

PRIOR RESTRAINT IN THE DIGITAL AGE

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In this Article we argue that the digital revolution requires a reshaping of the Doctrine of Prior Restraint, which prohibits the implementation of any regulations that prevent the publication of speech prior to its distribution. We describe the prohibition on prior restraint of speech, its rationales and its exceptions; present the characteristics of the media in the digital age; suggest that the traditional design of the Doctrine does not fit these characteristics; and describe the reshaping that we propose in order to adapt the Doctrine to the age of the Internet and social networking.

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INTRODUCTION

This Article argues that the unique characteristics of the digital age justify reshaping the Doctrine of Prior Restraint—a cornerstone of First Amendment jurisprudence—and suggests adapting the Doctrine to the age of the Internet and social media.

The Doctrine of Prior Restraint, adopted by the United States Supreme Court in *Near v. Minnesota*,¹ forbids the implementation of regulations which prevent the publication of speech prior to its distribution, including orders to remove an expression that has already been published.² According to the Doctrine, restrictions of speech ordinarily should only be enforced by imposing ex post criminal or civil sanctions.³ Although it is permissible to punish certain harmful expressions, such as libels, after their dissemination, “there are strict limitations on the constitutionality of preventing such expressions before they occur.”⁴ A major implication of the Doctrine—on which this Article focuses—is the courts’ refusal to issue injunctions against speech on the grounds that “an injunction against speech is the very prototype of the greatest threat to First Amendment values.”⁵

First Amendment protections apply to new media.⁶ This is significant because a large part of today’s opinion market is conducted online.⁷ Even so, the emergence of the network society has raised substantive questions regarding the interpretation of the First Amendment in an era when an Internet connection and a computer actualize the ability to transmit messages to potentially large audiences.⁸

We argue that the digital revolution requires a reshaping of the Doctrine of Prior Restraint. As Justice Cardozo put it almost a hundred years ago: “We do not inquire . . . ‘what the legislator willed a century ago, but what he would have willed if he had

¹ 283 U.S. 697 (1931). At least some aspects of the Prior Restraint Doctrine have far more ancient roots than *Near v. Minnesota*. See generally Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 308–13, 324–33 (2001); Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 674–78 (2008).

² See Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 340 (2011).

³ Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 FORDHAM L. REV. 289, 291 (1999).

⁴ *Id.*

⁵ *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 797 (1994) (Scalia, J., concurring).

⁶ See *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997).

⁷ See W. Danny Green, Comment, *The First Amendment and Cell Phones: Governmental Control over Cell Phone Use on Publicly Owned Lands*, 44 ARIZ. ST. L.J. 1355, 1384 (2012); Brandon Wiebe, Comment, *BART’s Unconstitutional Speech Restriction: Adapting Free Speech Principles to Absolute Wireless Censorship*, 47 U.S.F. L. REV. 195, 218 (2012).

⁸ See, e.g., MANUEL CASTELLS, COMMUNICATION POWER 51 (2009); Jared Schroeder, *Focusing on How Rather Than on Whom: Constructing a Process-Based Framework for Interpreting the Press Clause in the Network-Society Era*, 19 COMM. L. & POL’Y 509, 510–12 (2014).

known what our present conditions would be.”⁹ Free speech rights must be molded to address the challenges of the present digital age.¹⁰

The Internet, and social media platforms in particular, have some characteristics that distinguish them from traditional speech and media channels. Anyone who has access to the Internet can post expressions on a multitude of platforms. Expressions that appear on the Internet, as long as they have not been removed, have eternal exposure. Online news sources are open to everyone and access to them is not limited to professional journalists who are subject to ethical codes.¹¹ The typical time gap between writing and publication on the Internet is extremely narrow.¹² Online publications, and the damage they cause, are forever. Internet access is extremely broad, and almost anyone, nearly anywhere, can view online publications. Posts on social media platforms or digital publications can have a global viral effect¹³ and can potentially reach a huge audience through sharing. Accounting for all this, digital age technologies may enable courts to prevent unprotected expressions, without affecting the constitutionally protected parts of the same speech. These characteristics justify a reshaping of the Doctrine of Prior Restraint.¹⁴

The escalation of the chilling effect created by the Doctrine of Prior Restraint in the age of the Internet and social networks generates numerous difficulties. Speech in the digital age is no longer limited to major, financially sound mass media, which benefit from legal advice and professional self-confidence.¹⁵ Ex post criminal or civil sanctions, therefore, are likely to be particularly threatening to ordinary bloggers.¹⁶

⁹ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 84 (1921).

¹⁰ See, e.g., Eric B. Einisman, Note, *Switching the Flip: Questioning the Government's Authority to Shut Down Communication Networks in Furtherance of Public Safety*, 31 CARDOZO ARTS & ENT. L.J. 181, 184 (2012).

¹¹ See *infra* text accompanying notes 102–07.

¹² See, e.g., Chris Hamilton, *Breaking News Guidance for BBC Journalists*, BBC (Feb. 8, 2012, 2:18 PM), http://www.bbc.co.uk/blogs/theeditors/2012/02/twitter_guidelines_for_bbc_jou.html [<https://perma.cc/YB9B-B86E>].

¹³ Special difficulties arise due to the global nature of the new media, which is governed by legal regimes of different countries that are not mutually compatible. This Article, which is oriented toward the constitutional law of the United States, does not address these difficulties, which relate both to substantive law and to its enforcement. For a discussion of the difficulties arising from the global nature of the Internet, see generally Allison R. Hayward, *Regulation of Blog Campaign Advocacy on the Internet: Comparing U.S., German, and EU Approaches*, 16 CARDOZO J. INT'L & COMP. L. 379 (2008).

¹⁴ Developments related to the digital age may also justify redesigning the protections on freedom of speech with respect to aspects that do not pertain to the Prior Restraint Doctrine. See generally Conor M. Reardon, Note, *Cell Phones, Police Recording, and the Intersection of the First and Fourth Amendments*, 63 DUKE L.J. 735 (2013) (asserting that reasonable seizures can become unreasonable when they threaten free expression, and seizures of cell phones used to record violent arrests are of that stripe).

¹⁵ See generally Hayward, *supra* note 13 (discussing the global nature of the Internet).

¹⁶ Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 202 (2008).

For parties without deep pockets, such as individuals and minor media entities, the risk of large-scale damages may lead to economic collapse. Such a risk could have a highly increased chilling effect on speech.

This Article suggests a reshaping of the Doctrine of Prior Restraint designed to enhance the benefits provided by new media while diminishing the potential costs.¹⁷ Our proposal consists of two components. First, courts will be empowered to issue orders to remove expressions from the Internet or from social networks, and, in exceptional cases, to issue injunctions against unpublished expressions. Though courts will have broad discretion on whether to issue a removal order or an injunction, they will not be obligated to issue the order even if the conditions necessary for its issuance are met. Second, to avoid the chilling effect and to give speakers the freedom to choose whether to take the risk of subsequent sanctions, claims for damages will be contingent, in accordance with the Mitigation of Damages (Avoidable Consequences) Doctrine, upon the filing of an earlier application for an injunction or a removal order.

Part I of this Article describes the Doctrine of Prior Restraint, presents its main rationales, reviews the exceptions to the prohibition on prior restraints of speech, and suggests that prior restraints are frequently permitted when the threat to First Amendment values is not significant and the expected damage in the absence of prior restraint is significant. Part II addresses the general characteristics of the media in the digital age and suggests that the traditional model of the Doctrine of Prior Restraint does not fit these characteristics. Part III describes the alterations that we propose in order to adapt the Doctrine of Prior Restraint to the age of the Internet and social networking.¹⁸

I. THE CONSTITUTIONAL PROHIBITION ON PRIOR RESTRAINT AND ITS EXCEPTIONS

Prior restraint of speech is defined as restricting speech before “its dissemination on the basis of content.”¹⁹ The Doctrine of Prior Restraint bars any prohibition on speech issued in advance of publication,²⁰ as well as any determination of the legality

¹⁷ *Id.* For other suggestions with a purpose to reshape First Amendment doctrines in order to adjust them to the digital age, see Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531 (2012).

¹⁸ A multitude of scholars have criticized the Doctrine of Prior Restraint. See generally Bendor, *supra* note 3; John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983); William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245 (1982); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53 (1984); Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1 (1989). However, this Article does not suggest the abolishment of the doctrine; rather, we propose how it can be adapted to the modern digital age.

¹⁹ Nisha Chandran, *Crossing the Line: When Cyberbullying Prevention Operates as a Prior Restraint on Student Speech*, U. ILL. J. L. TECH. & POL'Y 277, 291 (2016). See also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 978–79 (4th ed. 2011) (citing RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 8-4 (1994)).

²⁰ See *Near v. Minnesota*, 283 U.S. 697, 721 (1931).

of particular expressions prior to publication.²¹ According to the Doctrine, the government and the courts are not permitted to restrain expressions before they are disseminated—either by administrative licensing regimes or by judicial injunctions²²—even if they may be constitutionally subjected to subsequent civil or criminal sanctions.²³ This also applies to types of expressions, such as obscenity, that are not fully protected by the First Amendment but are defined by ambiguous and indeterminable standards.²⁴ The Doctrine of Prior Restraint applies to the government and courts only.²⁵ Private online platforms, such as Facebook, Twitter and YouTube, are not subject to the Doctrine and generally are allowed to censor publications or use other means of prior restraint.²⁶

²¹ See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975). It has been argued that the development of the Doctrine of Prior Restraint shows that the Doctrine condemns only content-based restrictions. Jacob G. Fleming, Note, *The Case for a Modern Public Forum: How the Bay Area Rapid Transit System's Wireless Shutdown Strangled Free Speech Rights*, 51 WASHBURN L.J. 631, 641, 641 nn.74–75 (2012).

