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By Milton R. Larson*

Free Press v. Fair Trial in Nebraska: A Position Paper

"[T]he right of courts to conduct their business in an untrammelled way lies at the foundation of our system of government"¹

I. INTRODUCTION

A constitutional conflict vitally affecting the press and the legal profession began with the brutal slaying of three children and three adults in the village of Sutherland, Nebraska, on October 18, 1975. The United States Supreme Court, in *Nebraska Press Ass'n v. Stuart*,² faced the conflict between the constitutional guarantee of a free press and a criminal defendant's right to a fair trial before an impartial jury. The high Court determined that by imposing a judicial restraint on media coverage of the Sutherland slaying, a Nebraska district court judge had violated the first amendment rights of members of the news media. This article will explain why the judicial restraint was issued and will explore the problems facing a prosecutor in a sensational trial.

The issue of judicial restraint was raised in the *Sheppard*³ case, decided ten years ago. There, pervasive publicity, both pretrial and contemporaneous with trial, together with the "carnival atmosphere" surrounding the proceedings resulted in the chastisement of the legal profession and the news media. Since then prosecutors have increasingly feared reversal from unduly prejudicial publicity, and publishers and broadcasters have increasingly tasted the bitter cup of restraint upon publication and dissemination of news concerning pending criminal actions. This atmosphere has created an unhappy deterioration of the relationship between the news media

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1. Wood v. Georgia, 370 U.S. 375, 383 (1962).
2. 96 S. Ct. 2791 (1976).
3. Sheppard v. Maxwell, 384 U.S. 333 (1966).

and the judicial system. Each distrusts the motives of the other. The court system seems to suspect that the news media's only concerns are for sales and ratings. The media, on the other hand, suspect the judicial system of conspiring to keep its own inadequacies from being made public. This mutual paranoia strikes at the very heart of the democratic principles upon which our Constitution is based.

Fairness to the rivals in this controversy demands recognition that conscientious efforts have been made through joint cooperation between responsible representatives of the news media and the judiciary to obviate any conflict between the first and sixth amendments of the Constitution. One result was the American Bar Association Reardon report of 1968,⁴ which established guidelines for attorneys dealing with the press during criminal justice proceedings. In 1970, Nebraska adopted its own voluntary guidelines⁵ through agreement among judges, attorneys, and newsmen. These guidelines list material generally acceptable and unacceptable in the reporting of pending criminal actions. The agreement states that it is normally inappropriate to reveal a suspect's prior criminal record or the existence or contents of any alleged confession and that there should be no offer of any opinion about the guilt or character⁶ of a criminal defendant or the outcome of his trial.

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4. ABA ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1968).
 5. See Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation, June, 1970, in Nebraska Press Ass'n v. Stuart, 96 S. Ct. 2791, 2829 (1976).
 6. An article captioned "Simants described as 'quiet one of the family'" appeared in the North Platte Telegraph, on October 20, 1975, and stated as follows:

Erwin Charles (Herb) Simants was described by a relative today as "the quiet one of the family" who found it difficult as a child to show emotion and who hardly learned to read or write because he frequently missed school while growing up in North Platte.

Simants and his older brother, James, 38, who died in jail two years ago after being treated for a beating received on a North Platte street while apparently intoxicated, were "outsiders in the family," according to a relative who asked not to be named.

"They weren't accepted in the family at all," the relative said. "They were always in trouble so we weren't allowed to run around with them."

"Herb could never show emotion . . . he held it in," according to the relative.

Simants had once been married and he and his wife had a child who died after being born with a congenital birth defect. He and his wife later separated, the relative said.

A Sutherland resident, Mrs. Laura Woodard, who lives a

However, editors' concern that they and not judges should determine the newsworthiness of events and the extent of dissemination to the public has continually been met with equally great concern from the judiciary that judges and not editors should be armed with the power to control judicial proceedings in a manner that insures due process of law. This conflict has resulted in restrictions on press coverage of judicial proceedings at an increasing rate. These orders are sometimes disobeyed, even on pain of contempt.

Ironically, it is the very guidelines entered into upon a voluntary basis which provided much of the impetus for *Nebraska Press Ass'n v. Stuart*. On Monday, October 20, 1975, the local newspaper of general circulation throughout Lincoln County and surrounding counties published on its first page, dedicated almost exclusively to coverage of the gruesome weekend events, the following excerpts:

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

Further reported in the same article were the following remarks of the Lincoln County Sheriff:

. . . Gilster 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 that time," Gilster said. Gilster said Simants later "wandered in the weeds near the scene of the crime."⁷

Additional articles on page one of the paper indicated that the eldest victim, Henery Kellie, had recently saved the defendant, Simants, from jail by paying a fine for public intoxication which the defendant was unable to pay.⁸ On the same day the Lincoln Star,⁹

short distance from the murder house, described Simants as a loner.

"We don't know him very well, I don't think he ever mixed with other folks," she said.

Art Minshull, a tavern owner, also said Simants was "kind of a loner type."

And Albert Meyen, who lived just a block from Simants before the night of terror erupted in the village, said of the suspect: "I didn't even know he existed."

North Platte Telegraph, Oct. 20, 1975, at 1, col. 2.

7. *Id.* at 1, cols. 4-6.

8. The article was captioned "Kellie paid Simants' fine," and reported as follows:

Henery Kellie saved Erwin Charles Simants from jail Sept. 29, according to friends of Kellie.

According to the friends, Simants had been fined \$50 for

a paper of limited circulation in Lincoln County carried a story relating Simants' confession to his father. The following day, a Denver paper,¹⁰ also of limited circulation in Lincoln County and surrounding counties, reported confessions the defendant had made to his mother.

The Omaha bureau of the Associated Press released a wire story on October 21, 1975, stating that the Lincoln County Attorney had advised newsmen that Simants had given authorities a statement. The bureau chief later admitted that no such statement had been made.¹¹

All these articles appeared in the wake of the tragic event. During the eleven hours from discovery of the crime to the arrest of a suspect numerous reporters and photographers were at the crime scene, understandably attempting to obtain as much information as

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."

"Henery was well liked and it was just his nature to help people," said the minister. "I don't know if he had ever paid anyone's fine before, but he'd shelled out money to help in other ways."

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

Id. at 1, col. 6.

9. The Lincoln Star, Oct. 20, 1975, at 1, cols. 2-5.
10. The Denver Post, on October 21, 1975, stated on the front page, "Charges Filed in Nebraska Family Deaths," . . . "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."
11. See Friendly, *A Crime and Its Aftershock*, N.Y. Times, Mar. 21, 1976, § 6 (Magazine), at 16, 86:

By 9 that morning [October 19, 1975], Simants had been booked, stripped of his clothing and boots, which would be used as evidence, and had listened three times to the "Miranda card" warning that statements 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 30 minutes earlier, prosecutor Larson was quoted by the A.P. as saying, "Simants apparently walked to his father's home after the shooting and told his father he was responsible for the deaths." However, the A.P. now says it erred in quoting Larson. Ed Nichols, A.P. bureau chief in Omaha, admits hearsay of the ambulance driver's husband was falsely attributed to Larson.

