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PRETRIAL PUBLICITY

Nebraska Press Association v. Stuart, 96 S.Ct. 2791 (1976)

In *Nebraska Press Association v. Stuart*[1] the Court was asked to review the validity of a judicial order to the news media prohibiting the publication of information about a criminal trial. The Court, balancing the right to a fair trial as guaranteed by the sixth amendment against the right to free press as guaranteed by the first amendment, held that any prior restraint of the press bears a "heavy presumption" against its validity; and the facts in this case were not so compelling as to require the Nebraska district court to issue a prior restraint in order to guarantee a fair trial. The case is significant chiefly because of the seemingly insurmountable barrier which the Court has raised to all future "gag" orders against press coverage of criminal trials.

On October 19, 1975, Erwin C. Simants was arrested for the murder of six persons in a small Nebraska town. Local public concern and fear about the murders was great. Widespread press coverage, which had begun the night of the murders with the publication of the suspect's description, continued for three days after the arrest. At that point, *both* the prosecution and defense attorneys asked the county court to enter an order restricting further publicity.[2] After the county court heard oral argument on the motion,[3] it issued a restrictive order which prohibited the publication of information gained at pretrial hearings and made the otherwise voluntary Nebraska Bar-Press Guidelines mandatory.[4] The county court did not restrict attendance at the pretrial hearings, but only the publication of information presented at the hearings.

On the same day the order was issued, a preliminary hearing was held and Simants was bound over to the district court for trial. Several press groups immediately moved for leave to intervene, asking that the restrictive order be vacated. They were allowed to intervene[5] and the district court held a hearing on the order. With the testimony of the county judge and newspaper articles before him, Judge Stuart found a "clear and present danger" that publicity *could* impinge on the defendant's right to a fair trial.[6] He then issued his own order, which encompassed the Nebraska Bar-Press Guidelines, and prohibited any publication of incriminating evidence against the defendant.

The Nebraska Press Association then asked the Nebraska Supreme Court for a writ of mandamus, a stay, and an expedited appeal from the order. The Association also applied to Justice Blackmun, as Circuit Judge, to stay the order. Justice Blackmun at first refused to issue a stay, in deference to the Nebraska Supreme Court.[7] A week later, however, Justice Blackmun did issue an opinion staying the district court order insofar as it purported to make the voluntary Nebraska Bar-Press Guidelines mandatory rules of the court. However, he did not prohibit the Nebraska courts from issuing some type of restrictive order over publicity at the trial. An application to the full United States Supreme Court for an immediate and more extensive stay was denied.[8]

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[1] 96 S.Ct. 2791 (1976).

[2] State v. Simants, 194 Neb. 783, 784, 236 N.W.2d 794, 796–797 (1975).

[3] The county court took no evidence.

[4] The crucial sections of the guidelines are:

Information Generally Not Appropriate for Disclosure, Reporting

Generally, it is not appropriate to disclose or report the following information because of the risk of prejudice to the right of an accused to a fair trial:

1. The existence or contents of any confession, admission or statement given by the accused, except it may be stated that the accused denies the charges made against him. This paragraph is not intended to apply to statements made by the accused to representatives of the news media or to the public.

2. Opinions concerning the guilt, the innocence or the character of the accused.

3. Statements predicting or influencing the outcome of the trial.

4. Results of any examination or tests or the accused's refusal or failure to submit to an examination or test.

5. Statements or opinions concerning the credibility or anticipated testimony of prospective witnessess.

6. Statements made in the judicial proceedings outside the presence of the jury relating to confessions or other matters which, if reported, would likely interfere with a fair trial.

96 S.Ct. at 2829, App. A.

[5] 194 Neb. at 795–96, 236 N.W.2d at 802.

[6] *See* note 46 *infra*.

[7] 423 U.S. 1319 (Blackmun, Circuit Justice, 1975).

[8] 423 U.S. 1027 (1975).

