PARSING THE PENTAGON PAPERS

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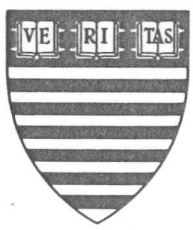

• PUBLIC POLICY •

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Lawyers commonly ask what a case *stands for*, or what it *means*, but they rarely ask the logically prior question of what it means for a case to mean something. Commonly the unarticulated assumption is that the meaning of a case is the set of legal doctrinal propositions that are fairly inferable from the text of the opinions, or the set of future cases that are likely to follow from or be controlled by the case.[1] Either of these views, however, presupposes that what a case means is what it means within the system of legal decisionmaking.

For most cases this presupposition rings true. *Erie R.R. v. Tompkins*,[2] in which the Supreme Court held that where a federal court's jurisdiction is based on diversity of citizenship the law to be applied is the law of the state as determined by the state, has essentially no public or social meaning. Its significance lies solely in how it is used and interpreted by lawyers and judges within the system of legal decisionmaking.

Occasionally, however, a decided case has a more widespread presence, and when it has such a public or social or political presence it has a public or social or political meaning that is potentially in theory and generally in practice divergent from its intra-systemic legal meaning. *Miller v. California*,[3] the most famous of the Supreme Court's 1973 obscenity decisions, is still widely understood by most of the public, most political officials, and many prosecutors to have determined that the definition of obscenity is exclusively a function of local community standards, despite the fact that such an interpretation was scarcely technically sustainable from the opinion itself, and is certainly no longer technically sustainable after *Jenkins v. Georgia*,[4] *Smith v. United States*,[5] or *Pope v. Illinois*.[6] Despite the doctrinal implausibility of the popularly held view, however, much of public debate and much of real-world policymaking is premised on an understanding of these decisions that diverges from the understanding that exists within the bulk of the narrower legal or specialist community.

Miller is a particularly crisp example, but others are probably even more obvious. *Brown v. Board of Education*[7] has become a component of much of the American public consciousness, and many people who have read neither this opinion nor any other have some idea of what *Brown* stands for and what it did, even though that idea might be different from what exists in the opinion. So too with *Roe v. Wade*,[8] *Miranda v. Arizona*,[9] and *United States v. Nixon*,[10] as well as with others whose case names might not be widely known but which still deal with publicly debated issues such as the right to die,[11] school prayer,[12] and affirmative action.[13] For cases like these, the public or political understanding, whether close to or far from the technical insider understanding, has a life and importance of its own, influencing real policymaking and real public perception of what the state of the law is and what various officials or citizens can and cannot do. In this sense the public understanding of a case has both behavioral and political significance independent of how highly that understanding would be graded on a law school examination. Although all lawyers know that a denial of certiorari has no precedential effect and is not to be taken as a decision on the merits, the Supreme Court's denial of certiorari in the *Skokie* litigation is no less understood by the public as the Court's having "permitted" the Nazis to march,[14] and I am confident that this understanding influences the decisions of policymakers considering the circumstances under which they might attempt to stop marches by Nazis and others of similar persuasion.

As should by now be apparent, I believe that *New York Times Co. v. United States*,[15] the case of the *Pentagon Papers*, fits well within this class of cases, especially if we consider within the realm of understanding outside the legal system not only public understanding, but also understanding within identifiable non-legal professional subgroups, such as the military and the mass media. Ideally I would attempt to establish the divergence in understanding by doing an empirical sociological analysis of how the case is now understood by American journalists, and comparing the results to an empirical sociological analysis of how the case is now understood by American First Amendment specialists operating within the legal system. Limitations of resources and talent prevent me from engaging in this type of inquiry, so as an alternative I will offer my own analysis of the technical internal meaning of the case, as well as the implications of that meaning, and leave it largely to the readers of this paper to compare that analysis with the understanding they

believe now exists at large or within the subgroup of professional journalists.

My hypothesis of divergence between the two understandings is emphatically not a claim that non-lawyers or non-specialists have gotten the case "wrong." To suppose that that is my message is to miss my point entirely. Rather, my point is that the meaning of a case is context- and domain-dependent, and that this domain-dependent meaning has domain-dependent significance for influencing those actions that are guided by a perception of what the law is. It is my hope that this will lead to further research into and discussion of the very process by which so-called "primary" legal items such as cases are presented to or translated for the denizens of domains other than the legal system itself.[16]

I

The *Pentagon Papers* case deals technically only with the issue of prior restraint. The six Justices in the majority—Black, Douglas, Brennan, Stewart, White, and Marshall—all agreed on the unconstitutionality of the prior restraint, but two members of that majority were expressly unwilling to conclude that on the facts of the case a subsequent punishment would also have violated the First Amendment. Justice Stewart offered his own articulation of the standard necessary to justify a prior restraint—that there will "surely result [] direct, immediate, and irreparable damage to our Nation or its people"—and concluded that it had not been met. And he joined the opinion of Justice White, in which White made it clear that his opinion was premised on the lack of congressional authorization for the remedy, and on the failure of the United States to meet the "unusually heavy justification" required for a prior restraint. But "that the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way. . . . I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if they published all the material now in their possession. That matter must await resolution in the context of a criminal proceeding if one is [instituted]."

