CONSTITUTIONAL LAW—ALTERNATIVES AVAILABLE TO TRIAL COURTS TO PROTECT JURORS FROM PREJUDICIAL PUBLICITY —*State v. Allen*, 73 N.J. 132, 373 A.2d 377 (1977).

Isaac Allen was tried in a New Jersey court on charges of armed robbery and felony murder.[1] A mistrial resulted when the jury failed to reach a unanimous verdict.[2] At the second trial, an evidentiary hearing was to be conducted on the admissibility of an alleged confession by the defendant.[3] Upon the requests of both the prosecution and the defense, the trial court issued a protective order prohibiting the publication of testimony given at the evidentiary hearing until after the jury was sequestrated for deliberation.[4] Although the jury was to be removed from the courtroom for the hearing, the trial court was concerned that the jurors might subsequently learn of the events

---

[1] State v. Allen, 73 N.J. 132, 136, 373 A.2d 377, 378 (1977). The criminal charges levied against Allen were for his alleged participation in the robbery of a bar in which a patron was killed by a shotgun blast fired at point-blank range. Brief for the State of New Jersey at 1, State v. Allen, 73 N.J. 132, 373 A.2d 377 (1977) [hereinafter cited as Brief for State]. The incident generated massive pretrial publicity at the defendant's first trial, causing the court to impanel a foreign jury. *Id.*; *see* N.J.R. 3:14-2, -3. In fact, the trial court in the defendant's second trial noted that armed robbery and felony murder "are the type of allegations which often are the subject of extensive coverage." Brief of Aggrieved Parties/Appellants Gannett Company, Inc. and the Home News Publishing Company, Inc., app. C at 2, State v. Allen, 73 N.J. 132, 373 A.2d 377 (1977) [hereinafter cited as Brief for Appellant, Gannett Co.].

[2] State v. Allen, 73 N.J. 132, 136, 373 A.2d 377, 379 (1977).

[3] State v. Allen, 73 N.J. 132, 135, 373 A.2d 377, 378 (1977). The New Jersey Supreme Court noted that when the admissibility of state's evidence is challenged during the course of a trial, it is the "usual practice" of New Jersey courts to remove the jury from the courtroom for the duration of the evidentiary hearing. *Id.* at 136, 373 A.2d at 378. If the evidence is found to be admissible, the jury will be recalled and presented with that evidence. *Id.* However, if the evidence is deemed inadmissible, the state is estopped from using it at trial. *Id.*

[4] Brief for Appellant, Gannett Co., *supra* note 1, at 3–4. A protective order, within the context of this Note, is an order by a court to prevent persons (primarily members of the press) present at a judicial proceeding from disseminating information regarding that proceeding. *See* State v. Allen, 73 N.J. 132, 135, 136, 373 A.2d 377, 378 (1977). The order is premised on the court's belief that such reporting would be detrimental to the assurance of a fair trial. *See id.* at 136, 373 A.2d at 378. As used in this Note, the term "protective" order is interchangeable with the terms "restrictive" order and "gag" order. *Compare id.* at 136, 137, 373 A.2d at 379 *with id.* at 156, 373 A.2d at 389 (Pashman, J., concurring).

In the instant case, upon issuing the protective order, the trial judge stated that "my decision at this moment is this: that the order will be that nothing which takes place outside the presence of the jury is to be printed. That includes anything said since I took the bench this morning." Brief for Appellant, Gannett Co., *supra* note 1, app. C at 4. The order would, therefore, even preclude the media from reporting that a press restriction was ordered by the trial court. The protective order was issued by the trial court prior to jury selection in an attempt to establish guidelines for the upcoming trial. *Id.* app. C at 2. Curiously, a similar protective order was issued by the court conducting the first *Allen* trial, but the order was not appealed. Brief for State, *supra* note 1, at 1–2.

that had transpired in their absence through media reports of the proceedings.[5] Prior to the issuance of the order, the trial court considered and rejected several alternatives to the granting of the protective order, including sequestration of the jury and the issuance of cautionary instructions.[6]

Shortly thereafter, counsel for the two newspapers, the *Courier-News* and the *Home News*, whose reporters were subject to the protective order, appeared before the trial judge to contest the order.[7] The newspapers alleged that the order was a prior restraint of publication, violative of both state and federal constitutions.[8] Nonetheless, the trial court upheld the order with slight modifications and proceeded to hold the evidentiary hearing.[9] A motion for leave

---

[5] *See* Brief for Appellant, Gannett Co., *supra* note 1, app. C at 5–6.

A defendant has a constitutional right to a fair trial, as provided by federal and state constitutions. The sixth amendment to the United States Constitution provides that "[i]n 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. . . ." U.S. CONST. amend. VI. In like manner, the New Jersey Constitution states that "[i]n all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury. . . ." N.J. CONST. art. I, para. 10.

[6] State v. Allen, 73 N.J. 132, 136, 373 A.2d 377, 379 (1977); Brief for Appellant, Gannett Co., *supra* note 1, at 5–6. The court doubted the effectiveness of issuing cautionary instructions in the event that inadmissible evidence came to the attention of the jurors through press reports, since it is "extremely difficult to tell them [jurors] to disregard something they have heard." *Id.* app. C at 6. Furthermore, the trial court was opposed to the use of a jury sequestration, for it believed that to sequester a jury for the projected four to six week-long trial would be unduly harsh and burdensome upon the jurors. 73 N.J. at 136, 373 A.2d at 379.

[7] Brief for Appellant, Gannett Co., *supra* note 1, at 4.

[8] *Id.* Freedom of the press is guaranteed by the first amendment to the United States Constitution, which provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. Similarly, the New Jersey Constitution states that: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." N.J. CONST. art. I, para. 6.

In addition to the constitutional claims, counsel for the newspapers argued that the trial court could have employed alternative measures to protect the defendant's rights, without imposition of restraint upon the press. *See* Brief for Appellant, Gannett Co., *supra* note 1, at 4. Counsel also maintained that the court's order was procedurally defective, since the court lacked jurisdiction over the reporters and the newspapers. *Id.*

[9] Brief for Appellant, Gannett Co., *supra* note 1, at 4–5. The trial court feared "that publication of testimony ruled inadmissible would present a clear and present danger to the administration of justice and the right of the defendant to a fair trial." *Id.* app. A at 3. To prevent such harm, the court reinstated a slightly modified version of its order, which provided:

> Publication of inculpatory testimony taken outside the presence of the jury at evidentiary hearings held to determine the admissibility of said testimony which after hearing the court determines it is inadmissible . . . , is prohibited until the jury is sequestered to deliberate its verdict.

State v. Allen, 73 N.J. 132, 135, 373 A.2d 377, 378 (1977). This order, rather than the trial court's initial order, was the directive considered by the supreme court. The modified order was less restrictive than the court's initial order, in that evidence found inadmissible by the trial

to appeal the trial court's order was presented to the appellate division, but was denied.[10] A similar motion was granted by the supreme court; however, it was entered two days after the jury had returned its verdict.[11]

In a factually related case, John Hughes and his co-defendant, Richard Thompson, were convicted of murder and robbery.[12] Their convictions were reversed by the appellate division on the grounds that the prosecutor had made prejudicial remarks during summation.[13] On retrial, a doubt arose as to the testimonial capacity of a state's witness.[14] The prosecutor, therefore, requested that the witness be examined out of the presence of the jury, in order to determine whether she was in fact a competent witness.[15] The trial judge granted the request and *sua sponte* ordered a newspaper reporter present in the courtroom not to report on the events which took place out of the jury's presence.[16] This restrictive order, as well as an almost identical second order issued later that day, was to remain

---

court could be published upon completion of the trial; the original order made no such provision. *Compare* Brief for Appellant, Gannett Co., *supra* note 1, app. C at 4 (original order) *with* 73 N.J. at 132, 135, 373 A.2d at 377, 378 (modified version).

After issuing its order, the trial court conducted a hearing on the defendant's alleged confession, and ruled it admissible. 73 N.J. at 136, 373 A.2d at 379. Since the press was solely prohibited from reporting on evidence ruled *inadmissible* by the court, "as a practical matter, the order was inoperative as to anything that took place at trial." *Id.* at 136–37, 373 A.2d at 379.

[10] State v. Allen, 73 N.J. 132, 137, 373 A.2d 377, 379 (1977). The appeal of the trial court's order was taken by the two newspaper publishing companies (the Gannett Co. and the Home News Publishing Co.) whose papers (the *Courier-News* and the *Home-News*, respectively) were subject to the protective order. Brief for Appellant, Gannett Co., *supra* note 1, at 1. Both publishing companies retained the same counsel on appeal. *Id.*

[11] State v. Allen, 73 N.J. 132, 137, 373 A.2d 377, 379 (1977). For the text of the supreme court's order granting the appeal, see State v. Allen, 70 N.J. 153, 358 A.2d 199 (1976).

[12] State v. Allen, 73 N.J. 132, 137, 373 A.2d 377, 379 (1977). The *Hughes* case also attracted much publicity due to the serious nature of the crime. In *Hughes*, the defendants Hughes and Thompson, along with Thompson's younger brother, were alleged to have murdered a man carrying an armload of Christmas presents after the man had refused their demand for money. Brief for State, *supra* note 1, at 4. The defendants then allegedly fled from the scene of the crime in a hail of gunfire. *Id.* at 4–5.

[13] State v. Allen, 73 N.J. 132, 137, 373 A.2d 377, 379 (1977).

[14] State v. Allen, 73 N.J. 132, 137, 373 A.2d 377, 379 (1977). There were also indications that the witness would recant her previously given written statement, which placed Hughes and Thompson at the scene of the crime. *Id.*

[15] State v. Allen, 73 N.J. 132, 137, 373 A.2d 377, 379 (1977).

[16] State v. Allen, 73 N.J. 132, 137, 373 A.2d 377, 379 (1977). The restrictive order was issued orally from the bench, without prior notice. Brief and Appendix on Behalf of Appellant, Trenton Times Corp. at 3, State v. Hughes, 73 N.J. 132, 373 A.2d 377 (1977) [hereinafter cited as Brief for Appellant, Trenton Times Corp.]. For an explanation of "restrictive" order, see note 4 *supra*. In its order, the court stated: "I charge you specifically, Mr. Norman [a *Trenton Times* reporter], this [the prospective witness' testimony] is out of the presence of the jury and not to be reported in your paper until the Jury Verdict is presented." *Id.* at 1a.

in effect until the jury had reached a verdict.[17] The witness in question was examined and found by the trial court to be incompetent to testify.[18]

The following day, counsel for the *Trenton Times*, one of the two newspapers subject to the order, appeared before the trial court and unsuccessfully sought to have the "orders vacated on First Amendment grounds."[19] An application to the appellate division, for an emergency stay of the order pending the outcome of a motion for leave to appeal, was also denied.[20] Some five days later, the New Jersey supreme court granted a similar petition praying for emergency relief to stay the trial court's order.[21] By this time though, the criminal case had already gone to the jury, yet a mistrial was declared for a second time since the jury failed to reach a verdict.[22] Subsequently on its own motion, the supreme court certified and granted the appellant's petition for leave to appeal then pending

---

[17] State v. Allen, 73 N.J. 132, 137–38, 373 A.2d 377, 379 (1977). Since the initial order was directed at a specific reporter, it was necessary to issue a second order when two different reporters appeared at the afternoon court seesion. *See* Brief for Appellant, Trenton Times Corp., *supra* note 16, at 2. At the latter session, the trial judge ordered the two newspaper correspondents not " 'to report in your paper[s] until after the verdict has been reached in this case, what will now take place in this courtroom out of the presence of the jury.' " *Id.* at 2–3.

[18] State v. Allen, 73 N.J. 132, 138, 373 A.2d 377, 379 (1977). At the hearing, the witness recanted her previous testimony. *Id.* The trial court, however, found the witness to have been under the influence of methadone while testifying, and therefore refused to admit her testimony into evidence. *Id.*

[19] State v. Allen, 73 N.J. 132, 138, 373 A.2d 377, 379–80 (1977); *see* note 8 *supra*. Although two reporters from the *Trenton Times* and one reporter from another local newspaper were subject to the restrictive orders, only the *Trenton Times* appealed the trial court's orders. *See* 73 N.J. at 138, 373 A.2d at 379–80; Brief for Appellant, Trenton Times Corp., *supra* note 16, at 2–3.

As in *Allen*, the trial court in *Hughes* considered and rejected several alternatives to issuing the restrictive orders. Brief for Appellant, Trenton Times Corp., *supra* at 11a–12a. The *Hughes* court found the use of jury sequestration to be "entirely too expensive." *Id.* at 12a. It also rejected the use of *in camera* proceedings which would totally bar press coverage, and questioned the effectiveness of jury admonitions once a major news article had been widely publicized. *Id.* at 11a–12a. The *Hughes* court was also influenced by the fact that during the previous week the *Trenton Times* had published a "highly prejudicial" article concerning another case, which caused a court in that case to sequester the jury. 73 N.J. at 141, 373 A.2d at 381; Brief for Appellant, Trenton Times Corp., *supra* at 10a. Thus, the Hughes court stated that "[i]f the papers will not exercise reasonable discretion, the Court has to take other steps." Brief for Appellant, Trenton Times Corp., *supra* at 11a.

[20] State v. Allen, 73 N.J. 132, 138, 373 A.2d 377, 380 (1977).

