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Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard

BY ALBERTO BERNABE-RIEFKOHL*

INTRODUCTION

The series of events leading to the arrest and trial of former football star O.J. Simpson captured the attention of the American public to a degree rarely seen in recent years. The notoriety of the defendant and the disturbing nature of the crime contributed to its appeal. However, it was probably the media coverage, including live coverage by all national network stations of the police car chase which led to Simpson's arrest, that allowed the case to captivate the American public in such a powerful way. On the other hand, with the murder investigation culminating in a trial of Simpson, many became worried that media coverage would make it difficult for him to receive a fair trial.¹ A poll conducted by CBS News concluded that eighty-seven percent of the people polled thought the murder trial was getting too much media coverage.² Similarly, eighty-six percent of those polled by the *American Bar Association Journal* stated that the coverage had made them more aware of the fact that the media could affect the defendant's right to a fair trial.³ Given this danger, and given their duty to protect the defendant's right to a fair trial,⁴ courts must ascer-

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¹ Although not referring to the O.J. Simpson trial in particular, author Eileen Tanielian has concluded that because of media coverage "[w]hat was once envisioned to be a guarantee of impartiality for the defendant has evolved into a guarantee of prejudice" Eileen F. Tanielian, *Battle of The Privileges: First Amendment vs. Sixth Amendment*, 10 LOY. L.A. ENT. L.J. 215, 215 (1990).

² *CBS News* (CBS television broadcast, July 6, 1994).

³ Don J. DeBenedictis, *The National Verdict*, A.B.A. J., Oct. 1994, at 52, 54.

⁴ See *Sheppard v. Maxwell*, 384 U.S. 333, 335 (1966) (discussing due process requirements for a fair trial in the face of media publicity). For a discussion of the court's

tain whether they can exercise some control over the media coverage of high profile trials. Evidently, to solve these conflicts⁵ courts must balance the First Amendment rights of the press⁶ with the Sixth Amendment rights⁷ of criminal defendants.

duty to protect the right to a fair trial, see *infra* notes 67-100 and accompanying text.

⁵ The relationship between the media and the judicial system can threaten the fairness of the judicial process and create difficult conflicts. This possibility is evidenced by the existence of "bar-media" committees in many communities. These committees usually exist to establish mechanisms which alleviate the tensions that media coverage creates on the judicial system. See JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 241 (1993). For example, the media's right of access to judicial proceedings under *Press-Enterprise Co. v. Superior Court (II)*, 478 U.S. 1, 2 (1986), *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984), and *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980), may clash with a witness's desire for privacy or the state's interest in protecting the identity of juvenile offenders.

In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Court held that a statute imposing mandatory exclusion of the public and the press from trial testimony of minors who are victims of sexual abuse was unconstitutional. *Id.* at 610-11. The Court held that the interests in protecting the privacy of a minor witness in a child sex abuse case to prevent further trauma and to encourage other victims to come forward were not sufficient to defeat the presumption of openness in a criminal proceeding. *Id.* at 607-09. Such a presumption would be defeated only if a compelling state interest required the closure order, and if the order were narrowly tailored to serve that interest. *Id.* at 607. Also, in most jurisdictions, delinquency proceedings against juveniles are closed to the media. THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ACCESS TO JUVENILE COURTS 2 (Fall 1991). Arguably, closure is needed to protect the identity of the juvenile, and to prevent publicity from interfering with his rehabilitation. *In re J.S.*, 438 A.2d 1125, 1129 (Vt. 1981) (holding that publication of a youth's name could impair the rehabilitative goals of the juvenile justice system). It has also been claimed that the media's access to judicial records clashes with a rape victim's right to privacy. In *Cox Broadcasting v. Cohn*, 420 U.S. 469, 495 (1975), however, the Court held that when a television broadcasting company legally obtains the name of a rape victim from public judicial records the state cannot impose criminal sanctions for the accurate publication of that name. Similarly, in *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989), the Court held that a plaintiff cannot recover for invasion of privacy from a media defendant for the publication of previously secret information regarding a rape victim, and that media coverage makes it impossible for a defendant to get a fair trial.

⁶ The First Amendment states in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

⁷ The Sixth Amendment guarantees:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. In addition, the Supreme Court has stated that the right to a fair trial includes "the principle that 'one accused of a crime is entitled to have his guilt or

On the one hand, the First Amendment protects media coverage of criminal matters and of the judicial system because press coverage is a valuable component of our democratic form of government.⁸ This is part of the reasoning behind the First Amendment's protection of freedom of the press.⁹ A better informed public can contribute more to the imple-

innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986) (citing *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)).

⁸ Needless to say, news programs and articles about murder investigations, crime, and punishment are also popular and profitable. A quick glance at the television listings for a week during the summer showed such shows as *Inside Edition*, *Hard Copy*, *A Current Affair*, *People's Court*, *The Untouchables*, *Dark Justice*, *NYPD Blue*, *Night Court*, *Cops*, *Dragnet*, *Diagnosis Murder*, *Under Suspicion*, *New York Undercover*, *Hill Street Blues*, *Silk Stalkings*, *Murder She Wrote*, *The Rockford Files*, *Columbo*, *Real Stories of the Highway Patrol*, and even old reruns of *Charlie's Angels*. Also, the fascination with crime and criminal justice has attracted the attention of television movie producers, who just recently offered, among other examples, the following: *In the Line of Duty: Ambush in Waco* (NBC television broadcast, May 23, 1993), a dramatization of the FBI's intervention at the Branch Davidian Compound in Waco, Texas just weeks after the incident; three different versions of Amy Fisher's story (*Amy Fisher: My Story* (NBC television broadcast, Dec. 28, 1992); *Casualties of Love: The Long Island Lolita Story* (CBS television broadcast, Jan. 3, 1993); and *The Amy Fisher Story* (ABC television broadcast, Jan. 3, 1993)); and a movie version of the life of a high school cheerleader's mother who was accused of murdering her daughter's rival, called *The Positively True Adventures of the Alleged Texas Cheerleader-Murdering Mom* (HBO television broadcast, Apr. 10, 1993). In fact, this HBO movie was the subject of an attempted prior restraint. Ruth Piller. *Judge Won't Block Showing of Pompom Mom TV Movie*, HOUS. CHRON., Apr. 9, 1993, at C6. Criminal justice enthusiasts can also spend all day watching Court TV, a cable television station which dedicates all of its air time to broadcasting trials. Since its creation in 1991, Court TV has reached an average of 350,000 viewers a day, a larger audience than daytime Cable News Network ("CNN"). *The Talk of the Town*, NEW YORKER, Jan. 24, 1994, at 27. "Court TV is based on a simple notion, even a primitive one: crime, scandal, and degradation make good TV." *Id.* at 28. Tales of murder, money, and race help make the case for coverage of trials. *Id.* at 27. For some examples of murder trials that have attracted extensive media attention, see generally PETER E. KANE, *MURDER, COURTS, AND THE PRESS* (1989).

⁹ See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451 (1987) (comparing Justice Holmes' "marketplace of ideas" justification for free speech with Justice Brandeis' "civic virtue" justification). There is not much record of the debates concerning the meaning of this Amendment in the House and Senate. See *Const. of the United States: Analysis & Interpretation*, S. DOC. NO. 82, 92d Cong., 2d Sess. 936 (1973). Indeed, the material available to determine the intent of the framers is capable of divergent interpretations. See *infra* note 43. Given the ambiguity of the historical research and the recent interpretations

mentation of solutions to the problem of crime.¹⁰ Also, the information helps make government institutions more accountable. If the public is going to perform its self-governing function, it must be able to receive information about how the government works. Yet, given modern social and governmental structures, it is doubtful that the average citizen has the ability or the time to perform this task alone. It is the press that has taken on the role of surrogates to the public. It is through the press that citizens can participate in self-governance. The First Amendment's protection of freedom of the press, therefore, serves the media as well as the individuals who depend on it to fulfill the values of freedom of expression,

by the Supreme Court, it is now clear that, notwithstanding the language of the Amendment, its protections are not absolute. Partly for this reason, the Amendment has generated a vast amount of literature that tries to develop a theory of its basis and meaning.

Meiklejohn has been the most commonly cited proponent of the model that interprets the First Amendment as a method of protecting and encouraging self-government by the public. *See also* Martin Redish, *Self-Realization, Democracy and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982) (arguing that free speech enhances the individual's contribution to the social welfare and, thus, to his self-fulfillment); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (positing that the constitutional guarantee of free speech aids in the individuals development of autonomy and human development).

Another influential approach to the First Amendment has been the "marketplace of ideas" model. According to this model, the function of the First Amendment is to guarantee the competition of ideas. This model has been traced back to JOHN MILTON, *AREOPAGITICA* (AMS Press 1971). The notion of the competition of ideas was later developed by John Stuart Mill in *ON LIBERTY OF THOUGHT AND DISCUSSION* (Hackett Publishing Co. 1978) (1859). Justice Oliver Wendell Holmes adopted the model and used it to argue his dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919). *See generally*, RODNEY A. SMOLLA, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT*, at 2-13, 2-14 (1994).

A third model values the protection of free speech as a contribution to the fulfillment of an individual's personal liberty. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1991). Yet, the First Amendment is perhaps better understood as a combination of all of these ideas. *See, e.g.*, THOMAS EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1966) (arguing that the First Amendment protection of free speech is necessary (1) to assure individual self-fulfillment, (2) as a means to attain the truth, (3) as a method of securing participation by the members of society in social and political decision-making, and (4) as a method to keep the balance between stability and change in society). In his concurring opinion in *Whitney v. California*, 274 U.S. 357, 375 (1927), Justice Brandeis advocated freedom of speech as "indispensable to the discovery and spread of political truth" and as essential to a stable government and to political change. *Id.* at 375 (Brandeis, J., concurring).

¹⁰ *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977); *see generally* MEIKLEJOHN, *supra* note 9.

participation in democratic government, and self-realization.¹¹ This is why speech that comments on governmental entities or that provides more knowledge of the government and the way it works is at the core of the First Amendment's protection of freedom of the press.¹² In the case of speech about the judicial process, the fact that the media has access to criminal trials also helps protect the defendant's right to a fair trial.¹³ Indeed, the Supreme Court has repeatedly stated that public

¹¹ See generally MEIKLEJOHN, *supra* note 9.

¹² "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966), *quoted in* *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). The Framers "gave into our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of [the First Amendment]." *Ollman v. Evans*, 750 F.2d 970, 996 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

The Supreme Court has repeatedly recognized the function of the press in our society. As early as the 1930s the Court explained:

The newspapers, magazines and other journals of the country . . . have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.

Grosjean v. American Press Co., 297 U.S. 233, 250 (1936). See also *Stromberg v. California*, 283 U.S. 359, 369 (1931) (reversing the defendant's criminal conviction based on a vague statute which could be interpreted to restrict his right to participate in political discussion).

¹³ The Supreme Court has consistently recognized that the guarantee of a public trial was created for the benefit of the defendant. In *In re Oliver*, for example, the Court held that a secret contempt trial violated the defendant's right to a public trial under the Fourteenth Amendment. 333 U.S. 257, 272-73 (1948). The Court stated: "The right to a public trial has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contempt review in the forum of public opinion is an effective restraint on possible abuse of judicial power." In *Estes v. Texas*, 381 U.S. 532, 538-39 (1965), the Court again recognized that the purpose of the requirement of a public trial exists to guarantee a fair trial for the accused.

In *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), Chief Justice Burger announced the judgment of the Court and wrote an opinion, joined by Justices White and Stevens, asserting that criminal trials are presumptively open to the public and the media, in part because the openness itself acts as an assurance of fairness for all concerned. *Id.* at 570, 573. In a separate concurring opinion, Justices Brennan and Marshall agreed and declared: "Publicity serves to advance several of the particular purposes of the trial (and,

scrutiny of criminal trials is an effective restraint on possible abuse of judicial power which enhances the quality and integrity of the process, with benefits to both the defendant and society as a whole.¹⁴

On the other hand, the Sixth Amendment's right to a fair trial for a criminal defendant¹⁵ is recognized as one of the "most fundamental of all freedoms,"¹⁶ essential "to the preservation and enjoyment of all other rights."¹⁷ The right to a fair trial includes the defendant's right to have his guilt determined solely on the basis of the evidence introduced at trial, and not on the grounds of "official suspicion, indictment, continued custody or other circumstances not adduced as proof at trial."¹⁸ Trial

indeed, the judicial) process. Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence." *Id.* at 593 (Brennan, J., concurring). *See also* *Press-Enterprise Co. v. Superior Court (II)*, 478 U.S. 1, 7 (1986) ("The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness."); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.").

¹⁴ For example, in *In re Oliver*, the Court recognized that while the right to a public trial is guaranteed to the accused, publicity also provides various benefits to the public, including the fact that through public trials the public learns about the government. *In re Oliver*, 333 U.S. at 270 n.24. In *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966), the Court stated: "The press does not just publish information about trials, but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial process to extensive public scrutiny and criticism." In *Cox Broadcasting v. Cohn*, 420 U.S. 469, 491-92 (1975), the Court stated:

Great responsibility is . . . placed upon the news media to report fully and accurately the proceedings of government, . . . and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.

See also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

¹⁵ *See supra* note 7.

¹⁶ *Estes v. Texas*, 381 U.S. 532, 540 (1965).

¹⁷ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 586 (1976) (Brennan, J., with Stewart and Marshall, JJ., concurring in judgment).

¹⁸ *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986) (citing *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)). Chief Justice Rehnquist has stated: "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) (Rehnquist, J., dissenting as to Part III). Witness credibility can also become a problem when it is disclosed that the press has paid witnesses generous amounts of money for information in a case. For a

courts have a duty to protect this right.¹⁹ However, it has also been recognized that the right to a fair trial does not guarantee a perfect trial²⁰ and that the press must be provided “maximum freedom” to carry out its essential and important function of informing the public about the judicial process.²¹

discussion of this problem, see Robert S. Stephen, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a “Media Circus”*, 26 SUFFOLK U. L. REV. 1063, 1103 (1992).

In 1994, California enacted what was believed to be the first example of a law criminalizing the sale of evidence. A new section was added to the state’s penal code which made it a crime for jurors or witnesses to provide information for compensation. Witnesses are bound for one year from the time of the criminal act or until there is a final judgment; jurors are bound for ninety days after being discharged. “*Trash for Cash*” *Outlawed in California*, NAT’L L.J., Oct. 10, 1994, at A10. On April 9, 1995, one of the ousted jurors from the O.J. Simpson trial and Dove Books filed a lawsuit against state and local law enforcement officials in federal district court seeking a declaration that the law abridges freedom of speech and of the press. See Gail D. Cox, *Ex-Simpson Juror Seeks to Cash In*, NAT’L L.J., May 1, 1995, at A13. On May 22, 1995 the court held a hearing to decide plaintiff’s motion for preliminary injunction or, in the alternative, for summary judgment and held that the statute was unconstitutional. *Dove Audio, Inc. v. Lungren*, No. 95-2570, 1995 WL 432631 (C.D. Cal. May 22, 1995). The court held that the law operated as an unconstitutional prior restraint and that the state failed to show a compelling state interest to support it. *Id.* at *3. It also held that the statute was unconstitutionally overbroad. *Id.* at *5. For these reasons, the court permanently enjoined the Office of the District Attorney for the County of Los Angeles from enforcing the statute. *Id.* at *6.

¹⁹ See *infra* notes 67-136 and accompanying text. Through a series of decisions in the 1960s, the Supreme Court discussed the effects of publicity in criminal trials and established the duties of trial courts in guaranteeing the accused’s right to a fair trial. This series of decisions culminated in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), where the Court concluded that, “[g]iven the pervasiveness of modern communications . . . trial courts must take strong measures” to protect the judicial process from prejudicial outside interferences. *Id.* at 362.

²⁰ In *United States v. Hasting*, 461 U.S. 499, 508-09 (1983), for example, the Court held that “given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial.” See also *United States v. Lane*, 474 U.S. 438, 445 (1986); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984); *Lutwak v. United States*, 344 U.S. 604, 619 (1953); *United States v. Fritz*, 580 F.2d 370, 378 (10th Cir.), *cert. denied*, 439 U.S. 947 (1978).

²¹ In *Estes v. Texas*, 381 U.S. 532, 539 (1965), the Court stated: “While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process.”

To balance all of the interests at stake, courts sometimes issue orders banning publication of pretrial information. Although the First Amendment does not specifically refer to orders of this type, it has been interpreted to protect the press from them.²² In fact, such "prior restraints" are considered "the most serious and least tolerable infringement on First Amendment rights."²³ Therefore, when an order banning publication is requested, courts must determine whether such an order would constitute an unconstitutional prior restraint on publication. In *Nebraska Press Ass'n v. Stuart*, the United States Supreme Court reiterated that such orders are presumptively unconstitutional prior restraints on the press.²⁴ However, in an attempt to solve the conflict²⁵ between the Sixth Amendment right to a fair trial and the First Amendment freedom of the press, the Court stated that orders banning publication could be constitutionally valid under very limited circumstances.²⁶ Recently, the American Bar Association ("ABA") amended its Standards for Criminal Justice to conform to this decision.²⁷

²² See *Near v. Minnesota*, 283 U.S. 697 (1931). In *Near*, the Court discussed the debate regarding the original intent of the Framers of the Constitution and concluded: "[I]t has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication." *Id.* at 713. For the modern debate on the intent of the Framers, see *infra* notes 39-45 and accompanying text.

²³ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). In *Nebraska Press*, the Court held that the petitioner of such an order has to satisfy a very high burden of proof because prior restraints are presumptively unconstitutional. *Id.* at 570. Speech about a judicial proceeding is "protected" under the First Amendment because it involves matters of public concern and matters related to the government and the way it functions. *Id.* at 559-60.

²⁴ *Id.* at 558.

²⁵ It has been argued that the conflict between the First Amendment freedom of the press and the Sixth Amendment right of the defendant is only "apparent" because the Constitution grants rights to the press and the defendant to be claimed against the state, not against each other. For a good discussion of this proposition, see Hans Linde, *Fair Trials and Press Freedom—Two Rights Against the State*, 13 WILLAMETTE L. REV. 211, 217 (1977). The fact is, however, that there is a conflict. On the one hand, the state must guarantee that the defendant gets a fair trial, while at the same time it must not abridge the freedom of the press. Both the press and the defendant have constitutional rights that should be protected by the state, which can lead to the type of "conflict" discussed in this article.

