NOTES

INJUNCTIONS PURSUANT TO PUBLIC NUISANCE OBSCENITY STATUTES AND THE DOCTRINE OF PRIOR RESTRAINTS

Many states use public nuisance statutes[1] to regulate obscene expressions.[2] These statutes commonly grant judges the power to impose injunctions[3] that restrain a "speaker"[4] from engaging in some form of

1. A public nuisance is "[a] condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property." BLACK'S LAW DICTIONARY 1107 (rev. 5th ed. 1979). *See infra* notes 60-97 and accompanying text.

2. The right of free expression is guaranteed by the first amendment of the United States Constitution, which provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. This right is protected from state abridgement by the fourteenth amendment, Gitlow v. New York, 268 U.S. 652 (1925). There are, however, judicially recognized exceptions, one of which is the class of speech identified as obscene. *See* Roth v. United States, 354 U.S. 476 (1957).

The Supreme Court established a three part test to define obscene expressions in Miller v. California, 413 U.S. 15 (1973):

> (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). For a general review of obscenity regulation, see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1344-80 (10th ed. 1980); F. SCHAUER, THE LAW OF OBSCENITY (1976) [hereinafter cited as F. SCHAUER]; THE CONSTITUTION OF THE UNITED STATES OF AMERICA ANALYSIS AND INTERPRETATION 941-44 (1972) [hereinafter cited as CONSTITUTION ANALYSIS].

3. A number of constitutional issues surround the issuance of temporary injunctions enjoining displays of films, sales of books, and speeches while an obscenity trial is pending. This Note will confine its analysis, however, to the constitutional validity of injunctions entered after a judicial finding of obscenity.

When a court determines that particular materials are obscene, it may permanently enjoin the display of such material; in some states, courts may go further and close the premises for one year. Thus, injunctions against obscene expressions may be permanent or temporary. *See infra* notes 60-97 and accompanying text.

4. "Speech" entitled to first amendment protection includes various forms of expression. *See, e.g.*, Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (live nude dancing); Spence v. Washington, 418 U.S. 405 (1974) (display of American flag with peace symbols attached); Cohen v. California, 403 U.S. 15 (1971) (t-shirt with printed words); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (armbands worn in school); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (motion pictures).

"Speaker" as used in this Note means "exhibitor," "displayer," "picketer," etc. It refers to any

speech a judge has already ruled obscene.[5] Some nuisance statutes provide for even more severe penalties,[6] such as an order padlocking the place of business where the obscene expression occurred.[7] Such a restraint affects expressions other than those found obscene,[8] implicating, among other first amendment concerns,[9] the doctrine of prior restraints.[10] This Note examines the types of injunctions a state court may issue pursuant to a public nuisance statute to abate obscene expression, which are consistent with the constitutional doctrine of prior restraints.

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person who engages in one of the forms of speech protected by the Constitution. The terms "expression" and "utterance" are used synonymously with "speech."

5. *See, e.g.,* People *ex rel.* Busch v. Projection Room Theatre, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied sub nom.* Van de Kamp v. Projection Room Theatre, 429 U.S. 922 (1976); State *ex rel.* Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), *vacated,* 445 U.S. 947 (1980), *aff'd,* 302 N.C. 321, 275 S.E.2d 443 (1981). *See infra* note 89 and accompanying text.

6. *See, e.g.,* Avenue Book Store v. City of Tallmadge, 103 S. Ct. 356 (1982); State *ex rel.* Kidwell v. U.S. Mktg., Inc., 102 Idaho 451, 631 P.2d 622 (1981), *appeal dismissed per stipulation sub nom.* U.S. Mktg., Inc. v. Idaho, 455 U.S. 1009 (1982). *See infra* notes 96-97 & 110-20 and accompanying text.

7. *See, e.g.,* State *ex rel.* Kidwell v. U.S. Mktg., Inc., 102 Idaho 451, 631 P.2d 622 (1981), *appeal dismissed per stipulation sub nom.* U.S. Mktg., Inc. v. Idaho, 455 U.S. 1009 (1982).

8. A motion picture theater closed by the court for one year is precluded from exhibiting other films that may not be obscene. *See infra* notes 154-59 and accompanying text.

9. The scope of injunctions imposed against possibly protected speech also raises overbreadth and vagueness issues. This Note will confine its discussion to the issue of prior restraints. Most state courts that have considered the permissible breadth of injunctions entered pursuant to public nuisance statutes have considered the major constitutional difficulty to be the doctrine of prior restraints. *See, e.g.,* People *ex rel.* Busch v. Projection Room Theatre, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied sub nom.* Van de Kamp v. Projection Room Theatre, 429 U.S. 922 (1976); Mitchem v. Schaub, 250 So. 2d 883 (Fla. 1971); Sanders v. State, 231 Ga. 608, 203 S.E.2d 153 (1974); Gulf States Theatres Inc. v. Richardson, 287 So. 2d 480 (La. 1973); State *ex rel.* Cahalan Diversified Theatrical Corp., 59 Mich. App. 223, 229 N.W.2d 389 (1975); State *ex rel.* Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), *vacated,* 445 U.S. 947 (1980), *aff'd,* 302 N.C. 321, 275 S.E.2d 443 (1981); New Riviera Arts Theatre v. State *ex rel* Davis, 219 Tenn. 652, 412 S.W.2d 890 (1967).

10. Historically, a prior restraint took effect prior to the expression. The most common example would be a censorship board or a licensing agency. If, before showing a film in a city, an exhibitor needs to have the film approved by a censorship board, then that exhibitor is subject to a prior restraint.

Currently, a prior restraint is an official action that chills speech prior to a finding that it is unprotected, and therefore restrainable. In the final analysis, however, whether a restraint is a prior restraint will depend upon "a pragmatic assessment of its operation in the particular circumstances." Freund, *The Supreme Court and Civil Liberties,* 4 VAND. L. REV. 533, 539 (1951).

I. THE DOCTRINE OF PRIOR RESTRAINTS

A. A Brief History of the Doctrine

The United States Supreme Court first recognized the doctrine of prior restraints in *Near v. Minnesota*.[11] *Near* involved the constitutionality of a state court order abating *The Saturday Press*, pursuant to a public nuisance statute, because the newspaper had published accusations concerning public officials.[12] The statute provided for the abatement of any "malicious, scandalous, and defamatory newspaper"[13] unless the owner or publisher could convince the judge of the truth of the accusations and the propriety of its motives.[14] In a 5-4 decision, the Supreme Court held that the statute was an unconstitutional prior restraint.[15] Quoting Blackstone,[16] Chief Justice Hughes stated, "the chief purpose of the [first amendment] guaranty [is] to prevent previous re-

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11. 283 U.S. 697 (1931). The Court found the fact that the issue of previous restraints had not come before it for 150 years, evidence of "the deep seated conviction that such restraints would violate constitutional rights." *Id.* at 718.

12. The newspaper alleged that a gangster engaged in various vices in the city of Minneapolis, and that the Minneapolis Chief of Police, County Attorney, and Mayor neglected their respective duties with respect to this gangster. *Id.* at 704.

13. *Id.* at 701-02. *See* MINN. STAT. § 10123-1 to -3 (1927), *cited in* Near v. Minnesota, 283 U.S. 697, 701-02 (1931), which states:

> Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away,
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> (a) an obscene, lewd and lascivious newspaper, magazine or other periodical, . . .
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> . . . .
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> is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

283 U.S. at 701-02.

14. The Court stated that the availability of this defense to the owner or publisher did not justify the prior restraint. "The preliminary freedom, by virtue of the very reason for its existence, does not depend . . . on proof of truth." 283 U.S. at 721.

15. *Id.* at 722-23. Chief Justice Hughes stated that there were exceptions to the doctrine of prior restraints. He enunciated four categories of speech that the state could regulate prior to their utterance. The "exceptional cases" were: (1) words that would hinder a nation at war, *e.g.*, obstructions of the draft and publications of troop and ship movements; (2) obscene publications; (3) words that incite the violent overthrow of the government; and (4) "words that may have all the effect of force." *Id.* at 716. If obscene publications are exceptions to the doctrine, had the action been brought under Section 1(a) of the Minnesota statute, the issue of prior restraints would not have arisen.