[21] State v. Hughes, 70 N.J. 153, 358 A.2d 200 (1976).

[22] State v. Allen, 73 N.J. 132, 138, 373 A.2d 377, 380 (1977). The appellant, Trenton Times Corp., claimed that if the supreme court did not issue the stay, the restrictive order would have remained in effect despite the mistrial, since by its terms the order would not expire until the jury had rendered a verdict. Brief for Appellant, Trenton Times Corp., *supra* note 16, at 4.

in the appellate division.[23] The court also ordered that the *Hughes* and *Allen* cases be joined on appeal.[24]

Upon review of the appeals, the supreme court in *State v. Allen*[25] held that orders which restrain the reporting of open, *i.e.*, publicly held, court proceedings were "clearly illegal," and therefore vacated both trial courts' orders.[26] Justice Sullivan, writing for the majority, was of the opinion that proceedings held in open court "are matters of public record," on which the media has "an absolute right to report."[27] To prevent similar controversies from arising in the future, the court recommended the use of various alternatives, including sequestration, cautionary instructions, and *in camera* proceedings.[28] It was posited that such alternatives would allow the defendant a fair trial without imposing direct restraints upon the press.[29]

When a court seeks to prevent dissemination of information by the media, the question arises whether such action constitutes a prior restraint on publication.[30] The issue of prior restraint of the press was first addressed by the United States Supreme Court in *Near v. Minnesota ex rel. Olson.*[31] In that case, an injunction had been imposed on Near, restraining him from further publication of his newspaper, pursuant to a state statute prohibiting publication of "'malicious, scandalous and defamatory newspaper[s].'"[32] Although the

---

[23] State v. Allen, 73 N.J. 132, 138, 373 A.2d 377, 380 (1977).

[24] Brief for Appellant, Trenton Times Corp., *supra* note 16, at 30a. The supreme court found the two cases to "present a common legal issue of fundamental and far-reaching importance to the news media and to the administration of justice." State v. Allen, 73 N.J. 132, 135, 373 A.2d 377, 378 (1977).

[25] 73 N.J. 132, 373 A.2d 377 (1977).

[26] *Id.* at 139, 146, 373 A.2d at 380, 383.

[27] *Id.* at 139, 373 A.2d at 380; *see, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 568 (1976) (right of press to report on open court preliminary hearings); Sheppard v. Maxwell, 384 U.S. 333, 349–50 (1966) (necessity of maintaining trials open to the public); Craig v. Harney, 331 U.S. 367, 374 (1947) (that which occurs in a courtroom is "public property," and may be freely reported upon); *accord*, State v. Demko, 56 N.J. Super. 193, 194, 152 A.2d 167, 167 (Somerset County Ct. 1959) (dictum) (right of a newspaper to report on what transpires in a courtroom).

[28] 73 N.J. at 141–42, 373 A.2d at 381–82.

[29] *See id.* at 143–44, 373 A.2d at 382.

[30] *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556–62 (1976); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931).

[31] 283 U.S. 697 (1931).

[32] *Id.* at 702, 705–06. The article published by Near which gave rise to his prosecution contained accusations of corruption and neglect of duty by public officials. *Id.* at 704. At trial, defendant Near contended that his first amendment right to publish was protected from state interference by the due process clause of the fourteenth amendment. *Id.* at 699, 705. The trial court was unpersuaded, and enjoined Near from further publication. *Id.* at 706. This decision was upheld by the Minnesota supreme court. *Id.* The defendant then appealed to the United States Supreme Court. *Id.* at 707.

state courts upheld the validity of the statute, the Supreme Court, on appeal, found it to be unconstitutional.[33]

Chief Justice Hughes, writing for the majority, concluded that the effect of the statute was to suppress or censor offending newspapers, rather than to redress or punish their wrongful acts.[34] In the opinion of the Court, by prohibiting publication of "scandalous" material, valid exposés, such as the uncovering of government corruption, could also be prevented.[35] The possibility that one might be wrongly accused was deemed to be an insufficient justification for such a prohibition on the press, since recourse was available through existing libel laws.[36] While recognizing that freedom of the press is not an absolute right,[37] the Court noted that the first amendment guarantee of freedom of the press has historically operated as an immunity from prior restraint of publication, as well as from censorship.[38] Therefore, the Court stated that punishment of the press for abuse of its

---

[33] *Id.* at 722–23.

[34] *Id.* at 709–12. The Court stated that the statute did not deal with the punishment of individual wrongful offenses, but rather provided for contempt proceedings if a court order, issued under the statute, was not obeyed. *Id.* at 715. Therefore, the Court concluded that the statute merely provided "for suppression and injunction, that is, for restraint upon publication." *Id.*

[35] *Id.* at 710. The statute was, in effect, overbroad for it did not adequately define a "'scandalous and defamatory'" publication. *See id.* at 712. Since the uncovering of government corruption would "by [its] very nature create a public scandal," publication of such material would violate the statute. *Id.* at 710.

[36] *Id.* at 715.

[37] *Id.* at 708. Freedom of the press is safeguarded from state action by the fourteenth amendment. *Id.* at 707; *see* Gitlow v. New York, 268 U.S. 652, 666 (1925) (first amendment is applicable to states through the fourteenth amendment). A state, however, retains the power to punish the press for an abuse of the privileges accorded it by the first amendment. 283 U.S. at 708.

[38] 283 U.S. at 716. The belief that the press should remain free from restraint of publication has existed in the United States even prior to the writing of the Constitution. 73 N.J. 132, 171–72, 373 A.2d 377, 396 (Schreiber, J., concurring). Although many early state constitutions provided for freedom of the press, *id.* at 171, 373 A.2d at 396, the New Jersey Constitution was devoid of any such provision until 1844, when an article comparable to the federal constitutional provision was adopted. Brief for State, *supra* note 1, at 15–16; *see* N.J. CONST. OF 1844 art. I, para. 5.

Despite the protections accorded the press through the first amendment, the *Near* Court stated that a court could issue a prior restraint on publication in "exceptional cases." 283 U.S. at 716. The Court narrowly confined the issuance of such a prior restraint to the following types of materials: (1) obscenity; (2) that which incites violence or insurrection; and, (3) publications compromising the nation's military security. *Id.* This position of the Court, however, has shifted over the years. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 590–91 (1976) (Brennan, J., concurring). It is now conceded that the first two types of materials comprise "situations in which the 'speech' involved is not encompassed within the meaning of the First Amendment." *Id.* at 590. As for the third category, Justice Brennan has observed that it "has never served as the basis for actually upholding a prior restraint against the publication of constitutionally protected materials." *Id.* at 591.

constitutional privilege would only be appropriate if subsequent to the violation.[39]

Later cases furthered the *Near* principle by establishing evidentiary requirements in prior restraint actions.[40] In *Bantam Books, Inc. v. Sullivan*,[41] several publishers challenged the constitutionality of a Rhode Island commission, which was empowered to investigate and recommend for prosecution dealers in obscene or "objectionable" material.[42] The state courts were divided over whether the commission's activities were violative of the first amendment; however, on appeal, the Supreme Court held such activities to be unconstitutional.[43] Justice Brennan, writing for the majority, found the commission's threat of legal sanctions, for lack of compliance with its directives, operated to suppress the circulation of various publications.[44] Thus, the distribution of publications within the state was subject "to a system of prior administrative restraints."[45] The Court characterized its displeasure with the utilization of prior restraints by cautioning that "[a]ny system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity."[46]

---

[39] 283 U.S. at 720.

[40] *See, e.g.*, Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (one seeking to impose prior restraint has "a heavy burden" to prove its necessity); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (prior restraints are presumptively invalid); *accord*, Hurwitz v. Boyle, 117 N.J. Super. 196, 204, 284 A.2d 190, 194–95 (App. Div. 1971).

[41] 372 U.S. 58 (1963).

[42] *Id.* at 59–61, 60 n.1. The appellants were opposed to various practices employed by the commission to restrict the sale of material it deemed to be objectionable. *Id.* at 64. Ordinarily, the practice of the commission was to notify distributors that it had found a particular publication undesirable for sale to minors. *Id.* at 61. The notification included a reminder that the local police authorities had been apprised of the objectionable material, and that the state attorney general would take action in cases of noncompliance. *Id.* at 62–63. These practices were found by the trial court to have the effect of intimidating distributors into compliance with the commission's dictates under threat of prosecution. *Id.* at 63–64.

[43] *Id.* at 61, 64. Although the trial court refused to declare unconstitutional the law establishing the commission, it did enjoin the commission from continuing its intimidating activities. *Id.* at 61. An appeal was taken by several publishers to the Rhode Island supreme court, which reversed the lower court's granting of injunctive relief. *Id.* This decision, in turn, was reversed by the Supreme Court, with the majority finding the commission's activities violative of the first and fourteenth amendments. *Id.* at 64.

[44] *Id.* at 67. The Court noted that the mere threat of prosecution operated as an "informal" means of censorship, which "sufficiently inhibit[ed] the circulation of publications to warrant injuctive relief." *Id.* (footnote omitted).

[45] *Id.* at 70.

[46] *Id.* The presumed invalidity of a prior restraint on publication has been recognized by the Court in subsequent cases. In Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), the petitioner, a community organization, was enjoined from distributing leaflets opposing, as racially biased, the sales practices ("blockbusting") of a local real estate dealer. *Id.* at 417–18. The Supreme Court ultimately granted certiorari, and vacated the state court injunction. *Id.* at 420. Chief Justice Burger, for the majority, compared the petitioner's conduct, in trying to

Attempts to restrain the press from specifically reporting on court proceedings are further complicated by the notion that trials are public events.[47] A notable case regarding the right of the press to cover court proceedings is *Craig v. Harney*.[48] In *Craig*, several newspapermen were convicted of criminal contempt for publishing news articles and editorials criticizing an ongoing forcible detainer case.[49] The trial judge believed that the publications misrepresented the court proceedings in an attempt to generate public pressure upon the judge to grant a new trial.[50] A state court had denied the defendants' petition for *habeas corpus* relief, but the decision was reversed by the Supreme Court.[51]

Upon review, the Court stated that "[a] trial is a public event [and] [w]hat transpires in the courtroom is public property."[52] Therefore, the Court concluded that one who observes what takes place in court can report on it with impunity, even though the reporting may be somewhat inaccurate.[53] The Court went on to reject the state court's contention that the published matter created "a clear and pres-

---

influence public opinion, to that of a newspaper. *Id.* at 419. Relying on the holding in *Bantam Books* that prior restraints were presumptively invalid, the Court declared that the "[r]espondent thus carries a heavy burden of showing justification for the imposition of such a restraint." *Id.* Although the respondent alleged that the distribution of leaflets violated his right of privacy, the Court held that "[h]e has not met that burden" which would warrant a restraint. *Id.* at 418–19.

[47] For representative cases upholding the right of the press to report on courtroom proceedings, see note 27 *supra*.

[48] 331 U.S. 367 (1947).

[49] *Id.* at 368–70. In the forcible detainer action, the judge "instructed" the jury prior to deliberation to find for the plaintiff. *Id.* at 369. The jury, however, despite the judge's instructions, returned a verdict for the defendant, whereupon the judge refused to accept the verdict, and asked the jury to redeliberate. *Id.* The jury again reached a verdict in favor of the defendant, and the judge refused to accept the jury's decision for the second time. *Id.* After deliberating for the third time, the jury found for the plaintiff, but stated that it did so under "coercion of the court." *Id.* Local newspapers criticized the judge, a layman, for taking the case from the jury, terming his action "a 'travesty on justice.'" *Id.*

[50] *Id.* at 370. The defendants contended that they reported what would have been the normal observations of an average person attending the trial. *Id.* They maintained that the purpose of the publications was not to influence the judge in deciding the case, but rather to make him exercise greater care in the administration of his judicial duties. *Id.*

[51] *Id.* at 370, 378.

[52] *Id.* at 374. With regard to publication of trial proceedings, the Court further noted that "[t]here is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Id.*

[53] *See id.* at 374–75. Justice Douglas acknowledged that the newspaper reports of events that had transpired at the trial were incomplete and "unfair." *Id.* at 374. He noted, however, that inaccuracies in reporting were commonplace occurrences, which would not warrant the imposition of a court's contempt power. *See id.* at 374–75.

ent danger" to the administration of justice.[54] To satisfy such a requirement, the Court stated that it would have to be shown that the threat to justice was "imminent," and not merely likely to occur.[55]

The right of the press to report on events which transpired in a courtroom was against issue in *Sheppard v. Maxwell*.[56] In *Sheppard*, the defendant was indicted for having murdered his pregnant wife.[57] The case was surrounded by massive pretrial publicity, and the defendant was eventually tried amid extensive press coverage.[58]

---

[54] *Id.* at 376–78. The state court relied upon the "clear and present danger" doctrine, as applied to publications by the Supreme Court in Bridges v. California, 314 U.S. 252 (1941). *Id.* at 371. *Bridges*, and its companion case, Times-Mirror Co. v. Superior Court, 314 U.S. 252 (1941), involved the appeal of a union leader and a newspaper corporation, who were convicted of contempt for commenting upon litigation then pending before state courts. *Id.* at 258–59, 271, 275–76. The state courts maintained that the publications interfered with the orderly administration of justice, while the defendants contended that their actions were protected by the first amendment. *Id.* at 258–59. Although the state supreme court upheld their convictions, the United States Supreme Court, in a five to four decision, reversed. *Id.* at 253, 278–79.