These two opinions, when conjoined with those of the three dissenters, make it clear that there is no warrant in the case itself for thinking that the newspapers that published the *Pentagon Papers* were necessarily immune from subsequent criminal prosecution for having published them. If this is so, then nothing in the case would have prevented criminal prosecutions against the newspapers, nor does anything in the case itself prevent, upon conviction, fines against the newspapers and imprisonment of their responsible officers and employees.

Moreover, nothing in the case indicates what standard would have been applied to test the constitutionality of a subsequent criminal proceeding had one been instituted and had a conviction resulted. Two years earlier the Court had decided *Brandenburg v. Ohio*,[17] in which again *per curiam* it established that prosecutions for "advocacy of the use of force or of law violation" could not be prohibited "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." This standard, plainly a major departure from weaker ones associated with the earlier decisions of *Gitlow v. New York*,[18] *Whitney v. California*,[19] and *Dennis v. United States*,[20] has made *Brandenburg* one of the three most important—the other two being *New York Times Co. v. Sullivan*[21] and *Cohen v. California*[22]—cases protecting the right to criticize the government and its policies. But in 1971 the *Brandenburg* standard remained unexplicated, and thus it was not yet clear what standard of explicitness of message or intent of the speaker was incorporated in the word "incite," what standard of probability was meant by "likely," and what degree of immediacy was necessary to satisfy the requirement of "imminence."[23] In addition, and perhaps more importantly, it was not at all clear then, and is hardly clear now, that the *Brandenburg* standard is the one to be applied to the disclosure of factual information, as opposed to non-factual normative advocacy. Had the *New York Times* seen itself as a latter-day Schenck and urged disobedience of the Selective Service System, or had the *Washington Post* encouraged citizens to take to the streets in mass and violent protest against the war, it is plain that their actions would have been measured against the *Brandenburg* standard and almost certainly been protected by it. But because there is a difference between encouraging people to blow up the draft board and publishing a formula for making Molotov Cocktails out of household chemicals, and because there is a difference between urging bank robbery and disclosing the combination to the vault and the minute-by-minute rounds of the guard, it is conceivable that *Brandenburg* might have been (and might still be) held inapt to disclosure of information, whether confiden-

tial or not,[24] resulting in a standard for subsequent punishment of disclosure of harmful factual information somewhat lower than the one applied to normative language urging harmful actions. Subsequent lower court cases have tended to reject this distinction, holding that disclosure of information and instructions is also to be governed by the *Brandenburg* standard.[25] But there is yet no Supreme Court ruling to this effect,[26] and certainly in 1971 it could hardly have been clear that even so speech-protective a standard as that of *Brandenburg* would have been applied to a subsequent punishment of the *New York Times* based on disclosure of confidential information, and hardly have been clear just how speech-protective *Brandenburg* was at all.

If the *Pentagon Papers* case thus said nothing whatsoever that would have led to any assurance about subsequent punishment, and if it was unclear then just how speech-protective a standard would have been applied to such an action, then what explains the celebratory environment that then and still surrounds the case? Why is it taken to be such a great victory for the First Amendment? And why has it generated such increased confidence on the part of journalists that their professional activities with national security implications are largely shielded by the *Pentagon Papers* case from official interference. Several possibilities emerge.

First and most obvious, the case embodies the received wisdom and doctrinal structure that prior restraints are somehow much worse than subsequent punishments, so that guarding against them is of paramount importance. This of course has been the accepted view since 1644, when John Milton in the *Areopagitica* simultaneously condemned advance licensing by a censorship board while making it clear that subsequent punishment of publishers for what they published was of no concern to him. A century later the same distinction was reaffirmed by Blackstone, who defined freedom of the press in terms of freedom from previous restraint while saying in the very same passage that the principle of freedom of the press did not protect the press from fine or imprisonment based on what it published.

There remains a dispute about whether *only* this aversion to prior restraint was the original intent of the drafters of the First Amendment,[27] but even after it has become clear that the First Amendment is also concerned with subsequent punishment, the distinction between the prior and the subsequent remains reflected in the doctrine insofar as the standard for justifying the former remains more stringent than that for the latter.[28] Even though the First Amendment now places great constraints on government when it wishes to impose subsequent punishments on utterances, it imposes even greater constraints when the government wishes to proceed by prior restraint. And that is why the failure to meet the higher standard, as in the *Pentagon Papers* case, says nothing about the likelihood that a lower standard could be satisfied.

