The Categorical Approach to Protecting Speech in American Constitutional Law

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Historically, some kinds of speech were considered to be simply outside the protective scope of the First Amendment, in what is sometimes called the two-tier theory (one tier of speech being unprotected, the other protected).[1] The list of unprotected speech included incitements to violence, libel, obscenity, fighting words, and commercial advertising.[2] It was as if these forms of expression were not considered to be "speech" at all for constitutional purposes. They were in some sense invisible to the First Amendment, receiving the same constitutional treatment as ordinary nonspeech behavior such as price fixing or drug use.

These categories of speech continue to receive special treatment today.[3] It is a gross oversimplification, however, to say that any of these categories is currently outside the protection of the First Amendment. For each category, the Supreme Court has now created a set of rules detailing the boundaries of permissible government regulation. For instance, as we will see, libel of a public official is only unprotected if the falsehood was intentional or at least reckless. Within this confined subcategory, one can still say that certain libels are "unprotected"—they can be the basis for punitive damages, for example. But to say that libel as a whole is unprotected in the sense of having no immunity whatsoever from government regulation would be untrue.[4]

Similarly, after many years of calling advertising "unprotected speech," the Court reversed its stance in the 1970s and began subjecting advertising regulations to serious

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1. The Supreme Court summarized the two-tier theory in *Cohen v. California*, 403 U.S. 15 (1971). *Cohen* suggests that the Court will be resistant to adding additional categories of unprotected speech. *Id.* In the thirty-eight years since the *Cohen* decision, the Court has added only child pornography and "true threats" to the list. *See* Virginia v. Black, 538 U.S. 343 (2003) (adding true threats); New York v. Ferber, 458 U.S. 747 (1982) (adding child pornography).

2. For good overviews of the categorical approach and its evolution, see Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992), and Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51, 53–66 (1994).

3. For a general discussion of the merits of the categorical approach, see Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981).

4. For discussion of libel law, see *infra* text accompanying note 35.

constitutional scrutiny.[5] But even today, advertising does not enjoy the same degree of constitutional protection as artistic, scientific, or political discourse. Rather, it is subject to a detailed set of constitutional rules governing the extent of permissible government regulation.[6] For example, the state has a free hand to regulate false advertising without being subject to the same kinds of rules that limit libel actions. For this reason, we might want to say that false advertising is unprotected speech. Truthful advertising, however, clearly receives some constitutional protection, though not so much as political speech—some might call it "less protected" speech.[7] Much the same is true of the other categories of "unprotected" speech. In short, the treatment of supposedly unprotected speech under the First Amendment has become much more nuanced, meaning that the government's hands are tied in ways that do not apply to the regulation of ordinary nonspeech behavior.

Just as some "unprotected" speech began to receive constitutional protection, it also became clear that under some circumstances "protected" speech could be the basis of government sanctions. For example, normally it would be considered core protected speech to characterize an elected official as a fool. But if a member of the official's personal staff says the same thing to another staff member, he can be fired from his government job for insubordination. Thus, under some circumstances, virtually any message might be unprotected in the sense that it could constitutionally be subjected to government sanctions. For this reason, we need to be very careful in referring to unprotected speech. Strictly speaking, a message should be considered unprotected only if it could be made subject to sanctions when communicated in a classic public forum, in the print media, or from one private citizen to another on private property. Even then, we have to keep in mind that whether the sanction would be permitted probably depends not just on the content of the message but on some of the surrounding circumstances, such as whether it was an intentional falsehood. It might also depend on the form of the government regulation, such as whether the regulation draws distinctions based on the viewpoint of the speaker.

For foreign students of the U.S. legal system, as well as members of the U.S. public who have not studied constitutional law, this terminology poses considerable risk of confusion. "Unprotected" means only that certain forms of regulation that would not be permitted for other forms of speech without a powerful supported justification are routinely allowed with regard to at least some of the speech in the disfavored category.

Despite all of these qualifications, it remains clear that some categories of messages are constitutionally disfavored and may be regulated by the state in a broad range of circumstances. Other kinds of messages can be regulated, but only on a more limited basis. This distinction is still important. The first step in analyzing any First Amendment problem is to run through the checklist of "unprotected" categories of speech to see if any of them covers the message in question.[8] Despite slogans about the

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5. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976) (reversing prior doctrine and holding that commercial speech is constitutionally protected).

6. The governing test is found in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

7. *See infra* text accompanying notes 36–43.

8. Regulations that are not based on content are typically subject to some kind of balancing test, which complements the categorical approach to content-based restrictions on speech. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and*

dangers of distinguishing between speech acts based on the content of the speech, some message types are treated with reverence while others are treated as suspiciously profane.

The differences between categories of speech are not only substantive but also methodological. As Kathleen Sullivan observes, categorization and its usual alternative, balancing, involve two very different intellectual styles:

> Categorization is the taxonomist's style—a job of classification and labeling. When categorical formulas operate, all the important work in litigation is done at the outset. Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing of the claimed right against the government's justification for the infringement.[9]

In contrast, she says, "[b]alancing is more like grocer's work (or Justice's)—the judge's job is to place competing rights and interests on a scale and weigh them against each other."[10] First Amendment doctrine combines both approaches, but in different proportions within different categories of speech.

A full-scale balancing approach would consider both the importance of the government interest and the value of the speech. Strict scrutiny can be seen as a form of balancing, but with a very strong thumb on the scale in favor of the speech interest. Under strict scrutiny, a regulation is upheld only if it is necessary to achieve a compelling government interest; thus, the government interest must be exceptionally strong and very clearly implicated before it can outweigh the speech interest.[11] This is the general test applied to proscriptions on speech. Other government regulations, such as standard economic regulations, are judged under the much more lenient rational basis test, which requires only that a regulation have some conceivable connection with a legitimate government interest.[12] The high degree of scrutiny given to restrictions on the content of public speech is perhaps the most notable characteristic of First Amendment law.

To a large extent, as we will see, the categorical approach amounts to a kind of prepackaged strict scrutiny, whereby the Court designates some governmental interests

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Balancing in First Amendment Analysis, 88 HARV. L. REV. 1482 (1975).

9. Sullivan, *supra* note 2, at 293.

10. *Id.* at 293–94. As Sullivan points out,

> [T]he surviving categories [of unprotected speech] may be rationalized as merely the precipitate of earlier balancing that always happens to come out the same way—like price fixing in antitrust, which is so typically anticompetitive that it can be barred per se without repeated resort to the balancing mode of the rule of reason. Still, once the categories are established, further ad hoc balancing is cut off; the categorical mode leads to briefs and arguments that concentrate much more on threshold characterization than on comparative analysis.