Since the state legislature did not provide guidelines detailing in what circumstances commentary upon pending litigation would be punishable, *id.* at 260, the Court adopted the "clear and present danger" standard of Schenck v. United States, 249 U.S. 47, 52 (1919) (an action will not be permitted if it threatens to cause an "evil" that Congress has sought to prevent). In defining this standard, the *Bridges* Court attempted to delineate the "'likelihood'" and "'proximity and degree'" of danger presented by a publication, which would be sufficient to necessitate a restraint. 314 U.S. at 261. The Court determined that "the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial,' . . . it must be 'serious.'" *Id.* at 262. Furthermore, the Court posited that "the degree of imminence [must be] extremely high before utterances can be punished." *Id.* at 263. Based on the record before it, the Court found the criticisms and comments made by the petitioners in no way posed a threat to the fair administration of justice. *Id.* at 273, 278.

Subsequent cases have dealt with the ability of a court to exercise its contempt power to curb commentary on pending litigation. *See, e.g.*, Wood v. Georgia, 370 U.S. 375 (1962); Pennekamp v. Florida, 328 U.S. 331 (1946); Baltimore Radio Show v. State, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950).

[55] 331 U.S. at 376. In reviewing the published matter at issue, the Court stated:

> The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.

Id.

[56] 384 U.S. 333 (1966).

[57] *Id.* at 335, 341.

[58] *Id.* at 337–49. From the outset of the homicide investigation, Sheppard was the principle suspect. *Id.* at 337. Amid press charges that "somebody is 'getting away with murder,'" a live, televised, public inquest took place in a school gymnasium. *Id.* at 339. Editorials soon called for Sheppard's arrest, and shortly thereafter, he was arrested and charged with murder. *Id.* at 341. Throughout the pretrial and trial stages, the press reported on evidence damaging to Sheppard, although much of the evidence was never introduced at trial. *See id.* at 340, 348. During the proceedings, the courtroom was so crowded with reporters that many were seated within the area normally reserved for the parties and their attorneys. *Id.* at 343. The court also allowed the press to establish special broadcasting facilities within the courthouse. *Id.*

Sheppard was convicted of second-degree murder, and after several unsuccessful state court appeals, he petitioned the federal courts for *habeas corpus* relief.[59] Petitioner Sheppard alleged that he had been denied a fair trial because of the pervasive prejudicial publicity surrounding his prosecution.[60] The Supreme Court ultimately granted certiorari, and subsequently held that the petitioner had been denied a fair trial in violation of the due process clause of the fourteenth amendment.[61] This decision was based upon a finding by the Court that the trial judge failed to protect the defendant from the media's prejudicial publicity and its disruptive courtroom activities.[62]

Justice Clark, writing for the majority, was generally supportive of the press, stating that "justice cannot survive behind walls of silence. . . ."[63] The Court recognized the unique role of the press as public guardian, since by subjecting the judicial system to extensive scrutiny through its reporting, the press could help to prevent "miscarriage[s] of justice."[64] Nevertheless, Justice Clark noted that to prevent a recurrence of the "carnival atmosphere" which existed during the *Sheppard* trial, a court should use its inherent power to control "the courtroom and courthouse premises."[65] It would, therefore, be within the power of the court not only to provide for orderly press coverage, but also to insulate witnesses from the press prior to

---

[59] *Id.* at 335 & n.1. Sheppard's conviction was affirmed by the Ohio court of appeals, State v. Sheppard, 100 Ohio App. 345, 128 N.E.2d 471 (Ct. App. 1955), and the state supreme court, State v. Sheppard, 165 Ohio St. 293, 135 N.E.2d 340 (1956). The United States Supreme Court denied Sheppard's petition for certiorari to review his conviction. Sheppard v. Ohio, 352 U.S 910 (1956). Sheppard then applied for, and was granted, a writ of habeas corpus by the United States district court. Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964). This decision, however, was reversed by the court of appeals. Sheppard v. Maxwell, 346 F.2d 707 (6th Cir. 1965).

[60] 384 U.S. at 335. For a discussion of the nature of the publicity, see note 58 *supra*.

[61] *Id.*; *see* Sheppard v. Maxwell, 382 U.S. 916 (1965) (granting certiorari).

[62] 384 U.S. at 355, 357. For a description of the prejudicial and disruptive press activities, see note 58 *supra*.

[63] 384 U.S. at 349; *see* In re Oliver, 333 U.S. 257, 268 (1948) ("Anglo-American" system of jurisprudence is characterized by its "distrust for secret trials").

[64] 384 U.S. at 350. Justice Clark commended the press for the services that it had rendered over the centuries, stating:

> A responsible press has always been regarded as the handmaiden of effective judicial administration . . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media . . . .

Id. In the preceding term, the same Court had acknowledged the important role of the press in guarding against governmental corruption by providing for an informed citizenry. Estes v. Texas, 381 U.S. 532, 539 (1965).

[65] 384 U.S. at 358.

testifying, and to control the release of information by all persons involved in the case.[66]

Since the *Sheppard* Court did not establish specific rules or possible sanctions which could be employed by a trial court to promote a fair trial,[67] many courts attempted to protect defendants by issuing restrictive or "gag" orders.[68] Much of the uncertainty existing after *Sheppard*, concerning the proper procedures for courts to follow to protect both the rights of the defendant and the press, was ultimately resolved by the Supreme Court in *Nebraska Press Association v. Stuart*.[69] *Nebraska* involved the issuance of a restrictive order pursuant to the prosecution of Erwin Simants, who was accused of murdering a family of six in a town of only 850 inhabitants.[70] Re-

---

[66] *Id.* at 358–62. The number of news reporters permitted in the courtroom at one time could be limited, and their conduct subject to regulation by the court. *Id.* at 358. *See also* Estes v. Texas, 381 U.S. 532, 544 (1965) (proscribing the televising of courtroom proceedings). With regard to the release of information to the press, the *Sheppard* Court did not specify how witnesses may be "insulated" from the press, as well as from other witnesses, or the extent to which they could be prevented from disclosing their testimony prior to testifying in court. 384 U.S. at 359. For a discussion of recent litigation concerning the curtailment of a witness' extra-judicial statements, see note 152 *infra*. Similarly, the Court's suggestion to proscribe, where appropriate, extra-judicial statements of opposing counsel, parties to the proceeding, and court officials, has also engendered much controversy. *See, e.g.*, Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 251 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (only statements by counsel that constitute "serious and imminent threat" to a fair trial may be proscribed by court or disciplinary rule); CBS, Inc. v. Young, 522 F.2d 234, 236 (6th Cir. 1975) (per curiam) (dismissing as overly broad an order preventing parties, "'their relatives, close friends, and associates'" from discussing proceedings with members of the media); United States v. Tijerina, 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969) (order preventing the attorney, defendant, and witness from commenting, out of court, on merits of case was not violation of those individuals' first amendment rights).

In *Allen*, the New Jersey supreme court acknowledged that a trial court would have "the power to exercise sufficient control over the prosecutor, counsel for defense, the accused, witnesses and court staff to prevent the release . . . of improper information." 73 N.J. at 145, 373 A.2d at 383. *See also* State v. Van Duyne, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964) (unethical conduct for prosecution or defense to provide the media with extra-judicial statements suggestive of a defendant's guilt or innocence).

[67] 384 U.S. at 359–63. The *Sheppard* Court issued a general directive that "[t]he courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Id.* at 363.

[68] Landau, *Fair Trial and Free Press: A Due Process Proposal, The Challenge of the Communications Media*, 62 A.B.A.J. 55, 56–57 (1976). A study by the Reporters Committee for Freedom of the Press found that there had been at least 174 cases involving restrictive orders during the nine-year period following the *Sheppard* decision. *Id.* at 55. This total consists of: sixty-one cases that have attempted to close court proceedings or seal their records; sixty-three cases involving the imposition of a prior restraint on the statements of trial participants; thirty-nine cases concerning the issuance of a prior restraint on publication; and, eleven cases dealing with a restriction on photography in relation to a judicial proceeding. *Id.* at 57.

[69] 427 U.S. 539 (1976).

[70] *Id.* at 542. For an informative background study of the Simants prosecution, see Friendly, *A Crime and Its Aftershock*, N.Y. Times, Mar. 21, 1976, § 6 (Magazine), at 16.

spondent Stuart, a state court judge, issued a restrictive order to bar publication of evidence and testimony adduced at Simants' preliminary hearing.[71] The order was to remain in effect until the jury was impaneled, since the judge feared that jury selection would be hindered by the widespread publicity that the case was attracting, thereby "'imping[ing] upon the defendant's right to a fair trial.'"[72] Various representatives of the press appealed the order to the Nebraska supreme court, but that court upheld a modified version of the order.[73] The Supreme Court granted certiorari, and thereafter reversed the Nebraska supreme court, finding the order violative of the first amendment guarantee of a free press.[74]

Although the jury had already rendered a verdict in the murder trial, the Court declined to dismiss the case as moot, noting that such a controversy was likely to recur.[75] The Court also noted that since

---

[71] 427 U.S. at 543. A restrictive order was originally issued by a Nebraska county court at the request of the prosecution and defense. *Id.* at 542. The order effectively prohibited the press from reporting on Simants' preliminary hearing, which was conducted publicly in the county court. *Id.* at 542–43. After Simants was bound over to the state's district court for trial, numerous press associations moved for leave to intervene in the district court proceedings for the purpose of challenging the county court's restrictive order. *Id.* at 543. Judge Stuart granted the petitioners' motions to intervene, vacated the order, and proceeded to impose his own restrictive order. *Id.* The new order, which was to remain in effect until the jury was impaneled, prohibited the petitioners from reporting on the following: a confession by Simants which was introduced in open court at his arraignment; medical testimony adduced at the preliminary hearing; statements made by Simants "to other persons"; the content of a note written by Simants on the night of the crime; the names of the murder victims; and, the scope of the restrictive order. *Id.* at 543–44.

[72] *Id.* at 543. The commission of the crime had "attracted widespread news coverage, by local, regional, and national newspapers, radio and television stations." *Id.* at 542.

[73] *Id.* at 544–45. While the appeal of the state district court order was pending before the Nebraska supreme court, the petitioners appealed to Justice Blackmun, in his capacity as Circuit Justice for the Eighth Circuit, 427 U.S. II, to stay the state court's order. 427 U.S. at 544 n.2; *see* Nebraska Press Ass'n v. Stuart, 423 U.S. 1319 (1975) (Blackmun, Circuit Justice) (in chambers). Justice Blackmun partially stayed the order, and the full Court later denied the petitioners' request for a more extensive stay. 427 U.S. at 544 n.2; *see* Nebraska Press Ass'n v. Stuart, 423 U.S. 1327 (1975) (Blackmun, Circuit Justice) (in chambers).

Despite the petitioners' initial request for an expedited appeal, the Nebraska supreme court issued a per curiam opinion one month later, modifying the state district court's order. 427 U.S. at 544–45; *see* State v. Simants, 194 Neb. 783, 801, 236 N.W.2d 794, 805 (1975) (per curiam). The modified order prohibited the press from reporting on: confessions made by Simants to law enforcement officers; confessions or admissions made by the defendant to third parties, except for those statements made to members of the media; and, any "facts 'strongly implicative' of the accused." 427 U.S. at 545.

[74] 427 U.S. at 570; *see* Nebraska Press Ass'n v. Stuart, 423 U.S. 1027 (1975) (granting certiorari).

[75] 427 U.S. at 546–47. The restrictive order, by its own terms, had expired when the jury was impaneled. *Id.* at 546. Despite the order's expiration, the Court concluded that its jurisdiction would attach since "the underlying dispute between the parties is one 'capable of repeti-

the orders were, by nature, "short-lived," they were susceptible of evading appellate review, thereby necessitating a definitive determination of the issue by the Court.[76] Proceeding to the merits of the case, Chief Justice Burger, writing for a plurality of the Court, initially noted that the right of the press to freely report on newsworthy events, and the right of the defendant to have a fair trial, were of equal importance.[77] The Court then examined the evidence which had been presented to the trial judge in order to determine whether the alleged dangers presented by the publication of the material were reasonably certain to occur, thereby justifying the imposition of the restraints.[78] In so doing, the Court found that the trial court had failed to demonstrate with a reasonable degree of certainty that absent the restraints, a fair and impartial jury could not have been selected.[79] The Chief Justice stated that the trial court could have employed alternative measures such as change of venue, or a *voir dire* examination of prospective jurors to eliminate those who may

---

tion, yet evading review.' " *Id.* (quoting Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). The Court concluded that the controversy could recur if Simants' conviction was reversed by the state supreme court. 427 U.S. at 546. Furthermore, since the state was a party to the Press Association's initial appeal to the state supreme court, that court's modified order could be interpreted as permitting the state prosecutors to employ restrictive orders in similar cases. *Id.* at 546–47.

[76] 427 U.S. at 547. *See also* Roe v. Wade, 410 U.S. 113, 125 (1973).

[77] 427 U.S. at 561.

[78] *Id.* at 562–69. The Chief Justice found it necessary to determine whether " 'the gravity of the "evil," discounted by its improbability, justifies such [an] invasion of free speech as is necessary to avoid the danger.' " *Id.* at 562 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)). To reach such a determination, he examined such factors as the nature and scope of the pretrial publicity, the efficacy of a restrictive order in providing for a fair trial, and whether alternatives existed which could have been employed to limit the pretrial publicity. 427 U.S. at 562.

