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PRIOR RESTRAINT OF EXPRESSION THROUGH THE PRIVATE SEARCH DOCTRINE

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Introduction

PRIVATE CITIZENS frequently discover the contents of damaged or misdelivered packages belonging to others.¹ When that private discovery uncovers material which appears to be obscene,² the conscientious private citizen normally contacts government authorities. Police officials often use the fortuity of the private discovery to re-inspect the contents of the privately seized container.³

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1. There are many cases involving fortuitous private discoveries of property. Some controversies arise from the detection of broken or damaged containers. *See, e.g.,* United States v. Bush, 582 F.2d 1016 (5th Cir. 1978); United States v. Entringer, 532 F.2d 634 (8th Cir. 1976); United States v. Kelly, 529 F.2d 1365 (8th Cir. 1976). Other situations involve attempts by shipping agents to determine the identity of lost baggage or packages. *See e.g.,* United States v. Bulgier, 618 F.2d 472 (7th Cir. 1980); United States v. Haes, 551 F.2d 767 (8th Cir. 1977); United States v. Sherwin, 539 F.2d 1 (9th Cir. 1976) (en banc). In still other cases, suspicious shipping agents undertake searches of package contents. *See, e.g.* United States v. Ford, 525 F.2d 1308 (10th Cir. 1975); United States v. Issod, 508 F.2d 990 (7th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975); United States v. Pryba, 502 F.2d 391 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975).

2. In recent years the Court has experienced difficulty in formulating effective standards for determining whether particular expression is obscene. *See infra* notes 56-58 and accompanying text.

3. The "private search doctrine" involves the acquisition by police authorities of private property that has been seized and searched by private citizens. The doctrine commonly holds that searches of private property by private citizens are beyond the scope of the fourth amendment. Courts frequently interpret the doctrine to hold that upon searching materials, private citizens may transfer the property to police officials without tolling the fourth amendment. For further discussion of the private search doctrine, *see infra* notes 128-38 and accompanying text.

Many courts have interpreted the private search doctrine as sanctioning any police

After reviewing the package contents, should police authorities determine that the seized materials are obscene, they frequently confiscate the material without a warrant⁴ and use it as evidence in a criminal prosecution against the owner of the package.⁵

The transfer of presumptively protected "expressive material"⁶ from private to official custody implicates both first and fourth amendment interests. Because all expression is presumptively protected until determined otherwise, the first amendment⁷ applies. The fourth amendment⁸ pertains because the seizure of the expressive material by police authorities is designed to preserve evidence for a criminal prosecution. Although both amend-

reinspection of contents of packages which were validly obtained from private parties, reasoning that a private party is simply relaying the fruits of his search to police authorities. Employing fourth amendment analysis, these courts have reasoned that any subsequent police action does not constitute a separate search requiring a warrant. *See, e.g., United States v. McDaniel*, 574 F.2d 1224, 1226-7 (5th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979); *United States v. Pryba*, 502 F.2d 391, 401 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975).

4. *See, e.g., United States v. Entringer*, 532 F.2d 634 (8th Cir. 1976). Police might leave the package with the shipper for purposes of enacting a "controlled delivery." A "controlled delivery" is a type of bait often used to lure dealers in contraband. Controlled deliveries frequently occur after a carrier unexpectedly discovers contraband in the course of inspecting luggage. Upon being contacted, law enforcement agents restore the contraband to its container and authorize the carrier to deliver the container to its owner. When the owner appears to take delivery, he or she is arrested. The practice has been upheld in *United States v. Bulgier*, 618 F.2d 472 (7th Cir. 1980); *United States v. Haes*, 551 F.2d 767 (8th Cir. 1977); *United States v. Issod*, 508 F.2d 990 (7th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975); *United States v. DeBerry*, 487 F.2d 448 (2nd Cir. 1973).

Police might also take only a few copies of the material for purposes of getting a warrant to seize all the material. *See United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978); *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (en banc); *United States v. Kelly*, 529 F.2d 1016 (8th Cir. 1976). In either event, police have established control over the material.

5. *See, e.g. United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978); *United States v. Haes*, 551 F.2d 767 (8th Cir. 1977); *United States v. Entringer*, 532 F.2d 634 (8th Cir. 1976).

6. The teachings of the Supreme Court hold that all expression must be presumed constitutionally protected until it has been judicially determined to be otherwise. *See Roaden v. Kentucky*, 413 U.S. 496 (1973); *Speiser v. Randall*, 357 U.S. 513 (1958).

7. The first amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

8. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ments apply, most courts are hesitant to sustain first amendment rights at the expense of police interests.⁹ Indeed, courts seeking to protect only fourth amendment concerns may fail to vindicate first amendment interests. Plainly, there is an uncertain and unresolved relationship between the first and fourth amendments over the handling of police receipts of expressive material procured through private searches.

This article examines the first and fourth amendment interests that are implicated when government authorities take possession of privately seized, presumptively protected expressive material and concludes that safeguards must be implemented to protect the first amendment interests at stake. First, the article reviews the recent Supreme Court case of *Walter v. United States*,¹⁰ that considered, but did not resolve, the constitutional problems at issue. Next, the discussion examines the first amendment values implicated by government controls over expression and considers procedures developed by the Supreme Court to safeguard first amendment rights in situations not involving private searches. The article then evaluates the fourth amendment ramifications of private searches and subsequent government acquisitions of expressive material, arguing that because of its underlying rationale and application, the fourth amendment is an inadequate vehicle with which to safeguard first amendment values in these situations. The discussion demonstrates that government seizures of expressive material often result in prior restraints of expression. Finally, the article concludes by providing a model for the satisfactory accommodation of freedom of expression, privacy, and police interests.

I. *WALTER V. UNITED STATES*

Although some courts are sensitive to the first amendment values implicated by government receipts of presumptively protected

9. See, e.g. *United States v. Sherwin*, 539 F.2d 1, 8 (9th Cir. 1976) (en banc) (fourth amendment protections do not apply to books discovered by private parties since the books were "voluntarily relinquished to the government [by private citizens.]"). Similar logic was employed in *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978); *United States v. Entringer*, 532 F.2d 634 (8th Cir. 1976); *United States v. Pryba*, 502 F.2d 391 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127 (1975); *Gold v. United States*, 378 F.2d 588 (9th Cir. 1967).

10. 447 U.S. 649 (1980).

expressive material,¹¹ a disturbing number have shown little inclination to sustain freedom of expression. These courts have instead relied on the private search doctrine to sanction police seizures of expressive material.¹² Even where police seizures of expressive material have ultimately been repudiated, many courts have predicated their condemnation on fourth amendment principles.¹³

The Supreme Court in *Walter v. United States* considered, but did little to resolve the lower courts' disparate treatment of first amendment protection of expressive material seized through a private search. Even though *Walter* involved the removal of 871 films from public circulation for at least sixteen months,¹⁴ the plurality barely addressed the first amendment rights implicated in the case, stating only that fourth amendment warrant requirements must be "scrupulously observed" when the object of the search involves the first amendment.¹⁵ The plurality seems to have assumed that fourth amendment protections would adequately safeguard first amendment interests.¹⁶

The plurality relied on fourth amendment principles to condemn police conduct and concluded that although the government acquisition was proper, examining the film contents constituted a "significant expansion" of the search that had been conducted previously by a private party. That additional police action was therefore characterized as a separate search.¹⁷ Because the additional government search was warrantless, it was invalid.¹⁸

Discounting a government argument that the initial private search had eliminated any expectation of privacy in the package

11. See, e.g., *United States v. Haes*, 551 F.2d 767 (8th Cir. 1977); *United States v. Kelly*, 529 F.2d 1365 (8th Cir. 1976).

12. See, e.g., *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978); *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976); *United States v. Entringer*, 532 F.2d 634 (8th Cir. 1976); *United States v. Pryba*, 502 F.2d 391 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127 (1975).

13. See, e.g., *United States v. Haes*, 551 F.2d 767 (8th Cir. 1977).

14. The F.B.I. held the films for two months before viewing all of them. The films were then held for another two months before the U.S. District Attorney's office received them. (This fact does not appear in the Supreme Court decision but is mentioned by the lower court. See *United States v. Sanders*, 592 F.2d 788, 797 (5th Cir. 1979) (Wisdom, J., dissenting)). At least one more year passed before the indictments were finally handed down. *Id.* at 797.

15. *Walter v. United States*, 447 U.S. 649, 655 (1980).

16. *Id.* at 654-55.

17. *Id.* at 657 (the viewing of the films with a projector by F.B.I. agents constituted the independent search).