²⁶ A prior restraint on publication would be valid only with proof of the following: (1) the nature and extent of the publicity would impair the defendant's right to a fair trial; (2) there are no alternative measures that could mitigate the effects of the publicity; and (3) the restraint would be effective. *Nebraska Press*, 427 U.S. at 562.

²⁷ See STANDARDS (THIRD) FOR CRIMINAL JUSTICE Standard 8-3.1 (American Bar

The standard created by the Supreme Court and recently adopted by the ABA has proven to be inoperable and confusing, and its use threatens the First Amendment protection of freedom of the press. To provide a consistent interpretation and application of the rights protected by the First Amendment, the premise of the decision in *Nebraska Press* must be re-examined and an absolute rule protecting the press from prior restraints must be adopted.

This Article begins by exploring prior restraint and freedom of the press jurisprudence.²⁸ Next, the Article discusses the problems which arise in an attempt to balance the First Amendment freedom of the press with the Sixth Amendment right to a fair trial.²⁹ The American Bar Association has established standards to deal with issues of free press and fair trial, but throughout the years these standards have been revised several times, paralleling the inability of the courts to establish a clear standard.³⁰ Particularly, *Nebraska Press Ass'n v. Stuart*³¹ set the course for needless litigation and injury to the First Amendment due to its failure to adopt an absolute rule.³² Although *Nebraska Press* concluded that restraining orders could be justified in some instances, the standard is almost impossible to meet.³³ Additionally, the *Nebraska Press* standard leads to courts becoming prepublication censors.³⁴ Even temporary bans on publication are unconstitutional prior restraints, since they have an immediate suppression effect on the dissemination of ideas.³⁵ The judiciary's contempt power and the effect of the collateral bar rule also tend to chill freedom of the press and amount to unjustified court censorship.³⁶ The Article then discusses studies that have shown that pretrial publicity does not pose an insurmountable threat to the defendant's rights to a fair trial. In fact, most prejudice can be effectively diminished in alternative ways, thus obviating the need for the remedy of prior restraint.³⁷ The Article concludes, therefore, that to eliminate groundless litigation and prevent the courts from becoming prepublication censors, the courts should adopt an absolute rule against the use of prior restraints.³⁸

Ass'n 1991) [hereinafter ABA STANDARDS 3D].

²⁸ See *infra* notes 39-66 and accompanying text.

²⁹ See *infra* notes 67-136 and accompanying text.

³⁰ See *infra* notes 137-56 and accompanying text.

³¹ 427 U.S. 539 (1976).

³² See *infra* notes 157-60 and accompanying text.

³³ See *infra* notes 161-78 and accompanying text.

³⁴ See *infra* notes 179-97 and accompanying text.

³⁵ See *infra* notes 198-216 and accompanying text.

³⁶ See *infra* notes 217-56 and accompanying text.

³⁷ See *infra* notes 257-75 and accompanying text.

³⁸ See *infra* notes 276-91 and accompanying text.

I. PRIOR RESTRAINTS AND FREEDOM OF THE PRESS JURISPRUDENCE

The Supreme Court has defined a prior restraint as any prohibition on speech issued in advance of publication.³⁹ Originally, the phrase "prior restraint" was used to describe an administrative licensing system which allowed the state to determine what could be published in advance. Through the analysis of the Supreme Court, however, the doctrine of prior restraints has been extended to statutes that allow suppression of speech, to injunctions issued by courts after full hearings and to temporary restraining orders.⁴⁰ The doctrine is not related to the substance of the speech but to the effect that the government's method of regulation will have on speech.⁴¹

Because at the time of the enactment of the First Amendment in 1791 the English prior restraint licensing system had been abandoned for almost one hundred years,⁴² it has been questioned whether the Framers intended the Amendment to protect against prior restraints.⁴³ However,

³⁹ *Near v. Minnesota*, 283 U.S. 697, 721 (1931). However, the Court made it clear that the protection against prior restraints is not absolute. *Id.* at 716. According to the prior restraint doctrine, "the government may not restrain a particular expression prior to its dissemination even though the same expression could be constitutionally subjected to punishment after dissemination." MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 127 (1984).

⁴⁰ *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (banning publication of information implicating the accused in a criminal trial); *Near v. Minnesota*, 283 U.S. 697 (1931) (finding a statute that allowed suppression of a newspaper after a hearing in court unconstitutional).

⁴¹ In *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975), the court suggested that prior restraints are defined by four elements: (1) a governmental order that restrains specified expression; (2) the order must be obeyed until reversed; (3) the violation of the order may be punished as contempt; and (4) the proceedings conducted for its violation do not include all the safeguards of a criminal trial, including the fact that the violator cannot argue the constitutionality of the order as a defense to its violation.

⁴² The English Licensing Act of 1662 was repealed in 1694. *See* John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 412 (1983) (discussing the English Licensing Act); *see also* William Medlen, *Inside Edition: Out of a Prior Restraint and Above the Law?*, 13 LOY. L.A. ENT. L.J. 164, 165 (1992). For a detailed history of the development of the doctrine before the adoption of the First Amendment, *see* Paul L. Murphy, *Near v. Minnesota in the Context of Historical Developments*, 66 MINN. L. REV. 95, 98-105 (1981).

⁴³ Rodney Smolla has explained the difficulty of determining the "original intent" of the Framers of the First Amendment:

Discerning the original meaning of the First Amendment is a frustrating exercise. First there were many persons involved in the process of drafting, approving, and ratifying the Bill of Rights, and they came from many different perspectives and acted out of many different motivations. So one must either reduce their differences to a common denominator, which inevitably will be a principle so general as to be of little concrete guidance for deciding future conflicts, or instead choose which of the many "framers" to emphasize in determining their collective intent. Second, the Bill of Rights was ratified at a time of great intellectual ferment, in which the views of many of the framers, including such key figures as James Madison, were in rapid flux. And so one must choose what specific time, within this period of robust philosophical transition, to focus upon. Finally, the framers did not always act as they spoke. Some of them might give ringing endorsements to the ideals of free speech in one breath, and instigate some act of heavy-handed censorship in the next.

SMOLLA, *supra* note 9, at 1-2 to 1-3.

It is clear that the dominant freedom of speech doctrine at the time was based on the views of English commentator William Blackstone. To Blackstone, freedom of the press was necessary for the maintenance of a free state, but it consisted only of a prohibition of prior restraints on publications, and not in immunity from the ramifications of publishing. He wrote:

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

4 WILLIAM BLACKSTONE, COMMENTARIES 152 (1779). See Belinda J. Scrimenti, *A Journalist's View of The Progressive Case: A Look at the Press, Prior Restraint, and the First Amendment from the Pentagon Papers to the Future*, 41 OHIO ST. L.J. 1165, 1176 (1980). However, it is not so clear whether the protection of the First Amendment was meant to be broader than this Blackstonian view. As Rodney Smolla has explained: "The key historical question is whether the [F]ramers saw themselves as adopting Blackstone and the English Common Law understanding of freedom of speech, or rebelling against it." SMOLLA, *supra* note 9, at 1-10.

Different interpretations of the historical evidence have therefore led to different conclusions. Leonard Levy, for example, has argued that the First Amendment was intended to prevent prior restraints. See LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 266-69, 272-74, 281, 348-49 (1985). Zechariah Chafee and David A. Anderson, in contrast, have argued that the First Amendment had to be intended to protect much broader freedoms, in part because it could not have been intended to prohibit a practice that had already been abandoned. See ZECARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES (1941); David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. REV. 455 (1983). Smolla has concluded that at the time the First Amendment was ratified, thinking on freedom of the press was evolving from theories of Blackstonian minimal protection to procedural protections and to more sophisticated and expansive interpretations. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 33 (1993). Smolla also

the Supreme Court has consistently concluded that the Amendment was enacted *at least* to protect against prior restraints.⁴⁴ It has also consistently held that prior restraints are the most dangerous infringement on freedom of the press because their effect is to totally suppress speech and because the press is unable to challenge the constitutionality of the order by disobeying it.⁴⁵

states that there is a high probability that many of those involved in the adoption of the Amendment did not focus on the meaning of the principles it embodies. *Id.* at 36. His conclusion on the issue is simple: "One can keep going round and round on the original meaning of the First Amendment, but no clear, consistent vision of what the [F]ramers meant by freedom of speech will ever emerge." *Id.* at 38.

⁴⁴ The Supreme Court's early interpretations of the First Amendment appear to be based on Blackstone's theory of freedom of speech. *See, e.g.*, *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (stating that the First Amendment was enacted to embody certain guaranties "which we had inherited from our English ancestors"); *see also Patterson v. Colorado*, 205 U.S. 454, 462 (1907), where Justice Oliver Wendell Holmes stated that the main purpose of the First Amendment is to prevent previous restraints upon publication such as had been practiced by other governments, but not subsequent punishment for expressions contrary to the public welfare. This view soon evolved. In *Schenk v. United States*, 249 U.S. 47, 51 (1919), Justice Holmes questioned his earlier statements and concluded: "It may well be that the prohibition of laws abridging freedom of speech is not confined to previous restraints."

More recent cases support this view, and a rejection of the view that the First Amendment was enacted only to protect against prior restraints. *See, e.g.*, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101 (1979) ("First Amendment protection reaches beyond prior restraints."); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 n.3 (1942) ("The protection of the First Amendment . . . is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication."); *Bridges v. California*, 314 U.S. 252, 265 (1941) (stating that the Framers of the First Amendment "intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society"); *Grosjean v. American Press Co.*, 297 U.S. 233, 246 (1936) (stating that if the Framers meant to prohibit only prior restraints, the First Amendment would be redundant as a mere codification of then-existing common law concepts).

In *Patterson v. Colorado*, 205 U.S. 454, 462 (1907), the Court stated for the first time that the First Amendment's protection of freedom of speech was enacted *at least* to protect against prior restraints: "[T]he main purpose of [the First Amendment] is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments.'" *Id.* (citations omitted). In *Near v. Minnesota*, 283 U.S. 697, 716 (1931), the Court also concluded: "[L]iberty of the press . . . has meant, principally although not exclusively, immunity from previous restraints or censorship." *See also Nebraska Press*, 427 U.S. at 539; *New York Times Co. v. United States (The Pentagon Papers Case)*, 403 U.S. 713, 714 (1971) (*per curiam*); *Lovell v. Griffin*, 303 U.S. 444, 451 (1938).

⁴⁵ After reviewing the decisions in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), *New York Times Co. v. United States (The Pentagon Papers Case)*, 403 U.S. 713 (1971) (*per curiam*), and *Near v. Minnesota*, 283 U.S. 697 (1931), the *Nebraska*

The Supreme Court first discussed the doctrine of prior restraints in detail in its 1931 decision in *Near v. Minnesota*.⁴⁶ In *Near*, the Court declared unconstitutional a nuisance statute designed to eliminate scandalous or defamatory publications.⁴⁷ Under the statute, a court had the power to order editors to stop publishing if it was convinced that the publication was detrimental to public morals and general welfare.⁴⁸ If the editors of such a publication wanted to publish again after the order was issued, they had to get permission from the court.⁴⁹ After the ninth issue of the *Saturday Press*, "a vituperative scandal sheet if there ever was one,"⁵⁰ a district attorney requested an injunction based on an evaluation of the publication's anti-Semitic and racist remarks. The Court granted a permanent injunction and ordered the editors to stop publishing.

The Supreme Court of Minnesota affirmed the decision, but the United States Supreme Court reversed. The Court held that the statute amounted to a prior restraint because the effect of a court order under the statute was the suppression of the publication of information.⁵¹ The Court stated that since the primary purpose of the First Amendment is to protect against the imposition of prior restraints, the statute was unconstitutional.⁵² Chief Justice Hughes concluded that even if the published

Press Court stated:

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted . . . A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.

Nebraska Press, 427 U.S. at 559 (citing ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 61 (1975)). Bickel has written: "Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss — a loss in the immediacy, the impact, of speech. . . . A prior restraint, therefore, stops more speech more effectively. A criminal statute chills, prior restraint freezes." BICKEL, *supra*, at 61. See also Thomas Emerson, *The Doctrine of Prior Restraint*, 20 *LAW & CONTEMP. PROBS.* 648 (1955).

⁴⁶ 283 U.S. 697 (1931).

⁴⁷ *Id.* at 723.

⁴⁸ *Id.* at 709.

⁴⁹ *Id.* at 712.

⁵⁰ Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 *MINN. L. REV.* 11, 15-16 (1981).

⁵¹ *Near*, 283 U.S. at 711.

⁵² *Id.* at 713, 722-23.

information was false and defamatory, the aggrieved parties could have other remedies, such as a defamation action against the press.⁵³

In reaching its conclusions, however, the *Near* Court gave the concept of prior restraint a much broader meaning than it had been afforded before. The Minnesota law did not create a licensing system. The decision to enjoin a publication was made by a court after a hearing and not by an administrative licenser or censor prior to publication. Yet, according to the Court, any governmental action with the effect of suppression of speech before publication, whatever its character, would be considered a prior restraint.⁵⁴ The Court declared clearly for the first time that the government may not abridge freedom of speech prior to publication because, by suppressing or delaying it, the government deprives speech of its effectiveness.⁵⁵

The Court stated, however, that the protection against prior restraints was not absolute and suggested three exceptions: cases of obscene material, cases of fighting words and incitement to violence or to overthrow the government, and cases of national security during war (where the information to be published could endanger troops or the success of a mission).⁵⁶ Unfortunately, the Court offered no explanation for these exceptions, nor why they should be considered to be outside the theory of prior restraints.⁵⁷

On the one hand, *Near* recognized for the first time that prior restraints on the press are presumptively unconstitutional and that the party seeking an injunction to prevent publication has a heavy burden to overcome. On the other hand, it sent the message that prior restraints could be acceptable under certain circumstances. *Near* thus opened the

⁵³ *Id.* at 718-19.

⁵⁴ *Id.* at 713-14. This extension of the doctrine has been criticized by some commentators. See, e.g., William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 282 (1982) (concluding that because injunctions are the product of judicial process, they should not be considered to be in the same category as licensing and prepublication censorship and should be preferred to subsequent punishment). For a response to this argument, see Howard O. Hunter, *Toward a Better Understanding of the Prior Restraint Doctrine: A Reply to Professor Mayton*, 67 CORNELL L. REV. 283 (1982).

⁵⁵ *Near*, 283 U.S. at 722.

⁵⁶ *Id.* at 716.

⁵⁷ In listing the exceptions, Chief Justice Hughes cited and discussed Oliver Wendell Holmes' decision in *Schenck v. United States*, 249 U.S. 47 (1919), which was not a decision about prior restraints, but about subsequent punishment. *Near*, 283 U.S. at 716. See Tim A. Pilgrim, *Dictum Recasts the First Amendment: A Revisionist Examination of Near v. Minnesota*, COMM. & LAW June 1991, at 43, 51-52.

door for courts to allow restraints on the press in the future, but it did not explain the standards that should be applied in those cases.

The underlying ambiguity of the standards applicable to prior restraint cases became apparent in *New York Times Co. v. United States (The Pentagon Papers Case)*,⁵⁸ where the badly fractured Court published ten separate opinions.⁵⁹ In *The Pentagon Papers Case*, the Court confronted the government's attempt to enjoin the publication of articles based on a secret study of involvement by the United States in the Vietnam War, which had been leaked to the press.⁶⁰ In a very short per curiam opinion, the Court merely reiterated that any order to prohibit publication has a heavy presumption against constitutional validity because its effect is that of a prior restraint, and that the party seeking the prior restraint has a heavy burden to show the justification of such a remedy.⁶¹ Even though the Court was dealing for the first time with the national security exception mentioned in *Near*, it did not explain the meaning of the burden needed to satisfy this analysis.

Each Justice filed an opinion in the case.⁶² Only two of them argued that the First Amendment does not admit any exceptions.⁶³ All others

⁵⁸ 403 U.S. 713 (1971) (per curiam).

⁵⁹ There was a per curiam opinion, plus a separate opinion from each Justice.

⁶⁰ On June 13, 1971, *The New York Times* published a section of the study. The President asked *The Times* to stop publication, but it went ahead and published two more sections. Two days later, the government filed a petition for a temporary restraining order in federal district court, arguing that further publication would threaten national security. This petition was denied by the district court on June 19, 1971. *United States v. New York Times Co.*, 328 F. Supp. 324, 330 (S.D.N.Y. 1971). However, the case was remanded for further proceedings by the Second Circuit Court of Appeals on June 23, 1971. Meanwhile, on June 18, *The Washington Post* began publishing sections of the secret report. The government again filed a petition for an injunction in federal district court. The court denied this petition, but again a court of appeals remanded for further hearings. Upon these further hearings, the district court denied the petition for an injunction, and the court of appeals affirmed. Both cases were then appealed to the United States Supreme Court, which granted expedited review. Eighteen days from the date of the first publication, the Supreme Court rendered its decision. For a detailed discussion of all of the facts surrounding *The Pentagon Papers Case*, see David Rudenstine, *The Pentagon Papers Case: Recovering Its Meaning Twenty Years Later*, 12 CARDOZO L. REV. 1869 (1991).

⁶¹ *New York Times Co.*, 403 U.S. at 714.

⁶² See Scrimenti, *supra* note 43, at 1179-81 (discussing the spectrum of opinions in *New York Times Co.*).

