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NOTE

*United States v. Progressive, Inc.: The Faustian Bargain and the First Amendment**

From the earliest days of the republic, any system of prior restraint on expression has been viewed with the utmost skepticism.¹ Characterizing such restrictions as "the most serious and least tolerable" limitations on first amendment freedoms,² the Supreme Court has held that

* A former director of the Oak Ridge National Laboratory has described the dilemma of the atomic age as follows:

We nuclear people have made a Faustian bargain with society. On the one hand, we offer . . . an inexhaustible source of energy. . . .

But the price that we demand of society for this magical energy source is both a vigilance and a longevity of our social institutions that we are quite unaccustomed to. In a way, all of this was anticipated during the old debates over nuclear weapons. As matters have turned out, nuclear weapons have stabilized at least the relations between the superpowers. The prospects of an all-out third world war seem to recede. In exchange for this atomic peace we have had to manage and control nuclear weapons. In a sense, we have established a military priesthood which guards against inadvertent use of nuclear weapons [T]his is not something that will go away, at least not soon. The discovery of the bomb has imposed an additional demand on our social institutions. It has called forth this military priesthood upon which in a way we all depend for our survival.

Weinberg, *Social Institutions and Nuclear Energy*, 177 SCI. 27, 33-34 (1972).

¹ See, e.g., *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 325 (Pa. 1788); *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 313-14 (1825). Justice Holmes cited these cases for the proposition that the prevention of prior restraints was the principal purpose of the first amendment. *Patterson v. Colorado ex rel. Att'y Gen.*, 205 U.S. 454, 462 (1907). But see *Schenck v. United States*, 249 U.S. 47, 51-52 (1919); Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 9-30 (1941); 2 T. COOLEY, *TREATISE ON CONSTITUTIONAL LIMITATIONS* 885-86 (8th ed. 1927); Litwack, *The Doctrine of Prior Restraint*, 12 HARV. C.R.-C.L. L. REV. 519, 520-22 (1977); Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 NOTRE DAME LAW. 898, 916-17 (1976). Historical research suggests that the framers had a rather limited conception of freedom of speech and of the press. See generally L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960).

Whatever the intended scope of the first amendment, it has been suggested that no one has ever challenged the presumptive invalidity of prior restraints on publication. See *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting); Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROB. 648, 652 (1955). But see *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957) (per Frankfurter, J.) ("[T]he phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test."); Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539 (1951) ("[I]t will hardly do to put 'prior restraint' in a special category for condemnation. What is needed is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.").

² *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

prior restraints must overcome a heavy presumption of invalidity.³ Yet as Chief Justice Hughes observed in *Near v. Minnesota*,⁴ when the nation is at war, "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of its troops."⁵

The tools of war have changed radically in the half-century since the suggestion of this national security exception to the prior restraint doctrine. The development of atomic weapons has raised the specter of the sudden annihilation of civilization, which in turn has led the United States to promote international efforts to halt if not reverse the spread of these armaments.⁶ One of the many variables affecting the

³ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The Court has contrasted the presumptive unconstitutionality of prior restraints with the lesser inhibitory effects of subsequent punishment. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (prior restraint "freezes" speech, subsequent punishment merely "chills" it); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) ("[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.") (emphasis in original); *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., joined by White, J., concurring); *id.* at 734-37 (White, J., joined by Stewart, J., concurring); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 715 (1931). This view follows Blackstone:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.

4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *151 (emphasis in original).

This distinction may well rest upon a rational basis: prior restraints, in contrast to subsequent punishment, bring governmental scrutiny to bear on a broader range of expression, before that expression occurs, and with fewer procedural safeguards. See T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 506 (1970). In addition, a prior restraint subjects a defendant to double liability for his conduct: subsequent punishment for his substantive act and contempt for defiance of the restraint. Compare *Walker v. City of Birmingham*, 388 U.S. 307 (1967) with *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). The distinction breaks down, however, to the extent that courts permit parties to attack prior restraints in collateral proceedings. See Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 551-59 (1977). See also Freund, *supra* note 1, at 537-39; cf. Murphy, note 1 *supra* (arguing that courts should examine the effect rather than the form of limitations on expression). Even a criminal penalty "requires the highest form of state interest to sustain its validity." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979).

The Court has never held prior restraints unconstitutional *per se*. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at 558; *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 47 (1961). Chief Justice Hughes suggested three exceptions to the rule against prior restraints in a famous dictum. In addition to national security, see text accompanying note 5 *infra*, these were obscenity and incitement to violent overthrow of the government. *Near v. Minnesota ex rel. Olson*, 283 U.S. at 716. Indeed, the Court has upheld such restraints on movies, commercial advertising, and demonstrations. See, e.g., *Times Film Corp. v. City of Chicago*, 365 U.S. at 49-50 (movies); *Donaldson v. Read Magazine*, 333 U.S. 178, 189-91 (1948) (advertising); *Cox v. New Hampshire*, 312 U.S. 569, 571 (1941) (demonstrations).

⁴ 283 U.S. 697 (1931).

⁵ *Id.* at 716.

⁶ See, e.g., Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (codified

success of this country's nonproliferation policies is the government's ability to restrict the dissemination of sensitive scientific and technical information. Many of the basic ideas necessary to design and build a nuclear bomb are already available in the open literature—although in unsynthesized form—and any attempt to limit their distribution would raise serious first amendment questions. But in *United States v. Progressive, Inc.*,⁷ the United States District Court for the Western District of Wisconsin overrode constitutional objections and enjoined *The Progressive*, a monthly political magazine,⁸ its editors,⁹ and Howard Morland, a free-lance writer working on assignment for them, from publishing, communicating, or otherwise disclosing certain information contained in a manuscript entitled "The H-Bomb Secret: How We Got It, Why We're Telling It."¹⁰ The court issued its preliminary injunction despite the author's unchallenged assertion that he had relied exclusively upon unclassified materials in the public domain.¹¹

The *Progressive* case raised the most fundamental questions about

in scattered sections of 22, 42 U.S.C. (Supp. II 1978)); Treaty on the Non-Proliferation of Nuclear Weapons, done July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161; Inaugural Address of President Jimmy Carter, I PUB. PAPERS 1, 3 (1977).

⁷ 467 F. Supp. 990 (W.D. Wis.), *motion to reconsider and to vacate preliminary injunction denied*, 486 F. Supp. 5 (W.D. Wis.), *writ of mandamus for expedited appeal denied sub nom.* Morland v. Sprecher, 443 U.S. 709, *dismissed as moot*, 610 F.2d 819 (7th Cir. 1979).

⁸ 467 F. Supp. at 997. *The Progressive* was founded in 1909 by Sen. Robert M. LaFollette, Sr. During 1978 it had a paid circulation of 33,375. Statement of Ownership, Management and Circulation, *reprinted in* PROGRESSIVE, Dec. 1978, at 60.

⁹ The named editorial defendants were editor Erwin Knoll and managing editor Samuel Day. 467 F. Supp. at 998.

¹⁰ The article actually appeared under the title *The H-Bomb Secret: To Know How is to Ask Why*, PROGRESSIVE, Nov. 1979, at 14.

At least two other periodicals have published detailed articles with diagrams on how to build an atomic bomb without encountering any governmental effort to suppress publication or even to punish them after the fact. The articles appeared in a feminist journal and in an underground newspaper in Madison, Wisconsin that has no connection with *The Progressive*. See N.Y. Times, Mar. 11, 1979, § 1 at 21, col. 1 (city ed.). In addition, students at Princeton and M.I.T. have been widely reported to have designed workable atomic bombs based upon unclassified materials. See Bernstein, *Profiles (Hans Bethe—Part II)*, NEW YORKER, Dec. 10, 1979, at 52, 79.

The episode most similar to this case occurred in 1950, when the editors of *Scientific American* reluctantly complied with a demand by the Atomic Energy Commission that certain portions of an article on the hydrogen bomb written by Prof. Bethe be deleted and that the 3,000 copies of the original article be destroyed. See Green, *Information Control and Atomic Power Development*, 21 LAW & CONTEMP. PROB. 91, 94 n.17 (1956); N.Y. Times, Apr. 1, 1950, at 1, col. 6. For the revised version of that article, see Bethe, *The Hydrogen Bomb: II*, SCIENTIFIC AM., Apr. 1950, at 18. The publisher of *Scientific American* described the published version as "mutilated" and strongly criticized the government position in *Progressive*. See Piel, *Giving Amin an H-Bomb*, N.Y. Times, Mar. 26, 1979, § A at 19, col. 1. Prof. Bethe, on the other hand, submitted an affidavit supporting the injunction against the Morland manuscript.

¹¹ The preliminary injunction remained in effect for six months because the Supreme Court found that the defendants had waived their right to an expedited review. 443 U.S. at 710-11. While counsel for Morland and the editors of *The Progressive* sought an early hearing on appeal,

the validity of expansive conceptions of freedom of the press.¹² This Note will argue that despite the enormity of the potential consequences of publication, neutral principles of first amendment adjudication should apply to the most hazardous as well as to the most mundane speech. After reviewing the known facts of the case,¹³ this Note will demonstrate that the district court placed a less stringent burden of justification upon the government than recent decisions of the Supreme Court require.¹⁴ Next, the complex relationship between the dissemination of information and the process of proliferation will be analyzed to underscore the causal weaknesses of the government's case. These weaknesses indicate that the government probably could not carry the burden of justification required to restrain publication of the article.¹⁵ This conclusion is tentative, however, because the failure of the district court to hold an evidentiary hearing precluded the development of an adequate factual record.¹⁶ Finally, this Note will focus upon the source and nature of the material contained in the article. First, it will conclude that the district court improperly discounted the author's reliance upon sources in the public domain, a fact which has been dispositive in

they learned for the first time from the Court that the attorneys for the magazine had acquiesced in a more leisurely schedule.

The government moved to dismiss the case as moot after the *Madison (Wis.) Press Connection* published an article containing the same basic information by Charles Hansen, a California computer programmer, on September 16, 1979. Hansen had made copies of his manuscript available to several newspapers. The United States sought to prevent them from publishing it, obtaining a temporary restraining order against the *Daily Californian*, the student newspaper at the University of California at Berkeley, and threatening similar action against other publications to which Hansen had sent the article. N.Y. Times, Sept. 17, 1979, § A at 1, col. 3 (city ed.); *id.*, Sept. 18, 1979, § A at 1, col. 8 (city ed.); Chi. Tribune, Sept. 18, 1979, § 1 at 1, col. 3. The *Chicago Tribune* reprinted the Hansen piece following the government decision to drop its efforts at suppression of both the Hansen and Morland manuscripts. *Id.*, § 1 at 12, col. 1.

¹² Both scientists and journalists expressed regret that the judiciary had been asked to settle this controversy. The Federation of American Scientists, which numbers half the nation's Nobel laureates in its membership, submitted an amicus curiae brief proposing a nonlegal resolution of the case. 467 F. Supp. at 992, 996-97. See also Feld, *The Progressive Secret*, BULL. ATOM. SCIENTISTS May 1979, at 5. Even the newspapers which had prevailed in the Pentagon Papers case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), were ambivalent, at least at first. See N.Y. Times, Mar. 11, 1979, § 4 at 20, col. 1; Wash. Post, Mar. 11, 1979, § C at 6, col. 1; Lewin, *How a Legal Bomb Works*, NEW REPUBLIC, Mar. 24, 1979, at 10, 11. The *Post* described the suit as "John Mitchell's Dream Case." Wash. Post, *supra*. But see N.Y. Times, Sept. 19, 1979, § A at 24, col. 1; Wash. Post, Sept. 19, 1979, § A at 20, col. 1.

