THE PROPER ROLE OF THE PRIOR RESTRAINT DOCTRINE IN FIRST AMENDMENT THEORY

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IF one constant exists in Supreme Court first amendment theory, it is that "[a]ny prior restraint on expression comes to . . . [the] Court with a 'heavy presumption' against its constitutional validity."[1] Under the prior restraint doctrine, the government may not restrain a particular expression prior to its dissemination even though the same expression could be constitutionally subjected to punishment after dissemination.[2] The doctrine thus turns not on the content or substantive character of the particular expression, but exclusively on the nature and form of governmental regulation of the expression. It assumes that prior restraints are more harmful to free speech interests than are other forms of regulation such as criminal prosecutions or the imposition of civil liability.[3]

Although the prior restraint doctrine pervades Supreme Court rhetoric, the Court's decisions reveal inconsistencies in the doctrine's application. On occasion the Court has condemned regulation solely because it came in the form of a prior restraint,[4] while

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[1] Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (citations omitted). See also Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[2] According to Professor Thomas Emerson, "[R]estrictions which could be validly imposed when enforced by subsequent punishment are, nevertheless, forbidden if attempted by prior restraint." Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Probs. 648, 648 (1955). See generally O. Fiss, The Civil Rights Injunction 40 (1978) (an injunction against speech allowed only if speech is as clearly unprotected as that revealing troop movements during wartime); J. Nowak, R. Rotunda & J. Young, Constitutional Law 886-94 (2d ed. 1983) (presumption against prior restraints). For a discussion of the doctrine's early development, see Emerson, supra, at 650-55.

[3] See, e.g., infra text accompanying notes 25-49.

[4] See infra note 6, 163.

at other times the Court has been surprisingly accepting of prior restraint despite the absence of any showing of need for this form of regulation.[5] More importantly, the doctrine's undue emphasis on the supposed harms of prior restraints in contrast to those of subsequent punishment schemes has often diverted judicial attention away from the significant substantive danger to first amendment rights posed by a particular regulation in question. Thus, reliance on the doctrine often has given rise to the inference that subsequent punishment in certain prior restraint cases would be permissible or has left that issue unnecessarily unresolved, causing a possible chilling effect.[6]

These apparent doctrinal ambiguities and inconsistencies result from the absence of any detailed judicial analysis of the true rationale behind the prior restraint doctrine.[7] Although several leading commentators have attempted to supply such an analysis, their arguments fail to justify the strong presumption against all forms

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[5] See infra text accompanying notes 92, 109, 116-17.

[6] Near v. Minnesota, 283 U.S. 697 (1931), and New York Times Co. v. United States, 403 U.S. 713 (1971), two classic prior restraint cases, illustrate this point. In *Near*, the Court struck down as an improper restraint a Minnesota statute that authorized judicial abatement of a "malicious, scandalous and defamatory newspaper." 283 U.S. at 701-02. The opinion focused exclusively on the harms of the prior restraint involved. One may ask, however, whether the true harm to first amendment rights actually was the prior restraint aspect of the regulation. Would the first amendment problems have been reduced or avoided if the legislature had instead made it a crime to publish such a newspaper? The Court's substantial emphasis on the evils of the prior restraint leaves such a conclusion an open possibility.

Similarly, in *New York Times* the Court invalidated judicial injunctions against the publication of the previously classified "Pentagon Papers" and in so doing generally emphasized the harmful nature of the prior restraint involved. 403 U.S. at 714. Yet, only Justices Black and Douglas' concurrence in the per curiam opinion focused on the vitally important *substantive* first amendment issue of whether publication of supposedly secret documents that would have a possibly embarrassing impact on the government is fully protected by the first amendment. Ultimately, all that the Court held was that such publication could not constitutionally be subjected to prior restraint. Id. at 714. For all that most of the opinions reveal, someone who published these papers could have been convicted of a crime and given a life sentence. Professor Kalven has noted that use of the prior restraint doctrine in *New York Times* "left the Court free, if necessary, at some later time in a criminal prosecution to deal with the true and difficult merits." Kalven, The Supreme Court, 1970 Term—Foreward: Even When a Nation Is at War—, 85 Harv. L. Rev. 3, 33 (1971). By emphasizing the supposed harms of the prior restraint, then, the decision diverted attention from the true first amendment issue and to this day has left a possible chill on anyone who might wish to publish similar documents.

[7] As Judge Linde has written, "The rule against . . . prior restraint entered modern Supreme Court doctrine under the aegis of history rather than logic or policy." Linde, Courts and Censorship, 66 Minn. L. Rev. 171, 185 (1981).

of prior restraint, whether judicial or administrative.[8] Courts and commentators quick to invoke the doctrine mistakenly believe that in such cases first amendment interests can be discerned and protected with relative ease: if a prior restraint is involved, the presumption against it is overwhelming. In reality, however, the first amendment interests are considerably more complex.[9] Try as the Court might, it cannot successfully substitute supposedly easily applied formulas for the careful balancing of interests necessary in first amendment analysis.[10]

Acceptance of these conclusions, however, does not necessarily lead to a total rejection of the prior restraint doctrine, for in certain instances prior restraints are appropriately disfavored. This is not because of most of the traditional judicial and scholarly arguments supporting the doctrine, but rather because of the coincidental harm to fully protected expression that results from the *preliminary* restraint imposed prior to a decision on the merits of a *final* restraint.[11] To be effective, a prior restraint must often restrict *all* relevant expression, whether or not fully protected, while the adjudicatory body determines whether the expression should be subjected to a final restraint. Such interim restraints present a threat to first amendment rights not found in subsequent punishment schemes—the threat that expression will be abridged, if only for a short time, prior to a full and fair hearing before an independent judicial forum to determine the scope of the speaker's constitutional right.

The requirement of a full and fair hearing before an independent judicial forum for the adjudication of constitutional rights is a widely accepted premise of modern constitutional thinking.[12]

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[8] See, e.g., Blasi, Toward a Theory of Prior Restraint: The Central Linkage, 66 Minn. L. Rev. 11, 93 (1981); Emerson, supra note 2, at 656-60. For a discussion of these arguments, see infra text accompanying notes 23-76.

[9] The prior restraint doctrine, like so many other code words of modern first amendment analysis, is premised upon a misleading simplicity that fails to comport with reality. For discussions of other first amendment code words, including "content regulation" and "overbreadth," see Redish, The Warren Court, The Burger Court and the First Amendment Overbreadth Doctrine, 78 Nw. U.L. Rev. (1983) (forthcoming); Redish, The Content Distinction in First Amendment Analysis, 34 Stan. L. Rev. 113 (1981) [hereinafter cited as Redish, Content Distinction].

[10] See supra note 6.

[11] See infra text accompanying notes 25, 102-06, 119-27.

[12] See, e.g., Crowell v. Benson, 285 U.S. 22, 60 (1932) (Constitution requires a fair opportunity to submit the issue to an independent judicial tribunal); Battaglia v. General Motors

Somewhat surprisingly, however, the principle has received inconsistent attention in the Supreme Court's decisions applying the prior restraint doctrine.[13] Though the Court has, on occasion, recognized the absence of an independent judicial determination as a harm of prior restraint systems,[14] at other times the Court has disregarded this essential principle. A brief footnote in Justice Brennan's concurrence in *New York Times Co. v. United States*[15] provides a classic illustration of this disregard. While attacking the evils of the prior restraint in that case, despite the fact that they were issued by an independent judicial forum,[16] Justice Brennan attempted to distinguish the nonjudicial interim prior restraints that the Court had allowed in the obscenity area. He reasoned that "those cases rest upon the proposition that 'obscenity is not protected by the freedoms of speech and press.' . . . Here there is no

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Corp., 169 F.2d 254, 257 (2d Cir. 1948) (fifth amendment governs Congress' control over jurisdiction and requires independent judicial forum), cert. denied, 335 U.S. 887 (1948); D. Currie, Federal Jurisdiction in a Nutshell 37 (2d ed. 1981) (closing of the courts to any class of free speech claims is a deprivation of due process); C. Wright, The Law of Federal Courts 38-39 (4th ed. 1983) (Congress' power to alter federal courts' jurisdiction limited by due process); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1371-72 (1953) (Congress' jurisdictional power is subject to all other portions of the Constitution); Redish & Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev. 45, 76-81 (1975) (recognizing a right to an independent judicial determination of all constitutional claims); Sager, The Supreme Court, 1980 Term—Foreward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17 (1981). See infra notes 76-82 and accompanying text.

[13] To a certain extent, both the Supreme Court and certain commentators have recognized the advantages of judicial over administrative regulation of expression. See Freedman v. Maryland, 380 U.S. 51, 57-58 (1965); Jeffries, Rethinking Prior Restraint, 92 Yale L.J. 409, 416, 421-26 (1983); Mayton, Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine, 67 Cornell L. Rev. 245 (1982); Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518 (1970). On a number of occasions, however, the Court has found no particular advantage or protection in judicial restraint. See, e.g., National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971). Moreover, even the commentators who recognize the advantages of judicial over nonjudicial regulation (and many of the leading commentators do not; see, e.g., Blasi, supra note 8; Emerson, supra note 2) fail either to view the distinction as a subpart of a broader due process concept of a right to an independent judicial forum for the adjudication of constitutional rights or to apply the principle consistently to reject any form of nonjudicial restraint not justified by a truly compelling governmental interest. See infra text accompanying notes 83-106.

[14] See supra note 13 and infra text accompanying notes 88-89.

[15] 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring).

[16] Both restraints came in the form of judicially issued injunctions. Id. at 725.

question but that the material sought to be suppressed is within the protection of the First Amendment . . . ."[17] The fallacy in Justice Brennan's logic is his assumption that the material restrained by the interim prior restraint in the obscenity area is necessarily obscene; such expression may ultimately be found to be protected. Yet it has been abridged for the time necessary to render that determination. Such interim restraints of speech—and *only* such restraints—present a threat not found in subsequent punishment systems.

Once one acknowledges that interim prior restraints are especially disfavored because they authorize abridgment of expression prior to a full and fair determination of the constitutionally protected nature of the expression by an independent judicial forum and because no other legitimate basis exists on which to disfavor prior restraints as compared to subsequent punishment schemes, certain conclusions logically follow. The validity of a prior restraint will be measured by comparison to the ultimate ideal of no abridgment prior to a full and fair judicial hearing. Most disfavored would be nonjudicial administrative licensing schemes, while the least problematic would be permanent judicial injunctions issued after trial.[18] Somewhere in between are judicially issued preliminary injunctions and temporary restraining orders.[19]

This suggested restructuring of the prior restraint doctrine does not alter most of the doctrine's traditional applications. Indeed, historically it was exactly such administrative licensing schemes at which the prior restraint doctrine was aimed and about which the first amendment's framers were primarily concerned.[20] The suggested alternative analysis, however, would alter the Supreme Court's[21] and commentators'[22] general failure to distinguish be-

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[17] Id. at 726 (quoting Roth v. United States, 554 U.S. 476, 481 (1957)).

[18] For a discussion of the appropriateness of certain nonjudicial licensing schemes, see supra notes 108-18 and accompanying text. For a discussion of the constitutionality of permanent judicial injunctions, see supra notes 128-30 and accompanying text.

[19] See infra text accompanying notes 119-27.

[20] See L. Levy, Legacy of Suppression 216-17 (1960).

[21] See cases cited supra note 13 and infra text accompanying notes 83-91. See also supra note 6 and infra note 163.

[22] See generally Emerson, supra note 2 (distinguishing judicial from administrative prior restraints only by noting in passing that the latter is more egregious); Blasi, supra note 8 (distinguishing both administrative and judicial prior restraints from subsequent punishment schemes).

tween *administrative* prior restraints on the one hand and *judicial* restraints on the other. In light of our accepted premises about both the constitutional necessity and sufficiency of an independent judicial forum, there is, on the whole, all the difference in the world between the two forms of prior restraint.