Subsequent to Justice Blackmun's order, the Nebraska Supreme Court issued a new order to remain in effect until the jury was impaneled. That order prohibited the press from releasing any information on the existence of a confession, on the nature of the confession, and any facts "strongly implicative" of the guilt of the accused.[9] The Nebraska Supreme Court's decision was premised on the vital importance of a fair trial to both society and the defendant. The Nebraska court noted that state law requires that Simants be tried within six months of his arrest and allows changes of venue only to neighboring counties.[10] In the eyes of the court these laws and the sensational nature of the case put the defendant's right to a fair trial in jeopardy: widespread press coverage would infect neighboring jurisdictions and would not die down before trial. Under these circumstances, the court felt an order restricting press coverage was justified. The U.S. Supreme Court granted certiorari[11] to consider the restrictive order as issued by the Nebraska Supreme Court.[12]

The primary issue facing the Court in *Nebraska Press Association v. Stuart*[13] was the clash between the first and sixth amendments. In criminal trials of a sensational nature, an unfettered press could make a fair trial difficult if not impossible. In the instant case, in an attempt to guarantee a fair trial, the Nebraska courts, as had other courts before them,[14] ordered temporary restraints on press coverage. The Nebraska order was not meant to obliterate the first amendment right to describe all events at the trial. Rather, the court had simply delayed that right until after the trial jury was impaneled. But all nine U.S. Supreme Court Justices felt the order could not withstand constitutional attack.

The Court[15] was first faced with the problem of mootness, as the order against publication had expired in January, 1975, when the trial of Simants began. The Court concluded that review of the order was proper because orders of this type would otherwise consistently evade review.[16] Moreover, this decision by the Nebraska Supreme Court would act as precedent for future restrictive orders in sensational cases.[17] In particular, this controversy might well recur for Simants, should he win an appeal of his conviction.[18]

Justice Burger began by pointing out that the controversy over the effect of pretrial press coverage has existed as long as the American judicial system.[19] Concern over free press-fair trial issues has led over the years to a plethora of studies, recommendations, and agreements[20] which attempt to ease the tension between first and sixth amendment rights. But that tension still exists. According to the Court, this important and difficult controversy arose from two separate lines of cases.[21] One line, holding the first amendment paramount, took severe steps to prevent

[9] 194 Neb. at 801, 236 N.W.2d at 805. The text of the order was as follows:

> The order of the District Court of October 27, 1975, is vacated and is modified and reinstated in the following respects: It shall be effective only as to events which have occurred prior to the filing of this opinion, and only as it applies to the relators herein, and only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interest made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings.

[10] *Id.* at 797–798, 236 N.W.2d at 803.

[11] 423 U.S. 1027 (1975).

[12] 96 S.Ct. at 2794.

[13] 96 S.Ct. 2791 (1976).

[14] According to the Reporters Committee for Freedom of the Press, there have been as many as 174 cases involving restrictive orders since 1966. Landau, *The Challenge of the Communications Media,* 62 A.B.A.J. 55 (1976).

[15] Chief Justice Burger wrote the opinion of the Court, joined by Justices Rehnquist and Blackmun. Justices Powell and White also joined in the Court's opinion and added comments of their own in separate concurring opinions. Justice Brennan concurred in the result and wrote a separate opinion joined by Justices Stewart and Marshall. Justice Stevens joined in Justice Brennan's opinion and added his own concurring opinion. It was thus a unanimous court decision but only five justices joined in the opinion of the Court. 96 S.Ct. at 2792.

[16] *Id.* at 2797.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 2797–98. The need for a searching *voir dire* was, according to the Court, emphasized as early as 1807 in the case of Aaron Burr. In that case Chief Justice Marshall made special attempts to search out biases among prospective jurors. In the 1930's the trial of Bruno Hauptmann for the murder of the Lindbergh child was a model of prejudicial press coverage.

[20] Voluntary agreements have been reached between the news media and state bar associations in at least 23 states. AMERICAN BAR ASSOCIATION: LEGAL ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, FAIR TRIAL/FREE PRESS VOLUNTARY AGREEMENTS 6 (1974). A judicial committee has conducted a study into the problem and suggested possible solutions. 45 F.R.D. 391 (1966). The American Bar Association has promulgated a full set of standards regarding the conflict of the fair trial mandate and the mandate of free speech. AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS, (1968).