¹³ See notes 19-42 and accompanying text *infra*. Substantial portions of the record were classified. As this Note went to press, the parties agreed to a revised protective order whereby the district court released most of the in camera record and provided for continuing review of the remainder. Under this arrangement, the government may declassify other material and the defendants retain any rights they may have under the Freedom of Information Act, 5 U.S.C. § 552 (1976 & Supp. III 1979), or other legal theories. No.79-C-98 (W.D. Wis. Sept. 4, 1980).

¹⁴ See notes 43-87 and accompanying text *infra*.

¹⁵ See notes 88-109 and accompanying text *infra*.

¹⁶ See notes 110-124 and accompanying text *infra*.

previous prior restraint cases.¹⁷ Second, it will show that the court interpreted the information control sections of the Atomic Energy Act in a restrictive fashion that can only have deleterious effects on both scientific research and political debate.¹⁸

THE FACTUAL BACKGROUND

The editors of *The Progressive* commissioned Howard Morland, a free-lance writer with a long-standing interest in nuclear issues,¹⁹ to prepare an article on the American nuclear weapons program.²⁰ With the knowledge and consent of the Department of Energy (DOE), Morland visited several nuclear weapons facilities and interviewed government employees. In most cases,²¹ he identified himself and explained his purpose.²² He never had access to classified documents.²³ By piecing together what he read, saw, and was told, Morland apparently managed to deduce the basic design of the American hydrogen bomb.²⁴

The editors of the magazine submitted the final draft of Morland's manuscript, along with accompanying illustrations, to the Energy Department for verification of certain technical information.²⁵ DOE officials responded that whatever Morland's sources, his piece contained Restricted Data as defined in the Atomic Energy Act of 1954.²⁶ Explicitly disavowing any desire to bar publication of the entire article, the DOE demanded the deletion of those portions containing sensitive

¹⁷ See notes 125-141 and accompanying text *infra*.

¹⁸ See notes 142-69 and accompanying text *infra*.

¹⁹ 467 F. Supp. at 997. Morland holds an A.B. degree in economics from Emory University. As an undergraduate, he took two courses in physics, two courses in chemistry, and one course in quantum mechanics. Affidavit I of Howard Morland in Opposition to Motion for Preliminary Injunction at 1, ¶ 2.

²⁰ Joint Brief of Appellants Knoll, Day and Morland on Consolidated Appeal from Preliminary Injunction and from Order Denying Motion to Vacate Preliminary Injunction (public filing) at 8, 610 F.2d 819 [hereinafter cited as Joint Brief]. Morland devoted six months to the project, which culminated in the publication of a piece on tritium, a substance used in thermonuclear bombs. See Morland, *Tritium: The New Genie*, PROGRESSIVE, Feb. 1979, at 20. The government raised no objection to the publication of this article. Simultaneously, he prepared the manuscript on the H-bomb secret which gave rise to the controversy under discussion. Joint Brief at 8-9.

²¹ See Morland, *The H-Bomb Secret: Learning it is Easy, Once You Know the Handshake*, PROGRESSIVE, May 1979, at 24, 26.

²² *Id.*

²³ Joint Brief at 9. This assertion, however, does not preclude the possibility that Morland had access to classified information or ideas. The government made no such claim but has announced that it will investigate whether anyone with access to Restricted Data may improperly have made such information available to him. Chi. Tribune, Sept. 20, 1979, § 1 at .10, col. 3.

²⁴ 467 F. Supp. at 999.

²⁵ *Id.* at 998. Morland initially circulated his draft manuscript among several acquaintances, one of whom made a copy available to Prof. George W. Rathjens of M.I.T. Rathjens in turn forwarded his copy to the Department of Energy. Rathjens notified the editors of *The Progressive* of his action. The editors then sent the final version to Washington. See Joint Brief at 9-10.

²⁶ 42 U.S.C. § 2014(y) (1976). For the statutory language, see note 143 *infra*.

materials.²⁷ When the magazine refused to comply, the government filed a complaint in the United States District Court for the Western District of Wisconsin, seeking to enjoin publication of the manuscript in its original form.²⁸ Upon the disqualification of the district judge, the case was transferred to the Eastern District of Wisconsin.²⁹

The District Court Decision

The district court issued a temporary restraining order on March 9, 1979, after holding a hearing at which counsel for both sides appeared.³⁰ On March 26, it conducted another hearing, this time on the government's request for a preliminary injunction.³¹ The court declined to hold an evidentiary hearing at which the parties might have confronted and cross-examined each other's experts. Also rejected were suggestions by amici curiae³² that a panel of experts be appointed to assist in evaluating the "numerous and complex" affidavits that had been submitted, because such a procedure "would merely proliferate the opinions of experts arrayed on both sides of the issue."³³ Thus, the case was decided solely on the basis of the affidavits and the briefs and oral arguments of counsel.

Recognizing the strong constitutional presumption against prior restraints, and noting that few things other than grave national security concerns would suffice to override the protections of the first amendment,³⁴ the court nevertheless held that the United States had met the heavy burden of justification for enjoining publication of the article.³⁵

²⁷ 467 F. Supp. at 998. DOE officials offered to rewrite the objectionable portions of the manuscript.

²⁸ *Id.*

²⁹ Judge James E. Doyle disqualified himself under 28 U.S.C. § 455(a) (1976), which provides: "Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 467 F. Supp. at 998-99. Although he offered no explanation, Judge Doyle's association with *The Progressive* dates to his earliest years in politics. He coordinated the unsuccessful effort to defeat Sen. Joseph McCarthy in 1952. McCarthy had defeated Sen. Robert M. LaFollette, Jr., son of the founder of *The Progressive*, in the 1946 Republican primary. See Frank, *The Team Against McCarthy*, NEW REPUBLIC, Mar. 10, 1952, at 16. In addition, before his appointment Judge Doyle was a partner in the law firm which represented *The Progressive*. See 3 MARTINDALE-HUBBELL LAW DIRECTORY, 1965, at 7494-95 (1965). The case had to be transferred since Judge Doyle was the only judge sitting in the Western District of Wisconsin at the time. 467 F. Supp. xvii. After the transfer to the Eastern District of Wisconsin, the suit was assigned to Judge Robert W. Warren.

³⁰ 467 F. Supp. at 991, 999.

³¹ *Id.* at 999.

³² Briefs amicus curiae were submitted by the Wisconsin Civil Liberties Union, the American Civil Liberties Union, and the Federation of American Scientists. The Federation made this suggestion. *Id.* at 992.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 996.

The Pentagon Papers decision, *New York Times Co. v. United States*,³⁶ was distinguished on the grounds that in that case the documents were essentially historical and neither cogent reasons nor statutory basis justified restraints on publication; in *Progressive*, however, Morland's article contained information of current value, substantial harm might ensue from its publication,³⁷ and the Atomic Energy Act specifically provided for the suppression of certain sensitive data and authorized the government to seek injunctive relief to prevent their disclosure.³⁸

The court also balanced the public's "need to know" technical details about the workings of the hydrogen bomb against the government's claim that publication of the article intact would endanger national security. It could discern no plausible reason why such information was necessary to stimulate debate on alternative means of preventing nuclear proliferation, the very reason which *The Progressive* had advanced for printing the story in the first instance. Indeed, publication of the contested information would tend to accelerate the dispersion of thermonuclear weapons.³⁹ In short, the court found that dissemination of technical data about the hydrogen bomb would result in "grave, direct, immediate and irreparable harm"⁴⁰ to the national interest. Consequently, the Morland article fell within the national security exception to the rule against prior restraints,⁴¹ and the preliminary injunction was granted.⁴²

THE STANDARD OF JUSTIFICATION IN PRIOR RESTRAINT CASES

In enjoining publication of the Morland article, the court empha-

³⁶ 403 U.S. 713 (1971).

³⁷ 467 F. Supp. at 994. In fact, in the Pentagon Papers case the government claimed that publication of the documents in question would have specific and serious present consequences. See Joint Brief at 27 & n.11.

³⁸ The court stated that it would have issued the injunction even in the absence of the statute. 467 F. Supp. at 1000.

³⁹ *Id.* at 994.

⁴⁰ *Id.* at 996-97. The court offered the parties a final opportunity to negotiate a resolution of the dispute. When they proved unable to do so, the injunction was granted.

⁴¹ *Id.* at 996. In *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931), Chief Justice Hughes suggested that a government could prohibit the publication of troop movements during wartime. In *Progressive*, Judge Warren observed, "Times have changed significantly since 1931. . . . Now war by foot soldiers has been replaced in large part by machines and bombs." 467 F. Supp. at 996.

⁴² 467 F. Supp. at 997, 1000. Several events that transpired after the granting of the preliminary injunction on March 26 led the defendants to request that the court reconsider and vacate that order. They based their arguments on two revelations: first, that the government itself had declassified several documents which revealed the same information that was at the center of the litigation; and second, that these documents had been readily available to the general public on the open shelves of federal research libraries. The district court held an in camera hearing and denied the motion in an opinion that remained under seal for more than six months. 486 F. Supp. at 7, 9.

sized the "disparity of risk"⁴³ should its decision be incorrect. To rule mistakenly against the magazine would seriously infringe freedom of the press "in a drastic and substantial fashion," whereas to rule mistakenly against the government could lead to a thermonuclear holocaust that would destroy civilization and render the right to publish moot.⁴⁴ The case reduced itself, then, to a stark confrontation between the requirements of the first amendment and those of national survival. Faced with that choice, Judge Warren had no difficulty in opting for the latter.⁴⁵

Turning specifically to the nature of the danger, the court concluded that the article would not provide a "do-it-yourself" guide for the construction of a nuclear device. Simply put, "[o]ne does not build a hydrogen bomb in the basement."⁴⁶ On the other hand, publication "could accelerate" the acquisition of thermonuclear weapons by other countries⁴⁷ because it "could possibly provide sufficient information to allow a medium size nation to move faster" in developing such weapons.⁴⁸ The danger arises in that "once the basic concepts are learned, the remainder of the process may easily follow."⁴⁹ Despite the allegedly ready accessibility of the information at issue, only five nations have succeeded in producing such a weapon.⁵⁰ Finally, while it might be just a matter of time before other countries develop the hydrogen bomb, time itself can be critical.⁵¹ On the basis of these considerations, the court issued the preliminary injunction.⁵²

Although the court's conclusion is superficially compelling in light of the alternatives which it constructed for itself, the analytical framework within which those alternatives were generated was grossly deficient. Purporting to base his decision on the rule of the Pentagon

⁴³ 467 F. Supp. at 996.

⁴⁴ *Id.* at 995. The court recognized the dilemma it faced in the following passage:

The destruction of various human rights can come about in differing ways and at varying speeds. Freedom of the press can be obliterated overnight by some dictator's imposition of censorship or by the slow nibbling away at a free press through successive bits of repressive legislation enacted by a nation's lawmakers. Yet, even in the most drastic of such situations, it is always possible for a dictator to be overthrown, for a bad law to be repealed or for a judge's error to be subsequently rectified. Only when human life is at stake are such corrections impossible.

