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Fair Trial/Free Press - *Nebraska Press Association v. Stuart*: Defining the Limits of Prior Restraint in the Trial by Newspaper Controversy

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There is something radically, flagrantly wrong in the conduct of most newspapers in the United States. . . . [T]he right of reputation . . . is habitually violated. . . . [The press] has become putrescence putrified.  

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries.

The conceivable tension between the first and sixth amendments to the Constitution—between the guarantees of freedom of the press and the right of an accused to a fair trial—is emphatically embodied in the expression “trial by newspaper.” This tension surfaced as early as the trial of Aaron Burr for treason, continued through the sensationalized trial of Bruno Hauptmann for the murder of the Lindbergh baby, and persists to the present day. The conflict is inevitable. Within the context of a criminal trial, the Court has repeatedly confronted these valid and competing concerns without reaching a constitutionally defined accommodation. In Nebraska Press Association v. Stuart, the Court has again grappled with the constitutional boundaries of the first and sixth amendments and has attempted to resolve the fair trial/free press debate. The decision delimits the areas of future conflict by defining permissible methods which can be used to guarantee fair trial.

In reaching its decision the Court sought to avoid the “absolutist” position, i.e., giving full effect to one constitutional right in derogation of the other. In rejecting this viewpoint, the majority refused to establish priorities between the two amendments. Their goal was...
to develop a middle ground where the courts and the press could cooperate in the administration of criminal justice. This article will attempt to define this middleground after discussing past case law governing the fair trial/free press controversy and articulating possible future delineations of the relationship between the rights of the defendant and those of the public via the press.

NEBRASKA: THE FACTUAL CONTEXT

On October 18, 1975, six members of the Henry Kellie family were brutally murdered in their home in a small farming community in Nebraska. The following morning, when Erwin Charles Simants was arrested and charged with the murder, a barrage of publicity, both local and national, began. Three days later, recognizing the future difficulty in impanelling an impartial jury if the publicity continued, both the defense and prosecuting attorneys requested restrictions on mass media coverage. The court granted the joint motion by prohibiting the release of any testimony or evidence to the public and by requiring the media to observe the Nebraska Bar-Press Guidelines. Simants' preliminary hearing was open to the public but was subject to the court's "gag" order.

Petitioners, several newspaper and broadcast associations, moved for leave to intervene in the state district court, seeking to vacate the restrictive lower court order. Petitioners were granted leave to intervene but the district court judge found a "clear and present danger" to the defendant's right to a fair trial and entered his own gag order. This order prohibited the news media from reporting on five specified subjects until a jury could be impanelled. Like the

96 S.Ct. at 2803-04.
8. 96 S.Ct. at 2794-95. In a similar case involving a highly publicized murder, a state appellate judge commented:
   Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy. . . . Circulation-conscious editors catered to the insatiable interest of the American public in the bizarre.
9. 96 S.Ct. at 2795. The guidelines are a voluntary code adopted by the Nebraska bar and press which govern the reporting of criminal trials. For a complete text, see 96 S.Ct. at 2829-30 (Appendix A).
10. The district judge's order prohibited petitioners from reporting on:
   (1) the existence or contents of a confession Simants had made to law enforcement officers, which had been introduced in open court at arraignment; (2) the fact or
lower court's order, the state district court order also incorporated the Nebraska Bar-Press Guidelines.

The Nebraska Supreme Court was then asked to stay the district court's order. The court refused to lift the ban but modified the lower court's order by reducing the prohibited subjects to three and voiding the requirement of compliance with the Nebraska Bar-Press Guidelines. The order, as modified, prohibited reporting on:

- the existence and nature of any confessions or admissions made by the defendant to law enforcement officers;
- any confessions or admissions made to any third parties, except members of the press; and
- other facts "strongly implicative" of the accused.

Before the United States Supreme Court granted certiorari, Mr. Justice Blackmun, in his capacity as Circuit Justice, twice refused to stay the gag order, as expressed in the state district court's order and then as stated by the Nebraska Supreme Court.

THE LEAST RESTRICTIVE ALTERNATIVE

To address the important issues raised in connection with the Nebraska Supreme Court order, the United States Supreme Court granted certiorari. After first determining that the case was "capable of repetition, yet evading review" and therefore not moot, a

nature of statements Simants had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; (5) the identity of the victims of the alleged sexual assault and the nature of the assault.

96 S.Ct. at 2795.

11. State v. Simants, 194 Neb. 783, 801, 236 N.W.2d 794, 805 (1975). The Nebraska Supreme Court explained its decision to limit the scope of the gag order in the following manner:

"We conclude that the order of the District Court of October 27, 1975, is void insofar as it incorporates the voluntary guidelines and in certain other respects in that it impinges too greatly upon freedom of the press. The guidelines were not intended to be contractual and cannot be enforced as if they were.