[21] 96 S.Ct. at 2803.

the use of prior restraints. The other line of cases commanded the courts to maintain impartial juries.

The Court noted that the right to a fair trial is basic to the American system of criminal justice, and that one important safeguard of that right is the impartiality of jurors. A long line of cases dealing with the right to a fair trial has focused on this requirement. For instance, in *Irvin v. Dowd,*[22] a case in which pretrial publicity was alleged to have biased the jury, the Court said:

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.[23]

To the *Dowd* court, a change of venue to a neighboring county "exposed to essentially the same news coverage" was insufficient to dispel the prejudice of the jury. In the words of the Court, "[w]ith his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion. . . ."[24] A new trial was ordered.

In *Rideau v. Louisiana*[25] the defendant's conviction was overturned because the local police released to the news media a filmed confession by the accused which was subsequently shown several times on television. According to the Court, such a display, seen by members of the jury, could only act to prejudice their decision.[26]

Similarly, in *Estes v. Texas,*[27] massive pretrial publicity and the courtroom presence of hundreds of newsmen and television cameramen was held to have denied the accused due process of law. The courtroom atmosphere was not conducive to a "sober search for the truth."[28] In that case the Court admonished state and federal courts to maintain a proper decorum in the courtroom "at all costs."[29] Chief Justice Earl Warren, in his concurring opinion, emphasized that "no procedure or occurrence" which threatened the right of a "fair and reliable" verdict could be tolerated.[30] Such emphatic language acted as a catalyst for the development of various methods to curb the prejudicial effect of publicity.

Of all the trial publicity cases, the case of Dr. Sam Sheppard was undoubtedly the most important in terms of guidance for blunting prejudicial publicity.[31] Dr. Sheppard was convicted for the murder of his wife in 1954. Twelve years later his counsel persuaded the U.S. Supreme Court that the volume and the nature of the publicity before and during the trial had prejudiced the jury. The original trial judge had taken few measures to safeguard the right of Dr. Sheppard to an impartial jury. In ordering a new trial the Supreme Court made explicit what the trial court should have done. It should either have continued the trial until publicity had died down or ordered a change of venue.[32] Even without a motion from the participants, the judge should have insisted on sequestering the jury.[33] Additionally, the judge should have ordered all lawyers, witnesses and court personnel to say nothing about the case.[34] Finally, the trial court should have requested that the press follow certain minimal voluntary guidelines on the publishing of highly prejudicial news items.[35]

Each of these cases illustrated exceptional circumstances in which pretrial publicity was so vast that there was little doubt that the impartiality of jurors had been destroyed. In contrast, the Court pointed out other cases in which it had refused to order new trials,[36] finding no proof of "actual prejudice" or of an "inherently prejudicial setting."[37] A juror's preconceived notions are not alone a basis for dismissal.[38] Indeed, recently the Court refused to reverse the murder conviction of "Murph the Surph" despite the fact that some jurors knew his past criminal record.[39] The possibility of prejudice was not considered great enough for reversal. Proof of prejudice, by inference or otherwise, must be clear.

[22] 366 U.S. 717 (1961).

[23] *Id.* at 722.

[24] *Id.* at 728, *quoted in* 96 S.Ct. at 2799. In this instance eight of the twelve jurors thought the defendant guilty before the trial, though they said they could give an impartial verdict.

[25] 373 U.S. 723 (1963).

[26] *Id.* at 726.

[27] 381 U.S. 532 (1965).

[28] *Id.* at 551.

[29] *Id.* at 540.

[30] *Id.* at 564 (Warren, C. J., concurring).

[31] Sheppard v. Maxwell, 384 U.S. 333 (1966). Other major cases of the period were: 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).

[32] 384 U.S. at 363.

[33] *Id.*

[34] *Id.* at 361.

[35] *Id.* at 362.

[36] Murphy v. Florida, 421 U.S. 794, 803 (1975); Beck v. Washington, 369 U.S. 541 (1962); Stroble v. California, 343 U.S. 181 (1951).

