Cornell Law Review

Volume 67
Issue 2 *January 1982*

Article 1

Toward a Theory of First Amendment Process: Injunctions of Speech Subsequent Punishment and the Costs of the Prior Restraint Doctrine

William T. Mayton

TOWARD A THEORY OF FIRST AMENDMENT PROCESS: INJUNCTIONS OF SPEECH, SUBSEQUENT PUNISHMENT, AND THE COSTS OF THE PRIOR RESTRAINT DOCTRINE

William T. Mayton†

INTRODUCTION: THE HANDS OF ESAU

The prior restraint doctrine precludes, except in certain limited circumstances, state-imposed restraints with respect to the publication of speech.[1] As presently understood, this doctrine includes, and prevents, injunctions of speech.[2] In this form, the prior restraint doctrine is thought to be crucial to securing liberty of expression.[3] In apparent conformity with this understanding, a committee of the United States Congress observed in 1799 that the first amendment secures "a permission to publish, without previous restraint, whatever [a person] may think proper."[4] But though the "voice is Jacob's voice, . . . the hands are the hands of Esau":[5] This seemingly libertarian sentiment was in fact offered in support of that most blatantly suppressive assault on free speech, the infamous Alien and Sedition Acts.[6]

---

† Associate Professor of Law, Emory University School of Law. B.S. 1963, University of South Carolina; J.D. 1972, Columbia University.

1 The prohibition against prior restraints of speech is accomplished by imposing a "heavy presumption" against their validity. New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). The few circumstances under which courts consider such restraints permissible are in time of war where, for example, "publication of the sailing dates of transports," "the number and location of troops," or information that would "set in motion a nuclear holocaust" is involved. New York Times Co. v. United States, 403 U.S. at 726. *See also* Near v. Minnesota, 283 U.S. 697, 716 (1931).

2 New York Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931).

3 *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 716 (1931) ("[L]iberty of the press . . . has meant, principally, although not exclusively, immunity from previous restraints or censorship.").

4 3 ANNALS OF CONG. 2988 (1799). These remarks were part of the report of a select committee of the House of Representatives that was appointed to study the constitutionality of the Alien and Sedition Acts. *Id.* at 2986.

5 *Genesis* 27:22.

6 1 Stat. 596 (1798). The Alien and Sedition Acts made criminal

> publishing any false, seandalous and malicious writing or writings againist the government of the United States, or either house of Congress of the United States or the President of the United States with intent to defame the said

The sleight of hand was simple. Because the first amendment embodies the doctrine of prior restraint, after the fact punishment of speech did not violate it. Accordingly, the Alien and Sedition Acts' provision for fines and imprisonment of persons who had already published "false, scandalous, and malicious writings against the Government" of the United States was claimed to be consistent with the first amendment.[7] The author of that amendment, however, was not at all convinced; to James Madison, the prior restraint/subsequent punishment dichotomy was nothing but a "mockery" of first amendment values.[8]

Nevertheless, this dichotomy has gained modern approval. According to the Supreme Court, the principle that a "free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand" is "deeply etched in our law."[9] Similarly, amid the plethora of opinions generated by that *cause célèbre*, the *Pentagon Papers* case,[10] individual Justices acknowledged that they would find "no difficulty in sustaining [subsequent criminal] convictions . . . on facts that would not justify the intervention of equity and the imposition of prior restraint."[11]

This preference for subsequent punishment over preventive relief is widely thought to enhance freedom of speech. Closer to the truth, however, is the intuition of those who used the prior restraint doctrine to support the Alien and Sedition Acts: A government determined to contain speech can forego preventive relief, but it must retain the power to suppress by subsequent punishment. In this light, a purpose of this Article is to show that the preference for subsequent punishment over injunctive relief diminishes the exercise of free speech by burdening it with costs that seem not yet comprehended. In this respect, I will analyze the common forms of process that are used to contain speech—administrative restraint, subsequent punishment, and preventive civil relief—in order to assess the costs incurred under each method. These costs will, I

---

government, or to bring them, or either of them, into contempt or disrepute

. . . .

Id. The sanction was imprisonment not exceeding two years and/or a fine not exceeding $2,000. The federalists used the Alien and Sedition Acts to stifle, by way of criminal prosecutions, criticism of their stewardship of the federal government. A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION 186-89 (5th ed. 1976). During the period when the Act was enforced, courts refused to hear claims regarding its coustitutionality. Today, the Act is thought to have been a gross violation of the first amendment. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 716-17 (1978).

7 3 ANNALS OF CONGRESS 2988-89 (1799).

8 According to Madison, "[i]t would seem a mockery to say that no laws should be passed preventing publicatious from being made, but that laws might be passed for punishing them in case they should be made." L. LEVY, LEGACY OF SUPPRESSION 274 (1960).

9 Southeastern Promotions, Ltd. v. Contrad, 420 U.S. 546, 559 (1975).

10 New York Times Co. v. United States, 403 U.S. 713 (1971).

11 *Id.* at 737 (White, J., concurring).

think, show that the present structure of first amendment process is upside down.

Also, I should note what the reader will later discern: I have in many respects treated the injunction as a form of declaratory relief. Indeed, there are important functional similarities between a formal declaratory judgment and an injunction. A declaratory judgment provides the basis for a coercive order;[12] an injunction is in many respects simply "a declaratory judgment plus a coercive order."[13] The injunction, therefore, often "provides the handle upon which the plaintiff can hang his request for a declaration about his rights."[14]

I

THE ENGLISH EXPERIENCE

The historical basis of the modern prior restraint doctrine is well known: It is England's troubles with a pervasive system of licensing used to contain the learning made broadly available by that dangerous advent, the printing press.[15] The prior restraint doctrine, insofar as it includes injunctions against speech and favors subsequent punishment, is based, however, on something of a bowdlerization of Blackstone's distillation of the reaction to such licensing. "[L]iberty of the press," Blackstone wrote, "consists in laying no *previous* restraints upon publications."[16] Because an injunction is a "previous" restraint, the easy *ipse dixit* has been to include it among the repressions of speech that the English experience teaches us to abhor.[17] But a closer reading of Blackstone indicates the error in this. Blackstone also warned that "[t]o subject the press to the restrictive power of a *licenser*, as was formerly done, . . . is to subject all freedom of sentiment to the prejudices of one man."[18] The key word is "licenser."[19]

---

12 28 U.S.C. §§ 2201, 2202 (1976).

13 O. FISS, INJUNCTIONS 51 (1972).

14 *Id.*

15 The struggle for the freedom of the press was primarily directed against the power of the [English] licensor . . . . And the liberty of the press became initially a right to publish "*without* a license what formerly could be published only *with* one." While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision.

Lovell v. City of Griffin, 303 U.S. 444, 451-52 (1937) (emphasis in original). *See also* Schneider v. State, 308 U.S. 147, 165 (1939); Grosjean v. American Press Co., 297 U.S. 233, 245-46 (1936); Near v. Minnesota, 283 U.S. 697, 713-16 (1931).

16 4 BLACKSTONE'S COMMENTARIES 151 (Tucker ed. 1803) (emphasis in original) [hereinafter cited as BLACKSTONE].

17 *See* note 2 and accompanying text *supra*.

18 4 BLACKSTONE, *supra* note 16, at 152 (emphasis added).

19 Although the preferred modern legal spelling is "licensor," this Article will use the term "licenser" for consistency with the quoted sources.

The licenser was at the center of an administrative system used to prevent seditious libel, protect copyright interests, and preserve monopolies.[20] During the post-restoration years, England maintained this system pursuant to legislative directive under Parliament's "Regulation of Printing Acts," which prescribed what could be printed, who could print, and who could sell.[21] The authority to implement the Acts was dispersed among various administrative officials such as the "surveyor of the press" and subordinate "messengers of the press."[22]

These Acts, unfortunately, did not adequately circumscribe the authority of these bureaucratic licensers. They enjoyed broad and vague powers to suppress the "many false . . . scandalous, seditious and libellous works . . . published 'to the great defamation of Religion and government.'"[23] These licensers in turn exercised their unfettered discretion with an insensitivity to political and literary values and to the monetary costs to publishers affected by censorship.[24] As a result, members of the printing trade petitioned Parliament, complaining that the licensing scheme "subjects all Learning and true Information to the arbitrary Will and Pleasure of a mercenary, and perhaps ignorant, Licenser; destroys the Properties of Authors in their Copies; and sets up many Monopolies."[25]

Eventually the licensing system fell of its own weight; in 1694, the House of Commons refused to renew the Regulation of Printing Acts.[26] Over the years, this failure of the Acts has come to be viewed as the libertarian triumph that is the basis of the prior restraint doctrine.[27] The "previous restraint" that Blackstone declaimed was therefore the work of an administrative licenser. Blackstone could, however, tolerate suppression that was achieved through a more appropriate process. He accepted suppression of speech that "on a fair and impartial *trial* [shall]

---

20 F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND (1476-1776), at 239-41 (1965). *See also* L. LEVY, *supra* note 8; L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 114-42 (1968).

21 F. SIEBERT, *supra* note 20, at 249-60.

22 *See* L. LEVY, *supra* note 8, at 104; F. SIEBERT, *supra* note 20, at 261.

23 J. MILTON, AREOPAGITICA & OTHER PROSE WORKS 1 (1927) [hereinafter cited as *Areopagitica*]. When it finally ended the Regulation of Printing Acts, the House of Commons cited the vagueness of the licenser's authority: "[b]ecause that Act prohibits printing and importing not only heretical, seditious, and schismatical Books, but all offensive Books; and doth not determine what shall be judged offensive Books . . . ." 11 JOURNALS OF THE HOUSE OF COMMONS 306 (1695). John Locke was also critical of the licensing laws because of their vague and general terms of prohibition. F. SIEBERT, *supra* note 20, at 261-62.

24 In terms of political and literary values, the great critic of licensing was Milton in *Areopagitica*. With respect to monetary costs to publishers, the principal critic was Locke, whose criticism was most instrumental in the repeal of the laws. F. SIEBERT, *supra* note 20, at 261-62.

25 *Id.* at 260.

26 L. LEVY, *supra* note 8, at 104.

27 *See, e.g.*, cases cited at note 15 *supra*.

be adjudged of a pernicious tendency."[28]

Injunctions against speech, then, are not the kind of restraint that the "English experience" teaches us to abhor. They are not the product of a system of administrative licensing as existed in England; instead, they are orders of a court. They are the result of "a fair and impartial trial," a process calculated to be sensitive to first amendment values. Unfortunately, a divided Court in *Near v. Minnesota*[29] ignored the differences between injunctions and licensing, and brought injunctions within the prior restraint doctrine.[30] That, at least, is how that decision is commonly read. But as I shall later discuss, that decision may more properly be read as a proscription only of overbroad injunctions rather than injunctions in general.[31]

The more fundamental lesson of the English experience is that broad legislative enactments providing an unconfined authority to harass, to discourage, and to tax the exercise of free speech are inimical to the freedom of expression.[32] This functional basis of the prior restraint doctrine is, unfortunately, usually overlooked. But as we keep this basis in mind, we can better understand the courts as they instruct us that subsequent punishment is the paradigmatic prior restraint.

II
A FUNCTIONAL ANALYSIS OF THE MODES OF SUPPRESSION OF SPEECH

England's troubles with a pervasive and unconfined bureaucratic authority to suppress speech formed the basis of the moderu prior restraint doctrine. This basis, as it relates to moderu bureaucratic licensing, subsequent punishment, and injunctions of speech, is developed more fully in this section.

