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Prior Restraint, Incommensurability, and the Constitutionalism of Means

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Cover Page Footnote

Senior Lecturer, Faculty of Law, Haifa University. LL.B., LL.D., Hebrew University of Jerusalem. This Article was written during my stay at Yale Law School in 1998-99. I am grateful to Bruce Ackerman, Akhil Amar, Jack Balkin, Jamie Boyle, Owen Fiss, Steve Wizner, and Howard Zonana for helpful discussions and suggestions, and to Yale Law School for its hospitality. Chris Klatell did a great editing job, and Limor Mizrahi provided valuable research assistance. Special thanks to Yael Lustmann. Without her this Article would not have been written.

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ARTICLES

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*Ariel L. Bendor**

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INTRODUCTION

THE freedom of speech is not absolute. For instance, it is widely acknowledged that in certain circumstances the government may constitutionally restrict speech.[1] A decision that government may restrict a certain category of speech, however, does not necessarily validate the constitutionality of all possible means of restricting that speech. For a speech restriction to be constitutional, it is not enough for the government to show that the speech in question falls within a

1. *See* Board of County Comm'rs v. Umbehr, 518 U.S. 668, 674-75 (1996); Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. Chi. L. Rev. 41, 45 (1992) [hereinafter Epstein, *Property, Speech, and Distrust*].

regulable category. The proposed means of speech regulation must also conform to the First Amendment. This Article labels this kind of analysis, which focuses on the constitutionality of a particular form of regulation, as the "constitutionalism of means" to distinguish it from purely substantive constitutionalism.

In American law, the doctrine of prior restraint regulates the means that the government can use to restrict speech.[2] This doctrine, first adopted by the Supreme Court in the 1930s in the case of *Near v. Minnesota*,[3] forbids the implementation of any pre-publication regulations that prevent the publication of speech, such as administrative licensing schemes and judicial injunctions against certain types of speech.[4] One analysis of the doctrine of prior restraint views it as an attempt to ensure that speech rights are protected using liability rules instead of property rules.[5] While it is permissible to punish certain harmful expressions, such as libels, after their commission, there are strict limitations on the constitutionality of preventing such expressions before they occur. Because of this general constitutional prohibition against prior restraints, restrictions of speech ordinarily must be enforced by the imposition of *ex post* criminal or civil sanctions.

Justifications of the rule against prior restraints tend to focus either on the possible damage that prior restraints could do to politically controversial speech[6] or on the chilling effect they might have on challenges to the constitutionality of a given speech restriction.[7] This Article, however, argues that both the doctrine of prior restraint itself and its customary justifications lack clarity and consistency.

The problem of incommensurability provides a strong argument against limiting speech regulation to enforcement of liability rules in both civil and criminal adjudication. "Incommensurability" in this context refers to the impossibility of providing a reasonable substitutive or comparative value for an item. This Article challenges the pos-

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2. In addition to the general constitutional rule prohibiting prior restraints, there is a non-constitutional rule that equity will not enjoin libel. *See* Douglas Laycock, The Death of the Irreparable Injury Rule 164 & n.27 (1991) [hereinafter Laycock, *Irreparable Injury*]. This non-constitutional rule, however, has a narrower reach than the constitutional rule, so it will not be discussed separately. Nevertheless, arguments negating the constitutionality or wisdom of the doctrine of prior restraint are also clearly applicable to this principle. In the realm of criminal law, there is a parallel rule that equity will not enjoin a crime where criminal prosecution would be an adequate remedy. For a discussion of this rule, see *id.* at 217-20.

3. 283 U.S. 697 (1931).

4. *See id.* at 709-23.

5. This analytical framework was first laid out by Guido Calabresi and Douglas Melamed. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1092 (1972).

6. *See* Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. Rev. 685, 705 (1978).

7. *See id.* at 693.

sibility, the propriety, and the morality of enforcing incommensurable "anti-speech entitlements" such as the individual rights to good reputation and privacy, and the right of the state to national security, with *ex post* criminal sanctions or civil penalties.

The negative externalities[8] that the prior restraint regime generates pose a collateral difficulty. In essence, the system allows the public to enjoy benefits at the expense of particular individuals. Because the harms suffered by individuals from unrestrainable speech are incommensurable, a liability rule system cannot provide full compensation for them. Speakers are therefore not made to bear the full costs of their speech, creating a classic negative externality problem.

In addition to the freedom to speak, this Article will also focus on "anti-speech entitlements." An appropriate constitutionalism of means must reflect, and attempt to achieve, a society's substantive constitutional balances. Substantive constitutional arrangements do not entrench freedom of speech alone—freedom of speech is not, after all, absolute. These arrangements also aim to protect certain anti-speech entitlements. In systems that provide for an expansive substantive freedom of speech, anti-speech entitlements take on an even greater weight because they come into play only in those extreme situations where there is no choice but to limit the protection afforded to speech. An effective constitutionalism of means must attempt to secure these valuable anti-speech entitlements in addition to substantive free speech rights.

One of the undesirable ramifications of the doctrine of prior restraint is that it often ironically constricts substantive free speech rights. If a legal system becomes overly reliant on the doctrine of prior restraint, it may focus unduly on procedural protections at the expense of constitutionally protected substantive speech rights. Moreover, a reliance on the prohibition against prior restraints assumes incorrectly that subsequently imposed penalties will always be less burdensome on speech than prior restraints.

This Article develops a criticism of the doctrine of prior restraint using the relationship between means-centered and substantive constitutional theories. By applying liability rules to incommensurable entitlements, the doctrine produces suboptimal levels of protection for both speech and anti-speech entitlements and creates a number of intractable moral dilemmas. This analysis explores the meaning of incommensurability and presents a number of potential definitions—some of which are radical and some more moderate. Even under a moderate view of the incommensurability of anti-speech entitlements, the doctrine of prior restraint produces problematic results.

Further, the problems with the current regime are grounded in re-

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8. *See* Richard A. Posner, Economic Analysis of Law 52 (2d ed. 1977) [hereinafter Posner, *Analysis of Law*].

mediable institutional and structural aspects of the law. The need to implement substantive constitutional arrangements (the "constitutionalism of substances") creates a constitutional duty to change these doctrines and structures (the "constitutionalism of means"). The Constitution must dictate the form of legal doctrines and institutional structures, and not *vice versa*.

Part I of this Article develops the concept of a constitutionalism of means. It also presents the doctrine of prior restraint, focusing on the distinction between prior restraints and subsequent sanctions, the scope of the doctrine, and its most frequently heard justifications. This part proceeds to examine prior restraint doctrine through the lens of Law and Economics, considering the argument that the purpose of the doctrine is to ensure that anti-speech entitlements are protected exclusively through the use of liability rules. Part II discusses the concept of incommensurability and explores the problems it creates for the doctrine of prior restraint in both the civil and criminal contexts. Part III addresses arguments promoting the doctrine of prior restraint that are grounded in political values or social theory. Part IV discusses the special issues created by criminal prior restraints protecting anti-speech entitlements. Part V summarizes and challenges arguments in favor of the doctrine that claim that structural or procedural aspects of our legal system make prior restraints untenable. In its last section, this part explores the constitutionality of the delays that the use of prior restraints can cause. This section concludes that such delays constitute the only serious constitutional obstacle to a regime that makes use of prior restraints. This Article concludes with proposals for a means-centered constitutionalism that is more consistent with substantive constitutional goals than the doctrine of prior restraint.

I. PRIOR RESTRAINT AND THE CONSTITUTIONALISM OF MEANS

Governmental regulation of behavior must operate within the boundaries established by respect for individual rights. In addition to these substantive protections, the Constitution offers procedural safeguards of liberty. This part distinguishes means-centered, or procedural, constitutional considerations from substantive rights analyses. It discusses the relationships among substance, means, and remedies to establish a framework for analyzing prior restraint doctrine.

A. *Constitutionalism of Substances, Constitutionalism of Means, and Constitutional Remedies*

The Constitution confers a range of basic rights on individuals. When a person has been granted a constitutional right, governmental authorities, and in certain circumstances other individuals, are precluded from violating it. This Article refers to the discourse relating

to the substance and scope of these constitutional rights as "substantive constitutionalism" or the "constitutionalism of substances."

Substantive constitutionalism stands at the center of constitutional theory and practice. It deals with the definition of constitutional rights, not all of which enjoy express mention in the text of the Constitution,[9] and with the determination of the boundaries of the various rights. Most substantive constitutional rights are not absolute; in certain circumstances they conflict with one another, and in others the government may restrict them in order to further the common good.[10] This is especially true, of course, in relation to secondary constitutional rights, such as economic rights, but it is also true in relation to freedom of speech, which is considered the cornerstone of human liberty and dignity.[11] As interpreted by the Supreme Court, the Constitution allows the freedom of speech to be restricted in certain situations and given certain conditions.

The restriction of a right may be carried out by diverse means. In practice, it is possible to restrict a right through the use of criminal law, civil law, administrative law, or a combination thereof. Rights may be limited by means of physical or normative prior restraint (actions taken to prevent a given act from occurring),[12] by means of subsequent sanctions (penalties imposed in order to create a disincentive to act in a certain way),[13] or by a combination of the two.

It may be constitutionally permissible to limit the circumstances in which a right can be exercised, but that does not imply that this can be accomplished by any means whatsoever. The means used to restrict a constitutional right must also conform to the Constitution. Therefore, a discourse on the constitutionality of the various means of restricting constitutional rights takes place alongside the discussion of the constitutionalism of substances. This discourse is the constitutionalism of means.

One must be careful not to confuse the constitutionalism of means with the issue of constitutional remedies. Constitutional remedies are secondary norms; they assume that an infringement of a constitutional right has taken place and are concerned with the possible ways of redressing such an infringement. By contrast, the constitutionalism of means deals with the shape of constitutional rights themselves. It does not assume an infringement of a constitutional right; rather, it investigates the constitutionality of schemes created to regulate constitutional rights. Only if it is found that the means used to regulate a

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9. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973) (finding a fundamental right, not specified in the Constitution, for a woman to abort her pregnancy).

10. *See* Richard A. Posner, The Economics of Justice 50, 331-39 (1983) [hereinafter Posner, *Economics of Justice*].

11. *See* Cohen v. California, 403 U.S. 15, 24 (1971).

12. *See* Gerald Gunther, Constitutional Law 1202-03 (12th ed. 1991).

13. *See id.* at 1203.

particular constitutional right are unconstitutional will the question of remedies come into play.[14]

B. *The Relationship Between Means and Substances: Searching for Consistency*

In cases where rights are absolute, the constitutionalism of means will inevitably track the constitutionalism of substances.[15] Freedom of speech, however, is not absolute; the pool of constitutionally protected speech is bounded by a certain set of criteria.[16] The significance of the doctrine of prior restraint is that the category of substantively protected speech is narrower than the category of speech that cannot be restrained by means of prior restraint.[17] According to the doctrine, there is a constitutional right to publish expressions that are not entitled to substantive constitutional protection, in the sense that such expressions can be regulated only by *ex post* sanctions and not by prior restraints.

This discrepancy between the body of speech that is substantively

14. Thus, a law that required the prior restraint of certain kinds of speech would probably, given the prior restraint doctrine, be deemed to be in violation of the Constitution. This is so even if the courts determined that the speech in question was not entitled to full constitutional protection. The relevant question here is not the scope of the substantive speech right, but the constitutionality of the mode chosen for enforcing it. The doctrine of prior restraint is thus part of the constitutionalism of means and not a question of constitutional remedies. Only after it has been determined that the restraints are unconstitutional does the question of remedies arise.

Nevertheless, there are some situations in which the issues of constitutional remedies and constitutional means intersect. Such situations arise when courts order remedies for infringements of constitutional rights that are themselves unconstitutional. For example, if a state actor was producing a discriminatory publication, a court might order it enjoined as a violation of the equal protection clause. An appeals court, however, would probably void the injunction on the grounds that it comprised an unconstitutional prior restraint.

15. Some questions would still exist, because even if the freedom of speech were absolute, the meaning of "speech" would still need definition. Not all physical acts of expression are considered "speech" and protected by the substantive constitutional right to freedom of speech. Obscene publications, no matter what their form, are a familiar example. Such publications, even though they are "expressions" in the everyday sense of the word, are not "expressions" within the meaning of the First Amendment. *See* Miller v. California, 413 U.S. 15, 36-37 (1973). Nevertheless, the doctrine of prior restraint does apply, at least partially, to obscene publications. The reason for this is that obscene publications may resemble protected publications—for example, indecent publications. If a licensing agency erred and classified protected speech as "obscene," it would in the process impair substantive free speech rights. Allowing prior restraint of obscene publications may therefore result in the impairment of freedom of speech.

16. *See* John Paul Stevens, Address, *The Freedom of Speech*, 102 Yale L.J. 1293, 1296-97 (1993); Owen M. Fiss, Comment, *State Activism and State Censorship*, 100 Yale L.J. 2087, 2098-3101 (1991) [hereinafter Fiss, *State Activism*].

17. *See, e.g.*, John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 Yale L.J. 409, 426 (1983) (noting that the doctrine of prior restraint may bar injunctions against speech that the First Amendment does not protect).

protected by the Constitution and the body of speech that is protected from prior restraint does not cause any major problems so long as the aims of the two sets of doctrine are consistent. Problems develop, however, when the two bodies of law are based on inconsistent theoretical grounds, or when there is a real discrepancy between the aims of the constitutionalism of means and the aims of substantive constitutional theory. In order to achieve consistency between the two, the framework for regulating means must produce full realization of substantive freedom of speech in those circumstances that the Constitution dictates. At the same time, it must ensure that speech rights are not protected in contexts where substantive constitutional theory gives preference to other interests.[18]

The legal system is not "neutral" towards expressions that are not protected by substantive freedom of speech. After all, these expressions are unprotected precisely because there is a special justification for exposing them to regulation and limitation.[19] There are individual and social interests in the non-publication of prohibited expressions, not just in the publication of permitted expressions.[20] Therefore, expressions that are not substantively protected by the First Amendment should not receive immunity against prior restraint, nor against any other means of regulation that guarantees that they will not be published. This is the only way that the balances sought by substantive constitutional theory will be mirrored in the constitutionalism of means.

In certain cases, no one form of regulation exists that will enable perfect consistency in this sense. For instance, the application of subsequent sanctions against damaging unprotected speech does not guarantee the non-publication of unprotected expressions.[21] Means of prior restraint, on the other hand, have the potential to impair protected free speech, because the publication of protected speech may be delayed if a prior restraint order is incorrectly issued.[22]

It is possible, however, to strive for a different kind of consistency by determining the means of implementing the freedom of speech and its limitations that most closely reflect the balances sought by substantive constitutional law. There will inevitably be occasions when substantive pro-speech rights come into conflict with substantive anti-speech entitlements.[23] In these cases, analysis should focus on means

18. *See* Schauer *supra*, note 6, at 727.

19. Examples of such "anti-speech entitlements" include concerns of national security, decency, and reputation. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 591-94 (1976) (Brennan, J., concurring); Miller v. California, 413 U.S. 15, 23-27 (1973); Roth v. United States, 354 U.S. 476, 483-85 (1957).

20. *See Miller*, 413 U.S. at 34-37.

21. *See infra* part IV.B.

22. *See infra* part V.E.

23. *See, e.g.*, Nebraska Press Ass'n, 427 U.S. at 570 (discussing the conflict between a criminal defendant's Sixth Amendment rights and the First Amendment

that produce the outcomes preferred by substantive constitutional concerns. This may require the sacrifice of some anti-speech rights in the name of robust pro-speech protections. At times, however, it may also require the use of devices like prior restraint, if and when those devices will better serve underlying constitutional goals.

In view of the central status that substantive constitutional theory confers on freedom of speech, there are likely to be far fewer cases of the latter type than the former. This tendency to favor speech, however, should not be elided into an overall and absolute preference for freedom of speech over other societal goals, including those that require the restraint of speech.[24] Assuring that the means for restraining defective expressions are available does not mean that they should always or recklessly be used regardless of the consequences for protected speech. It simply means that when choosing between two means of enforcing regulations on speech—the use of prior restraints and the use of *ex post* sanctions—attention must constantly be paid to a proper balance of the competing substantive interests at stake.

In essence, the Constitution must be seen as imposing a responsibility to do whatever is necessary to fully implement its substantive rules. Sometimes this will require creative contouring of the means the government uses to regulate speech. For instance, in *Freedman v. Maryland*,[25] the Supreme Court held that an administrative ruling relating to the licensing of a film and judicial review of that ruling had to occur within a short period of time.[26] If the ruling and review did not occur within that period, publication of the expression would be allowed regardless of the film's constitutional status.[27] *Freedman* provides an example of a prior restraint that the Court modified in order to implement the balance that it wanted to achieve between different substantive rights. Rather than relying on an ossified version of the prohibition against prior restraints, the Court focused on the substantive rights at stake. This is the type of creative means-based thinking that this Article proposes should be applied to the doctrine of prior restraint.

C. *The Prior Restraint Doctrine*

The doctrine of prior restraint, despite its status as a cornerstone of the constitutional law of the United States,[28] suffers from a lack of

rights of the press).

24. *See supra* note 19.

25. 380 U.S. 51 (1965).

26. *See id.* at 58-59.

27. *See generally* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11, 31-32 (1981) (discussing the *Freedman* decision's effect of "minimiz[ing] the impact of delay").

28. *See* Near v. Minnesota, 283 U.S. 697, 716-17 (1931).

clarity.[29] As discussed below, there is ongoing dispute as to what constitutes a prior restraint for the purposes of the doctrine,[30] what the rationale behind the doctrine is, how prior restraints are distinguished from *ex post* sanctions, and in what exceptional circumstances prior restraints will be allowed.

Nevertheless, the generally accepted approach is that the doctrine bars any prohibition on speech issued in advance of publication.[31] It also disallows determinations of the legality of particular expressions prior to publication.[32] There is "a heavy presumption against [the] constitutional validity" of prior restraint.[33] Limitations on freedom of speech, whether criminal or civil, must therefore be instituted solely by means of sanctions imposed after the act. While many kinds of governmental acts can serve as prior restraints, the two archetypal forms[34] of prior restraint are administrative licensing, which is enforced by the criminal law,[35] and judicial injunctions, which are ultimately enforced through contempt proceedings.[36] In addition to these two mechanisms, onerous regulatory burdens imposed on certain classes of expressions are sometimes considered prior restraints.[37] Finally, the denial of a job or financial support on the basis of a previous expression has also been classified as prior restraint.[38] Some have argued, however, that the latter two categories broaden the doctrine in a manner that impairs its quality as a legal rule.[39] Alternatively, some

29. *See* Thomas I. Emerson, The System of Freedom of Expression 505-07 (1970) [hereinafter Emerson, *Freedom of Expression*]; Laurence H. Tribe, American Constitutional Law 1057 (2d ed. 1988); Owen M. Fiss, *Free Speech and the Prior Restraint Doctrine*, *in* Liberalism Divided 121, 130-31 (1996) [hereinafter Fiss, *Free Speech*]; Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53, 53-55 (1984); Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. Rev. 1, 2-3 (1989).

30. *See* René L. Todd, Note, *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial participants*, 88 Mich. L. Rev. 1171, 1172-74 (1990).

31. *See Near*, 283 U.S. at 721.

32. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (overruling a municipal board's content-based rejection of an application for use of a municipal theater as a prior restraint).

33. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); *see* Kent Greenawalt, Fighting Words 16 (1995) (describing the general presumption against prior restraints in United States law).

34. *See* Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 L. & Contemp. Probs. 648, 655-56 (1955) [hereinafter Emerson, *Prior Restraint*].

35. *See* Tribe, *supra* note 29, at 1039-40; Emerson, *Prior Restraint*, *supra* note 34, at 655.

36. *See* New York Times v. United States, 403 U.S. 713, 724-25 (1971) (per curiam) (Brennan, J., concurring); Emerson, *Prior Restraint*, *supra* note 34, at 655-56.

37. Examples include the imposition of a special levy on publications, *see* Kent R. Middleton et al., The Law of Public Communication 64-65 (4th ed. 1997), and the requirement of registration as a condition of publication.

38. *See* Emerson, *Freedom of Expression*, *supra* note 29, at 161-63.

