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DISTINCTION WITHOUT A DIFFERENCE: A REAPPRAISAL OF THE DOCTRINE OF PRIOR RESTRAINT

MARIN SCORDATO†

For nearly 60 years, the doctrine of prior restraint has held a central position in first amendment jurisprudence. A law that acts as a prior restraint on speech comes under such searching judicial scrutiny that it almost always is invalidated. Professor Marin Scordato makes a frontal attack on the existing prior restraint doctrine in this Article. He first maintains that the traditional definition of prior restraint defies the common-sense meaning of the term. Then he examines the policy justifications for identifying prior restraints by their asserted tendency to produce constitutionally undesirable results compared with their definitional opposites, subsequent sanctions. He asserts that these justifications lack logical coherence and, in some cases, constitutional relevance. Professor Scordato suggests a redefinition of the doctrine that would limit its application to literal prior restraints, such as the physical seizure by the government of a speaker's medium of expression. He concludes that a literal approach would correct the doctrine's logical flaws and might spur the development of a more direct and relevant jurisprudence regarding the traditional prior restraints that would fall outside his redefinition, namely judicial injunctions and licensing systems.

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I. INTRODUCTION

Since the 1931 release of the Supreme Court's opinion in *Near v. Minnesota*,¹ the doctrine of prior restraint has been an essential element of first amendment jurisprudence. On its face, the doctrine requires that any government action which operates as a prior restraint on speech be subjected to strict judicial scrutiny. So strict is the scrutiny applied under the doctrine that the Supreme Court has never upheld a law that it has characterized as a prior restraint on pure speech.²

Despite the frequency with which the doctrine of prior restraint is cited in court opinions and the level of general recognition it has achieved, relevant case law does not provide a concise and logically coherent definition of a prior restraint on speech. Moreover, the Supreme Court in the years since *Near* has affixed the prior restraint label to an exceptionally diverse group of laws, regulations, and government actions. Upon inspection, these laws, regulations, and actions appear to have little in common other than the fact that the Court has deemed them deserving of strict judicial scrutiny.³ As a result, the term "prior restraint" has become largely a legal misnomer, and the doctrine a source of confusion and controversy.⁴

1. 283 U.S. 697 (1931); see *infra* text accompanying notes 17-21.

2. In this context, pure speech refers to expression that is not inextricably part of some otherwise problematic physical behavior. See *United States v. O'Brien*, 391 U.S. 367 (1968); *Stromberg v. California*, 283 U.S. 359 (1931); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1493-96 (1975); Friedman, *Why Do You Speak That Way—Symbolic Expression Reconsidered*, 15 HASTINGS CONST. L.Q. 587 (1988); Nimmer, *The Meaning of Symbolic Speech under the First Amendment*, 21 UCLA L. REV. 29 (1973).

Typically, Supreme Court decisions upholding regulations that potentially restrain symbolic speech before it can be expressed characterize such regulations as time, place, or manner restrictions rather than prior restraints. See, e.g., *O'Brien*, 391 U.S. at 376-77 (upholding conviction for burning a draft card); *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (upholding conviction for demonstration at county jail). The most recent example of this phenomenon is the Court's opinion in *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989). In this case, the Court reviewed a Use Guideline adopted by New York City that required those using a city bandshell in Central Park to use sound amplification equipment and technicians provided by the city. *Id.* at 2754-60. In upholding the Use Guideline, the majority concluded that, "[I]t is valid under the First Amendment as a reasonable regulation of the place and manner of expression." *Id.* at 2760. The dissent, by contrast, argued that, "As a system of prior restraint, the Guidelines are presumptively invalid." *Id.* at 2763 (Marshall, J. dissenting); see also *infra* note 103 (describing Court's treatment of symbolic and "mixed" speech in other cases).

3. See *infra* notes 25-35 and accompanying text.

4. See *infra* note 35. Perhaps because of the uncertainty that surrounds it, the doctrine of prior restraint historically has been the focus of lively debate among legal scholars. See, e.g., Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955); Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV.

The confusion associated with the doctrine of prior restraint results not only from its inconsistent application by the courts but, more importantly, from the incoherence that plagues the conceptual distinction at the root of the doctrine—the distinction between prior restraints and subsequent sanctions. The third section of this Article argues that a coherent conceptual distinction between prior restraints and subsequent sanctions is not possible so long as courts categorize as prior restraints laws that do not impose upon potential speakers a legal sanction until the speaker has publicly communicated the offending speech. This argument is based upon an appreciation of the fact that most positive laws are valued by society primarily for their ability to create and maintain effective prospective deterrents to societally disfavored behavior. From this perspective, all such laws operate as prior restraints. This insight is particularly problematic for the current doctrine of prior restraint because the vast majority of laws that the Supreme Court has identified formally as prior restraints do not impose upon potential speakers a legal sanction until the prohibited speech has been expressed.⁵

Over the years, legal scholars have attempted to resolve this fundamental problem, and thereby rationalize the prior restraint doctrine, by asserting that those laws identified as prior restraints accurately can be characterized as: (1) having a greater chilling effect on potential speech;⁶ (2) subjecting a wider spectrum of speech to official scrutiny;⁷ (3) suppressing speech at significantly less cost;⁸ and (4) encouraging greater speech suppression than laws in the form of subsequent sanctions.⁹ The fourth section of this Article demonstrates, using systems of administrative preclearance and judicial injunctions as paradigm examples of prior restraints, that these assertions simply are not tenable. Close examination of these prior restraints, especially when compared with classic and popular subsequent sanctions such as defamation laws and "Son of Sam" statutes,¹⁰ leads to the conclusion that neither systems of administrative preclearance nor judicial injunctions necessarily will possess any of the above undesirable attributes to any greater degree than speech-related laws in the form of subsequent sanctions. In fact, substantial reasons exist for suspecting that just the opposite might be the case.

Once it is established that the laws most frequently labeled by the United States Supreme Court as prior restraints neither impose a legal sanction on speakers until the offending speech already has been communicated nor possess the asserted undesirable attributes of prior restraints to any greater degree than do laws that traditionally have been classified as subsequent sanctions, then the

283 (1982); Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409 (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); Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984).

5. See *infra* text accompanying notes 25-34.

6. See *infra* notes 48-50 and accompanying text.

7. See *infra* note 64 and accompanying text.

8. See *infra* notes 66-67 and accompanying text.

9. See *infra* notes 79-82 and accompanying text.

10. See *infra* notes 93-94 and accompanying text.

modern doctrine of prior restraint is exposed as being fatally incoherent. At its very best, the doctrine masks judicial attempts to disfavor laws possessing certain undesirable attributes behind a facial disapproval of prior restraints. The fifth section of this Article describes and illustrates the problems inevitably associated with such an approach.

The sixth section of this Article proposes that the legal definition of prior restraint be revised to include only those government actions that result in the physical interception and suppression of speech prior to its public expression. This revision would base the prior restraint doctrine on a legal distinction between prior restraints and subsequent sanctions that is logically coherent and in harmony with the common-sense meaning of these terms. As a result, the distinction upon which the doctrine is based will be more intuitive and easily understood, thus providing the kind of predictability of application that is essential to the creation of an environment in which constitutionally protected speech can flourish. Moreover, adoption of this version of the prior restraint doctrine may encourage the development of new, more specific doctrines that deal directly, and thus more effectively, with the first amendment problems posed by judicial injunctions and systems of administrative preclearance of speech.

II. THE CURRENT VERSION OF PRIOR RESTRAINT

Any system of prior restraint . . . "comes to this Court bearing a heavy presumption against its constitutional validity." . . . The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.¹¹

When the first amendment was approved by the First Congress, it was undoubtedly intended to prevent government's imposition of any system of prior restraints similar to the English licensing system under which nothing could be printed without the approval of the state or church authorities.¹²

On one point adherents of all schools of thought appear to agree. At a minimum the First Amendment was adopted to prevent the federal government—and later the state governments through the Fourteenth Amendment—from instituting a general system of prior restraint on speech or press similar to that employed in England and the Colonies in the seventeenth and eighteenth centuries, i.e., licensing of the press and censorship of expression.¹³

11. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)) (citations omitted).

12. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-34, at 1039 (2d ed. 1988).

13. H. ZUCKMAN, M. GAYNES, T.B. CARTER & J. DEE, *MASS COMMUNICATIONS LAW IN A NUTSHELL* 28 (3d ed. 1988).

The first of the above three quotations is taken from the United States Supreme Court's decision in the case of *Southeastern Promotions, Ltd. v. Conrad*. The second comes from the latest edition of Professor Laurence Tribe's treatise on constitutional law. The third appears in a popular student guide on mass communications law. Representing as they do three very different spheres of legal literature, these quotations illustrate the current consensus with respect to the prior restraint doctrine: that laws and other official actions having the potential to suppress speech can be characterized as either a "prior restraint" upon speech yet to be uttered or a "subsequent sanction" in response to previously uttered speech and that prior restraints are to be strongly disfavored relative to subsequent sanctions for the purpose of determining the constitutional validity of such laws. Under current first amendment jurisprudence, prior restraints are so strongly disfavored that labeling a law as a prior restraint on speech is tantamount to a declaration that the law is unconstitutional.¹⁴

The distinction between laws that impose a prior restraint on speech and those that constitute a subsequent sanction can be traced to the eighteenth century.¹⁵ In his *Commentaries on the Laws of England*, Sir William Blackstone wrote:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.¹⁶

In the United States, the first and most frequently cited case in prior restraint jurisprudence is *Near v. Minnesota*.¹⁷ In *Near*, decided in the summer of 1931, the Supreme Court confronted a judicial injunction prohibiting the continued publication of a vehemently anti-Semitic newspaper. A state district court issued the injunction pursuant to a Minnesota statute that provided for the enjoining as a public nuisance of a "malicious, scandalous and defamatory newspa-

14. The United States Supreme Court never has found a prior restraint on pure speech to be constitutional. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 568-70 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Near v. Minnesota*, 283 U.S. 697, 713, 721-23 (1931).

15. Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 19-20 (1941); L. LEVY, *EMERGENCE OF A FREE PRESS* 12-13, 147, 169 (1985); F. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND: 1476-1776* 5, 392 (1952).

16. 4 W. BLACKSTONE, *COMMENTARIES* *151-52. It was Blackstone's view that prior restraints were the only unacceptable form of legal regulation of speech. It has been suggested, most notably by Professor John Jeffries, that this English common-law tradition encouraged early American courts, including the Supreme Court, to characterize all constitutionally unacceptable forms of speech regulation as prior restraints on speech. Jeffries, *supra* note 4, at 419-20. This tendency, according to Professor Jeffries, exerted pressure on courts continually to expand the accepted meaning of a prior restraint on speech. *Id.* ("We are left, therefore, with a doctrine of honored past but contemporary irrelevance—a formulation whose current contribution to the interpretation of the First Amendment is chiefly confusion.")

17. 283 U.S. 697 (1931). For a more expansive discussion and critique of the *Near* case, see Blasi, *supra* note 4, at 15-19. For a detailed account of the factual background in the case, see F. FRIENDLY, *MINNESOTA RAG* (1981).

per, magazine or other periodical.”¹⁸ The Supreme Court of Minnesota had affirmed the district court’s judgment.¹⁹ In a five-to-four decision, the United States Supreme Court held both the injunction and the statute to be prior restraints on speech in violation of the first amendment of the United States Constitution. Citing Blackstone as historical precedent,²⁰ the *Near* Court formally introduced into American case law the concept of prior restraint as a separate and significant category of first amendment analysis. According to the Court:

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.²¹

The Supreme Court consistently has reaffirmed the importance of prior restraint in the resolution of first amendment issues in a variety of cases since *Near*.²² Reviewing these cases in 1976, the Court wrote:

The Court has interpreted these [first amendment] guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a “previous” or “prior” restraint on speech.

. . . .

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.²³

Given this characterization of prior restraints, one might expect that special care would have been devoted to developing a formal definition of a prior restraint on speech. Nonetheless, neither the Supreme Court nor the lower federal courts thus far have developed such a definition.²⁴ Without an explicit judicial definition of a prior restraint, one naturally looks for an implicit definition in the pattern of court decisions in the area. In the cases decided since *Near*, however, the Supreme Court has applied the doctrine of prior restraint to a broad array of government activities. These various activities include: judicial injunctions;²⁵

18. *Near*, 283 U.S. at 701-02 (quoting Act of Apr. 20, 1925, ch. 285, 1925 Minn. Laws 358).