Thus, the full-and-fair-hearing rationale suggests that the prejudice against prior restraint results from lack of due process, a concern not met by traditional justifications of the doctrine. This article first considers and rejects the traditional arguments in support of the prior restraint doctrine, suggesting instead that the doctrine should strike down only restraints imposed prior to a full and fair judicial hearing. The article next examines what justifications should be accepted for the use of interim restraints which adversely affect protected expression. Analysis of these justifications reveals that, despite the Supreme Court's traditional reflexive rhetoric against prior restraints, the Court has improperly authorized certain forms of prior restraint—particularly in the areas of obscenity and demonstration regulation—that are incompatible with the rationale and that cannot be justified by any legitimate compelling interest. The article then contrasts nonjudicial prior restraints with subsequent punishment schemes, particularly in light of Professor William Mayton's recent proposal that these two forms of speech regulation be viewed as equally threatening to first amendment values. Finally, the article examines the implications of the full-and-fair-hearing theory on the "collateral bar" doctrine, which prohibits an individual accused of violating an injunction from challenging the validity of that injunction in his prosecution for contempt. The full-and-fair-hearing rationale would allow both the collateral bar rule and the prior restraint doctrine to continue, but in considerably modified form. Under the suggested rationale, haphazard and incomplete development caused by uncertain theoretical bases would be replaced by a sure foundation allowing regular application in a form more sensitive to first amendment concerns.

I. The Traditional Justifications for the Prior Restraint Doctrine: Rationale and Critique

Respected commentators, notably Professors Thomas Emerson[23] and Vincent Blasi,[24] have offered several arguments favoring the presumption against prior restraint, judicial or nonjudicial. Their arguments assert the following reasons in support of the prior restraint doctrine: prior restraints (1) shut off expression before it has a chance to be heard, (2) are easier to obtain than criminal convictions and therefore are likely to be overused, (3) lack the constitutional procedural protections inherent in the criminal process, (4) require adjudication in the abstract, (5) improperly affect audience reception of messages, and (6) unduly extend the state's power into the individual's sphere. This section examines each of these proffered justifications and concludes that they are irrelevant to first amendment concerns, are equally true of subsequent punishment schemes, or are exclusively applicable to administrative rather than judicial restraints.

A. Inhibition of the Marketplace of Ideas

Commentators have argued that "[p]rior restraint limits public debate more severely" than does subsequent prosecution, because "[w]hile subsequent punishment may deter some speakers, at least the ideas or speech at issue can be placed before the public."[25] Prior restraint thus imposes a greater burden on the marketplace of ideas than does subsequent punishment.

This analysis contains a fundamental fallacy. The prior restraint doctrine as it traditionally has been formulated posits that expression which could be constitutionally subjected to subsequent punishment is immune from regulation by prior restraint. When the doctrine is cast in these terms, one can logically assume that the speech which the prior restraint keeps from the marketplace of ideas is speech which would not be found constitutionally protected in a subsequent prosecution. Therefore, the affected speech is presumably beneath first amendment protection. If this is the case, one may question whether any harm of constitutional magni-

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[23] See Emerson, supra note 2.

[24] See Blasi, supra note 8.

[25] J. Nowak, R. Rotunda & J. Young, supra note 2, at 887.

tude occurs in preventing such speech from reaching the marketplace.

Professor Blasi, however, has argued that "once a communication is disseminated it becomes to some extent a *fait accompli.* The world is a slightly different place; perceptions regarding what is tolerable are altered. . . . This phenomenon . . . may influence the formulation and application of doctrine in the direction of permitting more speech."[26] He is correct in suggesting that, at least in a technical sense, the world is in some way a "different place," but that difference is not necessarily of constitutional magnitude. Blasi's apparent assumption is that the public availability of the challenged expression may somehow influence the substantive judicial first amendment analysis, leading speech that would otherwise be unprotected to be held protected. Yet Blasi fails to support this assumption with anything more than speculation, and the point is by no means intuitively clear. For Blasi's assumption to be correct, public reaction to the challenged expression must be favorable, the judiciary must somehow be made aware of this reaction, and the judiciary must be sufficiently influenced by this reaction to reverse its decision on constitutionality. Though all three of these events could conceivably occur in the same case, it is at least doubtful.

Initially, the public would not likely react to particular expression with sufficient fervor and unanimity that the reaction would be widely noticed. Secondly, given generally accepted first amendment jurisprudence, speech that is both subject to serious governmental challenge and likely to be found unprotected by the courts is invariably going to be speech that would be *rejected* by the majority, not accepted with wild enthusiasm. Thirdly, even if the public did express a coherent and favorable opinion, it is doubtful that that view would influence a court's substantive constitutional analysis. Moreover, it is arguable that it should not do so in any event because most would agree that generally a strong *negative* public reaction to challenged expression should have no influence on judicial constitutional analysis.[27]

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[26] Blasi, supra note 8, at 51.

[27] Of course, the arguable concern exists that prior to dissemination we cannot ascertain the possible harm speech may cause. This point is considered infra text accompanying notes 48-59. There also exists the underlying fear that the speech would have been found constitu-

B. Overuse

Similarly unpersuasive is the argument that prior restraints threaten first amendment rights because they are likely to be employed more often than subsequent punishment schemes. The overuse theory is premised largely on the ground that prior restraints are inherently easier to obtain than criminal convictions and are therefore likely to be employed more frequently to stifle expression. Professor Emerson has stated:

> A government official thinks longer and harder before deciding to undertake the serious task of subsequent punishment—the expenditure of time, funds, energy, and personnel that will be necessary. Under a system of prior restraint, he can reach the result by a simple stroke of the pen. Thus, in one case, the burden of initial action falls upon the government; in the other, on the citizen. Again, once a communication has been made, the government official may give consideration to the stigma and the troubles a criminal prosecution forces on the citizen.[28]

This analysis is fraught with assumptions that are neither empirically nor intuitively supported when applied to judicial restraints.[29] Initially, there is no reason to believe that a prosecutor "thinks longer and harder" about filing a criminal prosecution than about filing an action for an injunction. Although a criminal conviction may require more elaborate and stringent judicial process than would an injunction proceeding, the deterrent effect of a criminal conviction—indeed, of the very bringing of a prosecution—may be significantly greater than that of an injunction because the punishments involved differ substantially in severity. Thus, the effectiveness of simply bringing a criminal prosecution may cause a prosecutor to file a criminal case rather than an action for an injunction, even though the chance of ultimate conviction is

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tionally protected in a subsequent prosecution, and the prior restraint would have thus impeded the dissemination of protected, rather than unprotected, expression. Such a fear is well taken and forms the basis of my own rationale supporting a presumption against prior restraint in certain circumstances. See infra text accompanying notes 90-106.

[28] Emerson, supra note 2, at 657.

[29] Administrative restraints may well pose a danger of overuse. Most traditional justifications for the prior restraint doctrine, however, do not distinguish judicial from administrative restraints.

low and the proceeding requires greater effort than would an injunction.[30]

More importantly, those making the overuse argument fail to recognize the fundamental similarity in the proceedings: in each, assuming no interim prior restraint, no penalty or restraint is imposed absent a full and fair judicial determination that the challenged expression is not protected by the first amendment. Thus, even if it were true that authorities are more likely to *attempt* to obtain judicial prior restraints than they are criminal convictions, a fact far from established, it does not follow that the former present greater threats to first amendment interests than do the latter. Regardless of how many attempts are made, those attempts will prove successful only after a judicial body has concluded that the speech in question is unprotected.[31]

One might respond that the relative number of attempts to impose penalties on expression remains an important consideration because the assumed deterrant to the filing of criminal prosecutions will mean that certain expression will not be restrained even though a court might have found it unprotected. Requiring state authorities to employ solely criminal prosecutions to penalize speech thus will have the ultimate effect of leaving more expression unrestrained. If this expression would ultimately have been judicially determined to be unprotected, however, first amendment interests are unaffected by either the allowance or the restraint of that particular expression.

One could further argue that an increased number of attempts to obtain judicial prior restraints will provide more opportunity for judicial mistakes in failing to protect expression that deserves protection. The argument raises an interesting if largely unresolvable question concerning the definition of a constitutional right: is it some abstract, preexisting notion that the courts merely attempt to decipher, or is it simply whatever the final adjudicator deems it to be? If the latter, the judiciary's interpretation of the first amend-

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[30] Professor Emerson argues that a prosecutor may wish to avoid the "stigma" on the citizen that will result from the filing of a prosecution. See supra text accompanying note 28. If a prosecutor has concluded that a citizen is violating the law, however, she is likely to pursue the course of action deemed to enforce that law most effectively. See also Jeffries, supra note 13, at 430 n.67; Mayton, supra note 13, at 257.

[31] To the extent Professor Emerson's point is limited to *administrative* restraints, however, it is valid.

ment could not be deemed a mistake, as a definitional matter. Whatever the philosophical answer, as a purely practical matter the first amendment—and any other constitutional right—protects only what the judiciary deems it to protect. Academics may criticize one or more judicial first amendment interpretations, and appellate courts may reject or modify constitutional interpretations by the lower courts, but ultimately the first amendment has no legal force beyond what the highest court has held that it has. Thus, as long as the requisite judicial forum is provided before any penalty is imposed because of expression, it makes no difference whether the relative number of attempts to impose penalties is greater with one form of regulation than with another.

That judicial restraints will result in overuse of regulation when compared to subsequent punishment systems remains, then, far from clear. Even if such overuse were established, the relative difference should not have any constitutional consequences when the restraint follows a full and fair judicial determination that the challenged speech is not protected by the first amendment. In such cases the similarities between subsequent punishment and prior restraint override any differences in impact.

C. Difference in the Level of Procedural Protections

Closely related to the previous argument is the contention that subsequent punishment systems, criminal ones at least,[32] are preferable to prior restraint systems because they provide the defendant with both due process protections[33] and the right to a jury trial,[34] procedural guarantees that are presumably unavailable in

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[32] A subsequent punishment scheme could take the form of civil damage liability as well as criminal prosecution.

[33] "The presumption of innocence, the heavier burden of proof borne by the government, the stricter rules of evidence, the stronger objection to vagueness, the immeasurably tighter and more technical procedure—all these are not on the side of free expression when its fate is decided [under a prior restraint system]." Emerson, supra note 2, at 657. But see Mayton, supra note 13, at 277-78 (rejecting argument that "criminal procedures . . . afford speech a protection superior to that of the civil procedures of injunctive relief").

[34] Emerson, supra note 2, at 657. But see Blasi, supra note 8, at 63 (right to a jury trial in criminal proceedings is irrelevant because "all state constitutions guarantee civil defendants a jury trial"); Mayton, supra note 13, at 277 (stating that trial by jury "has generally been overly suppressive of speech"; hence, "scholars who have considered this problem are inclined towards a civil process that limits jury participation").

even a judicial prior restraint proceeding.[35] One fallacy in this argument is that it confuses the mechanisms for finding guilt or innocence with those for determining the level of constitutional protection given to particular expression. Procedural guarantees may guard against an individual's conviction for a crime she did not commit, but the factual questions that must be decided to prove or disprove an offense are often irrelevant to the legal issue of whether the first amendment protects particular expression.[36]

If an individual is prosecuted for distributing leaflets in violation of a criminal statute, for example, the procedural protections required in a criminal prosecution will help assure that the defendant will not be convicted for illegally distributing leaflets when she has never done so. The first amendment, however, will only become relevant when the defendant acknowledges that her conduct violates the statute, but contends that as applied to her activity, the statute violates her free speech rights. Where the relevant issue is the substantive scope of the first amendment, due process and the right to a jury trial are of no significance to the judicial determination which is the same in both criminal and prior restraint proceedings.

Adjudication of the first amendment right may involve determination of various factual or semifactual issues, however. A first amendment determination in the hypothetical leafleting case might turn in part on whether the defendant was harassing passersby. Another case might raise the question of whether the advocacy of unlawful conduct presents a clear and present danger that harm will result. In such cases, procedural guarantees may well provide significant assistance or protection to a defendant asserting her first amendment rights. If these protections are essential to vindicate an individual's first amendment rights, however, they can be employed in a prior restraint proceeding. That such proceedings are purely civil in nature need not preclude the use of these guarantees if the first amendment requires them.[37]

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[35] Much of Professor Emerson's analysis assumes a contrast between an administrative licensing scheme and a criminal prosecution. Emerson, supra note 2, at 657-58. The argument that procedural protections are essential, however, could also be made in regard to a judicially imposed prior restraint.

[36] Such guarantees, of course, are not required in a civil proceeding as a matter of procedural due process because the potential risk to the individual does not include criminal conviction.

