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Nebraska Press Association v. Stuart - A Prosecutor's View of Pre-Trial Restraints on the Press

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NEBRASKA PRESS ASSOCIATION V. STUART— A PROSECUTOR'S VIEW OF PRE-TRIAL RESTRAINTS ON THE PRESS

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Mr. Larson prosecuted the criminal case which formed the factual setting for the United States Supreme Court decision in Nebraska Press Association v. Stuart. *In this article, the authors explain the factors which prompted a pre-trial restraining order on publicity. They discuss the alternatives to prior restraints authorized by the Court and explain why they would have been ineffective in this case. Finally, they contend that the* Stuart *decision effectively eliminates all "gags" on the press, at least in coverage of criminal proceedings.*

Confusion has plagued the legal community and the media in recent years concerning the protection to be accorded conflicting constitutional rights arising in criminal jury trials which stimulate unusual public interest and extensive media coverage. The Sixth Amendment[1] right of a criminal defendant to a fair trial by an impartial jury is essential to the fair administration of justice. The right of the press to be free of "prior restraints"[2] on publication of facts surrounding criminal proceedings is the correlating and opposing freedom guaranteed by the First Amendment.[3] In exceptional cases, locale and circumstances may combine with intense publicity to create an atmosphere potentially destructive of the impartial and orderly functioning of the criminal justice system. This results in an open clash of First and Sixth Amendment rights.

In *Nebraska Press Association v. Stuart*[4] the United States

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1. U.S. CONST. amend. VI provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

2. *See* notes 35-47 and accompanying text *infra*.

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

4. 427 U.S. 539 (1976).

Supreme Court considered, for the first time, the propriety of a judicial order restricting pre-trial publicity of the facts of a heavily-publicized pending criminal action. Essentially, the question before the Court was the extent of judicial authority to limit freedom of the press: may responsible judicial discretion take the form of "prior restraint" on publication for a limited period of time? The question was narrowed to encompass only sensational proceedings in which revelation of facts would present an imminent threat to the impaneling of a constitutionally acceptable jury.

In *Stuart* the Court reversed an order of the Nebraska Supreme Court limiting pre-trial publicity in a criminal prosecution[5] for the murder of six residents of a small Nebraska village. This Article will discuss the factual setting of the *Stuart* decision, providing a basis for comparison with the leading Sixth Amendment cases which had formed the theoretical platform for the prosecutor's action in *Stuart*, and will conclude with an analysis of the Court's reasoning.

I. *Nebraska Press Association v. Stuart*: THE FACTS

On October 18, 1975, three children and three adults were murdered in the Village of Sutherland, Nebraska. Two of the children and an elderly woman had been sexually assaulted. It was the most sensational crime in Nebraska since the 1958 Starkweather murder case.[6] Late that night and early the following morning, dozens of members of both the electronic and print media gathered at the scene of the crime. They included representatives of all local media, the *Omaha World Herald*,[7] and the national wire services. A helicopter was sent by a national broadcasting net-

5. State v. Simants, 194 Neb. 783, 236 N.W.2d 794 (1975).

6. Nineteen year old Charles R. Starkweather with his accomplice, fourteen year old Caril Fugate, were charged with nine murders in Lancaster County, Nebraska. Caril's mother, stepfather and baby half-sister were the first victims. They killed six other persons in order to acquire money, an additional gun and ammunition, food and automobiles. Starkweather v. State, 167 Neb. 477, 480-82, 93 N.W.2d 619, 621-22 (1958).

This sensational crime spree still draws the attention of the news media. *See To a Dumpy New Life*, TIME, June 21, 1976, at 22 (interview with Caril Fugate upon her parole from a Nebraska penitentiary).

7. The Omaha World Herald is the only Nebraska paper with a statewide circulation. Its daily circulation was 235,830 in 1976. The Sunday edition had 278,826 readers.

work from Denver, Colorado. In this tense atmosphere, some reporters demanded access to the scene of the crime; the request was denied. However, they were told that the preliminary investigation indicated that Erwin Charles Simants was the prime suspect and they were given his description. On October 19, Simants was arrested by the Lincoln County Sheriff, charged with six counts of murder in the first degree, and arraigned in the county court of Lincoln County, Nebraska, in North Platte.[8]

Meanwhile, media representatives interviewed potential witnesses. On October 20, a local paper of general circulation in the Lincoln County area dedicated its front page, almost exclusively, to the gruesome events of the weekend. One story recounted statements by Simants' father that his son had killed "five or six people"[9] as well as hearsay statements by the Lincoln County sheriff about Simants' activities after the alleged murders.[10] Another story revealed that one of the victims had "saved Simants from jail" in the past as an act of kindness.[11] On the same day

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8. 427 U.S. at 573 (Brennan, J., concurring). The charges were amended later to include allegations of sexual assault. *Id.* at 575.

9. The *North Platte Telegraph* reported:

> [S]tanding near the Kellie home Saturday night, the elder Simants tearfully said, "my son killed five or six people here . . . ."
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> . . . .
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> . . .The elder Simants said his son told him of the slayings. Linstrom said that when his father suggested that he turn himself in, Erwin fled, according to Linstrom. . . .

Id. at col. 4.

10. Gilster [the sheriff] said Simants told him that he went to both the Rodeo and Longhorn Bars in Sutherland after the shootings occurred and ordered a beer in each. The patrons didn't know anything about it (the shootings) at the time.

> . . . .
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> . . .Gilster said Simants later "wandered in the weeds near the scene of the crime. . . ."

Id. at col. 5, 6.

11. The *North Platte Telegraph* article stated:

> *Henery Kellie Saved Erwin Charles Simants from Jail September 29 According to Friends of Kellie.* According to friends, Simants had been fined $50.00 for public intoxication but was unable to pay the fine. The Rev. Nels Ibsen, Kellie's pastor, said Kellie paid the fine so he (Simants) didn't have to lay it out in jail. . . .
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> . . . .
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> . . ."Henery was well liked and it was just his nature to help people," said his minister. "I don't know if he had ever had paid anyone's fine before, but he

another local paper carried an account of Simants' purported confession to his father.[12] On October 21, a Denver, Colorado paper published reports of Simants' confession to his mother,[13] and a national wire service released a story purporting to be the Lincoln County Attorney's account of Simants' confession.[14]

The prosecution filed a motion on October 21, requesting the county court to issue such order as it found necessary to restrict pre-trial publication of prejudicial facts which might endanger the impaneling of an impartial jury.[15] Although such requests are generally made by the defense, the prosecution took affirmative action because of the duty imposed on all prosecutors, as both officers of the court and representatives of the state, to maintain an adversary system which dispenses impartial justice, rather than one which merely seeks convictions.[16] Inherent in this pursuit are the right of a criminal defendant to a fair trial before a constitutionally acceptable jury and, of equal importance, the

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would always shell out money to help in other ways. . . ."

. . . .

. . .Kellie, Ibsen said, had befriended Simants when he had stayed with Simants' sister, Mrs. William Boggs, next door to the Kellie residence.

Id. at col. 6.