19. *State ex rel. Olson v. Guilford*, decision on certified question, 174 Minn. 457, 219 N.W. 770 (1928), decision on appeal of final judgment, 179 Minn. 40, 228 N.W. 326 (1929), *rev'd sub nom.* *Near v. Minnesota*, 283 U.S. 697 (1931).

20. *Near*, 283 U.S. at 713-14 (citing 4 W. BLACKSTONE, COMMENTARIES *151-52).

21. *Id.* at 713.

22. See *infra* cases cited in notes 25-34 and accompanying text; see also Note, *RICO Forfeiture and Obscenity: Prior Restraint or Subsequent Punishment?*, 56 FORDHAM L. REV. 1101, 1112 n.79 (1988) (“Since *Near*, the Supreme Court has continuously reaffirmed and refined the prior restraint doctrine.”).

23. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 556, 559 (1976).

24. See Jeffries, *supra* note 4, at 420 (“The lack of settled content in the term ‘prior restraint’ is, by now, painfully obvious, and might well be glossed over were it not for the surprising persistence of assumptions to the contrary.”).

25. *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 311-12 (1977) (per curiam); *Nebraska Press Ass’n*, 427 U.S. at 570; *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971).

systems of administrative preclearance that require a government license or permit prior to publication;²⁶ a state tax on the gross receipts of newspapers having greater than a specified circulation;²⁷ a use tax on the cost of paper and ink products required for newspaper publication;²⁸ a license fee applied to vendors of religious literature;²⁹ the refusal by a city to rent its municipal theater for a production of "Hair";³⁰ a statute prohibiting the publication of the names of juvenile offenders without the permission of the juvenile court;³¹ a zoning ordinance limiting the geographic concentration of theaters showing X-rated films;³² the creation of a commission whose primary purpose was to identify for the public, and for government prosecutors, books and magazines having the tendency to corrupt the morals of youth;³³ and a city ordinance granting the mayor authority to approve or deny applications for annual permits to place newspaper vending machines on public property.³⁴

It is difficult to identify any pattern or common characteristics shared by these formally recognized prior restraints, especially so since none involve suppression of speech prior to its expression. In fact, so many types of government activities have at one time or another been characterized as a prior restraint on speech that few courts or commentators have even attempted to develop a descriptive theory of the courts' activity in this area. Indeed, some legal scholars have acknowledged openly the conceptual confusion that currently plagues the doctrine.³⁵ For all this, the doctrine of prior restraint continues to thrive and to

26. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 159 (1969); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 506 (1952); *Kunz v. New York*, 340 U.S. 290, 295 (1951); *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951); *Saia v. New York*, 334 U.S. 558, 562 (1948); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940); *Lovell v. City of Griffin*, 303 U.S. 444, 450-52 (1938).

27. *Grosjean v. American Press Co.*, 297 U.S. 233, 350-51 (1936).

28. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592-93 (1983).

29. *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943); *Follett v. McCormick*, 321 U.S. 573, 577-78 (1944).

30. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 564 (1975).

31. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 105-06 (1979).

32. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 72-73 (1976).

33. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 71 (1963).

34. *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138, 2152 (1988).

35. In the most recent edition of his treatise on constitutional law, Professor Laurence Tribe writes:

Indeed, the doctrine has been used to invalidate such a variety of restrictions on speech, under such a wide range of conditions, that some scholars have questioned the conceptual clarity of the term. There is much to this criticism, for the Court has often used the cry of "prior restraints" not as an independent analytical framework but rather to signal conclusions that it has reached on other grounds.

L. TRIBE, *supra* note 12, §§ 12-34, at 1040; see also Jeffries, *supra* note 4, at 419-20 (The doctrine of prior restraint "purports to assess the constitutionality of government action by distinguishing prior restraint from subsequent punishment, but provides no coherent basis for making that categorization. . . . The lack of settled content in the term 'prior restraint' is, by now, painfully obvious. . . ."); Kalven, *The Supreme Court 1970 Term—A Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3, 32 (1971) ("it is not altogether clear just what a prior restraint is or just what is the matter with it"); Redish, *supra* note 4, at 53-54 ("Although the prior restraint doctrine pervades Supreme Court rhetoric, the Court's decisions reveal inconsistencies in the doctrine's application. . . . These apparent doctrinal ambiguities and inconsistencies result from the absence of any detailed judicial analysis of the true rationale behind the prior restraint doctrine."). But see Blasi, *supra* note 4, at 93 ("The concept of prior restraint is coherent at the core.").

exert its influence on the resolution of contemporary first amendment issues.³⁶

III. THE FUNDAMENTAL PROBLEM WITH THE CURRENT VERSION OF PRIOR RESTRAINT

The fundamental problem with the contemporary doctrine of prior restraint is that the distinction upon which the doctrine rests—the distinction between prior restraints and subsequent sanctions—lacks sufficient substance to support a categorical legal rule. The distinction, as developed thus far, fails to provide a means of identifying a category of potentially speech-suppressive government activities that is in any way meaningful for first amendment purposes. As a result, the prior restraint doctrine lacks the reliability and predictability of application necessary to support constitutionally protected speech. It is, in effect, a distinction without a difference.

Consider, for example, the definition of a prior restraint offered by Professor Thomas Emerson in his now classic 1955 article: "The concept of prior restraint, roughly speaking, deals with official restrictions imposed upon speech or other forms of expression in advance of actual publication."³⁷ The definition offered by Professors Rotunda, Nowak, and Young in their treatise on constitutional law is similar: "[A]ny governmental order which restricts or prohibits speech prior to its publication constitutes a prior restraint."³⁸

The essential problem with these definitions is that once the interpretation of terms like "restraint," "restrict," or "prohibit" moves beyond the strictly literal,³⁹ the definition loses the power to exclude most positive laws from its scope. It therefore loses its ability to serve as the basis for a meaningful doctrinal distinction. This is the case because nearly all laws, by their nature and purpose, are designed to influence human behavior prior to its actual occurrence. Since the general decline in the acceptance of the concept of natural law, positive laws and regulations have been rationalized primarily on the basis of their ability to reduce the future occurrence of societally disfavored behavior.⁴⁰

36. Hardly a Supreme Court term goes by without at least one or two cases being decided on the basis of the prior restraint doctrine. In the 1988-89 term, the Court decided *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2760 (1989) (discussed *supra* note 2) and *Fort Wayne Books v. Indiana*, 109 S. Ct. 916 (1989) (pretrial seizure of expressive materials beyond that required for evidentiary purposes without a determination of obscenity after an adversary hearing held to be invalid as posing an unacceptable risk of prior restraint).

Important prior restraint cases now working their way through the lower courts include *New Era Publications Int'l, APS v. Henry Holt and Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988), 57 U.S.L.W. 2178 (Sept. 27, 1988), and *Insurance Adjustment Bureau v. Pennsylvania Ins. Comm'r.*, 518 Pa. 210, 542 A.2d 1317 (1988), 56 U.S.L.W. 1185 (June 7, 1988).

37. Emerson, *supra* note 4, at 648.

38. 3 R. ROTUNDA, J. NOWAK & J. YOUNG, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 20.16, at 72 (3d ed. 1986) [hereinafter R. ROTUNDA]. Given the historical significance of the concept, Supreme Court case law is remarkable for its lack of a general definition of prior restraints on speech. The two definitions offered here accurately enunciate the meaning most often ascribed to the use of the phrase "prior restraint" by the courts.

39. Strictly literal, as used here, means the physical suppression of speech prior to its expression. See *infra* text accompanying notes 101-08.

40. See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, 13-33, 40-42 (1965); H. KELSEN, *THE PURE THEORY OF LAW* ch.1, 1-54 (M. Knight transl. 1970).

After-the-act sanctions are employed in the law largely to restrain members of the regulated community from engaging in that act again in the future.⁴¹ In a world in which laws are viewed primarily from this instrumentalist perspective, society views virtually all laws as prior restraints on behavior. Thus from this perspective it is clear that a substantive distinction cannot logically be maintained between some laws that operate as prior restraints on speech and others that operate as subsequent sanctions when in fact all of the laws in question do not impose upon potential speakers a legal sanction until the speaker actually has communicated the offending speech.⁴²

IV. THE CONVENTIONAL EVASION OF THE PROBLEM: A REEXAMINATION OF THE ASSERTED ATTRIBUTES OF PRIOR RESTRAINTS

Given the inconsistency inherent in the current distinction between prior restraints and subsequent sanctions, it is difficult to understand how the doctrine of prior restraint has survived intact for so long. Perhaps it has survived because it is perceived as a speech-protective doctrine in a period characterized by expanded protection of speech by the courts.⁴³ Perhaps it has provided a useful means to facially resolve cases which involve free speech issues that the courts have not wished to confront directly.⁴⁴

Regardless of the reasons, it is clear that one crucial element in the survival of the prior restraint doctrine has been the willingness of many courts, and many commentators, to finesse the definitional inconsistency embedded in the modern

41. See J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165-66 (J.H. Burns & H.L.A. Hart eds. 1970); E. PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT 17-25 (1966); Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 3-13 (1955).

42. According to one commentator,

The standard mechanism for a licensing system is a criminal prosecution for speaking without the required permit . . . Persons who violate permit requirements are sanctioned only if a district attorney determines that prosecution is warranted in light of the seriousness of the offense and competing pressures on the criminal docket.

Blasi, *supra* note 4, at 23-24. In discussing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), Professor Mayton noted further:

The majority in *Bantam Books* viewed the administrative licensing process in the usual way, without following the process to its end—where we find subsequent punishment. A tendency is to view a bureaucratic licensing scheme as “self-effectuating.” As Harlan’s dissent indicates, we ignore the subsequent punishment basis of a licensing scheme.

Mayton, *supra* note 4, at 264.

43. See Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1345-55 (1983); see also Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191, 196 (1958) (“Virtually all of the law of free speech, assembly and press . . . has been articulated in the last forty years.”); Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U.L. REV. 1, 5 (1986) (“Until World War I the first amendment was not a significant source of justiciable rights. Indeed, it was narrowly construed until the 1940’s and, some would say, until the 1960’s.”); Comment, *A Sign of the Times: Billboard Regulation and the First Amendment*, 15 ST. MARY’S L.J. 635, 647 (1984) (“As the scope of the first amendment review has been expanded to embrace state, as well as federal regulation of speech, the topics of protected speech have similarly been extended beyond the subject of political debate. Further, first amendment speech principles have been applied to various mediums of expression, apart from the spoken word.” (footnote omitted)); Garneau, *Friends of the First Amendment*, EDITOR & PUBLISHER 9 (July 1, 1989) (“The Supremes have been busy lately making free speech freer.”).

44. The clearest example of the prior restraint doctrine being used in this fashion is *The Pentagon Papers Case*, 403 U.S. 713 (1971) (per curiam).

version of the prior restraint/subsequent sanction distinction. This finesse is usually accomplished through a two-step strategy. The first step begins by asserting that laws traditionally labeled as prior restraints⁴⁵ share one or more constitutionally undesirable characteristics and that the presence of these characteristics justify subjecting the laws to especially strict judicial scrutiny. The second step of the analysis solves the definitional problem by asserting that all laws possessing the identified undesirable characteristics are, as a result, prior restraints.⁴⁶ One reason that this finesse has been so effective is that once a law is determined to be a prior restraint by virtue of possessing certain constitutionally undesirable characteristics, then it is a relatively easy matter to justify the larger legal doctrine mandating that all prior restraints be subject to strict, and usually fatal, judicial scrutiny.

Despite the practical success this definitional strategy has enjoyed, it possesses two serious flaws. The first involves the questionable nature of its major premise, that the undesirable attributes used to define the prior restraint category are in fact characteristic of those laws that traditionally have been labeled as prior restraints. The second flaw, following from the first, is that the prior restraint/subsequent sanction distinction, as currently defined, is almost perversely counterintuitive. It uses a category label that possesses a common-sense meaning in our language and yet defines the population of the category without reference to the common-sense meaning of that label. By adopting this distinction as its substantive base, the doctrine of prior restraint becomes little more than a label attached to a legal conclusion already reached; a veil behind which independent, and frequently unnamed, factors are considered and weighed. The result is a doctrine profoundly misleading and ripe for misuse.

The first step in the current definitional approach to the doctrine of prior restraint is the identification of certain undesirable attributes alleged to be characteristic of prior restraints. These identified attributes generally gravitate toward one of two major themes. The first theme involves asserted differences in the effect that prior restraints and subsequent sanctions have on potential speech. The second theme involves asserted differences in the procedural structure and the expected implementation of prior restraints compared with subsequent sanctions.