This distinction, entrenched both historically and doctrinally, has not fared well in the academic commentary. The reasons for that are fairly straightforward. In explaining the result in the *Pentagon Papers* case, Alexander Bickel, who represented the *New York Times*, said, famously, that "A criminal statute chills, a prior restraint freezes."[29] But whatever the rhetorical appeal of that phrase, it has seemed to most commentators to be empirically false.[30] First, criminal punishments are commonly designed to deter conduct in advance as well as to exact retribution. Their goal is ordinarily to prevent conduct thought harmful, and they often succeed in this goal. If this banal observation about the criminal law is correct, then we would expect to see a considerable amount of freezing rather than mere chilling insofar as potential speakers feared the imposition of subsequent punishments. The higher the punishment and the greater the likelihood that it will be imposed, the higher the likelihood that the effect of a strict subsequent punishment scheme with no mechanism for prior restraint will still ensure that some number of utterances will simply never see the light of day.

Conversely, there is nothing about an injunction that itself physically produces compliance. An enjoined speaker or publisher may, if willing to risk contempt sanctions, publish that which it has been prohibited from publishing.[31] In that sense, a prior restraint freezes only insofar as the sanctions it threatens cause a decisionmaker to refrain from actions in which she otherwise would have engaged. Assessing the circumstances under which this will occur, however, is a function of an entire theory of decision, incorporating, at the least, consideration of the likelihood of sanction, the extent of sanction if imposed, the likelihood of benefit from publishing, the extent of benefit from publishing, and the risk-aversion (or lack thereof) of the publisher or speaker. But this is a complex behavioral calculation, and there is no reason to

believe, and good reason to disbelieve, that the prior restraint/subsequent punishment distinction will be an accurate marker of the distinction between those utterances that will be published at least once and those that never see the light of day.

Although this general form of attack on the distinction between prior restraints and subsequent punishments has been widely accepted in the literature, it has never found much credence in the Supreme Court. Nor has it been received very well in the press, for whom the distinction remains real, for whom the freedom from prior restraint substantially reduces the perceived constraints on them, and for whom the *Pentagon Papers* case thus remains a major victory, regardless of what it did not say about the availability or non-availability of subsequent punishment.[32]

In order to understand this reaction, and in order to understand why much of the academic commentary has misperceived the empirical reality, it is worthwhile to note briefly the subsequent history of the *Pentagon Papers* litigation. Although Daniel Ellsberg and Anthony Russo were subsequently indicted by a grand jury for their role in furnishing the *Pentagon Papers* to the *New York Times*,[33] neither the *Times* nor any other newspaper was subsequently charged with violating the Espionage Act, despite the indications from Justice White's opinion that conceivably as many as five Supreme Court Justices would have been willing to countenance such an action. And on November 5, 1971, James Goodale, then General Counsel for the *New York Times*, reported that, in the words of Professor Fiss, "in the three months prior to publication, no one at the Times thought there was any risk of prosecution under the Espionage Act."[34] Moreover, even had there been a prosecution, it seemed then and still seems now extraordinarily unlikely that Arthur Ochs Sulzberger, President and Publisher of the *New York Times* and recipient of the official letter of warning from Attorney General John N. Mitchell, would, even if convicted, have been sentenced to time in a federal penitentiary for his role in publishing the *Pentagon Papers*.

But compare this with the actual or possible fate of some number of others whose Vietnam protests produced legal difficulties for them. David Paul O'Brien, whose conviction for burning his draft card on the steps of the South Boston Courthouse was upheld by the Supreme Court in 1968, served actual time in prison for his act.[35] Similar fates were suffered by Philip and Daniel Berrigan and others whose forms of protest involved physical destruction of government property.[36] Julian Bond was excluded from the Georgia House of Representatives because he had criticized the draft and Vietnam policy, but his exclusion was reversed by the Supreme Court.[37] Now-forgotten protestors named Spence and Goguen were criminally prosecuted for altering a flag and wearing a flag on the seat of his pants, respectively, but their convictions were overturned in the Supreme Court.[38] So too with Schacht, who became a defendant in a criminal case for wearing a military uniform as part of a protest. His conviction was overturned,[39] as was the thirty day jail sentence of Paul Cohen for objecting to the policies of the Selective Service System with a jacket bearing the words, "Fuck the Draft."[40] Numerous teachers were fired for Vietnam protest activities, although many succeeded in gaining judicial reversals of their dismissals.[41]

The point of this litany, of course, is to illustrate that a presumed legal immunity from prior restraint provided little assistance for O'Brien, and would have provided little comfort for Paul Cohen had he been required to serve his sentence, or Julian Bond had he been excluded from elective office, or Goguen or Schacht or Spence had they spent their lives with criminal records. For people falling within this category, and almost universally lying well outside of mainstream political debate, criminal prosecution is a real worry so long as it is constitutionally available, and for them the likelihood of such prosecution, conviction, and sentencing, even as they are essentially immune from prior restraints, will likely be a substantial determinant of their actions.