16. Blackstone said, "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 . . . ." 4 W. BLACKSTONE, COMMENTARIES 151, 152, *cited in* Near v. Minnesota, 283 U.S. 697, 713 (1931).

straints upon publication."[17] The state must find relief for abuses of liberty of the press in subsequent punishment, not prior restraint.[18]

In *Near*, "prior restraint" meant an official, governmental obstruction of protected or unprotected speech prior to its utterance. The state restrained future publication of the newspaper on the basis of a past utterance.[19] The statute operated as a censor on the publisher: if the state did not like the contents of a periodical, it could abate future publication, disregarding the first amendment protection of the periodical's future expressions.[20] The Court expressed a decided preference that speech, when regulated, be regulated by subsequent punishment. Chief

17. Near v. Minnesota, 283 U.S. 697, 713 (1931). It seems unlikely that the *chief* purpose of the first amendment speech clause was to prevent prior restraints since the classic form of prior restraint, licensing statutes, had been abolished in England for almost 100 years. Actually, England's licensing act expired in 1695, and the House of Commons did not extend it. The classic licensing act in England, "The Licensing Act of 1662," proscribed any printing of any material unless it was fully licensed by a state or clerical agent. No book could be imported or sold without a license. Emerson, *The Doctrine Of Prior Restraint,* 20 LAW & CONTEMP. PROBS. 648 (1955).

18. Near v. Minnesota, 283 U.S. 697, 720 (1931).

19. The order prohibited the defendants from having in their possession any editions of the *Saturday Review* that were found to be "malicious and defamatory." The order also denied them the right to publish future editions of *The Saturday Press*, or to publish, circulate, or have in their possession, "any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint herein or otherwise." *Id.* at 705.

The first part of the injunction restrained publication of materials which violated the statute. The second part of the injunction abated publication of the newspaper itself. *See* MASON'S MINN. STATS. § 10123-1 to -3 (1927). One commentator referred to the injunction abating the newspaper itself as a "hardcore" restraint, because such a restraint affects future publications without regard to their constitutional protection. *See* Rendleman, *Civilizing Pornography: The Case For An Exclusive Obscenity Nuisance Statute,* 44 U. CHI. L. REV. 509, 550 (1977). For a discussion of hardcore restraints see *infra* notes 107-23 and accompanying text. The third part of the injunction has been referred to as a "standards" restraint. A standards restraint simply adopts the standard embodied in the statute and thereby restrains all unlawful expression. For a discussion of standards restraints see *infra* notes 99-106 and accompanying text.

The three forms of injunction employed in *Near* are the types used in abating obscenity as a public nuisance. States disagree on which of these injunctions operate as a prior restraint, and therefore violate the federal constitution. *See infra* notes 98-123 and accompanying text.

20. The Court found this part of the injunction, the "hardcore restraint," most offensive. It stated:

> If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter . . . unless the owner or publisher is able . . . to bring competent evidence . . . that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is the essence of censorship.

Near v. Minnesota, 283 U.S. 697, 713 (1931).

Justice Hughes' express approval of the use of libel laws to punish those who abused the freedom of the press demonstrates that he contemplated that the speech in question might be unprotected.[21] Thus, the statute's flaw lay in its form and application to this particular utterance.

Under the Chief Justice's analysis there are three classes of speech. The first class comprises speech protected by the first amendment. The second class consists of unprotected speech a state may regulate by prior restraint, such as words that would hinder a nation at war, obscene publications, words that incite violent overthrow of government, and words that have the effect of force.[22] The third class consists of unprotected speech which the government may regulate only by subsequent punishment—all unprotected speech not falling within the previous category.

The Chief Justice never clearly identified the reasons for distinguishing between the second and third classes of speech. Justice Butler in his dissent, however, questioned why lewd publications could be constitutionally enjoined while malicious or defamatory expressions could not.[23]

In the years following *Near*, the doctrine of prior restraints became a talismanic test used to strike down many state statutes that required permits and licenses for public speakers.[24] A statute constituted an unconstitutional prior restraint if it imposed conditions upon a speaker, prior to his utterance, that exceeded reasonable time, place, and manner restrictions.[25] Similarly, a statute was an unconstitutional prior restraint if it imposed conditions upon a speaker's utterance that were subject to arbitrary administration because of excessive discretionary authority vested in the administrator of the licensing or permit

21. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. . . . For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws.

Id. at 715 (citations omitted).

22. *See supra* note 15; *infra* notes 38-43 and accompanying text.

23. Near v. Minnesota, 283 U.S. 697, 727 (1931) (Butler, J., dissenting).

24. *See, e.g.,* Staub v. City of Baxley, 355 U.S. 313 (1958); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. Griffin, 303 U.S. 444 (1938).

25. *See, e.g.,* Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

scheme.[26]

Current Supreme Court decisions indicate that a heavy presumption exists against the constitutional validity of any scheme employing prior restraints rather than subsequent punishment.[27] Two of the Court's recent decisions illustrate this proposition. In *New York Times Co. v. United States*[28] ("The Pentagon Papers Case") the Court refused to restrain *The New York Times* from publishing certain materials the Federal Government thought inimical to the national security.[29] Although unable to articulate a uniform standard for prior restraints sought for national security reasons, the Court held that the Government had failed to overcome the "heavy burden of showing justification for the imposition of such a restraint."[30] In *Nebraska Press Association v. Stu-*

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26. *See, e.g.,* Kunz v. New York, 340 U.S. 290 (1951):

> We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights.

Id. at 293.

27. Vance v. Universal Amusement Co., 445 U.S. 308, 316 n.13 (1980) (per curiam); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Carroll v. Princess Anne, 393 U.S. 175, 181 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

28. 403 U.S. 713 (1971).

29. The case involved the so-called "Pentagon Papers." The "Papers" consisted of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." The Government contended that the material would "gravely prejudice the defense interests of the United States or result in irreparable injury to the United States." United States v. Washington Post Co., 446 F.2d 1327, 1328 (D.C. Cir. 1971), *aff'd sub nom.* New York Times Co. v. United States, 403 U.S. 713 (1971). The district court refused to enjoin the materials and the Court of Appeals for the District of Columbia Circuit affirmed.

30. 403 U.S. 713, 714 (1971) (per curiam). The Court affirmed in a short per curiam opinion. The deep division in the Court over the particular standard by which to judge prior restraints for national security purposes was reflected in the fact that each Justice felt compelled to write a separate opinion. Justice Stewart maintained that the Government had not shown that disclosure of the papers "would surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (Stewart, J., concurring). Justice White thought that although the Government had not overcome the presumption of unconstitutionality that accompanied a prior restraint, it could possibly proceed by way of subsequent punishment. *Id.* at 733 (White, J., concurring). Justices Black and Douglas made it clear they would never permit prior restraints. *Id.* at 715 (Black, J., concurring); *id.* at 720 (Douglas, J., concurring). Justice Marshall pointed out that Congress had twice refused to grant the power the Executive Branch sought in this case. *Id.* at 747 (Marshall, J., concurring). Justice Brennan would issue a prior restraint sought by the Government only if the publication would "inevitably, directly, and immediately cause the occurrence of

art,[31] the Supreme Court invalidated as a prior restraint a gag order restraining the press from publishing certain facts concerning a widely publicized mass murder case pending in the state court.[32]

A restraint exists when the government either obstructs or imposes a condition upon expression. In its most extreme form, the restraint constitutes an absolute ban against expression as in *Near, New York Times Co.*, and *Nebraska Press*. In a more traditional form, the restraint consists of a licensing or permit scheme. Although not all prior restraints are unconstitutional,[33] the courts carefully scrutinize such restrictions because they prevent a speaker from entering the "marketplace of ideas" rather than punishing him for misconduct while there.