The Lincoln Star, Oct. 21, 1975, at 8, cols. 3-4, stated:

Police have yet to reveal any known motive for the slayings, but Lincoln County Atty. Milton Larson said Monday, that Simants has given authorities [sic] a statement. Larson declined to reveal any of the contents of the statement.

possible. Some were demanding access to the scene of the crime itself.¹² In addition, a helicopter owned or hired by NBC News arrived at the crime scene from Denver, Colorado, during the early morning hours of October 19, 1975, before the criminal investigation had been completed and the bodies removed from the premises.

Telephone calls from the three major commercial television networks, various national news services, and many major news publications, international and national in scope, were received by the prosecution throughout the night and for several days following the incident.

In this atmosphere the prosecution decided to request an order restricting pretrial publication of prejudicial facts. The step was taken in an effort to insure the impaneling of a constitutionally acceptable jury.¹³ The corollary to a criminal defendant's right to a fair trial is the right of society to effective enforcement of its penal code.

The State's motion was filed late in the afternoon of October 21, 1975, with an oral request for immediate hearing. The urgency was apparent because a preliminary hearing was scheduled for the following morning.¹⁴

Ronald A. Ruff, Lincoln County Judge, immediately notified interested media personnel¹⁵ and set a hearing for seven o'clock the same evening. The news media were represented by counsel at the hearing. No record was made, but statements of counsel were heard. The prosecution advised the court that testimony in the nature of confessions by defendant to his thirteen year old nephew, to his parents, and to law enforcement officials would be offered at the preliminary hearing. Further, the testimony of a pathologist would reveal that one of the child victims had been raped both before and after she was killed.¹⁶ Concern was expressed that publi-

12. Media personnel on the scene by 11:30 p.m., October 18, 1975, included representatives of the Omaha World Herald Company, North Platte Broadcasting Company, Associated Press and United Press International.

13. See Motion for Restrictive Order, filed Oct. 21, 1975, State v. Simants, Case No. 75-789 (Lincoln County Ct., Neb. 1975).

14. It should be noted that a continuance was unavailable to the State in light of NEB. REV. STAT. § 29-501 (Reissue 1964), which requires that a criminal defendant who is unable to make bond or is held without bond be offered a preliminary hearing within four days of his arrest. The defendant, Erwin Charles Simants, was held without bond.

15. Representatives of the Nebraska Press Association, the World Herald Company, the General Star, Western Publishing Company, North Platte Broadcasting, Nebraska Broadcasters Association, Associated Press, and U.P.I. were notified by telephone.

16. For Nebraska statutes dealing with sexual assault see NEB. REV. STAT. §§ 28-408.01 to 28-408.05 (Reissue 1975).

cation of such testimony would be so prejudicial as to preclude the impaneling of a constitutionally acceptable jury. Defense counsel joined in the motion. The court rejected arguments of counsel for the media that any such order would be unconstitutional and entered a protective order¹⁷ the following morning, just prior to the preliminary hearing. This order precluded the "release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing." The order further precluded the dissemination of any information regarding proceedings apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation.¹⁸ That part of the order, in effect, made compulsory these formerly voluntary guidelines.

On October 23, a hearing was held before Judge Hugh Stuart in the Lincoln County District Court. The constitutionality of the county court order was challenged and evidence was presented by all parties. The matter was taken under advisement by the court and observations of counsel were requested. Four days later, the court terminated the county court's order and directed that pretrial publicity in this action should be governed by the Nebraska Bar-Press Guidelines. Those guidelines were adopted by the district court and incorporated into its order.¹⁹

The news media appealed, first to the Nebraska Supreme Court and then to Justice Harry A. Blackmun, in his capacity as Justice for the Eighth Circuit.²⁰ They complained that the Bar-Press

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17. Order of the Court dated Oct. 22, 1975, *State v. Simants*, Case No. 75-789 (Lincoln County Ct., Neb. 1975).
 18. The issuing judge, Ronald A. Ruff, indicated to counsel that he recognized the overbreadth of the order, but that in light of the urgency of the situation, his lack of knowledge regarding the scope of the testimony to be introduced at the preliminary hearing, and the opportunity for immediate review of the order by the district court following bind over, the order was appropriate.
 19. See Order of the Court dated Oct. 27, 1975, *State v. Simants*, Case No. B-2904 (Lincoln County Dist. Ct., Neb. 1975).
 20. Justice Blackmun stated in his November 20, 1975, opinion in part as follows:

The most troublesome aspect of the District Court's restrictive order is its wholesale incorporation of the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation. Without rehearsing the description of those guidelines set forth in my prior opinion, it is evident that they comprise a "voluntary code" which was not intended to be mandatory. Indeed the word "guidelines" itself so indicates. They are merely suggestive and, accordingly, are necessarily vague. To cite only one example, they state that the publication of an accused's criminal record "should be considered very carefully" and

Guidelines were voluntary in nature, never having been intended to be incorporated in a formal court order, and that any judicial order in the nature of a prior restraint was constitutionally defective as violative of the first amendment guarantee of a free press. Justice Blackmun agreed with the press regarding the wholesale incorporation of the guidelines, and on November 20, remanded jurisdiction to the Nebraska Supreme Court for further proceedings. However, Justice Blackmun did conclude that some prior restraints on pretrial publicity were permissible and refused to stay the entire order. He concluded that facts strongly implicative of an accused's guilt may be restrained from publication prior to trial. "A confession or statement against interest is the paradigm," he said.²¹ He enumerated several examples of strongly implicative facts which may, under some circumstances, be restrained for pretrial purposes. Justice Blackman further observed that the accused's criminal record, though not necessarily implicative, may in some instances be highly prejudicial if released prior to trial.²²

The Nebraska Supreme Court heard oral arguments on November 25, and issued an order in compliance with Justice Blackmun's ruling on December 1.²³ Applying Justice Blackmun's reasoning to

"should generally be avoided." These phrases do not provide the substance of a permissible court order in the First Amendment area. If a member of the press is to go to jail for reporting news in violation of a court order, it is essential that he disobey a more definite and precise command than one that he consider his act "very carefully." Other parts of the incorporated Guidelines are less vague and indefinite. I find them on the whole, however, sufficiently riddled with vague and indefinite admonitions—understandably so in view of the basic nature of "guidelines"—that I have concluded that the best and momentary course is to stay their mandatory and wholesale imposition in the present context. The state courts, nonetheless, are free forthwith to reimpose particular provisions included in the Guidelines so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately specific and in keeping with the remainder of this order. That portion of the restrictive order that generally incorporates the Guidelines is hereby stayed.

Nebraska Press Ass'n v. Stuart, 96 S. Ct. 251, 254-55 (Blackmun, Circuit Justice, 1975).

21. *Id.* at 255.

22. Counsel for the media took issue with the prohibition contained in the district court order precluding disclosure of the "exact nature of the limitations" that it imposed upon publicity. Mr. Justice Blackmun, in answering this contention, said:

Inasmuch as there is no point in prohibiting the reporting of a confession if it may be reported that one has been made but may not be spoken of, the provision . . . that the restriction on reporting confessions may itself not be disclosed is not stayed.

Id. at 256.

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

the facts before it, the Nebraska Supreme Court held that the only pretrial restrictions on publication would be allegations of the existence or contents of: (1) confessions or admissions against interest made by the accused to law enforcement officials; (2) confessions or admissions against interest, oral or written, made by the accused to third parties, with the exception of statements made by the accused to representatives of the news media; or (3) other information strongly implicative of the accused as the perpetrator of the slayings.