⁶³ *New York Times Co.*, 403 U.S. at 715 (Black, J., concurring); *id.* at 720 (Douglas, J., concurring). Justices Black and Douglas frequently expressed absolutist views on the First Amendment. See, e.g., *CBS Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 156 (1973) ("The ban of 'no' law that abridges freedom of the press is in my view total and

accepted the idea that there was a national security exception to the prior restraint doctrine. Chief Justice Burger went even further and stated that there could be other exceptions not yet recognized by the courts.⁶⁴ Given these differences in opinion, Justice Blackmun called for the creation of clear standards to be used in prior restraint cases.⁶⁵

Unfortunately, the Court did not create any standards. It is also nearly impossible to get an accurate idea of what standards would be acceptable to a majority of the Justices from the ten different opinions. The Court did not conclude that the state cannot impose a prior restraint on the press for national security reasons. It only stated that, in *The Pentagon Papers Case*, the government did not meet the burden of proof required to support its claim. The Court did not provide any discussion on the original restraining order imposed on the press and did not discuss the evidence used by the government to support its claim. In essence, the Court failed to provide any guidelines for future litigants as to what would constitute sufficient evidence to comply with the burden of proof needed to overcome the presumption of invalidity that accompanies a petition for an order banning publication of protected information by the press. Therefore, the Court left the door open for future attempts by the government to ban dissemination of information prior to publication. Ironically, even though the decision was a victory for the press at the time, it led to a dangerous expansion of the prior restraint doctrine.⁶⁶

complete.”) (Douglas, J., concurring); *Beauharnais v. Illinois*, 343 U.S. 250, 274-75 (1952) (“I do not agree that the Constitution leaves freedom of petition, assembly, speech, press or worship at the mercy of a case by case, day by day majority of this Court. . . . I think the First Amendment . . . *absolutely* forbids [laws that prohibit or punish speech] without any ‘ifs’ or ‘buts’ or ‘whereases.’”) (Black, J., dissenting); *see also* Belinda J. Scrimenti, *supra* note 43, at 1179-80 (describing Justices Black’s and Douglas’ absolutist views on First Amendment protections).

⁶⁴ *New York Times Co.*, 403 U.S. at 749 (Burger, J., dissenting).

⁶⁵ Justice Blackmun stated: “What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the government to prevent. Such standards are not yet developed.” *Id.* at 761 (Blackmun, J., dissenting).

⁶⁶ Eight years after *The Pentagon Papers Case*, the United States government again attempted to get an order banning publication of information on national security grounds. In *United States v. The Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.), *dismissed without opinion*, 610 F.2d 819 (7th Cir. 1979), the government claimed that an article *The Progressive* was going to publish on how to build a hydrogen bomb would constitute a threat to national security. The district court agreed and issued an injunction against publication, but the case was abandoned later because another publication printed the article. In a series of other cases, courts have legitimized the government’s efforts to force employees to surrender their rights to publish information related to classified national

II. PRIOR RESTRAINTS AND FAIR TRIALS

Even though the problem of conflicts between the justice system and media reporting can be traced back as far as 1807,⁶⁷ it was not until the

security information. In *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972), for example, the court allowed an injunction banning publication of a book that allegedly contained confidential information about the CIA, based on its interpretation of an employment contract agreement between the author and the CIA. The court held that the First Amendment precluded restraints with respect to unclassified information, but not with respect to classified information touching on national defense. *Id.* at 1316-17. In *McGehee v. Casey*, 718 F.2d 1137, 1142-43 (D.C. Cir. 1983), the court held that restrictions on a government employee's speech rights must further a substantial governmental interest unrelated to the suppression of speech, and that such restrictions must be narrowly drawn. *See also* *Snepp v. United States*, 444 U.S. 507 (1980) (interpreting the government's claim as a breach of contract issue and not a prior restraint question); Kenneth J. Pierce, *Public Cryptography, Arms Export Controls, and the First Amendment: A Need for Legislation*, 17 CORNELL INT'L L.J. 197, 198 (1984) (discussing the national security exception for prior restraints in the context of encryption technology). *See generally* Michael A. Ferruggia, Note, *Balancing the Interests of National Security and Free Speech: A Proposed Modification of the English Approach Suitable for Adoption in the U.S.*, 4 TOURO J. TRANSNAT'L L. 217 (1993) (discussing the national security rationale for prior restraints).

⁶⁷ In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), the Court stated that the problems presented by excessive media coverage of criminal trials "are almost as old as the Republic," *id.* at 547, and concluded that it would be "inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press." *Id.* The Court cited a letter from Thomas Jefferson, written in 1786, where he concluded that even though it is disturbing that a person could be "arraigned in a newspaper," it was an evil for which there is no remedy because liberty depends on freedom of the press. *Id.* at 548.

In 1807, Aaron Burr complained that it would be difficult to find an impartial jury to serve in his treason trial because of the publicity surrounding the charges. Since Burr was acquitted, there was no occasion for appellate review of the problem of prejudicial pretrial publicity. *Id.* *See* Robert E. Drechsel, *An Alternative View of Media — Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial — Free Press Issue*, 18 HOFSTRA L. REV. 1, 3 (1989); *see also* J. EDWARD GERALD, *NEWS OF CRIME: COURTS & PRESS IN CONFLICT* 70-72 (1983).

Another famous example appeared in 1935, when almost one thousand reporters and photographers rallied to a small town in New Jersey to cover the trial of Bruno Hauptmann, who was accused of the kidnap-murder of Charles Lindbergh's son. During this trial, the media disrupted the proceedings by taking pictures and movies in violation of a court order. One newspaper conducted an informal poll and published that the defendant had been found guilty by the public. Sheldon Portman, *The Defense of Fair Trial from Sheppard to Nebraska Press Association: Benign Neglect to Affirmative Action and Beyond*, 29 STAN. L. REV. 393, 396-97 (1977). The trial was described as "perhaps the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial." Oscar

late 1950s that the Supreme Court began to make it clear that excessive media reporting could violate a defendant's Sixth Amendment rights. Between 1959 and 1966, the Supreme Court for the first time reversed several criminal convictions because they had been reached under circumstances heavily influenced by media coverage.⁶⁸ In *Marshall v. United States*, for example, the Court reversed a conviction because seven of the twelve jurors were exposed to news accounts of evidence that was not admitted at trial.⁶⁹ The Court concluded that "prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence."⁷⁰

Two years later, in *Irvin v. Dowd*,⁷¹ the Court reversed a murder conviction because, between the arrest and the trial for six murders in a small rural community,⁷² ninety-five percent of the homes in the trial court's county had access to numerous newspaper articles and editorials against the defendant.⁷³ The press reported that the defendant had confessed to the six murders and described him as "remorseless and without conscience."⁷⁴ It also commented on his juvenile criminal convictions and published a story about his court martial during the war.⁷⁵ Ninety percent of the jurors questioned in voir dire had formed an opinion as to the defendant's guilt.⁷⁶ Eight of the twelve actual jurors had stated in voir dire that they thought the defendant was guilty.⁷⁷ Given these facts, although the jurors indicated that they could render an impartial verdict, the Court found a "pattern of deep and bitter preju-

Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453, 454 (1940). See ZELEZNY, *supra* note 5, at 244 (discussing the media frenzy surrounding the trial). It was in response to this trial that the ABA created the first committee to recommend ways to deal with the problem of high publicity during trials. Portman, *supra*, at 397.

⁶⁸ See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Marshall v. United States*, 360 U.S. 310 (1959) (reversing a conviction because of the effects of trial publicity for the first time).

⁶⁹ *Marshall*, 360 U.S. at 313.

⁷⁰ *Id.* at 312-13.

⁷¹ 366 U.S. 717 (1961).

⁷² The community had approximately 30,000 inhabitants. *Id.* at 719.

⁷³ *Id.* at 725.

⁷⁴ *Id.* at 720.

⁷⁵ *Id.* at 725.

⁷⁶ *Id.* at 727.

⁷⁷ *Id.*

dice" created by extensive media coverage and reversed the lower court.⁷⁸

Similarly, in *Rideau v. Louisiana*, the Court reversed the defendant's conviction because the trial court had denied a change of venue after a television station had broadcast a filmed confession three times, reaching a combined audience estimated at 106,000 viewers in a community of approximately 150,000 people.⁷⁹ The Court held that refusal of the request for a change of venue was a denial of due process because the televised confession "in a very real sense was Rideau's trial,"⁸⁰ and that any "subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."⁸¹

Finally, in 1965, the Supreme Court reversed yet another conviction because of the effect of pretrial publicity. In *Estes v. Texas*, the Court held that the defendant had been deprived of due process of law after a pretrial hearing was televised live and later rebroadcast to approximately 100,000 viewers.⁸² In addition, the court proceedings were disrupted by the presence of reporters, photographers, cameramen and their equipment.⁸³

Through this line of cases, the Supreme Court reacted to the particular circumstances of each situation and attempted to provide a remedy for them. However, it did not really explain or give guidance to trial courts on how to solve the issues related to prejudicial publicity in the future. It was not until 1966, in *Sheppard v. Maxwell*,⁸⁴ that the Supreme Court provided guidelines on how to balance the interests of the press and the rights of a criminal defendant. In *Sheppard*, the Court reversed a conviction for murder, holding that publicity surrounding the trial had deprived the defendant of his right to a fair trial.⁸⁵ Even before the defendant was arrested, the media published countless stories about him which accentuated his alleged failure to cooperate with the investigation and called strongly for his arrest.⁸⁶ Many articles and editorials

⁷⁸ *Id.* at 725.

⁷⁹ 373 U.S. 723, 724 (1963).

⁸⁰ *Id.* at 726.

⁸¹ *Id.*

⁸² 381 U.S. 532, 550-52 (1965).

⁸³ *Id.*

⁸⁴ 384 U.S. 333 (1966).

⁸⁵ *Id.* at 335.

⁸⁶ *Id.* at 338-39. After an article demanded to know why there had been no public inquest, a three day inquest took place and Sheppard's questioning was covered by television and radio. *Id.* at 339. Apparently another article influenced the decision to arrest Sheppard, since he was arrested hours after the headline "Why isn't Sam Sheppard in

insinuated that Sheppard was guilty and discussed incriminating evidence that was never introduced at trial.⁸⁷ During the trial itself, the constant movement of reporters in the courtroom made it difficult for witnesses to be heard.⁸⁸ Because of the defendant's proximity to reporters in the courtroom, it was almost impossible for him to speak privately with his attorney during the proceedings.⁸⁹ Despite these circumstances, the trial judge did not take steps to limit the effects of the publicity and the behavior of the press during the trial. The judge did not grant a continuance, change the venue of the trial, sequester the jury, insulate the jurors from reporters, or prevent reporters from disrupting the proceedings.⁹⁰

In criticizing the trial court for allowing a "carnival atmosphere"⁹¹ in the courtroom and for failing to control the flow of publicity, the Supreme Court ordered lower courts to take an affirmative role in protecting the rights of defendants from undue interference by the press:

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.⁹²

These decisions sent a clear message to trial courts that even in the absence of actual prejudice, pervasive pretrial publicity can affect a defendant's right to a fair trial and that courts have a duty to protect the defendant from the effects of prejudicial publicity. In *Sheppard*, the Court enumerated some ways in which courts could make sure that publicity does not affect the defendant's right to a fair trial. For example, courts

Jail?" was published. *Id.* at 341.

⁸⁷ *Id.* at 340-41.

⁸⁸ *Id.* at 344. Twenty people were assigned to a special table for media representatives in the courtroom. The court also reserved four rows of seats behind the bar railing for television and radio reporters and for representatives of out-of-town newspapers and magazines. *Id.* The media used all available rooms in the building and a radio station was allowed to broadcast from a room adjacent to the room where the jury rested and deliberated. *Id.* at 343.

⁸⁹ *Id.* at 344.

⁹⁰ *Id.* at 358-59.

⁹¹ *Id.* at 358.

⁹² *Id.* at 362.

could regulate the conduct of reporters in the courtroom,⁹³ order a change of venue,⁹⁴ order a continuance of the trial,⁹⁵ isolate the witnesses,⁹⁶ and control the release of information to the media by law enforcement personnel and counsel.⁹⁷ However, the Court emphasized that the remedy for prejudicial publicity is the implementation of measures to prevent prejudice at its inception. The Court also urged lower courts to take steps that would protect the judicial process from prejudicial outside interference.⁹⁸

Although the Supreme Court in *Sheppard* did not suggest using direct restraints on the media as a solution to the problems created by trial publicity, courts soon began to issue such orders and injunctions as a means of exercising the control encouraged in *Sheppard*.⁹⁹ Restraints on the media were considered an effective measure for protecting the judicial process because they prevented prejudice at its inception.¹⁰⁰ Inevitably, the media claimed that such orders were unconstitutional prior restraints, and these arguments reached the Supreme Court.

In *Nebraska Press Ass'n v. Stuart*, the Supreme Court incorporated the prior restraint doctrine into the fair trial context.¹⁰¹ The Court vacated an order restraining the press from publishing or broadcasting

⁹³ *Id.* at 358.

⁹⁴ *Id.* at 363.

⁹⁵ *Id.*

⁹⁶ *Id.* at 359.

⁹⁷ *Id.* at 360-61. The Supreme Court has implied that a restraint on trial participants is not the equivalent of a prior restraint on the media. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (attorney made pretrial statements to the press); see also Mark R. Stabile, Note, *Free Press — Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case?*, 79 GEO. L.J. 337, 342-43 (1990) (arguing for a consistent standard for imposing gag orders); Rene L. Todd, Note, *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, 88 MICH. L. REV. 1171 (1990) (arguing that there should be no distinction between prior restraints on the press and gag orders on trial participants).

⁹⁸ *Sheppard*, 384 U.S. at 363. The effectiveness of these remedial measures has been questioned, however. See, e.g., Robert P. Isaacson, *Fair Trial and Free Press: An Opportunity for Coexistence*, 29 STAN. L. REV. 561, 561-67 (1977).

⁹⁹ In the comments to its Standards for Criminal Justice, the ABA refers to "the widespread abuse of prior restraints in the early 1970s." ABA STANDARDS 3D, *supra* note 27, at 20. See also ZELEZNY, *supra* note 5, at 250.

¹⁰⁰ Indeed, in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 555 (1976), the Supreme Court admitted that in issuing the restraining order "[t]he state trial judge . . . acted responsibly, out of a legitimate concern, in an effort to protect the defendant's right to a fair trial." The Court was required, however, to determine whether the specific means employed by the judge were foreclosed by the Constitution. *Id.* at 555-56.

¹⁰¹ *Id.* at 539.

accounts of admissions made by the accused, or of facts “strongly implicative” of him, in a widely reported murder trial. Six members of a family had been murdered in a small town of about 850 people.¹⁰² The case immediately attracted media coverage locally and nationally, which prompted the defendant and the prosecutor jointly to ask the court for an order restricting the publication of information by the media because of the threat to the defendant’s right to a fair trial.¹⁰³ The county court issued the order, and several press and broadcast associations, publishers, and individual reporters asked a district court to vacate it.¹⁰⁴ The district court revised the order and entered its own version, holding that there was a “clear and present danger that pre-trial publicity could impinge upon the defendant’s right to a fair trial.”¹⁰⁵ The order of the district court included a ban on publication of the contents of a note the defendant wrote on the night of the crime, the identity of the victims of the alleged sexual assault, and certain aspects of the medical testimony presented at the preliminary hearing. The order also prohibited reporting the nature of the order itself.¹⁰⁶ The Nebraska Supreme Court affirmed, but attempted to balance the defendant’s right to a fair trial and the press’ right to report pretrial events. The Nebraska Supreme Court limited the order to the publication of facts pertaining to the defendant’s confession and admissions, and to other facts which were “strongly implicative” of the defendant.¹⁰⁷ In a unanimous decision, the United States Supreme Court reversed.¹⁰⁸

The Court, in an opinion written by Chief Justice Burger, recognized that the press is important to the effective administration of justice because the press guards against miscarriages of justice and subjects the process to public scrutiny.¹⁰⁹ The Court also emphasized that prior restraints on publication are the most serious and “least tolerable infringement” on First Amendment rights.¹¹⁰ However, Burger recognized that the press had, at times, created such a biased atmosphere that it had, in fact, affected a defendant’s right to a fair trial and had forced the court to order new trials. He reiterated that First Amendment rights

¹⁰² *Id.* at 542.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 543.

¹⁰⁵ *Id.* (quoting the district judge).

¹⁰⁶ *Id.* at 543-44.

¹⁰⁷ *Id.* at 545.

¹⁰⁸ *Id.* at 570.

¹⁰⁹ *Id.* at 560 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

¹¹⁰ *Id.* at 559.

are not absolute and, although the barriers against prior restraints remain high, courts need to balance the defendant's right to a fair trial with the First Amendment rights of the press on a case-by-case basis.¹¹¹

Burger explained that because prior restraints carry a heavy presumption against constitutional validity, the burden of proof rests on the petitioner to show that the order was needed to protect the rights of the defendant.¹¹² In addition, he emphasized that the burden of proof required to justify a prior restraint cannot be based on mere allegations, nor on speculation.¹¹³ Prior restraints are valid when the probability that pretrial publicity will jeopardize a fair trial is demonstrated with the "required degree of certainty."¹¹⁴ To meet this burden, a party seeking an injunction must show that the publicity generated in the absence of an injunction would be so prejudicial that the defendant could not possibly get a fair trial.¹¹⁵ The petitioner must also show that there are no alternative measures which could mitigate the effect of the publicity and that the injunction would be effective in guaranteeing a fair trial.¹¹⁶ Only by meeting all three aspects of this test would a prior restraint on the press withstand an attack under the First Amendment. As to the alternative methods of protecting the defendant's right to a fair trial, the Court reviewed its decisions in some of the fair trial cases and supported using change of venue, sequestration of the jury, voir dire, and continuances.¹¹⁷

Applying this standard to the facts of the case, the Court concluded that the order imposed on the press was unconstitutional because the defendant did not meet the required burden of proof to defeat the presumption against the validity of the order.¹¹⁸ First, the Court noted that even in a rural community of only 850 people, the conclusion that

¹¹¹ *Id.* at 570. He was careful to conclude, therefore, that pretrial publicity did not lead automatically to unfairness, and that the courts could not prohibit the press from reporting news about the criminal justice system so easily. *Id.* at 565.

¹¹² *Id.* at 558 (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-20 (1971)).

¹¹³ *Id.* at 563, 569.

¹¹⁴ *Id.* at 569. Unfortunately, this phrase does not provide a clear guideline because the Court has never really explained what standard is needed to overcome the presumption. It did not explain it in *Near v. Minnesota*, 283 U.S. 697 (1931), nor in *New York Times Co. v. United States (The Pentagon Papers Case)*, 403 U.S. 713 (1971). *See supra* notes 46-66 and accompanying text.

¹¹⁵ *Nebraska Press*, 427 U.S. at 562.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 563-64.