B. Obscenity and the Doctrine of Prior Restraints

Courts react with less hostility to prior restraints of obscene expressions.[34] In *Near*, Chief Justice Hughes specifically excluded such expressions from the doctrine of prior restraints as one member of a class

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an event kindred to imperiling the safety of a transport already at sea. . . ." *Id.* at 726-27 (Brennan, J., concurring).

Chief Justice Burger, Justice Harlan and Justice Blackmun dissented from the per curiam opinion. The dissenters emphasized the haste with which the case was treated by the judiciary. *Id.* at 749 (Burger, C.J., dissenting); *id.* at 753 (Harlan, J., dissenting); *id.* at 760-61 (Blackmun, J., dissenting). Justice Harlan, with whom Chief Justice Burger and Justice Blackmun joined, stated that "[d]ue regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable." *Id.* at 753 (Harlan, J., dissenting).

31. 427 U.S. 539 (1976).

32. In order to protect the defendant's sixth amendment right to a fair trial, a state district judge prohibited the press from reporting five subjects: (1) material relating to the defendant's confession to law enforcement officers; (2) statements the defendant made to other persons; (3) contents of a note the defendant had written the night of the crime; (4) medical testimony given at the preliminary hearing; and (5) nature and identity of the victims of the murder. The order was to terminate once the jury was impanelled. *Id.* at 543.

The Nebraska Supreme Court modified the district court's order so that it applied only to confessions and admissions made to everyone except the press, and any other facts "strongly implicative" of the accused. *Id.* at 545.

In weighing the first amendment free press guarantee and the sixth amendment right to an impartial jury, the Supreme Court found that alternatives were available to the Nebraska court that would protect the defendant's sixth amendment rights; alternatives other than the "freezing" effect of a prior restraint. "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." *Id.* at 559 (footnote omitted).

33. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975); Bantam Books, Inc. v Sullivan, 372 U.S. 58, 70 n.10 (1963); Times Film Corp. v. Chicago, 365 U.S. 43, 47 (1961). *See also* Near v. Minnesota, 283 U.S. 697, 716 (1931).

34. *See, e.g.*, Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

of narrow exceptions.[35] Other Justices have reasoned that prior restraints on obscenity are treated differently because obscene speech is unprotected.[36] The Supreme Court appears to have settled on an approach to prior restraint of obscene speech that rests on the development of specific procedural safeguards to guarantee that states restrain only unprotected speech.[37]

Chief Justice Hughes set forth in *Near* four classes of exceptions to the prior restraint doctrine:[38] words that would hamper a war effort,[39] obscene utterances,[40] words advocating the violent overthrow of the Government,[41] and "words that may have all the effect of force."[42] The Chief Justice failed, however, to identify the source of the obscenity exception.[43] Although each excepted class comprised speech unprotected at the time the Court decided *Near*,[44] other unprotected categories[45] existed which were not included.

Justice Brennan has offered another explanation: Courts treat ob-

35. 283 U.S. 697, 722-23 (1931). *See supra* note 15; *infra* notes 38-43.

36. See New York Times Co. v. United States, 403 U.S. 713 (1971), in which Justice Brennan, concurring, stated that "cases regarding temporary restraints of allegedly obscene materials are not in point. For those cases rest on the proposition that 'obscenity is not protected by the freedoms of speech and press.'" *Id.* at 726 n.* (Brennan, J., concurring) (citation omitted). *See also* notes 46-48 and accompanying text.

37. *See, e.g.,* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975); Freedman v. Maryland, 380 U.S. 51, 58 (1965).

38. *See supra* note 15 and text accompanying note 21.

39. Chief Justice Hughes referred to Schenck v. United States, 249 U.S. 47 (1919)—a case in which no prior restraint was at issue—for the proposition that a government may prohibit words that obstruct "its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Near v. Minnesota, 283 U.S. 697, 716 (1931).

40. "On similar grounds, the primary requirements of decency may be enforced against obscene publications." Near v. Minnesota, 283 U.S. 697, 716 (1931). The Court cited no case law in support of this statement. *Id.*

41. "The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government." *Id.*

42. *Id.* See also Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 439 (1911), in which the Court stated that, "words are 'verbal acts' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged."

43. Near v. Minnesota, 283 U.S. 697, 716 (1931). *See also* Emerson, *supra* note 17, at 660-61. Emerson criticizes the Court for citing neither historical nor modern authority for the obscenity exception. See *supra* notes 38-42 to compare the support offered by the Court for the other exceptions.

44. For decisions prior to *Near* that assumed that obscene expression was unprotected under the first amendment, see Hoke v. United States, 227 U.S. 308, 322 (1913); Public Clearing House v. Coyne, 194 U.S. 497, 508 (1904); Robertson v. Baldwin, 165 U.S. 275, 281 (1897); United States v. Chase, 135 U.S. 255, 261 (1890); *Ex parte* Jackson, 96 U.S. 727, 736-37 (1877).

45. *See* Emerson, *supra* note 17, at 660-61.

scene speech differently than other speech for the purposes of prior restraint analysis because it is unprotected.[46] This explanation, however, is unsatisfactory; speech that is libelous is unprotected,[47] yet a prior restraint against this class of speech is not treated the same as a prior restraint on obscene speech.[48]

A more practical explanation for the peculiar treatment of obscenity in prior restraint analysis is that it generally appears in motion pictures, magazines and books, but rarely, if ever, in newspapers. The form that an utterance takes affects the degree of its protection.[49] Reviewing boards commonly prescreen movies to determine their fitness for a community.[50] It is difficult to imagine, however, a board reviewing a newspaper before its release to the public.[51] The Supreme Court has approved the use of motion picture censorship[52] boards, but has held that certain accompanying procedural safeguards are necessary to render any imposed prior restraint constitutional:[53] (1) that the state bear the burden of proof on obscenity; (2) that any restraint imposed prior to judicial review be imposed briefly; and (3) that the state ensure prompt final adjudication of the proceedings.[54]

The Supreme Court recently struck down a state statute as an uncon-

46 *See* New York Times Co. v. United States, 403 U.S. 713, 726 n.* (1971) (Brennan, J., concurring).

47 Konigsberg v. State Bar, 366 U.S. 36, 49 n.10 (1961); Times Film Corp. v. City of Chicago, 365 U.S. 43, 48 (1961); Roth v. United States, 354 U.S. 476, 486-87 (1957); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Pennekamp v. Florida, 328 U.S. 331, 348-49 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Near v. Minnesota, 283 U.S. 697, 715 (1931).

48. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 255 (1964). *See also* New York Times Co. v. United States, 403 U.S. 713 (1971).

49. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (radio broadcast); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 562 (1975) (motion picture); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969) (television); Times Film Corp. v. City of Chicago, 365 U.S. 43, 49 (1961) (motion picture); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) (motion picture).

50. *See, e.g.*, Times Film Corp. v. City of Chicago, 365 U.S. 43, 49 (1961) (upholding Chicago's power to require submission of films prior to their public exhibition).

51 Motion pictures were not considered protected by the first and fourteenth amendments of the federal constitution until 1951. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (motion pictures first brought under the protection of the first amendment). Verani, *Motion Picture Censorship and the Doctrine of Prior Restraint*, 3 HOUS. L. REV. 11 (1965).

52 Times Film Corp. v. City of Chicago, 365 U.S. 43, 49-50 (1961).

53. *See* Freedman v. Maryland, 380 U.S. 51 (1965). In *Freedman*, the Court held that "a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58.

54 *Id.*

stitutional prior restraint because it failed to meet the procedural safeguards outlined above. In *Vance v. Universal Amusement Co.*,[55] the Supreme Court held that a Texas public nuisance statute,[56] when coupled with the Texas Rules of Civil Procedure, "authorized a prior restraint of indefinite duration" because no limitation existed on the period of time between the entry of a temporary restraining order and final adjudication.[57] During that period, a state court could subject the exhibitor to contempt sanctions for showing any films, even those with non-obscene subject matter.[58] The Court found this scheme more onerous than a criminal statute prohibiting the same conduct because a showing that the film was not obscene would be a defense in a criminal proceeding, but not in a contempt proceeding for the violation of a temporary injunction.[59]

II. PUBLIC NUISANCE REGULATION OF OBSCENITY

A public nuisance statute is a codification of the common law of public nuisance.[60] At common law, a public nuisance was a violation of a public right.[61] It consisted of doing[62] or omitting to do[63] some-

55. 445 U.S. 308 (1980).