[37] Employing these procedural protections may be impractical in proceedings seeking a

Thus, jury trials in a civil prior restraint proceeding could be employed if the first amendment required them.[38] Courts, however, need not necessarily impose such a requirement. Though Professor Emerson has argued that "[t]hose who framed the First Amendment placed great emphasis upon the value of a jury of citizens in checking government efforts to limit freedom of expression,"[39] Professor Monaghan has reminded us "that the famous free speech cases of the past were really part of a much larger conflict between a fairly homogeneous citizenry and an unrepresentative government."[40] Today, however, "[l]ike administrative agencies, the jury cannot be expected to be sufficiently sensitive to the first amendment interests involved in any given proceeding."[41] The jury's role in making first amendment determinations, even in subsequent punishment schemes, is erratic. For example, the Supreme Court has given the judge, rather than the jury, the authority to determine whether advocacy of unlawful conduct presents a clear and present danger.[42] Furthermore, though the Court has given the jury authority to make certain mixed law-fact first amendment determinations, it has severely restricted the scope of that authority.[43] Thus, the jury initially determines whether allegedly obscene

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temporary restraining order or preliminary injunction against expression. The standard of protection employed in this article, however, may not be completely satisfied in such proceedings because they may fail to provide the required full and fair adjudication. See infra text accompanying notes 119-27.

[38] Such a requirement would render even more doubtful the constitutional validity of proceedings for temporary restraining orders or preliminary injunctions against speech.

[39] Emerson, supra note 2, at 657. Justice Brennan has argued that prior restraints are constitutionally defective because of the lack of a jury trial. Kingsley Books, Inc. v. Brown, 354 U.S. 436, 447-48 (1957) (Brennan, J., dissenting). According to Professor Monaghan, however, Justice Brennan's opinion "fails to articulate any comprehensive conception of the role of the jury in the first amendment. Moreover, in *Freedman v. Maryland*, Mr. Justice Brennan seems to have abandoned his position because in *Freedman* he sanctions an administrative-judicial process without jury participation." Monaghan, supra note 13, at 527 (footnote omitted). For a discussion of *Freedman v. Maryland*, 380 U.S. 51 (1965), and the general issue of prior restraints in the obscenity area, see infra text accompanying notes 83-95.

[40] Monaghan, supra note 13, at 528.

[41] Id. at 527.

[42] Dennis v. United States, 341 U.S. 494, 513-15 (1951).

[43] The Supreme Court has also significantly curbed the jury's factfinding authority in the determination of whether a defendant in a defamation action brought by a public figure has acted with reckless disregard of the truth or falsity of his statements. St. Amant v. Thomp-

material violates community standards,[44] but may not hold obscene a movie that did not " 'depict . . . patently offensive "hard core" sexual conduct.' "[45]

As the use of the jury to define community standards in obscenity cases reveals, the jury's current role in first amendment cases is to apply majoritarian values that *limit* expression, rather than to defend the expression of unpopular views. The Court's test for determining whether expression is obscene (and therefore beneath first amendment concerns) turns in part on "whether 'the average person, applying contemporary community standards' would consider [the challenged expression] . . . 'prurient.' "[46] This determination of "contemporary community standards" is to be made by "lay jurors as the usual ultimate factfinders in criminal prosecutions."[47] In determining the governing standards of morality and good taste, the jurors act as society's representatives—hardly a role for a protector of minority or unpopular views. Thus, the use of a jury, like other subsequent punishment process protections, is not in any way dictated by the first amendment.

D. Abstract Determinations

Perhaps the strongest argument against judicial prior restraint is that because such a restraint is imposed prior to the actual dissemination of expression, a court's first amendment ruling will necessarily be made in the abstract without any knowledge of the actual effect of the challenged expression.[48] Therefore the court will be forced to determine whether expression is so dangerous that it may be suppressed, without knowing whether harm will actually result—a problem that arguably does not plague subsequent punishment schemes.[49]

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son, 390 U.S. 727 (1968).

[44] Miller v. California, 413 U.S. 15, 26, 30 (1973).

[45] Jenkins v. Georgia, 418 U.S. 153, 160 (1974) (quoting Miller v. California, 413 U.S. 15, 27 (1973)). *Jenkins* concerned the film *Carnal Knowledge*. Despite the jury's contrary finding, the Court concluded that "[o]ur own viewing of the film satisfies us that [it] . . . could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way." 418 U.S. at 161.

[46] Miller v. California, 413 U.S. 15, 30 (1973).

[47] Id.

[48] See Blasi, supra note 8, at 49.

[49] "When adjudication precedes initial dissemination, the communication cannot be judged by its actual consequences or public reception. The adjudicative assessment of speech

Several answers can be made to this contention. First, even if substantive questions are decided more often in the abstract in prior restraint proceedings than in subsequent punishment proceedings, first amendment interests are not necessarily harmed as a result. The only way that the abstract nature of the determination could undermine first amendment interests is if the court were to assume the possibility of more harm than would actually have occurred. No firm basis exists for assuming such judicial behavior.[50] Because expression may be regulated only in the presence of a truly compelling governmental interest,[51] courts will be slow to uphold any restriction on expression when the demonstration of harm flowing from the expression is purely speculative. Under properly applied first amendment standards, the harm's abstractness should actually aid free speech interests because the burden would always be on the government to demonstrate the existence of significant danger from the expression, not on the speaker to prove the opposite. A court could conceivably deny a prior restraint because harm is too speculative, but later allow a subsequent punishment because harm actually resulted from the speech.[52]

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value versus social harm must be made in the abstract, based on speculation or generalizations embodied in presumptions." Id. See also F. Haiman, Speech and Law in a Free Society 404 (1981). Haiman noted that subsequent punishment systems avoid "penalties for defiance of authority per se—for instance, contempt of court—as contrasted with those which are responsive to the offense itself." Id.

[50] See Jeffries, supra note 13, at 417 n.57. Professor Jeffries noted two reasons for trusting judicial behavior. First he observed that "with every passing decade—not excluding the 1970s and the advent of the Burger Court—there is increasingly widespread acceptance of First Amendment claims that would have been thought fanciful only a few years earlier." Next he suggested that judges hostile to first amendment claims in general will not be more hostile in prior restraint proceedings than they would be in subsequent prosecutions.

[51] NAACP v. Button, 371 U.S. 415, 438 (1963).

[52] Of course, a court might disregard this fundamental first amendment directive and instead demand a showing of only remote danger. If so, the problem does not derive from use of a prior restraint but from misapplication of the law. The thrust of Supreme Court doctrine on the subject is clear. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). But see Blasi, supra note 8, at 50 ("A central tenet of modern first amendment theory . . . is that under conditions of uncertainty regarding consequences, both regulatory officials and judges tend to overestimate the dangers of controversial speech."). The standard is somewhat less rigorous when regulation does not turn on the content of expression. See generally Redish, Content Distinction, supra note 9 (advocating a unitary standard for all judicial review of governmental regulation of expression). To the extent that the standards differ for content-neutral regulation of expression, however, the difference flows from substantive first amendment doctrine and would therefore apply to either subsequent pun-

Two additional points demonstrate the inaccuracy of the abstractness argument. First, mere abstractness does not in itself render a regulation unconstitutional so long as regulation "in the abstract" means regulation based on potential rather than actual harm. Second, even if abstractness were generally deemed a constitutional defect, the problem may plague subsequent punishment schemes, just as it does prior restraints. Both points may be illustrated by examining *Dennis v. United States*,[53] in which the Supreme Court upheld criminal convictions of Communist Party leaders for conspiring to advocate overthrow of the government. Under the terms of the indictment, the defendants had not even been accused of actually advocating overthrow; certainly, no evidence was presented that any harm had already occurred. On the contrary, the Court acknowledged that the government need not await any actual showing of damage before it could criminally prosecute.[54] Although the decision has been heavily criticized for effectively dispensing with any requirement of temporal relation between expression and harm,[55] such criticism does not imply that the only speech which could be punished is speech which has actually led to provable harm. In any event, such criticism underscores the point that abstractness, to the extent it is a constitutional problem, may plague subsequent punishment as well as prior restraint.

One can imagine numerous other situations in which regulation of expression would be permissible, even in the absence of a demonstration of actual harm. It is difficult to believe, for example, that a court would be constitutionally restrained from prohibiting the holding of a Progressive Labor Party rally adjacent to a Nazi or Ku Klux Klan gathering. Consider also the individual, prosecuted for solicitation to crime, who had said to another, "I will pay you $500 to kill my wife." Could one realistically argue that that individual's speech is protected absent a showing that it actually led to the murder of his wife?

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ishment or prior restraint. This doctrinal clarity suggests that many adjudicators would be unlikely to demand less than a showing of serious and imminent danger.

[53] 341 U.S. 494 (1951).

[54] Id. at 509-11.

[55] I have been one of the strongest critics. See Redish, Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger, 70 Calif. L. Rev. 1159, 1195-99 (1982).

The point may be further demonstrated by hypothetically transforming two classic modern prior restraint cases into examples of subsequent punishment: the Supreme Court's invalidation of a judicial prior restraint of publication of the Pentagon Papers in *New York Times Co. v. United States*[56] and a lower court's order enjoining the publication of a magazine article describing how to construct a nuclear weapon in *United States v. Progressive, Inc.*[57] If the two cases had arisen in the course of subsequent punishment proceedings, the publishers of the Pentagon Papers and of the how-to-do-it article on nuclear weapons would have been prosecuted for violation of hypothetical criminal statutes making such actions crimes. Is it likely that to defeat the free speech claims in both cases the government would have had to establish that actual harm had resulted? Would a prosecutor have had to establish that someone actually had built a nuclear weapon as a result of the magazine article before a court could have found the defendant's free speech claim outbalanced by the danger the speech caused? Similarly, would a court in the Pentagon Papers case have to find that some measurable harm to American interests had resulted from the publication before a conviction could have been obtained?[58] Because the courts would presumably apply some form of clear-and-present-danger analysis to determine whether the speech in both cases was constitutionally protected, they would not likely demand such a concrete showing. The court also could conclude that the speech was constitutionally protected in both hypotheticals, but a finding that there had been no provable harm directly attributable to the challenged expression probably would not be either necessary or sufficient to reach that conclusion.

The abstract nature of harm thus does not distinguish prior restraints from many subsequent prosecutions, as *Dennis* and the two hypothetical prosecutions demonstrate, nor is abstractness an inherent constitutional defect. Although a court's ability to assess the actual harmful impact of challenged expression may sometimes affect the degree of constitutional protection it affords,[59] abstract-

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[56] 403 U.S. 713 (1971).

[57] 467 F. Supp. 990 (W.D. Wis. 1979), appeal dismissed, 610 F.2d 819 (7th Cir. 1979).

[58] See supra text accompanying notes 53-54.

[59] See generally Redish, supra note 55 (stating that any version of the clear-and-present-danger test that does not require courts to assess the individual facts of the case will offer either too much or too little first amendment protection).

ness cannot justify a bright-line dichotomy between judicial prior restraints and subsequent punishments.

E. Impact on Audience Reception

Professor Blasi has correctly asserted that "[i]t should be a matter of doctrinal concern if certain laws or methods of regulation cause audiences to shrink, or individual listeners to respond less intently (pro or con) to the speaker's message."[60] It does not follow, however, that all prior restraints should therefore be disfavored.

Professor Blasi argued that "audiences may react less intently, perhaps less spontaneously, when they know that the speech has already passed through a regulatory filter."[61] They may or they may not; Blasi provided no empirical or psychological basis on which to rest such a conclusion. The issue will likely turn on what we allow the regulatory filter to filter. In a totalitarian society that censors any statement critical of the government, an audience would likely be less than impressed with a speech staunchly endorsing the government.

Again, *procedural* issues of speech regulation must be distinguished from the actual *substantive* matters of what speech can be regulated. If prior restraints were not subjected to special disfavor, the substantive first amendment standards applied would presumably be no less protective than those used in subsequent punishment schemes. Under those standards, speech cannot be regulated merely because it criticizes the government[62] or because someone in authority disagrees with it[63] or because someone finds it distasteful.[64]

Given the context of our constitutional system, prior approval of speech thus would not amount to a government stamp of approval on speech; rather, it would mean only that nothing contained in the expression falls within any of the narrowly drawn categories of expression that are unprotected by the first amendment. Though

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[60] Blasi, supra note 8, at 63-64.

[61] Id. at 64.

[62] See, e.g., Garrison v. Louisiana, 379 U.S. 64 (1964).

[63] Such a possibility represents the fundamental reason for the traditional disdain for content-based regulation of expression. See, e.g., Police Dep't v. Mosley, 408 U.S. 92 (1972).

[64] This is true as long as the expression in question is not deemed legally obscene. See, e.g., Jenkins v. Georgia, 418 U.S. 153 (1974).

an audience may be less receptive to expression when it knows that the expression has met constitutional standards, it is doubtful that we should defer to such an audience's prejudices. In any event, an audience just as plausibly could be *more* receptive to speech when it knows that the speech is constitutionally protected, because that protection may well increase the speaker's legitimacy in the audience's eyes.