12. Id.

13. In the first instance, Mr. Justice Blackmun declined to issue a stay of the state district court's gag order as it appeared that the petitioners' application to the Nebraska Supreme Court was then being considered by that court. Mr. Justice Blackmun thought it desirable that as the issue involved an order by a Nebraska state court, it be resolved in the first instance by the Supreme Court of that state. 423 U.S. 1319 (1975). One week later, the Nebraska Supreme Court having still taken no action, Mr. Justice Blackmun reconsidered the petitioners' application and, while refusing to stay the order entirely, he did grant a partial stay at least insofar as it incorporated the Nebraska Bar-Press Guidelines. Mr. Justice Blackmun however, refused to prohibit the Nebraska courts from placing any restriction at all on the media. 423 U.S. 1327 (1975).

14. 423 U.S. 1027 (1975). In granting certiorari, the Court refused petitioners' application for a full stay of the Nebraska Supreme Court's gag order.

15. 96 S.Ct. at 2797. In the interim, defendant Simants had been convicted of murder and
unanimous Court held that the gag order was a prior restraint which infringed the freedom of the press guaranteed in the first amendment. The order was accordingly declared invalid.\(^{16}\)

The Court recognized the problems arising out of highly publicized criminal trials and acknowledged the prejudicial consequences of trial by newspaper. However, after reviewing several notorious past cases, the Court concluded that "pretrial publicity—even pervasive adverse publicity—does not inevitably lead to an unfair trial."\(^{17}\) The issue was not whether there existed a real danger to the defendant's right to a fair trial, but rather whether under the circumstances of this case the means employed to protect the defendant's rights were foreclosed by another provision of the Constitution.\(^{18}\)

The Court characterized the Nebraska Supreme Court's order as a prior restraint invading the first amendment. The temporary nature of the order did not alleviate its severity nor mitigate the constitutional infringement.\(^{19}\) In addition, the conclusion of the trial judge that publicity would adversely affect potential jurors was deemed speculative\(^{20}\) and the use of this extraordinary legal method to curb the allegedly harmful publicity was considered ineffectual.\(^{21}\) Finally, and most importantly, the availability of other, less severe, alternatives open to the trial judge weighed heavily in the Court's decision invalidating the restrictive order.\(^{22}\)

While this restrictive order was struck down as a prior restraint, the Nebraska Court did not preclude the issuance of some type of gag order in the future:

However difficult it may be, we need not rule out the possibility

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16. Id. at 2808.
17. Id. at 2800.
18. Id. at 2801.
19. Id. at 2803.
20. Id. at 2804. The Court, in holding that the effect on the jurors was speculative, pointed to the existence of a large number of unknowns—the amount of publicity which the crime would receive prior to the time a jury was selected and sequestered, the nature of that publicity, and how that publicity might affect the jurors selected to serve. The Court emphasized that in dealing with these unknowns, the trial judge could only base his conclusions as to the publicity's adverse effect on "common human experience."
21. Id. at 2805. In holding that the gag order was of improbable efficacy, the Court found it significant that the Nebraska Supreme Court had made no finding that alternative measures would not have protected Simants' rights. As for the Nebraska Supreme Court's implication that alternative measures might not be adequate, the Court could find no evidence in the record to support such a finding.
22. Id. at 2805.
of showing the kind of threat to fair trial rights that would possess 
the requisite degree of certainty to justify restraint.21

The decision does mandate that other less restrictive alternatives be 
given primary consideration in order to limit the possibility of con-

cflict between the defendant's fair trial protections and the freedom 
of the press. These alternatives include change of venue, 
continuance, more extensive voir dire, cautionary instructions and 
sequestration of the jury. In addition to these possibilities, the Court 
cited with approval the American Bar Association's Standards for 
Criminal Justice, Fair Trial and Free Press.22 These standards per-
mit the trial judge to exclude the public from all or part of pretrial hearings, to use within a limited scope the court's contempt power, 
and to allow the defendant to waive his right to a jury trial. In 
extreme cases, the ABA recommends that the court consider the 
possibility of reversing a conviction because of prejudicial public-

ity.23 An examination of the alternatives suggested by the Court in 
Nebraska and those promulgated by the ABA will reveal the varying 
degrees of effectiveness as well as possible drawbacks to their appli-
cation.

FAIR TRIAL PROTECTIONS SHORT OF PRIOR RESTRAINT: AN ANALYSIS

The methods employed to guarantee a fair trial can be analyzed 
and explored in three distinct categories: (1) traditional court proce-
dures such as those cited by the Supreme Court in Nebraska and 
suggested by the ABA; (2) the extraordinary remedy of the con-

tempt power, mentioned only by the ABA; and (3) those methods 
which have only a possibility of future realization, i.e., proposals by 
various commentators attempting to achieve that elusive constitu-
tional balance between the first and sixth amendments to the Con-
stitution.

Traditional Guarantees of a Fair Trial

Proceeding in order of trial chronology, the closed preliminary 
hearing is one of the first options available to a court to ensure the 
defendant a fair trial. The Supreme Court has long recognized this 
pretrial proceeding as the most crucial stage for the accused in

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23. Id. at 2808. But see the concurring opinion of Mr. Justice Brennan where he states 
that no prior restraints ought to be tolerated in press coverage of criminal trials. 96 S.Ct. at 
2809-28.