18. *Id.*

contents,¹⁹ the plurality determined that the conduct undertaken by government authorities violated the owners' legitimate expectation of privacy.²⁰ The government could not justify its reexamination of the materials by reason of the private parties' initial search, the plurality reasoned, unless the government had an independent ground upon which to search the packages.²¹ In discussing the private search, the plurality noted that the private party had not actually viewed the films.²² The plurality accordingly reserved judgment on whether the government would have needed a warrant had the private party been the first to view the films.²³

The lack of consensus in *Walter* reflects the confusion in the circuits regarding the treatment to be afforded official receipts of privately searched expressive material.²⁴ While recognizing that such police seizures raised freedom of expression problems,²⁵ the Court failed to apply effective first amendment safeguards. Thus it remains possible for courts to employ the private search doctrine as a vehicle for sanctioning seizures of presumptively protected expressive materials.²⁶

19. *Id.* at 658-59.

20. See *infra* notes 105-12 and accompanying text for development of the individual privacy interests that underlie the fourth amendment.

21. *Walter v. United States*, 447 U.S. 649, 658-59 (1980).

22. *Id.* at 657 n.9.

23. *Id.* Though concurring in the judgment, Justice White took exception to the plurality's suggestion that it was still an open question whether the government could screen the film if the private party had previously done so. *Id.* at 660. Justice White reasoned that any government screening of the film would require a warrant to avoid violating the defendant's privacy interests. *Id.* at 662. Concurring in the rest of the plurality's opinion, Justice White agreed that the government validly acquired the films and could legitimately examine package contents exposed to plain view without obtaining a warrant. *Id.* at 661-62.

24. See *supra* notes 11-13 and accompanying text.

25. *Walter v. United States*, 447 U.S. 649, 655-56 n.6 (1980).

26. Although the *Walter* case involved material on the borderline of obscenity, it is possible that a *Walter*-type police seizure could easily implicate other forms of expression. Alternative opinions on political matters or domestic or foreign policies might similarly become entangled in the web of transfer from private to official hands. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (attempted government suppression of "Pentagon Papers"). Any number of other forms of minority or dissenting expression might also be affected. Though the *Walter* case states the matter at issue, the problem is hardly confined to borderline obscenity.

The definition and meaning of "borderline" expression is considered *infra* notes 55-57 and accompanying text.

II. FIRST AMENDMENT CONSIDERATIONS

A. *Interests Protected By The First Amendment*

The right to receive and transmit information and ideas, regardless of their social worth, is fundamental to our free society and forms a core value of the first amendment.²⁷ By protecting the right of individuals and groups to engage in expression secure from the threat of government control, the first amendment safeguards the integrity of individual ideas, beliefs, and opinions.²⁸

While enhancing individual liberties, the first amendment guarantee of free expression also promotes significant social interests.²⁹ By protecting the public's right to the unrestricted circulation of ideas and opinions,³⁰ freedom of expression helps maintain the balance between stability and change in society by providing a vehicle for the exploration and testing of contrary ideas and view-

27. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969): "It is now well established that the Constitution protects the right to receive information and ideas . . . This right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free society." *Id.* (citations omitted).

28. *Stanley v. Georgia*, 394 U.S. 557 (1969); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Winters v. New York*, 333 U.S. 507 (1948).

29. A leading commentator, Professor Thomas Emerson, has outlined four broad categories of values that a system of freedom of expression encourages: (1) individual self-fulfillment, (2) means to attain truth, (3) a method of securing participation by citizens in social and political decision-making, and (4) a way of maintaining the balance between stability and change in society. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-9 (1970) (hereinafter cited as T. EMERSON, *FREEDOM OF EXPRESSION*); Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L. J.* 877, 878-79 (1963) (hereinafter cited as Emerson, *First Amendment Theory*). See also, Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 *RUTGERS L. REV.* 41 43 (1974) (essentially agrees with Emerson's four-value freedom of expression system); Fuchs, *Further Steps Toward a General Theory of Freedom of Expression*, 18 *WM. & MARY L. REV.* 347 (1976) (supports the Emersonian system). But see BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 *STAN. L. REV.* 299, 318-22 (1978) (rejects Emerson's premise that individual self-fulfillment is a first amendment principle). See also Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591 (1982) (argues that first amendment ultimately serves only one true value, individual self-realization, which may be interpreted as realization of human potential or control over one's life (destiny)).

30. See, e.g., *A Quantity of Books v. Kansas*, 378 U.S. 205, 213 (1964) (plurality) (" . . . if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public in a free society to unobstructed circulation of non-obscene books."); *Smith v. California*, 361 U.S. 147, 153 (1959) (city ordinance adversely impacts on first amendment because "bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted.").

points.³¹ Because freedom of expression promotes an exchange of viewpoints, citizens are readily informed of the prevailing currents of thought in society.³² This ready access to information fosters an open dialogue enabling all members of society to participate in the resolution of important societal issues.³³

Values which appeal to minority groups, however, are often rejected by majority members of society.³⁴ Strong societal pressures work to suppress unpopular ideas and values.³⁵ Yet the first amendment protects against the suppression of unpopular as well as conventional opinions.³⁶ Indeed, the first amendment is

31. *Roth v. United States*, 354 U.S. 476, 484 (1957): "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." See also, W. GELLHORN, *AMERICAN RIGHTS* 43 (1960) (freedom of expression tends to promote a more stable society); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (hereinafter cited as A. MEIKLEJOHN, *FREE SPEECH*); Emerson, *First Amendment Theory*, *supra* note 29, at 884-86.

32. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the first amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . ."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Cf. DuVal, *Free Communication and the Quest for Truth: Towards a Teleological Approach to First Amendment Adjudication*, 41 *GEO. WASH. L. REV.* 161, 188-94 (1972) (a brief review and critique of the marketplace theory of first amendment expression, which stresses the social value of free and open discussion as the best means of discovering and disseminating truth).

33. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 547 (1976): "[The Framers'] chief concern was the need for freedom of expression in the political arena and the dialogue in ideas." Cf. Z. CHAFEE, *GOVERNMENT AND MASS COMMUNICATION* 39-43 (1947) (first amendment guarantees that all ideas will at least be allowed to make an appeal to the intellect and conscience of individuals; freedom of expression necessary for popular participation in political process); A. MEIKLEJOHN, *FREE SPEECH*, *supra* note 31, at 48 ("freedom [of public discussion] is the basic postulate of a society which is governed by the votes of its citizens."); Meiklejohn, *The First Amendment Is An Absolute*, in *Free Speech and Association: The Supreme Court and the First Amendment* 1 (P. Kurland ed. 1975); Karst, *Equality as a Central Principle in the First Amendment*, 43 *U. CHI. L. REV.* 20, 68 (1975) ("At the heart of that system [of free expression] . . . is the guarantee of equal liberty of expression.").

34. See Z. CHAFEE, *supra* note 33, at 39 (viewpoints unpopular because of their novelty or confinement to minority groups); Emerson, *First Amendment Doctrine and the Burger Court*, 68 *CALIF. L. REV.* 422, 425 (1980) ("Values that appeal to individual, rather than social, interests are often less persuasive to majority elements in a society, particularly where their implementation requires deference to the rights of minorities.").

35. Emerson, *The Doctrine of Prior Restraint*, 20 *LAW & CONTEMP. PROB.* 648, 649 (1955) (hereinafter cited as Emerson, *Prior Restraint*). Professor Emerson decries the "ominous expansion of preventive law in the area of civil liberties," which, in part, he believes is due to government efforts to control expression. *Id.*; see also, Karst, *supra* note 33, at 29-35.

36. *Kingsley Int'l Pictures Corp. v. Regents of U. of N.Y.*, 360 U.S. 684, 688-89 (1959). "[T]his argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority And

designed to promote an exchange of contrasting expressions, ideas, and values.

Because the preservation of our system of liberty largely depends on an informed and active public,³⁷ genuine freedom of expression is essential. Any restriction on expression tends to undermine the democratic process by abridging the public's access to ideas.³⁸

B. *Prior Restraint Doctrine*

The prior restraint doctrine is concerned with limiting government control over expression and is fundamental to the protection of freedom of expression.³⁹ The doctrine holds that official restrictions may not be imposed on expression in advance of publication.⁴⁰ As observed by the Supreme Court, "a free society prefers

in the realm of ideas it protects expression which is eloquent no less than which is unconvincing." *Id.*; see also *Roth v. United States*, 354 U.S. 476, 484 (1957): "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interests." *Id.* (citation omitted).

37. Justice Brandeis outlined the value of freedom of expression in informing the general public and preserving our liberties in *Whitney v. California*, 274 U.S. 357, 379 (1927) (concurring opinion): "They [the Framers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine" *Id.*; see also T. EMERSON, *FREEDOM OF EXPRESSION*, *supra* note 29; DuVal, *supra* note 32, at 194-203; Fuchs, *supra* note 29.

38. Emerson, *Prior Restraint*, *supra* note 35, at 658.

39. T. EMERSON, *FREEDOM OF EXPRESSION*, *supra* note 29, at 503-12. Emerson provides a concise description of the prior restraint doctrine and its historical development. See also Emerson, *Prior Restraint*, *supra* note 35; Litwack, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L.L. REV. 519, 520-22 (1977); Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 NOTRE DAME LAW. 898 (1976).

