The First Amendment: Is the Freedom of Speech More Important Than the Protection of Human Life

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THE FIRST AMENDMENT: IS THE FREEDOM OF SPEECH MORE IMPORTANT THAN THE PROTECTION OF HUMAN LIFE?

A narrow but strong First Amendment, with its strong principle universally available for all speech covered by the First Amendment, has much to be said for it. First Amendment protection can be like an oil spill, thinning out as it broadens. But excess precautions against this danger might lead to a First Amendment that is so narrow as to thwart its major purposes.¹

I. INTRODUCTION

The First Amendment of the United States Constitution guarantees that "Congress shall make no law . . . abridging the freedom of speech . . . ."² Although the First Amendment appears unconditional on its face, the Supreme Court has never held that the right to speak freely is absolute.³ The refusal to conclude that the First Amendment is absolute is manifested in an understanding that "[a]n absolute right, by definition, is not subject to balancing"⁴—a technique courts commonly use in deciding First Amendment cases.⁵ Under the balancing approach, "[i]f the state interest is compelling and the means of regulation narrowly tailored to accomplish a proper state purpose, regulation of expression is not forbidden by the first amendment."⁶

Historically, First Amendment analysis has shifted from an "ad

². U.S. CONST. amend. I.
³. Historically, "[the absolutist view of free speech has been championed and most closely associated with Justices Black and Douglas, but it has never been explicitly [sic] adopted by a majority of the Court." JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 16.7(b), at 838 (3d ed. 1986) (footnote omitted); see also Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (Black, J., dissenting):
   I do not subscribe to [the doctrine that permits constitutionally protected rights to be "balanced" away whenever a majority of this Court thinks that a State might have interest sufficient to justify abridgment of those freedoms] for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field.
⁴. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 16.7(b), at 838 (3d ed. 1986).
⁵. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 792-93 (2d ed. 1988).
hoc” balancing approach\(^7\) to a “categorical” balancing approach\(^8\) in determining whether or not certain speech is constitutionally protected.\(^9\) While the ad hoc approach viewed individual First Amendment issues on a case-by-case basis, the categorical approach categorizes speech, either granting or denying First Amendment protection to the defendant based on the character of his speech. Under the prevailing categorical balancing approach, First Amendment cases can be divided into two classes: those involving protected speech and those involving categorically unprotected speech.\(^10\) Under the prevailing categorical balancing approach, the weight of each party’s interests has been pre-determined by an earlier decision. Although various interests have been found to outweigh the right to speak freely,\(^11\) decisions more often than not result in favor of the party claiming First Amendment protection.\(^12\) This occurs primarily because there is a finite list of categories which can be deemed as undeserving of constitutional protection.

This note examines the prevailing categorical balancing approach in detail, as used by the Pennsylvania courts in *Smith v. Linn* \(^13\) ("Smith"). This note thoroughly analyzes the Pennsylvania courts’ conclusion, scrutinizing the soundness of both the courts’ choice to rely on the First Amendment and their holding that the freedom of speech outweighs the sanctity of human life. In doing so, this note explores the historical progression of First Amendment analysis and the rationales underlying the

\(^7\) See generally GERALD GUNTHER, CONSTITUTIONAL LAW 983-84 (11th ed. 1985). For additional explanation of the “ad hoc” balancing approach, see infra text accompanying notes 65-83.

\(^8\) See generally GERALD GUNTHER, CONSTITUTIONAL LAW 984 (11th ed. 1985). For an additional explanation of the “categorical” balancing approach, see infra text accompanying notes 84-96.

\(^9\) See infra notes 84-86 and accompanying text.

\(^10\) Categorically unprotected speech includes: "(1) obscene speech, (2) libel, slander and misrepresentation, (3) 'speech or writing [constituting] an integral part of conduct in violation of a valid criminal statute,' and (4) speech which is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Peter A. Block, Note, Modern-Day Sirens: Rock Lyrics and the First Amendment, 63 S. CAL. L. REV. 777, 792-93 (1990) (footnotes omitted) (alteration in original).

\(^11\) Id.

\(^12\) Professor Tribe notes that in cases where the Court is faced with a regulation of the freedom of speech, “government must come forward with sufficient proof to justify convincingly its abridgment of the constitutional right to speak, in terms consistent with the basic theory of free expression.” LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 834 (2d ed. 1988) (Footnote omitted). This task, Tribe argues, would “be impossible unless government can persuasively show a harm that would be prevented by the abridgment but could not have been prevented by dialogue; whenever 'more speech' could eliminate a feared injury, more speech is the constitutionally-mandated remedy.” Id.

freedom of speech and discusses how the United States Supreme Court has employed both the ad hoc and categorical balancing approaches of First Amendment analysis.

II. STATEMENT OF THE CASE

A. Facts of Smith v. Linn

Patricia Smith, a resident of Norristown, Pennsylvania, shared a similar desire with other Americans: she wanted to lose some weight. While reading an issue of Family Circle magazine, Mrs. Smith noticed some excerpts taken from The Last Chance Diet book. The excerpts were enticing, so Mrs. Smith decided to buy the book and get a closer look. The book's introduction contained a statement from Lyle Stuart, the publisher, proclaiming the results of his own adherence to the "last chance diet." The temptation was amplified by the book's plea to potential readers:

Fat America . . . here's your last chance to get thin and stay thin. Finally, a revolutionary breakthrough in dieting that not only helps you lose weight swiftly . . . but helps you keep it off—for good!

If you've tried pills, shots, fat farms, fad diets or fasting—chances are you're fat today. Because until now, nobody could tell you how to keep weight off permanently.

. . . .

Don't give up. Get THE LAST CHANCE DIET. It can change your life.

In January, 1977, the mother of three purchased The Last Chance Diet, an instructional liquid protein diet book, published by Lyle Stuart, Incorporated ("Stuart"). Following the warnings found in several places in the book, Mrs. Smith sought medical supervision and, for six months, strictly followed the diet, substituting liquid protein drinks for solid

17. Id. (citing the Reproduced Record at 336-448).
19. Id. at iii.
food. The book had offered to "change [her] life." It certainly changed Mrs. Smith's life. On July 16, 1977, after losing one hundred and six pounds, Mrs. Smith died from cardiac failure allegedly caused by The Last Chance Diet. Specifically, "Mrs. Smith's body had consumed its own protein (some of which is heart muscle) so that, when she ate real food containing protein . . . , she was caused to have a heart attack."

David H. Smith ("Smith"), Mrs. Smith's widowed husband, sued Stuart, individually and as administrator of his deceased wife's estate. He brought claims alleging negligence, conscious and negligent misrepresentation, strict products liability, breach of warranty, and intentional infliction of emotional distress. Filed as Smith v. Linn, the case named several defendants, but after settlements and dismissals, the case continued.