²² See 2 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 15-4 to -5 (Supp. 2017); Larry Alexander, *There Is No First Amendment Overbreadth (But There Are Vague First Amendment Doctrines): Prior Restraints Aren't "Prior"; and "As Applied" Challenges Seek Judicial Statutory Amendments*, 27 CONST. COMMENT. 439, 443 (2011) (“There are two types of regulation that fall into [the prior restraint] category. One consists of those requirements that one obtain a license from some agency or person before engaging in the speech activity. . . . The other type of regulation deemed to be a prior restraint is the judicial injunction or order when directed against the content of speech or its time, place, or manner.”); Douglas B. McKechnie, *Facebook Is Off-Limits? Criminalizing Bidirectional Communication Via the Internet Is Prior Restraint 2.0*, 46 IND. L. REV. 643, 664 (2013); Al-Amyr Sumar, *Prior Restraints and Digital Surveillance: The Constitutionality of Gag Orders Issued Under the Stored Communications Act*, 20 YALE J.L. & TECH. 74, 77 (2018); Jacqueline G. Waldman, *Prior Restraint and the Police: The First Amendment Right to Disseminate Recordings of Police Behavior*, U. ILL. L. REV. 311, 319–20 (2014); see also Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2299, 2306–29 (2014) (“[N]ew-school techniques of speech regulation have effects similar to prior restraints, even though they may not involve traditional licensing schemes or judicial injunctions.”).

²³ See Redish, *supra* note 18, at 53.

²⁴ See Reardon, *supra* note 14, at 752 (asserting that “[t]he chief concern animating the prior restraint doctrine is that the hand of the government censor will operate to exclude disfavored speech before the speech reaches the public market. In the context of obscenity seizures, this danger is particularly acute. The indefinite nature of the obscenity standard, and of statutes that track that standard, lends itself to discretionary official action that suppresses protected speech as well as proscribed obscenity”).

²⁵ See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1609 (2018).

²⁶ See *id.* at 1599, 1609; Andrew Tutt, *The New Speech*, 41 HASTINGS CONST. L.Q. 235, 238 (2014) (“There is no baseline constitutional right to protection from private censorship, manipulation, deception, or exclusion on the Internet because major speech platforms are neither state actors nor ‘places of public accommodation,’ and therefore carry no obligation to guarantee, protect, or respect the expressive interests of the tens of millions of individuals who pass through their domains each day.”). However, it has been argued that:

The Doctrine, therefore, creates a constitutional right to publish expressions that are not entitled to substantive constitutional protection. These expressions may be regulated only by *ex post* sanctions.²⁷ The significance of the Doctrine is that the category of substantively protected speech is narrower than the category of speech that cannot be curbed by prior restraint.²⁸ The Doctrine thus grants superiority to freedom of speech over other entitlements—such as the rights to good reputation and privacy—even in situations in which the expression violates these rights.

The Supreme Court has yet to offer a compelling rationale for the Doctrine of Prior Restraint.²⁹ As we see it, however, the main rationale seems to stem from the desire to prevent the chilling of speech³⁰ by censorship or similar means³¹ and to ensure that all expressions are included in the marketplace of ideas.³² An efficient system of deterring harmful speech would be undesirable if it precluded valuable expressions from reaching the public, thereby limiting output in the marketplace of ideas.³³ If an expression is

[I]mposing liability on infrastructure providers unless they surveil and block speech, or remove speech that others complain about, has many features of a prior restraint, although technically it is not identical to a classic prior restraint. . . . In this way, our twenty-first-century digital world has recreated the prior restraints of the sixteenth and seventeenth centuries, offering a twenty-first-century version of administrative prior restraint.

Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011, 2017–19 (2018).

²⁷ See Bendor, *supra* note 3, at 295. A similar “non-constitutional rule [is] that equity will not enjoin libel.” *Id.* at 291 n.2 (citing DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 164, 164 n.27 (1991)).

²⁸ See Jeffries, *supra* note 18, at 426 (noting that the Doctrine of Prior Restraint may bar injunctions against speech that the First Amendment does not protect).

²⁹ Steve Tensmeyer, *Constitutionalizing Equity: Consequences of Broadly Interpreting the “Modern Rule” of Injunctions Against Defamation*, 72 N.Y.U. ANN. SURV. AM. L. 43, 46 (2017).

³⁰ See *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 61 (1975) (“A criminal statute chills, prior restraint freezes.”); SUSAN EASTON, *THE PROBLEM OF PORNOGRAPHY: REGULATION AND THE RIGHT TO FREE SPEECH* 69 (1994) (observing that “[t]he American courts . . . have favoured subsequent sanctions over prior restraint because of the latter’s chilling effect on publishers and film-makers”); Robert A. Sedler, *Self-Censorship and the First Amendment*, 25 NOTRE DAME J.L. ETHICS & PUB. POL’Y 13, 15 (2011) (asserting that “the chilling effect concept is the most fundamental and pervasive concept in the ‘law of the First Amendment.’ . . . The chilling effect concept is the basis of . . . the *New York Times* rule,” the rule against prior restraint of speech).

³¹ For the close connection between censorship and prior restraint, see Derek E. Bambauer, *Orwell’s Armchair*, 79 U. CHI. L. REV. 863, 871–72 (2012).

³² See Marla Brooke Tusk, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1223 (2003) (asserting that “[t]he most commonly touted justification of the Court’s predilection for subsequent punishment is that prior restraint does not permit certain expression to ever enter the marketplace of ideas, thereby imposing a more significant burden on speech”).

³³ See, e.g., David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 74 (2013).

banned under a system of prior restraint, it may never reach the market at all or may have to be withheld until it is approved.³⁴ As Larry Alexander has pointed out, “loss of time . . . is a real cost if one’s message is time-sensitive. It is the time the speaker must wait before speaking during which he tries to convince some court that his speech is constitutionally protected and thus should never have been enjoined.”³⁵

Another major rationale of the Doctrine is the Collateral Bar Rule.³⁶ According to this Rule, judicial orders from courts give rise to an absolute duty of obedience, notwithstanding any constitutional rights to engage in the enjoined conduct, unless and until that order is set aside by the court that issued it or by a higher court on appeal.³⁷ In our opinion, however, it is difficult to view the Collateral Bar Rule alone as sufficient justification for the prohibition of judicial injunctions of unprotected expressions.³⁸ The Rule:

does not prevent direct attacks on judicial orders on appeal or by petition. It merely prevents indirect attacks on such orders within the framework of contempt proceedings. In other words, a person against whom a court has issued an injunction does not lack a remedy against that order. He [or she] may apply to a competent court and argue that the judicial order is unconstitutional . . . without his [or her] application being dismissed *in limine*.³⁹

Although it is generally agreed upon that “prior restraint on expression comes . . . with a ‘heavy presumption’ against its constitutional validity,”⁴⁰ the prohibition against prior restraint is not absolute.⁴¹ Courts have approved prior restraint where

³⁴ See, e.g., Chandran, *supra* note 19, at 304; Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROBS. 648, 657 (1955).

³⁵ Alexander, *supra* note 22, at 445. According to Jack M. Balkin, “[p]rior restraints (which include licensing schemes) are especially troublesome because they shift the costs of action, the burdens of proof, and the consequences of inertia from the state to the speaker.” Balkin, *supra* note 22, at 2316.

³⁶ See Alexander, *supra* note 22, at 444; Balkin, *supra* note 22, at 2317.

³⁷ See *Walker v. Birmingham*, 388 U.S. 307, 321 (1967); Alexander, *supra* note 22, at 444; Balkin, *supra* note 22, at 2317; Richard E. Labunski, *The “Collateral Bar” Rule and the First Amendment: The Constitutionality of Enforcing Unconstitutional Orders*, 37 AM. U. L. REV. 323, 327 (1988).

³⁸ See Bendor, *supra* note 3, at 352–55.

³⁹ *Id.* at 354.

⁴⁰ *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). See also *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

⁴¹ See Ardia, *supra* note 33, at 44–51; Christina E. Wells, *Bringing Structure to the Law of Injunctions Against Expression*, 51 CASE W. RES. L. REV. 1, 14 (2000) (“The Court’s language . . . suggests an equation of injunctions and prior restraints, but the Court’s practice . . . included several cases in which it upheld injunctions against expression.”).

the speech is deemed obscene,⁴² where a prior restraint is needed to fulfill the right to a fair trial,⁴³ where the expression is part of an unprotected commercial speech,⁴⁴ where the speech was part of a continuing course of conduct,⁴⁵ and where the expression could endanger national security in time of emergency.⁴⁶ Courts have also approved prior restraint in order to protect privacy,⁴⁷ in order to prevent employment discrimination,⁴⁸ in order to protect property,⁴⁹ in order to regulate public forums,⁵⁰ and in order to prevent misleading commercial expressions.⁵¹

Courts have drawn a distinction between different forms of expression.⁵² For example, injunctions that neutrally regulate only time, place, or manner of speech are permissible.⁵³ Historically, permanent injunctions were not permitted in defamation actions, and damages were seen as a sufficient remedy for plaintiffs in such cases.⁵⁴ In unusual cases, however, courts have issued narrow permanent injunctions against specific statements that were found to be defamatory.⁵⁵ This issue was

⁴² See *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (“[T]he primary requirements of decency may be enforced against obscene publications.”).