A. *Bureaucratic Restraints and Injunctions: A Functional Comparison*

Several decades ago, the Supreme Court lumped bureaucratic restraints and injunctions together, characterizing them as equally base: "A statute authorizing previous restraint . . . by judicial decision after

---

28 4 BLACKSTONE, *supra* note 16, at 152 (emphasis added).

29 283 U.S. 697 (1931).

30 Four Justices dissented, however, because, *inter alia*, of the distinction between administrative licensing and injunctions of speech. *Id.* at 733-34 (Butler, J., dissenting).

31 *See* notes 207-11 and accompanying text *infra*.

32 *See* Southeastern Promotion, Ltd. v. Conrad, 420 U.S. 546 (1975). In overturning a form of municipal licensing for the use of a public auditorium, the Court stated:

> Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment frecdoms is too great where officials have unbridled diserction over a forum's use.

Id. at 553.

trial is as obnoxious to the Constitution as one providing for like restraint by administrative action."[33] The modern Supreme Court, however, surely does not place bureaucratic and judicial restraint on the same footing, and for good reason.

A commonly understood distinction is that a bureaucratic censor cannot ordinarily be expected to serve the range of societal interests as does the court which issues an injunction. The administrator's overriding concern is usually the specific governmental program that he serves, *e.g.*, preventing the publication of materials injurious to national interests. The natural tendency is to be partial to such programs at the expense of first amendment values.[34]

The harm of an administrator's insensitivity to first amendment values is multiplied by the characteristically vague standard that he enforces.[35] These vague standards permit and foster an indulgent censorship that is sometimes absurd: A Memphis theatre censor banned films showing train robberies, apparently because he was so robbed in his youth. More often, however, such censorship is quite pernicious; the same Memphis censor also banned Charlie Chaplin and Ingrid Bergman movies because of a "personal distaste" for their morals.[36] Another censor, a police sergeant, explained that his personal standard prohibited "propaganda," that is, "[n]othing pink or red."[37] The injury to speech caused by such latitude has been recognized, and condemned, by the Supreme Court: "[I]ndividual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law."[38]

This propensity for over-censorship is not so likely to be shared by the courts. The judiciary is accustomed to dealing with a range of societal interests; its basic charge, moreover, is to vindicate constitutional rights. Courts are therefore likely to be first of all sensitive to free speech

---

33 Cantwell v. Connecticut, 310 U.S. 296, 306 (1940).

34 "The censor is beholden to those who sponsored the creation of his office, to those who are most radically preoccupied with the suppression of communication. The censor's function is to restrict and to restrain . . . ." Times Film Corp. v. City of Chicago, 365 U.S. 43, 67-68 (1961) (Warren, C.J., dissenting). The classic, and harsh, judgment of the qualities of administrative censors is Milton's: "[W]e may easily forsee what kind of licensers we are to expect hercafter, either ignorant, imperious, and remisse, or basely precuniary." *Areopagitica*, *supra* note 23, at 21. *See* Lockhart & McClure, *Literature, The Law of Obscenity, and The Constitution*, 38 MINN. L. REV. 295 (1954).

35 For a discussion of the inherent vagueness of standards proscribing speech, see notes 63-87 and accompanying text *infra*.

36 Note, *Official and Unofficial Control of the Content and Distribution of Motion Pictures and Magazines*, 71 HARV. L. REV. 326, 338 (1957). *See also* Times Film Corp. v. City of Chicago, 365 U.S. 43, 69-84 (1961) (Warren, C.J., and Douglas, J., dissenting separately).

37 Times Film Corp. v. City of Chicago, 365 U.S. 43, 72 (1961) (Warren, C.J., dissenting).

38 Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 685 (1968) (quoting Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 701 (1959) (Clark, J., concurring in result)).

values, and only secondarily protective of specific government programs. This distinction between bureaucratic and judicial processes is now commonly observed by the courts. In *Freedman v. Maryland*,[39] the Supreme Court, overturning an administrative censorship of movies, concluded that "[b]ecause the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression."[40]

A second, perhaps more important, difference between judicial injunctions and bureaucratic restraints is that bureaucratic licensing lends itself to a more pervasive censorship. Laws providing for administrative censorship are typically broad and vague, according the licenser wide discretion. Under the English licensing laws, virtually all printed materials required the imprimatur of the censor's stamp—with the censor exercising broad description. Consequently, the calculus of virtually all editorial decisions necessarily included an estimate of the censor's reaction.[41] The deleterious impact on speech of such calculus has been recoguised in more modern times. For example, when movies first had to be cleared and classified by a "Motion Picture Classification Board" with broad authority, the Supreme Court observed that a movie producer's production decisions necessarily included a judgment as to "whether what he proposes to film, and how he proposes to film it, is within the terms of [the Board's] classification."[42] This pervasive intrusion into publication decisions was, as the Court recoguized, generally debilitating; a "vast wasteland" of mediocrity was in the offing.[43] In comparison, injunctions against speech function more discretely; the government intrudes only in those situations that a plaintiff has identified as worth the expense of a court action.

A third distinction that supports a dissociation of injunctions from burcaucratic censorship relates to the relative ease with which the bureaucratic censor plies his trade. Quietly, easily, unchecked by the examination of adversarial process, he goes about his task.[44] Injunctions

---

39 380 U.S. 51 (1965).

40 *Id.* at 57-58. *See also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559-61 (1975); Blount v. Rizzi, 400 U.S. 410, 419 (1971).

41 *See* notes 23 and accompanying text *supra*.

42 Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 684 (1968).

43 *Id.*

44 The censor performs free from all of the procedural safeguards afforded litigants in a court of law. . . . The likelihood of a fair and impartial trial disappears when the censor is both prosecutor and judge. There is a complete absence of rules of evidence; the fact is that there is usually no evidence at all as the system at bar vividly illustrates. How different from a judicial proceeding where a full ease is presented by the litigants.

Tünes Film Corp. v. City of Chicago, 365 U.S. 43, 68 (1961) (Warren, C.J., dissenting). *Cf.* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 561-62 (1975) (discussing absence of procedural safeguards in municipal board proceedings).

against speech, on the other hand, are checked by a process: The reasons for imposing a restraint are tested by open, adversarial proceedings. Along with more thoroughly airing the competing interests, this adversarial process, because of the associated transaction costs that the government bears, will itself diminish the number of suppressions attempted by the state.[45]

The preceding observations about administrative licensing show that it is bad in that it gives a person not likely to be sensitive to first amendment values a broad and unexamined authority to suppress speech. A cure that we might recognize is to submit the decisions of the administrative censor to immediate judicial review. Such review would subject the censorship to open, adversarial processes and provide a tribunal that is more likely to be sensitive to first amendment values.

The Supreme Court has ordered this cure. In *Freedman v. Maryland*,[46] the Court was confronted with a classic bureaucratic licensing scheme. State law required that all movies be submitted to, and approved by, a "Board of Censors" prior to exhibition.[47] This scheme, the Court noted, was subject to the major deficiencies associated with bureaucratic licensing: an insensitivity to first amendment values[48] and an absence of adversarial processes with which to test the Board's decisions. At the same time, the licensing system "effectively" barred exhibition of films "without any judicial participation."[49] This latter fact rendered the system unconstitutional.[50]

According to the Court, "[t]he teaching of our cases is 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."[51] Consequently, the licensing scheme was held unconstitutional because it did not ensure prompt judicial review of a board decision to censor.[52]

---

45 *See* notes 169-70 and accompanying text *infra*.

46 380 U.S. 51 (1965).

47 *Id.* at 55.

48 *Id.* at 57.

49 *Id.* at 54.

50 *Id.* at 57-60.

51 *Id.* at 58.

52 *Id.* at 60. *See also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-62 (1975); Blount v. Rizzi, 400 U.S. 410, 416-22 (1971). However, in Brown v. Glines, 444 U.S. 348 (1980), a majority of the Court approved a form of bureaucratic censorship of political speech. Air Force regulations required permission of a commanding officer before a serviceman could distribute "any printed or written material . . . within any Air Force installation." *Id.* at 349-50. The standard the officers applied was whether the publication might result in "a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission." *Id.* at 350. The Court approved this discretionary censorship because of the special needs of the military. Justice Brennan dissented, stating that "[t]ime and again, the Court has underscored the

On the other hand, in *United States v. Thirty-Seven Photographs*,[53] the Supreme Court approved a system of bureaucratic licensing, involving seizures of obscene material by customs officials,[54] where Congress had required prompt judicial review of such seizures.[55]

What this must mean is that when bureaucratic censorship is attended by prompt judicial review, it is no longer part of the prior restraint doctrine—the idea being that judicial review eliminates the evils that give rise to a presumption against such restraints. Why, then, are injunctions still subject to the doctrine of prior restraints? They are, after all, products of the judicial process that removes bureaucratic censorship from the constraints of that doctrine.

B. *Subsequent Punishment*

The experience with administrative licensing teaches us that censorship unchecked by judicial processes, censorship that is instead left to the loose discretion of those unlikely to be sensitive to first amendment values, is the core concern of the prior restraint doctrine. We should, therefore, expect modes of censorship that share these characteristics to be subject to the doctrine. Accordingly, in *Thornhill v. Alabama*,[56] the Supreme Court, acting on its "appreciation of the character of the evil inherent in a licensing system," found that a system of subsequent punishment shared these evils and therefore was unconstitutional.[57] This decision would be unsettling if subsequent punishment were, as is usually thought, the remedial mode most consistent with first amendment values. But it is not.

Long ago, John Milton recognized that the best means of controlling a seditious press was for the state to inculcate a broad scale self-censorship. Such censorship would be induced by subsequent punishment: "[I]f they be found mischievous and libellous," Milton wrote, "the fire and the executioner will be the timeliest and the most effectual remedy that man's prevention can use."[58]

Subsequent punishment, Milton told us, is a means of "prevention" of speech, something akin to a previous restraint. This prevention is "timely." Within the "pale of fear and timidity" that it creates, criticism of the state is stifled at birth: The *enfant terrible* that threatens the powers that be does not thrive.[59] Subsequent punishment is "effectual"

---

principle that restraints upon communication must be hedged about by procedures . . . that eliminate the play of discretion that epitomizes arbitrary censorship." *Id.* at 366.

53 402 U.S. 363 (1971).

54 *See* 19 U.S.C. § 1305(a) (1976).

55 402 U.S. at 373-74.

56 310 U.S. 88 (1940).

57 *Id.* at 97.

58 *Areopagitica*, *supra* note 23, at 40.

59 *Id.* *See* text accompanying notes 135-38 *infra*.

in a cost-effective sense: It creates an affordable suppression, a self-censorship that applies across the board, and all at once, to the classes subject to the laws that it implements.[60] Indeed, subsequent punishment presently may be more effectual than Milton thought. Today, the publication of speech is increasingly monopolized by cost-conscious businesses that are not noted for "putting large capital to the hazards of courage."[61]

Subsequent punishment may be a timely and cost-effective remedy for the state, but the suppression it creates is uniquely injurious to speech. The deterrence of punishment is of course widely used to contain antisocial behavior. Speech, however, has properties that transmute this ordinary means of controlling conduct into an extraordinarily insensitive tool of suppression. At the same time, these properties afford the state an exceptionally wide latitude within which it may stifle speech that displeases it. To these properties of speech we now turn, in order to establish the fundamental indisposition of speech to a system of subsequent punishment.

The key to this indisposition is process; the door is found in the text of the Constitution. Surprisingly, the constitutional provision that is most relevant to this point of view may not be the first amendment. Rather, it is the treason clause of Article III, particularly as it precludes a conviction for treason except upon the showing of an "overt Act."[62] The significance of this requires some development.

