and city, may . . . be a law unto itself,"[179] it would appear that the uncertainty is incapable of cure, the degree of chill unconstitutionally extreme. It should be recalled that as long as certain utterances are deemed to fall outside the shelter of the first amendment, there will always be an unavoidable chilling, to an unspecified extent, of speech which is deserving of protection. What makes a chilling effect unacceptable is not simply the risk inherent in the enforcement and litigation process, but the aggravation of that risk by substantive rules that increase the amount of uncertainty to an intolerable degree.

C. *Incitement, Advocacy and the* Brandenburg *Test*

Justice Holmes' now familiar comment that "[e]very idea is an incitement"[180] would appear to doom to failure any judicial attempt to draw a clear line distinguishing words that are "keys of persuasion"[181] from those considered "triggers of action."[182] Yet if it is accepted that the first amendment is not an absolute,[183] and recognized that certain words by

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[174] This is by no means a certain proposition, since the degree of local discretion is rather narrow. *See* Jenkins v. Georgia, 418 U.S. 153 (1974).

[175] *See* Schauer, *supra* note 26, 56 N.C.L. Rev.

[176] *See* text accompanying notes 139-69 *supra*.

[177] *See* note 26 *supra*.

[178] *See* Schauer, *supra* note 26, 56 N.C.L. Rev.

[179] L. Tribe, *supra* note 9, at 664.

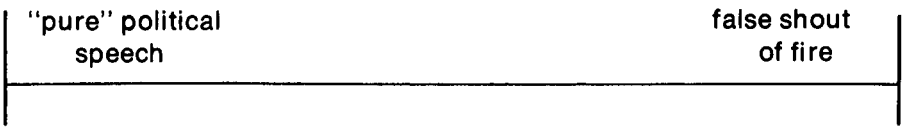
[180] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

[181] Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y.), *rev'd* 246 F. 24 (2d Cir. 1917), *quoted in* L. Tribe, *supra* note 9, at 615.

[182] *Id.*

[183] *But see* A. Meikeljohn, Free Speech and its Relation to Self-government (1948); Meikel-

their very utterance may constitute a direct incitement to illegal action, the need for such judicial line drawing becomes apparent. The analysis earlier proposed during the discussion of the Court's work in the areas of defamation and obscenity may be successfully adapted so as to lend insight into the Court's attempt to delineate discrete categories of "protected discussion" and "unprotected incitements."[184] While the analogy to the defamation and obscenity analysis is not exact, and although the reader may have already been sufficiently bombarded with pictorial assistance, I again propose the use of a diagram to aid in this analysis. At the extreme left we find the peaceful discussion of orderly political change, with no suggestion by the speaker that such change will be effectuated in any manner save through the democratic processes. This is the type of speech that most probably lies at the core of the first amendment. At the right extreme, we have words that contribute nothing to political dialogue, that stimulate no reflection or serious thought on the part of the listener; these utterances trigger action without any possibility of a reasoned response.[185] Perhaps Holmes' example of falsely shouting fire in a crowded theater is the prototype.[186] Thus, our chart initially takes on this appearance:



The Court grappled for years with different variations and applications of the classic "clear and present danger" test in an attempt to determine where, between the two extremes presented above, the line of constitutional protection should be drawn. In *Dennis v. United States,*[187] for example, Chief Justice Vinson adopted Judge Learned Hand's formulation of the test: "In each case [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."[188] But in the period following *Dennis,* the "Court tended to recast clear and present danger analysis from an exercise in assessing likely consequences along a continuum, to an exercise in characterizing an act as either 'in' or 'out' of a defined category of unprotected incitements."[189] Thus, in *Yates v. United States,*[190] the Court, speak-

john, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245; Meikeljohn, What Does the First Amendment Mean?, 29 U. Chi. L. Rev. 461 (1953).

[184] L. Tribe, *supra* note 9, at 615.

[185] *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence").

[186] Schenck v. United States, 249 U.S. 47, 52 (1919).

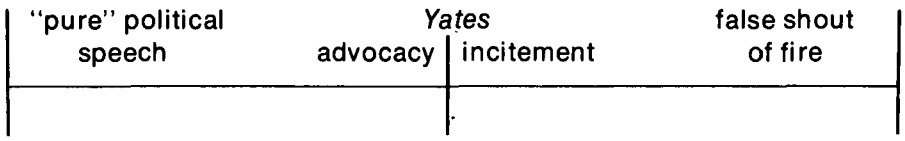
[187] 341 U.S. 494 (1951).