⁴³ See *Nebraska Press Ass’n. v. Stuart*, 427 U.S. 538, 569–70 (1976) (“However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint.”).

⁴⁴ See *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1239 (9th Cir. 1997).

⁴⁵ See *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208–09 (6th Cir. 1990).

⁴⁶ See *New York Times, Co. v. United States*, 403 U.S. 713, 714 (1971); Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 692 (2017).

⁴⁷ See *Porco v. Lifetime Entm’t Servs.*, 116 A.D.3d 1264, 1266 (N.Y. App. Div. 2014).

⁴⁸ See *Aguilar v. Avis Rent A Car Sys.*, 980 P.2d 846, 875 (Cal. 1999).

⁴⁹ See *Barlow v. Sipes*, 744 N.E.2d 1, 8–9 (Ind. Ct. App. 2001); *Advanced Training Sys. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984); *Guion v. Terra Mktg. of Nev.*, 523 P.2d 847, 848 (Nev. 1974); *Mazzocone v. Willing*, 369 A.2d 829, 831 (Pa. Super. Ct. 1976), *rev’d*, 393 A.2d 1155 (Pa. 1978).

⁵⁰ See *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002).

⁵¹ See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 571 n.13 (1980) (“We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it.”); *Amalgamated Acme Affiliates v. Minton*, 33 S.W.3d 387, 395 (Tex. App. 2000).

⁵² For instance, books and newspapers enjoy far greater protection from prior restraint than films, to which the prohibition is applied more narrowly. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 511–12 (1970).

⁵³ See *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 763–64 (1994). For a critique of the Supreme Court’s logic in *Madsen*, see Owen M. Fiss, *The Unruly Character of Politics*, 29 MCGEORGE L. REV. 1, 8–10 (1997).

⁵⁴ See Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 SYRACUSE L. REV. 157, 167–70 (2007).

⁵⁵ See *McCarthy v. Fuller*, 810 F.3d 456, 463 (7th Cir. 2015); *Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208–09 (6th Cir. 1990). For a discussion of the *McCarthy v. Fuller* decision, see Ann C. Motto, “*Equity Will Not Enjoin a Libel*”: *Well, Actually, Yes, It Will*, 11 SEVENTH CIR. REV. 271 (2016).

presented to the Supreme Court but was not decided upon the death of the plaintiff, a week after the oral arguments.⁵⁶ The Court resolved the case on narrow grounds without deciding the question presented as to whether injunctions are permissible in defamation cases.⁵⁷

On this background, it was asserted that:

[A]lthough the overall number of decisions granting injunctions [in state courts] is small relative to the total number of cases in which plaintiffs requested injunctive relief, it is clear that a trend is emerging within both state and federal courts that permits injunctions if the speech in question was adjudged to be defamatory.⁵⁸

Nevertheless, some interpreters noted that “the case law does indeed allow permanent injunctions of unprotected speech, entered after a final judicial finding that the speech is unprotected, but does . . . n[o]t allow restraints entered before such a finding.”⁵⁹

On the contrary, case law also provides a basis for the claim that the Doctrine of Prior Restraint forbids not only temporary preventive relief, but also permanent injunctions against speech.⁶⁰ This argument can be supported by the Supreme Court’s ruling in *Alexander v. United States*.⁶¹ In that decision, the Court stated that

⁵⁶ *Tory v. Cochran*, 544 U.S. 734 (2005).

⁵⁷ *Id.* at 737–38. For a discussion of *Tory v. Cochran*, see Charles H. Whitebread, *Going Out with a Whimper: A Term of Tinkering and Fine Tuning, The Supreme Court’s 2004–2005 Term*, 27 WHITTIER L. REV. 77, 159–60 (2005).

⁵⁸ Ardia, *supra* note 33, at 51.

⁵⁹ Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 175 (1998). The authors point out that allegedly libelous speech is often not subject to preliminary injunctions because no final adjudication regarding its libelous nature can be reached at the preliminary injunction stage. *Id.* at 171–72; Richard Favata, Note, *Filling the Void in First Amendment Jurisprudence: Is There a Solution for Replacing the Impotent System of Prior Restraints?*, 72 FORDHAM L. REV. 169, 187 (2003) (arguing that “because prior restraints are generally issued prior to a full and fair hearing, it is difficult to determine whether the speech in question is in actuality unprotected. Therefore, prior restraints remain presumptively unconstitutional, even where the speech may be unprotected”). See also Michael J. Pollele, *Racial and Ethnic Group Defamation: A Speech-Friendly Proposal*, 23 B.C. THIRD WORLD L.J. 213, 245 (2003) (asserting that “some sparse authority suggests an injunction might lie against further repetitions of a defamation once the plaintiff has secured a jury verdict”).

⁶⁰ See, e.g., Corinne Stuart, Comment, *The Applicability of the Prior Restraint Doctrine to False Advertising Law*, 21 GEO. MASON L. REV. 531, 546–47 (2014); see also Michael I. Meyerson, *Rewriting Near v. Minnesota: Creating a Complete Definition of Prior Restraint*, 52 MERCER L. REV. 1087, 1137 (2001) (pointing out that “injunctive relief generally is unavailable for libel plaintiffs, even those seeking to silence statements previously adjudged to be libelous”).

⁶¹ 509 U.S. 544 (1993).

“permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints” because they place a “restraint on future speech.”⁶²

The prohibition on prior restraint of speech is therefore neither rigid nor based on a dogmatic approach. Prior restraints are frequently permitted when the threat to First Amendment values is not significant and the expected damage in the absence of prior restraint is significant.

II. THE COMPATIBILITY OF THE DOCTRINE OF PRIOR RESTRAINT WITH THE DIGITAL AGE

Andrew Shapiro outlines six characteristics of the digital age: many-to-many interactivity, flexibility, packet-based distribution networks, interoperability, large bandwidth or carrying capacity, and universality.⁶³ These digital tools reveal a new existence—rather than a mere modification or perfection—of the old one.⁶⁴

New sources of media have emerged in the digital age. Although lines between forms of media are blurring,⁶⁵ it can be said that, while “old media” refers to print newspapers, radios, and television broadcasts,⁶⁶ the term “new media” conveys a sense of the ability to broadcast in digital media and to do so instantly and to a global audience “online.”⁶⁷ The term “new media” encompasses an expanding and diversifying set of applied communication technologies.⁶⁸ The new media bring together technological artifacts or devices, activities, practices or uses, and social arrangements or organizations that form around the devices and practices.⁶⁹ Its main features seem to be its interconnectedness, accessibility to individual users as senders or receivers, interactivity, multiplicity of use, open-ended character, ubiquity, and delocatedness.⁷⁰

The Doctrine of Prior Restraint was established and shaped in a communication world dominated by the old media.⁷¹ However, media revolution has occurred over the last several decades and the world of communication in which the Doctrine of

⁶² *Id.* at 550.

⁶³ ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 15–17 (1999).

⁶⁴ See Shulamit Almog, *Creating Representations of Justice in the Third Millennium: Legal Poetics in Digital Times*, 32 *RUTGERS COMPUTER & TECH. L.J.* 183, 189 (2006).

⁶⁵ David A. Anderson, *Freedom of the Press*, 80 *TEX. L. REV.* 429, 438 (2002). The term “media” itself is difficult to define. See Daniel Joyce, *Media Witnesses: Human Rights in an Age of Digital Media*, 8 *INTERCULTURAL HUM. RTS. L. REV.* 231, 233 (2013).

⁶⁶ See PETER STEVEN, *THE NO-NONSENSE GUIDE TO GLOBAL MEDIA* 27–30, 67 (2003); Emily Anne Vance, *Should Prosecutors Blog, Post, Or Tweet?: The Need For New Restraints In Light Of Social Media*, 84 *FORDHAM L. REV.* 367, 370 n.16 (2015).

⁶⁷ See STEVEN, *supra* note 66, at 72–73.

⁶⁸ DENIS MCQUAIL, *MCQUAIL’S MASS COMMUNICATION THEORY* Part 2.6 (6th ed. 2010).

⁶⁹ STEVEN, *supra* note 66, at 72–75.

⁷⁰ *Id.*

⁷¹ See Favata, *supra* note 59, at 173–74 (describing how the Doctrine of Prior Restraint developed in early American law as a reaction to English practices).

Prior Restraint was developed has been dramatically altered.⁷² The need to remodel the Doctrine does not necessarily indicate a change in values. It grew out of the media revolution, which weakened certain assumptions underlying the Doctrine in its traditional formulation and involved some substantial developments that need to be addressed.⁷³

In this Part, we describe and shed light on some prominent characteristics of the media in the digital age and discuss aspects in which unique characteristics of the new media may justify reshaping the Doctrine of Prior Restraint.