Professor Blasi has argued that when prior restraint systems are employed "audiences may wonder whether the communication that is transmitted represents the true message the speaker desired to convey. Did the speaker change a few passages in order to placate the censor or expedite the process of prior approval?"[65] Though some audience members might react in this manner to prior restraint systems, they could just as easily entertain similar doubts about the speaker's message if they knew that the speaker was subject to subsequent punishment.[66] Indeed, the fear that a speaker will exercise self-censorship to avoid a subsequent civil or criminal penalty provides the entire basis for the concept of an unconstitutional chilling effect, a concern which has substantially shaped much first amendment doctrine.[67] Thus, to the extent that audience reaction might actually be altered as a result of some form of prior regulation, an unproven assumption, much the same problem plagues subsequent punishment systems.[68]

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[65] Blasi, supra note 8, at 67.

[66] Schauer, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect," 58 B.U.L. Rev. 685, 725-30 (1978).

[67] New York Times Co. v. Sullivan, 376 U.S. 254 (1964), in which the Supreme Court invalidated the subsequent punishment system of civil damage awards for defamation against public officials, provides a classic illustration of this concern. The Court worried that fear of large damage awards in libel suits migbt cause public debate to become less "uninhibited, robust, and wide-open." Id. at 270. See also Dombrowski v. Pfister, 380 U.S. 479, 487-89 (1965); Jeffries, supra note 13, at 430 n.67 (arguing that there can be no sharp doctrinal line between injunctions and subsequent punishment); Schauer, supra note 66, at 695-701 (subsequent punishment schemes may exert a cbilling effect due to speaker's fear of an incorrect verdict or uncertainty about the protected status of the speech).

[68] A number of years ago, Professor Kalven made a related but "mirror image" argument in regard to New York Times Co. v. United States, 403 U.S. 713 (1971). Unlike Professor Blasi's argument, Professor Kalven's point concerned the intended impact of the restraint on tbe speaker's words and actions, rather tban its impact on the listener or viewer. Professor Kalven asserted, "It is . . . reasonably clear that Daniel Ellsberg, and also the *New York Times* and *Washington Post*, were engaged in a kind of political action, akin to civil disobedience." Kalven, supra note 6, at 34. This fact led him to conclude that

> in this context prior and subsequent restraints are not coterminous. No politically

F. Improper Division of State and Individual Authority

Professor Blasi has written:

> An important reason for disfavoring injunctions and licensing systems as methods of speech regulation is that they rest on three objectionable premises: (1) that speakers and audiences are to be trusted less than regulatory processes; (2) that the act of speaking is an abnormally hazardous activity that warrants special regulation; and (3) that the integrity of the communication or the autonomy of the speaker is not undermined when government plays a large role in determining the details and timing of a communication.[69]

Blasi's rejection of these "unacceptable premises"[70] is based on the contention that prior restraints, more than subsequent punishment systems, improperly allocate authority between state and individual.[71] Closer examination reveals, however, that Blasi's objections simply do not lead to his conclusion that all prior restraints are to be specially disfavored.

First, he incorrectly suggests that prior restraints, more than subsequent punishment systems, reflect the view "that speakers and audiences are to be trusted less than regulatory processes." A subsequent punishment system that is premised on the assumption that certain expression is not constitutionally protected and therefore is subject to punishment necessarily presumes that the

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> tolerable scheme of subsequent restraints would have prohibited the principled disobedience of the newspapers. But presuming the papers were not ready to frontally defy an injunction, in forbidding the prior restraint, the Court can be seen as protecting the chance for civil disobedience.

Id. (footnote omitted).

Perhaps the simplest response to this argument is to express wonder at Professor Kalven's implicit assumption that the first amendment should be construed to protect intended violations of constitutionally valid statutes, which is what the concept of civil disobedience means. More importantly, Professor Kalven apparently has seriously mischaracterized the intent of both the newspapers and Mr. Ellsberg. Although they were clearly willing to risk subsequent prosecution, their goal was clearly not purposely to violate a law they deemed unjust and to suffer the consequences. Rather, they sought to disseminate the information contained in the Pentagon Papers, fully believing that what they were doing was protected by the first amendment. Thus, they wished to publish the material in spite of, not because of governmental regulation.

[69] Blasi, supra note 8, at 91.

[70] Id.

[71] Id. at 93.

speaker and audience are not to be "trusted."[72] Otherwise, we would allow the speaker to communicate whatever she wished and trust the audience to reject any harmful or evil suggestions contained in the speech.[73] Blasi's argument, then, confuses substance and procedure: to the extent that failure to accord first amendment protection improperly reflects a lack of faith in individual judgment, this lack of faith is a problem derived from the substantive scope of first amendment doctrine, not from the regulatory method chosen.

Also puzzling is Blasi's belief that use of the prior restraint mechanism reflects the premise "that the act of speaking is an abnormally hazardous activity." If a system were established in which no one could speak, regardless of content, without first obtaining a license, Blasi's point might have validity. But at the very least that is not the manner in which judicially imposed prior restraints are employed.[74] Rather, the procedure is not even initiated without an allegation that the challenged expression actually is "abnormally hazardous" in some way, and presumably no restraint is issued unless an independent judicial officer determines that the expression presents such a danger. Thus, judicial prior restraints do not rest on the assumption that Professor Blasi asserted.

Professor Blasi's final point was that individual autonomy is unduly undermined when "government plays a large role in determining the details and timing of a communication." His concern over timing is valid, but for reasons different from those he asserted.[75] His view that government is unduly involved in the de-

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[72] See Jeffries, supra note 13, at 431 n.67.

[73] The long history of unlawful advocacy regulation establishes that even subsequent punishment systems, in the form of criminal prosecution, are established for the very reason that we do not always trust either the speaker or the audience. The same is true of the imposition of civil damage awards for libel and privacy invasions; if we truly trusted both the speaker and the audience, deterrence of such conduct by the provision of such penalties would presumably be unnecessary. For a description of the history of advocacy regulation, see generally Redish, supra note 55, at 1167-77 (concluding that the history of the clear-and-present-danger test reveals two key ambiguities: whether a strict interpretation of "imminence" is required for cases that do not involve ideological advocacy, and whether the words used must directly advocate unlawful conduct if they are to be lawfully suppressed).

[74] The analogy may apply to sweeping administrative licensing schemes for parades and obscene literature, but those forms of licensing are also rejected under the structure adopted in this article.

[75] For discussion of the free speech interest affected by delay, see infra text accompanying notes 96-106.

tails of the communication under a properly functioning system of prior restraint, however, is unacceptable. As long as the substantive first amendment doctrine applied in the prior restraint proceeding is valid (an issue distinct from the issue of regulatory method), the government will be unconcerned with details of communication that do not directly affect the speech's constitutionality. Blasi argued that inherent in prior restraint systems "is the ever present possibility, due to the phenomenon of adjudication prior to initial dissemination, that government officials may convince speakers to alter the details of their plans in order to conform to the government's preferences."[76] Yet unless the government's "preferences" derive from accepted first amendment doctrine, such pressure is not legal, need not be countenanced, and can be corrected by a judicial determination of constitutionality in a prior restraint hearing. Although government officials might use the threat of a prior restraint proceeding to achieve constitutionally impermissible ends, such a danger is likely to be as great or greater in the case of subsequent punishment where the speaker's fear of severe penalties may make her more susceptible to suggested governmental "preferences." These dangers do not affect judicial prior restraint because the court informs the speaker that her expression is or is not constitutionally protected before she disseminates it. Thus, the speaker need not risk severe criminal or civil penalties in order to obtain such a determination. Blasi's three unacceptable premises simply do not distinguish prior restraint from subsequent punishment systems. The argument that prior restraint improperly divides state and individual authority is therefore not supportable.

The six traditional justifications for prior restraint do not ultimately support the present strong distinction between the acceptability of all forms of prior restraint as opposed to subsequent punishment. These justifications are often irrelevant to first amendment concerns, confusing procedural issues with the substantive law of the first amendment. In addition, many of the justifications fail because the harms they seek to prevent are present in both prior restraint and subsequent punishment systems. Finally, some of the justifications apply only to administrative restraints. With the failure of these traditional justifications, a closer look at

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[76] Blasi, supra note 8, at 80.

the proper role of the prior restraint doctrine and its true theoretical rationale becomes necessary.

II. Determining the Proper Role of the Prior Restraint Doctrine

A. Assessing the True Theoretical Rationale

Although none of the traditional rationales supporting mistrust of prior restraint justifies a sharp dichotomy between all forms of prior restraints and subsequent punishment systems, an alternative theoretical basis supports a doctrine mistrustful of some forms of prior restraint.[77] Such a doctrine specially disfavors prior restraint as a form of speech regulation when that restraint limits expression prior to a full and fair hearing in an independent judicial forum to determine whether the challenged expression is constitutionally protected. Such restraint is permissible only in the presence of a truly compelling interest.

In contexts other than the first amendment, the Supreme Court has long held that a person's constitutional rights are violated when she is subjected to the judgment of an individual or institution directly interested in the outcome of the case.[78] If the body or individual determining whether a governmental agency has violated a constitutional right is a part of or directly controlled by the agency, that governmental agency is effectively determining the constitutionality of its own actions. The institution simply cannot be relied upon in such cases because its interests, both practical and emotional, are so intertwined in the decisionmaking process that any judgment will be designed inevitably, if only inadvertently, to further those interests, and the constitutional right in question will be violated for all practical purposes. Thus, for example, even though article III of the Constitution has been construed

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[77] See infra text accompanying notes 80-82, 125-27.

[78] See, e.g., Gibson v. Berryhill, 411 U.S. 564, 578-79 (1973) (holding that state board of optometry was so biased by pecuniary interest that it could not constitutionally conduct hearings to revoke optometrists' licenses); Tumey v. Ohio, 273 U.S. 510, 531 (1927) (holding unconstitutional practice whereby adjudicator's financial benefit from conviction greater than from acquittal). Cf. United States v. United States Dist. Court, 407 U.S. 297, 316-17 (1972) (holding that executive officers do not meet fourth amendment neutral-and-detached-magistrate requirement for issuing warrants); Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971) (holding that search warrant issued by chief investigator violates due process).

to provide Congress broad authority to limit the jurisdiction of the federal courts, courts have held that Congress may not close off all judicial forums from adjudicating the claim that congressional legislation unconstitutionally deprives individuals of their property.[79]

Applied to the first amendment context, this principle gives rise to several conclusions. Nonjudicial administrative regulators of expression exist for the sole purpose of regulating; this is their raison d'être.[80] They simultaneously perform the functions of prosecutor

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[79] See, e.g., Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948). See also Lockerty v. Phillips, 319 U.S. 182 (1943) (sustaining the Emergency Price Control Act of 1942, which restricted jurisdiction over the Act to an Emergency Court, because that court's decisions on the constitutional validity of the Act or regulations under it may be reviewed in specified article III federal courts). Perhaps partly because of these constitutional limitations, Chief Justice Hughes in Crowell v. Benson, 285 U.S. 22, 60 (1932), concluded that "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." According to Professor Jaffe, *Crowell* dictates that "[w]hen adjudication seriously touches property or interests traditionally of great moment, due process may require judicial process." L. Jaffe, Judicial Control of Administrative Action 388 (1965).

Although *Crowell* has largely fallen into disfavor, this is surely not because of the broad contours of this statement. See, e.g., Associated Indem. Corp. v. Shea, 455 F.2d 913, 914 n.2 (5th Cir. 1972) (per curiam) (observing that Supreme Court has failed to follow *Crowell* by no longer requiring trial de novo on jurisdictional issues at appellate review); K. Davis, 4 Administrative Law Treatise § 29.08, at 156-63 (1958) (noting that most courts reject *Crowell* doctrine that jurisdictional facts are subject to de novo review). But see Feinberg v. Federal Deposit Ins. Corp., 522 F.2d 1335, 1342 (D.C. Cir. 1975) (citing *Crowell* for the proposition that Congress may not exercise its power to limit jurisdiction so as to deprive any person of life, liberty, or property without due process); Cross v. United States, 512 F.2d 1212, 1217 (4th Cir. 1975) (citing *Crowell* for the proposition that judicial review is constitutionally required for administrative determinations of rights and privileges). Even dissenting Justice Brandeis agreed that when the potential loss of personal liberty was involved, "the constitutional requirement of due process is a requirement of judicial process." *Crowell*, 285 U.S. at 87 (Brandeis, J., dissenting). Similarly, ten years prior to *Crowell*, Brandeis authored the Court's decision in Ng Fung Ho v. White, 259 U.S. 276 (1922), granting a writ of habeas corpus to an individual alleging that he was being deported by the executive branch despite the fact that he was a citizen. Noting that "[t]he difference in security of judicial over administrative action has been adverted to by this court," id. at 285 (citations omitted), Brandeis held that a court rather than an agent of the executive branch must have final say on the issue of citizenship. See also United States v. Woo Jan, 245 U.S. 552, 556 (1918).