The case at bar is so difficult precisely because the consequences of error involve human life itself and on such an awesome scale.

Id.

⁴⁵ *Id.*

⁴⁶ *Id.* at 993. In fact, production of a hydrogen bomb requires "a large, sophisticated industrial capability coupled with a coterie of imaginative, resourceful scientists and technicians." *Id.*

⁴⁷ *Id.* at 994.

⁴⁸ *Id.* at 993.

⁴⁹ *Id.* at 994.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 1000.

Papers case,⁵³ Judge Warren misapplied that standard, failed to consider the more complete discussion of prior restraints contained in *Nebraska Press Association v. Stuart*,⁵⁴ and ignored several important recent developments in first amendment jurisprudence.⁵⁵

Distilling the Standard

The Pentagon Papers Case.—*New York Times Co. v. United States*⁵⁶ represents the only instance in which the Supreme Court has attempted to interpret the national security exception. The three-paragraph per curiam opinion is singularly opaque, holding only that the government failed to overcome the heavy presumption of unconstitutionality that inheres in any system of prior restraint, without indicating how it might have done so. Both the Court and commentators have come to view the standard of justification for such restraints as substantial certainty of serious harm to public interests of the highest order.⁵⁷ They derive this rule from two of the six concurring opinions in the case, those of Justices Stewart and Brennan.⁵⁸ Justice Stewart, while conceding that publication of some of the documents at issue probably would harm the national interest, could not conclude "that disclosure of any of them will surely result in direct, immediate, and irreparable harm to our Nation or its people."⁵⁹ Similarly, Justice Brennan argued that even if the situation were tantamount to wartime,⁶⁰ or the government had the inherent power in peacetime to suppress "information that would set in motion a nuclear holocaust," it could restrain the press, even on an interim basis, only if the executive branch alleged and proved that "publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea"⁶¹

⁵³ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

⁵⁴ 427 U.S. 539 (1976).

⁵⁵ Aside from the Pentagon Papers case, the court cited only three cases: *Schenck v. United States*, 249 U.S. 47 (1919); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); and Justice Frankfurter's dissent in *Bridges v. California*, 314 U.S. 252, 282 (1941). See 467 F. Supp. at 992. Both *Schenck* and *Bridges* dealt with subsequent punishment.

⁵⁶ 403 U.S. 713 (1971).

⁵⁷ See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 833 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 545 (1976); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 728-31 (1978); Litwack, *supra* note 1, at 544-45; *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 38, 199, 206 (1971).

⁵⁸ The concurrences were by Justices Black, Douglas, Brennan, Stewart, White, and Marshall. Justices Black and Douglas joined in each other's opinion, as did Justices Stewart and White. Chief Justice Burger and Justices Harlan and Blackmun dissented separately, the Chief Justice and Justice Blackmun also joining Justice Harlan's opinion.

⁵⁹ 403 U.S. at 730 (Stewart, J., joined by White, J., concurring).

⁶⁰ There had not, of course, been a declaration of war.

⁶¹ 403 U.S. at 726-27 (Brennan, J., concurring).

The Nebraska Press Decision.—The Court has avoided several opportunities to clarify its ambiguous holding in *New York Times* and to define the contours of the national security exception more precisely.⁶² At the same time, proposed limitations upon news reports in the interest of protecting the sixth amendment right of criminal defendants to receive a fair, public, and speedy trial have generated an enormous volume of literature.⁶³ The Court addressed these issues most comprehensively in *Nebraska Press Association v. Stuart*,⁶⁴ where it unanimously struck down as an unconstitutional prior restraint a sweeping injunction limiting pretrial publication of details of a sensational murder case.⁶⁵ Although the decision involved a conflict between specific provisions of the Bill of Rights rather than between the first amendment and a statute or an inherent governmental power, it does contain the Court's most complete recent discussion of the general problem of prior restraints. While the net effect of the case was to make it extremely difficult for the judiciary ever to enjoin the press in such a situation, once again the Justices differed over the rationale.

Chief Justice Burger, writing for five members of the Court,⁶⁶ suggested an ad hoc approach focusing upon the particular facts of the case. Reviewing earlier prior restraint decisions and reiterating the traditional judicial hostility to such restraints,⁶⁷ the Chief Justice invoked the clear and present danger test as formulated by Learned Hand in *Dennis v. United States*:⁶⁸ whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as

⁶² See, e.g., *United States v. Marchetti*, 466 F.2d 1309, 1311 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1365 (4th Cir.), cert. denied, 421 U.S. 992, rehearing denied, 422 U.S. 1049 (1975). For discussion of these cases, see notes 130-33 and accompanying text *infra*.

⁶³ For a discussion of the case law and nonjudicial research and recommendations, see Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 432-55 (1977).

⁶⁴ 427 U.S. 539 (1976).

⁶⁵ The case arose following the arrest of a suspect for the murder of six members of a family in a small Nebraska town. There was evidence that the killings had occurred in the course of a sexual assault. The prosecutor and defense jointly sought a restrictive order on press coverage in order to prevent prejudicial publicity which might preclude the selection of an impartial jury. As modified by the state supreme court, the order prohibited reports concerning the existence and nature of any admissions or confessions made by the defendant to law enforcement officers or to third parties, except members of the press, or other facts "strongly implicative" of the accused. It expired by its own terms when the jury was impaneled. *Id.* at 542-46.

⁶⁶ Justices White, Blackmun, Powell, and Rehnquist joined in the opinion, although White and Powell also wrote brief concurrences. See note 72 *infra*.

⁶⁷ 427 U.S. at 556-59. Discussing the Pentagon Papers case, the Chief Justice observed that "every member of the Court, tacitly or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraints as presumptively unconstitutional." *Id.* at 558 (quoting *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting)). But see note 1 *supra*.

⁶⁸ 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

is necessary to avoid the danger."⁶⁹ He determined that although the trial judge justifiably had concluded that the case would generate "intense and pervasive pretrial publicity . . . [h]is conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with matters unknown and unknowable."⁷⁰ The courts below had not demonstrated the likelihood that the evils attendant upon prejudicial pretrial publicity would occur "with the degree of certainty that our cases on prior restraint require."⁷¹ But the potential deleterious effect of pretrial publicity was precisely the inquiry which only six pages earlier had been found "speculative, . . . unknown and unknowable." In other words, while purporting to base his holding on the narrow facts of the case, the Chief Justice intimated that the government never could demonstrate with sufficient certainty that any potential harm would result from publication.⁷²

Justice Brennan, joined in the principal concurrence by Justices Stewart and Marshall, absolutely rejected the use of prior restraints against press reports concerning pending judicial proceedings.⁷³ He viewed the exceptions to the doctrine suggested by Chief Justice Hughes in *Near v. Minnesota*⁷⁴ as the only ones permitted under the first amendment.⁷⁵ Justice Brennan could find no justification in the record for carving out a new exception for three reasons. First, much of the information at issue was already public knowledge, so an injunction could not be effective.⁷⁶ Second, the purported harm was only

⁶⁹ For a detailed critique of this version of the clear and present danger test and of its application to this case, see Schmidt, *supra* note 63, at 458-66.

⁷⁰ 427 U.S. at 563. The Chief Justice made no reference to any of the empirical studies which had been conducted on this problem. See Schmidt, *supra* note 63, at 464. Examining the other factors, he found the restrictive order unjustifiable on the record of the case because the trial court had not explicitly considered the availability of less drastic alternatives or the likely effectiveness of its restraint. 427 U.S. at 563-69.

⁷¹ *Id.* at 569.

⁷² See generally Schmidt, *supra* note 63, at 465-66. Nevertheless, the Chief Justice refused to hold that prior restraints can never be justified. 427 U.S. at 569-70. Justice White expressed grave doubt that the requisite showing ever could be made but declined to propose such a rule in the first case which squarely presented the question. *Id.* at 570-71 (concurring opinion). Justice Stevens also inclined toward a categorical rejection of prior restraints in such cases but indicated that he too preferred to await fuller arguments involving other fact situations. *Id.* at 617 (concurring opinion). Justice Powell would have permitted a prior restraint only upon a showing that the actual publicity sought to be restrained posed a clear threat to the fairness of a trial and that there were no less restrictive alternatives. Even then, he would have disapproved the particular restraint since it would not have been effective. *Id.* at 571-72 (concurring opinion).

⁷³ 427 U.S. at 588.

⁷⁴ 283 U.S. 697, 716 (1931). These exceptions are discussed at note 3 *supra*.

⁷⁵ Two of these exceptions involved unprotected expression not relevant to the case, while the third, national security, had never formed the basis for upholding a prior restraint. 427 U.S. at 590-94.

⁷⁶ *Id.* at 595-98. Chief Justice Burger, writing for the majority, agreed: "To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly

speculative, not certain, direct, or immediate; trial courts have less drastic means to deal with any problems which might arise.⁷⁷ Third, imposition of prior restraints generally involves unacceptable and unprincipled judicial balancing of the public need to receive information against the harm which would accrue from publication, a balancing which could only promote arbitrary and excessive limitations upon the press.⁷⁸

Although the Burger and Brennan approaches to the fair trial-free press problem may differ more in form than in substance, the case-by-case review favored by the Chief Justice at least leaves open the possibility of using prior restraints for limited periods in exceptional circumstances.⁷⁹ This possibility rests in part upon a notion that the press has something akin to a fiduciary duty to exercise its extraordinary protected rights responsibly and in the public interest.⁸⁰ As recent cases make clear, however, aggrieved parties may find this duty extremely difficult to enforce.

Related First Amendment Developments.—In a series of decisions following *Nebraska Press*, the Court strongly suggested that government may not constitutionally punish the press for publishing truthful, lawfully obtained information about matters of public significance unless interests of the highest order are at stake.⁸¹ These cases are partic-

violated settled principles" *Id.* at 568. See also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 493-95 (1975); *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *Estes v. Texas*, 381 U.S. 532, 541-42 (1965); *Stroble v. California*, 343 U.S. 181, 193 (1952); *Craig v. Harney*, 331 U.S. 367, 374 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941).

⁷⁷ 427 U.S. at 599-604. Justice Brennan also failed to advert to the empirical studies on this question. See Schmidt, *supra* note 63, at 468-69. See also notes 70-72 and accompanying text *supra*.

⁷⁸ 427 U.S. at 604-11. Justice Brennan reasoned that the national security exception involves no such balancing of the countervailing public interest in receiving information since "the direct, immediate, and irreparable harm that would result from disclosure is simply *deemed to outweigh* the public's interest in knowing, for example, the specific details of troop movements during war-time." *Id.* at 605 (emphasis added). The very formulation of the national security exception, however, calls into question Justice Brennan's assertion. Clearly a balancing or weighing takes place; the result merely amounts to a conclusive presumption in favor of national security.

⁷⁹ In *Progressive*, however, there was no indication that the injunction would be in effect for a limited period. The government argued that the information at issue would be of continuing use to other nations. See notes 37 & 38 and accompanying text *supra*.

⁸⁰ See 427 U.S. at 560.