39. *See id.* at 511.

commentators consider any abrogation of free speech rights without judicial review to be prior restraint.[40] For these commentators, "prior" means "prior" to a competent legal decision, and not merely prior to any hearing at all.[41]

Like freedom of speech, however, the prohibition against prior restraint of speech is not absolute. A line of exceptions allows the application of prior restraint in certain circumstances.[42] As a rule, the exceptions to the doctrine apply when the threat to First Amendment values is not significant but the expected damage in the absence of prior restraint is particularly grave.[43] The Court has indicated its approval of prior restraints under narrowly-defined circumstances in which the speech in question is deemed obscene,[44] to protect criminal defendants against violations of their constitutional right to a fair trial,[45] to protect privacy,[46] in the context of the regulation of public forums,[47] to prevent misleading commercial expressions,[48] and where the expression could endanger national security in wartime.[49] In certain contexts, the Court has drawn a distinction between different forms of expression.[50] The Court has further restricted the scope of

40. *See* William T. 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, 280-81 (1982); *see also* Redish, *supra* note 29, at 55-57 (insisting that Court decisions be delivered after full hearing and generally rejecting decisions restraining expression delivered in interlocutory proceedings).

41. *See* Tribe, *supra* note 29, at 1042-45.

42. Some argue that the Supreme Court has tended to expand the circumstances in which it will permit a prior restraint in the 1990s. *See* Roy L. Moore, Mass Communication Law and Ethics 143-55 (1994).

43. *See* Laycock, *Irreparable Injury*, *supra* note 2, at 168.

44. *See* Times Film Corp. v. Chicago, 365 U.S. 43, 47-50 (1961); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 440 (1957). For the content-based definition of obscenity, see *Miller v. California*, 413 U.S. 15, 24 (1973). For the view that it is necessary to modify this definition in light of the special characteristics of cyberspace, see Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 Harv. J.L. & Tech. 87, 108-09 (1996). For the opinion that the doctrine of prior restraint has a central role to play precisely in relation to obscenity laws, see Emerson, *Freedom of Expression*, *supra* note 29, at 503-04.

45. *See* Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 570 (1976). For a description of the case law in this field, see Alberto Bernabe-Riefkohl, *Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard*, 84 Ky. L.J. 259, 275-93 (1996).

46. *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 420 (1971) (contrasting the facts of the case at bar with those of *Rowan v. United States Post Office*, 397 U.S. 728 (1970)).

47. *See* John E. Nowak & Ronald D. Rotunda, Constitutional Law 1138-67 (5th ed. 1995).

48. *See* Laycock, *Irreparable Injury*, *supra* note 2, at 167.

49. *See* New York Times v. United States, 403 U.S. 713 *passim* (1971) (per curiam) (discussing the government's failure to carry its burden in advocating a prior restraint).

50. For instance, books and newspapers enjoy far greater protection from prior restraint than films, to which the prohibition is applied more narrowly. *See* Emerson, *Freedom of Expression*, *supra* note 29, at 511-12.

prior restraint doctrine by holding that injunctions are permissible remedies when they neutrally regulate the time, place, and manner of speech and do not target acts of speech themselves.[51]

The common view in scholarly literature is that for a government action to qualify as a prior restraint it must consist of an active strike against a particular expression.[52] Providing or withholding governmental financial assistance on the basis of content-based criteria is therefore generally not considered prior restraint, even if the practical result of such a system is restraint, absolute or partial,[53] of expression.[54] Academic commentators do not speak unanimously on this issue, however, and some have argued that funding criteria should be viewed as prior restraints.[55] On the margin, it is certainly plausible to view absolute abstention from subsidization of art or other forms of expression as a form of prior restraint, making such an action subject to judicial review.[56] Commentators who make this argument, however, may simply be trying to find a way to ensure protection for certain cherished forms of speech without having to expand substantive free speech rights any further.

1. A Working Definition of Prior Restraint

Many cases and academic works discuss the distinction between prior restraint and subsequent sanctions.[57] While the manner of defining prior restraint in these examples is significant, especially where prior restraint has been deemed an inappropriate method of regulating speech, it is important not to fixate on the words "prior restraint" themselves. The important issue is not the meaning of the words "prior restraint," but the content—existing or desirable—of the law. There are no references to "prior restraint" or "subsequent sanctions" in the First Amendment or any other article of the Constitution, and accordingly there are no linguistic interpretive constraints to consider. Thus, the vast amount of time that some authors spend parsing the linguistic contours of "prior restraints" and "subsequent sanctions" is

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51. *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 763-64 (1994). For a critique of the Court's logic in *Madsen*, see Owen M. Fiss, *The Unruly Character of Politics*, 29 McGeorge L. Rev. 1, 8-10 (1997) [hereinafter Fiss, *Politics*].

52. *See* Steven Helle, *Prior Restraint by the Backdoor: Conditional Rights*, 39 Vill. L. Rev. 817, 828 (1994); Ron Smith, *Compelled Cost Disclosure of Grass Roots Lobbying Expenses: Necessary Government Voyeurism or Chilled Political Speech?*, 6 Kan. J. L. & Pub. Pol. 115, 136 (1996).

53. *Cf.* Fiss, *State Activism*, *supra* note 16, at 2097-98 (analogizing the effect of a denial of a grant to that of a criminal prosecution); Harry Kalven, A Worthy Tradition: Freedom of Speech in America 301-03 (1988) (distinguishing criminal sanctions from partial sanctions).

54. *See* Helle, *supra* note 52, at 851.

55. *See* Emerson, *Freedom of Expression*, *supra* note 29, at 627-30; Fiss, *State Activism*, *supra* note 16, at 2088-104.

56. *See* Fiss, *State Activism*, *supra* note 16, at 2104-05.

57. *See supra* note 29 and accompanying text.

at best of limited value; the "natural meaning" of each term is only tangentially related to the law.[58] Discussion should not focus upon what qualifies as a prior restraint or what differentiates a prior restraint from a subsequent sanction, but rather what should constitute the principles and rules for enforcing the substantive norms of freedom of speech.

One initial premise is that the definition of legal terms is never neutral. Definitions sometimes contain determinations that are not at all trivial. A good example of this phenomenon is found in the way prior restraint has heretofore been defined.

Part I.C began by presenting the common understanding of the doctrine of prior restraint. The alternative, working definition presented below rests on two premises. First, the doctrine of prior restraint deals with the *means* used to restrict freedom of speech, not with its substantive scope.[59] A helpful definition of prior restraint should therefore not be concerned with the content of an expression, its form, or the danger it poses, but rather with the form and timing of the restriction itself. Second, prior restraint of an expression must be distinguished from subsequent sanctions imposed in response to an expression.[60] The definition of prior restraint must therefore clarify the difference between such restraint and "subsequent restraints." While these two points may be the subject of some dispute, they form the basis for a useful definition of prior restraint. The definition of the term should not foreclose discussion of it, but should be viewed as an initial and partial stage of a more expansive conversation.

These premises challenge those approaches that argue that "the resolution of questions regarding the constitutionality of [government regulations that do not impose sanctions on a speaker until the offending communication has taken place] would no longer involve an invocation or application of the prior restraint doctrine."[61] This view, based largely on the literal meaning of the expression "prior restraint," argues that the doctrine should focus solely on the narrow issue of the means used to restrict speech. This approach essentially defines the problem away by arguing that all of the knotty problems within the current doctrine should simply be moved to other areas of

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58. Still, the legal terms are far from superfluous. Legal terms provide a very important means of communication, without which it would be difficult to pursue any legal discourse. The lack of clarity that obscures the meanings of basic terms of constitutional law is therefore regrettable. Definitional problems have at times caused the debate to revolve around the question of what "prior restraint" is, when a focus on the constitutionality of a given means of restricting speech would be more productive. Too many critics have wasted their time arguing that a means of restricting speech that they consider constitutional and proper does not constitute prior restraint, instead of simply defending the constitutionality of the method directly.

59. *See infra* note 69 and accompanying text.

60. *See* Scordato, *supra* note 29, at 30.

61. *Id.* at 31.

the law. While it is possible that such an approach can produce "a relatively coherent, generally understandable, and largely predictable definition of a prior restraint on speech,"[62] the advantages it provides are largely illusory. Limiting the scope of the doctrine actually provides very few answers; this approach merely suggests that certain questions should be answered in another framework. So limiting the doctrine of prior restraint may add to the clarity and coherence of the doctrine, but it will not add to the clarity and coherence of First Amendment jurisprudence or constitutional law as a whole.

On the other hand, to ensure the lucidity of the discussion and its relevance to general constitutional discourse, it is important to employ a working definition of prior restraint that is close to the generally accepted legal meaning of the term, and, insofar as possible, to the common-sense meaning of the words.

The working definition of prior restraint used in this Article will therefore incorporate the following factors: (1) the form of a restriction and its timing, not the content of an expression or the anticipated danger arising from it; (2) the difference between prior restraints and subsequent sanctions; (3) a sufficiently broad perspective to enable consideration of a proposed "constitutionalism of means"; (4) proximity to the accepted legal conception of the term; and (5) the nexus to the common-sense meaning of the words.

These factors produce the following working definition: a "prior restraint" is any physical or normative means exercised by a governmental authority to enforce substantive restrictions on a particular act of speech prior to the publication of that speech and with the purpose of preventing the publication of that speech. A means exercised after the commencement of publication, with the purpose of preventing the continuation of publication, will also be deemed to be a "prior restraint."

There are two kinds of prior restraint: physical restraints and normative restraints. The distinction between physical restraint of speech and the imposition of sanctions after the publication of the speech is clear even on an intuitive level. In the first case, the government prevents the publication of the expression.[63] In the second case, the government does not physically prevent publication, although the threat of *ex post* sanctions will likely deter publication.[64] The distinction between normative prior restraints and normative *ex post* sanctions, however, is more difficult to grasp.

As explained above,[65] certain normative means of restraining expression, such as injunctions, temporary restraining orders, and ad-

62. *Id.* at 32.
63. *See id.* at 2-3.
64. *See id.*
65. *See supra* note 58.

ministrative prohibitions, are forms of prior restraint. These means of prior restraint can be distinguished from criminal and civil normative sanctions that operate retroactively in both their purpose and in the specificity of the speech to which they apply.

The dominant purpose of prior restraint is prevention of an act of speech.[66] In this way prior restraints differ from subsequent sanctions. While deterrence and prevention of publication are goals of many civil and criminal speech restrictions that employ *ex post* sanctions, coextensive purposes such as redress, particularly in criminal law,[67] and the compensation of victims, particularly in civil law, also exist.[68]

The second element that distinguishes normative means of prior restraint from normative means of subsequent sanctions is the application of prior restraints to concrete cases, as distinct from general categories.[69] Whereas general prohibitive measures such as statutes or regulations act as *ex post* punishments, individual prohibitions such as permanent or temporary injunctions or administrative orders constitute prior restraints.[70] Of course, prior restraints are sometimes used to prevent the breach of general norms, and not all specifically individuated legal acts are prior restraints. For instance, a warning by a prosecutor that the government will press charges if a certain publication is continued does not fall within the meaning of prior restraint, despite its specificity,[71] because it is not a binding legal norm.

66. *Cf.* Schauer, *supra* note 6, at 725-26 (describing the primary goal of prior restraints as prevention rather than punishment).

67. *See* Leon Pearl, *A Case Against the Kantian Retributivist Theory of Punishment: A Response to Professor Pugsley*, 11 Hofstra L. Rev. 273, 274, 289 (1982); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 Yale L.J. 315, 334, 337-38 (1984).

68. The criminal contempt proceedings that are likely to be instituted against persons who breach injunctions and the criminal charges that may be brought against persons who breach administrative orders do not derogate from this rule, as the punishment in these proceedings is not in response to the speech itself, but to the breach of the judicial or administrative order.

69. Nonetheless, it is not easy in every case to classify a legal norm as general or individual. The level of abstraction of the norm is measured in relative terms. For example, the prohibition of a specific word could be classified either way. *See* Howard O. Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 Cornell L. Rev. 283, 284-85 (1982) (distinguishing between licensing mechanisms, which are manifestly prior restraints, and criminal prohibitions, which are subsequent sanctions). It is difficult, however, to find a substantive difference between the two mechanisms in the context of the prohibition of a specific word. Insofar as such a criminal prohibition is constitutional, its effect is identical, or at least very close, to that of a licensing mechanism.

70. *See* Tribe, *supra* note 29, at 1042-45.

71. For the similarity between prior restraint and a warning by a prosecutor with respect to possible charges relating to a concrete publication, see Fiss, *Free Speech*, *supra* note 29, at 132-33.

2. The Relationship Between Prior Restraint Doctrine and Substantive Freedom of Expression

When the United States was founded, and for many years thereafter, the protection provided to freedom of speech extended only to protection from prior restraint.[72] The definition of prior restraint was quite narrow, however, as it was based largely on the actual censorship mechanisms that were used in eighteenth-century England.[73] Nevertheless, one could argue that during the early years of this country's history the doctrine against prior restraint and the protection of freedom of speech were roughly one and the same.[74]

Currently, however, it is customary to distinguish between the substantive standards that establish the scope and boundaries of freedom of speech on the one hand, and the governmental means used to restrict speech on the other,[75] despite the fact that the two share a common constitutional anchor in the First Amendment.[76] The doctrine of prior restraint is concerned with the means used to restrict freedom of speech and not with the extent or substance of speech. It deals with limitations on form and timing, rather than on substance.[77] It is relevant only to expressions that are outside the ambit of substantive First Amendment protection;[78] "[t]he theoretical basis for the prior restraint doctrine is . . . a question of process, not substance."[79] A substantively protected expression may not be restrained either *ex ante* or *ex post*; its publication may not be prevented by means of prior restraint, nor can compensation be subsequently imposed or ordered in respect thereof. The doctrine of prior restraint, therefore, only comes into play when the speech in question does not enjoy full First Amendment protection, rendering the speaker exposed to some kind of punishment.[80]

Supreme Court Justice Byron White noted that "failure by the Government to justify prior restraints does not measure its constitu-

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72. *See* Emerson, *Freedom of Expression*, *supra* note 29, at 504.

73. *See id.* at 504.

74. *See* Akhil Reed Amar, The Bill of Rights 224 (1998); Cass R. Sunstein, Democracy and the Problem of Free Speech xii-xiii, 4 (1993) [hereinafter Sunstein, *Democracy*]. *But see* Jeffery A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 Wm. & Mary L. Rev. 439, 470 (1987) ("In the case of the first amendment, historical evidence supports the absolutists' position that the Framers intended that the press clause prohibit not only prior restraint, but also all content-based controls available to government.").

75. *See* Jeffries, *supra* note 17, at 410-11.

76. *See* Diane F. Orentlicher, Comment, *Snepp v. United States: The CIA Secrecy Agreement and the First Amendment*, 81 Colum. L. Rev. 662, 667 (1981).

77. *See* Emerson, *Prior Restraint*, *supra* note 34, at 648; Schauer, *supra* note 6, at 725.

78. *See* Tribe, *supra* note 29, at 1040-41.

79. Redish, *supra* note 29, at 89.

80. *See* Lucas A. Powe, Jr., The Fourth Estate and the Constitution 141 (1991).

tional entitlement to a conviction for criminal publication."[81] Accordingly, the imposition of onerous taxes on *permitted* publications is not a prior restraint, but actual substantive impairment of free speech rights.[82] The body of speech subject to prior restraints is always limited by the scope of substantive speech rights, because the means-of-restriction question only arises after the determination that the speech may be restricted in the first place. It is therefore entirely possible to support both expansive substantive speech rights and a system that allows prior restraint of unprotected speech.[83]

The doctrine of prior restraint does not expand substantive freedom of speech; it merely limits the remedies afforded against those expressions that are not entitled to full constitutional protection. For an expression to be enjoined, it is not enough to show that full substantive freedom of speech does not protect it. Rather, the expression must not only be outside the scope of the substantive protection of the First Amendment, it "also must be so in some dramatic, clear, and special way."[84]

Generalized, all-encompassing regulation, which applies to both protected and unprotected expressions, may occur either by means of prior restraint or subsequent sanctions. The constitutional defect in such regulation does not, therefore, lie in the fact that it comprises prior restraint of speech, but in the fact that it applies to legitimate expressions.[85] Furthermore, nothing in a policy supporting prior restraint of unprotected speech conflicts with a positive definition of freedom of speech that extends to mandatory governmental support of publications, or at the very least to a requirement of content neutrality in funding decisions. It is therefore easier and more logical to view abstention-from-support cases as substantive issues, wherein the constitutional problem is not prior restraint but the fact that support is being denied to an expression by virtue of its contents.[86] Because the

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81. New York Times v. United States, 403 U.S. 713, 733 (1971) (White, J., concurring).

82. *Cf., e.g.*, Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) (holding a state license tax imposed only on owners of newspapers with a weekly circulation of over 20,000 unconstitutional).

83. In fact, there is an internal logic to such a position, because if a society grants protection to a wide variety of speech, the remaining unprotected classes of speech are likely to be those that society would benefit the most from having restrained. Some of the exceptions to current prior restraint doctrine make more sense when seen in this light. For instance, the revelation of a state secret may be restrained if it poses a serious threat to national security interests, in part because of the severity of the damage that might otherwise occur.

84. Owen M. Fiss, The Civil Rights Injunction 40 (1978) [hereinafter Fiss, *Injunction*].

85. *See* Blasi, *supra* note 27, at 12-13.

86. For a different view, see generally Helle, *supra* note 52 (analyzing the rationales underlying the doctrine of prior restraint). For the need to adapt the laws of freedom of speech to the context of subsidizing speech by the State, see generally Robert C. Post, *Subsidized Speech*, 106 Yale L.J. 151 (1996) (examining the applica-

substantive question always has to be answered before the means question is even raised, opinions about prior restraint as a means of speech regulation should be secondary to substantive speech commitments.

Nevertheless, some courts have skipped the substantive questions altogether and validated speech restrictions merely because they were carried out by means of subsequent sanctions and not by means of prior restraint.[87] These judgments, which have contributed to the lack of clarity within the doctrine of prior restraint, were mistaken. A condition for the imposition of any sanction against a publication, whether it be a subsequent or prior sanction, must be that the expression under consideration is not entitled to First Amendment protection. The fact that freedom of speech is limited in a manner that appears less onerous does not validate the restriction. At the same time, it is hard to view these judgments as random accidents—they are the inevitable result of the misalignment between the doctrine of prior restraint and societal conceptions of substantive freedom of speech.

The same elision of prior restraint and substantive speech rights occasionally occurs in the academic discourse on the subject. For instance, one commentator argues that prior restraints impair the public value of permitted expressions because all such expressions will be perceived as reflecting the views of the government.[88] This assertion, however, does not address prior restraint as a means of regulation at all. The problem with this imagined world, "in which anti-speech injunctions were sought and issued with regularity,"[89] is that it lacks effective substantive protections for free speech. It does not even address the means issue. In contrast, another scholar notes that:

> If prior restraints were not subjected to special disfavor, the substantive first amendment standards applied would presumably be no less protective than those used in subsequent punishment schemes.... Given the context of our constitutional system, prior approval of speech thus would not amount to a government stamp of approval on speech....[90]

3. Is There a Meaningful Difference Between Prior Restraint and Subsequent Sanctions?

Because prior restraints, criminal penalties, and *ex post* civil sanctions are all designed to stop expressions from being published, the various methods of speech regulation cannot be distinguished by the

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tion of constitutional restraints to subsidized speech).

87. *See* Redish, *supra* note 29, at 54.

88. *See* Blasi, *supra* note 27, at 64.

89. *Id.* at 30.

90. Redish, *supra* note 29, at 70.

influence they have on actors' pre-publication decisions.[91] Certain commentators are therefore of the opinion that there is actually no substantive difference between prior restraints and subsequent sanctions.[92] The various means are "the same side of the same coin."[93] Thus, even if an injunction has been issued "restraining" speech, the only punishable act is disobedience of the injunction, which requires publication of the speech.[94] Like "subsequent sanctions," injunctions only have effect after the speech in question has been published. The difference between prior restraint and subsequent punishment thus lies in the administration and not in the substance.[95] The value of such an argument, however, is questionable. An approach that denies the existence of substantive differences between means classified as prior restraints and those classified as subsequent sanctions does not argue that prior restraints are harmful; it merely argues that they are arbitrary in the absence of any other justification. Such an analysis suggests no cogent reason exists for preferring prior restraints over subsequent sanctions, or *vice versa*. This line of argument is completely different from those that accept the distinction but take the view that there is still no reason for our current preference for *ex post* remedies.

