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Prior Restraint in Wartime

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Instrumental Justifications For The Protection Of Speech Are Especially Compelling In A Time Of War

By Paul E. Salamanca

Numerous justifications are given for the protection of speech. Most depend upon its instrumental value; others depend upon its intrinsic value. For example, many have argued that we protect speech because it facilitates elective democracy.[1] Because the people are the ultimate government in a democracy, they must have free access to ideas and information. Otherwise they will make uninformed choices and be incapable of articulating their concerns to each other and to public officials. Others have argued that we protect speech to ensure an unrestrained "marketplace of ideas" in which good ideas will drive out bad ones, and in which truth will be the residue of a lengthy contest between rival proposals.[2] Finally, mindful of the intrinsic value of speech, some have argued that we protect speech because it promotes individual development – because it serves as a means of "self-actualization."[3]

Instrumental justifications for the protection of speech are especially compelling in a time of war. War is a time of exigency, of felt necessity. It is a relatively poor answer to an asserted governmental need to suppress speech in a time of exigency that the would-be speaker has a personal call to expression, however compelling that call might be in a subjective sense. Far more persuasive is the answer that, as a matter of exigency, a polity needs expression as much in wartime as in a time of peace, if not more.

Expression has profound instrumental value in drawing every sector of a polity into public matters. While our soldiers and sailors are engaging an enemy overseas, we can feel involved – and perhaps *be* involved – by keeping track of what our military is doing, by engaging our friends and colleagues in discussion as to the wisdom of our nation's acts, and by offering our suggestions as to how a war might better be prosecuted – or, for that matter, why a war ought not to be prosecuted. The greatest military strength of a democracy is that, once roused, a high percentage of its population is capable of moving behind a war effort. Similar statements cannot be made about political systems in which the citizenry does not identify with the government or with its objectives.

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In addition, a government that operates in a milieu of free, private expression has an enormous claim to credibility that is not available to a repressive state. When the citizenry of a country believes that the media is sufficiently intrusive and powerful to expose official deception, a concomitant belief arises that the government will be deterred from engaging in such deception. Of course, this argument must not be taken too far. Public officials have infamously misjudged their ability to prevent the media from exposing their failings and deceptions. But the lesson to such officials must be clear in the aggregate: a large fraction of deception relating to highly important matters will eventually be discovered by a free media, with a high cost to pay if the deception hurts the nation in a material way. Given the general appreciation of this fact, the public will have reason to trust the pronouncements of the government in a milieu of open discussion of ideas and dissemination of information.

In light of these considerations, a wartime government checked by a powerful, free media is able to speak to the electorate with a high degree of credibility. Requests for patience, calm, and sacrifice are more likely to be acceded to.[4] This is not to say that the government is incapable of abusing or simply mishandling its ability to inform and engage the electorate, but the excesses of the government are more likely to arise from poor judgment than from outright attempts to deceive.

Despite the foregoing justifications for a free media in a time of war, we must remember that such a media is not self-actuating. The bar and the bench play important roles in promot-

ing and protecting a free media. In fact, it is imperative that the bar stand up to vindicate the rights of free expression in times of national emergency, and that the bench uphold the constitutional rights of the media against unjustifiable regulation. This is not simply a matter of protecting the media for its own sake. Although expression has intrinsic value, it also has instrumental value. As I have argued, the courts do no one a favor – including public officials – by permitting arbitrary restraints on free expression.

Although the focus of this essay is on prior restraint– governmental orders that prevent speech from occurring on an *ex ante* basis – regulation of the media can also take the form of punishment after the fact. Indeed, one could plausibly argue that these two forms of regulation present comparable threats to the free exchange of information. After all, threats of punishment after the fact can deter the media from disseminating information just as surely as a prior restraint prevents such dissemination in the first place.[5] But prior restraints present at least two dangers that are not readily presented by after-the-fact punishment.

First, prior restraints often consist of judicial orders, which cannot ordinarily be tested on constitutional grounds because of the collateral bar rule. Under this rule, a person who violates a judicial order is generally not permitted to argue as a defense to a citation for contempt that the order abridged a constitutional right. As the U.S. Supreme Court explained in Walker v . City of Birmingham,[6] a case from the civil rights movement that reiterated the collateral bar rule, "respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."[7] Because of this rule, a judicially imposed prior restraint that appears to violate the Constitution may not be ignored and later tested in the same way as similarly defective legislation.

