THE CONSTITUTIONALITY OF A REQUIREMENT TO GIVE NOTICE BEFORE MARCHING

In *Robinson v. Coopwood*,[1] the United States District Court for the Northern District of Mississippi recently considered the issue whether it is constitutionally permissible to require civil rights demonstrators to give to police one hour's notice before conducting a march on the public streets of a small town. The plaintiffs there, six black residents of Holly Springs, Mississippi, participated in a peaceful civil rights march and were convicted in the city court of failing to give the police one hour's notice before marching, as required by a Holly Springs ordinance.[2] The ordinance had been enacted five days before the plaintiffs' march. The marchers brought suit to enjoin enforcement of the ordinance on the ground that it unconstitutionally infringed on their rights of free speech, expression, and assembly.

The district court held in *Robinson* that the notice requirement "acts as an unconstitutional prior restraint upon the exercise of First and Fourteenth Amendment rights."[3] Quoting *Terminiello v. Chicago*,[4] the court further held that the notice requirement could not be imposed unless the marchers' conduct was "*shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.*"[5]

In reaching this result, the court found that the ordinance was neither void for vagueness nor overly broad.[6] The notice requirement permitted no exercise of administrative discretion, but served solely to

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[1] 292 F. Supp. 926 (N.D. Miss. 1968), *aff'd per curiam*, No. 27,275, 5th Cir., Oct. 22, 1969.

[2] The relevant section of the ordinance reads as follows:

> SECTION 1: Peaceful marching shall be permitted upon the public ways of the City of Holly Springs, Mississippi, but subject to the following conditions, regulations and exceptions:
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> . . . .
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> (f) No march shall be conducted or permitted to proceed unless notice to the police department of the said City shall have been given by participants at least one hour prior to the beginning of the march. Such notice shall identify the point of origin, the point of destination, the route to be taken and the approximate number of participants in the march. Such notice shall also apprise the police department whether upon arrival at the point of destination the march and related activity will be concluded or whether mass-meetings, assemblages, demonstrations or related activities are planned to occur at that place and time and if so, whether such activities will be conducted upon any public property.

Id. at 935.

[3] *Id.* at 932.

[4] 337 U.S. 1 (1949).

[5] 292 F. Supp. at 933 (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (emphasis added by district court)).

[6] 292 F. Supp. at 931.

inform the police of the time, size, and route of any impending march, as well as of the activities planned at the march's terminus. However, the court found further that enforcement of the ordinance had a "stifling effect" on the demonstrators' rights of free speech and assembly,[7] and then surmised that the motive behind enforcement was to impede or halt further demonstrations.[8] With these conclusions in mind, the court weighed the city's interest in adequately controlling traffic and violence against the plaintiffs' desire to conduct spontaneous marches free from official restraint. The court found that, in the absence of anticipated violence, the city's interest was wanting in the balance, and enjoined enforcement of the ordinance.[9] Although this analysis resembles a balancing test, the court actually applied the stricter test of clear and present danger.[10] By requiring the city to demonstrate the presence of an imminent threat of violence, the court placed a heavier burden of justification on Holly Springs, thus weighting the balance against the city. Because Holly Springs could show no actual or anticipated violence,[11] the city's interest in controlling traffic and maintaining the peace was clearly outweighed by the marchers' right of free expression.

In light of recent Supreme Court decisions involving communicative marches,[12] the *Robinson* court's analysis and holding are novel and surprising. This Comment examines the court's usage of the prior restraint doctrine and the clear and present danger test to determine whether such standards are appropriate for this case.

I. The Doctrine of Immunity From Prior Restraint

The doctrine of immunity from prior restraint is a subsidiary concept to the ideal of freedom of expression guaranteeed by the first amendment. It embodies in particular the widespread and deep-felt distaste for systems of licensing publications prevalent in America and England in the seventeenth century.[13] Licensing requirements were

[7] *Id.* at 930. The court cited no facts to support this finding.