A. Increased Chilling Effect on Ordinary Speakers

Anyone with network access can post expressions on the Internet and social media platforms. Certainly, “[n]o longer [does] one need the permission of a narrow set of editors who control[] television channels or newspaper pages.”⁷⁴ Any individual with a computer can launch a post to a website.⁷⁵ According to Justice Stevens, the Internet “provides relatively unlimited, low-cost capacity for communication of all kinds. . . . Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”⁷⁶ As a result, the Internet has evolved into “the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen.”⁷⁷

A significant number of Internet speakers, such as most Facebook contributors and Tweeters, are not even quasi-journalists.⁷⁸ In most instances, such speakers do

⁷² See Steven J. Venezia, *The Interaction of Social Media and the Law and How to Survive the Social Media Revolution*, 52 N.H. B.J. 24, 24 (2012) (noting major media developments since 1971); see also Balkin, *supra* note 22, at 2296.

⁷³ Cf. Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1670–76 (1995). Part IV, entitled: “Threats to an Online Agora: Rethinking Some Principles of First Amendment Practice,” describes First Amendment developments arising out of media changes. *Id.*

⁷⁴ Anupam Chander & Uyen P. Le, *Free Speech*, 100 IOWA L. REV. 501, 506 (2015). *But see* Levi, *supra* note 17, at 1562 (describing the “decline of the traditional editorial role” of the old media due to the rise of the new media).

⁷⁵ See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 7 (2004) (pointing out that “[l]arge numbers of people can broadcast and publish their views cheaply and widely. . . . [T]he development of weblogs (or blogs) allows people to publish content to the Internet with the press of a button, lowering the costs of publication and distribution even further”); Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 187 (2006).

⁷⁶ *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

⁷⁷ *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996).

⁷⁸ For discussions of the status of bloggers as journalists, see, e.g., Howard Fineman, *Who is a “Journalist”?*, 4 FIRST AMEND. L. REV. 1 (2005); Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395 (2006);

not consciously target their expressions to a mass audience.⁷⁹ In practice, however, their posts—which in most cases are not of any journalistic nature—may reach a huge audience and even become viral.⁸⁰

A difficulty lies in the escalation of the chilling effect created, in this new age, by the Doctrine of Prior Restraint in its traditional design. The Doctrine forbids the freezing of expressions by banning the issuance of anti-speech injunctions.⁸¹ However, it deters many lawful expressions as a result of the fear of exposure to subsequent sanctions.⁸² The Doctrine therefore has a chilling effect, “which occurs when a governmental action has the indirect effect of deterring a speaker from exercising her [or his] First Amendment rights.”⁸³ While a “chilling effect” on speech can be defined in general terms as a “collateral effect of inhibiting the freedom of expression, by making the individual . . . more reluctant to exercise it,”⁸⁴ chilling effects are undesirable as long as they also deter people from protected expressions.⁸⁵ Indeed, chilling expression may be a far more serious issue than prior restraint.⁸⁶

Thus, for instance, “[b]ecause the standards for awarding presumed damages in defamation cases are somewhat elusive, appellate courts have difficulty in evaluating claims that damages awards are excessive. The consequence is that the courts are generally liberal in evaluating the awards.”⁸⁷ “Consequential damages from defamation are usually speculative and always uncertain in amount.”⁸⁸ Before the rise of the new media, the accessibility of public speech was limited to financially sound mass media, which had readily available legal advice and professional self-confidence.⁸⁹ The birth of the new media, in contrast, dramatically increased the accessibility of speech to a wider range of people.⁹⁰ For the general public, individual bloggers, and the

Anastasia Heeger, *Securing a Journalist’s Testimonial Privilege in the International Criminal Court*, 6 SAN DIEGO INT’L L.J. 209 (2005).

⁷⁹ DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 61 (2007).

⁸⁰ *Id.* at 62.

⁸¹ *Alexander v. United States*, 509 U.S. 544, 550 (1993).

⁸² See, e.g., Bendor, *supra* note 3, at 329–31; Mayton, *supra* note 18, at 253–54; Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 728 (1978).

⁸³ See Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1474 (2013).

⁸⁴ *Smith v. California*, 361 U.S. 147, 151 (1959).

⁸⁵ *Id.*

⁸⁶ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1041 n.16 (2d ed. 1988).

⁸⁷ See Michael K. Steenson, *Presumed Damages in Defamation Law*, 40 WM. MITCHELL L. REV. 1492, 1516 (2014).

⁸⁸ Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 744 (1990).

⁸⁹ See Neil Weinstock Netanel, *New Media in Old Battles? Barron’s Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952, 964 (2008).

⁹⁰ Balkin, *supra* note 22, at 2304.

unorganized media characteristic of this new media, ex post criminal or civil sanctions are particularly more threatening.⁹¹ For those without deep pockets, the risk of large-scale damages may lead to economic collapse.⁹² Such a risk may impact their risk management, potentially heightening instances of the chilling effect on speech.

In terms of a marketplace of ideas, a significant chilling effect may be considerably worse than the freezing effect of injunctions. An injunction is focused on a specific expression and is only issued after a court finds that the expression, at least *prima facie*, is not constitutionally protected.⁹³ In contrast, the vagueness of the distinction between protected and unprotected expressions, as well as ordinary people's fear of subsequent criminal or civil sanctions, may prevent them from publishing even protected speech or may motivate them to remove such speech after receiving a warning that they will be sued if they do not delete it.⁹⁴ This may reduce, rather than expand, the scope of opinions in the digital age.

In order to prevent chilling of protected expressions, the Supreme Court has developed the Overbreadth Doctrine,⁹⁵ according to which speakers can challenge a statute on the basis that it would be impermissible as applied to others, but not to themselves.⁹⁶ The principal purpose of the Overbreadth Doctrine is to protect third parties—who might fear prosecution under an overbroad statute—from self-censoring constitutionally protected speech.⁹⁷ Chilling effects have also been invoked by the courts in “a wide variety of contexts to justify customized adjustments of particular legal rules in light of their purported uncertainties.”⁹⁸ As Leslie Kendrick puts it:

[T]he term “chilling effect” refers to a concern that an otherwise legitimate rule will curb protected expression outside its ambit. This phenomenon generally arises when would-be speakers, faced with the uncertainties of the legal process, refrain from

⁹¹ Ciolli, *supra* note 16, at 202.

⁹² *Id.*

⁹³ Chemerinsky, *supra* note 54, at 171.

⁹⁴ *Cf.* Alexander, *supra* note 22, at 439–41 (arguing that vague First Amendment tests chill free speech, not overbreadth).

⁹⁵ *See, e.g.,* R.A.V. v. St. Paul, 505 U.S. 377, 402 (1992) (White, J., concurring) (“The overbreadth doctrine has the redeeming virtue of attempting to avoid the chilling of protected expression.”); Massachusetts v. Oakes, 491 U.S. 576, 584 (1989) (“Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression.”).

⁹⁶ For the Overbreadth Doctrine, *see, e.g.,* New York v. Ferber, 458 U.S. 747, 767–69 (1982); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 261–79 (1994); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991); Marc E. Isserles, *Overcoming Overbreadth Facial Challenges and the Valid Rule Requirement*, 48 AM. U.L. REV. 359 (1998); Harvard Law Review Forum, *Overbreadth and Listeners' Rights*, 123 HARV. L. REV. 1 (2010).

⁹⁷ *See Oakes*, 491 U.S. at 581.

⁹⁸ *See* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1655 (2013).

making protected statements. This is an evil of constitutional proportions because free speech is an affirmative value, which the government has a particular obligation to promote, or at least not to deter.⁹⁹

It seems that, as in other contexts, the courts have shaped First Amendment doctrines in order to minimize the chilling of protected expressions.¹⁰⁰ This should also be done with respect to the Doctrine of Prior Restraint in the digital age.

B. The Lesser Impact of Journalistic Ethics on Ordinary Bloggers

The fact that many printed and broadcast media have Internet editions¹⁰¹ does not limit the openness of the Internet to additional forms of media. Bloggers and other new media speakers direct their texts to a wide public. However, ordinary bloggers often lack the professionalism associated with traditional forms of media.¹⁰² The writings of such bloggers are not published on institutionalized sites, hence are not subject to professional editing or journalistic standards.¹⁰³ In this respect, most

⁹⁹ *Id.*

¹⁰⁰ For example, one might note the concern of the Second Circuit about the chilling of protected expression that might result if schools are given the authority to punish speech that occurs off-campus. *See* *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1051 (2d Cir. 1979) (“The risk is simply too great that school officials will punish protected speech and thereby inhibit future expression.”).

¹⁰¹ *See* Barb Palser, *We’ve Only Just Begun*, 24 AM. JOURNALISM REV. 39 (2002); Levi, *supra* note 17, at 1533.

¹⁰² *See* Sunny Woan, *The Blogosphere: Past, Present, and Future. Preserving the Unfettered Development of Alternative Journalism*, 44 CAL. W. L. REV. 477, 484 (2008).