56. *See supra* note 1; *infra* notes 57-59 and accompanying text.

The public nuisance statute provided that the use of a premises for "commercial manufacturing, commercial distribution, or commercial exhibition of obscene material" was a public nuisance and could be enjoined by the state. 445 U.S. at 310 n.2.

57. Under the Texas Rules of Civil Procedure the state can obtain *ex parte*, a temporary restraining order. Within ten days, a hearing on a temporary injunction is obtainable. Once the state obtains a temporary injunction, there is no provision for swift final adjudication on the obscenity issue. *Id.* at 312.

58. After the state had shown probable success on the merits, the exhibitor would be subject to contempt proceedings for violating the temporary injunction even if the film was ultimately found not obscene. *Id.* at 316.

59. The injunction at issue in *Vance* is referred to as a standards injunction. *See supra* note 19; *infra* notes 99-106 and accompanying text. Although the Supreme Court did not hold this type of final injunction unconstitutional, it quoted the district court's opinion which stated that such an injunction was indistinguishable from the standards injunction in *Near*. For the purpose of evaluating the permissible scope of final injunctions entered pursuant to a public nuisance statute, this Note assumes that the statute does not contain the procedural flaws present in the Texas statute.

60. For a general discussion of common law public nuisance, see W. PROSSER, LAW OF TORTS 583-91 (4th ed. 1971); H. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS, INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY 37-105 (3d ed. 1893).

61. W. PROSSER, *supra* note 60, at 583; H. WOOD., *supra* note 60, at 34. "The term comprehends a miscellaneous and diversified group of minor criminal offenses, based on some interference with the interests of the community, or the comfort or convenience of the general public." W. PROSSER, *supra* note 60, at 583.

thing that injured the public health,[64] safety,[65] welfare[66] or morals[67] of the community.[68]

The idea that obscenity is a public nuisance emanates from the belief that obscene expressions, even those that occur behind closed doors, adversely affect the safety, welfare, or morals of the society.[69] Although many studies have failed to find any correlation between obscenity and tangible harm to a community,[70] courts agree that this uncertainty does not render a legislature impotent to enact statutes proscribing obscenity.[71]

Approximately one-half of the states authorize civil injunctions against obscene expressions based on a theory that obscene expressions are a public nuisance.[72] Some of those states have nuisance statutes tailored to pornography.[73] Others simply maintain general public nui-

62. *E.g.,* W. PROSSER, *supra* note 60, at 576 (obstruction of a public highway).

63. H. WOOD, *supra* note 60, at 38.

64. *E.g.,* W. PROSSER, *supra* note 60, at 583-84 (keeping of a hogpen, diseased animals, a malarial pond or carrying a child with smallpox along a highway).

65. *E.g., id.* (storage of explosives, shooting off fireworks in the streets, harboring vicious dog).

66. *E.g., id.* (bad odors, smoke, dust and vibration, obstructing a highway or navigable stream, being a common scold).

67. *E.g., id.* (maintaining a house of prostitution or gambling, indecent exhibitions, bullfights, public profanity).

68. A public nuisance is distinguished from a private nuisance in that a public nuisance affects an interest common to the general public, rather than one or several individuals. W. PROSSER, *supra* note 60, at 585. The nuisance need not affect the entire community, only interfere with those who come in contact with it while exercising a public right. *Id.*

69. For discussions of the application of public nuisance statutes to obscenity, see Hogue, *Regulating Obscenity Through the Power to Define and Abate Nuisance,* 14 WAKE FOREST L. REV. 1 (1978); Maltz & Hogue, *On Keeping Pigs Out of the Parlor: Speech as Public Nuisance After* FCC v. Pacifica Foundation, 31 S.C.L. REV. 377 (1980); Rendleman, *supra* note 19; Note, *Porno Non Est Pro Bono Publico: Obscenity as a Public Nuisance in California,* 4 HASTINGS CONST. L.Q. 385 (1977).

70. *See, e.g.,* Cairns, Paul & Wishner, *Sex Censorship: The Assumption of Anti-Obscenity Laws and the Empirical Evidence,* 46 MINN. L. REV. 1009, 1039 (1962). The author stated, "If one insisted on supporting empirical evidence it would be hard to find a rationale for our obscenity laws which squares with first amendment theory." *Id. See also* G. GUNTHER, *supra* note 2, at 1344-46, 1352-56.

71. *See, e.g.,* Paris Adult Theatres I v. Slaton, 413 U.S. 49 (1973). "[The] fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional." *Id.* at 62.

72. Rendleman, *supra* note 19, at 521 n.66.

73. *See, e.g.,* N.C. GEN. STAT. § 14-190.1 (Supp. 1975); N.D. CENT. CODE § 12.1-27.1-01 (Repl. Vol. 1976).

sance statutes containing broad language decreeing that any act which is injurious to the health or welfare of a community is an abatable nuisance.[74] A few general nuisance statutes define a public nuisance as any activity which is lewd or offensive to the senses.[75] To ensure the constitutionality of these statutes,[76] several state courts have imported the standards and definitions found in the Supreme Court's decisions on obscenity[77] into their public nuisance statute.[78]

As an approach to abatement of obscenity, public nuisance statutes present states four major procedural advantages not available under penal statutes. First, in a civil nuisance proceeding, the burden of proof on the state will be that of a preponderance of the evidence,[79] rather than a standard of beyond a reasonable doubt, required in criminal prosecutions.[80] Second, because suits for injunctive relief are suits in equity,[81] no constitutional right to a jury trial exists.[82] Third, an injunction regulates future conduct; it is personalized and precise. A criminal statute punishes past conduct. Last, injunctions provide remedial flexibility in contempt proceedings which is not generally available in analogous criminal proceedings.[83] Valuable practical considerations also provide an incentive for employing civil sanctions. For

74. Rendleman, *supra* note 19, at 522.

75. *See, e.g.,* CAL. PENAL CODE § 370 (West 1970); CAL. CIV. CODE § 3480 (West 1970).

76. Courts have an obligation to construe a statute in a constitutional manner when practicable. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); United States v. Vuitch, 402 U.S. 62 (1971).

77. If a nuisance statute uses the terms "lewd" and "offensive," the court may read in the term "obscene" as defined in Miller v. California, 413 U.S. 15, 24 (1973). *See supra* note 2.

78. *See, e.g.,* People *ex rel.* Busch v. Projection Room Theatre, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied sub nom.* Van de Kamp v. Projection Room Theatre, 429 U.S. 922 (1976).

79. A preponderance of the evidence means evidence which is of greater weight or more convincing than the evidence which is offered in opposition. In other words, it is evidence which as a whole shows that the fact sought to be proved is more probable than not. Braud v. Kinchen, 310 So. 2d 657 (La. App. 1975).

80. Although commentators agree that it is a difficult term to define, the burden of proof beyond a reasonable doubt is a much tougher standard to meet than the standard of a preponderance of the evidence. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 341 (E. CLEARY 2d ed. 1972). *Cf. In Re Winship*, 397 U.S. 358, 364 (1970) (beyond a reasonable doubt standard is a constitutional requirement of due process in criminal actions).

81. For a general discussion of injunctions, see O. FISS, INJUNCTIONS (1972).

82. The seventh amendment provides in part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII. Suits for injunctive relief are not "suits at common law." *See generally* CONSTITUTION ANALYSIS, *supra* note 2, at 1231-43.

83. Rendleman, *supra* note 19, at 511-12.

instance, the criminal law seems too harsh to apply to possibly protected speech.[84] Threat of a jail sentence may chill speech more than the threat of an injunction prohibiting publication or exhibition of certain materials.