27. Negligence is defined as "the failure to use such care as a reasonably prudent and careful person would use under similar circumstances . . . ." BLACK'S LAW DICTIONARY 1032 (6th ed. 1990).
28. A misrepresentation is "[a]ny manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts." Id. at 1001. This misrepresentation can be classified as "conscious" if the actor intends his statement "to induce or should realize that it is likely to induce action by . . . a third person, which involves an unreasonable risk of physical harm to the other," and that the actor knows of its falsity. RESTATEMENT (SECOND) OF TORTS § 310 (1965).
29. Negligent misrepresentation is "[a]n untrue statement of fact," BLACK'S LAW DICTIONARY 1001 (6th ed. 1990), which results in physical harm to the person to whom the statement was made or to a third person due to the actor's "failure to exercise reasonable care (a) in ascertaining the accuracy of the information, or (b) in the manner in which it is communicated." RESTATEMENT (SECOND) OF TORTS § 311 (1965).
30. Strict liability is "[a] concept applied by the courts in product liability cases in which [the] seller is liable for any and all defective or hazardous products which unduly threaten a consumer's personal safety." BLACK'S LAW DICTIONARY 1422 (6th ed. 1990).
31. A breach of warranty is "a violation of either an express or implied warranty relating to title, quality, content or condition of goods sold for which an action in contract will lie." Id. at 189 (citing to U.C.C. § 2-312 et seq.).
32. Smith v. Linn, No. 79-10524, slip op. at 1-2 (Ct. C.P. Montgomery County, Pa. Sept. 30, 1988). Intentional infliction of emotional distress occurs when the actor, "in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well being, whether or not the threats are made under such circumstances as to constitute a technical assault." State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282, 284-85 (Cal. 1952).
33. In the original case, before the Court of Common Pleas, Smith named Robert Linn, D.O., Lyle Stuart, Inc., Dixon-Shane, Inc., Howard Rosenfeld, M.D., and Robard Corpora-
Stuart was the only defendant remaining at the trial. After the dispute was transferred from arbitration, the Court of Common Pleas "entertained oral argument on the [summary judgment] motion" only and decided, *en banc*, in favor of Stuart. Smith protested application of the First Amendment, arguing that either the book fell into the unprotected category of speech inciting "immediate unreflecting action," or that the court should conclude that the defendant's conduct constituted negligent publication, a tort beyond First Amendment protection.

**B. Holding**

In response to Smith's appeal, the Pennsylvania Superior Court reviewed the lower court's decision in favor of Stuart. Although they were "moved by the grievous circumstances surrounding the . . . case," the Pennsylvania Superior Court refused to "disturb the proper ruling of the trial court in granting summary judgment on the basis of the first amendment right of the publisher."

In a four-part opinion, the *Smith* court explained its reasoning. First, the court dismissed Smith's assertion that *The Last Chance Diet* fit into an "established exception to first amendment protection," thus affirming the trial court's decision granting Stuart's motion for summary judgment. Second, the superior court declined to rely on the cases offered by Smith to support a finding that sections 310, 311, and 557A of the Second Restatement of Torts were intended to apply to publishers. Third, Smith offered sections 388 and 390 of the Second Restatement of Torts, as "defendants." See *Smith v. Linn*, No. 79-10524, slip op. at 1 (Ct. C.P. Montgomery County, Pa. Sept. 30, 1988). The case also named Hance Brothers and White Company, Wilson Foods Corporation, Delare Associates, Inc., General Foods Corporation, and U.S. Gelatin, Division of Peter Cooper Corporation as "additional defendants." *Id.*


34. *Id.*

35. *Id.*

36. *Id.* at 125.

37. *Id.*


39. *Id.* at 127.

40. *Id.*

41. *Id.* at 126.

42. The moving party is entitled to a summary judgment (a judgment as a matter of law) "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . ." Pa. R. C. P. No. 1035(b), 42 Pa. Cons. Stat. Ann. (1987).


44. *Smith*, 563 A.2d at 126.
ment of Torts 45 and the holding in Incollingo v. Ewing 46 ("Incollingo"), a Pennsylvania Supreme Court decision, for support. The Smith court's response was a finding that "[i]nstructions by a manufacturer which accompany medication or use of certain marketed goods cannot be equated with publication of books which espouse a writer's theory, opinions or ideology." 47 Finally, the court rejected Smith's plea to apply section 402A of the Second Restatement of Torts, 48 which marks a seller liable for physical harm caused by a defective or unreasonably dangerous product, even if "he has exercised all possible care in the preparation and sale of the product." 49 Instead, the court held that a book is not a product for the purposes of strict products liability. 50 The Pennsylvania Supreme Court affirmed the superior court's decision, per curiam, on appeal in March, 1991 without further discussion. 51 This note focuses on the superior court's opinion as affirmed by the Pennsylvania Supreme Court.

III. REASONING OF THE COURT

A. Background: The First Amendment

The First Amendment, ratified in 1791, has given rise to much controversy over its purpose, meaning, and scope. Throughout the years, various ideas have been suggested as rationales underlying the First Amendment. Some of the asserted rationales for the First Amendment include promotion of "self-expression and self-realization," 52 "freedom of expression for a system of representative democracy and self-govern-

45. Section 388 is entitled "Chattel Known to be Dangerous for Intended Use;" and section 390 is entitled "Chattel for Use by Person Known to be Incompetent." RESTATEMENT (SECOND) OF TORTS §§ 388, 390 (1965).
46. Incollingo v. Ewing, 282 A.2d 206 (Pa. 1971). Incollingo used section 402A of the Second Restatement of Torts in its determination of whether a drug manufacturer could be held strictly liable in tort for harm caused by its products. Id. at 219. Although the court stated in a footnote that "the strict liability rule of § 402A [was] not applicable" (id. at 220 n.8), its actual analysis implied that the primary issue in the strict liability analysis was "whether the warning that was given to the prescribing doctors was proper and adequate" (id. at 220), not whether the warnings on the cartons, labels and literature for the antibiotic drug involved could be classified as a product for strict liability purposes. Id. at 219-20.
47. Smith, 563 A.2d at 126.
49. Id. § 402A, cmt. a.
50. Smith, 563 A.2d at 126-27.
52. The concept of self-expression or self-realization rests on the idea that "free speech . . . enhance[s] the potential of individual contribution to the social welfare, thus enlarging the prospects for individual self-fulfillment." JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 16.6, at 836 (3d ed. 1986) (footnote omitted).
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ment, and promotion of the "search for knowledge and 'truth' in the 'marketplace of ideas.'"

Aside from the the purposes of the First Amendment, the holders of First Amendment rights also receive important consideration. Two distinct sets of rights arise from the freedom of speech. The first set of rights belongs to the speakers or producers of the speech. This protection affords broadcasters "a strong presumption in their favor, a presumption that extends to both entertainment and news." The second set of "rights belongs to the viewers and general public, whose rights are paramount and supersede those of the broadcasters."

Numerous disputes have arisen regarding the meaning of the First Amendment. Courts have debated whether or not the framers of the Constitution intended the First Amendment to grant an absolute right. Further, the definition of the term "speech" has been the subject of ongoing discussion. Thus far, courts have found First Amendment protec-

53. The belief that self-government is an important function of free speech is based on the suggestion that "the health of a society of self-government is nurtured by the contributions of individuals to its functioning." Id. (footnote omitted).

54. GERALD GUNTHER, CONSTITUTIONAL LAW 976 (11th ed. 1985) (footnote omitted); see also JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 16.6, at 836 (3d ed. 1986); 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774):

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

quoted in Roth v. United States, 354 U.S. 476, 484 (1957). The marketplace of ideas "theory is built upon the premise that the first amendment prohibits government suppression of ideas because the truth of any idea can only be determined in the 'marketplace' of competing ideas." JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 16.6, at 836 (3d ed. 1986).

56. Id.
57. Id.

58. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 16.5, at 833 (3d ed. 1986). The authors note that the "[i]nterpretation of the first amendment language has not proved as simple as Madison expected, however. A question of the intent of the Framers has been continually raised when considering the meaning of the first amendment . . . ." Id.


60. See Frederick Schauer, Codifying the First Amendment: New York v. Ferber, 1982 SUP. CT. REV. 285, 302. Even when the expressive conduct is verbal speech, it can be found to be unqualified for First Amendment protection because it is not the type of speech that was intended for protection. This theory "justifies treating perjury, price fixing, solicitation to nonpolitical crime, and contract law . . . as outside the First Amendment . . . ." Id. On the other hand, even though the First Amendment "literally forbids the abridgment only of 'speech,' . . . [the Supreme Court has] long recognized that its protection does not end at the spoken or written word." Texas v. Johnson, 491 U.S. 397, 404 (1989).
tion to "extend[,] to all artistic and literary expression, including concerts, plays, pictures, books, movies, music, and nude dancing."61

Additionally, the scope of the First Amendment's protection has been adjusted and readjusted in the two hundred years since its ratification.62 Changes in the scope of First Amendment protection are illustrated through two different balancing approaches: the ad hoc balancing approach and the categorical balancing approach.63 Although both views rely on the balancing of competing interests, they are strikingly different in methodology.64

1. The Ad Hoc Balancing Approach

The ad hoc balancing approach is a method of determining First Amendment protection by which the outcome of a decision depends upon "the particular facts of a particular case."65 Because of its underlying subjectivity, the approach "has been criticized for being too deferential to governmental judgments and as providing inadequate guidance to decisionmakers."66 Partially due to its unpredictability, the ad hoc balancing approach is no longer favored by the Supreme Court.67 This approach, however, was an important step in the development of the prevailing categorical balancing approach. Thus, an illustration of the application of the ad hoc balancing approach is helpful to achieve a thorough understanding of First Amendment analysis. The Supreme Court's decision in Schenck v. United States68 exemplifies the application of the ad hoc balancing approach.