40. Blackstone observed:

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

5 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 151 (1965 ed.); see also T. EMERSON, *FREEDOM OF EXPRESSION*, *supra* note 29, at 503-04.

to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand."⁴¹

While the prior restraint doctrine traditionally operated as a check on state actions in the operation of censorship systems,⁴² more recent decisions of the Supreme Court have expanded the notion of prior restraint to encompass official actions that curtail expression without a judicial determination of illegitimacy.⁴³ Under this view any official removal of expressive material from public circulation without a judicial determination of illegitimacy may constitute a prior restraint.⁴⁴

Because of the dangers to freedom of expression posed by prior restraints,⁴⁵ the Supreme Court has vigilantly guarded

41. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis in original).

42. See T. EMERSON, *FREEDOM OF EXPRESSION*, *supra* note 29, at 503-04.

43. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976) ("restrictive order entered to protect a defendant's right to a fair and impartial jury" constitutes a prior restraint); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (denial of use of municipal facilities for theater production constituted a prior restraint); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (administrative licensing scheme regarded as prior restraint).

44. *Heller v. New York*, 413 U.S. 483 (1973); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); see also Litwack, *supra* note 39, at 522 ("any government action that significantly curtails the dissemination of information and ideas prior to an adequate determination that the materials are unprotected by the first amendment is a prior restraint.").

45. Because prior restraints shut off expression before it transpires, they may suppress a wider range of expression and are more easily accomplished than resorts to subsequent punishment under the criminal process. T. EMERSON, *FREEDOM OF EXPRESSION*, *supra* note 29, at 506; Barnett, *The Puzzle of Prior Restraint*, 29 *STAN. L. REV.* 539, 543 (1977) ("prior restraint . . . excessively and unnecessarily stifling . . . [and] a more restrictive alternative than subsequent punishment."). Unlike a system of subsequent punishment, prior restraints do not require attention to the safeguards of the criminal process. Thus, while resorts to the criminal process assure reasoned scrutiny of expression through procedural safeguards a prior restraint "has an immediate and irreversible sanction." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1975). The Supreme Court has thus stated that if a criminal sanction "chills" speech, [a] prior restraint "freezes" it at least for the time." *Id.* at 559.

Prior restraints pose further dangers to first amendment speech since they often operate under administrative systems which partially screen the actions of censors or censoring bodies from general exposure. There is thus less opportunity for public appraisal and criticism. Institutional forces inherent in such administrative systems have a propensity to restrain and suppress all expression without regard to the nature of particular ideas. Emerson, *Prior Restraint*, *supra* note 35, at 657-70 ("The long history of prior restraint reveals over and over again that the personal and institutional forces inherent in the system nearly always end in a stupid, unnecessary, and extreme suppression." *Id.* at 659). Equally dangerous, individuals and administrative bodies, who judge expression and determine whether restrictions are warranted, generally lack adequate training or skill to make vital decisions affecting expression.

against the premature suppression of speech through prior restraints. In the landmark decision of *Near v. Minnesota*,⁴⁶ the Court stated, "it has been generally, if not universally, considered that it is the chief purpose of the [first amendment] guaranty to prevent previous restraints upon publication."⁴⁷ In affirming the *Near* principle, the Court recently announced in *Nebraska Press Ass'n v. Stuart* that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."⁴⁸ Because of the threats they pose, prior restraints are presumptively unconstitutional and require a heavy burden of justification to sustain validity.⁴⁹

Despite this heavy presumption of constitutional infirmity, prior restraints are not invalid *per se*.⁵⁰ There are certain well-de-

46. 283 U.S. 697 (1931). In *Near* the Court struck down a state statute which provided for the enjoining of publications which engaged in defamation, scandal, obscenity and maliciousness. Reasoning that the statute amounted to "effective censorship," the Court held that the statute constituted a prior restraint, and hence abridged freedom of press guarantees. *Id.* at 712.

47. *Id.* at 713. The Court also stated: "The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional rights." *Id.* at 718.

48. 427 U.S. 539, 559 (1975).

49. "'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

The Supreme Court has also stated that any system of prior restraint may be tolerated only when it is operated under sensitive procedural safeguards. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). "We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint." *Id.* (citations omitted). For development of the procedural safeguards employed by the Supreme Court to protect against the suppression of first amendment speech in systems involving prior restraints, *see infra* notes 67-99 and accompanying text.

50. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-42 (1957).

The phrase "prior restraint" is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: "What is needed," writes Professor Paul Freund, "is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis."

Id. (quoting Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 553, 539 (1951)).

finer exceptions to the doctrine.⁵¹ In the absence of an exception, however, the presumption of invalidity against prior restraints is extremely difficult to overcome. "And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit."⁵²

C. *The Chilling Effect Of Prior Restraints*

Prior restraints generally operate without supervision and tend to be indiscriminate;⁵³ therefore they often suppress wide ranges of expression. Legitimate expression is frequently restricted along with speech of a more questionable nature.⁵⁴ In theory all expression may be affected, however, prior restraints are especially likely to curtail expression which lies on the border of legitimacy.⁵⁵

51. The more commonly known exceptions to the prior restraint doctrine include war-time exigencies and incitements to violence and the overthrow of the government. *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

Although the Court in *Near* stated that obscene publications were also an exception to the prior restraint doctrine, the Court has since declined to develop the obscenity exception as envisioned in *Near. Id.*; see, e.g., *Freedman v. Maryland*, 380 U.S. 51 (1965) (statutory censorship system requiring prior submission of films may validly operate only under procedural safeguards); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957) (Court upheld statute regulating obscene publications, but emphasized statutory safeguards and did not rely on the prior restraint doctrine). Consequently, some commentators have postulated that the prior restraint doctrine has only limited application in the obscenity area and that no blanket exception exists for obscene matter. See, e.g., T. EMERSON, *FREEDOM OF EXPRESSION*, *supra* note 29, at 507-12.

52. *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968).

53. See, e.g. *Marcus v. Search Warrant*, 367 U.S. 717, 723 (1961): "They seized all magazines which '[i]n our judgment' were obscene; when an officer thought 'a magazine . . . ought to be picked up' he seized all copies of it." *Id.* at 723.

54. As aptly stated by the Supreme Court, while reviewing restraints placed on the musical production of "Hair," "The perils of prior restraint are well illustrated by this case, where neither the Board nor the lower courts could have known precisely the extent of nudity or simulated sex in the musical, or even that either would appear, before the play was actually performed." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561 (1975); see also, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 (1963) ("it should be noted that the Attorney General of Rhode Island conceded in oral argument in this Court that the books listed in the notices included several that were not obscene within this Court's definition of the term.").

55. Besides *Walter*, the tendency of prior restraints to suppress so-called "borderline" expression is well illustrated by other Supreme Court decisions. See, e.g., *Freedman v. Maryland*, 380 U.S. 51 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964) (plurality); *Bantam Books Inc. v. Brown*, 372 U.S. 58 (1963); *Marcus v. Search Warrant*, 367 U.S. 717

Such borderline speech frequently involves minority expression that may enhance individual and social values.⁵⁶ Thus the viewpoints which may stimulate a free exchange of ideas are often the most susceptible to suppression.

According to the Supreme Court, the "line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn"⁵⁷ In the obscenity area, in fact, the Court itself has frequently been unable to promulgate effective standards.⁵⁸ The difficulties experienced by the Supreme Court plainly illustrate the complexities involved in determining the limits of protected expression. In view of these complexities, the competence of police authorities to make decisions affecting expression must seriously be questioned.⁵⁹

(1961).

"Borderline" expression is material which lies on the line between unconditional protection and speech which may be regulated constitutionally. See *infra* notes 57-58 and accompanying text.

56. A famous example of attempted suppression of what was then considered borderline expression involves James Joyce's *Ulysses*. See *United States v. One Book Entitled "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd* 72 F.2d 705 (2nd Cir. 1934). For discussion of *Ulysses* and related cases, and the change in the obscenity standard surrounding their adjudication see T. EMERSON, *FREEDOM OF EXPRESSION*, *supra* note 29, at 468-70.

57. *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

58. See *Miller v. California*, 413 U.S. 15, 22 (1973):

Apart from the initial formulation in the *Roth* case, no majority of the Court has at any time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.'

Id. (citations omitted). Justice Douglas stated rather bluntly that "The Court has worked hard to define obscenity and concededly has failed." *Id.* at 37 (dissenting opinion). Cf. *Paris Adult Theatre I v. Slaton*, 413 U.S. 413 (1973); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Roth v. United States*, 354 U.S. 476 (1957).

