

COMMENTS

Gagging the Press Through Participant and Closure Orders: The Aftermath of *Nebraska Press Association v. Stuart*

Three years ago, in *Nebraska Press Association v. Stuart*,¹ the Supreme Court struck down a state court injunction prohibiting pretrial publication of matters deemed prejudicial to an accused murderer. The Court held that trial courts trying to minimize prejudicial publicity to preserve a fair trial must consider alternatives less drastic than gagging the press. Yet despite a unanimous pro-media² decision on the issue of direct gag orders, *Nebraska Press* has not fostered dissemination of information on judicial proceedings. Because *Nebraska Press* focused almost ex-

1. 427 U.S. 539 (1976). The decision has generated a great deal of commentary. See generally Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977); Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); Fenner & Koley, *The Rights of the Press and the Closed Criminal Proceeding*, 57 NEB. L. REV. 442 (1978); Freedman & Starwood, *Prior Restraint on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607 (1977); Garry & Riordan, *Gag Orders, Cui Bono?*, 29 STAN. L. REV. 575 (1977); Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Ass'n v. Stuart*, 29 STAN. L. REV. 497 (1977); Isaacson, *Fair Trial and Free Press: An Opportunity for Co-existence*, 29 STAN. L. REV. 561 (1977); Larson & Murphy, *Nebraska Press Ass'n v. Stuart—A Prosecutor's View of Pretrial Restraints on the Press*, 26 DEPAUL L. REV. 417 (1977); Portman, *The Defense of Fair Trial from Sheppard to Nebraska Press Ass'n: Benign Neglect to Affirmative Action and Beyond*, 29 STAN. L. REV. 393 (1977); Sack, *Principle and Nebraska Press Ass'n v. Stuart*, 29 STAN. L. REV. 411 (1977); Schmidt, *Nebraska Press Ass'n: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431 (1977); Schmidt & Volner, *Nebraska Press Ass'n: An Open or Shut Decision?*, 29 STAN. L. REV. 529 (1977); Shellow, *The Voice of the Grass: Erwin Charles Simants' Efforts to Secure a Fair Trial*, 29 STAN. L. REV. 477 (1977); Simon, *Does the Court's Decision in Nebraska Press Ass'n Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515 (1977); Younger, *Some Thoughts on the Defense of Publicity Cases*, 29 STAN. L. REV. 591 (1977).

2. This comment's scope is limited to the print media and does not extend to the broadcasting media. Pointing to differences in the characteristics of the two, primarily the limited number of television and radio frequencies to allocate, the Supreme Court has applied different first amendment standards to them. See generally Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659 (1975). Compare *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (statute granting political candidates a right to equal space to reply to criticism by a newspaper held void on its face because it purported to regulate the content of a newspaper in violation of the first amendment) with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (FCC's regulations requiring a broadcast station to offer a figure involved in a public issue an opportunity to respond and to offer reply time to opponents after allowing endorsement of one political opponent held constitutional).

clusively on the prior restraint doctrine, emphasizing a gag order's form rather than its effect on media coverage of the judicial system, the decision did not elaborate a principle applicable to orders that, although technically not prior restraints, nevertheless effectively restrain media coverage of judicial events. Accordingly, appellate courts generally have held *Nebraska Press* inapplicable when reviewing lower courts' resort to closed judicial proceedings, sealed records, and gag orders on trial participants.³ In the absence of Supreme Court guidance, appellate courts have established various standards for determining the validity of these restraints—restraints that often interfere substantially with the press' role as a check on the abuses of governmental power.⁴

3. See *United States v. Gurney*, 558 F.2d 1202, 1208 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Estate of Hearst*, 67 Cal. Appl. 3d 777, 783, 136 Cal. Rptr. 821, 824 (1977); *Philadelphia Newspapers, Inc. v. Jerome*, 478 Pa. 484, 502, 387 A.2d 425, 432 (1978), *appeal docketed*, No. 78-155 (U.S. July 27, 1978).

4. The press, no doubt, does not always fulfill this role responsibly. See, e.g., Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453, 454 (1940) (Bruno Hauptman's trial for the murder of Charles Lindberg's baby termed "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"). See also Portman, *supra* note 1.

Many commentators, however, suggest the first amendment's press clause was designed to insure the press' institutional independence, thus effecting a separation of the press from government and requiring editorial autonomy regarding both the form and substance of published material. Bezanson, *supra* note 1, at 732; Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975). This theory is similar to the libertarian theory of speech and press that emerged during the Sedition Act debates. See Seibert, *The Libertarian Theory of the Press*, in F. SEIBERT, T. PETERSON & W. SCHRAMM, *FOUR THEORIES OF THE PRESS* (1956). One commentator maintains the importance of securing the press' independence stems from fears implicit in Justice Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 631 (1919): "Persecution for the expression of opinion seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all your opposition." Bezanson, *supra* note 1, at 732. Much of the case law outside of the broadcast setting supports this theory. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Chicago Joint Bd., Amal. Cloth. Workers v. Chicago Tribune Co.*, 435 F. 2d 470, 478 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Avin v. Rutgers*, 385 F.2d 151, 153 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968). See also note 2 *supra*.

The contrasting social responsibility theory of the press is based on the premise the press has enforceable responsibilities, including the obligation to be accurate in reporting, to report matters of which the public should be aware, and to present all sides of an issue. See Peterson, *The Social Responsibility Theory of the Press*, in F. SEIBERT, T. PETERSON & W. SCHRAMM, *supra*. The theory's rationale—that the press should be held accountable for its actions—is well-expressed in a concurring opinion Justice Frankfurter wrote when the Court reversed a defendant's murder conviction because of jury prejudice:

This Court has not yet decided that the fair administration of justice must be subordinated to another safeguard of our constitutional system—freedom of the press properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors

This comment will examine post-*Nebraska Press* cases involving orders that restrict the flow of information concerning judicial proceedings and will suggest standards that focus on whether an indirect gag order inhibits media coverage of the judicial process. After a brief discussion of *Nebraska Press*' reasoning and its emphasis on the prior restraint doctrine, a survey of lower court cases will demonstrate *Nebraska Press* has not prevented judges from issuing orders that substantially impair press coverage of the judicial system. Finally, the comment will propose procedural safeguards to protect the press' role as a monitor of governmental abuses.

Nebraska Press involved the prosecution of Erwin Charles Simants for the murder of six members of a small town Nebraska family.⁵ Local newspapers dedicated front page coverage to the gruesome events of the alleged murders and sexual assaults, and to Simants' confessions to his parents and law enforcement officers.⁶ Because the town where the alleged murders occurred is a community of 850,⁷ potential jurors were few. Furthermore, Nebraska statutes limited the territorial scope of changes of venue and the length of continuances.⁸ These factors combined to create

or potential jurors were poisoned, the prisoner is constitutionally protected in plying his trade.

Irvin v. Dowd, 366 U.S. 717, 730 (1961) (Frankfurter, J., concurring). A few cases outside of the broadcast setting have reached results in line with this theory, enforcing rules of fairness in news presentation. See, e.g., Lee v. Board of Regents of State Colleges, 441 F.2d 1257 (7th Cir. 1971) (state university campus newspaper cannot reject advertisements because of their editorial contents); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969) (high school principal cannot prevent school newspaper from publishing paid advertisement opposing the Vietnam war despite an administrative policy limiting news items to matters pertaining to the high school).

Some commentators also have advocated an enforceable right of access to the press, arguing government has an obligation to ensure a wide variety of views reaches the public. They maintain at the time of the enactment of the first amendment the press collectively presented a broad range of opinions, but vast changes since that time have placed in a few hands the power to shape public opinion. Elimination of competing newspapers in many large cities and concentration of control of media have made it difficult for the public to contribute in a meaningful way to the debate on issues. See generally Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1 (1973).

5. Larson & Murphy, *supra* note 1, at 418.

6. *Id.* at 419.

7. 427 U.S. at 542.

8. Shellow, *supra* note 1, at 479, concludes the conflict the trial judge faced between free press and fair trial rights was not in this case inherent in the Bill of Rights, but evolved from these Nebraska statutes. Regardless of the constitutionality of the judge's restrictive order, Shellow maintains legislative restraints deprived the judge of meaningful alternatives to an order restraining publication.

profound practical problems for a trial judge seeking to assure that a jury determines a defendant's guilt or innocence "only by evidence and argument in open court, and not by any outside influence whether of private talk or public print."⁹ Moreover, the trial judge realized if prejudicial publicity prevented jury members from fairly receiving and evaluating evidence, an appellate court could overturn the conviction, thus necessitating a new trial.¹⁰ Faced with requests from both prosecution and defense to restrain prejudicial pretrial publicity, the trial judge issued an order proscribing publication of specified information.¹¹ On review, the Supreme Court sought to determine the scope of the judiciary's power to limit freedom of the press.

