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First Amendment "Due Process"

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A number of recent Supreme Court opinions, primarily in the obscenity area, have fastened strict procedural requirements on governmental action aimed at controlling the exercise of first amendment rights. Professor Monaghan believes that there are two basic principles that can be distilled from these cases: that a judicial body, following an adversary hearing, must decide on the protected character of the speech, and that the judicial determination must either precede or immediately follow any governmental action which restricts speech. The author argues that these two broad principles should limit any governmental activity which affects freedom of speech, no matter how indirectly. In conclusion, he suggests that courts must afford affirmative remedies in order to give full protection to first amendment interests.

"THE history of American freedom," Mr. Justice Frankfurter once observed, "is, in no small measure, the history of procedure." [1] While this comment was made in the context of criminal procedure, courts have lately come to realize that procedural guarantees play an equally large role in protecting freedom of speech; indeed, they "assume an importance fully as great as the validity of the substantive rule of law to be applied." [2] Responding to this realization, courts have begun to construct a body of procedural law which defines the manner in which they and other bodies must evaluate and resolve first amendment claims — a first amendment "due process," if you will.

It is in the obscenity area that the courts have been most concerned with procedural matters. There the Supreme Court has fashioned a series of specific rules designed to prevent insensitive procedural devices from strangling first amendment interests. The Court has found itself developing a comprehensive system of "procedural safeguards designed to obviate the dangers of a censorship system." [3] In so doing, the Court has placed little reliance upon the due process requirements of the fifth and fourteenth amendments, but instead has turned directly to the first amendment as the source of the rules. Thus, rather than attempting to apply the traditional requirements of due process to

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[1] Malinski v. New York, 324 U.S. 401, 414 (1945) (separate opinion). *See also In re* Gault, 387 U.S. 1, 19–21 (1967).

[2] Speiser v. Randall, 357 U.S. 513, 520 (1958).

[3] Freedman v. Maryland, 380 U.S. 51, 58 (1965).

obscenity determinations, the Court has judged the adequacy of procedures by a different standard: does the procedure show "the necessary sensitivity to freedom of expression?" [4]

While the Court has nowhere been so explicit as in the obscenity area, it has begun to extend first amendment due process beyond obscenity cases. It has, for example, sharply circumscribed the power of state courts to enjoin arguably protected mass demonstrations,[5] has shown an increasing reluctance to restrict the availability of prospective relief in first amendment cases,[6] and has even held that the burden of proof rules in tax litigation are of constitutional magnitude when first amendment interests are at stake.[7] The extension beyond obscenity is entirely warranted. If the Constitution requires elaborate procedural safeguards in the obscenity area, a fortiori it should require equivalent procedural protection when the speech involved — for example, political speech — implicates more central first amendment concerns. Like the substantive rules themselves, insensitive procedures can "chill" the right of free expression. Accordingly, wherever first amendment claims are involved, sensitive procedural devices are necessary

> to insure that the Court is called upon to balance competing interests of state and citizen only when the judgment that conduct should be punished has been made in a setting which is designed to discriminate between protected and unprotected activity.[8]

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[4] *Id.*

[5] *E.g.*, Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968), *discussed at* pp. 536–37 *infra.*

[6] *E.g.*, Zwickler v. Koota, 389 U.S. 241 (1967).

[7] In Speiser v. Randall, 357 U.S. 513 (1958), the Court struck down an otherwise adequate tax assessment procedure because the state was attempting to regulate speech via tax liability. While the case was ostensibly a due process decision, the gravamen of the Court's objection to the procedure was that it suppressed free speech without any compelling state interest. This case made it clear that criminal sanctions do not have to be invoked before freedom of speech is affected. *See generally* Note, *Civil Disabilities and the First Amendment*, 78 YALE L.J. 842 (1969). A threat of expulsion from college or of loss of employment can easily deter one from speaking his mind; likewise publicity which accompanies legislative disclosure of the membership of unpopular groups may subject present members to harassment and deter new members from joining. *See* Bates v. Little Rock, 361 U.S. 516, 523–24 (1960). In two cases concerning government employment and the Communist party, the Court has indicated that procedural defects in the system of regulation were among factors which caused the Court to declare the systems unconstitutional. United States v. Robel, 389 U.S. 258, 267 (1967) (federal Subversive Activities Control Act); Elfbrandt v. Russell, 384 U.S. 11, 17 (1966) (Arizona loyalty oath).

[8] Friedman, *Mr. Justice Brennan: The First Decade*, 80 HARV. L. REV. 7, 22 (1966).

The government, in other words, may regulate certain types of activity, but it must make sure, via proper procedural safeguards, that protected speech is not the loser.[9]

I. The Requirement of a Judicial Determination of the Character of Speech

A. Obscenity

Central to first amendment due process is the notion that a judicial, rather than an administrative, determination of the character of the speech is necessary. Cases in the obscenity area first established the principle, but neither their reasoning nor their language implies that the principle is restricted to obscenity determinations. *Manual Enterprises v. Day*[10] contains the first clear suggestion that, by virtue of the first amendment itself, courts alone are competent to decide whether speech is constitutionally protected. In that case, the Post Office Department had excluded as "non-mailable" certain allegedly obscene magazines.[11] The case reached the Supreme Court after an evidentiary hearing before a "judicial officer" of the Post Office, an appeal to an administrative board within the Post Office, and litigation in the lower federal courts. In a six-to-one decision, the Court set aside the post office's action. There was, however, no opinion of the Court. Mr. Justice Harlan announced judgment and, joined by Mr. Justice Stewart, said that the materials at issue were not patently offensive and therefore not obscene. In an elaborate concurring opinion by Mr. Justice Brennan, three Justices concluded that the Post Office lacked statutory authority to exclude the materials. A contrary conclusion, they said, would raise *inter alia* the substantial constitutional question "whether Congress, if it can authorize exclusion of mail, can provide that obscenity be determined in the first instance in any forum except a court," [12] without violating the first amendment.[13] The concurring opinion

[9] *See* Marcus v. A Search Warrant of Property, 367 U.S. 717, 730–31 (1961).

[10] 370 U.S. 478 (1962).

[11] The action was taken by the Post Office Department under the provisions of 18 U.S.C. § 1461 (1964), which "declared [obscene materials] to be nonmailable matter [which] shall not be conveyed in the mails or delivered from any post office or by any letter carrier."

For a collection of cases dealing with the power of the Post Office Department to bar obscene materials from the mail, see Annot., 76 L. Ed. 845 (1932); Annot., 8 L. Ed. 2d 1045 (1963). For an earlier discussion of this subject see Paul & Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship*, 106 U. Pa. L. Rev. 214 (1957).

[12] 370 U.S. at 497–98.

[13] Mr. Justice Brennan's suggestion that the first amendment itself demanded a judicial determination of whether speech was protected avoided the problems that have plagued earlier judicial efforts to establish a doctrine that certain issues could

did no more than pose this question and express the "gravest doubts" that such a procedure would be constitutionally permissible.[14]

The seeds planted by Mr. Justice Brennan began to bear fruit in *Bantam Books v. Sullivan*,[15] a case challenging the activities

not be withdrawn from independent judicial judgment because of the due process clause and/or article III considerations (and/or the constitutional provisions governing the jury trial). The general problem is one of ancient standing, *see* Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 284 (1856), but it reached its judicial zenith in Crowell v. Benson, 285 U.S. 22 (1932). There, Chief Justice Hughes recognized that the Constitution permitted a broad range of factual determinations to be made by administrative agencies, even in suits between private parties for money damages. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 89–90 (1965) [hereafter cited as JAFFE]. But he relied on the article III grant of "judicial power" to hold that de novo, independent judicial review must exist with respect to "facts" previously found by an administrative agency which are "constitutional" or "jurisdictional" in nature, *i.e.*, their existence is a condition precedent to congressional power. 285 U.S. at 54–64. A dissenting opinion by Justice Brandeis argued that article III could not support a distinction between "constitutional" and other factual determinations. *Id.* at 80–93. But, like Hughes, Brandeis seemed to assume that there are occasions in which judicial factfinding is required because "under certain circumstances the constitutional requirement of due process is a requirement of judicial process." *Id.* at 87 (dissenting opinion). Moreover, both Hughes (in *Crowell*, 285 U.S. at 49–50) and Brandeis (concurring in St. Joseph's Stockyards Co. v. United States, 298 U.S. 38, 84 (1936)) seemed to assume that article III required an independent determination by a court of all "law" questions, an assumption, however, which is inconsistent with numerous decisions. *See* JAFFE 546, 556–64.

The complexities involved in developing any of the various positions articulated in *Crowell* and its progeny are considerable. It is, therefore, unclear whether *Crowell* supports broad review of "fact" questions, "law" questions, or "mixed" questions of law and fact (*i.e.*, "law application") as most questions in the free speech area generally are. Additional difficulties are raised because, unlike due process, *see* Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289 (1920), article III cannot be used to justify independent judicial scrutiny by state courts over state administrative action. The foregoing questions are examined with great incisiveness by Professor Hart in *The Power of Congress to Limit The Jurisdiction of The Federal Courts: An Exercise in Dialetic*, 66 HARV. L. REV. 1362 (1953). *See also* JAFFE 546–653; 4 K. DAVIS, ADMINISTRATIVE LAW § 29.08–.10 (1958).

In view of the uncertainty that surrounds the *Crowell* doctrines, Mr. Justice Brennan wisely avoided any reliance upon this line of authority. Moreover, the first amendment basis for the position of Mr. Justice Brennan means that procedural rules growing out of the doctrine will be directly responsive to the first amendment interests which the rule is designed to protect. It is, however, interesting to note that in Jacobellis v. Ohio, 378 U.S. 184, 190 n.6 (1964), Mr. Justice Brennan referred to *Crowell* as supporting broad appellate review.

[14] 370 U.S. at 518–19. In dissent, Mr. Justice Clark apparently disagreed, *id.* at 523–24, although he purported to reserve judgment on the point. *Id.* at 521 n.2. Mr. Justice Harlan intimated that prior decisions of the Court would permit such a procedure, but refused to consider the matter further without "full-dress argument and briefing." *Id.* at 480 n.2.

[15] 372 U.S. 58 (1963). In this case, the Court declared that the informal pressure that a state obscene literature commission put on distributors was an uncon-

of a state obscene literature commission. In essence, the commission exerted considerable informal pressure on local retailers to withdraw objectionable literature from their newsstands. The commission's activities ranged from vigorous "advice" to the local retailers to threats of criminal prosecution. The Court held that the commission's conduct amounted to an unconstitutional prior restraint. In condemning this procedure, the Court referred to two particular deficiencies: there was no provision for "judicial superintendence" of the commission's actions, and there was no assurance of immediate judicial determination of the validity of any administratively imposed restraint. The net result was, therefore, that an administrative agency rather than a court was imposing a final restraint on speech. *Bantam Books* strongly intimated that the first amendment forbids this.