The question of whether obscenity should remain unprotected by the first amendment is beyond the scope of this article. Rather, the purpose of this article is to demonstrate the chilling effects current interpretations of the private search doctrine have on all protected expression, not just arguably obscene matter.

59. Indeed, police authorities' or censoring bodies' lack of or failure to utilize adequate and effective evaluative skills in deciding to place restrictions on expression has frequently resulted in arbitrary, injudicious actions. See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (city's attempted restraint of musical production "Hair"). For discussion of *Southeastern Promotions, Ltd.*, see *supra* note 54 and accompanying text; see also *Jenkins v. Georgia*, 418 U.S. 153 (1974) (Court overturned determination of state board that film *Carnal Knowledge* was obscene); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Mass.*, 383 U.S. 413 (1966) (Court reversed state court finding that book "*Fanny Hill*" was obscene).

Because police authorities lack the requisite evaluative skills, they may effect serious, indiscriminate restraints on expression, encompassing legitimate and illegitimate speech.⁶⁰ Coupled with the threat of criminal prosecution, any police conduct that inappropriately suppresses borderline expression constitutes a clear disincentive to the exercise of first amendment rights.⁶¹ Indeed, in the face of threatened criminal penalties, deprivations of licenses, economic losses, or other sanctions, few citizens will avidly seek to disseminate expressive materials. Such sanctions tend in fact to promote self censorship among disseminators of these materials.⁶²

While all expression is threatened by the actions of zealous police authorities, insensitive police conduct serves to chill minority expression especially, because the threat of punishment is greatest where the dissemination of unpopular viewpoints is involved. The whole process of arrest and pretrial confinement serves as a strong disincentive to the dissemination of any expressive material which approaches the borderline.⁶³ Injudicious police conduct affects society as well as individuals, because the distribution of borderline material decreases in proportion to the threat of criminal prosecution.⁶⁴ Where distributors and other secondary participants in the dissemination process refrain from first amendment activities, public access to controversial ideas and opinions is severely curtailed.⁶⁵ Society is then deprived of the open dialogue

60. See, e.g. *Stanford v. Texas*, 379 U.S. 476 (1964), where police committed particularly gross abuses. In *Stanford* police obtained a warrant to search defendant's home for evidence of his affiliation with the Communist Party. Despite the stated purpose of the warrant, police seized approximately 300 different books and pamphlets wholly unrelated to communist activities. "[A]mong the books taken were works by such diverse writers as Karl Marx, Jean Paul Sartre, Theodore Draper, Fidel Castro, Earl Browder, Pope John XXIII, and (even) Mr. Justice Hugo L. Black." *Id.* at 479-80.

Police also took possession of defendant's "private documents and papers, including his marriage certificate, his insurance policies, his household bills and receipts, and files of his personal correspondence." *Id.* at 480. Ironically, "[t]he officers did not find any 'records of the Communist Party' or any 'party lists and dues payments.'" *Id.*

61. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1967) "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms." *Id.* (citations omitted). "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Id.* at 487.

62. *Smith v. California*, 361 U.S. 147, 153-54 (1959).

63. *Monaghan, First Amendment "Due Process"*, 83 HARV. L. REV. 518, 538 (1970).

64. See *Cambist Films, Inc. v. Illinois*, 292 F. Supp. 185, 189 (1968).

65. See, e.g., *Smith v. California*, 361 U.S. 147 (1959), where the Court invalidated a

necessary for the democratic process and social progress.⁶⁶

D. *First Amendment Procedural Safeguards*

Recognizing that unbridled police discretion in searching and seizing presumptively protected expressive materials can easily result in prior restraints,⁶⁷ the Supreme Court has developed procedural safeguards for the search and seizure of material protected by the first amendment. Promulgated within the context of warrant-authorized police action and statutory censorship systems, the protections require prompt judicial involvement to control the handling and to determine the protected nature of the curtailed expression. These procedures safeguard individual first amendment rights and also serve to protect public rights in the unrestricted circulation of expressive material that ultimately may not be declared illegitimate.⁶⁸ As yet, the Court has not applied these protections to private searches of expressive material. The scope and limits of these protections are examined below.

1. *The Requirement Of An Adversarial Hearing With Judicial Determination*

The requirement of an adversary proceeding followed by a judicial determination of first amendment content is a fundamental protection and must accompany any curtailment of expression.⁶⁹

city ordinance which imposed strict liability on retail sellers of obscene materials because it would discourage sellers from selling any potentially controversial books. In striking down the ordinance the court reasoned that "the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted." *Id.* at 153.

66. See *supra* notes 29-38 and accompanying text.

67. In *Marcus v. Search Warrant*, 367 U.S. 717 (1961), for example, the Court concluded that a statutory seizure process was infirm in allowing warrants to be issued solely upon conclusory police allegations of obscenity. The process was defective, the Court reasoned, because it permitted unguided police discretion in the search and seizure of expressive materials. Without satisfactory statutory direction, the police were able to seize material based on their own ad hoc determinations on the spot. "[T]here was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." *Id.* at 732.

68. See *supra* notes 29-33 and accompanying text.

69. See, e.g., *Heller v. New York*, 413 U.S. 483 (1973); *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); see also Note, *Prior Adversary Hearings on the Question of Obscenity*, 70 COLUM. L. REV. 1403 (1970).

Such a proceeding allows full consideration of whether the curtailed expression is protected by the first amendment.⁷⁰ A neutral judiciary helps adjust the contrary individual and police interests. By providing an opportunity to examine fully the merits of a particular expression, the adversarial proceeding helps ensure that the public right to free dissemination of ideas is not violated.⁷¹

Following the adversarial proceeding, a judge must make an ultimate determination regarding the protected nature of the expressive material.⁷² This requirement is predicated on the belief that "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression . . . to impose a valid final restraint."⁷³ Because of the complexities involved in resolving the limits of protected speech, only a judge is adequately equipped to make such ultimate decisions affecting expression.⁷⁴

While an adversarial proceeding must take place, the Court has concluded that the hearing need not always occur before the seizure of the expressive material by police authorities, but may sometimes take place shortly afterward.⁷⁵ In *Heller v. New York* the Court determined that a judge could issue a warrant for the seizure of a film without first conducting an adversary hearing on the obscenity question.⁷⁶ The Court found that judicial action permissible because there was an opportunity for a judicial determination of obscenity in an adversary proceeding promptly following

70. See, e.g., *Heller v. New York*, 413 U.S. 483 (1973); *Freedman v. Maryland*, 380 U.S. 51 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); see also Note, Prior Adversary Hearings on the Question of Obscenity, *COLUM. L. REV.* 1403 (1970).

71. See, e.g., *Heller v. New York*, 413 U.S. 483 (1973); *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); see also Note, *supra* note 70, at 1403.

72. See, e.g., *Heller v. New York*, 413 U.S. 483 (1973); *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964).

73. *Heller v. New York*, 413 U.S. 483, 489 (1973); see also *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965).

74. See *supra* notes 57-59 and accompanying text.

75. *Heller v. New York*, 413 U.S. 483, 488 (1973). The Court noted that there was no absolute right to a prior adversary hearing applicable to all cases where arguably expressive material is seized. *Id.* Where the seizure is pursuant to a warrant, the case for a prior adversary hearing is particularly weak. *Id.*

76. The judge in *Heller* had previously viewed the film and found it to be obscene. *Id.* at 485. Moreover, the film was not actually subjected to a final restraint, as only a copy was temporarily detained in order to preserve it as evidence. *Id.* at 490.

the seizure.⁷⁷ The Court reasoned that a prompt judicial determination remained necessary, however, so that administrative delays would not become forms of censorship.⁷⁸

2. "Single Copy Rules"

The *Heller* case involved the seizure of a single copy of film pursuant to a warrant. The Court distinguished single copy seizures from wholesale seizures designed to destroy or block distribution or exhibition of mass quantities of expressive material, and determined that in situations similar to *Heller*, the judicial determination may follow the seizure because adequate protections to safeguard first amendment interests were available.⁷⁹ Because the seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral judicial magistrate,⁸⁰ the chance of gross abuse by police in exercising seizure powers is lessened.⁸¹ Moreover, the provision for adversarial participation in and judicial determination of the obscenity issue following the seizure assures the full consideration of expression in light of first amendment guarantees.⁸²

In addition, upon a showing that other copies of the film or similar expressive material is not available to the exhibitor, provision must be made so that continued dissemination of the material is unimpeded pending the judicial determination.⁸³ Thus, where other copies of the expressive material are not available, the exhib-

77. *Id.* at 488.