1. *An "Inherent Residual Vagueness"*[63]

At the outset, we must recognize an inherent limitation with respect to the laws that subsequent punishment implements. These laws necessarily cannot identify with any precision the speech to be suppressed. It is one thing for the state to define, and forbid, "physical" acts, *e.g.,* a battery of a public officer, destruction of government property, a monetary contribution to a political campaign, the transmission of defense information to the enemy, or destruction of a draft card. Such acts can be measured and identified by the senses.

It is quite another thing when the state seeks to define something not so readily perceived by the senses; where, for example, a person's speech creates a "clear and present" danger that an illegal physical act may occur. Here the illegality consists of creating a mental disposition to

---

60 *See* text accompanying notes 148-52 *infra*.

61 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 532 (1952) (Frankfurter, J., concurring). *See* text accompanying notes 148-50 *infra*.

62 This clause provides that "no Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act . . . ." U.S. CONST. art. III, § 3.

63 The phrase is borrowed from Justice Brennan's criticism of the obscenity laws. Paris Theatre I v. Slaton, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting) (quoting Ginzburg v. United States, 383 U.S. 463, 475 n.19 (1966)).

commit an illegal act. The offense is complete without the necessity of demonstrating an overt act toward an illegal end. Instead, the illegality consists of the speaker's instilling a certain state of mind in the listener, where the speech is "directed" to "inciting" lawless action.[64] Laws barring speech that might produce unlawful acts are not, of course, the only kind of speech laws that depend on mental state rather than overt physical acts. Obscenity laws, with the emphasis on the reader's prurient interest,[65] are another example of such laws.

The great problem is how the state can be appropriately cognizant of matters of the mind—especially when they are not marked by observable physical acts.[66] Early on, this problem was identified: Chief Justice Hale, in overturning a "conviction of constructive treason," that is, "imagining . . . the death of the King," found that the alleged offense consisted of "an internal act" which "without something to manifest it, could not possibly fall under any judicial cognizance, but [that] of God alone."[67]

More recently, Justice Frankfurter marked for us the definitional, or vagueness, problem incident to laws against a "verbal offense." In *Joseph Burstyn, Inc. v. Wilson*,[68] a New York law that permitted the banning of "sacrilegious" movies was overturned on vagueness grounds. Concurring with the majority, Justice Frankfurter pointed out that historically, the term "sacrilegious" referred to overt acts, "the physical abuse of sacred persons, places, or things."[69] But as used in the New York statute, the term applied to "blasphem[ous]" speech, a "peculiarly verbal offense."[70] Because of this evolution from conduct to speech, the statute had lost a "strictly confined meaning, pertaining to things in

64 In Brandenburg v. Ohio, 395 U.S. 444 (1969), the Supreme Court limited statutes proscribing "advocacy" of unlawful action to situations "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. To my mind, this does not cure the ultimate problem; there is still no objective referent, a physical act, to limit the range of the statute. All that this incitement formulation, with its components of "directed to inciting," "likely to incite," and "imminent lawless action," manages to achieve is "sequential open-endedness." United States v. Spock, 416 F.2d 165, 189 (1st Cir. 1969) (Coffin, J., dissenting in part). Indeed, the *Brandenburg* incitement formula reminds one of the suspect engineering practice of repairing a switch that has malfunctioned by installing more of such switches in series.

65 *See* Miller v. California, 413 U.S. 15, 24 (1973). For criticism of the vagueness inherent to definitions of obscenity, see Justice Brennan's dissent in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92, 93-96 (1973).

66 According to Justice Jackson, although "[o]ur trial processes are clumsy and unsatisfying for inferring cogitations which are incidental to aetions, . . . thcy do not even pretend to ascertain the thought that has had no outward manifestation." American Communications Ass'n v. Douds, 339 U.S. 382, 437 (1950) (Jackson, J., concurring in part and dissenting in part).

67 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 107 (1st Am. ed. 1847).

68 343 U.S. 495 (1952).

69 *Id.* at 528 (Frankfurter, J., concurring).

70 *Id.* at 525.

space not things in the mind."[71]

Laws against speech, then, are afflicted with an "inherent residual vagueness."[72] The problem this creates is twofold. First, "those bent on obedience" are not "sufficiently apprise[d]" of what these laws make illegal.[73] The ordinary, risk-averse person will "steer far wider of the unlawful zone."[74] Second, and probably more important, the vagueness inherent to laws against speech provides a broad and unbridled authority that enables the executive branch to smother, with either the threat or reality of discriminatory prosecutions, speech that displeases it.[75] For this reason, a state court sensitive to the delicate texture of speech found that a statute attaching guilt to "incitement"—the emotion that is "aroused in the mind of the listener as a result of what a speaker has said"—gave too much play to the state.[76]

Too much play to the state—history has witnessed this. During World War I, as the clear and present danger doctrine allowed prosecutions of speech claimed productive of acts contrary to the national security, we brought some 2,000 criminal prosecutions. These "immense inquisitorial activities" caught not a "single first-class German spy or revolutionary workingman," nor did they identify an actual "overt act" of espionage or sabotage.[77] Instead, we imprisoned the likes of Eugene Debs, not for his own acts, not for acts that he caused, but simply for speech trenchantly critical of our involvement in World War I.[78] In the fifties, we prosecuted and convicted communists under the Smith Act,[79] the present federal statute which on its face makes it criminal to "knowingly or willfully advocate . . . or teach the . . . propriety of overthrow-

---

71 *Id.* at 533.

72 *See* note 63 *supra*.

73 343 U.S. at 532; *see* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) ("[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable . . . .").

74 Speiser v. Randall, 357 U.S. 513, 526 (1958). Thus, a vague law may chill protected speech. *See* Paris Theatre I v. Slaton, 413 U.S. 49, 88-91 (1933) (Brennan, J., dissenting).

75 For examples of abuse of the discretion that laws against speech provide, see text accompanying notes 77-87 & 130 *infra*. *See also* Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 684 (1968) ("[T]he restrictions imposed cannot be so vague as to set 'the censor . . . adrift upon a boundless sea'. . . ."') (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504 (1952)); Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 694 (1959) (Frankfurter, J., concurring) ("[L]egislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a diserction for sweeping within its condemnation what is permissible. . . .").

76 State v. Klapprott, 127 N.J.L. 395, 402, 22 A.2d 877, 881 (1941). Because the statute provided no "norm to judge" the "phases of a human reaction," the question of whether the statute had been violated would be "entirely subjective." *Id.* at 876, 22 A.2d at 882.

77 Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 513 (1941) (quoting C. Beard).

78 Debs v. United States, 249 U.S. 211 (1919). The height of Debs's criminal activity appears to have been telling an audience that "you need to know that you are fit for something better than slavery and cannon fodder." *Id.* at 214.

79 Pub. L. No. 670, 54 Stat. 671 (1940) (codified as amended at 18 U.S.C. § 2385 (1976)).

ing" the government by force.[80] We did this without producing any evidence of unlawful acts such as espionage.[81] In the sixties, we prosecuted who but Dr. Spock—not for his acts, but for counseling evasion of the draft.[82] We thus suppress by waves of "abusive prosecutions" and later as new majorities form, we may repent. But all the while, we fail to develop a theory of first amendment process to halt the next wave.[83]

Currently, the police discretion afforded by vague obscenity laws is being used in various locales to censor speech that is unacceptable to majoritarian sentiments, or to the tastes of local law enforcement officials. In Atlanta, a district attorney's thorough and relentless prosecutions has forced the distributors of magazines, books, and movies that his office considers obscene to cease distribution of such materials. This success was engendered not by the fact that a judge and jury determined that these materials were obscene, but because the distributors simply could not bear the cost of subsequent punishment as assessed by the district attorney.[84] In particular, the distributors finally chose not to bear the continuous litigation costs necessary to defend their practices.[85] A federal district court at one point found that the tactics of the district attorney's office constituted a system of "informal censorship" in violation of the first amendment.[86] Nonetheless, the vague obscenity standard remained, and the district attorney continued, until in return for his dismissal of some forty pending cases, the distributors acceded to his censorship.[87]

2. *The Constitution's Overt Act Requirement*

The framers of the Constitution, aware of the play that laws against

---

80 *Id.*

81 Dennis v. United States, 341 U.S. 494, 581-84 (1951) (Douglas, J., dissenting).

82 United States v. Spock, 416 F.2d 165, 168 (1st Cir. 1969); *see* Military Selective Service Act of 1967, § 12, 50 U.S.C. app. § 462(a) (1976).

83 The Supreme Court has, of course, tightened the "clear and present" danger doctrine. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam). The Court's effort, however, seems inadequate. *See* note 64 *supra*. For a more general criticism, see Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163 (1970). In addition, the Supreme Court from time to time has disapproved of the creative law enforcement made possible by vague laws restricting speech. For example, in Coates v. Cincinnati, 402 U.S. 611 (1971), the Court found a vague statute "an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens." *Id.* at 616. Similarly, in Thornhill v. Alabama, 310 U.S. 88 (1940), the Court struck down a vague statute because it provided a means of "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Id.* at 97-98.

84 Atlanta Constitution, Jan. 18, 1981, § B, at 1, col. 3; *id.* Jan. 17, 1981, § B, at 1, col. 2.

85 *Id.*, Jan. 18, 1981, § B, at 1, col. 3.

86 *See* Penthouse Int'l, Ltd. v. McAuliffe, 436 F. Supp. 1241, 1255 (N.D. Ga. 1977), *aff'd in part and rev'd in part*, 610 F.2d 1353 (5th Cir.), *cert. dismissed*, 447 U.S. 931 (1980).

87 Atlanta Constitution, Jan. 18, 1981, § B, at 1, col. 3.

speech give the state, moved to limit it. This limitation is one of process. Article III requires that a charge of treason, which apparently includes crimes of political dissent,[88] be based on an "overt Act"; speech alone is insufficient to support such a charge. The treason clause provides that "[n]o Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act."[89] This sadly overlooked provision was intended for a greater role than the one to which it has succeeded. Indeed, the "overt act" requirement was seemingly intended to be a broad guarantee against "abusive prosecutions" brought to stifle political dissent.[90]

The "overt act" provision was specifically intended to eliminate the crime of "constructive treason" and the costs that it imposed on speech.[91] That crime, as it existed in England, consisted of a mental state, "compassing or imagining the death of the King."[92] Spoken or written words alone, without the referent of physical acts, sufficed to complete the crime.[93] Consequently, the range of suppression was as vague as it was broad, and law enforcement agencies gained the power to repress, by the costs of prosecution and punishment, speech that displeased them.[94] But eventually, jurists and philosophers came to the opinion that "[b]are words may make a heretick, but not a traytor with-

---

88 *See* note 90 *infra*.

89 U.S. CONST. art. III, § 3.

90 *See* note 97 and accompanying text *infra*. John Taylor, a contemporaneous commentator of some reknown, explained the purpose of the treason clause as follows:

> The third section of the third article of the general constitution, had been deeply rooted in the natural right of free utterance, before the public solicitude required its farther security, by the third amendment [*sic*]. The utterance of any opinions could not constitute treason. Irreverance expressed for our constitution and government; falsehood or reasoning to bring into contempt and overturn them; were not thought politically criminal. Instead of being condemned to punishment, they are shielded against prosecution . . . .

J. TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 414 (1950 ed.) *See generally* Hurst, *Treason in the United States*, 58 HARV. L. REV. 395, 417-44 (1945); Note, *Threats to the President and the Constitutionality of Constructive Treason*, 12 COLUM. J.L. & SOC. PROB. 351, 368-89 (1976). *See also* Cramer v. United States, 325 U.S. 1 (1944).