Freedman v. Maryland[16] was a short step from what had gone before. A Maryland motion picture censorship statute required an exhibitor to submit the film to an administrative board prior to its showing. If the board disapproved the film, the burden of instituting judicial review lay with the exhibitor. The statute put no time limits on either the administrative or the judicial determinations. Accepting the argument that under the statute "judicial review may be too little and too late,"[17] a unanimous Court invalidated the statute in an opinion by Mr. Justice Brennan. While unwilling to hold that a motion picture exhibitor had an absolute right to exhibit without a prior determination of obscenity, the Court ringed any such procedure with tight safeguards. Most important here was the Court's statement that

> [t]he teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.[18]

Freedman's preference for judicial evaluation of first amendment claims rests upon the most fundamental considerations — the inherent institutional differences between courts and administrative agencies, no matter how judicial the administrative proceedings may be. First, long judicial tenure frees judges, in most cases, from direct political pressures. Judicial insulation encour-

stitutional prior restraint. In State Cinema, Inc. v. Ryan, 303 F. Supp. 579 (D. Mass. 1969), Judge Wyzanski held that *Bantam Books* was inapplicable unless public rather than private threats are made by local officials.

[16] 380 U.S. 51 (1965); *accord*, Teitel Film Corp. v. Cusak, 390 U.S. 139 (1968) (per curiam) (holding invalid on its face a Chicago ordinance which did not provide for a speedy judicial determination of whether a film was protected).

[17] 380 U.S. at 57.

[18] *Id.* at 58.

ages impartial decisionmaking; more importantly, it permits the courts to take the "long view" of issues. Administrative bodies, particularly at a state level, are rarely so insulated; indeed, they are often seen primarily as political organs. Second, the role of the administrator is not that of the impartial adjudicator but that of the expert — a role which necessarily gives an administrative agency a narrow and restricted viewpoint. This is particularly pernicious in the obscenity area; those constantly exposed to the perverse and the abberational in literature are quick to find obscenity in all they see.[19] But institutional "tunnel vision" is by no means restricted to the censors; a labor board, for example, when dealing with questions of speech, is more likely to see the problem in terms of labor-management relations than in terms of first amendment interests. Courts, on the other hand, do not suffer congenitally from this myopia; their general jurisdiction gives them a broad perspective which no agency can have. They deal daily with a wide variety of situations, and this fact goes far toward eliminating the deficiencies that come from excessive singlemindedness.

The institutional characteristics of the American judicial system are, therefore, of central importance in realizing the constitutional guarantees.[20] The broad range of matters within the jurisdiction of the courts, coupled with the life tenure and the relative insulation of the judges, means, as Professor Hart observed, that the "structure of American institutions" predestined courts "to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles. . . ." [21] Professor Bickel adds:

> Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values

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[19] One may well question what type of person will put himself forward as a judge of morality. *See* text and sources cited in Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 658 & n.34. It has been observed, in the broader context of general censorship, that

> [i]f he be of such worth as behooves him, there cannot be a more tedious and unpleasing journey-work, a greater loss of time levied upon his head, than to be made the perpetual reader of unchosen books and pamphlets . . . . we may easily foresee what kind of licensers we are to expect hereafter, either ignorant, imperious, and remiss, or basely pecuniary.

J. MILTON, AREOPAGITICA 20–21 (Everyman ed. 1927).

[20]

> [T]he constitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system. I use integrity here in its specific sense of unity and coherence and in its more general sense of the effectuation of the values upon which this unity and coherence are built.

JAFFE, *supra* note 13, at 589–90.

[21] Hart, *The Supreme Court, 1958 Term — Foreword, The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959).

> of a society, and it is not something that institutions can do well occasionally, while operating for the most part with a different set of gears.[22]

These considerations are of paramount importance when first amendment interests are at stake. Courts alone are institutionally able consistently to discern, and to apply, the values embodied in the constitutional guarantee of freedom of speech.[23]

B. Implications for Other Areas of Substantive Law

Nothing in the rationale of *Freedman* and its predecessors suggests that their principles are confined to the obscenity area. In fact, when the subject matter of speech is political in character rather than bordering on the obscene, the need for a disinterested judicial judgment is even greater. One can, then, hypothesize as a general principle of first amendment due process that no procedure is valid which leaves the protected character of

[22] A. BICKEL, THE LEAST DANGEROUS BRANCH 25–26 (1962).

[23] In emphasizing the institutional importance of the courts in protecting first amendment interests, *Freedman* and its predecessors are not without some difficulty. To interpret the first amendment so as to require an evidentiary hearing before speech can finally be restrained is one thing; but to say that this evidentiary hearing must involve a court is quite another. On the surface at least, such a rule contradicts the principle that separation of powers is not a requirement imposed on the states by virtue of the federal constitution. *See* Dreyer v. Illinois, 187 U.S. 71, 84 (1902). In fact, however, the traditional rule has been too broadly formulated. To be sure, separation of legislative from executive power on the state level seems to have little federal constitutional significance. But several provisions of the original federal constitution (*e.g.*, the constitutional prohibition against bills of attainder) seem to presuppose the existence of a separate state judicial system. *But see* United States v. Brown, 381 U.S. 437, 472–73 (1965) (White, J., dissenting); *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 105, 121 (1965). And the expansive modern reading of the fourteenth amendment seriously erodes any purported rule that no separation of powers is required on the state level, at least so far as the existence of a separate state judicial system is concerned. Thus, "incorporation" of the fourth amendment, with its requirement of a magistrate's determination of probable cause for the issuance of a warrant, presupposes the existence of an independent state judicial system. *See, e.g.*, State *ex rel.* White v. Simpson, 28 Wis. 2d 590, 597–99, 137 N.W.2d 391, 394–95 (1965) (executive warrants invalid); *cf.* Mancusi v. De Forte, 392 U.S. 364, 370–71 (1968). *But cf.* Abel v. United States, 362 U.S. 217, 230 (1960). More importantly, the succession of cases which have imposed the requirements of the sixth amendment (e.g., speedy trial, counsel, and compulsory process) and which culminated in the holding in Duncan v. Louisiana, 391 U.S. 145 (1968), that a state is not free to deny a jury trial in any serious criminal case, all plainly assume the existence of a state judicial system. The impact of these decisions is, however, far more theoretical than practical, since as a matter of its own governmental structure each state possesses a separate judicial system. Accordingly, the imposition of a first amendment requirement that final determination of the protected character of speech must be made by a court will result in only the most minor dislocation in the state remedial system.

speech to the final determination of an administrative agency, no matter how "judicial" its procedure. This principle not only has a direct bearing on matters generally characterized by the label of "prior restraint," such as laws conditioning the exercise of first amendment rights on the issuing of a permit,[24] but it also extends to matters affecting the internal operations of governmental institutions. For example, under *Freedman* it would seem plainly improper to discharge government employees or expel state university students where first amendment interests are involved unless provision is made for a timely judicial determination of the first amendment claims. Indeed, where free speech interests are involved, it is even doubtful that Congress could reclaim its ancient power to punish contempt without judicial review.[25]

Freedman would also seem to require some reconsideration of the employer free speech cases. In *NLRB v. Gissel Packing Co.*,[26] decided at the end of last Term, the Court once again affirmed that, under the first amendment, an employer may indicate what he believes to be the consequences of unionization, but he has no constitutional right to make threats of economic reprisal. In rejecting an argument that this line was unconstitutionally vague, the Court made the somewhat unresponsive remark that "a reviewing court must recognize the Board's competence in the first instance to judge the impact [of the speech] in the context of the employer-employee relationship." [27] To be sure, the Court did not purport to make the administrative determination conclusive.[28] But the precise import of its language is uncertain; it does not define the scope of judicial review over an administrative finding that the speech was "coercive." *Freedman* seems to forbid application of the substantial evidence rule to such a finding; it requires the reviewing court to make an independent judgment on the first amendment question.[29]

[24] *See* pp. 532–43 *infra*.

[25] Congress has an implied power to imprison, for the session of Congress, nonmembers who refuse to respond to its summons and give testimony. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821). Since 1857, however, the general procedure of the Congress has been to prosecute recalcitrant witnesses for misdemeanors under 2 U.S.C. §§ 192, 194 (1964). This may be the only constitutionally permissible procedure for the Congress to follow after *Freedman*. It is clear that Congress is bound by the first amendment, *see, e.g.*, Watkins v. United States, 354 U.S. 178, 196–97 (1957), and it is only considerations of separation of power that might restrain a court from putting this limitation on the contempt power. Recently, however, the Court has shown an increased willingness to probe the internal affairs of Congress. *See* Powell v. McCormack, 395 U.S. 486 (1969).

[26] 395 U.S. 575 (1969).

[27] *Id.* at 620.

[28] *Id.* at 619.

[29] The Court of Appeals for the Tenth Circuit long ago articulated the proper approach when it said that "the problem of balancing the right of free speech by

In applying *Freedman* to administrative determinations, however, one must recognize an important distinction. *Freedman* requires only that the court make a separate, independent judgment on the administrative record; it would push *Freedman* too far to require additionally that the court construct its own record. So far as the first amendment is concerned, the task of historical factfinding may be left to administrative agencies,[30] at least if, as in *Gissel*, the agencies' procedures appear reasonably capable of ensuring reliable findings. At a minimum, this would require an evidentiary proceeding, with the protections of counsel, confrontation and cross-examination. Moreover, even if these safeguards are present, a completely de novo proceeding would seem required unless there is a transcript or written summary of the administrative proceedings; without such an administrative record, a court cannot confidently determine either the dimensions of the first amendment claim or the exact posture in which it was evaluated. Of course, measured by these standards few administrative determinations, particularly those at the state and local level, will avoid a first amendment requirement of de novo judicial factfinding. For example, where students are expelled from state universities over their objection that the expulsion resulted from the exercise of the right of free speech, a court must either compel the university to follow an adequate administrative procedure[31] or must undertake the task of constructing its own record.

C. The First Amendment and the Jury

The constitutional requirement of "sensitive tools"[32] for the evaluation of first amendment claims is not satisfied simply by

an employer against the employee's right to the free use of the same in matters of self-organization is essentially a judicial equation which we have the duty to resolve for ourselves." NLRB v. Continental Oil Co., 159 F.2d 326, 329 (10th Cir. 1947).