24. ABA Standards for Criminal Justice, Fair Trial and Free Press (Approved Draft, 
1968).

25. Id. at 73-74. See text accompanying notes 46 through 52 infra.
relation to mass media coverage.26

Preliminary hearings in the United States have normally been open to the public except for limits set by the judge on matters involving minors, sexually-related offenses, and other similarly "indelicate" affairs.27 However, under the influence of the Field Code28 a number of states incorporated a provision in their criminal codes which allowed the defendant in a criminal trial the right to insist upon a closed preliminary proceeding.29 Although only five states still retain this provision,30 it is a right of the defendant which most courts recognize.31 The Supreme Court in Nebraska recognized possible first amendment problems inherent in a closed preliminary hearing but failed to rule on the constitutional merits of that issue.32

The fact that pretrial proceedings have generally been open to the public (and by definition, to the press) is traceable to the historical fear and distrust created by secret trials33 and to the benefits thought to be derived from the open character of the proceedings.34

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26. See Estes v. Texas, 381 U.S. 532, 536 (1965), where the Supreme Court noted:
    Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence.
27. See Geis, Preliminary Hearings and the Press, note 1 supra, at 407.
28. N.Y. Laws 1848.
29. Field's personal antipathy towards the press was extreme. He once described the action of newspapers in their reporting of a recent trial as similar to that of "cormorants over a carcass." David Dudley Field quoted in Geis, Preliminary Hearings and the Press, note 1 supra, at 408 (1961).
30. The five states which retain this right in their codes of criminal procedure are: California, CAL. PENAL CODE § 868 (West) (1954); Idaho, IDAHO CODE § 19-811 (1947); Montana, MONT. REV. CODES § 95-1202 (1967); Nevada, NEV. REV. STAT. § 171.204 (1975); and Utah, UTAH CODE ANN. § 77-15-13 (1953).
32. Closure of pretrial proceedings with the consent of the defendant when required is also recommended in guidelines that have emerged from various studies. At oral argument petitioner's counsel asserted that judicially imposed restraints on lawyers and others would be subject to challenge as interfering with press rights to news sources. . . . We are not now confronted with such issues.
33. See In re Oliver, 333 U.S. 257, 268-70 (1948), where the Court noted:
    The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of the practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the lettre de cachet. . . . Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.
34. See Estes v. Texas, 381 U.S. 532, 583 (1965), where the Court stated:
    Clearly the openness of the proceedings provides other benefits as well: it arguably improves the quality of testimony, it may induce unknown witnesses to come for-
Despite the advantages of a public hearing, however, courts have increasingly viewed the right to a public trial as the right of the defendant, and thus a right which he may waive. For example, the Supreme Court in *Estes v. Texas*\(^{35}\) was faced with a situation where the trial court had declined to grant defendant’s request to bar the news media from the preliminary hearing. Consequently, the hearing was carried live on television and radio. In holding that the defendant had been denied due process, the Supreme Court emphasized that the right to a public hearing belonged to the defendant:

> [T]he guarantee of a public trial confers no special benefit on the press. . . . [T]he concept of public trial cannot be used to defend conditions which prevent the trial process from providing a fair trial and reliable determination of guilt.\(^{36}\)

The right of a defendant to waive a public preliminary hearing does not, of course, reduce or correct the problem of pretrial publicity when it occurs on a scale like that in *Nebraska*. Although the press may be barred from the courtroom, the media has not been prevented from revealing prejudicial evidence or statements by the defendant. In addition, there exists the possibility that the secrecy of the proceedings will encourage rumors and speculation. The ineffectiveness of the closed preliminary hearing may force the trial court to consider another traditional method of assuring the accused a fair trial—the granting of a continuance.

In granting a continuance, the trial judge allows the deluge of publicity to subside. This guarantees the accused a trial at a time when public emotion, and press coverage, are no longer at their height. This method would appear to preserve the defendant’s fair trial right in its purest form. However, two drawbacks to this approach immediately become apparent. First, a continuance cannot totally counteract the publicity once it has occurred. In a case like *Nebraska* which generates substantial community interest of the prurient type, it is extremely doubtful that a continuance, no matter how lengthy, is a useful remedy for the defendant. Second, as one commentator has pointed out, moving for a continuance deprives the defendant of his constitutional right to a speedy trial and

\(^{35}\) 381 U.S. 532 (1965).

\(^{36}\) Id. at 583.
also deprives the sovereign of its right to a quick administration of justice.\(^3\)

Still another alternative open to a trial judge endeavoring to ensure a fair trial is the granting of a change of venue. This important alternative was recognized by the Supreme Court in *Rideau v. Louisiana.*\(^4\) There, the Court reversed the conviction of a defendant who was denied a change of venue. Failure to grant the defendant's motion, under the circumstances, was deemed a denial of due process.\(^5\) Although the Court normally does not presume that a fair trial can be obtained in the wake of prejudicial publicity, failure of a defendant to request a change of venue may be considered an indication that the affected party did not feel threatened by the adverse press coverage. Absence of such a motion has led the Court to uphold a conviction.\(^6\)

The importance of a change of venue was recognized by the Court in *Irvin v. Dowd*\(^7\) where it held that a state statute which allowed only one change of venue must, under certain circumstances, be disregarded in favor of the right of the accused to a fair trial.\(^8\) In applying this principle the *Nebraska* Court determined that the state law restricting changes of venue to adjacent counties must yield to the constitutional requirement that the state afford the defendant a fair trial.\(^9\)

Although change of venue has been considered an important option for the defendant, criticism has been levelled at this method of securing a fair trial, as well. In light of the possibility of state-wide and national mass media coverage in addition to the pervasive local publicity, change of venue, whether granted one or a dozen times, may be an exercise in futility. Similarly, a change of venue deprives the defendant of his constitutional right to a speedy trial in the

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\(^{38}\) 373 U.S. 723 (1963).