Id. at 295 n.6.

11. For instance, the Court has held that the governmental interest in preventing corruption is sufficiently compelling to justify limits on campaign financing. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); Buckley v. Valeo, 424 U.S. 1 (1976). On the other hand, excessively restrictive campaign funding limitations do not pass muster. *See* Randall v. Sorrell, 548 U.S. 230 (2006) (striking down Vermont's stringent limits on campaign contributions and expenditures).

12. *See* Ry. Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

as compelling (e.g., preventing violence) and then asserts what a regulation must say in order to be considered properly tailored to that government interest. It thus reduces the standard of strict scrutiny to a set of relatively clear-cut rules covering various forms of speech, with regulation of the content of other forms of public speech being impermissible without an individualized demonstration of need. Thus, the rules governing unprotected speech can be seen as shortcut applications of strict scrutiny. The question regarding these categories of speech, then, is whether this transformation of strict scrutiny into a series of rules is desirable. Two of the categories, however, do not fit this pattern, and instead seem to be based on a sense that the speech in question is not valuable enough to justify full First Amendment protection. Therefore, most but not all doctrine concerning unprotected speech can be understood as a rule-like embodiment of the standard-like strict scrutiny test.

This Article begins in Part I by examining the evolution of the categorical approach. Part II probes more deeply into the meaning of the categories: what does it mean for speech to be "protected" or "unprotected"? Part III then tries to assess the desirability of the categorical approach. As it turns out, the rule-like aspect of the approach (prepackaged strict scrutiny) seems relatively easy to justify. But the Court's classification of two forms of speech as having lower First Amendment value is uncomfortably ad hoc. Perhaps it could be embedded in a broader theory about the public (nonprivate) value of speech, but the Court has failed to do so. Finally, Part IV offers some closing observations about the categorical approach.

I. THE HISTORY OF THE CATEGORICAL APPROACH

In *Chaplinsky v. New Hampshire*,[13] the defendant was a Jehovah's Witness who had been haranguing an unfriendly crowd with the message that religions are a "racket." When a disturbance occurred, the traffic officer on duty at the intersection hustled the speaker off to the police station, but without ever telling him formally that he was under arrest. On the way, they encountered the city marshal, who had earlier warned the speaker about the restive crowd. The marshal had also told hostile crowd members that the defendant had the right to speak. The marshal had heard that a riot was underway and was hurrying to the scene. When he met the traffic officer and the speaker, the traffic officer repeated his earlier warning about the crowd, whereupon the speaker called him a "God damned racketeer" and a "damned Fascist."[14]

The prosecution was brought under a statute that prohibited the use of insulting language. The Court upheld the statute, which the state courts had construed to cover only language "plainly tending to excite the addressee to a breach of the peace."[15] As the lower court had said, "[t]he English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight."[16] According to the Court, fighting words—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"—are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any

13. 315 U.S. 568 (1942).
14. *Id.* at 569.
15. *Id.* at 573.
16. *Id.*

benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[17] The Court viewed this category of unprotected speech as including obscenity, profanity, and libel, as well as fighting words.[18] Later cases progressively narrowed the category of fighting words.[19]

Advocacy of illegal action was the central battleground over free speech from World War I until the Vietnam War era. The Court initially applied the "clear and present danger" test, which was first articulated in the aftermath of World War I.[20] In the 1950s, it appeared that this test had essentially turned into a form of balancing between the government's interest in suppressing speech and the individual's speech interest.[21] The Court turned to a more categorical approach in *Brandenburg v. Ohio*,[22] which held that such speech can only be punished if it is directed to producing imminent lawless action and is likely to have this effect. This is one area where the categorical approach has been highly successful as a method for protecting speech. After *Brandenburg*, the Court has rarely had to return to this issue, and prosecutions against subversive speech seem to have dried up.

This must be counted a significant benefit of the categorical approach. From the first Adams administration through the early Cold War period, political dissidents faced considerable risk of prosecution for criticizing the government during crisis periods, even when they did not explicitly advocate violence or illegal action.[23] From the Vietnam era to the present, this issue has disappeared. Eliminating this type of abuse is a real judicial achievement. By announcing a clear, rule-based test, the Court decisively shut the door on a historic pattern of abusive government regulation.

Although *Chaplinsky* listed obscenity as one of the forms of speech outside the protection of the First Amendment, over a decade passed before the Court attempted to define this category. *Roth v. United States*[24] actually involved two companion cases, one arising under a federal law banning the mailing of obscene material, and the other arising under the California obscenity law. According to the Court, no question was presented about whether the particular material was obscene. The only question was whether obscenity in general is "utterance within the area of protected speech and press."[25] Justice Brennan's opinion for the Court concluded that obscenity was not protected speech.

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17. *Id.* at 572. Note, however, the Court's earlier reference to "a disarming smile" as relevant. *Id.* at 568. It is apparently not simply the words but the manner of speech that counts.

18. *Id.*

19. *See* Werhan, *supra* note 2, at 54. A key case was *Cohen v. California*, 403 U.S. 15 (1971), which made it clear that offensiveness was not enough to categorize speech as fighting words. Instead, the speech must be directed at the listener and likely to arouse a violent response. *See id.* at 20.

20. *See* Schenck v. United States, 249 U.S. 47 (1919).

21. *See* Dennis v. United States, 341 U.S. 494 (1951). For further discussion of *Dennis*, see William Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375.

22. 395 U.S. 444 (1969).

23. This topic is covered in depth in SECURITY V. LIBERTY: CONFLICTS BETWEEN CIVIL LIBERTIES AND NATIONAL SECURITY IN AMERICAN HISTORY (Daniel Farber ed., 2008).

24. 354 U.S. 476 (1957).

25. *Id.* at 497.

Justice Brennan began his analysis by noting that when the First Amendment was adopted, state laws generally regulated or banned several forms of speech, including libel and, in various states, blasphemy or profanity. Justice Brennan described the First Amendment as being "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[26] Thus, he said, "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" are protected by the First Amendment.[27] But "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[28] The defendants argued that the obscenity statutes failed the "clear and present danger" test. But Brennan argued that this test only applied to otherwise protected speech, so obscenity (as a kind of "nonspeech") was not covered. Thus, *Roth* rested on the view that the normal tests for speech regulation do not apply to unprotected communications because such communications do not qualify as "speech" for First Amendment purposes.

