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Filling the Void in First Amendment Jurisprudence: Is There a Solution for Replacing the Impotent System of Prior Restraints?

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NOTES

FILLING THE VOID IN FIRST AMENDMENT JURISPRUDENCE: IS THERE A SOLUTION FOR REPLACING THE IMPOTENT SYSTEM OF PRIOR RESTRAINTS?

Richard Favata[*]

INTRODUCTION

"[R]estrictions which could be validly imposed when enforced by subsequent punishment are, nevertheless, forbidden if attempted by prior restraint."[1]

The First Amendment of the Constitution protects a citizen's right to exercise free speech. The freedom of speech is a coveted right that Americans exercise daily. As a testament to its importance, the scope of the right of free speech has continuously been litigated in courts across the nation.[2] In certain cases, the government has attempted to restrict speech using "prior restraints."[3]

Prior restraints prohibit speech prior to its publication.[4] Prior restraints are essentially a means of censorship. Critics have argued that the government should reserve prior restraints for speech that is extremely inflammatory and detrimental to the public.[5] Prior restraints on speech may take many forms.[6] The earliest form of prior

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1. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648, 648 (1955).

2. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Texas v. Johnson, 491 U.S. 397 (1989); Brandenberg v. Ohio, 395 U.S. 444 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

3. *See generally* N.Y. Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931); *In re* Providence Journal Co., 820 F.2d 1342, 1345 (1st Cir. 1986); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

4. *See, e.g., N.Y. Times*, 403 U.S. at 714; *Near*, 283 U.S. at 701-07; Emerson, *supra* note 1, at 648; John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 Yale L.J. 409 (1983).

5. *See* Emerson, *supra* note 1, at 648; Jeffries, *supra* note 4, at 412.

6. *See* Jeffries, *supra* note 4, at 412; Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. Rev. 1 (1989).

restraint originated in England, and was known as administrative preclearance.[7] Today, court-ordered injunctions are a popular means of instituting a prior restraint.[8] Because the freedom of speech is so important and prior restraints serve to curtail that right, the courts have been highly critical of prior restraints.[9] In the landmark case of *New York Times Co. v. United States*, the Supreme Court decided that an injunction prohibiting the publication of the "Pentagon Papers" would constitute a prior restraint and was thus impermissible.[10] The Court noted that, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[11]

Though courts have undoubtedly maintained a strong animus toward prior restraints, a corollary to the doctrine has arisen.[12] The corollary is known as the collateral bar rule. The collateral bar rule dictates that even unconstitutional court orders must be complied with until amended or vacated.[13] Essentially, disobeying a court order, such as an injunction prohibiting publishing a story, leads to a contempt charge.[14] Under the collateral bar rule, the charge of contempt will stand regardless of whether the original court order had merit. Therefore, a party that fails to abide by the injunction is barred from challenging the validity of the injunction on the ground that the court erred in applying the underlying substantive law.[15]

Because the collateral bar rule is rather harsh and serves as an impediment to timely publication of speech, an exception has developed under which "[a] party subject to an order that constitutes a transparently invalid prior restraint on pure speech may challenge

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7. *See* Jeffries, *supra* note 4, at 412.

8. *See, e.g., N.Y. Times*, 403 U.S. at 714; *Near*, 283 U.S. at 704-05; *Providence Journal*, 820 F.2d at 1345; *Progressive*, 467 F. Supp. at 991; *see also* Jeffries, *supra* note 4, at 412; *see infra* Part I.A.3.ii.

9. *See, e.g., N.Y. Times*, 403 U.S. at 714; *Near*, 283 U.S. at 707-23; *Providence Journal*, 820 F.2d at 1345; *Progressive*, 467 F. Supp. at 992-94.

10. *N.Y. Times*, 403 U.S. at 714.

11. *Id.* (citation omitted).

12. John R.B. Palmer, Note, *Collateral Bar Rule and Contempt: Challenging a Court Order After Disobeying It*, 88 Cornell L. Rev. 215 (2002) (providing an excellent overview of the collateral bar rule and its application to different fields of law); *see also* Walker v. City of Birmingham, 388 U.S. 307 (1967); *Providence Journal*, 820 F.2d at 1345.

13. *Providence Journal*, 820 F.2d at 1345.

14. *See* Stephen R. Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539, 552-53 (1977); Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 Mich. L. Rev. 281, 311 (2000); John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239, 252 (2001); *see also Walker*, 388 U.S. at 315.

15. Conversely, other types of judicial orders may be violated without forfeiting the right to challenge the validity of the order on the merits. A court ordered subpoena is an example of such an order.

the order by violating it."[16] Unfortunately, the manner in which the case law developed in the area of transparently invalid restraints has caused the collateral bar rule to lose its force in the realm of First Amendment jurisprudence.[17] The Supreme Court has never upheld a prior restraint on protected pure speech.[18] As a result, a void has been created in First Amendment jurisprudence. The courts have not ruled out the possibility that certain topics, falling within the realm of protected speech, may need restriction.[19] They are, however, apparently unwilling to impose restrictions in the form of a prior restraint.[20] In today's political climate, certain publications could be extremely detrimental to the nation's safety.[21] Therefore, if the government is committed to the idea of maintaining a mechanism for restricting speech, the void must be filled by another mechanism for curtailing speech.

Accordingly, this Note argues that under the present state of First Amendment jurisprudence, all prior restraints on protected pure speech could be deemed transparently invalid,[22] and consequently can be violated without suffering the repercussions associated with the collateral bar rule.[23]

Parts I.A.1 and I.A.2 of this Note examine the history of prior restraints, both as they developed in England and as they became a part of the United States' jurisprudence. Moreover, Part I.A.3 details

16. *Providence Journal*, 820 F.2d at 1344. The term "pure speech" refers to printed material and oral speech. *See Walker*, 388 U.S. at 307; United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972); Christine Hasiotis, *Constitutional Law—Transparently Invalid Order Exception to the Collateral Bar Rule Under the First Amendment in the Federal Courts—In re* Providence Journal Company, *809 F.2d 63 (1st Cir. 1986)*, 21 Suffolk U. L. Rev. 265, 267 (1987). An injunction issued under a law that has the pretense of unconstitutionality must still be obeyed until vacated or modified. *See* W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 766 (1983) (holding a court ordered injunction must be obeyed until amended or vacated); GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 386 (1980) (same); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 439 (1976) (same).

17. *See infra* Part III.A (describing how the case law has developed in such a manner as to render the collateral bar rule impotent as a tool for restricting pure speech).

18. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971); Near v. Minnesota, 283 U.S. 697 (1931); *Providence Journal*, 820 F.2d at 1345; United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

19. *Providence Journal*, 820 F.2d at 1345; *see N.Y. Times*, 403 U.S. at 714; *Near*, 283 U.S. at 716; *Progressive*, 467 F. Supp. at 996.

20. *See N.Y. Times*, 403 U.S. at 714; *Near*, 283 U.S. at 723; *Providence Journal*, 820 F.2d at 1345; *Progressive*, 467 F. Supp. 992-94.

21. See *infra* Part II.A, detailing two specific instances where publication could threaten national security, and therefore may warrant restriction.

22. There are exceptions to this rule. Such exceptions include pure speech that is obscene, as well as speech that infringes upon intellectual property rights. *See infra* Part I.B.2.i.

23. *See infra* Part III.A.

the different types of prior restraints and the implications each has on the freedom of speech. Part I.B discusses the collateral bar rule and its application to the First Amendment. This section details the rule's origin, reasoning, and application to the First Amendment through an analysis of *Walker v. Birmingham*[24] and other relevant case law. Part I.B.2 delineates the exceptions that have developed to the collateral bar rule, as well as the ways in which the modern prior restraint doctrine had been applied to issues such as national security. Part I.C.1 discusses the case of *New York Times Co. v. United States* and its holdings, contrasted with a scenario arising from the case of *United States v. Progressive, Inc.*[25]

Part II details the conflict that has resulted from the development of the case law and commentary that consistently insist on preserving the ability to restrict speech should a case arise where it would be in the nation's best interest. This Note details two such scenarios.[26] However, despite the insistence on maintaining a system of restricting speech, the government has no legitimate means to do so due to the development of the relevant case law. Part III features this argument: the transparently invalid exception to the collateral bar rule has rendered the doctrine of prior restraints impotent as a mechanism for restricting speech. Finally, Part III details possible solutions for filling the void left by the absence of an adequate prior restraint doctrine, culminating in the conclusion that while the current system is undoubtedly flawed, it is still the best mechanism for protecting the nation's safety and its constitutional rights. The nation must therefore rely on the integrity and judgment of the media to censor the material that is truly a risk to national security, and the law to police that which crosses the line dictated by *Near v. Minnesota*.[27]

I. RESTRAINTS ON SPEECH

A. *The Origins of Prior Restraints*

The doctrine of prior restraints traces its ancestry back to English statutory law, and its development in the United States mirrors the unwelcomed reception received overseas. This section examines the history of the doctrine. One of the very first prior restraint cases heard before the Supreme Court, *Near v. Minnesota*, will also be discussed. Finally, the section highlights the four different ways in which speech can be restricted prior to its dissemination, concentrating on

24. 388 U.S. 307 (1967). In *Walker*, the Court held that the collateral bar rule would apply regardless of whether a prior restraint was unconstitutional.

25. 467 F. Supp. 990 (W.D. Wis. 1979).

26. *See infra* Part II.A.

27. 283 U.S. 697 (1931); see *infra* Part I.A.2.

administrative preclearance and injunctions.

1. English Origins and the First Amendment

The doctrine of prior restraints is rooted in the statutory law of England.[28] The English Licensing Act of 1662 developed a scheme requiring the Crown authorize all publications.[29] The Act afforded the Crown the opportunity to restrict the publication of materials that it felt were dangerous to the Crown's interest.[30] The statute had a term of thirty-two years. In 1694, the English Parliament refused the opportunity to renew the Licensing Act.[31] It had become a great burden, and was thought of as "unwieldy, extreme, and even ridiculous."[32] In due time, the English became accustomed to the freedoms that the abandonment of the act allowed.[33] Blackstone, one of the first commentators on prior restraints, declared:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.[34]

While Blackstone clearly denounced restriction of speech prior to publication, he also conceded that the freedom of speech is not totally unbridled. Blackstone believed in a state's right to punish improper speech only subsequent to its publication.[35]

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28. *See* Jeffries, *supra* note 4, at 412; William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 Cornell L. Rev. 245, 247-49 (1982) (discussing the English licensing systems).

29. *See* Jeffries, *supra* note 4, at 412; *see also* Emerson, *supra* note 1, at 651; Richard J. Vangelisti, *Cass Sunstein's "New Deal" For Free Speech: Is It An "Un-American" Theory of Speech?*, 85 Ky. L. J. 97, 130 (1997).

30. Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 Case W. Res. L. Rev. 1, 6 (2000).

