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TOWARD A BETTER UNDERSTANDING OF THE PRIOR RESTRAINT DOCTRINE: A REPLY TO PROFESSOR MAYTON

Howard O. Hunter†

In his Article on first amendment process,¹ Professor Mayton challenges a “sacred cow” of current first amendment theology and, in so doing, forces us to consider more carefully the implications of certain accepted approaches to the resolution of disputes about speech. Much of what he says about the process by which government restrains speech is true, especially that the prior restraint doctrine has often been inadequately understood and inappropriately invoked.² Nevertheless, some of his premises are subject to question. Furthermore, his conclusion—that a prior restraint model provides a better mechanism for the protection of speech than does a subsequent punishment model³—does not necessarily follow from his premises, nor does the conclusion reflect an adequate understanding of the prior restraint doctrine. What follows is an effort to highlight some of these problems, in the hope that the arguments presented will focus and perhaps add to Professor Mayton’s discussion.

I

THE PROBLEM OF COSTS

Professor Mayton argues that a state bent on restraining speech will prefer a system of post-speech punishment because it is less costly than a system favoring injunctive relief.⁴ There may sometimes be cost advantages to a system of subsequent punishment, but certainly this is not always the case. We can begin with two assumptions that lack empirical

† A.B. 1968, J.D. 1971, Yale University. Associate Professor of Law, Emory University School of Law. [While this Article was in the stages of final preparation, Professor Blasi published an article in the *Minnesota Law Review* that touches upon many of these issues. Time constraints prevent an incorporation of Professor Blasi’s ideas into this dialogue, but I can say that I find myself in general agreement with his conclusions. See Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 *MINN. L. REV.* 11 (1981)—Author’s Note].

¹ Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 *CORNELL L. REV.* 245 (1982).

² *Id.* at 247-49.

³ *Id.* at 279-81.

⁴ The cost of each enforcement process is measured both in terms of time, including administrative delays, and in dollars spent. *Id.* at 266-74.

support, but seem to make sense:⁵ (1) most people are risk-averse;⁶ and (2) a government will prefer a simple, cost-effective means to reach a certain end, all other things being equal.⁷ Accordingly, we can posit that most people will ordinarily act as self-censors and not engage in speech that may lead to legal or social opprobrium. A government that wants to limit speech will prefer the enforcement process that most effectively induces a natural tendency toward self-censorship.⁸ This may or may not be a subsequent punishment system.

Assume, for example, that an empirical study shows that the word "mud," when spoken aloud or printed in newspapers, magazines, and books of general circulation, causes antisocial behavior. Based on the study, a state legislature decides to prohibit the use of the word "mud" except in private communications and academic research. If the proposition is debated in the legislature and if the study in question is publicly discussed, the debate itself will have an educative effect that may begin the entire process of self-censorship. Although iconoclasts, free-will types, and others will shout "mud" in public places and write books filled with thousands of "muds," the average citizen will eschew the use of "mud" if told that its use leads to bad ends and may be punishable by the state.⁹ Passage of a law prohibiting its use will further encourage the self-censorship already begun.

To make its prohibition effective, the legislature will have to choose an enforcement mechanism. The most effective means to censor printed works, movies, videotapes or videodiscs would be an administrative licensing system. Although it may be highly effective, such a system would hardly be cost-efficient, because it would require the creation of a bureaucracy of indefinite duration. Furthermore, licensing schemes are generally disfavored because they are especially intrusive. As Professor Mayton correctly observes,¹⁰ the American doctrine of free speech was

⁵ These assumptions are developed at various points in Mayton's Article. See, e.g., Mayton, *supra* note 1, at 253-54, 256, 272.

⁶ This certainly seems to be true for businessmen. For an interesting discussion, see Breit & Elzinga, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 HARV. L. REV. 693 (1973).

⁷ All other things are rarely equal. There may be good social or political reasons for choosing a more expensive means, or the process of government may itself be so cumbersome that the most cost-effective method is overlooked.

⁸ I assume that the state has a legitimate interest in limiting speech and that it has the power to do so. Although the *power* is usually present, the legitimacy of the limitation is often subject to question.