The lesson of this, it appears, is that treating prior restraints as especially pernicious is a view that has a particular incidence on a certain subset of the total set of speakers or publishers. Those who are both highly visible and at the same time socially or politically or culturally unlikely to serve time in prison will have special reason to fear the prior restraint, for disobedience to such a restraint may create a possibility of punishment where for all practical purposes none existed before. Thus, the immunity provided by the *Pentagon Papers* case is genuine for the mainstream press, and providing immunity from prior restraint while saying nothing about subsequent punishment has a real effect on those whose activities are likely to be influenced by prior restraints but who, because of a variety of social and political and economic

reasons, are unlikely to worry much in practice about subsequent punishments that remain available in theory. Conversely, those who are less visible and less socially or politically powerful, however, have different interests and are differently at risk, and for them it is quite possible that the *Pentagon Papers* case, taken alone, is less to be celebrated for what it did say than feared for what it did not. From this perspective, therefore, the translation of the comparatively small doctrinal holding of the case into a very large political victory as commonly understood must be evaluated in light of the particular interests of those for whom the limited holding was a great victory, and who are consequently at the center of the celebration.

II

Not only did the *Pentagon Papers* case say nothing about subsequent punishment as opposed to prior restraint, it also said nothing about the relevance of the First Amendment to protecting the process by which the *New York Times* and others get the information the publication of which is then protected by the Constitution. The case did hold, importantly, that an otherwise applicable bar on prior restraint would not be removed simply because the information to be published had originally been obtained unlawfully. And seven years later, in *Landmark Communications, Inc. v. Virginia*,[42] the Court reached essentially the same conclusion with respect to subsequent punishment. Thus in *Landmark* the Court refused to relax the otherwise applicable "clear and present danger" standard because of any proprietary or other interest the government might originally have had in the information about improprieties in the judicial system. More recently, this principle was implicitly embodied in *United States v. Morison*,[43] for the government's very decision to prosecute only Samuel Loring Morison for providing the information to *Jane's Fighting Ships*, and not Jane's for publishing it, embodies the view that the First Amendment prohibits (except under otherwise applicable standards) prosecuting the receiver/publisher of information that has been obtained unlawfully.[44]

The corollary of all of this, however, is that the Fourth Circuit rejected Samuel Morison's First Amendment defense because nothing in any of the earlier cases, including the *Pentagon Papers* case, indicates that the First Amendment serves to protect otherwise unlawful acts that are preliminary to or associated with a constitutionally protected act of publication.[45] Just as the presence of a camera or a notebook will not immunize from prosecution illegal acts that are being photographed or described, and just as news organizations are as subject to traffic and labor and antitrust and occupational safety and tax laws as any other organization,[46] so too does the protection of the publisher not extend to protecting those unlawful acts designed to produce the information that is eventually published.

This, however, is but the more extreme manifestation of the position that nothing in the *Pentagon Papers* case indicates in any way that obtaining information, as opposed to publishing it, is guaranteed by the First Amendment. Going back to *Branzburg v. Hayes*[47] and *Zurcher v. Stanford Daily*,[48] the Supreme Court has been highly skeptical, to say the least, of press claims for exemptions from otherwise generally applicable governmental requirements. And although both *Branzburg* and *Zurcher* involved government action against members of the press by way of subpoena or search warrant, the same principle has supported the Court's reluctance to recognize a First Amendment right of access to newsworthy governmental information. In *Pell v. Procunier*,[49] *Saxbe v. Washington Post Co.*,[50] and *Houchins v. KQED*[51] the Court refused to recognize a First Amendment-grounded right for either the press or the public to have access to information the government does not want it to have, or to places the government does not want it to go, thus lending support for the more recent statement of Justice Stevens that "[It] has always been apparent that the freedom to obtain information that the Government has a legitimate interest in not disclosing [is] far narrower than the freedom to disseminate that information."[52] With the exception of the historically-based right of access to trials and associated proceedings,[53] as to which the right attaches to the public (including the press) but not to the press *qua* press, little in First Amendment doctrine as it now exists and nothing in the *Pentagon Papers* case lends support for the view that the First Amendment acts as a sword rather than as a shield.

From this perspective, the lesson of the *Pentagon Papers* for the government is partly that it should simply get better locks.[54] This of course has enormous relevance in the context of recent events in the Persian Gulf, for it is clear that as a matter of existing First Amendment caselaw nothing prevents the government from saying "I won't answer that," "I can't get into

that," or "You can't come in here." In terms of restricting information at the source as opposed to controlling its dissemination, the First Amendment as currently interpreted offers hardly any assistance. In this regard once again the *Pentagon Papers*, although broadly about the availability of information during time of war, turns out, by having said nothing at all about obtaining that information, to be of rather limited significance for an arguably more pervasive issue. If the First Amendment as interpreted is about using the information one gets and not about getting it, then much about the idea of public information about government in general and government in time of war in particular will be discussed and debated and decided in legislatures, in administrative proceedings, and in public debate itself rather than in the courts.[55]