31. *See* Jeffries, *supra* note 4, at 412. The act was allowed to expire in large part due to the difficulties in administrating the statute. *See* Emerson, *supra* note 1, at 651; Donald E. Lively, *The Information Superhighway: A First Amendment Road Map*, 35 B.C. L. Rev. 1067, 1073 n.52 (1994); Allen M. Shinn, Jr., *The First Amendment and the Export Laws: Free Speech on Scientific and Technical Matters*, 58 Geo. Wash. L. Rev. 368, 382 n.89 (1990).

32. Emerson, *supra* note 1, at 651.

33. *See* Stanley Godofsky & Howard M. Rogatnick, *Prior Restraints: The Pentagon Papers Case Revisited*, 18 Cumb. L. Rev. 527, 539 (1988); Jeffries, *supra* note 4, at 412.

34. 4 William Blackstone, Commentaries *152 (Wayne Morrison ed., 2001).

35. *See id.*; Jeffries, *supra* note 4, at 413-14.

From the English tradition, the Founders of this nation crafted the First Amendment.[36] It is evident that this Amendment and the subsequent development of its case law, in which prior restraints became not only obsolete but also condemned, were a reaction to the licensing schemes employed by the Crown.[37] What is less obvious is the manner in which the drafters intended to handle the second half of Blackstone's assertion regarding restraints on speech.[38] Because the Supreme Court's interpretation of the Framers' intention has somewhat wavered,[39] it is unclear whether speech was intended to be protected from both prior restraints and subsequent punishment by statute[40]. The current state of the law, however, can best be summarized as follows: "[T]here is a sense that the Court's current hostility to laws punishing speech after the fact, while strong, nevertheless does not rise to the level of its special hostility toward prior restraints."[41]

2. *Near v. Minnesota*

The Supreme Court first took the issue of prior restraints head on in 1931, in the case of *Near v. Minnesota*.[42] The case centered around a Minnesota statute allowing injunctive relief prohibiting the publication of a "malicious, scandalous, and defamatory newspaper, magazine, or other periodical."[43] The law was couched as a mechanism for eliminating public nuisances.[44] The controversy surrounding this statute arose when a weekly newspaper stated "a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and

36. *See* Laurence H. Tribe, American Constitutional Law, § 12-34, at 1039 (2d ed. 1988); Vangelisti, *supra* note 29, at 130; *see also* Shinn, *supra* note 31, at 382-83.

37. *See* Tribe, *supra* note 36, § 12-34, at 1039 (noting that the Founders' rejection of the English licensing schemes led to the protections offered by the First Amendment); Shinn, *supra* note 31, at 382-83; *see also* Vangelisti, *supra* note 29, at 130; *see generally* N.Y. Times Co. v. United States, 403 U.S. 713 (1971); Walker v. City of Birmingham, 388 U.S. 307 (1967); Near v. Minnesota, 283 U.S. 697 (1931); *In re* Providence Journal Co., 820 F.2d 1342, 1345 (1st Cir. 1986); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979); Zechariah Chafee, Jr., Free Speech in the United States 18-20 (1946).

38. *See* Wells, *supra* note 30, at 7; *see also* Jeffries, *supra* note 4, at 410; Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53, 54 (1984); Scordato, *supra* note 6, at 5.

39. *See* Schenck v. United States, 249 U.S. 47 (1919) (suggesting that all laws restricting speech are unconstitutional). *But see* Patterson v. Colorado, 205 U.S. 454, 462 (1907) (holding that while prior restraints are unconstitutional, subsequent punishments may be constitutional if used to protect the public welfare).

40. *See* Wells, *supra* note 30, at 7.

41. *Id.* at 7.

42. 283 U.S. 697 (1931).

43. *Id.* at 702.

44. *See* Wells, *supra* note 30, at 8.

agencies were not energetically performing their duties."[45] The government sought to enjoin the newspaper's future publication.

The Supreme Court struck down the statute as unconstitutional.[46] The Court reasoned that the statute's purpose "was not punishment . . . but suppression of the offending newspaper."[47] Moreover, the Court stated that the statute and the injunction against the newspaper were akin to censorship because they not only prevented the newspaper from publishing this article, but all similar future articles, unless the newspaper could convince a judge of a publication's good purpose.[48] Chief Justice Hughes, writing for the Court, renounced the use of prior restraints: "[I]t has been generally, if not universally, considered that it is the chief purpose of the guaranty [First Amendment] to prevent previous restraints upon publication."[49] Though Hughes laid out this very staunch principle, he was careful to include that prior restraints are not *per se* unconstitutional and that there may be instances, though limited, where they may survive judicial scrutiny.[50]

> No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force."[51]

Moreover, Hughes dictated that not all subsequent punishments would withstand judicial scrutiny.[52]

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45. *Near*, 283 U.S. at 704.

46. *Id.* at 697. However, a strong dissent led by Justice Butler argued that the statute at issue, as applied to the current case, was not unconstitutional. The dissenters reasoned that, the "constitution was never intended to protect malice, scandal and defamation when untrue or published with bad motives or without justifiable ends. It was never the intention of the constitution to afford protection to a publication devoted to scandal and defamation." *Id.* at 728-29.

47. *Id.* at 711.

48. *Id.* at 712. This restraint relied on a statute that made "malicious, scandalous and defamatory" speech illegal. Therefore, if the Court had upheld the statute in this context, any speech that reported official misconduct would have been prohibited. Thus, the publisher would have been censored in the future.

49. *Id.* at 713. Chief Justice Hughes relied on Blackstone and other commentators' disdain for prior restraints. Moreover, he likened the system of restraint in *Near* to the English licensing schemes, and thus struck down the statute.

50. *Id.* at 716.

51. *Id.* (citations omitted). These exceptions, as well as others, are discussed *infra* at Part I.B.2.

52. *Near*, 283 U.S. at 715. Hughes quotes Cooley noting "[t]he liberty of the press might be rendered a mockery and a delusion, . . . if, while every man was at liberty to

Though *Near* is regarded as a landmark decision in prior restraint law, and has clearly shaped the future case law on the subject, it is an unsatisfying opinion in many respects.[53] First, the Court provided no insight into why prior restraints are so much more abhorrent to First Amendment rights than other forms of regulation.[54] Second, the Court made no effort to define prior restraints.[55] Regardless, the Court did make it clear that injunctions were prior restraints, and that prior restraints existed under the specter of unconstitutionality.[56] Thus, injunctions were presumptively unconstitutional. This clear principal has been instrumental in the development of the law of prior restraints.

3. Types of Restraints

Prior restraints come in a few varieties, which Emerson enumerated in his article, *The Doctrine of Prior Restraint.* The first type of restraint, previously discussed, is the administrative preclearance that England employed as a means to restrict speech,[57] and which the United States Supreme Court has criticized over the years.[58] Administrative preclearance, in a sense, operates as a statute enforced by criminal prosecution and punishment.[59] The enforcement of the law has nothing to do with the speech itself, but rather with whether an individual had acquired permission before publication.[60]

The second type of prior restraint arises out of the judicial issuance of preliminary injunctions against speech.[61] In injunction cases,[62]

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publish what he pleased, the public authorities might nevertheless punish him for harmless publications." *Id; see also supra* note 40 and accompanying text.

53. *See* Thomas I. Emerson, The System of Freedom of Expression 506 (1970); Sandra Lynn Jordan, Bering v. Share: *Abortion Protestors Lose Ground in the State of Washington*, 18 Cumb. L. Rev. 205, 211 (1987).

54. *See* Emerson, *supra* note 53, at 506; Jordan, *supra* note 53, at 211.

55. *See* Emerson, *supra* note 53, at 506; Jordan, *supra* note 53, at 211.

56. *Near*, 283 U.S. at 716; *see also* Wells, *supra* note 30, at 9 (suggesting that the Court deemed prior restraints to be presumptively unconstitutional, but failed to address how they differed from other forms of restraint).

57. *See* Emerson, *supra* note 1, at 655; *see also supra* Part I.A.1.

58. *See* Jeffries, *supra* note 4, at 421-26. Jeffries discusses both case law and commentators who have denounced systems of administrative preclearance. *See also* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Freedman v. Maryland, 380 U.S. 51 (1965) (striking down a statute requiring prior licensing of movies by the Maryland State Board of Censors); Niemotko v. Maryland, 340 U.S. 268 (1951) (holding that systems of administrative preclearance are generally invalid); Tribe, *supra* note 36, at §§ 12-35, 12-36, at 1042-54. *See generally* Howard O. Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 Cornell L. Rev. 283 (1982).

59. *See* Jeffries, *supra* note 4, at 421-22.

60. *See id.* at 421; Shinn, *supra* note 31, at 383.

61. Emerson, *supra* note 1, at 655-56; Shinn, *supra* note 31, at 383-84.

62. N.Y. Times Co. v. United States, 403 U.S. 713 (1971); Walker v. City of

unlike the administrative preclearance cases, speech is not punishable in a subsequent fashion. Thus, if no prior restraint was issued, the speech cannot be attacked.[63]

The third category of restraints is legislative prior restraint statutes. These statutes, as their name indicates, make it unlawful to publish anything that does not comply with a "legislative act."[64] In essence, these are quite similar to administrative preclearance.[65]

Emerson's final category of prior restraints is termed indirect or secondary prior restraints.[66] These occur when political views or other beliefs serve as a prerequisite for entering a certain office.[67] An example of an indirect restraint appears within the Taft-Hartley Act,[68] which included a non-communist affidavit and contains loyalty security programs.[69] This Note concentrates on administrative preclearance and its similarity to prior restraint statutes, as compared with injunctions that serve as prior restraints.

i. *Administrative Preclearance*

Administrative preclearance centers around the concept of permission.[70] A modern example of such administrative preclearance

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Birmingham, 388 U.S. 307 (1967); Near v. Minnesota, 283 U.S. 697 (1931). It should be noted that these are only three of many famous cases dealing with injunctions. *See also* Schenck v. United States, 249 U.S. 47 (1919); Patterson v. Colorado, 205 U.S. 454, 462 (1907); *In re* Providence Journal Co., 820 F.2d 1342, 1345 (1st Cir. 1986); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

63. For the purposes of this Note, an "attack" on speech occurs when a party attempts to have it enjoined prior to publication. In certain instances, such as in *Near*, the speech may have been subject to a defamation action. *See* 283 U.S. at 697. In an action for defamation, the complaining party can obtain damages in the form of monetary compensation. However, the party cannot obtain redress in the form of an injunction of speech. These are two separate proceedings. This is also the case in other tort actions, such as actions regarding the right of publicity and disclosure of private or embarrassing facts.

This list is by no means exhaustive, but is simply being used to exemplify that other means are available for challenging speech, even if they do not lead to its suppression. "Not all speech will satisfy the requisite elements of these torts and thus generate legal liability for the speaker, but all speech will be 'screened' in the sense that it has the potential to generate legal liability for the speaker should the requisite elements be present." Scordato, *supra* note 6, at 17.

64. *See* Emerson, *supra* note 1, at 656.

65. *See infra* Part I.A.3.i.

66. *See* Emerson, *supra* note 1, at 656.

67. *See id.*

68. In 1947 Congress passed the Labor-Management Relations Act, more commonly known as the Taft-Hartley Act. In short, the act enlarged the National Labor Relations Board, thus establishing greater control over labor disputes. *See* Infoplease.com, *Taft-Hartley Labor Act*, at http://www.infoplease.com/ce6/bus/A0847620.html (last visited. Sept. 17, 2003).