91 Justice Jackson described the treason clause as it relates to constructive treason as follows:

> Our Constitution explicitly precludes punishment of the malignant mental state alone as treason . . . . It requires a duly witnessed overt act of aid and comfort to the enemy. . . . It is true that in England of olden times men were tried for treason for mental indiseretions such as imagining the death of the king. But our Constitution was intended to end such prosecutions. Only in the darkest periods of human history has any Western government concerned itself with mere belief, however eccentric or mischievous, when it has not matured into overt action . . . .

American Communications Ass'n v. Douds, 339 U.S. 382, 437-38 (1950) (Jackson, J., concurring in part and dissenting in part).

92 4 BLACKSTONE, *supra* note 16, at 78-79; *see* text accompanying note 67 *supra*.

93 *See, e.g.*, Note, *supra* note 90, at 351, 373-74 (citing authorites).

94 For example, the words "it would have been worth more than £100,000 to the kingdom had the king been dead the last twenty years" were made criminal. J. BELLAMY, THE

out an overt act."[95] Montesquieu, who was of some influence in the colonies, concluded that "[w]ords do not constitute an overt act; they remain only in idea."[96]

The framers, aware of the "temptation to abusive prosecutions"[97] that laws against speech held out to the state, moved to eliminate this temptation with the "overt act" limitation. Because we do in fact countenance laws against speech, the "temptation to abusive prosecutions" has in fact been presented; unsurprisingly, the state has not altogether resisted.[98]

3. *An Intrinsic Overbreadth*

Along with the definitional or "vagueness" problem unique to restrictions on speech, there is an inherent overbreadth problem as well, one that is not unique to speech but one that assumes an added dimension as it diminishes speech, a transcendent value in our society.[99] The overbreadth to which I refer is not that of precision in drafting (that statutes be written as narrowly as possible in light of legitimate ends) with which the courts often struggle. Rather, it is more fundamental: Legal standards are inherently overinclusive in that they will include some activities that the lawmaker would not proscribe if his attention were drawn to all possible applications of the law. In *The Statesman*, Plato described this phenomenon in a dialogue between The Stranger and Young Socrates:

> Stranger: And now observe that the legislator who has to preside over the herd, and to enforce justice in their dealings with one another, will not be able, in enacting for the general good, to provide exactly what is suitable for each particular case.
> Young Socrates: True.
> Stranger: He will lay down laws in a general form for the majority, roughly meeting the cases of individuals . . . .
> Young Socrates: He will be right.
> Stranger: Yes, quite right; for how can he sit at every man's side all through his life, prescribing for him the exact particulars of each day.[100]

LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES 118 (1970). More absurdly, when "Walker, the owner of a tavern called 'The Crown,' told his son, 'Tom, if thou behavest thyself well, I will make thee heir to the CROWN,' " he was reportedly prosecuted. Note, *supra* note 90, at 375.

95 3 E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND 14 (1809).

96 C. MONTESQUIEU, THE SPIRIT OF THE LAWS 193 (T. Nugent trans. 1949).

97 James Iredell, in debate about the ratification of the Constitution, referred to the treason clause's guaranty against such "temptations." 2 G. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 207 (1858).

98 *See, e.g.*, notes 77-87 *supra*; note 130 *infra*.

99 According to the Supremc Court, speeeh is "the matrix, the indispensable condition, of nearly every other form of freedom." Palko v. Conncctieut, 302 U.S. 319, 327 (1937).

100 PLATO, THE STATESMAN, as excerpted in J. WHITE, THE LEGAL IMAGINATION 627-28 (1973).

The legislature, then, must "enact for the general good" and will be unable to capture the "particulars of each day." Consequently, laws against speech will be susceptible to applications that the lawmaker did not intend. In this regard, Professor Linde, in a perceptive analysis of the limits of statutory suppression of speech, showed how "criminal anarchy" statutes enacted in response to the assassination of President McKinley in 1902 were in succeeding decades applied out of context to suppress political activity of an altogether different character—the activities of socialists and communists in the periods following World Wars I and II.[101] In the words of Professor Linde, "[w]hatever danger the new radicalism posed . . . , it was not [of the same danger as] the demonstrative assassinations" by the nineteenth century anarchists that occasioned the statutes.[102]

The legislator's inability to capture "the particulars of each day" led Justice Brandeis, in *Whitney v. California*,[103] to propose that a valid statute "creates merely a rebuttable presumption" that speech falling within its confines can be suppressed.[104] It would remain for the courts to decide whether in the circumstances of individual cases such repression is justified. The Supreme Court recently settled the matter by adopting the principal elements of the Brandeis solution. In *Landmark Communications, Inc. v. Virginia*,[105] a state statute imposed criminal sanctions on newspapers that published accounts of proceedings by a state commission investigating judicial disability and misconduct. The legislative purpose in barring such reporting was to maintain an "orderly administration of justice." Among other things, legislators were concerned that reporting of unfounded complaints would undermine "confidence in the judicial system" and unnecessarily damage a judge's reputation.[106] A Virginia newspaper violated the statute by publishing information about a pending investigation of judicial misconduct. The newspaper argued that the state "must prove by 'actual facts' the existence of a clear and present danger to the orderly administration of justice."[107] The Virginia Supreme Court, acknowledging that the record was devoid of such "actual facts," nevertheless held such a finding to be unnecessary "when the legislature itself ha[s] made the requisite finding 'that a clear and present danger to the orderly administration of justice

101 Linde, *supra* note 83, at 1176-78.
102 *Id.* at 1176.
103 274 U.S. 357 (1927).
104 *Id.* at 378-79 (Brandeis, J., concurring).
105 435 U.S. 829 (1978).
106 *Id.* at 833.
107 *Id.* at 843.

would be created by divulgence of the confidential proceedings of the Commission.' "[108]

The United States Supreme Court, however, did not agree. "Deference to a legislative finding" could not "limit judicial inquiry when first amendment rights are at stake." Although "[a] legislature appropriately inquires into and may declare the reasons impelling legislative action," still "the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution."[109] The Court, therefore, reversed and remanded with the charge that it was

> incumbent upon the Supreme Court of Virginia to go behind the legislative determination and examine for itself "the particular utteranc[e] here in question and the circumstances of [its] publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify [subsequent] punishment."[110]

The first amendment, then, carries with it a special requirement of process. Courts must ensure that a statute appropriate for the "general good" is also appropriate for the "particular utterance in question." Similarly, to cure that peculiar affliction of laws against speech, vagueness, courts require that such laws "only be imposed after an adversary judicial proceeding."[111] From this standpoint, a system of subsequent punishment carries with it a special risk. Its very purpose is to create self-censorship on the part of the many timid or prudent souls who are averse to the risks of prosecution and punishment.[112] Unfortunately, self-censorship evades the judicial review identified as necessary in each instance of suppression. A system of injuctive relief, on the other hand, is more protective of first amendment values because it requires such process.

Before proceeding to the next section, these points bear repeating. First, laws against speech are uniquely and intrinsically vague. Second, laws against speech are inherently overbroad. With these innate defects

---

108 *Id.* (quoting Landmark Communications, Inc. v. Commonwealth, 217 Va. 699, 708, 233 S.E.2d 120, 126 (1977)).

109 *Id.* at 843-44.

110 *Id.* at 844 (quoting Bridges v. California, 314 U.S. 252, 271 (1941)).

111 Bee See Books, Inc. v. Leary, 291 F. Supp. 622, 625 (S.D.N.Y. 1968) (obscenity laws). *See also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66-67 (1963).

112 *See, e.g.,* notes 135-38 and accompanying text *infra*. *See also* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973) ("The special vice of a prior restraint is that communication will be suppressed either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."); Drive-In Theatres, Inc. v. Huskey, 435 F.2d 228, 230 (4th Cir. 1970) (sheriff's threats of prosecution a "method of informal censorship," and held to be "an unconstitutional prior administrative restraint" because it was not subject to judicial superintendence), *discussed at* note 130 *infra*.

of lawmaking in mind, we should remember that the first amendment is by its terms a limitation of "law making": "Congress shall make no laws . . . ." Third, a system of subsequent punishment, by the police censorship it inculcates, permits the state to exploit the overinclusiveness of these laws and suppress speech that disturbs the current governing faction. In this light, we can see why Madison argued that the first amendment's restraint of legislative action, "to be effectual," must include an "exemption . . . from the subsequent penalty of laws."[113] Finally, the Constitution captures the sense of these points in the treason clause's specific proscription of prosecutions for speech alone.

C. *The Analogue of Bureaucratic Licensing and Subsequent Punishment*

As we have seen, the Supreme Court, recoguizing the evils of bureaucratic licensing, has ruled that such licensing, unless it is subject to immediate judicial review, is an unconstitutional prior restraint.[114] At the same time, criminal punishment remains the favored means of suppressing speech. I find this odd, because subsequent punishment and bureaucratic restraints turn out to be the same side of the same coin. We have this on the authority of the Supreme Court.

In *Thornhill v. Alabama*,[115] the constitutionality of a criminal conviction for labor picketing in violation of a state statute was before the Court. It overturned the conviction. It did so because subsequent punishment combined with an overly vague statute is, in the same manner as administrative licensing, an unconstitutional restraint of speech. The Court's discussion on this point turns on what it characterized as "an appreciation . . . of the evil inherent in a licensing system."[116] The touchstone for gaining this appreciation was the "English experience":

> The power of the licensor against which John Milton directed his assault by his "Appeal for the Liberty of Unlicensed Printing" is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. . . . A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continu-

113 L. LEVY, *supra* note 8, at 275.
114 *See* notes 39-40 and accompanying text *supra*.
115 310 U.S. 88 (1939).
116 *Id.* at 97.

ous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.[117]

Unfortunately, *Thornhill*'s association of administrative licensing with subsequent punishment has lain dormant. The strength of the analogue endures, however, and it has been sufficient to cause the Court more recently to characterize what was in fact suppression by subsequent punishment as a "prior administrative restraint," and to overturn the supression as such. This was the decision in *Bantam Books, Inc. v. Sullivan*.[118]

The state of Rhode Island had established a "Commission to Encourage Morality in Youth." A task of the Commission was to educate the public about obscene publications. It could also "recommend" that the attorney general prosecute those violations of the state's obscenity laws that the Commission thought it identified.[119] One Silverstein, a book distributor, had from time to time been notified by the Commission that it considered certain of his books to be obscene. At the same time, he was gently informed by the Commission that it would recommend prosecution to the attorney general's office if the books were not removed from circulation. For a time, Silverstein complied with the Commission's suggestions. When he finally challenged the Commission's actions, a majority of the Supreme Court characterized those actions as part of a "scheme of prior administrative restraints" accomplished without the "procedural safeguards" of a judicial process, and therefore found them unconstitutional.[120]

A "prior administrative restraint," the Court said, but was it really? In fact, the censorship was self-imposed, because of Silverstein's fear of a criminal prosecution. His testimony was that he had removed books from circulation "rather than face the possibility of some sort of a court action against ourselves, as well as the people that we supply."[121] Also, the trial court's finding was that "the threat of prosecution" engendered the censorship.[122] All the Commission did was perhaps to focus and make more specific the *in terrorem* suppression of the criminal law by threatening to recommend prosecution. Because of the Commission's role, the Court characterized the administrative suppression as an unconstitutional prior restraint.