61. Peter A. Block, Note, Modern-Day Sirens: Rock Lyrics and the First Amendment, 63 S. CAL. L. REV. 777, 790 (1990) (citing Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981)). Note, however, that even though an activity is protected by the First Amendment, that activity may still be regulated, depending on the surrounding circumstances. Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2460 (1991). In Barnes, the Supreme Court held that though nude dancing "had a communicative element, it was not the dancing that was prohibited, but simply its being done in the nude." Id. at 2463.


63. See GERALD GUNThER, CONSTITUTIONAL LAW 984 (11th ed. 1985).

64. See id.

65. Id.

66. Id. at 983-84.

67. Professor Tribe reasons that "[c]ategorical rules . . . tend to protect the system of free expression better [than ad hoc balancing] because they are more likely to work in spite of the defects in the human machinery on which we must rely to preserve fundamental liberties." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 794 (2d ed. 1988).

In 1919, the Supreme Court decided *Schenck v. United States* \(^69\) ("*Schenck*"), holding that the First Amendment does not protect "im-passioned language" \(^70\) which advocated and encouraged espionage. \(^71\) The defendant was charged with conspiring to violate the Espionage Act, causing or attempting to cause insubordination in the United States military, and obstructing the draft. \(^72\) Specifically, the flyers that Schenck circulated to drafted men contained, on one side, a copy of the Thirteenth Amendment and statements against the draft, describing it as "despotism in its worst form and a monstrous wrong against humanity ..." \(^73\) On the other side, the document encouraged men to assert their rights by refusing to comply with the draft and characterized those people opposing his views as "cunning politicians and a mercenary capitalist press ..." \(^74\)

Writing for the *Schenck* majority, Justice Holmes emphasized that even "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic." \(^75\) The Court recognized that "in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights." \(^76\) This statement suggests that the Court balanced the competing interests on a case-by-case basis, instead of applying a rigid formula. In doing so, the Court adopted the belief that "the character of every act depends upon the circumstances in which it is done." \(^77\)

*Schenck* was decided during World War I, when it was more important to encourage patriotism than to protect speech that encouraged espionage. \(^78\) In light of this concern, Justice Holmes introduced the "clear and present danger" test, \(^79\) a formula for determining the outcome of an

\(^{69}\) *Id.*

\(^{70}\) *Id.* at 51.

\(^{71}\) *Id.* at 52-53.

\(^{72}\) *Id.* at 49.

\(^{73}\) *Schenck v. United States*, 249 U.S. 47, 50-51 (1919).

\(^{74}\) *Id.* at 51.

\(^{75}\) *Id.* at 52.

\(^{76}\) *Id.*

\(^{77}\) *Id.*

\(^{78}\) *Schenck v. United States*, 249 U.S. 47, 52 (1919). The rationale was that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Id.*

\(^{79}\) The clear and present danger test provides that "governmental restriction on First Amendment freedoms of speech and press will be upheld if necessary to prevent grave and immediate danger to interests which government may lawfully protect." BLACK'S LAW DICTIONARY 251 (6th ed. 1990).
ad hoc balancing analysis. Holmes wrote: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." The Court further emphasized that satisfaction of the test depended on the "proximity and degree" of the speech and the evil. Applying the clear and present danger test, the Supreme Court found that Schenck's conduct, or more specifically, his speech, qualified as a substantive evil deserving of Congressional regulation.

2. The Categorical/Definitional Balancing Approach

By the 1940s, the Supreme Court began to change its application of the clear and present danger test. The new approach was a categorical one, whereby "the Court tended to recast [the] 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." The Supreme Court continues to take a categorical balancing approach in First Amendment cases, relying on categories of unprotected speech that have been predetermined by the balancing of earlier Courts. The Supreme Court's decision in Chaplinsky v. New Hampshire ("Chaplinsky") demonstrates the application of the categorical balancing approach.

In 1942, the Court decided Chaplinsky, denying First Amendment protection to a Jehovah's Witness' comments that the Rochester City Marshall was a "God damned racketeer" and "a damned Fascist." The Supreme Court rejected Chaplinsky's argument that his speech was protected by the First Amendment. In doing so, the Court altered its previous ad hoc balancing test and established a new categorical ap-

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80. Schenck, 249 U.S. at 52.
81. Id.
82. Id.
83. Id.
84. See Gerald Gunther, Constitutional Law 1017 (11th ed. 1985). In the 1940s, "the clarity and suitability of clear and present danger were being questioned." Id.; see also supra note 62 and accompanying text.
86. A recent categorically-based decision is United States v. Eichman, 110 S. Ct. 2404 (1990). In Eichman, the Court declined to hold that flag-burning fell into one of the established categories of unprotected speech. Id. at 2407-08.
88. Id. at 574.
proach in rejecting Chaplinsky’s argument that his speech was protected by the First Amendment:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.  

The Chaplinsky Court found that the benefits to the “social interest in order and morality” clearly outweighed the detriment to an individual caused by the restriction of “epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.” In other words, under the categorical balancing approach, Chaplinsky’s inciteful speech or “fighting words” were of a nature that had been pre-determined to give rise to an evil undeserving of Constitutional protection.

The categorical balancing approach allows courts to follow objectively the guidance offered by an earlier subjective decision. Although categorical balancing is a more clear-cut and well-defined approach than ad hoc balancing, it does have flaws. For example, “[a]s the number of available categories increases, so does the frequency of opportunity for putting a case in the wrong category . . . .” Additionally, the objective categorical analysis can produce anomalous results due to its focus on the words spoken and not on the harm caused. Further, the First Amendment has become “increasingly intricate” since the development of the categorical balancing approach, indicating that “maybe we are moving toward codification of the First Amendment.” This progression is “counterintuitive, for if a number of diverse values are served by

89. Id. at 571-72 (citations omitted).
90. Id.
91. Id. at 574.
the First Amendment, it would seem more likely that an equally diverse doctrinal structure would result.”

**B. The Categorical Balancing Approach Applied to Smith v. Linn**

The Court of Common Pleas of Montgomery County, Pennsylvania used the categorical balancing approach in its decision in the trial of Smith v. Linn. In applying this approach, the court looked to the categories of unprotected speech that have been established by binding precedents. Finding that Stuart’s “speech” did not fall into a pre-existing category of unprotected speech, the court concluded that it had to rule in favor of Stuart on its motion for summary judgment. Such a decision accepts the premise that although all the facts asserted by the plaintiff are true, the plaintiff’s legal claims still have no merit. Therefore, in granting the summary judgment motion, the court indicated its belief that Stuart could not be held responsible for the harm done, although the book containing false information was the cause of Mrs. Smith’s death. In support of this result, the court reasoned that “[p]lacing publishers in fear of civil liability of an untold magnitude for publishing controversial, dangerous or even potentially harmful ideas would stifle the publication, broadcast and exchange of all but the most simplistic material.” More bluntly stated, the freedom to publish false information is more important than the protection of a human life.