¹¹⁸ *Id.* at 570.

the publicity would make it impossible to find twelve unbiased jurors was based on speculation.¹¹⁹ The trial court had not shown that the publicity “would so distort the views of potential jurors that [twelve] could not be found.”¹²⁰ Only such a showing would have justified an injunction against the press. Second, the petitioner failed to show that there were no other alternatives available to protect the rights of the defendant.¹²¹ The Court also determined that it was not clear that the order would have successfully protected the rights of the defendant because the effect of the publicity on the public was too difficult to predict. Finally, there was no finding pertaining to the effect of the possible alternative measures on the publicity.¹²²

In a separate concurring opinion, Justice Brennan, joined by Justices Stewart and Marshall, advocated an absolute ban on prior restraints on publication of information related to a criminal trial.¹²³ He concluded that, even though the right to a fair trial is one of the most sacred rights,¹²⁴ a prior restraint is an impermissible way to attempt to enforce or protect it.¹²⁵

Settled case law concerning the impropriety and constitutional invalidity of prior restraints on the press compels the conclusion that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained. This does not imply, however, any subordination of Sixth Amendment rights, for an accused’s right to a fair trial may be adequately assured through methods that do not infringe First Amendment values.¹²⁶

Brennan criticized the majority opinion because it created a standard that was almost impossible to meet. The majority concluded that

¹¹⁹ *Id.* at 569.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 572 (Brennan, J., concurring).

¹²⁴ See *Estes v. Texas*, 381 U.S. 532, 540 (1965); *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963). Brennan emphasized that the right to a fair trial has been called “the most fundamental of all freedoms” and that it is “a right essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression.” *Nebraska Press*, 427 U.S. at 586 (Brennan, J., concurring).

¹²⁵ *Nebraska Press*, 427 U.S. at 572 (Brennan, J., concurring).

¹²⁶ *Id.* at 588 (Brennan, J., concurring) (footnote omitted).

speculation about the effect of publicity would not be enough to satisfy the burden needed to defeat the presumption against the prior restraint of the press.¹²⁷ The majority also required that the petitioner show that the publicity would make it impossible to find twelve jurors who could fulfill their duties exclusively on the evidence presented in open court.¹²⁸ In essence, to grant the order a court would have to be convinced that, unless the press is restrained, the information would reach every possible juror and that it would influence them in a way which could not be remedied by jury instructions or other alternative measures. Yet, as the majority admitted, it is almost impossible to determine the future effect of publicity with certainty.¹²⁹ In fact, the effect of publicity cannot be based on anything but speculation until the voir dire. Before the voir dire, a judge cannot predict who will read the information or what effect it will have on the readers. Even in cases where a court believes there is proof of prejudice, it will be difficult to prove that there is not a less dramatic alternative to protect the defendant's rights.¹³⁰

Brennan also warned of the possible consequences of not adopting an absolute rule against prior restraints in this context:

Recognition of any judicial authority to impose prior restraints on the basis of harm to the Sixth Amendment rights of particular defendants, especially since the harm must remain speculative, will thus inevitably interject judges at all levels into censorship roles that are simply inappropriate and impermissible under the First Amendment. . . . The incentives and dynamics of the system of prior restraints would inevitably lead to overemployment of the technique. In order to minimize pretrial publicity against his clients and pre-empt ineffective-assistance-of-counsel claims, counsel for defendants might routinely seek such restrictive orders. Prosecutors would often acquiesce in such motions to avoid jeopardizing a conviction on appeal. And although judges could readily reject many such claims as frivolous, there would be a significant danger that judges would nevertheless be predisposed to grant the motions¹³¹

¹²⁷ *Id.* at 569; *id.* at 604 (Brennan, J., concurring).

¹²⁸ *Id.* at 569.

¹²⁹ *Id.* It is very difficult to know what goes on in the mind of a juror. See *infra* notes 257-75 and accompanying text, for a short discussion of research in the area of the effects of publicity on jurors.

¹³⁰ *Nebraska Press*, 427 U.S. at 600-02 (Brennan, J., concurring).

¹³¹ *Id.* at 607-08 (Brennan, J., concurring).

In sum, Brennan argued that the standard created by the Court could lead to judges becoming prepublication censors, and to an increase in litigation of prior restraint orders, which is precisely what the Court wanted to avoid by creating the standard in the first place. In addition, allowing courts to issue prior restraints could create the possibility of "restraint proceedings collateral to every criminal case before the courts,"¹³² which would create "a significant financial drain on the media involuntarily made parties to these proceedings."¹³³ Eventually, there would be a chilling effect because media organizations would begin to fear the risks of publication.¹³⁴

In a separate concurring opinion, Justice White stated that it was difficult to see how the standard created by the decision could ever be met, but that he would wait for more cases before suggesting the adoption of an absolute rule.¹³⁵ However, he admitted that if the result in case after case were always the same, the Court should at some point announce a more general rule and avoid the "interminable litigation."¹³⁶

In the long run, the standard created by the Court could lead to the abandonment of the use of prior restraints against the press in the fair trial context because courts and litigants would realize that the test is insurmountable. Ironically, it could also lead to the opposite result: an increase in the use of injunctions against the press. By concluding that there is a possibility that a case may meet the *Nebraska Press* test, lower courts could be persuaded, or even compelled, to grant temporary orders while they determine if in fact the case before them does comply with the standards. The consequences of this trend would be higher litigation costs, both in terms of money and time, and temporary delays in the publication of information, all of which would affect freedom of the press.

III. THE ABA STANDARDS FOR CRIMINAL JUSTICE

The debate about freedom of the press and fair trials received increased national attention in 1963, after the assassination of Lee Harvey

¹³² *Id.* at 608 (Brennan, J., concurring).

¹³³ *Id.* (Brennan, J., concurring).

¹³⁴ In Brennan's words: "Indeed, small news organs on the margin of economic viability might choose not to contest even blatantly unconstitutional restraints or to avoid all crime coverage, with concomitant harm to the public's right to be informed of such proceedings." *Id.* (Brennan, J., concurring).

¹³⁵ *Id.* at 570-71 (White, J., concurring).

¹³⁶ *Id.* (White, J., concurring).

Oswald. The Report of the Commission on the Assassination of President Kennedy (the Warren Report) criticized the news media for its role in creating the publicity surrounding the allegations against Oswald.¹³⁷ In fact, the Warren Commission expressed doubts that he could ever have received a fair trial¹³⁸ and concluded: "The courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man accused of a crime."¹³⁹ The report recommended the creation of ethical standards for publicity to avoid interference with criminal investigations and the rights of defendants.¹⁴⁰

In response to the recommendations of the Warren Commission and the decision in *Sheppard*, the Judicial Conference of the United States conducted a study and suggested two areas of concern for trial courts: release of information to the press by attorneys and other trial participants, and the regulation of trial proceedings to protect jurors from prejudicial influences.¹⁴¹ Likewise, the ABA appointed a committee to develop standards to regulate the criminal justice system.¹⁴² During the next four years the committee worked on the standards and presented a

¹³⁷ The report mentioned incriminating, but inadmissible, evidence published by the press which could have affected the fairness of the trial, such as alleged statements by Oswald's wife and his refusal to take a lie detector test. THE WARREN COMMISSION, REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 238 (1964). The report concluded that the press' curiosity should not be satisfied at the expense of the accused's right to a trial by an impartial jury. *Id.* at 240.

¹³⁸ *Id.* at 239 ("The Commission agrees that Lee Harvey Oswald's opportunity for a trial by 12 jurors free of preconception . . . would have been seriously jeopardized by the premature disclosure and weighing of the evidence against him.").

¹³⁹ *Id.* at 240.

¹⁴⁰ *Id.* at 27.

¹⁴¹ *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue of the Judicial Conference of the United States*, 45 F.R.D. 391, 401 (1968). Interestingly, the Committee did not recommend any direct curb or restraint on publication by the press. *Id.*

¹⁴² The recommendations of this committee (usually referred to as the Reardon Committee because it was chaired by Justice Paul Reardon of the Supreme Court of Massachusetts) were published as ABA ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS (1968). The recommendations were later adopted by the ABA as part of its *Standards for Criminal Justice*. These recommendations were based on the conclusion that too much publicity about a trial can have a prejudicial effect on the fairness of the process. The report has been criticized, however, because it did not support this finding with any evidence from experiments, available at the time, about the effect of publicity on jurors, nor did the committee attempt to conduct its own experiments. It based its conclusions on the results of a questionnaire sent to attorneys and judges. *See* Benno C. Schmidt, Jr., *Nebraska Press Association: An Expansion of Freedom and Contraction Theory*, 29 STAN. L. REV. 431, 446-47 (1977).

draft to the ABA House of Delegates in 1968.¹⁴³ The standards included a chapter on the issue of "fair trial and free press," which included sections on the conduct of attorneys and judges during trials, and on the conduct of the judicial proceedings.¹⁴⁴ Most of these standards were based on the remedial recommendations of the Supreme Court in *Sheppard*.¹⁴⁵ For example, the ABA recommended the exclusion of the public from pretrial hearings,¹⁴⁶ hearings outside the presence of the jury, continuances, changes of venue, control of the trial participants, and the use of voir dire to minimize the effect of publicity on the jurors.¹⁴⁷

¹⁴³ STANDARDS FOR CRIMINAL JUSTICE (American Bar Ass'n 1978). Ten standards were approved in 1968, three in 1970, two in 1971, one in 1972, and the rest in 1973. STANDARDS (SECOND) FOR CRIMINAL JUSTICE at xx, xxii (American Bar Ass'n 1980) [hereinafter ABA STANDARDS 2D]. The introduction to the second edition of the standards explains that they are intended to be a balanced attempt "to walk the fine line between the protection of society and the protection of constitutional rights of the accused individual." *Id.* at xxii. They are not model codes nor rules for jurisdictions.

[T]hey are guidelines and recommendations intended to help criminal justice planners design a system, set goals and priorities to achieve it, and propose procedures for adoption by the legislature, courts, and practitioners to operate and keep it viable — all targeted toward achieving a criminal justice system that is fair, balanced, and constitutionally responsive to the needs of today and the future.

Id. at xx. Jurisdictions are free to adopt the standards and choose to implement them in various ways, such as translating them into a code, rules of court or of practice, or by encouraging judicial officers to look to the standards as authority in deciding appropriate cases. *Id.* at xix.

These standards, however, are not the first attempt by the ABA to solve the problems created by high publicity during trials. In 1936, in response to incidents during the trial of Bruno Hauptmann, *see supra* note 67, the ABA formed a special committee to study the effects of publicity on trials. The committee eventually proposed sixteen recommendations, most of which were directed at limiting the amount of information given by trial participants. Portman, *supra* note 67, at 397. However, the committee did not make any recommendations regarding pretrial publicity generated by police or non-attorney law enforcement officers. *Id.* at 398. The committee also failed to emphasize the duty and powers of the trial courts to protect the rights of defendants. *Id.*

¹⁴⁴ *See generally* ABA STANDARDS 2D, *supra* note 143, ch. 8.

¹⁴⁵ *Id.* at introduction to ch. 8, at 4-5.

¹⁴⁶ This exclusion would now be declared unconstitutional. In *Press-Enterprise Co. v. Superior Court (II)*, 478 U.S. 1 (1986), the Supreme Court decided that there is a qualified First Amendment right of access to pretrial proceedings.

¹⁴⁷ ABA STANDARDS 2D, *supra* note 143, at 37-47.

The first edition of the ABA Standards, published in 1968, did not contain any sections on direct restraint of the media, but eight years later, in response to *Nebraska Press*, the ABA Standing Committee on Criminal Justice revised its standards and created Standard 8-3.1.¹⁴⁸ However, the standard was not in accord with the decision of the Supreme Court because it precluded any and all prior restraint orders on the press.¹⁴⁹ Reasoning that the rule created by the Court in *Nebraska Press* was only a step away from such an absolute ban,¹⁵⁰ the ABA decided that it would be better to adopt a complete ban on prior restraints:

This standard [ABA Standard 8-3.1] categorically prohibits any judicial measure that seeks to prevent the press from publishing information in its possession relating to a criminal case. The circumstances under which prior restraints could constitutionally be imposed are extremely limited after the Supreme Court's decision in *Nebraska Press [Ass'n] v. Stuart*. Rather than invite courts to probe the limits of the First Amendment in this area and thereby intensify conflicts with the press, it is preferable to close the door entirely to the alternative of prior restraints.¹⁵¹

In 1991, however, the ABA again revised its standards for criminal justice,¹⁵² and abandoned this total ban for a "clear and present danger test."¹⁵³ The ABA retreated from its prior position and decided to "conform more closely to the accepted legal standard"¹⁵⁴ because a "nearly absolute" ban "is not an absolute ban."¹⁵⁵ The commentary to the new standard attempted to explain the change in direction:

¹⁴⁸ *Id.* at Standard 8-3.1, at 28 (1978).

¹⁴⁹ Standard 8-3.1, "Prohibition on Direct Restraints on Media," states: "No rule of court or judicial order shall be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case."

¹⁵⁰ *Id.* at 29-31.

¹⁵¹ *Id.* at 29 (citation omitted).

¹⁵² ABA STANDARDS 3D, *supra* note 27.

¹⁵³ The new Standard 8-3.1 states: "Absent a clear and present danger to the fairness of a trial or other compelling interest, no rule of court or judicial order should be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case." *Id.* at 19.

¹⁵⁴ *Id.* at 20.

¹⁵⁵ *Id.* at 20 n.3 (citation omitted).

[T]he change must be understood as more formalistic than substantive. The standard is still intended to reflect a policy of near-absolute prohibition of prior restraints on publishing. . . . *Nebraska Press* has aged better than expected as the leading guardian of a free press. It has largely brought to a halt the widespread abuse of prior restraints in the early 1970's. . . . The clear-and-present danger safeguards to a free press therefore appear sufficient.¹⁵⁶

The change within the ABA illustrates the two possible consequences discussed by Justice Brennan in *Nebraska Press*. The ABA initially suggested a complete ban on the use of restraints on the press. Then the ABA changed its position and recommended using the restraints, thus opening the door for abuses. This, unfortunately, seems to be the tendency among the courts in recent years.

IV. PRIOR RESTRAINT AND FAIR TRIALS SINCE *NEBRASKA PRESS*

Contrary to the conclusions of the ABA committee, *Nebraska Press* has not aged gracefully. Since the case was decided, courts have been struggling with the standard created by the Supreme Court to determine the constitutionality of prior restraints on pretrial publicity. Although the standard imposes a very difficult burden of proof on the petitioner, criminal defendants routinely request protective orders, gag orders on attorneys and other trial participants,¹⁵⁷ and restraining orders on the media.¹⁵⁸ The fact that *Nebraska Press* concluded that an injunction could be justified in some cases has motivated many lower courts to issue temporary restraining orders while they decide whether to issue permanent ones. The fact is, however, that in the twenty-five years following *Nebraska Press* only two restraining orders have survived constitutional

¹⁵⁶ *Id.* at 20 (citations omitted).

¹⁵⁷ In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Court suggested the use of orders controlling the flow of information from trial participants as a possible solution to the problem created by pretrial publicity. *Id.* at 361-62. The Court has implied that this type of order does not have the effect of a prior restraint. *See supra* note 97 and accompanying text.

¹⁵⁸ *See infra* note 160 for a list of cases in which courts have denied or vacated prior restraint orders on the media in the fair trial context.

attack.¹⁵⁹ In all other cases, the orders were either denied or reversed on appeal.¹⁶⁰

¹⁵⁹ See *United States v. Noriega (In re Cable News Network)*, 917 F.2d 1543 (11th Cir.), *cert. denied sub. nom. Cable News Network v. Noriega*, 498 U.S. 976 (1990), discussed *infra* notes 194-216 and accompanying text; *KUTV v. Wilkinson*, 686 P.2d 456 (Utah 1984). The *KUTV* court was the first court to allow a prior restraint order under the *Nebraska Press* test. The trial court issued a temporary restraining order and later held a hearing to determine whether it would issue a restraining order prohibiting the news media from reporting on a criminal defendant's alleged connections to the Mafia. After deciding that there were no alternatives to a restraining order, the court issued an order enjoining the press until the jury had retired to deliberate. *Id.* at 461. The court decided that sequestration was not a reasonable alternative because of the costs involved and the amount of time the jurors would have to be confined. *Id.* at 460. Sequestering the jury and constantly admonishing them through *voir dire* were also rejected as alternatives because they could prejudice the jury against the defendant. *Id.*

In *KUTV*, however, the court actually misapplied the *Nebraska Press* standard. With no evidence to support it, the court speculated that repeated warnings and sequestration would prejudice the jury against the defendant. *Id.* See also *id.* at 463 (Stewart, J., dissenting) (arguing that if a finding of prejudice to the defendant could be based on no supporting evidence, similar findings could be made in every case involving prejudicial publicity and sequestration would virtually never be appropriate). Stewart also took issue with the majority's speculation that the publicity would taint all future jurors, when it was not even clear that it had tainted the jurors who were excused in the first place. *Id.* (Stewart, J., dissenting). The court also considered that the inconvenience caused by sequestration outweighed the First Amendment rights of the press. *Id.* at 460. However, considerations of cost and inconvenience are not valid reasons to enjoin the press under the *Nebraska Press* analysis. In the end, while affirming the trial court by asserting that it had substantiated its finding on the *Nebraska Press* standard, the court actually engaged in the speculation *Nebraska Press* repudiated. In addition, the court added a fourth element to the analysis under the Utah Constitution: the degree of public interest in immediate access to the information to be published. *Id.* at 462. The court then concluded that there was no significant public interest in the information in question. *Id.* In so doing, of course, the court violated one of the most basic principles of First Amendment jurisprudence — it invaded the decision-making process of the editors and became a prepublication censor with the power to decide what information could and should be published by the news media. Therefore, at least in this particular case, it was an erroneous application of the *Nebraska Press* standard which led to the wrong result.

On another occasion, a court interpreted an apparent prior restraint order to be a constitutional restriction on time and place and did not discuss the prior restraint doctrine. *Tsokalas v. Purtil*, 756 F. Supp. 89 (D. Conn. 1991) (ordering confiscation of a sketch artist's drawing to prevent its publication).