⁹ This will only be true if some societal consensus exists as to both the legitimacy of state intervention and the dangers of the word "mud." As in most speech cases, the danger lies not in the utterances but in the reactions of others to those utterances—in the *actions* likely to occur rather than in the speech. Mayton correctly points out that the speech/action problem is central to an understanding of what is actually meant by free speech. Mayton, *supra* note 1, at 253-59.

¹⁰ *Id.* at 247-49.

founded in large measure on opposition to the English system of licensing—the classic prior restraint. Such procedures were once used widely in this country to control pornography, but they have largely fallen into desuetude, albeit more often for reasons of constitutional infirmity than for purposes of governmental economy.¹¹ In our example, then, the legislature more likely will choose to enforce its prohibition either by providing criminal sanctions for use of the word “mud” or by granting jurisdiction to the appropriate court to enjoin its usage. Which of these two systems is less costly? Mayton argues that the former is cheaper. In many instances, however, the latter may prove equally effective and no more costly.¹²

Every state has a system already in place to pursue either criminal prosecutions or equitable restraints. Neither process requires additional personnel. To make out a criminal case, however, the local prosecutor normally must secure the help of the police, make a grand jury presentment, prepare for and prosecute a jury trial, prove his case beyond a reasonable doubt, and contend with the complexities of the criminal process from arrest through arraignment, indictment, and trial. The entire process usually takes several months. In contrast, to seek an injunction the prosecutor need only file a complaint, perhaps post a bond, and prepare for a non-jury hearing in which he will bear only a civil burden of proof. If he seeks a temporary restraining order, the hearing will occur within a matter of days or even hours. A hearing on a preliminary injunction is also held quite soon after the filing of a complaint. The trial on the merits may not take place any sooner than a criminal trial, but if the prosecutor is successful in obtaining a temporary restraining order or a preliminary injunction, the issue may well become moot.

There are, to be sure, instances in which an equity action may not be practicable. If the speech in question has already occurred or will occur before the prosecutor can prepare a complaint, find a judge, and obtain hearing, he may well prefer a criminal process of subsequent punishment. A legislature could provide him with both, and even the current prior restraint doctrine recognizes that equity can intervene in some extreme cases despite the availability of a criminal sanction.¹³ Most of the time, however, the prosecutor can proceed with equal or greater speed, with fewer people, fewer hearings, and a less burdensome

¹¹ See, e.g., *Freedman v. Maryland*, 380 U.S. 51 (1965); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684 (1959); cf. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion picture licensing scheme held invalid for denying license on ground that film was “sacrilegious”).

¹² Mayton does recognize that in limited circumstances an injunction may be more effective. Mayton, *supra* note 1, at 272.

¹³ Both the *Pentagon Papers* case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), and the *Progressive* case, *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), are illustrative.

standard of proof in equity than in criminal law. Indeed, if speed is essential and the defendant cannot be immediately located, the prosecutor in equity may even be able to obtain an *ex parte* restraining order.¹⁴

Nevertheless, Mayton argues that the equitable process is preferable because it is so narrowly circumscribed. Although he does recognize the danger of overbroad injunctions, he is generally correct that injunctions involve discrete parties and concrete problems. It does not follow, however, that a system of injunctions will lead to less self-censorship than a system of subsequent punishment. Admittedly, the threat of a *criminal* prosecution may have a slightly greater deterrent effect on some people, but the risk-averse speaker or writer will want to avoid the costs of an equitable proceeding as much as he will want to avoid any lawsuit. A vigorous prosecutor can achieve broad self-censorship with a few well-chosen and well-publicized equitable actions coupled with the threat of continued enforcement just as well as he can with a few arrests and prosecutions. In either case, the prosecutor's enthusiasm and willingness to initiate actions determines the success of the prohibition. Unless the criminal penalties are particularly severe and the risk of suffering them is significant, the vigorous and enthusiastic pursuit of either injunctions or criminal prosecutions can serve the prosecutor's purposes adequately.

II

THE CONTEMPT POWER

In many situations, a prosecutor might prefer the injunctive remedy because it is coupled with the judicial contempt power, which supplements the civil remedy with a criminal-type enforcement mechanism. The collateral bar rule, in particular, makes the contempt power especially efficacious as a means of enforcing laws limiting speech. The underlying statute may be unconstitutional or the court may have issued an erroneous order, but that is of no avail to a defendant who disobeys an injunction against speech. For instance, a prosecutor might bring an action against a bookseller for selling a book containing the word "mud," and the court might enjoin future sales of such books. Subsequently, the law might be declared facially invalid or the injunction may be vacated as erroneously issued. But if the bookseller sold a book containing the word "mud" subsequent to the issuance of the preventive order, he could still be held in contempt. The bookseller could successfully challenge the contempt order only if the court lacked subject matter or personal jurisdiction.¹⁵ Although there may be some ex-

¹⁴ See FED. R. CIV. P. 65(b).