69. *See* Emerson, *supra* note 1, at 656.

70. *See* Vince Blasi, *Prior Restraints on Demonstrations*, 68 Mich. L. Rev. 1482, 1549-50 (1970).

is the rating system employed by the motion picture industry. Under this type of restraint, publications have to be pre-screened by what is in effect a censor before they go to print. The courts and commentators alike have been highly critical of such a system.[71]

The main complaint about a system of administrative preclearance is the bureaucracy that it creates. "The function of the censor is to censor. He has a professional interest in finding things to suppress."[72] Thus such a system lacks the objectivity, sensitivity, and the deference that ought to be afforded when dealing with constitutional rights. From this suggestion, courts and commentators have drawn the conclusion that administrative preclearance restrictions suffer from overbreadth.[73]

ii. *Preliminary Injunctions*

An injunction is a court order designed to prevent a wrong from occurring in the future.[74] When a court issues an injunction in a case regarding speech, the person who wishes to speak is foreclosed from doing so at the current time. Essentially, the speech is suppressed before it occurs, rather than being punished subsequently, as would normally be the case when a statute is violated.[75] The speech is forbidden, and if one decides to disobey the court order and exercise his "right" to speak, he may face criminal contempt charges.[76]

Injunctions clearly have a drastic effect on the rights of an individual, and thus should be issued sparingly. Rule 65 of the Federal Rules of Civil Procedure provides a basic framework for when an injunction should be issued.[77] However, in a practical sense, the determination is situation-dependent, and at the discretion of the

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71. *See* Emerson, *supra* note 1, at 659; Jeffries, *supra* note 4, at 422-24; *see also* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Freedman v. Maryland, 380 U.S. 51 (1965); Niemotko v. Maryland, 340 U.S. 268 (1951); Hunter, *supra* note 58, at 283; Tribe, *supra* note 36, at §§ 12-35, 12-36, at 1042-54.

72. Emerson, *supra* note 1, at 659.

73. *See Shuttlesworth*, 394 U.S. at 153-59. The Court held the law to be unconstitutional because of its overbreadth. The Court stated that the law failed to provide "narrow, objective, and definite standards to guide the licensing authority." *Id.* at 151; *see also* Jeffries, *supra* note 4, at 422-24.

74. Owen M. Fiss, The Civil Rights Injunction 8 (1978); *see also* McKune v. Lile, 536 U.S. 24 (2002) (seeking an injunction to prevent the withdrawal of prison privileges); Federal Republic of Germany v. United States, 526 U.S. 111 (1999) (seeking an injunction to prevent a scheduled execution).

75. Upon violating a statute the alleged perpetrator may challenge the validity of such statute.

76. Carolyn Grose, Note, *"Put Your Body on the Line:" Civil Disobedience and Injunctions*, 59 Brook. L. Rev. 1497, 1504-05 (1994) (providing a lucid and concise overview of the effect of an injunction).

77. Among other things, Rule 65 requires a showing that the speech will cause immediate and irreparable injury. *See* Fed. R. Civ. P. 65.

court.[78] In determining when to issue an injunction, courts engage in the practice of "balancing equities" or "balancing hardship."[79] In the context of injunctions on speech, this means balancing a constitutional right against the possible harm that will occur if that right is exercised. Because injunctions on speech have such a detrimental and direct impact on a right afforded by the Constitution, there is a strong presumption that such injunctions are unconstitutional and should not be issued or upheld.[80] However, it should be noted that there are instances where an injunction would be merited.[81]

iii. *Prior Restraint Statutes*

A prior restraint statute restricts the opportunity to publish unless an individual or organization complies with the regulations set forth by the statute.[82] If publishers are delinquent in their duty to obey the statute, they will be subject to punishment. Emerson provides examples of such types of prior restraints; including taxes on newspapers, or the requirement that lobbyists and political organizations be registered.[83] Thus, if the tax is not paid or the organization does not register, the violators will be subject to legal sanctions for their failure to comply with the law.[84]

This type of statute deals largely with notification and serves as a *prior* restraint. Essentially, if a party notifies the government of the existence of its organization, whether by paying a tax or by registering, then the party possesses the right to disseminate speech.[85] Another type of statute, which is *not* a prior restraint, is one that limits the content of what is being discussed. Some laws subject speech to the possibility of civil actions. Defamatory speech, speech that invades someone's privacy by portraying them in a false light, the public disclosure of private or embarrassing facts, and appropriation can all

78. This conclusion is gleaned from the voluminous case law regarding injunctions. *See, e.g.*, Lemon v. Kurtzman, 411 U.S. 192, 201 (1973).

79. *Id.* at 201; *In re* DeLorean Motor Co., 755 F.2d 1223 (6th Cir. 1985); Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380 (7th Cir. 1984); Buffalo Forge Co. v. Ampco-Pittsburgh Corp., 638 F.2d 568 (2d Cir. 1981).

80. N.Y. Times Co. v. United States, 403 U.S. 713 (1971); *see infra* Part I.C.1 for an extended discussion of this principle in the context of First Amendment rights and the role of injunctions.

81. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976); *N.Y. Times*, 403 U.S. at 714; Near v. Minnesota, 283 U.S. 697, 716 (1931); Schenck v. United States, 249 U.S. 47, 52 (1919); *In re* Providence Journal Co., 820 F.2d 1342, 1345 (1st Cir. 1986). This also will be discussed in greater detail at *infra* notes 118-22, 159-68, and 171-74 and accompanying text. *See also* Parts I.C, II.A.

82. *See* Emerson, *supra* note 1, at 656; Jeffries, *supra* note 4, at 421.

83. Emerson, *supra* note 1, at 656.

84. *Id.*

85. *See infra* notes 98-102 and accompanying text.

lead to legal liability.[86]

Just as these laws prohibit certain actions, laws could be drafted that prohibit the discussion of certain topics. In a sense, these laws would be akin to administrative preclearance. The difference is simply that under administrative preclearance one would have to gain permission from a censor,[87] whereas under a statutory system, the law would already be in place to dictate what speech is allowed.[88] Each system has both positive and negative aspects. Statutes offer certainty, but it may be extremely difficult to draft one that is not overbroad or underinclusive. Contrarily, administrative preclearance may be tailored specifically to the speech in question;[89] however, such restrictions may be arbitrary and dependent on the particular censor addressing the issue.

4. The Implications of a Statute Prohibiting Speech as Compared with an Injunction

In the case of *Nebraska Press Association v. Stuart*, Chief Justice Burger described the effect of prior restraints on speech versus subsequent punishment's effect on speech. "A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."[90] Burger, however, failed to detail how or why an injunction would have a greater effect on restricting speech than would a subsequent punishment.[91] Presumably, the logic is that an injunction deems speech inappropriate prior to its use. On the other hand, a subsequent punishment follows speech, and therefore the speech is made public prior to any threat of punishment. The difference thus lies in the timing of the punishment. Though an issue of timing in many instances may seem relatively unimportant, in this particular context it makes a substantial difference. A subsequent punishment allows speech to be disseminated before it is attacked, while an

86. *See* Scordato, *supra* note 6, at 17; *see, e.g.*, Freedman v. Maryland, 380 U.S. 51 (1965) (holding that a particular content-based prior restraint was unconstitutional); *see also* R. Randall Kelso, *Standards of Review Under The Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. Pa. J. Const. L. 225, 246 (2002).

87. *See supra* notes 70-73 and accompanying text.

88. *See supra* notes 82-86 and accompanying text (discussing two different types of statutory restrictions on speech).

89. However, this may not be the case. As noted earlier, the role of the censor may serve to perpetuate his own existence, and therefore lead to a problem of overbreadth. *See supra* notes 72-73 and accompanying text.

90. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (citing Alexander M. Bickel, The Morality of Consent 61 (1975)).

91. *Id.*; *see* Wells, *supra* note 30, at 18.

injunction shuts off speech before there is any opportunity to disseminate it.[92] The ability to publish information is key, and the timing of a restraint directly impacts this ability.

B. *Collateral Bar Rule*

The collateral bar rule dictates that even unconstitutional court orders must be obeyed, or the opportunity to challenge their validity is forfeited.[93] This further supports the argument that injunctions on speech serve as a greater deterrent than subsequent punishments.[94] The argument revolves around the application of the collateral bar rule.

The collateral bar rule has a long history in the jurisprudence of the United States.[95] "The United States Supreme Court has repeatedly held that the validity of a judicial order is determined by the court of first instance, and until its decision is modified or vacated through subsequent judicial process, disobedience of the order is in contempt of the court's lawful authority."[96] In the First Amendment context, the collateral bar rule applies as follows: if a publication is enjoined by a court, the would-be publisher of the material has to withhold from publishing the article if he wishes to maintain his right to challenge the validity of the speech and the invalidity of the order. If he chooses to publish, he will be held in contempt regardless of whether the injunction was erroneous and the speech was meritorious under the relevant substantive law.[97] Thus, a publisher is presented with two options, both of which lead to an unappealing result. However, if the publisher obeys the order and retains his right to

92. *See* Jeffries, *supra* note 4, at 430; Andrew P. Napolitano, *Whatever Happened To Freedom of Speech? A Defense of "State Interest of the Highest Order" As a Unifying Standard For Erratic First Amendment Jurisprudence*, 29 Seton Hall L. Rev. 1197, 1254 (1999).

93. *See* Walker v. City of Birmingham, 388 U.S. 307 (1967); *In re* Providence Journal Co., 820 F.2d 1342 (1st Cir. 1986); United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972).

94. *See generally supra* Part I.A.4 and *infra* Part III.A.

95. *See* Redish, *supra* note 38, at 93. Redish points out that the collateral bar rule has not been restricted to First Amendment jurisprudence, but rather has been used in a variety of instances.

96. *See* Hasiotis, *supra* note 16, at 267; *see also* W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 766 (1983) (holding a court ordered injunction must be obeyed until amended or vacated); GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 386 (1980) (same); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 439 (1976) (same). An injunction issued under a law that has the pretense of unconstitutionality must still be obeyed until vacated or modified. United States v. United Mine Workers, 330 U.S. 258, 293 (1947) (holding that erroneous orders must be abided by until amended or vacated). *See also* discussion *infra* Part I.B.1.

97. *See Walker*, 388 U.S. at 320-21; *Providence Journal*, 820 F.2d at 1345; *Dickinson*, 465 F.2d at 500.

challenge the validity, the news may become stale and worthless to him.[98] If he chooses to publish, he will undoubtedly be subject to criminal contempt.[99] The argument thus follows that the collateral bar rule has a greater deterrent effect on speech than a statute providing for subsequent punishment. Once an injunction is violated, a publisher is liable regardless of whether the injunction was issued erroneously. Conversely, one who is alleged to have violated a statute maintains his right to challenge that statute's validity.[100]

The rule's purpose has been best summed up by Justice Stewart's statement in *Walker v. Birmingham*: "[N]o man can be judge in his own case, however exalted his station, however righteous his motives . . . ."[101] Moreover, by requiring deference to a court-issued injunction, the collateral bar rule creates a respect for the judiciary.[102] It should be noted that while the Supreme Court and the Fifth Circuit have explicitly endorsed the collateral bar rule,[103] some states have adopted slightly different approaches to the application of the rule.[104] However, for the purposes of this Note, the focus will be on the interpretation of the collateral bar rule within the federal system.