¹⁰³ *See, e.g.*, Steven Keslowitz, *The Transformative Nature of Blogs and Effect on Legal Scholarship*, 2009 CARDOZO L. REV. DE NOVO 252, 268 (noting the fact “that blawgs [legal blogs] . . . lack a viable mechanism for filtering content by means of a sustained, methodical selection and editing process”); Lee F. Peoples, *The Citation of Blogs in Judicial Opinions*, 13 TUL. J. TECH. & INTELL. PROP. 39, 51 (2010) (noting that “comments in blogs lack the editing . . . of law journals”); *see also* Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 78 (2011) (noting that “[n]etworked approaches to editing news may not be much worse than the old media model”); Lili Levi, *A New Model for Media Criticism: Lessons from the Schiavo Coverage*, 61 U. MIAMI L. REV. 665, 691 (2007) (observing that “[o]ne does not need to be a professional journalist to be a blogger; many well-known bloggers are not and do not operate under traditional journalistic standards and ethics”); Robert M. O’Neil, *The Drudge Case: A Look at Issues in Cyberspace Defamation*, 73 WASH. L. REV. 623, 624 (1998) (“[a]n online journalist publishes informally, lacking editors, lawyers and many of the other indicia of traditional print or broadcast medium”); Benjamin J. Wischnowski, Note, *Bloggers with Shields: Reconciling the Blogosphere’s Intrinsic Editorial Process with Traditional Concepts of Media Accountability*, 97 IOWA L. REV. 327, 329, 344 (2011) (arguing that due to “the concomitant lack of uniform editorial standards” in blogs, “[t]he separate test for bloggers would direct courts, as an initial matter, to assess peer review

speakers in the new media differ from journalists in the established printed and broadcast media. Journalists working under the umbrella of traditional media “typically operate subject to a set of ethical and professional norms, made explicit in a host of ethical codes and, more importantly, absorbed by individual journalists in a deeply embedded sense of professional identity that shapes and constrains their actions.”¹⁰⁴ Indeed, the average blogger is a diarist who does not follow any code of ethics.¹⁰⁵ A similar rationale led the Federal Trade Commission (FTC) to refrain from applying the rules it adopted in 2009¹⁰⁶ for “consumer-generated media” to journalists who work for newspapers, magazines, or television and radio stations, which—in contrast to the new media—have independent editorial responsibility and, as a result, are more trustworthy than those without it.¹⁰⁷

The internal norms of the old media “are a far better predictor of the nature and limits of press behavior than any norms that could be imposed from the top down by the courts.”¹⁰⁸ Accordingly, there has been a call for “new media outlets that do want to be taken seriously as news providers . . . to establish their credibility as a journalistic source,” by adopting ethical policies similar to those of the established old media.¹⁰⁹ Even though, hypothetically speaking, “journalism ethics codes may provide a useful model”¹¹⁰ for “bloggers and others with the capacity to invade privacy,” the ability to motivate speakers in the new media to adopt and apply ethical norms seems extremely limited.¹¹¹ Even if such a proposal has any feasibility for

and blogger-to-blogger collaboration—both of which are a form of editorial oversight, albeit horizontal”). As for traditional books, see Michael J. Kelly & David Satola, *The Right to Be Forgotten*, 2017 U. ILL. L. REV. 1, 13 (“Traditional publication processes also contain screening devices through layers of editing and peer review that help ensure accuracy. Alternatively, electronic news sources, websites, blogs, and other Internet sources can instantaneously spring up without the underlying support of screening from editors and publishing houses.”).

¹⁰⁴ Paul Horwitz, “*Of the [Blog]*”, 11 NEXUS J. OP. 45, 59 (2006). See also Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 595 (2005).

¹⁰⁵ See SOLOVE, *supra* note 79, at 24, 59.

¹⁰⁶ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2009).

¹⁰⁷ See Cohen, *supra* note 103, at 2–3. This stands in conflict with Ellen Goodman’s assertion, in an article published in 2006, that “[o]nce bloggers become the conduits for paid promotions, the extent to which they truly function outside the commercial media is questionable. For now, . . . it may well be fitting to exempt [bloggers] from sponsorship and other disclosure requirements . . . at least until their role in public discourse and the Internet regulatory apparatus becomes clearer.” Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 151 (2006).

¹⁰⁸ Horwitz, *supra* note 104, at 59.

¹⁰⁹ Cohen, *supra* note 103, at 76.

¹¹⁰ Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1103 (2009).

¹¹¹ A question that this Article does not address concerns the enforcement of content restrictions on Internet speakers, including by means of prior restraint, by intermediaries such

those new media of an institutionalized nature, it is certainly not applicable to any “individual who Tweets from the scene of a natural disaster or who occasionally posts amateur videos of protests.”¹¹²

The target audience for legal regulation concerning new media is fundamentally different from that with respect to the traditional media. The Doctrine of Prior Restraint in its current formulation was developed in a society characterized by institutionalized media hierarchically structured with a dominant role for editors and guided by journalistic ethics. The Doctrine, which limits the involvement of the judiciary in enforcing rights, such as the right to good reputation and to privacy, to ex post criminal and civil sanctions, was not intended for a reality in which infringement of such protected entitlements is not exceptional. In a media environment where self-subordination to ethical norms is not common, it is necessary to reshape the constitutional rules.

C. Ease and Immediacy of Publication

The convenient and immediate use of a widely accessible social platform allows participants to easily create a global harm.¹¹³ A tort or an offense committed by online means is accomplished by typing a hasty post and pressing “send.”¹¹⁴ Unlike a book or a newspaper article, which demands time to write and is usually accompanied by research and revisions, posts on social media are written casually and spontaneously.¹¹⁵ Furthermore, writing a book or an investigative journal article is usually

as Twitter, Facebook and YouTube. For discussions on this issue, see, e.g., Raphael Cohen-Almagor, *The Role of Internet Intermediaries in Tackling Terrorism Online*, 86 FORDHAM L. REV. 425 (2017). Under Section 230 of the Communications Decency Act 1996, Internet service providers are not responsible for libels published through the use of their services, even if they take on some editorial role with respect to the content. 47 U.S.C. § 230(c)(1) (2012). Despite the section, private expression-platforms restrict the freedom of expression of their users by means of prior restraint. See Note, *The Impermeable Life: Unsolicited Communications in the Marketplace of Ideas*, 118 HARV. L. REV. 1314, 1315–16, 1332–33 (2005) (noting that Internet service providers can use filtering technologies to screen individuals from information).

¹¹² Cohen, *supra* note 103, at 76.

¹¹³ See, e.g., Frank D. Lomonte, *Fouling the First Amendment: Why Colleges Can't, and Shouldn't, Control Student Athletes' Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 2 (2014) (explaining, that with respect to campus regulators, “[w]hat makes social media novel and empowering—that it is an immediate, unfiltered way to ‘speak’ with thousands of people at once—is also what makes it frightening”); Graham H. Ryan, Comment, *What Went Wrong on the World Wide Web: The Crossroads of Emerging Internet Technologies and Attorney Advertising in Louisiana*, 71 LA. L. REV. 749, 755 (2011) (mentioning “immediate publication” as a benefit of advertising on the Internet).

¹¹⁴ See, e.g., Jennifer Westhoff, *Consideration of Legal Ethics in Using Social Media*, 38 LOS ANGELES LAW. 9, 9 (2015) (“Social media are by nature casual and hasty forms of communication.”).

¹¹⁵ See, e.g., Nancy S. Kim, *Web Site Proprietorship and Online Harassment*, 2009 UTAH

accompanied by editing and legal advice.¹¹⁶ In contrast, writers of quick social media posts rarely receive such editing or advice.¹¹⁷ New media platforms shorten the distance from a thought to its actuation in writing. With the unbearable ease of tapping the keyboard, almost any computer-literate person can commit a criminal offense or a tortious breach.¹¹⁸ For example, it has been recognized that even “[b]ombmaking information is literally at the fingertips of anyone with access to a home computer equipped with a modem.”¹¹⁹

The ease and immediacy of speech in the digital age leads to hasty and impulsive publications, particularly on social media platforms, as well as in talk-backs.¹²⁰ The value of such expressions to the marketplace of ideas and information is often limited.¹²¹ With regard to unprotected expressions—on the makers of which the

L. REV. 993, 1017 (“[A]nonymity and the ease and pace of the Internet may encourage impulsive behavior.”).

¹¹⁶ See, e.g., Ellyn M. Angelotti, *Twibel Law: What Defamation and Its Remedies Look Like in the Age of Twitter*, 13 J. HIGH TECH. L. 433, 451 (2013) (“In the world of passive publication, the editorial process provides time, edits and checks for a writer during the storytelling process. Many media companies allocate substantial resources to ensure high journalistic quality and accuracy. Copy editors are specifically devoted to catching and correcting errors; upper-level editors guide the content and help the writer make tough ethical calls prior to publication—especially regarding sensitive content. Many media companies even have lawyers on hand to consult about questionable stories and situations throughout the process and also review stories before publication.”). See also Susan P. Shapiro, *Libel Lawyers as Risk Counselors: Pre-publication and Pre-broadcast Review and the Social Construction of News*, 11 L. & POL’Y 281, 288–89 (1989) (an overview of the process of pre-publication or pre-broadcast review in an article published before the age of social media).

¹¹⁷ See, e.g., Heidi Frostestsd Kuehl, *Free Speech and Defamation in an Era of Social Media: An Analysis of Federal and Illinois Norms in the Context of Anonymous Online Defamers*, 36 N. ILL. U. L. REV. 28, 34 (2016) (“Under the current structure of dissemination of information in the virtual world, individuals could presumably anonymously create or post false online statements on a social media site or through an Internet Service Provider (“ISP”) without any editing or direct recourse by the ISP or social media site . . .”).

¹¹⁸ Vincent Angermeier, Comment, *Swinging for the Fences: How Comprehensive Drug Testing, Inc. Missed the Ball on Digital Sources*, 100 J. CRIM. L. & CRIMINOLOGY 1587, 1616 (2010).