\(^{39}\) Id. at 726 (showing of a film containing defendant's confession to armed robbery and murder on local television prior to the selection of a jury was a denial of due process).

\(^{40}\) See *Stroble v. California,* 343 U.S. 181 (1952). In this rather remarkable case, defendant's conviction for first degree murder was upheld despite the fact that before and during his trial, various headlines and the text of news stories referred to the defendant as a "werewolf," a "fiend," and a "sex-mad killer." It was also upheld despite the fact that the district attorney had announced to the press his belief that defendant was guilty and released to them details of defendant's confession before defendant's preliminary hearing. The Supreme Court in upholding the conviction found it significant that the defendant had failed to request a change of venue.


\(^{42}\) Id. at 721.

\(^{43}\) 96 S.Ct. at 2805 n.7.
county where the alleged crime was committed.\textsuperscript{44} In addition, the problems inherent in the use of a continuance become aggravated by the transfer of defendant's case outside his community. Not only is his speedy trial right jeopardized, but he may no longer be able to impanel jurors from his socio-economic class.

Other traditional, less restrictive alternatives to prior restraint include those remedies aimed at achieving a jury panel that is relatively insulated from the tide of public opinion—the \textit{voir dire} process, cautionary instructions and sequestration of the jury. These three jury-related procedures—vital to the trial judge in normal circumstances—become indispensable when the court is faced with the threat of adverse publicity. Indeed, when the Supreme Court reverses a conviction for failure to afford the accused a fair trial due to prejudicial publicity, it is commonly a result of the failure of the trial judge to exercise his quasi-absolute authority over the courtroom.\textsuperscript{45} An example is afforded by \textit{Irvin v. Dowd},\textsuperscript{46} where the Court found that the trial judge did not conduct a proper \textit{voir dire} examination. Out of a panel of 430, 268 prospective jurors had a fixed opinion as to guilt. Eight of the twelve selected jurors admitted they thought the defendant was guilty, although each indicated he could reach an impartial verdict. The Court, while reluctant to impose a requirement that jurors be totally ignorant of the facts and issues involved, found that the proper degree of impartiality was not attained by the trial judge.\textsuperscript{47}

In a few instances, this abdication by the trial judge of his authority over the jury and proceedings reached almost grotesque proportions. For example, in \textit{Sheppard v. Maxwell},\textsuperscript{48} a trial noted for its "carnival atmosphere,"\textsuperscript{49} names of the jurors were publicized three weeks before the trial began. As a result, several jurors received threatening letters and phone calls. Thus, the effects of the pretrial

\begin{footnotesize}
\begin{enumerate}
\item[46.] 366 U.S. 717 (1961).
\item[47.] In \textit{Irvin v. Dowd}, 366 U.S. 717, 727 (1961), the Supreme Court noted: Here the "pattern of deep and bitter prejudice" shown to be present throughout the community . . . was clearly reflected in the sum total of the \textit{voir dire} examination of a majority of the jurors finally placed in the jury box. . . . The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.
\item[48.] 384 U.S. 333 (1966).
\item[49.] \textit{Id.} at 358.
\end{enumerate}
\end{footnotesize}
publicity were exaggerated by the jury’s exposure to community pressures. Once the trial began, 20 newsmen were seated close to the jury in a courtroom area normally inaccessible to the public. A broadcasting station was allocated space outside the courtroom next to the jury room. The jury was not sequestered prior to their deliberations and had full access to all news media. The trial court made only “suggestions” and “requests” that jurors ignore press coverage of the case. The Supreme Court severely chastized the trial judge for this extreme failure to isolate the jury:

The court’s fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. . . .

The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court.

The power of the judge over his courtroom, and in particular, over the jury, is admittedly limited by practicality. For instance, in using *voir dire* and cautionary instructions, the trial judge might only strengthen the impression already established in the juror’s mind by the prejudicial publicity. Sequestration of the jury also poses a problem in that it might backfire on the accused since jury hostility might be aroused towards the “cause” of their isolation. The early observation of Chief Justice Holmes casts some doubt on the effect of all these precautions: “Any judge who has sat with juries, knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.”

The last of these less restrictive alternatives to prior restraint of the news media is the least appealing to the courts—reversal of a conviction and the granting of a new trial. This unattractive and burdensome alternative has become necessary because of the pervasive development of the mass media and its increasing influence in today’s society. More courts have grown to recognize the effects of the media on the defendant’s fair trial. As a result, courts are more receptive to pleas for reversal due to prejudicial publicity at the trial and pretrial stages.