For the next decade or so, confusion reigned over what exactly qualified as obscene. In 1973, a majority of the Justices were finally able to agree on a test for obscenity. In *Miller v. California*[29] and a companion case,[30] the Court expanded the government's power to ban obscenity. After reviewing the case law in the area, Chief Justice Burger's opinion for the Court set forth a three-part test for obscenity[31]:

> (a) [W]hether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest,
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> (b) [W]hether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;[32] and
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> (c) [W]hether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[33]

The approach to obscenity under *Miller* is a paradigm of the categorical approach. The Court did not attempt to balance the First Amendment value of the speech involved in the case against any tangible social harm. Rather, it carved out a category of expression that is deprived of constitutional protection. As a sympathetic observer explained, the rationale was that "the prototypical pornographic item on closer analysis shares more of the characteristics of sexual activity than of the communicative

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26. *Id.* at 484.
27. *Id.*
28. *Id.*
29. 413 U.S. 15 (1973).
30. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).
31. *Miller*, 413 U.S. at 24 (footnotes added) (citations omitted).
32. As examples, the Court mentioned depictions of "ultimate sexual acts, normal or perverted, actual or stimulated," or "of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25.
33. For example, as the Court pointed out, medical textbooks "necessarily use graphic illustrations and descriptions of human anatomy." *Id.* at 26.

process."[34] Again, unprotected communications were treated as conduct rather than speech.

Another traditional area of unprotected speech was defamation. The Constitution's treatment of defamation was transformed by *New York Times v. Sullivan*.[35] Although the Court began with the premise that false statements of fact are not a legitimate part of the marketplace of ideas, it emphasized the need to provide breathing room for vigorous public debate. In order to avoid chilling such debate, the Court held that defamation of public figures could only be a basis for liability if the speaker knew that the statement was false or at least knew that he had no factual basis for the statement.[36] The doctrine in this area has become increasingly complex, but many false and defamatory utterances are still protected from tort liability.

Commercial speech went through a similar evolution, resulting in its transformation from being unprotected speech to being protected at a reduced level.[37] The Supreme Court first attempted to resolve the First Amendment status of commercial speech in *Valentine v. Chrestensen.*[38] In *Valentine*, the plaintiff had distributed a handbill advertising a submarine exhibit in violation of a New York City ordinance forbidding commercial leafleting in the streets. He brought suit to enjoin enforcement of the ordinance, but lost because the Court found that the First Amendment allowed regulation of the commercial use of the streets.[39] Relying on this case eight years later, the Court held in *Breard v. Alexandria*[40] that door-to-door salesmen—"solicitors for gadgets or brushes"—could not claim the protection of the First Amendment.[41] Commercial advertising was treated as simply another form of commercial conduct, like setting prices or negotiating contract terms, rather than as a form of expression governed by the First Amendment.

Twenty-five years after *Breard*, however, the Court reversed course. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[42] it unequivocally held that the First Amendment applies to purely commercial speech. The current test for regulation of commercial speech was announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[43] In an effort to encourage electrical conservation, a state utility commission banned promotional advertising by utilities, with a narrow exception for ads encouraging shifts of consumption away from peak periods. The utility claimed that the ban prevented it from advertising products

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34. Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 922 (1979).

35. 376 U.S. 254 (1964). The classic article about the case is Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191.

36. *See N.Y. Times*, 376 U.S. at 279–80 (setting forth the "actual malice" standard).

37. For a more detailed examination of this history, see Professor Baker's contribution to this symposium, C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981 (2009).

38. 316 U.S. 52 (1942).

39. *See id.* at 54.

40. 341 U.S. 622 (1951).

41. *Id.* at 641.

42. 425 U.S. 748 (1976).

43. 447 U.S. 557, 566 (1980).

and services that use energy efficiently, such as heat pumps. Thus, the ban prevented the utility from promoting even services that would result in decreased use of electricity. In the course of striking down this ban, the Court announced the following standard for reviewing regulations of commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[44]

The current debate in the Court is not whether to protect commercial speech but whether *Central Hudson* provides *enough* protection to truthful advertising.[45] What was once considered beneath the notice of the First Amendment now vies for a level of protection akin to core speech.

By and large, the Court has been reluctant to recognize new categories of unprotected speech. This reluctance makes sense. If the rules governing unprotected speech were readily malleable, they would in effect operate as standards and fail to provide clear guidance to future cases or clear guidance to speakers and state authorities.

Despite this reluctance, the Court has recognized two such categories in recent years. The first is child pornography. In *New York v. Ferber* the Court upheld a statute banning "child pornography," which was defined as sexual material involving children as models or actors.[11]

[46] The Court found that the state's interest in protecting children from participating in the production of these materials was strong enough to justify banning the materials themselves, so as to dry up the market. Indeed, the Court later found that this interest was strong enough to justify a ban on private possession of child pornography, even though ordinary obscenity is not enough to justify an intrusion into the home.[47] The difference, according to the Court, is that child pornography laws are designed to protect the children who are exploited by the production of these materials, while obscenity laws rely on a paternalistic interest in protecting the reader's morals.

Ferber has turned out to be a limited exception to the *Miller* test. The Court has since resisted efforts to expand the category of child pornography. In *Ashcroft v. Free Speech Coalition*,[48] the Court rejected a congressional ban on "virtual child pornography"—pornography in which adult actors portray juveniles or in which computer-modified images appearing like real children are used. Justice Kennedy's opinion for the Court emphasized that "*Ferber*'s judgment about child pornography

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44. *Id.*

45. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (holding a complete ban on price advertising is an unconstitutional abridgment of the First and Fourteenth Amendments).

46. 458 U.S. 747, 774 (1982).

47. Osborne v. Ohio, 495 U.S. 103, 111 (1990).

48. 535 U.S. 234 (2002).

was based upon how it was made, not on what it communicated."[49] Thus, child pornography represents a uniquely compelling state interest in protecting children rather than a broader characterization of certain disturbing forms of erotic communications as unworthy of constitutional protection.

The second, most recently recognized category of commercial speech consists of "true threats." In *Virginia v. Black*,[50] the Court considered two episodes of cross burning, one at a Ku Klux Klan rally, and the other in the yard of a private home (apparently motivated by a dispute between neighbors over noise). The Court held that "true threats" are not constitutionally protected, and described this category of speech as follows:

> "[T]rue threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.[51]

True threats in this sense may be prohibited, and statutes banning cross burning are constitutional when applied to this type of conduct. Although *Virginia v. Black* represents the Court's official recognition of true threats as unprotected and its first definition of the category's boundaries, it can hardly be viewed as a surprise that the government is entitled to prevent individuals from threatening an individual or the public with immediate violence.