⁸¹ The per curiam opinion in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), invalidated a state court injunction that prohibited the news media from publishing the name and photograph of a minor who was the subject of a juvenile court action. The state failed to show that the press had obtained the information unlawfully; the judge and counsel knew of the presence of journalists in open court yet did nothing to have them removed despite the statutory provision for such a procedure. The court held that the purported state interest in protecting the anonymity of the juvenile did not justify an injunction against publication of material obtained in open court. *Id.* at 311-12.

Subsequently the Court has relied upon *Oklahoma Publishing Co.* to hold unconstitutional a

ularly important in view of the Court's repeated statements that sanctions imposed following publication raise fewer first amendment questions than do prior restraints.⁸²

The Court has also limited common law tort actions against the press. For example, where a newspaper obtains the information legally in open court, a rape victim may not recover damages because of the publication of her name in violation of state law.⁸³ A public figure may not recover for libel unless the press acts with reckless disregard for the truth.⁸⁴ Moreover, several recent cases have accorded at least qualified constitutional protection to commercial speech,⁸⁵ overturning the traditional view that such expression was wholly outside the scope of the first amendment.⁸⁶

In short, these cases indicate a strong trend toward a more expansive view of the first amendment and reinforce the conclusion that the district court in *Progressive* should have undertaken a more exacting examination of the government's request for injunctive relief. The de-

West Virginia law that imposed criminal sanctions upon newspapers that printed the name of any child involved in a juvenile court proceeding without a written order from the judge. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). The defendant newspapers had utilized standard journalistic techniques and violated no law in obtaining the name of the juvenile suspect. *Id.* at 99. The Court found that the state interest asserted—the protection of the anonymity of juvenile offenders—did not justify the use of criminal sanctions against the press. *Id.* at 104. The Court added that even if this state interest were of sufficient magnitude to warrant the imposition of such sanctions, the statute in question did not achieve its purposes since it applied only to newspapers, not to broadcast reports. *Id.* at 104-05. At least three radio stations had disseminated the same information. *Id.* at 99. Justice Rehnquist, citing a psychological report of the deleterious consequences of publicity for the youth involved in *Oklahoma Publishing Co.*, concurred on this latter ground only. *Id.* at 107-08 & n.1 (citing Howard, Grisso & Neems, *Publicity and Juvenile Court Proceedings*, 11 CLEARINGHOUSE REV. 203, 210 (1977)).

Similarly, in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), the Court held that states could not inflict criminal punishment upon a newspaper for accurately reporting information about proceedings before a judicial review commission. The case did not raise any issue as to the right of the state to close such proceedings or to punish participants for breaching that confidentiality, nor was there a question as to the applicability of the statute to persons who obtained information illegally and thereafter divulged it. *Id.* at 837. While confidentiality of such proceedings may serve legitimate public interests, the Court found that the state had offered "little more than speculation and conjecture" to justify encroachments on the first amendment. *Id.* at 841.

⁸² See note 3 *supra*.

⁸³ *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

⁸⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁸⁵ See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (advertisement of routine legal services); *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 94-97 (1977) (posting "for sale" signs in racially changing neighborhoods); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976) (dissemination of prices for prescription drugs). For more recent developments in the field of legal solicitation, compare *In re Primus*, 436 U.S. 412 (1978) with *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). For further discussion of these cases, see Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979).

⁸⁶ See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942).

cisions discussed above suggest that to justify even a subsequent punishment of the press, government must show with some certainty that the information at issue damaged a public interest of very high magnitude. To justify a prior restraint, the government must satisfy an even heavier burden. Moreover, the government must demonstrate that no less drastic measures will vindicate the public interest at stake and that the restraint actually will be effective. Even when the Court has applied an ad hoc analysis to the publication of otherwise protected speech, it virtually always has found that the government did not carry its burden.⁸⁷

Applying the Standard in Progressive

Despite ambiguities in the Court's approach to prior restraint in national security cases, it is possible to evaluate the district court's application of the Stewart-Brennan Pentagon Papers standard to the facts of *Progressive*. First, the court found that publication would cause grave and irreparable injury to the national interest. Unfortunately, it never clearly identified the risk about which it was concerned. At one point, the court suggested that certain information contained in the manuscript might facilitate the acquisition of thermonuclear weapons by a nation presently lacking such weapons.⁸⁸ At another, it implied that publication might cause the literal end of the world.⁸⁹ The government stopped considerably short of the latter claim. Instead it argued that publication

would substantially increase the risk that thermonuclear weapons would become available or available at an earlier date to those who do not now have them. If this should occur, it would undermine our nonproliferation policy, irreparably impair the national security of the United States, and pose a threat to the peace and security of the world.⁹⁰

Nevertheless, the court proceeded on the assumption that the article might give Idi Amin the capacity to incinerate the planet.⁹¹ This failure to identify clearly the alleged hazard affected both the outcome of

⁸⁷ Virtually the only instance in which a prior restraint has been approved on national security grounds is the decision of the United States Court of Appeals for the District of Columbia Circuit upholding a ban on demonstrations related to Iran near the White House on the basis that such demonstrations might endanger the safety of the American hostages in that country. Even then, the court noted that other, less potentially provocative sites for demonstrations were available. See N.Y. Times, Nov. 20, 1979, § A at 13, col. 3.

⁸⁸ 467 F. Supp. at 993-94.

⁸⁹ *Id.* at 996.

⁹⁰ Declaration of Cyrus R. Vance [Secretary of State] at 2, ¶ 5. See also Affidavit of Harold Brown [Secretary of Defense] (publication would shorten the development time for another nation's effort to produce a hydrogen bomb). Excerpts from these and other affidavits appear in *United States v. The Progressive: Excerpts from the Affidavits*, PROGRESSIVE May 1979, at 36.

⁹¹ At an early stage of the proceedings, Judge Warren remarked, "I want to think a long, hard time before I'd give a hydrogen bomb to Idi Amin." Knoll, 'Born Secret,' PROGRESSIVE, May 1979, at 12, 18.

the case and the process by which it was decided.⁹²

Second, the court found that the danger was only possible or probable, not sure or inevitable. Publication "could accelerate" the acquisition of thermonuclear weapons by other countries⁹³ because it "could possibly" permit some nation to move more quickly in producing a hydrogen bomb⁹⁴ and "could materially reduce the time required by certain countries to achieve a thermonuclear weapon capability."⁹⁵ Even if this formulation reflects only verbal infelicity, the court did not determine that publication would have the independent effect of enabling any nation to manufacture such weapons. Such equivocal findings do not meet the test of substantial certainty.

Third, the court concluded—without explanation—that publication would pose a direct and immediate danger to the United States.⁹⁶ It is clear, however, that the requirement of directness and immediacy laid down in the Pentagon Papers case was intended to import something similar to the tort notion of proximate cause into the analysis. Under that doctrine, an event that in fact causes some harm will not give rise to liability unless it relates closely enough to the injury to give rise to legal responsibility.⁹⁷ Similarly, the directness and immediacy requirement in prior restraint cases reflects the judgment that as the likelihood of the threatened harm becomes more remote, it is less certain that any harm which actually results should be imputed to the act of publication.⁹⁸

The construction of a hydrogen bomb involves considerable scientific and engineering expertise as well as a fairly sophisticated industrial infrastructure,⁹⁹ not to mention the will to commit substantial resources to a long, difficult, and potentially dangerous enterprise.¹⁰⁰

⁹² See notes 110-24 and accompanying text *infra*.

⁹³ 467 F. Supp. at 994.

⁹⁴ *Id.* at 993.

⁹⁵ *Id.* at 999.

⁹⁶ *Id.* at 996, 999, 1000.

⁹⁷ W. PROSSER, HANDBOOK OF THE LAW OF TORTS 244 (4th ed. 1971).

⁹⁸ At oral argument in the Pentagon Papers case, Justice Stewart posed the following hypothetical, which he characterized as "not immediate," to counsel for the *New York Times*: "Suppose the information was sufficient that judges could be satisfied that the disclosure of the . . . identity of a person engaged in delicate negotiations having to do with the possible release of prisoners of war, that the disclosure of this would delay the release of those prisoners for a substantial period of time." Transcript of oral argument, *New York Times Co. v. United States*, 403 U.S. 713 (1971), *reprinted in* THE PENTAGON PAPERS AS PUBLISHED BY THE NEW YORK TIMES 708 (1971).

⁹⁹ 467 F. Supp. at 993. See also note 46 *supra*.

¹⁰⁰ See CONGRESS OF THE UNITED STATES, OFFICE OF TECHNOLOGY ASSESSMENT, NUCLEAR PROLIFERATION AND SAFEGUARDS 94-111 (1977); E. LEFEVER, NUCLEAR ARMS IN THE THIRD WORLD 12, 19-22 (1979); H. NASH, NUCLEAR WEAPONS AND INTERNATIONAL BEHAVIOR 148-50 (1975); Barnaby, *The Scale of World Military Expenditures*, in DISARMAMENT AND WORLD DEVELOPMENT 7, 22-23 (R. Jolly ed. 1978); Bethe, *The Hydrogen Bomb*, 6 BULL. ATOM. SCIENTISTS

To prove that the Morland article created a direct and immediate danger, the government would have had to establish not only that its publication would set in motion a series of happenings that would enable a nation not previously capable of doing so to manufacture a hydrogen bomb, but also that such manufacture would follow so closely upon publication as to eliminate other possible causes. The court, however, made no such finding.

Moreover, given the risk actually asserted by the government—that publication would substantially increase the likelihood that thermonuclear weapons would become available or available at an earlier date than otherwise to nations not now capable of producing them—it is most unlikely that the court could have made such a finding under the standard that it was required and purported to apply.

A brief review of the variables affecting the successful construction of a hydrogen bomb indicates the nature of the problem. No country can build a bomb on the basis of information alone. It must also be able to afford the necessary ingredients and production facilities and be willing to devote these resources to the effort.¹⁰¹ Moreover, it must be prepared to persevere in the face of concerted opposition by other states and potentially intense domestic criticism.¹⁰² Thus, even if the Morland article offered a detailed blueprint and instructional guide or contained enough information for a group of physicists and engineers to make a bomb without having to consult any other source—and the government conceded on appeal that the manuscript contained at least one important technical error¹⁰³—it does not follow that any particular nation would do so. In other words, predictions as to the effect of publication could not suggest that the danger would result “with the degree of certainty that [the] cases on prior restraint require”;¹⁰⁴ they would be “of necessity speculative, dealing as [they would] with factors unknown

99, 103 (1950), reprinted in *THE ATOMIC AGE: SCIENTISTS IN NATIONAL AND WORLD AFFAIRS* 144, 152 (M. Grodzins & E. Rabinowitch eds. 1963); Rosecrance, *International Stability and Nuclear Diffusion*, in *THE DISPERSION OF NUCLEAR WEAPONS: STRATEGY AND POLITICS* 293 (R. Rosecrance ed. 1964) [hereinafter cited as *NUCLEAR DISPERSION*]. For case studies of the decision to seek or abjure nuclear weapons capability by various nations, see CONGRESS OF THE UNITED STATES, OFFICE OF TECHNOLOGY ASSESSMENT, *supra*, at 98-111; E. LEFEVER, *supra*, at 25-117; STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, *THE NEAR-NUCLEAR COUNTRIES AND THE NPT* 16-72 (1972).