12. Lincoln Star, Oct. 20, 1975, at 1, col. 4.

13. The Denver Post, Oct. 20, 1975, at 1, col. 6. The report appeared under the headline: *Charges Filed in Nebraska Family Death . . . Simants' Mother said her Son Admitted the Killings to Her and Her Husband, But Police—Baffled By the Incident—Wouldn't Reveal Whether They Had a Confession.*

14. Friendly, Fred W., *A Crime and Its AfterShock*, N.Y. Times, Mar. 21, 1976, §6 Magazine, at 86.

> By 9:00 that morning (October 20, 1975), Simants had been booked, stripped of his clothing and boots, which would be used as evidence and had listened three times to Miranda card warnings; that statements that he might make could be used against him. Now he was making a confession in which he admitted to the murders and sexual assaults . . . this confession was not officially reported to the media, but thirty minutes later, Prosecutor Larson was quoted by A.P. as saying "Simants apparently walked to his father's home after the shootings and told his father he was responsible for the deaths." However, the A.P. Bureau Chief in Omaha, admits hearsay of the ambulance driver's husband was falsely attributed to Larson.

15. The motion is summarized by Justice Brennan in his concurring opinion. 427 U.S. at 574.

16. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, §1.1(c) (Approved Draft, 1971). The section provides, "The duty of the prosecutor is to seek justice, not merely to convict." *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-103 (explaining the prosecutor's duty).

right of society to fair and effective enforcement of its laws. Thus, when facts arise which might jeopardize a defendant's right to a fair trial, action must be taken to protect this interest, or else any conviction obtained might be reversed.[17] Society also suffers a loss when a reversal is mandated because it is deprived of the efficient administration of its penal laws. None of these interests should be jeopardized by improper reporting. Therefore, it seems clear that the prosecution, independent of any action by the defense, has the duty to act swiftly to protect the important rights competing for attention in a criminal proceeding.

When the motion to restrict publicity was filed, an oral request was made for immediate action because a preliminary hearing on the murder charges was scheduled for the following morning.[18] The county judge, Ronald A. Ruff, immediately notified the interested media[19] and set the hearing for that same evening. The prosecution advised the court that testimony concerning Simants' confessions to his nephew, parents, and law enforcement officials would be offered at the preliminary hearing, along with testimony of a pathologist about the sexual assault on one of the child victims. It was feared that publication of such testimony would be highly prejudicial. The defense joined in the motion to restrict publication. The court entered a protective order, rejecting media contentions that it would be unconstitutional.[20] The order barred the "release for public dissemination in any form or manner whatsoever [of] any testimony given or evidence adduced during the preliminary hearing."[21] The county court's order

17. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333 (1966).

18. Two factors prompted the prosecution's request for an immediate restraint. First, the preliminary hearing was open to the public and press; therefore, the dissemination of further prejudicial publicity had to be halted before then. Second, the preliminary hearing could not be continued past Oct. 23 because Nebraska law requires that a preliminary hearing be held within four days of arrest if the defendant is held without bail, as Simants was. NEB. REV. STAT. §29-501 (1975) (the statute appears in note 108 *infra*).

19. Representatives of the following news media were notified by telephone: Nebraska Press Ass'n, The World Herald Co., The Journal Star, Western Publishing Co., North Platte Broadcasting, Nebraska Broadcaster's Ass'n, Associated Press, and United Press International. This is contrary to Justice Brennan's assertion that the press was not notified of the hearings. 427 U.S. at 575.

20. The county court's order is summarized in 427 U.S. at 575. *See also* State v. Simants, 194 Neb. 783, 784-85, 236 N.W.2d 794, 797 (1975).

21. *See* note 20 *supra*.

was challenged at a hearing in the district court of Lincoln County before Judge Hugh Stuart, who issued an order terminating the county court order and ruled that pre-trial publicity should be governed in accordance with the Nebraska Bar-Press Guidelines.[22]

The media appealed, first to the Nebraska Supreme Court and then to Justice Harry A. Blackmun,[23] in his capacity as Justice for the Eighth Circuit. They complained that the Bar-Press Guidelines were strictly voluntary, never having been intended to be incorporated into a formal court order and that any judicial order resulting in a prior restraint was violative of the First Amendment. Justice Blackmun agreed with the press regarding the wholesale incorporation of the Nebraska Bar-Press Guidelines, finding they were too vague to serve as mandatory restrictions.[24] However, Justice Blackmun did conclude that all prior restraints on pre-trial publicity "are not necessarily and in all cases invalid,"[25] and refused to stay the entire order. He concluded that facts "strongly implicative"[26] of a defendant's guilt may be restrained from publication by the media prior to trial, indicating that "a confession or statement against interest is the paradigm."[27]

With Justice Blackmun's comments in mind, the Nebraska Supreme Court considered the media's petition to modify the district court's restrictive order. The supreme court's order prohibited pre-trial publication of:

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22. The Nebraska Bar-Press Guidelines are set out in Appendix A to Justice Brennan's opinion. 427 U.S. at 613-17. For a general description of the district court order and the Guidelines, see 427 U.S. at 542-43 n.1.

23. 423 U.S. at 1327 (1975) (Blackmun, J., in chambers). Justice Blackmun initially postponed ruling on the application for a stay of the district court order in deference to the Nebraska Supreme Court, 423 U.S. at 1319. One week later, he declared that the inaction of the Nebraska Supreme Court had exceeded "tolerable limits," 423 U.S. at 1329, because over four weeks had elapsed since the entry of the district court order.

24. 423 U.S. at 1330-31.

25. *Id.* at 1332.

26. *Id.* at 1333.

27. Additional examples given by Justice Blackmun included facts associated with the circumstances of the defendant's arrest, a previous criminal record, and statements of the prosecution relating to the guilt of the accused. *Id.* at 1333.

Thus, Justice Blackmun's order constituted a partial stay of the district court order, directed at the wholesale incorporation of the Guidelines, the reporting of certain medical testimony at the preliminary hearing, and facts relating to the alleged sexual assault of some of the victims. *Id.* at 1330-32.

> (1) [c]onfessions or admissions against interest made by the accused to law enforcement officials; (2) confessions or admissions against interest, [either] oral or written . . . made by the accused to third parties, [except] . . . statements . . . made by the accused to [media] representatives . . .; [and] (3) [o]ther information strongly implicative of the accused as the perpetrator of the slayings.[28]

On appeal the United States Supreme Court found the restrictive order unconstitutional because: (1) although the pre-trial record provided a basis for the trial judge's conclusion that there would be intense and pervasive pre-trial publicity, his conclusion about the impact of such publicity on prospective jurors was, of necessity, speculative, based on unknown and unknowable factors;[29] (2) neither the state trial judge nor the Nebraska Supreme Court made express findings that alternative measures would have failed to protect Simants' rights and further, the record was lacking in evidence tending to support such a finding;[30] (3) the Court was uncertain that a prior restraint on publication would have protected the defendant's rights because of the inherent difficulties in managing and enforcing pre-trial restraining orders which would be limited by the state court's jurisdictional authority;[31] (4) the order was constitutionally defective to the extent it prohibited the reporting of evidence introduced at the preliminary hearing, which was held in open court;[32] and (5) the prohibition against publication of information "strongly implicative" of the accused as the perpetrator of the slayings was deemed too vague and broad to come within any exception to the prior restraint doctrine.[33]

The Court did not exclude the possibility that a case might arise justifying a restraint on pre-trial publication.[34] However, the decision, when analyzed in terms of the factual setting and record before the Court, leads to the conclusion that it would be almost

28. State v. Simants, 194 Neb. 783, 801, 236 N.W.2d 794, 805 (1975).
29. 427 U.S. at 562-63.
30. *Id.* at 563-65.
31. *Id.* at 565-67.
32. *Id.* at 567-68.
33. *Id.* at 568.
34. *Id.* at 570.

impossible for a factual situation to occur which would warrant a prior restraint.