Justice Harlan, however, was not fooled. In dissent, he noted that any "distributor or publisher wishing to stand his ground on a particular publication [may do so] by simply refusing to accept the Commis-

117 *Id.* at 97-98.
118 372 U.S. 58 (1963).
119 *Id.* at 59-60.
120 *Id.* at 70-72.
121 *Id.* at 63.
122 *Id.* at 64.

sion's opinion and awaiting criminal prosecution."[123] Because the distributor had chosen not to, the result was self-censorship similar "to a restraint [that] would occur from the mere existence of a criminal obscenity statute."[124] Harlan thus closed the circle—the "prior administrative restraint" in *Bantam Books* was in fact the self-censorship of subsequent punishment.

The majority in *Bantam Books* viewed the administrative licensing process in the usual way, without following the process to its end—where we find subsequent punishment. A tendency is to view a bureaucratic licensing scheme as "self-effectuating." As Harlan's dissent indicates, we ignore the subsequent punishment basis of a licensing scheme. In fact, a licensing scheme is not necessarily "self-effectuating"; that is, there is no legal duty to comply with an unconstitutional scheme. In *Shuttlesworth v. City of Birmingham*,[125] the petitioner was convicted for demonstrating without securing a "parade permit" from a municipal licensing authority. The Supreme Court, however, overturned the criminal conviction. Because the licensing scheme was itself unconstitutional, the petitioner was free to ignore it: "[O]ur decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license."[126]

If licensing schemes that infringe constitutionally protected speech may be disobeyed with "impunity," where then are the teeth to them? The answer must be this: The force to such schemes is that they enhance the ordinary *in terrorem* suppression of criminal punishment. In this regard, licensing systems are ordinarily backed by criminal punishment. For example, in *Shuttlesworth*, the city code made it "unlawful" to parade without the permission of the city commission and imposed a criminal penalty for such unlawfulness.[127] The difference between such a licensing scheme and the usual criminal statute is only a matter of

---

123 *Id.* at 78-79 (Harlan, J., dissenting).

124 *Id.* at 81.

125 394 U.S. 147 (1969).

126 *Id.* at 151. *Accord*, Freedman v. Maryland, 380 U.S. 51, 56 (1965) ("'One who might have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it.'") (quoting Thornhill v. Alabama, 310 U.S. 88, 97 (1939)).

I am not, however, suggesting that a person can disobey with "impunity" a licensing scheme that is "facially" constitutional. If, for example, the substantive law controlling the administrative licensing authority meets current constitutional standards, and if the administrative order is subject to immediate judicial review in accordance with the standards of *Freedman v. Maryland* (*see* text at notes 46-54 *supra*), then it seems that if a person disagrees with a particular order of the licensing body, he must resort to the immediate judicial review that the scheme affords. At the same time, that person would not seem free to disobey the administrative order pending judicial review. *See* Note, *Defiance of Unlawful Authority*, 83 HARV. L. REV. 626, 630-31 (1969).

127 394 U.S. at 149-50.

degree: A person who ignores an administrative censorship scheme is perhaps acting in a more visible fashion. Prosecution, therefore, seems more likely. This in turn causes the risk-averse to conform to the administrative scheme. And as Justice Harlan observed, this is the same kind of "self-censorship" that is associated with ordinary statutes implemented by punishment.[128] There is, sometimes, the difference in degree to which I have alluded: Administrative licensing may create a greater and more specific threat of punishment and litigation costs. This, however, is not always so. Specific warnings of prosecution from law enforcement officials create the same focused threat,[129] and indeed, such threats have been a favored mode of suppression.[130]

The lesson of *Bantam Books* is that administrative licensing and subsequent punishment are alike in a technical sense: They both depend upon the threat of punishment and litigation costs to instill compliance. And with both, this compliance is instilled largely without the "procedural safeguards" of judicial process. The lesson of *Thornhill v. Alabama* is that a system of subsequent punishment shares the fundamental deficiency of administrative licensing, a certain latitude of suppression made possible by vague and overinclusive legal standards, where "individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regnlation by law."[131]

---

128 Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 80-81 (1963) (Harlan, J., dissenting).

129 *Id.* at 80.

130 Lower federal courts have enjoined threats of prosecution and similar actions by law enforcement officials as unconstitutional prior restraints. For example, in Drive-In Theatres, Inc. v. Huskey, 435 F.2d 228 (4th Cir. 1970), the county sheriff announced that he personally considered all movies obscene under state law, except those recommended for general audiences, and that he would arrest anyone who showed "R" or "X" rated films. To avoid prosecution, movie theaters under his jurisdiction complied, until the steady diet of G movies eaused their business to drop considerably. The theater owners then sought declaratory and injunctive relief, which the court granted, on the ground that "the sheriff's method of informal censorship was an unconstitutional prior administrative restraint." *Id.* at 230. Such a restraint, the court stated, could be tolerated " 'only where it operate[s] under judicial superintendence.' " *Id.* (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). The self-censorship enhanced by the sheriff's prosecution threats of course operated without such superintendence. *See also* Bce See Book, Inc. v. Leary, 291 F. Supp. 622, 626 (S.D.N.Y. 1968) (effect of stationing uniformed officers in book stores was to warn customers "that purhcases may lead to prosecution," and this constituted "advance censorship without any of the protectious afforded by [judicial proceedings]"); HMH Publishing Co. v. Garett, 151 F. Supp. 903, 905 (N.D. Ind. 1975) (action of district attorney's office in sending magazine distributor list of magazines it considered obscene "was accompanied by an implied threat of prosecution" and therefore constituted an impermissible "previous restraint"); *cf.* Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 681 (1968) (criteria for determining whether movies suitable for young persons uncoustitutinally vague and incurable on judicial review).

131 Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 701 (Clark, J., concurring), *quoted in* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 685 (1968).

IV

THE COSTS OF SUPPRESSION

In this part, the preceding observations are used to establish a model for predicting the costs associated with the various means of suppression of speech. Once we have some idea of these costs, we can better determine the means of suppression that are most consistent with the values of free speech. The unit of measurement, "costs," is not of course limited to pecuniary transactions; rather, it is used in its broader sense, a sense of opportunities lost, of resources reallocated.[132]

Recognition of a certain function of judicial review is crucial to assessing the relevant costs. The function is that of sifting the suppressions of speech so as to separate and save speech that is constitutionally protected, or to save speech to which the standard in question was not meant to apply.[133] A court may accomplish this by requiring, among other things, that the restraint in question be as precise and narrow as possible; that it be the least restrictive restraint possible under the circumstances; and, if these tests are met, that the reasons for the restraint be sufficiently compelling to justify the infringement of speech.[134] This function may be compared to that of a one-way valve, spring-loaded so as to be tripped by, and so as to prevent, attempted suppressions of constitutionally protected speech. By this mechanism, the cost to society of erroneous suppressions of constitutionally protected speech is abated. Conversely, a means of suppression that eliminates this "stop valve" permits this cost.

A. *Subsequent Punishment: The Costs to Speech*

An effect of punishment for an activity is to deter that activity. The calculus of deterrence includes the magnitude of punishment multiplied by the probability of punishment.[135] Also, a prosecution involves litigation costs—out-of-pocket expenses, time, reputation, and so on—and the "specter of such expenses" is part of the deterrence.[136] The effectiveness of deterrence so computed will in turn depend upon how

---

132 R. POSNER, ECONOMIC ANALYSIS OF LAW 6-7 (2d ed. 1977).

133 *See, e.g.,* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838-39 (1978) (*discussed in* text accompanying notes 105-10 *supra*).

134 Buckley v. Valeo, 424 U.S. 1, 25 (1976). Professor Bickel has described eloquently the special function of the courts with respect to speech. Courts must ensure that the "statute express the wish of the legislature in the clearest, most precise and narrowest fashion possible," and that the decision to suppress was "made closely and deliberately, with awareness of the consequences." A. BICKEL, THE MORALITY OF CONSENT 78 (1975). *See also* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

135 R. POSNER, *supra* note 132, at 165; *see* Erlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUD. 259 (1972).

136 . Time, Inc. v. Firestone, 424 U.S. 448, 475 n.3 (1976) (Brennan, J., dissenting). *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

averse an individual is to risking the costs of prosecution and punishment. Among a law abiding public, an aversion to such risk is likely to be high, so that even a low-grade risk of prosecution and punishment can be a sufficient deterrent.[137] Moreover, deterrence increases if a person can pursue more "legitimate" activities that involve less risk.[138] Thus, when the state applies the pressure, a book seller predictably will switch his stock from *Playgirl* to *Cosmopolitan*, from a Henry Miller to a less controversial author.

Ordinarily, for example with armed robbery, deterrence by prosecution and punishment is a welcome means of law enforcement. With speech, however, we have quite a different situation. To begin, speech is of a transcendent value to our society,[139] so ordinary process may not be enough. In fact, the Supreme Court has overturned the use of "a common procedural device" because of its cost to speech:

> The States generally may regulate the allocation of the burden of proof in their courts, and it is a common procedural device to impose on a taxpayer the burden of proving his entitlement to exemptions from taxation, but where we conceived that this device was being applied in a manner tending to cause even a self-imposed restriction of free expression, we struck down its application.[140]

Moreover, in the context of laws against speech, subsequent punishment in and of itself is not ordinary process. Because of the inherent overinclusiveness of laws against speech, subsequent punishment is simply "an obvious invitation to discriminatory enforcement."[141] As a result, the state gains an unconfined discretion to pick and choose the idea that it would smother with the costs of subsequent punishment.

Against this background, we begin to see that the present preferred status of subsequent punishment has been established without sufficient

---

137 *See also* Z. CHAFEE, *supra* note 77, at 241. *See generally* Erlich, *supra* note 135, at 265-67.

138 "It is a basic theorem of economics that an increase in the cost of a subjectively desirable activity relative to other competing activities—individual preferences and real opportunities held constant—results in a general shift away from that activity and toward activities that are not relatively cheaper." Erlich, *supra* note 135, at 261.

139 *See* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 3-15 (1966).

140 Smith v. California, 361 U.S. 147, 151 (1959) (explaining Speiser v. Randall, 357 U.S. 513 (1958), the decision that actually prohibited such a use of burden of proof). The *Speiser* Court relied on the transcendent value of speech and the special demands that it makes on process, stating that "[w]hen the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society." 357 U.S. at 521. As *Speiser* indicates, the Supreme Court within the last two decades has been active in reducing the often subtle costs to speech engendered by procedures. *See, e.g.,* Freedman v. Maryland, 380 U.S. 51 (1975) (responsibility of obtaining judicial review of censorship placed on government body, so that costs of going forward would be borne by government rather than the speaker).

141 Coates v. Cincinnati, 402 U.S. 611, 616 (1971).

attention to the associated cost to speech. This cost we will now proceed to identify with more particularity. We start with the inherent overinclusiveness of laws against speech. In addition, a law maker may very deliberately and specifically make unlawful speech that a court would save as constitutionally protected. Laws against speech, then, involve this cost: erroneous suppressions of speech, consisting of both overinclusive suppressions and deliberate suppressions of constitutionally protected speech.