78. *Id.* at 489 (citations omitted). Although the Court in *Heller* refrained from defining any rigid, specific deadlines regarding the "promptness" of the judicial determination, it did note that by "prompt" it meant the shortest period "compatible with sound judicial resolution." *Id.* at 492 n.9. Following an adversary proceeding, the judicial determination in *Heller* occurred within 48 days of the seizure, which was apparently "compatible with sound judicial resolution" under the circumstances of the case. *Id.* at 490. Though 48 days from the seizure to ultimate determination of obscenity appears rather long, there are indications that the Court was persuaded by the lack of a practical restraint of expression in the *Heller* instance and the failure of the defendant to avail himself of opportunities for expedited judicial consideration of the obscenity issue. *Id.* Moreover, the 48 day period entailed the time from initial seizure to final judicial determination. It thus included the adversarial proceedings plus any delays attributable to the judicial process.

79. *Id.* at 492-93.

80. An outline of the probable cause requirement necessary to obtain a warrant is provided *infra* notes 108-09 and accompanying text.

81. *Heller v. New York*, 413 U.S. 483, 493 (1973).

82. *Id.*

83. *Id.* at 492-93, esp. n.11.

itor must be allowed to copy the material.⁸⁴ If copying is denied, the seized material must be returned.⁸⁵

Adherence to these safeguards in the context of single copy seizures of expression would, the Court reasoned, protect first amendment values from prior restraints by allowing "only a minimal interference with public circulation pending litigation."⁸⁶ Concomitantly, such procedures would also serve the "public interests in full and fair prosecution for obscenity offenses."⁸⁷ Implementation of the *Heller* procedures thus helps resolve conflicting first amendment and police interests when expressive material—especially material on the borderline of legitimacy—is seized.

3. "Mass Quantity Rules"

Wholesale removals of expressive materials for purposes of destruction or suppression as contraband require the different procedural protections of the "mass quantity rules."⁸⁸ Where expressive material has been removed from circulation in a wholesale manner, the Court has determined that a judicial determination of illegitimacy must take place *prior* to any seizure to avoid abridging the public right to free expression.⁸⁹ A prior judicial determination is necessary because when all copies are seized, the expression in them is effectively suppressed.⁹⁰ Even if the material were ultimately determined to be protected, the public would have been deprived of access to it in the interim.⁹¹

84. *Id.*

85. *Id.*

86. *Id.* at 493.

87. *Id.*

88. *Id.* at 492; see Comment, *Private Search & Prior Restraint of Obscene Materials: The Interaction of Two Doctrines*, 31 MERCER L. REV. 1029 (1980). The commentators called the different standards "single copy rules" and "mass quantity rules," terms which I have also employed. *Id.* at 1032-33 n.31.

89. See, e.g., *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964) (seizure of 1,715 copies of 31 novels); *Marcus v. Search Warrant*, 367 U.S. 717 (1961) (seizure of approximately 11,000 copies of 280 publications).

90. *A Quantity of Books v. Kansas*, 378 U.S. 205, 210 (1964); *Marcus v. Search Warrant*, 367 U.S. 717, 736-37 (1961). In *Marcus* the Court commented that the ability of distributors to circulate their ideas would thus be severely curtailed, dependent on their own integrity in acquiring or devising other copies. *Id.* at 736.

91. See *supra* notes 42-44 and accompanying text.

4. *Censorship Scheme Protections*

Finally, in addition to the procedures required in police single copy and mass quantity seizures of expression, the Court determined in *Freedman v. Maryland*⁹² that further procedural safeguards must apply to censorship schemes. These added protections are necessary to obviate the dangers inherent in any censorship system.⁹³ *First*, the censor must bear the burden of proving that the film constitutes unprotected expression.⁹⁴ *Second*, any requirement of advance submission may not "lend an effect of finality to the censor's determination"⁹⁵ *Third*, "any restraint imposed in advance of a final judicial determination . . . must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution."⁹⁶ *Last*, the procedure must assure a prompt final judicial decision to minimize the deterrent effect of an interim, and possible erroneous, denial of a license.⁹⁷

5. *Summary*

The *Heller* and *Freedman* decisions illustrate that sensitive procedures and practices are required to protect first amendment interests. Freedom of expression can easily be destroyed by insensitive procedures and practices used by police authorities in seizing and judging expressive materials. The procedural protections dis-

92. 380 U.S. 51 (1965). The censorship system involved in *Freedman* aptly illustrates the characteristics of such a statutory system. A film exhibitor must first submit the film to a board of censors for approval. Upon determination that the film is not obscene, the exhibitor receives a license to show it. *Id.* at 55.

93. The Court outlined some of the dangers inherent in a censorship system. A censorship proceeding generally puts the initial burden of persuasion on the exhibitor. Moreover, since it is the business of a censor to censor, there is always the danger that the censoring individual or body will be less responsive to first amendment values than a court. Finally, if the censorship system impedes opportunities for judicial review, there is always the danger that the censor's decision will be final. *Id.* at 57-58; see also Emerson, *Prior Restraints*, *supra* note 35, at 658-59.

94. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

95. *Id.* There must be assurance, by statute or "authoritative judicial construction," that the censor will "either issue a license or go to court to restrain the film" within a brief, specified period. *Id.* at 58-59. Thus, the censor bears the burden of going to court.

96. *Id.*

97. *Id.* As a model for the incorporation of the required procedural safeguards, the Court suggested the statute it upheld in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Freedman*, 380 U.S. at 60.

cussed above were designed to prevent such destruction.

The Court's reliance on the adversary hearing requirement to safeguard first amendment interests from unrestricted police conduct stems from its desire to vindicate public and individual rights in free expression.⁹⁸ Both individuals and society need protection from interim government suppressions of expressive material that ultimately may be found to be constitutionally protected. The adversary hearing requirement helps safeguard against any restraint that extends beyond the strictly temporary.⁹⁹ In the absence of an adjudication of illegitimacy, any serious or long-lasting suppression is not permitted.

Nevertheless, many courts choose not to apply the foregoing safeguards to government searches and seizures of expressive material obtained through private searches.¹⁰⁰ These courts have assumed that application of these safeguards is confined to situations factually similar to those for which the protections were formulated.¹⁰¹ Because a private search involves fortuity and lacks the overt participation of state authorities that police action pursuant to a warrant or statute provides, a narrow reading of these protections would not seem to demand their application.¹⁰² The Supreme Court's decision in *Walter* did not clarify the situation, as it relied primarily on fourth amendment principles.

98. As the cases discussed in the foregoing section indicate, only an adversary hearing insures the necessary sensitivity to first amendment values to determine the content of speech. Because the adversary hearing provides for the participation of the owner of the allegedly illicit material, the presence of the party best able to argue the merits of the targeted expression is insured.

99. For an excellent discussion of the prior adversary hearing, its origins and rationale, see Note, *supra* note 70, at 1403. ("The purpose of this requirement is not so much to supplement existing criminal procedures for protection of the individual rights of those who distribute allegedly obscene materials as it is to protect the public from interim governmental suppression of material that may ultimately be declared to be nonobscene and, therefore, constitutionally protected.")

100. See, e.g., *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978); *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976); *United States v. Entringer*, 532 F.2d 634 (8th Cir. 1976).

101. See, e.g. *United States v. Bush*, 582 F.2d 1016, 1021-22 (5th Cir. 1978); *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976); *United States v. Entringer*, 532 F.2d 634 (8th Cir. 1976). In *Sherwin*, for example, the court stated that "we do not agree that an adversary hearing prior to the seizure in this case was required by the first amendment," despite the restraint of 17 cartons of books. 539 F.2d at 8. (citation omitted).

102. See, e.g. *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978); *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976); *United States v. Entringer*, 532 F.2d 634 (8th Cir. 1976).

III. FOURTH AMENDMENT CONSIDERATIONS

Instead of relying on the first amendment safeguards examined above, most courts evaluate government controls over expressive material obtained through private searches according to fourth amendment dictates.¹⁰³ By relying on fourth amendment search and seizure rules, which are designed to preserve evidence for criminal prosecutions,¹⁰⁴ these courts inadequately attend to the first amendment values implicated in police controls over expression. After reviewing fourth amendment theory, this discussion demonstrates how application of the private search doctrine endangers these first amendment values.

A. *Interests Protected By The Fourth Amendment*

The core value underlying the fourth amendment is the right of an individual to be free from unwarranted government intrusion.¹⁰⁵ Circumscribing all official intrusions, the fourth amendment safeguards the privacy of citizens from arbitrary encroachments by police or other government officials.¹⁰⁶ Interference with individual privacy is permissible only when police authorities act pursuant to a warrant or a judicially created warrant exception.¹⁰⁷

In the typical fourth amendment case, police officials must obtain a warrant before searching or seizing property for evidentiary purposes. A warrant may be issued only by a neutral judicial officer and only after a determination is made that probable cause exists to believe that the property to be searched or seized is connected

103. See, e.g., *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978); *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976); *United States v. Entringer*, 532 F.2d 634 (8th Cir. 1976).