II. WHAT DOES IT MEAN TO BE "PROTECTED" OR "UNPROTECTED"?

The terminology in this area of constitutional law has become profoundly misleading. "Protected" speech is sometimes unprotected, and "unprotected" speech is sometimes protected. One might think that constitutionally protected speech was immune from government regulation, so that a person could never be punished for engaging in this speech unless he or she was committing some independent offense such as trespassing at the same time. On the other hand, one might also think that a person engaging in unprotected speech could never have a valid First Amendment claim. Neither of these perceptions is correct. Constitutionally protected speech is actually protected from some types of regulation but not others, while speech may be unprotected but nevertheless provide the occasion for a valid First Amendment claim. Nevertheless, there are differences in how regulations on these categories of speech are analyzed that go beyond statistical predictions that some regulations are more likely to

49. *Id.* at 236.
50. 538 U.S. 343, 348–50 (2003).
51. *Id.* at 359−60 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) (alteration in original) (citations omitted)).

be upheld than others. Thus, it is necessary to probe more deeply to discover the true significance of the distinction between protected and unprotected speech.

A. The Status of "Protected" Speech

We can begin by honing in on the doctrinal treatment of "protected" speech. The categorical approach disfavors certain kinds of speech but at the same time provides a high degree of protection to other speech, at least from regulations restricting expression in the media or in public spaces. Consider *Texas v. Johnson*,[52] in which the Court reversed the defendant's conviction for burning an American flag. The statute at issue prohibited actions that "deface, damage, or otherwise physically mistreat [the flag] in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."[53] Because it allowed the flag to be burned only in a respectful way, while banning the same action when conducted as an antigovernment protest, the effect of the statute was that "the flag itself may be used as a symbol . . . only in one direction."[54] To uphold the statute would be to allow the government to "prescribe what shall be orthodox" by authorizing the use of the flag only to convey patriotic messages.[55] It is important to note that the Court did not consider whether the social interests that might be served by protecting the flag outweighed the burden on free speech from banning flag burning. Rather, once the Court determined that the law was in effect a ban on unpatriotic expression, the case was essentially decided. Thus, the analysis was rule-like rather than standard-like.

Nevertheless, even protected speech may be proscribed given a sufficiently strong state interest, and this introduces a standard-like element. The Court's standard of review for content regulation of protected speech is exemplified in the "Son of Sam" case.[56] New York passed a statute to prohibit a serial killer who called himself "Son of Sam" and other criminals from profiting from books about their crimes at the expense of their victims. This is not on its face an unreasonable regulation. It does not prohibit the criminal from publishing a book about the crime but merely reallocates the profits to the victim, from whose suffering the criminal is now attempting to benefit financially. In some sense, the criminal's commercial exploitation of the crime could be considered a second "assault." But the Court unanimously overturned the statute because it was based on content: the criminal could profit from writing a book on any subject except for his crimes. Applying strict scrutiny, the Court found the statute to be poorly connected with the State's "undisputed compelling interest in ensuring that criminals do not profit from their crimes."[57] For our purposes, what is critical is not the outcome but the Court's recognition that even fully protected speech is subject to restriction if the regulation passes strict scrutiny.

Strict scrutiny has also been applied to campaign regulations, and some major regulations have survived review on the ground that they are narrowly tailored to

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52. 491 U.S. 397 (1989).
53. *Id.* at 400 n.1.
54. *Id.* at 416–17.
55. *Id.* at 417.
56. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991).
57. *Id.* at 119.

achieve the government's interest in preventing corruption of the electoral process. For instance, in *Austin v. Michigan Chamber of Commerce*,[58] the Court upheld a state prohibition on corporate expenditures in political campaigns except through special political action funds. The Court found that the statute burdened the plaintiff corporation's First Amendment rights. Nevertheless, the Court upheld the statute because it was supported by the compelling state interest in preventing corporations from channeling funds obtained from consumers and investors into political campaigns. Extending *Austin*, the Court also upheld an ambitious campaign finance law in *McConnell v. Federal Election Commission*.[59]

Although protected speech does receive a high degree of protection from direct censorship, regulations can avoid the application of strict scrutiny if they are not based on content or if they are limited to special contexts. Roughly speaking, we can divide the permissible regulations into two classes. First, regardless of the type of speech, the government is entitled to impose some restrictions on methods of communication. The classic example is that it can forbid the use of loudspeakers in the middle of the night, whatever the message may be. These restrictions on the "time, place, or manner" of speech are subject to some judicial scrutiny, but are likely to be upheld if at all reasonable.

The other type of regulation is harder to describe because it tends to involve some combination of the message and the surrounding circumstances, such as the location of the speech or the identity of the speaker. Usually, the regulation involves some special relationship between the government and the speaker, the location, or the medium. For instance, the speaker may be a student in a public high school, or may be seeking to use the internal mail system in a government office, or may be a government-licensed broadcasting station. Because of the nexus between the speech and some specific government activity, the government has special regulatory powers which it would not possess over private individuals having a conversation on private property. The crucial issues in this type of case are the extent to which the Court really regards the situation as falling outside the "normal" First Amendment rules, and how much it is willing to defer to government decision makers on factual issues.[60]

The extreme case is probably the military: the Court considers the military to be a separate (and unequal) society with only marginal protection by the First Amendment. It also is highly reluctant to second-guess the Pentagon on any issue of policy. Thus, not only are the tests phrased in ways that are highly favorable to the military, but the Court leans over backwards in applying the tests so as not to impair military discipline.[61] If Congress wanted to pass a statute virtually eliminating the First

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58. 494 U.S. 652 (1990).

59. 540 U.S. 93 (2003).

60. Much of First Amendment doctrine makes sense if we view the First Amendment as centrally concerned with the kind of speech that constitutes our culture—not just high art but popular entertainment, as well as religious and political discourse, all of which create a setting in which people interact with each other individually as well as through associations. We could view this world of interactions and organizations as making up civil society, using that term in a broad sense. The lesser degree of protection given to speech in schools, prisons, and the military can then be understood as a reflection that students, prisoners, and soldiers are not fully participating members in civil society.

61. *See, e.g.*, Brown v. Glines, 444 U.S. 348 (1980).