¹⁵ See *Walker v. City of Birmingham*, 388 U.S. 307 (1967). See generally Rendleman, *More on Void Orders*, 7 GA. L. REV. 246, 249-71 (1973).

ceptions to this rule at the state level,¹⁶ the availability of the contempt sanction not only makes the ordinary injunction a particularly powerful weapon; it can also effectively ratify for purposes of punishment an otherwise invalid law or order.

If an injunction of speech contemplates a single performance, then the contempt sanction may be criminal in nature and the disobedient party may be entitled to criminal due process in the contempt proceedings. The injunction may be mandatory, however, in that it compels speech—silence is as much a right of speech as is speaking¹⁷—or it may be limited in time in such a way that the coercive effect contemplates cure by the defendant.¹⁸ In either case, refusal to comply with the order normally will be treated as an instance of civil contempt and the defendant will not be entitled to criminal due process, notwithstanding the possibility of a jail sentence or a fine.¹⁹ Even in cases of criminal contempt, the judge who initially issued the order normally presides over the contempt proceedings, a fact which by itself shortchanges fundamental notions of fairness in the criminal process. The net effect is that the contempt sanction may make an injunction or other equitable order a more powerful remedy than many criminal statutes, particularly those prescribing a relatively mild misdemeanor sentence.

III

JUDGES AS LICENSORS

Regardless of the system of limitation employed, prosecutors will be at least partly cast in the role of licensor. They may not serve the same function as administrative licensors, but their understanding of and enthusiasm for laws affecting speech will set the tone for self-censorship by establishing the risks for publications at the limits of acceptability. In a system of subsequent punishment judges have a role similar to that of licensors, but the police and prosecutor often make the initial decision about the legality of a particular publication.

In a system of prior injunctive restraints, the judge's role as a licensor is substantially enhanced. The prosecutor may still be the initial actor, but the judge is forced to make a substantive decision early in the proceedings—a decision that may effectively resolve the issue if time is a matter of consequence. Thus, the relative reliability of judges as licensors should be of considerable concern.

¹⁶ See, e.g., *Younger v. Smith*, 30 Cal. App. 3d 138, 106 Cal. Rptr. 225 (1973); *Dobbs, Trial Court Error as an Excess of Jurisdiction*, 43 TEXAS L. REV. 854 (1965).

¹⁷ See *Wooley v. Maynard*, 430 U.S. 705 (1977).

¹⁸ An order to testify after the assertion of an evidentiary privilege would constitute such an order. For an example of the consequences of a refusal, see *In re Farber*, 78 N.J. 259, 394 A.2d 330, cert. denied, 439 U.S. 997 (1978).

¹⁹ See *In re Dinnan*, 625 F.2d 1146 (5th Cir. 1980).

Professor Mayton apparently trusts judges more than any other participants in this scheme. Judges are certainly charged with a duty to consider constitutional restraints, although it does prosecutors a disservice to imply that they too are not responsible for sensitivity to constitutional concerns. Moreover, judges are not charged only with the duty "to vindicate constitutional rights";²⁰ their basic charge is to decide cases within a constitutional framework. They are bound to enforce constitutional provisions limiting speech as much as they are bound to act as social agents for the promotion of speech. To be sure, judges should be sensitive to constitutional constraints on governmental action, but they must also be conscious of a variety of other concerns which may or may not support the interests of free speech.