Intriguingly, however, the very issue of access not even touched upon by the *Pentagon Papers* case creates concerns not unlike the concerns relating to the disproportionate incidence of worries about prior restraint and subsequent punishment. Consider in this regard the recent statements by Walter Cronkite, when, testifying on February 20, 1991 before the Governmental Affairs Committee of the United States Senate, he urged greater access for journalists to the theatres of war, and at the same time endorsed the greater censorship, both by prior restraint and by subsequent punishment (withdrawal of credentials), by the military of the press that he recognized was a concomitant of greater access during times of war.[56]

Against the background of Cronkite's statements, however, consider the array of journalists likely to be granted the increased access that Cronkite urged. Here some recent information is again relevant. Of the approximately 650 journalists registered with the Riyadh Joint Information Bureau on February 26, 1991,[57] the only ones that appear from a list of affiliations to be at all out of the mainstream are the two from *Soldier of Fortune*. All the rest are from major American newspapers, magazines, networks, and wire services, or from the equivalent national (or state-controlled) media of the other members of the coalition. Moreover, the list of the members of the media pool indicates 21 representatives of major wire services (AP, UPI, and Reuters, with one from Knight-Ridder), 43 from major daily newspapers like the *New York Times* and the *Los Angeles Times*, 63 from television, almost all of whom were from ABC, CBS, NBC, CNN (or their affiliates), 35 photographers from the foregoing wire services and newspapers as well as *Newsweek*, *Time*, and *US News and World Report*, 11 from magazines (*Newsweek*, *Time*, *Esquire*, *US News and World Report*), and 13 from radio, primarily ABC, CBS, NBC, and NPR, as well as Voice of America. Of the entire list of 186, the only one arguably out of the central mainstream of American politics and American political journalism is the representative from the *Washington Times*.

The recent litigation by the *Nation* and others makes clear the nature of the issue. Nowhere on these lists, or at presidential press conferences for that matter, do we find *Muhammad Speaks*, *Off Our Backs*, *The Daily Worker*, *The Watchtower*, *Mad*, *Dissent*, *The Harvard Lampoon*, *Screw*, *Spin*, *Hustler*, college newspapers, underground newspapers, or a host of other publications that do not, in the words of Frank Mankiewicz, "play within the forty yard lines."

Although this phenomenon is not politically surprising, it is troubling, for it manifests the dilemma of access. In some circumstances scarce "accessional" resources are not a problem, with freedom of information laws being perhaps the best example. The documents are available to all who want them, the *New York Times* and Noam Chomsky alike. But what happens when physically or logistically unlimited access is impossible, as with places at Presidential press conferences, or locations within twenty yards of a 155mm howitzer, or seats on a military aircraft? One possibility would be a lottery, with all citizens entitled to an equal statistical chance of exercising their unmediated right to know. But few people should start filling out forms or making reservations. It is obvious that some selection process will be used, and it is equally obvious that that selection process is in danger of drawing the very kinds of content or viewpoint distinctions that it is one of the primary purposes of the First Amendment to guard against.[58] Although there is an Arab-American News Bureau, it is unlikely that it would have been given the increased access desired by Walter Cronkite and others, and although it was common in the recent debate to hark back to the days when Ernie Pyle could go anywhere he wanted and talk to whomever he desired, no one ever doubted Pyle's loyalties, and no one ever doubted that Pyle thought the war just and an American victory. In fact, during the Second World War some number of journalists whose reputations or loyalties were questioned by military authorities were specifically precluded from access to the front lines, military locations,

or military aircraft.[59] But not all wars are just, and not all Americans or all American news organizations agree about these issues. As long as access is logistically limited, there remain serious concerns about whether the methods used to allocate these scarce resources will, although providing more information for ABC and the *New York Times* and *Newsweek*, also and at the same time entrench viewpoint differentials between organizations like these, on the one hand, and more marginal ones, on the other, and will employ the government as the vehicle of the content discrimination.

This is not to say that the dilemma of access is easy. There are advantages to providing more information to or through the mainstream press, and there are advantages to refusing to draw distinctions between received views and those more on the periphery. In the broadest sense the First Amendment supports both of these goals, and thus there is no easy First Amendment answer to how the dilemma should be resolved when the goals conflict. But I do not wish here to resolve this tension. Instead, I mention all of this to point out the similarity of this issue to that of the issue about the distinction between prior restraint and subsequent punishment. Just as the degree of concern about prior restraint as opposed to subsequent punishment can be seen to reflect the particular vulnerabilities and social position of various putative communicators, so too does the same disproportionate impact apply to the tension between access and viewpoint equality. Walter Cronkite can trade censorship for access because he recognizes that he and others similarly situated will probably not be censored, and will probably be granted access. But for those more likely to be censored (consider *United States v. Progressive, Inc.*[60]) and less likely to be granted access even if access is increased, the trade that Cronkite is willing to make is likely to seem far less favorable. The easy answer that access is granted to those with the largest circulations (itself empirically open to question) is arguably too easy, for at least one of the goals of the First Amendment is to protect those on the margins more than it entrenches those in the center.[61]