[30] JAFFE, *supra* note 13, at 652–53. It is, however, possible that a statute may require more extensive judicial factfinding than would the first amendment itself. *See* Esteban v. Central Missouri State College, 415 F.2d 1077, 1091 (8th Cir. 1969) (Lay, J., dissenting).

[31] The requirements of an adequate procedure in expulsion hearings here suggested are more rigorous than courts have been inclined to apply. *See, e.g.*, Wright v. Texas Southern University, 392 F.2d 728 (5th Cir. 1968); Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968) (suspension, not expulsion); Dixon v. Board of Educ., 294 F.2d 150, 158–59 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1962). The courts, however, have analyzed the cases in due process terms, and have not given consideration to the possible impact on the first amendment. *See* Esteban v. Central Missouri State College, 415 F.2d 1077, 1089 (8th Cir. 1969); Lucia v. Duggan, 303 F. Supp. 112, 117–18 (D. Mass. 1969).

[32] Speiser v. Randall, 357 U.S. 513, 525 (1958).

use of the judicial system. In the Court's view, the Constitution requires a procedure which is "designed to focus searchingly on the question of [the protected character of speech]." [33] To achieve this end, the doctrine of *Freedman* necessarily involves an important corollary, namely, a reconsideration of the role of the jury in first amendment cases. Since *Duncan v. Louisiana* [34] and its progeny now establish that a criminal defendant has a right to trial by jury for all serious criminal offenses, the question is whether, in cases not within the compass of *Duncan*, the first amendment requires the existence of a jury for certain types of determinations. An affirmative response would, of course, represent a significant departure from established doctrine. Nonetheless, in *Kingsley Books v. Brown*,[35] a dissenting opinion by Mr. Justice Brennan condemned the state injunction proceeding on the ground that the absence of a jury was a "fatal defect." Justice Brennan apparently believed that, as the embodiment of community norms, a jury must determine whether materials appeal to "prurient interests" and are "patently offensive." The dissent, however, fails to articulate any comprehensive conception of the role of the jury in the first amendment. Moreover, in *Freedman v. Maryland*,[36] Mr. Justice Brennan seems to have abandoned his position because in *Freedman* he sanctions an administrative-judicial process without jury participation.

In general, any expansive conception of the jury's role is inconsistent with a vigorous application of the first amendment. Like administrative agencies, the jury cannot be expected to be sufficiently sensitive to the first amendment interests involved in any given proceeding. The political libel cases squarely raise the problem of jury insensitivity. In the *New York Times* case,[37] three concurring Justices argued that the Court's rule that public officials could sue for defamation if false statements were made with "malice" was insufficient to protect first amendment freedoms because a jury was likely to find malice if the views expressed were unpopular ones.[38] Mr. Justice Brennan's opinion for the Court never adequately met this point. Perhaps, as he later argued, malicious untruth like obscenity lacks redeeming

[33] Marcus v. A Search Warrant of Property, 367 U.S. 717, 732 (1961).

[34] 391 U.S. 145 (1968).

[35] 354 U.S. 436, 447–48 (1957).

[36] 380 U.S. 51 (1965).

[37] New York Times v. Sullivan, 376 U.S. 254 (1964). Moreover, much of the Court's work in administering the *Times* rule seems devoted to confining the jury's latitude to infer malice. *See, e.g.*, Beckley Newspaper Corp. v. Hanks, 389 U.S. 81, 84–85 (1967); Rosenblatt v. Baer, 383 U.S. 75, 79–83 (1966); *cf.* St. Amant v. Thompson, 390 U.S. 727 (1968).

[38] *Id.* at 295 (Black and Douglas, JJ., concurring); *id.* at 300 (Goldberg and Douglas, JJ., concurring).

social value,[39] but the critical questions are how the defendant's *mens rea* is to be established, and whether, because of potential prejudices, a jury determination threatens substantial inroads upon first amendment interests. This may be a situation where it is necessary to "overprotect" free speech interests in order, as Professor Kalven puts it, "to assure that [they are] not underprotected." [40] Mr. Justice Brennan's opinion in the *Times* case itself gives substance to these concerns. After announcing the rule, the opinion elaborately reviewed the evidence and held that, on remand, it would be insufficient as a matter of law to support a finding of malice. Thus, in the very case in which the rule was laid down, the Court was unwilling to let the jury apply it.[41]

The jury has, it is true, long been extolled as a great guarantor of individual freedom, including freedom of speech.[42] English history and our own colonial past contain notable illustrations of the jury's refusal to return convictions based upon criticism of government. But one should recall that the famous free speech cases of the past were really part of a much larger conflict between a fairly homogeneous citizenry and an unrepresentative government. In earlier times, therefore, freedom of speech was conceived primarily as a guarantee that the voice of the people — *the majority* — would be heard, that unrepresentative government would be forced to hear, if not heed, their rising voices. As a bearer of majority sentiments, the jury served as a powerful and effective vehicle for preventing governmental repression of majority views.[43] The law of seditious libel found rough sledding in the hands of English and colonial juries. It is, however, important to recognize that the juries were extolled because they were acting in a lawless fashion. They may have helped to create new laws, but as the famous trial of John Peter Zenger illustrates,[44] they plainly refused to abide by the laws they were charged with administering. And when public sentiment ran

[39] *See* Garrison v. Louisiana, 379 U.S. 64, 75 (1964); Brennan, *The Supreme Court and The Meiklejohn Interpretation of The First Amendment*, 79 HARV. L. REV. 1, 18–19 (1965).

[40] Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 213.

[41] 376 U.S. at 284–88. *See also* Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730, 1750 (1967).

[42] The classic, although now outdated, history of freedom of speech in the United States is Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941), in which Professor Chafee, anticipating the *Times* case, argues that the framers intended to abolish the law of seditious libel. *Id.* at 16–22. This view is sharply challenged in L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION (1963).

[43] *See, e.g.*, LEVY, *supra* note 42, at 131–32.

[44] THE TRIAL OF PETER ZENGER (V. Buranelli ed. 1957).

strongly in favor of the government, juries could readily become *ex post facto* censors of the press in libel cases.[45]

To the extent that the law of seditious libel was a bulwark of unrepresentative government, it was long dead before it was formally interred in the *New York Times* case. The government had ceased to be grossly unrepresentative, once English government was thrown off and popular suffrage extended. As a protection for the majority against the government the first amendment has thus ceased to be of major importance. Much of its present importance lies in protecting unpopular speech, that of Jehovah's Witnesses, Communists, fascists, radicals and the like.[46] This development is a matter of fundamental significance, and one which requires a reevaluation of the assumption that the jury is a reliable factfinder in free speech cases. The jury may be an adequate reflector of the community's conscience, but that conscience is not and never has been very tolerant of dissent.

In the federal court system the jury will unquestionably continue to play a significant role in historical factfinding by virtue of article III and the sixth and seventh amendments, but despite the Court's expansive solicitude for the jury in other contexts,[47] first amendment considerations should be read to confine, not expand, the jury's role. This confinement follows from the perhaps unprovable premise that, by virtue of their training and occupation, judges are less inclined to be affected by passion and prejudice and more inclined to realize the importance of first amendment values. Moreover, action taken by lower court judges is more readily reviewable than action taken by the jury.

Methods for limiting the role of the jury are numerous. They range from rules which narrow jury discretion to ones which completely exclude the jury. The burden of proof rule of *Speiser*

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[45] In the years of 1792–94, when revolution on the Continent made many Englishmen uneasy, juries were quick to convict of seditious libel and harsh in their approach to the Libel Act of 1792. *See* 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 358–68 (1883).

[46] The express articulation of these goals has, however, been of very recent origin. The first amendment is today generally understood to protect and encourage criticism of government policy, "[f]or speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964). This protection makes possible "the distinctive contribution of a minority group to the ideas and beliefs of our society." NAACP v. Button, 371 U.S. 415, 431 (1963). For the view that the Court's "role" in our constitutional scheme is to protect "under-represented" minority groups through a vigorous application of the first amendment, see M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 34–39 (1966). *See generally*, Brennan, *supra* note 39, at 14–18. But the intention of the framers of the Constitution on the scope of the first amendment is by no means clear. *See* note 42 *supra*.

[47] *See, e.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

v. Randall[48] could be seen as an example of the former. So too are special findings when they are used. Professor Freund has suggested that in view of the sweep of the privilege to defame that exists under the *Times* case, a public official might require the jury to return a special finding so that it will appear of record that the statements were untrue even if they were constitutionally privileged.[49] Professor Freund viewed the special finding as a device to protect the reputation of the public official. But special findings might also be used to minimize possible jury confusion or prejudice. Requiring the jury to focus on specific issues increases the chances that the jury will rationally and carefully consider first amendment interests. Obscenity cases, for example, involve several discrete issues, and the jury — at least in civil trials[50] — could be required to focus on each separately.

Of perhaps even greater importance are rules which wholly eliminate any role for the jury. Fear that a jury is not likely to administer a rule properly might impel a court to choose a prophylactic — albeit theoretically less desirable — rule to minimize the jury's role. For example, evidence that juries are readily inferring malice from the expression of unpopular views might cause the Court to change the *Times* rule and give an absolute immunity to criticism of public officials.

Moreover, even where a jury has an unquestionable role to play, as in a criminal prosecution for selling allegedly obscene materials, first amendment considerations might alter the normal distribution of functions between judge and jury. For example, obscenity prosecutions present a series of discrete inquiries: whether the materials (a) appeal to "prurient interests"; (b) are "patently offensive"; (c) are "utterly without redeeming social

[48] 357 U.S. 513 (1958), *discussed in* note 7 *supra*.

[49] Freund, *Constitutional Dilemmas*, 45 B.U.L. REV. 13, 18 (1965).

[50] In federal criminal trials, use of special questions or findings seems verboten. In a recent case, United States v. Spock, 416 F.2d 165 (1st Cir. 1969), the First Circuit reversed the convictions of two of the four defendants because the judge on his own motion had submitted special questions to the jury. The court believed that the practice tended unduly to influence the jury's deliberations because the structure of the questions might lead the jury to speculate about the judge's view. Whether this reasoning is sound is open to question. It is, for example, not clear that in terms of their impact special questions can meaningfully be distinguished from jury instructions. In each case the relevant inquiry would seem to be whether the particular charge or question had a reasonable likelihood of intruding the judge's supposed views into the jury room. Perhaps the case can be better seen as a reaffirmation of the venerable tradition in Anglo-American law that the deliberations of the criminal jury shall be immune from external scrutiny. *See* Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670); The King v. Shipley, 99 Eng. Rep. 774 (K.B. 1784). In any case, *Spock* would seem to have no application to noncriminal cases, where special findings are available as a matter of course. FED. R. CIV. P. 49.

value"; and (d) whether there is any evidence of pandering.[51] Judges have recognized that they must make an independent judgment on the question whether materials have redeeming social value.[52] Although the Court has never been explicit about the reason for this requirement,[53] the first amendment would seem to provide an adequate basis for it. Judges ought to be required to find, before submitting the issue to the jury, that the speech or material is not protected by the first amendment; the jury would of course be precluded from acting if the judge finds the material protected.