104. See *infra* notes 105-12 and accompanying text.

105. See *supra* note 8.

106. See *infra* notes 110-12 and accompanying text.

107. Warrantless searches or seizures are per se unreasonable unless justified on the basis of certain accepted and well-delineated exceptions to the warrant requirement. *United States v. Chadwick*, 433 U.S. 1, 5 (1977). Some of the commonly recognized warrant exceptions are plain-view, see, e.g., *Harris v. United States*, 390 U.S. 234, 236 (1968) (per curiam) ("objects falling in the plain view of an officer who has a right to be in the position to have view are subject to seizure and may be introduced in evidence"); search incident to arrest, see e.g., *Chimel v. California*, 395 U.S. 752 (1969) (after valid arrest, police may make limited search of person and area within immediate reach of arrestee); exigent circumstance, see, e.g. *Cupp v. Murphy*, 412 U.S. 291 (1973) (police justified in seizing evidence without warrant due to likelihood that evidence would otherwise be lost); and the *Carroll v. United States*, 267 U.S. 132 (1925) automobile exception (warrantless conduct justified because of the inherent mobility of automobiles).

with criminal wrongdoing.¹⁰⁸ This neutral judicial determination is necessary, the Court has reasoned, to ensure the protection of citizens from unwarranted government intrusion.¹⁰⁹

Although privacy is not mentioned anywhere in the text of the amendment, numerous decisions have interpreted the fourth amendment as protecting privacy values.¹¹⁰ The underlying premise of the amendment is, in fact, that an individual's personal life should not be subject to constant or arbitrary government intrusion.¹¹¹ The amendment's proscription of warrantless searches and seizures protects the individual's right of privacy by preventing such intrusions.¹¹²

B. *Expectation Of Privacy Test*

The current test for determining whether fourth amendment rights have been violated was developed by the Court in *Katz v. United States*.¹¹³ In reasoning that the fourth amendment "pro-

108. *Ex parte* in nature, the warrant proceeding takes place before a magistrate. A prevailing test for determining probable cause for purposes of issuing a warrant is the two-prong standard articulated by the Supreme Court in *Aguilar v. Texas*, 378 U.S. 108 (1964). An affidavit must set forth the "underlying circumstances" necessary to enable a judicial officer to determine independently the validity of the affiant's conclusion that there is actually evidence of crime. Secondly, the affiant must support his claim that the informant he relied upon was "credible" or the information supplied in the affidavit was "reliable." *Id.* at 114.

109. *See, e.g., Arkansas v. Sanders*, 442 U.S. 753, 757-59 (1979).

110. *See, e.g., Alderman v. United States*, 394 U.S. 165, 175 (1969) (the security of persons and property); *Terry v. Ohio*, 392 U.S. 1, 17 (1968) (right of personal dignity); *Lopez v. United States*, 373 U.S. 427, 455 (1963) (dissenting opinion) (right of personal liberty); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (sanctity of home and "the indefeasible right of personal security, personal liberty and private property."); *United States v. Holmes*, 521 F.2d 859, 870 (5th Cir. 1975), *aff'd in part and rev'd in part per curiam on rehearing*, 537 F.2d 227 (5th Cir. 1976) (right to be let alone); *Fixed v. Wainwright*, 492 F.2d 480, 483 (5th Cir. 1974) (right of individuality).

111. *See, e.g., Camara v. Municipal Court*, 387 U.S. 523 (1967) where the Court stated:

The basic purpose of [the Fourth] Amendment as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which "is basic to a free society."

Id. at 528 (citation omitted).

112. The individual right to privacy arises by implication of judicial interpretation of the fourth amendment, holding that a person's daily activities are not subject to continual or indiscriminate official scrutiny. *See supra* notes 109-10; *see also* Comment, *The Concept of Privacy and the Fourth Amendment*, 6 J. LAW REF. 154 (1972).

113. 389 U.S. 347 (1967). In *Katz*, F.B.I. agents attached an electronic listening and

fects people, not places," the majority concluded that fourth amendment protection would no longer "turn upon the presence or absence of a physical intrusion into any given enclosure."¹¹⁴ The Court then determined that government activities in eavesdropping and recording the defendant's conversation in a telephone booth violated the privacy upon which he justifiably relied. The actions by government officials constituted a "search and seizure within the meaning of the fourth amendment."¹¹⁵ Because the actions were unsupported by a warrant or warrantless justification, the Court held them to be unlawful.

In a concurring opinion, Justice Harlan stated that the new fourth amendment rule imposed a two-fold requirement: (1) "that a person have exhibited an actual (subjective) expectation of privacy," and (2) "that the expectation be one that society is prepared to recognize as 'reasonable.'"¹¹⁶ Harlan's pronouncement has been regarded as the definitive statement of the Court's "expectation of privacy" test.¹¹⁷

Applying the principles of *Katz* to containers of personal effects, the Court has more recently determined that legitimate expectations of privacy attach to the contents of packages, luggage, and other receptacles.¹¹⁸ Thus when private parties open and

recording device to the outside of a public telephone booth from which the defendant placed calls. By this apparatus the F.B.I. obtained evidence of illicit gambling activities, which they used to convict the defendant. The Court overturned the conviction.

114. *Id.* at 353. The "trespass" doctrine formerly controlled the scope of fourth amendment protection. The trespass doctrine predicated fourth amendment protection on the physical penetration of a constitutionally protected area. A constitutionally protected area was a conclusory label used by the Court to designate areas to which fourth amendment protection was extended. In the absence of any physical penetration, there was no fourth amendment search and seizure violation. *Id.* It was thus possible to eavesdrop, electronically or otherwise, in traditionally protected area and avoid constitutional infirmity so long as no trespass was committed. Also known as the "constitutionally protected area" doctrine, the trespass doctrine was primarily developed in *Goldman v. United States*, 316 U.S. 129 (1942) and *Olmstead v. United States*, 227 U.S. 438 (1928).

115. *Katz v. United States*, 389 U.S. 237, 353 (1967).

116. *Id.* at 261.

117. For excellent discussions of the *Katz* expectation of privacy test, see Comment, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154 (1977) (Individuals should be entitled to a set of reasonable privacy expectations from government intrusions. These privacy expectations should be based on certain core property values, such as the home.); see also Comment, *The Relationship Between Trespass and Fourth Amendment Protection After Katz v. United States*, 38 OHIO ST. L.J. 709 (1977).

118. In *United States v. Chadwick*, 433 U.S. 1 (1977), the Court found that a legitimate expectation of privacy attached to the contents of a footlocker. By placing personal effects

search packages that are lost, mishandled or otherwise incorrectly delivered, the interests of absent package owners should still be subject to fourth amendment protections. Many courts, however, reason that in such situations the private search doctrine obviates the need to comport with the fourth amendment.¹¹⁹

C. *Private Search Doctrine*

Originating in the landmark case of *Burdeau v. McDowell*,¹²⁰ the private search doctrine holds that searches initiated by private citizens are beyond the scope of fourth amendment protection.¹²¹

inside a footlocker, the Court reasoned, defendants "manifested an expectation that the contents would remain free from public examination." *Id.* at 11. Therefore, a government search of the footlocker was unreasonable in the absence of a warrant or warrantless justification. *Id.* The Court fixed the point of the warrant clause's applicability at the time when police established exclusive control over the property. *Id.* at 15.

Continuing the trend begun in *Chadwick*, the Court held in *Arkansas v. Sanders*, 442 U.S. 753 (1979), that fourth amendment protection extended to the contents of personal luggage. By finding an expectation of privacy in the contents of a small, unlocked suitcase, the Court arguably broadened the *Chadwick* scope of fourth amendment protection to various kinds of containers. Because of *Sanders*, a container need not be locked or uncommonly large to receive fourth amendment protection from unreasonable, warrantless searches of its contents. *Id.* at 762 n.9.

The rationale of *Chadwick* and *Sanders* indicates that possessors of packages possess legitimate expectations of privacy in the contents of their packages. By placing contents in packages, which are frequently securely wrapped, the owners have manifested an expectation that the contents of their packages will remain private and free from unwarranted intrusion. Although an examination of package contents by private parties would be valid, a subsequent search by police authorities should still be subject to fourth amendment protection. As in *Chadwick* and *Sanders*, any warrantless police search of packages should thus be unconstitutional.

119. See, e.g., *United States v. Bulgier*, 618 F.2d 472 (7th Cir. 1980).

120. 256 U.S. 465 (1921). In *Burdeau*, the Supreme Court was first faced with the problem of reconciling a private search with the fourth amendment. Confronted with the issue of whether items stolen by private detectives could be used against their owner in a criminal proceeding, the Court fashioned the private search doctrine:

The Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority

The papers having come into the possession of the government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individual, unconnected with the government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character.

Id. at 475-76. The private search doctrine is also commonly referred to as the *Burdeau* rule.