The Court resolved the conflict between first amendment¹² and sixth amendment¹³ rights¹⁴ by holding that before entering a

9. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). The *Nebraska Press* Court, however, noted that pretrial publicity, even if pervasive and concentrated, does not necessarily lead to an unfair trial. 427 U.S. at 565.

10. See, e.g., *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961).

11. 427 U.S. at 542. The trial judge's order prohibited the news media from reporting: (1) the existence or contents of a confession the defendant had made to law enforcement officers; (2) the fact or nature of statements the defendant had made to other persons; (3) contents of a note the defendant had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; and (5) the identity of the victims of the alleged sexual assault and the nature of the assault. *Id.* at 544. Circuit Justice Blackmun denied the press' first request for a stay. In response to the press' second request, he granted a stay of portions of the state court order pending review by the Nebraska Supreme Court. *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319 (Blackmun, Circuit Justice, 1975). After the Nebraska Supreme Court upheld the remaining restrictions, the media applied for a more extensive stay. The full court, Justices Brennan, Marshall, and Stewart dissenting, and Justice White dissenting in part, similarly declined to stay the portions of the order that were still in effect, or to accelerate review. *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1027 (1975) (*mem.*).

Not all commentators believe gag orders reduce prejudice among potential jurors. Two defense attorneys have argued gag orders often work against criminal defendants, and fairness to a defendant does not require limitations on freedom of the press. They suggest instead extensive voir dire and increased preemptory challenges for the defense would work to safeguard a defendant's sixth amendment rights. See generally Garry & Riordan, *supra* note 1.

12. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ." U.S. CONST. amend. VI.

13. "Congress shall make no law . . . abridging the freedom of speech or of the press." U.S. CONST. amend. I.

14. Free press and fair trial rights do not necessarily conflict. Some commentators maintain the conflict is a "myth," Garry & Riordan, *supra* note 1, at 576, or that it is far less common than a great deal of the literature suggests, Fenner & Koley, *supra* note 1, at 446 n.16. See also Kaplan, *Of Babies and Bathwater*, 29 STAN. L. REV. 621, 623 (1977). Indeed, the Supreme Court has stated the sixth amendment public trial provision, which enables the public and press to attend judicial proceedings, serves to assure fair trials by restraining possible abuses of judicial power. *In re Oliver*, 333 U.S. 257, 268 (1948). See

direct gag order a trial court must find other measures avoiding a confrontation between these rights would be ineffective.¹⁵ Although the Court noted "trial courts must take strong measures to ensure that the balance is never weighed against the accused,"¹⁶ it suggested lower courts use the techniques mentioned in *Sheppard v. Maxwell*¹⁷ as alternatives to gagging the press.¹⁸ These include continuance, change of venue, voir dire, jury instructions, and participant gag orders. Thus, under *Nebraska Press*' analysis, before gagging the press, a trial judge must both find these alternatives would not mitigate the adverse effects of pretrial publicity,¹⁹ and demonstrate a restraining order would prevent the threatened harm.²⁰

By allowing trial courts to issue direct gag orders only when alternatives would not preserve a defendant's fair trial right, the Court recognized the need for complete coverage of the judicial process. Both Chief Justice Burger's majority and Justice Brennan's concurring opinions noted that the press guards against miscarriages of justice by subjecting police, prosecutors, and the

also note 81 infra. Judge Eric Younger, however, suggests although a strong distrust of secret trials still pervades legal thinking, the legal community no longer views free press and fair trial guarantees as allies or considers the press the guardian of the criminal defendant. He does not attribute the change in attitude to a change in media style. Stating "the roots of journalistic fervor" can be traced to the "beginnings of our national existence," Younger suggests the trend results from a coupling of two factors: the importance of the jury system and technological advances that have made possible instantaneous reproduction of events and constant exposure to the media. Younger, *supra* note 1, at 591-94. For background information on the free press-fair trial controversy, see Schmidt, *supra* note 1, at 432-55.

15. 427 U.S. at 569.

16. *Id.* at 553 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966)).

17. In *Sheppard*, the Court reversed the denial of Dr. Sam Sheppard's habeas corpus petition, stating he had been denied a fair trial by the prejudicial effects of publicity, and noting the "carnival atmosphere" caused by the trial judge's failure to control the courtroom. 384 U.S. at 358. For a discussion of *Sheppard*'s impact on the free press-fair trial conflict, see Portman, *supra* note 1.

18. 427 U.S. at 563-64.

19. *Id.* at 569. The Court seemed confident that alternatives would prove effective. Although it did not cite any empirical studies to support its conclusion, some studies do suggest courts can overcome initial prejudice by judicial instruction, the solemnity of the situation and the sense of responsibility created thereby, prior commitment on voir dire or a continuance to allow time for prejudice to dissipate. See generally H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966); Simon, *supra* note 1. But see Schmidt, *supra* note 1, at 449 (concluding results of empirical studies are inconsistent and experiments "fall too far short of reality to provide convincing evidence").

Commentators disagree on the effectiveness of alternative techniques. Compare Larson & Murphy, *supra* note 1 and Younger, *The Sheppard Mandate Today: A Trial Judge's Perspective*, 56 NEB. L. REV. 1 (1977) with Fahringer, *Charting a Course from the Free Press to a Fair Trial*, 12 SUFFOLK L. REV. 1 (1978) and Garry & Riordan, *supra* note 1.

20. 427 U.S. at 562.

judicial system to public scrutiny.²¹ Furthermore, Justice Brennan's opinion implicitly recognized the public's "right to know"; that is, a right to receive and actively acquire information.²² The right to know extends first amendment coverage to receivers and gatherers, as well as disseminators, of information: "[I]t would be a barren marketplace of ideas that had only sellers and no buyers."²³ Justice Brennan stressed that increased exposure of the judicial system through public criticism and debate can improve the quality of the system;²⁴ that is, the press ensures the integrity of the judicial system by publishing news that readers, because of limited time and resources, could not gather for themselves. Thus, *Nebraska Press* acknowledged the press' crucial role, in relation to both the judiciary and the public, of subjecting information on judicial proceedings²⁵ to public accountability.

To protect the press' role as a monitor of governmental abuses,²⁶ the Court used prior restraint analysis. All of the opin-

21. *Id.* at 560 (quoting from *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)); *id.* at 586-87 (Brennan, J., concurring).

22. The right presumes society's paramount interest should be in "an uninhibited marketplace of ideas in which truth will ultimately prevail," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969), because a free flow of information from which individuals can make reasoned judgments is indispensable to a self-governing society. See generally *The First Amendment and the Right to Know: A Symposium*, 1976 WASH. U.L.Q. 1 (1976); Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977).

For cases recognizing the right to know, see, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (recognized public's right to information on the price of legal services); *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 97 (1977) (right to know what houses are for sale by viewing "for sale" signs defeated state interest in promoting stable, integrated housing); *Bigelow v. Virginia*, 421 U.S. 809, 825 (1975) (right to information about availability of abortions); *Procunier v. Martinez*, 416 U.S. 396, 408 (1973) (right to receive mail from prisoners).

23. *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). In *Lamont*, a statute conditioned delivery of mail from abroad containing communist literature upon a written request from the recipient. The Court held the statute violated the addressee's free speech right.

24. 427 U.S. at 587 (Brennan, J., concurring).

25. *Nebraska Press* said information on judicial proceedings lies "near the core of the first amendment." 427 U.S. at 587 (Brennan, J., concurring). See *Landmark Communications Co. v. Virginia*, 435 U.S. 829, 838 (1978); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (a major purpose of the first amendment is to protect free discussion of governmental affairs).

26. Other cases recognizing this role include *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (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); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring) (Court is intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of the nation's press); *Pell v. Procunier*, 417 U.S. 817, 832 (1974) ("the constitutional guarantee of a free press 'assures the maintenance of our political system and an open society' . . . and secures 'the paramount public interest in

ions relied heavily on the prior restraint doctrine,²⁷ which imposes a strong presumption against the constitutionality of formal prohibitions on speech imposed in advance of utterance or publication.²⁸ The Supreme Court has authorized prior restraints only in "exceptional cases"²⁹ because they not only destroy the immediacy of intended communication,³⁰ but also are predetermined prohibitions a violator cannot challenge even though a court later adjudges the restraint unconstitutional.³¹

a free flow of information to the people concerning public officials' ") (footnotes omitted); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (the press does not simply publish news about trials but guards against miscarriages of justice).

For commentary recognizing the press' role as a check on governmental power, see *Bezanson*, *supra* note 1; *Fahringer*, *supra* note 19, at 4; *Stewart*, *supra* note 4.