In fact, judges often have been active licensors themselves. This is particularly evident in cases involving the tension between first amendment and sixth amendment interests. These cases are significant because they involve situations in which judges, bound by all the limitations of judicial *process*, have been ready censors because *substantive* issues have not been adequately understood or developed. For example, the sixth amendment "fair trial" cases have produced a flurry of "gag orders," courtroom closures, and other limitations on both access to trials and dissemination of information about them.²¹ The well-known case of *Nebraska Press Association v. Stuart*²² may have placed limits on the use of gag orders against the press in order to prevent potentially unfair pretrial publicity,²³ but gag orders continue to be applied to participants in the criminal process, such as witnesses, lawyers, jurors, police officers, and court personnel.²⁴ Unless one of those subject to the order complains, there may be considerable difficulty in obtaining review of such an order. The Supreme Court's recent decision that the first amendment supports a right of access to criminal trials,²⁵ however, may

²⁰ Mayton, *supra* note 1, at 250.

²¹ See generally D. GILLMOR & J. BARRON, MASS COMMUNICATION LAW 501-21 (3d ed. 1979) (collecting cases); F. SIEBERT, W. WILCOX & G. HOUGH III, FREE AND FAIR TRIAL (C. Bush ed. 1971).

²² 427 U.S. 539 (1976).

²³ *Id.* at 567-68. Reasoning that a "gag order" is a particularly pernicious form of prior restraint, the Court suggested a variety of alternatives to ensure a fair trial: postponement of the trial, change of venue, extensive voir dire, special jury instructions, sequestration, and limitations on speech by the participants. *Id.* at 563-65. The last was, of course, simply another form of the gag order. For the most recent federal guidelines, see U.S. Judicial Conference Guidelines on Fair Trial/Free Press (approved Sept. 25, 1980), 6 Media L. Rep. (BNA) 1897 (1980).

²⁴ See, e.g., *Georgia v. Williams*, 7 Media L. Rep. (BNA) 1852 (Ga. Super. Ct. 1981); *Ramsey v. Georgia Gazette*, 7 Media L. Rep. (BNA) 1658 (Ga. Super. Ct. 1981). Some suggest that the majority's strict focus on the prior restraint aspects of *Nebraska Press* opened the door to other, more restrictive limitations on press freedom. See, e.g., G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1520-21 (10th ed. 1980); Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977).

²⁵ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

offer some basis for a third party challenge to a gag order. Judges often issue gag orders *sua sponte*. Even when issued pursuant to a motion by a participant in the criminal process, there often may be only a limited hearing with no opportunity for those who may be directly or indirectly affected by the order to be heard. The judge does not act as an administrative licensor whose decisions affect all speakers at large and he may not encourage broad scale self-censorship of entire categories of speech, such as sedition or obscenity. Nevertheless, the judge who issues a gag order effectively suppresses any speech about a particular subject—one that may be of considerable public interest—by a class of persons who are subject to immediate criminal sanctions for violation of the order. This holds true even if the order is later found to have been erroneously issued.²⁶

Another relatively common method of prior restraint employed by judges is the closure order.²⁷ In *Richmond Newspapers, Inc. v. Virginia*,²⁸ the Supreme Court held for the first time that there is a constitutional right, based in part on the first amendment, of access to criminal trials.²⁹ The Court has been reluctant, however, to derive from the first amendment a right of access to other types of government information.³⁰ Analysis of recent actions in this area demonstrates that (1) the denial of access to information, to a place, or to an event such as a trial is an extraordinarily effective method of restricting the dissemination of information; and (2) except as limited by the Supreme Court, trial judges have been almost frenetic in their rush to issue orders denying access. For example, following the Supreme Court's decision in *Gannett Co. v. De-*

²⁶ See note 15 and accompanying text *supra*.

²⁷ See, e.g., *Indiana ex rel. Post-Tribune v. Porter Superior Court*, 6 Media L. Rep. (BNA) 2300 (Ind. Sup. Ct. 1980); *Oneonta Star v. Mogavero*, 6 Media L. Rep. (BNA) 2271 (N.Y. App. Div. 1980).

²⁸ 448 U.S. 555, 579-80 (1980).