Arguments that a meaningful distinction between prior restraint and subsequent sanctions exists are more convincing, and this Article argues that there are certain benefits to be derived from the use of prior restraints. Before proceeding to this analysis, it is important to answer those critics who believe that there is no real basis for the distinction. First, even the assumption that in certain circumstances there are common denominators between the two means of restricting speech does not render the distinction superfluous or meaningless. As Archibald Cox noted, "[c]lassification is important... because the earlier efforts to bring all first amendment cases under a 'clear and present danger' test have rightly given way to a variety of standards keyed to the character of the restriction."[96] Concepts and distinctions inevitably have margins that are nebulous. This does not reduce the value of the concepts in question; it merely shows that they are theoretical concepts.[97]

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91. *See* Blasi, *supra* note 27, at 11.

92. *See* Mayton, *supra* note 40, at 275-80; Scordato, *supra* note 29, at 34-35.

93. Mayton, *supra* note 40, at 262.

94. *See* Scordato, *supra* note 29, at 3.

95. *See* Mayton, *supra* note 40, at 265. This reasoning is not limited to the context of freedom of speech. It follows that there is no substantive difference amongst property rules, liability rules, and inalienability rules generally. *See* Calabresi & Melamed, *supra* note 5, at 1089.

96. Archibald Cox, Freedom of Expression 6 (1981).

97. The useful question is not whether a real and significant distinction between prior restraints and subsequent sanctions exists in every case, but whether the distinction possesses a kernel of usefulness. Concepts and distinctions in the field of law are not a goal in themselves, but a means of achieving political or social objectives and maintaining the harmony of the legal system. *See* R.W.M. Dias, Jurisprudence 226

The dispute as to the correct classification of the means used to restrict speech lies at the heart of cases such as *Bantam Books, Inc. v. Sullivan*.[98] In *Bantam* and similar cases the classification is clearly significant to the litigants.[99] For example, the existence of a prior restraint may have a greater deterrent value for a potential speaker than the threat of subsequent punishment; future sanctions will not necessarily deter someone who is determined to express herself and who is willing to bear the consequences, or someone who is mistakenly convinced that the intended publication is protected by the Constitution.[100]

Second, "prior restraint" sometimes means physical restraint, and not just the issuance of a paper injunction.[101] In the criminal context, decisions regarding prior restraint are likely to be enforced by the police and other law enforcement officials. Enforcement is likely to consist of the arrest of a person desiring to express himself, the forcible dispersal of a demonstration or protest, the confiscation of communications media through which expressions are due to be published, or similar physical methods. A policeman who reasonably suspects that an offense is about to be committed may, as a rule, intervene and physically prevent its commission or completion.[102] The criminal law, then, is not solely a framework for punishment after the fact; it allows law enforcement officers to intervene in order to prevent or stop an act.[103]

In the civil law context there are also differences between contempt hearings and *ex post* sanctions. For instance, coercive civil contempt proceedings are distinct from criminal contempt proceedings.[104] Criminal contempt is a matter of criminal law, in that the offender failed to satisfy an injunction in the past.[105] In contrast, coercive con-

(1985). If legal concepts and classifications make real-world differences, then they are unquestionably worthy of legal analysis.

98. 372 U.S. 58 (1963); *see* Mayton, *supra* note 40, at 263-64.

99. *See Bantam*, 372 U.S. at 70-71; Mayton, *supra* note 40, at 263.

100. *See Bantam*, 372 U.S. at 69-71; Mayton, *supra* note 40, at 264-65.

101. *Cf.* Scordato, *supra* note 29, at 30-31 (expressing the view that prior restraint of speech consists solely of physical restraint).

102. *See* Terry v. Ohio, 392 U.S. 1, 24 (1968).

103. The disfavoring of prior restraints of speech has significant repercussions within the field of criminal law, where a complete category of offenses is treated differently because of concerns about prior restraint. Law enforcement authorities are required to sit with folded arms and wait until the initial step in the commission of an offense has been performed. Only when an offense has been initiated are the authorities entitled to stop it and to begin coercive contempt proceedings. These are manifestly proceedings of prior restraint, not punitive proceedings. They are not intended to punish the defendant for breaching an injunction. Rather, their sole function is to cause the defendant to refrain from breaching the injunction in the future.

104. For the distinction between the different types of contempt, see Douglas Laycock, Modern American Remedies 712-20 (2d ed. 1994).

105. For a discussion of the argument that the penal character of criminal contempt proceedings indicates that an injunction is not substantively different from a criminal

tempt proceedings are intended to force the defendant to obey a judgment in the future.[106] These are clearly non-punitive, prior-restraint proceedings. They are not intended to punish the defendant for breaching an injunction. Their sole purpose is to cause the defendant to refrain from breaching it in the future.[107]

Third, there are many cases in which the practical effect of an injunction is more likely to resemble a prior restraint than a threat of *ex post* sanctions. The Pentagon Papers affair, considered in *New York Times Co. v. United States*,[108] illustrates this point. The *Times*, when required to refrain from publishing the Pentagon Papers and threatened with court proceedings under the Espionage Act,[109] gave notice that it would resist in court the application for an injunction, but would nevertheless obey the court's final decision.[110] When the trial court did indeed issue an injunction against publication, the newspaper honored the injunction despite denying its constitutionality and filing an appeal against it.[111] While the *Times* was willing to risk criminal prosecution under the Espionage Act, it was not prepared to defy the court's injunction.[112] It may be argued that the *Times*'s conduct was rooted in an idiosyncratic distinction that the newspaper drew between the political authorities and the court, wherein the newspaper, for reasons of principle, was not ready to disobey a court's judgment. There were certainly more radical critics of the government than the *Times* who failed to draw such a distinction between the two authorities, and who were willing to disobey judicial injunctions.[113] Nevertheless, the essential point is that in many cases—perhaps the majority of cases—there may be a difference between a potential speaker's reaction to a threatened *ex post* application of criminal law and an existing judicial injunction or concrete administrative prohibition.[114]

There are several reasons for this difference. First, the injunctive

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prohibition, see Mayton, *supra* note 40, at 277-78 and *infra* part IV.

106. It is not certain, of course, that sanctions imposed within the framework of such proceedings will lead the defendant to obey the injunction. There are cases where the state does not have the power to ensure the implementation of the judgment. *See* Doug Rendleman, *Disobedience and Coercive Contempt Confinement: The Terminally Stubborn Contemnor*, 48 Wash. & Lee L. Rev. 185, 189 (1991).

107. Naturally, coercive contempt proceedings will be instituted and sanctions will be imposed only where it emerges that the defendant is not complying with the injunction.

108. 403 U.S. 713 (1971).

109. 18 U.S.C. § 793(e) (1994); *see New York Times*, 403 U.S. at 720-21 (Douglas, J., concurring).

110. *See* Fiss, *Injunction*, *supra* note 84, at 71.

111. *See* Aviam Soifer, *Born Classified, Born Free: An Essay For Henry Schwarzchild*, 19 Cardozo L. Rev. 1369, 1383-84 (1998).

112. *See* Fiss, *Injunction*, *supra* note 84, at 71.

113. *See id.*

114. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1517 (1998).

process personalizes the law.[115] It is not a general and abstract prohibition that can be interpreted in a variety of ways, or a rule whose precise content, or even whose existence, is unknown to the average citizen. Rather, an injunction is a concrete prohibition that is personally directed against a certain person in a particular familiar context. Second, the punishment for breaching a prior restraint is certain.[116] The potential burden of such a personally directed prohibition appears greater than that of a general, retrospectively applied law. Third, the breach of an injunction involves not only an offense against a particular substantive law that the person in breach may believe to be defective, but also comprises a breach of a judicial order.[117] The breach involves a repudiation of the court, an institution essential to guarantee individual rights against the government. Few people dispute the importance of the courts and the necessity of general obedience to their judgments, even though those judgments will occasionally be mistaken.

Even if the collateral bar rule, which formally precludes persons in breach of judgments from raising constitutional arguments in contempt proceedings,[118] were to be annulled, it is unlikely that many people would choose to make their constitutional arguments in a contempt hearing instead of on appeal.[119] To a certain extent, individuals give the same special deference to administrative orders as to judicial rulings. This extra deterrent effect helps to explain the decision in *Bantam Books, Inc. v. Sullivan*,[120] in which the majority classified the recommendations of an administrative agency as prior restraint, even though those recommendations did not purport to have binding effect.[121]

The fourth difference between injunctions and *ex post* sanctions is that the collateral bar rule may apply to decisions classified as prior restraints,[122] whether judicial[123] or administrative.[124] This rule forbids

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115. *See* Fiss, *Injunction*, *supra* note 84, at 28, 71.

116. *See* Powe, *supra* note 80, at 152-53.

117. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 796 (1987).

118. *See infra* part V.D.

119. *See* Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539, 558-59 (1977).

120. 372 U.S. 58 (1963).

121. *See id.* at 64. Even were it to be proven that in certain contexts injunctions enhance the moral imperative of disobedience and therefore encourage infractions of the law, this is a consideration that can easily be factored into the decision making process of the person petitioning for the injunction. Moreover, the increased tendency of some people to break the law when an injunction is in place is not a ground for negating the distinction between injunctions and means of subsequent punishment.

122. The rule's application to prior restraints of speech is uncertain. *See infra* part V.D.

123. *See* Walker v. City of Birmingham, 388 U.S. 307, 321 (1967).

124. *See* Poulos v. New Hampshire, 345 U.S. 395, 414 (1953).

indirect attacks on the constitutionality of a specific judicial injunction or administrative order during any criminal or civil proceedings instituted against the person in breach of that injunction or order. So long as the collateral bar rule is relevant to one means of restricting speech and not to another, the two must be considered separately, even if the ultimate conclusion proves to be an acknowledgment of the constitutionality of both schemes.

Indeed, Owen Fiss has expressed the view that there would be no reason to question a court's power to issue injunctions restraining publications if no obstacle impeded indirect constitutional attacks on the injunction during contempt proceedings.[125] Even if one accepts this position, however, justification for the distinction between the two means of implementing speech restrictions would still exist for the other reasons discussed above.

The arguments presented in this subsection yield the conclusion that it is both justifiable and useful to distinguish between schemes that restrict speech through the use of prior restraints and those that make use of subsequent sanctions. The different means of regulation are appropriate to different sets of circumstances.

4. Prior Restraint, Liability Rules, and Property Rules

As noted above, there are cases in which the Constitution limits freedom of speech for the purpose of preventing damage to other interests, such as national security, public morals, or the reputation of a person.[126] In such cases, the holders of these interests—be they the state, the public at large, or individual persons—have entitlements, the content of which is the right to have the harmful expressions not be published. For example, the right of publicity or good reputation means only that another person will not express him or herself in a way that will cause unjustified harm to the reputation of the holder of the right.[127] The state's ability to restrict certain expressions that harm national security amounts to an entitlement to non-publication of these expressions.[128] This is also true with respect to obscene publications.[129] Similarly, criminal prohibitions, which are intended to protect the public as a whole, give rise to a societal right—the right to the non-breach thereof.[130] As these examples indicate, "entitlements"

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125. *See* Fiss, *Injunction*, *supra* note 84, at 29-30.

126. *See* Ronald Turner, *Regulating Hate Speech and the First Amendment: The Attractions of, and Objections to, an Explicit Harms-Based Analysis*, 29 Ind. L. Rev. 257, 266-69 (1995).

127. *See id.* at 274.

128. *See id.* at 273.

129. *See id.* at 279.

130. For the different types of rights and opposing duties, see Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning 35-60 (1919).

here are not necessarily the rights of individuals, as is typically the case with constitutional rights; they frequently belong to the state or to society at large.

The language of "entitlements" sets up a helpful way of analyzing prior restraint doctrine. Because individuals, society, and the state have certain "anti-speech" entitlements, or entitlements that require limitation of the speech rights of others, the question of how to best protect those entitlements must be addressed. Liability rules, property rules, or inalienability rules may provide an answer.[131] "An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller."[132] The state, after deciding to grant a right of this type, is not involved in determining its value.

An entitlement is protected by a liability rule if it can be purchased from its holder for a price that is set by the state, not by the holder.[133] The person paying the price set by the state does not need to obtain the consent of the holder in order to purchase the right.[134] In contrast, an entitlement is protected by an inalienability rule if "its transfer is not permitted between a willing buyer and a willing seller."[135] Inalienability rules prohibit certain kinds of transactions entirely.[136]

In practice, the three categories are not completely distinguishable from one another,[137] and there are numerous cases in which an entitlement is protected by a combination of the three kinds of rules.

The constitutional bias against prior restraints results in the use of liability rules to protect civil law anti-speech entitlements.[138] In other

131. The concepts are drawn from Calabresi and Melamed's framework. *See* Calabresi & Melamed, *supra* note 5, at 1089.

132. *Id.* at 1092.

133. *See id.*

134. *See id.*

135. *Id.*

136. *See* Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 Colum. L. Rev. 931, 934-35 (1985); *see also* Guido Calabresi, *Remarks: The Simple Virtues of The Cathedral*, 106 Yale L.J. 2201, 2202 (1997) (responding to Rose-Ackerman's criticism of the simplicity of the author's framework).

137. *See* Calabresi & Melamed, *supra* note 5, at 1093.

138. *See* Roberta Rosenthal Kwall, *The Right of Publicity vs. the First Amendment: A Property and Liability Rule Analysis*, 70 Ind. L.J. 47, 64 (1994). Some commentators argue, however, that even where the entitlement is protected by property rules, the rate of compensation is determined by the state, and that this rate is artificially high, making the impairment of the entitlement not worthwhile. *See* Ian Ayres & Eric Talley, *Distinguishing Between Consensual and Nonconsensual Advantages of Liability Rules*, 105 Yale L.J. 235, 237-38 (1995) [hereinafter Ayres & Talley, *Advantages*]; Ian Ayres & Eric Talley, *Solomonic Bargaining Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 Yale L.J. 1027, 1032-33, 1036 (1995). Nevertheless, the means used to protect anti-speech entitlements possess great theoretical and practical significance. *See supra* part I.C.2. For the argument that differences in the degree of protection that entitlements receive influence their substantive contents, see Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 Yale L.J. 1335,

words, a party interested in impairing an anti-speech entitlement has the power to do so, but in return he or she must pay the holder of the entitlement compensation at a rate determined by the state. The rate is usually determined subsequently as a damage award in a civil suit.[139]

For example, rights of publicity and good reputation are not protected by property rules because the holder of such an entitlement is not free to decide whether he or she wishes to sell it, and, if so, for how much. Under the prior restraint doctrine, the entitlement holder cannot obtain an injunction preventing the publication of an expression that would damage his or her reputation. Without the doctrine of prior restraint, the holder of the entitlement could refuse to sell it or, at the very least, could hold out for the price that he or she deemed satisfactory. Rights of publicity and good reputation are also not protected by inalienability rules; if they were, libel would be absolutely and criminally prohibited, regardless of whether or not the "victim" consented.[140] Instead, the victim of libel is entitled to compensation from the person harming him or her at a rate that is determined by a court.

Taking the economic analogy one step further, the doctrine of prior restraint, whereby anti-speech entitlements are protected by liability rules, can be seen as a system for taxing unwanted expressions. An expression that is fully protected by the First Amendment is "free." The person expressing him- or herself is free to do so without paying compensation for damages caused by his or her words, and the person suffering the harm bears the cost. An expression that is not fully protected, on the other hand, will be "taxed" by the state through the imposition of *ex post* civil damages at rates determined by the courts, and the person publishing the expression will bear the burden of paying the tax.

As discussed below, this "law and economics" analysis of prior restraint exposes four serious weaknesses within the doctrine. First, the doctrine blurs the boundary between the scope of the substantive freedom of speech and the means used to regulate speech, making the First Amendment discourse overly means-centric. Second, overreliance on the prohibition against prior restraints weakens the sense of free speech supremacy that should run through constitutional law. Third, the prohibition creates negative externality problems, whereby individuals shift the costs of their actions onto society at large. Fourth, in the speech context, it is not clear that liability rules produce the lowest transaction costs. The remainder of this part discusses

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1336-37 (1986).

139. *See* Kwall, *supra* note 138, at 64.

140. Generally, even in states where defamation is a criminal offense, one of the elements of the offense is the lack of the consent of the victim. Accordingly, even in these states it is possible to say that the right to one's reputation is protected by property rules, not inalienably rules.

these four issues.

a. *Blurring the Substantive Freedom of Speech*

A general acceptance of law and economics theory is not necessary to an appreciation of some of the insights that it can provide. Law and economics can be especially helpful when one is trying to analyze the efficiency with which a particular doctrine achieves its purported rationales.

The primary rationale given for the prohibition against prior restraints is usually the desire not to chill speech.[141] An efficient system of deterring harmful speech would be undesirable if it incidentally precluded valuable expressions from reaching the public, thereby limiting output in the marketplace of ideas. If society's goal is to allow as much speech as possible to reach the public, the prohibition against prior restraints makes sense because it allows all speech to reach the marketplace initially and therefore errs on the side of too much speech.

Even exceptions to the prohibition against prior restraint claim justification in the argument that society seeks to maximize the total amount of speech that is produced; as Thomas Emerson asserted, "[a] system of free expression can be successful only when it rests upon the strongest possible commitment to the positive right and the narrowest possible basis for exceptions."[142] Because the central rationale for the doctrine of prior restraint and its recognized exceptions is the production of maximal amounts of speech, the doctrine necessarily "intrudes into" the substantive constitutional arrangements relating to freedom of speech. In the process it also obfuscates them: when courts become overly focused on the proposed methods for controlling speech, they often lose sight of the underlying substantive questions. As noted above,[143] the first question should always be a substantive one about whether the targeted speech is protected, not a question about prior restraint. The constitutionalism of means must be consistent with the constitutionalism of substances.[144] Establishing an independent agenda within the constitutionalism of means that is isolated from the substantive principles of the Constitution undermines those principles and makes their message imprecise and unclear.

The blurring of substantive First Amendment values occurs when the central grounds underlying the doctrine of prior restraint prove to

141. As stated in the oft-quoted aphorism of Alexander M. Bickel, The Morality of Consent 61 (1975). This aphorism has occasionally been quoted by the Supreme Court. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); *see also* Tribe, *supra* note 29, at 1041 n.16 (arguing that chilling expression may be a far more serious issue than prior restraint itself).

142. Emerson, *Freedom of Expression, supra* note 29, at 10.

143. *See supra* part I.A-B.

144. *See supra* part I.

be inconsistent with those underlying substantive constitutional laws.

b. *Impairment of the Supremacy of Freedom of Speech*

It is doubtful that the doctrine of prior restraint is compatible with a regime that grants constitutional supremacy to freedom of speech. In a regime that values free speech highly, freedom of speech can be restricted only in those exceptional cases where other particularly important interests are at risk.[145] When an expression is permitted, as a liability regime allows, the speech in question has, by definition, been deemed not to threaten such an important interest.

If there are no especially important rights at issue, the justification for burdening the speech and imposing payment upon the publisher is unclear. An expression that is not so injurious as to justify its prevention also does not warrant the imposition of costs on its publisher. The imposition of such costs chills speech and discriminates between the rich, who can afford to pay these costs, and the poor, who cannot. Such results are not unconstitutional; they are, however, incompatible with a constitutional scheme that purports to grant supreme status to freedom of speech.

As discussed above, the prohibition against prior restraint is subject to a long list of exceptions.[146] In almost every case where an expression might cause substantive impairment to an interest of serious public importance, the barrier against prior restraint suddenly seems less than hermetic.[147] On the other hand, liability in the form of damages is often imposed on those who publish expressions that do not pose a serious danger to important public interests.[148]

The doctrine of prior restraint transforms a test that should examine whether speech is sufficiently dangerous to justify its lack of constitutional protection into a test of whether it is possible to prevent the expression through prior restraint. Problems then ensue because our current *ex post* liability regime excessively burdens protected speech, probably more so than property rules would limit it in certain situations.[149]

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145. *See supra* notes 1, 19 and accompanying text.

146. *See supra* part I.A.

147. *See* New York Times v. United States, 403 U.S. 713, 730 (1971) (Stewart, J., concurring) (stating that an injunction would be justified if disclosure would "surely result in direct, immediate, and irreparable damage" to national security); Raneta Lawson Mack, *Digital Signatures, the Electronic Economy and the Protection of National Security: Some Distinctions with an Economic Difference*, 17 J. Marshall J. Computer L. & Info. 981, 990-91 (1999).