27. Chief Justice Burger noted although there are marked differences between the order entered in *Nebraska Press* and other cases involving prior restraints on publication, "as to the underlying issue—the right of the press to be free from *prior* restraints on publication—those cases form the backdrop against which we must decide this case." 427 U.S. at 561-62 (emphasis in original). The majority opinion, *id.* at 569, and Justice Powell's concurring opinion, *id.* at 571, stressed the problems inherent in meeting the heavy burden of demonstrating before trial the necessity of a gag order, but did not rule out the possibility of such an order. The concurring opinions of Justices White, *id.* at 570-71, Brennan, *id.* at 594, and Stevens, *id.* at 617, however, emphasized the almost insuperable presumption against the constitutionality of prior restraints. See note 29 *infra*.

28. Litwack, *The Doctrine of Prior Restraints*, 12 HARV. C.R.-C.L. L. REV. 519, 520 (1977). See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*); *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1968).

29. *Near v. Minnesota*, 283 U.S. 697, 716 (1931). Despite the heavy presumption against the constitutionality of prior restraints, the United States District Court for the Western District of Wisconsin recently granted an injunction barring publication of an article describing the operation of a hydrogen bomb. *United States v. The Progressive*, 47 U.S.L.W. 1153 (W.D. Wis. April 10, 1979). The court stated that although first amendment rights have an honored place in the constitutional scheme, it could find no plausible reason for the public to know the technical details of hydrogen bomb construction. *Id.*

In *Near*, the Court gave three illustrations of "exceptional cases" when prior restraints might be permissible: 1.) restraints during wartime to prevent disclosure of military developments or obstruction of the military effort; 2.) enforcement of obscenity laws; and 3.) enforcement of laws against incitement of acts of violence or revolution. The restraint in the *Progressive* case may fall into the "military security" exception. The Supreme Court has also suggested a trial judge may restrain publication to preserve a defendant's right to a fair trial:

Despite the fact that newsgathering 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 restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.

Branzburg v. Hayes, 408 U.S. 665, 684-85 (1972) (emphasis added).

30. See *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968); A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975).

31. *Walker v. City of Birmingham*, 388 U.S. 307 (1967). See *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973). In *Dickinson*, two newsmen who violated a judge's order that "no reporting taken in this case today shall

Although the prior restraint doctrine appears to provide far-reaching protection, in fact it does not protect adequately the press' role. Prior restraint analysis emphasizes the form of the restraint rather than its effect. Although it prohibits restrictions prior to communication, the doctrine places no restrictions on other types of governmental action that can curtail significantly the dissemination of information and ideas.³² The prior restraint doctrine allows courts to seal records or close judicial proceedings entirely because these orders do not directly restrain utterance or publication.³³ Furthermore, the doctrine allows orders gagging

be made" were guilty of criminal contempt even though the Fifth Circuit held the order unconstitutional. Regarding the reasons for the criminal contempt exception requiring compliance with court orders while invalid non-judicial directives may be disregarded, the court said:

Disobedience to a legislative pronouncement in no way interferes with the legislature's ability to discharge its responsibilities (passing laws). The dispute is simply pursued in the judiciary and the legislature is ordinarily free to continue its function unencumbered by any burdens resulting from the disregard of its directives. Similarly, law enforcement is not prevented by failure to convict those who disregard the unconstitutional commands of a policeman.

On the other hand, the deliberate refusal to obey an order of the court without taking it through the established processes requires further action by the judiciary, and therefore directly affects the judiciary's ability to discharge its duties and responsibilities. Therefore, while it is sparingly to be used, yet the power of courts to punish for contempt is a necessary part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. . . .

Id. at 510 (quoting from *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911)).

32. Many commentators maintain courts should apply heightened scrutiny to prior restraints because that type of restraint deters more expression and is more unfair than other types of restrictions. Alexander Bickel writes:

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. They differ from the imposition of criminal liability in significant procedural aspects as well, which in turn have their substantive consequences. The violator of a prior restraint may be assured of being held in contempt; the violator of a statute punishing speech criminally knows that he will go before a jury, and may be willing to take his chance, counting on a possible acquittal. A prior restraint, therefore, stops more speech more effectively. A criminal statute chills, prior restraint freezes.

A. BICKEL, *supra* note 30, at 61. See also T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 406 (1970). Other commentators have suggested expanding the prior restraint concept to include other types of governmental restrictions that significantly curtail the dissemination of information and ideas. See generally Litwack, *supra* note 28; Murphy, *The Prior Restraint Doctrine in the Supreme Court: A Reevaluation*, 51 *NOTRE DAME LAW* 898 (1976).

33. See *United States v. Gurney*, 558 F.2d 1202, 1208 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Estate of Hearst*, 67 Cal. App. 3d 777, 783, 136 Cal. Rptr. 821, 824 (1977); *Philadelphia Newspapers, Inc. v. Jerome*, 478 Pa. 484, 502, 387 A.2d 425, 432 (1978), *appeal docketed*, No. 78-155 (U.S. July 27, 1978).

trial participants because, unlike prior restraints, a violator can challenge these orders.³⁴ Press coverage of the judicial system provides information of legitimate public concern.³⁵ To enable the press to perform its role in relation to the judiciary and the public, procedural safeguards should precede any governmental interference with the press' first amendment rights, regardless of whether the interference technically is a prior restraint. *Nebraska Press*, unfortunately, did not articulate a principle applicable to orders that technically are not prior restraints, and thus failed to protect adequately the public's first amendment right to receive useful information.³⁶

Post-*Nebraska Press* cases involving gag orders in the trial context demonstrate that prior restraint analysis inadequately protects the flow of information concerning judicial proceedings. The orders in these cases are of three types: first, orders preventing publication of information on the public record or orders failing to satisfy *Nebraska Press* standards; second, orders gagging witnesses, parties' attorneys, or other trial participants; and third, orders withholding information from both the public and press. Definitive standards govern issuance of orders in the first category: courts cannot prevent the press from publishing factual materials from judicial records,³⁷ and if courts directly gag the

34. See, e.g., *Younger v. Smith*, 30 Cal. App. 3d 138, 150, 106 Cal. Rptr. 225, 233 (1973) (court overturned district attorney's contempt conviction for violation of a participant gag order because his statement did not prejudice the pending criminal prosecution). In *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976), the Seventh Circuit distinguished between a court acting in its legislative role and its adjudicative role when it stated court rules limiting attorney comment but allowing challenge by the violator are not prior restraints. *Id.* at 247-48.

35. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("the commission of crime, prosecutions resulting from it, and the judicial proceedings arising from the prosecutions . . . are without question of legitimate public concern and are thus constitutionally protected").

36. The Court has observed the first amendment serves to protect "the free flow of information," *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1978), and the "unfettered exchange of ideas," *Roth v. United States*, 354 U.S. 476, 484 (1957), concerning "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Time Inc. v. Hill*, 385 U.S. 374, 388 (1967) (quoting from *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)). See, e.g., *Linmark Assocs. Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). See generally Meiklejohn, *Public Speech in the Supreme Court Since New York Times v. Sullivan*, 26 SYRACUSE L. REV. 819 (1975).

37. See *Oklahoma Publishing Co. v. District Ct. for Okla. County*, 430 U.S. 308 (1977) (order restraining media from publishing name of juvenile learned during court proceedings open to the public). Although the press has no greater rights than does the general public to gather news, *Pell v. Procunier*, 417 U.S. 817 (1974), the press can publish material from public records, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). *But*

press, they must meet the *Nebraska Press* standards.³⁸ Yet outside these areas, standards are far less clear.

When a court gags trial participants rather than the press, a significant threshold problem involves the press' standing to challenge the order. In two recent cases,³⁹ the United States District Court for the District of South Carolina refused to grant the press standing to appeal gag orders on trial participants. The district court said the press does not have a personal stake in the outcome of a participant gag order because the order does not directly restrain publication.⁴⁰ Reasoning that the first amendment does not guarantee the press a constitutional right of access to information unavailable to the general public, the court concluded that if the information is not public, the press has no first amendment right to gather it.⁴¹ Although the Fourth Circuit eventually granted the press standing, the press could not appeal the order

see Note, *First Amendment Limitations on Public Disclosure Actions*, 45 U. CHI. L. REV. 180 (1977) (an action for truthful public disclosure of private facts is constitutionally maintainable when disclosure of unnewsworthy private facts on the public record seriously harm the plaintiff's reasonable sense of individual dignity and the defendant is fairly chargeable with cognizance of the dignitary harm caused by the disclosure).