II. HISTORIC PERSPECTIVE

An understanding of the Court's rationale in *Stuart*, as well as the prosecutorial position, requires a brief overview of past decisions suggesting that limitations on First Amendment freedoms may be proper in some circumstances. These decisions indicate that First Amendment rights of freedom of the press and of expression are not absolute, nor of such magnitude to reduce all other constitutional rights to a subservient position, which was the contention of the press in *Stuart*.

The general rule is that there must be no prior restraint on the press.[35] However, in *Near v. Minnesota*,[36] the Supreme Court specifically recognized that free speech and freedom of the press to publish are not absolute rights. Accordingly, exceptions to the general rule against prior restraints have been sanctioned in the areas of national security,[37] obscenity,[38] and against usage of "insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[39] Similarly, "commercial speech" may be limited by the

35. *See* Patterson v. Colorado, 205 U.S. 454, 462 (1907).

36. 283 U.S. 697 (1931).

37. Schenck v. United States, 249 U.S. 47 (1919). The national security exception articulated in *Schenck* was most recently reviewed in New York Times Co. v. United States, 403 U.S. 713 (1971), where seven members of the Court recognized the validity of the *Schenck* exception to the presumption against prior restraints. However, the majority held that the prior restraint against publication there was invalid. The Supreme Court has clearly asserted in *Schenck* and in *New York Times* that the party asking for a prior restraint must show that there is an extremely high probability that the harm to be prevented would occur without the prior restraint. In *Schenck* and *New York Times*, however, the harm to be avoided was not the infringement of an individual's Sixth Amendment constitutional right to an impartial jury in a criminal proceeding.

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

39. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *Freedman* and *Chaplinsky* may be recognized as legitimate exceptions to the general prohibition against prior restraint although they are based under different footing than is the *Schenck* exception. What was banned in *Chaplinsky* and what might have been banned in *Freedman* had constitutional procedures been followed, was speech qua speech, although in Roth v. United States, 354 U.S. 476 (1957), the Supreme Court held that obscenity is not within the area of constitutionally protected speech or press. The same, of course, holds true for the "fighting words" prohibited by *Chaplinsky*.

legislature without incurring a violation of the prior restraint doctrine or the First Amendment.[40] Copyright laws, which authorize courts to grant injunctions prohibiting the publication of certain materials, also may be recognized as restrictions involving a prior restraint on the press.[41] Cases seeking injunctive relief under copyright law have been frequent in federal courts,[42] and even the press has not been adverse to prior restraints in these circumstances.[43] Federal regulatory statutes[44] in the area of labor relations have escaped constitutional criticism when cease and desist orders have been issued, as demonstrated by the Court's decision in *NLRB v. Gissel Packing Co.*[45] There the Court held that an employer's First Amendment right to communicate with its employees could be limited in order to protect the rights of the employees to associate freely.[46] Recently, a lower federal court sustained an injunction prohibiting a Central Intelligence Agency employee from publishing material in violation of an agreement against public disclosure of such material without agency approval.[47]

The examples above emphasize that the absolutist view of the First Amendment cannot be supported in history or in law. However, they admittedly do not address the specific issue of the constitutionality of a prior restraint on publication of facts sur-

40. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973); Valentine v. Chrestensen, 316 U.S. 52 (1942). For a discussion of recent Supreme Court decisions concerning the scope of First Amendment protection for commercial speech, see Note, *The Erosion of Commercial Speech—The Right to Know and the Informed Consumer—Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 26 DEPAUL L. REV. 134 (1976); Note, *Commercial Speech—An End in Sight to Chrestensen?*, 23 DEPAUL L. REV. 1258 (1974).

41. 17 U.S.C. §101(a) (1970); 28 U.S.C. §1338 (1970) (giving original jurisdiction to federal district courts to hear copyright infringement suits).

42. *See* Wheaton v. Peters, 33 U.S. (8 Peters) 591 (1834); American Metropolitan Enterprises, Inc. v. Warner Bros. Records, Inc., 389 F.2d 903 (2d Cir. 1968); Ideal Toy Corp. v. Fab Lu Ltd., 360 F.2d 1021 (2d Cir. 1966); Houghton Mifflin Co. v. J. Stackpole Sons, Inc., 104 F.2d 306 (2d Cir. 1939); Chappell & Co. v. Fields, 210 F. 864 (2nd Cir. 1914).

43. *See* International News Service v. Associated Press, 248 U.S. 215 (1918).

44. National Labor Relations Act, §§8(a)(1), (b)(7), 8 (c), 29 U.S.C. §§151 *et seq.* (1970).

45. 395 U.S. 575 (1969).

46. *Id.* at 616-17.

47. Albert A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 908 (1975). *See also* United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1973).

rounding a pending criminal action. The Supreme Court has considered the problems of prejudicial pre-trial publicity in criminal cases in several decisions in which post-conviction relief was sought. However, these cases did not involve the propriety of pre-trial judicial action to avoid prejudice to a prospective jury. As noted, *Stuart* is the first case in which prophylactic action was reviewed by the Court.

A reading of several post-conviction cases prior to *Stuart*, including *Irvin v. Doud*,[48] *Rideau v. Louisiana*,[49] *Estes v. Texas*,[50] and *Sheppard v. Maxwell*,[51] seems to indicate that there is a burden on the court and the attorneys involved in a case to take preventive action before trial to insure the constitutional right to a fair and impartial jury. Without such action, the only relief comes through a new trial, but the harm to the defendant exposed to outrageous publicity compounded by a verdict rendered by a biased jury can never be compensated fully.

Irvin v. Doud[52] established that there is an affirmative duty to take measures to insure a criminal proceeding that is conducted in an atmosphere hospitable to the fair administration of justice. This was the first state court conviction to be reversed by the Court exclusively on the grounds of prejudicial pre-trial publicity. In an unanimous decision, the Court found the defendant had been denied due process of law under the Fourteenth Amendment because he was not tried by an impartial jury.[53] A virtual flood of

48. 366 U.S. 717 (1961).
49. 373 U.S. 723 (1963).
50. 381 U.S. 532 (1965).
51. 384 U.S. 333 (1966).
52. 366 U.S. 717 (1961).
53. 366 U.S. at 728. The Court further stated:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. . . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. Illinois, 123 U.S. 131; Holt v. United States, 218 U.S. 245; Reynolds v. United States, 98 U.S. 145 (1878).