¹¹⁹ U.S. DEP’T OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION at i, 7 (1997), <http://cryptome.org/abi.htm> [<https://perma.cc/28BU-PBE2>]. See also Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 CARDOZO L. REV. 233, 281 (2005).

¹²⁰ See, e.g., Nancy S. Kim, *Website Design and Liability*, 52 JURIMETRICS 383, 384 (2012) (pointing out that a regrettable online behavior which has emerged within the last decade is “the impulsive posting of images or information (about oneself or others) without consideration of context or long-term implications”); Rodney K. Smith & Patrick A. Shea, *Religion and the Press: Keeping First Amendment Values in Balance*, 2002 UTAH L. REV. 177, 207 (asserting that “[w]ith the rise of the internet and other new technologies, these pressures will be intensified, resulting in an increasing desire to get the news out ‘Faster! Faster!’”).

¹²¹ Cody Delistraty, *Has the Internet Broken the Marketplace of Ideas? Rethinking Free*

Constitution allows the imposition of sanctions—the weight of considerations that underlie the prohibition on prior restraint of speech is reduced.

D. Eternity, Broad Access, and Virality

The Doctrine of Prior Restraint was originally created and designed in an environment with a relatively short-term memory.¹²² The damage caused by a printed or broadcasted speech was significant until another headline replaced it and the speech was naturally forgotten.¹²³ In contrast, as long as expressions appearing on the Internet are not removed, they have eternal exposure.¹²⁴ As the character of Erica Albright put it in the film *The Social Network*: “The [I]nternet’s not written in pencil . . . it’s written in ink”¹²⁵ “[T]he Internet rarely forgets.”¹²⁶ An online infringement is ongoing.¹²⁷ Posts that were displayed online decades ago can seriously harm a person today.

Additionally, Internet access is extremely wide.¹²⁸ Almost anyone, nearly anywhere, can be exposed to the Internet and can view blogs and social media posts. As a result, damages caused by new media releases may be greatly enhanced. While books and newspapers are usually accessible only to those who buy them or are exposed to them by chance, the Internet is accessible to nearly every child in the modern world.¹²⁹ The extent of the damage may therefore be huge, in light of both the number

Speech in the Digital Age, DOCUMENT J. (Nov. 5, 2018), <http://www.documentjournal.com/2018/11/has-the-internet-broken-the-marketplace-of-ideas-rethinking-free-speech-in-the-digital-age> [<https://perma.cc/QQV6-5FAU>].

¹²² Compare that to today’s landscape, where some see the establishment of a “right to be forgotten” as the only way to extinguish negative stories. Jeffery Toobin, *The Solace of Oblivion*, NEW YORKER (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/09/29/solace-oblivion> [<https://perma.cc/VBN3-SC5Q>].

¹²³ See *id.*

¹²⁴ See Jennifer Spencer, *No Service: Free Speech, the Communications Act, and BART’s Cell Phone Network Shutdown*, 27 BERKELEY TECH. L.J. 767, 789–90 (2012) (pointing out that “[s]peech may remain on the Internet for a long period of time, and illegal activity stemming from it may not occur right after the posting of the content”).

¹²⁵ THE SOCIAL NETWORK (Sony Pictures 2010).

¹²⁶ Andrew L. Roth, *Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet*, 2016 B.Y.U. L. REV. 741, 754.

¹²⁷ See Ernest Drucker, *Drug Law, Mass Incarceration, and Public Health*, 91 OR. L. REV. 1097, 1114–15 (2013) (explaining, regarding child pornography, that “[a]s these films and photos are widely distributed on the Internet, where they remain in permanent circulation, they come to constitute a long-term assault on these children’s lives as they grow into adults. By constantly re-stimulating the victim’s trauma into adulthood, this market continues a source of ongoing damages done by the initial production”).

¹²⁸ *Internet World Stats, Usage and Population Statistics*, INTERNET WORLD STATS, <https://www.internetworldstats.com/stats.htm> [<https://perma.cc/ZT2G-LEQV>] (last visited Apr. 11, 2019) (stating that, as of June 30, 2018, there were 4,208,571,287 Internet users around the world).

¹²⁹ UNICEF, CHILDREN IN A DIGITAL WORLD 1 (2017) (“Children and adolescents under 18 account for an estimated one in three internet users around the world.”).

of people exposed to the publications and the inability to conceal them from people immediately affected by them. In the past, parents who wanted to keep their children from being exposed to offensive information could hide the newspaper or prevent them from watching television. Today, every child who has a smartphone can access that information on the Internet or through a social media platform.

The sophisticated and efficient search engines, characterizing the digital age, make access to new media much easier too.¹³⁰ Indeed:

[I]f there are some controversial items in a book about a subject or person, it probably is not highlighted in the way that a Google search would retrieve the items. Unless it appears in electronic form or on Google Books, a book would need to be inspected to physically find the controversial information, but a search engine can take web users instantaneously to the precise location of the information in question.¹³¹

General publications on the Internet and social media posts in particular might become globally viral.¹³² The term “virality” is a description of “the quick permeation of thoughts, information, and trends into and through a human population.”¹³³ “[O]nce a rumor takes hold in cyberspace, it may be almost impossible to root out.”¹³⁴ The information in the new media comes out and is received at a tremendous speed; indeed, as Andrew Roth puts it, “viral content shared via social networks spreads much like an epidemic, spilling over from one network to another in rapid succession.”¹³⁵

Monetary compensation is not necessarily an effective remedy for ongoing and even viral harm.¹³⁶ Criminal punishment is also incapable of dealing with an offense, the consequences of which continue to develop after its perpetration in a manner that

¹³⁰ Kelly & Satola, *supra* note 103, at 13.

¹³¹ *Id.*

¹³² See, e.g., Amy Kristin Sanders, *Fast Forward Fifty Years: Protecting Uninhibited, Robust, and Wide-Open Debate after New York Times Co. v. Sullivan*, 48 GA. L. REV. 843, 844–45 (2014).

¹³³ Lauren Henry Scholz, *Privacy Petitions and Institutional Legitimacy*, 37 CARDOZO L. REV. 891, 926 (2016).

¹³⁴ Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 885 (2000).

¹³⁵ Roth, *supra* note 126, at 754.

¹³⁶ See Mary Margaret Giannini, *Slow Acid Drips and Evidentiary Nightmares: Smoothing Out the Rough Justice of Child Pornography Restitution with a Presumed Damages Theory*, 49 AM. CRIM. L. REV. 1723, 1741–42 (2012); Elad Peled, *Rethinking the Continuing Violation Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims*, 41 OHIO N.U. L. REV. 343, 383–86 (2015) (arguing that, “[w]here a prospectively continuing violation of the plaintiff’s rights is recognized,” the preferred remedy should be “systematic employment of injunctive relief. Within that relief the court would order the defendant to put an end to the injurious state of affairs by ceasing his conduct”).

is not necessarily predictable.¹³⁷ Truly, “[t]he prior restraint rules limit plaintiffs to less effective remedies because we fear overenforcement of rules against offensive speech. . . . Courts do not forbid prior restraints because other remedies are adequate, but because they are affirmatively hostile to prior restraints.”¹³⁸ The tremendous and eternal global exposure and potential virality of the new media increase the harmfulness inherent in unprotected expressions on the Internet.¹³⁹ They also significantly reduce the inherently limited effectiveness of imposing damages and criminal punishment for publication of digital expressions.¹⁴⁰ Given the concern with respect to the chilling effect of these subsequent sanctions,¹⁴¹ the justification for exempting speech in the new media from the policy that usually avoids any prior restraint remedies—even for unprotected expressions—is magnified.

¹³⁷ Giannini, *supra* note 136, at 1742 (describing child pornography victims’ difficulty in articulating ongoing harms related to knowledge of images being possessed).

¹³⁸ Laycock, *supra* note 88, at 744–45. Laycock asserts that:

On the usual criteria of irreparable injury, both damages and criminal prosecution are grossly inadequate. Money damages cannot replace a reputation once lost, or erase emotional distress once suffered. Neither can be accurately valued in dollars. Consequential damages from defamation are usually speculative and always uncertain in amount. Both because the thing lost is irreplaceable and because the loss is hard to measure, damages are an obviously inadequate remedy for defamation. The same analysis could be applied to any other category of unprotected speech. . . . Criminal punishment neither undoes the harm nor compensates for it. It may provide revenge or deterrence, but it is not a remedy. Thus, the subsequent remedies for speech torts and speech crimes are grossly inadequate, in the sense in which adequacy is usually measured under the irreparable injury rule.

Id.

¹³⁹ See, e.g., Winhkong Hua, Note, *Cybermobs, Civil Conspiracy, and Tort Liability*, 44 FORDHAM URB. L.J. 1217, 1218 (2017) (“The Internet allows individuals to be hurt in ways that simply did not previously exist. Several examples demonstrate the new types of harms that have become available when people use the Internet as a tool of harassment: from false accusations, gender discrimination, and inexplicable ire, to the scorning of people who tread past certain social norms.”); Roth, *supra* note 126, at 754–55 (2016) (“[T]he Internet also has the potential to drastically amplify the harms caused by libelous statements. This is because the Internet increases the ability of ordinary users to cause significantly more reputational damage than would be possible with traditional media. . . . Two other peculiar aspects of Internet discourse make defamatory statements published online particularly volatile: virality and permanence. First, the potential for libel to ‘go viral’ augments the harm to defamation victims by exponentially expanding the reach of libelous statements. . . . Indeed, viral content shared via social networks spreads much like an epidemic, spilling over from one network to another in rapid succession. . . . Next, the Internet rarely forgets.”).