[8] The court stated, "It would seem that the city officials, in enacting, enforcing, and prosecuting under this ordinance, were motivated primarily by a desire to impede and, if possible, totally halt all organized civil rights marches within the corporate limits." *Id.* at 934.

[9] The plaintiffs were convicted and filed appeals prior to seeking an injunction. *Id.* at 929. The District court granted the injunction even though 28 U.S.C. § 2283 (1964) provides that: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The *Robinson* court dismissed this statute as inapplicable because the Holly Springs ordinance constituted an unconstitutional prior restraint. 292 F. Supp. at 934-35.

[10] The test of clear and present danger actually is a balancing test. It forces the state to produce weightier justifications for restrictions on speech and communicative conduct.

[11] 292 F. Supp. at 933.

[12] *E.g.*, Cameron v. Johnson, 390 U.S. 611 (1968); Walker v. City of Birmingham, 388 U.S. 307 (1967); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

[13] *See* Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Prob. 648, 650-51 (1955).

effective means of suppressing criticism of governments and officials before the criticism could reach the public.[14] Thus prior restraints limited one of the primary functions of free speech—peaceful protest against government activities.

The United States Supreme Court first dealt significantly with the doctrine of prior restraint in *Near v. Minnesota*.[15] Even at this initial stage of the doctrine's development, the Supreme Court recognized that the immunity from prior restraints on first amendment freedoms was not absolute. However, Chief Justice Hughes carefully limited the circumstances under which prior restraints might be allowed: "[T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases . . . ." [16]

Since *Near*, both the Court [17] and commentators [18] have recognized other situations wherein prior restraints can be justified. For example, prior restrictions on conducting parades [19] and exhibiting motion pictures [20] have been upheld. Consequently, the doctrine is no longer as rigid as Chief Justice Hughes first stated it. This desanctification has resulted from the growing realization that a restraint is not necessarily undesirable simply because it acts prior in time to the expression it restrains. As Paul Freund has stated,

> [I]t will hardly do to place "prior restraint" in a special category for condemnation. What is needed is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.[21]

The opinion of *Robinson v. Coopwood* lacks this particularistic analysis. The *Robinson* court stated that the Holly Springs notice requirement and the discretionary enforcement of the parade statute struck down by the Supreme Court in *Cox v. Louisiana* [22] both suffered from the same constitutional defect—they were "impermissible prior restraint[s] on First Amendment freedoms." [23] However, although the restraint struck down in *Cox* did in fact act prior to any expression, the Supreme Court rested its decision on wholly separate grounds.

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14 *Cf. id.* 650-52.

15 283 U.S. 697 (1931).

16 *Id.* at 716. Among the exceptions are such extreme cases as military information during war, extreme obscenity, and seditious statements.

17 *See, e.g.*, Times Film Corp. v. City of Chicago, 365 U.S. 43, 48-49 (1961); Cox v. New Hampshire, 312 U.S. 569 (1941).

18 *See, e.g.*, Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 537 (1951); Note, 49 COLUM. L. REV. 1001, 1005-06 (1949).

19 *See* Cox v. New Hampshire, 312 U.S. 569 (1941).

20 *See* Freedman v. Maryland, 380 U.S. 51 (1965).

21 Freund, *supra* note 18, at 539.

22 379 U.S. 536 (1965).

23 292 F. Supp. at 932.

In *Cox v. Louisiana*, the appellant Cox led approximately 2,000 civil rights demonstrators in a march to the Baton Rouge, Louisiana, courthouse to protest the arrest of a group of Negro college students. The demonstrators assembled across the street from the courthouse and displayed protest signs, sang songs, and prayed. Cox was convicted, *inter alia*, of obstructing public passages under a state statute that banned all obstructions save labor demonstrations. The Court found that the Baton Rouge public authorities permitted some parades and public meetings which in fact obstructed traffic, if the participants were granted prior approval. The Court responded to this discriminatory enforcement by reversing Cox's conviction on the ground that the public officials exercised a broad power of censorship in violation of the first and fourteenth amendments.