Id. at 722-73. In Marshall v. United States, 360 U.S. 310 (1959), a conviction for unlawful dispensing of drugs was reversed because jurors were exposed to evidence not admitted at trial through newspaper accounts of the proceeding. Although the reversal was based on the supervisory power of the court rather than on constitutional grounds, the case

newspaper headlines, articles, cartoons, and pictures was published depicting the defendant during the seven months preceding his trial. Newspaper stories revealed he had confessed to six murders and 24 burglaries for which he had not been charged. Of the 430 veniremen called, nearly 90 percent had some opinion about his guilt; eight of the 12 jurors thought he was guilty.[54] The Court explained that the mere existence of a juror's preconceived opinion about a defendant's guilt or innocence, without more, was insufficient to raise a presumption against a prospective juror's impartiality; however, there must be some indication that the juror can lay aside his opinion and return a verdict based solely on the evidence presented in court.[55] The assertions of prospective jurors that they would be fair and impartial were not determinative in this case, Mr. Justice Clark noted, because "where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight."[56] However, in a later case, *Murphy v. Florida*,[57] the Court found no Fourteenth Amendment violation despite a barrage of newspaper articles and statements by a juror that he was aware of the defendant's prior criminal record. The distinguishing factor here, the Court indicated, was that the juror's bias was not considered significant because it was brought out by "leading and hypothetical questions."[58]

Pre-trial television broadcasts of statements by defendants and judicial proceedings have been condemned by the Court

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marks the Court's first recognition of the effects of prejudicial pre-trial publicity. The decision, however, was expressly made inapplicable to the states.

54. 366 U.S. at 727. While eight of the twelve jurors who finally served on the jury admitted that they thought petitioner was guilty, each indicated that despite his opinion, he could render an impartial verdict.

55. The Court feared that it would be difficult to determine whether each juror could exclude this preconception of guilt from his deliberations, and that "the influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Id.* The Court also considered the consequences at stake in such a determination, and decided that in light of those circumstances the finding of impartiality by the lower courts did not meet the constitutional standards. *Id.* at 727-28.

56. *Id.* at 728.

57. 421 U.S. 794 (1975). The case was heavily publicized. The juror stated that he had knowledge of defendant's prior convictions, and "imagined" that these convictions would influence his verdict. Certainly when this juror was sworn in he held something less than a presumption of innocence for the defendant.

58. *Id.* at 804 (Brennan, J., dissenting).

when they are extensive and tend to create a "carnival atmosphere." In *Rideau v. Louisiana*,[59] a state court conviction for robbery, kidnapping, and murder was reversed. The defendant's motion for a change of venue had been denied in spite of extensive television coverage. Two months before trial, the local television station had broadcast three times within the space of two days a twenty-minute statement made by the defendant to the parish sheriff. The defendant admitted that he had committed the crimes for which he was on trial. The Supreme Court held that the filmed "interview," seen by thousands of people in the community in which the defendant was to be tried, was antithetical to traditional notions of due process. The televised "confession" was, in effect, a "trial" at which the defendant had pleaded guilty. The Court found that any further proceedings in that community would be but a hollow formality.[60] In *Estes v. Texas*,[61] Justice Clark, writing for the majority, discussed the "carnival atmosphere" surrounding the now-famous swindling trial of Billy Sol Estes. The trial court had permitted pre-trial hearings to be televised, but banned coverage at trial, except for the attorneys' closing arguments.[62] Booths were erected in the rear of the courtroom for cameras to minimize the effects of their presence, but the cameras remained clearly visible. The Court found that a two-day pre-trial hearing had been televised in an atmosphere which lacked the judicial serenity and calm required for the fair administration of justice. Four of the twelve jurors selected to hear the case had seen or heard all or part of the broadcasts of the earlier proceedings.[63] The Court recognized that pre-trial publicity may be more harmful than publicity during the trial because it may set the community opinion about guilt or innocence.[64]

The *Estes* decision recognized that the press is a mighty catalyst in awakening the public interest in governmental affairs, exposing governmental corruption, and informing the public of

59. 373 U.S. 723 (1963).

60. *Id.* at 726.

61. 381 U.S. 532 (1965).

62. Only the prosecution's arguments were aired as the defense counsel requested not to be broadcast. *Id.* at 537.

63. *Id.* at 551.

64. *Id.* at 536.

important events and occurrences, including judicial proceedings. While this function must be protected, the Court clearly stated that the press may be subject to limitations needed to maintain absolute fairness in the administration of justice in a democratic society.[65]

The decisions in *Irvin, Rideau*, and *Estes* were confined to a discussion of errors made in the lower courts; no recommendations were made about preventive measures which a court might take to insure a fair trial. However, in *Sheppard v. Maxwell*[66] the Court, in dictum, indicated certain pre-trial steps which could be taken to prevent or minimize the impact of prejudicial publicity. The Court pointed out that:

> [R]eversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice *at its inception*. The courts must take such steps by *rule and regulation* that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for the defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of criminal trial *is not only subject to regulation*, but is highly censurable and worthy of disciplinary measures.[67]

The preventive measures the Court approved of in *Sheppard* will be discussed later in this Article.[68] It is important to note that the dictum in *Sheppard*, indicating that restrictive orders may be proper to insure a fair trial, laid the foundation for a proliferation of gag orders on both trial participants[69] and the press.[70] It is with this background that the Supreme Court considered the facts in *Stuart*.

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65. *Id.* at 539.

66. 384 U.S. 333 (1966).

67. *Id.* at 363 (1966) (emphasis added). The principle focus in *Sheppard* was the impact of pre-trial publicity and a trial court's duty to protect the defendant's right to a fair trial.

68. *See* notes 74-98 and accompanying text *infra*.

69. State v. Sperry, 79 Wash. 2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971).

70. *See* cases collected in Landau, *Fair Trial and Free Press: A Due Process Proposal*, 62 A.B.A.J. 55, 57 (1976).

III. An Analysis

The Court in *Stuart* observed that none of the prior restraint cases which had been decided previously involved restrictive orders entered to protect a defendant's right to a fair trial. However, "the thread running through all previous cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[71] This principle has a sound basis in law and in reason. For example, a criminal penalty or judgment in a defamation case is subject to a wide range of protections which defer the impact of judgment until all avenues of appellate review have been exhausted. A prior restraint, by contrast, has an immediate and irreversible effect. The Court explained that "if it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it, at least for a time."[72] Although the Court acknowledged that the extraordinary protection afforded by the First Amendment imposes a fiduciary duty to exercise the protected rights responsibly, it specifically warned that the damage to First Amendment freedoms can be particularly great where the prior restraint falls upon communication of news and commentary on current events.[73] An understanding of the Court's findings in *Stuart* requires a conscious awareness of the above observations. The following analysis will be broken into five main parts, each specifically discussing a major holding of the Court.