¹⁴⁰ See, e.g., Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 336 (2005) (“Cyberspace offers unscrupulous people an entirely new venue in which to conduct harmful activities without a significant chance of being identified, let alone punished.”).

¹⁴¹ See *supra* Section II.A.

E. Technical Ability to Separate Protected from Unprotected Speech

Digital technologies enable the courts to separate unprotected expressions from the constitutionally protected parts of speech and to remove only the former of such expressions.¹⁴² Deleting or altering parts of expressions in the old media, such as parts of an article in a printed newspaper or book, is very difficult to implement in practice. In contrast, the new digital technologies are built to alter or remove specific fragments of speech or even a few words.¹⁴³ Courts can easily order the deletion or alteration of parts of a post or a blog.¹⁴⁴ Just as the technological revolution that gave rise to the digital age changed the media in a way that would justify a previously problematic prior restraint, so too, can the new technologies moderate the means of prior restraint and reduce them to the least necessary level.

The proposed separation between protected and unprotected speech is an analogy drawn from the constitutional Severability Doctrine.¹⁴⁵ This Doctrine:

allows a court to excise any unconstitutional clauses or applications from a statute, leaving the remainder in force if the legislature would prefer that result to the statute's total invalidation. This makes possible as-applied adjudication and allows a court to save as much of a statute as it possibly can.¹⁴⁶

Just as a court may abolish only the unconstitutional parts of a law by exercising the Severability Doctrine, new technologies allow the court to order the deletion of only the constitutionally unprotected parts of text from the network.

¹⁴² See, e.g., The Digital Millennium Copyright Act, 17 U.S.C. § 512(b)(2)(E)(i) (limiting the liability of an internet service provider that voluntarily, or by court order, removes or disables access to content that violates the Act).

¹⁴³ See, e.g., Timothy J. Brennan, *Do Easy Cases Make Bad Law? Antitrust Innovations or Missed Opportunities in United States v. Microsoft*, 69 GEO. WASH. L. REV. 1042, 1058 (2001) (pointing out that “[a]lthough Microsoft would not delete the IE source code (i.e., the computer program) from its copies of Windows 95, it agreed to delete that part of the source code that would display the IE icon on the Windows 95 screen, or desktop, so consumers would not automatically presume that IE was on the computer”).

¹⁴⁴ See 17 U.S.C. § 512(b)(2)(E)(i).

¹⁴⁵ David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 639 (2008).

¹⁴⁶ *Id.* See also, e.g., Hannah Garden-Monheit, Comment, *Using Severability Doctrine to Solve the Retroactivity Unit-of-Analysis Puzzle: A Dodd-Frank Case Study*, 80 U. CHI. L. REV. 1885, 1887 (2013) (asserting that “in the severability context judicial modesty recommends an assumption that statutory provisions are independent of one another”); Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 TEX. REV. L. & POL. 1, 3 (2011) (pointing out that “[e]ach time a court strikes down a statutory provision, it must determine whether to invalidate only the unconstitutional provision, or instead whether to invalidate the statute in its entirety or in substantial part. Severability is the doctrine of determining whether part or all of a statute can survive without the invalid provision”).

III. ADAPTING THE DOCTRINE OF PRIOR RESTRAINT TO THE DIGITAL AGE

In accordance with the Doctrine of Prior Restraint, governmental and judicial authorities are required to make significant efforts to use less speech-restrictive means to address public and private concerns before taking more extreme measures such as a network-wide shutdown.¹⁴⁷

The development of the new media requires adapting and updating legal doctrines developed in the past.¹⁴⁸ Thus, “censorship is seen as anathema to deeply held beliefs about the importance of unfettered discourse and free expression.”¹⁴⁹ Even so, “[s]hould the government censor the Net, . . . it should do so directly—using legislation that is tailored to the problem, that incorporates safeguards informed by the history of prior restraint, and that creates a system that is open, transparent, narrow, and accountable.”¹⁵⁰

In this Part, we propose a twofold reshaping of the Doctrine of Prior Restraint, tailored to the distinctive characteristics of the digital age and the new media. The proposed reshape does not address the aspect of the Doctrine that focuses on the prohibition on administrative licensing of speech, since the development of the new media does not justify such a reshape. Our proposal addresses the aspect of the Doctrine that relates to judicial orders and injunctions. We believe there is room for adapting the Doctrine to the characteristics of the digital age.

Indeed, not all the characteristics of the new media, as described and discussed in Part II, apply to any expression in this media. However, the two proposals described below apply to any expression that appears or is intended to appear on the Internet or in the social media, since every expression in the new media has at least some of these characteristics. Only in rare cases are expressions in the current era not published or expected to be published on the Internet or social networks. Therefore, in practice, our suggestions apply to all sorts of expression.

A. Granting Judicial Injunctions and Removal Orders Concerning Speech in the New Media

Due to the immediacy of expression in the new media and other characteristics of the digital age,¹⁵¹ injunctive requests to prevent new media expressions which have not yet been published will likely be rare. For instance, the guideline for journalists set forth in the Society of Professional Journalists Code of Ethics, to “[d]iligently seek subjects of news coverage to allow them to respond to criticism

¹⁴⁷ See Einisman, *supra* note 10, at 206.

¹⁴⁸ See, e.g., Scott P. Kramer, *The Intersection between Social Media Speech and Domestic Violence: Tweeting Harassment*, 28 CBA RECORD 34 (Apr./May 2014).

¹⁴⁹ Bambauer, *supra* note 31, at 872–73.

¹⁵⁰ *Id.* at 930.

¹⁵¹ See *supra* Part II.

or allegations of wrongdoing,”¹⁵² does not reflect the practice among bloggers who are not professional journalists. Requesting a response from subjects of coverage can allow them time to apply for an injunction against publication.

Concerns with respect to the issuance of permanent and temporary judicial orders regarding publications that have already been distributed have increased in significance in the digital age.¹⁵³ It may be claimed that an injunction of that kind is not necessarily unconstitutional under the Doctrine of Prior Restraint, since the restraint of speech is not “prior”; rather, it takes place after the publication has been distributed or displayed for a time.¹⁵⁴ However, this argument alone is not persuasive. Removing an expression published on a medium with an eternal nature reduces its public visibility, starting from the time of removal.¹⁵⁵ Such removal will not be hermetic due to the characteristics of the Internet, and some accessibility to the expression will remain.¹⁵⁶ In spite of these concerns, this remains a prior restraint. As referenced previously,¹⁵⁷ even if case law provides certain indications that an injunction with respect to publication may be legitimate if granted in the framework of a final judgment, and not as a temporary remedy, these indications are not conclusive and the Supreme Court has not yet ruled on the issue.

However, the special characteristics of the new media justify, as in other areas where the constitutional legitimacy of prior restraints of speech has already been recognized,¹⁵⁸ a flexible judicial manner. This is certainly the case with respect to

¹⁵² *Society of Professional Journalists Code of Ethics*, SPJ (Sept. 6, 2014, 4:49 PM), <https://www.spj.org/ethicscode.asp> [<https://perma.cc/CC5F-JH6F>].

¹⁵³ See *supra* Part II.

¹⁵⁴ See Peled, *supra* note 136, at 385 n.423.

¹⁵⁵ See, e.g., Ardia, *supra* note 33, at 82 (“An injunction likely would have its greatest utility in situations where there is a danger of recurrent violation by the defendant and the speech has not been widely disseminated. Surprisingly, a number of defendants have actually conceded that they would continue to defame the plaintiff absent a court order enjoining their behavior. In such situations, an injunction prohibiting the defendant from continuing to publish his defamatory speech might be an effective remedy. . . . An injunction may also be a useful and appropriate remedy if the defamatory material is only circulating within a limited community and the injunction prohibits dissemination of the speech outside that community. . . . [A]n injunction may be an effective remedy where the defendant has created banners, distributed flyers, posted billboards, or has otherwise communicated the defamatory speech only to a limited audience.”).

¹⁵⁶ See Stacey B. Steinberg, *Sharenting: Children’s Privacy in the Age of Social Media*, 66 EMORY L.J. 839, 872 (2017) (arguing that “remedies could potentially require parents to delete offensive material from Internet sites they own, but this would do little to control the information shared on sites not owned or controlled by the parent. Additionally, these remedies would be ineffective in many cases where the material has been downloaded or shared by third parties and would offer little protection to a child who is already emotionally harmed by viral online disclosure. Furthermore, once information is shared, despite its future deletion, companies might retain the previously available data”).

¹⁵⁷ See *supra* note 59 and accompanying text.

¹⁵⁸ See *supra* notes 42–58 and accompanying text.

permanent injunctions for the removal of expressions. It is also the case in appropriate exceptional cases that pertain to temporary removal orders. A combination of factors—including the increased chilling effect of subsequent sanctions on ordinary speakers,¹⁵⁹ the lesser impact of journalistic ethics on bloggers,¹⁶⁰ the ease and immediacy of new media publications,¹⁶¹ the eternity of such publications,¹⁶² broad access to the new media,¹⁶³ virality of speech,¹⁶⁴ and the technical ability to separate protected from unprotected speech in the digital age¹⁶⁵—makes prior restraint in the digital age essentially different from the restraint anticipated by the drafters of the traditional Doctrine of Prior Restraint.