The case of the *Pentagon Papers* thus turns out to be even more intriguing. Although the incidence of its aversion to prior restraint but possibly not to subsequent punishment is such as to benefit the most culturally prominent and politically powerful publications, the incidence of its focus on restriction rather than access may cut in just the opposite direction, helping publications unlike the *New York Times* far more in the long run than those like it. By treating the restrictions on information already possessed, however obtained, as much more of a First Amendment problem than restrictions on obtaining information, the case may over time provide disproportionate help to those outside the center, even as its refusal to deal with the issue of access continues to frustrate those lying much closer to that center.

III

But perhaps all of this is to read the *Pentagon Papers* case too narrowly. Although it is plain that the standard necessary to justify a prior restraint, whatever that standard is,[62] is higher than the standard necessary to justify a subsequent punishment of the same material, both involve a compound question of empirical assessment. First, the government (or someone else initiating the legal process) offers a view about the likelihood that some harm will ensue from some utterance. And second, the court assesses the validity of the government's view about likelihood.

Thus, whether it be the likelihood that the information in the *Pentagon Papers* would help the North Vietnamese, or the likelihood that draft age men would be persuaded to resist conscription because of the importunings of Jacob Schenck or Benjamin Spock, a persistent feature of a wide variety of cases involving putative restrictions is the necessity of evaluating the size of the danger, the probability that the communicative act will increase its likelihood, and the probability that the restriction will lessen it.

It is the accepted wisdom that when these claims are offered by military authorities they are treated with special respect by the courts. Indeed, such a view seems supported by the degree of deference to military judgment found recently in *Goldman v. Weinberger*[63] and less recently in *Greer v. Spock*,[64] and the equivalent degree of deference to military-related congressional judgment in *Rostker v. Goldberg*.[65] More recently, in *Webster v. Doe*,[66] the opinions of Justices O'Connor and Scalia urged similar deference when issues of national security were at issue. Moreover, it is also the accepted wisdom that when claims about national security or military expertise are offered during times of armed conflict, the degree of deference is especially great. If we consider the cases I have just noted through the lens of that great

source of national and judicial shame, *Korematsu v. United States*,[67] it seems hardly far-fetched to suppose that courts inclined to grant greater-than-average deference to military authorities even in the face of individual rights claims will be inclined to increase even that degree of deference when guns are being fired and bombs are being dropped.

From this perspective the *Pentagon Papers* case may stand for a willingness of the courts to look behind claims of national security, or to look at them with at least normal (rather than reduced) scrutiny, even when made by the military, and even when made during time of war. Seen this way, the broader reading of the case, especially when conjoined with *Cohen*, *Schacht*, and those other cases in which claims about national security and national unity and the like were far from controlling, is that the First Amendment has teeth "even when a nation is at war."[68] Whatever the degree of deference to military determinations, whatever the degree of increase in that deference when war is actually being waged, there remains a difference between a system in which civil liberties are explicitly suspended during times of great internal and external conflict, and one in which those liberties remain officially available and subject to enforcement by the courts.

The result of this is that it is clear that the broad reading of the *Pentagon Papers* case, justified but hardly necessitated by the narrower technical reading, has had substantial effect on public perceptions about the relevance both of the First Amendment and of the willingness of courts to intervene during wartime. Even if those perceptions are neither technically nor empirically warranted, they have an import of their own, and plainly influence the practice of policymaking. The lessons of the *Pentagon Papers* case, therefore, are, if taken technically and legally, far narrower than is commonly supposed. But the lessons, if taken socially and politically, may be far greater than the text of the opinions would themselves indicate.

Endnotes

1. The two are not the same. Insofar as the perspective commonly known as Legal Realism is correct, what courts will do in the future is largely independent of the doctrinal propositions that can be inferred from previous decisions. Insofar as we are interested in Supreme Court opinions at all, we either to that extent reject the more extreme teachings of Legal Realism, or we are interested in those opinions only because of what they tell us about the authors. When the authors are retired or dead, this latter use of an opinion is of limited value to lawyers.

2. 304 U.S. 64 (1938).

3. 413 U.S. 15 (1973).

4. 418 U.S. 153 (1974).

5. 431 U.S. 291 (1977).

6. 481 U.S. 497 (1987).

7. 347 U.S. 483 (1954).

8. 410 U.S. 113 (1973).

9. 384 U.S. 436 (1966).

10. 418 U.S. 683 (1974).

11. Cruzan v. Director, Missouri Department of Health, 110 S. Ct. 2841 (1990).

12. Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980); School District of Abington Township v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

13. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); Regents of University of California v. Bakke, 438 U.S. 265 (1978).