148. *See supra* note 138 and accompanying text.

149. *See supra* part II.

c. *Negative Externalities*

Negative externalities occur when a person is required to bear the costs of an action over which he or she had no control.[150] Negative externalities are usually inefficient, although in some cases the costs of mitigation may be cheaper when borne by outsiders than when borne by the person who caused a particular injury.[151] The prohibition against prior restraints leads to negative externalities because speakers and the public are allowed to enjoy certain rights while the costs of those rights are borne exclusively by the holders of the violated anti-speech entitlements.[152] Costs are not internalized to speakers or to the public; rather, they fall on a distinct subset of the population.

Economic analysis, of course, does not take into account the fact that our present moral institutions do indeed place moral responsibility on those who actually cause the damage, regardless of who the cheapest cost avoider is. Even disregarding this reservation, however, it is doubtful that the creation of the negative externalities in this situation can be justified. First, in the same way that anti-speech entitlements that have been impaired are incommensurable in monetary terms,[153] they are also incommensurable in terms of the public interests underlying the doctrine of prior restraint.

Second, in this context, and precisely because of the incommensurability of the relevant entitlements, those injured do not have special means of mitigating their damages that would justify the negative externalities economically.

Third, the balancing between the public interest in freedom of speech and private interests in, for example, one's good name or privacy, should be carried out within substantive constitutional discourse. If private interests outweigh public interests in the substantive balancing, and prior restraint only comes into play when the speech is not fully protected,[154] then there is no justification for changing the balance when trying to decide how best to protect those private interests. Such a change would be an unjustified deviation in the realm of means from agreed-upon substantive arrangements.

d. *Transaction Costs*

According to Guido Calabresi and Douglas Melamed, one should always try to protect entitlements with the type of rule that will pro-

150. *See* Richard Cornes & Todd Sandler, The Theory of Externalities, Public Goods, and Club Goods 29 (1986) (defining an externality as "an event which confers an appreciable benefit [or] inflicts an appreciable damage" upon a third party).
151. *See* Posner, *Analysis of Law*, *supra* note 8, at 139.
152. *See id.* at 545.
153. Incommensurability is discussed extensively *infra* at part II.
154. *See supra* part I.C.2.

duce the most economically efficient system.[155] In their view, when transaction costs are high, liability rules are the most efficient way to protect entitlements.[156] In contrast, they argue that property rules are a more efficient way to protect entitlements when transaction costs are low.[157] Given this focus on transaction costs, it would seem that a distinction should be drawn in the speech context between publications that injure a broad section of the public and publications that injure a single person or a small number of people.

When a publication of the first type is at issue,[158] the cost of individual negotiations between the publisher and each member of the defamed group is likely to be very high, as such negotiations will give rise to collective action and hold-out problems.[159] The cost of gathering the members of a large group is huge, and sometimes such an operation is logistically impossible. Moreover, the completion of the transaction is contingent upon the separate consent of each member of the group; each of them is therefore in a position to extort in a manner that will yield her profits at the expense of the other parties.[160] In such circumstances, it appears that because of transaction costs, private law anti-speech entitlements should be protected exclusively by liability rules. Accordingly, in defamation claims brought by a large group, damages are more efficient means of regulation than injunctions, because injunctions would produce abnormally high transaction costs.

The calculus provided by Calabresi and Melamed yields a different result when a single individual or a small number of people holds the anti-speech entitlement. In such cases no special transaction cost problems arise.[161] According to this analysis, it would be proper to protect these entitlements, such as privacy, by means of property rules.[162]

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155. *See* Calabresi & Melamed, *supra* note 5, at 1093-94.

156. In part this is because the costs of negotiations will be more expensive than the market inefficiencies caused by government pricing. *See id.* at 1106-10.

157. *See id.*

158. The defamation of a sizable section of the public is an example of this type of publication.

159. *See* Lloyd Cohen, *Holdouts and Free Riders*, 20 J. Legal Stud. 351, 351-52 (1991).

160. *See id.* at 356; William A. Fischel, The Economics of Zoning Laws 187-88 (1985).

161. Except, of course, for potential bilateral monopoly problems. One could imagine situations in which no mass markets existed for certain anti-speech entitlements; would-be purchasers would then find themselves trapped in a bilateral monopoly. The significance of such problems is an empirical question.

162. For example, a newspaper that is interested in publishing an item that violates a specific person's privacy may approach that person and conduct negotiations with her. Such negotiations do not engender particularly heavy costs. It is therefore possible to conclude that in such cases the price of privacy should be determined by the holder of the entitlement, who will also be entitled to refuse to sell it. For the right to privacy as property, see Posner, *Economics of Justice*, *supra* note 10, at 258-59.

This part introduced the doctrine of prior restraint and outlined some of the justifications that have been advanced in its support. A law and economics analysis of the bar against prior restraint, and the resulting reliance upon liability rules to protect speech rights, highlights the inefficiency of some aspects of the liability rule regime. The next part applies this law and economics framework to examine the major problem with a liability-rule scheme of speech regulation: the incommensurable harm that is often done to anti-speech entitlements through the publication of speech that is not fully constitutionally protected.

II. INCOMMENSURABILITY AND PRIOR RESTRAINT

Prior restraint doctrine ensures that anti-speech entitlements are protected by liability rules instead of property rules.[163] This analysis brings into focus one of the major drawbacks of such a system, the problem of incommensurability.[164] Law and economics assumes that questions of preference, utility and choice are not particularly difficult,[165] but on an intuitive level, especially in the context of speech, the ranking and commodification of moral and political values that the approach requires seems problematic. There is something unsettling about the idea that non-market values and entitlements can be easily quantified in monetary terms. In recent years this problem has attracted widespread interest, particularly from scholars of jurisprudence, who have attempted to analyze with more rigor our common intuitive forebodings.[166]

Incommensurability, in the context of this Article, refers to the impossibility of comparing two goods, either in monetary or retributive terms, without violating our considered judgments about how these goods are best characterized.[167] Incommensurability occurs in situations in which things "cannot be compared in terms of 'better/worse' and 'best.'"[168] The question in the context of this Article is whether it is possible to establish a monetary sum that is commensurable to a holder's "property" in her reputation, privacy, or other anti-speech entitlements.[169] By extension, this question asks whether prior re-

163. *See supra* note 5 and accompanying text.

164. For a discussion of the nexus between incommensurability and property and liability rules, see Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 Mich. L. Rev. 779, 845-46 (1994) [hereinafter Sunstein, *Incommensurability*].

165. *See* Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 Utah L. Rev. 683, 683 [hereinafter Epstein, *Utility*].

166. *See* Sunstein, *Incommensurability*, *supra* note 164, at 780.

167. *See* Cass R. Sunstein, Free Markets and Social Justice 80 (1997) [hereinafter Sunstein, *Free Markets*]; Sunstein, *Incommensurability*, *supra* note 164, at 796.

168. Brian Bix, Law, Language, and Legal Determinacy 96 (1993).

169. *Cf.* Laycock, *Irreparable Injury*, *supra* note 2, at 246. Professor Laycock notes that:

> Money is an adequate remedy if, and only if, it can be used to replace the

straints that would prohibit injurious speech are commensurable with the subsequent monetary compensation victims receive under the current liability rules.[170]

Incommensurability can be defined several ways, distinguishing "radical incommensurability" from "moderate incommensurability," and "objective incommensurability" from "subjective incommensurability." Radical and moderate incommensurability may each be objective or subjective. Subjective incommensurability may be further divided into culturally specific incommensurability and purely rational or idiosyncratic incommensurability. The following subsections examine these definitions and a number of possible sub-classifications of them. The discussion will focus on entitlements to reputation and privacy, since these are particularly relevant to the private law application of the doctrine of prior restraint.

A. *Radical and Moderate Incommensurabilities*

As defined by one commentator, "two valuable options are incommensurable if (1) neither is better than the other, and (2) there is (or could be) another option which is better than one but is not better than the other."[171] Situations may also arise in which the two options are incommensurable without the existence of a third option that is better than either one alone.[172]

A requirement of this last type of relationship reflects a radical approach to incommensurability. Radical incommensurability involves the negation of the possibility of rational choice and even the comparison of different options.[173] While cases of incommensurability in this sense are relatively rare, they are possible and apparently also exist in the context of personal subjective incommensurability.[174]

There is also a more moderate approach to incommensurability.

> specific thing that was lost. That is to say, *money is never an adequate remedy in itself.* It is either a means to an end or an inadequate substitute that happens to be the best courts can do at reasonable cost.

Id.

170. Criminal sanctions do not purport to be a substitute for the values impaired by the commission of the offense. The punishment of an offender is certainly not commensurable with restraining the commission of the offense. *See* Laycock, *Irreparable Injury*, *supra* note 2, at 164-66. For a discussion of the question of whether the existence of criminal sanctions can justify the prohibition against prior restraints, see *infra* part III.

It should be noted that the topic of this Article is not the incommensurability of freedom of speech. That issue is discussed in Sunstein, *Incommensurability*, *supra* note 164, at 829-34. Where substantive constitutional law protects speech, no means may be used to impair that speech. This Article addresses only the question of whether anti-speech entitlements—not pro-speech rights—are incommensurable.

171. Joseph Raz, The Morality of Freedom 325 (1986).

172. *See* Sunstein, *Incommensurability*, *supra* note 164, at 805-06.

173. *See* Sunstein, *Free Markets*, *supra* note 167, at 85.

174. *See infra* part II.B.

Instead of requiring the absence of any possibility of a hierarchy of options or of rational choice among them, it suffices that a single metric does not exist on the basis of which it is possible to weigh the options.[175] Cases of incommensurability in this sense are relatively routine—typical examples include human life, pain and suffering, and injury to feelings.[176] People must choose between these values and other values in a rational manner. Moreover, these values are regularly expressed in monetary terms such as insurance rates and tort damages.[177] Nevertheless, it is not possible to measure these values in accordance with a single metric, and they are not "negotiable" in the usual sense. It is merely possible to choose between them, or to determine sums of money as compensation for their loss. These choices, however, are generally constrained, and they have a jarring impact and an aura of unpleasantness that is preferably avoided.[178]

Anti-speech entitlements are usually incommensurable in the moderate sense. Examples of entitlements of this type are the private rights to reputation and privacy,[179] and the public interest in national security.[180] Indeed, a violation of these rights may be compensated by money, and these rights can be weighed against other values, thus presenting rational choices. At the same time, this evaluation cannot be performed based upon a single metric, and the values are not negotiable. Rather, the determination of compensation or the choice between two values is made only under duress and is jarring in nature.

B. *Objective Incommensurabilities*

Objective incommensurability occurs when the comparison between a number of options is impossible from a logical point of view. In cases of objective incommensurability, it cannot be true that one of two options is preferable to the other, or that the two are of equal weight. Incommensurability of this type is exceptional because the ranking of a given set of options generally depends on subjective assessments. Such assessments are not shared by everyone, and by their nature they are likely to be controversial. Objective incommensurability requires the existence of objective rankings. It is therefore arguable that objective incommensurability is an impossibility.[181]

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175. *See* Elizabeth Anderson, Value in Ethics and Economics 66-71 (1993); Sunstein, *Incommensurability*, *supra* note 164, at 808-12.

176. *See* Restatement (Second) of Torts § 903 cmt. a (1977); Margaret Jane Radin, *Compensation and Commensurability*, 43 Duke L.J. 56, 69-71 (1993); Sunstein, *Incommensurability*, *supra* note 164, at 845-46.

177. *See* Radin, *supra* note 176, at 60-62.

178. *See infra* part II.C.

179. *See* Posner, *Economics of Justice*, *supra* note 10, at 255-56, 272.

180. *See supra* note 147 and accompanying text.

181. Nevertheless, it is possible that incommensurabilities "result[ing] from vagueness and the absence of sharp boundaries which infect language generally" are a partial example of objective incommensurabilities in the sense discussed above. Raz, *su-*

The comparisons this Article discusses do not involve objective incommensurabilities. A rational person may believe that his privacy or reputation is commensurable with money or other tangible benefits. At the same time, there may be another reasonable person who believes that her privacy or reputation is not commensurable to any particular sum of money. If a publisher were to approach the latter person in advance and ask her to enter into negotiations to "purchase" their privacy or reputation, she would refuse to negotiate. Because rational people could believe that a certain value was either commensurable or incommensurable, this is not a case of objective incommensurability.

C. *Subjective Incommensurability and the Doctrine of Prior Restraint*

Is there room to consider subjective incommensurability when determining the protection that should be given to an entitlement? One could argue that society must allocate material resources among various objectives, despite the unpleasantness or disturbance created in the process. Thus, while "many people find it jarring to hear that, in light of actual occupational choices, a worker values his life at (say) $8 million,"[182] this does not negate the need for determinations of this type. Not only is any other approach impracticable, but the valuation of human life as equal to unlimited sums of money assumes the legitimacy of valuing human life in terms of money. This contradicts the claim that human life and money are incommensurable in the radical sense.[183]

From a more general perspective, liability rules are based on the commodification of interests that are likely not to be commodifiable from the point of view of the parties concerned. Subjective incommensurability is not linked to any specific interests or values. From the subjective perspective of a particular person, every interest or value may be incommensurable to money.

Ultimately, the state does not coerce any person to convert interests or values which he considers incommensurable into money. If a person's entitlements have been taken from her, she has the option, or the power, to obtain monetary compensation for the injury. Possibly, this is also true with respect to radical incommensurability, which does

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pra note 171, at 327.

182. Sunstein, *Free Markets*, *supra* note 167, at 84.

183. Even if assessing the reputation or privacy of a person in monetary terms is disturbing to many people, there is no other choice. When rights of reputation or privacy are violated, there is no reason to withhold compensation from those people for whom reputation or privacy is commensurable. Even people who feel their reputations or privacy are incommensurable to money may be interested in compensation for attendant marketable losses, such as loss of income from business that is attributable to a privacy violation.

not acknowledge the possibility of a process for choosing between incommensurable options.[184] It is undoubtedly true with regard to moderate incommensurability, which does not see an inherent contradiction in having to choose between incommensurable options.[185]

D. *Idiosyncratic Incommensurability and Cultural Incommensurability*

There are two possible approaches to the question of whether subjectively incommensurable entitlements should be protected by liability rules or property rules. On one hand, one could analyze all cases in which the entitlement at issue was subjectively incommensurable, even if that incommensurability was purely idiosyncratic. On the other hand, one could limit one's analysis to those situations in which the incommensurability, while subjective in the ontological sense, is rooted in the accepted culture of the relevant community or society.

Because any entitlement may be incommensurable from an idiosyncratically subjective point of view, adopting the first approach would mean that every entitlement should be protected by property rules.[186] This Article does not take a definitive stand in relation to this approach, as its substance falls within the scope of the second approach, which applies to the more limited category of cases.

The second approach refers only to those subjectively incommensurable entitlements that have a certain objective element, entitlements whose incommensurability is anchored in social norms.[187] These norms are culturally dependent and are not based on logical analysis or abstract conceptions.[188] Following this approach, a damages award by a court reflects a favorable opinion about an entitlement's com-

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184. *See supra* part II.A.

185. *See* Sunstein, *Free Markets*, *supra* note 167, at 85-86. These arguments do not promote avoidance of the problem of incommensurability when deciding between different modes of protecting entitlements. After all, there are means of protecting an entitlement that preempt an injury and are intended to prevent it. These means should be differentiated from the remedies that are awarded after the violation of an entitlement and that are designed to compensate injured parties for the damage caused to them. Even if there is no choice but to commodify values in monetary terms when calculating *ex post* remedies, this is not the case when determining the appropriate means of protecting an entitlement, when trying to preclude the injury and not only to compensate for it. Sometimes the same means may fulfill both functions. Liability rules, for instance, are intended to deter and to compensate concurrently.

186. This assumes that people would use judicial enforcement of their property rights only in situations in which they actually did not want to sell, and not merely as negotiating tactics. *Cf.* Ayres & Talley, *Advantages*, *supra* note 138, at 242-48 (arguing that even according to the standard of economic efficiency propounded by Calabresi and Melamed, it is not efficacious for a person to apply to a court for a restraint of damage to his property if he intends to sell that property).

187. *See* Sunstein, *Free Markets*, *supra* note 167, at 85.

188. *See id.* at 85-86.

mensurability.[189] There are certain types of entitlements that society regards as inherently negotiable and similar to money, such as rights relating to fungible chattels.[190] In contrast, there are entitlements that are regularly considered incommensurable, despite the fact that the incommensurability is non-essential, subjective, and does not preclude necessary choices between different alternatives. Society disfavors, and on occasion even prohibits, commerce in such entitlements. At the very least, society demonstrates an understanding of those people who refuse to participate in a market for these entitlements.[191] Many of these entitlements have personal or sentimental value, in the sense of goods[192] or intangible rights[193] that money cannot replace. The entitlements to life and to good health exemplify this type of incommensurability.[194]

Even the entitlements to reputation and, to a great extent, privacy, fall within this category. Notwithstanding their subjective and moderate incommensurability, the prevailing cultural feeling is that converting these entitlements to monetary terms is not entirely appropriate, or at least that their exchange should not be compelled. This is because money damages cannot replace a good reputation or privacy once it has been lost, nor can money erase emotional distress once it has been suffered. Reputation, privacy, and emotional tranquillity cannot be purchased in the market.[195] Incommensurability must therefore be taken into account in determining the means that should be used to ensure the rights to reputation and privacy, rights in the name of which the First Amendment allows speech to be regulated.

The significance of the existing prohibition against prior restraint—which confers on these entitlements the protection of liability rules alone, and negates the possibility of protecting them with property rules—is that it denies the existence of incommensurability. Citizens are forced, in effect, to trade in their reputations and privacy for governmentally-determined prices, despite widespread reservations about the practice that are firmly rooted in the culture and morality of society.

E. *Commensurable Anti-Speech Entitlements as Exceptions to the Prior Restraint Doctrine*

Against this background, it is interesting to note that the prohibition against prior restraint does not apply to anti-speech entitlements that are primarily of a commercial nature, in particular intellectual

189. *See* Sunstein, *Incommensurability*, *supra* note 164, at 843.
190. *See* Laycock, *Irreparable Injury*, *supra* note 2, at 4.
191. *See id.* at 41-42.
192. *See id.* at 40-41, 45.
193. *See id.* at 41.
194. *See id.*
195. *See id.* at 165-66.

property protections such as copyright, trade secrets, and trademarks.[196]

It is precisely entitlements of this type, after all, that are not generally deemed to be incommensurable.[197] They are customarily treated as property, and their exchange in commerce is accepted. To a great extent, intellectual property rights exist in order to enable their exchange. Nevertheless, the doctrine of prior restraint does not apply to these entitlements, and generally they are protected by property rules. Thus, it is possible to issue injunctions—including temporary restraining orders—in order to halt their violation.[198]

Judicial willingness to engage in prior restraint within the framework of the protection of property or quasi-property rights[199] manifested itself in *Snepp v. United States*,[200] in which the Court found that a former government employee had breached a fiduciary obligation by failing to submit his book to the CIA for pre-publication review.[201] The Court accordingly placed the book's earnings into a constructive trust.[202] The United States Government did not rely on the contention that the book contained secret information.[203]

The lack of theoretical consistency in prior restraint doctrine, illustrated by courts' willingness to engage in prior restraint to protect commensurable entitlements, may conceal an assumption that the holders of intellectual property are interested in negotiating its sale. Accordingly, it may be that these entitlements should be protected by property rules. In contrast, the typical holder of rights to reputation and privacy may not be prepared to trade them. Thus, in order to enable their socially beneficial transfer, liability rules are put in place.

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196. At the same time, the grant of an injunction to restrain the breach of copyright is not automatic. When exercising the discretionary power to grant injunctive relief, courts are likely to take into account First Amendment considerations. *See* Kwall, *supra* note 138, at 64 and the sources referred to therein. For an argument justifying the protection of the right of publicity (which contains commercial elements) through the use of liability rules, see *id.* at 52-65.

197. Moral rights theories of intellectual property may present different issues. A moral right, in the context of intellectual property, is the right of a creator to control his creation so that it will not be changed or distorted in a way that may injure his dignity. *See* Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. Pub. Int. L.J. 41, 44 (1998).

198. *See* Laycock, *Irreparable Injury*, *supra* note 2, at 121.