¹⁶⁰ See, e.g., *CBS v. Davis*, 114 S. Ct. 912 (1994); *In re Charlotte Observer*, 921 F.2d 47 (4th Cir. 1990); *In re King World Productions*, 898 F.2d 56 (6th Cir. 1990); *Hunt v. NBC*, 872 F.2d 289 (9th Cir. 1989); *In re Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986), *modified* 820 F.2d 1354 (1st Cir. 1987), *cert. dismissed*, 485 U.S. 693 (1988); *CBS v. U.S. District Court*, 729 F.2d 1174 (9th Cir. 1984); *Goldblum v. NBC*, 584 F.2d 904 (9th Cir. 1978); *Jones v. Turner*, 23 Media L. Rep. (BNA) 1122 (S.D.N.Y. 1995);

The decisions in some of these cases clearly illustrate the inadequacy of the *Nebraska Press* standard and the need to adopt a new absolute rule. The first indication comes from the fact that it is almost impossible to meet the standard. Secondly, it would be unconstitutional for a court to require the press to produce the information prior to publication for the court to decide whether the standard is met. Finally, it would also be unconstitutional to stay the publication to take the time to decide whether the standard is met. Given these problems, needless litigation and injury to the First Amendment could be avoided by adopting an absolute rule.

V. THE IMPOSSIBLE STANDARD

The *Nebraska Press* standard is almost impossible to meet because rarely can a defendant convince a court that twelve impartial jurors cannot be found, or that alternative measures will not eliminate the risks created by the publicity. Indeed, in some of the most publicized murder

Menendez v. Fox Broadcasting Co., No. 94-233-9R, 1994 WL 525520 (C.D. Cal. Apr. 19, 1994); *Corbitt v. NBC*, 20 Media L. Rep. (BNA) 2037 (N.D. Ill. 1992); *Fort Wayne Journal Gazette v. Baker*, 788 F. Supp. 379 (N.D. Ind. 1992); *Lambert v. Polk County*, 723 F. Supp. 128 (S.D. Iowa 1989); *In re CBS, Inc.*, 570 F. Supp. 578 (E.D. La. 1983), *appeal dismissed sub nom. United States v. McKenzie*, 735 F.2d 907 (5th Cir. 1984); *KCST-TV Channel 39 v. Municipal Court*, 246 Cal. Rptr. 869 (Ct. App. 1988); *State v. Lynch*, 1989 WL 112545 (Del. Super. Ct. Sept. 26, 1989); *Gardner v. Bradenton Herald, Inc.*, 413 So. 2d 10 (Fla.), *cert denied*, 459 U.S. 865 (1982); *Clear Channel Communications, Inc. v. Murray*, 636 So. 2d 818 (Fla. Dist. Ct. App. 1994); *Times Publishing Co. v. Florida*, 632 So. 2d 1072 (Fla. Dist. Ct. App. 1994); *Florida Publishing Co. v. Brooke*, 576 So. 2d 842 (Fla. Dist. Ct. App. 1991); *Miami Herald Publishing Co. v. Morphonios*, 467 So. 2d 1026 (Fla. Dist. Ct. App. 1985); *Des Moines Register and Tribune Co. v. Osmundson*, 248 N.W.2d 493 (Iowa 1976); *State ex rel. New Mexico Press Ass'n v. Kaufman*, 648 P.2d 300 (N.M. 1982); *Wittek v. Cirigliano*, 576 N.Y.S.2d 527 (App. Div. 1991); *Hays v. Marano*, 493 N.Y.S.2d 904 (App. Div. 1985); *State ex rel. Chillicothe Gazette, Inc. v. Ross County Court of Common Pleas*, 442 N.E.2d 747 (Ohio 1982); *KUTV, Inc. v. Conder*, 668 P.2d 513 (Utah 1983).

For cases denying or vacating prior restraint orders related to the publication of information about juvenile delinquency proceedings, see *In re Lifetime Cable*, 17 Media L. Rep. (BNA) 1648 (D.C. Cir.), *cert. denied sub nom. Foretich v. Lifetime Cable*, 498 U.S. 847 (1990); *KGTV Channel 10 v. Superior Court*, 32 Cal. Rptr. 2d 181 (Ct. App. 1994); *San Bernadino County Dep't of Public Social Services v. Superior Court*, 283 Cal. Rptr. 332 (Ct. App. 1991); *In re Minor*, 537 N.E.2d 292 (Ill. 1989); *Minneapolis Star & Tribune Co. v. Schmidt*, 360 N.W.2d 433 (Minn. Ct. App. 1985); *Minneapolis Star & Tribune Co. v. Lee*, 353 N.W.2d 213 (Minn. Ct. App. 1984); *New Jersey ex rel. HN*, 632 A.2d 537 (N.J. Super. Ct. App. Div. 1993); *Edward A. Sherman Publishing Co. v. Goldberg*, 443 A.2d 1252 (R.I. 1982); *State ex rel. Register-Herald v. Canterbury*, 449 S.E.2d 272 (W. Va. 1994).

trials of recent years the courts either did not feel the need to issue restraining orders or rejected the requested orders as unconstitutional prior restraints. In *Menendez v. Fox Broadcasting Co.*, for example, a federal district court refused to enjoin Fox Broadcasting from airing a docudrama based on the lives and murder trial of Erik and Lyle Menendez while they were awaiting retrial.¹⁶¹ The Menendez brothers were accused of murdering their parents in a highly publicized case, and were the subjects of the docudrama *Honor Thy Father and Mother: The True Story of the Menendez Murders*.¹⁶² Even with such a suggestive title,¹⁶³ the court did not agree that the program would so severely taint the jury pool that it would deny the defendants their right to a fair trial.¹⁶⁴ The *Menendez* court concluded that it did not have to stay publication to conclude that none of the factors required by *Nebraska Press* was satisfied. The court was confident that the trial judge could find jurors and could mitigate any effect of the publicity by using voir dire and jury instructions.¹⁶⁵

In the notorious *State v. Smith* trial, in which William Kennedy Smith, nephew of Senator Edward Kennedy, was tried for sexual battery, the Florida Circuit Court did not even attempt to limit media coverage.¹⁶⁶ The media frenzy that surrounded this trial led the defendant's attorney to argue that it would be difficult for a jury to be impartial. The court used some of the alternative measures suggested by the Supreme Court in *Nebraska Press* to avoid a violation of the defendant's Sixth Amendment rights, but it did not impose a prior restraint on the press. The trial was conducted and televised all over the nation and the defendant was found not guilty. This case raises doubts as to whether the standard imposed by *Nebraska Press* is necessary. If the court in *Smith* could be convinced that twelve impartial jurors could be found, it is difficult to think of a case where this would not be possible.

Even in cases where the publicity included direct evidence of the crimes for which the defendants were to be tried, courts have held the proposed restraining orders unconstitutional. In *CBS v. United States*

¹⁶¹ *Menendez v. Fox Broadcasting Co.*, No. 94-2339R, 1994 WL 525520, at *2 (C.D. Cal. Apr. 19, 1994).

¹⁶² *Id.* at *1.

¹⁶³ The petitioners originally requested a restraining order postponing the broadcast of the movie, but in the alternative they requested that the court order Fox to change the title of the docudrama by eliminating the terms "murder" and "true story." *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *State v. Smith*, 91-5482-CF-A02 (Fla. Cir. Ct. 1991). See Stephen, *supra* note 18, at 1079-80 (discussing *Smith* and the media attention it generated).

District Court, for example, the court held that an order to ban the broadcast of surveillance tapes in the case against famous automobile industrialist John DeLorean was an unconstitutional prior restraint.¹⁶⁷ The FBI surveillance video tapes showed DeLorean committing the crime for which he was being tried.¹⁶⁸ Joined by the prosecution, DeLorean filed a petition for an order to prohibit the broadcast, alleging that showing him committing the crime for which he was being tried would affect his right to a fair trial.¹⁶⁹ After considering the *Nebraska Press* standard, the district court found that publication of the tapes would affect the defendant's right to a fair trial and entered a temporary restraining order delaying publication.¹⁷⁰ The court reasoned that the petitioner had met the burden of proof required under *Nebraska Press* because:

(1) . . . this case has generated "enormous, incessant and continually increasing publicity" and, consequently, release of the government tapes would have a "devastating effect"; (2) . . . "there is absolutely no method . . . to remove the taint upon the minds of potential jurors"; and (3) implicitly, . . . an order restraining CBS from broadcasting the tapes would adequately guard against the threatened danger.¹⁷¹

The court of appeals reversed, rejecting the trial court's conclusions that showing the tapes on television would affect the defendant's right to a fair trial and that there were no other alternatives available.¹⁷² It held that the restraining order had been based on speculation about the effect of publicity. Given that the trial was held in the Los Angeles area, the court concluded that it was not clear that the publicity would actually prejudice the entire pool of available jurors, making it impossible to find twelve impartial ones.¹⁷³ The court also found that there were several alternative methods to avoid a violation of the defendant's rights, such as a strong *voir dire*.¹⁷⁴

¹⁶⁷ 729 F.2d 1174, 1176 (9th Cir. 1983).

¹⁶⁸ *Id.* at 1179.

¹⁶⁹ *Id.* at 1176.

¹⁷⁰ *Id.* at 1178-79.

¹⁷¹ *Id.* (citing the district court opinion).

¹⁷² *Id.* at 1176, 1180.

¹⁷³ *Id.* at 1180-81. The court stated: "Thus it is not enough that publicity might prejudice one directly exposed to it. If it is to be restrained, the publicity must threaten to prejudice the entire community so that twelve unbiased jurors can not be found." *Id.* at 1180.

¹⁷⁴ *Id.* at 1181.

Taken together, highly publicized cases where the courts did not issue injunctions against the press and cases where the orders were declared invalid lead to the conclusion that the *Nebraska Press* standard can never be met, or that it is not really necessary to guarantee the rights of criminal defendants to a fair trial.¹⁷⁵ In *Nebraska Press* itself, the Court dealt with a highly publicized gruesome crime in a community of less than a thousand people, yet the Court concluded it would be speculation to say that twelve unbiased jurors could not be found.¹⁷⁶ In *CBS v. United States District Court*, the publicity involved video tapes of the criminal activity for which the defendant was being tried.¹⁷⁷ Arguably, there cannot be a more prejudicial piece of publicity than a video tape of the defendant committing the crime for which he or she will be tried. Indeed, as the court stated in *CBS*, if the test is applied as explained by the Supreme Court, "there may be no reason for courts ever to conclude that traditional methods are inadequate and that the extraordinary remedy of prohibiting expression is required."¹⁷⁸

VI. ORDERS TO PRODUCE THE INFORMATION FOR REVIEW BY THE COURT

In his opinion in *Nebraska Press*, Justice Brennan warned that the standard created by the Court could lead to a shift in the burden of proof and to courts becoming prepublication censors.¹⁷⁹ This, precisely, is the second reason why the *Nebraska Press* standard has not aged gracefully.

¹⁷⁵ There are many other high publicity cases that could be used to substantiate this argument. For example, the case of former Attorney General John Mitchell was heavily publicized, and a private survey showed 84% of those who had heard of the case thought Mr. Mitchell was guilty. Yet, he was eventually acquitted. See Gene S. Graham, *From the Press*, in *THE JURY SYSTEM IN AMERICA* 199, 202 (R. Simon ed., 1975), cited in *CBS v. United States District Court*, 729 F.2d 1174, 1181 (9th Cir. 1983). Apparently, even in such a clearly biased atmosphere a prior restraint order was not needed to guarantee a fair trial. Likewise, in 1990, broadcasters all over the United States showed a surveillance tape of Marion Barry, then the mayor of Washington D.C., engaging in an illegal drug transaction. Even though the tape of the transaction, the investigation, and the trial itself received extensive media coverage, the court did not see the need to impose any restraints on the press. See Paul Valentine, *Analyst Calls Quality of Tape "Actually Pretty Good"*, WASH. POST, July 2, 1990, at D7; Juan Williams, *Barry's Victims*, COURIER-JOURNAL (Louisville), July 5, 1990, at 7A.

¹⁷⁶ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 569 (1976).

¹⁷⁷ 729 F.2d 1174, 1176 (9th Cir. 1983).

¹⁷⁸ *Id.* at 1183.

¹⁷⁹ See *supra* notes 131-34 and accompanying text.

History has proven that Brennan was right. *In re CBS*¹⁸⁰ exemplifies the problem. In this criminal case, the defendants requested an order to ban the broadcast of a segment on the program *60 Minutes*, arguing that the order was needed because the courts had already tried alternative measures to avoid interference with their right to a fair trial.¹⁸¹ The venue had been changed once already and the trial had been continued several times. In fact, at the time of the request for the order, the case was two years old.¹⁸² The venue for the trial had been changed to Dallas and the *60 Minutes* program was scheduled to be broadcast after a nationally televised Dallas Cowboys football playoff game.¹⁸³ Given that *Nebraska Press* suggested that there may be cases where a restraint should be allowed, the court felt it needed to review the evidence to reach a conclusion as to the constitutionality of the requested order. Therefore, in an attempt to determine whether the *Nebraska Press* standard would be met, the court ordered CBS to produce a copy of the program to check its accuracy and to determine the possible effects of the publicity.¹⁸⁴ CBS refused, and was held in criminal contempt.¹⁸⁵

The criminal contempt order was vacated later and the court held that the order to produce the video tape had been an invalid prior restraint on the press.¹⁸⁶ The court had acted as a prepublication censor and therefore interfered with the First Amendment rights of the press because it subjected the broadcast to the court's permission.¹⁸⁷ Moreover, the court did not have to review the tape since it had concluded that there was only a "slight chance" that the broadcast would prevent the impaneling of an impartial jury and that it was "very unlikely" that it would issue a restraining order. The fact is that the trial court did not have to inspect the video tape to be able to conclude that twelve jurors probably could be found in a city of 3.6 million residents.¹⁸⁸

¹⁸⁰ 570 F. Supp. 578 (E.D. La. 1983), *appeal dismissed sub nom.* United States v. McKenzie, 735 F.2d 907 (5th Cir. 1984).

¹⁸¹ *Id.* at 579.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 582.

¹⁸⁵ *Id.* at 579. See *infra* notes 217-56 and accompanying text, for a discussion of the chilling effect that the threat of contempt orders has on the press.

¹⁸⁶ *In re CBS*, 570 F. Supp. at 583.

¹⁸⁷ *Id.* at 581-82.

¹⁸⁸ *Id.* at 582-83. CBS offered an uncontroverted affidavit indicating that an average of three million Dallas residents did not watch *60 Minutes*. *Id.* In United States v. Noriega (*In re Cable News Network*), 917 F.2d 1543 (11th Cir.), *cert. denied sub. nom.* Cable News Network v. Noriega, 498 U.S. 976 (1990), discussed *infra* notes 194-208 and

Ironically, in trying to do what the Supreme Court has held that the Constitution requires courts to do, the district court ended up violating the Constitution.

Similarly, in *Goldblum v. NBC*,¹⁸⁹ the Court of Appeals for the Ninth Circuit vacated an order instructing NBC to produce a film so the court could “view it for inaccuracies.”¹⁹⁰ Evidently, the trial court issued the order because it felt the need to review the evidence before deciding whether the *Nebraska Press* standard had been met.¹⁹¹ Yet, the appeals court held it was an invalid prior restraint because it was issued for the sole purpose of determining whether the court should prohibit broadcast of the film.¹⁹² The court concluded:

It is a fundamental principle of the [F]irst [A]mendment that the press may not be required to justify or defend what it prints or says until after the expression has taken place. The Government has been prohibited from interfering with the editorial process by entering the composing room to give directives as to the content of expression. The district court proceedings here intervened in the editorial process. . . . A procedure thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech.¹⁹³

Evidently, the need to determine whether the requested order can be issued under the *Nebraska Press* standard can lead a court to violate the Constitution. In *Goldblum* and *In re CBS*, the courts remedied this

accompanying text, the first case where a federal court allowed a prior restraint under the *Nebraska Press* standard to survive, the trial was going to be held in a forum with a population of over 3.1 million people. The jury pool probably had over one million people. Eric M. Schweiker, *United States v. Noriega: Conflicts Between the First Amendment and the Rights to a Fair Trial and Privacy*, 1993 U. CHI. LEGAL F. 369, 375 (1993).

¹⁸⁹ 584 F.2d 904 (9th Cir. 1978). In this case, the petitioner asked the court to prohibit NBC from broadcasting a film based on the events leading to his trial. He argued that the film would show a false portrayal of him and would jeopardize his appeal, his chances for parole, and his rights to a fair trial in a possible future criminal trial and in a current civil trial. *Id.* at 905. The court ordered NBC to produce the film but NBC refused, arguing that the order violated its First Amendment rights. The court then ordered the imprisonment of NBC’s attorney until NBC produced the film. *Id.* at 906.

¹⁹⁰ *Id.* The “screening” would take place just 12 hours before the film’s scheduled broadcast.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 907 (citations omitted).

violation. In *United States v. Noriega*¹⁹⁴ they did not. In *Noriega*, CNN planned to broadcast six recordings of telephone calls made by Panamanian General Manuel Noriega from his prison cell.¹⁹⁵ Joined by the prosecution, Noriega requested a restraining order. Reasoning that it needed to review the evidence to decide whether to issue a restraining order, the court ordered CNN to produce the recordings.¹⁹⁶ At the time he requested the restraining order, Noriega had not overcome the burden of proof required of parties seeking to impose a prior restraint on the media. By ordering CNN to produce the tapes, the court shifted the burden of proof to the media to show why the prior restraint should not be issued. Once again, the court actually issued a temporary prior restraint on publication to determine whether it would issue a permanent one.

The trial judges in *Goldblum*, *In re CBS*, and *Noriega* attempted to apply the *Nebraska Press* standard. They tried to avoid speculating about the character of the publicity at stake by getting access to it. Yet, the orders they issued were unconstitutional because they shifted the burden of proof onto the press to prove that the information would not affect the defendant and banned publication of protected speech until it was cleared by the court. In effect, they became prepublication censors. Following the reasoning in *Near* and *Nebraska Press*, the judges should have realized that their decisions were unconstitutional.¹⁹⁷ Once again, however, in attempting to meet the *Nebraska Press* standard, the courts instead violated the Constitution.

¹⁹⁴ *United States v. Noriega (In re Cable News Network)*, 917 F.2d 1543 (11th Cir.), cert. denied sub. nom. *Cable News Network v. Noriega*, 498 U.S. 976 (1990).