For the purpose of analyzing these asserted attributes, this section will focus on two kinds of government action that consistently have been characterized by courts as prior restraints: (1) judicial injunctions prospectively prohibiting speech; and (2) regulatory schemes involving the administrative preclearance of speech, such as licensing laws. These two types of government action have been

45. See *infra* note 47 and accompanying text.

46. According to one commentator,

The best of these efforts [to define what constitutes a prior restraint] look at the problem in reverse—that is, they begin with the functional consequence of finding a prior restraint and then seek to identify characteristics that justify that result. In other words, the scholarship seeks a functional reconstruction of prior restraint in terms that link the definition of the category with the rationale for creating a rule of independent constitutional disfavor.

Jeffries, *supra* note 4, at 420-21.

cited so frequently as illustrative examples that they have become virtual paradigms of prior restraint.⁴⁷ As a result, they can serve as examples against which to analyze the accuracy of the claim that laws traditionally characterized as prior restraints share certain undesirable characteristics.

A. *The Chilling Effect of Prior Restraints*

The first theme around which the asserted attributes of prior restraints cluster involves alleged differences in the effect that prior restraints and subsequent sanctions have on potential speech. The thrust of this argument is set forth succinctly in the Supreme Court's opinion in *Nebraska Press Association v. Stuart*: "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."⁴⁸ Professors Rotunda, Nowak, and Young's treatise on constitutional law is one of many secondary sources that embraces, and more explicitly articulates, this same basic point: "[T]he 'marketplace' theory of speech supports the distinction between prior restraint and subsequent punishment. While subsequent punishment may deter some speakers, at least the ideas or speech at issue can be placed before the

47. According to Blasi,

[T]he issue introduced by *Near* [is] should the injunction, as a general matter, be regarded as a particularly repressive method of regulating speech, akin to the historically disfavored administrative licensing system? The question is of importance in first amendment theory because the modern doctrine of prior restraint would be thrown into disarray should one of its two central props be removed.

Blasi, *supra* note 4, at 14. As Jeffries explains further,

Near has come to stand for a sort of syllogism about injunctive relief: Prior restraint of speech is presumptively unconstitutional, even where the speech in question is not otherwise protected. An injunction is a prior restraint. Therefore, an injunction against speech is presumptively unconstitutional, even where the speech enjoined is not otherwise protected.

Jeffries, *supra* note 4, at 417. See also Emerson, *supra* note 4, at 655 ("The clearest form of prior restraint arises in those situations where the government limitation, expressed in statute, regulation, or otherwise, undertakes to prevent future publication or other communication without advance approval of an executive official.").

Some legal scholars have attempted to distinguish judicial injunctions from systems of administrative preclearance and thereby to rescue judicial injunctions from the operational scope of the prior restraint doctrine. O. FISS, *THE CIVIL RIGHTS INJUNCTION* 69-74 (1978); Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 544-45 (1977); Jeffries, *supra* note 4, at 426-34, 433 ("In my view, a rule of special hostility to administrative preclearance is fully justified, but a rule of special hostility to injunctive relief is not."); Mayton, *supra* note 4, at 249-53, 246 ("A purpose of this Article is to show that the preference for subsequent punishment over injunctive relief diminishes the exercise of free speech by burdening it with costs that seem not yet comprehended.").

The strategy generally employed by these writers is to argue that many, if not most, of the ills traditionally associated with prior restraints are not applicable to judicial injunctions. Despite these efforts, the Supreme Court has not altered its view that judicial injunctions against speech are prior restraints as it initially announced in *Near v. Minnesota*, 283 U.S. 697, 722-23 (1931), and has continued to maintain in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 311 (1977) (per curiam); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); and *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971).

48. 427 U.S. 539, 559 (1976) (paraphrasing A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975)). In this case, the Supreme Court characterized as a prior restraint, and thereby reversed as being constitutionally invalid, a court order initially issued by a Nebraska state court, and subsequently modified by the Nebraska Supreme Court, that restrained the media from publishing potentially prejudicial pretrial material in a criminal trial in which the defendant was accused of committing six highly publicized murders. *Id.* at 570.

public. Prior restraint limits public debate and knowledge more severely."⁴⁹ The basic argument, echoed in the lower courts and by many commentators, is that prior restraints pose a greater practical deterrent to constitutionally protected speech than do subsequent sanctions.⁵⁰

For the purpose of examining this argument, suppose that the deterrent effect of a particular law or regulation can be expressed in the abstract as a function of the regulated community's perception of the negative value of the sanction imposed in response to a violation of the law discounted by the perceived probability that the sanction will in fact be imposed in response to a given violation.⁵¹ Under this model, a law, or other government action, can influence the likelihood that a given behavior will occur by altering the regulated community's perception of either the unattractiveness of the sanction or the likelihood that the sanction will be imposed in response to a given occurrence of the disfavored behavior. It therefore follows that in order to claim successfully that prior restraints result in greater overall suppression of speech than do subsequent sanctions, it is necessary to establish that prior restraints have a systematically different impact on either the perceived unattractiveness of the threatened sanction or on the perceived probability that the threatened sanction will be invoked in response to a given violation of the law.⁵²

With respect to the first factor in this calculation, there is no apparent logi-

49. 3 R. ROTUNDA, *supra* note 38, § 20.16, at 68.

50. See *Fehlhaber v. North Carolina*, 675 F.2d 1365, 1371 (4th Cir. 1982) (Phillips, J. dissenting); *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 469 n.15 (5th Cir. 1980) (en banc), *aff'd*, 452 U.S. 89 (1981); *United States v. Pryba*, 674 F. Supp. 1504, 1512 (E.D. Va. 1987); *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 615 F. Supp. 916, 934-35 (N.D. Tex. 1985), *aff'd in part, rev'd in part*, 848 F.2d 544 (5th Cir. 1988); *Planned Parenthood Comm. v. Maricopa County*, 92 Ariz. 231, 239 n.3, 375 P.2d 719, 725 n.3 (1962) (en banc). One commentator states the argument as follows:

[P]rior restraints, from whatever source and through whatever process, all curtail speech before it happens On the other hand, a system of subsequent punishment, properly limited, may have an inhibitory effect, but a speaker can proceed to speak if he is willing to risk possible prosecution. Simply stated, there is a world of difference between a government statement that one cannot speak at all and a statement that one can speak out at some risk of paying a specified cost.

Hunter, *supra* note 4, at 293; see also Blasi, *supra* note 4, at 25 ("It is a sign of the times that all the leading writers on prior restraint in the last decade—Bickel, Fiss, Barnett, Kalven, Litwack, Murphy, Schauer—have treated the self-censorship phenomenon as either the exclusive or the central consideration in deciding whether prior restraints should be disfavored.").

51. While this description of the probable deterrent effect of a given law clearly is not exhaustive (it excludes, for example, any consideration of the range of behavioral alternatives available to a potential actor), it adequately serves to demonstrate the problematic nature of asserting that a predictable and systematic chilling effect corresponds to the prior restraint/subsequent sanction distinction. For a more sophisticated attempt at model construction in this area, see Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685, 689-94 (1978).

52. This conclusion, and the model upon which it is based, implicitly assumes that the deterrent effect of a given law is almost exclusively a function of the fact that a breach of that law may result in the imposition of a legal sanction. There will, of course, be some percentage of cases in which people obey the law not so much as a result of a conscious strategy for avoiding legal sanction, but simply because it is the law. In such cases, people are likely to obey the law irrespective of the strength of the sanction threatened or the likelihood of its imposition. While it is true that the proposed model does not adequately account for cases of compliance that are not sanction-sensitive, this defect is only important for the purposes of the instant analysis to the extent that laws that have been traditionally characterized as prior restraints are thought to have a greater deterrent effect in this class of cases than do speech-restrictive laws not labeled prior restraints.

cal or practically necessary correlation between the severity of the sanction imposed in response to a violation of the law and the law's status as either a prior restraint or a subsequent sanction.⁵³ In other words, there is no reason why laws classified as prior restraints should consistently impose upon violators more severe sanctions than all other laws. For example, speakers found liable for defamation, unquestionably a subsequent sanction, often have faced judgments in the multimillion and multihundred thousand dollar range.⁵⁴ While no hard empirical evidence is available, it is difficult to imagine that sanctions imposed in response to the violation of speech-related injunctions ever reach such levels. In fact, instead of prior restraints consistently carrying with them more severe sanctions, the opposite may be true. As Professor Vincent Blasi has observed, "[S]anctions for the violation of injunctions and permit ordinances tend to be light in comparison with those commonly administered under the subsequent punishment regimes."⁵⁵

It is a bit more difficult to evaluate the second factor in the calculation, whether prior restraints systematically influence the perceived probability of a

53. See Blasi, *supra* note 4, at 26-27 ("Except in the area of defamation, and there only in one limited respect, the Supreme Court has been unwilling to erect constitutional limitations on how severely persons can be sanctioned for engaging in unprotected expression.")

54. The latest example of a multimillion dollar defamation judgment is the \$100 million awarded to GTE Corporation by a Florida jury in a trade libel action against Home Shopping Network, Inc. in August of 1989. N.Y. Times, Aug. 3, 1989, at D1, col. 6; 16 Media L. Rep. (BNA) No. 28, News Notes (Aug. 15 1989). Another example is Wayne Newton's acceptance of \$5,275,000 in his libel action against NBC, 15 Media L. Rep. (BNA) No. 42, News Notes (Jan. 31, 1989), 56 U.S.L.W. 2347 (Dec. 22, 1987), reduced from an original jury award of \$19,200,000, N.Y. Times, Dec. 18, 1986, at A26, col. 1. Other eight-figure jury awards in defamation cases in the 1980s include: *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 128 (2d Cir. 1984) (\$40,000,000, subsequently remitted to \$10,000,000), *cert. denied*, 471 U.S. 1054 (1985); *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982) (\$25,025,000), *cert. denied*, 462 U.S. 1132 (1983); *Guccione v. Hustler Magazine, Inc.*, *Slip op.* No. 80AP-375 (Ohio Ct. App. Oct. 8, 1981) (noted in *Guccione v. Hustler Magazine, Inc.*, 632 F. Supp. 313, 316 (1986), *rev'd*, 800 F.2d 298 (2d Cir. 1987), *cert. denied*, 479 U.S. 1091 (1987)) (\$40,300,000, subsequently remitted to \$5,150,000), *cert. denied*, 459 U.S. 826 (1982).

Though eight-figure defamation awards are much more the exception than the rule, the Libel Defense Resource Center has found that the average initial damage award in defamation cases decided between 1984 and 1986 was \$1,167,189. This compares with an average initial damage award of \$2,033,367 in defamation cases decided between 1982 and 1984 and \$2,051,178 in cases decided between 1980 and 1982. LIBEL DEFENSE RESOURCE CENTER, LITIGATION STUDY NO. 9, DEFAMATION TRIALS, DAMAGE AWARDS AND APPEALS III: TWO-YEAR UPDATE (1984-1986) 21, excerpted from Libel Defense Resource Center Bulletin No. 21 (Oct. 31, 1987); see also LIBEL DEFENSE RESOURCE CENTER DAMAGES STUDY NO. 1 (originally published in Libel Defense Resource Center Bulletin No. 4, 2-17 (Oct. 15, 1982)); LIBEL DEFENSE RESOURCE CENTER DAMAGES STUDY NO. 2 (originally published in Libel Defense Resource Center Bulletin No. 11 1-34 (Aug. 15, 1984)).

In addition to the actual jury awards returned in these cases, speakers face the prospect of spending large sums of money to defend themselves against defamation suits. For example, published estimates of the cost of defending General William Westmoreland's libel suit against CBS go as high as \$8,000,000, and estimates of the cost of defending Ariel Sharon's libel suit against Time, Inc. go as high as \$7,000,000. Baer, *Insurers to Libel Defense Counsel: "The Party's Over"*, AM. LAW., Nov. 1985, at 69. One congressman (Rep. Charles Schumer, D-NY) has estimated that on average a libel suit costs \$150,000 to defend. *Id.*; see generally THE ANNENBERG WASHINGTON PROGRAM IN COMMUNICATIONS POLICY STUDIES OF NORTHWESTERN UNIVERSITY, PROPOSAL FOR THE REFORM OF LIBEL LAW: THE REPORT OF THE LIBEL REFORM PROJECT 9 (1988) ("Libel suits tend to be enormously expensive for defendants, often costing them hundreds of thousands or millions of dollars.").