38. No court has held an order met *Nebraska Press* standards. See *Des Moines Register and Tribune v. Osmundson*, 248 N.W.2d 493 (Iowa 1976) (order restraining publication of jurors' names); *Times-Picayune Publishing Co. v. Marullo*, 334 So. 2d 426 (La. 1976) (order restraining publication of jurors' names). Some commentators have suggested the practical impact of *Nebraska Press*'s high standard is to outlaw all prior restraints in the free press-fair trial context. See *Larson & Murphy*, *supra* note 1, at 443; *Sack*, *supra* note 1, at 414.

39. *Central S.C. Chapter of Prof. Journ. v. United States D.C. of S.C.*, 551 F.2d 559 (4th Cir. 1977); *Central S.C. Chapter of Prof. Journ. v. Martin*, 431 F. Supp. 1182 (D.S.C.), *aff'd*, 556 F.2d 706 (4th Cir. 1977), *cert. denied*, 434 U.S. 1102 (1978). See also *Gannett Pacific Corp. v. Richardson*, ___ Haw. ___, ___, 580 P.2d 49, 58 (1978) ("to permit a third party to intervene would unnecessarily encumber pending litigation and invite the entry of non-parties when the right or interest sought to be enforced is not directly involved in the subject matter of the pending proceeding"); *Philadelphia Newspapers, Inc. v. Jerome*, 478 Pa. 484, 495, 387 A.2d 425, 429-30 (1978), *appeal docketed*, No. 78-155 (U.S. July 27, 1978) (court denied press' petitions for writs of mandamus requested after trial judges refused to grant the press standing to appeal orders closing pretrial suppression hearings).

40. 431 F. Supp. at 1186.

41. *Id.* at 1187. The court applied the test for standing established in *Data Processing Service v. Camp*, 397 U.S. 150 (1970). Under *Data Processing*: 1) the plaintiff must have a personal stake in the outcome of the controversy; and 2) the interest plaintiff seeks to protect must be within the zone of interests the statute or constitutional guarantee in question protects. In recent cases, the Supreme Court has applied more restrictive standing requirements. See, e.g., *Duke Power Co. v. Caroline Environmental Study Group*, 98 S. Ct. 2620 (1978) (used a two-prong test requiring injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury). See generally *Tushnett, The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

for several months.⁴²

Other courts granting the press standing to appeal participant gag orders recognize such orders deny the press access to potential sources of information even though they do not directly limit the press' activity.⁴³ Although trial participants may choose not to speak to news reporters, participant orders deny them the opportunity to make that choice. If the press has no sources from which to obtain news, the right to gather and publish news is meaningless.⁴⁴ Vague, overbroad participant orders not only infringe protected speech of trial participants, but also impair the press' right to gather that protected speech and publish it in the form of news.⁴⁵ The press, therefore, does have a personal stake in the outcome of a participant gag order and should have standing to challenge it. *Nebraska Press'* narrow prior restraint analysis, however, neither defines the press' constitutional rights⁴⁶ nor protects the press' role as a check on governmental power; it merely invalidates one method of restraining the press and leaves

42. In September 1976, the press appealed an order issued by a district court judge prior to a South Carolina state senator's trial on criminal charges. The order prohibited extrajudicial statements by participants that "might divulge prejudicial matter not of public record," prevented jurors, trial participants, and officials from mingling with news reporters around the courthouse, and prohibited witnesses from giving interviews. The Fourth Circuit denied the press standing in January 1977. Central S.C. Chapter of Prof. Journ. v. United States D.C. of S.C., 551 F.2d 559 (4th Cir. 1977). The press sought declaratory and injunctive relief against the order, but in May 1978, the district court would not grant the press standing. Central S.C. Chapter of Prof. Journ. v. Martin, 431 F. Supp. 1182 (D.S.C. 1977). Later in May, the Fourth Circuit granted the press standing but upheld all portions of the order except that part preventing participants from mingling with the press. Central S.C. Chapter of Prof. Journ. v. Martin, 556 F.2d 706 (4th Cir. 1977), cert. denied, 434 U.S. 1102 (1978).

43. C.B.S., Inc. v. Young, 522 F.2d 234 (6th Cir. 1975); Northwest Publications Inc. v. Anderson, 259 N.W.2d 254 (Minn. 1977); State ex rel. Beacon Publishing Co. v. Kainrad, 46 Ohio St. 2d 349, 348 N.E.2d 695 (1976).

44. Judge Michael Musmanno expressed the point as follows:

Freedom of the press is not restricted to the operation of linotype machines and printing presses. A rotary press needs raw material like a flour mill needs wheat. A print shop without material to print would be as meaningless as a vineyard without grapes, an orchard without trees or a lawn without verdure.

Freedom of the press means freedom to gather news, write it, publish it and circulate it. When any of these integral operations is interdicted, freedom of the press becomes a river without water.

In re Mack, 386 Pa. 251, 273, 126 A.2d 679, 689 (1956) (Musmanno, J., dissenting), cert. denied, 352 U.S. 1002 (1957).

45. See text accompanying notes 47-70 *infra*.

46. Murphy, *supra* note 32, at 900. Murphy maintains because the doctrine does not define the substantive rights protected under the first amendment its application "tends to truncate constitutional development and foster ambiguity." He suggests the prior restraint doctrine causes uncertainty in the formulation of governmental restrictions and in determinations by private parties of the safe limits for their expression.

others, such as denying the press standing to challenge participant gag orders, open.

Another question *Nebraska Press* left unanswered involves the standard trial courts should apply in gagging trial participants. Because most courts read the decision to allow judicially imposed restraints on trial participants,⁴⁷ they have developed standards governing their issuance. Most courts require a showing that participant comments would create a reasonable likelihood of tending to prevent a fair trial.⁴⁸ The Supreme Court impliedly adopted this standard in *Sheppard v. Maxwell*⁴⁹ when it listed the use of participant gag orders as one alternative to mitigate the effects of adverse publicity preferable to gagging the press.⁵⁰ Proponents of the reasonable likelihood standard argue the test is "honest" in that it allows trial judges to consider many uncertain factors that may combine to prevent a fair trial.⁵¹ Because the judge does not know where the trial will be held or how much attention it will attract, the reasonable likelihood test gives the judge discretion to take all the future variants into consideration and fashion an order limiting participant comments before those comments seriously endanger a defendant's fair trial right.⁵² The reasonable likelihood standard, however, does not provide

47. *Central S.C. Chapter of Prof. Journ. v. United States D.C. of S.C.*, 551 F.2d 559 (4th Cir. 1977); *State v. Carter*, 143 N.J. Super. 405, 363 A.2d 369 (1976); *People v. Dupree*, 88 Misc. 2d 780, 388 N.Y.S. 2d 203 (Sup. Ct. 1976). *But see* *Commonwealth v. Casper*, 249 Pa. Super. Ct. 12, 375 A.2d 737 (1977) (*Nebraska Press* placed propriety of orders governing extrajudicial statements by parties and witnesses in grave doubt.).

48. *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *State v. Carter*, 143 N.J. Super. 405, 363 A.2d 366 (1976); *People v. Dupree*, 88 Misc. 2d 780, 388 N.Y.S.2d 203 (Sup. Ct. 1976).

49. 384 U.S. 333 (1966).

50. *Id.* at 363-64. The *Sheppard* Court used the "reasonable likelihood" phrase only once, and not in connection with restraints on free expression: "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *Id.* at 363. Some commentators suggest because *Sheppard* did not use the "reasonable likelihood" language in connection with participant gag orders, it intended no retreat from the clear and present danger test it has consistently applied in cases involving first amendment restrictions. See Note, *Silence Orders—Preserving Political Expression by Defendants and Their Lawyers*, 6 HARV. C.R.-C.L. L. REV. 595, 605 (1971). The *Sheppard* Court, however, preferred the participant order suggestion and set that technique apart from the recommended devices list. It is unlikely the Court would require a higher standard of danger for using the preferred remedy than for using the others. Younger, *supra* note 19, at 11.

51. *Younger v. Smith*, 30 Cal. App. 3d 138, 164, 106 Cal. Rptr. 225, 242 (1973). Although this comment examines post-*Nebraska Press* cases and the California court decided this case before *Nebraska Press*, the *Younger* opinion articulates well the rationale behind the reasonable likelihood standard.