¹⁹⁵ *Id.* at 1545.

¹⁹⁶ *United States v. Noriega*, 752 F. Supp. 1032, 1035 (S.D. Fla. 1990). Upon CNN's insistence that the court look to the government for production of the tapes, the court ordered the government to produce a log of the calls. The log showed several times more than the amount of calls CNN was planning to broadcast. The judge told CNN he could review the government tapes but this would prolong the time during which CNN could not publish. *Id.* at 1035-36. The court held:

It seems fundamentally unfair to allow CNN to benefit from its refusal to disclose the contents of the tapes to the court — that is, to allow CNN to argue that no prior restraint should issue because no clear and immediate harm is apparent when the only reason that no clear and immediate harm yet appears is because CNN has so far prevented this court from reviewing the content of the tapes in its possession.

Id. at 1035.

¹⁹⁷ In the case of *Noriega*, the judge also had *CBS v. U.S. District Court*, 729 F.2d 1174 (9th Cir. 1984), *In re CBS, Inc.*, 570 F. Supp. 578 (E.D. La. 1983), *appeal dismissed sub nom. United States v. McKenzie*, 735 F.2d 907 (5th Cir. 1984), and *Goldblum v. NBC*, 584 F.2d 904 (9th Cir. 1978), as authority.

VII. THE USE OF TEMPORARY RESTRAINING ORDERS

The third reason for abandoning the *Nebraska Press* standard is that in an honest attempt to decide whether to issue an injunction, courts are issuing unconstitutional temporary restraining orders, suggesting they are valid because they are only temporary.¹⁹⁸ The fallacy of this analysis lies in the fact that to be effective, a temporary order must prevent all speech while the court determines whether or not the information should be banned. The temporary order has an immediate suppression effect on the dissemination of ideas and thus operates as a prior restraint.

This problem is best exemplified by *United States v. Noriega*.¹⁹⁹ There, the District Court for the Southern District of Florida granted Noriega's request to ban the broadcast by CNN of six recordings of telephone calls made by Noriega from his prison cell.²⁰⁰ The issue for the court was the same one found in all the fair trial-prior restraint cases: the judge had a duty to protect the rights of the defendant and had to apply the *Nebraska Press* standards to decide whether to issue a prior restraint order. Given that *Nebraska Press* had held that there could be a case where a prior restraint would be acceptable, the judge felt he needed to examine the tapes to determine whether this was the rare case in which a prior restraint could be constitutionally valid.²⁰¹ Therefore,

¹⁹⁸ See, e.g., *United States v. Noriega (In re Cable News Network)*, 917 F.2d 1543 (11th Cir.), cert. denied sub. nom. *Cable News Network v. Noriega*, 498 U.S. 976 (1990); *CBS v. U.S. District Court*, 729 F.2d 1174 (9th Cir. 1984); *Goldblum v. NBC*, 584 F.2d 904 (9th Cir. 1978); *In re CBS, Inc.*, 570 F. Supp. 578 (E.D. La. 1983), appeal dismissed sub. nom. *United States v. McKenzie*, 735 F.2d 907 (5th Cir. 1984).

¹⁹⁹ 752 F. Supp. 1032 (S.D. Fla. 1990).

²⁰⁰ *Id.* at 1038-39.

²⁰¹ *Id.* at 1033-34. The court made it clear that the basis for its decision was the fact that the Supreme Court in *Nebraska Press* had refused to issue a per se rule against the constitutionality of prior restraint orders in fair trial cases. *Id.* at 1034. The court stated that even though the Supreme Court had held that prior restraints come to the courts with a heavy presumption against their validity and that not once had a federal court upheld one yet, "[t]his does not mean, however, that there is no situation in which a prior restraint on the press is justified. Among the very narrow range of cases which may justify a restraint are those involving a criminal defendant's right to a fair trial." *Id.* at 1033-34. This reasoning is again well explained by the court in its opinion deciding that the tapes did not contain any information that would affect the defendant's right to a fair trial. See *id.* at 1050. Here the court described CNN's argument as resting on an absolutist view that prior restraints are per se unconstitutional under the First Amendment because it refused to allow the court to undertake the balancing required by *Nebraska Press*, while the Supreme Court had already rejected the argument that prior restraints would be per se unconstitutional. *Id.* The court concluded: "Keeping in mind that prior restraints are

as in some of the cases discussed above, the court issued a temporary restraining order postponing broadcast of the tapes and ordering CNN to produce them so that the court could decide whether a permanent injunction should be issued. The judge was careful, however, to distinguish his action from a restraining order. He explained that he was only trying to maintain the "status quo" until the evidence was reviewed and the *Nebraska Press* standard applied.²⁰² The court concluded that CNN's arguments were inherently contradictory because, on the one hand, CNN demanded findings to determine the validity of the injunction while denying the court the evidence needed to make the determination.²⁰³ The court of appeals upheld the decision, but not under a prior restraint standard.²⁰⁴ Even though this was the first time that a federal court had allowed a prior restraint to stand, the Supreme Court denied review over the strong dissent of Justices Marshall and O'Connor.²⁰⁵

presumptively unconstitutional and are the measure of last resort, *the court is nevertheless required to undertake this constitutional balancing.*" *Id.* at 1050 (emphasis added).

²⁰² See *id.* at 1036; see also *United States v. Noriega (In re Cable News Network)*, 917 F.2d 1543, 1546 (11th Cir.), *cert. denied sub. nom. Cable News Network v. Noriega*, 498 U.S. 976 (1990). The judge justified his reasoning in his written opinion rejecting the requested injunction after reviewing the tapes:

The court emphasizes again that its temporary restraint on the broadcast of Noriega's attorney-client conversations was not a determination on the merits — the court had *not* then concluded that Noriega's Sixth Amendment right to a fair trial outweighed CNN's First Amendment right to be free of prior restraints on publication, nor even that Noriega's right to a fair trial would be harmed by disclosure of his attorney-client conversations. Rather, the court's orders were entered for the very limited purpose of maintaining the status quo until the court could determine whether this was one of the narrow class of cases in which a prior restraint might be justified.

United States v. Noriega, 752 F. Supp. 1045, 1051 (S.D. Fla. 1990).

²⁰³ *Id.* at 1049.

²⁰⁴ *United States v. Noriega (In re Cable News Network)*, 917 F.2d 1543 (11th Cir.), *cert. denied sub. nom. Cable News Network v. Noriega*, 498 U.S. 976 (1990). The court concluded that "the District Court must *delineate carefully* its reasons for proscribing the broadcast of the tapes in question, guided by the three considerations of *Press-Enterprise II.*" *Id.* at 1550. Inexplicably, the court analyzed the Supreme Court cases that recognized a First Amendment right of access to criminal trials, see *supra* note 13, and balanced this interest with the state interest in protecting the Sixth Amendment right to a fair trial. This was not the correct analysis to use in this case, because the issue was not one of access to the trial but one of prior restraint under *Nebraska Press*. See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* (1992); Lance R. Peterson, *A First Amendment — Sixth Amendment Dilemma: Manuel Noriega Pushes the American Judicial System to the Outer Limits of the First Amendment*, 25 J. MARSHALL L. REV. 563 (1992).

²⁰⁵ In his dissent from the Supreme Court's denial of certiorari, Justice Marshall, joined by Justice O'Connor, concluded that this case provided a good opportunity to

Following the reasoning in *Noriega*, it may be argued that the use of temporary restraining orders to allow the courts to decide the validity of the requested orders to ban publication is a good compromise. Courts would be allowed to protect the defendants by banning publication temporarily. Yet, this argument is flawed for several reasons. First, the Supreme Court in *Near* decided that, to determine whether a judicial order was a prior restraint, courts must examine the effect of the order and not its title or character.²⁰⁶ The effect of a temporary order is to suppress speech indefinitely. According to *Near* and other prior restraint jurisprudence, this has the effect of a prior restraint. Indeed, a temporary order meets the four elements used by some courts to define a prior restraint: the order restrains specified expression, it must be obeyed until reversed, the violation of the order may be punished as contempt, and the proceedings conducted for its violation do not include all the safeguards of a criminal trial, including the fact that the violator cannot argue the constitutionality of the order as a defense for its violation.²⁰⁷

reexamine the prior restraint doctrine. Evaluating the facts of the case, he concluded that the courts below erred in granting a prior restraint when the petitioner did not meet the heavy burden of proof required to defeat the presumption of invalidity of a prior restraint. The dissenting opinion is short and poignant. Here it is reproduced in full:

The issue raised by this petition is whether a trial court may enjoin publication of information alleged to threaten a criminal defendant's right to a fair trial without any threshold showing that the information will indeed cause such harm and that suppression is the only means of averting it. The District Court in this case entered an order enjoining petitioner Cable News Network (CNN) from broadcasting taped communications between respondent Manuel Noriega, a defendant in a pending criminal proceeding, and his counsel. The court entered this order without any finding that suppression of the broadcast was necessary to protect Noriega's right to a fair trial, reasoning that no such determination need be made unless CNN surrendered the tapes for the court's inspection. The Court of Appeals affirmed this conclusion.

In my view, this case is of extraordinary consequence for freedom of the press. Our precedents make unmistakably clear that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity," and that the proponent of this drastic remedy "carries a heavy burden of showing justification for [its] imposition." I do not see how the prior restraint imposed in this case can be reconciled with these teachings. Even more fundamentally, if the lower courts in this case are correct in their remarkable conclusion that publication can be automatically restrained pending application of the demanding test established by *Nebraska Press*, then I think it is imperative that we reexamine the premises and operation of *Nebraska Press* itself. I would grant the stay application and the petition for certiorari.

Cable News Network v. Noriega, 498 U.S. 976, 976-77 (1990) (citations omitted).

²⁰⁶ *Near v. Minnesota*, 283 U.S. 697, 708-09 (1931).

²⁰⁷ See *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975); see

Moreover, the news value of the information may be lost while the restraining order is in place, as it may take several days for a court to make a ruling and for the appeals process.²⁰⁸ Thus, the public does not receive the information to which it is entitled, when it is entitled to it. Time is of the essence in the news publishing business. The press must be allowed to publish the news quickly enough for it to effectively check abuses of governmental power.²⁰⁹ Otherwise, the basis for the checks

also supra note 41.

²⁰⁸ See, e.g., *CBS v. Davis*, 114 S. Ct. 912, 915 (1994) (delay of 15 days); *In re Charlotte Observer*, 921 F.2d 47 (4th Cir. 1990) (delay of one week); *In re King World Productions*, 898 F.2d 56 (6th Cir. 1990) (delay of eight days); *CBS v. U.S. District Court*, 729 F.2d 1174 (9th Cir. 1984) (delay of one day); *Clear Channel Communications, Inc. v. Murray*, 636 So. 2d 818 (Fla. Dist. Ct. App. 1994) (delay of six and a half months); *Times Publishing Co. v. Florida*, 632 So. 2d 1072 (Fla. Dist. Ct. App. 1994) (delay of five months and ten days); *Florida Publishing Co. v. Brooke*, 576 So. 2d 842 (Fla. Dist. Ct. App. 1991) (delay of four months and five days); *Miami Herald Publishing Co. v. Morphonios*, 467 So. 2d 1026 (Fla. Dist. Ct. App. 1985) (delay of twenty-five days); *State ex rel. Chillicothe Gazette, Inc. v. Ross County Court of Common Pleas*, 442 N.E.2d 747 (Ohio 1982) (delay of five weeks); *KUTV, Inc. v. Conder*, 668 P.2d 513 (Utah 1983) (delay of four days). The two most recent examples of unjustified prior restraints exemplify the dangers inherent in allowing courts to issue restraining orders against the media. Paula Jones, for example, who has sued President Bill Clinton for sexual harassment, asked for an order banning the publication of nude photographs of her by *Penthouse* magazine. On that same day, District Court Judge Peter Leisure granted a temporary restraining order halting publication and distribution of the magazine. Seven media organizations joined *Penthouse* as amici. The press was forced to prepare for and participate in a lengthy hearing and the news was delayed for two days until the court lifted its order and denied the request by Jones. *Jones v. Turner*, 23 Media L. Rep. (BNA) 1122 (S.D.N.Y. 1995). More recently, Judge John Feikens, of the U.S. District Court for the Southern District of Ohio, imposed a permanent injunction on the publishers of *Business Week* restraining them from using certain information leaked to them by an attorney. *Procter & Gamble Co. v. Bankers Trust Co.*, No. C-1-94-735, 1995 WL 592280 (S.D. Ohio Oct. 3, 1995). The information had been filed under seal in a civil claim to which *Business Week* was not a party. *Id.* at *1. The court first issued a temporary restraining order just three hours before the magazine's deadline for publication. *Id.* at *1; Linda Himelstein, *The Story Behind the Bankers Trust Story*, BUSINESS WEEK, Oct. 2, 1995, at 58. The order, which was entered without notice to the publisher, had no deadline. Claudia MacLachlan, *Did Business Week Fold Too Easily?*, NAT'L L.J., Oct. 23, 1995, at A1, A21. It prevented publication for three weeks, when there was a hearing and the court entered the permanent order. See Deirdre Carmody, *High Court Will Not Lift Magazine Ban*, N.Y. TIMES, Sept. 22, 1995, at A7. During those three weeks, *Business Week* sought relief from both the Court of Appeals for the Sixth Circuit and from Supreme Court Justice Stevens in his capacity as Circuit Justice for the Sixth Circuit. Both denied jurisdiction in the matter until the district court had a chance to hold a hearing. *McGraw-Hill Companies v. Procter & Gamble Co.*, 116 S. Ct. 6, 7 (U.S. 1995).

²⁰⁹ In *Nebraska Press*, the Court recognized that the traditional function of the media

and balances on governmental action and the protection of the defendants' rights by assuring openness are defeated. The result in the long run is a dangerous chilling effect on the press. The press may decide it is not worth the fight or the wait to get information published after it has lost its value.

For these reasons, any delay of publication, for even minimal periods of time, unquestionably constitutes irreparable injury to the news media. As such, it is presumptively invalid.²¹⁰ Given that the press is expected to be the watchdog of the judicial process,²¹¹ this seems to be too much of a threat to freedom of the press. Justice Harlan, for example, once wrote: "It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances."²¹² More recently, Justice Blackmun, serving as a circuit judge, declared a restraining order unconstitutional as a prior restraint because it led to an indefinite delay of a broadcast which would cause "irreparable harm to the news media that is intolerable under the First Amendment."²¹³

Much has been written about the Supreme Court's denial of review in *Noriega*.²¹⁴ The decision to deny review was a mistake, but it should

is to report the news promptly. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976). Delays in publication can "destroy the contemporary news value of the information the press seeks to disseminate." *Id.* at 609 (Brennan, J., concurring).

²¹⁰ *CBS v. Davis*, 114 S. Ct. 912, 915 (1994) (holding delay of broadcast will cause irreparable harm to news media); *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *New York Times v. United States (The Pentagon Papers Case)*, 403 U.S. 713, 714-15 (1971) (per curiam) (Black, J., concurring) (holding that every delay in lifting the injunctions against the newspapers is a continuing violation of the First Amendment).

²¹¹ See *supra* notes 8-14 and accompanying text.

²¹² *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting).

²¹³ *CBS v. Davis*, 114 S. Ct. 912, 915 (1994). In this case a state court in South Dakota entered a preliminary injunction prohibiting CBS from airing a video of the practices at the petitioners' meat processing plant. Blackmun stayed the injunction, concluding that the petitioner had not met the heavy burden to defeat the presumption against the constitutional validity of a prior restraint. *Id.* at 914-15.

²¹⁴ *Cable News Network v. Noriega*, 498 U.S. 976 (1990). See Floyd Abrams et al., *The Noriega Tapes: Was it Right to Temporarily Ban their Broadcast?: No, the Wrong Standard Was Applied*, 77 A.B.A. J. 37 (1991) (concluding that it was the government's interception of the tapes that frustrated the attorney-client privilege, not the broadcaster's telecast); Martha A. Overland, *Prior Restraint Upheld, CNN's Tough Stance Leads to Supreme Court Loss*, 77 A.B.A. J. 19 (1991) (stating that reports of the death of the First Amendment in this case are greatly overstated); Peterson, *supra* note 204, at 579-80 n.123; James Rubin, *CNN-Noriega Tapes Ruling Harms Press Freedom, Advocates Say*, CHI. DAILY L. BULL., Nov. 19, 1990, at 1; Peter Schrag, *Noriega Case Threatens America*

not have been a surprise. It was the result of the unworkable standard created in *Nebraska Press*. The decisions of the lower courts in *Noriega*, in a genuine effort to apply the *Nebraska Press* standard, condoned the use of temporary restraining orders to postpone publication. Such a forced delay of publication was a direct infringement on freedom of the press. The presumption against the validity of the order and the burden of proof needed to overcome it should not have been diminished by the temporary character of the ban on publication.²¹⁵ In summary, any temporary ban like the one used in *Noriega* is a prior restraint issued to determine whether to issue a prior restraint.²¹⁶

VIII. CONTEMPT POWER AND THE EFFECT OF THE COLLATERAL BAR RULE

When confronting a restraining order, one alternative for the press could be simply to disregard the order and attack its constitutionality in court. This was CNN's plan in the *Noriega* incident. Unfortunately, in most cases this is a very risky decision to make. Indeed, CNN was found in contempt of court.²¹⁷ As opposed to cases of prohibition of publication by a statute imposing a fine or a criminal conviction, in the case of a restraining order the press cannot violate the order and then argue that the order constituted an unconstitutional prior restraint. Generally, a court order must be obeyed until it is reversed.²¹⁸ If it is not obeyed, the order may not be attacked as unconstitutional in a subsequent contempt proceeding. In such a proceeding, the only issue is whether the publisher knowingly violated the order. The constitutionality of the court order is not in dispute and would not have an effect on the finding of contempt.

More than the Dictator Himself Ever Did, L.A. DAILY J., Dec. 19, 1990, at 6; Schweiker, *supra* note 188, at 375; Kenneth Starr et al., *The Noriega Tapes: Was it Right to Temporarily Ban Their Broadcast?: Yes, The Order Was Constitutional*, 77 A.B.A. J. 36 (1991) (explaining that the First Amendment is part of the rule of law, not above it).