[80] Professor Emerson has observed, "The function of the censor is to censor. He has a professional interest in finding things to suppress." Emerson, supra note 2, at 659. See generally Jeffries, supra note 13, at 421-26 (asserting that administrative preclearance is the worst type of prior restraint system, but approving such a system if the statutory standards guiding administrators are narrowly drawn). Such a conclusion, however, fails to come to grips with the underlying constitutional difficulty with administrative restraints of expression. Professor Mayton has argued that the most important difference between judicial and administrative licensing is that the latter "lends itself to a more pervasive censorship," be-

and adjudicator and, if only subconsciously, will likely feel the obligation to justify their existence by finding some expression constitutionally subject to regulation. Such a systemic danger does not plague the functioning of a judicial forum.[81] In addition, the tradition of independence from external political pressure provides grounds for preferring judicial to administrative adjudication.[82] Thus, if the constitutional right to freedom of expression can be abridged only in the presence of a truly compelling governmental interest and if only an independent judicial forum can adequately decide whether particular expression is unprotected by the first amendment, it follows that any restriction of expression by an agency of government other than such a judicial forum is an unconstitutional abridgment of that expression except in the most extreme circumstances. One must conclude, then, that nonjudicial re-

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cause "[l]aws providing for administrative censorship are typically broad and vague, according the licenser wide discretion." Mayton, supra note 13, at 251. To the extent that this is true, however, the problem could be resolved as easily by narrowing the substantive statutory scope. See Jeffries, supra note 13, at 425-26. This reason thus cannot serve as a valid basis for preferring judicial to administrative restraints of expression.

[81] Professor Monaghan has argued that the administrative censor does not play the role of "the impartial adjudicator but that of the expert—a role which necessarily gives an administrative agency a narrow and restricted viewpoint. . . . Courts, on the other hand, do not suffer congenitally from this myopia; their general jurisdiction gives them a broad perspective which no agency can have." Monaghan, supra note 13, at 523. Professor Monaghan's point, though perhaps a valid one, is distinct from the one in the text. The text's argument turns not on the administrator's limited perspective, but rather on his likely tendency to use his regulatory power because his sole reason for existence is to regulate.

[82] I have argued previously that any state judiciary not provided the constitutional protections of salary and life tenure is insufficiently independent for purposes of due process in cases brought to challenge the constitutionality of state or local legislative or executive action. In effect, I proposed incorporating by reference into the due process clause the separation-of-powers protections of article III. Redish, Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager, 77 Nw. U.L. Rev. 143, 161-66 (1982). This is a position to which I still adhere. Thus, under my previously developed analysis of due process independence, state judges lacking these protections are in certain senses not substantially more constitutionally acceptable than are nonjudicial administrators. Although the Supreme Court has held that due process requires an independent adjudicator, it has never construed the due process clause to require such a level of independence for state judges. See, e.g., Palmore v. United States, 411 U.S. 389, 402 (1973). My due process analysis must therefore supplement everything I say about the need for an independent judicial forum.

Nevertheless, even if my due process analysis were rejected, the constitutional arguments for preferring even the less-protected state judges over administrators remain valid. State judges generally use more formalized adversarial procedures and have greater exposure to a broader spectrum of legal problems and concerns. In addition, state courts—unlike most administrative agencies—do not exist solely to regulate.

straint of expression prior to ultimate judicial review is the only form of prior restraint appropriately subjected to a special negative presumption. This is true even if the nonjudicial restraint is imposed merely on an interim basis pending ultimate judicial resolution. During that time period a prima facie abridgment of speech is taking place. As such, it can be permitted only in the presence of a truly compelling interest.

The Court appeared to accept the need for an independent judicial forum as an appropriate rationale for the prior restraint doctrine in *Freedman v. Maryland*,[83] but closer examination reveals that the Court's analysis ultimately failed to grasp the true justification for the principle and, as a result, failed to carry the principle to its logicial conclusion.[84] The appellant had been convicted of exhibiting a movie without submitting it to the Maryland State Board of Censors for prior approval. The state conceded that the picture involved did not violate statutory standards and would have received a license had it been properly submitted.

In reversing the conviction, the Court held the Maryland censorship system to be unconstitutional, noting that "no time limit is imposed for completion of Board action"[85] and that "there is no statutory provision for judicial participation in the procedure which bars a film, nor even assurance of prompt judicial review."[86] Justice Brennan's opinion fully recognized the dangers of having obscenity determinations made by administrative censors rather than courts[87] and added that "if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final."[88] The opinion therefore established a set of criteria on which to judge the constitutionality of administrative licensing schemes for expressive activities:

> [T]he exhibitor must be assured, by statute or authoritative judi-

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[83] 380 U.S. 51 (1965).

[84] Recognition of the unique damages presented by such interim restraints has escaped not only the Court but also commentators acknowledging a preference for judicial over administrative action in restraining expression. See, e.g., Jeffries, supra note 13; Mayton, supra note 13 (discussed infra text accompanying notes 97-106, 132).

[85] 380 U.S. at 55.

[86] Id.

[87] "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression." Id. at 57-58.

[88] Id. at 58.

> cial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. . . . [T]he procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.[89]

Upon superficial examination, Justice Brennan's opinion appears to be extremely speech-protective. The standards adopted are certainly more protective than those employed by the Maryland statute. Indeed, even commentators who generally decry the use of nonjudicial restraints of expression seem all too eager to accept the *Freedman* result as a satisfactory resolution of the problem.[90] Such an analysis, however, totally disregards the harm resulting from the *interim* invasion of the free speech right caused by an administrative restraint prior to even the promptest judicial review.[91] The fundamental defect in the Court's analysis is its unquestioned assumption that *any* form of administrative prior restraint for the distribution of films or books could *ever* be deemed constitutionally valid, at least when the asserted justification for such a system is to ferret out obscene films and publications.

At no point in *Freedman* did the Court explore the reasons for allowing even the most minimal form of prior restraint. Any societal harms caused by the distribution of obscenity are speculative at best[92] and in any event may be no worse than those caused by pro-

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[89] Id. at 58-59.

[90] See, e.g., Jeffries, supra note 13, at 424-25; Mayton, supra note 13, at 252-53. Professor Mayton approvingly interprets the Supreme Court's decisions as declaring "that when bureaucratic censorship is attended by prompt judicial review, it is no longer part of the prior restraint doctrine—the idea being that judicial review eliminates the evils that give rise to a presumption against such restraints." Id. at 253. This view fails to grasp the dangers to free speech interests of *any* interim nonjudicial restraint, regardless of the supposed promptness of the subsequent judicial review, and the consequential need to subject all such restraints to a compelling interest test. See infra text accompanying notes 91-106.

[91] See infra notes 97-106 and accompanying text. See also supra text accompanying notes 11-12.

[92] Comm'n on Obscenity and Pornography, The Report of the Commission on Obscenity and Pornography 32 (1970) ("empirical research . . . has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults"); Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591, 638 (1982).

tected expression such as extremely violent but nonobscene books and movies. In fact, part of the accepted basis for excluding obscenity from first amendment protection is not its harm but its presumed worthlessness.[93] Even assuming that obscene speech can be regulated constitutionally,[94] the resultant harms of such speech are not so great or compelling as to justify even a temporary abridgment of nonobscene expression.[95] Yet no evidence was suggested in *Freedman*, and apparently the Court demanded none, to establish a need for *any* form of administrative screening, with its resultant interim restraints, prior to judicial intervention.

The Court gave no indication why obscene expression could not be regulated adequately through prompt resort to judicial action. Because a judicial forum would issue the requested relief, the relief granted could conceivably come in the form of a civil restraint against further exhibition or distribution. Such relief would require, however, that the government establish a likelihood of success on the merits at an adversary judicial hearing and some form of compelling interest justifying resort to injunctive relief, as where minors are involved as viewers or performers.

One might argue that in most cases, the relatively limited time restrictions caused by administrative interim restraints on protected expression will be of little consequence to the speaker for two reasons. First, the time periods involved are likely to be so limited as to be de minimis. Second, as long as the relevant expression is not a news story about a current political event, one might think that the actual timing of dissemination is of little import and therefore a restriction on the timing represents only a minimal interference with first amendment freedom. Indeed, commentators concerned with the dangers of prior restraints have referred to such restrictions only when, according to some undefined external standard, timing was considered to be of the essence.[96]

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[93] As the Supreme Court stated in Roth v. United States, 354 U.S. 476, 484 (1957): "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

[94] I, however, have taken just the opposite position. See Redish, supra note 92, at 635-40 (arguing that Court's exclusion of obscenity from first amendment protection is irrational).

[95] Cf. Jeffries, supra note 13, at 412 (stating that the harm from obscenity, unlike that from publication of state secrets, increases with the incidence of distribution).

[96] See, e.g., F. Haiman, supra note 49, at 404; L. Tribe, American Constitutional Law § 12-33, at 730-31 (1978); Blasi, supra note 8, at 30-33; Emerson, supra note 2, at 657. Blasi noted, however, that "it is plausible that on some occasions, persons who lose control of the

Such an analysis, however, improperly shifts the burden of production in a first amendment case away from the government and onto the individual. Unless the government can establish a compelling interest to justify a restriction on any aspect of protected expression, the individual should be allowed to express herself in any manner deemed appropriate.[97] The choice of timing and manner of expression are themselves an integral part of the expression and thus intertwined with the exercise of first amendment rights. The Supreme Court has held, for example, that an individual's decision to express opposition to the draft by means of offensive language in a public place cannot be penalized.[98] Presumably the Court did not intend to express agreement with the individual that the use of obscenities was the most persuasive method of discourse about the draft. Rather, the Court was simply holding that—absent an overriding governmental interest—the manner of expression is for the individual to choose.[99] Similarly, the individual should make the decision as to timing because *when* she chooses to speak is as much a part of the individual's self-expression as is the substantive content of her statement.

Obviously, neither timing nor manner will always be within the total discretion of the individual, just as the actual substance of an individual's expression will not always be free from governmental regulation.[100] Unless a court finds that the government has met its initial burden of proof by establishing a threshold level of compelling interest in regulating the expression prior to its initial dissemination, however, the speaker should not be required under some externally devised standard to establish a reason for the importance of her chosen timing. If the government cannot establish a compelling interest, even a minimal restriction on the timing of protected expression cannot be justified.[101]

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timing of their utterances thereby lose their desire to speak." Blasi, supra note 8, at 33.

[97] Redish, Content Distinction, supra note 9, at 148-49.

[98] Cohen v. California, 403 U.S. 15 (1971).

[99] The Court arguably rejected the overriding governmental interest analysis in United States v. O'Brien, 391 U.S. 367 (1968), where it held constitutional a federal statute making criminal the destruction of a draft card even in protest against the Vietnam War. The Court, however, based its decision partly on the presence of what it found to be a legitimate governmental interest in preventing draft card destruction. Id. at 377-78.

[100] I have consistently rejected any form of absolutism in my first amendment analysis. See, e.g., Redish, Content Distinction, supra note 9, 143-44; Redish, supra note 92, at 622-24.

[101] A proper first amendment analysis would look at the relatively short time period be-

Moreover, the interim restraint on protected expression may not always be as minimal as one might believe,[102] even under the seemingly speech-protective standards adopted in *Freedman*. *Freedman* requires that "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period *compatible with sound judicial resolution*."[103] The final phrase ominously invites some degree of disguised manipulation. More importantly, even good faith efforts to obtain such a "sound judicial resolution" would require significant periods of time given current docket delays and potentially lengthy proceedings.[104] To be sure, the *Freedman* Court added that "the procedure must also assure a prompt final judicial decision."[105] In light of the Court's previously quoted statement, however, this statement does not appear intended to establish an objective promptness standard. Common sense dictates that promptness be defined in relation to the time period ordinarily required for such adjudications, and that period does not amount to a de minimis abridgment of expression even if one were to accept that a de minimis abridgment is allowable in the absence of a compelling interest.[106]

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tween initial dissemination of obscene matter and the opportunity of the government to obtain civil restraint at a full and fair judicial hearing and would conclude that the *government's* interest, rather than the speaker's, is de minimis.