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not . . . either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.[24]

Although the Court did not explicitly condemn Baton Rouge's system as a prior restraint, the discretionary enforcement acted essentially as a prior restraint on demonstrations protected by the first amendment. But the constitutional infirmity in *Cox* lay in the discriminatory enforcement of the statute rather than in any prior restraining effect.[25] In fact, the Court very definitely indicated that certain prior restraints upon first amendment freedoms would be permissible.

> It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is "exercised with 'uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination' . . . ."[26]

The mere fact that the restraint in *Cox* operated prior to the conduct regulated was insufficient to support a finding of unconstitutionality; therefore, in *Robinson*, the fact that the notice requirement was also a prior restraint should not make it unconstitutional. The district court's equation of the nondiscretionary Holly Springs ordi-

[24] 379 U.S. at 557-58.

[25] Mr. Justice Goldberg stated for the majority, "The situation is thus the same as if the statute itself expressly provided that there could only be peaceful parades or demonstrations in the unbridled discretion of the local officials." *Id.* at 557.

[26] *Id.* at 558 (quoting Cox v. New Hampshire, 312 U.S. 569, 576 (1941)).

nance to the discretionary parade control system struck down in *Cox* suggests an undiscerning "prior-therefore-prohibited" response to the problem. Although the opinion is unclear whether this in fact was the court's response, nevertheless, the court obviously felt that the notice requirement could not stand in the absence of a showing by the city of a clear and present danger of violence or breach of the peace.

II. Clear and Present Danger

The *Robinson* court cited several Supreme Court decisions that required a showing by the state of a "clear and present danger" [27] or "grave and immediate danger" [28] to justify restrictions on the right of free expression, and then contrasted the peaceful nature of the Holly Springs marches. Failing to find a clear and present danger of public disorder, the court struck down the notice requirement. "[T]here is no reason to require previous notice of an intention to conduct a peaceful assembly when there is no public danger . . . reasonably anticipated to result therefrom." [29]

In reaching the conclusion that the city must demonstrate a clear and present danger to sustain its notice provision, the court relied principally upon *Terminiello v. Chicago*.[30] In *Terminiello*, the appellant delivered a speech severely attacking various political and racial groups, thereby creating great unrest in the crowd assembled outside the auditorium in which he was speaking. Terminello was convicted under a breach of the peace statute which was construed in the trial judge's charge as prohibiting any behavior that " 'stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance . . . .' " [31] The Supreme Court reversed the conviction on the ground that the first amendment protects speech that raises unpopular ideas or "invites dispute."

In relying on *Terminiello*, the district court failed to make a crucial distinction: *Terminiello* involved a statute construed to limit the ideas one could express—the content of expression. The notice provision in *Robinson*, however, regulated only the form of the marchers' expression—the manner in which they expressed their ideas—but not the content.[32]

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[27] 292 F. Supp. at 933 (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

[28] *Id.* at 932 (citing Thomas v. Collins, 323 U.S. 516, 539 (1945)).

[29] 292 F. Supp. at 932.

[30] 337 U.S. 1 (1949).

[31] *Id.* at 4.

[32] This distinction between form and content is close to the distinction between speech and conduct which is noted by the district court. 292 F. Supp. at 932. The distinction between speech and conduct was noted by Justice Goldberg speaking for the majority in *Cox v. Louisiana*, 379 U.S. at 555, but it is most closely associated with Justice Black. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 508 (1965) (dissenting opinion); Cox v. Louisiana, 379 U.S. at 577 (concurring and dissenting opinions); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 497-502 (1949). Justice Black appears to base his speech-conduct dichotomy upon a literal interpre-