[79] 427 U.S. at 569. Upon review of the evidence before the trial judge, Chief Justice Burger conceded that it was reasonable to conclude that the pervasive pretrial publicity "might impair" Simants' right to a fair trial. *Id.* at 563. The issuance of a restrictive order, however, was not found to be an effective means of protecting the defendant's rights. *Id.* at 565–66. The Chief Justice noted the difficulty of "managing and enforcing" such an order, since it would be necessary to obtain in personam jurisdiction over "at-large" publications, as opposed to those publications located within the jurisdiction of the court. *Id.* In fact, the county court in *Simants* lacked jurisdiction over the petitioners. State v. Simants, 194 Neb. 783, 795, 236 N.W.2d 794, 802 (1975) (per curiam). The county court's general order restraining "'the news media'" could have been disregarded by the press with impunity, for " [t]he courts have no general power in any kind of case to enjoin or restrain 'everybody.'" *Id.* When the media associations appeared before the district court to contest the restrictive order, however, they voluntarily submitted to the jurisdiction of the court. *Id.*; *see* 427 U.S. at 566 n.9.

The Court further noted that due to the small size of the community, rumors of what had occurred were likely to abound, which could prove to be more damaging than an accurate news account. 427 U.S. at 567. Yet, the Court posited that "a whole community cannot be restrained from discussing a subject intimately affecting life within it." *Id.*

have been prejudiced by the publicity.[80] Such methods were preferable to the use of prior restraint of publication, which was considered "one of the most extraordinary remedies known to our jurisprudence."[81] The Court concluded that the orders restraining publication of information adduced at an open preliminary hearing were invalid, for the press may freely report on that which transpires in the courtroom.[82] Similarly, the Court held that reporting based on material obtained from sources other than courts, such as admissions by the defendant to third parties, was also not subject to restraint, in

---

[80] 427 U.S. at 563–64. The Court also noted as possible alternatives the postponement of a trial until publicity had subsided, and the issuance of "emphatic and clear instructions" to jurors, reminding them of their duty to decide issues solely on evidence adduced in open court. *Id.* Additionally, the use of sequestration of jurors could be resorted to, either before or after the jury was impaneled. *Id.* at 564. The Court concluded that on those past occasions when it "has reversed a state conviction because of prejudicial publicity, it [the Court] has carefully noted that some course of action short of prior restraint would have made a critical difference." *Id.* at 569.

[81] *Id.* at 562.

[82] *Id.* at 568; *see* notes 52 & 53 *supra* and accompanying text.

The Burger Court, on several occasions, has refused to hinder attempts at reporting information revealed in open court. *See* Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). For example, in the term immediately preceding the *Nebraska* decision, the Court in *Cox Broadcasting* held that a state could not prohibit the publication of information contained within court records which were open to public inspection. *Id.* at 491, 496. There, a reporter was found to be free from civil liability for broadcasting the name of a rape victim, despite a state statute which prohibited such disclosure. *Id.* at 471–72, 497. The reporter, however, had discovered the victim's name by an in court examination of the indictments of her assailants. *Id.* at 472. Thus, the Court concluded that once truthful information from court records is placed in the public domain, "the press cannot be sanctioned for publishing it." *Id.* at 496.

A similar rationale was employed by the Court in the term immediately following the *Nebraska* decision in Oklahoma Publishing Co., 430 U.S. at 311–12. In *Oklahoma,* the name and photograph of a juvenile was published subsequent to a detention hearing attended by members of the press, in which the juvenile was accused of "delinquency by second-degree murder." *Id.* at 309. Several days later, the minor was arraigned at a closed hearing, whereupon the judge entered a restrictive order enjoining the publication of the juvenile's name or picture. *Id.* & n.1. The press unsuccessfully appealed the order in the state courts, where it was held that state law provided for private juvenile proceedings unless otherwise directed by a judge. *Id.* at 309–10. Certiorari was granted by the Supreme Court, which held in a per curiam opinion that the restrictive order was violative of the first and fourteenth amendments. *Id.* at 309, 311–12. The Court commented that regardless of whether the judge had originally ordered the juvenile's hearing open to the public pursuant to the state statute, he, nevertheless, knowingly permitted the proceedings to be conducted in the presence of the press. *Id.* at 311. Furthermore, at no time were any objections raised by the judge, prosecutor, or defendant to the media's presence at the proceeding, or to the press' photographing the accused. *Id.* Since the juvenile's name and photograph had been "'publicly revealed'" at the hearing, the Court applied the *Cox Broadcasting* and *Nebraska* rationale that a court may not restrict the publication of information obtained pursuant to a judicial proceeding, once it is placed in the public domain. *See id.* at 310–12.

the absence of a showing of exigent circumstances warranting the imposition of a restrictive order.[83]

The *Nebraska* decision was issued subsequent to the press restrictions ordered in the *Allen* and *Hughes* criminal trials, but prior to oral arguments in the newspapers' appeal of those orders before the New Jersey supreme court.[84] Initially, the *Allen* court was faced with a threshold question of mootness.[85] Since the criminal trials in which the orders were issued had terminated prior to the supreme court's review of the appeals, arguably there was no longer a justiciable controversy.[86] The *Allen* court noted, however, that the appeals involved issues of "great public importance" which were certain to recur.[87] It therefore determined that it would be "paradoxical" to require that such issues be "viable" at the time of review by the supreme court, when, given the nature of the adjudicatory process, a trial, from which the issue arose, would usually have ended before the court could pass upon the merits of the appeal.[88] Accordingly, the court declined to dismiss the appeals as moot.[89]

In passing upon the merits of the case, the *Allen* court found the *Nebraska* decision to be controlling.[90] Justice Sullivan, for the majority, interpreted *Nebraska* as granting to the press an "absolute right or privilege" to report on all events which transpire in open

---

[83] 427 U.S. at 570. For a discussion of the showing required to overcome the presumption of invalidity for a prior restraint on publication, see note 46 *supra* and accompanying text.

[84] The restrictive orders were entered in the *Allen* and *Hughes* trials in February and March of 1976, respectively. 73 N.J. at 137, 373 A.2d at 379; Brief for Appellant, Gannett Co., *supra* note 1, at 2. On appeal, the briefs for the state and the appellant newspapers refer to the *Nebraska* case as pending before the Supreme Court. Brief for Appellant, Gannett Co., *supra* note 1, at 19; Brief for Appellant, Trenton Times Corp., *supra* note 16, at 11 n.7; Brief for State, *supra* note 1, at 28–29. After the Supreme Court had rendered its decision in *Nebraska* on June 30, 1976, 427 U.S. at 539, the appellant Trenton Times Corp. submitted a reply brief maintaining that *Nebraska* was "dispositive of the issues" in the appellant's action. Reply Brief on Behalf of Appellant, Trenton Times Corp., at 1, State v. Hughes, 73 N.J. 132, 373 A.2d at 377 (1977). Oral arguments before the New Jersey supreme court took place on October 12, 1976, and the court's decision was rendered on April 22, 1977. 73 N.J. at 132, 373 A.2d at 377.

[85] 73 N.J. at 138–39, 373 A.2d at 380.

[86] *See id.* at 137, 138, 373 A.2d at 379, 380. For a discussion of the appellant's argument in *Hughes* that the case was not technically moot, see note 22 *supra*.

[87] 73 N.J. at 138, 373 A.2d at 380. New Jersey courts have frequently refused to dismiss an appeal as moot, where the issue involved is of "overriding [public] importance." *Id.* at 147, 373 A.2d at 384 (Pashman, J., concurring); *see, e.g.*, Housing Auth. of Newark v. West, 69 N.J. 293, 295–96, 354 A.2d 65, 66–67 (1976); Busik v. Levine, 63 N.J. 351, 364, 307 A.2d 571, 578 (1973), *appeal dismissed*, 414 U.S. 1106 (1973); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 579, 279 A.2d 670, 671 (1971).

[88] 73 N.J. at 139, 373 A.2d at 380.

[89] *Id.* at 138, 373 A.2d at 380.

[90] *Id.* at 140, 373 A.2d at 380. The restrictive orders contested in *Nebraska* and Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam), were imposed before a jury

court.[91] Consequently, the *Allen* court held that the trial courts' orders, which restrained the press from reporting on open court proceedings, were "clearly illegal."[92]

The issue whether the orders imposed an unconstitutional prior restraint upon the press was extensively briefed by those party to the appeal.[93] Although the majority did not specifically address these contentions, the court did make reference to the discussion in *Nebraska* on prior restraint of publication.[94] The court determined, however, that this analysis was "not directly applicable" to the *Allen* case, since that portion of the *Nebraska* decision dealing with prior restraint was directed at information derived "from sources other than public court proceedings."[95]

The issue whether the trial court's orders posed a prior restraint on publication, in violation of first amendment guarantees, was, however, thoroughly explored by Justice Pashman, who issued a concurring opinion.[96] Initially, Justice Pashman outlined the United States Supreme Court's long opposition to prior restraints on publication, and its consistent holdings that such restraints were presumptively invalid.[97] While finding the prohibition against prior restraints to be

---

was impaneled, while those in *Allen* were issued after the jury had been impaneled. Justice Pashman, however, concluded that "this is an insufficient basis for distinguishing the result in these [*Allen* and *Hughes*] appeals from those in the *Nebraska* and *Oklahoma* cases." 73 N.J. at 160, 373 A.2d at 391 (Pashman, J., concurring). *Compare Oklahoma*, 430 U.S. at 308 and *Nebraska*, 427 U.S. at 546 *with Allen*, 73 N.J. at 135, 137, 373 A.2d at 378, 379.

[91] 73 N.J. at 140, 373 A.2d at 380.

[92] *Id.*

[93] *See* Brief for Appellant, Gannett Co., *supra* note 1, at 6–24; Brief for Appellant, Trenton Times Corp., *supra* note 16, at 5–24; Brief for State, *supra* note 1, at 7–28.

[94] 73 N.J. at 139–40, 373 A.2d at 380.

[95] *Id.* It is arguable that by prohibiting the press from reporting on open court proceedings, a court is, in effect, imposing a prior restraint on press publication. Under accepted rules of judicial construction, however, the *Allen* court chose not to address the prior restraint issue, *id.* at 139, 373 A.2d at 380, since "an appellate court need not decide a case on every ground advanced by the successful litigant or held by the trial court, when less will sustain the judgment." Schaad v. Ocean Grove Camp Meeting Ass'n, 72 N.J. 237, 250, 370 A.2d 449, 456 (1977). This principle of construction, when applied to constitutional issues, is termed "'the rule of necessity,'" which provides "that the resolution of controversies on constitutional grounds is to be avoided where possible." *Id.* at 250–51, 370 A.2d at 456; *see* Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[96] 73 N.J. at 150–57, 373 A.2d at 385–89.

[97] *Id.* at 152, 373 A.2d at 386; *see, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

The Burger Court's refusal to impose a prior restraint on publication is similar to the protection afforded first amendment rights by past Courts. *See* Steamer, *Contemporary Supreme Court Directions in Civil Liberties*, 92 POLITICAL SCI. Q. 425, 429, 438 (1977). In light of this continuity of opinion, one commentator has concluded that "the Court under Warren or Stone or Hughes, and not inconceivably under Vinson, could have authored the decisions involving

virtually absolute, he did note one possible exception where a restriction on press reporting was necessary for "military security" purposes.[98] Yet, relying on *New York Times Co. v. United States*,[99] Justice Pashman concluded that prior restraints, even those under the "military security" exception, are only valid in extreme circumstances.[100] In the *New York Times* case, a prior restraint was rejected despite intimations that the release of classified material could damage the country's military and diplomatic positions concerning the Viet Nam conflict.[101] From the nine separate opinions filed in *New York Times*, Justice Pashman gleaned that the majority would only allow a prior restraint to issue if it were shown that an "impending direct and immediate harm, of a grave nature" would otherwise result.[102]

In applying this criterion to the orders issued in *Allen*, Justice Pashman concluded that the state had failed to show any compelling reason which would have necessitated the imposition of a prior restraint on publication.[103] The restrictive orders were not issued to prevent a "direct and immediate harm"; rather, they were issued merely upon the possibility of prejudice to the defendants.[104] Even

---

prior restraint such as the *Pentagon Papers Case* [New York Times Co. v. United States] . . . [and] the *Nebraska Press Case* . . . ." *Id.* at 438 (footnotes omitted).

[98] 73 N.J. at 152, 373 A.2d at 387. The "military security" exception to the rule prohibiting prior restraint of the press was established by the Court in *Near*. 283 U.S. at 716. For further discussion of the exceptions allowed by *Near*, see note 38 *supra*.

[99] 403 U.S. 713 (1971) (per curiam).

[100] 73 N.J. at 153–54, 373 A.2d at 387.