²⁹ The full impact of *Richmond Newspapers* is still unclear because the Court let stand its 1979 decision in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), in which the Court sustained an order closing a pre-trial evidentiary hearing in the face of both first and sixth amendment challenges. *Id.* at 379-93. Compare Note, *The First Amendment Right of Access to Sex Crime Trials*, 22 B.C.L. REV. 361 (1981) with O'Brien, *The Trials and Tribulations of Courtroom Secrecy and Judicial Craftsmanship: Reflections on Gannett and Richmond Newspapers*, COMMUNICATIONS & LAW 3 (Spring 1981). In situations other than those of criminal trials, the Court has not yet accepted the notion of a first amendment right to gather information or to gain access to public places or public information, although the Freedom of Information Act of 1966, 5 U.S.C. § 552 (1976) and various state sunshine laws provide a statutory basis in some cases for access to government information. See Comment, *Developments Under the Freedom of Information Act—1980*, 1981 DUKE L.J. 338. In the 1978 case of *Houchins v. KQED*, 438 U.S. 1 (1978), the Court narrowly rejected a first amendment right to gather government information or gain access to public places. Chief Justice Burger, joined by Justices White and Rehnquist, wrote the opinion of the Court. Justice Stewart concurred separately, *id.* at 16, while Justices Stevens, Brennan, and Powell dissented, *id.* at 19. Justices Marshall and Blackmun did not participate.

³⁰ See note 29 *supra*.

Pasquale,³¹ an unprecedented series of courtroom closures ensued.³² Judges have also readily limited the use of cameras and recording devices and the taking of interviews in and around courthouses.³³ These orders may be issued in a good faith attempt to preserve the sanctity of the criminal process, but they reveal an apparently common tendency to be less than sensitive to broad first amendment rights and interests.

Some judicial insensitivity to first amendment interests has also been apparent in the cases involving assertions of reporters' rights to maintain the confidentiality of sources. Although news gathering may involve sensitive, confidential communications, the reporter's privilege has received only grudging judicial approval.³⁴ If one chooses to remain silent to protect a confidence for reasons of conscience or just personal eccentricity, that choice is as much an exercise of the right of free speech as a lecture given in a public forum.³⁵ A judicial order to speak has the same force and effect on an individual who prefers to remain silent as does an order to be silent on one who prefers to speak. Such an order, although not a prior *restraint*, is effectively identical in that it absolutely prevents, upon threat of criminal sanction, the exercise of a first amendment right. Although prior to issuance of the order to speak there may be some opportunity to be heard—unlike the usual gag order procedure—the process may be truncated and the penalties swift and severe.³⁶ Indeed, the procedural protection at the penalty stage may be

³¹ 443 U.S. 368 (1979). See note 29 *supra*.

³² See generally Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1 (discussing impact of *Gannett*) (citing REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, COURT WATCH SUMMARY (May 1980)).

³³ See, e.g., *United States v. Columbia Broadcasting Sys.*, 497 F.2d 102 (5th Cir. 1974); *Dorfman v. Meiszner*, 430 F.2d 558 (7th Cir. 1970); *Seymour v. United States*, 373 F.2d 629 (5th Cir. 1967); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634 (D. Minn. 1972); *In re Acuff*, 331 F. Supp. 819 (D. N. Mex. 1971).

³⁴ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972); *State v. Sandsrom*, 224 Kan. 573, 581 P.2d 812 (1978), *cert. denied*, 440 U.S. 929 (1979); *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974).

³⁵ See *Wooley v. Maynard*, 430 U.S. 705 (1977). Saying that a man has a right to be silent does not necessarily mean that the law cannot justifiably compel him to speak. I only mean to indicate another circumstance in which the right of speech—or silence—has fallen prey to arguments favoring contrary interests in the judicial process.

³⁶ The basic dispute in the Myron Farber case, for instance, concerned process. Farber, a New York Times reporter, invoked the reporter's privilege of confidentiality in the murder trial of a New Jersey doctor who allegedly had been one of the subjects of Farber's articles about mysterious deaths in a New Jersey hospital. New Jersey's "shield law" recognizes such a privilege but allows a judge to override the privilege in certain instances. The fundamental dispute was whether the judge could inspect the evidence and hear the testimony *in camera* to determine its relevance, or whether he had to make the initial decision as to relevance without any disclosure by the reporter. Farber argued for the latter interpretation on the ground that any disclosure would violate the privilege. The judge ruled against him, but he never did divulge his sources. To protect his sources and principles he spent 40 days in jail and his employer paid a large fine. See *In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978); N.Y. Times, Feb. 28, 1980, § B, at 2, col. 5.

especially limited because a continued refusal to speak will usually be treated as an instance of civil rather than criminal contempt.³⁷