55. Blasi, *supra* note 4, at 27.

legal sanction being imposed in response to a violation of the law. In the latest edition of his treatise on constitutional law, Professor Laurence Tribe writes:

[I]t might well remain the case that prepublication restraints, especially those affirmatively singling out the would-be disseminator, would deter far more protected conduct than criminal statutes ordinarily would. The latter is essentially a mute, impersonal threat; being told personally not to publish is apt to cause more second thoughts—no matter what defenses are ultimately available.⁵⁶

Professor Tribe apparently is suggesting that threats of legal sanction that are specific and personal in nature create stronger deterrents with respect to the targeted behavior than do more passive and impersonal threats. The conclusion he wishes to draw from this suggestion is that traditional prior restraints, such as judicial injunctions and denials of license applications, cause members of the regulated community to perceive the probability of eventual imposition of the threatened legal sanction as significantly higher than in the case of similar laws in the form of subsequent sanctions.

At least two points are worth noting in response to Professor Tribe's suggestion. The first is a matter of perspective. While it may be true that the deterrent effect on any given individual in the regulated community will differ depending on whether that individual is subject to specific, personal threats rather than uniform, impersonal ones, it does not follow necessarily that general use of the former in place of the latter would, on the whole, result in a larger net deterrent effect throughout the regulated community. This is the case because uniform, impersonal threats, while they may have less of a deterrent effect on any given individual, will have some influence on every individual in the regulated community. On the other hand, specific, personal threats, while perhaps more potent with respect to each targeted individual, are limited in their scope, by definition, to one, or at the most to a very few, such individuals. The overall societal impact of such specific, personal threats, given the large number of individuals in society, is quite small indeed.⁵⁷

One response to this argument might be that particular instances of a specific, personal threat, if publicized sufficiently, could serve as admonitory examples and thus be responsible for an overall societal deterrent much greater than

56. L. TRIBE, *supra* note 12, § 12-35, at 1042 n.2. Professor Tribe is here referring to a much more elaborate analysis of this point developed by Professor Vincent Blasi. See Blasi, *supra* note 4, at 35-36 ("This difference [in the degree of personalization present in prior restraints and subsequent sanctions] may go far to explain why the prior forms of regulation are commonly thought to cause more self-censorship than the subsequent punishment regimes."). Professor Blasi ultimately concludes that the possible consequences of such personalization are not an important source of what he terms "self-censorship" with respect to either judicial injunctions or systems of administrative preclearance. *Id.* at 35-43.

57. A logical extension of this line of reasoning could lead to the conclusion, recognized by some commentators in this area, that a system of speech regulation consisting exclusively of judicial injunctions and systems of administrative preclearance would be, on the whole, less speech restrictive than a similar system composed exclusively of laws employing subsequent sanctions. See L. TRIBE, *supra* note 12, § 12-34, at 1041 n.16; Blasi, *supra* note 4, at 26; cf. Mayton, *supra* note 4, at 281 ("Because injunctions are necessarily the product of a judicial process, they should be preferred to subsequent punishment. This, of course, reverses the hierarchy of process established by the present prior restraint doctrine.").

one might otherwise predict. The problem with this response is that the same logic could be applied as easily and accurately to prosecutions of individual violations of a law involving a uniform and impersonal subsequent sanction. Taken as a whole, therefore, there appears to exist no persuasive reason to believe that prior restraints, when viewed from an overall societal perspective, will alter the regulated community's perception of the likelihood of a legal sanction being imposed in response to the utterance of prohibited speech to any greater degree than will laws using subsequent sanctions.

In evaluating the relative strength and acceptability of deterrents likely to be produced by either prior restraints or subsequent sanctions, it is important to keep in mind that the kind of deterrents that are socially undesirable are those that discourage constitutionally protected speech. Political ideology aside, there is no reason formally to disfavor effective deterrents against speech deemed constitutionally unprotected by the courts. Therefore, even if one could establish convincingly that prior restraints generate more potent deterrents to speech than do subsequent sanctions, this point would have little constitutional relevance unless one also could establish that these more potent deterrents extend beyond the boundaries of unprotected speech into the realm of constitutionally protected speech.

Given the fact, as noted by Professor Tribe, that prior restraints tend to be more personalized and situation specific in nature than do subsequent sanctions,⁵⁸ one might reasonably assume that deterrents generated by legal regulation in the form of prior restraints would be more carefully tailored and specifically focused than deterrents generated by laws in the form of subsequent sanctions. Consequently, prior restraints as a class would be less likely to extend their reach into the domain of constitutionally protected speech than would subsequent sanctions.⁵⁹ From this perspective, then, it might appear that the current doctrine of prior restraint has it exactly backward. Subsequent sanctions, being more uniform and impersonal in nature than prior restraints, would appear to pose a significantly greater risk of deterring constitutionally protected speech. Thus subsequent sanctions should be disfavored more vigorously than prior restraints as a form of speech regulation.

As the preceding analysis indicates, there is little support for the notion that traditional prior restraints are associated with more severe punishment than are subsequent sanctions. Similarly, there is little reason to think that the community as a whole will perceive the possibility of a legal sanction actually being imposed as being systematically greater in the case of prior restraints than in the case of subsequent sanctions. Moreover, there is good reason to suspect that subsequent sanctions will generate a chilling effect that reaches substantially more constitutionally protected speech than will laws in the form of prior restraints. Taken as a whole, this analysis strongly suggests that laws traditionally

58. See *supra* text accompanying note 56.

59. The same observation suggests that prior restraints are significantly less likely than laws using subsequent sanctions to run afoul of the overbreadth and the void-for-vagueness doctrines. See R. ROTUNDA, *supra* note 38, §§ 20.8-20.9, at 24-37.

characterized as prior restraints are no more likely to produce a greater or more effective chilling effect on constitutionally protected speech than laws traditionally characterized as subsequent sanctions.

B. *The Operational Attributes of Prior Restraints*

Notwithstanding the above conclusion, both case law and scholarly literature present a number of arguments identifying attributes of traditional prior restraints that allegedly cause the implementation of such laws to extend their reach, and thus their deterrent effect, beyond the realm of constitutionally unprotected speech. These arguments typically focus on the operational characteristics of prior restraints, reflecting the second of the two general themes that characterize attempts to rationalize the current distinction between prior restraints and subsequent sanctions. Because the majority of these arguments have focused on systems of administrative preclearance and licensing,⁶⁰ they will be examined in this context.

The major arguments advanced in this area are:

- (1) systems of administrative review and licensing are capable of subjecting a wider spectrum of speech to official scrutiny than are laws in the form of subsequent sanctions;⁶¹
- (2) decisions to suppress speech are more easily made in the context of administrative review and licensing systems;⁶² and
- (3) administrative review and licensing systems both attract and reward persons who are disposed more favorably to speech suppression than the average citizen.⁶³

1. *Breadth of Coverage*

"The administrative apparatus erected to effect preclearance may screen a range of expression far broader than that which otherwise would be brought to official attention."⁶⁴

If taken literally, this argument asserts that it is possible to design systems of administrative preclearance and licensing that subject more speech to legal sanctions than do some laws in the form of subsequent sanctions. This seems clearly true. This interpretation, however, leaves open the prospect that laws may be designed in the form of subsequent sanctions that could screen a much broader range of expression than would carefully tailored systems of administra-

60. See Jeffries, *supra* note 4, at 421-26; Mayton, *supra* note 4, at 249-53.

Systems of administrative preclearance of speech, usually in the form of licensing requirements, have a long and relatively well-documented history in both England and the United States. See L. LEVY, *supra* note 15, at 6-7; F. SIEBERT, *supra* note 15, at 6-12.

61. See *infra* note 64 and accompanying text.

62. See *infra* note 66 and accompanying text.

63. See *infra* notes 79-82 and accompanying text.

64. Jeffries, *supra* note 4, at 422; see also Blasi, *supra* note 4, at 22 ("A licensing system is objectionable in part because it subjects a wide range of expression to scrutiny . . ."); Emerson, *supra* note 4, at 656 ("A system of prior restraint normally brings within the complex of government machinery a far greater amount of communication than a system of subsequent punishment.").

tive preclearance. Since the logic of the argument leaves both of these possibilities equally open, it provides no basis upon which formally to favor either prior restraints or subsequent sanctions as a form of speech regulation.

Viewed in another light, the above passage could be interpreted as asserting that systems of administrative review and licensing in general will be designed to screen more speech than will laws in the form of subsequent sanctions. Without supporting evidence, however, this assertion is little more than subjective conjecture. Why should systems of administrative preclearance be designed to screen more speech than currently is screened by subsequent sanctions? Would it be practically possible to design a system of administrative preclearance that effectively could screen more speech than currently is screened by subsequent sanctions?

In answering these questions it is important to remember that there currently exist laws in the form of subsequent sanctions, such as defamation and privacy torts, that make all speech subject to possible legal action and review. All speech is potentially subject to civil action based on defamation, false light invasion of privacy, public disclosure of private facts and appropriation.⁶⁵ Not all speech will satisfy the requisite elements of these torts and thus generate legal liability for the speaker, but all speech will be "screened" in the sense that it has the potential to generate legal liability for the speaker should the requisite elements be present. It is difficult to imagine a workable system of administrative preclearance that could possibly require official licensing of a similarly broad spectrum of speech. This suggests that the conjecture upon which the above argument is based is not only questionable, but very likely false.

Another important aspect of the larger analysis worth noting again in this context is the issue of constitutional relevance. Even if it could be shown that systems of administrative review are likely to be designed to screen more speech than will laws utilizing subsequent sanctions, this fact would be relevant for first amendment purposes only if it could also be shown that such systems are, as a result, likely to screen more constitutionally protected speech.

In considering this issue, one could argue plausibly that systems of administrative preclearance, irrespective of their scope, are much less likely to impose legal burdens on constitutionally protected speech than are laws in the form of subsequent sanctions. This argument is based on the recognition that laws in the form of subsequent sanctions that provide for the possibility of civil liability as a result of speech, such as defamation and privacy torts, allocate the power to initiate legal proceedings to the personally aggrieved subjects of the targeted speech. These are the very persons most likely to become aware of the speech in question and who are the most emotionally affected. Thus this group will be highly motivated to seek the imposition of all possible legal sanctions against the speaker. As between the aggrieved subject of the speech and a relatively impersonal government employee, it is not at all clear that more speech would be screened, in the aggregate, by a group of the latter than by a society full of the

65. See W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* §§ 111-18, at 771-869 (5th ed. 1984).

former. Nor is it clear that more constitutional mistakes, such as the legal prosecution of speech eventually found to be constitutionally protected, would be made by the latter than by the former. In fact, intuition suggests just the opposite.

In summary, the argument that systems of administrative review and licensing should be constitutionally disfavored because they are capable of subjecting a wider spectrum of speech to official scrutiny should be rejected. The argument ultimately rests upon an assertion that is either trivial in nature or likely false. Moreover, even if true, the argument carries little constitutional significance unless it also can be established that systems of administrative review and licensing are more likely than other laws to disfavor constitutionally protected speech. As the preceding argument has shown, however, there are reasons to believe that just the opposite is the case.

2. *Ease of Suppression*

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 restraints, he can reach the result by a simple stroke of the pen. . . . For these and similar reasons, a decision to suppress in advance is usually more readily reached, on the same facts, than a decision to punish after the event.⁶⁶

The thrust of this argument is that under a system of administrative preclearance, regulation of speech can be accomplished at far less cost to the government than it can under laws using subsequent sanctions. Much like the argument considered under the preceding section on *Breadth of Coverage*, the passage quoted above implicitly adopts as its analytical model the worst possible, and least likely, version of a system of administrative preclearance, asserting as it does that suppression of speech can be accomplished by a government official operating in a system of administrative preclearance “by a simple stroke of the pen.”⁶⁷

For this argument to provide serious support to the prior restraint doctrine, which subjects all instances of administrative preclearance to exceptionally strict judicial scrutiny, it should be necessary to establish that nearly all practicable systems of administrative preclearance allow effective suppression of speech at significantly less cost to the government than prosecutions under laws using subsequent sanctions.