Second, prior restraints – unless they are flouted – deprive the media of the option of disseminating information notwithstanding the threat of sanction.[8] Although the media may choose to squelch a story to avoid exposure to liability, even in the absence of a prior restraint, such a decision would lie outside the government's hands. Leaving the decision with the media is generally preferable. Because the media has an economic and professional incentive to disseminate information, as well as a counteracting incentive to avoid punishment, it can be counted on to give proper weight to all considerations. The government, by contrast, may lose sight of the long-term value of sharing information with the public. If so, it cannot generally be relied upon to strike the proper balance between allowing expression and imposing restraint.[9]

This is not to say that the government should never be able to restrain the dissemination of information. As Professor Chemerinsky has argued, even free-speech absolutists surely would have permitted the government to enjoin disclosure of the fact that the Allies had broken the Nazi code.[10] But the government's burden in justifying such measures must be exceedingly heavy.

And in fact it is. As a matter of settled constitutional law, it is very difficult for the government to restrain the media, even in a time of war. The seminal case in the area is New York Times Co. v. United States.[11] At issue in that case was an attempt by the Nixon Administration to suppress the "Pentagon Papers," a classified history of the Vietnam War that had been compiled by the Department of Defense and leaked to the press. In a short per curiam opinion, the Supreme Court held that the Papers could not be suppressed.[12] There were six concurring and three dissenting opinions.

For the most part, the concurring justices came out strongly in favor of protecting the press. In fact, Justices Black and Douglas seemed to reject out of hand the very idea of a prior restraint.[13] Similarly, although the other concurring justices indicated a willingness to uphold a prior restraint in dire circumstances, none found such circumstances to exist in the case at bar. Justice Brennan, for example, set forth the exacting standard that "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."[14] Likewise, although Justice Stewart was "convinced" that publication of certain of the Papers would harm the national

interest, he nevertheless concurred in the per curiam opinion, reasoning that such publication would not "surely result in direct, immediate, and irreparable damage to our Nation or its people."[15] Justice White also acknowledged that a prior restraint could constitutionally issue in the appropriate circumstances, but concluded that the government had failed to discharge the "very heavy burden" against such a restraint in the case before the Court.[16]

A theme that ran just below the surface in four of the first five concurring opinions, and that dominated Justice Marshall's concurrence, was the absence of specific congressional authority for the injunction that the Nixon Administration sought.[17] Given this theme, the *Pentagon Papers Case* gave rise to a separation of powers spin to the prior restraint debate, at least in situations implicating national security. This spin later played out in United States v. The Progressive, Inc.[18]

The issue in *Progressive* was whether a periodical could publish an article entitled "The H-Bomb Secret: How We Got It, Why We're Telling It," which purported to describe in detail how a hydrogen-bomb works. Indeed, in the opinion of government, the article contained a significant amount of restricted data, notwithstanding the fact that its author lacked security clearance.[19] Distinguishing the *Pentagon Papers Case*, the U.S. District Court for the Western District of Wisconsin acceded to the government's request for interim injunctive relief.[20] In granting this request, the district court laid great stress on the fact that two specific provisions of the Atomic Energy Act of 1954 appeared to authorize the government to seek equitable relief in a case like the one at bar.[21] The court also held that the government had met the precise constitutional standard for justifying a prior restraint set by Justices Brennan and Stewart in the *Pentagon Papers Case*, by demonstrating "grave, direct, immediate and irreparable harm to the United States" in the event of publication.[22] Scholars have supposed, however, that the *Progressive* judge was using the word "immediate" loosely, for there was little reason to believe that publication of the article would cause immediate nuclear proliferation. The judge seems to have compensated for this deficiency by stressing the enormity of the consequences were an unfriendly power eventually to develop a thermonuclear device, noting that:

> *A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.*[23]

Ironically, the case was dismissed as moot on appeal because another periodical published a lengthy letter that was substantively similar to the enjoined article.[24]

In light of the high bar for prior restraints set by the *Pentagon Papers Case*, as well as the government's inability to suppress the article at issue in *The Progressive* – even with an injunction in hand – it is hard to imagine how the government could effectively control the media through the courts. Indeed, the reality of the situation often leads to negotiation rather than a standoff in court.[25] In the vast majority of cases, this is clearly a desirable outcome. After all, the media is part of the polity, and there is no clear reason to assume that the media will be insensitive to an urgent need for secrecy set forth by the government.[26]

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ENDNOTES

1. See, e.g., ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948) (arguing that free speech is a "deduction from the basic American agreement that public issues shall be decided by universal suffrage").
2. See, e.g., Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").
3. See Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) ("The First Amendment serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression."). See also C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 994 (1978).
4. Cf. New York Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J., concurring) ("[S]ecrecy can best be preserved only when credibility is truly maintained.").
5. See John Calvin Jeffries, Jr.,

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Rethinking Prior Restraint, 92 YALE L.J. 409, 427-30 (1983).