A. *The Speculative Basis of the Trial Judge's Finding of Adverse Impact from Pre-trial Publicity*

The Court adopted a balancing test to determine the propriety of a restrictive order, that is, whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[74] This is a broad test and raises significant doubts whether any prior restraint on publication will ever be valid.

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71. 427 U.S. at 559.
72. *Id.*
73. *Id.*
74. *Id.* at 562, *quoting* United States v. Dennis, 183 F.2d 210, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

The Court found that the record justified the trial judge's finding that there would be intense, pervasive pre-trial publicity.[75] Nevertheless, the conclusion about the impact of such publicity on prospective jurors had to be speculative, at best, because the trial judge had to consider unknown and unknowable factors.[76] Along this line the Court stated:

> On the record now before us it is not clear that further publicity, unchecked, would so distort the views of potential jurors that *twelve* could not be found who would, under proper instructions, fulfill their sworn duties to render a just verdict exclusively on the evidence presented in open court. . . . Reasonable minds can have few doubts about the gravity of the evil pre-trial publicity can work, but *the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraints require.*[77]

As a practical matter, it is difficult to conceive of a situation in which the record could reflect satisfactorily, in advance of publication, that unchecked publicity would so distort the views of the community that 12 jurors could not be found who would be able to render a verdict exclusively on evidence presented in open court.

It is implicit in the Court's finding that there must be a showing of actual prejudice to a defendant's Sixth Amendment rights in order to validate a prior restraint on publication. However, the Court did not indicate what kind of evidence would be necessary to establish the requisite degree of harm to a defendant. Further, in advance of publication it is impossible to know the tone or extent of publicity to follow or to predict accurately the future responsibility or irresponsibility of the media. The need to show actual prejudice to a defendant's rights is confusing in light of the holdings in *Estes*,[78] *Rideau*,[79] and *Turner v. Louisiana*,[80] all of

75. 427 U.S. at 562-63.

76. *Id.* at 563.

77. *Id.* at 569 (emphasis added).

78. 381 U.S. 532, 542-43 (1965). The Court found that televising a criminal trial inherently interfered with the defendant's due process rights.

79. Rideau v. Louisiana, 373 U.S. 723 (1963). The Court held that televising a defendant's confession was violative of the Due Process Clause of the Fourteenth Amendment even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial.

which indicated that such a showing was not essential. In *Estes*, for example, the publicity and events surrounding the trial were sufficient to create a probability of prejudice to the defendant. As the Court stated there:

> [T]his Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case. It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.[81]

The facts in *Rideau* are the most analogous to those in *Stuart*. The televised confession in *Rideau* was seen in the community in which the trial ultimately was held. Simants, the defendant in *Stuart*, had confessed to his nephew and his parents, and had given a tape recorded confession to law enforcement officials. He was arrested on a Saturday and on the following Monday, all three confessions were publicized widely. The community in which Rideau was tried had a population of approximately 150,000 residents,[82] of whom an estimated 106,000 had witnessed the televised confession. Lincoln County, in which Simants was tried, has a population of approximately 30,000 residents, approximately 20,000 of whom reside in North Platte,[83] where there was extensive reporting of Simants' confessions. Rideau's conviction was reversed because of extensive exposure of the community to the spectacle of the defendant personally confessing, in detail, to the crimes with which he was charged. In the *Stuart* case, in-

80. 379 U.S. 466, 473 (1965). In *Turner*, a murder conviction was reversed where two deputy sheriffs who were the principal prosecution witnesses also served as bailiffs during a three-day murder trial. This duty resulted in their continuous and intimate association with the jurors. No prejudice was shown, but the circumstances were held to be inherently suspect, and therefore, a showing of actual prejudice was not required to gain a reversal. The Court was unimpressed with the testimony that the deputies had not discussed the case directly with any members of the jury, recognizing the extreme prejudice inherent in the continuous association throughout the trial between the jurors and the prosecution's key witnesses.

81. 381 U.S. 532, 542-43 (1965).

82. Rideau v. Louisiana, 373 U.S. at 724 (population of Calcasieu Parish, La.).

83. The 1976 populations for North Platte and Lincoln County were probably slightly larger. These figures appear in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK, Table 2 at 312 (1972).

depth exposure of the community to confessions of the defendant was forestalled by the restrictive order, limited in scope and duration to pre-trial proceedings. Without the restrictive order in *Stuart*, the likelihood of the prejudice which occurred in *Rideau* was high.

The trial court was acutely aware of the situation concerning publicity, reactions of the community and the gravity and brutality of the crime at the time it issued the restrictive order. It should be reiterated that this crime involved the mass murder of a family of six and was the most sensational crime in Nebraska since the Starkweather murders of 1958. If the factual circumstances surrounding the *Stuart* decision did not attain the requisite level of objective proof to justify a necessarily subjective finding that publication of such facts would have created an atmosphere inherently lacking in due process, the constitutionality of such an order under any circumstance is seriously in question.

B. *The State Court's Failure to Determine Whether There Were Alternatives to Prior Restraint*

The Court specifically criticized both the state trial court and state supreme court orders for their failure to expressly indicate whether measures short of prior restraint were available to protect the defendant's rights.[84] The Court, however, did concede that the entry of such orders might be read as a judicial determination that there was no feasible alternative course of action.[85] However, the Court went on to cite approvingly the alternatives to prior restraint discussed in *Sheppard*. The heavy reliance placed on these alternatives leads to the conclusion that the Court deems them adequate for nearly all conceivable situations.[86] The suggested alternatives include: (1) continuance of the trial date; (2) change of venue; (3) admonishments to the jury; (4) extensive voir dire of prospective jurors; (5) reversals; and (6) new trials.[87] Let us examine these alternatives as they relate to the factual circumstances before the court in *Stuart*.

84. 427 U.S. at 565.
85. *Id.* at 563.
86. *Id.* at 555.
87. *Id.* at 563-64.

The suggestion of a continuance of the trial date fails to acknowledge a criminal defendant's constitutional right to a speedy trial or the prosecution's statutory obligation to bring the matter to trial within six months.[88] Nebraska law requires that a criminal trial be given preference over civil cases, and that the trial of a defendant who is in custody and whose pre-trial liberty reasonably is thought to present an unusual risk must be given preference over other criminal cases.[89] The defendant Simants was held without bail. Recognizing these constitutional and statutory obligations, the trial judge set an early trial date. In view of the great interest expressed in this case both regionally and nationally, it is unlikely that the adverse effect of pre-trial publicity could have been substantially reduced by a continuance in Simants' case.

A logical question is whether the mere passage of time until trial would have destroyed much of the prejudicial effect of pre-trial publicity, even in the absence of a continuance. A cursory review of local news coverage reveals that scarcely a single day passed between the occurrence of the crime and the conclusion of the trial in which there was not a report of the progress of the action in the local newspaper, the *North Platte Telegraph*. The crime, certainly newsworthy and publicized each day, did not lessen in importance as time went by but rather became of greater importance to the community. This observation is in retrospect and was not part of the record before the Supreme Court in *Stuart*. However, it was the anticipation of such continuing substantial publicity that formed the trial court's subjective basis for the issuance of the order in question.