52. *Id.* at 160, 106 Cal. Rptr. at 239.

participants with adequate warning of what types of comments are impermissible. Participants determining what statements are reasonably likely to prevent a fair trial may differ as to application of the vague standard and restrict their conduct to that which is unquestionably safe. Many statements they predict to be reasonably likely to interfere may in fact not interfere at all. Thus, the standard provides inadequate protection for participants' first amendment rights because an order incorporating the standard may make participants overly cautious of saying anything concerning a case.⁵³

Some courts, however, have adopted standards even lower than reasonable likelihood. These courts hold participant gag orders permissible when the speech "tends"⁵⁴ or is "likely"⁵⁵ to prevent a fair trial. The West Virginia Supreme Court⁵⁶ urged a "common sense" rule, suggesting police and prosecutors "never discuss a case with the press any time before the verdict," and make "no comment of any sort on any subject before trial."⁵⁷ These standards inhibit drastically full and adequate reporting on the judiciary. Furthermore, after *Nebraska Press*, the United States Supreme Court refused to consider a case presenting the issue of attorney gag rules in the free press-fair trial context,⁵⁸ and thus implicitly sanctioned the presently existing wide range of standards. Although *Nebraska Press* described the press as the "handmaiden of effective judicial administration,"⁵⁹ the Court's subsequent acceptance of this wide range of standards seriously compromises the press' role.

The Seventh Circuit has accomplished the goals of participant gag orders—retaining the integrity of the judicial system while promoting free speech and press coverage—by adopting a clear, precise, and narrowly drawn standard.⁶⁰ The standard pro-

53. As the Court stated in *NAACP v. Button*, 371 U.S. 415 (1962): "These [first amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Id.* at 433.

54. *In re Porter*, 268 Or. 417, 521 P.2d 345, cert. denied, 419 U.S. 1056 (1974); *In re Sawyer*, 260 F.2d 189, rev'd, 360 U.S. 622 (1959).

55. *Philadelphia Newspapers, Inc. v. Jerome*, 478 Pa. 484, 387 A.2d 425, 431 (1978), appeal docketed, No. 78-155 (U.S. July 27, 1978).

56. *State v. Sette*, ___ W.Va. ___, 242 S.E.2d 464 (1978).

57. *Id.* at ___, 242 S.E.2d at 472.

58. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). The Court had refused to hear the issue earlier also. See *In re Porter*, 268 Or. 417, 521 P.2d 345, cert. denied, 419 U.S. 1056 (1974).

59. 427 U.S. at 560 (quoting from *Sheppard v. Maxwell*, 384 U.S. at 350 (1966)); 427 U.S. at 586-87 (Brennan, J., concurring).

60. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied,

scribes speech posing "a serious and imminent threat of interference with the fair administration of justice."⁶¹ Under the reasonable likelihood test, the trial judge possesses almost unfettered discretion in determining what comments, however trivial or innocuous, violate the order. In contradistinction, the Seventh Circuit requires a more principled approach to such a judicial determination; not only is the very scope of the order more limited, it inherently appears to require some measure of articulated judicial justification to sustain a violation of the order. The Seventh Circuit's approach allows participants greater latitude to determine what types of comment would prevent the trier of fact from fairly evaluating the evidence presented in court, thus enabling them to gauge when their speech is protected. Its redefinition of the area of acceptable comment gives more warning of what actions are impermissible and thus fosters dissemination of information that would not endanger a fair trial.⁶² The right to a fair trial is fundamental;⁶³ issues of law and

427 U.S. 912 (1976). The Sixth Circuit adopted an identical standard in *CBS, Inc. v. Young*, 522 F.2d 234 (1975). See notes 66-69 *infra*.

61. This is the test of traditional first amendment speech cases although the Supreme Court has restated the standard since formulating it in *Schenck v. United States*, 249 U.S. 47 (1919). See Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—And Beyond*, 1969 SUP. CT. REV. 41. The ABA, however, adopted the lower "reasonable likelihood" standard for attorneys. ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE—STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 74-75 (Approved Draft 1968) [hereinafter cited as the REARDON REPORT]: *Report of the Committee on the Operation of the Jury System on the "Fair Trial-Free Press" Issue*, 45 F.R.D. 391, 406 (1968) [hereinafter cited as the Kaufman Report]. The ABA Code of Professional Responsibility also limits an attorney's speech if it is "reasonably likely" to interfere with the administration of justice. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (A) - (H). Although the Kaufman Report does not discuss the standard at all and the REARDON REPORT does not deal with it in any depth, apparently relying on Sheppard's use of "reasonable likelihood," the reports' rationale was that defendant's right to a fair trial outweighs attorneys' rights to make possible prejudicial statements. Kaufman Report, *supra*, at 406.

Several courts have suggested a layman-attorney distinction, arguing laymen can publicly criticize the administration of justice but lawyers should be bound by higher standards of conduct and their criticism should be more restrained. See *In re Woodward*, 300 S.W.2d 385 (Mo. 1957) (*en banc*); *In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971); *In re Gerouch*, 76 S.D. 191, 75 N.W.2d 644 (1956); *In re Simmons*, 65 Wash. 2d 88, 395 P.2d 1013 (1964), *cert. denied*, 381 U.S. 934 (1965).

62. The serious and imminent threat standard also accords with the Supreme Court's reluctance to impose sanctions where the speech involved has serious political value. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-83 (1964). The Supreme Court held the social and political importance of comment on matters of public concern is so strong as to require a showing of "malice" before a court can render a libel judgment against a publisher.

63. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) ("trial by jury in criminal cases is fundamental to the American scheme of justice"); *In re Murchison*, 349 U.S. 133, 136 (1955) ("a fair trial in a fair tribunal is a basic requirement of due process").

fact in a judicial proceeding must be resolved on the basis of evidence admitted in court, not in the media.⁶⁴ Yet equally fundamental are the rights of all participants to exercise their first amendment rights, of the press to publish news on the judicial system, and of the public to obtain information on the workings of that system. The serious and imminent threat standard allows courts to protect proceedings from prejudicial interference without placing unnecessary limitations on first amendment freedoms.⁶⁵

Additionally, after a trial court finds a participant order necessary under the serious and imminent threat standard, the judge must precisely tailor its scope to the needs of the case. In *CBS, Inc. v. Young*,⁶⁶ an order prevented all parties concerned with the litigation and "their relatives, close friends, and associates" from discussing the case "in any manner whatsoever" with the media.⁶⁷

64. *Bridges v. California*, 314 U.S. 252, 271 (1941) ("legal trials are not like elections to be won through the use of the meeting hall, the radio, and the newspaper").

65. "[T]he limitation of first amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier v. Martinez*, 416 U.S. 396, 413 (1974). See also *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

66. 522 F.2d 234 (6th Cir. 1975).

67. *Id.* at 236. The Sixth Circuit granted the press standing to appeal the order, *id.* at 238, and held the order unconstitutional because there was not substantial evidence that publicity had created a clear and imminent danger to the fair administration of justice. *Id.* at 240.

The *CBS* order gagged a number of private persons. Although the REARDON REPORT placed restrictions on comments by attorneys and law enforcement officers, it did not recommend any general restrictions on private persons. The REPORT suggested there is no widely demonstrated need for a prohibition on private persons, and the prohibition could raise constitutional questions. REARDON REPORT, *supra* note 63, at 142. Nevertheless, trial judges have often issued gag orders that cover large numbers of private persons. See, e.g., *Hamilton v. Municipal Court*, 270 Cal. App. 2d 797, 76 Cal. Rptr. 168, cert. denied, 396 U.S. 985 (1969). In *Hamilton*, the California Court of Appeals upheld a trial judge's order gagging all parties, their counsel, all law enforcement officers, the regents, employees, and agents of a university and all of the university students. The reviewing court reasoned the order complied with the Supreme Court's mandate in *Sheppard v. Maxwell*, 384 U.S. 333 (1968), that trial judges utilize alternatives such as gagging trial participants to preserve a fair trial rather than gagging the press. *Id.* at 802, 76 Cal. Rptr. at 171. See notes 17-22 *supra* and accompanying text. See also *King v. Jones*, 319 F. Supp. 653 (N.D. Ohio 1970); *State v. Schmid*, 109 Ariz. 349, 354, 509 P.2d 619, 624 (1973). See generally Warren & Abell, *Free Press—Fair Trial: The "Gag Order," A California Aberration*, 45 S. CAL. L. REV. 51 (1972).

Some commentators suggest gag orders should not cover criminal defendants. They maintain pretrial publicity by a defendant does not prejudice a prosecutor's case. The sixth amendment guarantees a fair trial to the defendant, not the state. Moreover, the accused has a right to reply publicly to the prosecutor's charges. See generally Freedman & Starwood, *supra* note 1; Note, *Gag Orders on Criminal Defendants*, 27 HASTINGS L.J. 1369 (1976).