50. Id. at 353-55.
51. Id. at 357-58.
53. The increasing number of reversals is a phenomenon noted with concern by the symposium conducted by Northwestern University School of Law and the Medill School of Journalism. See generally Free Press-Fair Trial, A Report of the Proceedings of a Confer-
In the Supreme Court, two standards have emerged to govern reversals of convictions in cases involving prejudicial publicity. In the federal courts, the rule has been stated in evidentiary terms and based upon the Court's supervisory powers over the federal judiciary. In "trial by newspaper" cases arising in the state courts, the standard for reversal has been enunciated in due process terms.

The rule for the federal courts was first articulated in *Marshall v. United States*. In *Marshall*, the Court reversed a conviction where the jurors had read articles containing information which was not admissible as evidence at trial. The jurors stated that they were not influenced by the additional evidence, but the Court emphasized that the reversal was not based simply on the inadmissible nature of the evidence. Instead, the reversal was based on the prejudicial effect of the evidence on the jurors.

That *Marshall* was based solely on the Court's federal supervisory powers became clear in *Murphy v. Florida*, where the Court established the reversal standard for state court proceedings. In *Murphy*, the Court adopted a stricter rule, requiring that the prejudicial publicity amount to a violation of due process to warrant reversal.

Reversals of this kind are the last resort of the courts and for a variety of reasons are not the preferred method of protecting the accused's right to a fair trial. Reversals have little or no effect upon the continued promulgation of prejudicial publicity. The effect of a reversal on the news media is, at best, indirect and does not deter further sensationalism. In addition to their ineffectiveness vis-à-vis the press, reversals seriously threaten the maintenance of another right—the right of the prosecution to the speedy administration of justice. It is with these deficiencies in mind that the Court cautioned: "[W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception."

*Contempt by Publication*

Contempt by publication is not included among the traditional methods because of its limited application and because it has generally been regarded with suspicion and hostility. A citation for con-

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55. *Id.* at 312.
57. *Id.* at 797-98.
tempt is an extreme remedy for it is an attempt by the judiciary to exert authority beyond the courtroom as well as an attempt to directly restrain the press.

In *Nebraska*, the Court distinguished their fact situation from the so-called “contempt cases.” However, some analysis of this method of securing a fair trial is appropriate. In two respects, the exerting of authority beyond the courtroom and the direct restraint of the press, the power of a court to cite a newspaper for contempt directly parallels the prior restraint in *Nebraska*. An examination of the hostility engendered by the courts in their exercise of the contempt power will greatly aid in understanding the ultimate failure of the gag order in *Nebraska*.

In England, once a suspect is arrested, any publication of confessions (whether admissible at trial or not), evidence bearing on guilt, prior convictions, or disreputable associations and activities is considered criminal contempt. An English statute, however, does allow the press to be present and to report on the preliminary proceedings before the committing magistrate but does not allow comment on any evidence produced.

At an early date, the United States abandoned this English view of the contempt power. In 1831, Congress passed the Federal Contempt Statute which limits the summary contempt power of the federal courts to “misbehavior [occurring] in its presence or so near thereto as to obstruct the administration of justice.” There was some question whether the words “presence” and “near” had been used in the geographical or causative sense. Early authority understood the words in the causative sense and thus expanded the scope of the court’s contempt power. However, not since *Toledo Newspaper Co. v. United States*, has the Supreme Court upheld a federal court judgment of contempt by publication. In *Nye v. United States*, the Court construed the language of the Federal Contempt Statute in the geographical sense, thereby strictly limiting the federal contempt power to situations involving “misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business.”

59. 96 S.Ct. at 2802 n.5.
60. See *The King v. Parke*, 2 K.B. 432 (1903).
61. Law of Libel Amendments Act, 1888, 51 & 52 Vict. c. 64, § 3.
64. 247 U.S. 402 (1918).
65. 313 U.S. 39 (1941).
66. Id. at 52.
A state court's power to hold individuals in contempt has also been greatly curtailed by the "clear and present danger" doctrine. This Supreme Court limitation on a court's authority was developed in the so-called "contempt cases"—Bridges v: California,7 Pennekamp v. Florida,8 and Craig v. Harney.9

Bridges involved the citation for contempt of a newspaper which criticized a trial judge's actions in a pending trial. The Court rejected California's test for a determination of contempt, i.e., "any tendency to obstruct the administration of justice" and instead applied the more rigorous "clear and present danger" test first enunciated in the free speech area.70 Justice Black, in his majority opinion, cited the strength of the judiciary as part of the reason for applying so stringent a test for contempt:

To regard it [the publication], therefore, as in itself of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom or honor—which we cannot accept as a major premise.71

Pennekamp also involved judge-directed criticism. There the publication accused the judge of favoring certain criminals and gambling establishments. The trial court's standard for contempt was any publication "tending to obstruct the fair and impartial administration of justice." The trial court's contempt conviction was struck down for failure to show a "clear and present danger." The Court agreed that the publication contained half-truths and did not state the facts objectively, but found this was insufficient to warrant interference with freedom of the press.72