[101] 403 U.S. at 714, 763 (Blackmun, J., dissenting). *The New York Times* had acquired, and subsequently published, a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." 403 U.S. at 714, 759–60 (Blackmun, J., dissenting). Upon publication of the purloined document, the United States Government sought to enjoin the *Times* from further publication of the classified material. *Id.* at 714. The district court held that the Government had not met its burden of justifying the restraint, and this decision was ultimately upheld by the Supreme Court. *Id.*

[102] 73 N.J. at 153–54, 373 A.2d at 387. In *New York Times*, Justice Brennan concluded that a prior restraint on the press can only be valid if it is shown that publication of the material would "inevitably, directly, and immediately" produce a grave threat to the nation's security. 403 U.S. at 726-27 (Brennan, J., concurring). In his opinion the Government had failed to prove that such a serious harm would occur in the absence of a prior restraint on publication. *Id.* at 727. A similar result was reached by Justice Stewart since it was not shown that publication of the material would cause "direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730 (Stewart, J., concurring). Justices Black and Douglas "took an absolute position," 73 N.J. at 153, 373 A.2d at 387 (Pashman, J., concurring), for they maintained that the first amendment precluded governmental restraint of the press. 403 U.S. at 715 (Black, J., concurring), 720 (Douglas, J., concurring); *see* 73 N.J. at 153–54, 373 A.2d at 387 (Pashman, J., concurring).

[103] 73 N.J. at 154, 373 A.2d at 387.

[104] *Id.* at 154, 156–57, 373 A.2d at 387, 389. In both the *Allen* and *Hughes* cases, the restrictive order was entered prior to a hearing on the admissibility of the evidence. *Id.* at 156, 373

if media reports of events related to the trial had reached the jurors, this alone would have been insufficient to raise a presumption of prejudice.[105] If it could be shown, however, that the publicity had actually prevented a juror from fairly determining a defendant's guilt or innocence, then prejudice would be deemed to exist.[106] Although both trial courts attempted to protect the defendants from jury prejudice through the imposition of the restrictive orders, Justice Pashman concluded that the courts had failed to make the necessary preliminary determination that the jurors would have been unable to render a fair verdict in the absence of a prior restraint on publication.[107]

A.2d at 389. The judges, therefore, had no means of determining whether the proffered testimony would be prejudicial, and if so, the extent to which such information would be covered by the press, or the impact any media reports would have upon the jurors. *Id.* at 156–57, 373 A.2d at 389. Justice Pashman thus concluded that both trial courts had "engaged in the speculative type of reasoning which underlies our distrust of prior restraints on the press." *Id.* at 157, 373 A.2d at 389.

[105] *See id.* at 154, 373 A.2d at 388. In Irvin v. Dowd, 366 U.S. 717 (1961), a case involving prejudicial pretrial publicity, the Court held that jurors are not required to "be totally ignorant of the facts and issues involved" in a particular case prior to trial. *Id.* at 722. Due to the "swift, widespread and diverse methods of communication" presently existing, *id.*, the Court concluded that

> [t]o 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.

Id. at 723. In the case before it, however, the Court found the petitioner was denied a fair trial, since the publicity surrounding the case was so pervasive and inflammatory that the jurors' minds were permeated with preconceptions of the petitioner's guilt. *Id.* at 725–28. *See also* Murphy v. Florida, 421 U.S. 794, 800–01 & n.4 (1975) (jurors may be familiar with defendant's past criminal activities, so long as it does not result in their having "an actual predisposition against him").

A similar result was reached by the New Jersey supreme court in State v. Van Duyne, 43 N.J. 369, 204 A.2d 841 (1964). The defendant, Van Duyne, appealed the denial of his motion for a mistrial which was based upon the contention that the publishing of inculpatory statements attributed to Van Duyne had denied him a fair trial. *Id.* at 383, 204 A.2d at 849. Upon examination of the trial court record, the court found that once the trial judge was apprised of the prejudicial press reports, he allowed an extensive *voir dire* examination of potential jurors, and permitted a reopening of the *voir dire* as to one juror who had already been sworn. *Id.* at 384, 204 A.2d at 849. As a result of the *voir dire*, those prospective jurors who had read the prejudicial articles, and had apparently formed an opinion as to the guilt or innocence of the defendant, were excused from service. *Id.* at 385, 204 A.2d at 850. Others who had read the articles were accepted as jurors upon swearing that they were not prejudiced by such reports, and that they would render an impartial verdict based solely on evidence adduced in open court. *Id.* Considering these precautions taken by the trial judge, the court concluded that it could not "find sufficient evidence that the newspaper articles . . . prevented a fair trial or that they so infected the minds of some of the jurors as to leave them biased against the defendant." *Id.* at 386, 204 A.2d at 851.

[106] 73 N.J. at 156, 373 A.2d at 389; *see* note 105 *supra*.

[107] 73 N.J. at 156, 373 A.2d at 389.

After establishing that a court may not restrict the media's first amendment right to report on open court proceedings, the *Allen* court then sought to devise procedures for trial judges to utilize in protecting a defendant's concurrent sixth amendment right to a fair trial.[108] The majority suggested various alternatives available for courts to employ to guarantee fair trials when, as in *Allen*, a question arises regarding the propriety of press reporting on issues concerning the admissibility of evidentiary material harmful to the defendant.[109] As the court indicated, the customary protective measure in New Jersey, when evidentiary hearings are being conducted, "is to remove the jury from the courtroom."[110] After the jury's removal, though, most evidentiary hearings are conducted in open court, which gives the press an "absolute right" to report on those proceedings, thereby creating the possibility that jurors would learn what had transpired in their absence.[111] This problem could have been obviated by the media's strict adherence to guidelines adopted by the New Jersey Press Association and the supreme court, which prohibit the reporting of evidence adduced at such hearings until completion of the trial.[112] The *Allen* court noted, however, that the bar-press agreement has no legally binding effect, but rather depends on voluntary compliance.[113]

Due to the inadequacies presented by either jury removal or the use of bar-press guidelines, the court turned to more efficacious remedies to ensure a fair trial for the defendant.[114] One "obvious solution" recommended by the *Allen* court, to prevent jurors from becoming prejudiced by out of court statements published during the course of a trial, is to sequester the jury.[115] This remedy, however,

---

[108] *Id.* at 140–45, 373 A.2d at 381–83.

[109] *Id.* at 140, 373 A.2d at 381.

[110] *Id.* at 140–41, 373 A.2d at 381. For a further discussion of the customary procedure for holding evidentiary hearings, see note 3 *supra*.

[111] *Id.* at 141, 373 A.2d at 381. With regard to evidentiary hearings conducted in open court, the *Nebraska* Court commented that "once a public hearing had been held, what transpired there could not be subject to prior restraint." 427 U.S. at 568.

[112] 73 N.J. at 141, 373 A.2d at 381. The court noted that guideline five of the Statement of Principles and Guidelines for Reporting of Criminal Procedures provided in pertinent part that "'[t]he Press is free to report any judicial public proceeding, except that any evidence excluded by the court at a hearing outside of the jury's presence shall not be published until after the trial is concluded.'" *Id.*

[113] *Id.* Justice Sullivan remarked that the "compulsion [of the bar-press agreement] is moral and not legal and some members of the press have not always respected it." *Id.*

[114] *Id.* at 141–42, 373 A.2d at 381–82.

[115] *Id.* at 141, 373 A.2d at 381. Juror sequestration is of great utility since it can be employed at any time after a juror has been sworn. *See Nebraska*, 427 U.S. at 564; N.J.R. 1:8-6, Com-

presents numerous problems, primarily the excessive costs associated with secluding a jury.[116] Another difficulty is the personal hardships often endured by the sequestered jurors, which in turn hampers the jury selection process.[117] It was further posited that sequestered jurors would resent the defendant, holding him or her responsible for the imposition of the sequestration order.[118] The court also pointed out that New Jersey court rules restrict the use of sequestration to "compelling circumstances."[119] Despite these failings, the majority concluded that in highly publicized trials, judges should give serious consideration to the possibility of jury sequestration.[120]

Another alternative posited by the *Allen* court is to have a judge issue "clear and definitive" cautionary instructions, warning jurors not to engage in reading or listening to media reports regarding the court

---

ment 2. Guidelines adopted by the American Bar Association (ABA) dealing with news coverage of court matters recommend that sequestration be permitted in highly publicized trials upon motion of either party, or upon the court's own motion, when appropriate. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.5(b) (Approved Draft 1968) [hereinafter cited as ABA TRIAL GUIDELINES]. A study undertaken by the Association of the Bar of the City of New York concerning fair trial-free press conflicts suggested that sequestration be utilized more frequently than it has been in the past, finding it "in theory, [to be] an ideal remedy for publicity appearing during the trial." SPECIAL COMMITTEE ON RADIO, TELEVISION, AND THE ADMINISTRATION OF JUSTICE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, FREEDOM OF THE PRESS AND FAIR TRIAL 58 (1967). *See also* Note, *Sequestration: A Possible Solution to the Free Press—Fair Trial Dilemma*, 23 AM. U. L. REV. 923, 933–34 (1974) (sequestration effectively insulates jurors from prejudicial publicity without imposing restrictions upon press).

[116] 73 N.J. at 141, 373 A.2d at 381. The court made reference to a newspaper article in which it was estimated that the cost of sequestering a jury in a recent New Jersey murder trial amounted to $75,000. *Id.* at 141 n.2, 373 A.2d at 381.

[117] 73 N.J. at 141–42, 373 A.2d at 381.

[118] *Id.* at 142, 373 A.2d at 381; *see* N.J.R. 1:8-6, Comment 2 (inconvenience associated with a sequestration order may generate juror hostility towards the defendant or the state). *See also* Meyer, *Free Press v. Fair Trial: The Judge's View*, 41 N. DAKOTA L. REV. 14, 18 (1964) (sequestered juror may be hostile towards "the person requesting the lock-up procedure"); Will, *Free Press v. Fair Trial*, 12 DE PAUL L. REV. 197, 209 n.39 (1963).

[119] 73 N.J. at 142, 373 A.2d at 381. New Jersey Court Rule 1:8-6(a) provides that:

> The jury shall not be sequestered in any action, civil or criminal, prior to the instructing of the jury by the court, unless the court, in its discretion so orders on its findings that there are extraordinary circumstances requiring sequestration for the protection of the jurors or in the interests of justice.

N.J.R. 1:8-6(a). If a jury is not sequestered, then the individual jurors will be allowed to leave the courthouse premises unattended "for the night, for meals, and during other authorized intermissions in the deliberations" upon the discretion of the trial judge. N.J.R. 1:8-6(b). Although this form of jury dispersal was recommended to the supreme court by a special committee on jury deliberations for use in those cases where a court, within its discretion, deemed it appropriate, the committee cautioned that, in general, "the presumption against sequestration, which applies during the course of trial [should] not carry over to the deliberation phase." N.J.R. 1:8-6, Comment 3.

[120] 73 N.J. at 145, 373 A.2d at 383; *see id.* at 165, 373 A.2d at 393 (Pashman, J., concurring).

proceedings.[121] Furthermore, jurors should be instructed that they are to reach a verdict based solely on evidence presented to them in open court.[122] The *Allen* court did concede, however, that it would often be difficult to conclude that a juror could completely avoid contact with media reports, or that such instructions could "overcome prejudice to a defendant" if a juror does become aware of inadmissible inculpatory information.[123] In any event, the court proposed that in trials with extensive press coverage, the use of cautionary instructions should be a minimal requirement to protect a defendant's right to a fair trial.[124]

A final recommendation offered by the court is the utilization of *in camera* proceedings.[125] With the consent of the defendant, a closed evidentiary hearing may be held to the exclusion of the press, the public, and the jury.[126] Thus, a nonsequestered jury would have neither knowledge of the contested evidence, nor the means to obtain

---

[121] 73 N.J. at 142, 373 A.2d at 381; *see id.* at 164, 373 A.2d at 392 (Pashman, J., concurring). The American Bar Association Advisory Committee on Fair Trial and Free Press suggested that the following cautionary instruction be given to nonsequestered jurors before the conclusion of the first day of trial:

> During the time you serve on this jury, there may appear in the newspapers or on radio or television reports concerning this case, and you may be tempted to read, listen to, or watch them. Please do not do so. . . . [I]f you read, listen to, or watch these reports, you may be exposed to misleading or inaccurate information which unduly favors one side and to which the other side is unable to respond. In fairness to both sides, therefore, it is essential that you comply with this instruction.

ABA TRIAL GUIDELINES, *supra* note 115, at § 3.5(e). It was further recommended that the jurors be reminded of this instruction at the end of each day's proceedings, and at other appropriate times. *Id.*

[122] 73 N.J. at 142, 373 A.2d at 381.

[123] *Id.*

[124] *Id.* at 145, 373 A.2d at 383.

[125] *Id.* at 142, 373 A.2d at 382; *see id.* at 166, 373 A.2d at 393 (Pashman, J., concurring). The American Bar Association's Advisory Committee on Fair Trial and Free Press recommended that

> [i]f the jury is not sequestered, the defendant shall be permitted to move that the public, including representatives of the news media, be excluded from any portion of the trial that takes place outside the presence of the jury on the ground that dissemination of evidence or argument adduced at the hearing is likely to interfere with the defendant's right to a fair trial by an impartial jury.

ABA TRIAL GUIDELINES, *supra* note 115, at § 3.5(d). The proposal also suggests that such motions should be ordinarily granted by a judge, unless he or she finds "that there is no substantial likelihood" of trial interference. *Id.* A transcript will be kept during the course of the closed proceeding, and made available to the public upon completion of the trial. *Id.* The Committee also recommended that a similar procedure be employed at pretrial hearings. *Id.* at § 3.1.

[126] *See* 73 N.J. at 142, 373 A.2d at 382.