It is essential to distinguish, where possible,[33] regulation of the content from regulation of the form of expression[34] in order to determine which test of constitutionality should be applied to the regulation. The Supreme Court has required the state to show a clear and present danger of a substantive evil which the state has a right to prevent[35] or has used similar danger language[36] only when dealing with state attempts to regulate the content of expression.[37] This limitation on the clear and present danger test is derived from the original purpose of the test—to expand the boundaries of permissible expression by distinguishing between the idea and the mode of expressing that idea.[38] Thus when the Court has considered attempts to regulate only the form or manner of expression, it has discarded the clear and present danger test[39] and has resolved the constitutionality of the regulation under a balancing test or similar formulation more receptive to state regulation[40] than the clear and present danger standard.[41] However, when the regulation of form substantially limits the actor's ability to express himself effectively, the Court, realizing that the freedom of expression

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tation of the word "speech" in the first amendment. It is suggested here that the form-content distinction is more meaningful for dealing with first amendment problems. Since nearly all speech involves some type of conduct, the speech-conduct distinction tends to become meaningless upon close analysis.

[33] *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 917 (1963) [hereinafter cited as Emerson].

[34] *See generally* Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313, 314-18 (1952); Mendelson, *Clear and Present Danger—Another Decade*, 39 TEX. L. REV. 449, 450 (1961); 12 UTAH L. REV. 185, 186-88 (1967).

[35] *See* Schenck v. United States, 249 U.S. 47, 51-52 (1919).

[36] *See, e.g.*, Thomas v. Collins, 323 U.S. 516, 539 (1945).

[37] *See, e.g.*, Wood v. Georgia, 370 U.S. 375, 383-85 (1962) (publication alleged to be in contempt of court); Thomas v. Collins, 323 U.S. 516, 530 (1945) (registration of labor union organizer prior to public speaking); Bridges v. California, 314 U.S. 252, 261-63 (1941) (contempt of court); Schenck v. United States, 249 U.S. 47, 51-52 (1919) (subversive literature).

The Court, while employing the clear and present danger test only in decisions concerned with the regulation of the content of expression, has by no means been in constant or unanimous agreement that the clear and present danger test is the proper standard for judging state control of content. *See* Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313, 324-26 (1952); Mendelson, *Clear and Present Danger—Another Decade*, 39 TEX. L. REV. 449, 455-56 & n.46 (1961).

[38] *See* Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COLUM. L. REV. 313, 316 (1952).

[39] *Cf.* Emerson, *supra* note 33, at 911.

[40] *See* Konigsberg v. State Bar, 366 U.S. 36, 60-61 (1961) (Black, J., dissenting); Dennis v. United States, 341 U.S. 494, 540 (1951) (Frankfurter, J., concurring); Emerson, *supra* note 33, at 913.

[41] *Compare* cases cited note 37 *supra with* Kovacs v. Cooper, 336 U.S. 77, 87-89 (1949) (sound truck); Valentine v. Chrestensen, 316 U.S. 52 (1942) (commercial handbill combined with public protest); *and* Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (parade permit).

means little without "effective exercise of the right," [42] has added the clear and present danger test to the balancing test.[43]

The shift to a more rigorous test of the constitutionality of a statute or ordinance regulating expression when the regulation substantially controls content, reflects a realization that regulation of content is more invidious than regulation of form. Regulation of the content of expression would restrict or bar completely the dissemination of particular ideas. On the other hand, reasonable regulation of the form of expression would not censor ideas, but only channels their expression into a form compatible with an ordered society.[44] Further, by using a more rigorous test only when regulation encroaches upon content, courts recognize that a regulation of form frequently serves a valid state interest which must be satisfied. Applying a test of content—the clear and present danger test—to a regulation of form restricts too greatly this state interest and can lead to absurd results. Consider, for example, a ban on sound trucks in residential areas during the hours of darkness.[45] Courts should not require a showing that the community faces a clear and present danger of mental fatigue or breakdown before permitting the city to regulate these trucks.