¹⁰¹ Kramish, *The Emergent Genie*, in *NUCLEAR DISPERSION*, *supra* note 100, at 261, 264-65. See also sources cited in note 100 *supra*.

¹⁰² See Rosecrance, *International Stability and Nuclear Diffusion*, in *NUCLEAR DISPERSION*, *supra* note 100, at 305-09.

¹⁰³ See Brief for the Appellee (public filing) at 12, 15, 54 n.53, 610 F.2d 819. See also *Publish and Perish?* CHI. LAW., Dec. 1979, at 6, 8. The *Chicago Lawyer* article is an unofficial edited transcript of the oral argument in the court of appeals. After dismissing the case, the court erased its recording of the argument without transcribing it.

¹⁰⁴ See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 569 (1976).

and unknowable."¹⁰⁵

The same problems arise with respect to a claim that publication could or would permit a nation to construct a hydrogen bomb sooner than it otherwise would have. By definition, such a country had the ability to do so eventually. The government could not realistically argue that the acquisition of thermonuclear capability in this situation flowed directly from publication unless it could show that the article somehow had enabled the candidate nation to make a breakthrough that would have been impossible otherwise. Since five of the six nations which have proven that they have the atomic bomb have also exploded a hydrogen bomb and the former is prerequisite to and part of the latter,¹⁰⁶ such a contention would be untenable. Because the essential information is already accessible in the public domain, although perhaps in different form, an injunction against publication could not be effective. Anyone truly interested in building a hydrogen bomb could and would assemble the same information from other publicly available sources.¹⁰⁷

The foregoing considerations apply with even greater force to the less serious risks that publication might pose.¹⁰⁸ For example, a marginal increase in the probability that a nation or group which presently lacks thermonuclear capability will gain it as a result of publication cannot justify a prior restraint; such a small increment in likelihood

¹⁰⁵ *Id.* at 563. On the other hand, if some country actually did make a bomb, the time required to do so might be so great as to render the consequences of publication sufficiently remote as to fail the test of immediacy.

¹⁰⁶ See Teller, *Hydrogen Bomb*, 14 *ENCYCLOPEDIA AMERICANA* 654, 656 (1978). Charles Hansen, author of the letter whose publication led the government to drop its case against *The Progressive*, contended that the Teller article itself contains Restricted Data and was published in violation of the Atomic Energy Act. See Chi. Tribune, Sept. 18, 1979, § 1 at 12, col. 1. At least one expert made the same point for the defendants in the district court. See Affidavit No. 1 of Theodore A. Postol.

¹⁰⁷ The government removed certain documents from the public shelves of the Los Alamos Scientific Library because it claimed that they had been declassified erroneously. These documents apparently had been available to the general public for some time. 486 F. Supp. at 7-8. It is not clear whether Morland relied upon these documents in writing his article. If he did, and if they were the only public sources of certain information, their reclassification would make the argument for the effectiveness of the injunction stronger. On the other hand, the release of these documents can be seen as a waiver that prevents the government from restricting public access to them. Cf. *Gorin v. United States*, 312 U.S. 19, 28 (1941) (dictum) (suggesting that communication of defense information previously released by the government cannot violate the Espionage Act). If he did not rely upon them, the information must have been available elsewhere and an injunction could not prevent others from gathering the same material. In fact, during the pendency of the injunction, a reporter for the *Milwaukee Sentinel*, whose only scientific background consisted of a college course in botany, wrote two articles describing the operation of the hydrogen bomb based upon materials in public libraries in Milwaukee and Waukegan, Illinois. See *Milwaukee Sentinel*, April 30, 1979, § 1 at 1, col. 1; May 1, 1979, § 1 at 1, col. 1. These articles were included in the sealed portions of the district court record.

¹⁰⁸ See text accompanying note 115 *infra*.

would amount to "little more than speculation and conjecture."¹⁰⁹ Indeed, it might prove difficult to distinguish the effect of publication from that of persistence, serendipity, or other independent factors. Accordingly, the government could not establish the necessary substantial certainty of direct and immediate harm. Finally, a mere threat to build a bomb, without more, cannot create the sort of danger that would permit a prior restraint against the article since the bare threat would not be a sufficiently grave injury to the national interest.

The Fact-Finding Procedure

The dissemination of information which even arguably increases the risk of a thermonuclear holocaust raises questions about which reasonable persons find it difficult to remain logical and dispassionate. Yet the district court failed to take any effective measures to minimize this problem, thereby eroding the potential for a realistic assessment of the likely consequences of publication. The court never conducted an evidentiary hearing at any stage of the proceedings, and instead relied exclusively upon the submitted affidavits and the arguments of counsel. By contrast, in the Pentagon Papers cases the government presented live witnesses at in camera hearings to support its request for temporary restraining orders against the newspapers.¹¹⁰ The failure to provide for confrontation and cross-examination of the experts arrayed on both sides can only have obscured the basic issues at stake and prevented the court from ruling dispassionately on the basis of an adequate record.

The Need for an Evidentiary Hearing.—The nature of the inquiry facing Judge Warren clearly illustrates the need for an evidentiary hearing. In effect, the court wanted to know whether it would be safe to permit publication. Bare affidavits, however, cannot answer this question. Scientists cannot make safety judgments on scientific grounds.¹¹¹ A thing or a course of action is safe if the attendant risks

¹⁰⁹ Landmark Communications v. Virginia, 435 U.S. 829, 841 (1978).

¹¹⁰ See United States v. Washington Post Co., 446 F.2d 1327, 1328 (D.C. Cir.) (per curiam), *aff'd per curiam sub nom.* New York Times Co. v. United States, 403 U.S. 713 (1971); United States v. New York Times Co., 328 F. Supp. 324, 326 (S.D.N.Y.), *aff'd per curiam*, 403 U.S. 713 (1971), *rev'g* 444 F.2d 544 (2d Cir.) (per curiam).

¹¹¹ See W. LOWRANCE, OF ACCEPTABLE RISK: SCIENCE AND THE DETERMINATION OF SAFETY 109-14 (1976); Weinberg, *Science and Trans-Science*, 10 MINERVA 209 (1972); Lederberg, *The Freedoms and the Control of Science: Notes from the Ivory Tower*, 45 S. CAL. L. REV. 596, 609 (1972). See also R. GILPIN, AMERICAN SCIENTISTS AND NUCLEAR WEAPONS POLICY 264-67 (1962). There is also a large social science literature on the relationship between scientific knowledge and public policy. See, e.g., D. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING 167-205 (1968); J. WILSON, THINKING ABOUT CRIME 47-70 (1975); Gouldner, *Anti-Minotaur: The Myth of a Value-Free Sociology*, 9 Soc. Prob. 199 (1962), *reprinted in* SOCIOLOGY ON TRIAL 35 (M. Stein & A. Vidich eds. 1963); Millikan, *Inquiry Into Policy: The Relation of Knowledge to Action*, in THE

are deemed acceptable.¹¹² Hence, the determination of safety involves two very different assessments: measuring risks and judging safety in light of those risks. The former is an empirical calculation of the probability and severity of anticipated harm, the latter a normative decision that certain risks are acceptable while others are not.¹¹³ Because scientists themselves may not appreciate the influence of their underlying moral, philosophical, and political assumptions, they cannot completely identify their possible biases or isolate the components of their recommendations as either matters of scientific fact or prescriptive judgment.¹¹⁴

These problems are especially acute in *Progressive*. The construction of a hydrogen bomb requires substantial technical knowledge, significant economic and material resources, and the willingness to commit them to such an ambitious project.¹¹⁵ Publication of an article on the hydrogen bomb could pose several plausible risks, including:

(1) a nation or group which previously had the inclination and resources to build a bomb would obtain the knowledge required to do so solely as a result of publication;

(2) a nation or group which previously had the knowledge and resources but not the inclination to build a bomb would change its mind out of concern that others will do so solely as a result of publication;

(3) a nation or group that previously had the inclination but was uncertain of its ability to build a bomb would reconsider and proceed to build one exclusively in light of the apparent ease with which Howard Morland acquired the necessary information;

(4) a nation or group in any of the above categories would threaten to build a bomb solely as a result of publication;

(5) publication would significantly increase the probability that any of the above results will occur;

(6) publication would marginally increase the probability that any of the above results will occur.

Scientific experts might come to radically different conclusions about the wisdom of publication even though they agree as to the likelihood of each of these risks. This could happen if such experts characterized the hazard differently; one chance in ten that some event will occur may strike one person as remote, another as uncomfortably likely. Their judgment undoubtedly would be affected by subconscious

HUMAN MEANING OF THE SOCIAL SCIENCES 158 (D. Lerner ed. 1959); M. WEBER, *Science as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 129 (H. Gerth & C. W. Mills trans. & eds. 1946).

¹¹² See W. LOWRANCE, *supra* note 111, at 8.

¹¹³ *Id.* at 75-76.

¹¹⁴ See R. GILPIN, *supra* note 111, at 264-65.

¹¹⁵ See notes 99-102 and accompanying text *supra*.

and unarticulated assumptions which influence their opinions as to the desirability of suppressing certain information in the Morland article.¹¹⁶ Without providing for some form of confrontation, the court could not have known the true basis for the conflicting advice provided by the affidavits.

Judicial Power to Require Evidentiary Hearings.—At best, then, the court exhibited poor judgment in failing to require an evidentiary hearing. Clearly it was not beyond the court's power to have done so. Federal courts have the discretion to hold hearings on requests for preliminary injunctions in two situations, both of which arguably were present in *Progressive*. First, a hearing should normally be held where the parties have submitted affidavits showing disputed issues of fact.¹¹⁷ That was certainly true in *Progressive*; the parties offered affidavits by qualified experts who strongly disagreed about the nature of the information contained in the Morland manuscript.¹¹⁸ Since traditional so-

¹¹⁶ See R. GILPIN, *supra* note 111, at 266, 297-98.

¹¹⁷ See, e.g., *Forts v. Ward*, 566 F.2d 849, 851-52 (2d Cir. 1977) (citing cases).

¹¹⁸ Compare the following assessments of the Morland manuscript by two nuclear physicists.

My appraisal of the article is that it contains a significant amount of information which is properly classified as Secret Restricted Data. It provides a more comprehensive, accurate, and detailed summary of the overall construction and operation of a thermonuclear weapon than any publication to date in the public literature.

There are many feasible and grossly different possible designs for thermonuclear weapons. . . . There are bits and pieces of information in the open literature that apply to one or more of these different types of designs. Nowhere is there a correct description of the type of design used in U.S. weapons. This type is far superior in efficiency and practicality to any other known type of design. . . . The Morland article goes far beyond any other publication in identifying the nature of the particular design used in the thermonuclear weapons in the U.S. stockpile.

The Morland article describes in a relatively detailed manner the basic design concepts and certain specific design features of U.S. thermonuclear weapons. This accomplishment would normally take a substantial investment of time and resources which would be obviated by the publication of the article, and it is therefore an extremely important disclosure to a nation seeking a thermonuclear capability.

Affidavit of Jack Rosengren [senior research physicist, R & D Associates, and consultant, Department of Energy] at 2, ¶¶ 3-5.