Although not specifically stated by the court, requiring the defendant to consent to the closed hearings would presumably be necessary to conform to the state and federal constitutions which guarantee the accused the right to a public trial. *See* note 5 *supra*; United States v.

such knowledge.[127] Since the press has a right to cover only open court proceedings, the *Allen* court believed that the use of closed *in camera* proceedings would avoid the imposition of any "direct restraint" upon the media.[128] The court did acknowledge, however, that a question may arise regarding the constitutionality of such a procedure which excludes the press and the public from court hearings.[129] As this was not at issue in the appeals, the court merely assumed the procedure to be constitutional without a decision on the merits.[130] The court, however, did carefully condition resort to *in camera* proceedings to those cases where other alternatives are found to be unsuitable for the particular situation,[131] there is a "clear showing of a serious and imminent threat to the integrity of the trial,"[132] and the defendant expressly consents to the closed proceedings.[133] While recourse to *in camera* hearings would be a rare occurrence given the routine nature of many trials, the majority stated that when such a procedure is employed, "it should be used with circumspection."[134]

Kobli, 172 F.2d 919, 922–23 (3d Cir. 1949) (trial judge cannot indiscriminately exclude members of general public from trial over objections of defendant).

The court cites Branzburg v. Hayes, 408 U.S. 665, 684–85 (1972), for the proposition that "[n]ewsmen . . . may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." *See* 73 N.J. at 143, 373 A.2d at 382. The Supreme Court's statement, however, was apparently dictum, for the issue in that case was whether a reporter has a testimonial privilege to refuse to testify before a grand jury. 408 U.S. at 682.

[127] *See* 73 N.J. at 143, 373 A.2d at 382.

[128] *See id.* at 143–44, 373 A.2d at 382.

[129] *Id.* at 144, 373 A.2d at 382–83. One commentator has suggested that the general public, as well as the accused, has a right under the sixth amendment to have court proceedings publicly conducted. Wiggins, *The Public's Right to Public Trial*, 19 F.R.D. 25, 26, 30 (1955).

Although the *Allen* court did not object to the use of *in camera* proceedings, it did observe that "[f]rom the standpoint of the press, the *in camera* procedure, while not a direct restraint, arguably achieves the same result by more subtle means and becomes in effect a prior restraint on the news-gathering ability of the press." 73 N.J. at 144, 373 A.2d at 382–83.

[130] 73 N.J. at 144–45, 373 A.2d at 383.

[131] *Id.* at 145, 373 A.2d at 383.

[132] *Id.* For a discussion of the *Allen* court's required showing of harm, see notes 192–95 *infra* and accompanying text.

[133] 73 N.J. at 145, 373 A.2d at 383. For an explanation of the necessity of obtaining the defendant's consent, see note 126 *supra*.

[134] 73 N.J. at 144–45, 373 A.2d at 383. Most evidentiary hearings, as well as trials, contain very little newsworthy material, and, therefore, are not often covered by the press. *Id.* at 144, 373 A.2d at 383. In addition, the brief duration of many trials generally renders "academic any question of possible prejudice through news accounts." *Id.* When a question concerning the voluntariness of a defendant's statement or the admissibility of certain evidence arises, a hearing and determination of the issue can often be had "without the necessity of disclosing the text of the statement or the nature of the evidence." *Id.* Even if a court proceeding is subject to media coverage, the *Allen* majority believed that "the willingness of the news media to exercise self restraint [should not] be overlooked." *Id.*

In his concurring opinion, Justice Pashman offered several other options that a trial court could employ to protect a defendant's right to a fair trial without unduly restricting the press.[135] In the instant case, for example, he suggested that since the trial judge was uncertain whether the jurors were aware of any out of court information, the judge could have conducted a *voir dire* examination of the jury.[136] Any juror who had read the press reports would receive cautionary instructions, or be dismissed from service if prejudiced, with an alternate juror taking his or her place.[137] Justice Pashman further maintained that if a judge was fairly certain that the remaining jurors were likely to learn about the evidentiary information and be prejudiced by it, an attempt should be made by that magistrate to have the parties stipulate to the facts.[138] In the event that this action proves unworkable, the judge must give consideration to sequestration of the jury, and he would ultimately be obliged to declare a mistrial if sequestration proved to be unsuitable.[139]

---

[135] *Id.* at 160–66, 373 A.2d at 391–93.

[136] *Id.* at 160, 373 A.2d at 391.

[137] *Id.* With regard to the use of cautionary instructions, Justice Pashman commented that such instructions were important since, in addition to ordering jurors to disregard certain information, they also informed jurors of their "proper role" in the judicial process. *Id.* at 164, 373 A.2d at 392. The cautionary instructions would have to be carefully worded, however, so as not to arouse the juror's curiosity about the case, thereby possibly prompting him or her to disobey the instructions. *Id.* Justice Pashman also warned that "realistic expectations should be made of the jury" when cautionary instructions are utilized, for often such instructions alone will not be sufficient to ensure a fair trial. *Id.* This approach would most likely be successful "where news coverage is not widespread, the information contained in the reports does not conflict with testimony proven in court, and it is factual rather than emotional in nature." *Id.* at 164, 373 A.2d at 393. *See also* State v. Curcio, 23 N.J. 521, 527–28, 129 A.2d 871, 875 (1957) (jurors issued cautionary instructions presumed to follow them absent contrary showing).

[138] 73 N.J. at 160–61, 373 A.2d at 391. Justice Pashman stated that if less imposing techniques, *see* notes 136 & 137 *supra* and accompanying text, fail, resort to sequestration, *see* note 139 *infra* and accompanying text, should be had unless "the parties could [be] convinced to stipulate to the facts." 73 N.J. at 161, 373 A.2d at 391. The Justice did not elaborate on the propriety of stipulating to the facts. Where prejudicial information is involved, however, it would appear to be difficult, if not impossible, to stipulate to such information without seriously compromising one's case.

[139] 73 N.J. at 161, 373 A.2d at 391. When publicity concerning a trial is widespread or particularly "emotional," individual jurors may be sequestered immediately upon their acceptance by the court, even though a full complement of jurors has not yet been chosen. *Id.* at 165, 373 A.2d at 393; *see, e.g.*, State v. Van Duyne, 43 N.J. 369, 388, 204 A.2d 841, 851 (1964). Since the prejudicial information in *Allen* arose after the jury was impaneled, Justice Pashman concluded that sequestration "would have successfully protected [the] defendants' Sixth Amendment rights" had it been employed. 73 N.J. at 165, 373 A.2d at 393. Yet he advised that sequestration is not a "panacea" for the problems created by prejudicial publicity. *Id.* Noting the possible adverse consequences of sequestration, including excessive costs, inconvenience to the jurors, and possible prejudice to the defendant, *see* notes 116–18 *supra* and accompanying text, Justice Pashman stated that it should only be used when less burdensome measures would prove to be ineffective. 73 N.J. at 165, 373 A.2d at 393. Thus, he reasoned that "in a highly

By characterizing an *in camera* proceeding as "the only remaining alternative" to declaring a reversal or mistrial, Justice Pashman clearly evidenced his displeasure with this type of proceeding.[140] While accepting the limited use of *in camera* proceedings, the Justice warned that closed hearings may circumvent the right of the press to report on events occurring in open court.[141] Justice Pashman's analysis of an *in camera* proceeding was not restricted to first amendment concerns; rather, it included what he termed "values associated with the criminal justice system."[142] Inherent in these values are compelling policy reasons for maintaining publicly held trials.[143] Justice Pashman observed that other jurisdictions have refused to close trial proceedings, based upon a finding that the public has a right to have an open judicial process.[144] This was so despite the defendants' contentions that they would otherwise be denied fair trials.[145] According to Justice Pashman, a similar result is obtainable

---

publicized trial it [sequestration] may be the only way of protecting First and Sixth Amendment rights without resorting to either a mistrial or methods which impinge upon First Amendment interests." *Id.*

[140] 73 N.J. at 166, 373 A.2d at 393.

[141] *Id.* at 166, 373 A.2d at 393–94.

In discussing the effect of the Supreme Court's decision in *Nebraska*, an attorney for the Nebraska Press Association predicted that in the future attempts would be made to close court hearings that would normally be open to the public. Prettyman, Nebraska Press Association v. Stuart: *Have We Seen the Last of Prior Restraints on the Reporting of Judicial Proceedings?*, 20 ST. LOUIS L. REV. 654, 661 (1976). He concluded that "[i]f courts begin closing hearings in order to prevent potentially prejudicial publicity, the Supreme Court will be faced with 'prior restraints' in a form different from, but just as effective as, the one struck down in *Nebraska Press Association*." *Id.* (footnote omitted). This is similar to Justice Pashman's observation "that the [improper] use of closed proceedings has the capacity to subvert the entire effect of our decision today." 73 N.J. at 166, 373 A.2d at 394.

[142] 73 N.J. at 167, 373 A.2d at 394.

[143] *See id.* Various benefits are attributed to the open trial process, the foremost being a positive impact on witnesses who would be more inclined to testify truthfully in a public forum. Wiggins, *supra* note 129, at 27. Those involved in the trial process would also be prompted to be more conscientious in the performance of their duties, since they will be subjected to public observation and criticism. *Id.* The public at large would benefit by learning more about the workings of the adjudicatory system, and perhaps of litigation that may in some way affect them. *Id.* at 28. Public proceedings may also operate to deter future transgressions of the law, for the public would be forewarned of the consequences of similar violations of existing laws. *Id.* Finally, by subjecting the judicial branch to intensive public scrutiny, public confidence in the courts is generated, and the integrity of the judicial system can be maintained. *Id.*

[144] 73 N.J. at 167–68, 373 A.2d at 394–95; *see, e.g.*, Phoenix Newspapers, Inc. v. Jennings, 107 Ariz. 557, 490 P.2d 563, 567 (1971) (public has right to observe court proceedings except in cases "where there is a clear, present threat to the due administration of justice or one which appeals primarily to the morbid and prurient"); E. W. Scripps Co. v. Fulton, 100 Ohio App. 157, 167, 125 N.E.2d 896, 903 (Ct. App.), *appeal dismissed*, 164 Ohio St. 261, 130 N.E.2d 701 (1975) (per curiam) (defendant can waive his right to a public trial, but not "the right of the people to insist that the proceedings of the courts . . . be open to public view").

[145] 73 N.J. at 167, 373 A.2d at 394.

in New Jersey, "predicated upon the common law nature of the trial process, or upon court rule."[146]

Although Justice Pashman, as well as the *Allen* majority, had reservations concerning the use of an *in camera* proceeding, Justice Schreiber, in a concurring opinion, contended that such a proceeding was valid in those instances "when the defendant so desires and the subject-matter, if ruled inadmissible, may adversely affect the jury's impartiality."[147] He remarked that although the first amendment granted the press freedom from prior restraint, it did not give the media the right to report on confidential government affairs.[148] Similarly, the public was never granted a constitutional right to be present at all government activities.[149] Justice Schreiber found the use of an *in camera* hearing to be a recognized form of a judicially protected proceeding, analogous to a sidebar conference, in which the press and the public have no absolute right of access.[150]

---

[146] 73 N.J. at 168, 373 A.2d at 395. New Jersey Court Rule 1:2-1 provides that "[a]ll trials, hearings of motions and other applications, pretrial conferences, arraignments, sentencing conferences (except with members of the probation department) and appeals shall be conducted in open court unless otherwise provided by rule or statute." N.J.R. 1:2-1.

[147] 73 N.J. at 170, 373 A.2d at 395. For a discussion of the reservations expressed concerning the use of *in camera* hearings, see notes 129 & 141 *supra* and accompanying text.

[148] 73 N.J. at 171, 373 A.2d at 396. Members of the press may be accorded special privileges in order to facilitate the reporting of news events. *See* Pell v. Procunier, 417 U.S. 817, 830–31 (1974). The press does not, however, have "a constitutional right of special access to information not available to the public generally." Branzburg v. Hayes, 408 U.S. 665, 684 (1972); *cf.* 73 N.J. at 173, 373 A.2d at 397 (Schreiber, J., concurring) (protections afforded the press through the first amendment are predicated on "the right to criticize" rather than on "a right to know"). *But see* Branzburg v. Hayes, 408 U.S. at 721 (Douglas, J., dissenting) (press conferred with "a preferred position in our constitutional scheme," enabling it "to bring fulfillment to the public's right to know"). *See also* Pell v. Procunier, 417 U.S. at 834 (press has "no constitutional right of access" to state prisons to interview inmates); Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (no right of access of press to federal prisons beyond that permitted the general public).

[149] 73 N.J. at 174, 373 A.2d at 398. *But cf.* N.J. STAT. ANN. §§ 10:4-6 to -21 (West 1976) ("Open Public Meetings Act" requiring all meetings of public bodies open to the public, except for specified exceptions).

[150] 73 N.J. at 175–76, 373 A.2d at 398. *In camera* proceedings are a recognized part of the judicial process. *Id.* at 175–77, 373 A.2d at 398–99. For example, in In re National Broadcasting Co., 64 N.J. 476, 478–79, 317 A.2d 695, 696 (1974) (per curiam), the court allowed television network artists to sketch courtroom proceedings for news broadcasts, except on those occasions when the judge held hearings *in camera*. *See also* United States v. Nixon, 418 U.S. 683, 713–16 (1974) (*in camera* inspections of proffered evidence may be conducted by a court to protect the confidentiality of Presidential communications); State v. Jackson, 43 N.J. 148, 163–64, 203 A.2d 1, 9 (1964) (in chambers bail hearings may be used to prevent possibly prejudicial pretrial publicity).