In Craig, the Court extended the limitation placed on a state court's contempt power. As in the earlier contempt cases, the publication involved criticism directed at the trial judge. Although the criticism was of a particularly virulent strain and was aimed at a layman only elected to the judiciary for a short time, the Court persisted in relying on the strength of the judiciary and applied the "clear and present danger" test:

But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are

67. 314 U.S. 252 (1941).
68. 328 U.S. 331 (1946).
69. 331 U.S. 367 (1947).
70. 314 U.S. at 260-61.
71. Id. at 273.
72. 328 U.S. at 347.
supposed to be men of fortitude, able to thrive in a hearty climate. 73

The effect of these cases has resulted in a paucity of contempt citations involving the media in state as well as federal courts. Since the Craig decision, only one state conviction for contempt by publication has been upheld by an appellate court. 74 The Court’s attitude toward the use of the contempt power has been severely criticized by at least one commentator. 75 However, it appears unlikely that this method could ever become a useful weapon in the arsenal of a trial judge. Even if contempt by publication were to be viewed favorably by the Court, it would only be a futile exercise in revenge. While a citation for contempt attempts to attack the prejudicial publicity at its “inception,” the damage has already been done. A citation for contempt may restore or ensure the dignity of the trial judge, but it does nothing to mitigate or prevent the influence of the prejudicial publicity on the jury.

Techniques of Fair Trial Enforcement: Future Directions

It is apparent that the use of contempt by publication is an extremely limited alternative of doubtful constitutionality which provides little protection for the accused. Similarly, the more traditional, less restrictive methods of securing a fair trial also have serious deficiencies. Recognizing the Supreme Court’s increasing annoyance with the conduct of the media, 76 commentators, courts, members of the bar, and concerned journalists have attempted to establish codes (voluntary or otherwise) to govern the reporting of criminal proceedings.

73. 331 U.S. at 376. This boundless confidence in the judiciary prompted the rather discerning remark of Mr. Justice Frankfurter: “Judges are not merely the habitations of bloodless categories of the law which pursue their predestined ends.” 331 U.S. at 392 (Frankfurter, J., dissenting).

74. See People v. Goss, 10 Ill.2d 533, 141 N.E.2d 385 (1957) (contempt conviction of a television actor for comments made on his television show during the pendency of a divorce action, upheld by the Illinois Supreme Court). See generally the discussion of Goss in FREE PRESS—FAIR TRIAL note 53 supra, at 25.

75. See Barist, The First Amendment And Regulation Of Prejudicial Publicity—An Analysis, 36 FORDHAM L. REV. 425 (1968), where the author takes a dim view of the Court’s idealism regarding the fortitude of a short-term judge in a political system.

76. In Sheppard v. Maxwell, 384 U.S. 333, 362 (1966), the Court expressed concern over the prevalence of prejudicial news commentary:

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. . . . Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. (Emphasis added).
Before examining the various codes and their effect on the fair trial/free press controversy, reference should be made to H.L. Mencken's observation: "Journalistic codes of ethics are all moonshine." It is perhaps best to allow such healthy cynicism to temper any reliance on these "cooperative" codes. The courts, members of the bar, and representatives of the journalism profession will retain differing opinions as to the relative merits of each side of this debate. However, the seemingly inherent impossibility of reconciliation has not prevented the rival groups from reaching some middle-ground.

Fairly typical of such voluntary codes is the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation. These guidelines define for the news media what the legal profession regards as prejudicial material, inappropriate for publication at certain critical stages of the trial proceedings. It covers such sensitive subjects as the existence or contents of confessions; opinions concerning the guilt of the accused; statements predicting or influencing the outcome of the trial; results of any tests conducted or the accused's refusal to submit to such tests; statements or opinions concerning the credibility or anticipated testimony of prospective witnesses; and statements made in the judicial proceedings outside the presence of the jury which, if reported, would likely interfere with a fair trial. The list is the result of the collective experience of courts and represents factors which have, either alone or in combination, led various appellate courts to reverse a conviction because of prejudicial pretrial or trial publicity.

These voluntary codes represent what the legal community regards as an ideal in criminal reporting. It is just that, however, an

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78. This divergence of purpose once led Harold Sullivan to explode:
   Cite [for contempt] the owner, publisher, managing editor, directors of the offending papers, those who have a voice in its policies, and a share of the profit money flowing from such sordid conduct. Bring the full responsibility home to where it properly belongs, to those who own, control, manage and profit by this lawless enterprise.
   H. SULLIVAN, TRIAL BY NEWSPAPER 65 (1961).
79. 96 S.Ct. at 2829-30 (Brennan, J., concurring, Appendix A).
80. Id. at 2829.
81. See generally Sheppard v. Maxwell, 384 U.S. 333 (1966) (murder conviction reversed due to prejudicial publicity which included opinions as to guilt); Rideau v. Louisiana, 373 U.S. 723 (1963) (showing of a film clip containing defendant's confession to armed robbery and murder prior to trial); United States v. Accardo, 298 F.2d 133 (7th Cir. 1962) (conviction for tax fraud reversed after jury exposure to newspaper publicity concerning defendant's alleged mob connections).
ideal. The practicalities of a diverse and ever-expanding news media prevent any uniformity of code compliance. The codes also contain no enforcement or penalty provisions which might give them substance. In fact, the Nebraska Bar-Press Guidelines take great pains to stress that its rules or standards are purely voluntary.\(^2\) It is this apologetic attitude toward actual control of prejudicial news reporting which has led some to suggest a statutory solution to achieve a constitutionally fair media coverage of criminal proceedings.