1. *Walker v. Birmingham*

The Supreme Court touched on the collateral bar rule in *Walker v. Birmingham*, a First Amendment case.[105] In *Walker*, Dr. Martin Luther King, Jr. led a group of local ministers in planning a protest

98. *See* Richard E. Labunski, *The 'Collateral Bar' Rule and the First Amendment: The Constitutionality of Enforcing Unconstitutional Orders*, 37 Am. U. L. Rev. 323, 331-32 (1988).

99. *See Walker*, 388 U.S. at 320-21; *see also* Labunski, *supra* note 98, at 332.

100. The collateral bar rule does not exist in a vacuum. There are several exceptions. One in particular, the "transparently invalid" exception, has taken the teeth out of what seems like an otherwise harsh rule. See *infra* notes 117-20 and accompanying text for a discussion of these exceptions.

101. *Walker*, 388 U.S. at 320-21.

102. Lawrence N. Gray, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 13 J. Suffolk Acad. L. 1, 21 (1999).

103. *Id.*; *see* United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972). In *Dickinson*, the Fifth Circuit held that contempt charges levied against newspaper reporters were valid despite the invalidity of the court orders. The court noted that the collateral bar rule is a "well-established principle" and "an injunction duly issuing out of a court having subject matter and personal jurisdiction *must be obeyed*, irrespective of the ultimate validity of the order." *Id.* at 509. *Dickinson* had a tremendous impact on First Amendment case law. The decision came at a time when courts were moving toward exempting First Amendment cases from the collateral bar rule. *See* Labunski, *supra* note 98, at 337-38. *Dickinson* served to reaffirm the existence of the collateral bar rule within First Amendment doctrine.

104. *See* Labunski, *supra* note 98, at 348-63. Labunski undertakes a case study of the collateral bar rule in several different state jurisdictions.

105. *Walker*, 388 U.S. at 320-21.

against racial segregation.[106] In an effort to comply with local law, the protesters made an unsuccessful attempt to obtain a permit.[107] In accord with the ordinance that required the permit, local authorities were able to obtain a temporary restraining order against the protestors.[108] King and his followers decided to disobey the court order and were subsequently arrested and held in contempt of court.[109]

The Supreme Court upheld the Alabama court's decision finding the protestors in contempt.[110] The lower court focused on the fact that the protestors made no effort to comply with the judge's order, and only challenged the injunction after the parades took place.[111] It is worth noting that even though the Court agreed with this reasoning, the Court implicitly acknowledged that the ordinance was unconstitutional.[112]

> As a general rule, an unconstitutional statute is an absolute nullity and may not form the basis of any legal right or legal proceedings, yet until its unconstitutionality has been judicially declared in appropriate proceedings, no person charged with its observance under an order or decree may disregard or violate the order or the decree with immunity from a charge of contempt of court; and he may not raise the question of its unconstitutionality in collateral proceedings on appeal from a judgment of conviction for contempt of the order or decree.[113]

According to the Court, precedent clearly put the petitioners on notice that they could not bypass orderly judicial review of the injunction before disobeying it.[114]

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106. *Id.* at 310.

107. *See id.* at 310-12.

108. For the purposes of this Note, a temporary restraining order ("TRO") has the same effect on speech as an injunction. The main difference is that a TRO is valid for a shorter period of time than an injunction.

109. This is the exact type of situation that is alluded to at *infra* notes 240-41 and accompanying text. If Dr. King and his followers had never applied for the permit, they would not have been subject to an injunction and subsequent contempt charge. If they had chosen this course of action, they would have been able to challenge the validity of the ordinance at a later date. In fact, in *Shuttlesworth v. City of Birmingham*, the very same statute was violated. 394 U.S. 147 (1969). However, in *Shuttlesworth*, no injunction was issued prior to the violation. The petitioners faced no contempt charge and even had their convictions for violating the ordinance overturned on appeal. The Court reasoned, "our 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." *Id.* at 151.

110. *Walker*, 388 U.S. at 315.

111. *Id.* at 311, 318 (referencing the lower court's opinion).

112. *Id.* at 320.

113. *Id.* (citing Fields v. City of Fairfield, 143 So. 2d. 177, 180 (Ala. 1962)).

114. *Id.*

Despite the presumption of unconstitutionality, the Court still upheld the contempt charge in accordance with established precedent. The Court thereby established the presumption that even unconstitutional orders must be obeyed until they are vacated or amended.[115]

2. Exceptions to the Collateral Bar Rule

Exceptions to the collateral bar rule have developed, in part, as a check against abuses of judicial power. These exceptions are geared toward instances where prior restraints are issued by a judge who either does not have the authority to do so, or where the judgment of the issuing judge is drastically skewed. While the exceptions are sensible as a mechanism to check judicial power, their development has ultimately weakened the force of the collateral bar rule.

The first intimation of an exception came in the Court's prior restraint case *Walker v. City of Birmingham*. In *Walker*, Justice Stewart announced: "Without question the state court that issued the injunction had . . . jurisdiction over the petitioners and over the subject matter of the controversy. And this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity."[116] Accordingly, three exceptions can be gleaned from this statement, including those instances: 1) where the court lacks personal jurisdiction; 2) where the court lacks subject matter jurisdiction; and 3) where the injunction is "transparently invalid."[117] Thus, "[a] party subject to an order that constitutes a transparently invalid prior restraint on pure speech may challenge the order by violating it."[118] Therefore, the rather harsh collateral bar rule has been significantly defanged. Now, in "limited" circumstances, a person can violate the order without forfeiting his right to challenge the validity.[119] The guiding principle behind all of these exceptions to the rule is that while deference should be shown to the judiciary, it must be subject to some constraints. Therefore, the exceptions serve as a means to protect against "improper exercise of judicial authority."[120]

The obvious question at this point is what constitutes a transparently invalid order. The First Circuit in *In re Providence Journal Co.* failed to provide any significant guidance.[121] Admittedly,

115. *Id.*
116. *Id.* at 315.
117. For the purposes of this Note, the discussion will focus on the transparently invalid exception.
118. *In re* Providence Journal Co., 820 F.2d 1342, 1344 (1st Cir. 1986).
119. *Id.*
120. *See* Hasiotis, *supra* note 16, at 272.
121. *Providence Journal* established that that transparently invalid orders could be

the court recognized that the "line between a transparently invalid order and one that is merely invalid is, of course, not always distinct."[122] Thus, the court has left us with the following: "'[A] very clearly wrong' court order is not void and must be obeyed," however, "orders which are transparently invalid . . . need not be obeyed."[123] This standard seems impossible to apply. Without a clear explanation from the courts as to what constitutes an invalid order as opposed to a transparently invalid order, it is unreasonable to expect publishers to make such a determination. When an order attacks protected pure speech,[124] it amounts to a distinction without a difference. Though the language in *Providence Journal* intimates that situations may exist where an order restricting pure speech is valid,[125] through tracing the case law it becomes apparent that any[126] restriction on protected pure speech would be inherently transparently invalid.[127]

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violated. The court, however, failed to provide insight or examples regarding what may constitute a transparently invalid order.

122. *Providence Journal*, 820 F.2d at 1347.

123. *See* Gray, *supra* note 102, at 21 (citations omitted).

124. The term "pure speech" refers to printed material and oral speech. Other categories of speech, such as demonstrations, do not fall into this category. For example, the speech at issue in *Walker* cannot be said to be pure speech; however, the speech at issue in *Near v. Minnesota* is considered pure speech. A distinction is made within the realm of pure speech, i.e. between speech that is protected by the First Amendment, and speech that is unprotected. There has been a great deal of debate as to whether certain categories of speech should be considered "unprotected" as opposed to "less protected." However, for the purposes of this Note, it is only important to understand that certain categories of speech have traditionally not received protection from the courts. "[F]reedom of speech is not absolute, the court added: some types of speech are unprotected or entitled to narrow protection (obscenity, child pornography, fighting words, incitement to imminent lawless activity, and purposely or recklessly made false statements of fact)." Alan Stephens, Annotation, *First Amendment Guaranty of Freedom of Speech or Press as Defense to Liability Stemming from Speech Allegedly Causing Bodily Injury*, 94 A.L.R. Fed. 26, 40 (1989). Conversely, some categories of speech retain ultimate protection by the First Amendment. The Supreme Court, in *Brandenburg v. Ohio*, recognized that political speech is at the core of the First Amendment. *See* 395 U.S. 444, 447-49 (1969); *see* Stephens, *supra* at 40. The type of speech that this Note proposes as dangerous, and that may be in need of restriction, is likely protected and political in nature. *See infra* notes 190-91 and accompanying text.

125. *See Providence Journal*, 820 F.2d at 1344.

126. There are a few exceptions where a restriction on speech may not be transparently invalid. *See infra* Part I.B.2.

127. *See infra* Part III.A.

i. *Prior Restraints on Unprotected Pure Speech Are Not Inherently Transparently Invalid*[128]

In addition to the protection of national security,[129] the Court in *Near v. Minnesota* held that certain categories of speech might be enjoined prior to their dissemination. The court stated:

> On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force."[130]

Chief Justice Hughes specifically discussed obscenity and speech that may incite violent actions.[131] Since the Court's decision in *Near*, the number of categories of "pure speech" that can be restricted without a presumption that the restraint is transparently invalid has grown. The additions fall almost exclusively in the realm of intellectual property and privacy law, and include copyright violations, theft of the right of publicity, and dissemination of intimate or embarrassing facts.[132]

a. Obscenity[133]

The First Amendment does not protect obscenity.[134] Chief Justice Hughes included this unprotected form of speech as one that could be legitimately enjoined with a prior restraint.[135] That being said, the case law has developed in such a manner that even unprotected

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128. This section is designed to make clear that there are certain categories of pure speech for which prior restraints are not inherently transparently invalid. Thus, the analysis of the issue does not pertain to these categories of speech.

129. Near v. Minnesota, 283 U.S. 697, 716 (1931).

130. *Id.* at 716 (citations omitted).

131. *Id.*

132. *See generally* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1998).

133. Obscenity has been chosen as an example representing all forms of unprotected speech for which prior restraints remain presumptively constitutional. Other forms include libel and defamation.

134. Miller v. California, 413 U.S. 15 (1973). The *Miller* test has been adopted to determine when material is considered obscene. The test includes three parts, all of which need to be satisfied.

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted).

135. *Near*, 283 U.S. at 716.

speech, such as obscenity, has not been subject to preliminary injunctive relief.[136] In *Vance v. Universal Amusement Company*, the Court reasoned that such injunctions were unconstitutional because the prior restraints were of indefinite duration and had not been finally adjudicated to be obscene.[137] In determining whether prior restraints are constitutional for other forms of unprotected speech, such as libel, the courts have used similar reasoning.[138] Because there is no final adjudication regarding the nature of the speech at the time of the preliminary hearing, there is still a presumption that a prior restraint is unconstitutional.