Instructions to the jury to disregard prejudicial information which had come to them from outside sources is another alternative suggested in *Sheppard*. The Court previously has held that the circumstances surrounding a criminal trial can give rise to such a prejudical atmosphere that due process is inherently lacking.[90] No matter how hard a juror tries consciously to set aside an opinion which he has formed, subconscious impartiality may be impossible. Instructions are effective only if given to a jury which

88. NEB. REV. STAT. §29-1207 (1975).

89. NEB. REV. STAT. §29-1205 (1975).

90. *See* Estes v. Texas, 381 U.S. 532 (1965); Turner v. Louisiana, 379 U.S. 466 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Doud, 366 U.S. 717 (1961).

was not impaneled with an established pre-disposition toward guilt or innocence. Again, the pervasive and extensive information in *Stuart* already had been published at the time of the issuance of the disputed order. These publications gave rise to the trial courts subjective determination that, if such publicity continued, there would have been an imminent threat to the impaneling of an impartial jury.

Extensive voir dire examination to determine prejudice and to eliminate veniremen who held an established opinion about a criminal defendant also would appear to have been an ineffective alternative. As the Supreme Court has noted, an entire community can be fatally infected from extensive prejudicial publicity[91] or from circumstances such as those in *Rideau*.[92] Moreover, *Irvin, Turner, Rideau*, and *Estes* recognize that what a juror says on voir dire does not insure impartiality. Finally, it is apparent that the more often a potential juror is asked whether he has heard of confessions, statements, or accounts of the defendant's prior criminal record, the more the existence of this prejudicial information is driven home. If the attorneys are less direct in their examination of potential jurors, they may not uncover an existing bias.[93]

In a study involving experimental juries hearing actual cases, Professors Padawer-Singer and Barton found that jurors exposed to prejudicial coverage "were as much as 66 [percent] more likely to find defendants 'guilty' than jurors who had read 'straight' news reporting."[94] The preliminary study also found

91. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966); Irvin v. Doud, 366 U.S. 717 (1961).

92. Rideau v. Louisiana, 373 U.S. 723 (1963). However, in *Stroble v. California*, 343 U.S. 181 (1952), the Supreme Court affirmed a conviction and death sentence challenged on the ground that pre-trial news accounts, including the prosecutor's release of the defendant's recorded confession, were allegedly so inflammatory as to amount to a denial of due process. The Court disapproved of the prosecutor's conduct but noted that the publicity had receded some six weeks before trial, that the defendant had not moved for a change of venue, and that the confession had been found voluntary and admitted in evidence at the trial. The Court also noted the thorough examination of jurors on voir dire and the careful review of the facts by the state courts, and held that the petitioner had failed to demonstrate a denial of due process. 427 U.S. at 554.

93. *See* Broeder, *Voir Dire Examinations: An Empirical Study*, 38 So. CAL. L. REV. 503 (1965).

94. Padawer-Singer & Barton, *The Impact of Pretrial Publicity on Juror's Verdicts*, in THE JURY SYSTEM IN AMERICA 123-39 (R.J. Simon ed. 1975).

that thorough voir dire examination reduced this figure but did not eliminate it.[95] Additional problems may arise in ferreting out bias in jurisdictions which do not allow attorneys to question jurors on voir dire. The trial judge conducting the voir dire cannot raise all the possible questions which counsel would raise. This possibility reduces the effectiveness of this method.

The suggested alternatives of reversals or new trials cannot be considered as viable alternatives to a trial judge. They exist only to insure that the pre-trial publicity was not unduly prejudicial to a criminal defendant. As noted in *Sheppard*, "we must remember that reversals are but palliatives; and the cure lies in those remedial measures that will prevent the prejudice at its inception."[96] The supposed remedies of sequestration of witnesses and juries, and admonitions to disregard media coverage are directed to the conduct of the trial itself and can have no effect on prejudicial pre-trial publicity.

The suggested alternative which most probably could have been used in Simants' case in lieu of a prior restraint on publication was a change of venue. Although Nebraska law[97] permits change of venue in criminal cases only to a county adjoining the county in which the crime was committed, the Supreme Court in *Stuart* pointed out that they have held that state laws restricting venue must on occasion yield to the constitutional requirement that a state afford a fair trial.[98] At the time the restrictive order was entered a change of venue was not available to the trial court as a practical matter, in light of existing state laws limiting a

95. *Id.*

96. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

97. NEB. REV. STAT. §29-1301 (1975). The Nebraska statute provides:

> All criminal cases shall be tried in the county where the offense was committed, except as otherwise provided in sections 29-1301.01 to 29-1301.03 or section 24-903, or unless it shall appear to the court by affidavits that a fair and impartial trial cannot be had therein. In such a case the court may direct the person accused to be tried in some adjoining county.

98. 427 U.S. at 563 n.7, *citing* Groppi v. Wisconsin, 400 U.S. 505 (1971). The Court observed that the combined population of Lincoln County and adjacent counties to which a change of venue could be had, is over 80,000 and suggested that there was a substantial pool of prospective jurors. This observation is incorrect. The pool of prospective jurors is no larger than the number of people living in the county in which the trial is to be held. For example, if a trial is held in Lincoln County the total number of prospective jurors is 30,000. If a trial is had in Arthur County, which is an adjoining county to Lincoln County, the total pool of prospective jurors is 600, the population of Arthur County.

change of venue to an adjoining county. All the counties surrounding Lincoln County are smaller and are served by the same television and radio stations and the same newspaper. Thus, all adjoining counties were subject to the same prejudicial publicity. It also should be noted that one of the parties in *Stuart* was the *Omaha World Herald* which has a statewide circulation. The pretrial publicity was not localized in Lincoln County and the surrounding area but pervaded the entire state.

C. *Practical Limitations on the Effectiveness of Any Pre-trial Restraining Order*

The Court took a hard look at the practical effectiveness of a restraining order and concluded that there were three major obstacles in the *Stuart* case. The first was the limited jurisdictional power of the trial court. It would be difficult, if not impossible, to have in personam jurisdiction over all the media involved in the case. Second, the court expressed concern about the drafting of such an order to cover all the information which might affect potential jurors. It would be impossible to predict accurately the kind of information which would have an adverse impact and so any order would necessarily be deficient in offering protection to a defendant's rights. Finally, the Court seemed to feel that the restrictive order would be of little real value because of the fact that the crime occurred in a small community in which rumors travel by word of mouth.

The jurisdictional problems in enforcing a prior restraint on publication were underscored in *Stuart*.[99] The trial court order applied to publication at large as distinguished from restraining publication by named individuals within the trial court's jurisdiction. This difficulty was acknowledged by the Nebraska Supreme Court which decided that the state court had no jurisdiction over the media except through their voluntary submission to the court's power when they intervened in the action. Except for the intervention the Nebraska Supreme Court conceded the petitioners "could have ignored the order."[100]

99. *Id.* at 565-66.

100. State v. Simants, 194 Neb. 795, 236 N.W.2d 802 (1975).

Certainly the concept of an order directed at large rather than at named parties is foreign to our concept of jurisprudence. However, it would not seem, at least at first glance, that in personam jurisdiction would normally present a practical problem, even in sensational cases.