²¹⁵ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). *See, e.g.*, *Florida v. Lopez*, 22 Media L. Rep. (BNA) 1574 (Fla. Cir. Ct.), *cert. denied sub nom. DeJesus Lopez v. Florida*, 621 So. 2d 442 (Fla. Dist. Ct. App. 1993) (taking pains to distinguish *Noriega* to deny a requested temporary restraining order).

²¹⁶ *See Peterson*, *supra* note 204, at 584-85.

²¹⁷ *United States v. Cable News Network*, 865 F. Supp. 1549 (S.D. Fla. 1994) (holding that CNN knowingly and wilfully violated the court's restraining order).

²¹⁸ *Walker v. City of Birmingham*, 388 U.S. 307, 313 (1967); *United States v. Dickinson*, 465 F.2d 496, 509 (5th Cir. 1972) (ruling that an injunction must be obeyed, irrespective of the validity of the order).

This "collateral bar rule"²¹⁹ limits the possibilities of the press in confronting a court order enjoining publication of trial information. The effect of this "rule" is to force the publisher to relinquish its First Amendment rights while it waits for a court decision.²²⁰ Yet, its validity has been affirmed repeatedly.²²¹

It is usually stated that the collateral bar rule is needed to protect the integrity of the judicial system.²²² The rule is conceived to promote the authority of the courts because the deliberate disregard of a court order would subvert the independence of the judiciary, and its ability to

²¹⁹ For a discussion of this rule, see Paul W. Butler, *Defining the "Transparently Invalid" Exception to the Collateral Bar Rule*, 61 ST. JOHN'S L. REV. 311 (1987); Christine Hasiotis, *Constitutional Law-Transparently Invalid Order Exception to the Collateral Bar Rule Under the First Amendment in the Federal Courts*, 21 SUFFOLK U. L. REV. 265 (1987); Richard E. Labunski, *The "Collateral Bar" Rule and the First Amendment: The Constitutionality of Enforcing Unconstitutional Orders*, 37 AM. U. L. REV. 323 (1988); K. McGinn, *Zal v. Steppe: Ninth Circuit Approval of an In Limine Ban of Specific Words*, 23 GOLDEN GATE U. L. REV. 35, 38 (1993); Hal S. Shapiro, *The Collateral Bar Rule — Transparently Invalid: A Theoretical and Historical Perspective*, 24 COLUM. J.L. & SOC. PROBS. 561, 566 (1991).

At least one court has referred to the rule as "the federal rule." See *Glen v. Hongisto*, 438 F. Supp. 10, 14-15 (N.D. Cal. 1977) (distinguishing the rule applied in federal courts with *In re Berry*, 436 P.2d 273 (Cal. 1978) (en banc) (holding that in the state of California a contempt conviction will not be upheld if the underlying order is unconstitutional)). However, the collateral bar rule is also generally accepted in most state jurisdictions. See, e.g., *State v. Alston*, 887 P.2d 681 (Kan. 1994) (concluding that a criminal contempt conviction can be affirmed even though the underlying order is later shown to be unconstitutional); *State v. Cherryhomes*, 840 P.2d 1261 (N.M. Ct. App. 1992) (holding that defendant must comply with an order even if it is subject to being set aside as unconstitutional).

²²⁰ The rule has been used to affirm contempt convictions in cases where the original court order arguably abridged First Amendment rights. See, e.g., *Walker v. City of Birmingham*, 388 U.S. 307, 316 (1967) (order banning demonstration); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972) (holding a newspaper in contempt of court for violating a temporary restraining order that was later found unconstitutional); *Taylor v. Searcy Denney Scarola Barnhart & Shipley, P.A.*, 651 So. 2d 97 (Fla. Dist. Ct. App. 1994) (order banning communication with client); *People v. Sequoia Books, Inc.*, 527 N.E.2d 50 (Ill. App. Ct. 1988) (holding contempt conviction valid even though underlying injunction was reversed as a prior restraint); *State v. Cherryhomes*, 840 P.2d 1261 (N.M. Ct. App. 1992) (holding that defendant must comply with order even if it is subject to being set aside as an unconstitutional restriction on free expression).

²²¹ See, e.g., *supra* note 220; *Ex parte Purvis v. Local Union No. 1317*, 382 So. 2d 512, 514 (Ala. 1980); *State v. Chavez*, 601 P.2d 301, 306 (Ariz. Ct. App. 1979); *Mead School Dist. v. Mead Educ. Ass'n*, 534 P.2d 561, 565 (Wash. 1975), all cited in Labunski, *supra* note 219, at 327 n.15.

²²² *Walker*, 388 U.S. at 320-21.

discharge its responsibilities.²²³ In *Walker v. City of Birmingham*,²²⁴ for example, the Supreme Court for the first time upheld the use of the collateral bar rule in a case where the order imposed by the trial court affected First Amendment rights and would “unquestionably be subject to substantial constitutional question.”²²⁵ The lower court in *Walker* had issued an injunction which prohibited a march in the city of Birmingham. Dr. Martin Luther King and many others marched in violation of the order and were held in contempt of court.²²⁶ Even though the Supreme Court admitted that it had grave doubts as to the constitutionality of the order, it upheld the convictions.²²⁷ The Court ruled that the petitioners should have appealed the order and argued its constitutionality before violating it.²²⁸ The Supreme Court rejected the claim that the contempt convictions should be set aside because of the alleged invalidity of the order.²²⁹ The Court held that the collateral bar rule is needed to maintain order in our system of government because “respect for judicial process is a small price to pay for the civilizing hand of law.”²³⁰

This willingness to uphold the validity of the collateral bar rule, even in cases where First Amendment rights are involved and the order is of dubious validity, places the press in a very difficult position.²³¹ When facing a court’s prior restraint order, the press has two options: it can comply with the order and thus be forced not to publish until the order is reversed; or it can disobey it, exercise its First Amendment rights, and then suffer the consequences of a subsequent contempt conviction. In other words, the rule forces the publisher to choose between a waiver of its constitutional rights or an almost certain conviction for contempt. The

²²³ *Dickinson*, 465 F.2d at 510.

²²⁴ 388 U.S. 307 (1967).

²²⁵ *Id.* at 317.

²²⁶ *Id.* at 307.

²²⁷ *Id.* at 321.

²²⁸ *Id.* at 320.

²²⁹ *Id.* at 321.

²³⁰ *Id.*

²³¹ The situation would be different if the publisher were facing a statute that acts as a prior restraint. The press is not forced to comply with a statute it believes to be an unconstitutional prior restraint. The press can ignore it, engage in the exercise of its First Amendment rights, and then allege the unconstitutionality of the statute during the ensuing trial. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). Thus, the press is guaranteed a chance to argue the validity of the statute before it is punished for breaking it. For example, in *Shuttlesworth*, which arose out of the same facts as *Walker*, the Supreme Court reversed the convictions of the demonstrators imposed under the ordinance because in this case the issue was the constitutionality of the ordinance itself and not of the court order. *Id.* at 151.

prospect of a certain contempt action with no constitutional defense creates a strong incentive to obey the order. The court's contempt power, therefore, can create a strong incentive for the publisher to comply with an unconstitutional prior restraint order that should not have been issued in the first place.

Although courts have recognized exceptions to the collateral bar rule,²³² these exceptions do not provide much relief to the press. In *Walker*, the Court acknowledged that a litigant can challenge the constitutionality of an order if the order was issued without jurisdiction.²³³ In dictum, the Court also suggested that an exception may be recognized for cases where the order is "transparently invalid" or has "a frivolous pretense to validity"²³⁴ and an attempt to have the order reviewed had been met with delay or frustration.²³⁵ The Court, however, did not explain this possible exception nor the circumstances in which it could be applied.²³⁶

Only one other court, however, has applied the exception to cases where the injunctions affect First Amendment rights.²³⁷ In *In re Provi-*

²³² See *In re Providence Journal Co.*, 820 F.2d 1342, 1346-47 (1st Cir. 1986) (recognizing transparently invalid orders as exceptions to the collateral bar rule), *modified* 820 F.2d 1354 (1st Cir. 1987), *cert. dismissed*, 485 U.S. 693 (1988); *Phoenix Newspapers, Inc. v. Superior Court*, 418 P.2d 594, 597 (Ariz. 1966) (noting that a court order prohibiting publication of events at a judicial hearing violated the Arizona Constitution, rendering the court order void); *In re Berry*, 436 P.2d 273, 280 (Cal. 1980) (en banc) (holding that contempt cannot exist where the order is constitutionally void on its face, though not transparently invalid); *Fitchburg v. 707 Main Corp.*, 343 N.E.2d 149, 154 (Mass. 1976) (holding ordinance unconstitutionally vague on its face cannot sustain contempt); *State v. Coe*, 679 P.2d 353 (Wash. 1984) (reversing contempt convictions for violation of an order prohibiting the broadcast of tape recordings that had already been played in open court because the order was a patently invalid prior restraint); *State ex rel. Superior Court v. Sperry*, 483 P.2d 608, 613 (Wash. 1971) (stating that the contempt order violated was transparently invalid), *cert. denied*, 404 U.S. 939 (1971). See generally Labunski, *supra* note 219, for a discussion of the rule and its exception.

²³³ *Walker*, 388 U.S. at 314.

²³⁴ *Id.* at 315.

²³⁵ *Id.* at 318.

²³⁶ In fact, in a later case the Court seemed to contradict this dictum. In *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968), the Court held that a litigant could not challenge the constitutionality of a court order as a defense if he disobeyed it "no matter how well-founded their doubts might be as to its validity." *Id.* at 179. Adding to the confusion is the fact that the Supreme Court has allowed some litigants to challenge the constitutionality of court orders after disobeying the orders without mentioning the collateral bar rule. See, e.g., *Maness v. Meyers*, 419 U.S. 449 (1975); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

²³⁷ See cases cited *supra* note 232.

dence Journal Co.,²³⁸ for example, the court applied the exception suggested in dictum in *Walker* for cases where the court order is "transparently invalid."²³⁹ The son of a reputed figure in organized crime had sued the *Journal*, alleging that the FBI had wrongly released the surveillance record of his father and requested a temporary restraining order prohibiting dissemination of the information. The district court granted the motion and set a date for a hearing to determine whether to vacate the order.²⁴⁰ Before the hearing, the *Journal* published a story based on the surveillance record and was found in contempt of court.

The Court of Appeals for the First Circuit reversed. It held that the original order was a transparently invalid prior restraint, and therefore the *Journal* could challenge its constitutionality by violating it.²⁴¹ After a rehearing en banc, however, the court modified the opinion. It held that, for the exception to apply, the publisher must make a "good faith effort" to seek emergency relief from the appellate court, "even when it thinks it is the subject of a transparently unconstitutional order of prior restraint."²⁴² Only if the publisher could not get timely access to appellate relief, or if a timely decision was not forthcoming, could the publisher violate the order and then challenge its constitutionality in the contempt proceedings.²⁴³ The Supreme Court later dismissed a certiorari petition,²⁴⁴ leaving the decision of the First Circuit unaffected.

Although *Walker* and *Providence Journal* have recognized the "transparently invalid" order exception to the collateral bar rule, they do not provide much guidance on how to apply it. Other than lack of jurisdiction, there are no established standards that would help a journalist recognize a transparently invalid order. In fact, the court in *Providence Journal* held that the line between a transparently invalid order and one

²³⁸ 820 F.2d 1342 (1st Cir. 1986) (holding that a party subject to a transparently invalid prior restraint on pure speech may challenge that order by violating it), *modified* 820 F.2d 1354 (1st Cir. 1987), *cert. dismissed*, 485 U.S. 693 (1988).

²³⁹ *In re Providence Journal Co.*, 820 F.2d at 1346-47 (citing *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967)).

²⁴⁰ *Id.* at 1345.

²⁴¹ *Id.* at 1353.

²⁴² *Id.* at 1355. This may also be the result of the interpretation of other dictum in *Walker*, where the Supreme Court suggested that the decision in that case could be different "if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims." *Walker*, 388 U.S. at 318.

²⁴³ *In re Providence Journal Co.*, 820 F.2d at 1355.

²⁴⁴ 485 U.S. 693 (1988).

that is merely invalid is not always distinct and that there should be a heavy presumption in favor of the validity of the order.²⁴⁵ Therefore, the court held that the collateral bar rule should be applied if the order had any pretense to validity at the time it was issued.²⁴⁶ To determine this, a court would have to go through a fact-specific inquiry, wholly within the court's discretion.²⁴⁷

The exception for transparently invalid orders is, therefore, an acceptable means to limit the power of the collateral bar rule, but it is not a viable solution to the dilemma faced by publishers when confronted with prior restraint orders. As interpreted, the exception does not provide clear guidance for publishers, and it requires an attempt at appellate relief. Because timeliness of the news is an important element in journalism, the press would still face the same difficult decisions before publication. In most cases, the prior restraint will be invalidated on appeal. But, according to *Walker*, a contempt conviction may stand even if it is based on an unconstitutional injunction.²⁴⁸ If there is any pretense of validity, the order must be obeyed and, given the lack of guidelines to determine exactly when the order should be obeyed, the press at best would be taking a risk if it decides to publish. Therefore, for the publisher, the question of what will happen on appeal is not as important as the dilemma of what to do about the order that prevents it from publishing the news.

If the order is not violated, the news may never be published. Therefore, to avoid suppression of the information, the publisher would first have to determine whether the order is transparently invalid, a determination for which there are no clear standards. Then it would have to attempt to secure appellate relief. While waiting for relief, it would then have to decide whether to take the risk of violating the order as CNN did in *Noriega*.²⁴⁹ Yet, the publisher cannot be certain that the court of appeals will determine that the order is transparently invalid. *Providence Journal* did not hold that the publisher could not be held in contempt if it follows this process.²⁵⁰ It only held that if the court finds that the order is transparently invalid, the publisher could challenge its

²⁴⁵ *In re Providence Journal Co.*, 820 F.2d at 1347.

²⁴⁶ *Id.*

²⁴⁷ *Id.* See also *United States v. Dickinson* 465 F.2d 496, 509-10 (5th Cir. 1972); *Dunn v. United States*, 388 F.2d 511, 513 (10th Cir. 1968).

²⁴⁸ See *supra* notes 232-36 and accompanying text.

²⁴⁹ 752 F. Supp. 1045, 1048 (S.D. Fla. 1990).

²⁵⁰ *In re Providence Journal Co.*, 820 F.2d at 1353.

constitutionality during the contempt proceeding.²⁵¹ The resulting uncertainty forces the publisher to make difficult decisions.

Once again, *Noriega* is the best example of the problem.²⁵² There, the broadcaster was found guilty of criminal contempt even though the court concluded that the primary reason for the violation of the court order was the fact that CNN truly believed it was transparently invalid.²⁵³ This exemplifies the dilemma of the press. The broadcaster made

²⁵¹ *Id.*

²⁵² Actually there is another very good example, but it does not involve the claim of lack of a fair trial. In a case that is still pending as this Article goes to press, the publishers of the magazine *Business Week* were faced with the dilemma of suppressing a story and complying with an order, or challenging it and risking contempt. *Procter & Gamble Co. v. Bankers Trust Co.*, No. C-1-94-735, 1995 WL 592280 (S.D. Ohio Oct. 3, 1995). They decided to suppress the story and the court eventually permanently banned them from publishing it. *Id.* at *7.

On September 12, 1995, *Business Week* received a copy of an amended complaint filed under seal by Procter and Gamble against Bankers Trust Co. in the District Court for the Southern District of Ohio. MacLachlan, *supra* note 208. The next day, just a few hours before the magazine's deadline to publish a story based on the complaint, both parties in the action jointly requested an order prohibiting publication. Without any attempt to contact the publishers of *Business Week*, U.S. District Court Judge John Feikens entered the order. *Id.* Given the lack of clear guidelines as to whether the media can challenge the constitutionality of the order by violating it, *Business Week* decided to hold the story and appeal the order. *Id.* Both the Circuit Court of Appeals for the Sixth Circuit and Supreme Court Justice Stevens, as Circuit Justice for the Sixth Circuit, denied the appeals on jurisdictional grounds. *McGraw-Hill Companies v. Procter & Gamble Co.*, 116 S. Ct. 6 (U.S. 1995). The case was remanded to the trial court for a hearing. *Id.* at 7. By this point, the story had been delayed three weeks, and after the hearing held on October 3, it was banned permanently. *Business Week* has appealed, but given that the information in question became part of the public record and could be used to write other stories, the issue may be dismissed as moot. MacLachlan, *supra* note 208.

This case exemplifies the dilemmas and the risks created by the confusing state of prior restraint doctrine today. The publisher did not know how to react to the court order and consequently gave up the issue entirely. The public never got to see the original story. At first sight the order seemed to be a "transparently invalid" prior restraint. It was issued without notice to the publisher who was not even a party to the litigation, there was no threat to the fairness of the trial, and the circumstances did not comply with any of the exceptions recognized by *Near v. Minnesota*. Yet, the publisher was not confident enough to violate the rule because the risk of a contempt conviction was too high. In the end, the combination of confusion about the doctrine and the contempt power of the court resulted not in a mere chilling of the speech in question, but in its total suppression — precisely what the prior restraint doctrine should help prevent.

²⁵³ *United States v. Cable News Network*, 865 F. Supp. 1549, 1559, 1561, 1563 (S.D. Fla. 1994). In the trial for contempt, CNN personnel testified that it "would never intentionally violate the order of a court." David Lyons, *CNN Argues Its Side on Noriega Jail Tapes*, NAT'L L.J., Sept. 26, 1994, at A12. The CNN legal advisors testified that, at

the correct analysis, reached the right conclusion,²⁵⁴ yet it was found guilty of contempt for exercising its constitutional rights and for trusting the unworkable standards created by the courts.²⁵⁵ The burden on freedom of the press is, therefore, obvious. Whenever there is a risk of

the time, they fully expected the court of appeals to reverse the prior restraint order issued by the district court. *Id.* In its decision the court stated:

A review of the testimony and the exhibits makes it rather clear that CNN's attorneys felt that this court's orders were unconstitutional and that pursuant to the teaching of *Providence Journal* they could ignore the order and avoid contempt if, indeed, they were as right as they thought they were. They were not right and now cannot avoid the consequences by shifting the emphasis for their decision.