Although a transparently invalid prior restraint on unprotected speech can be violated much the same as a prior restraint on protected speech, prior restraints on pure speech, unprotected by the First Amendment, are not inherently transparently invalid. However, because prior restraints are generally issued prior to a full and fair hearing, it is difficult to determine whether the speech in question is in actuality unprotected.[139] Therefore, prior restraints remain presumptively unconstitutional, even where the speech may be unprotected.

b. Copyright Infringement[140]

The First Amendment does not protect speech that infringes upon a copyright.[141] In the case of *Harper & Row, Publishers, Inc. v. Nation Enterprises* the Supreme Court held that a copyright is an "engine of free expression" that "supplies the economic incentive to create and disseminate ideas."[142] Accordingly, "[c]opyright law restricts speech: it restricts you from writing, painting, publicly performing, or

136. Vance v. Universal Amusement Co., 445 U.S. 308 (1980); *see also* Blount v. Rizzi, 400 U.S. 410 (1971).

137. *Vance*, 445 U.S. at 312.

138. *See* Lemley & Volokh, *supra* note 132, at 173-74 (noting that allegedly libelous speech is often not subject to preliminary injunctions because no final adjudication regarding its libelous nature can be reached at the preliminary injunction stage).

139. *Id.*

140. Copyright infringement has been chosen as a representative example of many different infringements of intellectual property rights. The law regarding the issuance of prior restraints in trademark infringement cases aligns most closely with that of copyright. *See id.* at 217. However, there are some differences between the two. The burden placed on plaintiffs seeking a preliminary injunction in a trademark infringement case is higher than that in a copyright action. *Id.* In trade secret cases, preliminary injunctions are subject to the traditional four-part test. *See infra* note 146 and accompanying text. However, the elements are given sharper "teeth" in trademark cases than they are granted in copyright cases. *See* Lemley & Volokh, *supra* note 132, at 229. Finally, in the context of the right of publicity there is no clear precedent as to whether prior restraints are presumptively valid or invalid. *Id.* at 228-29.

141. *See* Harper & Row, Publishers, Inc. v. Nation Enters, 471 U.S. 539 (1985).

142. *Id.* at 558.

otherwise communicating what you please."[143] Though libel, obscenity, and speech infringing upon a copyright are all unprotected, speech infringing upon a copyright has received drastically different treatment by the courts. Unlike obscenity, where prior restraints remain presumptively invalid and are extremely hard to obtain,[144] enjoining speech that threatens a copyright has become commonplace.[145]

The issuance of a preliminary injunction in a copyright case is subject to a four-pronged test.[146] Yet, "[i]n a copyright infringement action, . . . the rules are somewhat different."[147] In copyright cases, application of the factors that determine whether an injunction will be issued is often skewed in favor of plaintiffs seeking to protect their copyrights.[148]

The difference between the ability to obtain preliminary injunction in obscenity and copyright infringement cases does not affect the application of the transparently invalid exception to unprotected categories of speech.[149] For both unprotected and protected pure speech a transparently invalid prior restraint can be violated without suffering the consequences of the collateral bar rule.[150] However, a prior restraint suppressing unprotected pure speech, whether presumptively invalid, as is the case with obscenity, or generally valid, as is the case with copyright infringement, is not inherently

143. *See* Lemley & Volokh, *supra* note 132, at 165-66.

144. *See supra* Part I.B.2.i.a.

145. *See* Lemley & Volokh, *supra* note 132, at 150.

146. The test asks: (1) whether success on the merits is likely; (2) whether irreparable injury will occur if the injunction is not granted; (3) "whether the balance of hardships tips in the plaintiff's favor"; and (4) whether public interest is served by granting the injunction. *Id.* at 158; *see* 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948 (2d ed. 1995) (detailing the test and its application in case law).

147. *See* Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330, 1335 (9th Cir. 1995).

148. *See* Lemley & Volokh, *supra* note 132, at 158-59; *see also* Religious Tech. Ctr. v. F.A.C.T.Net, Inc., 901 F. Supp. 1519, 1523 (D. Colo. 1995) (describing the test for preliminary injunctive relief in copyright cases as "less rigorous" than the normal standard). The inquiry is certainly more detailed than what has been presented here. Its purpose for this Note is simply providing the background as a means to differentiate between the treatment certain categories of "pure speech" receive. For a comprehensive discussion of this topic see, Mark A. Lemley & Eugene Volokh *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1998).

149. Obscenity and copyright infringement are highlighted because they represent opposite ends of the spectrum. Prior restraints on alleged obscene speech remain presumptively invalid, whereas prior restraints on speech that allegedly violates a copyright are commonplace. All the other types of unprotected speech fall within this spectrum.

150. *See supra* notes 118-20 and accompanying text.

transparently invalid.[151]

C. *Modern Prior Restraint Doctrine*

The case of *New York Times Co. v. United States* affirmed that prior restraints are presumptively unconstitutional. Even national security concerns do not change this belief. Indeed, prior restraints are presumptively unconstitutional unless a type of speech falls directly within the exceptions outlined by the Court in *Near v. Minnesota*, for example if the publication imperils the transport of troops. The Supreme Court would have been faced with a significant challenge to this presumption had it heard the case of *United States v. Progressive, Inc.*[152]

1. *New York Times Co. v. United States* and its Progeny

On June 13, 1971, the *New York Times* printed the first article of what would become known as the "Pentagon Papers."[153] The articles were based on a study that had been leaked to the *Times*,[154] and detailed United States policy and decision-making throughout the Vietnam War.[155] Two days later, one of the sharpest and quickest legal battles in American history commenced. However, the government successfully obtained a temporary restraining order enjoining the *Times* from continuing to publish the Pentagon Papers.[156] Though the government won the first battle, it suffered a set-back when the *Washington Post* began running similar articles.[157] After a trial court loss and a Saturday morning appeal,[158] the *Post* also was temporarily enjoined and the case was remanded for further review. The parties jockeyed their way through the federal court system with great haste. On Saturday, June 26, 1971, just thirteen days after the initial publication, the Supreme Court heard oral arguments. Four days later, in the case of *New York Times Co. v. United States*, the Supreme Court handed down a decision in favor of the *Times* and the *Post*, and laid the foundation for future prior

151. *See supra* Part I.B.2.i. The distinction lies in speech that is protected versus speech that is unprotected by the First Amendment.

152. *See* L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. Colo. L. Rev. 55 (1990); *see supra* Part I.C.2..

153. David Rudenstine, The Day the Presses Stopped: A History of the Pentagon Papers Case 1 (1996).

154. It has been suggested that the *N.Y. Times* illegally obtained the information used in this publication. *See In re* Providence Journal Co., 820 F.2d 1342, 1348-49 (1st Cir. 1986).

155. *See* Rudenstine, *supra* note 153, at 1-2.

156. United States v. N.Y. Times Co., 328 F. Supp. 324 (S.D.N.Y. 1971).

157. *See* Rudenstine, *supra* note 153, at 2-3.

158. *Id.*

restraint law.[159]

The government argued its brief on two grounds. "'The authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the Conduct of foreign affairs and his authority as Commander-in-Chief.'"[160] The interrelation between the two boiled down to the idea that the publication should be enjoined in the interest of national security.[161] *Near v. Minnesota* provided the motivation for an argument that a prior restraint could be upheld in the interest of national security.[162] There the Court reasoned that, "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[163]

In his concurrence in *New York Times*, Justice Brennan took note of this argument. Brennan responded, "there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden."[164] Brennan, however, indicated that this has been reserved only for when the nation is at war.[165] "Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."[166] Justice Stewart, also concurring, argued that an injunction would only be warranted when disclosure of the documents involved would "surely result in direct, immediate, and irreparable damage to our Nation or its people."[167]

While the Court undoubtedly considered the government's argument regarding national security, it was ultimately denied.[168] The government was misguided in attempting to equate the effect of the Pentagon Papers with the exceptions stated in *Near*.[169] The Pentagon Papers reported history that would presumably embarrass the United

159. N.Y. Times Co. v. United States, 403 U.S. 713 (1971).
160. *Id.* at 718 (citations omitted).
161. *Id.*
162. 283 U.S. 697, 716 (1931).
163. *Id.*
164. *N.Y. Times*, 403 U.S. at 726 (Brennan, J., concurring).
165. *Id.*
166. *Id.* at 726-27.
167. *Id.* at 730 (Stewart J., concurring). Brennan quoted from Stewart's concurrence in his own concurrence in *Nebraska Press Association v. Stuart*, 427 U.S. 539, 593 (1976).
168. *See N.Y. Times*, 403 U.S. at 713.
169. *Near v. Minnesota* has come to stand for the proposition that in a very limited number of cases where national security is an issue, a prior restraint may be valid. *See* 283 U.S. 697, 716 (1931).

States, thus holding up negotiations to end the United States' involvement and effectuate the removal of troops. *Near*'s exceptions regarded immediate and direct impacts on the nation, but the reasoning as to why the publication of the Pentagon Papers would compromise national security was indirect. Thus, in *New York Times*, the Supreme Court held that an injunction on the press would constitute an impermissible prior restraint.[170] The Court went on to note, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[171]

This strong presumption of unconstitutionality bears even more weight when the speech at issue is considered pure. In the case of *In re Providence Journal Co.*, the First Circuit asserted that the presumption of unconstitutionality is virtually insurmountable when dealing with a prior restraint on pure speech.[172] In its history, the Supreme Court has yet to uphold a prior restraint on protected pure speech. The national security interest set forth by the government in the Pentagon Papers was insufficient to enjoin the publication of articles, despite the fact that the content was likely derived though criminal conduct, and implicated a national security interest on some level.[173] Moreover, in *Nebraska Press Association v. Stuart*, the Court chose to strike down a prior restraint on pure speech, rather than to ensure a criminal defendant's Sixth Amendment rights.[174] As the Court stated in *CBS v. Davis*:

> Although the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in "exceptional cases." Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this "most extraordinary remed[y]" only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures.[175]

Seemingly, the Court finds much greater equity in protecting speech than in protecting either national security or other constitutional interests.

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170. *N.Y. Times*, 403 U.S. at 714; *see* CBS v. Davis, 510 U.S. 1315 (1994).

171. *N.Y. Times*, 403 U.S. at 714 (citation omitted). It should be noted that in *Near*, the Supreme Court stated that the publication of troop movements could be restricted. 283 U.S. at 716.

172. *In re Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986) (citing *Neb. Press*, 427 U.S. at 558, 570 (White, J. concurring)); *see also* Part I.B.2.i (describing instances where prior restraint is not necessarily transparently invalid).

173. *See infra* notes 192-96 and accompanying text; *see also Providence Journal*, 820 F.2d at 1349.

174. *Neb. Press*, 427 U.S. at 570; *see Providence Journal*, 820 F.2d at 1349.

175. *CBS*, 510 U.S. at 1317 (citations omitted).