[188] Dennis v. United States, 341 U.S. at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).

[189] L. Tribe, *supra* note 9, at 615.

[190] 354 U.S. 298 (1957).

ing through Mr. Justice Harlan, construed the language of the Smith Act as embracing the traditional distinction between advocacy of abstract doctrine and advocacy of action—*i.e.*, incitement.[191] Although the *Yates* Court admittedly decided the issue not "in terms of constitutional compulsion" but, rather, in recognition of its "duty . . . to construe [the] statute,"[192] Justice Harlan clearly sought to perform this duty in conformance with the requirements of the first amendment.[193] The advocacy-incitement distinction, then, would appear to mark the boundary separating speech sheltered by the first amendment from those utterances which receive no constitutional protection. If the *Yates* line is added to the skeletal chart previously introduced, we see:



With our utopian legal system functioning smoothly, we find no instances where penalties are mistakenly imposed upon individuals operating to the left of the *Yates* line; similarly, all individuals bold enough to cross to the right of that boundary need entertain no doubt as to the swift and efficient imposition of legal sanctions punishing their unlawful conduct. *Yates* draws the ideal line, perfectly adequate in an ideal world.

But, the only true certainty in our legal system is the certainty of error. The *Yates* distinction, "often subtle and difficult to grasp,"[194] is one particularly susceptible to erroneous application—the heated discussion of political doctrine often blends imperceptibly into the forceful advocacy of illegal action. And, as the likelihood of error is great, so is the harm generated by such an error. The lawful advocacy of ideas is often most effective when it approaches incitement; to punish mistakenly a speaker for exhortations falling just to the left of the *Yates* line is to suppress protected speech at the point where it may have the greatest impact. Moreover, the probability of error increases as we draw near to that legal line dividing the punishable and the protected. Again, a margin for error is needed, and, at the risk of sounding repetitive, this margin must be drawn in favor of speech.

A reading of the Court's per curiam opinion in *Brandenburg v. Ohio*[195] indicates that just such a "buffer zone" has, in fact, been provided. In that case the Court, in striking down Ohio's Criminal Syndicalism Act as unconstitutionally overbroad, held that

> the constitutional guarantees of free speech and free press do not

[191] *Id.* at 320. *See generally* L. Tribe, *supra* note 9, at 615; Comment, *Brandenburg v. Ohio*: A Speech Test For All Seasons?, 43 U. Chi. L. Rev. 151, 155 (1975).
[192] Yates v. United States, 354 U.S. at 319.
[193] Comment, *supra* note 191, at 155 n.22.
[194] Yates v. United States, 354 U.S. at 326.
[195] 395 U.S. 444 (1969) (per curiam).

> permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action.[196]

The two prongs of the *Brandenburg* test add a measure of overprotection, in the tradition of *New York Times Co. v. Sullivan*[197] and the various obscenity decisions previously discussed.[198] Consider the first component of the *Brandenburg* standard—that the utterances in question be directed at incitement or the production of immediate unlawful behavior. A rule holding a "soapboxer" responsible for the ultimate effect of his speech, regardless of intent, would subject that speaker to strict liability for the hostile reactions of his audience.[199] Just as it was impermissible to expect a publisher to verify the truth of all his published factual statements and unreasonable to require a bookseller to familiarize himself with the contents of each book in his inventory, it is impracticable, if not impossible, to force a speaker to predict the possible violent reaction of his often large and diverse audience. And beyond this, "a function of free speech under our system of government is to invite dispute."[200] Knowing that he may be held liable in the event that this invitation is accepted, a speaker may forego speaking entirely or, at the very least, temper his remarks to the point of negating their very effectiveness. To prevent this harm, the *Brandenburg* Court included an intent requirement; and, as we now have come to expect, the price exacted by the imposition of this requirement is the acceptance of the "escape" of the "guilty" in those instances where the government is unable to prove the intent that, in fact, does exist.