The critical question, however, is whether the judge, if he finds that the speech is unprotected, must submit the issue to the jury. *Dennis v. United States*[54] indicates that the defendant has no constitutional right to insist that the jury pass on the protected character of the speech. There a divided Court held that the trial judge had not erred in refusing to submit to the jury the issue of whether speech constituted a "clear and present danger." But whatever the extent of constitutional compulsion, surely no error is committed if the trial judge does permit the jury to consider whether the speech is protected — so long as the judge himself has made a determination that it is not. This is analogous to the procedure required by *Jackson v. Denno*,[55] which permitted the judge in a criminal proceeding to submit the question of the voluntariness of a confession to the jury only

[51] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966).

[52] *See, e.g.*, Jacobellis v. Ohio, 378 U.S. 184 (1964).

[53] The "constitutional fact" doctrine of Crowell v. Benson, 285 U.S. 22 (1932), has at least once been referred to as the source of this obligation. In Jacobellis v. Ohio, 378 U.S. 184, 190 n.6 (1964), Mr. Justice Brennan cited *Crowell* to justify the independent judgment made by the Court on a film's social value. This is a doubtful citation. *Crowell* rested on article III, not the first amendment, and as such had no relevance to an appeal from the state courts. Moreover, *Crowell* was concerned with the distribution of functions between courts and administrative agencies, not with the distribution of functions within the judicial system itself. Finally, on appeals from state courts, the Court has always asserted a broad power to make an independent judgment on "law application" questions quite apart from *Crowell*. *E.g.*, Recznik v. Lorain, 393 U.S. 166 (1968) (redetermination of factual matters affecting legality of an arrest); Davis v. North Carolina, 384 U.S. 737, 741–42 (1966) (redetermination of whether confession coerced); Watts v. Indiana, 338 U.S. 49, 50–51 (1949) (same); *see* Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 946–48 (1965); Note, *Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases*, 14 STAN. L. REV. 328 (1962). There is, however, a close relationship between the *Crowell* case and the rules governing Supreme Court review of state court judgments. Both seem to focus on the undisputed historical facts. *See* JAFFE, *supra* note 13, at 645 n.6.

[54] 341 U.S. 494 (1951).

[55] 378 U.S. 368 (1964).

after he himself had made an independent judgment that the confession was voluntary.

II. Requirement that the Judicial Determination Precede or Immediately Follow Governmental Intervention

The other major teaching of the obscenity cases is that in the first amendment area judicial review must either precede final governmental action or expeditiously follow it. Both *Freedman* and *Teitel Film Corp. v. Cusak* [56] invalidated statutes which did not provide for immediate judicial review of the administrative determination. In part, this result seems predicated on the belief that delay in the availability of judicial relief differs only in degree, and sometimes not at all, from the complete absence of judicial review. The requirement of expeditious judicial review is an extension of the reasoning that underlies the *Thornhill* doctrine.[57] Under *Thornhill*, a defendant whose conduct could constitutionally be punished is permitted to challenge the constitutionality of the statute under which he is being prosecuted "on its face" at least in part because of the overriding first amendment interest in seeing that legislation which chills first amendment rights is struck down as soon as possible.

A. Ex Parte Seizures and Restraining Orders

The Court has consistently refused to sanction any attempt at wholesale seizure of materials or injunctive restraint of speech prior to an adversary proceeding before a court. Two decisions dealing with the ex parte seizure of books were of central importance in this development. In *Marcus v. A Search Warrant of Property*,[58] the Court invalidated a clumsy Missouri procedure under which police officers, executing a vague, ex parte warrant, seized approximately 1,000 copies of 280 publications. Mr. Justice Brennan's majority opinion reasoned that the states were not free to adopt any procedure they saw fit regarding obscenity. The warrants in *Marcus* left far too broad a discretion in the arresting officer. In *A Quantity of Books v.*

[56] 390 U.S. 139 (1968).

[57] The doctrine is derived from Thornhill v. Alabama, 310 U.S. 88 (1940). The Court has explicitly recognized the relevance of *Thornhill*. Citing *Thornhill*, the Court in Bantam Books v. Sullivan, 372 U.S. 58, 63 (1963), said that "*Marcus* [v. A Search Warrant of Property, 367 U.S. 717 (1961), which invalidated an ex parte warrant procedure as inconsistent with the first amendment] . . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks."

[58] 367 U.S. 717 (1961).

Kansas,[59] the Court condemned a considerably more restricted seizure procedure. After carefully examining seven books, all appearing under the Night Stand label, a judge concluded that they appeared obscene and that they were representative of all books bearing that label. He thereupon issued a warrant for the seizure of all copies of the seven books, and of all other Night Stand books. A seven-to-two majority held that this procedure was constitutionally deficient, both with respect to the named and the unnamed books. Mr. Justice Brennan's plurality opinion sharpened *Marcus* by holding that seizure of books prior to an adversary hearing on their unprotected character was an impermissible intrusion upon first amendment interests. If any "seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of non-obscene books." [60]

Ex parte seizures of materials are closely akin to ex parte restraints against speech, and not surprisingly the Court has been increasingly sensitive to the necessity for a prior adversary hearing in the latter area. This sensitivity first manifested itself in movie censorship cases. There the Court early recognized that motion picture exhibitors may be required to submit their films prior to showing, and that, as incident thereto, some interim restraint is permissible. But in *Freedman*,[61] the Court was careful to observe that "[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be

[59] 378 U.S. 205 (1964).

[60] *Id.* at 213. Few situations warrant exemption from the prohibition against interim restraint or seizure prior to an adversary hearing. Perhaps the Post Office can be authorized to exclude material from the mails and to seize allegedly obscene materials for condemnation, but this seems doubtful, as the concurring opinion in *Manual Enterprises* indicated. 370 U.S. at 497–98. The federal government's interest in the control of obscenity is marginal at best, in view of the extensive state legislation in the area, as pointed out by Mr. Justice Harlan, dissenting in Roth v. United States, 354 U.S. 476, 503–05 (1957). In addition, under a recently enacted federal statute, the addressees of allegedly obscene material can request the Post Office to discontinue delivery. 39 U.S.C. § 4009 (Supp. III, 1967), *held constitutional in* Rowan v. United States Post Office Department, 300 F. Supp. 1036 (C.D. Cal. 1969), *prob. jurs. noted*, 38 U.S.L.W. 3150 (U.S. Oct. 27, 1969). This statute would seem adequate to vindicate any federal interests involved.

A more solidly based exception to the prohibition against wholesale seizures might be thought to exist in the customs area. By statute, customs officials are authorized to impound obscene materials and to institute forfeiture proceedings. Tariff Act of 1930 § 305, 19 U.S.C. § 1305 (1964), *as amended*, (Supp. I, 1965). While no court has yet held that this aspect of customs procedure is invalid, at least one district court has upheld bulk seizures only on the assumption that the safeguards of *Freedman* were applicable. United States v. 77 Cartons of Magazines, 300 F. Supp. 851, 852–53 (N.D. Cal. 1969).

[61] 380 U.S. at 59; *accord*, Teitel Film Corp. v. Cusak, 390 U.S. 139 (1968). The Court's early references to the problem were extremely uncertain. The stat-

limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." The cases upon which *Freedman* relied, particularly *A Quantity of Books v. Kansas*,[62] plainly suggest that the propriety of any interim restraint should be conditioned on the availability of a prior adversary hearing. The justification for this requirement need not be labored. The requirement of a prior adversary hearing sharply reduces the chances of an erroneous injunction. At such a hearing, the judge will not only receive a more accurate description of the relevant factual considerations than is ordinarily available at an ex parte hearing, but his attention will also be directed to the relevant legal principles.[63] In addition, the adversary hearing will insure that any injunctive order which issues will "be tailored as precisely as possible to the exact needs of the case." [64] Moreover, with respect to exhibition of films, ex parte orders have a drastic impact. Since the film is presumably being shown, the exhibitor is given no notice that he may

ute upheld in Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), did permit an ex parte injunction, but the Court observed that the duration of that order was brief and that it was unclear whether a violation of the order would under state law be punished as contempt "if [the defendant] prevails on the [merits]." 354 U.S. at 443 n.2. *Kingsley Books* was, however, given a somewhat different reading in subsequent decisions. There was a strong suggestion in *Marcus* that no punishment for violation of an ex parte order would be sustained:

> . . . *Kingsley Books* does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene. This Court expressly noted there that the State was not attempting to punish the distributors for disobedience of any interim order entered before hearing.

376 U.S. at 735–36. And in *Freedman*, the Court said of *Kingsley*, "[t]hat procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing." 380 U.S. at 60. These cases suggest that no ex parte order can be made the basis for contempt findings in obscenity cases.

Freedman also added another significant limitation — there must be a provision for speedy resolution of the merits. This is a salutary limitation. The dangers to first amendment interests posed by interim injunctions are substantially reduced when quick decisions on the merits are forthcoming. These dangers are by no means eliminated, however, because the appeal process is necessarily time consuming. Accordingly, an expedited appeal process is also necessary if restraint is sought during the appeal. *See* Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690 n.22 (1968). It may well be that a publisher or exhibitor who wins in the lower court should be subject to no restraint pending the appeal. Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969), suggests that result. But it is difficult to see that this reflects any generalized principle that a free speech claimant can never be restrained on appeal if he is successful in the trial court. In a large scale demonstration, for example, success by the demonstrators in the lower court should not invariably carry with it any automatic immunities pending appeal.

[62] 378 U.S. 205 (1964).

[63] *See id.* at 210–11; *cf.* Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 183–84 (1968).

[64] Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968).

quickly need to obtain a substitute film. There is, therefore, a clear-danger of a temporary interruption of the exhibitor's business.[65] This is, of course, not the case in the normal book situation since the bookseller can continue to sell other materials.