The *Robinson* court's failure to distinguish between form and content creates similar problems. A persual of the Holly Springs notice requirement [46] reveals that, on its face, it is a regulation of the form of expression, marching. It does not to any extent limit the ideas that may be advanced by marching. Further, it does not limit the effective-

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[42] Thornhill v. Alabama, 310 U.S. 88, 104 (1940). *See* Mendelson, *Clear and Present Danger—From Schenck to Dennis,* 52 COLUM. L. REV. 313, 317-18 (1952).

[43] Thornhill v. Alabama, 310 U.S. 88 (1940), demonstrates the difficulty in drawing a definite line between form and content of communicative conduct. In *Thornhill,* petitioner was convicted under a statute prohibiting loitering or picketing before any business premises for the purpose of influencing the business activities of prospective customers, employees, or business associates. The statute regulated the form of the petitioner's expression—picketing. However, this regulation of form deprived petitioner of one of his most effective means of publicizing labor grievances. *Id.* at 100. Thus, the statute encroached upon the content of expression by prohibiting a form of expression. The Supreme Court found the statute invalid on its face. The Court stated,

> The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property . . . can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute . . . .

Id. at 105. Where, as here, form merges into content to the extent that a limitation on form substantially restricts the content of expression, danger language is employed in testing the validity of the restriction. *See* Konigsberg v. State Bar, 366 U.S. 36, 68-70 (1961) (Black, J., dissenting). *But see* Emerson, *supra* note 33, at 939. *See generally* Mendelson, *Clear and Present Danger—From Schenck to Dennis,* 52 COLUM. L. REV. 313, 317-18 (1952).

[44] *See* Cox v. Louisiana, 379 U.S. 536, 554 (1965).

[45] *See* Kovacs v. Cooper, 336 U.S. 77 (1949).

[46] The notice requirement is reproduced in note 2 *supra.*

ness of the marchers' expression, but only requires that the police be given prior notification of the time, size, and route of the march.[47]

Nevertheless, as a result of the district court's decision, two legitimate state interests, control of the streets and the prevention of disorders, are compromised. In *Cox v. New Hampshire*,[48] the Supreme Court gave clear recognition to the legitimacy of the former interest. There petitioners had been convicted under a state statute which prohibited parades without a special license. In a unanimous decision upholding the constitutionality of the statute, the Court declared:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need.[49]

The Court in *Cox* did not require a showing of clear and present danger to validate the New Hampshire parade license provision. That case is not materially different from *Robinson*; it suggests that the *Robinson* ordinance be held constitutional.

In addition, the district court's holding in *Robinson* undercuts enforcement of a pressing state interest in the prevention of disorders that may result from marches. As a result of the decision, should the march erupt into violence at some point along its route, the failure to notify the police could result in an absence of law enforcement personnel at the time and place they are needed most.[50]

It is not asserted that recognition of the distinction between content and form of expression will produce an automatic solution to all freedom of expression problems. For one thing, it is not always possible to

[47] A regulation, which, on its face, is a reasonable attempt to control the form of expression, may become, through discriminatory enforcement, an impermissible control of the content of expression by discouraging communicative conduct. For example, if every Negro who obtains a march permit is subsequently subjected to police harassment or private terrorism, Negroes willing to participate in spontaneous demonstrations may refuse to give public notice of their intentions to march or refuse to join scheduled marches. However, the problem here does not lie within the ordinance but in the subsequent use of the marchers' notification. *Cf.* Cameron v. Johnson, 390 U.S. 611 (1968); Dombrowski v. Pfister, 380 U.S. 479 (1965).

[48] 312 U.S. 569 (1941).

[49] *Id.* at 574.

[50] Holly Springs, a city of about 7300 persons, has 5 regular police officers. Robinson v. Coopwood, 292 F. Supp. 926, 933 (N.D. Miss. 1968). An hour's notice of an intent to march would enable the city police to either patrol the route of march or summon auxiliary forces.

categorize a regulation as one solely of content or of form. For example, a statute that prohibited picketing to publicize labor disputes would limit a form of expression, but it may also affect content of expression because it would deprive laborers of one of their most effective methods of publicizing grievances.[51] However, the distinction between regulation of content of expression and regulation of form of expression has a valid basis in our society's varying interests in limiting the effects of these two types of regulation. When the distinction is clear, as it is in *Robinson*, it is unnecessary and unprecedented to require a showing of clear and present danger to justify a regulation of the form of expression.