But the Court in *Brandenburg* felt that a further measure of protection, supplementing the intent requirement just discussed, was needed to safeguard sufficiently lawful advocacy. Before utterances which are, in fact, directed to inciting imminent lawless action will be deemed to have forfeited constitutional protection, it must also be shown that these utterances are likely to produce such action. A brief comparison with the Court's work in the area of obscenity points out the significance of this additional requirement. In order to have a particular work adjudged obscene, the prosecution need only focus upon the *content* of that work; no inquiry is directed towards the ultimate *effect* which the circulation of the material may have. Once it is demonstrated that a book or film fits within the definition of obscenity announced in *Miller v. California*[201] the prosecution's task is complete; there need be no showing of any "clear and present danger" or imminent lawless activity. But the Court is more protective when political advocacy is on the line. The second prong of the

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[196] *Id.* at 447 (emphasis added).

[197] *See* notes 90-139 and accompanying text *supra*.

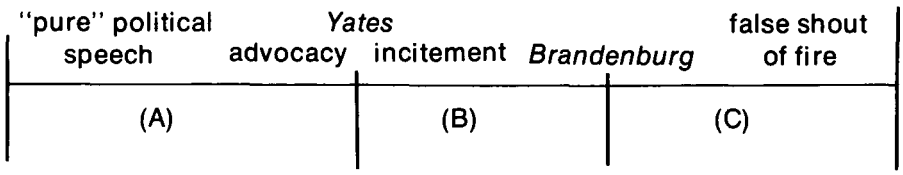
[198] *See* notes 139-80 and accompanying text *supra*.

[199] For an example of a decision holding a speaker liable for the response of his audience, see Feiner v. New York, 340 U.S. 315 (1951).

[200] Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

[201] 413 U.S. 15 (1973). *See generally* notes 154-62 and accompanying text *supra*.

Brandenburg test permits certain utterances of an admittedly inflammatory nature to remain untouched. The most ardent attempt to incite will not shed constitutional immunity unless it is demonstrated that the attempt was likely to succeed. Under *Brandenburg*, then, a speaker is protected whether his effort to incite meets an apathetic response or whether his attempt at peaceful persuasion ends in violence. Translating this measure of overprotection to the chart previously introduced, we find:



Once again, Area B speech receives a measure of strategic protection. This "margin for error" does not, however, reflect the intrinsic value of such speech.[202] Rather, this approach recognizes that drawing the line any further to the left creates an unacceptable risk that Area A material will erroneously be penalized. The distinction between advocacy and incitement is indeed too subtle, and the mistaken punishment of lawful political discourse too harmful to allow the placing of the legal line where it ideally should be drawn. The inevitability of error, and our preference for error made in favor of free speech, mandate that we embrace "a strategy that requires that speech be overprotected in order to assure that it is not underprotected."[203] And consistent with its approach in the areas of defamation and obscenity, the Court in *Brandenburg* again formulated a substantive rule reflecting its acceptance of that strategy.

IV. The Doctrine of Prior Restraint Revisited

A full appreciation and understanding of the principles underlying the chilling effect concept substantially undercut the rationale supporting a distinct constitutional doctrine of prior restraint that focuses upon the timing rather than the substance of governmental regulation of speech. Although regulation through prior restraint may take a variety of forms,[204] in every case the primary aim of such regulation is prevention,

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[202] If it is argued that everything in Area B is, in fact, valuable, and not just protected for strategic reasons, then there is something wrong with the *Brandenburg* test. If we desire to grant protection to all utterances falling within Area B, it is necessary to push the actual legal test to the right of the right boundary of Area B. Recall that if the actual legal test is congruent with the limits of ideal protection, then as soon as we leave the world of absolutely accurate adjudication we will make the exact type of error that our rule is designed to avoid.

[203] Kalven, *supra* note 91, at 213 (discussing the rule of the *New York Times* case).

[204] The most traditional form of prior restraint is a licensing system, where all communications must be offered for advance approval by the censor or licensing body. This type of censorship has been employed to control the distribution of motion pictures. *See, e.g.*, Freedman v. Maryland, 380 U.S. 51 (1965); Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961). Where such a system obtains, publication without advance submission and approval is an independent offense without regard to the contents of the publication. *See, e.g.*,

not punishment. The accomplishment of this preventive goal through pre-publication governmental interference with speech-related activity will generally be constitutionally countenanced only if the state is able to clear an unusually high hurdle of justification[205]—the nature of the government restriction is assumed to require the imposition of additional safeguards. However, an analysis of this assumption, performed against the backdrop of the chilling effect doctrine, reveals that the view holding prior restraints as particularly pernicious, a view inherited from Milton[206] and Blackstone,[207] is at best questionable.