[102] Professor Blasi, for example, noted that under *Freedman*, "[T]he administrative censor's power is only to disallow speech pending expeditious adjudication." Blasi, supra note 8, at 33.

[103] 380 U.S. at 59 (emphasis added).

[104] Recall that any judicial obscenity determination will probably be held to require the use of numerous procedural protections. See supra text accompanying notes 85-89.

[105] 380 U.S. at 59.

[106] A possible problem with my "interim restraint" analysis is that although due process may well require judicial process at some point, such process is not always deemed required at the very beginning of the governmental regulatory process. Compare Mathews v. Eldridge, 424 U.S. 319 (1976) (allowing termination of Social Security payments prior to the holding of a hearing), with Fuentes v. Shevin, 407 U.S. 67 (1972) (holding unconstitutional state statutes authorizing summary seizure of secured goods on ex parte application). Even when the Supreme Court has required a predeprivation hearing, that hearing often may be administrative, rather than judicial. See, e.g., Bell v. Burson, 402 U.S. 535 (1971) (removal of driver's license). As a practical matter, the procedural requirements of due process will ultimately be the product of a balancing of competing interests. Our political and judicial traditions dictate, however, that the first amendment right of free expression receive the greatest possible constitutional protection, a description which could not be made of the quasi-property interests involved in cases like *Mathews* or *Bell*. Moreover, as a purely conceptual matter, an administrative restraint on penalty of contempt for failure to comply effectively

A proper construction of the prior restraint doctrine, then, would focus exclusively on the issue of providing a full and fair judicial hearing prior to any abridgment. Thus directed, the doctrine would impose its heavy negative presumption against any form of administrative abridgment, no matter how temporary. Of course, the relatively limited nature of the temporal restraint might properly be included in the weighing necessary in virtually every first amendment case. Hence, if the government showed a compelling interest, the fact that the abridgment was strictly time-limited might influence a decision to defer to that interest. Absent such a threshold demonstration of a compelling interest, however, such abridgments should not be allowed, regardless of the supposedly minimal nature of the restraint.

B. Practical Implications of the Theoretical Rationale

Once one recognizes the full-and-fair-judicial-hearing rationale as the sole basis on which to impose the prior restraint doctrine's negative presumption, we must determine under what circumstances, if any, interim restraints of expression should be allowed prior to a formal, adversarial judicial determination. First amendment interests may properly be forced to give way, but only in extreme circumstances. Interim restraints thus should be permitted only when a compelling emergency exists. The preceding analysis has made clear that the interest in regulating obscenity does not meet this standard.[107] The only other conceivable justifications for such interim restraints are the need for administrative screening of planned demonstrations and the concern for national security.

1. Demonstrations

Although the Court has imposed some restrictions on the administrative licensing of parades and demonstrations,[108] it has never

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abridges expression for however long that restraint remains in force. In light of the extremely strong constitutional interest involved, the need for such a system of administrative restraint, even for relatively limited time periods, must be justified by a truly compelling governmental interest. Because the *Freedman* Court concluded that the first amendment interest is fully satisfied by so-called "prompt" post-administrative judicial review, it never asked whether these interim administrative restraints are really necessary. The Court thus completely ignored the effective interim abridgment of expression.

[107] See supra text accompanying notes 92-95.

[108] See, e.g., Thornhill v. Alabama, 310 U.S. 88 (1940) (holding unconstitutional statuta

held the use of such nonjudicial screening of this fully protected form of expressive activity unconstitutional per se.[109] Yet in every sense, such systems present the core danger of a prior restraint: they limit speech prior to a judicial determination that the speech may properly be the subject of regulation. Despite this fact, the Court has never engaged in a detailed analysis to determine whether such prima facie abridgments are supported by a compelling justification.

Perhaps this failure can be explained by what many would consider the obvious practical need for such licensing; without it, total chaos might well result. Professor Baker argued in a recent provocative article, however, that administrative licensing of demonstrations effectively discriminates against expressive activity.[110] He correctly pointed out that on the night that the would-be demonstrators in the famed case of *Cox v. New Hampshire*[111] were arrested for marching down the streets of Manchester without a permit, many other individuals walked the streets of that city without any governmental interference. The only difference between the two groups, he noted, was that the former pedestrians were attempting to express a viewpoint, while the latter were not.[112] Therefore licensing requirements, he argued, seek out expressive activity for negative treatment. The point has considerable force: such licensing requirements deter spontaneous expressive activity. It does not necessarily follow, however, that there is no role to be played by administrative licensing of demonstrations; not even Baker's analysis goes quite that far.[113] The question is whether recognition of the constitutional dangers presented by licensing should require an adjustment in the scope of authority exercised by the licensers.

To prevent chaos when more than one group attempts to employ the same space at the same time, an administrative licensing sys-

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prohibiting any picketing of businesses).

[109] See, e.g., Poulos v. New Hampshire, 345 U.S. 395 (1953); Cox v. New Hampshire, 312 U.S. 569 (1941). See generally J. Nowak, R. Rotunda & J. Young, supra note 2, at 973-76 (stating that administrative licensing schemes are constitutional unless vague or overbroad).

[110] Baker, Mandatory Parade Permits: The Fruits of Unreasoned Reasonableness, 78 Nw. U.L. Rev. (1983) (forthcoming).

[111] 312 U.S. 569 (1941).

[112] Baker, supra note 110.

[113] Id.

tem could function properly as a reservations service. One might argue that licensers should have no authority to deny a license on *any* ground other than the existence of a prior reservation. Yet demonstrations planned for 5 p.m. Friday evening on Chicago's Michigan Avenue obviously cannot be allowed. Thus, once we move beyond licenser as reservationist to licenser as protector of public order, the question becomes whether the licensing determination can be made by the administrator alone or whether she must instead seek a judicial order prohibiting the demonstration.

Because judicial injunctions are often employed to preserve the status quo in emergency situations of all types, the clear constitutional preference for a judicial rather than an administrative determination would seem to require the administrators to resort to the judiciary to restrain a proposed demonstration for reasons other than schedule conflicts. Though authorities not given notice of a planned demonstration obviously will have insufficient opportunity to seek a judicial order, most demonstration planners will wish to notify the authorities if only to reserve the exclusive opportunity to parade at their chosen time and place.[114] Thus, recognition that expression may not be abridged prior to a full and fair judicial hearing requires that the administrative role in the licensing of demonstrations be substantially reduced.

2. *National Security*

In *Near v. Minnesota*,[115] the classic expression of the presumption against prior restraints, the Court acknowledged that such restraints were permissible in certain situations. "No one would question," said the Court, "but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of

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[114] Nevertheless, if individuals engage in a demonstration that presents a real threat to safety or order, without giving prior notice, the obvious recourse is to arrest them for breach of the peace, just as when a licensed demonstration gets out of hand. This method concededly carries with it the danger of police abuse of authority, an abuse that can only be remedied by overturning the arrest long after the demonstration has been disrupted. The danger of improper police disruption is always present, however, for either licensed or unlicensed demonstrations, and any would-be demonstrators seeking to reduce this risk may notify the authorities of their plans sufficiently prior to the demonstration date to allow a judicial ruling.

[115] 283 U.S. 697 (1931).

troops."[116] From this statement has developed the accepted principle that national security stands as an exception to the presumption against prior restraints.[117]

The use of any form of administrative restraint to effect this principle, however, can never be justified. Administrative authority to impose restraints on grounds of national security is especially harmful to free speech interests for two reasons. First, the definition of "national security" is likely to fluctuate with the contemporary political climate. Second, the incentive of nonjudicial regulators, as for any censor, is to use their authority to suppress.[118] Given the obvious political sensitivity of much information that a government might choose to consider secret, the need for a forum with a long tradition of independence from the political branches is overriding. The courts are therefore the only proper forum for restricting publication in the interests of national security.

C. Differentiating Among Forms of Judicial Restraint

Because of the concern that expression may be abridged prior to a full and fair judicial ruling on the protected nature of the challenged expression, the prior restraint doctrine appropriately should impose a strong presumption against any form of nonjudicial restraint. Though resort to a judicial rather than an administrative

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[116] Id. at 716.

[117] Judge Linde has questioned this exception. Linde, supra note 7. He pointed to the important distinction "between breach of secrecy and publication." Id. at 196. Usually, the threat to national security will not come from the general *publication* of sensitive information, but from the simple act of privately passing the information on to our enemies. "It seems more likely," he argued, "that when the press has the information, its secrecy already cannot be relied on, and publication may only alert the government to that fact." Id. He further noted that "to suppress public reporting of government acts and policies in the name of security also means suppressing the political means of affecting those acts and policies." Id. at 197.

Judge Linde's position is, to say the least, a controversial one. His arguments, however, in no way turn on the method of regulation; they apply with equal force to subsequent punishments and prior restraints. Thus, one need not view the issue simply as a matter of the prior restraint doctrine. That doctrine comes into play only when a prior restraint would not be constitutional in a case in which subsequent punishment would be; otherwise, the constitutional issue is one of substantive first amendment analysis rather than of the manner of regulation. Because it is difficult to imagine that substantive first amendment doctrine would prohibit subsequent punishment of the revelation of truly sensitive military secrets, the analysis in this article suggests that judicially ordered restraints should in many instances be permitted with equal frequency. But see infra text accompanying notes 119-31.

[118] See supra notes 80-82 and accompanying text.

forum is a necessary condition for avoiding the negative presumption imposed by the prior restraint doctrine, it is not a sufficient condition. To meet the concerns of the prior restraint doctrine, judicial action must be preceded by a full and fair hearing; the mere presence of a judicial rather than an administrative officer does not by itself guarantee such a hearing.

Most suspect of the possible judicial actions is the ex parte temporary restraining order. In *Carroll v. President and Commissioners*,[119] the Court held unconstitutional an ex parte restraining order of a planned rally "because of a basic infirmity in the procedure by which it was obtained."[120] The Court noted that the order had been issued "without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings" and concluded that "there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate."[121] In this case the Court's treatment of prior restraint is beyond criticism.[122]

The situation is not so clear cut, however, when temporary relief follows notice and some form of hearing. A temporary restraining order, for example, should usually issue only after notice and hearing.[123] The due process problems that plague hearings for temporary restraining orders similarly affect hearings on preliminary injunctions. Neither type of hearing provides all procedural protections afforded at a full trial.[124] Thus, such temporary forms

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[119] 393 U.S. 175 (1968).

[120] Id. at 180.

[121] Id.

[122] The issue of ex parte temporary restraining orders becomes more complicated, however, when a speaker defies such an order, even one improperly issued, and then attempts to defend against a contempt citation on the grounds that the order was improper. This question implicates the controversial collateral bar rule, discussed infra text accompanying notes 143-61.

[123] See Fed. R. Civ. P. 65(b) advisory committee note ("In view of the possibly drastic consequence of a temporary restraining order, the opposition should be heard, if feasible, before the order is granted.").

[124] As Professor Fiss has noted:

> Preliminary injunctions may be issued after a truncated presentation of the facts and law. The ordinary opportunities for discovery may be curtailed. The rules of evidence . . . may be abandoned; heavy reliance is likely to be placed on documents rather than on live testimony to establish a factual point; the ordinary opportunities for

of relief fall into a "twilight zone" of prior restraint—not deserving of the strong negative presumption traditionally associated with the prior restraint doctrine, but also not deserving of treatment identical to that given to most subsequent punishment systems.

To a certain extent, these first amendment concerns are already accommodated by the nonconstitutional limitations traditionally imposed on these forms of relief. Purely as a matter of equity, injunctions cannot be issued without a demonstrated likelihood of success on the merits and a threat of significant, irreparable harm if the injunction is denied.[125] In a sense, these requirements reflect the same concerns that are inherent in a "twilight zone" form of compelling interest analysis derived from the first amendment itself: because such prior restraints are imposed by a judicial officer following some form of adversarial judicial process, the heavy negative presumption traditionally associated with the prior restraint doctrine is inappropriate. Nevertheless, because prior restraints are issued following only an abbreviated judicial inquiry, they are properly employed only if the asserted governmental interest could not be adequately protected by regulation following a full adversarial trial and only if the court determines that a strong likelihood exists that the government will be able to establish that the challenged expression is regulable under substantive first amendment standards. Thus, substantial alteration of the traditional limitations on preliminary equitable relief may be unnecessary to meet first amendment standards under the revised version of the prior restraint doctrine.[126] The traditional equitable principle that the issuance of such preliminary relief is largely a matter of the court's discretion,[127] however, would have to change. Such broad discre-

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> cross-examination are curtailed; and often the judge must decide without adequate opportunity to study either the law or the facts.