II. ISSUE

The issue is narrow. There is an overwhelming presumption against prior restraints on publication and broadcast.²⁴ There is no suggestion that the full context of judicial proceedings should not ultimately be made available to the public. The issue does not affect the vast majority of criminal cases, for generally the first amendment right of a free press and the sixth amendment right to a fair trial by an impartial jury enjoy a harmonious relationship.

Rather, at issue is whether, in the exceptional case, the sensational, highly publicized case, locale and circumstance can combine to create an atmosphere in which the fair and orderly administration of justice is impossible.

Let us presume that such a situation may arise. A trial judge should then, in the absence of reasonable alternatives, be permitted to balance the constitutional guarantee of freedom of the press against a criminal defendant's right to a fair trial by an impartial jury free from outside influence. On finding the existence of a "clear and present danger" to the administration of criminal justice, proper judicial discretion requires issuance of an order tailored to the circumstances momentarily and narrowly proscribing prejudicial pre-trial publicity.

There appears to be an undercurrent that perhaps the ultimate question presented is the integrity of the jury system. It is suggested that for the first time in modern history the judicial system is directly questioning the ability of potential jurors to set aside information obtained prior to trial, which may render them unable to base their verdict solely upon the evidence received at the time of the trial. It strains credulity to suggest that ordinary citizens, once elevated to the status of juror, somehow acquire a super-human capacity to set aside preconceived prejudices. A general tenet of education is that one learns from what he sees, from what he reads, and from what he hears. Further, an idea, once implanted

24. See *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301 (1974).

in the mind may become permanent and have a lasting effect upon the individual. It has been observed that the "influence that lurks in an opinion, once formed is so persistent that it unconsciously fights detachment from the mental process of the average man."²⁵

Recently, experiments were conducted at Columbia University by Professors Padawer-Singer and Barton to determine the impact on potential jurors of prior knowledge of alleged retracted confessions and previous criminal record of a criminal defendant. The prior knowledge was communicated to the jurors through news stories regarding a major criminal case. The results established that newspaper stories containing such information had a definite impact on experimental juries. Although not all unfavorable publicity was apparently damaging, a serious problem was shown to exist in regard to a previous criminal record or alleged retracted confession.²⁶

The question of pretrial restraint in limited, highly prejudicial areas involving due process considerations does not constitute an affront to juror integrity. Rather it is only an observation of the reality of human frailty. Recognition of this unalterable fact provides much of the unspoken but well reasoned basis for several holdings, commencing with *Irvin v. Dowd*²⁷ which marked the first state court conviction reversed solely on the ground of prejudicial pretrial publicity.²⁸ In *Irvin*, the Supreme Court unanimously held that a prisoner had been denied due process of law under the fourteenth amendment because the jury in the state trial had not been impartial. *Irvin* involved a conviction of murder resulting in the imposition of the death penalty. Pretrial headlines proclaimed that the defendant had confessed to six murders and twenty-four burglaries for which he was not charged. Of 430 veniremen called, nearly 90% entertained some opinion as to the guilt of the defendant. Eight of the twelve jurors themselves thought the defendant to be guilty. A virtual flood of newspaper headlines, articles, cartoons, and pictures was unleashed against the defendant during the seven months preceding his trial. The Court did state that the

25. *Irvin v. Dowd*, 366 U.S. 717, 727 (1961).

26. R. SIMON, *THE JURY SYSTEM IN AMERICA* 125 (1975).

27. 366 U.S. 717 (1961).

28. In *Marshall v. United States*, 360 U.S. 310 (1959), a conviction was reversed when jurors were exposed, through news accounts, to information not admitted at trial where the conviction was for unlawful dispensing of drugs, and where the State alleged that the defendant had previously practiced medicine without a license. Some of the jurors had seen the news accounts. Although the reversal was made on supervisory rather than constitutional grounds, this case marks the Court's first recognition of the effect of prejudicial pretrial publicity. The case was expressly held not applicable to state court proceedings.

mere existence of any preconceived notion as to guilt or innocence, without more, will not raise a presumption against a prospective juror's impartiality, provided the juror can lay aside his opinion and render a verdict based solely on the evidence presented in court.²⁹ No fault can be found in this rationale. Nevertheless, the Court held that in this case due process considerations required reversal of the conviction.³⁰ Justice Clark observed that notwithstanding assertions of prospective jurors that they could be fair and impartial, "where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight."³¹ Justice Frankfurter in his concurring opinion intimated that the fair administration of criminal justice is the ultimate consideration.³²

In *Estes v. Texas*³³ Justice Clark, again writing for the majority of the court, related the "carnival atmosphere" surrounding the coverage of the now famous swindling case involving financier Billy Sol Estes. The trial court had permitted pretrial hearings to be aired. However, at the trial itself, with the exception of arguments of counsel,³⁴ live coverage was prohibited. Booths were built in the rear of the courtroom for cameras in an effort to minimize the effect of their presence, but the cameras were clearly visible. The Court ruled that the sixth amendment was violated by federal courts and the fourteenth amendment by state courts when they allowed criminal trials to be televised to the public.

29. 366 U.S. at 723.

30. Where one's life is at stake—and accounting for the frailties of human nature—we can only say that in light of the circumstances here the finding of impartiality does not meet constitutional standards. Two-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take evidence to overcome their belief. . . . With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of its members admit, before hearing any testimony, to possessing a belief in his guilt.

Id. at 727-28.

31. *Id.* at 728.

32. This Court has not yet decided that the fair administration of criminal 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 the jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.

Id. at 730.

33. 381 U.S. 532 (1965).

34. Only the prosecution arguments were aired as the defense requested not to be broadcast. *Id.* at 537.

Justice Harlan concurred in the Court's opinion but noted that the case dealt with a criminal trial of great notoriety and not with one of a more routine nature. There had been such extensive pre-trial publicity that press clippings which were on file with the Court filled eleven volumes. This publicity had given the case national notoriety. A two-day pretrial hearing had been televised in an atmosphere which lacked the judicial serenity and calm required for the fair administration of justice.

The Court recognized that pretrial publicity may be more harmful than publicity during the trial, for it may well set community opinion as to guilt or innocence.³⁵ Four of the trial jurors selected had seen or heard all or part of the broadcast of the earlier proceedings.

A free press was recognized as a mighty catalyst in awakening public interest in governmental affairs, exposing governmental corruption and informing the populace of public events and occurrences, including court proceedings. While this important function must be protected, the Court clearly recognized that the exercise of a free press must necessarily be subject to the maintenance of absolute fairness in the judicial process of a democratic society.³⁶

The concept that reporters of all media are free to report whatever occurs in open court was reaffirmed in *Estes*. This concept will be discussed later in the context of the principal case.³⁷ The theory that actual prejudice must be shown by the moving party prior to the entry of an order restricting publicity was rebutted in *Estes*.³⁸ The Court held essentially that circumstances such as those in *Estes* create a probability of prejudice that is deemed inherently lacking in due process.³⁹

35. 381 U.S. at 536.

36. *Id.* at 539.

37. It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media. This was settled in *Bridges v. California*, 314 U.S. 252 (1941), and *Pennekamp v. Florida*, 328 U.S. 331 (1946), which we reaffirm.

Id. at 541-542.

38. *Cf. Adams v. United States ex rel. McCann*, 317 U.S. 269, 281 (1942).

39. [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.