[37] The standard enunciated for evaluation of prejudice was:

> Petitioner has failed to show that the setting of the trial was inherently prejudicial or that the jury selection process of which he complains permits an inference of actual prejudice.

Murphy v. Florida, 421 U.S. at 803.

[38] Irvin v. Dowd, 366 U.S. at 723.

[39] Murphy v. Florida, 421 U.S. at 800.

The Court concluded from its review of these cases "that pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." [40] While the "tone and effect" of that publicity can prejudice the trial, those factors could be "shaped" by the conduct of "attorneys, police and other officials." [41] The trial judge in particular has a crucial role to play in controlling the extent and effect of pretrial publicity through the use of such measures as described in the *Sheppard* case. [42] Traditionally it has been the trial court's burden to guarantee that all measures are taken to prevent prejudice; and the Court took special notice that the trial judge in this instance acted responsibly in an effort to protect the defendant. [43] The Supreme Court could not ignore, however, a significant competing interest which the first amendment protects. Thus, against this fair trial background, it turned to an examination of the strong tradition opposed to the use of prior restraints of any kind over the press.

In *Near v. Minnesota* [44] the Court made its famous statement that "it has been generally, if not universally, considered that it is the chief purpose of the [first amendment] guaranty to prevent previous restraints upon publication." [45] Only in cases dealing with obscenity, national security, and incitements to violence has the Court allowed prior restraints of expression. And even in those limited areas the test adopted by the Court is a difficult one to pass: [46]

> Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. [47]

More recently in *New York Times v. United States,* [48] all nine Justices reiterated that prior restraints of the press were presumptively unconstitutional.

In the *Times* case, the temporary nature of the restrictive order, which prohibited the publication of the Pentagon Papers, did not affect the Court's determination. *Any* limitation on freedom of the press bears a "heavy presumption" against its validity. [49] Prior restraints virtually freeze speech. [50] Once the order is issued, the results are immediate and irreversible. The timely nature of reporting requires immediate publication if it is to serve its purpose of informing the people. In the instant case the Nebraska courts were trying to control the reporting of news events. Thus, they had to demonstrate a basis for imposing a prior restraint which would overcome the "heavy presumption" of unconstitutionality.

The Court used three criteria in its examination of the facts:

> (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger. [51]

With regard to the nature and extent of publicity, the Supreme Court found the district judge was correct in assuming that there would be extensive pretrial publicity in the Simants case. However, the Court pointed out that the trial judge could not precisely predict what effect that publicity would have on the jurors. His conclusions were of necessity speculative because he was dealing with psychological factors which were "unknown and unknow-

[40] Nebraska Press Association v. Stuart, 96 S.Ct. at 2800.

[41] *Id.* at 2805.

[42] *See* text accompanying notes 32–35 *supra.*

[43] 96 S.Ct. at 2804.

[44] 283 U.S. 697 (1931). The Court in *Near* was aware that harm might at times result from unrestrained press coverage. This did not prevent the Court from taking its very strong stand against the use of prior restraints. As the Court noted:

> The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

Id. at 720.

[45] *Id.* at 713.

[46] *Id.* at 716. The limitations which have been allowed by the Supreme Court can give one some idea of the unwillingness of the Court to impose prior restraints. In Schenck v. United States, 249 U.S. 47 (1918), Justice Holmes was careful to note that the leafleting of draftees by Schenck was aimed at encouraging disunity and dismay among new military members. National security was the basis for imposing silence on Schenck. In a time of war such drastic measures can be allowed. An important requisite is that there must be a "clear and present danger" of harm to justify a prior restraint. *Cf.* Cohen v. California, 403 U.S. 15 (1971); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[47] Bantam Books Inc. v. Sullivan, 372 U.S. 58, 70 (1963). *See also,* New York Times v. United States, 403 U.S. 713, 714 (1971) (attempt to restrain publication of the Pentagon Papers held improper); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (enjoinment of pamphleting over an entire city held improper as a prior restraint); Carroll v. Princess Anne, 393 U.S. 175, 181 (1968) (restraining order which had the effect of banning a racist rally overturned).

[48] 403 U.S. 713 (1971).

[49] 96 S.Ct. at 2808.