It is true that an initial look at the common characteristics of the various systems of prior restraint would appear to justify our apprehension of pre-publication prevention. These fears seem particularly acute where, as is frequently the case, the censoring body is an administrative board or licensing body rather than a judicial tribunal confronted with an injunction request. Generally, censorship bodies are vested with a large amount of broad and often unchecked discretion;[208] in addition, the standards applied by the censor are frequently vague and loosely defined, inviting suppression based upon personal animosity and prejudice. Moreover, censorship and licensing authority is rarely placed in the hands of lawyers or judges; consequently, decisions are often framed in response to political pressure and reflect a lack of understanding of applicable legal standards and a lack of sensitivity to minority views. Censorship bodies may also have a vested interest in prohibiting the dissemination of some material, an interest unrelated to the effectuation of any valid governmental purpose. Censors are in business to censor.[209] The licensor's compulsion

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Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (holding municipal parade licensing ordinance unconstitutional).

A different form of prior restraint exists where there is no requirement for advance submittal, but all publications found to be outside of the protected range will be banned and future distribution will be prohibited. *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931).

The third significant form of prior restraint is the judicial injunction, prohibiting specific persons from publishing particular material; a violation of such an injunction is punishable by contempt sanctions. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam); Walker v. Birmingham, 388 U.S. 307 (1967). *See generally* Blasi, Prior Restraints on Demonstrations, 68 Mich. L. Rev. 1481 (1970).

[205] Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963); Near v. Minnesota, 283 U.S. 697 (1931).

[206] Milton's objections were solely to licensing. He supported subsequent punishment if books were found harmful. J. Milton, Areopagitica 48, 136 (J.C. Suffolk ed. 1968).

[207] 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. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.

IV W. Blackstone, Commentaries *151-52.

[208] *See generally* Emerson, *supra* note 72.

[209] Freedman v. Maryland, 380 U.S. 51, 57 (1965) (invalidating state motion picture

to justify and exercise his power will often lead to an aggressive and overly expansive use of that power. And since licensing procedures are rarely subject to public scrutiny, any abuse or misuse of authority will most likely go unnoticed and unpublicized. In addition, violation of a suppression order involves almost certain punishment since it is directed at a particular individual and a specific act. Subsequent punishment, on the other hand, may often be far less restrictive. Finally, there is one further characteristic of any system of prior restraint that is often cited as the principal justification for greeting such systems with open hostility: unlike subsequent punishment, a prior restraint totally prevents certain material from ever reaching the public's eye. As Alexander Bickel commented: "A criminal statute chills, prior restraint freezes."[210]

Now, it must be understood that the very existence of any sanction, prior or subsequent, means that some utterances fall outside the shelter of the first amendment—in every area of free speech lines are drawn separating the protected from the unprotected. Given the primacy of the principle of free speech, the overriding goal is to minimize the suppression of those utterances that have not, in fact, shed constitutional protection. And once this is isolated as the real issue, the distinct doctrine of prior restraint begins to break down.

It may be that the description presented above does lend support to the view that prior restraints are particularly damaging to first amendment freedoms. Perhaps the dangers of oversuppression are increased when the censor sits. However, the defects alleged have little, if anything, to do with the timing of the government regulation. Unchecked discretion, vague standards and incompetent administration, while frequently associated with the system of prior restraint, can just as easily exist in a system of subsequent punishment. If the flaws inherent in any prior restraint scheme do lead to frequent instances of mistaken suppression of protected material, the fault lies in the applicable rules and procedures[211]—

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censorship statute for failure to provide adequate procedures to safeguard first amendment interests).

[210] A. Bickel, The Morality of Consent 61 (1975).