381 U.S. at 542.

It long has been established that the integrity of our judicial system requires that verdicts be based only on evidence adduced and arguments made in open court and not on any outside influence, whether private talk or public print.⁴⁰ In *Rideau v. Louisiana*⁴¹ and again in *Turner v. Louisiana*,⁴² the Supreme Court departed from the approach taken in *Irvin* where a careful examination was made of the facts to determine whether actual prejudice had resulted.

In *Rideau* a conviction for robbery, kidnapping, and murder was reversed because a motion for change of venue had been denied. Two months prior to the trial the local television station had broadcast three times in a space of two days a twenty-minute filmed confession made by the defendant to the parish sheriff in which the defendant admitted that he had perpetrated the crimes of which he was later charged.

The Court held that the filmed "interview," seen by thousands of people in the community in which the defendant faced trial, was antithetical to traditional concepts of due process; and that the televised confession was, in effect, a "trial" at which defendant pled guilty to murder. Any further court proceedings in that community could be but a hollow formality.⁴³

In *Turner* a murder conviction was reversed where two deputy sheriffs who were the principal prosecution witnesses also performed the function of bailiff 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, such a showing was not held to be a requisite of reversal.⁴⁴ The Court was not impressed with

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

41. 373 U.S. 723 (1963).

42. 379 U.S. 466 (1965).

43. [W]e hold that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial—at which he plead guilty to murder. Any subsequent Court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.

373 U.S. at 726.

44. Mr. Justice Holmes stated no more than a truism when he observed that "Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the enviroing atmosphere."

379 U.S. at 472, quoting from *Frank v. Mangum*, 237 U.S. 309, 349 (1914) (dissenting opinion).

testimony that the deputies had not discussed the case directly with any member of the jury, recognizing the extreme prejudice inherent in the continued association throughout a trial between the jurors and key witnesses for the prosecution.

Finally, Dr. Samuel Sheppard was granted relief on his application for a writ of habeas corpus in *Sheppard v. Maxwell*⁴⁵ because of the "Roman Holiday" atmosphere created by prejudicial publicity, both pretrial and contemporaneous with trial. From the outset, news reports and headlines stressed the defendant's lack of cooperation. A coroner's inquest was staged "live" in a school gymnasium. Pretrial publicity emphasized evidence that tended to incriminate the defendant and pointed out discrepancies in his statements. The jury was not sequestered until the case was submitted to it for deliberation; and much of the material printed or broadcast during the trial, to which the jury had access, was never heard from the witness stand. This deluge of publicity reached at least some members of the jury. No effort was made by the court to control telephone access to the jury. Media representatives were permitted inside the railing of the courtroom separating the trial participants from the spectator area, handled and photographed exhibits on the counsel table and generally disrupted the proceedings to the point of chaos. This case is an embarrassment both to the legal profession and to journalists.⁴⁶ A responsible press was credited with being the handmaiden of effective judicial administration, guarding against miscarriage of justice by subjecting the police, prosecutors, and the judicial processes to extensive public scrutiny and criticism. The Court set forth several alternatives⁴⁷ which it deemed available to the trial judge in *Sheppard* and which would have been deemed sufficient to insure Sheppard's right to a fair trial. While it did not sanction the use of a prior restraint on publication in that case, *Sheppard* cannot be made to stand for the proposition that the alternatives suggested were exhaustive and adequate for any conceivable situation. The Court simply stated that the alternatives which it suggested would have been sufficient to guarantee Sheppard a fair trial, and it expressly declined to consider what sanctions might be available against a recalcitrant press.⁴⁸

III. ABSOLUTISM AND THE FIRST AMENDMENT

Certainly the overwhelming importance of a free press and the

45. 384 U.S. 333 (1966).

46. The embarrassment to the legal profession was compounded by the fact that the prosecutor was running for municipal judge at the time and the trial judge was up for re-election. *Id.* at 342.

47. These alternatives are analyzed at pages 567-70 of this article as they relate to *State v. Simants*.

48. 384 U.S. at 358.

dangers inherent in restricting that freedom in a democratic society cannot be overstated. It long has been held that freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.⁴⁹ However, as was observed by Justice Black in his dissenting opinion in *Cox v. Louisiana*,⁵⁰ notwithstanding the importance of a free press, that freedom should not be permitted to divert a trial from its very purpose of adjudicating controversies in the calmness and solemnity of the courtroom according to legal procedures. One of the most important of those legal procedures to a criminal defendant is the requirement that the jury's verdict be based on evidence received in open court, and not from outside sources. It was observed in *Marshall v. United States*⁵¹ that prejudice through news accounts may be even greater than prejudice resulting from the prosecution's evidence, because the news accounts are not tempered by judicial procedures.

The press took the position in the *Simants* case that the first amendment is absolute, automatically bringing into subservience every other provision of the Constitution. Indeed, the press position denied the very existence of a conflict between the first amendment guarantee of freedom of the press and the sixth amendment guarantee to a criminal defendant of a fair trial before an impartial jury.

Clearly a conflict exists in an exceptional, sensational, highly publicized case such as the *Simants* murder trial. However, the question is not whether a conflict exists, but, rather, whether there are always adequate alternatives to the temporary restriction of prejudicial publicity.

The claim of first amendment absolutism should be examined briefly in historical perspective. It should be noted at the outset that it is the sixth amendment and not the first which is couched in absolute terms. The legislature is expressly prohibited from passing any laws abridging freedom of the press and freedom of speech. The executive and judicial branches of government are omitted from this absolute prohibition. When examining prior restraint as it applies to the executive branch in protecting the national security and the judicial branch in securing the fair administration of justice, a somewhat more flexible approach logically may be taken. It is readily apparent that each of the latter branches of government lacks the legislative capacity to institute a pervasive system of censorship.⁵²

49. See *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946).

50. 379 U.S. 559, 583 (1965).

51. 360 U.S. 310, 313 (1959).

52. This statement is not to be taken as endorsing unwarranted restric-

The Supreme Court in *Near v. Minnesota*⁵³ specifically recognized that liberty of speech and of press are not absolute rights. The Court has long recognized exceptions to the rule against prior restraints in the area of national security, *Schenck v. United States*;⁵⁴ obscenity, *Freedman v. Maryland*;⁵⁵ and "the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," *Chaplinsky v. New Hampshire*.⁵⁶ The national security exception articulated in *Schenck* was most recently reviewed in *New York Times Co. v. United States*⁵⁷ where seven members of the Court recognized the validity of the *Schenck* exception to the presumption against restraints although the majority held that the prior restraint against publication there involved was invalid.

Freedman and *Chaplinsky* may be recognized as legitimate exceptions to the general prohibition against prior restraints although they are based on a 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. In *Roth v. United States*⁵⁸ 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*.

Likewise, "commercial speech" may, under certain circumstances, overcome the constitutional presumption of invalidity of prior restraints.⁵⁹ Constitutional protection is also not afforded to libelous or defamatory comment.⁶⁰

The validity of other restrictions involving prior restraints on the press or on speech has been recognized in the area of copyright law. Since the founding of the Republic, we have had copyright laws authorizing the courts to grant injunctions against publication.⁶¹ Cases involving injunctions under the copyright law have been frequent in federal courts⁶² and even the press has not been

tions on publication and broadcasting by the executive and judicial branches of government. The Watergate experience clearly demonstrates the importance of a free press.

53. 283 U.S. 697, 708 (1931).

54. 249 U.S. 47 (1919).

55. 380 U.S. 51 (1965).