Amendment, all it would have to do would be to draft the entire population into the military. In less dramatic ways, the rights of high school students, public employees, and broadcasters are all abnormal. These abnormal categories give rise to considerable doctrinal tension, since there are always arguments for bringing them into accord with the "normal rules."

Normally, when people speak about the categorical approach, they are referring to the rules that give lesser protection to certain content based on its supposed lack of value. There are also sets of categories relating to disfavored speakers (e.g., students, prisoners, soldiers, state employees) or settings (classrooms, employer communication systems, military bases). The result is a complex tapestry of rules regarding speech restrictions.

B. What Does It Mean for Speech to Be "Unprotected"?

One might imagine that a person whose speech was unprotected by the First Amendment could never have a First Amendment claim. This would be incorrect. Unprotected speech can provide a predicate for a First Amendment claim in at least two circumstances. The first type of claim derives from the cross-burning case, *R.A.V. v. City of St. Paul*.[62] The St. Paul ordinance criminalized any communicative act (specifically including burning crosses and Nazi swastikas), if the speaker "knows or has reasonable grounds to know" that the action "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[63] The state court had construed the ordinance to apply only to "fighting words," which the Court had previously held to be outside the protection of the First Amendment. Justice Scalia's majority opinion viewed the ordinance as impermissible content discrimination. Abusive communications, "no matter how vicious or severe," are permitted unless they relate to one of the prohibited categories.[64] Under the ordinance it was perfectly permissible to use fighting words "to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality."[65] Indeed, Justice Scalia considered the ordinance to be even more fatally flawed because it prohibited only the use of fighting words to support racist or sexist viewpoints, not to oppose those viewpoints. Thus, it was an example of impermissible viewpoint discrimination, which apparently is not permitted even for what has traditionally been called unprotected speech.[66]

Other First Amendment claims can also be made even when speech is supposedly "unprotected." For example, even unprotected speech is largely immune to prior restraints. The leading case on prior restraints is *Near v. Minnesota ex rel. Olson*.[67] A newspaper had charged public officials with protecting local gangsters and had demanded a special grand jury. Acting under a state statute, the government obtained

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62. 505 U.S. 377 (1992).

63. *Id.* at 380.

64. *Id.* at 391.

65. *Id.*

66. Werhan considers *R.A.V.* as undermining the categorization approach, although it might be equally apt to say that it merely makes the meaning of categorization more complex. *See* Werhan, *supra* note 2, at 61–62

67. 283 U.S. 697 (1931).

an injunction forbidding the defendants from circulating "any publication whatsoever which is a malicious, scandalous or defamatory newspaper."[68] Chief Justice Hughes wrote the opinion for the Court lifting the injunction. He emphasized that unless the publisher can "satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt."[69] Thus, the State had instituted the equivalent of a licensing system, covering only the defendants. "This," said Hughes, "is of the essence of censorship."[70] He stressed the powerful objections to prior restraints voiced by Blackstone, as well as later history: "The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right."[71]

Similarly, overbreadth claims can also be made even though the speaker's expression was unprotected. A badly drafted regulation can be struck down on its face, without any inquiry into its application to the particular plaintiff challenging the regulation. Thus, even if speech could be restricted under a properly drafted regulation, the overbroad or vague regulation will be invalidated. A striking example is provided by *Board of Airport Commissioners v. Jews for Jesus, Inc.*[72] The Los Angeles Board of Commissioners adopted a resolution banning all "First Amendment activities" within the "Central Terminal Area" at Los Angeles International Airport. An airport officer told a minister affiliated with Jews for Jesus that he must stop distributing religious literature in the Central Terminal Area. The plaintiff filed suit, claiming that the resolution was unconstitutional on its face. The Court began its analysis by summarizing the test for overbreadth:

> Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." A statute may be invalidated on its face, however, only if the overbreadth is "substantial." The requirement that the overbreadth be substantial arose from our recognition that application of the overbreadth doctrine is, "manifestly, strong medicine," and that "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."[73]

Doctrines such as prior restraint and overbreadth allow First Amendment claims to be predicated on unprotected speech, but only for instrumental reasons. The unprotected speaker is allowed to make the claims in order to destroy barriers that confront protected speakers. *R.A.V.*, in contrast, allows the unprotected speaker to

68. *Id.* at 706.
69. *Id.* at 713.
70. *Id.*
71. *Id.* at 718.
72. 482 U.S. 569 (1987).
73. *Id.* at 574 (citations omitted).

make a claim on his own behalf, on the theory that he has been improperly singled out from other unprotected speakers on the basis of his ideas. All of these approaches allow the unprotected speaker to make claims based on the improper drafting of the law, either for sweeping too broadly into the arena of protected speech or cutting too narrowly within the unprotected category.

As we have seen, the protection given to protected speech is not unlimited. Protected speech may be penalized on the basis of its content if the speaker falls into a special category (i.e., student speech) or if the speech uses government property other than some kind of public forum. It can also be penalized under a content-neutral regulation, and even under a content-based regulation if the government can prove a compelling interest.

Putting all of this together, we arrive at the following definitions of protected and unprotected speech:

> Speech is *protected* if it is immune from content-based restrictions when uttered by a member of the general public (not a student, prisoner, etc.) in the print or digital media or in a public forum unless the government can show that a restriction is narrowly tailored to a compelling governmental interest. If speech is *unprotected*, it may be proscribed even in the media or in a public forum on the basis of its content, provided the regulation is properly drafted.

Even more simply, we might say that protected speech is subject to general proscription only if the regulation survives strict scrutiny, whereas content regulation of unprotected speech is subject to a set of complex rules that vary with the category of speech.

C. Reconceptualizing the Treatment of Unprotected Speech

We can bring a greater degree of unity to First Amendment doctrine by considering the relationship between the default standard for protected speech (strict scrutiny) and the rules governing unprotected speech. As we will see, the deep structure of the doctrines governing unprotected speech can be seen as embodying strict scrutiny, translating that general standard into ready-made and easily applicable rules.

Some of the categories of unprotected speech could be considered to be applications of the compelling interest test. The *Brandenburg* test and the fighting words doctrine could be viewed as defining what regulations are sufficiently narrowly tailored to the government's interest in preventing violence, while *New York Times v. Sullivan* could be viewed as performing the same function regarding the government's interest in protecting individual reputation from false accusations. The category of "true threats" also looks like an application of the compelling interest test (with the interest being protection of citizens from intimidation), while the child pornography category is an application for the government's interest in preventing the sexual abuse of the children featured in the pornography.