Initially, it appeared that codification would be the judicially-favored approach to the "trial by newspaper" question. In \textit{Bridges v. California}, the Court considered it significant that the legislature had not enacted any statute to control publications commenting on a pending case. This lack of legislative activity appeared to weigh heavily in their decision against the validity of a contempt citation.\(^3\)

Responding to this judicial challenge to develop statutory guidelines, several commentators outlined proposals designed to protect the rights of the accused within permissible constitutional limits.\(^4\) Generally, these proposed statutes follow the lines of voluntary codes already in existence; however, some commentators have undertaken unorthodox approaches to this challenge.\(^5\) These proposed statutes, however, remain just that—proposals. No state legislature

\footnote{82. These \textit{voluntary} guidelines reflect standards which bar and news media representatives believe are a reasonable means of accommodating, on a \textit{voluntary} basis, the correlative constitutional rights of free speech and free press with the right of an accused to a fair trial. \textit{They are not intended to prevent the news media from . . . reporting on the integrity . . . of law enforcement, the administration of justice, or political or governmental questions whenever involved in the judicial process. As a \textit{voluntary} code, these guidelines do not necessarily reflect in all respects what the members of the bar or the news media believe would be permitted or required by law. 96 S.Ct. at 2829 (Appendix A) (Emphasis added).}

\footnote{83. See Bridges v. California, 314 U.S. 252, 260-61 (1941), where the Court noted: "Here the legislature . . . has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation.


85. One unique statutory proposal recommended a total ban on all non-public issue publicity (as defined by the Court in New York Times Co. v. Sullivan, 376 U.S. 254 (1964)) during the pretrial period. See Barist, \textit{The First Amendment And Regulation Of Prejudicial Publicity—An Analysis}, note 75 supra. Another potential radical approach involves an adoption of the English judiciary's propensity for the contempt citation in pretrial proceedings. See Geis, \textit{Preliminary Hearings And The Press}, note 84 supra, at 413.}
has actively considered enactment. In addition, dicta in a recent case suggests that this Court, at least, would not react favorably to a statutory solution of the problem.  

**PRIOR RESTRAINT**

In *Nebraska,* the trial judge was faced with an explosive situation. After assessing the drawbacks of the traditional methods of securing a fair trial, he resorted to a questionable means to curb the excesses of the news media—prior restraint of publication. In light of the problems involved with the traditional methods of mitigating prejudicial publicity, the limited power of contempt, the lack of statutory guidelines, and the absence of sanctions to enforce a voluntary code, the Supreme Court in *Nebraska* analyzed the concept of prior restraint and defined its possible future in the fair trial/free press debate.

Prior restraint stands apart as a judicial method of protection against potentially damaging prejudicial publicity in that (1) it is an extension of the court's authority beyond the courtroom and (2) it seeks not to mitigate but to prevent a publication which might later be deemed prejudicial. These two characteristics make prior restraint unique. They also make prior restraint a constitutional risk. As was evident in the contempt situations, once outside the courtroom, judicial authority to sanction becomes doubtful. Attempts to exercise this authority and to directly control and restrain an institution with fundamental constitutional mandates is an exercise of questionable validity. Until *Nebraska,* the judicial door was not altogether closed on the concept of prior restraint. Indeed, in the recent case of *Branzburg v. Hayes,* the Court left open the possibility of some permissible use of prior restraint in a manner like that eventually employed in *Nebraska*:

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such re-

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86. Mr. Chief Justice Burger, writing for the Court in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), stated: "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." *Id.* at 256.

87. 96 S.Ct. 2791 (1976).

restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.98

Prior to this apparent invitation, however, prior restraint was never favorably regarded by the Court. Historically, the Court recognized that prior restraint, by definition, interfered with the editorial process of a free press before the otherwise valid exercise of a first amendment right. The Court established early that any system of prior restraint of expression bears a heavy presumption against its constitutional validity.99 Thus, the restraining agency carries the "heavy burden of showing justification for the imposition of such a restraint."99

Normally, in cases involving prior restraint, the Court would focus on the burden of proof needed to overcome this presumption of invalidity. In only one case does it appear that a prior restraint remained unchallenged and unquestioned. This case arose early in the constitutional development of the right of free expression and may have occurred in an era when the press was more timid in confronting the judiciary. In that case, United States v. Holmes,92 the court reporter related the opinion of Circuit Justice Baldwin:

"[A]s the court perceives several persons apparently connected with the daily press, whose object, we presume, is to report the proceedings and evidence in this case, as it advances, the court takes occasion to state that no person will be allowed to come within the bar of the court for the purpose of reporting, except on condition of suspending all publication till after the trial is concluded. On compliance with this condition, and not otherwise, the court will direct that a convenient place be afforded to the reporters of the press."