On appeal to the Pennsylvania Superior Court, Smith offered several cases in support of his position. As to the issue of First Amendment protection, Smith based his argument primarily on four United States

96. Id. at 313.

97. Smith v. Linn, No. 79-10524, slip op. at 18-19 (Ct. C.P. Montgomery County, Pa. Sept. 30, 1988). The trial court concluded that “The Last Chance Diet does not fall into any of the categories such as defamation, incitement, obscenity, fighting words or commercial speech which would lower the shield of first amendment protection.” Id.

98. Id.

99. Id.

100. A motion for summary judgment can only be granted if there are no disputes as to the facts, viewed in a light most favorable to the non-moving party. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (“The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”).


102. See Smith, 563 A.2d at 125-27.

103. Smith also offered extensive support for his assertion that Stuart was liable in tort for negligence, conscious and negligent misrepresentation, strict products liability, breach of warranty, and the intentional infliction of emotional distress. These issues are discussed supra notes 43-50 and accompanying text.


First, Smith argued that the United States Supreme Court’s decision in *Gertz v. Robert Welch, Inc.*110 ("Gertz") "sets a precedent for [the Pennsylvania Superior Court] to balance the life and health of an individual against the greed of a publisher in knowingly publishing [what Smith purported to be] 'a false and dangerous food diet book.' ”111

The *Gertz* decision involved a "[l]ibel action . . . brought against [the] publisher of [a] magazine article describing [the] plaintiff as a 'Communist-fronter,' [a] 'Leninist' and [a] participant in various 'Marxist' and 'Red' activities."112 The trial and lower appellate courts concluded that the publisher "could assert the constitutional [First Amendment] privilege because the article concerned a matter of public interest."113 The Supreme Court disagreed.114 Justice Powell, writing for the majority of the Court, noted that the Supreme Court had "struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment."115 The Court recognized that, were "[t]he need to avoid self-censorship by the news media . . . the only societal value at issue . . . publishers and broadcasters [would] enjoy an unconditional and indefeasible immunity from liability for defamation."116 Taking into account

107. Dicta are “[e]xpressions in [the] court’s opinion which go beyond the facts before [the] court and therefore are individual views of [the] author of [the] opinion and [are] not binding in subsequent cases as legal precedent.” BLACK’S LAW DICTIONARY 454 (6th ed. 1990).
110. *Id*.
112. *Gertz*, 418 U.S. at 323. Libel is defined as "[a] maliciously written or printed publication which tends to blacken a person's reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession." BLACK’S LAW DICTIONARY 915 (6th ed. 1990) (citing Corabi v. Curtis Pub. Co., 273 A.2d 899, 904 (Pa. 1971)).
114. *Id* at 332.
115. *Id* at 325. Defamation is "[a]n intentional false communication, either published or publicly spoken, that injures another's reputation or good name." BLACK’S LAW DICTIONARY 417 (6th ed. 1990).
the interest of private individuals, the Court found that a publisher's immunity is not unconditional where, as in *Gertz*, the victim of the defamation is a private figure rather than a public figure.117 The Court's rationale for this conclusion is apparent in its explanation of the distinction between private and public individuals with respect to defamation law:

The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then [sic] private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.118

The *Gertz* Court held that the speech in the defendant's magazine was not protected by the First Amendment because it fell into the defamation category of unprotected speech.119 Following a similar categorical balancing approach, the *Smith* court found that it could "derive no such precedent from *[Gertz]*"120 because Mrs. Smith was not the victim of defamation. In granting Stuart's motion for summary judgment, the *Smith* court resolved any doubts as to issues of fact in favor of Smith.121 Hence, the *Smith* court must have agreed with Smith's assertion that *The Last Chance Diet* was "false and dangerous." If the book did contain false information, Stuart's speech is unprotected based on the *Gertz* holding that "there is no constitutional value in false statements of fact."122 Apparently, the *Smith* court was unaware of this flaw in its reasoning because it otherwise failed to distinguish *Gertz* convincingly.

2. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*123

In addition to the *Gertz* decision, Smith also relied on the Supreme

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117. See *id.* at 348.
118. *Id.* at 344.
119. *Id.* at 343-44:

Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.

120. *Smith*, 563 A.2d at 125.
121. See *supra* notes 42, 100.
Court’s decision in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.\textsuperscript{124} ("Dun & Bradstreet") to support his position.\textsuperscript{125} The Dun & Bradstreet case involved a "credit reporting agency [that] sent a report to five subscribers indicating that [the] respondent construction contractor [Greenmoss] had filed a voluntary petition for bankruptcy. The report was false and grossly misrepresented [the] respondent’s assets and liabilities.”\textsuperscript{126} In actuality, a "high school student [who was] paid to review Vermont bankruptcy pleadings, had inadvertently attributed to [Greenmoss] a bankruptcy petition filed by one of [Greenmoss’] former employees."\textsuperscript{127}

The Dun & Bradstreet plurality\textsuperscript{128} noted that the Court had "long recognized that not all speech is of equal First Amendment importance.”\textsuperscript{129} The Court distinguished the strong First Amendment protection that is applied to "matters of public concern"\textsuperscript{130} from the less powerful protection given to "matters of purely private concern.”\textsuperscript{131} In Dun & Bradstreet, the Court justified the differing degrees of protection on the basis of whether the matter is of private or public concern,\textsuperscript{132} by explaining that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.”\textsuperscript{133} This special protection is rooted in the understanding that public figures have "voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally [have] effective opportunities for rebutting such statements.”\textsuperscript{134} Protecting private matters, on the other hand, is less important because they pose "no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-govern-

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\textsuperscript{124} Id.
\textsuperscript{125} Smith, 563 A.2d at 125.
\textsuperscript{126} Dun & Bradstreet, 472 U.S. at 749.
\textsuperscript{127} Id. at 752.
\textsuperscript{128} A plurality opinion is "[a]n opinion of an appellate court in which more justices join than in any concurring opinion (though not a majority of the court) . . . ." BLACK'S LAW DICTIONARY 1154 (6th ed. 1990). Additionally, "[a] plurality opinion carries less weight under stare decisis than does a majority opinion.” BARRON'S LAW DICTIONARY 327 (2d ed. 1984). Justice Powell wrote the Dun & Bradstreet plurality, in which he was joined by Justices Rehnquist and O'Connor. Dun & Bradstreet, 472 U.S. at 751. Chief Justice Burger, id. at 763, and Justice White, id. at 765, concurred individually in the judgment, while Justices Brennan, Marshall, Blackmun, and Stevens joined in dissent. Id. at 774.
\textsuperscript{129} Id. at 758.
\textsuperscript{131} Id. at 759.
\textsuperscript{132} See id. at 761-64.
\textsuperscript{133} Id. at 759 (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).
\textsuperscript{134} Id. at 756 (citing Gertz, 418 U.S. at 345).
The Court noted that "the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors." Thus, the Court held "that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." Greenmoss recovered both presumed and punitive damages.

As in Gertz, the plaintiff in Dun & Bradstreet sued to recover damages for harm of a defamatory character. Because Smith did not allege defamation, the Smith court concluded that Dun & Bradstreet, "which held that false statements in a credit report did not involve matters of public concern which would require a showing of actual malice to recover presumed and punitive damages," was inapposite to Smith's argument. Smith's reference to a case involving defamation, an established category of unprotected speech, had no bearing on the Smith court's decision. Because no defamation claim was made on behalf of Mrs. Smith, the Smith court correctly declined to follow the Dun & Bradstreet decision.