56. 315 U.S. 568, 572 (1942).

57. 403 U.S. 713 (1971).

58. 354 U.S. 476, 485 (1957).

59. *Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations*, 413 U.S. 376 (1973).

60. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

61. See, e.g., 17 U.S.C. § 101 (1970); 28 U.S.C. § 1338 (1970).

62. Cf. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *Folsom v. March*, 9 F. Cas. 342 (No. 4901) (C.C.D. Mass. 1841).

averse to the prior restraint involved in an injunction in such cases.⁶³

The Supreme Court also has sustained the validity of an injunction involving a prior restraint on an employee of the CIA who had signed an agreement not to make disclosures and who was threatening to publish material without the approval required by that agreement.⁶⁴

Cease-and-desist orders have escaped constitutional defect when issued to secure enforcement of federal regulatory statutes.⁶⁵ In *Sinclair v. NLRB*,⁶⁶ the Supreme Court upheld the National Labor Relations Board's setting aside of a representative election because of coercive communications by the employer to its employees during an election campaign, notwithstanding Sinclair's first amendment challenge. The Court unanimously upheld the Board's order requiring Sinclair to cease-and-desist from "threatening the employees with the possible closing of the plant or the transfer of the weaving production, with the attendant loss of employment, or with any other economic reprisals, on the basis of their selection of any labor organization as their collective-bargaining representative."⁶⁷ In its opinion in *Sinclair*, the Court specifically recognized that the freedom of speech granted to the employer is subject to the limited restriction necessary to protect "the equal rights of the employees to associate freely . . ."⁶⁸ The above authorities are cited only to emphasize that an absolutist view of the first amendment cannot be supported in history or in law.

IV. PRIOR RESTRAINTS AND THE JUDICIAL PROCESS

It consistently has been held that the exercise of first amendment rights is constitutionally protected only when done in a reasonable and proper time, place, and manner.⁶⁹ In this regard prior

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

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

65. See *FTC v. Texaco Inc.*, 393 U.S. 223, 231 (1968), where the Supreme Court ordered enforcement of an order of the Federal Trade Commission restraining Texaco from using devices such as dealer discussions, in violation of the Federal Trade Commission Act.

66. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), aff'g *NLRB v. Sinclair Co.*, 397 F.2d 157 (1st Cir. 1968).

67. *Id.* at 589.

68. *Id.* at 617.

69. Archer, *The Constitutional Fairness of Fair Trial-Free Press*, 1976 (unpublished manuscript in office of Lincoln County Attorney, North Platte, Nebraska); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

restraints have been held to pass constitutional scrutiny to the extent that demonstrations, parades, and similar first amendment conduct require the obtaining of a permit beforehand;⁷⁰ provided that the regulating legislation is not vague⁷¹ and does not allow the officials granting the permits any degree of discretion violative of due process.⁷²

Focusing on first amendment activity directed at the judicial process, *Cox v. Louisiana*⁷³ reversed on due process grounds the conviction of the leader of demonstrations under a statute prohibiting parades or pickets in the proximity of a courthouse with the intended effect of interference with the administration of justice. However, in upholding the validity of the statute the Court stated that "specific conduct that infringes a substantial state interest in protecting the judicial process can be constitutionally prohibited."⁷⁴

It has been stated expressly that temporary restraints on the press involving pending judicial actions may be employed in some instances. Mr. Justice White in *Branzburg v. Hayes*⁷⁵ stated that newsmen "may be prohibited from attending or publishing information about trials if such restrictions are necessary to insure a defendant a fair trial before an impartial tribunal."⁷⁶

Restrictions on publication of prejudicial information would seem to be more easily justified if limited to the period prior to the impaneling and sequestering of a jury. Most of the cases which previously reached the Supreme Court and which resulted in protection of the press from restrictions on what they may report are concerned with the trial phase of the proceedings. At that stage in the criminal proceeding the jurors and witnesses can be otherwise shielded from prejudicial publicity.⁷⁷ A restriction limited to pretrial coverage may delay coverage but does not take on the form of permanent censorship. Further, unless the threat to a fair administration of criminal justice is both "substantial" and "imminent" any delay should be deemed constitutionally impermissible.⁷⁸

70. *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

71. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

72. *Carroll v. Princess Anne*, 393 U.S. 175, 183-84 (1968).

73. 379 U.S. 559 (1965).

74. *Id.* at 564.

75. 408 U.S. 665 (1972).

76. *Id.* at 685. See also *Newspapers, Inc. v. Blackwell*, 421 U.S. 997 (1975); *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1307 (1974).

77. See, e.g., *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941).

78. See *Bridges v. California*, 314 U.S. 252, 263 (1941).

The distinction between jury and nonjury cases was expressly recognized in *Wood v. Georgia*⁷⁹ where a public official criticized the judge who initiated a grand jury investigation into alleged political corruption in a press conference specifically covering the subject of the grand jury investigation. In reversing the conviction for contempt the court observed that "this case does not represent a situation where an individual is on trial."⁸⁰

Nebraska Press Ass'n v. Stuart did not involve news comment upon a public official or the judicial system. The Supreme Court consistently has held that judges are not immune from criticism in their judicial capacity.⁸¹ It has also held that the sixth amendment guaranteeing a criminal defendant not only the right to a public trial, but also to a fair trial by a panel of impartial jurors. It is clear that when that right is subverted by prejudicial publicity in violation of due process requirements applicable to the states through the fourteenth amendment, the necessary result is frustration of the judicial process necessitating a new trial.⁸² As noted in *Sheppard v. Maxwell*, "we must remember that reversals are mere palliatives; the cure lies in those remedial measures which will prevent the prejudice at its inception."⁸³

V. TEMPORARY RESTRAINT V. PUBLIC ACCESS

The essential conflict presented to the Supreme Court in *Nebraska Press Ass'n v. Stuart* was between two vitally important concepts: (1) that the right of the courts to conduct their business unimpeded lies at the foundation of our system of government⁸⁴ and (2) that the news media have the right to report what transpires in the courtroom.⁸⁵

Although temporary restraint on publication of events transpiring in judicial proceedings open to the public has never been afforded constitutional sanction, the admonition in *Sheppard* requiring the courts to take measures to avoid the effects of prejudicial publicity where there is a reasonable likelihood that it will prevent a fair trial remains as a constant reminder to the legal profession and journalists that irresponsible conduct will not be tolerated.⁸⁶

79. 370 U.S. 375 (1962).

80. *Id.* at 387.

81. See cases cited in note 77 *supra*.

82. *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961).

83. 384 U.S. at 365.

84. *Wood v. Georgia*, 370 U.S. 375, 383 (1962).

85. See *Craig v. Harney*, 331 U.S. 367, 374 (1947).

86. 384 U.S. at 362-63.

Both *Craig* and *Sheppard* focused upon the trial stage of the judicial proceeding. The statement of Justice Douglas in *Craig* is based on the premise that "a trial is a public event." Of course, the concern in *Sheppard* was the "Roman Holiday" atmosphere surrounding the trial itself. The order of the Nebraska Supreme Court subjected to constitutional scrutiny applied only to pre-trial hearings, some of which could have been waived by the defendant. The difficulty arose from the fact that the order applied to hearings in open court. The most notable proceeding to which it applied was the preliminary hearing held on October 22, 1975, at which the State was required to present sufficient evidence to justify binding over the defendant to the district court for trial.