The function performed by the categorical approach under these circumstances is that it eliminates the need to consider the application of the compelling interest test on a case-by-case basis. Moreover, because the Court has rarely found this test to be satisfied so far when applied outside of these categories, there seems to be a strong presumption against this possibility. Thus, the compelling interest test has become crystallized into the categories (fighting words, etc.) almost completely.

Two categories of expression, however, do not fit this analysis. The first is obscenity. The Court has never articulated a compelling interest, and the connection between the speech and its possible harmful effects (destruction of socially valuable sexual inhibitions or perhaps prevention of sexual violence) is much less direct than the causal links between speech and harm for the other unprotected categories. The Court's real motivation here seems to be a sense that "sex is different" and that sexual speech is constitutionally dubious.

The other aberrant category is commercial speech. Under the definitions given above, false or misleading commercial speech is unprotected; presumably this could be justified on the basis of a compelling interest in preventing consumer fraud. But under *Central Hudson*, truthful commercial speech can be regulated on the basis of its content without showing that the regulation is narrowly tailored to a compelling government interest—it is enough if the regulation directly advances a substantial government interest.[74]

The remaining categories can be seen as crystallized applications of the compelling interest test, with a strong presumption that speech outside the categories does not qualify for regulation under that test. Obscenity and truthful commercial speech fall outside this framework. Their treatment seems to rest on a perception of their First Amendment value—apparently nearly nil in the case of obscenity and less-than-full in the case of truthful commercial speech.

From the point of view of those who seek to maximize the protection of speech, the recognition of any categories of disfavored speech is unsettling. Hence, it is tempting to characterize all categories of unprotected speech as mere relics of a less enlightened day. Alternatively, they might be seen as reflecting the few contexts in which the value of speech is so minimal that it might as well be considered a form of pure conduct. But these views do not give adequate weight to the government interests such as prevention of imminent violence or malicious harm to personal reputation. Even if no category of unprotected speech existed, many of the speech restrictions that the Court currently upholds by applying the categorical approach could instead be justified under the compelling interest test of strict scrutiny. This insight provides a basis for rethinking the foundations of the categorical approach.

III. RETHINKING THE CATEGORICAL APPROACH

We have seen that most of the categories of unprotected speech can be seen as representing the result of something like strict scrutiny, resulting in a defined form of regulation that is reasonably justified on the basis of a compelling government interest. The categorical approach has the function of replacing a case-by-case application of strict scrutiny with a set of rules about permissible proscriptions of speech. This switch from a standard (strict scrutiny) to a rule (categorical exclusions) will be discussed below in Part III.A. For the remaining categories of speech, this characterization seems weak, and the Court's treatment of these categories (commercial speech and obscenity) seems more motivated by perceptions of First Amendment value. The Court's treatment of these categories will be discussed in Part III.B.

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74. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980).

A. The Crystallization of the Compelling Interest Test

As we have seen, the categorical approach can be seen in many respects as crystallizing the compelling interest test. It gives the government safe harbors in which this test is automatically satisfied. Thus, properly drafted laws intended to prevent violence or the warranted fear of violence, false accusations against individuals, or consumer fraud are automatically upheld. Laws that address other government interests through a proscription on content will nearly always be struck down. For these uses of the categorical approach, the question is whether it would be better to simply apply the compelling interest test to each case, or whether it is better to reduce the application of the test to a set of specific rules (with a strong presumption against applying the test outside of the rules).

This dispute is a familiar one in the law, between believers in rules and believers in standards.[75] Most law professors can recite, pretty much by heart, the arguments on both sides of the broader debate.[76] Rules have the advantage of providing clearer guidance for both lower courts and the public. Because they leave less room for discretion, they also provide less of a toehold for subjective biases. These advantages may be particularly important in First Amendment litigation. In cases involving free expression, we have particular reason to want to avoid having the judges' ideological biases enter into the decision, lest those biases then have a distorting effect on public discourse. Because of the concern that legal uncertainty will deter legitimate speech, the extra clarity of rules is also an advantage.

Even in First Amendment cases, however, the advocates of standards are not without ammunition. The alleged certainty of rules may be overstated. Some supposedly clear-cut rules suffer from significant definitional problems, rendering their boundaries unpredictable. Also, the more complex the rules become, the harder it is for anyone but a specialist to know what is or is not permitted, which is why a decreasing number of people manually prepare their own tax returns. Some First Amendment rules may have reached the point of being understandable only to specialists. Experience has shown, for example, that many law students have trouble grasping the complex rules governing defamation actions. And, as advocates of standards point out, whatever certainty does come with the use of rules is purchased at a price. Sticking to a clear-cut rule requires a willingness to decide some cases differently than we would if we considered all the circumstances. In a sense, in the interests of greater certainty and efficiency, we have to be willing to tolerate some mistaken outcomes.

The positive function of the categories is clear. Essentially, for some key government interests, the Court has given clear direction about which regulations are acceptable. This provides useful guidance to the government, and more importantly, clear warning to speakers about what they may and may not say. There seems to be a clear gain from avoiding the case-by-case application of the compelling interest test.

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75. This distinction itself is not razor sharp, but the gist can be basically understood by comparing "do not exceed fifty-five miles per hour" (a rule) with "do not drive faster than conditions allow" (a standard). Thus, most American roads follow a rule; the German Autobahn follows a standard.

76. For discussion of the rule/standard distinction, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992), and Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

The negative function of the categories is to make it very difficult for the government to pursue any other potentially compelling interests. The compelling interest test as such has rarely been a basis for successful defense of individual speech regulations, but the government may essentially deploy it as an argument for recognizing an additional category of unprotected speech. This is essentially what happened regarding "true threats" and child pornography. But this is a very hard path for the government to tread. Would it be better if the Court were more receptive to case-by-case applications of the compelling interest test outside of the existing categories?

Given the difficulty that the government confronts in prevailing under the compelling interest test, it may be that no special presumption against applying the test is needed. The Court might fear that lower courts would be tempted to distort the test in order to target unpopular speakers, or that speakers themselves might fear this and therefore self-censor. This seems a bit speculative, but perhaps extra caution in applying the test outside of the recognized categories is warranted.