2. *United States v. Progressive, Inc.*

In light of the decisions that have been handed down over the years and the rhetoric of the Court, it seems very unlikely that a case could ever spur the Court to uphold a prior restraint on protected pure speech.[176] A significant, though likely futile, challenge to this principle might have arisen had the Supreme Court heard the case of *United States v. Progressive, Inc.*[177] In *Progressive*, the District Court of Wisconsin enjoined the publication of an article entitled "The H-Bomb Secret: How We Got It, Why We're Telling It."[178] The district court reasoned that the article threatened "direct, immediate and irreparable injury to our nation and its people."[179] Moreover, the court argued that the publication of the article would violate the Atomic Energy Act.[180]

A combination of the aforementioned factors led the court to hold that the "disparity of the risk" between offending First Amendment rights and the national security risk was too great to allow the publication of the article.[181] The district court essentially argued that this case was akin to the exception in *Near v. Minnesota*.[182] The court reasoned that the level of danger posed by the publication of an article detailing how to create a hydrogen bomb was equivalent to the danger associated with the publication of troop movements because of new technologies that make long-range quick strikes possible.[183]

This dispute was bound for the Supreme Court until the article's impact was derailed by the publication of a letter containing substantially the same material.[184] However, commentators speculate that even an article describing the mechanism for creating a hydrogen bomb would not have overcome the presumption of unconstitutionality that accompanies prior restraints.[185] The injury resulting from a hydrogen bomb ending up in the wrong hands would certainly be irreparable and direct, however it is hard to imagine that the impact of the article would have been immediate.[186] Thus, it was

176. *See infra* Part II.
177. 467 F. Supp. 990 (W.D. Wis. 1979).
178. *Id.* at 991.
179. *Id.* at 1000 (citation omitted); *see supra* note 167 and accompanying text (quoting Justice Stewart's language).
180. *See Progressive*, 467 F. Supp. at 996.
181. *Id.*
182. 283 U.S. 697 (1931); *see supra* Part I.A.2.
183. *Progressive*, 467 F. Supp. at 996.
184. *See* Powe, *supra* note 152, at 55. A subsequent letter was published describing how to construct a hydrogen bomb.
185. *See id.* at 60; Mary M. Cheh, *The Progressive Case and the Atomic Energy Act: Waking to the Dangers of Government Information Controls*, 48 Geo. Wash. L. Rev. 163, 199 (1980).
186. *See* Powe, *supra* note 152, at 70.

unlikely, and even improbable, that the Supreme Court would have upheld such a prior restraint, especially in light of the past case law and the general sentiment toward restricting speech.

In light of the preceding case law, Part II will address the argument that current doctrine is inherently flawed, and does not adequately address current national security concerns.

II. THE INHERENT FLAWS OF THE COLLATERAL BAR RULE

The collateral bar rule serves to protect the integrity of the judiciary.[187] The collateral bar rule also seeks to protect against persons acting as the "judge in [their] own case."[188] Moreover, the collateral bar rule supplies a unique and particularly important function as applied to the First Amendment. The nature of the activity (publication of sensitive material) to be stopped makes it incredibly important that court orders be obeyed. Unlike violating a subpoena order by a court, the violation of an order restraining publication is irreversible.[189] Whether the prior restraint was constitutionally valid becomes moot at the very moment of publication. Once the "cat is out of the bag," whether the injunction had merit or not becomes a mere footnote. Presumably the damage that the injunction sought to protect against has already occurred. Thus, beyond protecting the dignity of the courts, we must be careful to protect against the potential effect a publication can have on a national security interest.

Since September 11, 2001, the United States has faced issues of homeland security that have never before been addressed. Due to the United States' current national security concerns, restrictions on the publication of investigations of terrorist cells, plans to attack nations with whom we are not at war, the sensitive material of international negotiations, etc., may be warranted.[190] However, any restrictions in the name of national security[191] must be delicately balanced against

187. *See* Gray, *supra* note 102, at 21.

188. Walker v. City of Birmingham, 388 U.S. 307, 320-21 (1967); *see supra* note 110-12 and accompanying text.

189. A court ordered subpoena may be ignored without any real consequence to the matter at hand. The government will simply find the individual and force compliance. However, once injunctions on speech are broken, there is no redress because the harm that the injunction was intended to prevent has already and irreversibly been perpetrated.

190. These are just a few examples of types of publications that may pose a national security risk and could be subject to restriction. *See infra* Part II.A for a detailed discussion of two scenarios that may warrant restriction.

191. Speech that details issues of national security is likely political, and therefore protected. *See* Brandenberg v. Ohio, 395 U.S. 444, 447-49 (1969). Thus, any injunction restricting it would be inherently transparently invalid. *Compare* Part I.B.2.i.a *with* Part I.B.2.i.b.

the impact which curtailing the free press will have on constitutional rights.

The Supreme Court has never upheld a prior restraint on protected pure speech.[192] Nor does it seem that the Court would uphold such a restraint, unless the speech falls directly in line with the exceptions detailed in *Near v. Minnesota*,[193] such as a publication announcing troop movements.[194] The Court has not faced this situation since *Near*, but it has been asked to render a decision on restricting speech regarding other facts implicating national security and competing constitutional rights.[195] Yet, in every instance, the Supreme Court has declined to rule that a prior restraint on protected pure speech was valid.[196] There is no doubt that prior restraints have the specter of unconstitutionality looming over them.[197]

Restrictions on speech should be carefully scrutinized, but in certain situations, they are a necessary evil in the quest to protect the public.[198] Even with the strong presumption against prior restraints that has developed in the courts, the case law and even commentary on the subject have developed along these lines.[199] It is clear that the

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192. *See supra* notes 172-75 and accompanying text.

193. 283 U.S. 697, 716 (1931); *see also supra* Part I.C.2. for a discussion of the Supreme Court's likely holding in *Progressive*.

194. *Near*, 283 U.S. at 716. It should be noted that this exception was derived from the Court's holding in *Schenck v. United States*, 249 U.S. 47 (1919).

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

249 U.S. at 52.

195. Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976); N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

196. *See supra* notes 157-75 and accompanying text; *see also supra* Part I.C.2 discussing *Progressive*. Though the Supreme Court never had the opportunity to decide the case, commentators believe that the Court would have concluded that publication of instructions for building a hydrogen bomb did not warrant a prior restraint. *See supra* notes 185-86 and accompanying text.

197. *N.Y. Times*, 403 U.S. at 714 ("'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963))).

198. *See infra* Part II.A. As a means of protecting national security interests and avoiding the presumptively invalid exception to the collateral bar rule accompanying all protected pure speech, the courts could move speech dealing with national security interest into the realm of unprotected speech. *See infra* Part III.B.3.

199. *See N.Y. Times*, 403 U.S. at 714; Shuttlesworth v. City of Birmingham, 394 U.S. 147, 153-59 (1969); Walker v. City of Birmingham, 388 U.S. 307, 320-21 (1967); *Near*, 283 U.S. at 716; *Schenck*, 249 U.S. at 52; Patterson v. Colorado, 205 U.S. 454, 462 (1907); *In re* Providence Journal Co., 820 F.2d 1342, 1345 (1st Cir. 1986); United States v. Progressive, Inc., 467 F. Supp. 990, 992-94 (W.D. Wis. 1979); *see also* Blackstone, *supra* note 34, at *152; Jeffries, *supra* note 4, at 412; Wells, *supra* note 30,

courts, and indeed, the very same commentators who reject the principle of prior restraints, believe that there are situations where restrictions on protected pure speech are appropriate and necessary.[200] Despite this belief, the Supreme Court's past decisions have essentially foreclosed the possibility of a case upholding a prior restraint ever arriving at its doorstep.[201] Nevertheless, such situations possibly exist. Part II.A details two scenarios that would arguably require the government to suppress speech. The first is drawn from a Supreme Court case and the second is drawn from recent events.

A. *Scenarios That May Warrant a Restriction on Speech*

Though the development of the case law has virtually eliminated the possibility of suppressing such speech through a prior restraint, the government can enact a statutory framework as a mechanism to curtail dangerous speech.[202] One situation that would surely warrant restriction—possibly even via prior restraint—is the publication of troop movements.[203] Depicting a single hypothetical, however, that would warrant suppression is of little use, as a wide array of situations exist where speech could endanger national security. Moreover, it should be noted that at the time that Chief Justice Hughes declared that the publication of troop movements was a significant threat to national security and would warrant restriction,[204] the press was relatively unsophisticated. Today, no information is outside the reach of the press, and therefore a host of issues endangering national security could appear in print.

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at 7.

200. *See N.Y. Times*, 403 U.S. at 714 (recognizing that situations exist that would render a prior restraint valid); *Walker*, 388 U.S. at 320-21 (same); *Near*, 283 U.S. at 716; *Schenck*, 249 U.S. at 52; Blackstone, *supra* note 34, at *152 (renouncing the idea of a prior restraint, yet leaving open the possibility of subsequent punishment as a means for restricting speech); Emerson, *supra* note 1, at 648 ("[R]estrictions which could be validly imposed when enforced by subsequent punishment are, nevertheless, forbidden if attempted by prior restraint.").

201. *See infra* Part III. Part III will detail how the Court's past decisions have prohibited the collateral bar rule and the doctrine of prior restraints from operating as originally intended. Thus, publishers will publish enjoined material and argue that the injunction was transparently invalid, leaving no judicial recourse to restrict speech.

202. *See infra* Part III.

203. *Near*, 283 U.S. at 716.

204. *Id.*

1. Scenario One: Newspaper *Y* Publishes the Names of Covert Central Intelligence Agency (CIA) Agents and Details Special Operations That They Will Undertake.