Cable News Network, 865 F. Supp. at 1559 (footnote omitted).

²⁵⁴ After all, the court in *Providence Journal* stated that when "the prior restraint impinges upon the right of the press to communicate news and involves expression in the form of pure speech — speech not connected with any conduct — the presumption of unconstitutionality is virtually insurmountable." 820 F.2d 1342, 1348 (1st Cir. 1986), *modified* 820 F.2d 1354 (1st Cir. 1987), *cert. dismissed*, 485 U.S. 693 (1988) (footnote omitted).

²⁵⁵ CNN faced possible fines of up to \$100,000, but was given the choice of issuing a public apology and reimbursing \$85,000 in legal fees. It chose to apologize and pay the fees. Lyons, *supra* note 253, at A12. Yet, the lack of a harsher penalty does not diminish the importance of the issues involved. Compare *State v. Alston*, 887 P.2d 681 (Kan. 1994), where the Supreme Court of Kansas reversed a contempt order issued against the press for violating a clearly unconstitutional prior restraint. There, after granting a motion to suppress evidence of a defendant's prior criminal record, the trial judge in open court ordered the press not to report this evidence. *Id.* at 684. After attempting to contact the judge and its attorneys, a local newspaper published a story stating that the defendant had a criminal record. The newspaper's editor later declared that he believed the order was an invalid prior restraint. See *Contempt Conviction of Paper, Publisher for Violating Judge's Gag Order Overturned*, NEWS MEDIA & L., Fall 1994, at 11. The next day, the judge ordered a change of venue, concluding that the defendant could not receive a fair trial and, after a hearing, found the editor and the newspaper guilty of criminal contempt. *Id.* The Kansas Supreme Court concluded that the original order banning publication was an unconstitutional prior restraint under the *Nebraska Press* standard and that, given the good faith efforts of the press to seek appellate review before its publishing deadline on the same day, it did not have to wait for a court to reverse the order before violating it. *Alston*, 887 P.2d at 691. The court cautioned that only when timely review is not available or when the order is transparently invalid may the press publish in violation of the order and wait until the contempt proceeding to challenge it. *Id.* at 690. The court also stated that the press must be ready to document all steps taken to seek relief. *Id.* Cases like this one are encouraging because they depict an understanding of how the law should be interpreted and applied. However, they offer little help to the press in making its prepublication decisions. The standards are still the same but the decisions are unpredictable, which means the only thing the press knows for sure is that it takes a big risk when deciding to publish in violation of an order. See also cases cited *supra* note 232.

future retaliation on the publisher there is a risk of a chilling effect on the press. The risk may lead the publisher to decide to avoid the problem of challenging the injunction altogether by not publishing.

Temporary restraining orders are, therefore, as objectionable as permanent injunctions. Unless the petitioner of the order meets the very heavy burden of proof required at the precise moment the petition is made, even temporary restrictions on the publication of protected speech should not be tolerated. The net effect of a temporary order is the same as that of an injunction. The publication is banned and there is a strong chilling effect on the press, while the court becomes a censor exercising discretion to determine what information should be published. This is the "essence of censorship" rejected by the Supreme Court in *Near*.²⁵⁶ This author finds no justification for this infringement on freedom of the press. The press should be protected from this type of intrusion to be able to perform its function. The best solution is to ban the use of court orders restraining information about ongoing trials. Such orders are impermissible prior restraints that should not be considered by the courts as solutions to the problems created by pretrial publicity.

IX. THE EFFECTIVENESS OF PRIOR RESTRAINT ORDERS

There is another reason for not using prior restraints in the fair trial context.²⁵⁷ The *Nebraska Press* standard is based on the notion that publicity has an effect over possible jurors and therefore threatens the defendant's rights to a fair trial. To defeat the presumption of unconstitutionality the petitioner must show that the restraining order will be effective in eliminating this effect and the threat to a fair trial. Yet, the evidence on the effect of pretrial publicity on potential jurors is, at best, inconclusive. Some studies have shown that jurors are affected by pretrial

²⁵⁶ *Near v. Minnesota*, 283 U.S. 697, 712 (1931).

²⁵⁷ Actually, there are two other reasons. The second one is the argument that the value of the speech is diminished when it is interfered with by a prior restraint order, even if the order is later lifted. *See* Blasi, *supra* note 50, at 67-68. It has been hypothesized that even if the message is ultimately transmitted to the public, the temporary ban affects the trust relationship between the public and the press. *Id.* at 63-66. The audience may doubt that the published information is the true original message and may wonder whether it has been edited to placate the censor. *Id.* at 67. Additionally, the lifting of the ban may be perceived as an official seal of approval eliminating some of the impact of the information. *Id.* Moreover, the publicity of the litigation regarding the ban may displace the contents of the communication as a news item. *Id.* at 68. In fact, in *Noriega*, the discussion of irregularities in the government's conduct in taping Noriega's confidential communications was lost in the debate about the prior restraint issue.

publicity and that some of the traditional remedies, such as instructions by the court, are not effective in eliminating this effect. For example, the studies performed by the "Free Press — Fair Trial Project" in the early 1970s of ten panels of jurors led to the conclusion that exposure to prejudicial pretrial publicity would double the chance of a guilty verdict.²⁵⁸ However, the use of voir dire helped a little in controlling juror prejudice. Without voir dire, seventy-eight percent of the jurors who had been exposed to prejudicial publicity voted for a guilty verdict. After jury selection with voir dire, sixty-nine percent of those jurors voted for a guilty verdict.²⁵⁹

The studies that have claimed to find clear evidence of prejudicial effect, however, have been criticized as inconclusive and ineffective in determining the relationship between news coverage and jury influence.²⁶⁰ One researcher, for example, has criticized that most jury studies do not use real jurors as subjects, that the setting of the studies is not a real trial and that the findings of effect of publicity on jurors are inaccurate because certain types of people are more predisposed to influence from outside sources.²⁶¹ Jury studies cannot use real criminal proceedings and therefore cannot produce in the experimental jurors the sense of responsibility that real jurors might feel.²⁶² Also, the experimental exposure is not diffused through competition with other messages experienced in real life, such as television, radio, and newspapers. Finally, many studies have relied on survey methodology which does not clearly link pretrial publicity and jury decision-making.²⁶³

Moreover, many studies have concluded that pretrial publicity does not have as much prejudicial effect on jurors and that there is little correlation between guilty verdicts and prejudicial publicity.²⁶⁴ Based

²⁵⁸ Alice M. Padawer-Singer & Allen H. Barton, *The Impact of Pretrial Publicity on Jurors' Verdicts*, in *THE JURY SYSTEM IN AMERICA* 123, 135 (1975).

²⁵⁹ *Id.*

²⁶⁰ Robb M. Jones, *The Latest Empirical Studies on Pretrial Publicity, Jury Bias, and Judicial Remedies — Not Enough to Overcome the First Amendment Right of Access to Pretrial Hearings*, 40 *AM. U. L. REV.* 841, 844 (1991).

²⁶¹ Rita J. Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 *STAN. L. REV.* 515, 517, 520 (1977). See also Schmidt, *supra* note 142, at 448.

²⁶² Schmidt, *supra* note 142, at 448.

²⁶³ See Amy L. Otto et al., *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 *LAW & HUM. BEHAV.* 453, 455 (1994).

²⁶⁴ See F. Gerald Klein & Paul H. Jess, *Prejudicial Publicity: Its Effects on Law School Mock Juries*, 43 *JOURNALISM Q.* 113 (1966), cited in Scott A. Hagan, *KUTV v. Wilkinson: Another Episode in the Fair Trial/Free Press Saga*, *UTAH L. REV.* 739, 752-

on a study conducted at the University of Minnesota, for example, researchers concluded that even though pretrial publicity does affect subjects' initial judgments, the evidence suggested that the problems created by pretrial publicity are diminished by the trial itself.²⁶⁵ The study results showed that "different pretrial publicity manipulations produced effects of different magnitude."²⁶⁶ The largest effects were found to be when the negative pretrial publicity involved the defendant's character.²⁶⁷ This type of pretrial publicity made subjects more likely to say that the defendant was guilty prior to trial.²⁶⁸ However, while the pretrial publicity may have had significant effects upon the subjects' pretrial judgments, the trial itself diminished greatly any effect of the pretrial publicity.²⁶⁹ Of the five pretrial publicity manipulations, not a single one had "significant direct effects on subjects' posttrial verdicts."²⁷⁰

At least two other studies have found that the proportion of jurors voting for a guilty verdict was virtually the same in a group of jurors that had been exposed to sensationalistic news accounts as in a group that had not been exposed to the news after they were both instructed by the court to disregard the publicity.²⁷¹ Another study showed that although the experimental jurors were influenced by the publicity to which they were exposed, most of them changed their minds after the trial process and voted for not guilty verdicts.²⁷² The researcher interpreted this result to mean that the jurors took the judge's instructions seriously and were able

53 (1985); Simon, *supra* note 261, at 528 & n.60. For a discussion of these studies, see also Drechsel, *supra* note 67, at 14-15; Jones, *supra* note 260, at 844; John Kaplan, *Of Babies and Bathwater*, 29 STAN. L. REV. 621, 623 (1976-1977) (using surveys of actual jurors to conclude that "newspaper publicity, or any other assertions of the facts of a case made outside of court, have virtually no impact upon the jury trying the case"); Otto et al., *supra* note 263, at 453. The Report of the ABA Advisory Committee on Fair Trial and Free Press (the Reardon Report) states: "There are no determinative empirical data that will supply ready answers to the questions of whether jurors can put aside preconceived opinions, and abide by judges' instructions to decide only the evidence on the record," *quoted in* Schmidt, *supra* note 142, at 445.

²⁶⁵ Otto et al., *supra* note 263, at 464-66.

²⁶⁶ *Id.* at 464.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 465.

²⁷⁰ *Id.*

²⁷¹ Simon, *supra* note 261, at 528 & n.60.

²⁷² *Id.*

to put the prejudicial material out of their minds.²⁷³ Using surveys of actual jurors, another author has concluded that “newspaper publicity, or any other assertions of the facts of a case made outside of court, have virtually no impact upon the jury trying the case.”²⁷⁴ One researcher has summarized the evidence on this issue:

Experiments to date indicate that, for the most part, juries are able and willing to put aside extraneous information and base their decisions on the evidence. The results show that when ordinary citizens become jurors, they assume a special role in which they apply different standards of proof, more vigorous reasoning and greater detachment.²⁷⁵

In conclusion, there seems to be little support for the balancing approach prescribed by the court in *Nebraska Press*. The recognition of a prior restraint in the fair trial context is based on the possible prejudicial effect of publicity on prospective jurors. If the evidence does not support that such a risk exists, there is no need for the proposed remedy.

CONCLUSION

In cases where a criminal defendant’s right to a fair trial seems to be in jeopardy, the reasons for prior restraint of the press appear very sensible, and the potential damage to the press seems minimal. Yet, the end result of the prior restraint analysis in *Nebraska Press* was to leave the door open for abuse of the system by allowing courts to tell the media that it cannot publish truthful information about events of public concern. This may be the increasing trend of a high number of unreported cases, where a trial court issues a quick temporary injunction, only to lift it or have an appellate court vacate it.²⁷⁶ This trend can lead to prior restraints becoming easier to obtain than the standards of *Nebraska Press* intended. Indeed, this was the result in *Noriega*.²⁷⁷ It seems that the standard created by the court in *Nebraska Press* may have reached its

²⁷³ *Id.* at 522-23.

²⁷⁴ Kaplan, *supra* note 264, at 623.

²⁷⁵ Simon, *supra* note 261, at 528.

²⁷⁶ For examples of this trend, see *Blackmun Lifts Gag on News Broadcast*, NEWS MEDIA & L., Winter 1994, at 25. For some of the reported cases, see *supra* note 160.

²⁷⁷ *United States v. Noriega*, 752 F. Supp. 1045 (S.D. Fla. 1990).

limits and, as Justice Marshall and O'Connor have suggested, it is time to re-examine it.²⁷⁸

Noriega itself best illustrates this need. There, the court order banning publication of the information was issued to maintain "the status quo."²⁷⁹ Yet, the "status quo" should have been the recognition of a presumption in favor of the publisher's rights. The court should have protected the First Amendment right to publish until the party seeking the injunction could meet the heavy burden to defeat the presumption of invalidity of the injunction. The temporary restraining order and the order to produce the tapes actually disrupted the status quo and impinged on the exercise of the media's First Amendment rights.²⁸⁰ As explained by the court in *Providence Journal*:

It is misleading in the context of daily newspaper publishing to argue that a temporary restraining order merely preserves the status quo. The status quo of daily newspapers is to publish news promptly that editors decide to publish. A restraining order disturbs the status quo and impinges on the exercise of editorial discretion.²⁸¹

Even if one argues that there could be a case that meets the almost insurmountable standard of *Nebraska Press*, there are many reasons that support the claim for an absolute rule against prior restraints. First, it seems that it is almost impossible to meet the standard. If the information published in *Nebraska Press* was not enough to convince the Court that the trial court would not be able to find twelve impartial jurors in a community of 900 people, it is difficult to imagine that any court would not be able to find jurors in any other case. Also, the standard calls for certainty in the determination that twelve unbiased jurors cannot be found.²⁸² Yet to answer that question, courts must inevitably engage in speculation as to the extent and effects of the publicity. And, even if the effect of the publicity is intense, the court can still apply other alterna-

²⁷⁸ *Cable News Network v. Noriega*, 498 U.S. 976 (1990) (Marshall and O'Connor, JJ., dissenting from denial of certiorari).

²⁷⁹ *Noriega*, 752 F. Supp. at 1051.

²⁸⁰ *In re Providence Journal Co.*, 820 F.2d 1342, 1351 (1st Cir. 1986), *modified* 820 F.2d 1354 (1st Cir. 1987), *cert. dismissed*, 485 U.S. 693 (1988). See SMOLLA, *supra* note 43, at 399. See also *Goldblum v. NBC*, 584 F.2d 904 (9th Cir. 1978); and *In re CBS, Inc.*, 570 F. Supp. 578 (E.D. La. 1983), *appeal dismissed sub nom. United States v. McKenzie*, 735 F.2d 907 (5th Cir. 1984), for example, on the issue of orders to produce evidence for review by the court.

²⁸¹ *In re Providence Journal Co.*, 820 F.2d at 1351.

²⁸² *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 569 (1976).

tives to eliminate its detrimental effects. Unfortunately, as long as the door to prior restraints remains open, judges may feel compelled to restrain the press to "preserve the status quo" while they decide whether to issue a permanent injunction.

The creation of an absolute rule is also valid because the current standard has led to the implementation of a dangerous system of abuse and overuse of censorship by the courts that would infringe upon freedom of the press. It has also resulted in delays in, or loss of, the publication of information of public interest. The Supreme Court has stated that the loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.²⁸³ The result of the *Nebraska Press* prior restraint standard is that the First Amendment right to publish, and the public's right to receive the information, are being suppressed by courts that issue indefinite restraining orders as a first resort against the press when they are not necessary or effective to achieve their purpose.²⁸⁴

In *Near* the Supreme Court stated that the press has a moral duty to exercise its First Amendment rights with discretion.²⁸⁵ In *Nebraska Press*, the Court added that the press also has a duty to promote the fair administration of justice through the exercise of editorial self-restraint.²⁸⁶ There is no doubt, however, that at times certain members of the press have been irresponsible, disruptive, or reckless in their reporting. In fact, in a system that affords protections to the press such as those under the Constitution, this result is to be expected.²⁸⁷ Therefore, if the press is going to act as a check on government in a democratic society, it must be afforded some liberty to make mistakes.²⁸⁸ Just

²⁸³ *Elrod v. Burns*, 427 U.S. 347, 373 (1976). See also *CBS v. Davis*, 114 S. Ct. 912, 914 (1994); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

²⁸⁴ See *supra* note 160.

²⁸⁵ *Near v. Minnesota*, 283 U.S. 697, 714, 715 (1931).

²⁸⁶ The Court stated:

The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly — a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the right of an accused to a fair trial by unbiased jurors.

Nebraska Press, 427 U.S. at 560.

²⁸⁷ See Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975) (discussing the Press Clause of the First Amendment).

²⁸⁸ In 1786 Madison recognized this need: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876). This is the

because there is the possibility of misuse, it does not follow that courts should eliminate or limit the constitutionally protected rights of the press. Although the press has at times acted irresponsibly, placing limits on the exercise of First Amendment rights is not an acceptable way to eliminate the irresponsible press.²⁸⁹

There is no real need for a balancing of interests approach to the issues related to prior restraints in the fair trial context. The re-examination of the doctrine should lead to the adoption of an absolute rule against the use of prior restraints as suggested by Justice Brennan in *Nebraska Press*.²⁹⁰ The ABA initially adopted such a rule for its Standards, but recently abandoned it.²⁹¹ It should be reinstated.

The advantages of a new absolute rule against prior restraints in the fair trial context should be readily apparent. First, an absolute rule would eliminate much groundless and expensive litigation. An absolute rule would also eliminate the risk of a chilling effect and delays in the publication of the information. Recognizing that the press should have a right to publish does not mean that all information should be published. The media must exercise self-control and good judgment in the selection of the information it wishes to publish, but that decision must be left to the press and not to the courts. Allowing the courts to make editorial decisions comes dangerously close to an institutionalized system of censorship, which is, at the very least, what the First Amendment was enacted to prevent.

principle that inspired the decision in *New York Times v. Sullivan*, 376 U.S. 254, 271, 272 (1964), where the Court created a new standard of fault in libel cases. The Court concluded that "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'" (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Justice Potter Stewart has also explained that "newspapers, television networks, and magazines have sometimes been outrageously abusive, untruthful, arrogant, and hypocritical. But it hardly follows that elimination of a strong and independent press is the way to eliminate abusiveness, untruth, arrogance, or hypocrisy from government itself." Stewart, *supra* note 287, at 636.

²⁸⁹ See Stewart, *supra* note 287, at 636-37.

²⁹⁰ 427 U.S. at 572-613.

²⁹¹ STANDARDS FOR CRIMINAL JUSTICE Standard 8.30 (American Bar Ass'n 1978). See *supra* notes 142-56 and accompanying text.