[50] *Id.* at 2803.

[51] *Id.* at 2804.

able." [52] He could therefore not be sure the action he was taking was necessary.

The Court found that neither the Nebraska Supreme Court nor the district court considered the use of less drastic measures, and both lower court opinions could, at most, only imply that such methods would be inadequate. Since, the Supreme Court noted, findings of prejudicial publicity do not automatically lead to reversals, the Nebraska court should have considered the possibility of conducting a fair trial in spite of the publicity before issuing its ban. [53]

The Nebraska courts found that publicity *might* jeopardize Simants' right to a fair trial, not that it *would surely* lead to an unfair trial. In such a situation, restrictive measures may not be necessary at all. If they are, Justice Burger stresses that the gravity of prior restraints is such that all alternatives, including sequestering orders, orders for silence over court personnel, voluntary codes, lengthy voir dire, and change of venue should be evaluated before a gag order is approved. [54]

Finally, the Court analyzed the feasibility of the order and concluded that "the reality of the problems of managing and enforcing pretrial restraining orders" made the orders essentially unworkable. [55] Not only would the court have difficulty determining before publication what type of publicity would be prejudicial to the defendant, it would also have difficulty enforcing the order once it is made. [56] Furthermore, the Court noted that eliminating publicity may not solve the problem of prejudice because without press coverage the community may become enveloped in rumors which would be even more damaging than reasonably accurate news accounts. In fact, the pretrial publicity may perform the salutary function of keeping the public informed and dispelling harmful rumors. [57]

However, the Court found this particular order faulty for two additional reasons. First, the order attempted to prevent the publication of information presented in an open court proceeding. Relying on *Cox Broadcasting v. Cohn,* [58] *Craig v. Harney,* [59] and *Sheppard v. Maxwell,* [60] the Supreme Court emphasized that "there is nothing that proscribes the press from reporting events that transpire in the courtroom." [61] Second, the Court found that the third proviso of the Nebraska Supreme Court ruling banning publication of facts "strongly implicative of the guilt of the accused," was too vague and too broad to survive scrutiny. [62]

Although the Court focused carefully on the facts of this particular case, it made special note that its conclusion was not "simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied." [63] The first amendment can not be restricted on the *speculation* that publicity might make a fair trial difficult. [64] Furthermore, the Court notes that "the practical problems of managing and enforcing restrictive orders is an almost impossible task." [65] Thus, though the Court refused to completely rule out the use of restrictive orders, the *Nebraska Press Association* case, in effect, makes the "heavy pre-

[52] *Id.*

[53] *Id.* at 2805.

[54] The Court looked to Sheppard v. Maxwell, 384 U.S. at 357–62, for a description of methods for protecting sixth amendment rights. The methods, as the Court described them, were:

> (a) change of trial venue to a place less exposed to the intense publicity that seemed imminent in Lincoln County; . . . (b) postponement of the trial to allow public attention to subside; (c) use of searching questioning of prospective jurors, as Chief Justice Marshall did in the *Burr* case, to screen out those with fixed opinions as to guilt or innocence; (d) the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues—only on evidence presented in open court. Sequestration of jurors is, of course, always available. Although that measure insulates jurors only after they are sworn, it also enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths.

96 S.Ct. at 2805.

[55] 96 S.Ct. at 2806.

[56] *Id.* Only the voluntary submission to the court of the Nebraska Press Association created a case to decide. Many major papers were beyond the personal jurisdiction of the court and never did submit to the court's jurisdiction. Indeed, several national news magazines published the forbidden information. Landau, *Free Press Boon: A Stop to Direct Gag Orders?*, TRIAL 127, September 1976.

[57] 96 S.Ct. at 2806. In a sense this argument alone could have been used to dispel the notion that prior restraints need to be used against the press. On the one hand, if a city is very large the publicity will not make it impossible to find twelve impartial jurors. On the other hand, if the town is quite small the imposition of a silence order will not be effective in keeping information about the defendant from the people.

[58] 420 U.S. 469 (1975).

[59] 331 U.S. 369 (1947).

[60] 384 U.S. 333 (1966).