The first situation parallels *Snepp v. United States*[205] and *Haig v. Agee*.[206] In *Snepp*, CIA agent Frank Snepp sought to publish a book detailing his experiences with CIA activities in South Vietnam.[207] In response, the government took pains to gain an injunction and set an example by showing that the publication of CIA secrets would not become a profitable business for CIA agents.[208] The government wisely steered clear of triggering the First Amendment, and was able to obtain the relief they sought via a breach of contract claim.[209] Snepp signed an agreement in which he agreed "not . . . [to] publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency."[210] Though the Court relied on contract law to enjoin the publication, it hinted that Snepp's book would have been enjoined even if he had not signed the agreement.[211]

In *Agee*, CIA agent Philip Agee sought to discredit the CIA following his retirement. Agee traveled abroad and "repeatedly and publicly identified individuals and organizations located in foreign countries as undercover CIA agents, employees, or sources."[212] As a result of his actions, the Secretary of State revoked Agee's passport.[213] Agee challenged the revocation, arguing that it violated his First Amendment rights and his right to travel.[214] While Agee was successful in the trial and appellate courts,[215] the Supreme Court

205. 444 U.S. 507 (1980).
206. 453 U.S. 280 (1981).
207. *Snepp*, 444 U.S. at 507.
208. Judith Schenck Koffler & Bennett L. Gersham, *The New Seditious Libel*, 69 Cornell L. Rev. 816, 845-46 (1984) (noting that the Court's enforcement of the injunction resulted in a $140,000 fine for Snepp).
209. *Snepp*, 444 U.S. at 515-16.
210. *Id.* at 508.
211. *Id.* at 511 n.6.
212. Haig v. Agee, 453 U.S. 281, 284 (1981).
213. *Id.* at 286. The Secretary of State acted under the authority granted to him under the Passport Act of 1926. The Act authorizes the Secretary of State to "grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States . . . under such rules as the President shall designate and prescribe" *Id.* at 290. (quoting 22 U.S.C. § 211(a) (1976 ed., Supp. IV)). The Court held that while the Act did not explicitly grant the power to revoke passports, it does not expressly limit these powers either. Accordingly, since the Secretary of State had the power to withhold passports for reasons not explicitly stated in the Act, he could revoke passports in the same manner. *Id.*
214. *See id.* at 306.
215. Agee v. Vance, 483 F. Supp. 729 (D.D.C. 1980), *aff'd sub nom.* Agee v.

overturned these decisions.[216] The Court argued that Agee's actions solicited murder and severely compromised the security of the United States and other nations.[217] Although the Court paid relatively little attention to the First Amendment claims, it did however, liken Agee's actions to the publication of troop movements.[218] Moreover, the Court noted that Agee's statements "are clearly not protected by the Constitution" because their intent was to "obstruct[] intelligence operations and the recruitment of intelligence personnel."[219]

In *Snepp*, the Government and the Court did everything within their power to make sure the publication of CIA secrets was prevented. Because Snepp had signed the confidentiality statement upon the commencement of his employment with the CIA, the Court and the Government had an alternative argument at their disposal: that Snepp had violated the contract by threatening the publication of information he learned during his employment without agency approval. Likewise, in *Agee* the Court relied on alternate grounds to withhold Agee's passport, though they did provide both an explanation for the invocation of a prior restraint[220] and possible grounds for a statute prohibiting this behavior.[221] Regardless of the specific legal doctrine upon which the Supreme Court relied, the rationale and result sought remain clear. In each of these cases, the Government and the Court wanted to suppress speech because they felt it endangered national security.

Scenario One and the *Snepp* case have differences, aside from the confidentiality agreement. Mainly, the publication in *Snepp* was subsequent to the events that it detailed, while Scenario One presumes Newspaper *Y* has obtained the names of agents and the details of their operations prior to or during their missions. Thus, the information presented in Scenario One is even more sensitive than in *Snepp*. The information in the scenario is closer to Agee's pronouncements, which the Court ruled were unprotected by the First Amendment.[222] In light of the Government's arguments in *Agee*, it is clear that the Government would deem the publication detailed in Scenario One as detrimental to national security, and therefore would argue it was an instance warranting suppression.

Muskie, 629 F.2d 80 (D.C. Cir. 1980).

216. *Agee*, 453 U.S. at 310.
217. *Id.* at 286, 308.
218. *Id.* at 308.
219. *Id.* at 309.
220. *See supra* note 218 and accompanying text.
221. *See supra* note 219 and accompanying text.
222. *See supra* note 219 and accompanying text.

2. Scenario Two: Journal *X* Publishes Research on How to Weaponize Anthrax

The second scenario is derived from a recent resolution of over twenty scientific journals to withhold publication of articles that would compromise national security.[223] The resolution stems from a common mindset among scientists and editors. They "'don't want to be the one that publishes 'Here's how to weaponize anthrax' and find someone tomorrow used that and killed hundreds of thousands of people.'"[224] This mindset seeks to reduce the level of information publicly available regarding biological or chemical compounds that could be weaponized by terrorists. "[B]ioterrorism [is] a serious threat"[225] and this self-governing policy provides some protection. Although many journals have adopted the policy, there still remains a great deal of dissention as to the merits of such a pact within the scientific community.[226] Thus, the government has a legitimate interest in creating uniform regulation in this area to protect national security.[227]

Dissemination of information regarding nuclear physics is classified and controlled via statute;[228] however, biological research is currently unclassified.[229] As a result, the very real threat of a biological terrorist attack may be fueled by the research published in scientific journals, thus arguably warranting suppression.

It should be noted that the two scenarios presented above are by no means exhaustive. In fact, hundreds of scenarios could arise that would pose a comparable risk to national security, justifying prior restraints on speech. The scenarios presented were chosen mainly because they are rooted in concrete, factual instances that have already occurred.

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223. *See* Amy Harmon, *Journal Editors to Consider U.S. Security in Publishing*, N.Y. Times, Feb. 16, 2003, §1, at 1.

224. *Id.*

225. *See id.*

226. Some believe that "knowledge" rather than "ignorance" is the best defense. There also remains questions as to how the policy detailed by the resolution would be implemented.

227. *Id.* The American Society of Microbiology reported that among their eleven journals, only two of 14,000 articles have been flagged since December 2001. *Id.* Thus, governmental regulation is likely necessary to ensure that national security is guarded.

228. 42 U.S.C. § 2274 (2000).

229. *See* Harmon, *supra* note 223.

III. FILLING THE VOID: PRESERVING THE OPPORTUNITY TO RESTRICT PURE SPEECH

On the surface, the problem appears to be that upon adjudication all prior restraints will be overturned and publication will ensue.[230] The greater issue, however, stems from the development of this situation in the case law. The development of the First Amendment law surrounding the collateral bar rule has rendered the rule and the doctrine of prior restraints antiquated.[231] Thus, the original purpose of the collateral bar rule conflicts with its current exception. The idea of deterring publication[232] has been overridden by the concept that all restraints on protected pure speech are transparently invalid and therefore can be violated.[233] Thus, in the unique case where a prior restraint would be both necessary and constitutional,[234] the government and the people of the United States would have no course of action to stop such a publication.[235]

A. *Prior Restraints on Protected Pure Speech Are Inherently Transparently Invalid*

For a number of reasons, the collateral bar rule has rendered prior restraints impotent as a deterrent to those who are enjoined from publishing materials. First, the issuance of a prior restraint is a less effective deterrent than a statute prohibiting speech.[236] Second, the transparently invalid exception to prior restraints is extremely difficult to define.[237] Most importantly, through the development of the case law, the transparently invalid exception to the collateral bar rule has

230. *But see* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (recognizing that situations exist that would render a prior restraint valid); Walker v. City of Birmingham, 388 U.S. 307 (1967); Near v. Minnesota, 283 U.S. 697 (1931); Schenck v. United States, 249 U.S. 47 (1919).

231. *See generally N.Y. Times*, 403 U.S. at 714; *Near*, 283 U.S. at 701; *In re* Providence Journal Co., 820 F.2d 1342, 1345-46 (1st Cir. 1986); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979); *see also supra* Part I.B.2.

232. *See, e.g.*, Fiss, *supra* note 74, at 8; *see also* McKune v. Lile, 536 U.S. 24 (2002) (seeking an injunction to prevent the withdrawal of prison privileges); Federal Republic of Germany v. United States, 526 U.S. 111 (1999) (seeking injunction to prevent a scheduled execution).

233. *See infra* Part III.

234. The commentators and the case law presume such a case exists. *See N.Y. Times*, 403 U.S. at 714 (recognizing that situations exist that would render a prior restraint valid); *Walker*, 388 U.S. at 320-21; *Near*, 283 U.S. at 701; *Schenck*, 249 U.S. at 52; *see also* Blackstone, *supra* note 34, at *152; Emerson, *supra* note 1, at 648; Jeffries, *supra* note 4, at 412; Wells, *supra* note 30, at 7.

235. *See generally N.Y. Times*, 403 U.S. at 714; *Near*, 283 U.S. at 701; *Providence Journal*, 820 F.2d at 1345; *Progressive*, 467 F. Supp. at 994-96. *See also supra* Part I.B.2.

236. *See infra* notes 239-41 and accompanying text.

237. *See infra* note 242 and accompanying text.

eliminated the ability to enforce a prior restraint on protected pure speech.[238]

The timing of a prior restraint as compared to a subsequent punishment seemingly provides evidence supporting the proposition that prior restraints have a greater impact on deterring speech than a statute.[239] However, due to the mechanics involved in issuing an injunction, a statute that provides for subsequent punishment actually has a greater effect of deterring speech than does an injunction. A prior restraint only occurs when an injunction is issued.[240] Unless a publisher decides not to publish the entire story or decides to release the topic prior to publication, an injunction cannot be issued.[241] Thus, the deterrent effect of injunctive relief is limited to situations where a publisher affords the opportunity for an injunction to be issued. Contrarily, a statute will have a strong deterrent effect because it will remain in place and attach to all publications. Courts readily admit that what is not and is transparently invalid is difficult to determine.[242] Presumably, publishers could use this as an excuse to publish articles despite an injunction being issued against them. Therefore, the deterrent effect of the collateral bar rule is further weakened.

Because the Supreme Court has never upheld a prior restraint on protected pure speech, it is submitted that, by definition, a prior restraint on "protected pure speech" is transparently invalid. Thus, every injunction of protected pure speech can be violated without implicating the consequences associated with the collateral bar rule. Accordingly, because of the transparently invalid exception, the collateral bar rule ceases to exist when protected pure speech is at issue.

Many may find this result appealing. The early English law dictating administrative preclearance was abandoned due to the detrimental effect of such restraints.[243] Blackstone, one of the first commentators to address the issue, renounced prior restraints as an inhibitor to freedom in general.[244] Moreover, the case law in the United States, dating back to the Supreme Court's original decision in

238. *See infra* notes 243-49 and accompanying text.

239. *See supra* Part I.A.4.

240. *Compare* Walker v. City of Birmingham, 388 U.S. 307 (1967), *with* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

241. *See* Powe, *supra* note 152, at 70. In *New York Times Co. v. United States*, the publisher made a conscious decision not to publish all of the Pentagon Papers at once. *Id.* at 55. Likewise, in *Progressive* the editor decided that a confrontation with the government would be of greater benefit than the immediate publication of the article. *Id.* at 70. In either case, the publisher could have easily avoided any restraint due to an injunction. *Id.* at 57.

242. *In re* Providence Journal Co., 820 F.2d 1342, 1347 (1st Cir. 1986).

243. *See supra* Part I.A.1.

244. *See supra* notes 34-35 and accompanying text.

Near v. Minnesota, has been highly critical of prior restraints.[245] Essentially, prior restraints restrict a constitutionally given right to free speech.[246] Commentators, like the courts, have been highly critical of the system of prior restraints.[247]

Therefore, assuming situations do exist that would warrant restrictions, the government has run into a predicament. The evolution of the collateral bar rule, mainly the exception allowing violation of transparently invalid orders, has left a void.[248] No longer can the government rely on the mechanism of prior restraint to restrict protected pure speech that it deems a threat to national security.[249]

B. *Solutions for Repairing a Flawed Doctrine*

It is clear that the law of prior restraints as it now exists, cannot fulfill the needs it was originally instituted to satisfy.[250] The government and the courts have three options to resolve this problem. First, the collateral bar rule could be maintained without the transparently invalid exception. Second, the doctrine of prior restraints could be modified. Lastly, the collateral bar rule could be left as it is,[251] and the government could instead rely on statutory law to restrict speech, prohibiting certain kinds of speech and stiffening post-publication punishment for violating the prohibitions.