121. For an excellent discussion of the private search doctrine, see Note, *Private*

Government authorities may lawfully take possession of the privately seized property, as they did not participate in the initial search or seizure.¹²² Having lawfully acquired the property, they are free to use it as evidence in a criminal prosecution.¹²³

In *Walter* the Supreme Court indicated a desire to limit the scope of the private search doctrine,¹²⁴ but did not delineate the parameters beyond which police agents may not legally proceed.¹²⁵

Searches and Seizures: United States v. Kelly and United States v. Sherwin, 90 HARV. L. REV. 463 (1976), wherein the commentator argues that the applicability of the *Burdeau* rule should be limited, ceasing to have effect when the government takes possession of privately seized material. See also Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039 (1971); Note, *The Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314, 1323-24, 1336-59 (1969); Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608 (1967).

122. See, e.g., *United States v. McDaniel*, 574 F.2d 1224, 1225 (5th Cir. 1978), cert. denied, 441 U.S. 952 (1979): "the initial search by the airline employee, a private person, was clearly outside the protection of the Fourth Amendment. Since the airline then voluntarily notified the authorities and turned the briefcase over to them the Government's action did not constitute a separate search or seizure." See also *United States v. DeBarry*, 487 F.2d 448, 450-51 (2nd Cir. 1973); *United States v. Blanton*, 479 F.2d 327 (5th Cir. 1973); *Clayton v. United States*, 413 F.2d 297 (9th Cir. 1969).

123. Three separate events occur in the typical private search: (1) a private search, (2) a private seizure, and (3) government acquisition of the privately seized material. Although it is undisputed that the first two events do not implicate the fourth amendment, the transfer from private to official custody tests the limits of the fourth amendment proscription of unwarranted government intrusion into individual privacy. Indeed, many courts view government acquisitions of privately seized material as beyond fourth amendment strictures. See, e.g., *United States v. Bulgier*, 618 F.2d 472 (7th Cir. 1980); *United States v. McDaniel*, 574 F.2d 1224 (5th Cir. 1978). Individuals who fortuitously lose property through private searches may thus have no protection against discovery of their property contents. Therefore, notwithstanding official intrusions into their private property, such individuals are constitutionally powerless to challenge the seizure of their property.

124. The plurality decision in *Walter v. United States*, 447 U.S. 649 (1980), is unlikely to curb the propensity of some courts to validate private to official transfers of property. By failing to reach a consensus in defining the limits of the private search doctrine, the plurality's pronouncements in *Walter* that lawful government possession of boxes of film did not sanction a warrantless search of their contents, *Id.* at 654-55, will not protect the rights of individual possessors of privately seized property. Indeed, the position of the four member dissenting group in *Walter* serves to encourage the continued tolerance of property transfers from the private to official hands:

The Court at least preserves the integrity of the rule specifically recognized long ago in *Burdeau v. McDowell*, 256 U.S. 465 (1921). That rule is to the effect that the Fourth Amendment proscribes only governmental action, and does not apply to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official.

Id. at 662.

125. The Court has had many opportunities, previous to *Walter v. United States*, 447

Until precise boundaries are established, the federal circuits will continue to differ in their perception of the type of police conduct which triggers application of fourth amendment protections.¹²⁶ In many cases police will continue to receive and hold private property, including expressive materials, free from judicial scrutiny.¹²⁷

D. The Abridgement Of Freedom Of Expression Through The Private Search Doctrine

When government authorities accept presumptively protected expressive material from private parties, police officials may easily effect a prior restraint of expression. Because the transfer of control from private to official hands occurs surreptitiously, police officials may dispense with satisfying the judicial scrutiny and other warrant requirements necessary in the more typical police search

U.S. 649 (1980), in which to resolve the problems represented by the private search doctrine. Some of these opportunities have included *United States v. McDaniel*, 574 F.2d 1224 (5th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979) (airline employee opened defendant's unmarked briefcase and discovered firearm, and then "voluntarily" turned briefcase over to authorities); *United States v. Issod*, 508 F.2d 990 (7th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975) (suspicious freight agent in California, opened trunk and discovered marijuana and then contacted government agents, who subsequently searched the trunks while arresting defendants in Wisconsin); *United States v. Pryba*, 502 F.2d 391 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975) (air carrier examined boxes and found arguably obscene films in San Francisco, and then relayed information to government authorities who seized films without an adversary hearing upon their arrival in Washington, D.C.).

126. The contrast between the Eighth and Ninth Circuits in their treatment of the private search doctrine best highlights the differing approaches of the circuits. In *United States v. Kelly*, 529 F.2d 1365 (8th Cir. 1976), the Eighth Circuit viewed a government acquisition of defendant's books from a common carrier as a seizure subject to the fourth amendment warrant requirement. Because the government did not obtain a warrant prior to seizing the books, the court found a seizure within the meaning of the fourth amendment.

By contrast, the Ninth Circuit, in *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (en banc) determined that a government acquisition of defendant's expressive materials from a shipper was not a seizure within the meaning of the fourth amendment, since the property was "voluntarily relinquished to the government by private citizens." *Id.* at 8. All subsequent police conduct was therefore viewed as being outside the scope of fourth amendment protection and thus valid. For further examination of these two cases and their difference in approach to seizures of first amendment material see HARVARD Note, *supra* note 121.

127. For an example of the type of conduct police have engaged in due to the absence of any bright-line prohibitive rule limiting the private search doctrine, see *United States v. Kelly*, 529 F.2d 1365 (8th Cir. 1976) (over a four month period, F.B.I. agents took copies of allegedly obscene books without notifying the owner or obtaining a warrant); see also *supra* note 126.

or seizure.¹²⁸ By holding presumptively protected materials without notifying the dispossessed owners or judicial officers, government authorities commit a second prior restraint.¹²⁹ Similarly, police officials impose prior restraints when they hold expressive material before judicial proceedings and make the owner initiate action to regain possession.¹³⁰

By allowing police authorities to seize expressive material on the assumption it will be declared illicit, the private search doctrine poses a grave threat to first amendment rights. Long intervals often occur between government acquisitions of expressive material and the ultimate determination of its protected content.¹³¹ In the *Walter* case, for example, government authorities held expressive material for some sixteen months before the ultimate hearing occurred.¹³² Any such lengthy restraint of expression significantly abridges first amendment rights by restricting public access to presumptively protected material.

Moreover, private searches often result in restraining large volumes of expressive material.¹³³ In *Walter*, for example, twenty-five different films and 871 copies of those films were detained.¹³⁴ Despite the Supreme Court's safeguards governing mass quantity seizures,¹³⁵ courts nonetheless sanction government receipts of large volumes of expressive material when procured through a private search.¹³⁶

Most importantly, however, the private search doctrine allows police authorities to make the initial decision of whether to accept

128. See *supra* notes 108-09 and accompanying text for discussion of the warrant procedure.

129. See *supra* notes 42-44 and accompanying text. The failure to notify opposing parties and to give them opportunities to participate in decisions affecting their ideas has been noted by the Supreme Court to be a basic constitutional infirmity. See *Carroll v. Princess Anne*, 393 U.S. 174, 180 (1968).

130. See *supra* notes 42-44 and accompanying text.

131. See, e.g., *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (en banc) (16 month delay from seizure to adversary hearing); *Gold v. United States*, 378 F.2d 588 (9th Cir. 1967) (at least one year delay from seizure to trial).

132. This fact appears in the lower court decision. *United States v. Sanders*, 592 F.2d 788, 797 (5th Cir. 1979) (Wisdom, J., dissenting).

133. See, e.g., *United States v. Bush*, 582 F.2d 1016 (5th Cir. 1978) (six cartons of film); *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (en banc) (17 cartons of expressive material); *United States v. Entringer*, 532 F.2d 634 (8th Cir. 1976) (114 reels of film).

134. *Walter v. United States*, 447 U.S. 649, 656 n.6 (1980).

135. See *supra* notes 88-91 and accompanying text.

136. See *supra* note 133..

or hold expressive material. Because police officials are incapable of evaluating the protected nature of expression,¹³⁷ police acquisition of privately seized expressive material tends to allow especially indiscriminate controls. Of the twenty-five titles seized by police in *Walter*, only five were ultimately declared unprotected and used in the criminal prosecution.¹³⁸ Similarly, indiscriminate and overly broad restraints of expression are likely to occur whenever the private search doctrine is applied.

Yet despite significant criticism,¹³⁹ the private search doctrine is very much alive.¹⁴⁰ The continued tolerance of such unbridled police conduct can only have an acutely chilling effect on the individual exercise of and the public right to freedom of expression.¹⁴¹

IV. A SUGGESTED MODEL

Because of the significance and fragility of first amendment rights, freedom of expression *must* be vigilantly guarded.¹⁴² To do so, effective procedural safeguards must be promulgated and vigorously enforced. Yet when police authorities obtain presumptively protected expressive material through private searches, there are currently no mandated procedural safeguards with which authorities must comply. It is apparent that where police officials discover a first amendment interest in seized property, the safeguards developed by the Supreme Court in *Freedman v. Maryland*¹⁴³ should apply to protect first amendment rights from the dangers now posed by the private search doctrine.