Notwithstanding these advantages, a number of difficulties surround public nuisance statutes. Many of the civil statutes are vague and overbroad.[85] Further, an action for a civil injunction resembles a criminal proceeding in some respects,[86] yet lacks the procedural protections provided in criminal cases. For instance, civil injunction actions do not require a jury trial[87] which may result in unfairness.[88] Finally, at least one commentator criticizes the injunction as a usurpation of the legislative function by the courts.[89]

One of the major difficulties with these statutes is the scope of final injunctive relief that may be granted consistent with the doctrine of prior restraints.[90] Judges grant three basic types of injunctions in civil

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84. *Id.* at 512.

85. *Id.* at 513. "The severity of criminal sanctions is itself partly responsible for the unpredictability of obscenity law . . . [B]ecause few [merchants] are willing to risk imprisonment, the precise standards . . . remain largely unknown." *Id.*

This problem occurs more often with states that regulate obscenity through general public nuisance statutes than with states that draft public nuisance statutes which specifically relate to obscenity. *See supra* text accompanying notes 73-78. These general public nuisance statutes have "procedural anachronisms that have little place in litigation that raises sensitive first amendment issues." Rendleman, *supra* note 19, at 523.

86. For instance, the state is a party to the suit and the suit is closely related to criminal statutes which prohibit the dissemination of obscene materials. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975); Alexander v. Virginia, 413 U.S. 836, 836-37 (1973).

87. *See supra* note 82.

88. This problem is especially acute in statutes authorizing hardcore restraints. The more severe the restraint, the more important procedural requirements become.

89 Note, *supra* note 69, at 409-10. The author refers to the state court's application of a general public nuisance statute to obscenity in People *ex rel.* Busch v. Projection Room Theatre, 17 Cal 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied sub nom.* Van de Kamp v. Projection Room Theatre, 429 U.S. 922 (1976).

90. *Compare* State *ex rel.* Kidwell v. U.S. Mktg., Inc., 102 Idaho 451, 631 P.2d 622, *appeal dismissed per stipulation,* 455 U.S. 1009 (1981) *with* Sanders v. State, 231 Ga. 608, 203 S.E.2d 153 (1974); State v. A Motion Picture Entitled "The Bet," 219 Kan. 64, 547 P.2d 760 (1976); Gulf States Theatres of Louisiana, Inc. v. Richardson, 287 So. 2d 480 (La. 1973); State *ex rel.* Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), *vacated and remanded,* 445 U.S. 947 (1980), *reaff'd,* 302 N.C. 321, 275 S.E.2d 443 (1981).

Compare also People *ex rel.* Busch v. Projection Room Theatre, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied sub nom.* Van de Kamp v. Projection Room Theatres, 429 U.S. 922 (1976) *with* State *ex rel.* Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), *vacated and remanded,* 445 U.S. 947 (1980), *reaff'd,* 302 N.C. 321, 275 S.E.2d 443 (1981). *See infra* notes 98-123.

obscenity nuisance proceedings.[91] The first, called a "tailored" injunction, dictates that specific material violates the law.[92] The second precludes the future exhibition of "obscene" material.[93] Courts refer to this type as a "standards" injunction[94] because it merely adopts the standard of the statute the defendant violated.[95] The last, called a "hardcore" restraint,[96] closes the business of the defendant for a specified period of time or permanently abates the business or periodical involved.[97] States disagree on which of these injunctions violate the doctrine of prior restraints.

III. FINAL INJUNCTIONS AND THE DOCTRINE OF PRIOR RESTRAINTS: STATE APPROACHES

The vast majority of states that employ public nuisance statutes to regulate obscene expressions prefer the tailored injunction.[98] It applies only to films, books, or magazines which a judge has specifically declared "obscene."

The Supreme Court recently refused to end a conflict among the state courts when it denied certiorari in *Avenue Book Store v. City of Tallmadge*.[99] The issue in *Avenue Book Store* involved the permissibility, as a prior restraint, of a standards injunction entered pursuant to a public nuisance statute.[100] The position that a standard's injunction is a prior restraint receives support from *Near v. Minnesota*.[101] The Court

91. *See supra* note 19; *infra* notes 92-97 and accompanying text.

92. This type of injunction will hereinafter be referred to as a tailored injunction because the court tailors it to the materials in question. *See infra* note 98 and accompanying text.

93. *See, e.g.,* Hall v. Commonwealth *ex rel.* Schroering, 505 S.W.2d 166 (Ky. Ct. App. 1974).

94. Rendleman, *supra* note 19, at 550. *See infra* notes 100-106 and accompanying text.

95. All states that allow civil proceedings against obscene exhibitors permit this form of injunction. *See generally* Rendleman, *supra* note 19.

96. *See supra* note 19.

97. Rendleman, *supra* note 19, at 550. *See infra* notes 107-23 and accompanying text.

98. *See supra* note 19.

99. Avenue Book Store v. City of Tallmadge, 103 S. Ct. 356 (1982) (White J., dissenting from denial of certiorari).

100. *Id.* at 357 (White, J., dissenting from denial of certiorari).

101. 283 U.S. 697 (1931). *See, e.g.,* State *ex rel* Kidwell v. U.S. Mktg., Inc., 102 Idaho 451, 456, 631 P.2d 622, 627, *appeal dismissed per stipulation sub nom.* U.S. Mktg., Inc. v. Idaho, 455 U.S. 1009 (1981); State *ex rel.* Andrews v. Chateau X, Inc., 296 N.C. 251, 265-66, 250 S.E.2d 603, 612 (1979), *vacated and remanded,* 445 U.S. 947 (1980), *reaff'd,* 302 N.C. 321, 275 S.E.2d 443 (1981). *See supra* note 19 & notes 11-22 and accompanying text. Although the Court in *Near* most strongly objected to that part of the injunction which abated the newspaper itself, the Court also criticized the standards injunction because it was in effect a prior restraint. Although the injunction did not force the publishers to clear material in advance of publication, the Court thought it

in *Near* criticized the use of such an injunction, stating that it effectively censored the speaker.[102] Advocates of this position maintain that standards injunctions censor speakers by forcing them to check with the court before engaging in expression that might violate the injunction.[103]

The states that argue in favor of the validity of standards injunctions claim that they simply incorporate the terms of the civil or criminal statute;[104] thus their constitutionality should not differ from the statutes on which they are based.[105] In addition, it is argued that the restraint is not prior because it only punishes a person who actually has displayed obscene materials.[106]

Three state courts have approved the use of hardcore restraints,[107] although two of those courts have subsequently withdrawn their approval.[108] A number of states have statutes that allow such a

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would have that result. 283 U.S. 697, 712-13 (1931). *See infra* notes 131-41 and accompanying text.

102. 283 U.S. 697, 712 (1930). Part of the difficulty stemmed from the vague terms of the statute. "In the present instance the judgment restrained the defendants from 'publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law.' The law gives no definition except that covered by the words "scandalous and defamatory. . . ." *Id.* at 712.

103. "[T]he defendant would be held, under penalty of punishment for contempt as provided in the statute, to a manner of publication which the court considered to be 'usual and legitimate' and consistent with the public welfare." *Id.* at 713.

104. Hall v. Commonwealth *ex rel.* Schroering, 505 S.W.2d 166, 169 (Ky. Ct. App. 1974) (affirming injunction to the extent it permanently enjoins defendants from violating obscenity laws).

105. *See* State *ex rel.* Andrews v. Chateau X, Inc., 296 N.C. 251, 261, 250 S.E.2d 603, 609 (1979), *vacated and remanded,* 445 U.S. 947 (1980), *reaff'd,* 302 N.C. 321, 275 S.E.2d 443, 449 (1981).

106. *Id.*

107. *See supra* note 19 and text accompanying notes 96-97.