The problem of ex parte restraint became particularly acute in two recent decisions dealing with ex parte orders against demonstrations. In the first, *Walker v. City of Birmingham*,[66] the defendants had been convicted of contempt for violating an ex parte order against holding a demonstration. The state court refused to consider a contention that the conviction was unconstitutional because the restraining order simply tracked the language of an unconstitutionally broad ordinance. The state court followed the nearly universal rule that in contempt proceedings the merits of an injunction issued by a court "with jurisdiction" cannot be litigated.[67] On appeal, a bare majority

[65] The decision in Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968), is, therefore, mystifying. There the Court, in a brief per curiam opinion, voided a seizure of a film because the warrant which authorized the seizure was issued on the basis of conclusory allegations. In so doing, the Court expressly reserved the question "whether the justice of the peace should have viewed the motion picture before issuing the warrant." *Id.* at 637. It is difficult to believe that this is an open question after *Marcus*, and the Court's concern about the "difficulty" of viewing the film prior to issuance of the warrant is singularly unpersuasive. But the difficulties in *Lee Art Theatre* run even deeper. *Marcus* teaches that an adversary proceeding is important because it can direct the judge to the relevant legal considerations. Accordingly, even if a judge had viewed the film, no seizure could be permitted before some adversary hearing has taken place.

Lee Art Theatre has resulted in considerable confusion and divergence of opinion among the lower courts. Thus, in a brief, wholly inadequate opinion, the Massachusetts Supreme Judicial Court has held that *Lee Art Theatre* permitted pretrial seizure if the warrant was issued on the basis of precise allegations of the film's content. Commonwealth v. State Amusement Corp., 248 N.E. 2d 497 (Mass. 1969). But in Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969), where the issuing magistrate had viewed the film, the Fourth Circuit reached the opposite result. The court relied upon *A Quantity of Books* and said that "the reasons for an adversary hearing before seizure apply as strongly to [movies] as they do to books." *Id.* at 641. *Accord*, Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969).

[66] 388 U.S. 307 (1967).

[67] Howat v. Kansas, 258 U.S. 181 (1922). *See generally* Rodgers, *The Elusive Search For The Void Injunction: Res Judicata Principles in Criminal Contempt Proceedings*, 49 B.U.L. REV. 251, 270–84 (1969). One could have objected that an injunction which was unlawful under the first amendment deprived the court of "jurisdiction." Developments in the law of habeas corpus would support such an argument. The Supreme Court extended habeas corpus to reach convictions based on unconstitutionally utilized evidence through the fiction that use of the tainted evidence deprived the trial court of "jurisdiction." *See* Fay v. Noia, 372 U.S. 391, 404–15 (1963); *id.* at 449–63 (dissenting opinion). But this fiction is utter nonsense; it has been discarded in the habeas corpus area and should not be extended elsewhere. Like most fictions, it simply verbalized results reached on far different grounds.

of the Supreme Court upheld the contempt finding in *Walker* in an opinion by Mr. Justice Stewart. The opinion was unclear on whether the ordinance was void on its face.[68] But, in any event, the core conduct which the ex parte order prohibited was clear enough, the Court said. Mr. Justice Stewart stressed the wide acceptance of the rule relied upon by the state court and said that there was no evidence that efforts by defendants to dissolve the injunction would have met with "delay or frustration." In these circumstances, the Court refused to permit the defendants to ignore the judicial order: "respect for judicial process is a small price to pay for the civilizing hand of law. . . ." [69] The minority in *Walker* thought the ordinance invalid on its face and reasoned that its command gained no strength by being embodied in a judicial decree.[70] Moreover, they seem to have accepted the approach of *Kingsley Books, Inc. v. Brown*[71] — that the first amendment prohibits a contempt adjudication on the basis of an ex parte order if the injunction is later defeated on the merits — at best a dubious policy, since it encourages gambling with judicial orders.

Walker is hardly unambiguous. What the majority would have thought if they had concluded that the ordinance upon which the injunction had issued and which it had tracked was void on its face is uncertain. This is particularly troublesome since a few years later, the Court in *Shuttlesworth v. City of Birmingham*,[72] a case arising out of the same demonstration, held that "as written" the ordinance was plainly void.[73] Moreover, in *Walker*, the majority left open the question whether defendants could have challenged the validity of the injunction if the Alabama courts had erroneously refused to dissolve it upon their request.[74]

In any event, in *Carroll v. President and Commissioners of Princess Anne*,[75] decided last Term, the Court indicated that, like seizures, injunctions must follow adversary hearings, absent an overriding emergency. The Court held that no ex parte order is valid if an adversary hearing on the question of interim restraint is practicable, even though a procedure is available to

[68] The Court said that the ordinance "would unquestionably raise substantial constitutional issues concerning some of its provisions," but that since a narrowed construction was possible, "it could not be assumed that this ordinance was void on its face." 388 U.S. at 316–17.

[69] *Id.* at 321.

[70] *Id.* at 328, 345–46 (Warren, C.J., dissenting; Brennan, J., dissenting).

[71] 354 U.S. 436 (1957); *see* note 60 *supra*.

[72] 394 U.S. 147 (1969).

[73] *Id.* at 150–53. *Walker* would suggest that even if the ordinance was void "as written" it could not be disregarded at least until the state court had declined to give the ordinance a narrowed construction.

[74] 388 U.S. at 318–19.

[75] 393 U.S. 175 (1968).

dissolve the ex parte order. The holding was not clear-cut because *Carroll* arose on a direct appeal from the granting of the order and not in the context of a contempt adjudication for violating the ex parte order. One could, of course, argue that a contempt finding would have been void because the ex parte order was a nullity. But the real question is somewhat different. Should judicial orders be ignored in the hope of proving that an adversary hearing was practicable? If not, how will the states be compelled to comply with *Carroll*?

Despite the general undesirability of ex parte orders, they should not be invariably barred by the first amendment. The boundaries of any such rule would be unclear, particularly where speech is mixed with conduct, as in picketing and demonstrations. More importantly, such a rule could result in the sacrifice of important public interests. For example, an ex parte order might be indispensable to protect substantial public interests against a sudden, large-scale demonstration. *Carroll* should be read, therefore, as authorizing the issuance of brief ex parte restraining orders where there is a compelling justification for doing so, where it is not reasonably possible to have a prior adversary hearing, and where speedy methods are available to dissolve any erroneous order.[76] This is consistent with generally accepted principles governing first amendment limitations: restrictions on free speech are valid where necessary to vindicate compelling governmental interests and where no less restrictive alternatives are available.[77]

Since ex parte orders can have a drastic impact on first amendment interests, the limitations suggested above must be satisfied. The state ought to carry the burden of proof that an ex parte order is necessary, and unless the record affirmatively showed that the burden had been met any contempt finding should be invalidated.[78] There is no justification, however, for permitting the parties to ignore an injunction simply because it is erroneous, whether or not they have unsuccessfully attempted

[76] *Carroll* seems to assume this to be the case, albeit somewhat by indirection.

> There is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.

393 U.S. at 180.

[77] *See* Sheldon v. Tucker, 364 U.S. 479, 488 (1960). *But see* Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

[78] Even outside the first amendment context, the Court has shown a rapidly accelerating tendency to require that the record show affirmatively the justification for the state's conduct. Gaps in the record on appeal no longer will be used to support the conviction. Boykin v. Alabama, 395 U.S. 238, 243–44 (1969), and North Carolina v. Pearce, 395 U.S. 711, 726 (1969), both decided at the end of the last Term, are two illustrations of this significant development.

to seek its dissolution.[79] The first amendment cannot sensibly be read to require the impossible; some margin for good faith error is acceptable so long as reasonably adequate procedures are available to evaluate first amendment claims.[80]

The discussion of the permissibility of seizure of arguably protected materials invites consideration of a still more difficult problem — whether the first amendment imposes any restrictions upon the power of the police to arrest those colorably exercising first amendment rights. So far at least, only the fourth amendment has restricted police conduct, and the only constitutional remedy for a violation of its command is the suppression of any illegally obtained evidence.[81] And the fourth amendment is generally taken to permit the arrest of those committing offenses in the presence of the arresting officer.[82] The California Supreme Court has ruled that under the first amendment a film cannot be seized as an incident to a lawful arrest; [83] but what of the arrest of the film exhibitor himself? [84] Arrests of exhibitors, distributors, or protestors can dampen enthusiasm for the exercise of first amendment rights. What justification is there, for example, for permitting the arrest of a clerk in a paperback store or in a drug store for selling *Candy* or *The Strap Returns*? Functionally, an arrest resembles a non-judicially imposed injunction against certain conduct; and where timing is important, as in many demonstrations, an arrest, like an ex parte injunction, can wholly frustrate the exercise of first amendment rights without any searching inquiry into the merits of the first amendment claim. Indeed, here there is not even the barest judicial inquiry before the damage is done. Finally, the whole process of arrest and pretrial confinement may well discourage many from future activities that might approach the borderline.

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[79] One commentator seems to assert that although a state contempt conviction entered under such circumstances would be affirmed on direct appeal, it could be set aside on federal habeas corpus. Rodgers, *supra* note 67, at 264–65. This seems far wide of the mark. The petitioners would be in custody for violating the injunction, and that order is valid and binding whether erroneous or not. Moreover, if it is not binding, there is no reason for not so declaring on direct appeal.

[80] In the context under discussion, the first amendment would at least require some expedited appeal procedure. If the procedure is available, the injunction cannot be violated because in a particular case time was too short to take advantage of even an expedited appellate procedure. *See* note 61 *supra*.

[81] Mapp v. Ohio, 367 U.S. 643 (1961).

[82] *See, e.g.*, Draper v. United States, 358 U.S. 307 (1959).

[83] Flack v. Municipal Court, 66 Cal. 2d 981, 429 P.2d 192, 59 Cal. Rptr. 872 (1967). *But cf.* Rage Books, Inc. v. Leary, 301 F. Supp. 546, 549 (S.D.N.Y. 1969).

[84] *See* Pinkus v. Arnebergh, 258 F. Supp. 996, 1003 (C.D. Cal. 1966) (arrest of exhibitor does not violate first amendment); *cf.* Rage Books, Inc. v. Leary, 301 F. Supp. 546, 549 (S.D.N.Y. 1969).