Third, Smith urged the Pennsylvania Superior Court to accept his claim as analogous to that brought in New York Times Co. v. Sullivan ("Sullivan"). In that case, L.B. Sullivan, an elected commissioner of Montgomery, Alabama, who was in charge of the police department, brought a civil libel suit against the New York Times Company. Although Sullivan was not expressly libeled, he claimed that all ref-

136. Id. at 762-63.
137. Id. at 763.
138. Id.
139. Id. at 752.
140. Smith, 563 A.2d at 125-26.
142. Id.
143. Smith, 563 A.2d at 126.
145. Neither of the statements printed in the New York Times mentioned Sullivan by name. Id. at 258.
146. The Supreme Court explained that, "[u]nder Alabama law as applied in this case, a publication is 'libelous per se' if the words 'tend to injure a person . . . in his reputation' or to 'bring [him] into public contempt'; . . . the standard [is] met if the words are such as to 'injure
erences to the police found in a paid “editorial” advertisement published in the New York Times caused him harm.\textsuperscript{147} The article described an encounter in which “truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus.”\textsuperscript{148} Additionally, Sullivan claimed that references to police as “they” further on in the article libeled him:

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. \textit{They} have bombed his home almost killing his wife and child. \textit{They} have assaulted his person. \textit{They} have arrested him seven times—for “speeding,” “loitering” and similar “offenses.” And now \textit{they} have charged him with “perjury”—a \textit{felony} under which \textit{they} could imprison him for \textit{ten years} . . . .\textsuperscript{149}

The Supreme Court reversed a judgment in favor of the plaintiff, holding that “the rule of law applied by the Alabama courts [was] constitutionally deficient for failure to provide safeguards for freedom of speech and of the press that are required” by the First Amendment.\textsuperscript{150} The Court found that the advertisement clearly qualified for constitutional protection\textsuperscript{151} and that the advertisement did not “lose its constitutional protection merely because it [was] effective criticism [of the official conduct of government officials].”\textsuperscript{152}

The Pennsylvania Superior Court found Smith’s suggested analogy to \textit{Sullivan} to be inappropriate.\textsuperscript{153} The United States Supreme Court held that the “speech” at issue in \textit{Sullivan} was protected because it did not satisfy the elements of libel, an unprotected category of speech.\textsuperscript{154} Smith, on the other hand, made no libel claim on behalf of his deceased wife, and therefore could not recover by analogizing to the Supreme Court’s holding in \textit{Sullivan}.\textsuperscript{155}

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\item him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust . . . .” \textit{Id.} at 267.
\item 147. \textit{Id.} at 256.
\item 149. \textit{Id.} at 257-58 (emphases on “they” added).
\item 150. \textit{Id.} at 264.
\item 151. \textit{Id.} at 271.
\item 152. \textit{Id.} at 273.
\item 153. \textit{Smith}, 563 A.2d at 126.
\item 154. \textit{Sullivan}, 376 U.S. at 285-86. The court “further [held] that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for [the plaintiff].” \textit{Id.} at 264-65.
\item 155. \textit{Smith}, 563 A.2d at 126.
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4. Schenck v. United States\textsuperscript{156}

Smith apparently found additional support for his claim in Schenck v. United States\textsuperscript{157} ("Schenck"), although he did not specifically cite it in the pleadings.\textsuperscript{158} Smith alleged that publishing "a false and dangerous food diet book" could be likened to the unacceptable abuse of speech exercised when one shouts "Fire!" in a crowded theatre.\textsuperscript{159} The "Fire!" hypothetical originally arose in the context of Justice Holmes' broad statement in the Schenck opinion that even "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."\textsuperscript{160} Justice Holmes emphasized that the "question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."\textsuperscript{161} At issue in Schenck was whether or not advocacy against the draft deserved First Amendment protection in light of the fact that the United States was involved in World War I at the time.\textsuperscript{162}

The Pennsylvania Superior Court found the analogy to be "inappropriate"\textsuperscript{163} for two reasons. First, Justice Holmes advocated an ad hoc balancing approach in Schenck that recognized the nation's involvement in the War.\textsuperscript{164} Thus, the Schenck Court denied the defendant First Amendment protection based on the specific events of the time. In contrast, the Smith court followed a categorical balancing approach.\textsuperscript{165} Second, even had the Smith court applied an ad hoc balancing approach, nothing assured the plaintiff that the result would have been similar to that in Schenck. The Smith case was decided in "the Gimme decade,"\textsuperscript{166} a time of "pinched privatism, . . . smug selfishness, . . . glib pragmatism, . . .

\textsuperscript{156} Schenck v. United States, 249 U.S. 47 (1919).
\textsuperscript{157} Id.
\textsuperscript{158} Smith's brief included an analogy of Stuart's conduct to that of someone shouting "Fire!" in a crowded theater. Smith, 563 A.2d at 126. Smith "appea[red] to be referring to the Opinion written by Mr. Justice Holmes in Schenck v. United States, although he offer[ed] the Pennsylvania] Court no case authority for his contention." Id. at n.2 (citations omitted).
\textsuperscript{159} Id.
\textsuperscript{160} Schenck, 249 U.S. at 52.
\textsuperscript{161} Id.
\textsuperscript{162} See id.
\textsuperscript{163} Smith, 563 A.2d at 126.
\textsuperscript{164} Schenck, 249 U.S. at 52.
\textsuperscript{165} See Smith, 563 A.2d at 126. Because Smith did "not point [the court] to any established exception to first amendment protection, [it could not] find the court erred in finding publication of The Last Chance Diet to be protected under the first amendment." Id. (emphasis added).
\textsuperscript{166} Anthony DeCurtis, The Eighties, ROLLING STONE, Nov. 15, 1990 at 59, 60.
grim status consciousness, . . . [and] brutal superficiality." 167 Society's values and fears had changed dramatically in the seventy-two years between the Schenck and Smith decisions. Because of these changes, the reasoning used in Schenck could not have been applied to the facts in Smith, even through an ad hoc balancing approach.

IV. CRITICISMS OF THE SMITH COURT'S REASONING

The Pennsylvania Supreme Court's conclusion that Stuart was not responsible for Mrs. Smith's death is proper. The reasoning that led to the result, however, was unnecessarily and improperly based on the First Amendment. Instead of dismissing Smith's claims for constitutional reasons, the Pennsylvania court should have based its dismissal on state tort and contract law.

As early as 1923, cases brought against publishers have resulted in findings in favor of those defendants. 168 The reasoning of these decisions has included reliance on both tort and contract law, 169 as well as reliance on the First Amendment. 170 A court's rationale can control the procedural future of the case. Choice of applicable law determines whether or not the decision may be subject to Supreme Court review. 171 Where, as in Smith, the court's decision rested on both state and federal grounds,

167. Id.
169. See, e.g., Courteen Seed Co. v. Hong Kong & Shanghai Banking Corp., 157 N.E. 272, 273 (N.Y. 1927) (In response to the appellant's argument "that the respondent should be held liable for careless words," the New York Court of Appeals held that "negligent words are not actionable unless they are uttered directly, with knowledge or notice that they will be acted on, to one to whom the speaker is bound by some . . . duty, arising out of public calling, contract or otherwise, to act with care if he acts at all."); Jaillet, 139 N.E. at 714 (The New York Court of Appeals affirmed the lower court's decision, holding "that the relation of [the] defendant to the public was the same as that of a publisher of a newspaper and that it was not liable to one with whom it had no contract or fiduciary relationship for an unintentional mistake in its report.").
170. See, e.g., Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1025 (5th Cir. 1987) (The United States Court of Appeals for the Fifth Circuit stated that they did not have to decide whether the plaintiff "would have been entitled to recover damages under Texas tort law." Instead, the court found that the defendant, Hustler Magazine, could not be held liable "on the basis that the article was an incitement to attempt a potentially fatal act without impermissibly infringing upon freedom of speech." Id.); Demuth Dev. Corp. v. Merck & Co., 432 F. Supp. 990, 993 (E.D.N.Y. 1977) (In denying the plaintiff's claims for negligence and willful misrepresentation, the district court held that "Merck's right to publish free of fear of liability is guaranteed by the First Amendment . . . and the overriding societal interest in the untrammeled dissemination of knowledge." (citation omitted)); Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985) (The Illinois Appellate Court held that "[e]ven if liability could be imposed consistently with the Constitution, we believe that the adverse effect of such liability upon the public's free access to ideas would be too high a price to pay.").
171. GERALD GUNThER, CONSTITUTIONAL LAW 57 (11th ed. 1985).
an ambiguous holding may require wasteful and time-consuming efforts to clarify the reasons underlying the decision. More important, an ambiguous holding offers little or no guidance to the lower courts in the same jurisdiction. Without guidance, the range of every court's judicial interpretation of both state and federal law has the potential to broaden uncontrollably. Subjecting the First Amendment to an infinite number of differing interpretations endangers the uniform application of the Constitution.