When private citizens transfer control over expressive materi-

137. See *supra* notes 59-61 and accompanying text.

138. *Walter v. United States*, 447 U.S. 649, 652 (1980).

139. See HARVARD Note, *supra* note 121. The commentators argue that the private search doctrine incorrectly casts police in the role of passive receivers of evidence, and tends to absolve them of any fourth amendment responsibility. Furthermore, little consideration, if any, is accorded "the interests or rights of absent third parties against whom the evidence is used." *Id.* at 467; see also Comment, *supra* note 88 (*Burdeau* rule should not have extensive application in the first amendment arena).

140. The position of the four member dissent in *Walter*, which favors the continued implementation of the private search doctrine, should especially be noted. See *supra* note 124 and accompanying text.

141. See *supra* notes 53-66 and accompanying text.

142. "[C]easeless vigilance is the watchword to prevent . . . erosion (of first amendment rights) by Congress or by the States." *Stanley v. Georgia*, 394 U.S. 557, 563 (1969) citing *Roth v. United States*, 354 U.S. 476, 488 (1957).

143. See *supra* notes 92-97 and accompanying text.

als to police authorities, the government can reasonably be expected to be aware of a first amendment interest in the seized property.¹⁴⁴ Upon discovery that such an interest is at stake, the government must comply with the first amendment procedural safeguards developed by the Supreme Court in the context of censorship systems and warrant-authorized police action.¹⁴⁵ As yet, the Supreme Court has shown no willingness to mandate application of these safeguards to government controls of expressive material obtained through private searches. However, these safeguards are essential to sustain first amendment interests and to protect expressive material from prior restraint.¹⁴⁶

Fortunately, useful models for applying procedural protections are available. The Supreme Court determined in *Blount v. Rizzi*¹⁴⁷ that the set of protections developed in *Freedman v. Maryland* must be applied when postal workers inadvertently discovered potentially obscene or otherwise seemingly illicit expressive materials. Likewise, the Court determined in *United States v. Thirty-seven Photographs*¹⁴⁸ that the *Freedman* protections must be applied when customs officials fortuitously discovered similar expressive materials.

In both *Blount* and *Thirty-seven Photographs* the Court reasoned that the *Freedman* protections were necessary to safeguard first amendment interests from the dangers of an administrative censorship system.¹⁴⁹ The Court thus reaffirmed its conviction, expressed in *Freedman*, that a system of prior restraints violates the first amendment if it lacks certain safeguards.¹⁵⁰ Indeed, "the First Amendment requires that procedures be incorporated that 'ensure

144. In most private searches, the private party informs government officials regarding the nature of the property discovered. The government should thus be aware that it will receive expressive materials. In *Walter v. United States*, 447 U.S. 649, 652 (1980), for example, the private parties called the F.B.I., informing the government of the films. See also *United States v. Bush*, 582 F.2d 1016, 1018 (5th Cir. 1978); *United States v. Sherwin*, 539 F.2d 1, 4 (9th Cir. 1976) (en banc); *United States v. Kelly*, 529 F.2d 1365, 1368 (8th Cir. 1976).

145. See *supra* notes 67-99 and accompanying text.

146. Prior restraints increase the likelihood of censorship. See *supra* notes 53-66, 128-141 and accompanying text.

147. 400 U.S. 410 (1971).

148. 402 U.S. 363 (1971).

149. *Blount v. Rizzi*, 400 U.S. 410, 416-22 (1971); *United States v. Thirty-seven Photographs*, 402 U.S. 363, 367-75 (1971).

150. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.'¹⁵¹

In *Freedman* the Court held "that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."¹⁵² The Court further held that to ensure a prompt judicial determination, so that administrative delays would not in themselves become a form of censorship, several additional steps were necessary. Specifically, (1) there must be assurance that the censor will either seek judicial review of or license the expression within a specified, brief period, (2) "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution," and (3) "the procedure must . . . assure a prompt final judicial decision" to minimize the impact of possible erroneous action.¹⁵³

The logic of *Freedman* applies with equal, if not greater, force to police receipts of expressive material obtained through private searches. Even though most private searches do not involve formal statutes authorizing censorship as in the postal and customs settings, the conduct of government officials in seizing and maintaining control over expressive material obtained through private searches constitutes another form of equally pernicious and pervasive censorship.

As with postal and customs searches, police discovery of expressive materials obtained in private searches is fortuitous and poses grave threats to freedom of expression. Such discovery, like customs searches, serves to restrain expressive material for sustained periods of time.¹⁵⁴ Police authorities, like postal and customs officials, are incapable of correctly evaluating the nature of expressive material; they are equally likely to impose indiscrimi-

151. *Blount v. Rizzi*, 400 U.S. at 416 (citation omitted).

152. 380 U.S. 51, 58 (1965).

153. *Id.* at 58-59.

154. Regarding customs searches, the Court noted in *United States v. Thirty-seven Photographs*, 402 U.S. 363, 371-72 (1971), that "[o]ur researches have disclosed cases sanctioning delays of as long as 40 days and even six months between seizure of obscene goods and commencement of judicial proceedings." *Id.* (citations omitted).

nate and overly broad restraints. Wrongly delivered or handled packages merit the same constitutional protection accorded material seized by postal and customs officials.

Application of the *Freedman* protections to privately searched and seized expressive materials would safeguard first amendment rights more effectively than resort to the "single copy" and "mass quantity" rules developed by the Court in *Heller v. New York* and *Marcus v. Search Warrant*, respectively.¹⁵⁵ In the typical private search, police authorities acquire possession of property directly from private parties and before any involvement of the judiciary. Because police already have control of the expressive material, there appears to be little logic in applying the *Marcus* "mass quantity" rule that requires a judicial determination prior to any seizure of expressive matter. Likewise, the major provision of the *Heller* "single copy" rule, the prompt adversary hearing, is included among the more extensive *Freedman* protections. The *Heller* and *Marcus* protections are designed primarily to control police discretion in seizing expressive material. In *Freedman*, the protections serve to limit the acts of government officials who already exercise control over the expressive material—precisely the situation resulting from the typical private search.

Application of the *Freedman* protections to expressive material acquired by government officials through private searches would require police authorities to notify the judiciary when potentially obscene or illicit material is obtained or to release it.¹⁵⁶ Upon notifying judicial officials, police would have to transfer the material to the more neutral judiciary. After such transfer, any restraint placed on the material before a final judicial determination would be limited to preserving the status quo¹⁵⁷ and the discretion of government authorities would be significantly curtailed. Lastly, there must be a *prompt*, final judicial determination. In *Thirty-seven Photographs*, the Supreme Court construed the statute to require intervals of no more than fourteen days from seizure of the property to initiation of judicial proceeding and no more than 60 days from the filing of the action to final determination by the court.¹⁵⁸ Similarly brief, or briefer, intervals should apply in the

155. See *supra* notes 79-91 and accompanying text.

156. *Freedman v. Maryland*, 380 U.S. 51, 59 (1965).

157. *Id.* at 58-59.

158. 402 U.S. 363, 373-74 (1971).

case of private searches.¹⁵⁹

Application of the *Freedman* protections to private searches would satisfy several of the needs of a free society. Prompt adversarial hearings and prompt judicial determination of first amendment content obviate the dangers of censorship imposed by unrestricted police discretion and thus insure the integrity of the first amendment.

Conclusion

This article has described some of the dangers to freedom of expression posed by the Supreme Court's current treatment of police receipt of privately seized expressive material. Police removal of presumptively protected material from circulation without notifying the dispossessed owners or the judiciary constitutes a prior restraint. Because police authorities may effect this restraint without resort to minimal procedural protections, severe and long-lasting forms of censorship may be imposed. Current interpretations of the private search doctrine which permit these practices serve to chill individual and societal interests in freedom of expression.

The article has argued that the aforementioned dangers have resulted from the Court's misguided reliance on the fourth amendment and from failure to promulgate a comprehensive set of standards to govern fortuitous government acquisitions of expressive material. To safeguard first amendment rights, this article has suggested a model to limit police control over expressive matter. The suggested model provides a satisfactory means of resolving the conflict among individual, police and first amendment interests.

159. The 48 day period from seizure to judicial determination in *Heller v. New York*, 413 U.S. 483, 490 (1973) is certainly a more reasonable time frame than the similar 60 day period in *United States v. Thirty-seven Photographs* 402 U.S. 367, 367-75 (1971). The briefer the time span between seizure and final judicial determination provides, of course, for a lesser interim abridgement of expression. Certainly the briefest possible restraint is the optimal result.

With regard to the interval from seizure to initiation of judicial proceedings on the protectedness question, the 14 day period in *Thirty-Seven Photographs* also seems somewhat excessive. A one week limit would be far more desirable.