In theory, judicial review reduces this cost. Judicial review "commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution."[142] When the mode of suppresion is subsequent punishment, however, the means of eliminating erroneous supressions of speech may be avoided. The risk-averse among us, those who will not chance the costs of prosecution and punishment, simply will not speak.[143] At the same time, the vagueness and overbreadth intrinsic to laws against speech enable law enforcement officials to intensify these risks for speech that displeases them. For example, merely a letter from the police to a publisher listing certain disfavored books is ordinarily a sufficient enhancement of these risks to cause the publisher to shift his stock to other works.[144]

This cost of subsequent punishment—a greater probability of erroneous suppression caused by the circumvention of judicial review—is one that the Supreme Court has identified and condemned. In *Bantam Books, Inc. v. Sullivan*,[145] after a book distributor testified that he withdrew certain books from circulation rather than risk "some sort of court action,"[146] the Court held that such suppression by self-censorship was unconstitutional because it eliminated the protection of a "trial hedged about with . . . procedural safeguards," and thus "provide[d] no guards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter."[147]

Unfortunately, the impact of these costs in increased by a certain characteristic of many publishers of speech. As explained by Professor Chafee: "[T]he owner of a syndicated press chain is not likely to share the eagerness of Socrates to speak the truth even if he must die. The

142 Landmark Communications, Inc. v. Virginia, 435 U.S. 844 (1978). *See also* Thornhill v. Alabama, 310 U.S. 88, 96 (1939).

143 In the words of the Supreme Court, "[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as actual application of sanctions." NAACP v. Button, 371 U.S. 415, 433 (1963).

144 *See* note 130 *supra*.

145 372 U.S. 58 (1963).

146 *Id.* at 63.

147 *Id.* at 69-70.

balance sheet becomes a more important document than the editorial page, and it seems wiser to keep them both out of the red."[148] With a profit-oriented media, marginal costs count, and prosecution and punishment is a cost sufficient to influence publication policies.[149] Moreover, a particular feature of speech heightens the influence of such costs on these publication decisions. As we have noted, the deterrence of subsequent punishment is greater when a person can readily shift resources to less costly activities;[150] with speech, this reallocation of resources is inordinately easy. Speech is easily modified, easily softened—alternative books or magazines that meet the state's approval are readily available. And on the income statement, there is no distinction between the speech of, say, Dr. William Sloane Coffin, and that of the Reverend Billy Graham.

B. *Subsequent Punishment: Costs to the State*

While the costs to speech of subsequent punishment are great, the costs to the state of such suppression are correspondingly slight. What the state gets is suppression in wholesale lots.[151] The major costs to government are those of enforcement, the costs to the state of implementing a scheme of suppression. Subsequent punishment—calculated to suppress by means of self-censorship—minimizes enforcement costs; this censorship is achieved without the expense of either a civil or criminal prosecution. These reduced enforcement costs are beguilingly, and probably unwittingly, captured in the current homage to the doctrine of prior restraint, that a "free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand."[152] Of course it would. Because only a "few" will be

148 Z. CHAFEE, *supra* note 77, at 522.

149 *See, e.g.,* Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353, 1359-62 (5th Cir.) (imposition of such costs amounts to "unconstitutional prior restraint"), *cert. denied*, 447 U.S. 931 (1980). In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court pointed out how readily the economic costs of a state "right of access" law could shade editorial decisions. The Court found this unacceptable:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. at 258.

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

151 Thomas Jefferson, in encouraging state prosecution of press criticism of his administration, wrote that "I have . . . long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses." L. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 364 (1966) (letter from Jefferson to Gov. Thomas McKean, Feb. 19, 1803).

152 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1965) (emphasis in original).

hardy enough to speak in violation of a criminal statute, subsequent punishment carries with it diminished enforcement costs. In contrast, to "throttle them and all others beforehand," as by injunctive relief, imposes large enforcement costs: Such selective means of enforcement require judicial process for each instance of suppression.

C. *Injunctions Against Speech*

Subsequent punishment, calculated as it is to suppress by a self-censorship that evades judicial review, necessarily results in a significant social loss, consisting of the speech that judicial review might save. Suppression by injunction, however, minimizes this loss. No sanction accompanies the issuance of the injunction;[153] therefore, the unreviewed, *in terrorem* suppression of criminal punishment is avoided. The preventive order that does issue must first be tested by adversarial processes,[154] with the government carrying the burden of showing the court that the requested suppression is the narrowest possible under the circumstances, and that the circumstances warranting such suppression are urgent.[155] The order itself can, and must, be specific: "pinpointed" as to persons and conduct.[156] In this way, the cost to speech of erroneous suppression is minimized.

I do not, however, wish to overstate my argument. While an injunction imposes a lesser cost on speech, it is not cost-free. It will involve litigation costs, and in some situations, this cost may deter publication (the small retailer, for example, who can easily shift his stock of books and magazines to others that will not cause him to risk litigation expenses). Nonetheless, subsequent punishment carries with it a significantly greater cost to speech, and remains the more injurious process. The Supreme Court has acknowledged as much.[157] In this regard, Justice Brennan wrote that

> [a] civil procedure that complies with the commands of the First Amendment and due process may serve the public interest in controlling obscenity without exposing the marketer to the risks and the stigma of a criminal prosecution, and thus protect, by minimizing the risk of marketer self-censorship, the right to the free publication and

---

153 The sanction that can accompany an injunction—contempt of court—is imposed at a later stage, and only then if a person bound by an injunction (including parties, officers, agents, servants, employees, attorneys, and those in "active concert or participation" with the parties, FED. R. CIV. P. 65(d)) violates the terms of the injunction. Imposition of contempt requires a second hearing, with a full set of procedures, including a jury trial for criminal contempt. *See* cases cited in O. FISS, *supra* note 13, at 848-77.

154 Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 182-85 (1968).

155 *See* Buckley v. Valco, 424 U.S. 1, 25 (1976). *See also* A. BICKEL, *supra* note 134, at 78.

156 Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968).

157 *See also* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55 (1973); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442 (1957).

dissemination of constitutionally protected literature.[158]

The comparatively lower costs to speech of injunctive relief is illustrated in an account by Professor Chafee of police censorship of the New York stage.[159] Not surprisingly, this account starts with the distinction that we drew previously between laws that apply to physical events and laws that purport to define the conceptual. New York extended its "padlocking power" in 1927 from liquor to obscenity, creating a problem. Although "anyone knows whether a beverage is or is not intoxicating, . . . the test of obscenity is so vague that the owner or producer of a theatre cannot ascertain whether the law is violated."[160] The consequences of violating the vague obscenity standard were serious—the loss of an entire theatrical season if the play were closed. As a result, a cost-conscious owner would not risk prosecution, and even the "hint of a prosecution" was "sufficient to make him withdraw the play." The "actual control over . . . drama in New York City" was, therefore, "placed in the hands of the district attorney and the police."[161]

In an attempt to avoid the cost of this form of police censorship, the owners of a certain play sought declaratory and injunctive relief against enforcement of the law. Unfortunately, the court denied this relief[162] on the ground that it was "unprecedented and would convert the civil courts into censors of the drama."[163] As this anecdote indicates, there is a distinct tendency on the part of cost-conscious publishers to seek preventive relief in the face of a system of subsequent punishment.[164] As

158 McKinney v. Alabama, 424 U.S. 669, 683 (1976) (Brennan, J., dissenting).

159 Chafee, Book Review, 42 HARV. L. REV. 142 (1928).

160 *Id.* at 142-43.

161 *Id.* at 143.

162 Liveright v. Waldorf Theatres Corp., 220 A.D. 182, 221 N.Y.S. 194 (1927).

163 Chafee, *supra* note 159, at 143.

164 In fact, a number of similar examples in other cases bear out this hypothesis. *See, e.g.*, Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353, 1355-57 (5th Cir.), *cert. denied*, 447 U.S. 931 (1980); Krahm v. Graham, 461 F.2d 703, 705 (9th Cir. 1972); Black Jack Dist., Inc. v. Beame, 433 F. Supp. 1297, 1300 (S.D.N.Y. 1977); Drive In Theatres, Inc. v. Huskey, 305 F. Supp. 1232, 1282-83 (W.D.N.C. 1969), *aff'd*, 435 F.2d 228 (4th Cir. 1970); Bee See Books, Inc. v. Leary, 291 F. Supp. 622, 622-23 (S.D.N.Y. 1968); New Am. Library of World Literature, Inc. v. Allen, 114 F. Supp. 823, 825-26 (N.D. Ohio 1953). In this light, the Commission on Obscenity and Pornography has recommended greater use of civil declaratory procedures so as to avoid the costs to speech of subsequent punishment. The Commission's report states:

> A declaratory judgement procedure . . . would permit prosecutors to proceed civilly, rather than through the criminal process, against suspected violations of obscenity prohibition. If such civil procedures are utilized, penalties would be imposed for violation of the law only with respect to conduct occuring after a civil declaration is obtained. The Commission believes this course of action to be appropriate whenever there is any existing doubt regarding the legal status of materials; where other alternatives are available, the criminal process should not ordinarily be invoked against persons who might have reasonably believed, in good faith, that the books or films they distributed were entitled to constitutional protection, for the threat of criminal sanctions might otherwise deter the distribution of constitutionally protected material.

rational costs avoiders, these publishers are telling us something about the relative costs of the two systems.

Along with being less costly to speech, an injunction, at least from one standpoint, is advantageous to the government. An injunction is necessarily addressed to identifiable parties and to specific circumstances.[165] At the same time, rights are defined with some precision by the process that resulted in the injunction. Because of this specificity with respect to parties and conduct, the injunction tends to be a relatively effective deterrent. A classic example is the *Pentagon Papers* case,[166] during which the *New York Times* announced that although it would not abide by an ambiguous espionage statute, it would obey a court injunction.[167] An injunction, therefore, may more effectively prevent the speech adjudged to cause social loss sufficient to warrant suppression. As the court saw it in *United States v. Progressive, Inc.*,[168] such specific deterrence was warranted in order to avoid the harm of thermonuclear proliferation.

Injunctive relief, however, is not a form of suppression that the government will ordinarily favor. Why? The high "transactions costs" that it imposes on government. Suppression by injunction requires judicial process for each instance of suppression. For example, in the *Progressive* case, after a number of publishers gained access to the article on how to make a hydrogen bomb, the Justice Department ceased its attempts at suppression by injunction. As indicated by news reports, the government could not maintain the various litigations that would have been necessary to suppress by this means.[169] To have done so would have been "like riding herd on a swarm of bees."[170]

D. *A Model of Suppression*

The preceding identification of costs allows us to predict the state's choice of a means of suppression. When government desires an extensive day-to-day censorship, we would expect suppression by a system of subsequent punishment. As we have seen, subsequent punishment brings about such censorship with relatively low transaction costs. In

---

COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 62 (1970).

165 *See, e.g.*, FED. R. CIV. P. 65(d).

166 New York Times Co. v. United States, 403 U.S. 713 (1971).

167 O. FISS, *supra* note 14, at 154-55.

168 467 F. Supp. 990 (W.D. Wis. 1979), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979), *motion to reconsider denied*, 486 F. Supp. 5 (W.D. Wis. 1980).

169 N.Y. Times, Sept. 18, 1979, § A, at 1, col. 6.

170 This remark is attributed to Judge Poff of the District of Columbia Court of Appeals. It was prompted by what he saw as the government's difficulties in suppressing by injunction the "Pentagon Papers" after they had been made available to some 20 newspapers. Abrams, *The Pentagon Papers a Decade Later*, NEW YORK TIMES MAGAZINE, June 7, 1981, § 6, at 22, 80-82.

fact, such suppression has been the rule, from the Alien and Sedition Acts of 1798,[171] to the current sedition acts,[172] and to more mundane examples such as the present federal campaign contribution laws.[173] Such suppression is the rule, although the specific deterrence of injunctive relief may be greater than that of subsequent punishment; again, the transaction costs associated with injunctive relief ordinarily are too high. Only in exceptional circumstances, such as the *Pentagon Papers* case,[174] will the government choose to bear the costs of selective enforcement and specific deterrence by seeking injunctive relief.