[61] 96 S.Ct. at 2807, *quoting Sheppard,* 384 U.S. at 362–63.

[62] 96 S.Ct. at 2807.

[63] *Id.*

[64] *Id.*

[65] *Id.*

sumption" against their use almost insurmountable.

There were four concurring opinions.[66] Justice Powell took largely the same approach as the Court, but sought to emphasize the "unique burden that rests upon the party . . . who undertakes to show the necessity for prior restraint on pretrial publicity."[67] Justice Powell set out specific requirements which would have to be met to justify a gag order. In his words there must be a showing that:

> (i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available. Notwithstanding such a showing, a restraint may not issue unless it is also shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious. The threat to fairness of the trial is to be evaluated in the context of Sixth Amendment law on impartiality, and any restraint must comply with the standards of specificity always required in the First Amendment context.[68]

Justice Brennan, in his concurring opinion,[69] joined by Justices Stewart and Marshall, went beyond Justice Powell and the opinion of the Court to conclude that *no* restrictive order can meet first amendment requirements. According to Justice Brennan, any order regarding publicity not yet published about a criminal trial must be speculative:

> A judge importuned to issue a prior restraint in the pretrial context will be unable to predict the manner in which the potentially prejudicial information would be published, the frequency with which it would be repeated or the emphasis it would be given, the context in which or purpose for which it would be reported, the scope of the audience that would be exposed to the information, or the impact, evaluated in terms of current standards for assessing juror impartiality, the information would have on the audience,[70]

The speculative basis for the order simply can not be overcome. Even if the order were not inherently speculative, Justice Brennan felt that alternative methods are available to judges fearful of prejudicial publicity.[71]

Justice Brennan pointed out that, at present, prior restraints are permissible in only three types of situations: obscenity, incitements to violence, and national security. Approval of the Nebraska order would necessitate an unwise expansion beyond the three areas approved by prior case law. The expansion would be unwise for several reasons. First, issuance of a gag order might lead the general public to believe that the person is guilty.[72] Second, the discretion of the court to issue such orders would inevitably be abused. The prosecution and defense counsel would automatically request such orders, and the judge, fearful of reversal for not protecting the rights of the accused, would more often than not capitulate.[73] Third, use of such orders might lead the general public to the belief that the judicial process was being misused by the judges and the litigants.[74] The public would have no way of finding out what was actually happening in the courtrooms. Fourth, litigants would be wasting their money and the court system's valuable time in appealing each order.[75] Fifth, and to Justice Brennan the most important reason to prohibit gag orders, from a lack of resources or some other reason an order may remain unchallenged. Thus, even a flagrant violation of the first amendment might be permitted to stand.[76]

In Justice Brennan's view, a choice between the first and sixth amendments is unnecessary. The trial judge has a wide variety of measures to control publicity, short of infringing on the first amendment through prior restraints. With sensitive use of those alternative methods a judge can avoid the conflict of first and sixth amendment rights.

Justice Brennan's blanket prohibition of restrictive orders which are directed to the press may be the opinion ultimately adopted by the Court. In addition

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[66] *See* note 15 *supra.*

[67] 96 S.Ct. at 2808. (Powell, J., concurring).

[68] *Id.* In Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (1974) (Powell, J., in chambers), *vacated as moot,* 420 U.S. 985 (1975), Justice Powell expressed his opinion that a silence order must meet a heavy presumption against its validity. That analysis has clearly carried over to this case.

Justice Powell was a member of the original committee of the ABA which investigated the possibility of standards for pretrial restrictive orders. AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS, title page (1968). Though that committee suggested that restrictive orders be used only on a voluntary basis, *id.* at 112–118, apparently Mr. Justice Powell would have provided a standard for mandatory orders if forced to do so.

[69] 96 S.Ct. at 2809. (Brennan, J., concurring).

[70] *Id.* at 2822. This position is consistent with Justice Brennan's prior reasoning as stated in New York Times v. United States, 403 U.S. 713, 725 (1971) (Brennan, J., concurring) " . . . the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture. . . . "

[71] 96 S.Ct. at 2822–24.