Note that the analysis of these categories of expression does not rely on a factor first identified in *Chaplinsky*: the supposed lack of First Amendment value for these categories of speech.[77] Speech that falls within the proscribed categories may still have social value as a means of self-expression. For at least some of the categories, it is possible that the speech might even have *significant* value. For instance, a movie about child sexual abuse might be artistically and socially important even if the making of it involved sexual acts by minors. Speech that incites a violation of the law may communicate a valuable idea about the evils of the status quo or about the justice of unlawful action.

Admittedly, the large majority of proscribed speech adds little or nothing to public discourse. This is partly because the "narrow tailoring" requirement has the effect of forcing the state to focus on speech that has little function except to threaten the government's compelling interest. The narrowness of the tailoring can be judged partly by the extent to which the government avoids unnecessarily intruding on speech that serves valuable functions. Thus, the value of speech may be relevant, not as a separate justification for regulation, but rather as part of the balancing process that is inevitably involved in determining whether the government's regulation burdens free expression more than it needs to achieve the government's goals. The value, or lack of value of speech does enter the analysis, but only at the margins by helping to define the exact contours of government regulation, rather than serving as the basic justification for upholding the regulation.

Although the question of First Amendment value has only this indirect relevance to the categories discussed in this part—incitement, fighting words, true threats, child pornography, false accusations—it does seem to have critical importance for the remaining two categories of commercial speech and obscenity. These categories seem to be justified at least in part on the view that they involve less valuable forms of expression.

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77. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

B. The Question of First Amendment Value

Obscenity seems to be proscribed less because it threatens a compelling interest and more because the Court views sexual speech as inherently less valuable than other kinds of speech. It is true that some obscene materials might be connected with sexual assaults, but the Court has never limited the obscenity category to violent pornography. Instead, it has defined the proscribed category in terms of unpalatable explicitness in describing the subject matter of the speech. Surely the Court would never allow speech to be banned simply for describing political events in terms that are patently offensive under contemporary community standards. It is only when the subject of the speech is sexual that the Court is willing to countenance this type of restriction. And note that the *Miller* test allows speech to be restricted even when it has some artistic value, so long as the value is not "serious."[78] Apparently, anything less than serious value is cancelled out by the negative value of sexual arousal.

Commercial speech receives less than complete protected status for the same reason. Misleading advertising can be considered akin to defamation, but perhaps the different set of rules governing the two categories could be justified based on the varying degrees of narrow tailoring needed given the different incentives of speakers. The regulation of truthful commercial speech allowed under *Central Hudson* seems to rest primarily on the perception that truthful commercial advertising has a lower value to society than similar forms of expression such as truthful political advertising. Clearly, the Court would never be willing to apply the same test to other forms of speech such as religious tracts or popular entertainment.

The Court also draws distinctions based on the value of speech in other contexts.[79] For example, speech by public employees on matters of public concern is protected, but their speech about workplace issues is not.[80] Within the category of defamation, some of the cases draw distinctions on this basis or on the basis of the media or nonmedia nature of the speaker.[81] Nonobscene sexual speech may be subject to zoning restrictions that the Court would clearly never tolerate as applied in other areas.[82] The Court is nonchalant about special zoning for erotic bookstores; it is difficult to imagine that it would take the same cavalier attitude toward zoning laws that targeted political bookstores or religious bookstores.

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78. Miller v. California, 413 U.S. 15, 24 (1973); *see supra* text accompanying notes 31–33.

79. The legitimacy of distinguishing between types of speech based on their value is intensely controversial. *See, e.g.*, Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547 (1989); Cass R. Sunstein, Commentary, *Low Value Speech Revisited*, 83 NW. U. L. REV. 555 (1989).

80. *See* Connick v. Myers, 461 U.S. 138 (1983).

81. *See* Phila. Newspaper, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (explaining that in a case with a media defendant and a nonpublic-figure plaintiff, the burden of proof must be on the plaintiff to prove falsity); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 749–50 (1985) (plurality opinion) (giving lower protection to credit ratings as not being speech of public concern); *see also* Bartnicki v. Vopper, 532 U.S. 514, 515 (2001) (rejecting an invasion of privacy suit based on illegal communications intercept in part because the speech was on a matter of public concern).

82. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. Am. Mini Theatres, Inc., 427 U.S. 50 (1976).

Attention to the different values at issue in different cases pulls the courts toward content-based differentiations between categories of speech. Courts are tugged the other way, not just by a formalist impulse toward uniformity, but also and more importantly by a skepticism about the ability of anyone other than the individual listener to assess the value of speech. For most of the past twenty years, the attraction of uniformity has been greater, but there have been enough exceptions to leave the final resolution in doubt. The trend toward uniformity leads to broad principles such as the Court's general hostility to content-based regulation, while resistance to the trend results in exceptions such as *Central Hudson*, which provides a lower level of protection to speech that seems less central to the concerns of the First Amendment.

What is troubling about the treatment of commercial speech and obscenity is that it seems so ad hoc. It is hard to imagine that the Court's willingness to allow regulation of advertising reflects a hostility to capitalism, but its attitude toward obscenity can be plausibly considered to be a reflection of prudish Puritanism. Placing commercial speech on a lower plane than political speech may well be justified, but the Court has done a poor job of explaining why similar treatment would not be appropriate for other forms of speech such as violent entertainment aimed at children.

One plausible explanatory principle for the commercial speech cases would be that speech should receive a lower degree of protection when it lacks the essential attribute of being a public good—that is, when the speaker is in a position to realize most of the value of the speech to listeners and there is little spillover effect to third parties.[83]

Information is what economists call a public good, which basically means that its benefits cannot be confined to a single consumer.[84] Since the producers of ideas cannot recover the full social benefits of their product, they have an insufficient economic incentive to produce the product. For ordinary consumer goods, it may make sense to make the seller pay for all the damages caused by the goods, however unintentionally. For a public good like information, however, this kind of liability could deter the production of information. Because a newspaper's profits do not reflect the full social value of the its publication, strict liability would cause it to strike the wrong balance between the harm done by inaccurate information and the benefit of producing additional accurate information.

Commercial advertising and pornography are two forms of expression where almost all of the social value is captured by the speaker in terms of increased profits. Advertising is primarily designed to increase sales by the speaker. Given the strong attraction held by sexual materials, it may be possible to market those materials with little or no information content. If so, they are more akin to ordinary consumer goods

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83. This theory is developed in Daniel A. Farber, Commentary, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991).