[211] In Freedman v. Maryland, 380 U.S. 51 (1965), the Court elaborated the manner in which administrative censorship could be effectuated within constitutional limits. The case was concerned with a state motion picture licensing statute; in adjudging the statute unconstitutional, the Court stressed that such regulation would be held valid "only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58. The Court indicated that two principal safeguards would be required. First, the burden of proving that the work is unprotected must be shouldered by the censor; this prong of the *Freedman* test strongly resembles the corrective measure in *Speiser*. *See* notes 74-90 and accompanying text *supra*. In addition, the *Freedman* Court insisted that there be a prompt judicial review of any censorship order. It noted that

> because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. . . . Moreover, . . . even after the expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. . . . Therefore, the procedure must also assure a prompt final judicial

timing is a largely irrelevant factor.[212] Thus, it is not the temporal quality of the restraint but the identity and discretion of the restrainers that is important.[213]

Indeed it is possible that a well-designed and fairly administered system of prior restraint, operating under clearly defined and precise guidelines, might more closely resemble the utopian system suggested earlier than the more common system of subsequent punishment. Consider, for example, a statute that imposes a five-year prison term for the distribution of obscene motion pictures,[214] and assume that lengthy sentences are meted out with regularity. A distributor aware of the vigorous enforcement of that statute will, for reasons previously discussed,[215] operate under a considerable amount of uncertainty. This uncertainty will lead to caution, and, particularly where borderline material is involved, to self-censorship. Thus, the existence of the criminal penalty effectively freezes a certain amount of protected activity. Where subsequent punishment is the rule, borderline materials may never see the light of day. Recognizing this, we afford a measure of strategic protection to speech that ideally ought not be protected. In a sense, we relocate the borderline to ensure that any marginal material that is withheld by the overcautious is, in fact, material of little or no social value. The societal cost of this relocation is obvious: the extension of constitutional protection to the "undeserving."

Under a system of prior restraint, however, the need for such a margin for error may be significantly diminished. It was earlier explained that a great degree of risk, uncertainty and deterrence result from the inability of an individual to ascertain accurately whether his contemplated conduct is governed by a particular regulating rule. In addition, it was suggested

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decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

380 U.S. at 58-59.

[212] In one important sense, timing may be a critical factor to be considered in the evaluation of the detrimental effect of any system of prior restraint. As Alexander Bickel noted:

> Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact, of speech. . . . Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech.

A. Bickel, *supra* note 210, at 61.

[213] This anomaly is presented in starkest relief in the Pentagon Papers case. There was no question of the suppression of future or unidentified publications. All of the materials at issue were in fact before the courts. And the initial injunction was issued not by an administrative body, but by a court after a full adversary hearing. The materials were evaluated by courts at three levels, all as competent as any body to evaluate the legality of the publications. If the Pentagon Papers should have been published, it was the general principles of freedom of speech and freedom of the press and not the prior restraint doctrine that commanded the result. *See* Henkin, The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers, 120 U. Pa. L. Rev. 271, 278 (1971); Junger, Down Memory Lane: The Case of the Pentagon Papers, 23 Case West. Res. L. Rev. 3, 16-17 (1971); Kalven, Foreword: Even When a Nation Is at War, 85 Harv. L. Rev. 3, 31-34 (1971).

[214] *See, e.g.*, 18 U.S.C. §§ 1461, 1462, 1465 (1976).

[215] *See* text accompanying notes 46-73 *supra*.

that an individual's risk-aversion may be an important factor influencing his decision whether to proceed with publication or distribution. Under a system of prior restraint, these "uncertainty-generating agents" are no longer operative. When some form of advance determination is possible, there is no risk in submitting even the closest cases to the licensor. Thus, materials that are, in fact, protected, but not clearly so, are more likely to emerge under a system of prior restraint than under a subsequent punishment mechanism. And, as a result, the buffer zone generally required when after-the-fact penalization is involved may, theoretically, be reduced. Such a margin for error need only reflect the imperfection inevitably inherent in the process itself; there is no longer a need to compensate for individual uncertainty and timidity.

Those most hostile to prior restraints find support for their position by emphasizing that under a system of subsequent punishment material will surface at least once. In addition, it is stressed that under a prior restraint scheme there exists an absolute certainty of punishment. It is of course not true that all material will surface at least once where subsequent punishment is the rule. The message embodied in the chilling effect doctrine demonstrates that the deterrence caused by a scheme of subsequent punishment may result in prevention to the same extent as does a licensing system. But even if some material that would be prohibited by a licensing scheme will emerge under a punishment system, what is the value of this? Assuming that the rules and procedures applied by a licensing board pass constitutional muster, there would appear to be little social utility in allowing the publication and distribution of those materials that have been found to fall outside the law and outside the protection of the first amendment. If someone feels that the importance of what they have to say justifies the violation of the law, they can as easily ignore a prior restraint as a criminal statute.[216] To be sure, the probability of punishment is higher in the former instance. But what is the independent value of protecting the unprotected? I fail to see how a *legal* principle can be based upon the value of protecting civil disobedience.[217]

Professor Freund once remarked that "[t]he generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis."[218] He felt that a blind reaction to the invocation of the phrase "prior restraint" must yield to "a pragmatic assessment of its operation in the particular circumstances."[219] The prior restraint doctrine has focused too keenly upon the temporal quality of the restraint, directing insufficient attention towards the true defects in the mechanism. It is true that a scheme of prior restraint may involve risks of excess suppres-

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[216] *See* O. Fiss, Injunctions 154-55 (1972).