Though the argument has been rejected by one district judge as "ludicrous," [85] the foregoing considerations make it inviting to view the first amendment as a source of restrictions upon the power of the police to seize persons as well as things. But the problems with this approach are considerable. The difficulties are not primarily remedial: an exclusionary rule could be developed, and suits under the civil rights act permitted.[86] The problems are in fashioning criteria which can be applied by those charged with enforcing the law. Some limits do suggest themselves, however. The first amendment can be read as ordinarily barring any attempted arrests of addressees of speech. For example, a federal judge in San Francisco has recently enjoined city officials from arresting patrons at movie theaters prior to a determination that the film being viewed is obscene,[87] where the arrests were made as part of a stepped-up drive on the exhibition of allegedly obscene films and with the express purpose of discouraging attendance. On the other hand, it is far more difficult to frame rules grounded on the first amendment which could be applied to arrests of speakers. The range of factual situations (*e.g.*, demonstrations, leafletting, movie exhibitions) does not readily yield to generalizations. One might, however, consider whether the first amendment should require the use of summonses rather than arrests except where there is a clear and convincing showing that the arresting officer could not have expected the arrested person to respond to a summons. This rule would clearly prevent arrests of those movie exhibitors and retail book sellers who have roots in the community.

B. Permits

Although publication or distribution of a book cannot be conditioned on issuance of a permit or license,[88] most other first amendment activity — demonstrations, parades, public exhibition of a film [89] — can. Licensing, which functionally has the impact

[85] Rage Books, Inc. v. Leary, 301 F. Supp. 546, 549 (S.D.N.Y. 1969).

[86] 42 U.S.C. § 1983 (1964). The availability of damages under this section in cases not involving violence or other shocking conduct has not been explicitly established. *Compare* Monroe v. Pape, 365 U.S. 167 (1961), *with* Damico v. California, 389 U.S. 416 (1967).

[87] Demmich & Co. v. Alioto, No. 51994 (N.D. Cal. Aug. 29, 1969) (Zirpoli, J.). *Contra*, Barrows v. Reddin, 301 F. Supp. 574 (C.D. Cal. 1969) (injunction against continuous arrest of performers refused). *See also* Bee See Books, Inc. v. Leary, 291 F. Supp. 622 (S.D.N.Y. 1968) (injunction against presence of a police officer in a book store).

[88] *See* Near v. Minnesota, 283 U.S. 697 (1931).

[89] *See* Teitel Film Corp. v. Cusak, 390 U.S. 139, 141 (1968); Freedman v. Maryland, 380 U.S. 51, 58–59 (1965). Constitutional guarantees require that a licensing system contain "procedural safeguards" to protect against the dangers of censorship.

of a specially tailored injunction with respect to the exercise of a first amendment right, has felt the impact of the principles announced in *Freedman*. The outstanding example of this impact is shown by *Shuttlesworth v. City of Birmingham*,[90] decided last Term.

In *Shuttlesworth*, the defendant was convicted for engaging in a march in violation of a local ordinance which required a permit. The ordinance authorized the denial of the permit if the local authorities concluded that "the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." [91] Prior to the march city authorities had made it clear to defendant that under no circumstances would a permit be issued. On appeal, the conviction was reversed by the Supreme Court. The Court began by observing that peaceful demonstrations were unquestionably a form of expression. The Court, however, recognized that the municipality may "rightfully exercise a great deal of control in the interest of traffic regulation and public safety," [92] and accordingly, permit ordinances narrowly directed to those ends could not be held invalid on their face. But "as written," this permit ordinance was not so confined; rather, it amounted to a grant of "extensive authority to issue or refuse to issue parade permits on the basis of broad criteria entirely unrelated to legitimate municipal regulation of the public streets and sidewalks." [93] This is impermissible. Under the first amendment,

> a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community.[94]

The fact that the defendant had not applied for a license was irrelevant. Citing an almost unbroken line of decisions extending back to *Lovell v. City of Griffin*,[95] the Court held that a person faced with an unconstitutional licensing ordinance regulating free expression may ignore it with impunity and that in a criminal prosecution for violating such an ordinance, the defendant can raise the invalidity of the ordinance on its face.

So viewed, *Shuttlesworth* was solidly grounded on precedent. But the state sought to affirm the judgment by reliance on *Cox*

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[90] 394 U.S. 147 (1969).

[91] *Id.* at 149.

[92] *Id.* at 152.

[93] *Id.* at 153.

[94] *Id.*

[95] 303 U.S. 444 (1938). The cases are collected in the Court's opinion, 394 U.S. at 151 n.3.

v. New Hampshire.[96] *Cox* involved a conviction for failure to obtain a permit under a broadly written permit statute which was completely silent on the criteria governing the issuance of permits; the state court had sustained the conviction, after giving the statute a narrow construction. The Supreme Court affirmed. In *Shuttlesworth*, the highest state court did precisely the same thing; it sought to narrow the ordinance's broad language to constitutionally permissible limits, and on that basis it sustained the conviction. Assuming that the ordinance was valid as construed, the Court proceeded to limit *Cox*. The Court considered *Cox* inapplicable where no one could have anticipated the narrowed construction and where the record showed that the local authorities had in fact operated under the free-wheeling permission apparently conferred upon them.[97]

Shuttlesworth did not explicitly delineate the relevance of *Freedman* to the permit granting process, but seemed to assume that, in general, *Freedman* would apply. The Court remarked in a footnote that whether the state court's interpretation had rendered the statute constitutional "would depend upon, among other things, the availability of expeditious judicial review of the Commission's refusal of a permit." [98] The Court then referred to *Freedman* and to the concurring opinion of Mr. Justice Harlan which was cast entirely in terms of *Freedman*.[99] Mr. Justice Harlan found the ordinance invalid for lack of expeditious administrative and judicial procedures for review of permit denials. He considered *Freedman*'s requirement of speed particularly important here. Some delay may be tolerated in the movie cases because, the exhibitor's interests aside, the public will ultimately see the film. "In contrast, timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." [100]

All the reasons which justify the result in *Freedman* apply in the permit cases. And if the principles announced in the former case are applied to statutes and ordinances governing the issuance of permits for parades and demonstrations, virtually all will be held unconstitutional on their face — unless the state courts virtually rewrite them "to avoid constitutional doubt." Few, if any, of those statutes or ordinances contain any timetable whatever, or impose the burden of seeking judicial review upon the public authorities.

[96] 312 U.S. 569 (1941).
[97] 394 U.S. at 155–59.
[98] *Id.* at 155 n.4.
[99] *Id.* at 159–64.
[100] *Id.* at 163.

Freedman clearly should govern the permit cases, but the increased administrative burdens on the state are significant. The exhibitor can plan his operations so that questionable films will have sufficient time to clear the administrative-judicial procedure prescribed by *Freedman*. But there may be far less "lead time" in the case of demonstrations and protests. Some are planned well in advance; others are generated by rapidly developing events. The premises implicit in a permit statute require recognition of the fact that the government may legitimately require some brief notice — for administrative processing and police protection — but the period must be of very short duration.[101]

One final matter might be mentioned. The Court's concern for adequate procedures in permit cases requires that *Poulos v. New Hampshire*[102] be discarded. There the defendant had applied for a permit to conduct religious services under a statute which was silent as to the criteria governing permit issuance. The permit was refused, but the services were held without a permit. After a determination by the state supreme court that the statute involved was constitutional when narrowly construed, the defendant was convicted for violation of the permit statute. The trial court held that the refusal of the city authorities to issue the permit was unreasonable, but refused to dismiss the case because the applicants should have sought relief in civil proceedings rather than deliberately violating the ordinance. The state supreme court said that since the ordinance was valid on its face the defendants' remedy was to apply for a writ of certiorari, not to violate the ordinance and then attempt to set up the defense of the arbitrary refusal of the license in a subsequent prosecution. The Supreme Court affirmed, rejecting claims that to foreclose a criminal defendant from raising the unlawfulness of the administrative action violated due process and/or the first amendment. Mr. Justice Reed's opinion distinguished the line of cases which eventually led to *Shuttlesworth* on the ground that there the statutes or ordinances were invalid on their face whereas in *Poulos* the only claim was wrongful conduct under a valid statute.[103] In a concurring opinion Justice Frankfurter relied on the absence of any showing that the defendant could not obtain prompt judicial review of the denial of the permit, and on the ample opportunity which he had to seek review since the permit

[101] See the discussion in A Quaker Action Group v. Hickel, 38 U.S.L.W. 2015 (D.C. Cir. June 24, 1969) (Bazelon, C.J.), in which the court upheld a fifteen-day notice provision for demonstrations across the street from the White House. But it is doubtful that such a lengthy notice will be tolerated generally.

[102] 345 U.S. 395 (1953).

[103] *Id.* at 414.

was denied seven weeks prior to the date of the scheduled service.[104]

Poulos is plainly inadequate on first amendment grounds. It rests upon a distinction between statutes unconstitutional on their face and those unconstitutionally applied in particular cases. But the latter situation presents considerable danger to first amendment interests because the low visibility of the administrative decision permits easy destruction of first amendment interests. Mr. Justice Frankfurter's opinion meets this problem part way, by its stress on the necessity for "adequate" judicial review of the permit denial. But *Freedman* would require much more: (a) that the licensing statute itself contain specific time limits for administrative and judicial action, and (b) that the burden of instituting judicial review rest with the state or municipality.

C. The Constitutional Preference for Criminal Proceedings and Anticipatory Relief

The Court has indicated a marked preference for the ordinary criminal prosecution as a judicial vehicle for determination of obscenity.[105] Several reasons for this preference are evident. The rigorous procedural safeguards which inhere in the criminal trial will "focus searchingly" on the first amendment claim. And in principle, at least, a criminal defendant is free to distribute the challenged materials during the period in which he is contesting the prosecution. (His willingness to do so will, of course, vary with a number of factors, including his judgment as to his chances of success and his fear of prosecution for interim distribution.) Additional and more subtle considerations also support the Court's preference. Use of the criminal process means that the burden of going forward rests with the government, and the force of inertia alone will discourage some prosecutions. Moreover, the action must be brought by a public prosecutor, who cannot be single-minded, as can an administrative agency, about the prosecution of first amendment cases; he has limited resources with which to enforce all the laws of the community, and concentration on one area will mean sacrificing enforcement in another.

A criminal prosecution may be an appropriate vehicle for protecting first amendment interests where the protected character of the speech involved can only be determined after the fact. However, where the speech is fixed (as in a movie) and its protected character can be determined prior to distribution

[104] *Id.* at 420. This interpretation of *Poulos* received the approval of the Court in *Shuttlesworth*. 394 U.S. at 155 n.4.

[105] *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 69–70 (1963).

and sale, an in rem procedure similar to that of Massachusetts may be superior. Massachusetts permits the Commonwealth to bring an in rem proceeding against any book to determine its status.[106] Since the book distributor can appear to defend the book,[107] this procedure permits him to obtain a penalty-free determination of the protected character of the book.[108] Even if there is no constitutional obligation on the states to proceed by a penalty-free determination, where first amendment interests are at stake this Massachusetts in rem procedure is plainly desirable as a matter of policy.