The order was vague because it did not sufficiently identify "close friends" or "associates" of the litigants. Because the line between innocent and condemned conduct becomes guesswork when an order uses such indefinite terms, the order may have prevented many people from saying anything about the case for fear of contempt charges. Further, by prohibiting anyone associated with the case from discussing it "in any manner whatsoever," the order prevented people from making tangential comments having no tendency to prevent a fair trial. Thus, the order was overbroad because the government's interest is merely to limit speech that prevents a fair trial.⁶⁸ Such an order infringes on first amendment rights unnecessarily by drastically limiting access to news sources.⁶⁹

Private litigation often affects important areas of public concern, and trial participants are a crucial source of information and opinion on issues involved in the case. Orders directed at trial participants, however, arguably are not prior restraints because

68. Although vagueness and overbreadth are similar in their deterrence of protected expression, the concepts are distinct. As a matter of due process, a law is void on its face if it is so vague that persons of "common intelligence must necessarily guess at its meaning and differ as to its application . . ." *Conally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (statute imposing fines or imprisonment upon contractors who paid their workmen less than the "current rate of per diem wages in the locality where the work is performed" held void for uncertainty). See generally Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). An overbroad law is one that "does not aim specifically at evils within the allowable area of government control, but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise" of protected expressive or associational rights. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (statute prohibiting all picketing void on its face because it banned peaceful picketing protected by the first amendment). See generally Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

69. By limiting access to potential news sources, a vague, overbroad participant order creates an information vacuum that may lead the press to seek out sources less responsible than attorneys and public officials. In an article in the *ABA Journal*, Evelle Younger, district attorney for Los Angeles County, explained how this can happen. Before the trial of Sirhan Sirhan for the assassination of Robert F. Kennedy, the trial judge issued a sweeping participant gag order. When a young woman announced she had seen a girl in a polka-dot dress saying, "we got Kennedy," run from the assassination scene with two foreign looking males, the press sought out the woman who had seen the girl in the polka-dot dress. The media broadcast and printed her statement nationwide. Actually, she had fabricated the story, but because the order was so broad, its wording prohibited the district attorney from even explaining the account was untrue. Further, when the press asked the district attorney questions like, "Is it true President Nasser was behind the assassination?," he could only respond with "no comment." This left the impression there might have been evidence of Nasser's involvement when in fact there was not, and Younger suggests it would not have impaired Sirhan's right to a fair trial for the attorney to have said, "no, there is no evidence of that." Thus, the order not only limited accurate reporting on the judicial system, but also generated speculation and false rumors. Younger, *Fair Trial, Free Press and the Man in the Middle*, 56 A.B.A.J. 127, 129 (1970).

one prosecuted for violating them can appeal.⁷⁰ They also are not direct restraints on the press. Therefore, *Nebraska Press*' prior restraint analysis provides no standards for trial judges issuing orders silencing trial participants. Nevertheless, participant orders that neither incorporate the serious and imminent threat standard nor fit the specific needs of a case impermissibly limit the publication of accurate information about the judicial process. Because courts have not developed definitive standards that protect the press' and public's first amendment rights, trial judges often have issued participant gag orders that inhibit media coverage and thus curtail dissemination of information critical to a government in which the citizenry is the final judge of the proper conduct of public business.

A lack of definitive standards also has resulted in trial judges applying inconsistent standards when withholding information from the public and press. Attempting to preserve the integrity of judicial proceedings, judges often seal records or close proceedings. Because the press' right to gather news is no greater than the public's,⁷¹ orders limiting information available to the public also limit the press' access to that information. Although the Supreme Court in *Cox Broadcasting Corp. v. Cohn*⁷² held that once information is on the public record the press may publish it, the Court avoided the broader issue of how much information trial courts can keep off the record. Unfortunately, *Nebraska Press* did not clarify matters.

Because *Nebraska Press* emphasized the form of an order rather than its substance, the decision provides no guidance to trial judges who must determine when and what they may withhold from the public. Sometimes with no discussion of limits or alternatives, appellate courts in post-*Nebraska Press* cases have allowed trial judges broad discretion to seal records,⁷³ close portions of judicial proceedings,⁷⁴ and limit access to information.⁷⁵ These courts reason *Nebraska Press* is inapplicable because acts

70. See *Younger v. Smith*, 30 Cal. App. 3d 138, 151, 106 Cal. Rptr. 225, 233-34 (1973).

71. *Pell v. Procunier*, 417 U.S. 817 (1974); *Zemel v. Rusk*, 381 U.S. 1 (1965).

72. 420 U.S. 469 (1975).

73. *Gannett Co. v. Burke*, 551 F.2d 916 (2d Cir. 1977); *In re Estate of Hearst*, 67 Cal. App. 3d 777, 136 Cal. Rptr. 821 (1977).

74. *Commercial Printing Co. v. Lee*, 262 Ark. 87, 553 S.W.2d 270 (1977); *Gannett Co. v. DePasquale*, 43 N.Y.2d 370, 372 N.E.2d 544 (1977), cert. granted, 435 U.S. 1006 (1978); *Philadelphia Newspapers, Inc. v. Disciplinary Bd. of Sup. Ct.*, 468 Pa. 382, 363 A.2d 779 (1976).

75. *United States v. Gurney*, 558 F.2d 1202 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978).

of sealing records and closing proceedings are not directed at, and thus technically are not prior restraints on, the press.⁷⁶

Absence of standards governing the withholding of information gives judges great discretion to censor information of significant public interest. In *Philadelphia Newspapers, Inc. v. Disciplinary Board of the Supreme Court*,⁷⁷ the Pennsylvania Supreme Court upheld a trial judge's decision to conduct a disbarred attorney's reinstatement hearing in secret, because the supreme court believed opening the procedure would serve only to embarrass the attorney and would not benefit the public.⁷⁸ Similarly, the New York Court of Appeals in *Gannett v. DePasquale*⁷⁹ recently condoned an order closing a pretrial suppression hearing to the public without making the defendants in the murder case establish prejudice. The court said the public's concern about judicial and prosecutorial accountability did not rise to a legitimate level because any irregularities in earlier proceedings occurred out of state.⁸⁰

76. *United States v. Gurney*, 558 F.2d 1202, 1208 (5th Cir. 1977); *In re Estate of Hearst*, 67 Cal. App. 3d 777, 783, 136 Cal. Rptr. 821, 824 (1977); *Philadelphia Newspapers, Inc. v. Jerome*, 478 Pa. 484, 502, 387 A.2d 425, 432 (1978), *appeal docketed*, No. 78-155 (U.S. July 27, 1978). Some courts, however, have treated orders sealing records and closing proceedings as prior restraints and used *Nebraska Press*' test to determine their validity *Gannett Co. v. Burke*, 551 F.2d 916 (2d Cir. 1977) (Oakes, Circuit J., dissenting); *Gannett Pacific Corp. v. Richardson*, ___ Haw. ___, 580 P.2d 49 (1978); *Northwest Publications, Inc. v. Anderson*, 259 N.W.2d 254 (Minn. 1977); *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976). For a discussion concluding the distinction between indirect restraints via closing the courtroom and direct restraints via gag orders on the press exalts form over substance, see *Fenner & Koley, supra* note 1, at 471-73.

77. 468 Pa. 382, 363 A.2d 779 (1976).

78. The attorney petitioning for reinstatement had pled guilty to twelve counts of federal securities fraud involving 1.5 million dollars. *Id.* at 388, 363 A.2d at 782. The dissent argued because the criminal activity that led to the attorney's disbarment is part of the public record and reinstatement hearings are an integral part of a court's obligation to supervise the judicial system, the hearings are public business. *Id.* at 388, 363 A.2d at 782 (Roberts, J., dissenting).

79. 43 N.Y.2d 370, 372 N.E.2d 544 (1977), *cert. granted*, 435 U.S. 1006 (1978).

80. See also *Philadelphia Newspapers, Inc. v. Jerome*, 478 Pa. 484, 387 A.2d 425 (1978), *appeal docketed*, No. 78-155 (U.S. July 27, 1978) (rules closing pretrial suppression hearing to the public at defendant's request held constitutional). *Nebraska Press* left open the question of the constitutionality of closing pretrial proceedings with the defendant's consent. 427 U.S. at 564 n.8 & 584 n.11 (Brennan, J., concurring). The Supreme Court granted *certiorari* in *Gannett*, 435 U.S. 1006 (1978), and heard oral arguments, 47 U.S.L.W. 3325 (1978). Counsel for *Gannett* argued the sixth amendment's public trial clause and the first amendment require suppression hearings be open to the public unless the defendant establishes, using *Nebraska Press*' standard for direct gag orders, publication of what occurred at the hearing will prejudice his or her case. *Id.* at 3325-26. Counsel for Judge DePasquale and the defendants in the murder case stated "if there is any constitutional absolute, it is the accused's right to a fair trial, and anything that would truncate this right must be avoided." *Id.* at 3326.