14. Collin v. Smith, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953, *cert. denied*, 439 U.S. 916 (1978). As with the *Pentagon Papers* case and *United States v. Nixon*, there is little doubt that public awareness of the issues in Skokie, and consequent public belief about how the decision was to be understood, was substantially fueled by the "real time" nature of the litigation.

15. 403 U.S. 713 (1971).

16. It is of course widely recognized that law has an effect far beyond litigated cases. *See* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979); Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399 (1985). But there has been little attention as yet to the potential divergence between the effect of the law as it "is" and the effect of the law as it is perceived to be by those who are affected.

17. 395 U.S. 444 (1969) (per curiam).

18. 268 U.S. 652 (1925).

19. 274 U.S. 357 (1927).

20. 341 U.S. 494 (1951). Although *Brandenburg* represents a dramatic departure from *Dennis*, *Brandenburg* may be but the final crystallization of doctrinal developments in the intervening years, including cases such as Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957).

21. 376 U.S. 254 (1964).

22. 403 U.S. 15 (1971).

23. As to the last, see Hess v. Indiana, 414 U.S. 105 (1973).

24. In what may be a good example of my major thesis about divergence of understanding, United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), is often understood to be about the secrecy in fact of classified information, such that the ultimate discovery in that case that the material was widely available (albeit with some difficulty) made legal action impermissible. But there is no case granting absolute protection to the dissemination of harmful but non-classified information, and consequently no case holding that someone figuring out solely through his own efforts and experiments how to construct a nuclear weapon would necessarily be constitutionally entitled to publish instructions for the manufacture of such weapons, although it is highly likely that some variant of a "clear and present danger" test would be applied.

25. *See, e.g.*, Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802 (S.D. Tex. 1983), *motion to dismiss denied*, 583 F. Supp. 1566 (S.D. Tex. 1984), *rev'd*, 814 F.2d 1017 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); Olivia N. v. National Broadcasting Sys., 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981), *cert. denied*, 458 U.S. 1108 (1982); Walt Disney Productions, Inc. v. Shannon, 247 Ga. 402, 276 S.E.2d 580 (1981). *See generally* K. Greenawalt, Speech, Crime, and the Uses of Language (1988); Schauer, *Mrs. Palsgraf and the First Amendment*, 47 Wash. & Lee L. Rev. 161 (1990).

26. Consider, for example, the standard to be applied in a prosecution for violating the Intelligence Identities Protection Act of 1982, 50 U.S.C. sec. 421 (1988), which prohibits the disclosure of information (even by non-employees of intelligence agencies) that would be sufficient to identify covert intelligence operatives.

27. "[T]he main purpose of [the] constitutional provisions is 'to prevent all such *previous restraints* upon publication as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." Patterson v. Colorado, 205 U.S. 454 (1907) (Holmes, J.). *See also* L. Levy, Emergence of a Free Press (1985). Compare Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455 (1983).

28. *See* FW/PBS Inc. v. City of Dallas, 110 S. Ct. 596 (1990); Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

29. A. Bickel, The Morality of Consent 61 (1975).

30. *See, e.g.*, O. Fiss & D. Rendelman, Injunctions 239-42 (2d ed. 1984); Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11 (1981); Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 539 (1951); Jeffries, *Rethinking Prior Restraint*, 92 Yale L.J. 409 (1983); 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); Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53 (1984); Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 Boston Univ. L. Rev. 685 (1978).

31. *See* Kalven, *The Supreme Court, 1970 Term—Even When a Nation Is at War*, 85 Harv. L. Rev. 3, 34 n.156 (1971). "The injunction is not a set of handcuffs. In itself it cannot prevent the defendant from doing the criminal act." Wright, *The Law of Remedies as a Social Institution*, 18 U. Det. L.J. 376, 391 n.65 (1955).

32. Note the same reaction to Nebraska Press Association v. Stuart, 427 U.S. 539 (1976), again heralded as a great victory for the press although it said nothing about the extent to which members of the press could be fined or imprisoned for violating statutes prohibiting publication of information relating to a pending or ongoing criminal trial. *See* Barnett, *The Puzzle of Prior Restraint*, 29 Stan. L. Rev. 539 (1977).

33. The indictments were subsequently (May 11, 1973) dismissed by Judge Byrne on the basis of improper government conduct with reference to the circumstances of the prosecution.

34. O. Fiss & D. Rendleman, *supra* note 31, at 241.

35. United States v. O'Brien, 391 U.S. 367 (1968).

36. *See* United States v. Berrigan, 283 F. Supp. 336 (D. Md. 1968), *aff'd sub nom.* United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); United States v. Kroncke, 459 F.2d 697 (1972). *See also* United States v. Malinowski, 472 F.2d 850 (3d Cir. 1973) (refusal to pay taxes).