Although the associated costs to speech indicate that the government's predictable choice of subsequent punishment should be suspect, it does not mean that subsequent punishment should be an altogether impermissible means of suppression. An example of what seems an appropriate use of subsequent punishment is that of the present federal laws limiting the amount of money that individuals, and business and labor entities, can contribute to candidates for federal offices.[175] For example, individuals can contribute no more than $1,000 per election to a candidate for federal office;[176] corporate political action committees can contribute no more than $5,000.[177] These monetary limitations are enforced by subsequent punishment—fine and imprisonment.[178] The Supreme Court, while finding these limitations to be regnlations of political speech at the core of first amendment values, nonetheless held that the limitations were constitutional. Among other things, maintaining the integrity of our electoral process was a compelling justification.[179]

This approval of a system of subsequent punishment in this particular instance seems justified. First, although the Court characterized the laws as applying to speech, they in fact apply to a measurable physical act, monetary payments, which can be observed and quantified. Because an objective referant is available to contain police discretion, the

---

171 Ch. 74, 1 Stat. 596 (1798).

172 Examples of federal sedition laws include the Smith Act, 18 U.S.C. § 2385 (1976), *see* text accompanying notes 79-81 *supra*, and the Espionage Act of 1917, 18 U.S.C. § 2388 (1976) (continued in effect through peace time, 18 U.S.C. § 2391 (1976)). For a collection and description of the Sedition Acts, see T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 97-160 (1970).

173 Federal Election Campaign Act Amendments of 1979, 2 U.S.C. § 437(g) (Supp. IV 1980).

174 New York Times Co. v. United States, 403 U.S. 713 (1971).

175 Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-441 (1976 & Supp. IV 1980).

176 *Id.* § 441a(a)(1)(A).

177 *Id.* § 441a(a)(2)(A).

178 *Id.* § 437g(d). The Act contains prescriptive remedies as well; it provides for a formal negotiation and conciliation process and grants the Federal Election Commission the power to seek injunctive relief. *Id.* § 437g(a)-(c).

179 Buckley v. Valeo, 424 U.S. 1, 14-29 (1976).

over-censorship engendered by the vagueness inherent to laws against "pure" speech is avoided. Second, the contribution limits necessarily apply to a broad spectrum of speakers—the many individual, business, and labor contributors. In these circumstances, and with a law that avoids the vagueness associated with laws against pure speech, a form of subsequent punishment seems justified. The self-censorship that it induces is probably the only means of suppression that the government can afford.

On the other hand, I have difficulty in remitting to subsequent punishment such intrinsically vague laws as those prohibiting "advocating and teaching" the violent overthrow of the government[180] or "counseling" evasion of the draft.[181] Just as administrative censorship is denounced because it permits such personal standards of censorship as "propaganda" or something "pink or red,"[182] so should this subsequent punishment be denounced because these vague standards permit a similar police censorship.

E. *Bureaucratic Licensing*

In historical context, the prior restraint doctrine provides a presumption against administrative licensing. The identified costs of administrative censorship involve an intrinsic proclivity towards overcensorship and a latitude, provided by intrinsically overinclusive standards, to indulge this proclivity. In short, the probability of erroneous suppression is inordinately high. Accordingly, the Supreme Court has endeavored to reduce this cost by requiring that administrative censorship be subject to prompt judicial review.[183] Moreover, the Court, recognizing the deterrence of litigation costs, has placed the burden of securing such review on the administrative body.[184] What the Supreme Court has not done, however, is to acknowledge the analogue that it has recorded between administrative censorship and subsequent punishment,[185] that the same kind, and about the same degree, of costs to speech are involved in each.

V

THE ARGUMENTS AGAINST PREVENTIVE RELIEF

Manifestly, preventive civil relief seems the mode of suppression least costly to speech. Why, then, does the injunction, itself a form of

---

180 18 U.S.C. § 2385 (1976).

181 50 U.S.C. app. § 462 (1976).

182 *See* note 37 and accompanying text *supra*.

183 *See* notes 46-55 and accompanying text *supra*.

184 Freedman v. Maryland, 380 U.S. 51, 58 (1965), *discussed in* notes 46-53 and accompanying text *supra*.

185 *See* notes 115-31 and accompanying text *supra*.

preventive relief, remain disfavored, and especially so relative to subsequent punishment? This may in large part result from guilt by association, the careless association of injunctions with the bureaucratic suppression that is the source of the prior restraint doctrine. Otherwise, the reason may be more sinister, the continuing intuit that the "fire and the executioner"[186] is the more effective suppressor of speech.

Be that as it may, the distinction between injunctions and subsequent punishment is ordinarily defended in terms of free speech values. The usual arguments[187] are (1) that an injunction is more injurious to speech because it more effectively suppresses speech; (2) that an injunction imposes a larger social loss because, unlike subsequent punishment, it prevents speech from ever occurring at all; and (3) that subsequent punishment, with the attendant procedural protection of the criminal law, offers the superior process. We will consider the validity of these arguments in turn, along with the problem of the overbroad injunction.

A. *The Injunction as a More Effective Suppressor of Speech*

Professor Bickel, in an oft-quoted aphorism, stated that while "[a] criminal statute chills, a prior restraint freezes."[188] This comment was provoked by the effectiveness of an injunction in suppressing the speech against which it was directed. "The violator of a prior restraint," Professor Bickel explained, "may be assured of being held in contempt."[189] True, but this is not a compelling argument against the injunction. It "freezes," but it does so specifically and discretely.

Criminal statutes and injunctions are alike in that they both proscribe conduct and penalize disobedience. As Professor Bickel points out, however, they differ in that the sanction for violation of an injunction—contempt of court—is swift and certain. An injunction necessarily is addressed to identified parties. At the same time, the prohibited act must be specifically described in the court's order.[190] Moreover, the judicial process that produces the injunction settles and defines rights with some precision.[191] So, yes, an injunction freezes, but with parties, conduct, and rights identified.

And indeed, as Professor Bickel asserts, the criminal statute may only "chill."[192] Ordinarily, the general deterrence of this chill will be

---

186 *Areopagitica*, *supra* note 24, at 40.

187 *See, e.g.*, Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV. 283 (1982).

188 A. BICKEL, *supra* note 134, at 61.

189 *Id.*

190 FED. R. CIV. P. 65(d); *cf.* Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 183-84 (1968) (*ex parte* procedure held invalid).

191 *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978), *discussed in* notes 105-10 and accompanying text *supra*.

192 A statute that is addressed by necessity to general situations often has only an uncer-

less than the specific deterrence of an injunction (although law enforcement officials can render this general deterrence specific, and enhance it, through such practices as warnings of prosecutions and blacklists[193]). Be that as it may, the adverse consequences of the "chill" of subsequent punishment statutes are overarching. First, the "chill" is pervasive; unlike the "pinpointed" deterrence of an injunction, it descends on the mass of speakers within the broad and uncertain range of the statute. Second, the pervasive self-censorship that subsequent punishment inculcates is largely untested by adversarial processes. An injunction, on the other hand, does not issue until the speaker has had his day in court. For these reasons, Justice Frankfurter, when confronted with the choice, preferred the discrete "freezing" of an injunction to the broad "chill" of subsequent punishment:

> One would be bold to assert that the *in terrorem* effect of [subsequent punishment] less restrains booksellers in the period before the law strikes than does [injunctive relief]. Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity.[194]

B. *The Social Loss Caused by Injunctions Against Speech*

The argument most commonly raised against injunctions of speech and in favor of subsequent punishment is that injunctions deprive society of speech, while subsequent punishment does not. Because subsequent punishment occurs only after publication of speech, the public gains the advantage of reading the book or newspaper, even if the publisher or seller is subsequently convicted. This longstanding idea, however, seems incorrect in its premises. Subsequent punishment is calculated to suppress, and does indeed suppress, the publication of speech.[195] And it does so on a broad scale, through the extensive self-censorship that it inculcates. This too is lost speech, in an amount likely to be greater than that of speech lost by the more specific suppression of an injunction.

Moreover, there is a second, somewhat different flaw in the notion

---

tain application in specific circumstances. Even if the range of the statute could be certain, it still may include speech that a court will determine to be constitutionally protected. In addition, the state may for whatever reason choose not to prosecute what it believes to be violations of the statute. For these reasons, a statute may only "chill."

193 *See* note 130 *supra*.

194 Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442 (1957). *See also* cases cited in note 157 *supra*.

195 *See* text accompanying notes 135-38 *supra*.

that the injunction imposes greater social loss. In issuing an injunction, a court specifically determines that the speech is without constitutional protection. On the other hand, the self-censorship associated with subsequent punishment operates without a specific judicial determination of whether the speech in question is constitutionally protected. This self-censorship is more pernicious; it may include "protected speech," that is, speech that the added institutional safeguard of judicial review would save from government suppression.

C. *The Alleged Superiority of Criminal Procedures*

The idea is that criminal procedures such as jury trials and a higher burden of proof that attend a system of subsequent punishment afford speech a protection superior to that of the civil procedures of injunctive relief. At the outset, the notion of a procedural difference between injunctive relief and subsequent punishment is somewhat wide of the mark. The legal rights embodied in an injunction are indeed determined by civil procedures, but before a court can impose punishment for activities inconsistent with the injunction, it must afford the defendant a hearing attended by the basic features of a criminal trial.[196] This modern development, based on due process, requires at the contempt stage such procedures as a jury trial[197] and proof beyond a reasonable doubt.[198]

At the rights-determining stage, where the court formulates the terms of the injunction, the procedure is indeed civil. But at this task of formulating rights, of sifting protected from unprotected speech, the adversarial procedures of the civil process seem equal to the procedures of criminal process. Indeed, that mainstay of criminal process, trial by jury, has generally been overly suppressive of speech.[199] The dissident speaker has not been a favorite of the juror, and it is the dissident's right to speak that is a measure of freedom of speech. On the whole, scholars who have considered this problem are inclined towards a civil process that limits jury participation.[200]

In any event, the whole argument that subsequent punishment pro-

---

196 *See* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 543-51 (1970). See also Vance v. Universal Amusement Co., 445 U.S. 308, 322-23 (1980) (White, J., dissenting) ("An exhibitor who shows a film arguably violative of the injunction would likely be tried for criminal contempt. At such a proceeding the exhibitor would have the rights of any criminal defendant. . . . Such procedures seem more than adequate . . . in the First Amendment context.")

197 Bloom v. Illinois, 391 U.S. 194 (1968).

198 Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911).

199 Z. CHAFEE, *supra* note 77, at 503; L. LEVY, *supra* note 8, at 252.

200 *See, e.g.,* Monaghan, *supra* note 196, at 528-32. Professor Monaghan writes that "first amendment considerations should be read to confine, not expand, the jury's role." *Id.* at 529. His conclusion is based on the judge's greater sensitivity to first amendment values and that a judge's decision is subject to a more searching appellate review. *Id.*

vides better procedures can be turned on its head. It assumes that suppressions by subsequent punishment will in fact be tested by the protections of criminal procedure. But if the system of criminal punishment works as it should, much of the suppression will not be subject to judicial process. Instead, it will be the result of a self-censorship by the risk-averse, a mode of suppression that evades judicial review and criminal procedures.

The Supreme Court has invalidated this censorship that lacks process. In *Bantam Books, Inc. v. Sullivan*, the distributor was found to have withdrawn certain books from publication because of a "threat of prosecution."[201] The Court explicitly recognized that this suppression circumvented the judicial process and that it avoided "a determination of obscenity . . . in a criminal trial hedged about with the procedural safeguards of the criminal process."[202] Injunctive relief, which requires judicial process, and probably adversarial procedures, for each instance of suppression, avoids this problem.[203]

D. *The Overbroad Injunction*

The matter of "first amendment process" has received a fair amount of the Supreme Court's attention in recent years. Much of this attention has involved correcting certain problems, none overwhelming, of injunctive relief. For instance, the Court has limited the duration of interlocutory injunctions[204] and it has required expedited appeals of in-

---

201 372 U.S. 58 (1963); *see* notes 112-18 and accompanying text *supra*.