These decisions are deficient in several respects. First, the sixth amendment's public trial provision does not allow a judge to close the courtroom merely by determining the public's interest does not rise to a significant level. In fact, the Supreme Court has suggested the right to a public trial belongs not only to the accused, but to the public, because the right serves to restrain possible abuses of judicial power by limiting a judge's discretion to close the courtroom.⁸¹ Second, the "legitimate level" standard

81. See, e.g., *Lewis v. Peyton*, 352 F.2d 791 (4th Cir. 1965); *United States v. General Motors Corp.*, 352 F. Supp. 1071 (E.D. Mich. 1973); *United States ex rel. Mayberry v. Yeager*, 321 F. Supp. 199 (D.N.J. 1971); CONGRESSIONAL RESEARCH SERVICE, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION*, S. DOC. NO. 92-82, 92d Cong., 2d Sess., amend. VI 1200 (1973) ("it appears that while it is possible to exclude some persons from the courtroom, it is not permissible to bar wholly the public and the press, either with or without the concurrence of the defendant") (footnotes omitted). The public's right to a public trial is reinforced by the lack of a contrary right on behalf of the criminal defendant. Although a defendant, under some circumstances, can waive his constitutional right to a public trial, he has no absolute right to compel a private trial. *Singer v. United States*, 380 U.S. 24, 34-35 (1965).

Further, in explaining the Anglo-American distrust for secret trials, the Court, in *In re Oliver*, 333 U.S. 257 (1948), did not suggest the right to a public trial attaches only when a trial judge perceives public interest has risen to a certain level, but observed the right serves to restrain possible abuses of judicial power:

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English court of the Star Chamber, and the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolize a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in a public way 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. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

Id. at 268-70. In *Estes v. Texas*, 381 U.S. 532 (1965), the Court noted a public trial improves the quality of testimony, may induce unknown witnesses to come forward with relevant testimony, moves trial participants to perform their duties conscientiously, and gives the public the opportunity to observe the courts' performance of their duties and to determine whether they are performing adequately. *Id.* at 583. These benefits derived from a public trial are not dependent necessarily on a public interest rising above the level of curiosity, as the *Gannett* court suggested it must.

Although the *Gannett* court closed a suppression hearing rather than a trial, some courts have suggested the right to a public trial attaches at the suppression hearing "because of the importance of providing an opportunity for the public to observe judicial proceedings at which the conduct of enforcement officials is questioned . . . rather than permit[ting] such crucial steps in the criminal process to become associated with secrecy." *United States v. Clark*, 475 F.2d 240, 246-47 (2d Cir. 1973); accord, e.g., *United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (3d Cir. 1969); *United States v. Lopez*, 328 F. Supp. 1077, 1087 (E.D.N.Y. 1971). But see *Philadelphia Newspapers, Inc. v. Jerome*, 478 Pa. 484, 505, 387 A.2d 425, 436 (1978), *appeal docketed*, No. 78-155 (U.S. July 27, 1978)

is too vague, providing insufficient protection for the press' and public's first amendment rights.⁸² Finally, the decisions seem to require the media to prove the public's concern measures up to the vague standard. Yet as Justice Brennan noted in staying portions of the *Nebraska Press* trial judge's order, those requesting the restraint bear the burden of demonstrating publication of particular facts will irreparably impair the ability of jurors to reach an independent and impartial judgment.⁸³ Because an order closing the courtroom infringes first amendment rights and, in effect, operates as a prior restraint on the press, the burden of proof in these cases should rest on those requesting closure.⁸⁴

Gannett and Philadelphia Newspapers also fail to recognize the unique role of a judge who enters a closure order. Normally a court is brought into a dispute as a neutral third party. In these cases, however, the court and the press are adversaries because the court is preventing the press from reporting the court's workings.⁸⁵ The trial judge's involvement in the proceedings may lessen the court's detachment and neutrality. The potential for excessive and arbitrary withholding of information exists because judges sometimes must determine whether to allow publication of information reflecting on their own competence. Moreover, if prosecution and defense both request a closed proceeding, the trial judge becomes the "sole guardian of first amendment [media] interests,"⁸⁶ which interests conflict with the express wishes of both parties to the litigation. This places a tremendous

(pretrial suppression hearing will be held in private at defendant's request because "most damaging of all information from outside the courtroom" comes from these hearings and public's interest in avoiding unfair trials outweighs its interest in access).

82. See text accompanying notes 68-71 *supra*.

83. 423 U.S. at 1333 (1975) (Blackmun, J., Circuit Justice). Furthermore, the Supreme Court has held the burden of proof should operate to decide close cases in favor of the speech being protected. *Smith v. California*, 361 U.S. 147 (1959). See Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 546 (1970).

84. See Fenner & Koley, *supra* note 1, at 493-94.

85. *Id.* at 456-57.

86. Younger, *supra* note 19, at 6-7.

Fenner and Koley describe the situation as follows:

The defense attorney is, of course, single minded in his regard for his client's interest; a good deal of the time this means the less publicity the better, whether truly out of fair trial concerns or simply to save the client's face. The prosecutor is interested in a conviction which will stand on appeal; currently, reversal of a conviction because of prejudicial publicity although *extremely* rare, constitutes a real possibility, while *reversal of a conviction for infringement of the media's rights*, of course remains unheard of.

Fenner & Koley, *supra* note 1, at 456 (emphasis in original).

emotional and intellectual burden on the trial judge.⁸⁷ Unless adequate procedural devices govern issuance of these types of orders, this burden, combined with a lack of neutrality, could result in orders closing proceedings when less restrictive means would effectively mitigate prejudice.

Courts have failed not only to articulate standards for orders withholding information, but also to delineate the permissible scope of closure orders. An Arkansas trial judge conducted voir dire in his chambers.⁸⁸ Similarly, the Second Circuit upheld a trial judge's order sealing all files in three pending criminal cases and issued no opinion explaining why the order was necessary.⁸⁹ Such orders, like orders gagging trial participants, do not directly restrain the press because the news media are free to try to obtain the information from other sources. Yet few sources can provide an accurate and detailed account of a judicial proceeding, particularly if the judge also gags trial participants. Thus, without clear standards governing when closure orders are appropriate and what trial courts can withhold, such orders can curtail severely the press' access to information. Even if the court provides a transcript after a trial is over, it is a poor substitute for actually observing the event.⁹⁰ Furthermore, when the trial is over, public interest may have dissipated and the proceeding will no longer be newsworthy.⁹¹

87. Younger states that "[e]motionally and intellectually, the burden on a trial judge who is asked to go counter to the wishes of a defendant in a capital case on a major constitutional point *where the state joins in the defense position* is almost unbelievable." Younger, *supra* note 19, at 6-7 (emphasis in original).

88. *Commercial Printing Co. v. Lee*, 262 Ark. 85, 553 S.W.2d 270 (1977). Although the state supreme court invalidated the judge's order, the court ignored both respondents' assertion of the defendant's sixth amendment right to a fair trial and petitioners' assertion of their first amendment right of freedom of the press. The court relied instead on the substantial public interest in keeping all portions of a criminal trial open, but did not make clear whether it considered that right absolute or considered the defendant's claim of prejudice insufficient to overcome the public right. See Note, *Constitutional Law and the Criminal Trial: Exclusion of the Press from Voir Dire*, 32 ARK. L. REV. 132 (1978).

89. *Gannett Co. v. Burke*, 551 F.2d 916 (2d Cir. 1977).

90. "[A] transcript of a proceeding is a sterile substitute for observing the actual conduct of a hearing, as reviewing courts are well aware. Actual observation of the demeanor, voice and gestures of the participants in a hearing must be as informative to the press and public as those same matters are to juries during trial." *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 471, 351 N.E.2d 127, 136 (1976) (Stern, J., concurring).

91. As the Supreme Court stated in *Bridges v. California*, 314 U.S. 252 (1941):

It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive

A few courts, however, have recognized the problem and have established standards for the validity of orders closing judicial proceedings or sealing records. The New Hampshire Supreme Court adopted the proposed American Bar Association standard, which allows a trial court to close a pretrial hearing or seal records in a criminal case only if failure to do so constitutes a clear and present danger to a fair trial.⁹² This standard requires a finding that information prejudicial to the defendant would reach jurors, and that the court cannot curb the prejudicial effect by less restrictive alternatives. In *United States v. Cianfrini*,⁹³ the Third Circuit held that any motion to close a proceeding or seal a record is proper only after full consideration of the important policies the sixth amendment public trial provision serves.⁹⁴ *Cianfrini* requires a court to test any claim for a departure from the constitutional requirement of a public trial by a standard of "strict and inescapable necessity" to ensure that only under the most exceptional circumstances may a judge close even limited portions of a criminal trial.⁹⁵ Although the Second Circuit and ABA standards are clear and narrowly drawn, they apply only to criminal proceedings. The lack of standards applicable to civil proceedings is unfortunate because civil trials also may affect vital areas of public concern.⁹⁶ A precise standard resting upon first amendment values and applicable to both civil and criminal proceedings is necessary to protect adequately the press' constitutionally mandated role in relation to the public and the judiciary.⁹⁷

results at the precise time when public interest in the matter discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion.