It is my opinion that the article by Morland contains no information or ideas that are not already common knowledge among scientists, including those who do not have access to classified information.

It was my judgment at the time of reading the Morland article, and it is my judgment now, that the article contains no ideas or information which could not be readily concluded or obtained by any competent physicist after seeing the diagram prepared by Dr. Edward Teller for his article on the hydrogen bomb in the *Encyclopedia Americana* [Teller, *supra* note 106, at 655]. . . . Furthermore, the ideas and information contained in the Morland article would be arrived at not within years, but within hours.

In my Affidavit No. II filed contemporaneously with this Affidavit, I demonstrate that a careful examination of the Edward Teller article in the *Encyclopedia Americana* would result in a physicist quickly coming to the same conclusion as did Morland. The Morland article reviewed by me appears to contain no information which would not be arrived at from the well-known physical principles stated in my Affidavit No. II. Moreover, the article in no way provides any of the detail necessary for the construction of any element, yet alone, a complete, nuclear weapon.

It is possible, but not obvious to me, that the article gathers together bits and pieces of public information in a manner not previously done; however, the article contains well

licitude for freedom of expression must lead courts to tread with extreme caution before acting so as to limit first amendment rights, a hearing to assess the conflicting evidence was certainly appropriate here.

Second, at least in patent infringement cases, public policy considerations dictate that preliminary injunctions not issue solely on the basis of affidavits except in the event of extreme urgency.¹¹⁹ In a sense, *Progressive* is analogous to a patent infringement suit; the Atomic Energy Act grants the federal government a monopoly on atomic weapons while authorizing the award of patents relating to other aspects of atomic energy.¹²⁰ The district court might have found that the government, in effect, was asserting a claim of attempted infringement of its monopoly or patent on the hydrogen bomb. On the other hand, the danger alleged to be inherent in publication reasonably might be held to constitute the very type of extreme urgency that obviates the need for an evidentiary hearing.

It is not necessary, however, to analogize the *Progressive* case to a patent infringement suit to find justification for an evidentiary hearing in this matter. Important procedural considerations militate against exclusive reliance on affidavits. Federal courts have explicit authority to consolidate a hearing on a request for a preliminary injunction with a trial on the merits.¹²¹ Such action has been held generally proper when there is a need for prompt decision and the parties are not prejudiced by lack of notice.¹²² In prior restraint cases, courts may limit expression before a final judgment on the merits only to preserve the status quo "for the shortest fixed period compatible with sound judicial resolution."¹²³ Consequently, the parties must have known from the outset

known commonly accepted information and is, to a physicist, technically less sound than the *Encyclopedia Americana* article by Dr. Teller. Included in my Affidavit No. II are a list of references from which my arguments follow. The court should note the easy accessibility and elementary technical level of these references. It is my opinion that my Affidavit No. II contains far more scientifically useful information than the Morland article in spite of the fact that it is common knowledge among physicists. . . .

Dr. Teller's *Encyclopedia Americana* article supplies an important insight into how the problems of stacking fusion materials in thermonuclear weapons might be solved. The diagram speaks for itself for any physicist; however, I go through the reasoning process in my Affidavit No. II.

Affidavit No. I in Opposition to Motion for Preliminary Injunction of Theodore A. Postol [staff physicist, Argonne National Laboratory] at 2-3, ¶¶ 6-10. Postol's Affidavit No. II was placed under seal.

¹¹⁹ See, e.g., *Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Corp.*, 443 F.2d 867, 871-72 (2d Cir. 1971) (citing cases).

¹²⁰ See 42 U.S.C. § 2181(a) (1976). The 1946 Act granted the government an absolute monopoly on patents in the field of atomic energy, a feature which generated more opposition than any other aspect of the bill. See 92 CONG. REC. 6076-98, 9483-93 (1946).

¹²¹ See FED. R. CIV. P. 65(a)(2).

¹²² See, e.g., *Drummond v. Fulton County Dep't of Family & Children's Serv.*, 563 F.2d 1200, 1204 (5th Cir. 1977)(en banc); *Cooper v. Wisdom*, 440 F. Supp. 1027, 1029 (S.D. Fla. 1977).

¹²³ *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). This is one of a series of cases involving

of the need for prompt action and could not have been prejudiced by lack of notice. The district court already had frozen the situation by issuing a temporary restraining order; consolidating an evidentiary hearing on the government's motion for a preliminary injunction with the trial on the merits would have had the dual advantage of clarifying the arguments of the parties while simultaneously producing a final determination in the shortest period compatible with sound judicial resolution of the controversy.¹²⁴

Because the district court had the discretion, if not the obligation, to look beyond bare affidavits that could not elucidate the underlying factual issues, it should have conducted an evidentiary hearing before enjoining publication of the Morland article. By doing so, the court would have understood more fully and objectively the risks involved and seen that the government had failed to carry its stringent burden of justification under the Stewart-Brennan standard of the Pentagon Papers case.

The court might have reached the same conclusion by another route. Had the court proceeded properly and applied traditional first amendment principles, it could have resolved the *Progressive* case quickly and simply against the government. In every previous instance where the information at issue was already accessible to the general public, that fact alone was dispositive in favor of the right to publish. Only when the materials had not been revealed previously did other factors, including the existence of express and appropriately limited legislative authorization of prior restraints, become relevant.

allegedly obscene materials, in which the Court has most fully explored the procedural safeguards applicable in prior restraint litigation. The other standards include the placing of the burden of proof upon the government, vesting the final decision in a judicial rather than an administrative officer, and guaranteeing a prompt and final judicial decision so as to minimize the deterrent effect of interim, and possibly erroneous, preliminary restraints. *Id.* The Court did not enunciate an explicit scheme consistent with these criteria. It observed, however, that the New York procedure, which provided that before any imposition of restraint against the sale of allegedly obscene books, a judicial hearing must be held one day after joinder of issue followed by a decision within two days of the hearing, probably would survive a constitutional attack. *Id.* at 60. See also *Heller v. New York*, 413 U.S. 483, 489-93 (1973); *United States v. Thirty-seven Photographs*, 402 U.S. 363, 367 (1971); *Blount v. Rizzi*, 400 U.S. 410, 417-18 (1971); *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141-42 (1968); *A Quantity of Books v. Kansas*, 378 U.S. 205, 210-13 (1964); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-70 (1963); *Marcus v. Search Warrant*, 367 U.S. 717, 734-38 (1961); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Litwack*, *supra* note 1, at 536-40.

¹²⁴ In the future, courts might avoid these difficulties by requiring each affidavit in prior restraint cases to specify all underlying assumptions and to discuss all relevant factors as specifically as possible. However, assuming the feasibility of such requirements, affidavits conforming to these specifications would not assist the court in the trial on the merits should it be consolidated with the motion for a preliminary injunction in the interest of expeditious resolution of the controversy.

THE PUBLIC DOMAIN

The court in *Progressive* never questioned the defense's assertion that Morland relied exclusively upon sources in the public domain. But the court did question the defense's contention that the government cannot suppress information deduced from the synthesis and collation of materials otherwise freely available to the public. Instead, the district court agreed with the government that while the contested portions of the Morland manuscript "contain[ed] some information that ha[d] been previously disclosed in scattered public sources, the article contain[ed] a more comprehensive, accurate, and detailed analysis of the overall construction and operation of a thermonuclear weapon than any publication to date in the public literature."¹²⁵ It was the article's juxtaposition of certain concepts that had never before been disclosed in conjunction with one another, rather than the original materials themselves,¹²⁶ that posed the threat of "immediate, direct and irreparable harm to the interests of the United States."¹²⁷

Although various decisions of the Supreme Court have intimated that availability of information in the public domain "foreclose[s] any serious contention that further disclosure of such information can be suppressed before publication or even punished after publication,"¹²⁸ none of these cases involved the significant deductive reasoning or the overtones of national security raised by *Progressive*. Likewise, *New York Times* provides no assistance on this issue; the Pentagon Papers had been classified and were made available to the newspapers without proper authority.¹²⁹ *Progressive* involves the more vexing problem of

¹²⁵ 467 F. Supp. at 999.

¹²⁶ *Id.* at 993.

¹²⁷ *Id.* at 991. At least two other democratic governments recently have succeeded in obtaining convictions of journalists in national security cases on the basis of similar arguments. Three British journalists who described certain aspects of their country's intelligence operations on the basis of various public documents, including telephone directories, were found to have violated the Official Secrets Act, 1 & 2 Geo. 5, c. 28 (1911), as amended by 10 & 11 Geo. 5, c. 75 (1920) and 2 & 3 Geo. 6, c. 121 (1939). See Nossiter, *The ABC Caper*, PROGRESSIVE, May, 1979, at 41; Manchester Guardian Weekly, Nov. 26, 1978, at 10, col. 1. But cf. Attorney-General v. Leveller Magazine Ltd., [1979] A.C. 440 (in case arising from Official Secrets Act prosecution described *supra*, magazine which inferred identity of government witness from his own testimony could not be held in contempt for publishing his name despite agreement of parties that the name not be revealed in open court). Two Norwegian reporters who compiled a list of intelligence agents operating in their country from various sources available to members of the general public were found to have violated two sections of their nation's criminal code. See Stothard, *The "List Affair,"* INDEX ON CENSORSHIP, Sept./Oct. 1979, at 59.

¹²⁸ Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 596 (1976) (Brennan, J., concurring).

¹²⁹ New York Times Co. v. United States, 403 U.S. 713, 749-50 (1971) (Burger, C.J., dissenting); *id.* at 754 (Harlan, J., joined by Burger, C.J., and Blackmun, J., dissenting); *id.* at 759 (Blackmun, J., dissenting). This fact placed *The Progressive* in a stronger position than the newspapers in the Pentagon Papers case. See Lewin, *supra* note 12, at 11.

the right of the government to suppress the fruits of individual research and speculation based on publicly available sources of data.

Although the Supreme Court has never passed on the significance of this distinction, some lower court decisions offer insight into the question. In *United States v. Marchetti*,¹³⁰ the government obtained a preliminary injunction preventing a former CIA agent from publishing a book describing his experiences in intelligence work until he submitted his manuscript for Agency review. Such review was required by agreements he had signed at the beginning and the end of his term of employment. The government alleged that the book contained classified information that came within the provisions of the secrecy agreements.¹³¹ While the United States Court of Appeals for the Fourth Circuit upheld these agreements as a reasonable means for the CIA to perform its statutory duty of safeguarding intelligence methods and sources,¹³² it also held that the government could not prevent Marchetti from disclosing unclassified information or classified information which had been officially disclosed by others during the course of his employment.¹³³ Thus, Marchetti could discuss any material in the public domain, no matter how sensitive, so long as that material had been released by someone else.¹³⁴

Howard Morland, however, was a private citizen, not a government employee. He did not have access to classified information as a routine part of his job, nor was he under a contractual obligation not to disclose such information. Consequently, *Marchetti* stands factually distinct from *Progressive*. A situation more similar to that in *Progressive* arose in *United States v. Heine*.¹³⁵ Heine, a naturalized citizen who sent reports on the American aircraft industry to his native Ger-

¹³⁰ 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972).

¹³¹ 466 F.2d at 1311-13. See *id.* at 1312 nn.1 & 2 for the text of the secrecy agreements.