199. Some commentators compare freedom of speech itself to a property right. *See* Epstein, *Property, Speech, and Distrust*, *supra* note 1, at 59-60.

200. 444 U.S. 507 (1980) (per curiam); *see also* Jonathan C. Medow, *The First Amendment and the Secrecy State:* Snepp v. United States, 130 U. Pa. L. Rev. 775, 777-82 (1982) (discussing the Supreme Court's affirmation of prior restraint for reasons of national security); Orentlicher, *supra* note 76, at 662-66 (discussing the Court's finding a fiduciary duty for the appellant to submit all publications concerning the CIA for prior approval).

201. *See Snepp*, 444 U.S. at 510.

202. *See id.* at 515-16.

203. *See id.* at 508 (outlining the government's claims).

At the same time, intellectual property, and in particular copyright, is characterized by the fact that one of its purposes is to encourage freedom of speech and democratic values.[204] Intellectual property restricts certain aspects of freedom of speech in order to promote freedom of speech in general.[205] Intellectual property, therefore, does not entail a limitation on freedom of speech solely to promote competing values or interests. Indeed, while the doctrine of prior restraint is intended to prevent curtailment of freedom of speech in favor of other interests, the application of the doctrine to intellectual property leads to the impairment of freedom of speech itself. Consequently, the pro-speech elements of intellectual property may generate an argument against the prohibition of prior restraint in this area.

This argument, however, is not particularly persuasive, nor does it provide a suitable explanation for the non-application of the doctrine of prior restraint to intellectual property. The doctrine of prior restraint is primarily based on two contentions, which apply to intellectual property in the same ways as to other kinds of speech. The first contention is that the collateral bar rule, which forbids raising constitutional issues in contempt hearings, makes issuing anti-speech injunctions problematic. This fear, however, exists to the same extent with judicial injunctions or administrative orders issued against publications that purportedly violate intellectual property rights. The second contention focuses on the harm that prior restraints cause to the democratic nature of society.[206] This argument is not significantly weakened in the intellectual property context, however, because one of the rationales for the copyright regime is that it encourages speech. It is therefore unclear why these arguments against the use of prior restraints are thought to be persuasive only outside the realm of intellectual property.

As noted above, Calabresi and Melamed have argued that the test for determining the type of protection that courts should confer on an entitlement depends on the anticipated transaction costs associated with the transfer of that entitlement.[207] Courts will grant property-like protection to an entitlement if negotiation and transaction costs are low. It would seem that in the field of intellectual property, transaction costs are generally low. In part, these low transaction costs result from the fact that the intellectual property interest in a given work tends to be found in the hands of one person or a limited number of

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204. *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 347 (1996).

205. Some commentators argue that the protection of intellectual property by property rules actually harms freedom of speech considerably. *See, e.g.*, Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 Yale L.J. 1533, 1538-39 (1993).

206. For a discussion of the relationship between prior restraint and democratic values, see *infra* part III.

207. *See* Calabresi & Melamed, *supra* note 5, at 1106.

people. One who wishes to use the intellectual property can therefore easily approach its owners and conduct negotiations with them cheaply.

Similarly, in many cases the transaction costs involved in the transfer of non-commercial anti-speech entitlements should not be especially high. An exception to this may be a photograph of a large group of people, where purchasing each individual's privacy right could prove expensive, especially under time pressure. Analogous cases exist in the context of commercial entitlements, however, so it is difficult to distinguish between commercial and non-commercial anti-speech entitlements on this ground alone.

III. ABSTRACTION, SELF-CENSORSHIP, AND DEMOCRATIC VALUES

This part discusses three interconnected arguments that unfavorably compare prior restraints to *ex post* criminal and civil sanctions. According to these arguments, the law should universally prefer *ex post* sanctions to prior restraints because the former are less injurious to First Amendment values. These arguments are not persuasive. Prior restraints not only fare as well as subsequent sanctions in promoting core democratic values, but at times, actually perform better.

A. *Abstraction and Hypothetical Adjudication*

When a court or an administrative authority is confronted with a request for prior restraint, there is frequently no way for it to know whether the publication in question would cause any damage if released. The situation is different when a court is weighing *ex post* sanctions: because publication has already occurred, there is usually clear data available indicating the damage caused. Some commentators have therefore argued that prior restraint is undesirable because it amounts to adjudication in the abstract.[208] This argument, despite its intuitive strength,[209] is problematic and difficult to accept.

First, speakers are often retrospectively sanctioned for speech that was only dangerous "in the abstract" at the time it was spoken. The same level of abstraction that would prohibit prior restraints would also prohibit *ex post* sanctions, because if it is impossible for the state to determine the dangerousness of speech in advance than it must also be impossible for individual speakers to do so. The abstraction argument does not concern the means used to regulate unprotected speech *per se*, but the question of whether particular kinds of speech are protected.[210] This is a substantive constitutional issue, not one that can be

208. *See* Blasi, *supra* note 27, at 49-54.

209. *See* Redish, *supra* note 29, at 66.

210. *See id.* at 68-70 and the examples set out there; *see also* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 864 (1991) (discussing examples of categories of speech "completely beyond First Amendment protection").

handled through the constitutionalism of means. The Constitution may indeed limit the state's power to impose abstract restrictions on freedom of speech. This fact, however, is not logically related to the prohibition against prior restraint.

Second, as noted above, criminal law generally requires that the person committing an act have a particular mental state at the time of the act.[211] Particularly with respect to inchoate offenses, criminal law generally affords determinative weight neither to the question of whether the intended damage actually occurred, nor to whether any concrete damage could have occurred.[212] The actual damage question is relevant only for the purpose of classifying the act as an attempt or a completed offense.[213] This emphasis on mental elements, as opposed to actual harm, in the criminal law follows from criminal law's objectives: retribution and deterrence.[214] In contrast, the sole purpose of prior restraint is the prevention of harmful speech that is not entitled to First Amendment protection. The effect of rejecting the possibility of prior restraint in any case where anticipated damage was at all uncertain would be to give absolute preference to freedom of speech over all other interests and values, despite the contrary language of the Constitution. Society would have to bear all risks necessary to guarantee freedom of speech. This approach is inconsistent with the belief that freedom of speech is not absolute. Moreover, this approach entails an inconsistency between the constitutionalism of means and substantive constitutional theory. While this Article argues that a high degree of proof of the damaging nature of an expression must be demonstrated before that expression may be restrained,[215] this position is distinct from saying that any reliance on predictive hypotheticals makes prior restraint untenable.

Third, in certain speech offenses the amount of damage caused by publication is not one of the elements of the offense; rather, the speech itself is prohibited.[216] There is no purpose to prohibiting prior restraint of these types of speech when, even in the absence of damage, publication alone constitutes a completed offense.[217]

Fourth, the damage that will be caused by a particular expression is often clear from the content of the speech itself, and there is no need

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211. *See infra* part IV.C.

212. *See* Andrew Ashworth, Principles of Criminal Law 395-423 (1991).

213. *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 750 (1983) (providing an example of applying the actual damage analysis to attempted murder).

214. *See infra* part IV.

215. *Cf.* Redish, *supra* note 29, at 67 (stating that the government bears the burden of demonstrating that the expression to be restrained presents a significant danger).

216. *See* Blasi, *supra* note 27, at 50 (noting examples of the current doctrines regarding obscenity and fighting words).

217. *See* Redish, *supra* note 29, at 68-69 (noting that "the only speech which could be punished is speech which has actually led to provable harm").

for speculation about future developments. These cases include disclosures of national security secrets, defamations, and disclosures of commercial secrets.[218] There is no reason to deny prior restraint based on abstraction under these circumstances.

Subsequent sanctions actually appear more abstract than prior restraints in significant respects.[219] After all, prior restraints always refer to specific, concrete expressions, whereas *ex post* sanctions are based on the application of general norms. Speech regulations have had recurring problems with unconstitutional vagueness.[220] They generally do not refer to specific prohibited expressions, but rather to the abstract characteristics of prohibited speech. On the basis of these laws, a person might find it difficult to determine whether publication of a particular expression would create exposure to sanctions in advance. Similar vagueness also exists in the laws conferring the power of prior restraint on the judiciary.[221] In contrast, the issuance of a prior restraint at least enables an individual to know, prior to acting, whether a planned publication is lawful.[222] This is particularly true in the case of injunctive restraints that are subject to immediate judicial review.[223] The iniquity of imposing sanctions upon a person who could not have known in advance that his conduct was prohibited would not occur under a prior restraint regime.

There may be cases in which a prohibition will be conditioned upon a court or other competent authority imposing a specific prohibitive norm. Such a prohibition is not a direct consequence of the law. Instead, the law confers power on a court or agency to use its discretion in issuing restraints.[224] It is precisely the importance of freedom of speech, and societal sensitivity to fears that it may be unduly re-

218. *See id.* at 69.

219. *See* Blasi, *supra* note 27, at 49.

220. *Cf.* Mayton, *supra* note 40, at 255-57 (discussing the problem of vagueness in laws restricting speech).

221. *Cf.* Schauer, *supra* note 6, at 727-28 (discussing the vagueness of laws conferring the power of prior restraint to administrative bodies).

222. *See* Mayton, *supra* note 40, at 277-78.

223. In this respect, it is also relevant to ask whether defying an order issued by a competent administrative or judicial authority is a criminal offense when the authority erred in issuing the order. The question is whether there is an obstacle to an indirect attack on the constitutionality of an injunctive restraint during criminal proceedings against the person who breached the restraint. *See* Walker v. City of Birmingham, 388 U.S. 307, 315 (1967). Where the possibility of such an indirect attack exists, an individual cannot know with certainty whether or not the publication will constitute an offense. At the same time, of course, it is difficult to argue that publishers would suffer as a result of being allowed to raise this defense. The situation would be different if parties opposing a publisher could argue that publication of the expression was an offense subject to sanctions despite the refusal of a competent authority to restrain the expression on constitutional grounds. For a description of the issues surrounding indirect attacks on decisions of this type, see *infra* part V.D.

224. *See* Fiss, *Injunction*, *supra* note 84, at 26-27 (describing the "injunctive process . . . as *concentrating* or *fusing* the decisional power in the judge").

stricted, that make individual discretionary review of judicial speech regulation desirable. It is difficult to understand, then, why some commentators would promote general, abstract, and vague speech restrictions.[225] It is also hard to comprehend why they would argue against legislative attempts to impose a duty upon courts to look closely at an expression before restraining it.

For instance, in the sensitive constitutional balancing of First and Sixth Amendment rights, it is probably inappropriate not to determine the extent of permitted publication *ex ante*, leaving the press to "gamble" on the legality of any given publication. Our current regime focuses on the wrong questions. In such a situation, the critical issue is whether a court may prohibit a concrete publication, not whether the press should be subject to sanction according to some general norm. The tools of prior restraint, including the ability to issue precise injunctions, can handle such a task most effectively and sensitively.[226]

There is no need, for example, to impose any restrictions upon media coverage of criminal trials. If there are circumstances that justify the imposition of speech restrictions, it would be more proper to enforce them by means of restraining the publication of the pertinent expressions than by punishing the publishers.

Nevertheless, the demand for individuated imposition of restrictions does not obviate the legislature's duty to specify standards to govern discretionary speech restrictions.[227] Conferring the power to decide whether or not to prevent a publication upon a court or administrative agency does not conflict with the rule against the delegation of legislative power[228] any more than the discretion given to prosecutors or courts in sentencing. The legislature must set the standards for authorities to use in hearing an application for a restraint, but this does not mean that the legislature cannot also mandate an individuated, discretionary hearing.

B. *Self-Censorship*

A central consideration in determining the means that should be used to regulate unprotected speech is the amount of self-censorship of protected speech that may occur. On the margins, the existence of any speech regulation will cause potential publishers to refrain from publishing some amount of protected speech. This unnecessary deterrence is problematic because of the high social value we place on freedom of speech as a means of collective self-determination and

225. *See, e.g.*, *id.* at 70 (arguing that "[i]ndividuation is the antithesis of overbreadth; it is the means of containing the 'chilling effect' of a prohibition").

226. For an opposite view, however, see Bernabe-Riefkohl, *supra* note 45, at 267.

227. *Cf.* Tribe, *supra* note 29, at 1055 (arguing that the authority to determine what speech is protected rests finally within the scope and power of the judiciary).

228. For a description of the non-delegation doctrine, see Stephen G. Breyer et al., Administrative Law and Regulatory Policy 39-70 (4th ed. 1999).

public enlightenment. Reluctance to publish protected speech injures not only the hesitant speaker, but also society in general.

The scope of private censorship threatens to grow particularly wide when it is imposed on speakers by media corporations or publishing houses, which often have no interest in placing themselves at risk in order to guarantee that their employees' ideas are heard. Unlike state censorship, private censorship is not subject to judicial review,[229] and it typically occurs outside the bounds of public scrutiny. The extent of private censorship is therefore unknown.

The regulation of unprotected speech undoubtedly causes some damage to speech that is protected by the First Amendment. The appropriate question, therefore, is what means of regulating speech will restrict unwanted, unprotected speech most effectively while causing the least damage to protected speech.

One of the most common arguments against the prior restraint of speech is that such procedures inevitably lead to overly broad self-censorship.[230] Potential publishers, the argument goes, will be deterred by the unpleasantness and expense of prior restraint to the extent that they will refrain from publishing constitutionally protected speech.[231] "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."[232]

This argument is largely based on the contention that prior restraint functions "in the abstract," as discussed above. Essentially, it expresses a fear that because it is impossible to be one hundred percent sure *ex ante* when prior restraint will be exercised, publishers will avoid the publication of borderline speech so as to avoid having it restrained. As discussed above,[233] however, this contention does little to distinguish prior restraints from *ex post* sanctions; presumably, the lack of certainty about future sanctions should lead to self-censorship under both regimes.

The deterrent effect of criminal and civil sanctions may lead to self-censorship of desirable speech that is broader than that caused by prior restraints.[234] The specter of a criminal sanction may induce a publisher to leave a wider margin of error than the imposition of a prior restraint. Moreover, because *ex post* sanctions involve the application of general norms while prior restraints act on specific expres-

229. *See* Mayton, *supra* note 40, at 268, 277.
230. *See id.* at 275-78.
231. *See* Blasi, *supra* note 27, at 24-49; Steven T. Catlett, Note, *Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine*, 84 Colum. L. Rev. 1616, 1627-28 (1984).
232. Thornhill v. Alabama, 310 U.S. 88, 97 (1939) (citing Near v. Minnesota, 283 U.S. 697, 713 (1931)).
233. *See supra* part III.A.
234. *See* Mayton, *supra* note 40, at 253-54; Schauer, *supra* note 6, at 728.

sions, the former may lead to greater amounts of self-censorship than the latter.

It should be clear, however, that self-censorship is one of the goals of any system of speech regulation. The objective, however, is to encourage self-censorship of harmful, unprotected speech while encouraging protected speech. The problem is that the two goals are often confused in the minds of potential speakers. The advantage of prior restraints over subsequent sanctions in this regard is that their specificity gives speakers a fair degree of certainty about the legality of a particular expression.[235] This certainty may actually encourage discussion because it will give speakers peace of mind, allowing those who desire to "steer far [wide] of the unlawful zone"[236] to do so. The publisher of constitutionally protected speech views the "censor," whether an administrative agency or a court, not as a barrier to speech, but rather as a source of certainty and protection. A publication that has passed the "censor" is absolutely and fully protected. In contrast, under a regime dominated by *ex post* sanctions, a publisher is always exposed to liability based upon past publications.

For example, if a court imposes monetary sanctions on a funding source that contributed to an art exhibition that was later found to be obscene, the funding source may hesitate before financing another avant-garde exhibition. The self-censorship and damage to First Amendment values in this case are much greater than in the case in which the "obscenity" of a given exhibition is determined in advance, because the speaker or financier can be confident that the speech in question is absolutely protected.[237] There is no disincentive to funding cutting-edge performances when speech regulations are determined in advance.

Most self-censorship arguments presented are anecdotal or intuitive, without empirical support. Some commentators even argue that there is no such thing as self-censorship distinct from governmental censorship.[238] In any case, without compelling empirical evidence, self-censorship arguments in no way justify the decision to protect anti-speech entitlements through liability rules alone.

C. *Reservations About Prior Restraint That Extend Beyond Speech*

Another argument advanced in favor of the doctrine of prior restraint holds that it is necessary to generally limit the exercise of prior restraints in a liberal democratic society. According to this line of thought, concerns over the prior restraint of speech are only one ex-

235. *See* Schauer, *supra* note 6, at 729.
236. Speiser v. Randall, 357 U.S. 513, 526 (1958).
237. *See* Fiss, *State Activism*, *supra* note 16, at 2094.
238. *See* Steven Alan Childress, *The Empty Concept of Self-Censorship*, 70 Tul. L. Rev. 1969, 1971 (1996).

ample of a broader disfavoring of prior restraints: as serious violations of liberty[239] that are difficult to reconcile with our conceptions of limited government.[240] One commentator suggests that the general reservation about prior restraints manifests itself not only in the First Amendment, but also in the Fourth Amendment's provision of the right to be free of unreasonable searches and seizures.[241]

The rejection of preventative detention or arrest, even when important interests are thereby put at risk, is an example of the general reluctance to use prior restraints. It is widely accepted that a person's liberty cannot be physically constrained except as punishment for an offense that he or she has committed.[242] The apparently contradictory use of prior restraints in the speech context proposed in this Article must therefore be explained.

Despite courts' traditional aversion towards preventative arrest and detention, in recent years they have increasingly circumvented this outright prohibition. The Supreme Court has recognized the constitutionality of many of the methods used to accomplish this. For example, until 1984, a defendant on trial for past offenses could not be kept in federal prison out of a fear that he or she might commit more offenses if released.[243] Congress changed this rule with the enactment of the Bail Reform Act,[244] which the Supreme Court upheld in *United States v. Salerno*.[245] Under the Act, the government may keep a defendant incarcerated if it can prove by "clear and convincing evidence" that he or she will commit further offenses if released.[246]

Further, courts have recognized for generations that mentally ill persons may be incarcerated against their will to prevent them from doing harm to themselves or their surroundings.[247] This traditional, although not uncontroversial,[248] doctrine has been extended in many states to include the power to civilly commit people who, as a result of mental abnormalities or personality disorders, are likely to engage in

239. *See* Fiss, *Injunction*, *supra* note 84, at 68.

240. *See* Blasi, *supra* note 27, at 69-85. Blasi's argument focuses on prior restraint of speech, but the essence of his comments is also relevant to the prior restraint of other activities. *See also* Jeffrey Standen, *The Fallacy of Full Compensation*, 73 Wash. U. L.Q. 145, 159-64, 181-85 (1995) (arguing that courts have difficulty issuing injunctions or prohibitory remedies).

241. *See* Amar, *supra* note 74, at 71-72.

242. *See* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 Colum. L. Rev. 920, 934 (1987).

243. *See* United States v. Salerno, 481 U.S. 739, 742 (1987).

244. 18 U.S.C. § 3141-3156 (1994).

245. *See Salerno*, 481 U.S. at 755.

246. *See id.* at 751.

247. *See* Kansas v. Hendricks, 521 U.S. 346, 356-59 (1997).

248. *See* George A. Huber et. al., *Hospitalization, Arrest, or Discharge: Important Legal and Clinical Issues in the Emergency Evaluation of Persons Believed Dangerous to Others*, 45 L. & Contemp. Probs. 99, 99 (1982).

acts of sexual violence.[249] It is difficult to justify this policy's exclusive application to sex-offenders, rather than a general inclusion of all violent habitual offenders. The relevance of whether a mental disorder causes the criminal tendency is also unclear.

Finally, state statutes in California[250] and Washington,[251] and new federal statutes,[252] provide for life imprisonment of habitual offenders. These statutes are intended to prevent people who have been proven to be dangerous from repeating their offenses. Various petitions attacking the constitutionality of these statutes have been rejected.[253] The logic behind these statutes is problematic. Instead of directly examining the justification for incarcerating a given individual on the basis of the danger he or she poses to society, a mechanical procedure based on the number of offenses he or she has committed is used, which may lead to arbitrary results.

The rejection of preventative arrest as an appropriate method of criminal regulation therefore involves difficulties similar to those we saw in prior restraint doctrine. In both cases, there is a danger that courts will focus too narrowly on a body of doctrine regulating a set of means, in the process losing sight of the substantive constitutional concerns that the doctrine in question was originally intended to protect.