O. Fiss, supra note 2, at 28-29.

[125] 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948 (1973).

[126] Many of the same equitable limitations, particularly the requirement that no adequate remedy exist at law, apply as well to the issuance of permanent injunctive relief after a full trial. In light of the theory of prior restraint advocated here, such requirements need not be imposed as a first amendment matter. No reason exists, however, to alter these traditional equitable requirements. The first amendment does not require them, but it in no way prohibits them.

[127] See generally 11 C. Wright & A. Miller, supra note 125, at § 2948 (stating that trial court has discretion to grant or deny temporary restraining orders; standard of appellate review is abuse of discretion).

tion is not consistent with first amendment concerns, and any court issuing such preliminary relief against expression should expect no deference in the course of appellate review.

Most of the problems plaguing the use of preliminary injunctive relief against expressive activity are irrelevant to the issuance of permanent injunctive relief following a full trial because all of the procedural protections necessary for a full and fair adjudication are present. One might argue, however, even with all of these protections, that such equitable relief should nevertheless be presumptively invalid because the relief is issued prior to any appellate review. No doubt an opportunity for appellate review is important to the fairness of the judicial process and may do much to preserve the legitimacy of that process in the eyes of the litigants.[128] Although provision of an opportunity for appeal may be advisable, however, the Supreme Court has unequivocally refused to recognize the right of appeal to have constitutional significance.[129] In light of this refusal, no basis exists for extending this principle in the first amendment context.[130]

The theoretical basis for the prior restraint doctrine is thus a question of process, not substance. A speaker must be afforded an opportunity in a full and fair judicial hearing to contest any restraint before it is imposed. To prove the speech constitutionally unprotected, the government must show a truly compelling interest that outweighs the first amendment right. This requirement parallels the requirements of likely success on the merits and irreparable harm that traditionally accompany temporary relief in nonconstitutional issues.[131] A judicial determination is necessary even when issues of national security are involved and when the licenser's duty passes beyond that of a reservations officer. A nonjudicial prior restraint, therefore, is seldom permissible. Contrasting nonjudicial prior restraints and subsequent punishment systems will make clearer the unique dangers of the nonjudicial prior restraint.

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[128] I have made this argument in greater detail in a different context. See Redish, The Pragmatic Approach to Appealability in the Federal Courts, 75 Colum. L. Rev. 89, 96-97 (1975).

[129] See, e.g., Griffin v. Illinois, 351 U.S. 12, 18 (1956).

[130] Of course, a trial court always has discretion to stay its order pending appeal, and in certain cases the appellate court itself may grant a stay. But it is difficult to see how these possibilities can be raised to the level of a constitutional right.

[131] See supra text accompanying note 125.

III. Nonjudicial Prior Restraints and Subsequent Punishment Contrasted

In most instances, judicially issued prior restraints on expression are no more harmful to first amendment interests than are subsequent punishment systems and therefore do not deserve the traditional disdain imposed by the prior restraint doctrine. Only administrative restraints present problems unique to prior restraints and therefore should continue to receive the special disdain of the prior restraint doctrine. Professor Mayton, however, has gone considerably further, arguing that subsequent punishment systems are themselves an unduly invasive means of regulating expression and should be as suspect as nonjudicial restraints.[132] Under Professor Mayton's hierarchy, the most acceptable method of regulating expression is by means of judicial injunction, while subsequent punishment and administrative restraints are equally disfavored.[133] Such an analysis mistakenly disregards significant differences between subsequent punishment systems and nonjudicial prior restraints in both potential harm to free speech interests and potential benefit to society.

Mayton argued that both forms of regulation "effectively evade[]

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[132] Mayton, supra note 13, at 265, 281. Interestingly, although Professor Mayton was quick to condemn subsequent punishment systems, he accepted administrative restraints when they are followed by some form of judicial process. See id. at 252-53. He thus completely ignored the danger of an unjustified interim restraint. See supra text accompanying notes 97-106.

[133] "[A]s courts disapprove of schemes of . . . administrative censorship, they should also disfavor systems of subsequent punishment." Mayton, supra note 13, at 281. Mayton recognized that, despite a general presumption against subsequent punishment, on occasion such a regulatory method may be employed. Id. at 273. He cited as an example federal laws limiting the amount of money that individuals and corporations may contribute to political campaigns. Id. This example of expressive activity which Mayton believed should be subjected to subsequent punishment is one that I believe should not constitutionally be subjected to *any* form of governmental regulation. See generally Redish, Campaign Spending Laws and the First Amendment, 46 N.Y.U. L. Rev. 900 (1971) (arguing that proposals to limit campaign expenditures and to require disclosure of funds' sources violate candidates' and contributors' freedom of speech); Redish, Reflections on Federal Regulation of Corporate Political Activity, 21 J. Pub. L. 339 (1972) (suggesting that the Federal Corrupt Practices Act violates the first amendment by criminalizing corporate political expenditures). In any event, it is questionable why this activity is so much more threatening to societal interests than are other forms of expression that it should be subjected to what Mayton deems a more invasive regulatory method.

judicial review"[134] and that both "depend upon the threat of punishment and litigation costs to instill compliance."[135] It is clearly overstatement, however, to suggest that subsequent punishment schemes, as a general matter, effectively evade judicial review. In too many criminal prosecutions a first amendment defense has been raised, often successfully, for such a sweeping assertion to be acceptable.[136] Although administrative restraints may often restrain expression under penalty of contempt without opportunity for effective judicial review, at least no one may *formally* be penalized by a subsequent punishment scheme absent substantial judicial involvement.

The central difficulty with Mayton's equation of administrative restraint and subsequent punishment is that the former is virtually never necessary to protect a compelling governmental interest;[137] the latter often is. To the extent that pre-expression restraints are ever required, they usually can be as effectively invoked by judicial as by nonjudicial mechanisms. Attaining the legitimate goals of the criminal law, however, will often be impossible by any means other than the threat of subsequent prosecution. Thus, though Mayton has correctly pointed to the potential chill on protected behavior which subsequent punishment systems sometimes share with administrative restraints, he has ignored the fact that such a chill properly results from a compelling interest in *preventing*, not just punishing crime.

The presumably acceptable legislative goal of preventing solicitation of crime provides a clear example. Traditionally, this goal is attained by legislatively categorizing such conduct as criminal; someone soliciting a criminal act may be punished for doing so. Could one reasonably suggest that the same goal could be achieved by means of pre-expression restraint? Such a suggestion is, of course, absurd: a court or prosecutor could not know of the planned solicitation before it is spoken. Once the solicitation has been made, a court, instead of criminally prosecuting the speaker, could restrain her from soliciting again, under threat of a contempt

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[134] Mayton, supra note 13, at 281. Mayton noted that subsequent punishment systems exert a chilling effect that escapes judicial review.

[135] Id. at 265.

[136] See, e.g., Wooley v. Maynard, 430 U.S. 705 (1977); Cohen v. California, 403 U.S. 15 (1971); Lovell v. Griffin, 303 U.S. 444 (1938).

[137] See supra text accompanying notes 117-18.

citation. That individual, however, has absolutely no incentive not to solicit criminal conduct the first time if the worst that can happen to her is that she will be prohibited from doing it again. She may never be discovered, and if she is, she has lost little. The threat of a criminal sanction for that initial utterance, however, will presumably deter many people from the start, including a few whose behavior would have gone undetected.

Mayton acknowledged that this chilling effect of the criminal law is desirable for overt, physical crimes such as bank robbery.[138] He suggested, however, that "[i]t is quite another thing when the state seeks to define something not so readily perceived by the senses."[139] But the situation is different only if one has preliminarily concluded that the speech sought to be regulated is protected by the first amendment. Certain forms of expression in certain contexts have been found unprotected, presumably because the danger of this expression to society outweighs its benefits.[140] Once that decision about the substantive nature of the expression has been reached, the societal danger of the speech is of as much legitimate concern as is the bank robbery. True, statutes that criminally punish expression certainly may, through overbreadth or vagueness, spill over to chill fully protected speech.[141] This concern is admittedly unique to statutes regulating expression and one of which the courts must routinely be wary. But once one has concluded that certain types of expression are so dangerous as to be constitutionally regulable, to preclude the only method of regulation effective against such expression is nonsensical. Unless Professor Mayton believed that an injunction system can somehow effectively deter or remedy these forms of harmful expression, he would have to concede that subsequent punishment (usually of the criminal variety) presents the only viable regulatory option in certain contexts.[142]

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[138] Mayton, supra note 13, at 254.

[139] Id.

[140] An example of this type of speech is advocacy of unlawful conduct. See, e.g., Hess v. Indiana, 414 U.S. 105 (1973) (holding that state may not forbid advocacy of violence or unlawful conduct unless such advocacy is directed to inciting imminent lawless behavior and is likely to do so); Brandenburg v. Ohio, 395 U.S. 444 (1969).

[141] Mayton, supra note 13, at 254-57.

[142] Mayton or other commentators could argue that such expression is not sufficiently dangerous to justify regulation or that the danger of expression should never be included in a first amendment calculus. Such an issue concerns the substantive scope of first amend-

Thus, Mayton's lumping together of administrative restraint and subsequent punishment as equally invasive means of regulating expression proves invalid. On balance, subsequent punishment systems provide greater access to a judicial forum prior to abridgment than do administrative restraints. Furthermore, though both remedies potentially chill protected behavior, that chill is a necessary adjunct to a subsequent punishment system which seeks to deter that which is illegal. Subsequent punishment systems, therefore, both protect first amendment activity by providing a full and fair trial to an accused speaker and protect society by chilling destructive behavior. Judicially imposed prior restraints, operating in a slightly different sphere, likewise provide a full and fair hearing and prevent destructive behavior but do so without the generalized chill, focusing instead on particular activities. Nonjudicial restraint on expression, on the other hand, is significantly more suspect as a constitutional matter than either of the other two forms of regulation, for it provides the benefits of neither and adds the danger of improper process.

IV. Implications for the Collateral Bar Rule

The collateral bar rule provides that, with relatively rare but complex exceptions,[143] an individual who has knowingly violated an injunction cannot defend against a contempt citation on the ground that the injunction was invalid. The doctrine has had a long history in contexts other than the first amendment.[144] When the rule has been applied to contempt for violation of injunctions against expressive activity, however, substantial controversy has ensued.

The Court applied the collateral bar rule in the first amendment

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ment doctrine; it in no way turns on matters of regulatory form. In Mayton's analysis the real issue—the substantive reach of the first amendment—has become obscured by a debate about regulatory method, as so often happens in discussions of the prior restraint doctrine. See supra text accompanying notes 6, 69-76.

[143] See infra text accompanying notes 150-54.

[144] See generally Cox, The Void Order and the Duty to Obey, 16 U. Chi. L. Rev. 86 (1948) (suggesting a rule that the duty to obey injunctions be qualified if the litigant has exhausted all normal metbods of appellate review and will be irrevocably injured in some concrete way); Watt, The Divine Right of Government by Judiciary, 14 U. Chi. L. Rev. 409 (1947) (criticizing the doctrine as repressive and reactionary in the context of injunctions issued against labor movements).

context in *Walker v. City of Birmingham.*[145] Martin Luther King and a group of local Birmingham ministers planned to protest racial segregation in that city by picketing and parading. Informal attempts to obtain a permit required by a constitutionally dubious local ordinance were unsuccessful. On the basis of the ordinance, local authorities successfully obtained an ex parte temporary restraining order from the state circuit court against further mass demonstrations. Two days later, on Good Friday, Dr. King and his followers defied the injunction by holding a parade. Another demonstration was held on Easter Sunday, and Dr. King and other demonstration leaders were later convicted of criminal contempt for violating the injunction. A sharply divided Supreme Court upheld the contempt convictions on the basis of the collateral bar rule.

Use of this collateral bar rule for violations of injunctions stands in striking contrast to accepted procedure for violations of statutes, where an individual may first violate the law and then defend on the basis of the law's unconstitutionality.[146] If one seeks a justification for the collateral bar rule, one usually finds the argument "that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion."[147] The rule is thus thought to foster respect for the law and the legal system. This justification, however, appears embarrassingly inconsistent with the accepted practice for statutory violations.[148] Disrespect for the law is equally encouraged when we allow a defendant to challenge a law's constitutionality after he has violated it. We allow this practice perhaps because its costs are justified by the benefits of ferreting out unconstitutional laws. Yet, at least in certain contexts, the same argument could be made about invalid injunctions.[149]

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[145] 388 U.S. 307 (1967).