Instances of the judge as licensor may also arise in cases involving statutory, contractual, or common law limitations on speech. The statutory category includes those cases involving the proposed publication of a book, lecture, article, or essay by a current or former government employee who has had access to confidential information.³⁸ The second category includes disputes between employers and employees who are contractually bound to keep certain trade information in confidence, but who may want, for example, to publish research findings in trade journals or scientific periodicals.³⁹ Common law limitations involve instances in which speech runs afoul of a dignitary interest, such as privacy, or of a proprietary interest in one's visage, character, or persona.⁴⁰ Cases in this third category may also derive in part from statutory limitations.⁴¹ A judge presented with such a case may be confronted with a decision whether to intervene in equity or to defer to law.⁴² Moreover, whatever remedy he deems appropriate, he must decide whether the alleged injury is of more consequence than the limitation sought to be imposed on speech. This decision may be particularly complex when the injury implicates an interest that itself has constitutional implications.⁴³ Unless the plaintiff's interest is of constitutional dimension the balance generally should be struck in favor of speech, but this balancing forces the judge regularly into the role of a licensor.⁴⁴

Professor Mayton argues that judges are best suited to decide such disputes; they are preferable to an administrative licensor charged with a narrower purpose of enforcing a particular law limiting speech. A bureaucrat may indeed approach his task with a certain tunnel vision that places speech interests in a less favored position. That, however, is not necessarily the fault of the bureaucrat as such; rather, the fault may

³⁷ As the old saying goes, the person subject to the order holds the keys to the jail—all he has to do is speak.

³⁸ See generally *Snepp v. United States*, 444 U.S. 507 (1980).

³⁹ This obviously involves property concepts as well as speech interests.

⁴⁰ See, e.g., *Memphis Dev. Foundation v. Factors, Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980), noted in 67 CORNELL LAW REV. 398 (1982); *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953); *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

⁴¹ See, e.g., N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 1976). See generally Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976).

⁴² This difficulty is well illustrated by the running battle between Jacqueline Kennedy Onassis and the photographer Ron Gallela. See *Gallela v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

⁴³ The privacy cases raise this problem. Although the tort of invasion of privacy has its origins in trespass theory, the notion of privacy as a protected interest has also found support in the Constitution and even in the first amendment. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462 (1973).

⁴⁴ Admittedly, virtually every attempt to regulate speech involves some balancing including, to a degree, the "clear and present danger" test.

lie in the enabling legislation that defines his duties and responsibilities. If a bureaucrat were told, for example, that the presumption in any balancing should weigh heavily in favor of speech, and if he operated under certain procedural limitations,⁴⁵ then his job definition would not be significantly different from that of a judge.

Ultimately, then, there is no good reason to prefer judges as a class over administrative licensors as a class, provided that the charge to the two classes is similar. Indeed, judges as a class have often manifested a significant degree of indifference to first amendment values in comparison to other interests. The criminal process provides the best example. The argument in favor of gag orders, closures, and other such devices is often couched in terms of competing *constitutional* rights, but the argument often flies wide of the mark. Many things can be done to ensure the fairness of a criminal trial short of squelching speech rights,⁴⁶ but there is a disturbing judicial tendency to limit speech, perhaps because it is the simplest, least expensive, and most efficient method for achieving the end sought. The same is sometimes true of judicial remedies for the apparent conflict between the constitutional right to compel witnesses to testify and the speech right to remain silent.

IV

A BETTER UNDERSTANDING OF PRIOR RESTRAINT

Professor Mayton argues that, at least since *Near v. Minnesota*,⁴⁷ judges have fallen prey to a tendency to equate the old English licensing scheme with injunctions of speech obtained through the judicial process. On that point he may well be correct; at least the evidence he musters in support of his argument suggests that conclusion. But it does not necessarily follow that a misunderstanding of the historical meaning of "prior restraint" or a proper appreciation for procedural safeguards in the judicial process permits the conclusion that injunctions of speech, rather than post-speech civil or criminal sanctions, should be the favored method for imposing limitations on speech. In fact, Mayton's own argument—that laws such as the Sedition Act,⁴⁸ the Espionage Act,⁴⁹ and the Smith Act⁵⁰ cause excessive self-censorship compared with an in-

⁴⁵ The Administrative Procedure Act does provide procedural due process safeguards generally equivalent to those available in the judicial process. Administrative Procedure Act of 1966, 5 U.S.C. §§ 551-58 & 701-03 (1976).