[217] And I remain unpersuaded by Professor Dworkin's argument to the contrary. *See* R. Dworkin, *supra* note 35, at 206-22.

[218] Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539 (1951).

[219] *Id.*

sion of protected speech. But an appreciation of the chilling effect concept reveals that such underprotection can accompany any form of legal sanction; the chilling effect directs us away from frequently irrelevant issues of timing and forces us to confront the real issues involved.[220]

V. Is a Behavioral Justification Necessary?

The introduction of chilling effect reasoning and analysis was greeted with considerable judicial skepticism.[221] While the chilling effect concept appears to be premised upon predictions or assumptions about human behavior, no evidence has been proffered to justify those predictions. It has not been clearly established that individuals are mistakenly deterred or become overly cautious as a result of the existence of particular statutes, rules, or regulations.[222] Yet it surely is not to be expected that courts will always abstain from making or accepting assumptions about human behavior; behavior is, after all, that with which the law is fundamentally concerned. Courts cannot completely ignore psychology, sociology, or other disciplines geared toward the study of human activity. The legitimate objection arises when a court embraces a predictive position that is based upon scientific or technical theory beyond the ken of the judges involved in the process of prediction. The problem is most acute when those not trained in a particular discipline attempt to choose from competing views espoused by those who are.[223] Thus, if it can be demonstrated that the assumptions underlying the chilling effect doctrine are not based upon questionable experimental evidence or unresolved scientific conflict, the traditional objections to the use of chilling effect reasoning can be silenced.

This task does not appear insurmountable if we emphasize the comparative aspects of the chilling effect doctrine rather than specific, and most likely unprovable, predictions of human behavior. We need make only two broad and seemingly safe assumptions: first, that the legal system is far from perfect, its only certainty the certainty of error; and second,

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[220] Consider Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). From the point of view of the newspaper involved, this case can hardly be viewed as one chiefly concerned with the timing of the governmental regulation. It is doubtful that the press would be any more receptive towards a criminal statute subjecting publishers, editors and writers to a year's imprisonment for publishing any material about a pending criminal prosecution. The objection to the type of restriction involved in *Nebraska Press* is to the substance of the restraint, not to the fact that an injunction was utilized to carry it out. *See generally* Barnett, The Puzzle of Prior Restraint, 29 Stan. L. Rev. 539 (1977).

[221] *See* Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959). *See generally* Jahoda & Cook, Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs, 61 Yale L.J. 295 (1952).

[222] For an attempt to identify specific instances of deterrence, see Anderson, *supra* note 112.

[223] The objections, with which I do not agree, to the use of sociology by the Supreme Court in Brown v. Board of Educ., 347 U.S. 483 (1954), seem primarily based upon the fact that there was no sociological opinion so clear-cut that judicial notice was warranted. *See* Cahn, Jurisprudence, 30 N.Y.U.L. Rev. 150, 157-58 (1955); Honnold, Book Review, 33 Ind. L.J. 612, 614-15 (1958).

that individuals are risk-averse. As long as these general assumptions are acceptable, the chilling effect emerges not as a prediction, but simply as a method of looking at the first amendment. It is, at bottom, just a branch of decision theory. In a first amendment context, the imperfection of our legal system will lead to errors of overprotection and underprotection. Without involving ourselves at all with specific estimates of human behavior, we find that the principle of comparative harm, as embraced by the Court in *Speiser v. Randall,* mandates that we err in favor of free speech. Legal rules must be designed so as to favor the overcautious rather than restrict the undercautious; in our imperfect system, we guess in favor of protection rather than non-protection. Now it is conceivable that convincing evidence might be introduced demonstrating that a substantial governmental interest can be safeguarded only by restricting free speech to some extent—in some instances, the balance may go against speech.[224] But in the absence of such evidence, the "transcendent value" embodied in the first amendment means that the presumption is with speech. Behavioral ignorance or imprecision must be resolved in favor of excess permission, not over-restriction. Thus, the chilling effect doctrine flows not from a specific behavioral state of the world, but from an understanding of the comparative nature of the errors that are bound to occur. By comparing rather than measuring, the behavioral imprecision of the chilling effect concept becomes irrelevant.