It was further noted by Justice Schreiber that several New Jersey court rules provide for *in camera* or closed proceedings. 73 N.J. at 175–76, 373 A.2d at 398. New Jersey Court Rule 3:6-6(a), for example, strictly delineates those individuals that may be present during grand jury proceedings, while Rule 3:6-9(c) provides for an *in camera* hearing when a public official wishes to contest a presentment returned against him, prior to its release. Closed hearings are also

Although the supreme court's decision in *Allen* clearly rejects the use of "gag" orders in open court proceedings,[151] the opinion fails to satisfactorily resolve the continuing controversy regarding the extent of a court's power to restrict the press from freely reporting on judicial proceedings.[152] By narrowly defining the issue before it as whether a court may validly restrict the press from reporting on open court proceedings,[153] the *Allen* court was able to support its decision by reliance on the Supreme Court's decision in *Nebraska*.[154] Although the New Jersey supreme court briefly analyzed the *Allen* and *Hughes* cases under first amendment principles,[155] its primary attention was directed to alternatives that could be employed by courts to protect a defendant's sixth amendment right to a fair trial.[156] By so doing, it was unnecessary for the *Allen* court to specifically discuss any privileges or protections accorded the press through the first amendment.[157] Thus, aside from open court hearings, the scope of permissible press coverage of judicial proceedings free from restraint has been left in doubt.

To date, there are few New Jersey court rules concerning the procedure to be followed with regard to press interference, or the

---

used to examine prior statements of witnesses, so that irrelevant material may be excised. N.J.R. 3:17-2. Additionally, Rule 5:5-1(b) provides for private hearings "in any matrimonial matter and in any matter affecting children." Juvenile delinquency and incorrigibility proceedings are also conducted in private, with press attendance prohibited pursuant to Rule 5:9-1.

A recommendation has been proposed by the National Conference of State Trial Judges to allow the use of private pretrial hearings when a defendant's sixth amendment rights are in jeopardy. 73 N.J. at 176, 373 A.2d at 399. Similarly, the American Bar Association has adopted a proposal which provides for the closing of pretrial and trial hearings when necessary to provide a fair trial for the accused. ABA TRIAL GUIDELINES, *supra* note 115, at §§ 3.1, 3.5(d).

[151] 73 N.J. at 139, 373 A.2d at 380.

[152] The scope of the rights and privileges accorded the press by the first amendment has not been clearly defined. At least one court has avoided the imposition of a direct restraint on the press by preventing the trial participants, who would ultimately be the media's news sources, from publicly discussing the trial proceedings. Central S. C. Chapter v. Martin, 431 F. Supp. 1182, 1184–86 (D.S.C. 1977), *cert. denied*, 434 U.S. 1022 (1978).

The United States Supreme Court is scheduled to review a New York decision which allows the exclusion of the press and the public from an *in camera* pretrial hearing to suppress evidence. Gannett Co. v. De Pasquale, 43 N.Y.2d 370, 375, 380–81, 372 N.E.2d 544, 546, 550–51, 401 N.Y.S.2d 756, 758–59, 762–63 (1977), *cert. granted*, 98 S. Ct. 1875 (1978). *But see* United States v. Cianfrani, 573 F.2d 835, 850, 854, 861 (3d Cir. 1978) (pretrial suppression hearings are within scope of sixth amendment's public trial provisions, thereby preventing exclusion of press and public absent a showing of " 'strict and inescapable necessity' ").

[153] 73 N.J. at 139, 373 A.2d at 380.

[154] *Id.* at 140, 373 A.2d at 380.

[155] *See id.* at 139–40, 373 A.2d at 380–81.

[156] *Id.* at 140–45, 373 A.2d at 381–83.

[157] For a discussion of the first amendment issues raised by Justice Pashman in his concurring opinion, see notes 95–107 *supra* and accompanying text.

possibility of press interference, with the administration of justice. The lack of existing rules allows for the establishment of guidelines, as in *Allen*, through a "piecemeal" caselaw approach.[158] As a result, there is no uniform procedure encompassing the spectrum of problems which may arise from the issuance of a "gag" order. This is particularly problematical in that neither the press nor the court is certain which reportorial actions are subject to legal sanctions, or what the appropriate judicial response should be.

In conjunction with the lack of discernible standards is the related problem of procedural fairness.[159] For example, in both the *Allen* and *Hughes* cases, none of the appellant newspapers were served with process or represented by counsel when the "gag" orders were directed from the bench in the respective cases.[160] In order to prepare a proper defense to countermand an attempt to restrict press coverage, a mandatory notice requirement should be established for

---

[158] Justice Pashman, however, offers a differing point of view. 73 N.J. at 149, 373 A.2d at 385. The Justice believed that by deciding the issue in an expansive manner, the court was able to pass upon the merits of the various alternatives available to trial courts, rather than to "consider the various options in a piecemeal fashion" as they individually arose on appeal. *Id.* The court's present consideration and adoption of trial procedures to protect the interests of the accused, the press, and the general public would, therefore, avert "future infringements" of the first and sixth amendments, as well as promote judicial economy. *Id.* at 149–50, 373 A.2d at 385. *See also* Busik v. Levine, 63 N.J. 351, 363–64, 307 A.2d 571, 578, *appeal dismissed*, 414 U.S. 1106 (1973) (court may deal with an issue in a narrow or expansive manner, as required for its proper resolution). For a discussion of the alternatives proposed by the majority, see notes 115, 121 & 125 *supra* and accompanying text.

[159] The Third Circuit addressed the issue of procedural fairness regarding restrictive orders in United States v. Schiavo, 504 F.2d 1 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1096 (1974). In *Schiavo*, a restrictive order was issued during the course of a federal perjury trial, prohibiting members of the press from reporting upon the murder and conspiracy indictments then pending against the defendants. 504 F.2d at 3. Shortly thereafter, one of the newspapers subject to the order appeared before the trial court in an unsuccessful attempt to have the order stayed pending appeal, or vacated. *Id.* at 4. The newspaper then appealed to the Third Circuit on grounds that the order violated the first amendment, and that it was issued without proper "procedural safeguards." *Id.* at 6. A plurality of the court of appeals reversed the district court's oral restrictive order, finding the order to be "procedurally deficient," since the trial judge had failed to reduce it to writing for nearly one week. *Id.* at 7–8. The court held that

> [t]he district court should have vacated the oral order, held a prompt hearing after notice to the involved members of the press and parties, and, if a silence order was deemed to be justified, reduced such order to writing with specific terms and reasons and had it entered on the district court docket.

Id. at 8 (footnote omitted). The appellate court concluded that failure to reduce the order to writing had "an impermissible 'chilling effect'" on the rights of the press, for, in the absence of a writing, the appellants would have little guidance on "precisely what conduct was prohibited." *Id.*

[160] *Compare* Brief for Appellant, Trenton Times Corp., *supra* note 16, at 3, *with* Brief for Appellant, Gannett Co., *supra* note 1, at 3–4.

those members of the press affected by the restriction.[161] Such a requirement may in fact be constitutionally mandated by the due process clause of the fourteenth amendment.[162]

In light of this nation's historical concern for an unfettered press,[163] an expedited appeals process should also be implemented to minimize delays in publication which may result from the media contesting any order that affects its ability to report on courtroom proceedings.[164] In the *Hughes* case, for example, although the newspapers sought and were ultimately granted emergent relief, the press was subject to the illegal restriction over a five day period, until the order was finally stayed by the Chief Justice.[165] Rather than contesting an ordered press restraint before the trial court judge who issued the order, as was done in *Allen* and *Hughes*,[166] an immediate appeal to the appellate division should be made available. In any event, a

---

[161] The Supreme Court has required that an individual be given notice and a hearing before a state can restrict his or her right of free speech. Carroll v. President of Princess Anne, 393 U.S. 175, 185 (1968). In *Carroll*, several Maryland courts had recognized the right of local government officials to enjoin, through an *ex parte* proceeding, the holding of a rally by a racist organization. *Id.* at 177–78. The Supreme Court, however, reversed, finding in those cases where the adverse party is known to the party seeking the injunction, "the failure to give notice, formal or informal, and to provide an opportunity for an adversary proceeding . . . is incompatible with the First Amendment." *Id.* at 185. *See also* United States v. Schiavo, 504 F.2d 1, 7–8 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 1096 (1974); *Nebraska*, 427 U.S. at 591 (Brennan, J., concurring).

[162] *See* Landau, *supra* note 68, at 58.

[163] 73 N.J. at 170–73, 373 A.2d at 396–97 (Schreiber, J., concurring).

[164] In commenting upon the restraints imposed in *New York Times*, Justice Black stated that "every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment." 403 U.S. at 715 (Black, J., concurring). Furthermore, any delay might well destroy the contemporary news value of the information subject to the restraint. *Nebraska*, 427 U.S. at 609 (Brennan, J., concurring).

An expedited appeals process has been suggested, whereby the appeal of any restrictive order would have to be decided within a five day period by the highest state court empowered to review such a matter. Note, *Ungagging the Press: Expedited Relief from Prior Restraints on News Coverage of Criminal Proceedings*, 65 GEO. L. J. 81, 117–18 (1976). If at the conclusion of the five day period the appropriate state court had failed to render a decision on the validity of the restrictive order, the order would automatically expire, and the press could then publish the material with impunity. *Id.* Since a final judgment would be rendered "by the highest court of a State in which a decision could be had," 28 U.S.C. § 1257, the decision would be directly appealable to the United States Supreme Court. *See id.*; Note, *supra* at 118. *See also* Freedman v. Maryland, 380 U.S. 51, 58–59 (1965) (state film censorship boards are valid provided their procedures allow only brief delays, and "assure a prompt final judicial decision"); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 437–39 & n.1, 445 (1957) (state procedure to enjoin sale of obscene material upheld, which provided for judicial determination of obscenity within two days of hearing on the matter); N.J.R. 2:9-2 (time schedule for an appeal may be accelerated).

[165] Brief for Appellant, Trenton Times Corp., *supra* note 16, at 4.

[166] *Compare* Brief for Appellant, Gannett Co., *supra* note 1, at 3–4 *with* Brief for Appellant, Trenton Times Corp., *supra* note 16, at 2–3.

systematic priority in the appellate process should be established to provide for the immediate resolution of those matters involving a restraint on publication. Expedition of the appeals process may also help to eliminate potential problems of mootness which might otherwise arise.[167]

During the course of publicized trials, courts should periodically issue jury admonitions, directing the jurors to avoid media reports of any matters related to the case, and reminding them of their duty to render a verdict based solely on evidence presented in open court.[168] In the event that potentially prejudicial media reports are issued, a hierarchy of remedial alternatives should also be available for judges to employ, beginning with those that pose the least restrictions on the press, as well as minimal burdens on the jurors.[169] Initially, an extensive *voir dire* examination of the jurors should be conducted to discover, and thereupon eliminate, any prejudiced members.[170] The final determination whether a juror is incapable of rendering an impartial verdict, despite his or her protestations to the contrary, must remain within the trial judge's discretion.[171] A finding of prejudice would, of course, automatically result in the juror's dismissal.[172] To compensate for dismissed jurors, a sufficient number of alternate jurors should be impaneled to take the excluded juror's place.[173] Thus, if a trial judge believes that the case before him is particularly newsworthy, he should consider the possibility of prejudicial publicity, and seek to mitigate its impact by impaneling a

---

[167] Trials of relatively short duration might well conclude before an accelerated appeals process is completed, thus giving rise to claims of mootness. *See, e.g.*, 73 N.J. at 138, 373 A.2d at 380. It appears, however, that such issues will not be dismissed as moot, as long as questions of importance are involved that are likely to recur. *Id.* For a discussion of problems associated with a claim of mootness, see notes 85–89 *supra* and accompanying text.

[168] After a jury has been impaneled, a cautionary instruction should be given by a judge to inform jurors of their duties. For a recommended cautionary instruction, see note 121 *supra*.

[169] *Compare* 73 N.J. at 140–45, 373 A.2d at 381–83 *with* 73 N.J. at 160–69, 373 A.2d at 391–95 (Pashman, J., concurring).

[170] *See id.* at 160–63, 373 A.2d at 391–92 (Pashman, J., concurring).

[171] *See* State v. Van Duyne, 43 N.J. 369, 386, 204 A.2d 841, 850 (1964). The court in *Van Duyne* stated that when a *voir dire* examination is conducted to determine whether a juror is prejudiced, a trial judge must "analyze and evaluate carefully the words, attitude and demeanor" of each juror who professes to be impartial and unprejudiced. *Id.* If a judge should have any "lingering doubt" concerning the juror's impartiality, then the court should excuse the juror from service. *Id.*

[172] *Id.*

[173] In a criminal action in New Jersey, a maximum of four alternate jurors may be impaneled to supplement the required twelve member jury. N.J.R. 1:8-2(a), (d). By comparison, the Federal Rules of Criminal Procedure permit the impaneling of up to six alternate jurors, FED. R. CRIM. P. 24(c), in addition to the usual twelve member jury. FED. R. CRIM. P. 23(b).

full complement of sixteen jurors.[174] To meet the demands of an exceptionally notarized trial, the New Jersey supreme court may consider modifying its court rules to allow for an increase in the maximum number of allowable jurors from sixteen to eighteen, the latter being the maximum allowed in federal courts.[175]

Where trial publicity is so persuasive and extreme in nature that even a juror conscientiously attempting to carry out his oath could not help but to come into contact with such information, and be prejudiced by it, the only appropriate alternative is jury sequestration.[176] Although present court rules restrict the use of sequestration to "extraordinary circumstances,"[177] a highly publicized trial should satisfy such a criterion.[178] Concededly, the burdens imposed upon the jurors and the costs borne by the state pursuant to an order of sequestration are considerable.[179] Few trials, however, could be expected to generate the extensive press coverage that would necessitate recourse to sequestration.[180]

Although the *Allen* court tacitly approved the use of *in camera* proceedings, in actuality this approach is somewhat inconsistent with the court's view on the invalidity of "gag" orders.[181] There appears to be no practical difference between an open hearing which cannot be reported on by the press, and a closed hearing conducted out of the presence of the press; in both cases the media is effectively restrained from publication.[182] In fact, the judicially recognized use of *in camera* hearings imposes a greater restriction on the press than does the impermissible "gag" order. Whereas a restrictive order would permit the press to attend the hearing, but would delay publication of reports on the proceedings until the trial was concluded, an

---

[174] *See* note 173 *supra*.