III. An Alternative Approach

The district court's use of the doctrine of prior restraint and the clear and present danger test to judge the constitutionality of an ordinance regulating the form of expression was a misapplication of first amendment doctrines and did not provide a satisfactory solution to the problem presented in *Robinson*. A more reasoned approach should determine first, whether the ordinance on its face authorized administrative discretion or was discriminatorily enforced, in either case permitting censorship of the content of expression; and second, whether the ordinance was overbroad.

On its face, the Holly Springs notice provision does not permit administrative discretion.[52] In fact, the ordinance was copied wholly from an injunction previously issued by the court.[53] As soon as the requisite notice is given, that provision of the ordinance is automatically satisfied. There is also insufficient evidence to establish a pattern of selective enforcement of the ordinance. Passage of the ordinance only five days prior to the plaintiffs' arrests nearly precludes such a finding.[54] There is no indication that other marches were allowed to proceed even though the provisions of the ordinance had not been complied with.[55]

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[51] Note 43 *supra*.

[52] 292 F. Supp. at 931.

[53] *Id.* at 934.

[54] *Id.* at 928-29.

[55] Perhaps the reason which the district court explicitly advanced for finding the notice provision unconstitutional—that the city had failed to demonstrate a clear and present danger or an imminent threat of violence—was not the primary motivation for its result. Near the end of its opinion the court stated:

> It would seem that the city officials, in enacting, enforcing, and prosecuting under this ordinance, were motivated primarily by a desire to impede and, if possible, totally halt all organized civil rights marches within the corporate limits.

292 F. Supp. at 934.

A good argument can be made that the motive of the Holly Springs officials was precisely the one that the court suggested. But what significance should be given to a bad motive where the statute is otherwise constitutional is not clear. The Supreme Court declared in United States v. O'Brien, 391 U.S. 367, 383 (1968):

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive.

To determine whether the ordinance is overbroad, the court must identify precisely those interests that will be advanced by the regulation and those interests that will suffer from its enforcement.[56] Here, if the notice provision is permitted to stand, the marchers' ability to engage in completely spontaneous marches and their feeling of freedom from official restraint will suffer to some degree.[57] On the other hand, if the notice provision is upheld, the city will have sufficient time to assemble an adequate number of police officers to handle any traffic problems that might develop and to deter violence that might arise between marchers and spectators.[58]

With the interests at stake identified, a choice must be made to determine which shall prevail. In making this choice, the court should consider the distinction between a regulation of the form of expression and the more invidious regulation of the content of expression. If the regulation is one of form, the state should not have as heavy a burden of justifying the regulation as the clear and present danger test requires; rather, the balancing test should be used. But even with recognition of this distinction, there is no mechanical scale to weigh the conflicting interests; the search for a metaphysical phrase which will generate an automatic solution to the problem only diverts attention from making the choice between the conflicting interests. The decision rests inescapably upon a human judgment of the more desirable alternative.

On the basis of this analysis, the notice requirement ought to stand. A fairly administered notice provision restricts only slightly the form of the marchers' expression without affecting in any way the content, and by insuring adequate police presence to prevent violence, adds to the probability that marches will accomplish a peaceful, public airing of grievances.

But in the same term the Court held an Arkansas statute unconstitutional as a violation of the freedom of religion since

> Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine . . . .

Epperson v. Arkansas, 393 U.S. 97, 103 (1968).

If the motive of the Holly Springs aldermen who enacted the ordinance was the primary concern of the district court, it should have dealt directly with this question, and not borrowed the clear and present danger test to declare the ordinance unconstitutional.

[56] *See* Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091, 1120 & n.158 (1968).

[57] 292 F. Supp. at 934.

[58] Note 50 *supra*.