VI. Conclusion

Perhaps the reader is still asking, "So what?" The question deserves an answer, and I believe the answer is suggested by the paragraph at the end of the preceding section. The essence of the chilling effect is structural. It provides a way of looking at procedures, at rules and at institutions. Although appellate courts have the technical obligation of reviewing all factual determinations of non-protection[225]—whether they be in defamation, obscenity, or incitement—it is difficult to conceive of a system where the extent of protection is dependent upon case-by-case determination by the court sitting at the top of the judicial pyramid. As the first amendment comes to embrace new ground, the area of commercial speech being the most recent example,[226] the Supreme Court's ability effectively to fulfill its obligation of factual review becomes less and less a realistic possibility.[227] The vitality of first amendment protection thus rests

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[224] The notion that there must be strong and specific evidence to rebut the presumption in favor of speech is really the underlying premise of the "clear and present danger" test.

[225] *See* Jacobellis v. Ohio, 378 U.S. 184, 189-90 (1964) (opinion of Brennan, J.); Roth v. United States, 354 U.S. 476, 497-98 (1957) (Harlan, J., concurring in part and dissenting in part).

[226] *See* cases cited at note 44 *supra. See also* note 69 *supra.*

[227] For example, one would hardly expect the Supreme Court to review the contents of each registration statement filed under the Securities Act of 1933 which is found by the Securities and Exchange Commission to be false or misleading.

more on the substantive and procedural rules employed below than on the appellate review of the findings made under those rules.

With the rulemaking process preeminent, the importance of the chilling effect emerges clearly: the chilling effect doctrine embraces the principles that most plainly affect what the rules must be and determines what procedures are necessary for the application of those rules. It is the ever-present guide for the formulation of first amendment theory applicable in a system characterized by uncertainty and fallibility. The chilling effect is but a principled distortion of "ideal" rules—since our legal system does not include ideal jurors, judges, or citizens, the attempted application of the ideal rule to the non-ideal reality is itself a distortion. The two basic principles underlying the chilling effect doctrine allow us to recast those "ideal" rules in a conceptually sound manner.

The two principles are not complex. First, the chilling effect recognizes the fear that is caused by the inherent uncertainty in the legal system. It is not necessary to measure that uncertainty, but only to realize that it exists in all cases. What we must isolate are those factors that cause a significant increase in the degree of uncertainty and fear normally surrounding the legal process. The existence of this added uncertainty or increased fear enhances the possibility of an erroneous judicial determination and leads to the second component of the chilling effect doctrine: the rule of priority, or comparative harm.

The chilling effect is premised upon the recognition of the first amendment as a preferred value. More than just an emotive observation, this recognition provides the analytical foundation for dealing with a legal system characterized by uncertainty. Admitting the inevitability of error, and expressing our preference for errors made in favor of free speech, we are forced to design rules and procedures that minimize the occurrence of the more harmful error, *i.e.*, the wrongful suppression of speech. This is the essence of the chilling effect.

These principles are not, however, absolutes. Obviously one could eliminate all first amendment error by deeming every utterance protected, regardless of its potential harm. By so doing, we would minimize or eliminate the more harmful error, but at an unacceptable social cost, and with an unacceptable increase in the error of overprotection.[228] Thus, the recognition of comparative harm and comparative error is fundamentally a balancing process, but it is balancing at the rule-making level.[229] It is a principled way of incorporating nonconceptual chilling effect oratory into a definitional balancing approach.[230] The final result is the conversion of the chilling effect idea into a conceptual doctrine. The chilling effect concept has been around for some time, but it is not too late to recognize its true importance in first amendment adjudication.

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[228] *See* note 112 *supra*.

[229] *See* Fried, Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test, 76 Harv. L. Rev. 755, 763-70 (1963).

[230] *See generally* Nimmer, The Right to Speak from *Times* to *Time:* First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Calif. L. Rev. 935 (1968).