Prior restraint of speech, including speech on the Internet, is not a trivial matter. It requires deep thought and careful judicial discretion. Despite the traditional equitable principle that the granting of preliminary relief is largely subject to the discretion of the court, a court that grants preliminary relief against expression should expect no deference in the course of appellate review.¹⁶⁶

B. Retraction and Injunction Requests as a Condition for Damages

In order to reduce the chilling effect and give speakers the freedom to choose whether to take the risk of subsequent sanctions, we propose that the awarding of damages for harm caused by unprotected speech in the new media be made contingent upon submitting a request for retraction to the offending party, and if he or she refuses, filing an application for an injunction or a removal order. If such a request is made, and the offending party removes the publication, damages will be imposed only for injuries caused until removal.

The sub-constitutional Mitigation of Damages (Avoidable Consequences) Doctrine precludes an injured party from recovering damages for losses that he or she could reasonably have avoided.¹⁶⁷ If a plaintiff can reasonably take measures to eliminate damages, rather than merely minimizing them, the Doctrine requires him or her to do so.¹⁶⁸ Similar to the Mitigation of Damages Doctrine,¹⁶⁹ in many states, the request

¹⁵⁹ See *supra* Section II.A.

¹⁶⁰ See *supra* Section II.B.

¹⁶¹ See *supra* Section II.C.

¹⁶² See *supra* Section II.D.

¹⁶³ See *supra* Section II.D.

¹⁶⁴ See *supra* Section II.D.

¹⁶⁵ See *supra* Section II.E.

¹⁶⁶ See Redish, *supra* note 18, at 88–89.

¹⁶⁷ Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 967 n.2 (1983). See also Yehuda Adar, *Comparative Negligence and Mitigation of Damages: Two Sister Doctrines in Search of Reunion*, 31 QUINNIPIAC L. REV. 783, 792 (2013).

¹⁶⁸ Douglas H. Cook, *Personal Responsibility and the Law of Torts*, 45 AM. U. L. REV. 1245, 1253 (1996).

¹⁶⁹ See Donna M. Murasky, *Avoidable Consequences in Defamation: The Common-Law*

for retraction serves, according to legislation or case law, as a criterion for determining whether a libel suit was filed in good faith.¹⁷⁰ Like the general Mitigation of Damages Doctrine, the burden of requesting retraction, which is incumbent upon the plaintiff in a defamation action, is “to ‘use such means as are reasonable under the circumstances to avoid or minimize the damages.’”¹⁷¹ This sub-constitutional state law applies to defamatory publications in the new media as well.¹⁷²

We suggest that constitutional status be granted to the Mitigation of Damages Doctrine with respect to speech in the new media. Seeking damages for violation of an anti-speech entitlement, such as the rights to good reputation, privacy, and intellectual property (to the extent that the intellectual property that was harmed conflicts with freedom of expression), will be contingent upon a retraction request, and if the request is not accepted by the defendant, by a plea for injunction or a removal order.

A plaintiff has a primary right for a defendant not to act unlawfully; this right should ideally be protected by injunction and only as a second-best remedy to damages.¹⁷³ The traditional Doctrine of Prior Restraint bars prohibition on speech issued in advance of publication, principally because of the fear of freezing the expression or of postponing it if the specific expression is time-sensitive.¹⁷⁴ This rationale itself supports making damages contingent upon the plaintiff’s prior demand to remove the speech from the Internet. The need to prevent chilling of expression and to preclude deterring ordinary people from expressing themselves in the new media, while respecting their freedom of choice, makes it necessary for persons who believe that their rights have been violated by an unprotected speech in the new media to first demand the removal of that speech. Only if this demand is rejected will the injured party be entitled to claim damages for the harm caused by the speech.

Duty to Request Retraction, 40 RUTGERS L. REV. 167, 175–76 (1987) (asserting that “[i]n the case of defamation, the rationale for the rule applies with particular force. A retraction, if granted, not only may remedy and prevent economic loss but also, and perhaps more important, is likely to be the best method of curing a loss that is not easily measured in monetary terms—that of vindicating the reputation of a person who has been falsely accused of some misdeed”).

¹⁷⁰ See, e.g., John C. Martin, *The Role of Retraction in Defamation Suits*, 1993 U. CHI. LEGAL F. 293, 294 (pointing out that “[t]raditionally, retraction has served as evidence of an absence of malice as revealed in both case law and state statutes. Similarly, a refusal to retract has sometimes been used to buttress allegations that a defendant published a defamatory article maliciously”).

¹⁷¹ See Allison E. Horton, *Beyond Control? The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265, 1293 (2009) (quoting C. MCCORMICK, *LAW OF DAMAGES* 127 (1935)).

¹⁷² See Jeff Kosseff, *Private or Public? Eliminating the Gertz Defamation Test*, 2011 U. ILL. J.L. TECH. & POL’Y 249, 267–68.

¹⁷³ Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693, 1705–06 (1995).

¹⁷⁴ See *Nebraska Press Ass’n. v. Stuart*, 427 U.S. 539, 561 (1976) (“As a practical matter, moreover, the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.”).

The court that hears the motion for injunction or removal order will have to exercise careful discretion while attributing considerable weight to First Amendment values. The need to effectively protect the First Amendment values also dictates the awarding of damages for harm caused by expression in the new media only after careful judicial consideration. The court should be convinced that, under the circumstances of the case, it was not appropriate to order the removal of the expression and thereby prevent the chilling effect of the damages.

CONCLUSION

The Doctrine of Prior Restraint in the United States is rooted in nineteenth-century cases from state courts, which recognized and implemented protections against prior restraints as integral components of state constitutional provisions.¹⁷⁵ The Doctrine as it stands today was formulated almost nine decades ago, in the 1931 *Near v. Minnesota* Supreme Court decision.¹⁷⁶ Over the years, a technological revolution has taken place; this revolution gave rise to the digital age, one of the main manifestations of which is the new media.

While the major rationales of the Doctrine of Prior Restraint have not changed in the digital age, the characteristics of the new media require a reshaping of the Doctrine. The required reshape does not result from a change in the rationales of the Doctrine, but rather, from the need to promote them in the digital age.

The new media increase the risk to freedom of expression and the marketplace of ideas as a result of subsequent sanctions on unprotected expressions.¹⁷⁷ At the same time, the new media also increase the harm caused by unprotected expression to rights including the right to good reputation and the right to privacy.¹⁷⁸ These implications stem from the combination of the increased chilling effect of subsequent sanctions on ordinary speakers in the new media, the lesser impact of journalistic ethics on ordinary bloggers, the ease and immediacy of publication, the eternal nature of new media speech, the broad access to it, and the technical ability to separate protected from unprotected speech.¹⁷⁹

The flexibility and indeterminability of the Doctrine of Prior Restraint has enabled its adaptation in the past to changing social needs.¹⁸⁰ These attributes of the Doctrine also allow it to be reshaped in order to suit the digital age. In light of the combination of the new media characteristics, we propose a two-component reshaping of the Doctrine of Prior Restraint: first, empowering courts to issue orders to remove new media expressions and, in exceptional cases, to issue injunctions against

¹⁷⁵ Meyerson, *supra* note 1, at 1087.

¹⁷⁶ *Near v. Minnesota*, 283 U.S. 697 (1931).

¹⁷⁷ *See supra* Section II.A.

¹⁷⁸ *See supra* Section II.B.

¹⁷⁹ *See supra* Part II.

¹⁸⁰ *See supra* Part I.

unpublished expressions; and second, granting speakers freedom to choose whether to take the risk of subsequent sanctions by constitutionalizing the Mitigation of Damages Doctrine with respect to speech in the new media.

“Law must be stable and yet it cannot stand still.”¹⁸¹ This famous insight¹⁸² by Roscoe Pound, Dean of Harvard Law School from 1916 to 1936,¹⁸³ is particularly apt in the field of constitutional law. Indeed, “to keep our constitutions vital, we must ensure that the law is stable but never stands still.”¹⁸⁴ In order to maintain the stability of the values underlying the Constitution in the digital age, some change of its interpretation is needed. This is the aim of the proposed reshape of the Prior Restraint Doctrine.

¹⁸¹ ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 1 (1923).

¹⁸² *See, e.g.,* The Honorable Roger J. Miner, *A Significant Symposium*, 54 N.Y.L. SCH. L. REV. 15, 16 (2009–2010).

¹⁸³ *See Deans of Harvard Law School*, HARV. L. SCH., <https://hls.harvard.edu/about/history/hls-deans> [<https://perma.cc/UH8V-8B9J>] (last visited Apr. 11, 2019).

¹⁸⁴ The Honorable Margaret H. Marshall, “*Wise Parents Do Not Hesitate to Learn from their Children*”: *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1655 (2004). *See also* Robert B. McKay, *Stability and Change in Constitutional Law*, 17 VAND. L. REV. 203, 203 (1963) (“The law regards change merely for the sake of change with suspicion, demanding in the name of stare decisis special justification for departure from the past. But the law also has its moments of movement, particularly in the ever-shifting domain of constitutional law.”).