While the Massachusetts procedure (or a declaratory judgment) is adequate, so far as the first amendment is concerned, for determining that the first amendment protects the material, more serious problems arise when the state uses in a criminal prosecution prior in rem determinations that the first amendment does not protect certain material. The Massachusetts law, for example, expressly provides that in any criminal prosecution for a sale *after* an in rem determination of obscenity a defendant shall be "conclusively presumed" to have knowledge that the book is obscene.[109] The presumption seems to have so little basis

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[106] MASS. GEN. LAWS ANN. ch. 272, §§ 28C–28H (1959). The statute is set out as an appendix to the opinion of Mr. Justice Brennan in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 421–24 (1966).

[107] Section 28D provides that "Any person interested in the sale, loan or distribution of said book may appear and file an answer . . . ."

[108] Indeed, I was formerly of the opinion that a case could be made that the first amendment required the state to proceed in a manner which sought prospective relief only (for example, by way of declaratory or injunctive proceedings, or in rem against the book), at least if obscenity embraced anything other than "I-know-it-when-I-see-it" hard core pornography. I thought this procedure required because of the vagueness which inheres in the concept of obscenity and the obvious advantage of a penalty-free determination in not exposing the publisher or distributor to crushing criminal penalties. That position seems foreclosed by Mishkin v. New York, 383 U.S. 502 (1966). *See* Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127, 155 (1966) (hereinafter cited as Monaghan). And further reflection convinces me that, as a general principle, my original view is open to serious objection. It failed to distinguish between situations where the dimension of the free speech claim is readily apparent before any sanction (*e.g.*, movies) and those where it might not be (*e.g.*, demonstrations, the legality of all aspects of which may not be specified in advance). It is, moreover, difficult to see what the boundaries of the proposed rule would be. Would it mean, for example, that a state could not litigate the lawfulness of an arguably legal entry on property — such as the distribution of leaflets at a shopping center — in the form of a criminal prosecution, but only by civil suit. If so, there would be a considerable shift in the present practice, because, unless an injunction were obtained, the distribution could continue undeterred by disruptive arrests.

[109] MASS. GEN. LAWS ANN. ch. 272, § 28H (1959).

in reason as to be unconstitutional.[110] In addition, this procedure would seem to violate due process, at least if any substantial penalty were to be imposed,[111] since the statute seems to foreclose the defendant's raising his lack of knowledge of the contents of the book or of the prior proceeding.[112] Even if the retailer knew of the prior proceeding, it is questionable whether, as a constitutional matter, he can be bound by the results.[113] To be sure, the state can make a plausible case for the position that the prior determination should be binding against those specifically put on notice. While no retailer is likely to participate in the original proceeding, the publisher can and does appear in behalf of the book. Given the considerable identity of interest between the publisher and local retailers, the state might argue that it can fairly decline to litigate the protected character of the book more than once. Nonetheless, to permit the state to foreclose in a subsequent criminal proceeding against a retailer the defense that the book is constitutionally protected would raise serious constitutional problems.

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[110] *See* Leary v. United States, 395 U.S. 6 (1969) (striking down as unconstitutional a statutory presumption from possession of marijuana that possessor knew it had been imported), *noted in The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 103 (1969).

[111] However, in Powell v. Texas, 392 U.S. 514, 531–36 (1968), Mr. Justice Marshall's opinion apparently assumes that the states have unlimited power to dispense with any requirement of *mens rea* in criminal prosecutions. *See* Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 433 (1958). But it is difficult to believe that a lengthy jail sentence could constitutionally be imposed in the absence of some showing of culpable misconduct. For an excellent discussion of the *mens rea* requirement, see Comment, *Counseling Draft Resistance: The Case for a Good Faith Belief Defense*, 78 YALE L.J. 1008, 1022–27 (1969), particularly at 1023 n.75, which however does not discuss *Powell*. *See also* Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of Powell v. Texas*, 69 COLUM. L. REV. 927, 963 (1969).

[112] *See* Smith v. California, 361 U.S. 147 (1959) (first amendment invalidates ordinance imposing strict liability on retail seller of obscene materials because it would discourage sellers from selling any potentially controversial books).

[113] To be sure, in the extraordinary case of Yakus v. United States, 321 U.S. 414 (1944), the Court sustained a wartime measure which precluded a criminal defendant from challenging the correctness of a general administrative regulation fixing maximum prices for the sale of beef. But even permissively read, *Yakus* provides no support for extension of in rem and class action principles into the area of criminal prosecutions. In *Yakus* the defendant was not simply under a general mandate to act lawfully; he had notice of a specific duty imposed upon him (and others similarly situated) by an administrative price-fixing regulation. By contrast, the Massachusetts book seller is required at a minimum to assess the overall significance of the in rem action — even though at the time of the proceeding he might not be selling any of the books at issue. The immediacy of the impact of the in rem proceeding on the seller is, therefore, not nearly so sharp or defined as the rate regulation in *Yakus*. Moreover, in *Yakus* a specific statutory proceeding was provided to challenge the administrative command, and the Court

Quite apart from these considerations, however, the first amendment itself may bar in rem or class actions when free speech interests hang in the balance. *Noto v. United States* [114] suggests such a limitation. *Noto* was a Smith Act prosecution in which the Government had to prove certain characteristics of the Communist Party. These characteristics had been established in criminal prosecutions against other defendants.[115] In finding the Government's evidence insufficient, the Court laconically remarked: [116]

> It need hardly be said that it is upon the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party.

Moreover, both *Smith v. California* [117] and *Speiser v. Randall* [118] would seem to bar not only a conclusive presumption but also any use of the in rem judgment as prima facie evidence of *scienter*. In *Smith* the Court struck down a statute which imposed strict liability on a bookseller since such a doctrine would necessarily cause a seller to steer wide of the danger zone. *Speiser* involved a statute which placed the burden of proof that speech was protected on the free speech claimant. The Court held that since there is always a chance of error in the factfinding process, the burden of proof should operate to decide close cases in favor of the speech's being found protected. *Speiser* rested on the recognition that a taxpayer, knowing that he will have to sustain the virtually impossible burden of proof that he had not engaged in forbidden activities, would avoid any vaguely suspicious activity.

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refused to read the statute as foreclosing a defense that the administrative order was unconstitutional on its face, *see* 321 U.S. at 446–47, which would suggest that a defendant could not be precluded from arguing that the "social value" of the materials in question was "clear" and "self-demonstrating".

Yakus, however, may not represent the broadest latitude given to Congress to foreclose defenses in criminal trials. Two Selective Service cases, Falbo v. United States, 320 U.S. 549 (1944), and Estep v. United States, 327 U.S. 114 (1946), recognize only the narrowest review over an administrative order. This is, however, not an occasion to consider these cases further. They have been subject to harsh criticism by Professor Hart. Hart, *supra* note 13, at 1380–83. *See also* Poulos v. New Hampshire, 345 U.S. 395 (1953), *discussed at* pp. 542–43 *supra*, where the state court refused to permit a criminal defendant to raise the validity of an administrative order *specifically directed to him*. The state court held that the order could be attacked only by certiorari order. The Supreme Court affirmed, rejecting contentions that this procedure violated due process and/or the first amendment.

[114] 367 U.S. 290 (1961).

[115] *See, e.g.*, Scales v. United States, 367 U.S. 203 (1961).

[116] 367 U.S. at 299.

[117] 361 U.S. 147 (1959).

[118] 357 U.S. 513 (1958).

Even if the first amendment does not require the state to proceed by way of a penalty-free proceeding, however, it might require that the state permit a distributor to *initiate* a penalty-free proceeding to determine the constitutional status of a book or motion picture or activity. More broadly stated, this means that some prospective remedy such as an injunction or declaratory judgment must be made available at the option of a prospective defendant. Freedom from criminal penalty is not all that is at stake here. If prospective relief is available, a distributor can avoid incurring the substantial costs of production, advertising, or distribution of material that eventually proves to be unprotected. The possibility of such wasted expenditures may well deter the cautious businessman from handling material that is at all questionable.

There is, of course, considerable support for the view that both Congress and the states possess wide discretion in shaping their own remedial systems.[119] And, as Professor Hart observes, our historical tradition is that "preventive relief is the exception rather than the rule. That naturally makes it hard to hold that anybody has a constitutional right to an injunction or a declaratory judgment." [120] It may therefore be argued that the Constitution is satisfied when the defendant can raise his constitutional right as a defense to an enforcement proceeding.[121] But this position seems inadequate as a matter of principle, and, while the authorities are uncertain and not decisive here, they support the view that in some instances the Constitution can be read to require the existence of an affirmative remedy.[122] One need not go

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[119] *See, e.g.*, Clark v. Gabriel, 393 U.S. 256 (1968) (upholding constitutionality of draft law provision barring preinduction review of draft classification); Lockerty v. Phillips, 319 U.S. 182, 187 (1943).

[120] Hart, *supra* note 13, at 1366.

[121] *See generally id.* at 1371–83.

[122] In utility cases the due process clause has been read to require the existence of an affirmative remedy to forestall heavy criminal penalties. *E.g.*, Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920). *See also* Yakus v. United States, 321 U.S. 414, 437–38 (1944); Pacific Tel. & Tel. Co. v. Kuykendall, 265 U.S. 196, 204–05 (1924). As Professor Freund observed, this result has been reached "where a public utility has no means of challenging an order other than violation and exposure to multiple penalties." P. FREUND, THE SUPREME COURT OF THE UNITED STATES: ITS BUSINESS, PURPOSES AND POLITICS 65 (1961) [hereafter cited as FREUND]; *see* note 113 *supra*. The analogy to the public utility cases is not perfect of course; the utilities cannot discontinue services and the utility cases disclose penalty schemes in fact designed to deter any challenge to the underlying orders. But neither are these cases wholly inapposite. Surely the fact that the utility cannot discontinue service is not controlling. To permit any person to engage in a generally lawful business or activity but to punish him criminally if he incorrectly estimates the lawfulness of particular conduct while simultaneously depriving him of a penalty-free determination of that conduct is dubious policy at best. *See*

so far as a recent opinion in the Second Circuit which suggested that the Constitution generally guarantees a right to equitable relief to restrain unconstitutional action.[123] Nor need one accept the recently expressed suggestion of a district judge that where the first amendment is involved, due process and article III (but, strangely, not the first amendment itself) are violated by a failure to provide prospective relief.[124] The first amendment would seem a proper source for the implication of affirmative remedies; since the risks of the criminal process and a possibly hostile jury may deter the exercise of first amendment freedoms as much as may an overbroad statute, the state should be required to provide remedies which are adequate to rectify the situation.