The danger to a fair trial presented by pre-trial publicity is directly related to the tone of the publicity, the extent or repetition of the publicity, and the proximity of the publicity to time of trial. Those most interested in the circumstances of even a sensational trial will be local media. In the normal course, a trial judge may obtain personal jurisdiction over local print and electronic media. National coverage by major networks or newspapers is generally of limited duration except in extremely rare cases which provoke a continuing nationwide interest and concern. This was not the case in the murder of a rural family by an unknown defendant. Wire stories available to the local media from outside sources need not be printed if they violate a specific court order. Therefore it would seem, at least in sensational cases of primarily local interest, courts generally would have jurisdiction over those parties most likely to be responsible for disseminating prejudicial facts to potential jurors on a continuing basis.[101] It was, in fact, lack of control over local media that resulted in the reversals in *Rideau, Estes*, and *Sheppard*.

The Court suggested that the effect of rumor in the small rural community in which the crime occurred could "well be more damaging than reasonably accurate news accounts."[102] The Court was unimpressed with the state's argument that less credence is given by the average person to "back door" gossip than is given to media accounts of events transpiring in court. Is it not more plausible that a potential juror will be able to set aside a preconceived bias based on hearsay and rumor acquired from a neighbor than newspaper revelations of a confession admitted into evi-

101. Hanson v. Denkla, 357 U.S. 235 (1958). Local media may be subject to in personam jurisdiction of a state court because of their actual presence within the borders of the state. Thus, under the facts in *Stuart*, the local newspapers in North Platte, Lincoln, and the Omaha World Herald would have been within the territorial jurisdiction of the Lincoln County court. Because the local media have the greatest continuing interest and influence in reporting a local news story, prejudicial publicity could be effectively controlled at this level.

102. 427 U.S. at 567.

dence for the purpose of establishing probable cause at a preliminary hearing? The problem is magnified if a confession or admission, though reported, is inadmissible into evidence at trial because it was unconstitutionally obtained.

The strongest point made by the Court in *Stuart* is the inherent difficulty faced by the trial judge in predicting what information will in fact undermine the impartiality of jurors. However, Justice Blackmun, in granting a partial stay of the trial court order, concluded that, in appropriate circumstances, certain facts "strongly implicative" of an accused may be restrained from publication prior to trial, noting that "a confession or statement against interest is the paradigm."[103] He cited as examples of highly prejudicial facts, those associated with the circumstances of the accused's arrest, facts associated with the accused's criminal record, and certain statements about the accused's guilt by those associated with the prosecution.[104] Those facts deemed highly prejudicial must, of necessity, be determined on a case by case basis. Any effort to adopt standards applicable to all conceivable situations would fall short of the mark.

D. *A Court May Not Prevent the Press from Attending and Reporting on Public Trials*

The Nebraska order barred the media from reporting about evidence which had been presented during a preliminary hearing to determine probable cause. The Court found that this portion of the order violated the well-established principle that "there is nothing that proscribes the press from reporting events that transpire in the courtroom."[105] This is an affirmation of the long standing American tradition that "what transpires in the courtroom is public property."[106]

The prosecution was faced with several conflicting duties at the time of the preliminary hearing. On one hand, the press had to

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103. 423 U.S. at 1333 (Blackmun, J., in Chambers).

104. *See* note 27 *supra*.

105. 427 U.S. at 568, *quoting* Sheppard v. Maxwell, 384 U.S. at 362-63 (1966).

106. Craig v. Harney, 331 U.S. 367, 374 (1947). *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Stroble v. California, 343 U.S. 181 (1952); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

be allowed to attend the hearing under existing Nebraska law, which makes all judicial proceedings open to the public.[107] However, the only evidence available to establish probable cause was Simants' confessions to his nephew, his parents, and law enforcement officials. This problem arose because of the Nebraska rule that a defendant held without bond, as Simants was, must be granted a preliminary hearing within four days of his arrest.[108] At the time of the hearing, all other physical evidence was being prepared for shipment to the Federal Bureau of Investigation Laboratory in Washington, D.C. for analysis. It was feared that continued news reports about the confessions would only exacerbate the difficulty in protecting the defendant's Sixth Amendment rights.

The prosecution was also mindful of the rules established by *Jackson v. Denno*[109] which grant a defendant a right to a preliminary hearing to determine the voluntariness of a confession. Voluntariness is a question of law for the court, not of fact for the jury. Therefore, *Jackson* requires that this issue be resolved outside the presence of the jury to avoid possible prejudice.[110] This goal could not be achieved if the confessions were published again, but this time as part of a judicial proceeding. While it is

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107. NEB. CONST. art I, §13 provides, "Justice administered without delay. All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

108. NEB. REV. STAT. §29-501 (1975) provides:

> Examination before magistrate; adjournment; period; prisoner; how sustained and kept. If it shall become necessary for any just cause to adjourn the examination of any person brought before the magistrate as set forth in sections 29-401 to 29-414, it shall be lawful for such magistrate to adjourn such examination and commit such person, from time to time, for safekeeping to the jail of the county until the cause of delay is removed, and no longer; *Provided*, the whole time of such confinement in the jail shall not exceed four days; *provided, further*, the officer having in custody any such person may by written order of the magistrate, detain such person in custody in some secure and convenient place other than the jail, to be designated by the magistrate in his order, not exceeding four days; and it shall be the duty of the officer in whose custody any person shall be detained as above, to provide for the sustenance of such prisoner while in custody.

109. 378 U.S. 368 (1964).

110. "[T]he issue of his confession should not have been decided by the convicting jury but should have been determined in a proceeding separate and apart from the body trying guilt or innocence." *Id.* at 394.

true that Simants' confessions already had been published before the restrictive order was entered, it was felt that the order could lessen the impact.

It has been suggested that the defendant should have waived his right to a preliminary hearing. However, had he done so, he also might have waived his right to appeal the probable cause finding for his arrest and detention. Both the defendant and the prosecution would have been placed in untenable positions had there been no order restricting prejudicial coverage. The defendant would have had to choose whether to protect his record for appeal. The prosecution would have had to choose between the possibility of not presenting sufficient evidence to insure a probable cause finding or the possibility of paving the way for a reversal due to prejudicial pre-trial publicity because of the introduction of the confessions. Thus, in Simants' case, without a restrictive order the right of the criminal defendant to a preliminary hearing and the right of the state to effective enforcement of its laws would have been impaired by prejudicial coverage of the pre-trial proceedings.

As indicated previously, an absolutist position concerning the First Amendment guarantee of the press has never been accepted. The press exists to provide the widest dissemination of information possible to the public. In this respect, the press as an institution is protected by the First Amendment. This institution, however, exists to serve the people. Service requires responsibility, and publication of information that may have the effect of so influencing the fair administration of justice that a guilty man would go free, denies that responsibility.

The Court takes no position on the closing of a pre-trial proceeding with the defendant's consent.[111] The alternative of closing pre-trial proceedings has been recommended by the American Bar Association Standards Relating to the Administration of Criminal Justice.[112] It would be far more consistent with the pub-

111. This issue might have been resolved in a case which was pending before the Supreme Court at the same time as *Stuart*. Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied sub nom.* Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976).

112. ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Approved Draft) (Mar. 1968).

lic's "right to know" and the justifiable concerns of the press regarding closed judicial proceedings, that members of the press be permitted to attend the proceedings, even if immediate coverage is proscribed, than to be excluded entirely from the proceedings. Nevertheless, closed proceedings may be a viable constitutional alternative to prior restraint on publication.

The closing of a preliminary hearing to the public seems analogous to proceedings brought before a grand jury. There is no question that the press is barred from grand jury proceedings, which are similar to a preliminary hearing in Nebraska. Both require a showing by the prosecution that there is probable cause to believe that an individual has committed a crime. The primary difference is that in the grand jury proceeding evidence is presented to jurors and in the preliminary hearing the evidence is presented to a judge.

It is apparent that judicial efforts to protect defendant's Sixth Amendment right to a fair trial which infringe upon First Amendment freedoms must follow the least restrictive course. Therefore, as closure of hearings is most restrictive of First Amendment freedoms in denying access to the judicial process, it must be the last alternative utilized.

E. *Vagueness of the "Strongly Implicative" Standard*

The final holding of the Court was that the Nebraska Supreme Court's order restraining publication of facts "strongly implicative" of the guilt of the accused was too vague and too broad to survive the scrutiny given to prior restraints on First Amendment rights.[113] It is plain that, absent a more specific definition of the "strongly implicative" standard, courts cannot determine what information might be restrained from immediate publication. Moreover, if a reporter bears the risk of being held in contempt of court for publishing certain information, he is entitled to know in advance what information he is proscribed from reporting. Therefore, the Supreme Court justifiably refused to adopt an imprecise standard governing prior restraints.

Nevertheless, the Court could have upheld the Nebraska Su-

113. 427 U.S. at 568.

preme Court order insofar as it restrained the immediate publication of explicit facts and information given by the accused to third parties, prior to his arrest and preliminary hearing. For example, both the Nebraska Supreme Court and Justice Blackmun forbade the publication of Simants' confessions to his relatives and other statements against interest made by him to the sheriff. These statements are examples of third party confessions and hearsay declarations that can be readily discerned by courts and reporters alike. Had the Supreme Court considered the right of the criminally accused to an impartial jury at least as urgent as the right of the press to be free of prior restraint, the Court might have upheld short-term suppression of the accused's confessions and hearsay declarations against interest. When Justice Blackmun balanced these absolute rights he recognized that possibly a very specific standard could pass constitutional muster. By failing to defend the standard posed in his own partial stay, Justice Blackmun now indicates that, like most of the Court, he will not permit a prior restraint under any circumstances.

IV. CONCLUSION

The Supreme Court has held consistently that there is an overwhelming presumption against prior restraints on publication and broadcast. This presumption was reaffirmed strongly in *Stuart*. In fact, it may be said that this decision has constructed a barrier so high that it is tantamount to an irrebuttable presumption against judicial imposition of restraints on pre-trial publicity. While the Court did not rule out the possibility that facts might arise in which restraints are necessary,[114] it seems that the only conceivable situation to warrant such action would be a presidential assassination.[115] The primary obstacle is that any judicial order entered in advance of publication must be speculative, dealing with factors which are unknown and unknow-

114. *Id.* at 569-70.

115. The issue was raised by the Warren Commission Report in relation to its investigation of the assassination of President John F. Kennedy. *See id.* at 549 n.3. It should be noted, however, that the strong interest of the public to be informed of facts surrounding the killing of a national leader might readily outweigh the need to suppress the accused's self-incriminating statements.

able—the real impact of pre-trial publicity. In this regard the Court stated:

> Of necessity our holding is confined to the record before us. But our conclusion is 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. The practical problems of managing and enforcing restriective orders will always be present. In this sense, the record now before us is illustrative rather than exceptional.[116]

The Court's meaning should be unmistakable. With the possible exception stated above, no conceivable circumstance would afford an opportunity to make a record in advance of publication as to the ultimate effect of such publication on potential jurors. The Court requires a finding that it would be impossible to find twelve constitutionally acceptable unbiased, indifferent jurors. A factual record cannot be established regarding the effect of future events to the extent necessary to establish "actual" prejudice to the fair administration of justice in advance of improper conduct.

The Court relies heavily upon alternatives suggested in *Sheppard* and added to those alternatives the possibility of closed pre-trial hearings. The latter would result in a much greater "chilling" effect on First Amendment freedoms than an order limited in scope and duration, restricting publication of specific facts, the news-worthiness of which would be as great when revealed at trial as at the time of pre-trial proceedings.

The concurring opinions of the Court give additional credence to the position that a prior restraint on publication of facts surrounding a pending criminal controversy is per se unconstitutional. Mr. Justice White in his separate opinion states that "for the reasons which the Court itself canvasses there is a grave doubt in my mind whether orders with respect to the press such as rendered in this case would ever be justifiable."[117] Mr. Justice Brennan, in an opinion joined by Mr. Justices Stewart and Marshall, took the position that prior restraints on publication and broadcast are in fact constitutionally impermissible.[118] In the

116. *Id.* at 569.
117. *Id.* at 570-71.
118. *Id.* at 572.

opinion of these Justices, a trial judge has at his command sufficient alternatives to prior restraints to insure that fundamental fairness is accorded the accused.[119] Mr. Justice Stevens, in his concurring opinion, agreed with Mr. Justice Brennan, although he suggested the need to hear arguments on:

> [w]hether the same absolute protection would apply no matter how shabby or illegal the means by which the information is obtained, no matter how serious an intrusion on privacy might be involved, no matter how demonstrably false the information might be, no matter how prejudicial it might be to the interests of innocent persons, and no matter how perverse the motivation for publishing it . . . .[120]

Of all the concurring opinions written, only Mr. Justice Powell conceded that a prior restraint properly might be applied, and then only upon a showing that it was necessary "to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality."[121] Even though the contents of the defendant's confession had been published prior to the institution of the court order in *Stuart*, Mr. Justice Powell found "beyond question that the prior restraint here was impermissible."[122]

The lesson to be learned from *Nebraska Press Association v. Stuart* is simple if not as direct as it might have been. There are virtually no circumstances under which an adequate record could be prepared to justify the imposition of restraints on publication and broadcast prior to dissemination.

For members of the media the lesson of *Stuart* is contained in a single paragraph:

> The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly — a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First

119. *Id.* at 572-73.
120. *Id.* at 617.
121. *Id.* at 571.
122. *Id.* at 572.

> Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.[123]

Whether one agrees with the Court, it is obvious that a recalcitrant press can be dealt with only after the fact. It is clear that no matter how vile, worthless, or prejudicial the publicity is, no direct sanctions against the press may be had. The rights of the accused and the rights of the state must be protected by other methods including reversals, if necessary. This may be a heavy price to pay, but it is clear from the Court's opinion that this is a price which must be paid for living in a free society.

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123. *Id.* at 560.