108. *See* People *ex rel.* Busch v. Projection Room Theatre, 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328, *cert. denied sub nom.* Van de Kamp v. Projection Room Theatre, 429 U.S. 922 (1976); State *ex rel.* Kidwell v. U.S. Mktg., 102 Idaho 451, 631 P.2d 622 (1981), *appeal dismissed by stipulation sub nom.* U.S. Mktg., Inc. v. Idaho, 455 U.S. 1009 (1982); State *ex rel.* Cahalan v. Diversified Theatrical Corp., 59 Mich. App. 223, 229 N.W.2d 389 (1975), *rev'd sub nom.* State *ex rel.* Cahalan v. Diversified Theatrical Corp., 396 Mich. 244, 240 N.W.2d 460 (1976).

The initial *Busch* opinion stated that "[w]e express no opinion upon the further question whether the court may, in addition, either close the premises entirely or enjoin further 'obscene' exhibitions regarding materials not yet adjudged obscene. Several cases suggest that further forms of relief would be appropriate and constitutionally permissible." People *ex rel.* Busch v. Projection Room Theater, 546 P.2d 733, 743, 128 Cal. Rptr. 229, 239 (1976) (In Bank) (citations omitted).

Subsequently, the California Supreme Court modified the opinion by deleting the above quoted language and replacing it with: "[W]e emphasize that the closing of such bookstores or theaters,

restraint.[109]

In the most recent approval of hardcore restraints, *State ex rel. Kidwell v. U.S. Marketing*,[110] the Idaho Supreme Court granted an order abating an obscene bookstore as a public nuisance.[111] In approving an order requiring the place of business to be padlocked for one year,[112] the court claimed that the order operated as a subsequent punishment,[113] not a prior restraint.[114] It imposed no conditions upon the bookstore owner.[115] The court analogized the action as one against property,[116] as in a drug raid case;[117] the statute was acceptable because it directed the forfeiture of property, not speech.[118] The court relied on

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either temporarily or permanently, . . . constitutes an impermissible prior restraint. . . ." 17 Cal. 3d 42, 59, 550 P.2d 600, 610, 130 Cal. Rptr. 328, 338 (1976) (In Bank).

In *Cahalan*, the Michigan Supreme Court reversed the Michigan Court of Appeals on the grounds that the statute authorizing padlocking orders did not apply to obscenity. State *ex rel.* Cahalan v. Diversified Theatrical Corp., 396 Mich. 244, 250, 240 N.W.2d 460, 463 (1976). It specifically refused to reach the prior restraints question. *Id.* at 251.

109. *See, e.g.*, IDAHO CODE § 52-406 to -412 (1949).

110. 102 Idaho 451, 631 P.2d 622 (1981), *appeal dismissed by stipulation sub nom.* U.S. Mktg., Inc. v. Idaho, 455 U.S. 1009 (1982).

111. The question presented on appeal was narrow. "The sole constitutional question presented in this appeal is whether a district court may impose a one-year forfeiture of the use of real property upon a finding, made pursuant to constitutionally acceptable procedures, that obscene materials were disseminated on the property." *Id.* at 453, 631 P.2d at 624.

112. *Id.* 631 P.2d at 624. The trial judge refused to issue the order sought by the state on the basis that the requested order would constitute an unlawful prior restraint and a violation of due process.

113. The court pointed out that if the bookseller was imprisoned, he would not be subject to a prior restraint, even though, as with the property forfeiture, it would have that effect. *Id.* at 456, 631 P.2d at 627.

114. The court expressed dissatisfaction with existing analysis of the prior restraints doctrine. *Id.* at 455-56, 631 P.2d at 626-27.

The opinion also drew support from the Supreme Court's denial of certiorari in State *ex rel.* Ewing v. "Without a Stitch," 37 Ohio St. 2d 95, 307 N.E.2d 911 (1974) (Brennan, Marshall and Stewart, JJ., dissenting), *dismissed for want of substantial federal question sub nom.* Art Guild Theatre, Inc. v. Ewing, 421 U.S. 923 (1975) (Ohio Supreme Court ruled one-year closure provision constitutionally permissible method of controlling obscenity).

115. "[T]he manifest purpose of Idaho's one-year closing provision [is] not to prevent future expression, but to punish past illegal conduct by depriving the violator of economic gain." 102 Idaho 451, 457, 631 P.2d 622, 628 (1981).

116. The injunction was directed against the business premises. *See supra* text accompanying note 111.

117. "[C]ontemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974). *See, e.g.*, United States v. Stowell, 133 U.S. 1 (1890); Dobbins' [*sic*] Distillery v. United States, 96 U.S. 395 (1878).

118. On this basis, the court distinguished Near v. Minnesota, 283 U.S. 697 (1930), in which the challenged injunction restrained speech. *See supra* note 19.

Young v. American Mini Theatres, Inc.,[119] in which the Supreme Court held that a zoning ordinance providing for the dispersal of adult motion picture theaters, but which did not reduce their availability, was not a prior restraint.[120]

Most states do not follow the reasoning employed by the Idaho Supreme Court. Courts generally strike down statutes or injunctions that include hardcore restraints as state remedies.[121] They reason that a hardcore restraint is indistinguishable from the impermissible restraint imposed by the state court in *Near*[122] to abate publication of *The Saturday Press*. Though it is true that the owners of a paper subject to restraint can publish future issues under a different name, state courts assert that effective restraint of future expression on the basis of past expression constitutes a prior restraint.[123]

IV. EXPLICATION OF THE DOCTRINE OF PRIOR RESTRAINTS AND THE VALIDITY OF FINAL INJUNCTIONS

The doctrine of prior restraints may be separated into two components, the concept of temporal priorness and the concept of restraint.[124] An analysis of these components demonstrates that standards injunctions do not violate the doctrine while hardcore injunctions are unconstitutional prior restraints.[125]

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119. 427 U.S. 50 (1976).

120. In finding the statute was not an unlawful prior restraint, the Court stated, "There is no claim that distributors or exhibitors of adult films are denied access to the market . . . ." *Id.* at 62.

121. *See, e.g.*, Sanders v. State, 231 Ga. 608, 203 S.E.2d 153 (1974); State v. A Motion Picture Entitled "The Bet," 219 Kan. 64, 547 P.2d 760 (1976); Gulf States Theatres, Inc. v. Richardson, 287 So. 2d 480 (La. 1973); State *ex rel.* Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), *vacated*, 445 U.S. 947 (1980), *reaff'd*, 302 N.C. 321, 275 S.E.2d 443 (1981).

122. *See supra* note 19. Most state courts do not accept the distinction between abating a publication and padlocking a building. *See supra* note 121; *infra* note 123 and accompanying text.

123. *Cf.* Sanders v. State, 231 Ga. 608, 203 S.E.2d 153 (1974). The court stated:

> One obscene book on the premises of a book store does not make an entire store obscene. The injunction closing this store and padlocking it as a public nuisance necessarily halted the future sale and distribution of other printed material which may not be obscene . . . creating an unconstitutional restraint upon appellant.

Id. at 613, 203 S.E.2d at 157.

124. Although the courts do not separate these concepts, traditional statements of the doctrine make it clear that severable and distinct elements are involved: "The concept of prior restraint, roughly speaking, deals with official *restrictions* imposed upon speech or other forms of expression in *advance* of factual publication." Emerson, *supra* note 17, at 648 (emphasis added).

125. *See infra* notes 160-67 and accompanying text.

A. The Concept of Temporal Priorness

The concept of temporal priorness focuses on the time at which the state imposes the restraint.[126] A restraint may constitute both a prior restraint and a subsequent punishment. For example, a hardcore restraint such as that involved in *State ex rel. Kidwell v. U.S. Marketing*[127] may be termed punishment for speech already uttered;[128] insofar as it requires the speaker to obtain another building to continue business, however, it is a condition on future expressions.[129]

The fact that a restraint may be both prior restraint and subsequent punishment does not obliterate the distinction between the two concepts. A gag order such as that involved in *Nebraska Press Association v. Stuart*[130] cannot constitute a subsequent punishment. It forbids certain words from entering the marketplace for fear of their effect. As such, a gag order can only be temporally prior to the expression it prohibits.