Professor Freund, for example, believes that the existence of an affirmative remedy for a distributor should embrace the right to enjoin any criminal prosecutions for interim sales, since each interim sale would, of course, be a potential separate criminal offense.[125] In effect, the Constitution requires not only a prospective remedy but such coercive relief as is necessary to ensure protection of the first amendment right. This argument seems sound. The critical point is that the first amendment must guarantee not simply some prospective relief, but relief fully adequate to protect first amendment interests. The availability of relief with respect to interim sales, moreover, should not depend upon

Note, *Declaratory Relief in the Criminal Law*, 80 HARV. L. REV. 1490, 1493–98 (1967). This is particularly true in the area of constitutionally protected freedoms. In addition, in the area of freedom of speech the procedures associated with the penalty (*e.g.*, arrest, pretrial detention, etc.) often discourage challenge to the underlying statute or ordinance far more than the penalty it contains. In any event, the cases dealing with the states' obligations to provide affirmative remedies have not been confined to public utilities. Ward v. Love County, 253 U.S. 17 (1920), and its progeny suggest that, in as yet a largely undefined set of circumstances, state courts must provide affirmative remedies to vindicate constitutional rights. Here, however, the affirmative remedy was to recover property illegally seized. Case v. Nebraska, 381 U.S. 336 n.5 (1965), also suggests that an affirmative remedy may be required to attack collaterally a conviction. But here too the affirmative remedy will simply restore the status quo ante. General Oil Co. v. Crain, 209 U.S. 211, 225–26 (1908), is more helpful because it strongly intimated that an affirmative remedy may be required where necessary to restrain threatened illegal interferences. But *Crain* may have been overruled sub silentio in Georgia RR. & Banking Co. v. Musgrove, 335 U.S. 900 (1949). *Cf.* Truax v. Raich, 239 U.S. 33 (1915). *See generally* H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 395–99, 474–77 (1953); Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109 (1969).

[123] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 409 F.2d 718, 723 (2d Cir. 1969) ("It is now clear that there is an implied injunctive remedy for threatened or continuing constitutional violations"). But the cases relied upon by the court do not support such a broad proposition.

[124] Murray v. Vaughn, 300 F. Supp. 688, 695 (D.R.I. 1969).

[125] *See* FREUND, *supra* note 122, at 65; *cf.* Karalexis v. Byrne, Civ. No. 69-665-J (1st Cir. Nov. 28, 1969) (granting temporary injunction against interim prosecutions for exhibiting allegedly obscene movie).

a substantial allegation that the prosecutor in fact intends multiple prosecutions. A distributor should not be at the mercy of the prosecutor and the changing pressures which influence prosecutorial discretion.

If a right to affirmative relief were recognized, it would have implications beyond the obscenity area. Since even temporary suspension from school can have adverse effects on a student's education, on a nonfrivolous claim by a state university student that he was suspended for exercising his first amendment rights courts should be willing to issue injunctions against the university forbidding the suspension pending a judicial determination of the first amendment issues. Similar injunctions should be available for state employees who are suspended for the exercise of their first amendment rights. The procedures of legislative investigations may also be circumscribed by the first amendment. A witness at such an investigation may reveal the protected membership list of an organization rather than gamble on a finding in a later criminal prosecution that the list was in fact protected. To avoid this dilemma, perhaps the Constitution requires a procedure such as New Hampshire followed in *Sweezy v. New Hampshire*; [126] there a witness refusing to answer a question was called before a court and, on a finding that the question was pertinent and not protected by the Constitution, was ordered to answer. The ensuing case arose out of a contempt of the court, not of the legislative body itself.

Recognition that the first amendment guarantees a right to prospective relief may have important remedial consequences in the federal court system. The federal courts are "the *primary* and powerful reliances for vindicating every right given by the Constitution . . . ." [127] Institutionally, the federal courts are particularly sensitive to first amendment claims and are well-suited to vindicate those claims. This suggests that where first amendment rights are at stake, these judicially fashioned ordinances of self-denial have no place. Therefore the Court should completely eliminate the abstention doctrine when first amendment interests are involved,[128] as well as the already much relaxed rule of *Douglas v. City of Jeannette* [129] prohibiting federal injunctions against threatened criminal prosecutions.

[126] 354 U.S. 234, 244 (1957). *Cf.* Stamler v. Willis, 415 F.2d 1365 (7th Cir. 1969) (permitting declaratory judgment as to rule establishing House Un-American Activities Committee).

[127] Zwickler v. Koota, 389 U.S. 241, 247 (1967).

[128] Dombrowski v. Pfister, 380 U.S. 479 (1965), and Zwickler v. Koota, 389 U.S. 241 (1967), make substantial inroads on the abstention doctrine in the first amendment context. *See* Karalexis v. Byrne, Civ. No. 69-665-J (1st Cir. Nov. 28, 1969); Henley v. Wise, 303 F. Supp. 62, 65 (N.D. Ind. 1969).

[129] 319 U.S. 157 (1943). Suits against threatened criminal prosecutions are becoming increasingly common. *E.g.*, Karalexis v. Byrne, Civ. No. 69-665-J (1st

The logic of the view that the first amendment has important remedial consequences for the federal courts also necessarily calls into question the validity of congressionally imposed jurisdictional limitations in the first amendment area. In particular, the $10,000 jurisdictional amount limitation governing federal question jurisdiction [130] and the statutory bar to preinduction review of draft classifications contained in section 10(b)(3) [131] of the Military Selective Service Act may be invalid in a first amendment context. On its face section 10(b)(3) would bar prospective relief even where first amendment interests are at stake. Suits against state officials [132] and some actions against federal officials [133] may presently be maintained in the federal courts on first amendment grounds without regard to any jurisdictional amount. But apparently some suits in federal court against federal officials must still meet the $10,000 amount of 28 U.S.C. § 1331.[134] It is no answer to suggest that these suits could be maintained in the state courts, because these courts have no power to issue coercive orders against federal officials.[135] Whether this limitation inheres in the basic constitutional structure, or as seems more likely, stems from a judicially fashioned (and congressionally reversible) common law of federalism,[136] the result is the same: no action

Cir. Nov. 28, 1969); Barrows v. Reddin, 301 F. Supp. 574 (C.D. Cal. 1968). Even where an injunction might not be available, declaratory relief can be utilized. *See* Zwickler v. Koota, 389 U.S. 241, 252–54 (1967). *See generally* Note, *Declaratory Relief in the Criminal Law*, 80 HARV. L. REV. 1490 (1967).

[130] 28 U.S.C. § 1331 (1964).

[131] 50 U.S.C. app. § 460(b)(3) (Supp. IV, 1969). That statute purports to bar preinduction review of "the classification or processing of any registrant by local [draft] boards." Neither Oestereich v. Selective Service System Local Bd. No. 11, 393 U.S. 233 (1968), nor Clark v. Gabriel, 393 U.S. 256 (1968), considered this door-closing statute in a first amendment context, nor did the Court's recent per curiam order in Boyd v. Clark, 393 U.S. 316 (1969). Lower federal courts have, however, expressed grave reservations about the constitutionality of applying the statute where first amendment interests are at stake. *See* National Students Ass'n v. Hershey, 412 F.2d 1103, 1108–09 (D.C. Cir. 1969); Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969).

[132] *See* 28 U.S.C. § 1343 (1964).

[133] One should not overlook the impact of 28 U.S.C. § 1361 (1964), which grants jurisdiction to the district courts "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." A broad reading of this grant of jurisdiction would go far toward eliminating the problem being considered. *See* Murray v. Vaughn, 300 F. Supp 688, 696–97 (D.R.I. 1969). *See generally* Byse & Fiocca, *Section 1361 of The Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

[134] Wolff v. Selective Service Local Bd. No. 16, 372 F.2d 817, 826 (2d Cir. 1967); Ackerman v. Columbia Broadcasting System, 301 F. Supp. 628, 633–34 (S.D.N.Y. 1969).

[135] *See* United States v. Tarble, 80 U.S. (13 Wall.) 397 (1872).

[136] *See* H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL

can be maintained in the state courts. Accordingly, so long as prospective relief is unavailable in the state courts and the federal courts have general federal question jurisdiction and the power to award affirmative relief, the $10,000 monetary limitation and section 10(b)(3) should be disregarded where necessary adequately to vindicate first amendment interests.[137] While the Supreme Court has never invalidated a jurisdictional limitation,[138] surely a statute which specifically eliminated first amendment cases from the district courts' general power to give prospective relief would be invalid. To be sure, neither the jurisdictional amount nor the bar against preinduction review discriminate against first amendment claims, but they place a heavy burden on first amendment interests[139] without a showing that other alternatives are not satisfactory to accomplish any overriding policies advanced by these statutes.

In short, the Court should approach the problems of anticipatory relief and of jurisdictional limitations with the same sensitivity for first amendment interests shown by opinions like *Freedman*. The first amendment due process cases have shown that first amendment rights are fragile and can be destroyed by insensitive procedures; in order to completely fulfill the promise of those cases, courts must thoroughly evaluate every aspect of the procedural system which protects those rights.

SYSTEM 388 (1953). *See generally* Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964).

[137] *Cf.* Hart, *supra* note 13, at 1386–90. The district judge in Murray v. Vaughn, 300 F. Supp. 688, 694–95 (D.R.I. 1969), seemed inclined towards this result. It is important to stress that this argument presupposes the existence of the general federal question jurisdiction of the federal courts. It is far beyond the scope of this article to discuss the consequences of a serious effort by Congress to curb the jurisdiction of the lower federal courts — a subject probed with great incisiveness by Professor Hart.

[138] United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), is not inconsistent with this statement. The Court did not view the statute there involved as in fact a jurisdictional one, but one in which Congress purportedly laid down an improper substantive rule in the guise of a jurisdictional statute.

[139] The statutory bar contained in 28 U.S.C. § 2283 (1964) against enjoining pending state criminal prosecutions is less susceptible of condemnation; compelling considerations of federalism are present. But, nonetheless, in appropriate circumstances first amendment considerations may require the issuance of an injunction. *See* Machesky v. Bizzell, 414 F.2d 283, 287–89 (5th Cir. 1969) (§ 2283 has limited applicability in the first amendment area); Grove Press, Inc. v. Philadelphia, 300 F. Supp. 281, 284–88 (E.D. Pa. 1969) (distributor enjoined pending state action against retailer). In any event, declaratory relief may be appropriate. *See* note 129 *supra*. Note also should be made of the apparently growing practice of in effect enjoining a pending suit by framing the federal complaint in terms of an action against future prosecutions of the same character. *E.g.*, Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex. 1969).