¹³² *Id.* at 1316. The court stated: "[T]he risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary" that more than ordinary criminal sanctions were needed to prevent breaches of security. *Id.* at 1317.

¹³³ *Id.* Subsequently, the Fourth Circuit reviewed the district court disposition of the CIA review of the manuscript on remand in *Marchetti* and held that the Agency could not prevent Marchetti from disseminating what any other citizen could obtain from the CIA and then publish. *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1367 (4th Cir.), cert. denied, 421 U.S. 992, rehearing denied, 422 U.S. 1049 (1975).

¹³⁴ Following the appearance of the Morland article in the November 1979 issue of *The Progressive*, the Supreme Court upheld similar CIA secrecy agreements requiring current and former Agency employees to obtain advance clearance before publishing any information about intelligence activities. In *Snepp v. United States*, 444 U.S. 507 (1980), a former CIA agent was ordered to disgorge his profits from a book which he had not submitted for prepublication screening even though the government made no claim that he had divulged classified information. *Id.* at 511. The per curiam decision makes clear, however, that although the CIA has the right of advance review, the Agency cannot suppress material that is unclassified or in the public domain. *Id.* at 513 n.8. Moreover, *Snepp* turned on the author's breach of his contractual obligations, a feature totally absent in *Progressive*. See text accompanying note 135 *infra*.

¹³⁵ 151 F.2d 813 (2d Cir. 1945), cert. denied, 328 U.S. 833 (1946).

many during the year preceding this country's entry into World War II, was prosecuted under the Espionage Act.¹³⁶ He had compiled his reports both from unclassified publications, interviews and correspondence with persons involved in the industry, and from exhibitions at the New York World's Fair.¹³⁷ In an opinion by Judge Learned Hand, the United States Court of Appeals for the Second Circuit reversed Heine's conviction, reasoning that "[a]ll of this information came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it"¹³⁸ It made no difference that he had condensed and arranged the information rather than sending it in its original form since the statute was "aimed at the substance of the proscribed information, not at the act of making it more readily available for use."¹³⁹

Striking factual similarities exist between *Heine* and *Progressive*. Howard Morland compiled his article from unclassified materials, interviews with knowledgeable persons, and legal visits to government facilities. All his information came from sources that were lawfully available to anyone willing to take the trouble to gather it. Once he had obtained this material, he sifted and arranged it to make it more readily available for use.

Moreover, the principal factual differences between the cases do not aid the government's position in *Progressive*. Morland wrote to warn of the danger of excessive secrecy about nuclear weapons. Indeed, the government reaction to his article unwittingly confirmed his point.¹⁴⁰ By contrast, Heine had attempted to collect everything extant about aviation so that a hostile power would be informed about American air defenses in the event of war.¹⁴¹ Further, *Heine* involved no prior restraint; the government acted only after the defendant had transmitted his reports. If the United States could not prosecute an individual for the knowing conveyance of defense-related information

¹³⁶ The section under which Heine was charged provided:

Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years

Act of June 15, 1917, ch. 30, § 2(a), 40 Stat. 218 (current version at 18 U.S.C. § 794(a) (1976)).

¹³⁷ *Id.* at 814-15.

¹³⁸ *Id.* at 815.

¹³⁹ *Id.* at 817.

¹⁴⁰ See DeWitt, *Has U.S. government disclosed the secret of the H-bomb?* BULL. ATOM. SCIENTISTS, June 1979, at 60; Lewin, *supra* note 12, at 11.

¹⁴¹ *United States v. Heine*, 151 F.2d at 816. At the same time, the court upheld Heine's conviction for failure to register as a foreign agent. *Id.* at 817.

to a potential enemy already at war with its neighbors because the sources from which that information was derived were in the public domain, surely the government cannot take the more drastic step of enjoining the publication of an article containing sensitive military data based upon functionally identical sources and written for the avowed purpose of influencing national policy.

Yet the nature of the information involved in *Progressive* does provide some grounds for distinguishing that case from *Heine*. First, the data synthesized in *Heine* dealt with the location and deployment of aircraft and the structure of the industry, while that synthesized in *Progressive* dealt with the workings of military weapons. Second, even had material relating to the construction of military aircraft been involved in *Heine*, the contrast in destructive power between those armaments and the hydrogen bomb is so great as to constitute a difference in kind rather than degree. Nevertheless, *Heine* remains critically relevant because it arose under a statute with wording quite similar to the portions of the Atomic Energy Act sections invoked by the government in support of its action against *The Progressive*.

THE ATOMIC ENERGY ACT

In reaching its decision, the district court relied upon several provisions of the Atomic Energy Act of 1954,¹⁴² including: section 2014(y), which defines Restricted Data as, *inter alia*, any information related to the design, manufacture, or utilization of atomic weapons;¹⁴³ section 2274(b), which imposes criminal penalties upon any person who communicates, transmits, or discloses Restricted Data *with reason to believe* that the United States will be injured or another country will benefit thereby;¹⁴⁴ and section 2280, which authorizes the government to

¹⁴² 42 U.S.C. §§ 2011-2296 (1976).

¹⁴³ Section 2014(y) provides:

The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title.

¹⁴⁴ U.S.C. § 2014(y) (1976).

¹⁴⁴ Section 2274 provides:

Whoever, lawfully or unlawfully, having possession of, access to, control over, or being entrusted with any document, writing, sketch, photograph, plan, model, instrument, appliance, note, or information involving or incorporating Restricted Data—

(a) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with intent to injure the United States or with intent to secure an advantage to any foreign nation, upon conviction thereof, shall be punished by imprisonment for life, or by imprisonment for any term of years or a fine of not more than \$20,000 or both;

(b) communicates, transmits, or discloses the same to any individual or person, or attempts or conspires to do any of the foregoing, with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation, shall, upon conviction, be punished by a fine of not more than \$10,000 or imprisonment for not more than ten years, or both.

seek injunctive relief to prevent such disclosures.¹⁴⁵

The information control portions of the Act¹⁴⁶ vest virtually unlimited discretion in the Department of Energy to control the dissemination of Restricted Data.¹⁴⁷ The term "Restricted Data" is sweepingly defined to include every piece of paper or apparatus, and any idea having anything to do with atomic weapons unless and until declassified by the government.¹⁴⁸ Literally interpreted, these provisions would prevent scientists from speculating, talking, or writing about the principles of physics and chemistry underlying nuclear weapons or from attempting to devise peaceful applications for atomic energy.¹⁴⁹ So construed, the Act arguably could reach even informed public discussion of cer-

42 U.S.C. § 2274 (1976).

¹⁴⁵ Section 2280 provides:

Whenever in the judgment of the [Secretary of Energy] any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this chapter, or any regulation or order issued thereunder, the Attorney General on behalf of the United States may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Commission that such person has engaged in or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted.

42 U.S.C. § 2280 (1976). See also 42 U.S.C. §§ 5814(c), 7151(a) (1976 & Supp. II 1978).

¹⁴⁶ 42 U.S.C. §§ 2273-2277, 2280 (1976).

¹⁴⁷ Green, *supra* note 10, at 95. In the only case in which the Supreme Court has construed these provisions, the government did not assert that the Restricted Data sections standing alone would justify the withholding of particular documents relating to a proposed nuclear test. *EPA v. Mink*, 410 U.S. 73, 77 n.4 (1973). On the other hand, a district court refused to compel the government to prepare an Environmental Impact Statement before making use of a newly constructed munitions storage facility at Pearl Harbor specifically because such a statement would require the disclosure of Restricted Data. *Catholic Action of Hawaii/Peace Educ. Project v. Brown*, 468 F. Supp. 190 (D. Hawaii 1979). The *Progressive* case, however, did not involve any demand that the government release Restricted Data in its exclusive possession.

¹⁴⁸ 42 U.S.C. §§ 2014(y), 2162 (1976).

¹⁴⁹ At one time there was considerable optimism that numerous peaceful applications of nuclear and thermonuclear explosives would be found. Although research in this field continues, expectations have become more modest. Scoville, *Peaceful Nuclear Explosions—An Invitation to Proliferation*, in *NPT: PARADOXES AND PROBLEMS*, 47, 47-51 (A. Marks ed. 1975). These nonmilitary devices are technologically indistinguishable from nuclear weapons. M. WILLRICH, *NON-PROLIFERATION TREATY* 17, 69-70 (1969); Teller, *supra* note 106, at 656. The *Progressive* maintained that the Teller article contained more sensitive information than did the Morland manuscript. See note 118 *supra*.

Moreover, the prior detonation of thermonuclear explosions by five nations suggests that suppression of this article would have been futile since others could and would discover the "secret." At a certain level of cultural development, social conditions are conducive to multiple independent discovery of scientific and technological concepts. A study conducted more than half a century ago listed 148 such independent inventions and discoveries. In almost every instance, the independent breakthrough occurred within less than a decade of the initial success. The list includes calculus, sunspots, oxygen, the airplane, the law of conservation of energy, the steamboat, and the telephone. See Ogburn & Thomas, *Are Inventions Inevitable?* 37 *POL. SCI. Q.* 83, 93-98 (1922). See also R. MERTON, *Singularities and Multiples in Science*, in *THE SOCIOLOGY OF SCIENCE* 343, 352-65 (1973). For an account of the simultaneous and independent technological development that revolutionized composition for and performance on the (French) horn, see Heyde, *On*

tain questions of national defense, foreign policy, environmental protection, and energy conservation and development.¹⁵⁰ On their face, then, these sections would appear to establish a scheme of governmental licensing of all public expression in the field of atomic energy—in short, a classic prior restraint, with all its inherent constitutional problems.¹⁵¹ It is possible, however, that the scienter requirement of section 2274 and those provisions of the statute that encourage the declassification and dissemination of Restricted Data¹⁵² would save the Act from a finding of facial invalidity.

On the other hand, the correctness of the district court's application of the Act to the defendants in *Progressive* is another question. Section 2274 prohibits only the communication, transmission, or disclosure of Restricted Data *with the intent or reason to believe* that such data will be used to injure the United States or to secure an advantage to a foreign nation. The basis for the district court's reliance upon the statute can only have been the "reason to believe" requirement of section 2274 because the government did not claim that the defendants intended to injure the United States. The court offered no explanation for its conclusion that the defendants possessed the requisite "reason to believe."¹⁵³ Perhaps the court reasoned that thermonuclear proliferation poses such grave and obvious risks to civilization that anyone who proposes to publish descriptive information about the hydrogen bomb has reason to believe that publication would jeopardize the security of the United States. In light of the weakness of the causal nexus between the Morland article and the realization of the risks that its publication might pose to the national interest, however,¹⁵⁴ this reasoning must fall of its own weight. Moreover, such an analysis would suggest that a strict liability standard applies to violations of the Act, but the Supreme Court has emphatically rejected such a standard in first amendment cases, even where national security is at issue.¹⁵⁵

the Early History of Valves and Valve Instruments in Germany (1814-1833) Part I, 24 BRASS BULL. 9 (1978).

¹⁵⁰ See Joint Reply Brief of Appellants Knoll, Day and Morland (public filing) at 11-12 & nn.** & ***, 610 F.2d 819.