⁴⁶ Judges have available, for example, the power to order a change of venue, lengthy and searching *voir dire*, sequestration of jurors, and the power to maintain close control over the decorum in the courtroom itself. See note 23 *supra*.

⁴⁷ 283 U.S. 697 (1931). For more on the background of *Near*, see generally F. FRIENDLY, MINNESOTA RAG (1981).

⁴⁸ Ch. 74, 1 Stat. 596 (1798).

⁴⁹ Ch. 30, 40 Stat. 217 (1917).

⁵⁰ Ch. 439, § 2(a)(1), 54 Stat. 671 (1940) (codified at 18 U.S.C. § 2385 (1976)).

junction of a particular defendant's speech⁵¹—suggests the real problem: the failure to articulate a comprehensive theory of prior restraint. Mayton quite correctly asserts that the risk-averse will refrain from speaking in violation of a criminal prohibition and that much acceptable speech might be stifled by a vague law.⁵² A vague law, although imposing a subsequent punishment, effectively restrains speech in advance and is itself as much a prior restraint as an injunction. That was certainly Justice Black's opinion of the Smith Act as it applied in *Dennis v. United States*.⁵³

A prior restraint may result from legislation, bureaucratic edict, or judicial decree. The judicial process may be protected by substantial procedural safeguards—although neither the legislative process nor the administrative process is bereft of them—and a judge's order may be highly specific rather than of broad general application. In those respects the judicial process may have some advantages, but prior restraints, from whatever source and through whatever process, all curtail speech before it happens. To use the common phrase, they “freeze” speech, they do not just chill it. With injunctions, an aggressive prosecutor can both freeze and chill speech.

A prior restraint operates as a governmental decision to prohibit absolutely that particular speech—a decision that, as Justice Black argued, runs counter to the most basic premise of the first amendment. On the other hand, a system of subsequent punishment, properly limited, may have an inhibitory effect, but a speaker can proceed to speak if he is willing to risk possible prosecution. Simply stated, there is a world of difference between a government statement that one cannot speak at all and a statement that one can speak out at some risk of paying a specified cost. The problem is to ensure that the cost and risk associated with the latter limitation do not transmogrify it into the former. That task is difficult, but not impossible.

Professor Mayton argues that laws against speech are inherently vague and that this vagueness renders any legislation imposing a system of subsequent punishment susceptible to the criticism that it requires unnecessary self-censorship. Thus, it acts as a form of broad prior restraint.⁵⁴ Some laws are perhaps proper targets of this criticism, but a

⁵¹ Mayton, *supra* note 1, at 256-57.

⁵² *Id.* at 256; *see generally id.* at 254-58.

⁵³ 341 U.S. 494 (1951).

The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. I would hold § 3 of the Smith Act authorizing this prior restraint unconstitutional on its face and as applied.

Id. at 579 (Black, J., dissenting).

⁵⁴ Mayton, *supra* note 1, at 254-57.

law against speech can be drafted with reasonable precision. It can be as narrowly focused as an injunction and thus need not carry with it the prohibitory force of an absolute prior restraint. Making an overt act a prerequisite for punishing speech, as Mayton suggests,⁵⁵ may aid in the precision with which the limitation is applied,⁵⁶ but it is not necessary to precise definition. Explicitness and clarity may be achieved by specifying the speech prohibited (certain listed words may not be spoken by *anyone* appearing on radio or television⁵⁷) and identifying a class against whom a prohibition is directed (military officers in uniform while on active duty may not make public speeches without prior approval of the content by their respective commanding officers, or some other designated superior⁵⁸). Justifying a limitation may be difficult, but if it is supportable, a precise, narrowly defined limitation can be imposed.

As a matter of fact, most laws against speech are relatively vague, but many of these laws are based on judicial decisions. Although legislators have enacted statutes dealing with libel, slander, invasion of privacy, and obscenity, the critical law on such matters is judge-made. Precision is frequently not a hallmark of the judicial process—judicial definitions are often vague, inconsistent, and contradictory.⁵⁹ Whatever the sources of vague laws, the remedy for the ills that flow from them should be the removal of vagueness and the substitution of precision. This can be accomplished through a system of subsequent punishment; we need not reverse the historical tendency to avoid injunctions of speech, nor need we reverse the traditional deference of equity to law in the American system.