Because there was no binding authority\textsuperscript{172} in support of holding a publisher liable for negligent publication,\textsuperscript{173} the \textit{Smith} court looked to persuasive authority.\textsuperscript{174} This gave the Pennsylvania Superior Court the option to rely on either federal or state law in support of its conclusion. The outcome of the decision would have been the same either way, but the case's future in the court system depended on the court's choice of applicable law. This is because, "[i]n constitutional litigation, . . . even though [a] state court opinion may include an elaborate discussion of the meaning of the federal guarantee . . . the Supreme Court will not review if the state judges rest their decision on their own constitutional [or statutory] provisions as well."\textsuperscript{175} The \textit{Smith} court wisely elected to follow state law with respect to a portion of its holding.\textsuperscript{176}

\textbf{A. The Court Should Have Dismissed Smith's Claims Based on State Tort and Contract Law}

1. Smith's Tort and Contract Claims

The trial court in \textit{Smith} described Smith's complaint as "sound[ing] in negligence, conscious and negligent misrepresentation, strict products liability, breach of warranty, and the intentional infliction of emotional

\textsuperscript{172} Binding authorities are "[s]ources of law that must be taken into account by a judge in deciding a case; for example, statutes or decision by a higher court of the same state on point." \textsc{Black's Law Dictionary} 169 (6th ed. 1990).

\textsuperscript{173} \textit{Smith}, 563 A.2d at 125. Smith argued that the court "should reverse the decision of the trial court that the diet book publisher was within its first amendment right to freedom of speech, and find instead, \textit{for the first time}, that a publisher is liable to a reader for negligent publication of a book which it published." \textit{Id.} (emphasis added).

\textsuperscript{174} \textit{Id.} The court commented that the trial opinion "set forth a thorough review of decisions of various jurisdictions in the United States, both state and federal, which have dealt with the issue of imposition of civil liability on a publisher for alleged 'negligent publication.'" \textit{Id.} Persuasive authority is "that law or reasoning which a given court is likely but not bound to follow. For example, decisions from one jurisdiction may be persuasive authority in the courts of another jurisdiction." J. MYRON JACOBSTEIN & ROY M. MERSKY, \textsc{Legal Research Illustrated} xxxiv (1987 ed.).

\textsuperscript{175} \textit{Id.}

\textsuperscript{176} \textit{Smith}, 563 A.2d at 126-27.
These claims were based on various sections of the Second Restatement of Torts, Pennsylvania's adopted version of the Uniform Commercial Code, and various non-binding judicial decisions. For each tort or contract claim, a plaintiff must prove the specified elements of that claim in order to succeed. Therefore, a judicial ruling should rest solely on whether the plaintiff met his or her assumed burden of proof for each claim brought.

2. The Court's Treatment of Smith's Claims

The Pennsylvania Superior Court divided its opinion into four parts. Three of these parts dismissed Smith's tort and contract claims based on insufficient proof of the elements of those claims. For example, as to Smith's assertion that Stuart was liable for conscious, negligent, and fraudulent misrepresentation involving a risk of physical harm, the court found that Smith had failed to show that Stuart owed a duty of


178. Smith, No. 79-10524, slip op. at 23 n.5 (Ct. C.P. Montgomery County, Pa. Sept. 30, 1988): "Plaintiff relies on § 302(a), 303, 307, 308, 310, 311, 321, 388, 390, 402A and § 402B of the Restatement (Second) of Torts." The Smith court dismissed the above claims because "[n]othing in [those] sections, the illustrations or the comments thereto, suggests they were meant to be applied to publishers." Id. at 24.

179. Id. at 25. Smith's claims for breach of express and implied warranty were based on 13 Pennsylvania Consolidated Statutes Annotated sections 2313, 2314. Id. The trial court dismissed the warranty claims because they were "unwilling to hold that the content of a book or a publication is a 'good' or a 'product' for purposes of U.C.C. warranties or for § 402A [strict liability] purposes." Id. at 26.

180. See Smith, No. 79-10524, slip op. passim (Ct. C.P. Montgomery County, Pa. Sept. 30, 1988). The Smith court distinguished several cases, sometimes identifying them as asserted by the plaintiff and sometimes merely citing to them without such identification; see, e.g., id. at 27: "[P]laintiff cites Kercsmar v. Pen Argyl School District, 1 D.&C.3d 1 (1976) for the proposition that a book's contents are a product within the scope of the Uniform Commercial Code, 13 Pa. C.S.A. § 2102 (1984)."; see also id. at 28: "Plaintiff relies upon cases upholding liability on printers of aviation and nautical charts in support of his argument that liability be imposed on Lyle Stuart in this matter."


182. Explaining that the lower court "did not specifically address section 557A," the superior court nevertheless included this section in its discussion. Its rationale was that the lower court's reasoning "that nothing in the Restatement sections relied upon by [the] appellant suggests their applicability to publishers of information" also applied to section 557A. Smith, 563 A.2d at 126 n.3. Fraudulent misrepresentation is a "false statement as to [a] material fact, made with [the] intent that another rely thereon, which is believed by [the] other party and on which he relies and by which he is induced to act and does act to his injury, and [the] statement is fraudulent if [the] speaker knows [the] statement to be false if it is made with utter
care to its readers. Additionally, the court's opinion suggested, without actually stating, that Smith had failed to establish the causation element with respect to his claim under sections 388 and 390 of the Second Restatement of Torts. These sections make a person liable for harm to a third party caused by the supply of a chattel, known to be dangerous, that was used for its intended purpose or which was supplied to a person known to be incompetent. Further, the court rejected Smith's claims under strict liability, explaining that Smith had failed to prove that a book was a "product" within the meaning of the law. Last, the court addressed Smith's final tort claim for "negligent publication." However, the court undertook a First Amendment analysis, instead of conducting a tort analysis from which it could have quickly concluded that Stuart owed no duty of care to Smith.

B. Precedent Supporting a Conclusion Based on Tort and Contract Law

Two cases decided prior to Smith that involved similar factual patterns and conclusions based on state law are Demuth Development Corp. v. Merck & Co. ("Demuth") and Alm v. Van Nostrand Reinhold Co. ("Alm"). These two decisions exemplify the proper use of state law in deciding cases brought against publishers. Additionally, both cases serve as persuasive precedent for the Pennsylvania courts to follow, although neither Demuth nor Alm were Pennsylvania decisions.


183. Smith, 563 A.2d at 126. The court found that nothing in the offered law implied that it was "intended to apply to publishers, nor would case law cited by [the] appellant suggest [that the law] may be applied in such a way." Id.

184. The Smith court rejected the plaintiff's claim that Stuart was "as responsible as if he had directly sold the liquid protein to the decedent and concomitantly with the sale had supplied her with the book as a form of 'package insert.'" Id.

185. A chattel is "[a]n article of personal property, as distinguished from real property." BLACK'S LAW DICTIONARY 236 (6th ed. 1990).


187. Id. § 402A.

188. Smith, 563 A.2d at 126-27.

189. Id. at 125.

190. Id. at 125-26. Actually, the trial court's application of the First Amendment to these claims was the issue addressed on appeal.


air sterilization appliance . . . used in hospitals and by manufacturing firms requiring germ-free environments.” The defendant published The Merck Index, “an encyclopedia of chemicals and drugs [which] contains . . . information of value to chemists, biochemists, pharmacists, botanists, physicists, chemical engineers, and others interested in the life sciences.” The suit arose when the defendant published an incorrect definition of triethylene glycol, “a chemical indispensable to the operation of plaintiff’s glycol vaporizer,” characterizing it as being toxic to humans. The plaintiff brought suit, alleging “compensatory and punitive damages of $4,000,000 . . . seek[ing] compensation for what it claims was either a negligent . . . or a willful . . . misrepresentation.”