¹⁵¹ See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-14 (1931); *id.* at 733-36 (Butler, J., dissenting); 4 W. BLACKSTONE, *supra* note 3, at *151.

¹⁵² See 42 U.S.C. § 2013(b) (1976).

¹⁵³ 467 F. Supp. at 994-95, 999.

¹⁵⁴ See notes 96-109 and accompanying text *supra*.

¹⁵⁵ See, e.g., *United States v. Robel*, 389 U.S. 258 (1967); *Scales v. United States*, 367 U.S. 203, 228-30 (1961); *Smith v. California*, 361 U.S. 147, 152-54 (1959); *Yates v. United States*, 354 U.S. 298, 312-27 (1957).

Alternatively, the government might claim that the objections raised by officials of the Department of Energy gave the magazine the requisite reason to believe. See 467 F. Supp. at 998. This argument, however, proves too much. If the government can show reason to believe on this basis, then the statutory scienter requirement becomes a mere cipher. It would create a self-fulfilling prophecy: innocent and otherwise legal conduct becomes unlawful simply because the gov-

Alternatively, the requisite "reason to believe" might be found in the very words of the Morland article itself. The manuscript begins: "What you are about to learn is a secret—a secret that the United States and four other nations, the makers of hydrogen weapons, have gone to extraordinary lengths to protect."¹⁵⁶ Morland then characterizes the coupling mechanism by which a fission bomb triggers a fusion reaction as a concept "that may not have occurred to the weapons makers of a dozen other nations bent on building the hydrogen bomb,"¹⁵⁷ and concedes that "it is conceivable that [this] information will be helpful to them."¹⁵⁸ Although these statements might be dismissed as journalistic hyperbole,¹⁵⁹ it would not be unreasonable to hold the writer to a high standard of verbal precision when discussing such sensitive technical matters.

Yet, deducing a satisfactory basis for inferring that Howard Morland did in fact possess the requisite reason to believe would not remove all the obstacles to the application of section 2274. Indeed, two significant hurdles remain. First, it is not clear that section 2274 reaches persons like Morland, persons who have neither a contractual relationship with the government nor access to classified information in the possession or control of a federal agency. When section 2274 was adopted as part of the original Atomic Energy Act of 1946, the United States had a monopoly on nuclear weapons, and all atomic research was carried out under government auspices. Some of this work later came to be done by approved outside facilities, but then only under stringent conditions imposed by the Atomic Energy Commission. Underlying this section of the Act were the assumptions that Restricted Data can be neatly packaged and dispensed, that no one may possess Restricted Data without government approval, that the government can limit the dissemination of Restricted Data within authorized channels, and that lawful access to Restricted Data may be terminated when authorization for such access expires.¹⁶⁰ In this sense, section 2274 operates simply as an explicit check on those who are entrusted with highly sensitive information, a check analogous to the secrecy agreements for CIA employees that provided the basis for the *Marchetti* result.¹⁶¹ These assumptions do not contemplate that a creative, talented, and persistent person independently can produce or discover concepts that

ernment says that the conduct might have untoward consequences. See Lewin, *supra* note 12, at 12. In that case, only the discretion not to grant an injunction vested in the courts by § 2280 would differentiate the Act from an unconstitutional licensing scheme.

¹⁵⁶ See Morland, *supra* note 10, at 14.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ One of the members of the court of appeals made such a suggestion at oral argument. This remark does not appear in the unofficial *Chicago Lawyer* transcript. See note 103 *supra*.

¹⁶⁰ See Green, *supra* note 10, at 105.

¹⁶¹ See notes 130-33 and accompanying text *supra*.

fall within the statutory definition of Restricted Data.¹⁶² That is precisely what happened in *Progressive*.

Second, even if the Act does cover those not in privity with the government, it cannot limit their rights of expression in contravention of the first amendment. No law may abridge freedom of speech or of the press because of the mere possibility of harmful consequences.¹⁶³ If knowledge of the bare likelihood that certain information will secure an advantage to a foreign nation constitutes the requisite reason to believe, then strict liability and government licensing of certain speech on the basis of its content, with all of their attendant legal infirmities, emerge as the underpinnings of section 2274.¹⁶⁴ Not only must these underpinnings fail under conventional analysis, they also directly contradict the implicit understanding of the sponsors of the original Atomic Energy Act of 1946 and of members of Congress from both parties and of diverse ideological viewpoints who addressed the issue during the debates on that measure and the consideration of the revised Atomic Energy Act of 1954.¹⁶⁵ The Special Senate Committee on Atomic Energy concluded that nuclear secrets are "matters of science and engineering that other nations can and will discover. In large part they are secrets of nature, and the book of nature is open to careful, painstaking readers the world over."¹⁶⁶ Its report accompanying the 1946 bill also explicitly stated that the language of what is now section 2274 was deliberately chosen to balance the demands of national de-

¹⁶² See Green, *supra* note 10, at 105-08.

¹⁶³ See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-44 (1978); *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969).

¹⁶⁴ See notes 153-55 and accompanying text *supra*.

¹⁶⁵ For example, Rep. Clare Boothe Luce, a conservative Republican, observed:

Some Members speak as though there were one, or even a dozen, or 20 bits of paper containing atomic formulas which, if they could be "handed over," or "snitched," would destroy our national supremacy on atomic bombs. Anyone who has studied, even as a layman, this subject knows that there is no such manageable sheaf of formulae to hand over.

92 CONG. REC. 9265 (1946)(remarks of Rep. Luce).

Rep. Jerry Voorhis, a liberal Democrat, spoke in a similar vein:

Indeed, such secrets as do exist today repose in the minds of certain scientists, who, fortunately for us, have chosen to serve America.

The fact there are no secrets that we can expect to keep for any appreciable length of time, it seems to me, means more than ever that we are embarking, in essence, upon an atomic armament race at this minute which will continue and become evermore terrible and evermore an influence causing the people of all nations to live under a feeling of suspicion and distrust as time goes on. I am afraid that is the case today. One reason I am afraid it is the case is because I do not believe it is possible, as I stated, for the mind of man to stop either in this country or in any other nation, nor do I believe over a period of time that secrets can be the exclusive possession of any nation.

Id. at 9270 (remarks of Rep. Voorhis). See also *id.* at 9253 (remarks of Rep. Short); *id.* at 9344 (remarks of Rep. Hinshaw); *id.* at 9347 (remarks of Rep. Johnson); *id.* at 9350 (remarks of Rep. Douglas); *id.* at 9364 (remarks of Rep. Herter); *id.* at 9473 (remarks of Rep. Price); 100 CONG. REC. 10368 (1954) (remarks of Sen. Hickenlooper); *id.* at 11660 (remarks of Rep. Durham).

¹⁶⁶ S. REP. NO. 1211, 79th Cong., 2d Sess. 5 (1946).

fense with the need for freedom of scientific inquiry.¹⁶⁷

Moreover, the Restricted Data provisions limit expression on a particular topic. The peculiar constitutional problems of such subject-matter limitations dictate that they be narrowly interpreted, especially where they could have a viewpoint-differential impact that suggests an underlying intention to suppress disfavored ideas.¹⁶⁸ It has been argued that the government has applied the Restricted Data regulations inconsistently, invoking them against critics of atomic energy and nuclear weapons but not against favored scientists and supporters of such programs.¹⁶⁹ Even if these charges are inaccurate or misleading, the potential for this type of abuse is sufficiently great that the government should be permitted to invoke the Restricted Data rules only in situations where there is more than a hypothetical danger of untoward consequences. The record in *Progressive* does not show the existence of such a plausible danger.

CONCLUSION

In *United States v. Progressive, Inc.*, a free-lance journalist and a general circulation magazine, using materials freely available to anyone with the time and interest to digest them, proposed to publish details of the most destructive military weapon known to humanity. Naturally it is disquieting to think that a responsible government cannot prevent the publication of an article that could lead to a thermonuclear holocaust merely because catastrophe is less than certain to follow. For that very reason, however, this case could have been the occasion for a reconsideration of the special opprobrium which the judiciary has reserved for prior restraints and for a systematic restatement

¹⁶⁷ The committee wrote:

[V]ital objectives in a sense compete with or are in direct conflict with one another. The common defense and security require control over information which might help other nations to build atomic weapons or power plants (until effective international safeguards are established) and, at the same time, sufficient freedom of interchange between scientists to assure the Nation of continued scientific progress.

Id. at 23, reprinted in [1946] U.S. CODE CONG. & AD. NEWS 1327, 1334.

Indeed, a statute that unduly restricts scientific inquiry may contravene the first amendment. See, e.g., *United States v. Doe* (In re Popkin), 460 F.2d 328, 333-34 (1st Cir. 1972); *Richards of Rockford, Inc. v. Pacific Gas & Electric Co.*, 71 F.R.D. 388, 390 (N.D. Cal. 1976); *Henley v. Wise*, 303 F. Supp. 62, 66 (N.D. Ind. 1969). See also Delgado & Millen, *God, Galileo, and Government: Toward Constitutional Protection for Scientific Inquiry*, 53 WASH. L. REV. 349, 362-71, 372-92 (1978); Goldberg, *The Constitutional Status of American Science*, 1979 U. ILL. L.F. 1, 11-16; Robertson, *The Scientist's Right to Research: A Constitutional Analysis*, 51 S. CAL. L. REV. 1203, 1240-46 (1978). The government itself recognized this problem in administering the 1946 Act. See G. DEAN, REPORT ON THE ATOM 229 (1954).

¹⁶⁸ See Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 110-12 (1978).

¹⁶⁹ In his article, Charles Hansen claimed that the government refused to apply the Restricted Data regulations against Edward Teller, Theodore Taylor, and George Rathjens. See Chi. Tribune, Sept. 18, 1979, § 1 at 13, col. 1.

ment of the rationale of freedom of the press. Instead, faced with what once had seemed only a macabre hypothetical contingency, the district court was unwilling or unable to apply the relevant constitutional precedents properly or to offer a principled basis for departing from them.

At the same time, this case concerned the legality, not the wisdom, of publication. Reasonable persons disagree about the propriety of disseminating information that could increase, even infinitesimally, the risk of nuclear proliferation. As a matter of law, *The Progressive* had the right to publish. Now that the article has appeared, however, urgent questions remain. The government might conclude, rightly or wrongly, that only its declassification of information within its exclusive control made this result possible. This could reduce the government's willingness to release voluntarily other materials from which similar inferences might be drawn in the future. Such a result would make the ultimate outcome of this episode truly a Pyrrhic victory for the first amendment. Perhaps more important, to the extent that freedom of the press rests upon an instrumental basis, this case could encourage additional attempts to restrict publication¹⁷⁰ on the grounds that in certain circumstances there may be no other effective means of assuring that the press fulfills its fiduciary duty to the public.

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¹⁷⁰ Indeed, the writings of Philip Agee and other critics of American foreign policy have led to legislative proposals that would impose criminal sanctions upon any person, including a journalist, who discloses the identity of a CIA or FBI agent, informant, or source of operational assistance, even if such information were available in the public domain. See S. 2216, 96th Cong., 2d Sess., 126 CONG. REC. S366 (daily ed. Jan. 24, 1980); H.R. 5615, 96th Cong., 1st Sess., 125 CONG. REC. H9331 (daily ed. Oct. 17, 1979).