A Nebraska statute requires that a criminal defendant who is unable to make bond or is held without bond shall be offered a preliminary hearing within four days of his arrest.⁸⁷

The right to a preliminary hearing is a right belonging to the accused. He may waive the hearing should he desire. However, if it is impossible to restrict prejudicial coverage, the criminal defendant may prejudice his right to a fair trial by exercising his right to a preliminary hearing. This is especially true, when, as in the *Simants* case, the testimony to be adduced by the State included not one but three damaging statements against interest.

From the standpoint of society, the resultant pervasive publicity arising from the introduction of confessions in a sensational case may have the attendant effect of frustrating effective prosecution. That danger is especially significant in Nebraska where a change of venue in criminal actions is limited to removal to counties adjoining the county in which the crime was committed.⁸⁸ The counties adjoining Lincoln County, Nebraska, are served by essentially the same newspapers and broadcast stations as Lincoln County. The crime involved the largest scale mass murder in Nebraska since the Charles Starkweather killings of 1959. The matter, therefore, attained a level of great importance to the people of Lincoln County and to surrounding communities.

The media relied heavily on the concept of immunity from prior restraint based on the supposed voluntary revelation by the prosecution of the existence of confessions at the preliminary hearing of the defendant, *Simants*. The first point which must be made is that a Nebraska statute requires that all judicial proceedings be open to the public unless otherwise provided.⁸⁹ The constitutional-

87. NEB. REV. STAT. § 29-501 (Reissue 1975).

88. NEB. REV. STAT. § 29-1301 (Reissue 1975).

89. NEB. REV. STAT. § 24-311 (Reissue 1975).

ity of this statute was not challenged and the prosecution successfully opposed all motions of the defendant to close the proceedings. It would seem to be far more desirable from the vantage point of the people's "right to know" to permit the press to be present at all proceedings even if, in exceptional circumstances, publication of certain highly prejudicial information is restricted until the jury is impaneled and may be protected from outside influences. The argument that it is a denial of equal protection to apply the order only to members of the media and not to members of the public attending the hearings defies logic and practical experience. The impact of media coverage through the use of commercial air waves and mass dissemination of printed material is infinitely greater than discussions with friends and relatives initiated by those members of the public in attendance at the proceeding.

The concern that rumor and innuendo in communities victimized by sensational crime can more greatly prejudice the sixth amendment right to a fair trial than impartial reporting of the facts is likewise without merit. The average citizen gives much greater credence to the printed word than to hearsay information received from acquaintances. This is particularly true with regard to reports of judicial proceedings. There is added danger in reporting prejudicial testimony from a preliminary hearing in that the only purpose served by the hearing is a determination of probable cause to require a criminal defendant to undergo trial. When confessions are introduced, the question of voluntariness is not before the court for determination. In the *Simants* case, all of the physical evidence which would be used at trial to corroborate the State's case was being prepared for shipment to the criminal laboratory of the Federal Bureau of Investigation in Washington, D.C., for analysis, at the time of the preliminary hearing. The only evidence in the State's possession at the time of the preliminary hearing linking the defendant to the crime, was his confessions to his nephew, his parents, and law enforcement officials. In the absence of the introduction of the defendant's incriminating statements, the State would have been unable to bind over the defendant to district court for trial. It cannot be contended that the prosecution "voluntarily" disclosed for public dissemination confessions of a defendant which were necessarily revealed in proceedings statutorily required to be open to the public.

Confessions lend themselves uniquely to pretrial restraint against publication. It may be argued that it is desirable for the public to be informed of alleged confessions because (1) press reports may reveal that the confession was improperly coerced and (2) the confession itself may implicate other persons whom the prosecutor may, for improper reasons, otherwise fail to prosecute.

With regard to the revelation of a coerced confession, it is submitted that the voluntariness of a confession is, in the first instance, a question for judicial determination, not editorial comment.

As indicated above, the admissibility of a confession is not before the court for determination at the time of the preliminary hearing. At that stage in the proceedings, after the perpetration of a crime has been established, the mere fact of the existence of a confession establishes "probable cause" to believe that the defendant committed the crime and to provide a basis for binding him over to the district court for trial. In *Jackson v. Denno*⁹⁰ the Supreme Court determined that the question of the voluntariness of a confession is a matter of law for determination by the court and not a question of fact for determination by the jury. The question for jury determination is the truthfulness of the confession. In that case the Court set forth the requirement that criminal defendants are entitled to a hearing in state courts on the question of the voluntariness of a confession. Such a hearing is to take place outside the presence of the jury and would be of little practical effect if vast numbers of potential jurors had already been exposed to the fact that a confession or confessions existed. The fact that Simants confessed to his nephew, his parents, and law enforcement officials was published prior to the prosecution's request for an order restricting publicity in the *Simants* case. The contents of the confession to defendant's parents already had been related.

Perhaps the defendant should have waived his right to a preliminary hearing. However, if he had done so, he may have been precluded from raising, on appeal, the legal question of "probable cause" for his arrest and detention. In the absence of an order restricting prejudicial coverage, both the defendant and the prosecution would have been placed in untenable positions. The defendant would have had to choose whether to protect the record for appeal and the prosecution would have had to choose between the possibility of not adducing enough evidence to insure a bind over or that of paving the way for a reversal because of prejudicial pretrial publicity through introduction of additional evidence. Neither the right of a criminal defendant to a preliminary hearing nor the right of the state to effective enforcement of its laws should be impaired by prejudicial coverage of pretrial proceedings. The contention that it is better that a guilty man go free than that the press be limited grants to the press absolute freedom while denying any responsibility. As indicated above, an absolutist position concerning the first amendment guarantee of freedom of the press has never been accepted. The press exists to provide the widest dissemi-

90. 378 U.S. 368 (1964).

nation of information possible to the people. 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 the publication of information that may have the effect of so influencing the fair administration of justice that a guilty man would be freed, denies that responsibility.

VI. THE STANDARD TO BE APPLIED

Any action taken, including prior restraint, which produces a chilling effect on the exercise of first amendment guarantees must be carefully scrutinized. The action taken must be reasonable and have the attendant effect of eliminating a "clear and present danger" to the administration of justice. The "substantive evil" thought to be forestalled must be extremely serious and the degree of "imminence" extremely high.⁹¹ The loss of a criminal defendant's sixth amendment rights must certainly be considered a "substantive evil."⁹²

A "clear and present danger" exists if prejudicial publicity impairs the protection of sixth amendment rights possessed by a criminal defendant. The importance of the "individual" is basic to our democratic system. The concern of the Founding Fathers for the individual was underscored by George Mason's refusal to support ratification of the Constitution because it did not contain guarantees of individual rights. Shortly after Mason's action, the Bill of Rights was ratified, which insured that the central government would not tamper with those rights basic to a free people. Applying the clear and present danger test, the case which bears the closest analogy to the facts of *Nebraska Press Ass'n v. Stuart* is

91. Mr. Justice Black, in *Bridges v. California*, 314 U.S. 252, 263 (1941), concluded: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high . . ." *Bridges* did not deal directly with prior restraints but rather with the possibility of contempt citations being issued for publishing certain matters. It is submitted that in determining the validity of any Court action that impinges on the first amendment rights of the press, the proper test to be applied should be the "clear and present danger" test.