One factor weighing heavily against successfully establishing such a proposition is that systems of administrative preclearance regulating activities other than speech require formal procedures for information gathering and adjudication far more sophisticated and burdensome for the government than a solitary

66. Emerson, *supra* note 4, at 657.

67. *Id.*; see also Blasi, *supra* note 4, at 58-59 (“Injunctions are issued and permit applications are denied ‘by a stroke of the pen.’ . . . No special burden of persuasion, and in most cases not even a formal hearing, operates to check the suppressive stroke of the pen by a licensing official.”).

decision by an autonomous executive official. For example, the licensing and oversight of nuclear facilities,⁶⁸ the testing and approval of new drugs,⁶⁹ the issuance of patents,⁷⁰ and even the procurement of military supplies and equipment⁷¹ are all areas in which the government's administrative activity must conform to specific guidelines that require adherence to burdensome and often expensive procedures. In fact, though it may be somewhat surprising given the conventional rhetoric surrounding the doctrine of prior restraint, it is also true that speech communicated by means of radio or television has for more than fifty years been subject to a sophisticated and procedurally complex system of administrative review and licensing.⁷²

The import of this is not that systems of administrative review and licensing are appropriate means by which to regulate speech simply because such systems

68. The Atomic Energy Act of 1954, Pub. L. No. 703, § 1, 68 Stat. 919, 921 (1954) (codified as amended at 42 U.S.C.A. §§ 2011-2296 (West 1988)), makes it unlawful for any person within the United States to produce, possess, or use any nuclear power plant except under and in accordance with a license issued by the Nuclear Regulatory Commission. The Act requires the Nuclear Regulatory Commission to engage in a complicated and potentially contested hearing procedure in connection with the issuance or renewal of any such license. *Id.* § 2239(a)(1); 10 C.F.R. §§ 2.714-2.760 (1989).

69. Since 1938, federal law has required a detailed premarket review and approval by the Food and Drug Administration of all new drugs before they are allowed to reach the market. Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, ch. 675, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301-392 (1982)) (especially sections 505 (d) and (e) of the Act, 21 U.S.C. §§ 355 (d), (e) (1982)). According to an established text on the subject, "The [new drug licensing] process leads to more extensive agency involvement in the decisionmaking of private manufacturers than any other provision of the Act. . . . Among all of FDA's diverse programs, its responsibility for licensing new drugs may be the single most important." R. MERRILL & P. HUNT, *FOOD AND DRUG LAW: CASES AND MATERIALS* 369 (1980). See Peskoe, *The New Drug Approval Process—Changes and Impacts*, 41 *FOOD DRUG COSM. L.J.* 195 (1986); Note, *Drug Efficacy and the 1962 Drug Amendments*, 60 *GEO. L.J.* 185 (1971).

70. The Commissioner of Patents establishes regulations for the Patent Office, including the publication of "Rules of Practice in Patent Cases," which contains approximately 450 numbered paragraphs establishing required procedures for the application, review, and issuance of patents. 35 U.S.C.A. §§ 1-14, 21-26, 31-33, 41-42, 111-122, 131-135, 141-146, 151-154, 251-256 (West 1984).

71. The primary statute governing the procurement of military equipment and supplies is the Armed Services Procurement Act of 1947, Pub. L. No. 80-413, 62 Stat. 21 (codified as amended in scattered sections of 10 U.S.C.). Two other important statutes regulating government activity in this area are the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended in various sections of 5, 10, 31, 40, and 41 U.S.C.) and the Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, 99 Stat. 583 (1985) (codified as amended in various sections of 10, 18, 31, 41, and 50 U.S.C.). For a general overview of the subject, see Mayer, *Military Procurement: Basic Principles and Recent Developments*, 21 *GEO. WASH. J. INT'L L. & ECON.* 165 (1987).

The procurement of military supplies and equipment is an especially complicated subset of the generally highly regulated area of government contracting. The relevant regulations, known collectively as the Federal Acquisition Regulations System, appear in 48 C.F.R. NATIONAL ARCHIVES & RECORDS ADMIN. & OFFICE OF THE FEDERAL REGISTER, *FEDERAL ACQUISITION REGULATIONS SYSTEM* (1988). This regulatory system includes an opportunity for frustrated contractors to file bid protests. The protest claims are investigated and adjudicated by the Government Accounting Office. 4 C.F.R. §§ 21.0-21.12 (1988). See Tieder & Tracy, *Forms and Remedies for Disappointed Bidders on Federal Government Contracts*, 10 *PUB. CONT. L.J.* 92 (1978); Weitzel, *GAO Bid Protest Procedures Under the Competition in Contracting Act: Constitutional Implications After Buckley and Chadha*, 34 *CATH. U.L. REV.* 485 (1985).

72. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C.A. §§ 151-610 (West 1988)); cf. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (the Communications Act of 1934 grants to the FCC broad discretion to regulate broadcasters in the public interest); see M. FRANKLIN, *CASES AND MATERIALS ON MASS MEDIA LAW* 858-907 (3d ed. 1987).

currently exist. Rather, it is that legislatures have demonstrated their capacity to design systems of administrative preclearance and licensing that require of government officials far more than a single stroke of the pen to prohibit or approve proposed behavior. Moreover, a well-developed body of law regarding judicial review of administrative action is currently in place.⁷³

Further, and often underplayed in analyses of the prior restraint doctrine, is the fact that constitutional law doctrines exist that are independent of the prior restraint doctrine and that place significant limits on the design, scope, and operation of systems of administrative preclearance. Most notable in this regard are the doctrines of overbreadth and vagueness.⁷⁴

Given this current state of affairs, it does not seem persuasive to suggest that systems of administrative preclearance involving speech somehow systematically will fall outside of this existing structure and will be designed to require only a minimum of government effort to effect suppression.⁷⁵ In other words, there is no reason to believe that prior restraint in the form of administrative preclearance will permit regulation of speech at an unusually low cost to the government.

An even more serious problem for the ease of suppression argument is that while the creation and maintenance of such systems frequently involves substantial government resources, subsequent sanctions are by comparison a tremendous bargain. This is because existing laws in the form of subsequent sanctions provide for civil liability in response to pure speech. Such laws, including most notably the defamation cause of action, generate powerful deterrents to speech without expending any government resources at all, save for the dispute resolution resources of the judiciary. Consequently, one can say accurately that there are laws in the form of subsequent sanctions, not just imagined but currently in force, that routinely lead to the prosecution of pure speech at virtually no marginal cost to the government. In this environment, it is not possible to support a

73. This well-developed body of law includes statutes, regulations, judicial opinions and agency decisions generally gathered under the rubric of Administrative Law, anchored by the Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (repealed and reenacted by Pub. L. No. 89-554 §§ 551-59, 701-06, 80 Stat. 378, 381-88, 392-93 (1966) (codified as amended at 5 U.S.C.A. §§ 551-59, 701-06 (West 1988)). Sections 701 through 706 of the Administrative Procedure Act deal with the judicial review of administrative agency action.

74. A statute is unconstitutionally overbroad if it sweeps within its coverage protected speech as well as conduct that constitutionally can be prohibited. See *Lewis v. City of New Orleans*, 415 U.S. 130, 131-32 (1974); R. ROTUNDA, *supra* note 38, § 20.8, at 24-33; Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 852-58 (1970). A statute is unconstitutionally vague if it fails to communicate to a person of average intelligence the legally required or prohibited conduct. See *Winters v. New York*, 333 U.S. 507, 509-10 (1948); R. ROTUNDA, *supra* note 38, § 20.9, at 34-37; Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

75. One possible response to this observation is to accept that the likelihood is not great that plausible systems of administrative preclearance of speech will differ markedly from existing systems of administrative preclearance that focus on nonspeech behavior and to argue instead that it is the special constitutional protection afforded speech that warrants blanket disfavor of such systems when they are applied to primarily expressive activities. While there are arguments asserting the primacy of constitutional protection of speech over constitutional protection of other activities, their evaluation does not fall within the scope of this article. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-9 (1970); Blasi, *supra* note 4, at 78-80; Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Schauer, *Must Speech Be Special?*, 78 NW. U.L. REV. 1284 (1983).

doctrine that views such laws as relatively benign and that subjects all systems of administrative preclearance to especially strict judicial scrutiny on the basis that all, or even the majority of, such systems present the government with the opportunity to regulate speech at significantly less cost than do subsequent sanctions.⁷⁶

Finally, it should be noted again that first amendment concerns regarding the relative ease of suppression of one scheme of regulation over another are only constitutionally relevant if it can be established that the more efficient schemes of regulation consistently tend to suppress speech that is constitutionally protected. In the absence of such a tendency, greater efficiency generally should be regarded as an attractive attribute of a given system of legal regulation.

Taking this line of reasoning one step further, one might argue that claims of greater efficiency with respect to systems of administrative preclearance may be irrelevant in any case. To the extent it can be shown that such laws consistently suppress constitutionally protected speech, their constitutional status under the first amendment more properly should be analyzed and determined under the established doctrine of overbreadth.⁷⁷ In this context, the question of whether such laws are or are not prior restraints is irrelevant. The attempt to characterize laws as prior restraints based on the likelihood of such laws being applied to constitutionally protected behavior results in little more than the recharacterization of the doctrine of overbreadth as the doctrine of prior restraint.⁷⁸

3. *Propensity to Suppress*

Most important, administrative preclearance requires a bureaucracy of censorship. Persons who choose to fill this role may well have psychological tendencies to overstate the need for suppression. Whether or not this is so, there are powerful institutional pressures to justify one's job, and ultimately one's own importance, by exaggerating

76. In this context it also could be argued that a legal regime that prohibits the regulation of speech by means of judicial injunctions and systems of administrative preclearance while providing for the possibility of civil liability for speech is highly regressive. That is to say that such a regime strongly favors the expressive interests of the wealthy, including corporations, because this subset of society enjoys a marked relative advantage both in pursuing and defending against civil liability based on speech. In effect, this argument suggests that a legal regime that systematically refuses to allow the collectivization of speech regulation through the government provides a powerful practical speech advantage to those who can most easily access and effectively use the levers of the civil liability system.

77. See *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Kunz v. New York*, 340 U.S. 290 (1951); 3 R. ROTUNDA, *supra* note 38, § 20.8, at 24-33; L. TRIBE, *supra* note 12, §§ 12-27 to -28, at 1022-29; Redish, *The Warren Court, The Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U.L. REV. 1031 (1983); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

78. See Jeffries, *supra* note 4, at 425 (The overbreadth doctrine provides a "more informative frame of reference" for examination of preclearance requirements than does the doctrine of prior restraint; "A rule of special hostility to administrative preclearance is just another way of saying that determination under the overbreadth doctrine should take account not only of the substance of the law but also of the structure of its administration.").

the evils which suppression seeks to avoid.⁷⁹

This third line of argument is particularly interesting because its message has been echoed by many commentators. For example, in addition to the passage by Professor John Jeffries quoted above, Professor Thomas Emerson has written:

Perhaps the most significant feature of systems of prior restraint is that they contain within themselves forces which drive irresistibly toward unintelligent, overzealous, and usually absurd administration. One factor is the ability and personality of the licensor or censor. . . . No adequate study seems to have been made of the psychology of licensors, censors, security officials, and their kind, but common experience is sufficient to show that their attitudes, drives, emotions, and impulses all tend to carry them to excesses.⁸⁰

More recently, Professor Martin Redish wrote, "Nonjudicial administrative regulators of expression exist for the sole purpose of regulating; this is their *raison d'être*. They simultaneously perform the functions of prosecutor and adjudicator and, if only subconsciously, will likely feel the obligation to justify their existence by finding some expression constitutionally subject to regulation."⁸¹ The Supreme Court also has echoed this theme: "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."⁸²

Given the frequency with which this argument is advanced, it is surprising to note in these presentations a complete absence of supporting empirical evidence. After all, without empirical support, or at least the development of a more sophisticated *a priori* argument, the basic thrust of this argument amounts to little more than an expression of distrust of governmental administrators as decisionmakers, or, as the argument is sometimes phrased, a strong preference for judicial decisionmakers.⁸³ Preference becomes prejudice, however, in the absence of supporting evidence. Moreover, given that the persons advancing this argument are themselves judges and law professors, the expression of such a strong preference for legally trained decisionmakers can be seen as somewhat parochial.