1. Elimination of the "Transparently Invalid" Exception

Keeping the collateral bar rule and eliminating the transparently invalid exception legitimately responds to the development of the law. It is clear that while the Supreme Court is reluctant to enjoin protected pure speech prior to its publication, it is also clear that pure speech exists that could be validly enjoined.[252] By eliminating the

245. *See supra* notes 37-49 and accompanying text.

246. Because the constitutional right at issue is speech, a whole new set of considerations arises. The publication of an article is often time sensitive. Thus, if a prior restraint prohibits publication, the article may become worthless to the publisher, making the prior restraint particularly injurious.

247. *See* Blasi, *supra* note 70, at 1482-83; Emerson, *supra* note 1, at 648.

248. *See supra* Part II.

249. *See supra* note 196 and accompanying text.

250. *See supra* Part II.

251. As has been detailed, this would be equivalent to abandoning the collateral bar rule, because its purpose has been totally undermined by the transparently invalid exception.

252. *See* N.Y. Times Co. v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931); Schenck v. United States, 249 U.S. 47 (1919); *see also In re* Providence Journal Co., 820 F.2d 1342 (1st Cir. 1986); United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979); Blackstone, *supra* note 34, at *152; Emerson, *supra* note 1, at 648.

transparently invalid exception to the collateral bar rule, the courts could reinstate the deterrent effect that the collateral bar rule is supposed to serve. In doing so, however, the courts would once again retain an unbridled power to impose these injunctions.[253] Moreover, a prior restraint may be difficult to obtain. If publication occurs without any warning to the government, the imposition of an injunction will be impossible. Therefore, the deterrent effect of the prior restraint and the collateral bar rule can easily be circumvented by a publisher.[254] The collateral bar rule in the absence of the transparently invalid exception would certainly be an improvement; moving the law in this direction will put some teeth back into prior restraints. Further, it is not likely that this resolution would sufficiently protect citizens' constitutional rights, nor would it adequately protect their security.

2. Modification of Existing Law

As for the second solution, softening the doctrine of prior restraints would essentially mean undoing years of case law. As it currently stands, there is a strong presumption that a prior restraint on speech is unconstitutional, and an even stronger presumption of unconstitutionality when that speech is pure.[255] This presumption has been bolstered by language that dictates a publication must "surely result in direct, immediate, and irreparable damage to our Nation"[256] and "inevitably, directly, and immediately" cause an event imperiling safety to justify an injunction.[257] Weakening the presumption against prior restraints would have a significant impact.

First, it would give the transparently invalid exception validity. Language such as "surely result in direct, immediate, and irreparable damage" is insurmountable, but if the Court recognized that injunctions could be issued only when "direct" and "irreparable" damage to the nation may occur, the specter of unconstitutionality would be diminished.[258] Thus, the conclusion reached earlier that all

253. One common example is the following: A judge seeking re-election imposes an injunction prohibiting publication of materials that would endorse his opponent. While there is no doubt this type of behavior would be reprehensible and the injunction would be overturned on appeal, the damage would have already been done. The election would have passed, and the news would no longer be relevant. *See* Labunski, *supra* note 98, at 375.

254. *See supra* note 241 and accompanying text.

255. *See supra* notes 169-75 and accompanying text.

256. *N.Y. Times*, 403 U.S. at 730.

257. *Id.* at 726-27.

258. This is a very subtle shift in the language, but would likely have a significant impact. Commentators on *Progressive* noted that the term "immediate" likely would have held back an injunction on the publication of material detailing how to construct a hydrogen bomb. *See supra* notes 185-86 and accompanying text. A more drastic approach would be to view prior restraints in a medium similar to the test set forth in

prior restraints on pure speech are inherently transparently invalid would become false. If not all injunctions on pure speech were inherently transparently invalid, then the collateral bar rule would maintain its power as a deterrent, and would no longer be obsolete.

This is an attractive way to reinstate the collateral bar rule while maintaining a check on the judiciary's power to impose injunctions. The drawbacks to this approach, however, are monumental. First, such an approach would require undoing years of case law and overcoming extreme anti-prior restraint sentiment. This may be impossible. Second, weakening the presumption of unconstitutionality arguably weakens constitutional rights. Finally, the government's ostensible goal of deterrence would be lost in this approach because injunctions are easily circumvented.[259]

3. The Use of Statute

The last solution offered to fill the void left by the collateral bar rule is to retain the collateral bar rule in its current form, and instead to rely on statutory law to restrict speech. Statutes could prohibit speech on certain topics and provide stiff subsequent punishment to those who violate the prohibitions. This solution seemingly satisfies both First Amendment activists and those within the government who have a growing concern about the publication of sensitive materials.

As noted, prior restraints are easily circumvented, as is the deterrent effect incorporated in the collateral bar rule. Statutes, however, can serve as a deterrent before publication takes place without "freezing" speech.[260] The government may restrict speech on topics that it feels are detrimental to national security. If the publisher believes the statute is overly inclusive or otherwise unconstitutional, he may violate it and challenge the merits later.[261] Moreover, reliance on statutes permits First Amendment jurisprudence to be tailored to the specific needs of the nation at specific times.[262]

The possibility, however, of using a statutory framework to fill this

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Dennis v. United States, 341 U.S. 494 (1951). While this approach would also diminish the specter of unconstitutionality looming over prior restraints, it would suffer from the same drawbacks as a more subtle shift.

259. *See supra* notes 240-41 and accompanying text.

260. The speech prohibited by a statute would be unprotected. Thus, a prior restraint on this type of speech will no longer be inherently transparently invalid. This permits the courts to effectively use the current system of prior restraints. *See supra* Part I.B.2.

261. *See supra* Part I.A.4.

262. This moves the system closer to the decision reached in *Schenck*, where the Court reasoned that whether the speech should be enjoined depends on the current state of affairs. *See* Schenck v. United States, 249 U.S. 47, 52 (1919); *see also supra* note 165.

void is extremely minimal. The difficulty of this approach comes not only in drafting a statute, but in administering it.[263] One possible statute may read as follows:

> During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy.[264]

Critics will argue that Congress has already rejected this hypothetical statute.[265] During the Congressional hearings on the matter one of the main objections concerned whether Congress had the power to enact a law that the President has absolute discretion to implement.[266] Arguments for and against its constitutionality were made during the hearings, and the issue seemed unresolved.[267] Such uncertainty, among other issues, casts doubt on the constitutionality of this statute.

Another possible statute could be more closely modeled after 18 U.S.C. § 793(e), which targets those

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263. See *infra* Part III.3.A.

264. 55 Cong. Rec. S1763 (daily ed. May 3, 1917).

265. 55 Cong. Rec. 2167 (daily ed. May 12, 1917).

266. *See supra* note 265.

267. Though the issue remained unresolved during the congressional debates, the case of *Youngstown Sheet & Tube Co. v. Sawyer* sheds light on the dilemma. 343 U.S. 579 (1952). In *Youngstown*, the Court examined the inherent powers of the President. Justice Jackson's concurrence, which became accepted as the rule of law, developed three categories of presidential action, according to the level of support the President garnered from Congress. *Id.* at 634. Presidential action falls into a particular category based on the level of support the President garnered from Congress. The categories determine whether the President acted within his inherent constitutional powers.

The first category states that when "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum." *Id.* at 635. The second is an intermediate category, and requires "when the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent power." *Id.* at 637. The last category grants the least amount of power to the President, and occurs when "the President takes measures incompatible with the expressed or implied will of Congress." *Id.*

Using Justice Jackson's *Youngstown* categories would lead to the conclusion that the President would be acting within his powers if he were to act pursuant to the express authorization by Congress and prohibit publication. However, some continue to argue that the *Youngstown* categories relate to foreign affairs only, and thus, this line of reasoning would spark two additional debates: first, whether *Youngstown* only applies to foreign affairs, and second, whether censuring domestic publication to stop domestic terror attacks by foreign terrorist cells constitutes a foreign affair. These issues will remain unresolved by this Note.

> having unauthorized possession of, access to, or control over any document, [or] writing, . . . relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States . . . willfully communicates, delivers, transmits [*publishes*] or causes to be communicated, delivered, or transmitted [*published*] or attempts to communicate, deliver, transmit, [*publish*] or cause to be communicated, delivered, transmitted, [*or published*] the same to any person not entitled to receive it . . .[268]

However, drafting the statute in this manner would limit flexibility. Moreover, the statute has already been drafted and subsequently interpreted not to include "publications," thus it would be difficult to insert such language and have the statute pass constitutional muster.

i. *Scenarios One and Two: Application*

The proposed statute is easily applied to Scenario One. President Bush has "proclaimed" that there is a "national emergency" and that the nation is currently fighting a "war" on terror. The issue stems from the subjective determination that the President is called on to make.

The publication of CIA operatives' names and the details of special operations the CIA is involved in clearly are "of such a character that is or might be useful to the enemy." There is little doubt that if the President proclaimed such publications illegal under the proposed statute his subjective determination would stand up to the strictest scrutiny. The scenario, however, is similar to the situation in *Near* and therefore would likely be subject to restriction via prior restraints. Scenario Two presents a more difficult subjective determination for the President. The key language in the statute proposed is "might be useful to the enemy." This calls for a subjective determination that will inevitably wear at the nation's First Amendment rights.

Though the statutes would be extremely narrowly tailored, they simply pose too large a risk to the central tenets upon which the nation was founded.

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268. The Actual text of the statute reads:

> Whoever having unauthorized possession of, access to, or control over any document, writing, . . . relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States . . . willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, . . . shall be fined not more than $10,000 or imprisoned not more than 10 years, or both.

18 U.S.C. § 793(e) (2003).

CONCLUSION

Seemingly, the current state of law concerning prior restraints is in harmony. There is a strong presumption against prior restraints in all situations, and an even a stronger presumption that a prior restraint on pure speech is unconstitutional. Thus, having a collateral bar rule that allows for the violation of a transparently invalid prior restraint without repercussion makes sense. Courts and commentators, however, have not foreclosed the possibility of a valid restraint on pure speech. Thus, the absence of viable prior restraints has left a void. Despite the heavy presumption against prior restraints, the flawed transparently invalid distinction, and the significant threat to the United States, reactionary legislation and judicial holdings that may impair the nation's constitutional rights are not the answer. Though the solutions proposed certainly offer options, none has the capability of filling the void while at the same time maintaining the necessary constitutional protections. As a result, the issue will remain largely unresolved. The nation and its security must rely on the current law, as well as responsible reporting, as protection against the evils that may arise from the publication of sensitive security materials.

In an era where national safety is of the utmost importance, the law regarding restrictions on publications needs review. No solution will simultaneously afford maximum protection of national security and of constitutional rights. Relying on prior restraints, however, has become impossible due to the development of the case law. Therefore a move toward a statutory based restriction system could resolve many of the current problems. Regardless of which system is utilized, it will be difficult to maintain the necessary balance between constitutional rights and national security, as both interests are tremendously important.