202 *Id.* at 70. *See also* Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353, 1358-62 (5th Cir.), *cert. denied*, 447 U.S. 931 (1980).

203 *See* Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 183-84 (1968).

204 Professor Hunter, in his response to this Article, has referred to the "collateral order" doctrine and the fact that injunctions, in the case of interlocutory injunctions, may be based on a summary process. Hunter, *Toward A Better Understanding Of The Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV. 283, 286-87 (1982). The collateral order doctrine would bar the first amendment as a defense in a contempt action, the question to be litigated being that of whether conduct proscribed by the injunction has occurred. *See* Walker v. City of Birmingham, 388 U.S. 307 (1967). Ordinarily, this would not seem inconsistent with first amendment process. If "[t]he special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is protected by the First Amendment," Pittsburgh Press Co. v. Pittsburgh Human Relations Comm'n., 413 U.S. 376, 389-70 (1973), then application of the collateral order doctrine in the context of a permanent injunction would not seem an untoward restraint of speech. The reason is that the permanent injunction is the result of a complete judicial process.

Interlocutory injunctions present a different problem; here the injunction may be based on a summary and incomplete process. In this context, application of the collateral order doctrine may allow a restraint of speech "before an adequate determination that it is protected by the First Amendment." In this context, Professor Hunter's concerns about the collateral order doctrine and interlocutory injunctions are well-taken. The Supreme Court, however, by requiring that the duration of "interim judicial orders" be "limited to preserving the status quo for the shortest fixed period compatible with sound judicial administration"

junctions.[205] Although a full discussion of these developments would unduly lengthen this Article, one particular procedural matter, that of "overbroad" injunctions, warrants a present attention, because it involves what may be the fundamental explanation of *Near v. Minnesota*,[206] the decision that is broadly read as establishing the current presumption against injunctions against speech.

The case involved a constitutional challenge to a restraint under the "Minnesota Gag Law," a state statute that proscribed publication of "malicious, scandalous, or defamatory" newspapers.[207] Pursuant to this statute, a state court, because of the antisemitic rabble of a weekly tabloid, the *Saturday Press*,[208] enjoined it from publishing or circulating "any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law."[209] This order did not identify any specific publication; instead, it broadly and vaguely prohibited the "malicious, scandalous or defamatory." In order, therefore, to guard against punishment for contempt for publishing anything that might touch the vague confines of "malicious, scandalous or defamatory," the *Saturday Press* was forced either to clear in advance future issues with the court, or not to publish them at all.

---

has diminished the problem. United States v. Thirty Seven Photographs, 402 U.S. 363, 368 (1971). See also Vance v. Universal Amusement Co., 445 U.S. 308 (1980).

There remains, however, the use of an interlocutory injunction (historically the temporary restraining order) to upset the timing of speech, *e.g.*, a temporary restraining order barring a political rally that night. Here again, Supreme Court action, a requirement of adversarial process for such an order rather than "ex parte TRO's," eases the problem somewhat. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 183-84 (1968).

205 National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); *see also* Nebraska Press Ass'n v. Stuart, 423 U.S. 1319 *reh'g granted* 423 U.S. 1327 (1975) (Blackmun, Circuit Justice).

206 283 U.S. 697 (1930). Also worth mentioning at this point is the issue of "justiciability," in view of its relevance to the distinction between subsequent punishment and preventive relief. Subsequent punishment is based on a judgment as to the legality of conduct that has already occurred. On the other hand, injunctions, being preventive, must sometimes be premised on anticipated events. The court that is asked to enjoin future speech may have to act when the content and consequences of the speech are not yet focused and sharpened by context. This obviously can promote judicial guesswork and increase the risk of erroneous suppressions. *See, e.g.,* United Pub. Workers v. Mitchell, 330 U.S. 75, 90 (1947). Everything, however, must be viewed in context—including the need for context.

First, an injunction will often be requested for speech that has already been published. Second, the speech is often written, so its content can readily be determined prior to publication (as is the case with the obscenity of a book not yet distributed for sale). Third, the interest that conflicts with speech may be such that it can be served only by preventing the speech; therefore, to wait for context is to deny the interest. For example, in the *Progressive* case, *see* note 168 *supra*, it would have done little good for the government to seek relief after the article describing how to constrnct a hydrogen bomb was published. Fourth, if a court postpones consideration of the issues until the subsequent punishment stage, speech lost to self-censorship will never provide a better context.

207 *See* 283 U.S. at 701-02.

208 *Id.* at 704.

209 *Id.* at 706.

This blanket injunction, according to the Supreme Court, placed the newspaper under "an effective *censorship*."[210] On the other hand, injunctions that specify parties and publication, and therefore provide process for each and every act of suppression, do not share the deficiency of the order in *Near v. Minnesota*. This case, then, concerned a presumption, not against all injunctions, but against the broad, nonspecific ones that suppress in an overly inclusive manner akin to administrative licensing and subsequent punishment. Recently, this distinction led the Florida Supreme Court, in *Ladoga Canning Corp. v. McKenzie*,[211] to overturn a lower court order enjoining distribution of any printed materials that violated Florida's obscenity statute. This order, the court held, would not do. It would have required the respondent booksellers "to guess at their peril which of their publication are not obscene." It would have deprived respondents of their "right" to "a prior judicial determination of the status of and clear identification of each item whose distribution is sought to be enjoined."[212]

CONCLUSION AND PROLOGUE

Professor Kalven, commenting on the *Pentagon Papers* case (where the prior restraint doctrine, appearing in talismanic splendor, played the leading role[213]) observed that "it is not altogether clear just what a prior restraint is or just what is the matter with it."[214] But in light of Supreme Court decisions such as *Freedman v. Maryland*[215] and *Bantam Books, Inc. v. Sullivan*,[216] perhaps we can say "what a prior restraint is":

---

210 *Id.* at 712 (emphasis added).

211 370 So. 2d 1137 (Fla. 1979).

212 *Id.* at 1141.

213 In the *Pentagon Papers* case, the executive branch attempted to enjoin publication of a purloined copy of a Defense Department history of our involvement in Vietnam. After hearings, the Second Circuit granted an interlocutory order temporarily enjoining publication. Following an extremely expedited briefing and argument schedule, the Supreme Court summarily overturned the lower court order in a two-paragraph per curiam opinion. The Court based its opinion on the prior restraint doctrine and the heavy presumption it creates against injunctive relief. New York Times Co. v. United States, 403 U.S. 713 (1971). Curiously enough, the precedent on which the majority primarily relied was Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), which in fact created a presumption against subsequent punishment rather than injunctive relief. *See* text accompanying notes 118-30 *supra*. *See also* Penthouse Int'l, Ltd. v. McAuliffe, 619 F.2d 1353 (5th Cir), *cert. dismissed*, 447 U.S. 931 (1980).

Justice Harlan, arguing in dissent that the majority had acted "almost irresponsibly" in its frenzied refusal to address the merits of the case, listed a number of critically important issues that had gone unresolved. 403 U.S. at 847-48. Justice Harlan seems right in that the problem was not with the form of relief. If, as the government claimed, there were indeed serious threats to peace negotiations in Paris and to the safety of servicemen then in combat, it seems it could do little other than seek preventive relief. Moreover, the relief granted was a stay, after adversarial processes, of an identified publication for a short period. Thus, it is hard to agree with the majority that the problem was with process.

214 Kalven, *The Supreme Court—A Foreword*, 85 HARV. L. REV. 3, 32 (1971).

215 380 U.S. 51 (1965), *discussed in* notes 46-52 and accompanying text *supra*.

216 372 U.S. 58 (1963); *see* notes 118-24 and accompanying text *supra*.

It is a restraint of speech imposed without the checks and examinations of judicial review.[217] "Just what is the matter" with such a restraint is that it operates without judicial review and thus creates an unacceptable risk of erroneous suppression of speech. Accordingly, the Supreme Court has repeatedly overturned bureaucratic suppressions of speech that were not subject to immediate judicial review.[218] The point that has evaded us, however, is that as courts disapprove of schemes of such administrative censorship, they should also disfavor systems of subsequent punishment. The self-censorship of subsequent punishment, which may be enhanced according to the tastes and preferences of enforcement officials, also evades judicial review.

Because injunctions are necessarily the product of a judicial process, they should be preferred to subsequent punishment. This, of course, reverses the hierarchy of process established by the present prior restraint doctrine. It should be remembered, however, that preventive civil relief is not without costs to speech. In this regard, my point has been that preventive civil relief, including injunctions, carries a significantly *lesser* cost to speech.

This cost, of the best of process, leads me to speculate about a matter of substantive first amendment law. So far, I have taken the law as it stands, that free speech is not an absolute right and Congress can therefore enact some laws against speech, even public, or political, speech. Accepting these laws as a given, I have attempted to identify the processes that minimize the suppression of constitutionally protected speech. But these laws, uniquely and incurably overinclusive, inevitably chill too broadly. At the same time, they are an easy invitation to enforcement officials to enhance this chill according to their own politics and taste, with threats of prosecution, blacklists, litigation costs, and so on. So while we try to order the means of suppression of speech so as to diminish the costs to speech of these laws, we find no means of eliminating these costs completely. Laws against speech, then, in and of themselves may "abridge" freedom of speech.

There is evidence that the framers were so persuaded. Familiar as they were with England's "abusive prosecutions" of political spcech under its constructive treason laws, they precluded such prosecutions for speech alone and instead required, by the treason clause, proof of an overt act. This protection of speech, relating to prosecutions, gained "farther security"[219] by the first amendment. This amendment, consis-

217 "The special vice of a prior restraint is that communication will be suppressed either directly or indirectly by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." Pittsburgh Press v. Human Relations Comm'n, 413 U.S. 376, 390 (1973).

218 *E.g.*, Freedman v. Maryland, 380 U.S. 51 (1965).

219 J. TAYLOR, *supra* note 90, at 414.

tent with the view that it is impossible to confine laws against speech to socially useful applications, is by its terms a bar to lawmaking: "Congress shall make no laws. . . ."

This relation between the treason clause and the first amendment was recognized early on. As explained by John Taylor:

> The third section of the third article of the general constitution [the treason clause] had been deeply rooted in the natural right of free utterance, before the publick solicitude required its farther security by the first amendment. . . . Irreverence expressed for our constitution and government; falsehood or reasoning to bring them into contempt and overturn them; were not thought politically criminal. Instead of being condemned to punishment, they are shielded against prosecution. . . .[220]

220 *Id.* Taylor also added that the "utterance of any opinion could not could not constitute treason." *Id.* Treason, in Taylor's view, included sedition. In this regard, Taylor with some precience warned that "as in the case of sedition, [Congress] might go on to enact a code of law to punish arts heretofore called treasonable, . . . by fine, confiscation, banishment, or imprisonment, until social intercourse shall be hunted by informer out of the country; and yet all might be said to be constitutionally done, if principles could be evaded be words." S. DOC. NO. 973, 62d Cong., 2d Sess. 99-100 (1912). In this regard, Professor Hurst, in a thorough study of the treason clause, concludes that it was intended to bar federal prosecution of "seditious" speech. J. HURST, THE LAW OF TREASON IN THE UNITED STATES 126-66 (1971).