As Professor Howard Hunter has observed, a formal preference for judicial decisionmakers in matters of speech regulation is ironic given the actual history

79. Jeffries, *supra* note 4, at 422.

80. Emerson, *supra* note 4, at 658.

81. Redish, *supra* note 4, at 76-77.

82. *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965); see also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560-61 (1975) ("An administrative board assigned to screening stage productions—and keeping off stage anything not deemed culturally uplifting or healthful—may well be less responsive than a court, an independent branch of government, to constitutionally protected interests in free expression." (footnote omitted)); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) (approvingly quoting the above passage from *Freedman*); *Blasi*, *supra* note 4, at 33 ("Concern about the biases of administrative censors has always been a prominent part of the case against licensing speech.").

83. See Mayton, *supra* note 4, at 253; Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 523 (1970); Redish, *supra* note 4, at 77.

of judicial suppression of speech, especially in those instances in which judges perceive free speech rights as being in conflict with the operation of a fair trial.⁸⁴ This is, of course, a setting in which the judges' own bureaucratic interests are most clearly at stake. Professor Hunter writes:

[T]he sixth amendment "fair trial" cases have produced a flurry of "gag orders," courtroom closures, and other limitations on both access to trials and dissemination of information about them.

. . . . Analysis of recent actions in this area demonstrates that (1) the denial of access to information, to a place, or to an event such as a trial is an extraordinarily effective method of restricting the dissemination of information; and (2) except as limited by the Supreme Court, trial judges have been almost frenetic in their rush to issue orders denying access.⁸⁵

Instead of intuition suggesting that judges should be the preferred decisionmakers in matters of speech regulation, it may well be that administrative officials, operating under a system of administrative preclearance and possessing a desire to promote and maintain broad popular support for the particular bureaucracy in which they work, will be relatively more risk-averse in their decisionmaking. Thus administrative officials may be relatively less prone to suppression of speech than judicial officers, who, after all, enjoy a much greater degree of formal insulation from popular opinion and from the Congress. It should also be noted in this context that the decision with respect to the existence and size of a speaker's liability under many laws in the form of subsequent sanctions, such as defamation laws, frequently rests with a jury. There is little reason to believe that juries will be more tolerant, and some reason to believe that they will be far less tolerant, of unpopular speech and unpopular speakers than will officials operating within a system of administrative preclearance.⁸⁶ In any case, in the absence of empirical support in one direction or the other, intuitive preferences for judicial decisionmakers, no matter how frequently sounded,

84. Hunter, *supra* note 4, at 287-92; see, e.g., *In re Dow Jones & Co.*, 842 F.2d 603 (2d Cir.), *cert. denied*, 109 S. Ct. 377 (1988); *State ex rel. Post-Tribune Publishing Co. v. Porter Superior Court*, 274 Ind. 408, 412 N.E.2d 748 (1980); *Federated Publications v. Swedberg*, 96 Wash. 2d 13, 633 P.2d 74 (1981), *cert. denied*, 456 U.S. 984 (1982).

The opinion in *United States v. Dickinson*, 465 F.2d 596 (5th Cir. 1972), exemplifies this sort of judicial behavior.

[*United States v. Dickinson*] . . . gave impetus to the issuing of protective or restraining orders—what the press prefers to call "gag" orders—in criminal cases. Court proceedings and court records were closed. Names of jurors and witnesses, criminal records, and arrest records were sealed. Prior restraints were imposed by forbidding publication of information about exhibits, pleas, jury verdicts, and editorial comment on guilt or innocence.

D. GILLMOR & J. BARRON, *MASS COMMUNICATION LAW CASES AND COMMENT* 502 (4th ed. 1984).

85. Hunter, *supra* note 4, at 288-89. Having set forth these observations, Professor Hunter concludes by stating, "Ultimately, then, there is no good reason to prefer judges as a class over administrative licensors as a class, provided that the charge to the two classes is similar." *Id.* at 292.

Another lesson that follows from this analysis is that the first amendment should be interpreted to prefer fully neutral decisionmakers in those cases in which speech interests are at stake. Under such an interpretation, judges presiding over a case should not rule on motions made by the parties that potentially pit free speech interests against the possibility of a fair and orderly trial.

86. See *supra* note 54.

constitute an insufficient foundation upon which to construct basic constitutional doctrine.

This third line of argument presents still another problem. Imagine a regular system of administrative preclearance and licensing that is clearly constitutional but for its possible characterization as a prior restraint. A government official operating within such a system has, in effect, the power to create a legal climate in which a sanction may be imposed legitimately on a speaker if the disapproved or unlicensed speech is in fact expressed. This is, in essence, no different from the power that now resides in and is exercised by all state legislatures, as well as Congress, when enacting legislation in the form of subsequent sanctions. In either case, nonjudicial decisionmakers are primarily responsible both for identifying the disfavored speech and establishing the range of appropriate legal sanctions. Assuming the existence of no other constitutional defect in the regulatory scheme, there seems to be no special reason to object to the legislative branch delegating this power, under proper guidelines, to the executive branch. Legislatures, after all, have delegated such authority for decades. Precisely this situation exists at present, and has existed for more than fifty years without successful constitutional challenge, in the regulation of radio and television broadcasts.⁸⁷ Given the continued vitality of this regulatory structure, it makes little sense to assert that significant regulatory discretion in the hands of administrative officials could possibly serve as the basis for a definition of presumptively unconstitutional prior restraints on speech.

This basic characterization of the work of officials operating within a system of administrative preclearance also can serve to refute attempts to distinguish prior restraints from subsequent sanctions on the basis of what has been called "adjudication in the abstract."⁸⁸ In his 1981 article on the subject of prior restraint, Professor Vincent Blasi writes:

One phenomenon common to licensing systems and injunctions governed by the collateral bar rule is what might be termed adjudication in the abstract. Under both systems, the final authoritative judicial decision regarding the legal status of a disputed communication takes place before the moment of initial dissemination. That typically is not true under the subsequent punishment regimes. When adjudication precedes initial dissemination, the communication cannot be judged by its actual consequences or public reception. The adjudicative assessment of speech value versus social harm must be made in the abstract, based on speculation or generalizations embodied in presumptions.⁸⁹

If by the phrase "the final authoritative judicial decision regarding the legal status of a disputed communication," Professor Blasi is referring to the point at which someone formally determines, as a fact-finding matter, that a particular hypothetical instance of speech will, if expressed, violate the prohibitions of a preexisting statute, then adjudication in the abstract and its corresponding

87. See *supra* note 72 and accompanying text.

88. Blasi, *supra* note 4, at 49.

89. *Id.*

problems⁹⁰ will arise in the case of judicial injunctions and systems of administrative preclearance to a greater degree than in the case of laws in the form of subsequent sanctions only to the extent that such laws define the targeted speech in terms of the harm that the speech inflicts. An example of such a law is defamation, which defines the kind of speech giving rise to legal liability on the basis of whether the speech can be shown to have injured the reputation of another.⁹¹ When applying such a law in a given case, judges and juries have the ability to work with established historical facts, including after-the-fact assessments of the actual harm caused by the targeted speech, in determining whether or not to impose legal liability.

Not all laws using subsequent sanctions take this approach, however; some define the targeted speech without any reference to the actual harm caused by the speech. A common example of such laws are those sometimes referred to as the "Son of Sam" statutes.⁹² These laws, existing in at least thirty-six states and in federal law,⁹³ generally require a person convicted of a crime to forfeit the proceeds earned from the sale of rights to a reenactment or depiction of that crime, regardless of whether the sale of such rights can be shown to have generated injury or harm.⁹⁴ When dealing with such a statute, or with any law that

90. See Blasi, *supra* note 4, at 49-54.

91. See W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771-78 (5th ed. 1984); see also RESTATEMENT (SECOND) OF TORTS § 559 (1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").

92. These statutes are so named because the first such law was enacted in New York in response to the activities of David Berkowitz, the notorious "Son of Sam" killer. *Barrett v. Wojtowicz*, 66 A.D.2d 604, 608, 414 N.Y.S.2d 350, 353 (N.Y. App. Div. 1979); N.Y. Times, Aug. 13, 1977, at A20, col. 3.

93. Victims of Crime Act of 1984, 18 U.S.C.A. §§ 3681-3682 (West Supp. 1989); ALA. CODE §§ 41-9-80 to 41-9-84 (1982); ALASKA STAT. § 12.61.020 (1984); ARIZ. REV. STAT. ANN. §§ 13-4201 to 13-4202 (Supp. 1987); ARK. STAT. ANN. § 16-90-308 (1987); CAL. CIV. CODE § 2225 (West Supp. 1989); COLO. REV. STAT. §§ 24-4.1-201 to 24-4.1-207 (Supp. 1988); CONN. GEN. STAT. ANN. § 54-218 (West 1985); DEL. CODE ANN. tit. 11, §§ 9101-9106 (1987); FLA. STAT. ANN. § 944.512 (West Supp. 1989); GA. CODE ANN. §§ 17-14-30 to 17-14-32 (1982 & Supp. 1988); IDAHO CODE § 19-5301 (1987); ILL. ANN. STAT. ch. 70, §§ 401-414 (Smith-Hurd 1987); IND. CODE ANN. §§ 16-7-3.7-1 to 16-7-3.7-6 (Burns 1983 & Supp. 1988); IOWA CODE ANN. § 910.15 (West Supp. 1989); KAN. STAT. ANN. §§ 74-7319 to 74-7321 (Supp. 1988); KY. REV. STAT. ANN. § 346.165 (Michie/Bobbs-Merrill 1986); LA. REV. STAT. ANN. §§ 46:1831-1839 (West 1982); MD. ANN. CODE art. 27, § 764 (1987); MASS. GEN. L. ch. 258A, § 8 (1980 & Supp. 1988); MINN. STAT. ANN. § 611A.68 (West 1987); MO. ANN. STAT. § 595.045 (11) (Vernon 1987); MONT. CODE ANN. § 53-9-104 (1)(d) (1987); NEB. REV. STAT. §§ 81-1836 to 81-1840 (1981 & Supp. 1986); NEV. REV. STAT. ANN. § 217.265 (Michie 1986); N.J. STAT. ANN. §§ 52:4B-26 to 52:4B-33 (West 1986 & Supp. 1987); N.M. STAT. ANN. § 31-22-22 (Supp. 1986); N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1987); OHIO REV. CODE ANN. §§ 2969.01 to 2969.06 (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 17 (West Supp. 1987); 71 PA. CONS. STAT. ANN. § 180-7.18 (Purdon Supp. 1987); R.I. GEN. LAWS §§ 12-25.1-1 to 12-25.1-12 (Supp. 1986); S.C. CODE ANN. §§ 15-59-40 to 15-59-80 (Law. Co-op. Supp. 1986); S.D. CODIFIED LAWS ANN. §§ 23A-28A-1 to 23A-28A-14 (Supp. 1987); TENN. CODE ANN. § 29-13-201 to 29-13-208 (1980); TEX. REV. CIV. STAT. ANN. art. 8309-1, §§ 16 to 18 (Vernon Supp. 1987); UTAH CODE ANN. § 78-11-12.5 (1987); WASH. REV. CODE ANN. §§ 7.68.200 to 7.68.280 (Supp. 1987); WIS. STAT. ANN. § 949.165 (West Supp. 1987); WYO. STAT. § 1-40-112 (Supp. 1987).

94. For example, N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1987) provides as follows:

Distribution of moneys received as a result of the commission of crime.

1. Every person, firm, corporation, partnership, association or other legal entity con-

does not define the targeted speech by reference to the harm generated by that speech, courts do not have the benefit of after-the-fact assessments of the actual harm caused by the targeted speech in determining whether to impose legal liability. This is true not because such assessments are inherently unavailable but because such assessments are, pursuant to the terms of the law, legally irrelevant to the issue of liability.

From a more general perspective, it is clear that to the extent laws utilizing subsequent sanctions define the targeted speech without reference to the harm actually inflicted by the speech, legislatures enact such laws through a process of prior adjudication that is as fully abstract and "based upon speculation or generalization embodied in presumptions" as the kind of prospective judgments made by judges issuing injunctions and executive officials operating within a system of administrative preclearance. Given the continued existence of just such laws,⁹⁵ it is not descriptively accurate to distinguish between prior restraints and subsequent sanctions on the basis of the existence of adjudication in the abstract.⁹⁶

One final point. Imagine again a regular system of administrative preclearance and licensing of certain speech that is unquestionably constitutional but for its possible characterization as a prior restraint. It might well be that an administrative official operating within such a system will possess the practical power, if not the formal authority, to initiate legal proceedings once it has been shown that the unapproved or unlicensed speech has been expressed. The discretion exercised by an administrative official in such a situation is no different from the discretion now exercised by a prosecutor, who is also a government official, when deciding whether to initiate legal proceedings with respect to a possible violation of a law in the form of a subsequent sanction. The administrative official's discretion also is not remarkably different from that exercised by a private citizen deciding whether to initiate legal proceedings with respect to a perceived cause of action under civil law. Because none of the three decisionmakers in these typical situations is a judicial officer, it makes little sense to adopt or maintain an interpretation of the prior restraint doctrine, assertedly based on the comparative constitutional undesirability of nonjudicial decisionmakers, that characterizes the first situation as a prior restraint, thus subjecting it to especially strict scrutiny, while at the same time characterizing the

tracting with any person or the representative or assignee of any person, accused of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, radio or television presentation, live entertainment of any kind, or from the expression of such person's thoughts, feelings, opinions or emotions regarding such crime, shall pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so convicted or his representatives. The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim of crimes committed by such person, provided that such person is eventually convicted of the crime and provided further that such victim, within five years of the date of the crime, brings a civil action in a court of competent jurisdiction and recovers a money judgment against such person or his representatives.