The doctrine of prior restraint, which purports to protect freedom of speech, actually does little to promote First Amendment values. The same is true of the doctrine of preventative arrest, which is intended to protect physical liberty but in all likelihood increases the number of times that individuals' liberty rights are trampled. These doctrines have undercut the policies that they were formulated to implement.

Even if the general reservations about prior restraint are well founded, prior restraint of speech is unique in two respects that may justify it's use even in those circumstances in which prior restraint of conduct usually appears problematic. First, prior restraint of speech takes pre-existing speech as its object. The publication, rather than the creation, of the speech is being restrained. Therefore, the substance and content of the speech in question is almost always already determined. There is no need to speculate about future conduct in the speech context, as is required in a case of preventative arrest. While it

249. The Supreme Court has confirmed the constitutionality of such practices. *See Hendricks*, 521 U.S. at 371; Stephen R. McAllister, *"Punishing" Sex Offenders*, 46 Kan. L. Rev. 27, 47-54 (1997); Thomas J. Weilert, *Thoughts on the Cost of Freedom*, 46 Kan. L. Rev. 17, 19 (1997).

250. *See* Cal. Penal Code § 667(e)(2)(A) (West 1999).

251. *See* Wash. Rev. Code Ann. § 9.94A.392(2) (West 1998).

252. *See* Violent Crime Control and Law Enforcement Act, 42 U.S.C. § 13701-14223 (1994).

253. *See* Meredith McClain, Note, *"Three Strikes and You're Out": The Solution to the Repeat Offender Problem?*, 20 Seton Hall Legis. J. 97, 114-16 (1996).

is problematic to restrain individual liberty on the basis of speculative assertions about future conduct, this difficulty does not arise when the object of the restraint is an expression whose content is known. The only question is whether the expression enjoys full First Amendment protection.

In certain cases, of course, the latter question will involve an examination of the anticipated consequences of publication, such as its effects on public safety. One could argue that these assessments are unnecessary in an *ex post* regime, and that *ex post* sanctions only penalize publications that caused actual damage. Adding an "actual damage" component to speech regulations, however, does nothing to remedy the incommensurability and externality problems described above,[254] because there would still be no adequate remedy available when actual damage did occur.

Second, prior restraint of speech can be distinguished from prior restraint generally in that it focuses on particular expressions. The only freedom that the prior restraint of an expression limits is the freedom to publish that expression. Even to label this a "freedom" is misleading, because the speech in question was never constitutionally protected to begin with. The side effects of prior restraints on speech are therefore relatively limited. In contrast, arresting a person in order to prevent that person from committing future offenses destroys that person's liberty entirely—she has become a prisoner. In prison, almost all of a person's rights are limited in some way, including those rights that bear no rational relationship to the harms against which society was trying to protect.

IV. PRIOR RESTRAINT AND CRIMINAL LAW

Criminal law prohibits conduct that endangers society's interests to the extent that tort law is insufficient to do so.[255] Criminal law targets those forbidden and harmful acts that society absolutely disfavors. Criminal regulations usually take the form of inalienability rules, because criminal forms of conduct are non-negotiable.[256] It is not possible to "purchase" from one's victim the right to commit a criminal act.

A. *The Dstinction Between Two Types of Offenses*

Criminal law, unlike civil law, does not seek to protect private entitlements in and of themselves. Its purpose is the protection of social interests as a whole.[257] Criminal and civil prior restraints therefore

254. *See supra* parts I.C.4, II.

255. *See* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum. L. Rev. 1193, 1201 (1985).

256. *See* Jeanne L. Schroeder, *Three's a Crowd: A Feminist Critique of Calabresi and Melamed's* One View of the Cathedral, 84 Cornell L. Rev. 394, 500 (1999).

257. *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between*

may present different questions. A law and economics approach may or may not prove helpful in the criminal context.

This Article's analysis divides criminal speech regulations into two categories. The first contains those criminal laws that include the lack of the victim's consent as one of their elements. The second category encompasses those acts that are criminal regardless of whether or not the victim gave her consent.

1. Offenses Contingent Upon the Lack of Consent of the Victim

In the United States, the number of criminal speech regulations that deal with harm to individuals, instead of harm to national security or public morals, is small. There are a few examples of criminal offenses, however, where the lack of the victim's consent is an element of the crime.[258] Without the doctrine of prior restraint, it would not be difficult to conclude that this kind of speech regulation confers the protection of property rules on the holders of these entitlements. They may determine the price of the entitlements, and are free not to sell them at all.

The conclusion that criminal law provides protection through property rules is surprising. The doctrine of prior restraint itself differentiates between means of prior restraint (which are property rules) and *ex post* criminal sanctions.[259] Perhaps, then, the protection that criminal law provides is actually achieved through liability rules, because criminal sanctions are dictated by the state rather than determined by negotiations between the offender and the victim. After all, a person is free to use the intellectual property of another if she is willing to bear the criminal sanctions determined by the state.

This contention, however, is not persuasive. Property rules comprise means of protecting entitlements, but they do not provide the holder of the entitlement with absolute physical immunity from injury. When the property right is impaired, criminal sanctions and liability rules arise as additional lines of defense. The defenses that the criminal law provides, however, do not consist only of subsequent sanctions. As explained below, criminal law protections also include means of prior restraint, and a criminal prohibition may form the basis for an injunction.[260] More importantly, unlike a classic liability rule, the serving of a criminal punishment does not confer on the offender any rights whatsoever in the intellectual property of the victim. Its

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Criminal and Civil Law, 101 Yale L.J. 1795, 1807 (1992); Pearl, *supra* note 67, at 288-89; Seidman, *supra* note 67, at 337-38.

258. *See, e.g.*, 17 U.S.C. § 506 (1994 & Supp. III 1997) (defining the crime of copyright infringement).

259. *See* Scordato, *supra* note 29, at 11.

260. In civil law, too, anti-speech entitlements that are classified as property rights—such as copyright—are free of the prohibition against prior restraint. *See supra* part I.C.

transfer continues to require the consent of the property owner. The continued possession of the entitlement by its original holder, and the criminality of any future violations, demonstrate that a property regime is actually in place.

If the prohibition against prior restraints was really enforced in this context, neither the requirement of consent contained in criminal laws of this variety nor the actions taken to enforce those laws would ever be constitutional. The police would not be entitled to confiscate injurious materials or preemptively arrest offenders, and courts would not be competent to issue injunctions against future commission of the offending act.

The application of the doctrine of prior restraint in this context would therefore send contradictory messages and lead to an absurd conclusion. On one hand, the criminal law would make the publication of certain expressions conditional on the consent of the person likely to be injured by the publication. On the other hand, the system would allow the expressions to be published even without consent, and would be powerless to stop such publication. Using property rules to protect an entitlement but not allowing those rules to actually function would be useless. The few criminal regulations in this category therefore generally fall within the exceptions to the prohibition against prior restraints.

2. Offenses That Are Not Contingent Upon the Lack of Consent of the Victim

Most criminal speech offenses are not dependent upon the absence of the victim's consent, or do not have a specific victim at all. Examples of speech offenses of this type are solicitation of murder, or of any other offense, and the publication of obscene material.[261] Regulations of this type reflect inalienability rules.[262] The prohibition against prior restraints means that it is permissible to penalize these speech crimes, but not to prevent the acts from being committed.

The difference between these offenses and those described above is that they are not protected by property rules. The potential victim does not have the power to sell his or her entitlement to the injuring party. Some might argue that the doctrine of prior restraint, which was adopted because liability rules are more efficient than property rules, should not come into play in these cases because property rules are not involved. This argument, however, is difficult to accept. Inalienability rules express the public perception that the interests at issue are so critical that even the consent of the victims cannot validate their transfer. There is no logic to weakening a property rule regime

261. *See* Model Penal Code § 5.02 (1980) (defining criminal solicitation); *id.* § 251.4 (defining the crime of obscenity).

262. *See* Calabresi & Melamed, *supra* note 5, at 1111-12.

in cases in which the property in question has been deemed so valuable that it cannot be exchanged. Even if there were some justification for prohibiting prior restraint of speech crimes in which the consent of the victim was a mandatory element of the crime, such justification would fail with respect to offenses that express inalienability rules.

Another variation of this type of speech crime includes those offenses in which an element of the crime is the non-authorization of the speech in question by a particular state authority. An example is the screening of a cinematic film that has not been authorized by a censor.[263] At first glance, such offenses might be thought to express property rules, not inalienability rules. After all, the authorizing body has the power to determine if, and on what terms, the right will be transferred. The purpose of the authorizing entity, however, is to determine whether the expression harms a protected interest to an extent that justifies its prohibition. This is a judicial function. The authorizing body is not the holder of the entitlement, but only the determiner of its existence. This authority does not possess discretion to determine the "price" of the right in the way that courts do in a liability rule context. Moreover, it does not determine the price in the way a seller would in a property rule context. Censorship regimes of this variety therefore actually function by means of inalienability rules.

B. *The Problem of Punishment Without Prevention*

In the criminal context, some of the justifications for the doctrine of prior restraint are problematic. The most common argument is that *ex post* sanctions are preferable to prior restraints because restraints prevent the publication of speech entirely, thereby limiting output in the marketplace of ideas. In contrast, subsequent sanctions allow society to enjoy the benefits of speech without denying compensation to those who suffer harm from it.[264]

It is absurd, however, to criminalize the publication of speech based upon its harmful effect upon society while concurrently establishing a rule that enables its publication on the grounds that publication benefits society.[265] There may be a variety of opinions about whether any particular expression is desirable and deserving of First Amendment protection; these opinions may even change over time.[266] Society,

263. In practice it has been held—as an exception to the prohibition on prior restraint—that the administrative censorship of cinematic films in order to prevent the screening of obscene films is not unconstitutional, provided that certain requirements of due process and swift judicial review are met. *See* Freedman v. Maryland, 380 U.S. 51, 58-59 (1964).

264. *See* Nowak & Rotunda, *supra* note 47, at 970.

265. *See* Redish, *supra* note 29, at 59-60.

266. *Cf.* Blasi, *supra* note 27, at 51 (arguing that the dissemination of speech becomes a "fait accompli" and that "[t]he world is a slightly different place" as a result).

however, must be able to determine whether a publication is permitted or prohibited at any point in time, and whether its restriction is constitutional or unconstitutional. If a given expression is categorized as unconstitutional, it makes no sense to deny society the means necessary to regulate it. Constitutional means must conform to substantive constitutional goals.

Moreover, the argument that restraints should be forbidden because they deny certain benefits to society, while those who publish unprotected speech should be punished, contains certain moral flaws. The publisher becomes a tool used to produce societal benefits, yet is deemed a criminal offender and forced to pay for the damages incurred as byproducts of his socially beneficial actions. The Kantian school of thought, for example, identifies an absolute moral prohibition against such violations of human dignity.[267] Even those who do not believe in the absolute right to Kantian dignity, however, should agree that this system requires an explanation. Such justification, however, is difficult to find. As a rule, if society is unwilling to prevent speech despite the damage that it may cause out of a fear of losing the benefits of that speech, it should also refrain from imposing penalties on the speakers.

Furthermore, punishment, despite its centrality in criminal law, is only one of its objectives. In addition to retribution, prevention of future offenses is a primary goal of criminal law.[268] The deterrent effect of punishment for past offenses is one method of achieving this goal; prior restraint is another. Both means are integral parts of the criminal legal system, and prohibiting one of them impairs the effectiveness of the whole system. The function of the police is not only to solve crimes that have already been committed, but to frustrate the commission of future crimes.[269] Outside of the speech context, it would be unthinkable to argue that police officers, upon learning that a crime is about to be committed, should have to sit and wait for the crime to occur,[270] instead of preventing the crime and arresting the perpetrators.

But see Redish, *supra* note 29, at 60 (stating that the "difference" is not of "constitutional magnitude").

267. Thus, according to Kantians there is a categorical imperative against using another person as a means instead of as an end. *See* Immanuel Kant, Critique of Practical Reason (Mary Gregor trans., 1997).

268. *See* Pearl, *supra* note 67, at 273; Seidman, *supra* note 67, at 334-35.

269. *See* Terry v. Ohio, 392 U.S. 1, 22 (1968).

270. The answer to the question of whether the doctrine of prior restraint only prohibits censorship of speech prior to publication, or also prohibits the forced cessation of publication that has already been commenced, is dependent on the centrality that one attributes to the collateral bar rule. The collateral bar rule does *not* preclude indirect attacks on the constitutionality of infringements of freedom of speech if the infringement in question has been carried out by a competent authority *after* the commencement of the publication. Thus, following the rationale of the collateral bar rule, it is doubtful whether there is "prior restraint" in an infringement of this sort.

Some types of criminal sanctions, such as conditional sentences, are themselves prior restraints. Fear that a speech offense is about to be committed does not generally justify the arrest of a potential speaker, but courts may well be interested in imposing conditional sentences upon people who have already been convicted of such offenses. In other words, a court could hold that if a defendant is ever again convicted of the same speech offense he will be sanctioned with a predetermined fine or a fixed term of imprisonment. Such a sentence is, in substance, a prior restraint. The only difference between this and a judicial injunction—which is defined as an unconstitutional prior restraint—is that injunctions tend to be more specific than conditional sentences. Consistency would therefore argue that the doctrine of prior restraint prohibits the imposition of conditional sentences in respect of speech offenses.[271] Such a rule, however, would hamper the effective conduct of criminal trials and would also cause defendants to suffer, because conditional sentences are generally lighter than immediately effective ones.[272] A court that is precluded from imposing conditional imprisonment may be forced to impose actual imprisonment on the defendant, even if it believes that conditional imprisonment would be more appropriate on the merits.

C. *The Requirement of Mens Rea*

Criminal liability generally contains a mental element: it must be shown that an actor was aware of his conduct and the circumstances in which it was performed.[273] Sometimes the prosecutor must also prove that the actor intended to achieve the harmful result.[274] Only in exceptional cases, where the protected value is of particularly critical importance, is criminal liability imposed for mere negligence.[275] Negligence imposes a reasonableness standard; conduct that is "unreasonable" is therefore sometimes also considered criminal.[276] The Constitution limits the state's power to create strict liability offenses; that is,

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271. This difficulty might be resolved, and conditional sentences may be allowed for speech offenders, if one's rationale for the doctrine of prior restraint is the desire not to allow infringement of freedom of speech in the absence of a jury verdict. According to this rationale, an injunction may not be issued against a publication because this relief is given by a judge without jury participation. In contrast, a jury participates both in the criminal trial in which the conditional sentence has been imposed and the criminal trial in which implementation of this sentence is requested. However, the jury rationale for the doctrine of prior restraint is a poor one and should not be regarded as a sufficient basis for the doctrine.

272. *See* Sanford H. Kadish & Stephen J. Schulhofer, Criminal Law and its Processes 97-98 (6th ed. 1995).

273. *See* Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. Cal. L. Rev. 953, 958-59 (1998).

274. *See* Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1108-10 (1952).

275. *See* Model Penal Code § 2.02(2)(d) (1985).

276. *See* Lloyd L. Weinreb, Criminal Law 269 (6th ed. 1998).

offenses that do not include a mental element.[277]

Pragmatic objectives, such as deterrence, and moral concerns, such as retribution, demand that criminal liability be made contingent upon the existence of a mental element.[278] The required mental element, however, is usually separable from the value that the criminal law is seeking to protect. For example, in homicide, the act of killing is in no way logically dependent upon the existence of a given mental state. The reason behind the inclusion of mental elements in criminal offenses is not that no damage would have occurred without the requisite mental state—the victim is dead regardless of what the killer was thinking—but that the deterrent and retributive calculations differ with the mental state of the perpetrator.[279] Without a requirement of intent, or wantonness, or willfulness, punishment may lack a deterrent quality. Punishment would then be both ineffective and immoral.

The requirement of mens rea detracts from the criminal law's efficiency, in that it takes the focus off of the protection of the values and interests that criminal law is supposed to protect.[280] As a result, criminal sanctions do not provide as much protection as they possibly could.

D. *Cases in Which It Is Not Appropriate To Impose Criminal Liability*

Criminal sanctions are the most severe sanctions that society can impose on a person, both in terms of the restrictions that they place on his freedoms and the damage they do to his reputation. An unprotected publication may not cause enough harm to warrant criminal punishment, even if it was made with the requisite state of mind. Society may want to prevent these expressions from being published without convicting their publishers or branding them as criminals. For example, preventing the publication of commercial secrets may be eminently justifiable,[281] but it would not be appropriate to make such

277. *See* Alan C. Michaels, *Constitutional Innocence*, 112 Harv. L. Rev. 828, 830 (1999).

278. *See* R. A. Duff, Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law 8-11 (1990).

279. *See* Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. Rev. 101, 103-06 (1997).

280. In the case of a homicide, for example, this value is the victim's life. Furthermore, the threat of criminal sanctions is ineffective against people who are willing to risk punishment, either because they assume that they will not be caught or because the anticipated punishment is lower than the gain, concrete or ideological, that they expect to achieve from the offense. In the words of Mayton, "The calculus of deterrence includes the magnitude of punishment multiplied by the probability of punishment." Mayton, *supra* note 40, at 266.

281. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36-37 (1984). For a discussion of the propriety of preventing a third party from engaging in publication, see Giles T. Cohen, Comment, *Protective Orders, Property Interests and Prior Restraints: Can the Courts Prevent Media Nonparties from Publishing Court-Protected Discovery Materi-*

publication a criminal offense.

Even when an act of publication fulfills the requirements of a criminal offense, including mens rea, there may be situations in which prosecuting the publisher would be undesirable, but preventing the publication would still benefit society. This situation occurs, for example, when the criminal provision at issue is vague or when there is a factual or legal difficulty involved in determining whether it applies to the publication in question. In such cases restraint of publication is likely to be more justified than punishment, as it will achieve protective goals without unnecessarily stigmatizing the publisher. In the absence of prior restraint, however, courts may feel compelled to proceed with unnecessary criminal prosecutions.

V. PROCEDURAL AND INSTITUTIONAL BARRIERS TO PRIOR RESTRAINT

The preceding sections of this Article demonstrated that there is no consistent and compelling reason for the overriding prohibition against prior restraints in First Amendment law. This part will examine some of the procedural and institutional aspects of American law that are frequently mentioned as alternative grounds for the necessity of a prohibition against prior restraints. Despite first appearances, however, these concerns about administrative law, the judicial injunctive power, evidentiary and procedural rules, and the collateral bar rule do not justify the persistence of prior restraint doctrine.

A. *Administrative Law Concerns*

As noted above, the original target of prior restraint doctrine was administrative censorship.[282] Commentators still view an administrative agency's attempt to restrain speech more harshly than similar actions undertaken by a court.[283] The reason for holding bureaucratic restraints in particular disfavor, however, does not appear to be rooted in the notion that an administrative restraint of an expression injures freedom of speech more gravely than judicial prior restraint of the very same expression. Rather, the fear is that bureaucrats will exercise their power of prior restraint in more cases than the courts, and will thereby impair freedom of speech without justification.

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als?, 144 U. Pa. L. Rev. 2463, 2481-503 (1996).

282. *See supra* part I.C.2.

283. Indeed, in the past, no distinction was drawn between the two categories. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 306 (1940) (stating that a statutory requirement for judicially imposed restraint is "as obnoxious to the Constitution as one providing for like restraint by administrative action"). A change has taken place in this approach. Many scholars now distinguish between judicial prior restraints and administrative prior restraints. *See, e.g.*, Mayton, *supra* note 40, at 249-53 (arguing that bureaucratic censorship is subject to greater scrutiny than judicial restraints).

There are several reasons for this belief. First, administrative personnel tend to be interested in certain government policies that would benefit from the restraint of some kinds of speech,[284] and, for institutional reasons, bureaucrats are eager to exercise their powers of censorship, in the same way that they are tempted to overuse their other powers.[285] Second, the legislative standards implemented by administrative authorities are vague and imprecise and leave agencies significant discretion to engage in broad censorship.[286] Third, the administrative process is not always public, and it is sometimes inquisitorial in nature. The bureaucrat acts as both prosecutor and judge.[287] Fourth, the cost of administrative prior restraint is low, and therefore it is easy to exercise. "Under a system of prior restraint, [a government official] can reach the result by a simple stroke of the pen."[288] Fifth, prior restraints that take the form of administrative licensing schemes usually apply to broad categories of expressions, such as the entire corpus of cinematic films (or parades, etc.), and are not limited to concrete expressions.[289] They may therefore be more harmful to a wide range of speech.