A good process—one that is replete with safeguards against abuse—can be employed vigorously to enforce substantive law that is vague and overbroad so that it encourages wholesale self-censorship. This is not to say that process is unimportant; to the contrary, it is often critical. A judge bound by the constraints of the Constitution and precedent is

⁵⁵ *Id.* at 258-59, 262.

⁵⁶ The law of conspiracy, however, is filled with examples to the contrary. *See generally* Note, *Conspiracy and the First Amendment*, 79 YALE L.J. 872 (1970).

⁵⁷ *See, e.g.*, FCC v. *Pacifica* Foundation, 438 U.S. 726 (1978). Such a limitation is justified by the government licensing monopoly over the limited spectrum of airwaves. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 376-79 (1969). In point of fact, the statute relied upon in *Pacifica* was vague, but one could be drafted that contained a specific list of the dirty words prohibited.

⁵⁸ For a discussion of the free speech rights of servicemen, see Imwinkelried & Zillman, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community*, 54 TEXAS L. REV. 42 (1975).

⁵⁹ The agonies some courts go through in applying the *Miller* obscenity test, *Miller v. California*, 413 U.S. 15 (1973), are truly tortured. *See, e.g.*, *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980). In another area, truth is still an absolute defense to a libel action, but not to an invasion of privacy action for the publication of true private facts. This can lead to an analysis almost as complex and confusing as the one employed in the obscenity cases. *See, e.g.*, *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975).

much to be preferred over an administrative licensor whose only charge is to encourage public decency. Nonetheless, process alone affords limited protection for speech. Stronger protection results from a proper appreciation of the substantive limits that government can impose on individual expression, and the most severe limitation that can ever be imposed is one that prevents speech from occurring at all. This is the real reason for the concern with prior restraints. If limitations on speech can be justified, the limitations to be preferred are those that impose a risk or a cost without being prohibitory. The cost may be a deterrent to some, but it is not prohibitive unless the cost and the risk of paying it are inordinately high,⁶⁰ in which case the limitation should be characterized as a form of prior restraint and not a form of subsequent punishment.

CONCLUSION

Professor Mayton's attempt to force us to reconsider a neglected area of first amendment law is much needed. Many of Mayton's concerns, however, can be alleviated by the use of a declaratory judgment process to determine the legitimacy of a particular form of speech prior to any criminal action against a publisher or distributor. This approach will not succeed in all cases, but it has been used with some success to protect booksellers, clerks, movie ticket takers, and others in the line of distribution.⁶¹

In any event, I disagree with his conclusion because (1) the costs to the state of enforcing injunctions that cause massive self-censorship are not demonstrably greater than the costs of effectively enforcing a system of subsequent punishment; (2) judges can wield tremendous pre- and post-speech powers that, through equity, can deter speech as effectively as any system of subsequent punishment; (3) judges have not necessarily shown themselves to be especially sensitive "licensors"; (4) prior restraints take many forms and are to be avoided in *any* form because they are the most intrusive, most damaging, and most limiting form of state action against individual speech;⁶² and (5) substance, not process, is the best approach to the problem.

Our concern should not be entirely with the process; rather, it should be with the justification for any limitation on speech and the

⁶⁰ Of course, there must be a minimum risk of enforcement for the law to have much effect.

⁶¹ See *American Book Seller Ass'n v. McAuliffe*, 7 Media L. Rep. (BNA) 2282 (N.D. Ga. 1981); *Louisiana v. Walden Books*, 6 Media L. Rep. (BNA) 1696 (La. Sup. Ct. 1980); *Septum v. Keller*, 6 Media L. Rep. (BNA) 1116 (5th Cir. 1980) (theater owner allowed to seek federal declaratory and injunctive relief from threatened enforcement), *remanded*, 7 Media L. Rep. 1664 (N.D. Ga. 1981) (movie found obscene); *Missouri v. All Star News Agency*, 5 Media L. Rep. (BNA) 1076 (Mo. Sup. Ct. 1979).

⁶² With respect to the fourth point, Professor Mayton apparently agrees with me at least in part, because he does seem to recognize that prior restraints may be varied in form.

means by which a limitation may be imposed with precision so as not to deter speech that is not justifiably subject to limitation. That may not be easy, but it is the fundamental task.