According to the district court, the pivotal question in the case was “whether Merck owed any duty to plaintiff in respect of its publication of information about triethylene glycol”—an issue sounding in tort law. In finding for the defendant, the court held that “though the law of New York recognizes that ‘a negligent statement may be the basis of recovery of damage,’ [not] every casual response, not every idle word, however damaging the result, gives rise to a cause of action.” The court asserted:

Liability in such cases arises only where there is a duty . . . to give the correct information. . . . There must be knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that, if false or erroneous, he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care.

Complying with New York state law, the Demuth court found that the defendant could not be held liable because the plaintiff had not relied “to its detriment on misinformation published by Merck,” the rela-

194. Id. (quoting THE MERCK INDEX) (alteration in original).
195. Id.
196. Id. at 992.
197. Id.
200. Id.
201. Demuth, 432 F. Supp. at 993.
tionship between the parties was insufficient to create a duty, and "Merck's right to publish free of fear of liability is guaranteed by the First Amendment and the overriding societal interest in the untrammeled dissemination of knowledge." The court discarded the plaintiff's claim for negligent misrepresentation, stating that to hold otherwise "would serve neither justice nor the public interest because of its manifestly chilling effect upon the right to disseminate knowledge."  

In *Alm*, the Illinois Court of Appeals decided an issue very similar to that in *Smith*. Mr. Alm purchased *The Making of Tools*, published by the defendant Van Nostrand Reinhold Co., Inc., and was injured when a tool he was making according to the book's instructions shattered. Alm sued both the author and the publisher of the book for damages. The trial court dismissed Alm's complaint, "ruling that there is no duty on the part of a publisher to verify the material it publishes." The appellate court affirmed, stating that recognizing a cause of action for negligent misrepresentation "would place upon publishers the duty of scrutinizing and even testing all procedures contained in any of their publications."  

Although the *Alm* court clearly relied on state tort law, it briefly addressed application of the First Amendment to the relevant facts. The Illinois court discussed cases that "declined, on First Amendment grounds, to impose a duty similar to the one urged by [Alm]." The court explained that the only reason it was mentioning the First Amendment was because the parties had argued it, thus implying that such mention was otherwise unnecessary.

In its discussion of the First Amendment, the Illinois court stated that the plaintiff had attempted to distinguish the defendant's "how to" book from other books, such as treatises on "politics, religion, philosophy, interpersonal relationships, [and] the like." With little explanation, the court dismissed this distinction, justifying its dismissal by asserting that a finding of liability would have a chilling effect on publishers. The *Alm* opinion concluded that "[e]ven if liability could be im-

202. *Id.* (citation omitted).
203. *Id.* at 994.
204. *Alm*, 480 N.E.2d at 1264.
205. *Id.*
206. *Id.*
207. *Id.* at 1267.
208. *Id.*
210. *Id.*
211. *Id.*
posed consistently with the Constitution, . . . the adverse effect of such liability upon the public's free access to ideas would be too high a price to pay.\textsuperscript{212} The court's choice of words suggests that its opinion, at least regarding the applicability of the First Amendment, rested on public policy grounds rather than on black letter law. Because public policy is vague and subjective at times, it would have been more precise and predictable to base the holding on black letter state tort law.

The court's decision to reserve its policy statements for the end of the opinion reflects the general tendency to begin with the strongest and most convincing argument and conclude with weaker but supportive contentions. Clearly, the court relied heaviest on state tort law to support its holding in the case. In fact, the court's discussion of the First Amendment arguably was merely dicta and not part of the binding decision because the court concluded that the plaintiff stated no cause of action before it began any discussion of the First Amendment. Additionally, the court explicitly stated that the only reason it discussed the First Amendment was because the parties had argued it. Further, the portion of the opinion that addressed the First Amendment sounded in public policy arguments rather than black letter tort law.

The facts underlying the disputes in both \textit{Demuth} and \textit{Alm} are strikingly analogous to those in \textit{Smith}. These cases offer examples to future courts in other states when confronting cases of first impression involving similar First Amendment issues. The \textit{Smith} court should have looked to the New York and Illinois examples and decided in favor of Stuart based solely on state law. By failing to follow the persuasive authority, the Pennsylvania Supreme Court failed to set a clear and effective example for future cases in both Pennsylvania and other states.

V. THE \textit{SMITH} COURT'S OTHER OPTIONS

A. A New Category of Unprotected Speech

1. The Irony of the Present Interpretation of the First Amendment

The current practice of the United States Supreme Court is to provide remedies for victims of defamatory or privacy-invading speech.\textsuperscript{213} These victims are compensated because the speech with which they were attacked happens to fall into a category outside of First Amendment protection. The harm caused to these victims is generally to their reputa-

\textsuperscript{212} \textit{Id.}

\textsuperscript{213} \textit{See}, e.g., \textit{Gertz}, 418 U.S. at 345-46 ("[W]e conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.").
tions, damaging intangible concepts such as the victim’s future earning potential.\textsuperscript{214} When the type of speech has been deemed as shielded by the First Amendment, however, the speaker is completely protected from all claims arising out of those types of speech.\textsuperscript{215} This protection exists without regard to the type or extent of harm caused by the speech.\textsuperscript{216} Ironically, the harm done to the victims of protected speech can be fatal, and yet still go uncompensated.\textsuperscript{217} This anomaly occurs solely because of arbitrarily created categories of unprotected speech. Instead of focusing on the degree of harm suffered by the victim, the courts look to the nature of the speech. This process balances away the individual victim’s interest in favor of society’s overall interest in the free flow of ideas. Although this practice abides by the judicial interpretations of the First Amendment, it may lead to shocking results, thus indicating that a less harsh alternative may exist.

2. A Possible Solution

A viable alternative to the Supreme Court’s current approach would be to create an additional category of unprotected speech labelled “the negligent use of words.”\textsuperscript{218} This category would provide an opportunity for victims of negligent speech to recover for their physical injuries without disrupting the Supreme Court’s current application of the categorical analysis to First Amendment cases. In order to curb the number of claims brought under this proposed exception to First Amendment protection, the Court would need to set a minimum amount of harm suffered for a plaintiff to have standing to bring suit. Although this standard would be arbitrary, a review of past cases can serve as a guide to where the line should be drawn.

There have been cases where the victim of negligent speech has suf-

\textsuperscript{214} See, e.g., Dun \& Bradstreet, 472 U.S. at 752 (The plaintiff “alleged that the false report had injured its reputation and sought both compensatory and punitive damages.”); Sullivan, 376 U.S. at 260 (Sullivan did not try “to prove that he suffered actual pecuniary loss as a result of the alleged libel.”) In fact, a former employer . . . testifed that if he had believed the statements, . . . he would not re-employ respondent if he believed “that he allowed the Police Department to do the things that the paper say he did.”

\textsuperscript{215} As one author wrote, “[C]ourts have not stated convincingly why an actor will be excused from liability for injury resulting from words but held liable when the same injury results from analogous actions.” Gerald R. Smith, Note, \textit{Media Liability for Physical Injury Resulting from the Negligent Use of Words}, 72 Minn. L. Rev. 1193, 1218-19 (1988).

\textsuperscript{216} “The categorical approach, identifying speech as either protected or unprotected and barring civil liability for protected speech, does not consider adequately the state interest in protecting individuals from physical harm.” \textit{Id.} at 1217.