37. Bond v. Floyd, 385 U.S. 116 (1966).

38. Spence v. Washington, 418 U.S. 405 (1974); Smith v. Goguen, 415 U.S. 566 (1973).

39. Schacht v. United States, 398 U.S. 58 (1970).

40. Cohen v. California, 403 U.S. 15 (1971).

41. *See, e.g.*, James v. Board of Education, 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972).

42. 435 U.S. 829 (1978).

43. 844 F.2d 1057 (4th Cir. 1988).

44. The conclusion in the text is a bit of an overstatement. First, the Court in *Landmark Communications* referred to "third persons who are strangers to the inquiry, including news media." This language is arguably ambiguous about the extent of the protection of a somewhat more involved potential publisher. Suppose, for example, that the *New York Times* had itself stolen the *Pentagon Papers*. Would that have changed the legal result, in the sense of making either an injunction or a subsequent punishment for publication permissible under the First Amendment? There is no question but that the *New York Times* in such circumstances could be prosecuted for the theft, but would the publication itself have been immune? A fair reading of all of the cases, possibly including Butterworth v. Smith, 110 S. Ct. 1376 (1990), would seem to say no, but the issue is far from crystal clear, especially in light of the "third party" language in *Landmark Communications*, and also in light of Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

Second, and a matter of considerable current interest, is whether the statement in the text applies to the publication of information that may endanger other individual rights, most obviously Sixth Amendment rights to counsel and to a fair trial generally. Although Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), seems to support the view that the concerns of the First Amendment will trump those of the Sixth, not until the recent CNN/Noriega imbroglio has there been a conjunction of the First Amendment/Sixth Amendment question with the unlawfully obtained information question.

45. This was made clear in *Landmark Communications*, 435 U.S. at 837, and in Justice Stewart's opinion in the *Pentagon Papers* case, 403 U.S. at 730.

46. Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Associated Press v. United States, 326 U.S. 1 (1971).

47. 408 U.S. 665 (1972).

48. 436 U.S. 547 (1978).

49. 417 U.S. 817 (1974).

50. 417 U.S. 843 (1974).

51. 438 U.S. 1 (1978).

52. Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Stevens, J., dissenting).

53. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).

54. On the proposition that the government may obtain pretty strong locks in the figurative sense, see Snepp v. United States, 444 U.S. 507 (1980).

55. In this connection it is worthwhile noting the desirability of public debate about these very issues. Take as a given that with respect to military matters the press will always want more information than the military wants to give them, and that the military will refuse to give all that the press wants. If we assume that the military is occasionally right (although frequently wrong) in its assessment of what would be hazardous to troops to disclose, then no absolute rule is possible. And given that, then, under existing First Amendment doctrine removing the courts from this issue, it may be important that this tension be played out in public, so that pressing for more information on the part of the press and refusing to provide it on the part of the military is something the public can witness and consequently assess. From this perspective, military briefings that are off the record or closed to television cameras deprive the public of its opportunity to observe and then evaluate the process by which some information is provided and other information withheld. It may be that the off the record briefing can provide in one sense more information, but in another sense it also provides much less, and deprives the public of something the public may very well wish to know and see in order to make the determinations that it necessarily must make. *See generally* Schauer, *The Role of the People in First Amendment Theory*, 74 Calif. L. Rev. 761 (1986).

56. Lest I be accused of exaggeration, the headline in *Electronic Media* on February 25, 1991 was "Cronkite calls for greater access, more censorship."

57. I am grateful to Jacquie Calnan for obtaining this information, and to LtCol Garlinger and SSGT Godbey, both of the Joint Information Bureau, for providing it.

58. The aversion to content distinctions has been a prominent theme of recent First Amendment cases and commentary. *See* Boos v. Barry, 485 U.S. 312 (1988); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); News America Publishing, Inc. v. Federal Communications Commission, 844 F.2d 800 (D.C. Cir. 1988). *See also* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (White, J., concurring); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983). *See generally* Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L.Rev. 189 (1983).

59. I have benefited from reading an unpublished manuscript by Hugh Crumpler, who served as a correspondent for the *New York Herald Tribune* and for United Press in China, India, and Burma from 1943 to 1945.

60. 467 F. Supp. 990 (W.D. Wis. 1979).

61. *See* S. Shiffrin, The First Amendment, Democracy, and Romance (1990).

62. Unlike the *Brandenburg* "test," there remains no canonical formulation of the prior restraint standard. The "heavy presumption" or "heavy burden" language used by the Court remains unclear about just how heavy it is. The standard citation to Near v. Minnesota, 283 U.S. 697 (1931), should not suggest that there is a "*Near* test" as crystallized as the tests in *Brandenburg*, *New York Times v. Sullivan*, or *Miller v. California*.

63. 475 U.S. 503 (1986).

64. 424 U.S. 828 (1976).

65. 453 U.S. 57 (1981).

66. 486 U.S. 592 (1988).

67. 323 U.S. 214 (1944).

68. Kalven, *Foreword: Even When a Nation Is at War*, 85 Harv. L. Rev. 3 (1971).