92. Mr. Justice Frankfurter, concurring in *Pennekamp v. Florida*, 328 U.S. 331, 353 (1946), declared:

"The clear and present danger" to be arrested may be danger short of a threat as comprehensive and vague as a threat to the safety of the Republic or 'the American Way of life.' . . . Among "the substantive evils" with which legislation may deal is the hampering of a court in a pending controversy, because the fair administration of justice is one of the chief tests of a true democracy."

Rideau v. Louisiana,⁹³ discussed above, in which a conviction was reversed because a motion for change of venue was denied after a confession of the defendant had been televised three times in the space of two days by a local station. Rideau had given a televised confession to the parish sheriff and that confession was televised to the community in which the trial ultimately was held. Simants had confessed to his nephew, his parents, and had given a tape-recorded confession to law enforcement officials. Simants was arrested on Saturday, October 19, 1975, and on the following Monday, reports of the contents of confessions to the nephew and parents were publicized together with the fact that Simants made a statement to law enforcement officials.

A distinguishing characteristic between the cases is that the Simants confessions were publicized prior to the time the court had opportunity for admonishment from the bench regarding prejudicial publicity. The community in which *Rideau* was tried had a population of approximately 150,000 inhabitants. It was estimated that audiences totaling 106,000 had witnessed the televised confession during its three twenty-minute segments over a period of two days. Lincoln County, in which Simants was tried, has approximately 32,000 total population of which approximately 22,000 reside in the city of North Platte, the county seat. The local radio and television stations reach all counties to which venue could have been changed. The North Platte Telegraph has a circulation of 17,000, most of which is in Lincoln County and counties immediately adjacent to Lincoln County.

In *Rideau* the conviction was reversed because of in-depth exposure of the community to the spectacle of the defendant personally confessing in detail to the crimes of which he was charged. In Simants' case, in-depth exposure of the community to confessions of the defendant was forestalled by the protective order, limited in scope and duration, as ultimately entered by the Nebraska Supreme Court. The latter part of the state court's order, precluding dissemination of "other information strongly implicative of the accused as the perpetrator of the slayings," was attacked as vague and all-encompassing. The Supreme Court in *Nebraska Press Ass'n v. Stuart* agreed. It is submitted that while the admonition may appear vague in the abstract, its meaning is clarified when applied to the factual circumstances of a given case.

The threat posed by highly prejudicial pretrial publicity in Simants' case was both "substantial" and "imminent." The trial court was acutely aware of the situation concerning publicity, reactions

93. 373 U.S. 723 (1963).

of the community, and the gravity and the brutality of the crime. The trial court found that a "clear and present danger" existed, threatening the sixth amendment right of Simants to a fair trial. Therefore, an accommodation had to be made between his rights and the rights of the press under the first amendment. The media suggested that the first and sixth amendment have enjoyed a harmonious relationship since the founding of our country. *Sheppard, Estes, Rideau*, and other cases⁹⁴ clearly establish the invalidity of such an argument in this modern world of massive and instantaneous dissemination of news. Where a "clear and present danger" exists to the impaneling of an impartial jury, the prospective injury to the rights and interests of the criminal defendant and society must be balanced against the prospective injury to the rights and interests of the press.

Certainly freedom of the press is vitally important to a democratic society and only in rare circumstances should limits be placed on the news media.⁹⁵ It is precisely in those limited and rare cases where a "clear and present danger" exists that the press should be circumscribed temporarily from reporting that which takes place in open court at pretrial hearings. However, such orders should be strictly limited to the exceptional, highly publicized, sensational case and should be tailored to the specific circumstances, limited in scope and duration.⁹⁶ This position is not undermined by the decision in *Times-Picayune Publishing Corp. v. Schulingkamp*⁹⁷ which resulted in the stay of a restriction on publication in a clearly distinguishable case.

VII. ALTERNATIVES TO A PRIOR RESTRAINT

Some contend that *Sheppard v. Maxwell* stands for the proposition that a prior restraint on publication may never issue because that case set forth sufficient reasonable alternatives to be used by the judiciary under any conceivable circumstance. Therefore, the alternatives suggested in that case should be analyzed in relationship to *Nebraska Press Ass'n v. Stuart*.

94. *Marshall v. United States*, 360 U.S. 310 (1959) (per curiam); *Shepherd v. Florida*, 341 U.S. 50 (1951) (per curiam).

95. Justice Frankfurter, concurring in *Pennekamp*, stated: "Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society." 328 U.S. at 354-55 (footnotes omitted).

96. See ABA LEG. ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, PRELIMINARY DRAFT PROPOSED COURT PROCEDURE FOR FAIR TRIAL-FREE PRESS JUDICIAL RESTRICTIVE ORDERS (1975).

97. 419 U.S. 1301 (1974).

Alternatives suggested in *Sheppard* included continuance of the trial date, change of venue, admonishments to the jury, extensive voir dire of prospective jurors, reversal or new trial. None of these alternatives would have solved the problems raised by the *Simants* case.

The suggestion of a continuance of the trial date does not acknowledge the criminal defendant's constitutional right to a speedy trial and the prosecution's statutory obligation to bring the matter to trial within six months.⁹⁸ Further, Nebraska requires that the trial of a criminal case be given preference over civil cases, and that the trial of a defendant who is in custody and whose pretrial liberty is reasonably thought to present unusual risks must be given preference over other criminal cases.⁹⁹ The defendant, *Simants*, was held without bail. Recognizing these constitutional and statutory obligations, the trial judge set a January 5, 1976, trial date. Because of the necessity of an early trial date and in view of the great interest expressed in this case both regionally and nationally, the position that adverse effects of pretrial publicity could have been substantially reduced by continuance lengthening the cooling off period between arrest and trial is untenable.

The logical question is whether it would not have been possible that the passage of time before the trial would have destroyed much of the prejudicial effect of pretrial 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 *North Platte Telegraph*. As indicated earlier, this newspaper is the paper of general circulation throughout Lincoln County and surrounding communities. 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 people in the community.

Similarly, a motion for change of venue would not have been a practical alternative. Nebraska law¹⁰⁰ permits change of venue in criminal cases only to a county adjoining the county in which the crime was committed. The defendant, *Simants*, did, in fact, move for a change of venue, and this motion was opposed by the prosecution on the bases that limitations on pretrial coverage had been effective, and that if defendant's right to a fair trial had been prejudiced in Lincoln County, a change of venue to an adjoining county would not remedy the problem. All adjoining

98. See NEB. REV. STAT. § 29-1207 (Reissue 1975).

99. NEB. REV. STAT. § 29-1205 (Reissue 1975).

100. NEB. REV. STAT. § 29-1301 (Reissue 1975).

counties are smaller than Lincoln County and are served by many of the same television and radio stations, newspapers, and wire services. It should be observed that the parties involved in *Nebraska Press Ass'n v. Stuart* included the Omaha World Herald Co., which publishes a newspaper of general circulation for the entire state of Nebraska; United Press International, and Associated Press, both national organizations for the dissemination of news; and the Nebraska Broadcasting Association, the state organization of broadcasters. The pretrial publicity which this case received was not localized in Lincoln County but pervaded the entire state of Nebraska.

Instructions from the court that the jury disregard prejudicial information which had come to them from outside sources is another alternative which was impractical. As has been shown circumstances surrounding a criminal proceeding can give rise to such a prejudicial atmosphere that due process is inherently lacking. No matter how hard a juror tries consciously to set aside an opinion which he has established, subconscious impartiality may be unobtainable. Instructions are effective only if given to a jury which was not seated with an established predisposition toward guilt or innocence.