84. For most products, the seller of the product receives compensation from the buyer for the full value of the product. When you buy a meal in a restaurant, you receive (and pay for) the full benefit of the meal. But when you read a newspaper, the benefits of the information flow to other people as well as to you, for two reasons. First, if you read something interesting, you may well pass the information along to others, which is something you cannot do with a meal. Second, the information may affect other behavior, such as how you vote, which in turn affects others through its contribution to the outcome of the election.

than to most other forms of speech, and it might be possible to justify providing little or no First Amendment protection on that basis.[85]

This "public good" approach could be taken literally, as the basis for an economic analysis of First Amendment law. But we can recast much the same insight in other terms. Some speech confers only private benefits on the speaker or on the direct audience for the speech. In this sense, it is less public-regarding than other speech which seeks an impact on a community rather than merely on individuals considered in isolation. Note, for example, that we have art museums to make art available to those who lack the financial means to purchase it themselves, but no one seems to ask for government subsidies to provide pornography or commercial advertising to the impoverished. In this vision, a central function of free speech is to assist the construction of civil society. Commercial speech and pornography do not contribute to the tasks of creating a culture independent of government or a rich set of private associations.

Some additional categories of speech might also be subject to similar treatment, such as some types of violent broadcasting directed at children. There are, however, risks to this approach. Opinions may differ about what forms of speech have the capacity to enter public discourse or otherwise benefit third parties other than the speaker and the audience. Defining such disfavored categories of speech may also be difficult. So in the end, the refusal to apply this approach beyond a couple of categories of historically unprotected speech may simply represent a desire not to take these risks.

Something like the "public good" concept might help justify the lower level of constitutional protection given to obscenity and commercial speech without relying on the idea that these forms of speech have lower First Amendment value. But the Supreme Court has never embraced this rationale. Alternatively, the Court might identify some of the regulatory interests involved as compelling, such as maintaining market integrity or preventing sexual assaults, and these compelling interests might conceivably justify a set of categorical rules for these categories of speech. It is not at all clear, however, that those rules would resemble current doctrine.

Without reconceptualization along one of these lines or the other, commercial speech and obscenity doctrines will remain distinct from other types of unprotected speech. Unlike the other unprotected categories, these categories seem to receive special treatment because the speech in the category is deemed less valuable to society, rather than because the speech poses special risks of serious social harm.

CONCLUSION

As we have seen, First Amendment doctrine has traditionally identified certain categories of messages as warranting heightened government intervention. Initially, these categories were conceptualized as being entirely outside the scope of the First Amendment. In some sense, they were not considered to be "speech" at all for purposes of the First Amendment; instead, they could be regulated like any other form of conduct. So the world of communicative acts was divided into two types: the various

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85. In contrast, those who speak on political topics cannot capture all of the social value of their speech through sales prices, because their speech also has a potential benefit to others who hear about their ideas secondhand and to those who benefit even less directly because the electorate is better informed.

categories of "unprotected speech," which were utterly outside the pale of the First Amendment, and all the rest of expressive conduct, which was protected equally by the First Amendment regardless of the specific nature of the speech.

Although this picture still survives and the terminology of "protected" and "unprotected" speech is still in use, legal developments of the past thirty years have eroded its foundations. Each of the categories of "unprotected speech" now in fact enjoys considerable constitutional protection. Defamation suits face huge obstacles under *New York Times v. Sullivan*, literature that would formerly have been considered obscene is protected by *Miller v. California*, and whether the fighting words exception even survives is controversial. Moreover, *R.A.V. v. City of St. Paul* indicates that speech that fails to qualify for protection under any of these tests is still not "invisible" to the First Amendment.[86] Thus, "unprotected" speech is not a constitutional zero under the First Amendment. On the other hand, although speech outside of these categories usually cannot be regulated on the basis of content, there are plenty of specific contexts in which the government is in fact allowed to take content into account. So, today we seem to have disfavored versus favored categories of speech, with corresponding levels of regulation for each, rather than absolutely unprotected versus absolutely protected speech.

To the extent the categorical approach functions as a prepackaged form of strict scrutiny, this substitution of rules of speech protection for the standard of strict scrutiny seems largely helpful. It gives clearer notice to speakers, as well as governments, about the boundaries of permissible regulation. In the areas outside of these rules, strict scrutiny remains available, although the Court has been cautious in applying that standard. The categories of unprotected speech based on perceived lack of First Amendment value are harder to justify. They seem to single out a couple of categories with little explanation about why these are unique. This approach could be put on a sounder footing by recourse to the economic theory of public goods or some alternative theory about the public value of speech. Such a theory might also allow other forms of speech, such as violent entertainment for children, to receive a lower level of First Amendment protection. Unless the Court is willing to consider such arguments regarding other types of speech, its treatment of commercial speech and obscenity will remain vulnerable to criticism.

Revisiting our understanding of the categorical approach raises some more general doctrinal questions. It invites us to take a closer look at strict scrutiny, and in particular to the extent to which the value of the burdened speech is relevant to the determination of narrow tailoring. It also invites a closer look at what government interests should count as compelling. If protecting personal reputation from assault is a compelling government interest, perhaps some other forms of social or psychological harm should be given similar treatment.

More fundamentally, an improved understanding of the treatment of unprotected speech suggests the need for renewed attention to how the rules/standards distinction operates in this corner of constitutional law. The Supreme Court has decided several hundred First Amendment cases, and in the process has created a complex web of rules and standards. The categorical approach discussed here is part of the basic structure of that web. Besides the categorical approach, there are other features of U.S. doctrine

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86. 505 U.S. 377, 383 (1992).

that are quite powerful and arguably unique, including the availability of facial attacks on speech regulations (which consider only the general validity of a regulation but not its application to the facts), the deep suspicion of the government's judgments about the validity of ideas or their dangers, and the use of the content distinction (between content-based and content-neutral regulations) as an organizing principle. It is probably unrealistic to expect to reduce this complexity to one or two basic principles. Understanding the categorical approach to protecting speech, however, is a necessary prerequisite to making sense of the many refinements and qualifications in First Amendment doctrine.

First Amendment doctrine is sometimes criticized for its complex array of rules, which some consider more suitable for a tax code than a statement of constitutional principle.[87] This rule-based approach does risk losing sight of the fundamental values at stake in First Amendment cases. On the other hand, it does provide guidance to speakers who might otherwise be deterred by uncertainty over whether their speech would receive judicial protection. The justifiability of putting such a high priority on avoiding the possibility of chilling speech may be debatable. There can be no doubt, however, that basing constitutional doctrine on categorical rules has been a dominant strategy in American law.

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87. For criticism of the Court's propensity to generate complex, multipart tests, see Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).