\textsuperscript{218} See Gerald R. Smith, Note, \textit{Media Liability for Physical Injury Resulting from the Negligent Use of Words}, 72 Minn. L. Rev. 1193, 1202 (1988).
fered grave harm and yet the defendant’s speech was found to be protected by the First Amendment. One example is the decision in DeFilippo v. National Broadcasting Co.\textsuperscript{219} ("DeFilippo"). In DeFilippo, the plaintiffs were the parents of the deceased Nicky DeFilippo, suing individually and as administrators of their son’s estate.\textsuperscript{220} The suit arose when Nicky DeFilippo accidentally hung himself to death while trying to emulate a stunt shown on The Tonight Show.\textsuperscript{221} The stunt performed "involved dropping through a trapdoor with a noose around [the performer’s] neck."\textsuperscript{222} After briefly reviewing the law, the court concluded that "[o]f the four classes of speech which may legitimately be proscribed, . . . the only one under which [the] plaintiffs can maintain this action is incitement to immediate harmful conduct under Brandenburg v. Ohio."\textsuperscript{223} The DeFilippo court found, however, that the incitement claim could not succeed because "Nicky was . . . the only person who is alleged to have emulated the action portrayed in the ‘hanging’ on the May 23, 1979 broadcast of ‘The Johnny Carson Show.’"\textsuperscript{224} Although the Rhode Island Supreme Court found the accident to be "unusual and tragic,"\textsuperscript{225} it held that the First Amendment barred relief to the DeFilippos.\textsuperscript{226}

The court’s reasoning suggests that, although one person’s death is insufficient to support restriction of the speech, the court might have decided otherwise if a group of people had died. Had the court’s decision been different, its holding would have been based more on public policy than on black letter tort law.

\section{B. Treat a Book as a Product Under a Strict Product Liability Analysis}

Another solution to the problem that arises when physically injured plaintiffs are denied recovery while defamed plaintiffs are granted enormous awards is to classify a book as a product under section 402A of the Second Restatement of Torts. This argument was offered by Smith in his briefs throughout the lawsuit.\textsuperscript{227} Smith argued that books are comparable to charts and guides for air and sea navigation which have been clas-

\begin{thebibliography}{100}
\bibitem{220} Id. at 1037.
\bibitem{221} Id. at 1037-38.
\bibitem{222} Id. at 1037.
\bibitem{223} Id. at 1040 (citation omitted).
\bibitem{224} DeFilippo v. National Broadcasting Co., 446 A.2d 1036, 1037 (R.I. 1982).
\bibitem{225} Id.
\bibitem{226} Id. at 1038.
\end{thebibliography}
sified as "products" for strict liability purposes when these charts and guides are found to have been "erroneously prepared." A finding that a book is, in fact, a "product" for purposes of strict liability "is a sufficient basis for permitting the jury to determine the extent of Lyle Stuart's liability in this case." The Smith court, however, was unimpressed with Smith's arguments supporting consideration of a book as a product. Reasoning that "no appellate court in any jurisdiction has held a book to be a product for purposes of section 402A," the Pennsylvania Superior Court denied Smith's proposal of the classification. The Pennsylvania court also distinguished Kercsmar v. Pen Argyl Area School District ("Kercsmar"), which Smith offered as further support. In differentiating Kercsmar, the Smith court offered a weak excuse for not following the decision in that case. In Kercsmar, the court held that a text book could properly be considered "goods within the meaning of . . . the Uniform Commercial Code . . . " In its dismissal of Smith's proposal, the Smith court asserted that, "while Kercsmar does suggest at least that a trial court believed the contents of a book to be a good, as an appellate court, we may decline to accept that view." Although its contentions were correct, the Smith court failed both to confront Smith's arguments fairly and to dismiss them with logical and clear reasoning.

Concededly, the assertion that a book should be considered a product for strict liability purposes does not have strong legal support. When a book is compared to air and sea navigational charts, however, the assertion is more convincing. The mere fact that the manufacturer of a similar written item can be held liable under strict product liability law supports an analogy to books. Nevertheless, the Smith court denied the analogy, although Smith cited numerous cases in his brief. The justification offered by the Pennsylvania court was that "[i]n those cases, extremely technical and detailed materials were involved, upon which a limited class of persons imposed absolute trust having reason to believe in their unqualified reliability." This rationalization serves to discredit

228. Id. at 44 (citing Reminga v. United States, 631 F.2d 449 (6th Cir. 1980); Aetna Casualty & Surety Co. v. Jeppeson & Co., 642 F.2d 339 (9th Cir. 1981); Saloomey v. Jeppeson & Co., 707 F.2d 671 (2d Cir. 1983); Brocklesby v. United States, 753 F.2d 794 (9th Cir. 1985)).
229. Id. at 45.
230. Smith, 563 A.2d at 126.
231. Id.
233. Id. at 2.
234. Smith, 563 A.2d at 127.
235. Id.
rather than support the court's decision. Paraphrased, this argument claims that a source of information can be held to the standards of strict product liability because it contains many details and is trusted by a limited class of people.

The court failed to lobby for protection of a larger group of people, who relies on general written statements and broad instructions on how to do something so commonly desired as losing weight. Under a strict products liability analysis, the tendency is to protect groups with fewer members. Under a negligence analysis, however, the defendant must not have actually breached his duty if only a few people are injured.

The contention that a book is a product concededly rests on unstable pillars of legal support. Nevertheless, there clearly exist some bases for the argument, rooted in comparisons to similar written documents that have been found to be products for strict liability purposes. In addition, the analogy is not as far-fetched as the court implied. The charts and guides qualified as products because "extremely technical and detailed materials were involved, upon which a limited class of persons imposed absolute trust having reason to believe in their unqualified reliability." Had the Smith court been confronted with a book with similar traits, it would not have been able to distinguish the book from maps and navigational charts. The Smith trial court could have viewed a book, or only this particular book, as a product, had it wanted to protect innocent people like Mrs. Smith from the false statements published by Stuart.

VI. CONCLUSION

In July, 1991, the Ninth Circuit decided Winter v. G.P. Putnam's Sons ("Winter"). The Winter case was brought by "mushroom enthusiasts who became severely ill from picking and eating mushrooms after relying on information in The Encyclopedia of Mushrooms, a book published by the defendant." The plaintiffs' suit alleged "liability based on products liability, breach of warranty, negligence, negligent misrepresentation, and false representations." Although the Court of Appeals for the Ninth Circuit was "[g]uided by the First Amendment and the values embodied therein," its decision contained two basic findings:

236. Id.
238. Id. at 1033.
239. Id. at 1034.
240. Id. at 1036.
(1) a book is not a product for the purposes of strict products liability; and (2) a publisher has “no duty to investigate the accuracy of the contents of the books it publishes.” For the most part, the Ninth Circuit’s decision focused on the required elements of the torts alleged and the meaning of specific terms as found in those elements. Faced with a scenario almost identical to that in Smith, the Winter court correctly avoided an unnecessary interpretation of the First Amendment.

The First Amendment protects publishers from liability for harm caused by books that they publish. State tort and contract laws serve this same purpose. In order to preserve the force of the First Amendment, courts should rest their decisions solely on state grounds whenever possible. This practice would prevent unnecessary and incorrect interpretations of the First Amendment and serve the legal policy of judicial economy. Lyle Stuart, Incorporated would have won its motion for summary judgment under either state or federal law. The next case at issue, however, may be one where the defendant may be found liable under state tort or contract law and, at the same time, protected by the First Amendment. Should this matter arise, the court deciding the case will be unable to use the reasoning of the Smith decision.

A uniform treatment of book publishers must be established. Cases relying on only the First Amendment, relevant state laws, and both state and federal grounds confuse the lower courts following these precedents. An immediate need exists to decide which laws are appropriate. The most logical solution is to require the states to apply only state law whenever possible. This will ensure uniformity, at least within each state, and possibly within the federal judicial system as well. The Winter decision may presage a trend toward treating lawsuits against book publishers under a tort law analysis. Preservation of the First Amendment depends on such a trend.

Heather Appleton*

241. Id.
* Thanks to my mom and Kev for dealing with my late nights and early mornings while writing this article. But, most of all, thanks to my dad without whom I never would have had the motivation to finish when I was only half way done.