Extensive voir dire examination to determine the existence of prejudices and to eliminate those veniremen who hold an established predisposition with regard to this particular criminal defendant was also impractical. As the Supreme Court had noted, an entire community can be fatally infected from extensive prejudicial publicity¹⁰¹ or from circumstances such as those in *Rideau* where the defendant's televised confession was shown repeatedly and in depth two months prior to trial; or from the televising of pretrial proceedings and parts of the trial itself as in *Estes*. The Court has recognized that pretrial publicity can create a major problem for a criminal defendant and has refused to sanction television coverage of trials as a valid exercise of first amendment freedoms.

These cases recognize that what a juror says on voir dire does not insure impartiality. The criterion is far from satisfactory and its application is unclear. For instance, *Murphy v. Florida*,¹⁰² involved a case where "scores of articles," "bizarre media coverage" and a juror who not only had knowledge of defendant's prior convictions but who "imagined" these convictions would influence the verdict. Certainly he came into the case with something less than a presumption of innocence for the defendant. Yet the Court by a majority of 7 to 1 held that fourteenth amendment due process

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

102. 421 U.S. 794 (1975).

had not been violated. The juror's bias was not considered significant because it was brought out by "leading and hypothetical questions."¹⁰³

It is apparent that the more times 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. Pervasive and prejudicial publicity surrounding trials of unpopular defendants substantially enhances the problem.

At best, voir dire is an elimination, not a selection process. Biases are sought through extensive inquiry and if the bias cannot be neutralized the venireman should be excused. Discovery of bias may be rendered impossible regarding some veniremen who will consciously or unconsciously hide their bias.¹⁰⁴

Professors Padawar-Singer and Barton found that jurors exposed to prejudicial coverage "were as much as 66% more likely to find defendants 'guilty' than jurors who had read 'straight' news reporting." The preliminary study also found that thorough voir dire examination reduced this figure but did not by any means eliminate it.¹⁰⁵

The projected alternatives of reversals or new trials cannot be properly considered as alternatives to a trial judge. They exist only to insure that the pretrial publicity was not unduly prejudicial to a criminal defendant. The trial judge must enter whatever orders are necessary to secure a criminal defendant his right to a fair trial by an impartial jury. A judge who would refuse to enter a protective order in a necessary case because any prejudices arising from pretrial publicity could presumably be corrected on appeal would abuse his discretion and the appellate judicial process.¹⁰⁶ The supposed remedies of sequestration of witnesses, juries, and admoni-

103. See *id.* at 804 (Brennan, J., dissenting).

104. The most dangerous are those who have a preconceived opinion, and who will use deceit in order to serve on a jury so as to execute that opinion, the number being in direct proportion to the intensity of pretrial publicity. See Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965).

105. Archer, *supra* note 69.

106. Is it a satisfactory resolution of the problem to protect "the poisoner" in plying his trade, but—because the first trial was "poisoned"—put the state to the trouble and expense of a second trial years after the event, and subject the accused to the ordeal of a second trial—which again may be "poisoned"?

L. HALL, Y. KAMASAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 1145 (3d ed. 1969).

tions to disregard media coverage are directed to the conduct of the trial itself and can have no effect on prejudicial pretrial publicity.

The discussion above encompasses each of the alternatives suggested in *Sheppard* as an alternative to protective orders. The alternatives suggested, though ordinarily adequate, do not extend to every conceivable situation and certainly would have been inadequate with respect to the *Simants* case. In the sensational, exceptional, highly publicized case there may be no adequate alternative to a temporary restraint on publication of prejudicial facts.¹⁰⁷

VIII. CONCLUSION

The question of pretrial publicity should not be relegated to emotionalism. The use of terms such as "gag" hide the problem in an aura of emotion. No suggestion is made that the first amendment should be the sacrificial lamb of the sixth amendment. Rather, the issue is one of sovereignty in the judicial system. It has been suggested that exposure of the judicial process to injury in exceptional, highly publicized, sensational cases is the price which must be paid by society for the privilege of enjoying a free press. This position is not acceptable in that the injury in such case is to society as a whole, which, due to the impossibility of a criminal defendant obtaining a fair trial, must necessarily forego a conviction of a person who may well have committed the crime for which he is charged.

The importance of severely limiting any infringement of the exercise of a free press to exceptional cases cannot be overemphasized. Certainly, in balancing the interests of the fair administration of justice as against the exercise of a free press, borderline cases should be resolved in favor of the first amendment. This is true because of the various alternatives available to trial judges in protecting the criminal defendant's right to fair trial. However, the alternatives to a prior restraint simply are not feasible in every circumstance. The *Simants* case provided a classic example justifying prior restraints on publication during the pretrial period. The *Bridges* requirements that the "substantive evil" be extremely serious and the degree of "imminence" extremely high were clearly met as they related to the impaneling of an impartial jury. This is es-

107. The limited period of the restraint in this case finds an analogy in *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), where the Supreme Court found that a restraint of 74 days was not unconstitutionally excessive. It is true that obscenity is not within the scope of first amendment protection. But when the issue is whether the item is or is not obscene, some of the items may constitute protected expression. A restraint on their publication for the limited period necessary to decide the issue was upheld, though an unlimited restraint would have been invalid.

pecially true in light of the statutory inability of the Nebraska trial judge to transfer the case beyond the reaches of the prejudicial publicity. There did not exist in *Simants* the "Roman Holiday" or "Carnival Atmosphere" that was prevalent during the *Sheppard* trial or the theatrical environment of the *Estes* and *Rideau* trials. However, in light of the attitudes of the community, the publication of the existence and contents of alleged confessions made by *Simants*, and the magnitude of the crime which focused statewide attention on a small rural community, the finding of a "clear and present danger" to the administration of criminal justice was warranted.

An issue not yet examined, but which certainly underlies the question of prejudicial pretrial publicity, is the effect of such publicity on the prosecution's burden of proof. It is incumbent upon the prosecution in our system of judicial administration to prove the allegations against a criminal defendant beyond a reasonable doubt. The prejudices created in the minds of the citizens of a community in which a sensational case arises would seem to have the practical effect of reducing that burden. The corresponding effect is to place upon the criminal defendant the burden of establishing his innocence. Such a result cannot be tolerated under our constitutional system of government.

A narrow limitation on the press, confined to the shortest fixed period compatible with sound judicial determination, is a moderate price to pay for the preservation of justice and public confidence in the judicial system. Freedom of the press must not be permitted to divert a trial from its purpose of adjudicating controversies in an atmosphere compatible with due process considerations and according to established judicial procedures. Paramount of such procedures is that jury verdicts should be based upon the evidence received in open court and not on outside sources. The essential liberties encompassed by the first and sixth amendments can be protected only in a case by case determination. What is needed is expeditious review of any judicial order entered to insure that any unconstitutional limitation on the press may be promptly reviewed and reversed. It is incumbent upon the legal profession to recognize that restraints should be imposed in only isolated incidents involving a "clear and present danger" to the impaneling of a fair and impartial jury. It is difficult to conceive of a situation arising outside the setting of a potential jury trial in which a prior restraint would be justifiable. We may correctly presume that those individuals entrusted with the responsibilities of the judiciary are sufficiently strong-minded to be able to administer justice regardless of news accounts and editorial comment upon questions requiring their decisions alone.