95. No court yet has found a "Son of Sam" law to violate the first amendment.

96. This is not to say, however, that the existence of adjudication in the abstract should not serve as an appropriate independent basis upon which constitutionally to disfavor laws that exhibit that trait, regardless of the law's status with respect to the prior restraint doctrine.

latter two situations as examples of relatively nonproblematic subsequent sanctions.

In fact, all of the problems identified by the proponents of this third line of argument regarding officials operating within systems of administrative preclearance would apply equally to settings in which administrative officials, such as government prosecutors and other officials, participate in decisions regarding the initiation of formal legal proceedings against suspected violators of laws that exclusively utilize subsequent sanctions. Due to the obvious similarity, at least in this context, between administrative officials exercising discretion within a system of administrative preclearance and administrative officials exercising discretion with respect to the prosecution of suspected violators of laws using subsequent sanctions, the perceived deficiencies of administrative officials as decisionmakers, even if accepted as true, hardly serve as a rational basis to distinguish between prior restraints and subsequent sanctions.

V. DEFINING PRIOR RESTRAINTS BY REFERENCE TO THEIR ASSERTED ATTRIBUTES

Sections II and III of this Article demonstrate the fundamental problem with the current doctrine of prior restraint—the lack of logical coherence in the substantive distinction upon which the doctrine is based, the distinction between prior restraints and subsequent sanctions. Apparently reluctant to retire the doctrine, however, judges and scholars have attempted to resolve this fundamental problem by defining prior restraints as those laws that possess one or more disfavored attributes said to be characteristic of laws traditionally deemed prior restraints.⁹⁷ Section IV of this Article demonstrates that these disfavored attributes are not more strongly or more consistently associated with traditional prior restraints than they are with laws in the form of subsequent sanctions.

If the argument presented in section IV is accepted, then the definitional strategy that has become so much a part of the common wisdom surrounding the doctrine of prior restraint is exposed as being essentially circular in nature. The strategy involves replacing a doctrine that purportedly disfavors prior restraints with a doctrine that instead disfavors laws possessing one or more particular attributes, regardless of whether the identified attributes are uniquely, or even predominantly, characteristic of traditional prior restraints. By using the presence of certain undesirable characteristics as criteria for defining the disfavored category of prior restraint, the doctrine becomes internally self-justifying and therefore, from a legal point of view, tautological. So long as the members of the disfavored category of prior restraints are chosen because they possess certain undesirable characteristics, then the prior restraint doctrine itself, which mandates that all members of the prior restraint category be subjected to strict judicial scrutiny, always will be facially rational. The problem is that the doctrine, when developed in this way, adds nothing substantive to legal analysis. Its application to a given set of facts does not resolve the issue of a particular law's

97. See *supra* text accompanying notes 48-50 and 64-66.

constitutional status in one way or the other. The prior restraint doctrine does not serve to uncover or illuminate constitutionally relevant factors that may be present in a challenged law or regulation. Instead, all of the serious substantive analysis takes place when deciding whether to apply the doctrine at all—in deciding whether a particular law is or is not a prior restraint.

The difference between a genuinely substantive doctrine of prior restraint and the current version of the doctrine is the difference between having substantive reasons for disfavoring members of an independently definable category and determining the members of a category exclusively by reference to the substantive reasons for disfavoring them. This latter approach is meaningful only to the extent that a high correlation exists between the population of the suspect category as determined by its overt definition or label and the population of the suspect category as determined by the presence in its members of the factors cited for disfavoring the category.

As a simple example of this point, suppose that there existed in a hypothetical pond fish of many colors and a variety of flavors. Over time, it is determined that the unappealing taste of yellow-colored fish make them barely edible. Thereafter, it becomes a standard rule among fishermen in the relevant community not to keep for human consumption any yellow fish caught. This is an example of the first categorizing strategy referred to above. The label given to the disfavored category, in this case "yellow," is independently determinable and it correlates highly with an important characteristic shared by the members of the category as so defined, in this case their unappetizing taste.

Now suppose that the initial unhappy experience of consuming yellow fish led instead to a general rule among fishermen that no brightly colored fish should be caught for human consumption. Over time, the fishermen become more sophisticated in their approach and they recognize that many brightly colored fish are in fact delicious while a number of dark-colored fish are not good to eat. Nonetheless, the term "bright" continues to be used to connote unappetizing fish, and the general rule among fishermen remains that "bright" fish should not be caught for human consumption, even though the generally accepted definition of that word among fishermen includes some fish that are in fact brightly colored and some fish that are unquestionably dark-colored.

This is an example of the second categorizing strategy referred to above. To preserve a generally accepted categorical rule, in this case the general rule that brightly colored fish should not be caught for human consumption, the facial category label is maintained, but the members of the category increasingly are defined not by reference to the label. Instead they are defined by reference to whether they deserve the result that the categorical rule dictates. In this case, unappetizing fish should not be kept for human consumption, and that result effectively is reached by using the categorical rule so long as only unappetizing fish are described as being "bright," regardless of their actual coloring.

In this kind of categorizing scheme, the factors used by the fishermen to determine which fish are and which are not appetizing are not revealed by looking only to the generally accepted categorical rule. The categorical rule uses the

term "bright" as little more than a linguistic surrogate for the substantive factors, or patterns of behavior, that are in fact employed to determine the attractiveness of the fish for human consumption.

This kind of categorical rule may be workable when employed within a relatively small and stable community of users. Such users may be able to determine to a reasonable degree of certainty the current definition of the category label by frequent exposure to the actual operation of the rule. Even in a large and diverse community, the use of this kind of categorical scheme may be effective, and perhaps necessary, in those cases in which it is not practically possible to explicitly articulate the bases upon which the relevant categorical decisions are made. For example, it is difficult to articulate, at least in any generic way, the specific factors that a jury uses to determine whether a defendant in a tort suit was at fault in causing harm to the plaintiff. For the purpose of formulating a general categorical rule, we often use the term "negligent." Thus we say that the tort defendant will be made to pay the plaintiff if the jury finds the defendant negligent. Largely because "negligent" is an unusual word that possesses little or no meaning in our language outside of the context of legal fault and responsibility, its use as a part of a general categorical rule regarding tort liability strongly indicates to an untutored member of the community that the term may carry with it in practice an unfamiliar or nonobvious meaning.

From this perspective, the worst of all possible categorical rules to be employed in a large and pluralistic community would be one that uses as its category label a term possessing some independent meaning in the language and at the same time interprets the term for purposes of the rule in a nonobvious or counterintuitive manner. The use of such a categorical rule can be deeply destructive, encouraging the uninitiated to incorrectly apply the result that the rule dictates. Consider, for example, the novice fisherman or fish consumer who has learned the categorical rule but who is unaware of the special meaning that the term "bright" has acquired over time. He will inevitably throw back a lot of good-tasting brightly colored fish and keep many unappetizing dark ones.⁹⁸

98. A less hypothetical example of a categorical rule that uses its category label in a generally unfamiliar way is the ruling of the Supreme Court in the case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), prohibiting a public official from recovering in a defamation action for statements made about her official conduct unless the public official proves that the statements were made with actual malice. *Id.* at 279. Actual malice is defined for the purposes of this rule as knowledge by the defendant that the statements were false or reckless disregard on the part of the defendant of whether the statements were false or not. *Id.* at 279-80. The inevitable confusion that has resulted from such a counterintuitive use of this phrase has been well noted. *See, e.g.,* *Herbert v. Lando*, 441 U.S. 153, 199 (1979) (Stewart, J., dissenting) ("Although I joined the Court's opinion in *New York Times*, I have come greatly to regret the use in that opinion of the phrase 'actual malice.' For the fact of the matter is that 'malice' as used in the *New York Times* opinion simply does not mean malice as that word is commonly understood."); *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 151, 516 A.2d 220, 233 (1986) ("The term 'malice' caused enough confusion when it was confined to the common law, but now that it has assumed a constitutional dimension, the confusion is compounded. Understandably, the differing definitions of 'malice' have confounded trial courts."); *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 363 n.1, 568 P.2d 1359, 1361 n.1 (1977) ("The term 'actual malice' is used by the Court to describe knowledge of falsity or reckless disregard of the truth. This is unfortunate and will lead to confusion because it does not mean hate, ill will or intention to harm, which is usually termed 'express malice,' or 'common law malice' and sometimes 'actual malice.' 'Actual malice,' as used by the Supreme Court of the United States, is

In attempting to maintain the viability of the prior restraint doctrine, courts and legal commentators have transformed it into this kind of a rule. The category label "prior restraints" has been retained, but the category has been defined in ways that bear no reasonable relation to the common-sense meaning of the category label. In fact, the category has been defined so that the only common thread between members of the category is that they have been deemed to possess certain characteristics that make them deserving of the result that the rule dictates.⁹⁹ Worse still, the traditional stalwart members of the category of prior restraint, judicial injunctions and systems of administrative preclearance, do not themselves reliably and consistently possess the characteristics now thought to define the category.¹⁰⁰

VI. REDEFINING PRIOR RESTRAINTS: A LITERAL APPROACH TO THE PROBLEM

Given the highly problematic nature of the current version of the prior restraint doctrine, one question that naturally arises is whether it would not be best simply to retire the doctrine. One prominent legal scholar, Professor John Jeffries, has examined the Supreme Court's activity in the area of prior restraints and has reached this conclusion:

In sum, therefore, I suggest that in confronting these and similar questions the conventional doctrine of prior restraint be laid to one side. In my judgment, that doctrine is so far removed from its historic function, so variously invoked and discrepantly applied, and so often defective of sound understanding, that it no longer warrants use as an independent category of First Amendment analysis.¹⁰¹

Although Professor Jeffries' work in this area is largely unassailable, and although the foregoing analysis demonstrates the difficulty involved in developing an operationally meaningful distinction between prior restraints and subsequent sanctions, there remains an appropriate place in first amendment jurisprudence for a doctrine subjecting government actions resulting in a prior restraint on speech to strict constitutional scrutiny. Preserving such a role for the doctrine of prior restraint, however, requires rather radical semantic surgery. It will require that the concept of prior restraint be taken literally.

The key to placing the prior restraint doctrine on sounder conceptual footing is a realignment of the legal definition of "prior restraint" with the common-sense meaning of the phrase. To that end, I propose that both the doctrinal and the operational definitions of "prior restraint" be revised to include all government actions, and only those government actions, that result in the physical

not malice at all."); Note, *Punitive Damages and Libel Law*, 98 HARV. L. REV. 847, 859 & nn.76-77 (1985); Note, *The Triumph of the Press: New Jersey Departs from Federal Trends in Libel Law*, 36 RUTGERS L. REV. 91, 92-94 nn.13 & 20 (1983); Note, *"Actual Malice" and the Standard of Proof in Defamation Cases in California: A Proposal for a Single Constitutional Standard*, 16 SW. U.L. REV. 577, 589-93 (1986).

99. See *supra* notes 25-34 and accompanying text.

100. See *supra* notes 43-96 and accompanying text.

101. Jeffries, *supra* note 4, at 437.

interception and suppression of speech prior to its public expression.¹⁰² "Physical interception and suppression of speech" should mean literally the effective prevention by the government, either through confiscation or by any other physical means, of any speaker's attempt to communicate an idea, thought or opinion to the public at large. The prior restraint doctrine then would operate to characterize all such government action as a presumptively unconstitutional violation of the first amendment.¹⁰³

Excluded from the scope of this proposed definition of prior restraint are schemes of government regulation that do not impose sanctions on a speaker until the offending communication in fact has taken place. Therefore, judicial injunctions prohibiting speech that are not violated until the prohibited communication occurs and systems of administrative preclearance that encourage compliance by the threat of subsequent punishment would not come within the purview of this proposed definition. This does not mean that government activities of this sort would, or should, be viewed as being constitutionally acceptable under the first amendment. It simply means that the resolution of questions regarding the constitutionality of such activities would no longer involve an invocation or application of the prior restraint doctrine.