[146] See infra note 155.

[147] *Walker*, 388 U.S. at 320-21 (footnote omitted).

[148] O. Fiss, supra note 2, at 73, noted that the *Walker* rule, see supra note 147 and accompanying text, is at odds with the prior restraint doctrine because it makes injunctions more powerful than criminal statutes.

[149] Professor Blasi has argued that a speaker has an absolute duty to make an advance challenge to an injunction, no matter how obviously invalid, as long as time permits. First, he contends that legal obligations should be unambiguous and unequivocal. Second, self-help raises the risk of violence. Blasi, Prior Restraints on Demonstrations, 68 Mich. L. Rev.

Certain judicially recognized exceptions to the rule seem to undermine the asserted rationale. In *Howat v. Kansas*,[150] one of the earlier Supreme Court decisions applying the rule, the Court impliedly recognized that a defendant could challenge the issuing court's jurisdiction in a contempt proceeding.[151] In *United States v. United Mine Workers*,[152] the Court appeared to limit the scope of this exception to cases not only in which the issuing court lacked jurisdiction, but also in which that court's assertion of jurisdiction was "frivolous and not substantial."[153] The *Walker* Court, however, seemed to expand significantly the *United Mine Workers* exception by applying the "frivolousness" criterion to the merits as well as to jurisdiction.[154] Yet if the rationale of the collateral bar rule is that one should not be encouraged to act as a judge in his own case, recognition of *any* exception directly undermines that principle by encouraging defendants to decide for themselves whether a judicial order is frivolous.

Another argument justifying the rule is that an injunction, un-

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1481, 1558-59 (1970). Both of these reasons, however, could just as easily be asserted against the practice of allowing a challenge to a law's constitutionality as a defense against its violation.

[150] 258 U.S. 181 (1922).

[151] Id. at 189.

[152] 330 U.S. 258 (1947). In *United Mine Workers*, the Supreme Court upheld the imposition of fines on a union and its president for willful violation of a judicial order restraining them from striking. The union defended against the contempt citation on the ground that the federal court lacked power to enjoin the strike because of the prohibitions contained in the Norris-LaGuardia Act. Id. at 269-72. Although the Supreme Court rejected this defense on the merits, id. at 282, the Court's decision is best remembered for the holding "that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which tbe order is issued." Id. at 293 (footnote omitted). The Court relied heavily upon the following language from *Howat v. Kansas*:

> An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.

258 U.S. 181, 189-90 (1922), quoted in 330 U.S. at 293-94 (footnote omitted).

[153] 330 U.S. at 293.

[154] 388 U.S. at 315.

like a statute, is specifically designed to avoid irreparable injury in an individual case. Thus, society must discourage any attempt to circumvent an injunction's directive. The argument fails to persuade. Although a statute is generally not designed to prevent a specific harm in an individual case, it is difficult to believe that the harm which most criminal statutes are designed to deter could not be characterized as "irreparable." A statute making murder a crime, for example, surely is designed to deter conduct as harmful as that prohibited by any injunction, so it is unlikely we would wish to encourage such prohibited conduct any more than we would wish to encourage a violation of an injunction.

Despite the inadequacy of the traditional justifications for the collateral bar rule, however, it need not be abandoned in its entirety when applied in the first amendment context.[155] Use of the rule could continue, but in a significantly modified form, by apply-

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[155] One commentator has suggested abolishing the rule to reduce the chilling effects of prior restraints. Barnett, The Puzzle of Prior Restraint, 29 Stan. L. Rev. 539 (1977). An injunction would then be indistinguishable from a criminal statute which allows an individual first to defy a law and then to defend on the basis of the statute's unconstitutionality. See, e.g., Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Lovell v. City of Griffin, 303 U.S. 444 (1938). As the Court stated in Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (citation omitted): "One who might have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it." The Court has developed some limitations on the collateral bar rule, the contours of which are not entirely clear. See, e.g., Poulos v. New Hampshire, 345 U.S. 395 (1953) (upholding conviction for conducting a religious service without a license because statute not facially void, even though defendant had been denied that license arbitrarily). See generally J. Nowak, R. Rotunda & J. Young, supra note 2, at 974-76 (explaining *Poulos* result by noting that the defendant had failed to show the lack of a prompt judicial remedy and that the statute was valid as interpreted by state courts). Regardless of these unclear limitations, it is safe to state that the collateral bar rule described in the text is by far the predominant rule.

If one were to dispense with the collateral bar rule entirely, however, those who have difficulties with judicially imposed prior restraints probably would not be satisfied. Even if a speaker were allowed to challenge the constitutionality of an injunction as a defense in a contempt proceeding, the speaker probably would not be as willing to defy an injunction as he would be a criminal statute. A certain degree of chill undoubtedly exists when a speaker chooses to violate a criminal statute despite the ability to defend on the basis of the statute's unconstitutionality because the speaker risks criminal penalties if be guesses wrong. A considerably greater chill exists, however, when an individual is the subject of an injunction. An injunction is aimed directly at a particular individual and is issued only after the authorities have deemed it necessary to invoke the judicial process. Contempt proceedings are thus highly likely to follow the violation of an injunction. Although the chill of a criminal statute may well be significant, the chill of a particularized injunction is likely to be even greater. Hence, even if the collateral bar rule were discarded, the dangers that some find in prior restraints would not necessarily be removed.

ing the full-and-fair-hearing rationale to first amendment claims raised in collateral contempt proceedings.

The unique vice of prior restraints is that in certain instances they abridge expression that would ultimately be found protected in a judicial forum. Thus, if an individual violates a first amendment injunction issued after a full and fair hearing by a competent judicial forum, no constitutionally based reason exists to allow him to raise the first amendment issue a second time in a collateral contempt proceeding. To allow this issue to be raised would be to permit two bites at the judicial apple, a practice not required by either the first amendment or due process. Indeed, the logic of the rule of collateral estoppel suggests that a party should not be allowed to relitigate a factual or mixed law-fact question already litigated in a completed separate proceeding.[156] Thus, if after a full trial a court determines that challenged expressive activity is constitutionally regulable and enjoins that activity, no constitutional or common-law principle enables the losing party to relitigate those issues in a collateral contempt proceeding. This situation is very different from a case in which a defendant is charged with violation of a statute. There—unlike the case of an injunction—the defendant has not yet had a judicial hearing on his constitutional claim.

But most contempt proceedings in which the collateral bar rule is invoked probably do not follow an injunction issued after a full trial. Under the presently advocated criterion for measuring the constitutional validity of prior restraints,[157] ex parte temporary restraining orders such as those violated in both *United Mine Workers*[158] and *Walker*[159] are by far the most dubious of all judicially ordered restraints on expression because they are entered without either notice or opportunity for even the most basic form of adversary proceedings.[160] In such a case the defendant in the contempt proceeding is identical to the defendant in the criminal prosecu-

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[156] See generally F. James & G. Hazard, Civil Procedure §§ 11.16-.21, at 563-73 (2d ed. 1977) (stating that issues are precluded if they were litigated by the parties, determined by a tribunal, and necessarily so determined; modern tendency is to apply issue preclusion to matters of law as well as of fact).

[157] See supra text accompanying notes 11-17, 80-82, 125-27

[158] 330 U.S. at 266.

[159] 388 U.S. at 308-09.

[160] See supra text accompanying notes 119-22.

tion: neither has yet had a judicial hearing. This form of judicial restraint may be appropriate in a compelling emergency, but only for a highly restricted time period. If in such a case the traditional justifications for the collateral bar rule prove unacceptable, the government will never be able to establish a sufficiently compelling interest to prevent a defendant's collateral challenge at a contempt proceeding of the constitutionality of that restraining order. Though the government's interest may be sufficiently compelling to justify the initial issuance of the restraining order, as arguably was the case in *Walker*, that interest is satisfied by the court's issuance of the order; the interest does not justify insulating that order from any subsequent form of judicial review. Therefore, the *Walker* decision is clearly incorrect, at least under the narrow circumstances of that case.[161]

More complex is the issue of the collateral bar rule's validity when the judicial restraint is a preliminary injunction following an adversary hearing. Such orders fall into a constitutional twilight zone because they meet some but not all of the requisite constitutional criteria.[162] Thus, they should be measured by a sliding scale, compelling interest analysis. Though they need not be justified by a truly overwhelming emergency—the standard required for any form of nonjudicial prior restraint of expression—they do require at least some significant governmental interest to justify their use against expressive activity. A justification sufficiently compelling to authorize a preliminary injunction, however, does not necessarily justify use of the collateral bar rule in a proceeding brought to enforce that injunction. The same principle applies to statutes invoked against expressive activity: no one suggests that a justification sufficiently compelling to uphold such a statute would further

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[161] Professor Mayton, though recognizing the dangers of the summary process inherent in the preliminary injunction procedure, seemed to have no problem with the collateral bar rule in contempt proceedings for the violation of such an injunction. Mayton, supra note 13, at 278 n.204. He reasoned that "[t]he Supreme Court . . . by requiring that the duration of 'interim judicial orders' be 'limited to preserving the status quo for the shortest fixed period compatible with sound judicial administration' has diminished the problem." Id. (citing United States v. Thirty-Seven Photographs, 402 U.S. 363, 368 (1971)). But Mayton's analysis misses the key point: the issue is not whether a sufficiently pressing emergency exists to justify dispensing with full adversarial judicial process prior to the issuance of a restraining order. The issue instead turns on whether that same emergency further justifies forbidding the defendant to challenge the validity of that order collaterally in a contempt proceeding.

[162] See supra text accompanying notes 80-82, 125-27.

justify a refusal to allow an intentional violator to challenge the statute's constitutionality as a defense to a prosecution. Because no strong justification exists for the collateral bar rule in any context—at least as long as criminal prosecutions for violations of statutes are not deemed to require a similar rule—it follows that the collateral bar rule can never be justified in the enforcement of a preliminary injunction.

The collateral bar rules raises difficult questions in the first amendment arena. It need not, however, be totally abandoned to provide sufficient protection to speakers in the context of injunctions if the full-and-fair-hearing rationale for prior restraint is embraced. When a speaker receives adequate opportunity to litigate the constitutionality of the injunction, he does not need a second chance in a collateral contempt proceeding. When an individual does not receive such an opportunity, however, he should be put on the same footing as the defendant in a statutory violation proceeding. Both defendants should be allowed to attack the statute's or injunction's constitutionality when called upon to defend their violations.

V. Conclusion

The prior restraint doctrine as it presently stands crudely sweeps within its reach all forms of direct governmental restraint of expression—those issued administratively and judicially, those issued prior to an adversarial hearing, as well as those issued following such a hearing.[163] Ironically, such an unbending, sweeping approach has led the Court both to condemn restraints when they perhaps should not have been condemned and to allow restraints, particularly in the areas of obscenity regulation and demonstrations, when they were actually harmful and could not be justified by truly compelling interests.

Most of the arguments traditionally employed to justify special mistrust of judicial prior restraints as a means of speech regulation are unacceptable for one reason or another. Prior restraints instead

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[163] One commentator has argued that the modern Supreme Court finds administrative restraints more egregious than judicial restraints. See Mayton, supra note 13, at 250. Nevertheless, in both New York Times Co. v. United States, 403 U.S. 713 (1971), and Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), the Court condemned the restraints issued even though they had been issued by courts, rather than by administrators.

should be disfavored over subsequent punishment schemes when and only when they abridge expression prior to a full and fair hearing before an independent judicial forum. Only after such a hearing can one conclude with any level of confidence that the expression in question is unprotected by the first amendment. To be sure, a certain portion of the expressive activity swept within a prior restraint's dragnet will ultimately be found unprotected. Only under the most extreme circumstances, however, should fully protected expression ever be restrained along with the unprotected expression even for a relatively limited time.

Hence, prior restraint terminology should not be used to avoid the hard questions that first amendment analysis invariably presents in individual cases. Use of the approach suggested here would often require careful and difficult balancing of competing interests. But first amendment interests are not served by attempts to avoid difficult questions by use of oversimplified formulas.[164] Nowhere is this more evident than in the current structure of the prior restraint doctrine.

[164] For a critique of this approach, see articles cited supra note 9.