Those who disfavor administrative prior restraints think that administrative agencies pale in comparison to the courts. Courts are sensitive to constitutional rights, and are willing to vindicate them even at the expense of specific government objectives. Judicial discretion is also narrower than administrative discretion, and it is exercised according to standards provided by law. Moreover, the judicial process does not operate against every pending publication, but only against those that affected parties elect to try to restrain in court. Court hearings are public, and are conducted in an adversarial manner in which the judge is neutral and objective.

These contentions about administrative restraints focus on institutional factors and not on substantive factors. They are similar to many arguments raised against prior restraint in general, which are also institutional as opposed to substantive in nature. Some of the grounds for the above contentions are dubious, lacking even serious intuitive plausibility.[290] There is no argument presented in favor of the creation of a general administrative "prior restraint" mechanism that will prohibit all publications that have not been bureaucratically approved

284. For the contention that the grant of powers to administrative authorities to impair freedom of speech is contrary to the principle negating the empowerment of bodies directly interested in the outcome of the case, see Redish, *supra* note 29, at 75-83.

285. *See* Emerson, *Prior Restraint*, *supra* note 34, at 659; Redish, *supra* note 29, at 73.

286. *See* Mayton, *supra* note 40, at 251.

287. *See* Redish, *supra* note 29, at 76-77.

288. Emerson, *Prior Restraint*, *supra* note 34, at 657.

289. *See id.* at 655-56; Blasi, *supra* note 27, at 22.

290. *See* Redish, *supra* note 29, at 61.

and licensed. It is difficult to dispute that such a system would lead to the "self-censorship" of permitted expressions,[291] and, even worse, that it would make life insufferable. The real question is whether the dismissal of such an all-encompassing totalitarian system[292] necessarily entails the claim that all forms of administrative prior restraint would seriously damage constitutionally protected speech and the democratic nature of society. The answer to this question is a resounding "no."

Most of the claims that disfavor administrative prior restraints are just as pertinent with respect to administratively imposed *ex post* sanctions, and therefore say little about prior restraint itself.[293] Yet no one is proposing that the executive authority be disbanded. Administrative prior restraint is needed in order to implement substantive constitutional arrangements. Judicial prior restraint does not suffice. The subject matter of adjudication is not policy making but the settling of disputes. Judicial prior restraint may therefore suffice in disputes within the area of civil law, where one party wishes to obtain the assistance of the judicial system against another party who wishes to violate his rights.

In contrast, an administrative authority's decision to grant a prior restraint is what generates a dispute in the first place. Indeed, a court may examine the constitutionality of such a decision within the framework of judicial review, but the judicial review is a reaction to the administrative decision, not a substitute for it.

The aforesaid flaws, all of which are procedural, can easily be remedied. Thus it is not appropriate, and more precisely, it is not constitutional, to deviate from substantive constitutional arrangements for reasons that are grounded in the incidental institutional structure of a branch of government. As noted, a constitutionalism of means must follow, in so far as possible, a system's substantive constitutionalism.[294] The existing procedures and structures must not be allowed to dictate substantive constitutional arrangements: substantive constitutional arrangements must dictate which governmental procedures and structures exist.

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291. *See* Blasi, *supra* note 27, at 28.

292. In the nineteenth century it was widely accepted that such a system could not be created. *See* Emerson, *Prior Restraint*, *supra* note 34, at 651.

293. The imposition of subsequent sanctions is generally classified as a judicial activity, and it is assigned to the judicial authority. In practice, no serious problem has arisen in relation to the exercise of punitive powers by administrative authorities. Constitutional difficulties arise, however, when an independent agency not only deals with implementation, but also with legislation and adjudication. *See* Stephen G. Breyer et al., *supra* note 228, at 33. The accepted manner of dealing with this difficulty is to construct the agencies in such a manner as to preserve an appropriate separation between the judicial wing and other offices. A solution in this spirit is proposed below.

294. *See supra* part I.

A system could conceivably exist wherein administrative authorities, like individuals, would be required to receive prior judicial authorization for every restraint of expression. Such a system, however, would not conform to our expectations of the executive branch, and it would lead to the publication of unprotected and harmful expressions in cases where the courts could not react quickly enough. Moreover, it has been held that any move by a governmental agency to regulate speech in advance of publication is a prior restraint, even the mere adoption of a non-binding position that has not been physically enforced. This case law suggests that the very application by an administrative authority to a court for an injunction against speech would consist of a prior restraint.[295]

It is not possible to banish administrative prior restraint entirely without deviating from substantive constitutional norms. A list of recommendations follows, in which this Article proposes a system for implementing substantive constitutional norms that does not require the abolition of administrative prior restraint.

One accepted method for dealing with the special difficulties posed by administrative prior restraint is to provide immediate judicial review of administrative decisions. The Supreme Court has affirmed this method with respect to the censorship of obscene films.[296] In this scheme, the administrative authority is deemed competent to decide on the prior restraint of an expression, provided that the authority itself brings the decision to a court for authorization without delay.[297] One problem with this method is that it may permit the implementation of erroneous administrative prior restraints during the period between the agency's decision and review by the court.[298] Manipulation of the system may also lead to increased delays, but these procedural concerns cannot be allowed to overwhelm constitutional limitations on the freedom of speech.

When an authority is aware that its decision will be subjected to immediate judicial review, it will carefully avoid reaching decisions that do not meet substantive constitutional standards. Moreover, the short period of time between the administrative decision and judicial review will ensure that erroneous administrative decisions, if made, will not remain in place for long. Finally, courts will be likely to issue temporary restraining orders halting the execution of administrative prior restraints that appear to be unconstitutional on their face even before there is full judicial review of the restraint in question.

Another means of implementing administrative prior restraint that

295. *See* Helle, *supra* note 52, at 835 (discussing the Supreme Court's expansion of the definition of measures as prohibited prior restraints).

296. *See* United States v. Thirty-Seven Photographs, 402 U.S. 363, 374-75 (1971); Freedman v. Maryland, 380 U.S. 51, 58 (1965).

297. *See Freedman*, 380 U.S. at 58-59.

298. For discussion of the problem of delay, see *infra* part V.E.

would mitigate the harm done to protected expressions would be to rely on media professionals who are committed to freedom of speech and know the substantive constitutional laws to implement the process, instead of leaving it in the hands of career bureaucrats.[299]

The proposal is equally relevant when an administrative agency is applying to a court for a restraint, a situation parallel to the application by a prosecutor to the court for sanctions. The executive department has to take into account not only interests such as national security, but also the protection of constitutional human rights. In deciding when to apply to the courts for a restraint, the executive would be greatly aided by a professional body that was knowledgeable in the relevant constitutional balances and that did not have a structural tendency in favor of any particular consideration.

Obviously, a professional military officer who identifies with certain security objectives might find it difficult to properly fulfill the function of a military censor, because that position requires the ability and willingness to balance the needs of the military against freedom of speech. Therefore, a more rounded, less interested party might perform the task better.

The ideal person, who is simultaneously a professional journalist, a professional military officer, and a professional constitutional lawyer, may be impossible to find. But it would be possible to form a panel or a council comprised of people with all of these skills. It would be better if participating professionals were not civil servants, but rather professional journalists who would fulfill the function for fixed periods of time. In an administrative agency reviewing pornographic materials, professional bureaucrats could share power with creators and artists, criminologists, psychologists, and other experts. Of course, consideration must be given to the structural aspects of such panels to ensure their independence. Fixed terms of service and exclusive review by judicial bodies, for example, could satisfy this concern.

This proposal for wider participation in administrative restraint-granting bodies may initially appear unreasonable. It is possible to argue that it contains an inherent contradiction. Some would say that no independent member of the media who respects herself and her profession would be willing to act as a censor. It should not be assumed, however, that no honest artists or media persons will be found who will be willing to acknowledge that freedom of speech is not absolute, or who will not be prepared to examine in good faith, whenever required, whether there is justification for prior restraint.

Moreover, the current suspicion that administrative agencies are ill-inclined toward freedom of speech ensues from the fact that in many

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299. For a discussion of how administrative authorities exercise censorship powers as experts and not as judges, see Henry P. Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518, 523 (1970).

cases the authorities are public servants whose qualifications and institutional affiliations draw them closer to the interests that compete with freedom of speech. The participation of women of letters alongside these bureaucrats is likely to rectify, from an institutional point of view, this inclination. The protection afforded to freedom of speech will improve, and institutionally compelled decisions will be prevented. Persons committed to freedom of speech therefore have a clear interest in participating in administrative bodies, because their participation will increase the overall protections given to speech.

Peer participation and review is already a common practice in the decision-making process that governs state financial support for exhibitions and other art projects.[300] As noted, denial of government support is often considered a prior restraint of speech.[301] Nonetheless, not only do artists and experts in art partake, as a matter of course, in these decision-making bodies; they also feel quite strongly that the transfer of their decision-making powers to bureaucrats would represent a threat to free speech.[302]

Some commentators argue that any administrative agency, no matter what its makeup, will have a "tendency to use its regulatory power, because [its] sole reason for existence is to regulate."[303] Several points contradict this position. First, the power under discussion is not the power to censor, but the power to decide whether to censor. "Regulating" here includes allowing publication; just because an agency will regulate does not mean it will do so in a particular direction. Second, if the institutional inclination thesis is correct, it should also be correct in regard to judicial authorities. In other words, courts that are empowered to issue injunctions, whether they are directed at preventing a publication or whether they concern restraint of other activities, also tend to issue more injunctions than are necessary. From this perspective, courts have no advantage over executive authorities. In any event, there are no grounds for preferring judicial to administrative restraints on the basis of a fear of over zealousness.

B. *Judicial Prior Restraint*

Even if there are grounds justifying caution in the empowerment of administrative agencies to exercise prior restraint, it is difficult to accept that the reservations concerning prior restraint are applicable to orders issued by the judiciary. Indeed, commentators have expressed the opinion that the doctrine of prior restraint should not be applied to court decisions, or at least not to judicial decisions that have been

300. *See* Thomas O. McGarity, *Peer Review in Awarding Federal Grants in the Arts and Sciences*, 9 High Tech. L.J. 1, 4 (1994).
301. *See supra* part I.C.1.
302. *See* Fiss, *State Activism*, *supra* note 16, at 2094.
303. Redish, *supra* note 29, at 77 n.81.

issued after a full and fair hearing.[304]

The basis for this position is that courts, in contrast to executive bodies, are not "interested parties" whose objectivity must be doubted. Nor are they dependent on the political system. Judges, in contrast to professional administrative censors, are not likely to have been appointed on the basis of their approach to matters of censorship.[305] Courts do not make decisions or issue orders on their own initiative, after having come to one-sided conclusions. It is difficult to attribute a special institutional tendency to unconstitutionally restrict freedom of speech to courts.[306] They are passive bodies that settle disputes and conflicts between the parties. There is no dispute as to their competence to consider, in adversarial proceedings, offenses relating to speech, or their ability to determine punishments and other sanctions with respect to speech. For these reasons, commentators have viewed judicial restraints more favorably than administrative ones.

In view of all the safeguards listed above,[307] the primary substantive contention[308] that can be raised against judicial prior restraint is the fear that the power will be exercised unlawfully, in the sense that judges may erroneously issue injunctions against speech that is in fact entitled to the protection of the First Amendment.[309] A general fear of potential judicial mistakes, however, cannot be sufficient justification for the prohibition of judicial prior restraint. A fear always exists that a judge may err in her judgment. The fear is as relevant in the awarding of *ex post* damages as in the case of prior restraint. But when the judge has before her all the relevant data, fear of mistake cannot justify a grant of sweeping permission to harmful publications that, from a substantive point of view, ought not to be protected.

Except in death penalty cases, the possibility that a court will err in determining the facts or the law does not justify the general denial of a remedy that is deemed appropriate *per se*. This is particularly true in cases contemplated in this Article, because, as noted above, restriction of the freedom of speech is permitted only in those exceptional cases where there is a real chance that publication will lead to serious harm to important values and interests.

It is reasonable to assume that courts generally will not err when enjoining publications. Revoking the courts' power to issue injunc-

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304. *See* Jeffries, *supra* note 17, at 426-30; Redish, *supra* note 29, at 57-58.

305. *See* Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, *in* The Cost of Libel 121, 126 (Everette E. Dennis & Eli M. Noam eds., 1989).

306. For another opinion, see Hunter, *supra* note 69, at 289-90.

307. *See supra* notes 296-305 and accompanying text.

308. This is the primary contention apart from the contention against prior restraint in general (and not only prior restraint of speech). For a discussion of this contention, see *supra* part III.C.

309. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 792-93 (1994) (Scalia, J., concurring in part and dissenting in part).

tions against speech because of the mere possibility that in exceptional cases the courts will err injures basic values to which the law gives preference over speech. Allowing unconstitutional results in numerous cases to absolutely prevent the possibility of error-based unconstitutional results in a few cases is not proper policy. Such a policy would not be acceptable in any other context. If it were accepted it would paralyze the legal system and the government as a whole. The possibility of error in the implementation of the law does not abrogate the need to apply the law. Constitutional means are needed to serve and implement substantive constitutional goals. Means that do not fundamentally conform to underlying constitutional norms cannot be constitutional.

Moreover, the courts are already responsible for the imposition of *ex post* sanctions, including punishment for speech crimes and the award of compensation for speech torts. It is possible for courts to err in their exercise of this power as well. The punishment of an innocent man is no less unfortunate than the prior restraint of an expression. Nevertheless, courts' ability to mete out criminal sentences is not restricted because of the chance that they might occasionally err. Neither should their powers of prior restraint be limited for this reason.

An interesting contention has been made that judges may be overeager in their use of prior restraints because they will not want to be responsible for the damage that petitioners claim will be done by a particular body of speech.[310] This argument is particularly compelling when the state argues that the publication of an expression will harm national security. The courts may prove willing to restrain speech in these cases without rigorously demanding a demonstration that the speech in question is constitutionally unprotected. The opposite is likely to be the case in criminal cases, where judicial reluctance is more likely to fixate on the notion of sending speakers to prison.[311]

These arguments are not particularly well founded, and, in any event, they do not justify the application of the doctrine of prior restraint to the judiciary. First, alongside cases such as *Korematsu v. United States*,[312] in which the Court strayed from the constitutional path because of the gravity of the risks alleged by the state,[313] stand examples such as *New York Times v. United States*,[314] in which the Court refused to grant an injunction despite the state's claim that one was necessary to safeguard national security. Moreover, the existence of the doctrine of prior restraint, itself a judicial creation, is evidence of courts' unwillingness to overstep their bounds on a systematic basis.

310. *See* Nowak & Rotunda, *supra* note 47, at 1022-23.
311. *See* Powe, *supra* note 80, at 166.
312. 323 U.S. 214 (1944).
313. *See* Eugene v. Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489, 503-04 (1945).
314. 403 U.S. 713 (1971).

Second, even in its most absolute form, the prohibition against prior restraints allows the prior restraint of expressions that are likely to damage the ability of the state to conduct itself effectively during war.[315] In any event, a judge who wants to avoid responsibility for potential harm to national security will in all likelihood defer to the opinion of military leaders on the substantive issue of whether or not a particular expression is protected.

Third, even if the courts do tend to display special caution in allowing the publication of expressions that may seriously harm national security, this could be for legitimate reasons. The courts' caution probably stems from the importance of the interests that are being evaluated. Substantive constitutional law allows for the restriction of freedom of speech for reasons of national security,[316] and both sides of that balance should be weighed equally by the courts. A lack of eagerness to impose *ex post* sanctions on speech does not demonstrate that they are a more appropriate and more careful form of speech regulation than prior restraint; it merely shows that courts use *ex post* sanctions in cases where the interests that are weighed against speech rights are less valuable. Subsequent sanctions, by their nature, do not directly guarantee the protection of the interests that are in conflict with speech rights. Consequently, they are only used in the close cases where society is reluctant to burden speech at all.

C. *Procedural and Evidentiary Rules and Prior Restraint*

Strict rules of evidence do not normally apply to administrative hearings.[317] An administrative agency is allowed to rely on hearsay evidence, and can even base its decisions exclusively on such evidence.[318] Administrative bodies make their factual findings using a preponderance of the evidence standard and do not have to prove matters beyond a reasonable doubt, or even on the basis of clear and convincing evidence.[319] Administrative decisions do not require full hearings[320] and do not use juries.[321]

Similarly, when exercising their powers of prior restraint, courts do not follow all the procedural and evidentiary rules that a criminal case

315. *See* Near v. Minnesota, 283 U.S. 697, 716 (1931).

316. *See id.* at 716.

317. *See* Alfred C. Aman, Jr. & William T. Mayton, Administrative Law 225 (1993).

318. *See* Richardson v. Perales, 402 U.S. 389, 402 (1971).

319. *See, e.g.*, Steadman v. SEC, 450 U.S. 91, 93 (1981) (discussing the "preponderance-of-evidence" standard as applied by an administrative law judge).

320. *See* R. Cammon Turner, Note, *Streamlining EPA's NPDES Permit Program With Administrative Summary Judgment:* Puerto Rico Aqueduct & Sewer Authority v. Environmental Protection Agency, 26 Envtl. L. 729, 735-39 (1996) (discussing the power of administrative agencies to bypass hearings through rulemaking).

321. *See* Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 622 (1973).

would require.[322] In hearing applications for an injunction, courts apply the "balance of probabilities" evidentiary standard that is appropriate in civil cases,[323] and they do not demand proof beyond a reasonable doubt.[324] Moreover, there is no constitutional jury requirement for civil injunctive proceedings.[325]

One commentator has noted that courts occasionally issue gag orders and orders relating to criminal *in camera* proceedings after hearing the direct parties to the case, but before other potentially interested parties, such as journalists, have had the opportunity to oppose the orders.[326] This practice is a ground for objecting to courts' power to issue such injunctions.[327]

It appears inconceivable that one of the fundamental rights of American law could be abrogated in a hearing that uses flimsy rules of evidence and does not guarantee the right to a jury or the right to defend oneself. The standards of administrative and civil law may suffice for the routine decisions made in those fields, but, one could argue, they are certainly not satisfactory when the issue is the prior restraint of speech. This argument, however, is not substantive in nature, as it does not relate to the actual scope of free speech rights. Instead, it focuses on the fear that the procedural and evidentiary rules that are used in prior restraint hearings will allow too many errors to be made in the parsing of the substantive law. This is really just another version of the fear-of-error argument discussed above.[328]

An effort to craft substantive rules to correct for procedural difficulties of this type, however, should only follow an examination of the possibility of simply fixing the procedures. The existing flaws in the procedures used to implement prior restraint do not argue against the constitutionality of prior restraint. The First Amendment instead requires a change in procedure to produce desired substantive outcomes.[329]

A prima facie ground for preferring injunctive prior restraint to civil sanctions is that the Constitution guarantees a jury in contempt proceedings but not in civil proceedings. Although all state constitutions provide for a jury in civil cases, one commentator argues that "[i]f that safeguard [were] removed . . . it is possible that the First Amendment would be read to require some such right in the case of civil actions against speakers, in libel and privacy litigation for example."[330] In

322. *See* Fiss, *Injunction*, *supra* note 84, at 28-29; Redish, *supra* note 29, at 87-88.
323. *See* Redish, *supra* note 29, at 87-88.
324. *See id.*
325. *See* Monaghan, *supra* note 299, at 527.
326. *See* Hunter, *supra* note 69, at 288-89.
327. *See id.*
328. *See supra* note 309 and accompanying text.
329. *See* Redish, *supra* note 29, at 64-65.
330. Blasi, *supra* note 27, at 63.

other words, to properly preserve the constitutional right to freedom of speech without precluding the possibility of enforcing legitimate civil sanctions, it is desirable to interpret the First Amendment as requiring that civil actions be conducted in accordance with certain procedures.

The Constitution, however, compels the establishment of special evidentiary and procedural rules for prior restraint hearings when such rules are necessary to ensure the protection of substantive constitutional rights. The development of such rules, not an arbitrary ban against prior restraints, is the proper aim of a constitutionalism of means. Special procedural and evidentiary rules will improve existing protections of freedom of speech because the prohibition against prior restraint has a substantial number of exceptions.[331] Currently, decisions about whether an expression falls within one of these exceptions are made using the standard rules.[332] In contrast, the more demanding procedures and evidentiary laws proposed in this Article extend to all cases, including those in which prior restraints are currently allowed.