This proposed revision of the prior restraint doctrine possesses a number of attractive features that the current version lacks. From a doctrinal point of

102. For the sake of simplicity, this Article will sometimes refer to this proposed redefinition of prior restraint as "literal prior restraint" or "literal prior restraints."

103. Two qualifications embedded in this proposed definition should be highlighted. One is that the definition is intended only to cover expression that is not inextricably part of some otherwise problematic physical behavior; the kind of expression sometimes known as "pure" speech. See *supra* note 2. Government actions designed physically to prevent the publication of a newspaper or a book, or to prevent public broadcast of certain information, as contrasted with the government regulation, necessarily "prior," of more physical forms of expression, such as mass demonstrations and other physical symbolic acts, present such fundamentally different sets of practical, political and constitutional problems that the inclusion of both forms of expression under a uniform doctrine of prior restraint is unwise and unworkable. Therefore, the proposed reform of the prior restraint doctrine advanced herein is intended only to provide special constitutional protection for pure speech and would not apply necessarily to the prior restraint of potentially symbolic physical behavior.

The Supreme Court itself, at least implicitly, has recognized a difference in the treatment of pure speech and mixed speech and conduct in the prior restraint context. While the Supreme Court never has found a prior restraint on pure speech to be constitutional, it has on at least two occasions upheld prior restraints on mixed speech and conduct. *Walker v. Birmingham*, 388 U.S. 307 (1967) (upholding temporary injunction enjoining certain individuals from participating in or encouraging street demonstrations without required permit); *United States v. United Mine Workers*, 330 U.S. 258 (1947) (upholding restraining order and preliminary injunction preventing the United Mine Workers from issuing a strike notice to its members). Lower courts have followed its lead. *State v. Chavez*, 123 Ariz. 538, 543, 601 P.2d 301, 306 (1979) (upholding preliminary injunction prohibiting picketing by the United Farm Workers); *Mead School Dist. v. Mead Educ. Ass'n*, 85 Wash. 2d 278, 285, 534 P.2d 561, 567 (1975) (en banc) (upholding temporary injunction prohibiting teachers' strike).

The second qualification worth noting is that the proposed definition is intended to encompass, and thus to protect, only communications by speakers to the public at large. Therefore government actions designed physically to intercept the communication of certain information between two individuals, or between a very limited number of individuals, would not necessarily be covered. This limitation primarily is intended to exclude from the operation of the prior restraint doctrine situations in which the United States Government attempts physically to intercept the communication of sensitive national security information to agents of other governments. It is not intended, however, to exclude those situations in which such information is being communicated to the public at large. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

view, it presents a relatively coherent, generally understandable, and largely predictable definition of a prior restraint on speech. The development of such a definition would enable potential speakers to predict with greater accuracy whether a particular governmental sanction ultimately will be deemed unconstitutional as a prior restraint. Only this kind of predictability in the content and application of first amendment standards creates a meaningful legal sanctuary in which free speech can flourish. Similarly, a more direct and understandable definition of prior restraint will serve as a more powerful and effective guide to legislatures as they enact new, and amend old, laws relating to speech.

In addition, this proposed version of the prior restraint doctrine is more rational from a policy point of view with respect to the critical distinction between prior restraints and subsequent sanctions. Once it is determined that the phrase "prior restraint" should include within its scope only those governmental actions in fact resulting in the physical prevention of speech prior to its public expression, then it is clear that prior restraints, as a class, pose a greater practical deterrent to constitutionally protected speech than do all other laws. This is the case because actual physical restraint is a far more effective form of speech suppression than almost any scheme of threatened legal sanction that is not imposed until after the public expression of the prohibited speech.

Moreover, and most significantly from the perspective of preventing the chilling of constitutionally protected speech, every instance of a literal prior restraint¹⁰⁴ will by definition involve the actual suppression of speech. This is not the case with respect to laws that have been determined to come within the scope of the current doctrine of prior restraint,¹⁰⁵ nor is it the case with respect to laws utilizing subsequent sanctions. Judicial injunctions are sometimes not obeyed.¹⁰⁶ Speakers may on occasion communicate information without first having obtained the required license. In either case, the speech that is targeted by the legal regulation may be well chilled, but it will not necessarily be frozen. Precisely the same analysis applies when the applicable legal regulation is a law using subsequent sanctions.¹⁰⁷

Under the proposed revision of the prior restraint doctrine, however, every instance of a prior restraint will result in the suppression of speech. The important, and necessary, consequence of this fact is that every constitutional mistake made in the implementation of a literal prior restraint will involve the actual suppression of constitutionally protected speech. This is not the case with respect to the current doctrine of prior restraint, nor is it the case with respect to laws utilizing subsequent sanctions. This disparity fully justifies creating a formal legal distinction between literal prior restraints and all other laws and

104. See *supra* note 102 and accompanying text.

105. See *supra* notes 25-34 and accompanying text.

106. The numbers of such instances in the area of speech may well increase since the United States Court of Appeals for the First Circuit's recent decision allowing a newspaper that violated a court order barring the publication of certain trial-related documents to avoid prosecution for criminal contempt on the grounds that the order constituted a "transparently invalid" prior restraint on speech. *In re Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986), *modified on reh'g*, 820 F.2d 1354 (1st Cir. 1987).

107. See *supra* notes 48-59 and accompanying text.

makes sense of the application of especially strict judicial scrutiny to all instances of literal prior restraints. In other words, it is primarily because literal prior restraints on speech significantly increase the practical stakes involved that it becomes possible to argue persuasively that such laws should be separately identified and subjected to strict judicial scrutiny through the operation of an independent constitutional doctrine.

Perhaps most importantly, the adoption of this proposed version of the prior restraint doctrine, due to its greater clarity, would result in stronger constitutional protection against government suppression of speech prior to its public expression. The practical value of this protection, to the extent that it now exists, is severely compromised by the confusion and indeterminacy that characterize the current prior restraint doctrine. It is important that constitutional protection against government activity that involves the physical suppression of speech prior to its public expression be clear and unambiguous because the practical consequence of such activity is that the targeted speech does not enter the public domain. When speech that the government attempts to suppress does not enter the public domain, the opportunity for democratic public oversight of, and reaction to, the speech-suppressive activities of the government is severely restricted, if not completely foreclosed.

A corollary to this argument, advanced by Professor Martin Redish,¹⁰⁸ is that judicial use of the prior restraint doctrine to resolve first amendment issues has in some cases turned the Court's focus away from more fundamental first amendment concerns and thus created an unnecessary chilling effect on constitutionally protected speech. For example, in those cases in which government conduct violates the first amendment even if not found to be a prior restraint on speech, the Court's reliance on the prior restraint doctrine to invalidate the conduct leaves open the possibility that this same speech-suppressive activity might be found constitutional if sufficiently redesigned and recast in the form of a subsequent sanction. Legislatures may respond to this possibility by authorizing similar government conduct in the form of laws using subsequent sanctions. Persons wishing to publish material that is the object of such laws certainly will think twice before relying upon a judicial finding of unconstitutionality.

It is also important in this context to note that adopting the proposed version of the prior restraint doctrine does not mean that judicial injunctions against speech or systems of administrative preclearance should be free of strict scrutiny under a first amendment analysis. It means instead that the specific attributes of individual judicial injunctions and particular systems of administrative preclearance more properly should be understood and analyzed through the perspective of other constitutional doctrines, most notably the doctrine of overbreadth,¹⁰⁹ rather than through the disorienting and ultimately irrational perspective of the prior restraint doctrine.

Further, acceptance of the more literal version of the prior restraint doctrine might well facilitate the development within first amendment jurisprudence

108. See Redish, *supra* note 4, at 54.

109. See Jeffries, *supra* note 4, at 425.

of a doctrine that would characterize as presumptively unconstitutional judicial injunctions and systems of administrative preclearance of speech that can be shown to actually possess one or more of the particular operational characteristics and undesirable attributes now thought to define the entire category of prior restraints. In other words, adoption of a more literal version of the prior restraint doctrine could be the catalyst for the development of a more direct and relevant first amendment jurisprudence dealing with judicial injunctions and systems of administrative preclearance.

A doctrine dealing directly with systems of administrative preclearance, for example, could be based upon the potential for such systems: (1) to permit the denial of a permit or a license without sufficient investigatory procedures or adequate judicial review; (2) to place an unacceptable burden of initiative on potential speakers; or (3) to delay or disrupt the timing of speech. Because these potentially speech-suppressive problems are not necessarily associated with government efforts to physically suppress speech prior to its public expression, it is appropriate, and conducive to much greater clarity in first amendment analysis, that such a doctrine develop independently from the doctrine of prior restraint.

VII. CONCLUSION

The doctrine of prior restraint long has been a source of confusion and controversy. This confusion has resulted both from inconsistent application of the doctrine by the courts and from a logical incoherence in the current legal distinction between prior restraints and subsequent sanctions. Courts and legal scholars have sought to rescue the doctrine from this incoherence by defining prior restraints as a set of speech-related laws that are characterized by their possession of certain undesirable attributes. Although these efforts are currently popular and capable of producing widely accepted results in specific cases, they are destined to fail because even the most traditional and paradigmatic prior restraints do not consistently possess these undesirable attributes to any greater degree than laws classified as subsequent sanctions.

This Article proposes that the legal definition of prior restraint be changed to include only those government actions that result in the physical interception and suppression of speech prior to its public expression. Once prior restraints are redefined in this way, it would then be true, as it is not now, that prior restraints would pose a greater practical deterrent to constitutionally protected speech than do all other speech-related laws. This is the case because: (1) actual physical restraint is a far more practically effective form of speech suppression than any scheme of threatened legal sanction that is not imposed until after the public expression of the prohibited speech; (2) every instance of a prior restraint actually will result in the suppression of speech; and (3) every mistake made in the implementation of a prior restraint will involve the actual suppression of constitutionally protected speech.

This redefinition of the prior restraint/subsequent sanction distinction would stabilize the prior restraint doctrine and bring its operation more in line with the common-sense meanings and expectations generally associated with the

terms "prior restraint" and "subsequent sanction." This convergence of legal and ordinary language meanings is critical to the effective operation of the prior restraint doctrine. It is only through the creation and maintenance of reliance by potential speakers on the fact that effective legal protections for speech exist, and actually operate to their benefit, that first amendment doctrines serve to create an environment in which constitutionally protected expression can thrive.

Though this more literal definition of prior restraint may appear narrower, and thus less protective of speech, than the current version, it is important to note that the benefits generated by this proposed redefinition can be realized without any appreciable cost to current first amendment values. The current version of the prior restraint doctrine, counterintuitive and unpredictable as it is, provides little or no protection for potential speakers whose anticipated expressive activity falls outside of the specific case precedents thus far established by the courts. Given the present lack of a discernible, reasonably predictable definition of prior restraint in either the decisional pattern or the rhetoric of the courts, speakers have no reasonable basis upon which to predict whether the possible suppression of their speech by the government, and the sanctions that such speakers might bear as a result of challenging such suppression, will be overturned by a court applying the prior restraint doctrine. In such a climate, the doctrine is not performing a useful function in defining the domain of constitutionally protected speech under the first amendment.

Moreover, protection against the kind of constitutional abuses that have been said to accompany laws falling under broader definitions of prior restraint effectively can be provided by other currently existing constitutional doctrines, or by the development of more specific doctrines directly disfavoring systems of administrative preclearance and judicial injunctions that possess one or more of the disfavored attributes now incorrectly thought to be shared by all such schemes of legal regulation.

Finally, and perhaps most importantly, adoption of this proposed redefinition of the prior restraint doctrine will strengthen constitutional protection against government activity that results in the physical suppression of speech prior to its public expression. This protection is critical because when speech that the government attempts to suppress never enters the public domain, the opportunity for public perception of, and reaction to, the government's speech suppressive activities is eliminated. This is the most dangerous possible environment in which government regulation of speech can take place and fully justifies the maintenance of an independent constitutional doctrine that subjects all such government action to strict judicial scrutiny.