Id. at 268-69. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 561 ("element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly"); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968) ("the present case involved . . . 'political' speech in which the element of timeliness may be important").

92. *Keene Publishing Corp. v. Keene Dist. Ct.*, ____ N.H. ____, 380 A.2d 261 (1977).

93. 573 F.2d 835 (3d Cir. 1978).

94. See note 81 *supra*.

95. 573 F.2d at 854.

96. See, e.g., *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (participant gag order issued in a civil action against Kent State University officials and the National Guard arising from a confrontation between demonstrating students and guardsmen). In invalidating the ABA Code of Professional Responsibility's no comment rules applicable to civil actions, the Seventh Circuit, in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976), recognized that many important social issues become entangled in civil litigation. *Id.* at 258.

97. This comment suggests such a standard is necessary to enable the press to provide information to the public. One commentator, however, makes no distinction between public and press and maintains the standard can be grounded in the first amendment

Although *Nebraska Press* did not articulate a standard for orders withholding information from the public and press, its standard for direct press gag orders should apply because an order closing a proceeding or sealing a record often curtails press activity to as great a degree as a direct restraint on the press. Under this approach, a trial court must find that less restrictive measures would not mitigate adverse effects of publicity, and explain why the proposed order would prevent the threatened harm. This standard, coupled with sensitive procedural devices, will ensure courts will limit first amendment rights of the public and press only if they cannot avoid the confrontation between first and sixth amendment rights by less restrictive alternatives.

Because *Nebraska Press* focused on the technical form of a gag order rather than its chilling effects, the decision does not adequately protect the press in its role as a free institution monitoring governmental power. Participant orders and orders withholding information from both the public and press can chill speech and publication as effectively and completely as prior restraints on the press. Accordingly, procedural safeguards are necessary to ensure that courts do not impose either indirect or direct restraints on the press when less restrictive alternatives would be effective. Several jurisdictions require courts to give the press notice and an opportunity to be heard prior to entry of a direct prior restraint;⁹⁸ courts should give the press the same opportunity prior to entry of a participant gag order or an order sealing a record or closing a judicial proceeding. The opportunity to be heard would allow the trial judge to explore alternative techniques to ensure a fair trial, to obtain a full airing of the first amendment ramifications of a restraint, and to formulate an order tailored as precisely as possible to the needs of the case. Further, if a trial judge issues an order, expedited review should be available in an independent forum to protect the immediacy value of speech and publication on the judicial process.

right of public access. The approach is based on the premise the open trial enables the public to scrutinize the workings of the judicial system and to participate "through the 'theatre of justice,' in the ritual process society has established to resolve conflicts." Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899, 1923 (1978) (footnotes omitted).

98. *United States v. Schiavo*, 504 F.2d 1, 8 (3d Cir.), cert. denied, 419 U.S. 1096 (1974); *New York Times Co. v. Starkey*, 51 App. Div. 2d 60, 380 N.Y.S.2d 239 (1976); *State ex rel. Beacon Journal Publishing Co. v. Kainrad*, 46 Ohio St. 2d 349, 351, 348 N.E.2d 695, 697 (1976); ABA LEGAL ADVISORY COMMITTEE ON FREE TRIAL AND FAIR PRESS, RECOMMENDED COURT PROCEDURE TO ACCOMMODATE RIGHTS OF FAIR TRIAL AND FREE PRESS (Rev. Draft Nov. 1975) (adopted by ABA House of Delegates, without changes, Aug. 12, 1976).

The procedural safeguards the Supreme Court has developed in obscenity cases provide a model for protection of the press' right to cover judicial proceedings. When the state attempts to regulate books or magazines as obscene, the Supreme Court has fashioned a series of specific rules designed to prevent insensitive procedural devices from strangling first amendment interests.⁹⁹ The issue in obscenity cases is whether the speech to be regulated is obscene, and thus outside the area of first amendment protection. Under the model, a judge cannot issue a restraint before notice and an adversary hearing. Thus, procedural due process requirements attach to the initial discussion concerning whether regulation will infringe first amendment rights.

If the Constitution requires elaborate procedural safeguards in the obscenity area, it should require equivalent procedural protection when the speech implicates more central first amendment values, as information on the judicial system does.¹⁰⁰ The party petitioning for a participant or closure order should have the burden of establishing that such an order is the least restrictive means to mitigate prejudice.¹⁰¹ If all other alternatives short of infringing first amendment rights would be ineffective, the trial judge should make specific factual findings indicating why the order was necessary under the circumstances of the case. Further, the judge must consider all alternatives to the order and detail why each is inadequate.¹⁰² The procedure helps to ensure the judge is aware of both sides of the law and facts, and the record helps to ensure that, having been made aware of the issues, the judge has considered them.

If the only hearing is before the trial judge, however, the procedure may be insufficient to prevent imposition of unconstitutional gag orders. Judges may be inclined to grant the order to insulate their conduct from criticism, to ease the task of assuring a fair trial, or to respond to pressure from counsel for the defense and prosecution.¹⁰³ Past cases illustrate that despite a hearing requirement judges can impose unconstitutional gag orders by merely reciting, without further analysis, the factors required for

99. See Managhan, *supra* note 83, at 518-20.

100. For a discussion of the press' due process rights, see Fenner & Koley, *supra* note 1, at 442-52.

101. See text accompanying notes 83-84 *supra*.

102. The Minnesota Supreme Court recently adopted this procedure for determining the validity of orders to seal records or close the courtroom. See *Northwest Publications, Inc. v. Anderson*, 259 N.W.2d 254, 257 (Minn. 1977).

103. See notes 86-87 *supra* and accompanying text.

issuance of such an order.¹⁰⁴ Thus, notice and an opportunity to be heard are, by themselves, inadequate to protect first amendment interests; expedited review of the trial judge's order also must be available in an independent forum.¹⁰⁵

When a state administers a censorship system to protect the public from obscene motion pictures, the Constitution requires the state to provide expedited judicial review of any prior restraint it imposes.¹⁰⁶ The state should provide a similar procedure to ensure speedy review of direct and indirect gag orders. Providing the press with notice and an opportunity to be heard prior to issuance of orders gagging trial participants or withholding information from the public and press, coupled with some form of expedited review, provides more effective protection for media coverage of judicial proceedings than *Nebraska Press'* narrow prior restraint analysis.

As lower court decisions demonstrate, participant gag orders and orders closing judicial proceedings can inhibit media coverage of the judicial system as effectively as direct prior restraints. Further, a trial judge issuing these types of orders may lack neutrality because the media are reporting the court's workings and perhaps the judge's performance. Thus, courts should grant the press notice and an opportunity to be heard prior to issuance of such orders. The judge should consider all alternatives to the orders and list reasons for a conclusion that each is inadequate. Finally, if a judge issues an order closing the courtroom or gagging trial participants, expedited relief should be available in an independent forum to protect the immediacy value of press coverage

104. See *Des Moines Register and Tribune Co. v. Osmundson*, ___ Iowa ___, 248 N.W.2d 493 (1976). The trial judge entered an order in a criminal trial restricting publication of jurors' names. The Iowa Supreme Court held the order unconstitutional because it was entered without notice and hearing. The judge then held a hearing, noting sequestration, the supreme court's suggested alternative, was impractical because jurors had family commitments, and again issued the order. The state supreme court again held the order unconstitutional.

105. See Note, *Un gagging the Press: Expedited Relief from Prior Restraints on News Coverage of Criminal Proceedings*, 65 GEO. L. REV. 81 (1976). The comment discusses several procedures for prompt relief from the freezing effects of an unconstitutional restraint: staying the order pending plenary review on the merits; permitting the press to violate the order and assert its unconstitutionality; and allowing expedited appellate review on the merits of the gag order.

Commentators have explored various alternatives. See Landau, *The Challenge of the Communications Media*, 62 A.B.A.J. 55 (1976) (automatic stay); Rendleman, *Free Press-Fair Trial: Review of Silence Orders*, 52 N.C. L. Rev. 127 (1973) (examines various alternatives); Roney, *The Bar Answers the Challenge*, 62 A.B.A.J. 60 (1976) (ABA recommendations).

106. *Freedman v. Maryland*, 380 U.S. 51 (1965).

on the judicial system. Such a procedure would help ensure adequate protection for the press' role as a check on governmental power and would avoid the triumph of form over substance that prior restraint analysis fosters.

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