[72] *Id.* at 2825.

[73] *Id.* at 2826.

[74] *Id.* at 2825.

[75] *Id.* at 2826.

[76] *Id.* at 2826–27. This is especially true of small newspapers. They have neither the resources nor the time to spend in challenging each restrictive order.

to Justices Stewart and Marshall who joined Justice Brennan in his opinion, Justice Stevens stated in a separate opinion [77] that, for the most part, he agreed with Justice Brennan. However, he could not yet say that there was *no possible situation* where prior restraints might be constitutionally used to protect an accused's right to a fair trial. At the same time he noted that if he were "ever required to face the issues squarely," he might well decide to go along with Justice Brennan. [78] Justice White in a separate concurring opinion [79] stated that he joined the opinion of the Court, but only because he would like to see more case law developed before stating a specific standard. He admitted that he had "grave doubts" that restrictive orders such as this one could ever be upheld. [80]

But, even without a switch to the Brennan position, it is clear that the Court has raised an almost insurmountable barrier to judicial orders restricting pretrial publicity. Any court which attempts to use such an order must consider: (a) the nature and extent of coverage, (b) the efficacy of other measures, and (c) the effectiveness of the restraining order. Its findings must *mandate* a restrictive order, not just *suggest* the advisability of such an order. There must be *certain prejudice* and the restrictions on the press must be very limited.

The Court's decision is not surprising given its consistently negative view of any prior restraint on the press. [81] Although the language in some of its earlier pre-trial publicity cases may have misled lower courts into thinking gag orders were permissible, the Court has clearly resolved any possible ambiguity in favor of free expression. This decision thus acts not to extend press protection but rather to hold the line on any new infringements on press freedoms. Direct prior restraints of the press are simply not tolerated by the first amendment as interpreted by the Court.

On a purely practical level the decision recognizes that gag orders are essentially unworkable, and perhaps counterproductive. [82] No one can know ahead of time the consequences and effects of publicity. No one can tell whether lack of newspaper publicity will maintain calm within the community or, as the Court suggests, give rise to rampant and damaging rumors. Constitutional rights can not be subject to guesswork and speculation.

Of course the Court has not yet resolved the fair trial/free press problem completely. Chief Justice Burger indicates that past decisions were not a reflection on the need for a vigorous press; they were a signal to judges to take measures to protect the accused by controlling events in the courtroom itself. Yet, if the courts must abandon restrictive orders against the press and replace them with ever-broadening restraints against trial participants (such as witnesses and attorneys), the same problems of free movement of ideas would remain. [83] Furthermore, if the courts may still order members of the courtroom to avoid commenting on a case, the press might be held in contempt for publishing what one of those persons reveals, [84] thus preventing open discussion of cases. Perhaps the courts will simply choose to close all pretrial proceedings. Yet, that closing might violate the right of a person to a "public" trial. In the final analysis the Court's insistence on other methods of protecting an accused's right to fair trial may create just as many constitutional problems as would gag orders on the press.

[77] *Id.* at 2830. (Stevens, J., concurring).

[78] *Id.*

[79] *Id.* at 2808. (White, J., concurring).

[80] *Id.*

[81] *See* note 46 *supra.*

[82] *See* notes 55-57 *supra.*

[83] *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) *cert. denied sub nom.* Cunningham v. Chicago Council of Lawyers, 44 U.S.L.W. 3756 (1976). In that case, the Seventh Circuit Court of Appeals invalidated D.R. 1.07 as violative of the first amendment. That rule commands all Illinois lawyers to remain silent on certain aspects of every case. The Seventh Circuit felt that such a rule was invalid primarily because it was too broad. The court did not say that every such rule would violate the first amendment; only that a rule such as this should not be applied to every case regardless of the facts involved. There must be a "serious and imminent threat" to the trial. *Id.* at 251.

[84] At least one California commentator felt that the press could be held liable for revealing information they know should not have been disclosed. *See* Sturm, *Judicial Control of Pretrial and Trial Publicity: A Reexamination of the Applicable Constitutional Standards,* 6 GOLDEN GATE U. L. REV., 101, 124 (1975).