The reporters expressed their acquiescence in this order of the court, and the most respectful silence, on the part of the press, prevailed during the whole trial.93

Beyond this very unusual case, it has generally been thought that the news media has a constitutional right of sorts to report on judicial proceedings. In Sheppard v. Maxwell, the Supreme Court hastened to blunt its rather sharp attack on irresponsible journalism by stating: "Of course, there is nothing that proscribes the press from

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89. Id. at 684-85 (Emphasis added).
93. Id. at 363.
reporting events that transpire in the courtroom."

Also, Mr. Justice Douglas noted in one of the contempt cases:

A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity.

And yet, despite these far-reaching remarks, a restrictive or gag order was never explicitly forbidden as an unconstitutional route to a fair trial.

The actual gag order in Nebraska prohibited reporting of only three matters: (1) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers; (2) any confessions or admissions made to any third parties, except members of the press; and (3) other facts "strongly implicative" of the accused. In addition, the order was effective only to such time as a jury was impanelled.

The Court, in analyzing this restrictive order, noted that, as in earlier cases, such a restraint must bear a heavy burden of justification and that this burden is not reduced by the temporary nature of the restraint. This is due to the belief that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Comparing prior restraint to other infringements, the Court said criminal contempt situations at least afford the press the protection of appellate review.

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.

Refusing to rule out this extraordinary remedy altogether, the majority indicated that, in the future, a balancing test should be applied to determine whether justification for a prior restraint exists:

[We] must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to miti-

96. 96 S.Ct. 2791, 2796.
97. Id. at 2795.
98. Id. at 2802.
99. Id.
100. Id. at 2803.
gate the effects of unrestrained pretrial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger.\textsuperscript{101}

In balancing these considerations and applying them to the facts involved in \textit{Nebraska}, the Court determined that the dangers of prior restraint outweighed its benefits, that other adequate measures existed which could effectively protect the accused's right to a fair trial, and that the corrective effects of the restraining order were doubtful. When this analysis of prior restraint is applied to a particular fact situation it leaves room for a future role of some prior restraint, at least within the limits of the majority's balancing test.

It is precisely this open-ended case-by-case approach to the concept of prior restraint which Mr. Justice Brennan criticized in his concurring opinion.\textsuperscript{102} The concurrence would totally bar the remedy of prior restraint in the area of criminal reporting, allowing prior restraint in only three types of cases: (1) restraints on publication of obscene materials; (2) restraints on incitement to acts of violence and the overthrow by force of orderly government; and (3) a limited restraint in the area of military security.\textsuperscript{103}

In the final analysis, \textit{Nebraska} represents an attempt to restrict the future use of prior restraint by the courts. It is not intended to be an absolute bar. "[W]e need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint."\textsuperscript{104} It could be argued that the "requisite degree of certainty" is likely to surface in only exceptional cases. Prior restraint remains a viable concept for an exceptional trial—a trial of Bruno Hauptmann, a Lee Harvey Oswald, or a Sirhan Sirhan.

\textbf{CONCLUSION}

"Trial by newspaper" is a judicially and journalistically recognized problem. It is also a problem which, although constitutionally defined in \textit{Nebraska}, remains to be solved. What the Warren Commission reported some twelve years ago is perhaps equally true today:

The experience in Dallas during November 22-24 is a dramatic affirmation of the need for steps to bring about a proper balance.

\textsuperscript{101} \textit{Id.} at 2804.
\textsuperscript{102} \textit{Id.} at 2816 (Brennan, J., concurring, joined by Stewart, Marshall, J.J.).
\textsuperscript{103} \textit{Id.} at 2817-18 (Brennan, J., concurring).
\textsuperscript{104} \textit{Id.} at 2808.
between the right of the public to be kept informed and the right of the individual to a fair and impartial trial.\textsuperscript{105}

Following Nebraska, courts will adopt a balancing approach to uphold these two equally vital constitutional guarantees. To some it may appear that the balance has been struck in favor of one constitutional provision over another.\textsuperscript{106} And yet, the Supreme Court, however idealistically or theoretically, has refused to choose between the equally important rights of fair trial and free press. Temporarily, the Court in Nebraska has struck a balance, achieved an equilibrium, and reached the safety of a middleground.

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\textsuperscript{105} Report of the President's Commission on the Assassination of President Kennedy at 242 (1964), noted in Barist, The First Amendment And Regulation Of Prejudicial Publicity—An Analysis, note 75 supra.

\textsuperscript{106} One such pessimist, or realist depending on one's point of view, is Telford Taylor, who believes that the press has won the battle:

If the fair trial-free press issue in America be regarded as a conflict between the claims of the bar and the press, an observer must conclude that the press has won the game hands down. In part this victory has been handed to the press by the bar; the votes of legislatures (among whom are many lawyers) in 1831 for the federal contempt statute, and the votes of Supreme Court justices in 1941 in the Bridges case... 