A detailed proposal for the reform of the procedural and evidentiary rules used in constitutional cases is beyond the scope of this Article. Nevertheless, even under existing law, a person placed on trial for the breach of an injunction or administrative order is entitled to the procedural safeguards of the criminal law,[333] even though the procedures used in issuing the injunction or order in question are either civil or administrative.[334]

The starting point for the proposed procedural rules is that the proof required for prior restraints should be identical to what due process demands in criminal cases. It is not clear that administrative prior restraint hearings should require the use of every formal non-constitutional rule of evidence, but the standard of proof should unquestionably be beyond a reasonable doubt. Primarily, this means that prior restraint of speech will be permitted only upon proof beyond a reasonable doubt that the speech in question does not merit constitutional protection.[335] There must be a presumption against prior restraint, and the burden of proof must fall on the party requesting restraint.[336]

331. *See supra* part I.C.

332. *See supra* notes 322-25 and accompanying text.

333. *See* Bloom v. Illinois, 391 U.S. 194, 199-200 (1968) (discussing a defendant's constitutional right to a jury trial in a contempt proceeding).

334. *See* Mayton, *supra* note 40, at 277-78.

335. *Cf.* Jackson v. Virginia, 443 U.S. 307, 314-16 (1979) (describing the evidentiary requirements in civil actions for proving acts that constitute criminal offenses); *In re* Winship, 397 U.S. 358, 365-68 (1970) (discussing the requirement of proof of guilt beyond a reasonable doubt in criminal trials).

336. *Cf.* Taylor v. Kentucky, 436 U.S. 478, 483 (1978) (holding that a criminal defendant is presumed innocent and that the prosecution bears the burden of proving guilt beyond a reasonable doubt).

Where a particularly vexatious or unpopular expression is under consideration, which will often be the case, it is reasonable to expect that juries will not provide adequate protection for speech rights.[337] Professional administrators, and, a fortiori, judges, may display greater restraint than jury members in exercising powers that impair the freedom to publish expressions that offend the public but that are protected by the First Amendment. "The jury is a majoritarian institution ... [and it is not] likely to protect dissidents from a popularly elected government."[338] During the First World War, for example, "the right to a jury trial for antiwar dissent became simply a right to be convicted."[339] Still, a publisher who so desires should enjoy the right to a jury in restraint hearings, even if that option will prove less than helpful.

There may be exceptional circumstances in which the urgency of a matter requires that a preliminary administrative or judicial decision be made in the absence of the normal procedural safeguards.[340] Such time constraints, however, do not absolve the courts of the fundamental constitutional duty to refrain from abrogating freedom of speech on the basis of evidence that would not suffice for conviction in a criminal trial.

With regard to "gag orders" in criminal trials,[341] the desirable solution to the problem does not lie in abandoning the injunctions compelled by Sixth Amendment rights. Instead, courts must establish a proper procedure for granting injunctions so that all relevant persons, including those who are not direct parties to the criminal trial, are heard before an injunction issues. After all, the establishment of procedures that ensure a proper balance between two conflicting constitutional rights is itself a due process requirement.

D. *The Collateral Bar Rule*

A final procedural justification given for the prohibition against prior restraints is that the doctrine constitutes a necessary corollary of the collateral bar rule.[342] The collateral bar rule prevents a person who has breached a judicial injunction or administrative order from arguing against the constitutionality of the breached order during proceedings instituted against him because of the breach.[343] The very breach of such an injunction or order is an offense, regardless of the fact that the order in question may have been unconstitutional. The only arguments that the person in breach may raise in his defense are

337. *See* Mayton, *supra* note 40, at 277; Monaghan, *supra* note 299, at 528-29.
338. Laycock, *Irreparable Injury*, *supra* note 2, at 166.
339. Powe, *supra* note 80, at 77.
340. For a discussion of temporary orders of prior restraint, see *infra* part V.E.
341. *See supra* part IV.
342. *See* Tribe, *supra* note 29, at 1042-45; Hunter, *supra* note 69, at 286.
343. *See* United States v. United Mine Workers, 330 U.S. 258, 293-94 (1947).

that (1) the court or administrative authority that made the decision lacked substantive or formal competence, or (2) the law under which the court granted the restraint was facially unconstitutional.[344] This is true even in cases such as *Near v. Minnesota*,[345] where the restraint at issue was identical to the provisions of a criminal statute;[346] obviously, the constitutionality of the criminal statute would have been challengeable if the hearings had proceeded under its rubric.[347] A person in breach of a judicial or administrative order against publication is therefore subject to punishment even if the order is unconstitutional (to the extent that the order prohibits activities that the Constitution protects).

Insofar as administrative licenses and judicial injunctions are enforceable by the police powers of the state, the collateral bar rule effectively allows the physical prevention of constitutionally protected speech without judicial review. The purpose of the collateral bar rule is to strengthen the obligation to respect the orders of competent authorities.[348] A citizen who believes that an order is unconstitutional may appeal the order or attack it in another way; she may not take the law into her own hands by ignoring the order. This is why the collateral bar rule does not apply to general rules, such as statutes, the issuance of which cannot be appealed.

The doctrine of prior restraint aims to prevent situations in which the injured party has no opportunity to argue against the violation of his rights. In this sense, it is a partial corrective of the collateral bar rule. It reflects the special importance and status of freedom of speech, since other rights are also subject to the collateral bar rule but not to the prohibition against prior restraints.

While it is unclear that the collateral bar fully applies in contempt proceedings that relate to the breach of judicial injunctions restraining speech,[349] the following comments assume that the collateral bar rule does apply in the speech context under current law. To the extent that the rule does not apply to such decisions, the case against prior restraints is even weaker.

While the status of the collateral bar rule is unclear in judicial contempt hearings, it is quite clear as to administrative orders. The Supreme Court has held that where a licensing mechanism meets the demands of the Constitution, a defendant accused of publishing with-

344. *See* Walker v. City of Birmingham, 388 U.S. 307, 315 (1967) (suggesting that an injunction that was "transparently invalid" or that had been issued by a court lacking jurisdiction would not be covered by the collateral bar rule).

345. 283 U.S. 697 (1931).

346. *See id.* at 701-03.

347. *See* Blasi, *supra* note 27, at 16-19.

348. *See United Mine Workers*, 330 U.S. at 293-94 (citing Howat v. Kansas, 258 U.S. 181, 189-90 (1922)).

349. *See* Blasi, *supra* note 27, at 21-22.

out a license cannot claim that the refusal of the license in his specific case was unconstitutional.[350]

There are two possible ways of contending with the arguments against prior restraint that are grounded in the existence of the collateral bar rule. One way is to argue against the constitutionality of the collateral bar rule itself.[351] If the rule were rescinded, nothing would preclude arguments in contempt or criminal proceedings to the effect that the order in question was unconstitutional because the speech at issue was protected under the First Amendment.[352] The constitutionality of the collateral bar rule is beyond the scope of this Article, which focuses only on the extent to which the rule justifies the doctrine of prior restraint.

The second argument, that courts should not be able to issue injunctions against speech because of the collateral bar rule, is problematic in two respects. First, the prohibition against prior restraints is not necessarily the proper method of achieving a balance between the desire to ensure respect for governmental orders and the desire to prevent the violation of constitutional rights. The prohibition against prior restraints actually limits the means available to state actors, but the purpose of the collateral bar rule is purportedly the assurance of respect for the decisions of state actors.[353] Restricting governmental authorities' powers is a problematic method of safeguarding their status.

Second, the collateral bar rule does not prevent direct attacks on judicial orders on appeal or by petition.[354] It merely prevents indirect attacks on such orders within the framework of contempt proceedings. In other words, a person against whom a court has issued an injunction does not lack a remedy against that order. He may apply to a competent court and argue that the judicial order is unconstitutional (or flawed for another reason) without his application being dismissed *in limine*.[355] The same is true if an administrative authority issued the

350. *See* Poulos v. New Hampshire, 345 U.S. 395, 408-09, 414 (1953). There is room for criticism of this judgment. On the surface it appears that the decisions of administrative authorities are not subject to many of the special considerations that justify preventing indirect attacks on court decisions. Forbidding indirect attacks on administrative decisions in a licensing matter harms the institution of the collateral attack *per se*.

351. *See* Richard E. Labunski, *The "Collateral Bar" Rule and the First Amendment: The Constitutionality of Enforcing Unconstitutional Orders*, 37 Am. U. L. Rev. 323, 327-33 (1988); Hal Scott Shapiro, Note, *The Collateral Bar Rule—Transparently Invalid: A Theoretical and Historical Perspective*, 24 Colum. J.L. & Soc. Probs. 561, 583-88 (1991).

352. *See* Fiss, *Injunction*, *supra* note 84, at 30.

353. *See* Walker v. City of Birmingham, 388 U.S. 307, 313-14 (1967) (quoting Howat v. Kansas, 258 U.S. 181, 189-90 (1922)).

354. *See* Nowak & Rotunda, *supra* note 47, at 1022.

355. *See id.* at 1022.

order: a person it injures may submit it for judicial review.[356]

Outside the context of governmental restraints on speech, the price that the collateral bar rule forces citizens to pay for the safeguarding of the status of governmental authorities is not regarded as unreasonable. The citizen is deprived of one way of implementing his or her constitutional rights, but he has other methods available. Direct attacks on judicial or administrative orders that violate constitutional rights are usually no less efficient or convenient than indirect attacks. The contrary is often true. For example, it is more efficacious to appeal an unconstitutional judicial decision than to breach it because the court that issued an injunction is unlikely to find it unconstitutional.[357]

An exception to the effectiveness of appeal may occur when the matter is especially urgent. In such a case, directly attacking an injunction on appeal may take so long that it will destroy the value of publication.[358] An exception to the collateral bar rule in such situations may be appropriate. Even if such an exception does not gain recognition, however, there is still little reason to deny courts the power to issue injunctions against speech, so long as one agrees with two reasonable assumptions about courts. The first assumption is that judicial decisions are generally correct, and that most of those that are not are reversed on appeal. The second assumption is that the Constitution permits the limitation of speech rights only where such limitation is necessary to prevent serious harm to values, rights, or interests of great importance. A publication that is not entitled to constitutional protection may cause serious damage, and it must not be taken lightly. If these two assumptions are correct, cases in which serious harm is caused by unprotected speech under the extant system are probably more numerous than the cases in which freedom of speech would be unconstitutionally impaired by prior restraints.

E. *Prior Restraint and the Problem of Delay*

The primary difficulty created by prior restraints lies in the delay that they may cause in the publication of legitimate and desirable speech.[359] While most of the arguments against the use of prior restraints are speculative and confused, this argument has substance. Any system that investigates the constitutional status of expressions prior to publication runs a serious risk of delaying the publication of speech that is entitled to First Amendment protections. Such delays amount to *per se* violations of freedom of speech. Take, for example, the case in which a newspaper desires to publish a piece about a political candidate immediately before an election. The candidate files

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356. *See* Freedman v. Maryland, 380 U.S. 51, 58 (1965).
357. *See* Blasi, *supra* note 27, at 44.
358. *See infra* part V.E.
359. *See* Blasi, *supra* note 27, at 30-33, 64-67.

an application for an injunction against the article's publication on the grounds that it is defamatory. The court agrees and issues an injunction. From the perspective of constitutionalism of means, the injunction imposes no difficulty if the speech under consideration does not enjoy the substantive protections of the Constitution. If, however, it becomes clear that the newspaper piece should in fact receive full constitutional protection, then even after the injunction has been voided the intervening delay will have amounted to a serious violation of the First Amendment.[360] Even the delays caused by temporary injunctions may violate freedom of speech and the important public and private interests underlying it.

As discussed above,[361] however, because substantive freedom of speech is not absolute, there cannot be a requirement that the constitutionalism of means implement substantive freedom of speech absolutely. That requirement would ignore competing values and interests. The constitutional means used to protect freedom of speech should be consistent with the substantive scope of the right.

Because substantive constitutional law does not attribute absolute value to freedom of speech,[362] concerns about delay cannot trump all other concerns in the formulation of a constitutionalism of means. Taking all possible measures to prevent potential violations of substantive freedom of speech, at the expense of the interests in whose name substantive freedom of speech was limited in the first place, would be inappropriate. An argument that the possibility of delay should bar the use of prior restraint can only proceed from the premise that freedom of speech is more important than the interests protected by prior restraints. In some circumstances, however, these interests are more important than free speech.[363] Therefore, allowing the harms to substantive speech rights that delays cause to automatically prohibit the use of prior restraints would create a fundamental discrepancy between the constitutionalism of means and substantive constitutional theory. To achieve consistency, the means used to implement freedom of speech must produce substantive free speech outcomes in those contexts, and only in those contexts, in which speech interests substantively outweigh other interests.

No means exist, however, that would guarantee absolute consistency in this sense. Subsequent sanctions do not guarantee the non-publication of unprotected speech in some contexts, and at other times they may unconstitutionally burden protected speech. Because of the delays that it causes, prior restraint also violates free speech

360. Similarly, if the newspaper assumes that it will be enjoined, and for this reason cancels publication, serious harm to freedom of speech will result. *Cf. id.* at 30 (discussing the potential for a licensing system to cause delay and self-censorship).

361. *See supra* part I.

362. *See* Posner, *Economics of Justice*, *supra* note 10, at 333-40.

363. *See supra* notes 43-49 and accompanying text.

rights in some cases. While acknowledging that there will be discrepancies in certain cases, jurists must aspire to achieve the maximum possible overall consistency between means and substances.

At the same time, the Constitution must be read as imposing a duty to do everything possible to fully implement its substantive provisions, even if that means creating novel regulatory schemes. For example, in *Freedman v. Maryland*,[364] the Court held that an administrative licensing scheme, clearly a prior restraint, was constitutional if the restraints were judicially reviewed within a short period of time.[365] In practice, such solutions appear to be feasible in most cases. Occasionally, however, a case will require means that might produce unwanted substantive results.

It is a matter of dispute whether temporary restraining orders ("TROs") that enjoin publications are prior restraints. Some argue that they are remedies, and therefore restraints, in and of themselves, while others maintain that they are merely a step in the process of applying for a restraint such as an injunction.[366] The constitutionality of TROs against speech should not depend on the extent to which they can be analogized to prior restraints. Instead, the threshold question should be whether an injunction would be constitutionally permissible in the case at hand, because TROs are interim orders that pave the way for injunctions. If it is clear in advance that a permanent restraint could not be granted, there is no room for a temporary remedy.

The hard case, however, arises when it is not clear in advance whether or not permanent prior restraint would be a constitutional option. The constitutionality of permanent prior restraint will likely become clear only after extended proceedings in many cases; in fact, the resolution of this question is often the reason for the proceeding. A judge confronted with a request for a TRO will therefore be unable to immediately determine whether a restraint will be found constitutional after a full trial. There are several ways to look at these "hard" cases.

On the one hand, restraint of protected speech violates the First Amendment even when it is temporary. Delay harms the interests of both the publisher and the public, especially when the speech in question is time-sensitive news or commercial speech. In practice, the court will usually not have the factual and legal groundwork necessary to determine whether the speech under consideration in a TRO hearing is likely to violate anti-speech entitlements to the extent that

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364. 380 U.S. 51 (1965).

365. *See id.* at 58-59.

366. The latter view was adopted by the Eleventh Circuit in *United States v. Noriega*, 917 F.2d 1543, 1551-52 (11th Cir. 1990). This approach, and the Supreme Court's refusal to consider the matter, have been widely criticized. *See* Bernabe-Reifkohl, *supra* note 45, at 297-302 & n.214 (listing sources).

free speech rights should be limited.[367] Granting a TRO in such a situation would therefore almost always violate the First Amendment, because it is nearly impossible in such a setting to demonstrate that the restraint meets the necessary substantive constitutional standards.

On the other hand, refraining from granting a TRO against a publication may frustrate the substantive law that entitles the applicant to obtain prior restraint. When a court denies an application for a TRO and the publisher releases the speech into the public domain, the later issuance of an injunction becomes useless. The permanent injunction would be analogous to locking a stable door after the horses have already fled.[368] If substantive law entitles plaintiffs to prior restraint, civil procedure must ensure that this relief, if and when it is granted, is effective.

The considerations on both sides have merit, and it is impossible to completely resolve the issue one way or the other. There is no reason, however, to have a general presumption supporting or opposing the granting of TROs against speech. In this sense, TROs differ from injunctions. At the time of a TRO hearing, no decision has yet been made about the constitutional status of the speech in question; in a permanent restraint hearing, on the other hand, the speech has already been determined to be substantively unprotected, which means that it is probably also undesirable. In TRO hearings, there is room for a flexible approach that will balance the potential damage caused by a delay (if the speech is indeed protected) against the harms that might arise from publication (if the speech ultimately turns out to be unprotected). Because of the special sensitivity of this issue, courts should try to examine the record in front of them with extra care, so that they may approximate as closely as possible the results of the primary proceedings.

CONCLUSION

While "[a] criminal statute chills, a prior restraint freezes."[369] The fact that prior restraint of unprotected speech prevents unwanted speech and protects those interests that might be harmed by it, however, is not a drawback. It is one of the method's greatest advantages.[370] "Freezing" speech that the First Amendment does not protect should not be repugnant as a rule. Every reasonable measure should be undertaken to prevent such speech, including the use of both prior restraints and *ex post* sanctions. On the other hand,

367. *See, e.g.*, Fiss, *Injunction*, *supra* note 84, at 28-29 (describing preliminary injunctions and temporary restraining orders).

368. At the same time, certain types of speech, such as obscene publications, are continuously or cumulatively damaging, and in these cases it would be efficacious to permanently enjoin publication even if temporary relief was not originally granted.

369. Bickel, *supra* note 141, at 61.

370. *See* Jeffries, *supra* note 17, at 429.

avoiding freezing, or even chilling, speech that is protected by the Constitution is essential.

This Article argues that there is no reason to prohibit the use of prior restraints against substantively unprotected speech. It remains strictly neutral about the appropriate scope of substantive free speech rights. At the same time, a reciprocal connection may exist between the scope of substantive freedom of speech and the means used to instantiate it. For example, it is probably impossible to reconcile the prohibition against prior restraints with a substantive theory that imposes positive pro-speech duties on the state.[371]

The doctrine of prior restraint does not always promote the fundamental principles of freedom of speech, and in many cases actually hinders their development. It is difficult to criticize commentators and politicians for refusing to read positive state duties into the First Amendment when the persistence of the doctrine of prior restraint would combine with such duties to produce absurd results.[372]

Instead of contributing to the procedural protection of unprotected speech, the doctrine of prior restraint leads to a reduction in the number of expressions that are entitled to substantive protection. Focusing on the doctrine of prior restraint facilitates courts' acceptance of the restriction of substantive freedom of speech, because they can be satisfied that while they may be burdening speech, they are not acting unconstitutionally by restraining it. Considering the onerous nature of some *ex post* sanctions, however, there is no reason to be particularly reassured by this state of affairs. Some speech that is currently outside the scope of substantive First Amendment protection may have enjoyed protection in the absence of the prohibition against prior restraints.

Aside from the damage that it does to substantive free speech values, the prior restraint doctrine also impairs incommensurable anti-speech entitlements, such as the rights to reputation and to privacy. When these entitlements are protected by liability rules, people are forced to sell them at prices set by the state, despite the fact that the amount they receive will be incommensurable to the harm they have suffered. The inability to restrain speech may occasionally vitiate anti-speech entitlements entirely, disturbing our carefully calibrated substantive constitutional balances. Further, making individuals bear the cost of the production of widely enjoyed social benefits is a clear negative externality, and such a system is difficult to justify.

The inconsistencies that the doctrine of prior restraint creates between substantive and means-centric constitutional theories negatively affect both speech entitlements and anti-speech entitlements.

371. *See* Tribe, *supra* note 29, at 965.

372. *See, e.g.*, Sunstein, *Democracy*, *supra* note 74, at 227 (describing governmental funding of the arts as a discretionary matter).

This lack of consistency is not, therefore, only a formal or aesthetic flaw. Its repercussions are not limited to the field of constitutional means; it also raises serious substantive problems. While absolute consistency between means and substances may not be possible, it is nevertheless an important aspiration. This aspiration is the appropriate goal of any constitutionalism of means.