[175] *Id.*

[176] *See* 73 N.J. at 164–65, 373 A.2d at 393 (Pashman, J., concurring).

[177] N.J.R. 1:8-6(a). For the text of this section of the sequestration rule, see note 119 *supra*.

[178] *See* 73 N.J. at 165, 373 A.2d at 393 (Pashman, J., concurring).

[179] For a discussion of problems attendant to an order of sequestration, see notes 116–19 *supra*.

[180] *Cf.* 73 N.J. at 144, 373 A.2d at 383 (*in camera* proceeding would "seldom" be necessary, since many evidentiary hearings, as well as trials, are not of "sufficient news interest to warrant press coverage").

[181] *Compare* 73 N.J. at 142–45, 373 A.2d at 382–83 (holding *in camera* proceeding to exclusion of the press) *with id.* at 140, 373 A.2d at 380 (absolute right of the press to report on a "public court hearing").

[182] The *Allen* court stated that the use of an *in camera* proceeding "would avoid any *direct* restraint on the news media." *Id.* at 143–44, 373 A.2d at 382 (emphasis added). It might, therefore, be inferred that a procedure which only *indirectly* burdens the press could be validly employed by a trial court. Whether a direct or indirect restriction is imposed, the common result is that the press would be effectively restrained from publication. *See generally* Prettyman, *supra* note 141, at 661.

in camera hearing would be conducted without any members of the press in attendance.[183] Although a transcript of the *in camera* proceeding would be released at the conclusion of the trial,[184] reporting based on a transcript is hardly the equivalent of a reporter's own first-hand account. In such cases, the protective function of the press as an observer and critic of the justice system would be thwarted.[185]

The *Allen* court did, nevertheless, attempt to impose restrictions on the use of *in camera* hearings.[186] Initially, the court required that a closed proceeding could only be held with the consent of the defendant.[187] The defendant's consent, in effect, would constitute a waiver of his constitutional right to a public trial.[188] The court's decision allowing the defendant the opportunity to close the trial proceedings, however, resulted in an inadequate consideration by the court of an equally important right recognized by other jurisdictions, namely, "the public's right to [a] public trial."[189] Such a right appears to be recognized in New Jersey court rules which require open court trials and hearings on motions.[190] By closing what would ordinarily be open court proceedings, *in camera* hearings may violate the spirit, if not the letter, of such a rule.

Providing further direction for the use of *in camera* proceedings, the *Allen* court required "a clear showing of a serious and imminent threat to the integrity of the trial" before such a proceeding could be employed.[191] Although the court failed to offer any guidance concerning what would constitute such grievous circumstances, the language employed by the *Allen* court is very similar to the "clear and

---

[183] In *Hughes*, the trial judge preferred to issue a restrictive order rather than hold an *in camera* proceeding, in order that the press would be able to attend the hearing. Brief for Appellant, Trenton Times Corp., *supra* note 16, at 11a–12a. In justifying the issuance of the restrictive order, the trial judge stated:

> It was never my desire to deprive the press of knowing what took place on these occasions. I would frankly want them to know. I have the alternative, of course, to hold such a hearing in camera, and at that point they would know nothing. That has not been my practice and is not my intention.

Id.

[184] 73 N.J. at 144 n.3, 373 A.2d at 382.

[185] *See Sheppard*, 384 U.S. at 350.

[186] For a discussion of the restrictions placed upon the use of *in camera* proceedings, see notes 131–34 *supra*.

[187] 73 N.J. at 145, 373 A.2d at 383.

[188] For a discussion of the right of a defendant to a public trial, see note 5 *supra*.

[189] Wiggins, *supra* note 129, at 25. *But see* 73 N.J. at 144, 373 A.2d at 382–83.

[190] N.J.R. 1:2-1. For the text of this rule, see note 146 *supra*. Irrespective of the existence of this court rule, the public's right to an open trial "might be predicated upon the common law nature of the trial process." 73 N.J. at 168, 373 A.2d at 395 (Pashman, J., concurring).

[191] 73 N.J. at 145, 373 A.2d at 383.

present danger" test enunciated in *Bridges v. California.*[192] In the *Bridges* case, the Supreme Court stated that "the substantive evil must be extremely serious and the degree of imminence extremely high" before freedom of speech or of the press can be restricted.[193] It would then appear that the state and federal tests are identical and may be profitably compared. In subsequent applications of the "clear and present danger" test, the Supreme Court explained that the danger must be "imminent" or "immediately imperil," and not be merely "likely," "remote or even probable."[194] If the use of an *in camera* proceeding is predicated upon such a clear and immediate showing of harm, it is highly improbable that the strictures of the Court's test could be met, for to assess the impact of possible media reports on jurors would be to engage in pure speculation.[195]

The threat posed by the use of an *in camera* proceeding is fourfold in nature. Primarily, an *in camera* hearing may be improperly used as a *substitute* for the illegal "gag" order.[196] Since a judge can no longer prevent the press from reporting on open court proceedings, he may employ an *in camera* hearing in its place, thereby changing the form of the proceeding, while maintaining the same restraint on the press.[197] Secondly, once the use of an *in camera* proceeding to protect the defendant's right to a fair trial is established, its utilization may become fairly routine, despite the *Allen* court's warnings.[198] A defense counsel may conceivably feel compelled to move for such a hearing to protect his client's rights, and a judge would be disposed to grant such a motion to ensure a fair trial.[199]

---

[192] 314 U.S. 252 (1941).

[193] *Id.* at 263. For a discussion of the Court's holding in *Bridges*, see note 54 *supra*.

[194] *Craig*, 331 U.S. at 376.

[195] A trial judge would ordinarily use an *in camera* hearing without knowledge of whether the information subject to the proceeding would in fact be published, and if so, whether the jurors would learn of the reports. *Cf.* 73 N.J. at 157, 373 A.2d at 389 (Pashman, J., concurring) (*Allen* and *Hughes* trial courts failed to substantiate the need for a prior restraint). Justice Brennan's discussion in *Nebraska* of the speculative nature of pretrial restrictive orders would seem to be equally valid in the case of *in camera* proceedings. *See* 427 U.S. at 599–600 (Brennan, J., concurring). The Justice stated:

> A judge . . . will be unable to predict the manner in which the potentially prejudicial information would be published, the frequency with which it would be repeated or the emphasis it would be given, the context in which or purpose for which it would be reported, the scope of the audience that would be exposed to the information, or the impact . . . the information would have on that audience.

Id. (footnote omitted).

[196] *See* 73 N.J. at 166, 373 A.2d at 393–94 (Pashman, J., concurring).

[197] Prettyman, *supra* note 141, at 661.

[198] *Cf. Nebraska*, 427 U.S. at 607–08 (Brennan, J., concurring) (any established system of prior restraints would inevitably be overemployed).

[199] *Cf. id.* at 607–08 (Brennan, J., concurring) (once permitted, restrictive orders would be routinely requested by defendant and granted by court).

Thirdly, in granting a motion for an *in camera* hearing, a trial judge would in effect be deciding what information the public may receive.[200] Such a decision would place the judge in the position of being a censor of the press.[201] Finally, although the information which could be curtailed through the use of an *in camera* proceeding would appear to be of little public importance in a case similar to *Allen*, future incursions may be far more substantial.[202]

Courts, therefore, should strictly adhere to the prerequisites established in *Allen* when an *in camera* proceeding is utilized.[203] It is possible, of course, that despite the best efforts of a court in applying the above alternatives, a jury may nevertheless become prejudiced. In such a situation, it would be imperative that the judge exercise his ultimate authority by declaring a mistrial[204] and ordering a new trial.[205]

A procedural system should be established, implementing the above recommendations, in order that future courts may act uniformly when presented with a fair trial-free press conflict. This can be done by the supreme court's promulgation of definitive court rules, pursuant to its constitutional authority to regulate "the practice and procedure" of New Jersey courts.[206] In furtherance of such an objective, the supreme court should take the matter under the advisement of The Judicial Conference of New Jersey.[207] The Conference, an advisory body consisting of judges, lawyers, legislators, and laymen, was established by court rule "to assist the [s]upreme [c]ourt in the consideration of improvements in the practice and procedure in the

---

[200] *Cf. id.* at 605 (Brennan, J., concurring) (systems of prior restraint would result in judicial determinations of what material is suitable for public dissemination).

[201] *See id.* at 607 (Brennan, J., concurring). Justice Brennan stated that "at least in the context of prior restraints on publication, the decision of what, when, and how to publish is for editors, not judges." *Id.* at 613. *See also* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 & n.24 (1974).

[202] *See* 427 U.S. at 606 (Brennan, J., concurring). A more complex situation may develop when a public official is charged with having committed a criminal offense. A judge might reasonably conclude that the release of any information adverse to such an individual would generate sufficient news coverage to jeopardize his or her right to a fair trial. Yet, should the court forego an open hearing and withhold incriminating information concerning a public official immediately preceding an election, "even a brief delay in reporting that information . . . may have a decisive impact on the outcome of the democratic process." *Id.*; *see* Prettyman, *supra* note 141, at 661 (quoting Brief for Petitioners at 60, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)).

[203] For a list of the prerequisites, see notes 131–33 *supra* and accompanying text.

[204] *See* 73 N.J. at 161, 373 A.2d at 391 (Pashman, J., concurring).

[205] N.J.R. 4:49-1(a), (c). A judge can grant a new trial if "it clearly and convincingly appears that there was a miscarriage of justice under the law." *Id.* 4:49-1(a).

[206] N.J. CONST. art. VI, § 2, para. 3.

[207] *See* N.J.R. 1:35-1.

courts."[208] Within the Conference, a special committee could be established to deal exclusively with proposing new court rules that would protect the defendant's right to a fair trial, while preserving freedom of the press.[209] Representatives of the media should be included among the committee's members, thereby allowing the press to participate in the development of procedural guidelines that would ultimately affect its reporting.

Apart from the judicial conference, other means may be employed to help foster greater cooperation between members of the bench, the bar, and the press. For example, in the *Allen* case, the trial judge held a brief in chambers discussion with two members of the press to elicit their "reaction" to the imposition of his proposed order.[210] A discussion of this type would make the press aware of any problems which might result from media coverage of a particular aspect of a trial. Being cognizant of potential problems that could arise, the press might thereby voluntarily exercise self-restraint when reporting on sensitive trial issues.[211] Voluntary restraint by the press can also be promoted through the continued use of bar-press guidelines. Despite the fact that these guidelines are not binding,[212] they are still of value in that they reflect a joint acknowledgment by the court and the press of the respective roles and duties of each institution.[213]

The impact of the *Allen* decision remains to be seen in the prospective application of the New Jersey supreme court's guidelines by trial courts in criminal prosecutions. If the *Allen* court's objective—to provide the defendant a fair trial without impinging upon the freedom of the press—is to succeed, voluntary self-restraint must be practiced by all parties. Trial courts should resort to an *in camera* proceeding

---

[208] *Id.* 1:35-1(a). Membership on the conference includes, among others, the justices of the supreme court, various appellate division and superior court judges, state legislative leaders, the state attorney general and public defender, the administrative director of the courts, clerks of the supreme court and superior courts, designated county judicial officers, and leaders of state and local bar associations. *Id.* 1:35-1(b)(1) to (6). A maximum of fifteen "representatives of the general public" may also serve on the conference. *Id.* 1:35-1(b)(7). In addition, the supreme court is empowered to create within the conference any committee which it deems "necessary or desirable." *Id.* 1:35-1(d). Committee members, however, "need not be members of the conference." *Id.*

[209] *See* note 208 *supra*. Members of the press should be appointed to such a special committee to represent the media's viewpoint.

[210] Brief for Appellant, Gannett Co., *supra* note 1, app. C at 3–4.

[211] *See generally Nebraska*, 427 U.S. at 612–13 (Brennan, J., concurring).

[212] For a discussion of the New Jersey bar-press guidelines, see notes 112 & 113 *supra* and accompanying text.

[213] *See generally Nebraska*, 427 U.S. at 613 (Brennan, J., concurring).

only in the most compelling circumstances, and the press should act responsibly by reporting news, rather than by engaging in sensationalism. Only through the mutual cooperation by, and respect for, all the parties involved, can the interests of the court, the defendant, the press, and the public be served, and their rights protected.

Robert D. Laurino