All subsequent punishment schemes may be considered prior restraints if one only considers their effect.[131] Persons who know they will be subject to punishment if they utter obscene speech may restrain themselves from uttering "borderline" expressions.[132] Thus, although a court does not *impose* the restraint prior to the speech utterance, it has prior *effect*.[133] The Supreme Court in *Near* extended the doctrine of prior restraints to subsequent punishment schemes that were prior re-

126. One of the arguments in State *ex rel* Kidwell v. U.S. Mktg., 102 Idaho 451, 631 P.2d 622 (1981) *appeal dismissed by stipulation sub nom.* U.S. Mktg., Inc. v. Idaho, 455 U.S. 1009 (1982), emphasizes the temporal distinction. *See supra* notes 110-18 and accompanying text.

127. 102 Idaho 451, 631 P.2d 622 (1981) (forfeiture of business premises for one year), *appeal dismissed by stipulation sub nom.* U.S Mktg., Inc. v. Idaho, 455 U.S. 1009 (1982). *See supra* notes 19 & 110-18 and accompanying text.

128. The Idaho Supreme Court viewed it as solely subsequent punishment. 102 Idaho at 456, 631 P.2d at 627. *See supra* note 19.

129. The state would only use the punishment if it believed that the forfeiture would cause the defendant economic hardship. If no economic strain would result the punishment would not serve as a deterrent.

130. 427 U.S. 539 (1976). *See supra* notes 30-32 and accompanying text.

131. At least one commentator argues that the focus ought to be on whether a restraint is prior-in-effect and not whether it is prior-in-form. Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation,* 51 NOTRE DAME LAW. 898 (1976). This Note rejects that analysis for the reasons stated *infra* notes 134-35 and accompanying text.

132. Borderline expressions constitute speech that is protected but given the severity of the punishment the speaker will not risk an error in judgment. Presumably, the harsher the sanctions, the more "chilling" their effect.

133. *See supra* notes 126-29 and accompanying text.

straints in effect.[134] This unwarranted extension of the doctrine has led to much of the confusion that exists today.[135]

Applying the doctrine of prior restraints to restraints that are prior in effect, however, fails to address the underlying problem manifested in the restraining effect; the court's ignore that which causes the prior restraint effect.[136] If a court determines that a particular restraint is prior in effect, it applies a heightened standard of review[137] and consequently may strike down the statute as a prior restraint. The court thereby leaves the legislature that drafted the restraint without guidance concerning the precise cause of the prior restraint.[138] A vague statute often constitutes a prior restraint in effect.[139] Individuals, uncertain of the scope of the statute, overcautiously refrain from expressing certain ideas. But the fault which needs correcting is the lack of clarity of the statute's terms, not when the statutory penalties are imposed. The analysis should concentrate on the *cause* of the restraining effect, not on *when* the restraining effect occurs.[140] Application of the doctrine of prior restraints in effect may lead to superficial, inadequate analysis. Every unconstitutional restraint on speech is prior in effect, for it chills protected speech in advance of its utterance.[141] Thus, courts could

134. *Near* did not involve a licensing scheme. The Court, however, found the injunction analogous to a licensing or censorship scheme because it thought that in order to obey the injunction forbidding publication of a "scandalous and defamatory" newspaper, the defendants would have to clear future speech with the state court. As discussed earlier, the Court's major difficulty involved the meaning of those statutory terms. *See supra* note 20.

Although "obscenity," even as defined in Miller v. California, 413 U.S. 15 (1973), *see supra* note 2, is not a perfect test, there are a number of extant judicial interpretations that provide guides to merchants of such material.

135. *See supra* notes 98-103 and accompanying text.

136. This situation arose in *Near* with respect to the standards injunction in issue. The terms scandalous and defamatory are vague. The Court, however, analyzed the issue as if the problem arose because the injunction was prior in effect. It really did not matter in *Near* that the injunction was prior in effect. The statute would have been struck down as vague no matter what its temporal effect.

137. *See supra* note 26 and accompanying text.

138. If a statute was struck down as a prior restraint, one would assume that the problem was its form, and that the legislature needed to alter when its terms took effect. But this is not always so. *See infra* text accompanying notes 136-40.

139. The difficulty would also exist with overbroad statutes, or any other constitutionally deficient statute.

140. *But see* Murphy, *supra* note 131

141. Contrast the notion of "chilling," with the notion of "freezing" introduced by Chief Justice Burger. A prior restraint in effect may chill speech, but a prior restraint, insofar as it is an obstruction to speech altogether, freezes it. Likewise, license and permit schemes freeze speech until requisite conditions are met. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

classify all unconstitutional restraints on speech as prior restraints causing the doctrine to lose all meaning.

Therefore, courts should strictly confine the concept of prior restraints to situations in which the government imposes an obstruction to or condition on expression, and thereby exclude from the doctrine situations in which an individual speaker may subjectively feel restrained.[142] A licensing scheme is a prior restraint; a criminal statute punishing unprotected speech is not.[143]

B. The Concept of a Restraint

Restraints on speech utterances are of two types, absolute and conditioned. An absolute restraint, as the name implies, absolutely precludes speech from being uttered.[144] A conditioned restraint, on the other hand, requires the speaker to meet certain conditions before speaking.[145] Both restraints exist in any order or injunction.[146] A gag

142. Effect will be important for the purposes of analyzing whether a restraint exists or not. It is only in the context of the temporal aspect of the doctrine that effect analysis has no place. The only issue should be *when* the restraint is imposed. The question of whether speech is chilled is properly an inquiry into the second element of prior restraints analysis, which focuses on the restraint concept. *See infra* notes 144-159.

143. The traditional prior restraint is a form of censorship. The concept of temporal priorness in form exists because the speaker must have his speech cleared by the government or because the government gags the speaker with respect to certain topics. *See, e.g.,* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (gagging press with respect to facts of mass murder); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (refusing to permit exhibition of "Hair"); New York Times Co. v. United States, 403 U.S. 713 (1971) (refusing to restrain New York Times and Washington Post from publishing classified military study); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (refusing to restrain leaflets in community where target of leafletting lived); Freedman v. Maryland, 380 U.S. 51 (1965) (invalidating Maryland motion picture censorship statute); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (Rhode Island Commission which compiled list of objectionable publications and threatened publisher with criminal prosecution was prior administrative restraint).

The concept of temporal priorness in form runs throughout the cases cited above. There were no arguments that the statutes chilled speech, forbade it altogether, or placed conditions on its utterance.

144. *See, e.g.,* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, (1975); New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-19 (1971).

145. E.g., a licensing or permit scheme. *See, e.g.,* Freedman v. Maryland, 380 U.S. 51, 52 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61-63 (1963); Staub v. City of Baxley, 355 U.S. 313, 317 (1958); Kunz v. New York, 340 U.S. 290, 290-91 (1951); Niemotko v. Maryland, 340 U.S. 268, 269-70 (1951); Cantwell v. Connecticut, 310 U.S. 296, 298 (1940); Schneider v. State, 308 U.S. 147, 149 (1939); Lovell v. Griffin, 303 U.S. 444, 444-45 (1938).

146. *See, e.g.,* State *ex rel* Kidwell v. U.S. Mktg., Inc., 102 Idaho 451, 631 P.2d 622 (1981) *appeal dismissed by stipulation sub nom.* U.S. Mktg., Inc. v. Idaho, 455 U.S. 1009 (1982). In

order is an absolute restraint on the particular information restrained.[147] It is also a conditioned restraint on persons desiring to utter the prohibited speech; it permits entrance to the marketplace of ideas, but does not allow expression of the particular proscribed utterances.[148]

The precise degree of restraint necessary for a prior restraint is a question without a clear answer. At a bare minimum the restraint must inhibit speech.[149] But not all restraints that inhibit speech constitute unconstitutional prior restraints.[150] Placing someone in jail for violating the law surely inhibits their future expression, but does not constitute a restraint for the purposes of prior restraint analysis.[151] Requiring a publishing company to register with the state in accordance with Blue Sky Laws or to conform to the antitrust laws may inhibit speech but does not constitute a restraint for purposes of the doctrine.[152] The Supreme Court has held, for example, that zoning ordinances are not restraints for purposes of the doctrine.[153]

Kidwell, the order that the business be padlocked was absolute in terms of its effect on that building as a medium of expression. But the order was conditioned, with respect to the person who previously used that building for expression, on the speaker's ability to survive the economic consequences of a padlocking or to secure adequate alternative premises.

147. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 541 (1976) (gagging press with respect to facts of mass murder). *See supra* notes 31-32.

148. This conditional entrance to the marketplace presented a particularly difficult problem in the *Near* case, because the only purpose of *The Saturday Press* was to discuss political corruption. Near v. Minnesota, 283 U.S. 697, 724 (1931) (Butler, J., dissenting).

149. If there is no restraint, there can be no prior restraint. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 62 (1976) (upholding zoning ordinance because "[t]here is no claim that distributors or exhibitors of adult film are denied access to the market . . .").

150. Associated Press v. United States, 326 U.S. 1 (1945). These are generally restraints directed against conduct other than speech. Publishing companies are "affected no differently from any other commercial enterprise." *See infra* text accompanying notes 151-53.

151. *See, e.g.*, State *ex rel.* Kidwell v. U.S. Mktg., 102 Idaho 451, 456, 631 P.2d 622, 627 (1981) *appeal dismissed by stipulation sub nom.* U.S. Mktg., Inc. v. Idaho, 455 U.S. 1009 (1982); State *ex rel.* Cahalan v. Diversified Theatrical Corp., 59 Mich. App. 223, 237, 229 N.W.2d 389, 396 (1975), *rev'd on other grounds,* 396 Mich. 244, 240 N.W.2d 460 (1976).

This problem could be viewed from two perspectives. One could argue, as in *Kidwell*, that incarceration is not prior. Alternatively, one could argue that there are policy reasons, such as deterrence, against considering incarceration a restraint for purposes of the prior restraint doctrine.

152. *See supra* note 143.

153. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1975). *See supra* note 119-20 and accompanying text. "The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation." 427 U.S. at 78 (Powell, J., concurring).

At the other end of the spectrum, it is clear that an absolute prohibition of the expression of certain material, such as a gag order, is a restraint. But absolute restraints[154] against property, or against businesses, are conditional restraints against speakers. A padlocking order is an absolute prohibition against the building, but it is a conditional prohibition against the speaker who used that building as a forum for expression.[155] This person may be absolutely restrained, however, if he cannot afford the business consequences of such a padlocking.[156] In such a case, the order clearly restrained that speaker.

The development of a definition of restraint for purposes of the doctrine of prior restraints requires an analysis of the particular facts of each case.[157] Restraints analysis questions whether the state has effectively gagged the speaker by punishing for past conduct in a manner that has the effect of silencing him.[158] If so, policy reasons, such as deterrence of future violations, may justify letting the punishment stand.[159]

C. Standards Injunctions

Standards injunctions are certainly prior in nature. They regulate future conduct. But they are not restraints. A standards injunction essentially states that a speaker may break the laws but will be subsequently punished. As such it is analogous to application of the antitrust laws to newspapers.[160] Assuming the procedural defects of the Texas statute held unconstitutional in *Vance*[161] are not present, a standards injunction is no more than a criminal sanction applied after the

154. *See supra* notes 140-44 and accompanying text.

155. This condition is not functionally different from a licensing or permit scheme. The government has placed a condition on this speaker's future expressions.

156. Thus, the situation is distinguishable from *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), in which there was no indication that any speech would be restrained. *See supra* note 149.

157. For example, whether a fine is a prior restraint will depend upon the size of the fine and the defendant's ability to pay. For a very wealthy defendant, a padlocking order may not be a restraint. But that would be true only in extreme cases.

158. If a defendant has been silenced, censorship has occurred; censorship is the essence of prior restraint. Near v. Minnesota, 283 U.S. 697, 713 (1931).

159. The importance of the policy of deterrence is one possible explanation for why imprisoning a defendant is not a prior restraint. *See supra* note 147. The first and fourteenth amendments are not absolute and may yield to other interests in certain circumstances. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1975).

160. *See supra* note 149.

161. 445 U.S. 308 (1980). *See supra* note 55.

event.[162] The only condition that it imposes on a speaker is that the speaker not violate the laws. Thus, it clearly does not constitute a restraint for the purposes of the doctrine of prior restraints.

D. Hardcore Injunctions

A hardcore injunction such as a padlocking provision is clearly prior under the above analysis. Though it only closes a place of business for a specified period of time, it actually imposes a conditional restraint which may become absolute. It allows the speaker to continue to express ideas, but not from that building, or through that business.[163] Future expression is therefore conditioned on an ability to replace the building or business. To the extent that it may not be economically feasible for the speaker to move his place of business, the speaker is silenced with regard to the particular product he was brokering in the marketplace. Thus, the state has effectively censored the speaker.[164]

This restraint is distinguishable from the zoning restraint in *Young*[165] in which there was no allegation that anyone would be unable to meet the zoning requirements.[166] The hardcore injunction has a much more severe practical effect than a zoning ordinance.[167]

V. CONCLUSION

A hardcore injunction clearly constitutes a prior restraint as that doc-

162 An injunction may be more severe than a criminal statute in the sense that certain procedural safeguards may not be present, e.g., right to jury trial. *See supra* note 82. This argument fails because the procedural safeguards are part of the state's rules of civil procedure; if those rules do not meet the safeguards enunciated in Freedman v. Maryland, 380 U.S. 51 (1965), then the statute itself will fail. *See supra* notes 50-51 and accompanying text. *See also* Vance v. Universal Amusement Co., 434 U.S. 308 (1980). The failure would not be the form of the injunction, but rather, the underlying statute. *See supra* notes 52-58 and accompanying text.

163. The argument here is not that a speaker has a right to certain facilities as a speaker, but rather, that to deprive the speaker of the particular building is equivalent to obstructing future expression. The order is equivalent to censorship in that it reduces the speaker's access to the marketplace.

164. A state such as Idaho would not use a padlocking provision as subsequent punishment unless the legislature thought it would restrain the defendant. *See supra* notes 110-18 and accompanying text. If a padlocking order would have no effect on a defendant, the state would have little reason to use it.

165. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

166 *See supra* notes 116-17 and accompanying text.

167. In the *Young* situation the only difficulty would be finding a building in an area which permits the particular business (and thus expression) pursuant to local zoning laws. A hardcore injunction requires that a defendant suffer the economic loss of use of the building for one year.

trine is traditionally defined. The states find hardcore restraints advantageous for their censorship effect.[168] A standards injunction, however, does not constitute a prior restraint. Although it may have the effect of inhibiting speech, it does not impose a restraint on the speaker as speaker; it simply mandates that the speaker not violate the laws. Courts may constitutionally order standards injunctions as final orders after a finding that a particular business or individual exhibited obscene materials. The states find standards injunctions advantageous not because they censor the person enjoined, but because they place the speaker on notice of the boundaries of protected speech.[169]

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168. *See supra* note 162. It is useful to contrast the state interests in employing hardcore and standards restraints. Hardcore restraints are adopted for their damaging effect upon a defendant. They are intended to punish and deter. By definition they are restraints. Standards injunctions, however, are adopted by the state because of the procedural advantages they offer to the state, not because of the injury they cause to the defendant. *See supra* notes 76-82 and accompanying text.

169. Rendleman, *supra* note 19, at 556. "An injunction forbidding 'obscenity' or specifying standards is distinguishable from criminal punishment because it gives the defendant one free bite: a court finds the defendant's activity illegal but withholds punishment until he commits a second violation." *Id.* In his proposed statute, Rendleman allows only tailored injunctions. His argument is that because of the inherent imprecision of obscenity, a standards injunction would "chill . . . the marketplace of ideas." *Id.* at 557.