6. 388 U.S. 307 (1967).
7. Id. at 321.
8. See ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 61 (1975) (published posthumously) ("A criminal statute chills, prior restraint freezes.").
9. Another important distinction between a prior restraint and after-the-fact punishment, at least in the criminal context, is that criminal prosecutions are hard to bring, and are subject to the protections of the criminal process. See THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 506 (1970).
10. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 778 (1997).
11. 403 U.S. 713 (1971) (per curiam).
12. See id. at 714.
13. See id. at 715 (concurring opinion of Black, J., joined by Douglas, J.) ("In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined.").
14. Id. at 726-27 (Brennan, J., concurring).
15. Id. at 730 (Stewart, J., concurring).
16. Id. at 731 (White, J., concurring).
17. See id. at 718 (Black, J., concurring) ("The Government does not even attempt to rely on any act of Congress."); id. at 720 (Douglas, J., concurring) ("There is, moreover, no statute barring the publication by the press of the material which the Times and the Post seek to use."); id. at 730 (Stewart, J., concurring) ("[I]f Congress should pass a specific law authorizing civil proceedings in this field, the courts would . . . have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved."); id. at 731 (White, J., concurring) (noting "the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these"); id. at 742 (Marshall, J., concurring) ("It would . . . be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit."). Another theme that ran through the concurring opinions was the extent to which publication of the Papers might subject the newspapers to criminal indictments. Because the case arose from a request for equitable relief, the Court did not reach such issues, but several of the concurring justices nevertheless discussed potentially applicable criminal statutes. See id. at 720-22 (Douglas, J., concurring); id. at 733-40 (White, J., concurring); id. at 743-44, 745 (Marshall, J., concurring).
18. 467 F.Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).
19. See L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55, 56 (1990).
20. See 467 F.Supp. at 996.
21. See 467 F.Supp. at 994 (discussing 42 U.S.C. § 2274(b), which prohibited the disclosure of restricted data by any person who has "reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation"); id. at 1000 (discussing 42 U.S.C. § 2280, which authorized injunctive relief to enforce the provisions of the Atomic Energy Act).
22. Id. at 996.
23. Id. at 996.
24. See United States v. Progressive, Inc., 610 F.2d 819 (7th Cir. 1979). See also Powe, supra note 19, at 70.
25. For example, in October 2001 the major networks agreed to edit videotapes prepared by Osama bin Laden or his followers after a conference call with National Security Advisor Condoleeza Rice. See Bill Carter and Felicity Barringer, *Networks Agree to U.S. Request To Edit Future bin Laden Tapes*, NEW YORK TIMES, Oct. 11, 2001, at A1.
26. As a practical matter, the media has less cause for concern about prior restraints in wartime than about obtaining access to information. Because the government often exercises heavy, if not exclusive, control over the sources of information regarding the progress of a war, the media is made unusually dependent upon the government's willingness to share information. See Michael R. Gordon, *Pentagon Corners Output of Satellite Images of Afghanistan*, NEW YORK TIMES, Oct. 19, 2001, at B2; Steven Livingston, *Media are too dependent on Pentagon for war coverage*, LEXINGTON HERALD-LEADER, Oct. 23, 2001, at A7. The pressure on the media to probe inconsistencies in official statements and to exploit leaks is therefore enhanced. All of this adds to the sense in which the media can be seen to negotiate with the government.

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was simply not created for atheists or agnostics, and we certainly do not have to cater to them in our law and government. That would be turning America on its head.

Finally, I believe that Lemon and Stone are both bad law, and should be reversed. Lemon has fallen into disuse and has been criticized greatly over the years. Stone was not even argued or briefed before the Court. It is now time for the Supreme Court to clarify this area of the law with a new and wise decision, based on the principles that made America great. There is no concrete "wall of separation between church and state" and government must not be hostile to religion. Rather, there should be a partnership between church and state, where the state honors the church and all it has done and all it can do for our country.

Sincerely,
Judge John Marshall Meisburg, Jr.